

# CONSULTANT'S TERM AGREEMENT

**Project No.: XXXXXX-XX**

This Agreement made as of July 7, 2023, by and between the State University Construction Fund, having its principal office and place of business at the H. Carl McCall SUNY Building, 353 Broadway, Albany, New York 12246, hereinafter referred to as the "Fund", and

CONSULTANT,

having its principal office and place of business at

ADDRESS,  
CITY, STATE ZIP,

hereinafter referred to as the "Consultant".

WHEREAS, the Fund desires the Consultant to undertake certain services in preparation of and in relation to rehabilitation or construction work at various campuses within the State University of New York (SUNY) system (Project or Projects); and

WHEREAS, the Consultant represents they have the authority, qualifications and expertise to provide the services required in accordance with this Agreement and as further authorized in individual assignments which will meet the Fund's objectives and comply with the requirements of the Fund and all applicable laws and regulations.

NOW, THEREFORE, the parties in consideration of the mutual covenants herein contained agree as follows:

## Article I Consultant's Basic Services

The Consultant agrees to undertake the services provided for under this Agreement, as may be directed by the Fund from time to time, in accordance with an assignment (Work Order Assignment or Assignment) issued by the Fund to the Consultant. This Agreement is the total of all assignments to be performed by the Consultant in accordance with the terms herein. An Assignment will provide for payment for the services in the amount set forth in the Assignment, up to the total compensation authorized under this Agreement in Article III. The Consultant agrees to notify the Fund of its acceptance of all of the terms and conditions of a Work Order Assignment within 10 (ten) business days of receipt of the particular Assignment by executing the Assignment and returning it to the Fund. Fund approved Work Order Assignments will be returned to the Consultant, specifying the start date for services and the Consultant agrees to commence services immediately.

Each Work Order Assignment issued by the Fund will be for services for a particular assigned Project. Each Work Order Assignment is governed by and incorporates by reference the terms and conditions of this Agreement but may also include other items that the Fund deems appropriate for an Assignment.

The Consultant acknowledges that the Fund has selected the Consultant for the Project (Assignment) in reliance on the ability of the Consultant to perform services in accordance with the Fund's Program Directives, Bulletin on Payment of Consultant Fees, Management of Design & Construction Manual, and other written instructions provided by the Fund, as the same may be modified, amended, or supplemented from time-to-time by the Fund. The Consultant agrees that time is of the essence in completing the services required for each Assignment under this Agreement and that required services shall be performed in a diligent manner and with sufficient staffing. The Consultant agrees to ensure that all design phase services required to provide complete bidding documents under an Assignment shall be entirely completed and performed on schedule and agrees to perform all services reasonably required to fulfill the Consultant's role and responsibilities as set forth in the Construction Agreement(s) for each construction contract awarded for the Project (Assignment).

Unless a Work Order Assignment specifically provides otherwise, the Consultant services to be provided for an Assignment shall include, but are not limited to, the following:

### Section A General Services

- (1) Determine, select and manage the staffing and subconsultants necessary for the timely performance of the services required hereunder to meet the Fund's program requirements, including the services of a Cost Analyst if required by the Fund.
- (2) Periodically advise the Fund of the progress of the planning, design and construction of the Project and any anticipated delay in the same.
- (3) Attend, together with its subconsultants, all conferences reasonably required by the Fund, and take, prepare and promptly distribute minutes of all such conferences.
- (4) Provide written responses within ten business days to all written comments submitted by the Fund.

- (5) Coordinate all the services to be provided hereunder with other projects being undertaken by the Consultant or by others.

## **Section B Specific Services**

Additional required services are set forth below, and in accordance with the services required in a Work Order Assignment. All such services must be in compliance with Fund Program Directives.

### **Design Services - (For each Project assigned pursuant to a Work Order):**

#### (1) Program Verification Phase

- a. Attend orientation meetings at the Project site and/or Fund office to review the Project, Fund requirements at various development phases, and the Program of the Project. For the purposes of the Agreement, the term "Program" includes: this Agreement, Project schedules, Justification and Scope of Work, Fund Program Directives, and the comprehensive Project program including campus plan requirements, site program, facilities program, equipment program, budgets, schedules and program addenda.
- b. Review, analyze, and evaluate the contents of the Project Program. Prepare an analysis including the following factors: intended use, space and sequencing requirements; site and property requirements; environmental considerations; provision of all utilities; local building practices; time schedules for all phases of the Project; budget and cost forecasts; pedestrian access and egress patterns; public transportation facilities; vehicular traffic and parking availability and requirements; relationship to other projects either existing or proposed; sufficiency and adequacy of the Program; and other relevant factors.
- c. Prepare a written report verifying the function, scope, sequencing, content and practicability of the Project Program and identifying any possible deficiencies and, when deemed necessary by the Fund, prepare planning drawings including the contract limits of each of the proposed construction contracts.

#### (2) Concept Phase

- a. Prepare an analysis of the site and, in the case of the rehabilitation of an existing building, the existing condition of the building, including, but not limited to, determining the location, measurement and other essential data of existing architectural, equipment, structural, mechanical, electrical and utility features, and submit a report to the Fund setting forth such analysis and confirming that the data available is sufficient to

proceed with the design of the project. Provide additional information reasonably determined by the Fund to be necessary or desirable, such as topography, soil data, and municipal agency and utility company projects and/or a plan for accessing such information.

- b. Identify such testing, measurements, verification, and/or surveys as may be required to properly execute the design of the project.
- c. Prepare diagrammatic studies of the Project showing, in the case of a project involving a structure, the relationship of rooms and spaces to the program requirements of the Fund and to the site, services, utilities and other structures; and in the case of a project involving sitework, the relationship of site systems to the site, services, utilities, and structures.
- d. Confirm the Project Budget and Schedule and identify and justify any proposed changes.
- e. Prepare a construction phasing analysis, which shows the time frames provided by the campus and maintains adjacent occupancies, including a description of temporary construction and facilities necessary to maintain campus operations; establish a general sequence of the phasing demonstrating the continuity of campus operations.
- f. Prepare a Code Analysis providing for compliance with all applicable requirements.
- g. Prepare a concept phase cost estimate verifying that the Project can be completed within the program budget.
- h. Prepare a Concept Phase Report in a format acceptable to the Fund, setting forth in detail the function, scope and intent of the Project and illustrating three or more design concepts which satisfy the basic program requirements of each proposed design. Submission of the aforesaid report by the Consultant shall constitute its acceptance of the Program, Budget and Time Schedule, unless otherwise specified and agreed to by the Fund in writing.

#### (3) Schematic Design Phase

- a. Prepare a Schematic Design Report which shall include, but not be limited to:
  - i. Such graphic material, code analysis, and information as is necessary or appropriate to fully illustrate the proposed design and the construction materials of the Project, and the relationship of the Project to other projects on the campus, either existing or proposed, and such other factors as may affect the design of

the Project or otherwise involve or relate to the Project.

- ii. Engineering reports analyzing and economically justifying: the proposed structural, mechanical, electrical and other systems in the Project; the constructability of the structure and components, