

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER
AGREEMENT WITH
INTERNATIONAL BUSINESS MACHINES, INC.
NEW YORK STATE COMPTROLLER'S CONTRACT NUMBER C001036

THIS AGREEMENT ("Agreement") is between the New York State Office of the State Comptroller ("OSC" or "Customer" or "Client"), by the Department of Audit and Control, whose main office and principal place of business is 110 State Street, Albany, New York , 12236, and International Business Machines Corporation OBA IBM Corporation (the "Contractor " or "IBM") whose principal office is located at 1 New Orchard Road, Armonk, NY 10504, and with an office location at 80 State Street, Albany, New York, 12207 (OSC and the Contractor are collectively referred to as "the Parties").

WITNESSETH

WHEREAS, IBM is the sole manufacturer of IBM mainframe software and IBM mainframe hardware;

WHEREAS, OSC has an ongoing need for the right to continue licensing designated IBM mainframe software programs already installed and to obtain licenses for new mainframe software programs ("Program" or "Programs");

WHEREAS, to meet this responsibility, OSC issued an advertisement in the New York State Contract Reporter dated July 20, 2018 for a vendor to provide the Programs as Monthly Licensing Charges as set forth in Section 9, below ("Services");

WHEREAS, the Contractor was the only vendor that responded to the advertisement with a response dated July 20, 2018;

WHEREAS, OSC has determined that the Contractor is a responsible entity with the ability to perform the Services and that the compensation to be paid to the Contractor is reasonable; and

WHEREAS, IBM is qualified to continue to license such Programs and will continue to provide them at a Monthly License Charge ("MLC"), and provide new licensed Programs, as determined to be necessary, upon request of OSC.

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

1. TERM

This Agreement shall commence on October 1, 2018 and shall continue for a period of five years.

2. MERGER OF DOCUMENTS/CONFLICT OF CLAUSES

This Agreement shall be deemed inclusive of the following documents and appendices which are set forth herein:

1. Appendix A - Standard Clauses for NYS Contracts;
2. Agreement - (this document), including:

- Appendix B - Forms AC 3239-A, Contractor's EEO Staffing Plan of Anticipated Workforce and AC 3239-B, Contractor's/Subcontractor's EEO Workforce Utilization Report;
 - Appendix C - OSC Policy Statement on Discrimination and Harassment, Including Sexual Harassment;
 - Appendix D - OSC Executive Order on Procurement Integrity and OSC Procurement Integrity Procedures;
 - Appendix E - Contractor's Certification/Acknowledgements; and
 - Appendix F - Disclosure of Prior Non-Responsibility Determinations;
3. Exhibits, including:
- Exhibit A - the New York State Contract Reporter advertisement dated July 20, 2018; and
 - Exhibit B - Contractor's response to New York State Contract Reporter Advertisement dated July 20, 2018.
4. Attachments, including:
- Attachment A - Description of Current Licensed Programs;
 - Attachment B - Monthly License Charges effective October 1, 2018;
 - Attachment C.1 - Monthly License Charges effective April 1, 2019;
 - Attachment C.2 - Monthly License Charges effective April 1, 2020;
 - Attachment D - Attachment for IBM System z Advance Entry Workload License Charges;
 - Attachment E - IBM Data Processing Addendum;
 - Attachment F.1 - IBM Privacy Statement (effective as of May 2018);
 - Attachment F.2 - IBM Online Privacy Statement (effective as of May 2018);
 - Attachment G - IBM Client Relationship Agreement;
 - Attachment H - IBM Software Licensed under the ICA - Backup Use Defined; and
 - Attachment I - IBM Global Employment Verification Standard.

Conflicts between these documents shall be resolved in the following descending order of precedence, regardless of any language, express or implied, to the contrary, in Attachments A through and including I:

1. Appendix A - Standard Clauses for NYS Contracts;
2. This Agreement (This Document), including Appendices B through and including F;
3. Exhibits A through and including B; and
4. Attachments A through and including I.

Only documents expressly enumerated above shall be deemed a part of the Agreement, and references contained in IBM documents to additional documents not set forth herein shall be of no force and effect.

The IBM documents in Attachments D through and including I are only applicable to the Programs and Services provided under this Agreement and may not be used or relied upon by IBM for any other purpose.

3. COMPENSATION

OSC shall compensate the Contractor pursuant to this Agreement in accordance with the MLCs set forth in Attachments B, C.1, and C.2. Total compensation under this Agreement's five-year term shall not exceed \$6,113,782.46.

4. PAYMENT AND INVOICES

4.1. Contract Payments

The compensation shall be payable in the ordinary course of OSC business upon receipt of the Contractor's invoice. Invoices must be submitted on a quarterly, advanced basis, including MLC charges for additional Programs purchased by OSC, if any, during the Term. All MLCs for each quarter must be submitted on a single invoice. Approved invoices will be paid in accordance with Article 11-A of the State Finance Law. Whenever a license is terminated, either by OSC or IBM, IBM shall prorate any charges paid in advance by OSC, and shall provide a credit to OSC in a timely manner, but no more than 90 days. If OSC is entitled to a credit as of the date of termination or expiration of this Agreement, IBM shall apply the credit amount to future OSC purchases of any IBM products or services under a separate agreement within 36 months.

IBM represents that, as of the Execution Date, MLC pricing is the same for all full capacity Advance Entry Workload License commercial, state, and federal customers, including in# GS-35F-110DA.

If at any time during the term of this agreement, IBM enters into an agreement with another State of New York Agency on a basis that provides MLCs more favorable than those provided to OSC hereunder, under substantially similar material circumstances and terms and conditions, then IBM will, at OSC's request, adjust OSC's MLCs to match the more favorable MLCs. Nothing contained herein shall be construed to require a State Agency to migrate to this service agreement.

The MLCs for Programs for the period October 1, 2018 through March 31, 2019, and for the periods beginning April 1, 2019 and April 1, 2020, are itemized in Attachment Band Attachments C.1 and C.2, respectively. Prices quoted on Attachments B, C.1, and C.2 are based on maximum usage. For subsequent years effective April 1, 2021, IBM and OSC shall, if applicable, create an Annual Amendment to this Agreement in accordance with Section 9.12 below. Consistent with General Services Administration ("GSA ") Schedule# GS-35F-110DA in effect as of the Effective Date, in no event will MLC price increases for any year subsequent to September 2019 exceed the lesser of 10% of the prior year's cost based on the applicable MLC pricing in effect at the end of the preceding 12-month period or the percentage increase applied to each MLC price charged to the federal government for the concurrent 12-month period. Any MLC increases for the then-existing MLCs shall only take effect at the beginning of a next pricing cycle (April 1), not in the middle of the OSC's fiscal year, and shall be included in the Annual Amendment to Attachment A as described under Section 9.12 below. If, prior to the next fiscal

year, OSC determines that the annual price increase applied to MLC prices listed under the applicable GSA Schedule #GS-35F-11ODA, or any applicable, successor GSA Schedule with corresponding government MLCs, is less than the annual price increase applied to MLC prices charged to OSC for a given year, OSC will notify IBM and IBM will reduce the MLC prices charged to OSC accordingly and credit OSC for any corresponding overpayments. IBM's proposals of any price increases pursuant to this paragraph shall be submitted to OSC, in writing (which may include issuance by IBM of announcement letters), at least 90 days in advance of the April 1 renewal date and shall take effect at the beginning of the next pricing cycle and will not be effective retroactively.

Notwithstanding any language to the contrary regarding payments, prepayments, credits, or refunds in Attachments A through I, the language of this Section 4.1 shall govern.

4.2. Taxes

Purchases made by the State of New York and its authorized non-State agencies are exempt from New York State sales, use and, with certain exceptions, federal excise taxes. For tax-free transactions under the Internal Revenue Code, the New York Registration Number is 14740026K.

4.3. Invoices

All invoices must include the following information:

- a) OSC's Agreement #C001036, Contractor's taxpayer identification number, and Contractor's New York State Vendor Identification Number;
- b) A detailed description of licenses provided;
- c) The total amount billed (in MLCs) for each of the licenses for the invoice period; and
- d) The beginning and ending service dates of the billing period included in the invoice, and the expiration date of this Agreement.

All invoices shall be subject to OSC's acceptance of the Services for which billing is being made and are to be submitted via email (preferred) to contractinvoices@osc.ny.gov or via hard copy mail to:

**Office of the State Comptroller
Financial Administration
Contract Payment Unit
110 State Street, Stop 13-2
Albany, NY 12236-0001**

With a copy to CIOProcurement@osc.ny.gov (preferred) or via hard copy mail to:

**ATTENTION: CIO Procurement
Office of the State Comptroller
110 State Street, Stop 8-7A
Albany, NY 12236-0001**

5. DOCUMENTATION

OSC may request to receive, upon 30 days' written notice, and IBM will provide, additional copies of any manual or document concerning the operation, administration, or use of the Programs at a cost not to exceed the publication, printing, handling, and shipping costs as incurred by IBM.

6. MODIFICATION

6.1. Additional Options

Upon mutual agreement of the Parties, this Agreement may be amended to encompass additional options during the term of the Agreement.

6.2. No Subsequent, Unilateral Modification of Terms

Notwithstanding any other provision of any agreement which may be hereafter issued unilaterally by IBM, and irrespective of whether any such agreement has been proposed prior to or after the date of this Agreement, the terms and conditions set forth herein shall supersede and govern licensing of all Programs hereunder.

6.3. More Advantageous Price Terms and Conditions

Notwithstanding any other provision of any agreement, IBM may offer more advantageous price terms and conditions than those set forth herein upon mutual agreement of the Parties.

7. EQUAL EMPLOYMENT OPPORTUNITY (EEO) REPORTING

Contractor agrees to comply with federal, State, and local requirements applicable to IBM concerning equal employment opportunities for minorities and women, including but not limited to Executive Law § 312 and its implementing regulations. In addition to the requirements stated in Appendix A Clause 12 (Equal Employment Opportunities for Minorities and Women), and to ensure complete compliance with such requirements (and with Executive Law § 312 and the regulations adopted pursuant thereto) Contractor agrees to submit to OSC its EEO Policy Statement, and Form AC 3239-A Proposer's EEO Staffing Plan of Anticipated Workforce. Further, Contractor shall submit on a semi-annual basis Form AC 3239-B (Contractor's/Subcontractor's EEO Workforce Utilization Report) and shall require each of its Subcontractors, if any, to submit such Report on a quarterly basis during the term of the Agreement.

The Contractor/Subcontractor shall submit two originals and two copies of Form AC 3239-B to OSC at the following address:

Attn: Director of Financial Administration
New York State Office of the State Comptroller
Bureau of Financial Administration
110 State Street, Stop 13-2
Albany, NY 12236

These Reports are reviewed as part of OSC's general compliance monitoring. If discrepancies exist between the EEO Staffing Plan of Anticipated Workforce and the Contractor's/Subcontractor's EEO Workforce Utilization Reports, the Contractor/Subcontractor may be subject to an in-depth EEO compliance review. If deficiencies are identified, OSC shall make every effort to resolve the deficiencies identified and to bring the Contractor/Subcontractor into compliance with such requirements. If OSC is unsuccessful in its efforts, and upon review, the Deputy Comptroller for the Division of Finance and Administration at OSC determines that the

Contractor/Subcontractor is non-compliant, such Deputy Comptroller shall submit a written complaint to the New York State Department of Economic Development's Division of Minority and Women's Business Development ("DMWBD") regarding the Contractor's/Subcontractor's noncompliance and shall recommend to DMWBD that it review and attempt to resolve the noncompliance matter. Such Deputy Comptroller shall serve a copy of the complaint upon the Contractor/Subcontractor by personal service or certified mail, return receipt requested.

DMWBD shall attempt to resolve a noncompliance dispute. If a resolution of the noncompliance dispute is satisfactory to the Parties, the Parties shall so indicate by signing a document indicating that the matter has been resolved and stating the terms of the resolution. If a resolution is not possible, DMWBD shall take all appropriate actions under statute (Executive Law § 316) and regulation (5 NYCRR § 143.6).

8. NOTICES

Any notice or other communication given pursuant to this Agreement shall be in writing and addressed to such party at the address set forth in this Agreement, and shall be effective:

- a) When delivered personally to the party for whom intended;
- b) Upon five days following the deposit of the notice or other communication into the United States Postal Service mail (certified mail, return receipt requested, or first class postage prepaid); or
- c) Upon actual receipt by the intended party if such notice or other communication is sent by overnight mail service.

The following are the names and contact information for OSC and the Contractor. The Parties shall notify each other, as soon as possible of any change.

OSC:

Title: Director of Financial Administration
Address: Office of the State Comptroller
110 State Street, Stop 13-2
Albany, NY 12236-0001

Contractor:

Name : Jack Milvaney
Title: IBM Corporation
Address: 80 State Street
Albany, NY 12207
Telephone: 518-487-6518

9. SERVICES

9.1. Description of Services

OSC does hereby retain and employ IBM to continue to license the Programs identified in Attachment A, and, as agreed to in advance and in writing by OSC, to provide new licenses, and related maintenance, product support and any software updates, patches, fixes or comparable MLC replacement or successor software programs as described below as needed by OSC at an agreed-upon licensing fee.

9.2. **Definitions**

- a) **Date of Installation for a Program** is the following:
 - i. for a basic license, the second business day after the Program's standard transit allowance period; or
 - ii. for a copy, the date (specified in a Transaction Document) on which IBM authorizes OSC to make a copy of the Program; or
 - iii. for a chargeable component, the date OSC distributes a copy of the chargeable component in support of OSC's authorized use of the Program.
- b) **Designated Machine(s)** is either:
 - i. the machine(s) on which OSC will use a Program for processing and which IBM requires OSC to identify to IBM by type/model and serial number, which OSC may change from time to time on prior written notice to IBM (including effective date that any such machine change occurred), provided that such change is (a) to a different, replacement machine (not an additional machine that will operate concurrently) of the same operational specifications, or (b) on the same machine with reduced operational specifications, or
 - ii. any machine on which OSC uses the Program if IBM does not require OSC to provide this identification.
- c) **Programs** are the following, including the original and all whole or partial copies of software licensed at any time pursuant to this Agreement:
 - i. machine-readable instructions and data;
 - ii. components;
 - iii. audio-visual content (such as images, text, recordings, or pictures;) and
 - iv. related licensed materials.
- d) **Program Services** are provided by IBM for Programs under warranty ("Supported Programs"), and include, but are not limited to, basic search capability for closed authorized program analysis reports ("APARs") and software fixes; the ability to report defects according to the instructions in the software support guide; resolution to defects in IBM code and publications; problem support for suspected defects in IBM code and publications, including the provision of remote technical specialists necessary to resolve defects at no additional cost; and updates to the software licensed.
- e) **Specifications** is a document that provides information specific to a Program. IBM provides a Program's Specifications in a document entitled "Licensed Program Specifications."
- f) **Specified Operating Environment** is the machines and programs with which a Program is designed to operate, as described in the Program's Specifications.
- g) **Transaction Documents** are as defined under Section 9.11 of this Agreement.

9.3. **Scope of Services**

This Agreement sets forth the terms and conditions governing the license of Programs delineated in Section 9.1 above. The license of Programs hereunder may include, at a minimum,

the provisions of the Program Services as described in Section 9.9 below. IBM shall continue to provide such licensed Programs during the Agreement term in accordance with and subject to the rights, obligations and terms set forth herein.

9.4. License

For Programs already installed, and/or obtained pursuant to Section 9.11 of this Agreement, IBM grants OSC nonexclusive, nontransferable license to use the Programs in the United States. Programs are owned by International Business Machines Corporation, one of its subsidiaries, or a third party and are copyrighted and licensed (not sold). IBM shall include Program Services as detailed in Section 9.9 as part of such license.

9.5. Authorized Use

Under each license, IBM authorizes OSC to:

- a) use the Program's machine-readable portion on only the Designated Machine(s). If a Designated Machine(s) is inoperable, OSC may use another machine(s) temporarily. If a Designated Machine(s) cannot assemble or compile the Programs, OSC may assemble or compile the Programs on another machine. If OSC changes a Designated Machine previously identified to IBM, OSC agrees to notify IBM of the change and its effective date;
- b) use the Program to the extent of authorizations OSC has obtained;
- c) make and install copies of the Programs, to support the level of use authorized, provided OSC reproduces the copyright notices and any other legends of ownership on each copy or partial copy; and
- d) use any portion of a Program that IBM (a) provides in source form, or (b) marks restricted (for example, "Restricted Materials of IBM") only to:
 - i. resolve problems related to the use of a Program, and
 - ii. modify a Program so that it will work together with other products.

9.6. OSC Additional Obligations

For each Program, OSC agrees to:

- a) comply with any additional terms that are mutually agreed to, in advance and in writing, by the Parties, including in IBM's Specifications, a Transaction Document, or this Agreement;
- b) ensure that anyone who uses it (accessed either locally or remotely) does so only for OSC's authorized use and complies with IBM's terms regarding Programs; and
- c) maintain a record of all copies and provide it to IBM at its request.

9.7. Actions OSC May Not Take

OSC agrees not to:

- a) reverse assemble, reverse compile, or otherwise translate any Program unless expressly permitted by applicable law without the possibility of contractual waiver; or
- b) sublicense, assign, rent, or lease any Program.

9.8. Program Components Not Used on the Designated Machine

Some Programs have components that are designed for use on machines other than the Designated Machine on which the Program is used. OSC may make copies of a component and its documentation in support of OSC's authorized use of the Program. For a chargeable component, OSC agrees to notify IBM of its Date of Installation.

9.9. Program Services

- a) IBM provides Program Services for Supported Programs. If IBM can reproduce OSC's reported problem in the Specified Operating Environment, IBM will issue defect correction information, a restriction, or a bypass. IBM provides Program Services for only the unmodified portion of a current release of a Program.
- b) IBM provides Program Services on an on-going basis (with at least 6 months' written notice before IBM terminates Program Services for any Program).
- c) Program Services shall include, but not be limited to, the following:
 - i. Basic Search capability for closed APARs and software fixes;
 - ii. ability to report defects according to the instructions in the software support guide
 - iii. resolution to defects in IBM code and publications;
 - iv. problem support for suspected defects in IBM code and publications, including the provision of remote technical specialists necessary to resolve defects at no additional cost; and
 - v. updates to the software licensed.

9.10. Program License Termination

OSC may terminate the license for a Program upon 30 days' written notice to IBM at any time during the Agreement term. OSC agrees to promptly destroy all copies of the terminated Programs within 30 days of the date when the notice was sent to IBM. MLCs for the terminated Programs shall cease at the end of the month in which IBM receives the notice from OSC. In the event that the termination does not occur at the end of a quarter in which the licensed fees for the terminated Program had been billed, IBM shall issue a credit to OSC in a timely manner but no more than 60 days or next regular invoice cycle.

Licenses for certain replacement Programs may be obtained for an upgrade charge, which will be captured in a mutually-agreed upon, revised MLC. When OSC obtains licenses for these replacement Programs, OSC agrees to terminate the license of the replaced Programs when charges become due, unless IBM specifies otherwise.

IBM may terminate OSC's license if OSC fails to comply with the license terms, upon 30 days' written notice, provided, however, that OSC shall be given the right to cure such non-compliance within 30 business days of such written notice. If IBM terminates a license, OSC's authorization to use the associated Program is also terminated at the end of the notice period. However, in the event that OSC requires additional time to obtain a replacement Program, OSC shall give IBM 10 days written notice, and IBM shall grant OSC the license to continue utilizing the terminated software for a reasonable period of time thereafter, but in no event more than 30 days.

9.11. Transaction Documents

- a) OSC may request an increase or decrease to existing MLC Program licenses, new Program licenses, upgrades, and replacement Programs under this Agreement by use of a Transaction Document, which shall be mutually agreed to, in writing, by the Parties. All finally executed Transaction Documents are amendments to this Agreement, will be incorporated into this Agreement, and are issued under the terms of this Agreement and cannot supersede terms and conditions set forth herein, except to the extent that such Transaction Document expressly states that it supersedes specifically enumerated terms and conditions set forth in this document, including reference to the section(s) of this document over which the Transaction Document takes precedence. Notwithstanding the foregoing, IBM may, in a Transaction Document, agree to provide OSC with more favorable prices, terms, warranties, or other benefits than are specified elsewhere in this Agreement.
- b) OSC may request an increase or decrease to, or termination of, existing MLC licenses, new Program licenses, upgrades, and replacement Programs under this Agreement by use of a Transaction Document, which shall be mutually agreed to, in writing, by the Parties. All Transaction Documents are deemed to be incorporated into this Agreement and to be issued under the terms of this Agreement and cannot supersede terms and conditions set forth herein, except to the extent that such Transaction Document expressly states that it supersedes specifically enumerated terms and conditions set forth in this document, including reference to the section(s) of this document over which the Transaction Document takes precedence.. Notwithstanding the foregoing, IBM may, in a Transaction Document, agree to provide OSC with more favorable prices, terms, warranties, or other benefits than are specified elsewhere in this Agreement. Transaction Documents are required for the following:
 - i. New licensed Programs or increases, decreases, or termination MLC licenses for currently-used Programs as requested by an authorized representative of OSC;
 - ii. Version Upgrades; and
 - iii. Replacement licensed Programs: where a Program license is discontinued or terminated by IBM, OSC shall be offered a license for a replacement licensed Program at an MLC comparable to the replaced Program.
- c) A Transaction Document will be created as follows:
 - i. OSC, as authorized user of the ShopZSeries System, submits a request for a software pricing document;
 - ii. IBM shall provide a software pricing document for the requested, licensed Program, pricing to be calculated in accordance with Attachment C.1 or C.2 or, if applicable, as set forth in Section 4.1;
 - iii. upon OSC's determination that IBM's pricing is accurate and mutually agreeable, OSC may create a Transaction Document and submit it to OSC's Bureau of Contracts ("BOC") for approval;
 - iv. upon BOC's approval of the Transaction Document, which shall constitute an amendment to the Agreement, OSC shall submit an order using the ShopZSeries System; and

- v. upon receipt of OSC's order as authorized by the BOC-approved Transaction Document, IBM shall provide the licensed Programs via the ShopZSeries System.
- d) Transaction Documents shall not be required for the following:
- i. Upgrades and Fixes -Where version upgrades and software fixes require no additional MLC, no approval of BOC shall be required. Such upgrades and fixes shall be obtained through the current IBM ShopZSeries system, or any replacement of the ShopZSeries system. Attachment A shall be amended according to Section 9.12 below to reflect the upgrade, if necessary.

9.12. Annual Amendment

As set forth in Section 4.1 (Contract Payments), beginning April 1, 2021, and annually thereafter, IBM and OSC shall, as applicable, create and execute a mutually-agreeable, written amendment to this Agreement, providing amended Attachments A and C, and MLCs (as applicable) for such Programs, which are subject to annual review ("Annual Amendment"). The Annual Amendment shall reflect any new licenses, upgrades, replacement Programs and terminated Programs. Where there are no changes to the Description of Current Licensed Programs or the MLCs for such Programs for the upcoming year from April 1 through March 31, no Annual Amendment will be required.

9.13. Evaluation Period

OSC may direct a request to the IBM Software Sales Representative for an evaluation period prior to acquiring software licenses, subject to the terms and conditions contained in Attachment D. IBM shall respond to such request within 30 days. If such period is granted, it shall be for a period as mutually agreed to and starts upon the date the software is delivered.

9.14. General Principles

- a) Neither Party grants the other the right to use its (or any of its Enterprise's) trademarks, trade names, or other designations in any promotion or publication without prior written consent.
- b) Each Party is free to enter into similar agreements with others.
- c) Each Party grants the other only the licenses and rights specified. No other licenses or rights (including licenses or rights under patents) are granted.
- d) Except for amendments to this Agreement and service of legal process (which must comply with the applicable State or federal rules of civil procedure), and subject to the requirements for Notices as set forth in Section 8, above, each Party may communicate with the other by electronic means and such communication is acceptable as a signed writing. An identification code (called a "user ID") contained in an electronic document is sufficient to verify the sender's identity and the document's authenticity.
- e) Each Party will allow the other reasonable opportunity to comply before it claims that the other has not met its obligations.
- f) Except as provided in Appendix A, neither Party may assign this Agreement, in whole or in part, without the prior written consent of the other. Any attempt to do so is void. Neither Party will unreasonably withhold such consent.

- g) OSC agrees that OSC is responsible for the results obtained from the use of the Programs.
- h) OSC agrees to provide IBM with sufficient, free, and safe access to OSC's facilities and systems as reasonably necessary for IBM to fulfill its obligations under this Agreement.
- i) OSC agrees to allow IBM and its subsidiaries to store and use OSC-issued contact information, including names, OSC-issued phone numbers, and OSC-issued e-mail addresses, anywhere they do business, provided, however, that such information will only be processed and used in connection with the Parties' business relationship under this Agreement, and may be provided to contractors, Business Partners, and assignees of IBM and its subsidiaries for uses consistent with their collective business activities as necessary to provide the Services under this Agreement, including communicating with OSC (for example, for processing orders, except where such communications could violate the procurement lobbying restrictions under the State Finance Law). This information will not be used for promotions and market research.
- j) OSC agrees to comply with all applicable export and import laws and regulations.
- k) OSC agrees that IBM will not be responsible for any third party claims against OSC except as described in the Indemnification section contained in this Agreement or as permitted by the Limitation of Liability section contained in this Agreement for bodily injury (including death) or damage to real or tangible personal property for which IBM is legally liable.

10. COOPERATION

The Contractor and OSC and their respective agents, employees and officers shall cooperate with each other to the greatest extent reasonable in connection with the Services to be provided under this Agreement. OSC shall supply and make available necessary information and personnel to assist the Contractor to perform the Services.

11. STAFF

Contractor's "Staff" includes employees, consultants, owners, officers, directors, subcontractors, subsidiaries, affiliates, partners, third party contractors, subprocessors, and agents of the Contractor providing products or Services under this Agreement.

IBM certifies that Staff who provide Program Services under this Agreement possess the necessary integrity and professional capacity (i.e., experience and knowledge) to meet OSC's reasonable expectations. Subsequent to the commencement of this Agreement and the delivery of Program Services, whenever IBM becomes aware, or reasonably should have become aware, that any Staff member(s) providing Program Services to OSC no longer possesses the necessary integrity or professional capacity, IBM shall immediately discontinue the use of such Staff and notify OSC.

OSC reserves the right to remove any of IBM's Staff from the provisioning of Services under this Agreement if, in OSC's discretion, such Staff is not performing in accordance with this Agreement, or for any other reasonable work-related cause. IBM shall be fully responsible for performance of work by its Staff. OSC reserves the right to bar anyone from access to OSC's premises and/or access to OSC's information resources.

Notwithstanding any language to the contrary regarding Staff, including third party contractors and subprocessors, in Attachments A through I, the language of this Section 11 (Staff) shall govern.

The Federal Immigration Reform and Control Act, as amended (8 USC§ 1324a et al.), obligates employers, such as the Contractor and its subcontractors, if any, and only to the extent applicable, to verify that their employees are legally entitled to work in the United States. In order to confirm that the employees are legally entitled to work in the United States, OSC reserves the right to request documentation attesting to the legal entitlement to work in the United States of any Contractor or subcontractor employee assigned work under the Agreement. OSC does not provide sponsorship. The Contractor warrants to OSC that the employees assigned to OSC for the performance of Services under this Agreement are eligible for employment in the United States to the extent Services under this Agreement are performed in the United States. The Contractor is responsible for ensuring that such assigned employees for the performance of United States-based services retain the authorization to legally work in the United States throughout the term of the Agreement. OSC does not discriminate against individuals on the basis of national origin or citizenship.

12. RELATIONSHIP OF PARTIES: RIGHTS TO WORK PRODUCT

The relationship of the Contractor and its Staff to OSC shall be that of an independent contractor, and not that of an agent or employee of OSC. The Contractor, as an independent contractor, shall not have the authority to contract for or bind OSC for any purpose whatsoever. The Contractor covenants and agrees that its Staff will not hold themselves out as agents, officers, or employees of OSC, and that they will not make any claim, demand or application for any right or privilege applicable to any officer or employee of OSC, including but not limited to, Workers' Compensation coverage, Social Security coverage or Retirement System benefits.

All work performed by Contractor or its Staff for OSC under the Agreement, including all deliverables, supporting materials, modifications, customizations, custom programs, tools, data, modules, components, and any properties embodied therein and furnished to OSC under this Agreement by or through Contractor or its Staff is a work for hire. Such work is specially ordered and commissioned for use as contributions to a collective work, or is other such work as specified by the U.S. Copyright Act [17 U.S.C. § 101(2)], and is intended to be a work for hire that is made for the use and ownership of the State of New York . Furthermore, OSC and the Contractor agree title and ownership shall pass to the State of New York upon acceptance of the work. The Contractor and its Staff who have been or may be used in regard to the Agreement forfeit all claims of title or ownership to work produced under the Agreement. Any and all reports and other materials (preliminary, final and otherwise), analyses and data (whether statistical or otherwise), transmitted to OSC by the Contractor shall become the sole and exclusive property of OSC for such use as OSC shall deem appropriate, other than Contractor's work papers, which Contractor may retain. The foregoing paragraph shall not apply to, and shall not convey any right, title or ownership to, Contractor-owned pre-existing works or derivative works thereof, the ownership of which, including all rights and title, shall remain with Contractor.

Nothing herein shall preclude the Contractor from otherwise using the related or underlying general knowledge, skills, ideas, concepts, techniques and experience developed in the course of Contractor's business.

13. REPRESENTATIONS AND WARRANTY

13.1. Warranty

- a) The Contractor hereby warrants that the Services will be performed in a professional and workmanlike manner, in accordance with applicable industry standards. For purposes of this Agreement, "applicable industry standards" shall be defined as the commercially reasonable degree of care, skill, efficiency, and diligence that a reasonably prudent person possessing technical expertise in the subject area and acting in a like capacity and for a similarly situated entity would exercise in similar circumstances.
- b) IBM warrants that each warranted Program, when used in the Specified Operating Environment, will conform to its Specifications. The warranty period for a Program expires when its Program Services are no longer available. During the warranty period, IBM provides defect-related Program Services without charge. Program Services are available for a warranted Program for at least one year following its general availability. If a Program does not function as warranted during the first ninety (90) days after you obtain your license and IBM is unable to make it do so, IBM shall either (i) if possible, replace the Program with one that is functionally equivalent at no cost to OSC, or (ii) allow OSC to return the Program and receive a full refund. To be eligible, you must have obtained your license while Program Services (regardless of the remaining duration) were available for it. Additional terms regarding Program Services are contained in Section 9.10 of this Agreement.
- c) The warranty will not apply to the extent that there has been misuse, accident, modification, unsuitable physical or operating environment, operation in other than the Specified Operating Environment, or failure caused by a product for which IBM is not responsible.
- d) THE WARRANTY IN THIS SECTION 13 IS OSC'S EXCLUSIVE WARRANTY AND REPLACES ALL OTHER WARRANTIES OR CONDITIONS, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OR CONDITIONS OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, except where specifically provided for elsewhere in this Agreement.
- e) This Warranty gives OSC specific legal rights and OSC may also have other rights which vary from jurisdiction to jurisdiction. Some jurisdictions do not allow the exclusion or limitation of implied warranties, so the above exclusion or limitation may not apply to OSC. In that event such warranties are limited in duration to the warranty period. No warranties apply after that period. Nothing in this Agreement affects any statutory rights of consumers that cannot be waived or limited by contract.
- f) IBM does not warrant uninterrupted or error-free operation of a Program or that IBM will correct all defects. Unless IBM specifies otherwise, it provides non-IBM programs WITHOUT WARRANTIES OF ANY KIND. IBM will identify all programs (IBM and non-IBM) that it does not warrant, prior to execution of this Agreement. However, non-IBM manufacturers, developers, suppliers and publishers may provide their own warranties to OSC and IBM shall, to the extent such products are supplied to OSC under this Agreement, provide commercially reasonable efforts respecting that such warranties, to the extent available, are passed through to the name of OSC. IBM will provide reasonable notice to OSC of the availability

and ownership of such warranties. Warranties, if any, for other IBM programs and non-IBM programs may be found in their license agreements. IBM shall be responsible for the coordination during the Program warranty or extended warranty period(s) with other third-party manufacturer(s) for warranty repair or replacement of third-party manufacturer's program.

13.2. Virus Warranty

IBM regularly tests its Programs to help ensure that the Programs are free from viruses; IBM warrants that it has no knowledge that any of the Programs provided under this Agreement contain any known viruses. In the event that a virus is detected in any Program, IBM's sole obligation under the warranty and OSC's exclusive remedy is for IBM to replace such Program with the same Program not containing any viruses. Virus is defined as any computer code, whether or not written or conceived by IBM, and any malware, spyware, adware, ransomware, worm, rootkit, or Trojan horse, which disrupts, disables, harms, or otherwise impedes in any manner the operation of the Program, or any other associated software, firmware, hardware, or computer system (such as local area or wide-area networks), including aesthetic disruptions or distortions, but does not include security keys or other such devices installed by program manufacturer. IBM and its Staff have an ongoing obligation to exercise commercially reasonable efforts to notify OSC as soon as reasonably practicable of the discovery of viruses in any Programs or third-party software that are provided under this Agreement that create a vulnerability of exposure or results in the disclosure or accessibility of OSC data to third parties. IBM is not responsible for viruses introduced at OSC's site that did not originate from IBM's Programs or Services.

13.3. Date/Time Warranty

IBM warrants that Programs furnished and licensed pursuant to this Agreement shall, when used in accordance with the specifications, be able to accurately process date/time data (including, but not limited to, calculating, comparing, and sequencing) transactions, including leap-year calculations. Where IBM proposes or an acquisition requires that specific Programs must perform as a package or system, this warranty shall apply to the Programs as a system.

Where IBM is providing ongoing Services, IBM warrants that Services shall be provided in an accurate and timely manner without interruption, failure or error due to the inaccuracy of IBM's business operation in processing date/time data (including, but not limited to, calculating, comparing, and sequencing) transactions, including leap year calculations. Subject to Section 17.2 of this Agreement, IBM shall be responsible for damages resulting from any delays, errors, or untimely performance resulting therefrom, including but not limited to the failure or untimely performance of Services.

This Date/Time Warranty shall survive beyond termination or expiration of this Agreement through: a) 90 days or b) IBM or product manufacturer/developer stated date/time warranty term, whichever is longer. Nothing in this Section 13.3 shall be construed to limit any rights or remedies otherwise available under this Agreement for breach of warranty.

14. DISASTER RECOVERY AND DISASTER RECOVERY TESTING

OSC may use and copy, as required and in good faith, Programs and related documentation in connection with:

- a) reproducing a reasonable number of copies of the Program for backup and Disaster Recovery procedures in the event of destruction or corruption of the Program or OSC-declared disasters (which shall be reasonably declared) or

emergencies which require OSC to restore backup(s) or to initiate Disaster Recovery procedures for its platform or operating systems;

- b) reproducing a reasonable number of copies of the Program and related documentation for "Cold Site" storage. "Cold Site" storage is defined as a restorable backup copy of the Program not to be installed until and after the declaration by OSC of a disaster;
- c) reproducing a backup copy of the Program to run in conjunction with a documented consolidation or transfer;
- d) three to four Disaster Recovery tests per year of two to three days duration (not to exceed ten days maximum); and
- e) the production use of backup copies of a Program as intended by paragraphs (a) through (c), above, in the event of an OSC-declared disaster, including in the event of destruction or corruption of a Program or disasters or emergencies that require OSC to restore backup(s), or to initiate Disaster Recovery procedures for its platform or operating systems.

"Disaster Recovery Testing" shall be defined as the installation, storage and testing of software in ready-to-execute, backup computer systems prior to disaster or breakdown that is not used for active production or development; however, said backup copy or Cold-Site copy may be tested at reasonable intervals at a Cold-Site location to ensure effective Disaster Recovery procedures. Notwithstanding the foregoing, in no event shall the number of copies of each Program made under the rights granted in this Section exceed two copies.

Notwithstanding any language regarding disaster recovery in Attachments A through I, the language of this Section 14 will govern.

15. CONFLICTS OF INTEREST

The Contractor represents that it currently has no conflicts of interest with respect to Services and any other client engagements, consultant contract, or employment, and that the Contractor shall immediately advise OSC whenever it becomes aware of any situation that involves or appears to involve such a conflict of interest or potential conflict.

16. CONFIDENTIALITY, SECURITY, AND BACKGROUND INVESTIGATIONS

16.1. Definition

The term "Confidential Information" shall mean any and all information which is disclosed by either party ("Owner") to the other ("Recipient") verbally, electronically, visually, or in written or other tangible form which is either identified as such in writing or should be reasonably understood under the circumstances to be confidential or proprietary. Confidential Information may include, but not be limited to, trade secrets, computer programs, software, documentation, formulas, data, inventions, techniques, marketing plans, strategies, forecasts, customer lists, employee information, financial information, confidential information concerning Owner's past, current, or possible future products or methods, including information about Owner's research, development, engineering, purchasing, manufacturing, accounting, marketing, selling, leasing, and/or software (including third party software).

16.2. Treatment

Owner's Confidential Information shall be treated as strictly confidential by Recipient and shall not be disclosed by Recipient to any third party except to those third Parties operating under non-disclosure provisions no less restrictive than those in this Section and who have a justified business "need to know." This Agreement imposes no obligation upon the Parties with respect to Confidential Information which either Party can establish by legally sufficient evidence: (a)

was in the possession of, or was rightfully known by the Recipient without an obligation to maintain its confidentiality prior to receipt from Owner; (b) is or becomes generally known to the public without violation of this Agreement; (c) is obtained by Recipient in good faith from a third party having the right to disclose it without an obligation of confidentiality; (d) is independently developed by Recipient without the participation of individuals who have had access to the Confidential Information; or (e) is required to be disclosed by governmental or judicial order or applicable law provided notice is promptly given to the Owner and provided further that diligent efforts are undertaken to limit disclosure.

16.3. Confidentiality and Security of OSC Information

In connection with the Services, the Contractor and its Staff may view or have access to Confidential Information owned by OSC. Subject to Section 16.1 herein Confidential Information shall include, but not be limited to:

- Personal information about individuals, e.g., home addresses, home telephone numbers, social security numbers, payroll information, account numbers, health status, etc.
- OSC security procedures, topology, practices and policies.
- Computer codes or other electronic or non-electronic information, the disclosure of which could jeopardize the security of OSC's computer systems.
- Any other material designated in writing (which writing may be provided by email) as being "Confidential," either at the time of disclosure or within a reasonable time period thereafter.

The Contractor agrees to preserve the confidentiality of any and all Confidential Information viewed, accessed or developed under the Agreement, and agrees:

- The Parties acknowledge and agree that neither party intends IBM to view, access, or develop Confidential Information under the Agreement, and to the extent OSC or OSC staff disclose or provide access to such Confidential Information to IBM Staff, OSC shall specifically identify it as such and shall specifically request that it be encrypted in transit (i.e., in flight) and at rest at levels that incorporate Federal Information Processing Standard (FIPS)-approved algorithms for data encryption at a minimum of 128 bit strength. To the extent applicable, use of outdated, cryptographically broken, or proprietary algorithms is prohibited. Encryption products, if any, must have FIPS 140 (Security Requirements for Cryptographic Modules) validation and be operated in FIPS mode. To the extent applicable, electronic information used to authenticate the identity of an individual or process (i.e., PIN, password, passphrase) must be encrypted when stored, transported or transmitted;
- To view, access and use only the Confidential Information relevant and necessary to provide Services;
- To use commercially reasonable efforts to preserve the confidentiality of the Confidential Information, provided such efforts are at least as protective as those taken by IBM to protect its confidential information, provided, however, that to the extent such Confidential Information to be disclosed by OSC includes personal identification information or other highly sensitive OSC operations, customer, payroll, or retirement system information, the Parties agree that OSC shall so notify IBM at

the time of disclosure as set forth above and IBM agrees that it will work with OSC, in good faith, to develop a process, which shall be documented by written agreement between the parties, that will be appropriately protective of such information;

- To use commercially reasonable efforts to prevent disclosure of the Confidential Information to any person other than to OSC employees, provided such efforts are at least as protective as those taken by IBM to protect its confidential information;
- To abide by all State confidentiality policies and procedures provided to Contractor in writing in advance;
- That all reports and other materials, preliminary, final and otherwise, prepared for or relating to Services (other than Contractor's work papers) shall be treated at all times as Confidential Information by the Contractor;
- All OSC Confidential Information shall remain the property of OSC;
- That all OSC Confidential Information shall be returned or destroyed (using commercially reasonable standard secure disposal methods that are consistent with and at least as stringent as the secure disposal methods used by IBM to dispose of its confidential information) within 30 days after the expiration of the Agreement and that upon such destruction the Contractor will certify as to the method of destruction.

16.4. Security

The Contractor and its Staff shall be required to comply with all applicable facility and information security policies and procedures provided to Contractor in writing in advance, including, as applicable, any training required, (both present and future), by OSC in performing the Services.

Except and only to the extent expressly permitted by this Agreement or in other, subsequent written consent as approved, in advance, by OSC's Chief Information Officer, the Contractor may not connect any non-State computer, electronic storage device or telecommunications equipment to OSC's network. Personal and corporate laptop computers, personal and corporate USB devices, smartphones and tablets are included in this prohibition. IBM's only anticipated access to OSC's network shall be in connection with the Services described in Section 9 of this Agreement.

Where performance of Services involves use by the Contractor of State-owned or licensed, or OSC-owned or licensed, papers, files, computer disks or other electronic storage devices, data or records at OSC or State facilities or offices, the Contractor shall not remove such records therefrom without the prior written approval from an authorized representative of OSC.

16.5. Background Investigations

OSC policy requires that background investigations be conducted on Contractor Staff providing Products or Services under this Agreement who will have access to OSC's IT systems, access to OSC confidential information/data, or routine access to any OSC facility. For purposes of this policy, "routine access" is defined as access to an OSC facility for five consecutive business days or 10 business days over the annual term of the engagement. Accordingly, with the signing of this Agreement, and to the extent applicable, the Contractor certifies that it has or will conduct its standard and customary background investigation on Staff providing Products or Services under this Agreement to whom the policy applies. The Contractor agrees to undertake its standard and customary background investigation of any newly hired Staff providing Products or Services under this Agreement during the term of the Agreement. A copy of IBM's employment screening and related background check practices, which are set forth in the document titled, "Global Employment Verification Standard," are annexed hereto as Attachment I. IBM will timely provide to OSC updated or revised employment screening and background check practices, as applicable, to the extent such impact Contractor Staff providing Products or

Services under this Agreement. The Office of the State Comptroller Inspector General may audit the results of these background checks, as applicable, unless prohibited by law.

Upon OSC's reasonable request, the Contractor will endeavor to the greatest extent reasonable to obtain the consent of its Staff providing products or services under this contract to allow OSC, upon request: (i) to review the background investigation records, including all supporting documentation, and (ii) to conduct its own background investigation.

During the term of the Agreement, and in accordance with Appendix A (Section 10, Records), the Contractor must maintain records related to the background investigations performed, if any, during the term of the Agreement.

17. INDEMNIFICATION AND LIABILITY

Notwithstanding any language to the contrary regarding indemnification and liability in Attachments A through I, the language of this Section 17 (Indemnification and Liability) shall govern.

17.1. Indemnification

a) IBM hereby agrees to fully indemnify and save harmless OSC and its officers, agents and employees from any suits, or actions, and any damages and costs of every name and description that a court finally awards or that are included in a settlement arising out of the wrongful acts or omissions of IBM, its officers, employees, subcontractors, partners, or agents, acting in their capacities as IBM's officers, employees, subcontractors, partners, or agents, based upon any third party claim for:

- i. personal injury, damage to real or personal tangible property for which IBM is legally liable, without limitation; or
- ii. infringement of any United States Letter Patent with respect to the Programs furnished, or of any copyright, trademark, trade secret or other third party proprietary right in relation to the Programs furnished, without limitation, provided that OSC shall give IBM:
 - a. prompt written notice of any action, claim or threat of infringement suit, or other suit, promptness of which shall be established by the State by the furnishing of timely written notice and verified receipt,
 - b. the opportunity to take over, settle or defend such action, claim or suit at IBM's sole expense, and
 - c. assistance in the defense of any such action at the expense of IBM.

Notwithstanding the foregoing, the State reserves the right to join or remain a party in any such action, claim, suit or proceeding, at its sole expense, if it determines there is an issue involving a significant public interest.

b) With regard to claims under (i) of paragraph (a) of this Section, IBM shall not be required to indemnify for that portion of any claim, loss or damage that arises thereunder due to the act or failure to act of OSC.

- c) With regard to claims under (ii) of paragraph (a) of this Section, the obligation to indemnify shall not apply to the extent that part or all of the claim is based on any of the following:
 - i. anything provided by OSC which is incorporated into the Programs, including, but not limited to, non-IBM products included by IBM at the express written direction of OSC;
 - ii. OSC's modification of the Programs, or use in other than its Specified Operating Environment, where such modification was not expressly approved in writing (which may be provided by email) by IBM;
 - iii. the combination, operation, or use of a Program with other products not provided or approved by IBM as a system, or the combination, operation, or use of a Program with any product, data, or apparatus that IBM did not provide or approve; or
 - iv. infringement by a non-IBM Program alone, as opposed to its combination with Programs IBM provides as a system.

Where a dispute or claim arises relative to a real or anticipated infringement, OSC may require IBM, at its sole expense, to submit such information and documentation as OSC shall require.

- d) If the use of any Program or part(s) thereof shall be enjoined for any reason or if IBM believes that it may be enjoined, IBM shall have the right, at its own expense and sole discretion to take action in the following order of precedence:
 - i. to procure for OSC the right to continue using such Program(s) or part(s) thereof, as applicable;
 - ii. to modify the Program(s) so that it becomes a non-infringing product of at least equal quality and performance;
 - iii. to replace said Program or part(s) thereof, as applicable, with a non-infringing product of at least equal quality and performance; or
 - iv. if none of the foregoing is commercially reasonable, then OSC agrees to return the Program (or part thereof) and IBM shall provide OSC a credit equal to the amount paid by OSC or twelve months' charges (whichever is less).
- e) This Section 17.1 constitutes OSC's sole remedy regarding any claim of infringement for Programs provided hereunder.

17.2. Limit of Liability

- a) Circumstances may arise where, because of a default on IBM's part or other liability, OSC is entitled to recover damages from IBM. In each such instance, regardless of the basis on which OSC is entitled to claim damages from IBM (including, but not limited to, fundamental breach, negligence, misrepresentation, or other contract or tort claim), IBM is liable for no more than:
 - i. payments referred to in Section 17.1 (Indemnification) above;
 - ii. damages for bodily injury (including death), and damage to real property and tangible personal property; and
 - iii. The amount of any other actual direct damages up to the greater of:

- a. \$5,000,000; or
- b. an amount equal to two times the aggregate MLC payments made pursuant to this Agreement, said amount shall not exceed a total of 12 months Recurring Charges payable under the applicable Transaction Document.

This limit is the maximum for which IBM, its subcontractors, and Program developers are collectively responsible, provided, however, that IBM remains liable for the acts or omissions of its Staff in the performance of Services under this Agreement.

Under no circumstances are IBM, its subcontractors, or Program developers liable for any of the following even if informed of their possibility:

- a. loss of, or damage to, data; or
 - b. special, incidental, or indirect damages for any economic consequential damages; or
 - c. lost profits, business, revenue, goodwill, or anticipated savings.
- b) Neither the Contractor, OSC, nor the State shall be liable for any delay or failure in performance beyond its control resulting from acts of war, hostility or sabotage; act of God; electrical, internet or telecommunications outage that is not caused by the obligated Party; or government restrictions, or other force majeure event. The Parties shall use reasonable efforts to eliminate or minimize the effect of such force majeure events upon performance of their respective duties under this Agreement. If such event continues for more than 90 days, either Party may terminate all or any agreed upon portion of the Agreement immediately upon written notice. This Section does not excuse either Party's obligation to take reasonable steps to follow its normal disaster recovery procedures, or OSC's obligation to pay for Services provided by the Contractor which have been approved by OSC.
- c) Notwithstanding the foregoing, Contractor remains liable, without monetary limitation, for direct damages for personal injury, death or damage to real property or tangible personal property or intellectual property attributable to the negligence or other tort of Contractor, its officers, employees or agents.

18. RESPONSIBILITY TERMS

- a) The Contractor represents that it has, to the best of its knowledge, truthfully and thoroughly completed the Contractor's Vendor Responsibility Questionnaire ("Responsibility Questionnaire") provided to the Contractor by OSC prior to execution of this Agreement. The Contractor further represents that as of the date of execution of this Agreement, there are no material events, omissions, changes or corrections to such document requiring an amendment to the Responsibility Questionnaire.
- b) The Contractor shall provide to OSC updates to the Responsibility Questionnaire if any material event(s) occurs requiring an amendment or as new information related to such Responsibility Questionnaire becomes available. The Contractor shall, on an annual basis, re-certify such Responsibility Questionnaire, noting any changes, whether material or non-material, or submit a certification of "no change" to OSC. Contractor's periodic filings with OSC, or updates thereto, regarding IBM's Responsibility Questionnaire obligations, shall be sufficient to satisfy this provision.

- c) Notwithstanding Subsection (B) hereinabove, OSC reserves the right, in its sole discretion, at any time during the term of this Agreement, (i) to require updates or clarifications to the Responsibility Questionnaire, (ii) to inquire about information included in or omitted from the Responsibility Questionnaire, and (iii) to require the Contractor to provide such information to OSC within a reasonable timeframe to be established at OSC's sole discretion.
- d) OSC reserves the right to make a final determination of the Contractor's non-responsibility ("Determination of Non-Responsibility") at any time during the term of this Agreement based on (i) any information provided in the Responsibility Questionnaire and/or in any updates, clarifications or amendments thereof; or (ii) the Contractor's failure to disclose material information; or (iii) State's discovery of any other material information which pertains to the Contractor's responsibility.
- e) If OSC preliminarily determines the Contractor to be non-responsible, State shall provide written notice to the Contractor detailing the reason(s) for the preliminary determination, and shall provide the Contractor with an opportunity to be heard before the determination is finalized.
- f) Upon a Determination of Non-Responsibility of the Contractor, OSC reserves the right to terminate this Agreement for cause pursuant to Section 19 (Termination).

19. TERMINATION

- a) OSC may terminate this Agreement, or terminate the Services with respect to a specific matter or matters, with or without cause upon 30 days' prior written notice.
- b) OSC reserves the right to terminate this Agreement, or to terminate the Contractor's Services with respect to a specific matter or matters immediately upon written notice to the Contractor, if Contractor materially breaches this Agreement.
- c) In the event of termination, OSC's liability to IBM for MLC shall be pro-rated in accordance with Services actually provided to the end of the month in which termination occurs.

Notwithstanding any language regarding termination in Attachments A through I that could be considered in addition or contrary to the termination language of this Section 19, the language of this Section 19 shall govern.

20. TERMINATION FOR INTENTIONAL PROVISION OF FALSE OR INCOMPLETE CERTIFICATION

Notwithstanding Section 19, OSC reserves the right to terminate this Agreement in the event that the certification filed by IBM (that all information disclosed to OSC pursuant to SFL §§ 139-j and 139-k is complete, true and accurate with regard to prior non-responsibility determinations within the past four years based on [i] impermissible Contacts or other violations of New York State Law, or [ii] the intentional provision of false or incomplete information to a governmental entity) is found by OSC to be intentionally false or intentionally incomplete. Upon such a finding, OSC may exercise its right to terminate this Agreement; in that event this Agreement shall be deemed terminated and of no further force and effect within thirty days from the date OSC provides written notification to IBM of such termination in accordance with Section 19 of this Agreement.

21. TERMINATION FOR FAILURE TO CERTIFY OR FOR FALSE CERTIFICATION PURSUANT TO TAX LAW 5-A

Notwithstanding Section 19, IBM's failure to make the certification required by Tax Law 5-a or IBM's filing of a false certification shall be a material breach of this Agreement and in either event OSC shall have the right to terminate this Agreement.

22. NOTICE PRIOR TO PRODUCT DISCONTINUANCE

IBM provides Program Services for Supported Programs in accordance with Section 9.9 of this Agreement. In the event that IBM proposes to discontinue Program Services for Supported Programs or a particular version of these Supported Programs, IBM shall:

1. notify OSC in writing of its intention of discontinuance at least six months prior to the planned date of discontinuance; and
2. continue to provide Program Services until the date IBM specifies, or for a period IBM specifies.

23. TRANSITION

Upon expiration or termination of this Agreement, the Contractor shall provide to OSC and not unreasonably withhold all records in the Contractor's possession relating to the Services provided under this Agreement. At OSC's request, the Contractor shall, at then-current hourly rates, also make appropriate Staff available to OSC during normal business hours to answer questions regarding such records and the Services which have been provided by the Contractor under this Agreement. The Contractor shall cooperate to the greatest extent commercially reasonable with any successor contractor in order to accomplish a smooth and orderly transition, so that the Services are uninterrupted and are not adversely impacted.

24. MISCELLANEOUS PROVISIONS

24.1. Waiver

The waiver by either Party of any default or breach of this Agreement shall not constitute a waiver of any other subsequent default or breach.

24.2. Severability

If any term or provision of this Agreement shall be held invalid or unenforceable, the remainder of this Agreement shall not be affected thereby and every other term and provision of this Agreement shall be valid and enforced to the fullest extent permitted by law.

24.3. Ethics Compliance

The Contractor and its Staff shall comply with the requirements of Public Officers Law §§ 73 and 74, and other State codes, rules and regulations establishing ethical standards for the conduct of business with New York State. Failure to comply with those provisions may result in termination of the Agreement and/or other civil or criminal proceedings as required by law.

24.4. Public Communication

Neither the Contractor nor any of its Staff shall make any statement to the press or issue through any media of communication any statement bearing on the Services performed or data collected under this Agreement, without the prior written approval of OSC.

24.5. Public Information

Disclosure of items related to this Agreement shall be permitted consistent with the laws of the State of New York and specifically the Freedom of Information Law ("FOIL") contained in § 87 of the Public Officers Law. The State shall take reasonable steps to protect from public disclosure any of the records relating to this Agreement that are otherwise exempt from disclosure under that statute. Subject to Section 16, information consisting of trade secrets, for purposes of FOIL, must be clearly marked and identified as such upon submission. Subject to Section 16, if IBM intends to seek an exemption from disclosure of these materials under FOIL, IBM shall, at the time of submission, request the exemption in writing and provide an explanation of why the disclosure of the identified information would cause substantial injury to the competitive position of IBM. Acceptance of the identified information by the State does not constitute a determination that the information is exempt from disclosure under FOIL. Determinations as to the availability of the identified information will be made in accordance with FOIL at the time a request for such information is received by the State.

24.6. Survival

The provisions of Sections 13 (Representations and Warranty), 16 (Confidentiality, Security and Background Investigations), 17 (Indemnification and Liability), 23 (Transition), and Appendix A shall survive the expiration or termination of this Agreement.

24.7. Policies and Security

If IBM is required to perform work on-site at OSC or will have access to OSC's systems, IBM shall be required to comply with commercially reasonable and applicable facility and information security measures, including policies and procedures of OSC and the State, in performing the scope of work under this Agreement, IBM shall be provided, in advance, with then-current policies and will be notified when such policies change.

25. ENTIRE AGREEMENT/APPROVALS

This Agreement and the appendices, exhibits, and attachments hereto constitute the entire Agreement between the Parties, and no statement, promise, condition, understanding, inducement or representation, oral or written, expressed or implied, which is not contained herein shall be binding or valid. The Agreement shall not be changed, modified, or altered in any manner except by an instrument in writing executed by the Parties. This Agreement and any amendment hereof shall not be deemed executed, valid, or binding unless and until approved in writing by the New York State Attorney General and thereafter, approved in writing by the OSC's Bureau of Contracts pursuant to § 112 of the State Finance Law, and filed in the Office of the State Comptroller.

REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK

IN WITNESS WHEREOF, the Parties have executed this Agreement.

In addition to the acceptance of this Agreement, OSC and Contractor signatures on this page also certify that originals of this signature page will be attached to all other originals of this Agreement.

CONTRACT NUMBER: C001036

INTERNATIONAL BUSINESS MACHINES, INC.

J E Milvaney
SIGNATURE

JOHN E. MILVANEY
PRINTED NAME

CLIENT EXECUTIVE
TITLE

4-3-2020
DATE

CONTRACTOR'S ACKNOWLEDGEMENT

STATE OF NEW YORK

COUNTY OF ALBANY

On the 3rd day of APRIL in the year 2020, before me personally appeared JOHN E. MILVANEY known to me

to be the person who executed the foregoing instrument, who, acknowledged to me that he/she maintains an office at 80 STATE STREET ALBANY, NY 12207

and further that he/she is the CLIENT EXECUTIVE IBM

the corporation described in foregoing instrument; that, by authority of the Board of Directors of the corporation he/she is authorized to execute the foregoing instrument on behalf of the corporation for purposes set forth therein; and that, pursuant to that authority, he/she executed the foregoing instrument in the name of and on behalf of the corporation as the act and deed of the corporation.

Amanda Robinson

Notary Public
Registration No. 01R06390046

AMANDA P ROBINSON
NOTARY PUBLIC STATE OF NEW YORK
SARATOGA
LIC. #01R06390046
COMM. EXP. 04/08/2023

APPROVED AS TO FORM:
NYS ATTORNEY GENERAL

APPROVED:
THOMAS P. DINAPOLI, COMPTROLLER

By: _____

DATE _____

By: _____

DATE _____

APPROVED
DEPT. OF AUDIT & CONTROL
May 01 2020
David Burmaster
FOR THE STATE COMPTROLLER

From: [Remo, Lorraine](#)
To: [Joseph M. Leathem](#); [Ellen Porcari](#)
Cc: [Contract Approval](#)
Subject: FW: C001036 IBM Resubmission
Date: Wednesday, April 08, 2020 1:54:38 PM
Attachments: [C001036 AG Letter \(Resubmission\).pdf](#)
[C001036 IBM Final Contract ELECTRONICALLY EXECUTED.PDF](#)
[C001036 AG Rejection Notice 2020-03-16.pdf](#)
[C001036 AG Response Letter 2020-03-25.pdf](#)

Approved as to form: 4/8/2020 by Lorraine I. Remo
Received: 3/12/2020

Reminder: Agencies must forward the contract approved by the OAG Contract Approval Section along with the email in which the OAG Contract Approval Section approved the contract, to OSC via the Comptroller's EDSS system. If you are not enrolled in the EDSS system and have not made alternative arrangements with OSC on how to submit your transaction, please contact OSC at [REDACTED] or email [REDACTED]

OAG: CAS please file and enter.

Lorraine I. Remo
Section Chief
Contract Approval Section
Department of Law
518-776-2350
ATTORNEY CLIENT PRIVILEGED/NOT FOR DISSEMINATION

The information contained in this electronic mail message is privileged and confidential and intended only for the individual or individuals named above. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering it to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please reply to the sender immediately to notify us of the error and delete the original message. Thank you.

APPENDIX D

OSC EXECUTIVE ORDER ON PROCUREMENT INTEGRITY

Whereas, it is the policy of the Office of the State Comptroller (OSC) and the New York State Common Retirement Fund (CRF) to procure goods and services in a fair, equitable and open manner and to protect the procurement process from improper influences; and

Whereas, procurement lobbying activities must be monitored and documented to assure the integrity of the procurement process;

Now, therefore, I, Thomas P. DiNapoli, Comptroller of the State of New York, in consideration of the foregoing, do hereby order as follows;

1. **Applicability.** This executive order applies to determinations by OSC or CRF to award a contract for the acquisition of any goods, services, or information technology. Decisions to invest or disinvest CRF assets in securities, properties, or other investment vehicles, and selections of investment advisors or managers whose services are integral to the administration of CRF investments, remain subject to the Comptroller's fiduciary responsibility to administer the CRF prudently to increase and preserve CRF assets on behalf of its beneficiaries. In addition, selection of counsel to represent the CRF in transactional, investment or litigation matters remain subject to the Comptroller's fiduciary responsibilities. Although such CRF investment decisions and selections are not subject to this executive order, they shall be made in a fair and equitable manner, in accordance with the Comptroller's fiduciary responsibilities.
2. **General Counsel.** The General Counsel shall have general responsibility for the prevention of improper influence relative to all procurement contracts awarded by OSC or CRF. The General Counsel shall form such committees or draw upon OSC staff as needed to fulfill this responsibility.
3. **Procedural Controls.** The General Counsel shall develop, in consultation with the executive staff of OSC, procedural controls in the form of written Procurement Integrity Procedures. Such procedures shall:
 - a. require that decisions made on the award of procurement contracts shall be made in accordance with Article 11 of the State Finance Law, free from any improper influence;
 - b. require that any OSC employee who has direct knowledge of any improper influence or attempted improper influence shall immediately make a record of the improper influence or attempted improper influence relating to a bid, proposal or a procurement contract and notify the General Counsel or appropriate Division of Legal Services staff designated by the General Counsel;
 - c. prohibit contact relating to a bid or proposal, during the procurement process, between all OSC personnel involved in the determination of the procurement contract award and any employee, agent, or consultant of a bidder or proposer competing for the contract, except for contacts authorized by the procedures established pursuant to this executive order;
 - d. establish procedures for appropriate contacts between OSC personnel involved in the determination of a procurement contract award and the employees, agents or consultants of a bidder or proposer for the purpose of clarifying a bid or proposal. Such authorized contacts shall only be for the purpose of providing information to OSC personnel to assist them in understanding and assessing the qualities, characteristics and anticipated performance of a product or service offered by a bidder or proposer, and shall occur only at such times and in such manner as have been authorized by the procedures established pursuant to this executive order;

- e. provide for appropriate contacts between OSC personnel and the employees, agents or consultants of a proposer for the purpose of negotiating contract terms after the evaluation of bids or proposals and selection of a contractor have been completed;
 - f. establish a process for the review by the General Counsel of any allegations of improper influence or attempted improper influence, and for the imposition of sanctions if such improper activity has been found to exist.
4. Incorporation of Procedural Controls in Contract Documents. The Procurement Integrity Procedures required by this executive order shall be incorporated into all OSC and CRF procurement solicitations and contracts.
 5. Periodic Review. The General Counsel shall periodically review the Procurement Integrity Procedures with OSC personnel in order to ascertain potential areas of exposure to improper influence and to adopt desirable revisions for more effective avoidance of improper influences.
 6. Sanctions. Any OSC employee who violates the Procurement Integrity Procedures may be subject to disciplinary action. Any vendor who violates the Procurement Integrity Procedures may be found to be a non-responsible vendor, and on the basis of such finding, may be ineligible to receive a contract award.

/s/

Thomas P. DiNapoli
Comptroller, State of New York

Last Revised Date: March 14, 2007
Original Date: February 14, 2002

OSC PROCUREMENT INTEGRITY PROCEDURES

In order to ensure that procurements of goods or services' by the Office of the State Comptroller (OSC) or the Common Retirement Fund (CRF) are conducted in a fair, equitable and open manner, the procedures set forth below shall apply to the procurement process.

The General Counsel to the Comptroller shall have general responsibility for the prevention of improper influence relative to all procurement contracts awarded by OSC or CRF.

A copy of these Procurement Integrity Procedures will be given to every OSC employee, consultant, or other person assigned to any task related to an OSC or CRF procurement. A copy of these procedures will be incorporated into every Request for Information (RFI), Request for Proposals (RFP) or Invitation for Bids (IFB) issued by OSC or CRF.

Any OSC employee who violates these procedures may be subject to disciplinary action, such as a reprimand, suspension, demotion, or dismissal. Any vendor who violates these procedures may, after notice and an opportunity to be heard, be determined to be a non-responsible vendor, and on the basis of such a determination may be ineligible to receive a contract award.

Every reasonable effort will be made to assure compliance with these procedures, but a minor deviation from these procedures that does not impair the fairness and integrity of the procurement process will not require the invalidation of a contract award.

1. OSC employees must provide every interested vendor² with an equal opportunity to compete. No information may be given to one vendor without being made available to all other interested vendors. Vendors should be asked to submit every substantive question ³ concerning the procurement in writing not later than the date specified by OSC for such questions; and a copy of each question, together with OSC's written answer, should be supplied to all interested vendors and included in the procurement record.
2. Unless otherwise directed by the General Counsel to the Comptroller, OSC's Assistant Comptroller for Administration or a designee will serve as the coordinator for all procurement-related contacts between OSC personnel and vendor personnel. All telephone calls, correspondence, and meeting requests must be routed to: Assistant Comptroller for Administration, Office of the State Comptroller, 110 State Street - 13th Floor, Albany, NY 12236, telephone: (518) 474-7574, Fax: (518) 473-9377, Email: RFP@osc.state.ny.us. OSC's Assistant Comptroller for Administration, or a designee, will maintain a record of all such contacts.

¹ These procedures apply to determinations by OSC or CRF to award a contract for the acquisition of any goods, services, or information technology, except that they do not apply to (i) decisions to invest or disinvest CRF assets in securities, properties, or other investment vehicles, (ii) selections of investment advisors or managers whose services are integral to the administration of CRF investments, and (iii) selection of counsel to represent the CRF in transactional, investment or litigation matters. Such CRF investment decisions and selections remain subject to the Comptroller's fiduciary responsibilities, and are to be made in a fair and equitable manner in accordance with those responsibilities.

² For the purposes of these procedures, the term "interested vendor" means a person or firm that has received or requested a Request for Information (RFI), an RFP, or an IFB issued by OSC or CRF.

³ For the purposes of these procedures, the term "substantive question" means an inquiry concerning a material requirement of the procurement process, such as a technical specification or a financial prerequisite. The term does not apply to ministerial matters, such as the time and place or manner of submitting a bid or proposal.

3. A vendor may not exert or attempt to exert any improper influence⁴ relating to the vendor's bid or proposal. Any OSC employee who has direct knowledge of any improper influence or attempt to exert an improper influence concerning a procurement contract shall immediately make a record of the improper influence or attempted improper influence and notify the General Counsel to the Comptroller. The General Counsel to the Comptroller shall thereupon cause an investigation to be made and shall recommend such action, if any, as may be necessary.
4. Unless otherwise directed by the General Counsel to the Comptroller, OSC's Assistant Comptroller for Administration or a designee will be responsible for approving and scheduling all contacts between OSC employees and vendor personnel concerning procurements.
5. Vendors are expected to obtain information relating to an OSC or CRF procurement only from an OSC employee or other person designated by OSC. Vendors who seek information from other sources are cautioned that they rely on such information at their own risk.
6. Every IFB and RFP shall require vendors to identify in their bids or proposals the persons authorized to represent the vendor by name, address, telephone number, place of principal employment and occupation. This requirement applies not only to vendor employees involved in the submission of the vendor's bid or proposal but also to every individual or organization employed or designated by the vendor to attempt to influence the procurement process⁵. If, after submission of a bid or proposal, a vendor retains an individual or organization to attempt to influence the procurement process, then the name, address, telephone number, place of principal employment and occupation of such individual or organization shall be disclosed in writing to OSC or CRF prior to any contact with OSC or CRF and such disclosure shall be included in the procurement record. IFBs and RFPs shall require that vendors indicate in their bids or proposals or subsequent disclosures whether each contact individual or organization has a financial interest in the procurement.
7. All contacts between OSC personnel and vendor personnel during which a procurement-related matter is discussed in any way must be by telephone, in writing, or in person at the place of business of OSC or the vendor or at a place designated by OSC. Written documentation of all such discussions must be filed by the Assistant Comptroller for Administration or designee in the procurement record.
8. During the procurement process no lunch, dinner, or other meal shall be accepted by a member of the OSC staff from an interested vendor, except that a presentation, interview or similar session occurring at the place of business of OSC or a vendor or at a place designated by OSC may include a refreshment break.
9. The evaluations of competing bids or proposals and the recommendations and deliberations of OSC evaluation or selection committees shall be based solely on the merits of the bids or proposals, free from any improper influence.
10. Prior to the public release by OSC or CRF of an Invitation for Bids (IFB) or Request for Proposals (RFP), no OSC employee may disclose the contents of any portion of an IFB or RFP to any person not employed by OSC or any other person not authorized by the Assistant

⁴ For the purposes of these procedures, the term "improper influence" means any attempt to achieve preferential unequal, or favored consideration of a bid or proposal based on considerations other than the merits of the proposal, including but not limited to, any conduct prohibited by the Ethics in Government Act, as set forth in Public Officers Law sections 73 and 74.

⁵ For the purposes of these procedures, the term "attempt to influence the procurement process" means any attempt to influence any determination by OSC or CRF by a person other than an OSC employee with respect to (i) the solicitation, evaluation or award of a procurement contract; or (ii) the preparation of specifications or request for submissions of bids or proposals for a procurement contract.

Comptroller for Administration or designee unless such disclosure is specifically authorized by the Assistant Comptroller for Administration , who shall only authorize such disclosure if he or she determines that such disclosure will not impair the fairness and integrity of the procurement process.

11. The evaluation of competing bids or proposals shall be conducted strictly in accordance with the detailed evaluation and selection procedures documented in the procurement record prior to the initial receipt and opening of the bids or proposals. The Assistant Comptroller for Administration or a designee shall issue the detailed evaluation and selection procedures to the members of the evaluation and selection committees prior to the distribution of the bids or proposals to the committee members for evaluation.
12. During the evaluation and selection phases of the procurement process, no OSC employee may disclose any part of a bid or proposal to any other person, except that (i) a member of an evaluation or selection committee may discuss a proposal with another member of the same committee, and (ii) a member of an evaluation or selection committee may disclose a proposal or a portion of a proposal to a person assigned to assist in the evaluation or selection process, as described below.
13. With the approval of the Assistant Comptroller for Administration or designee, evaluation or selection committees may appoint OSC employees or other experts to provide supporting services or information to assist in the evaluation of proposals and the selection of a contractor.
14. At the discretion of the Assistant Comptroller for Administration or a designee, any person to whom a bid or a proposal or a portion of a bid or a proposal is disclosed may be required to comply with a written non-disclosure or confidentiality agreement setting forth the terms and conditions under which such person is entrusted with the bid or proposal or portion thereof.

October 11, 2011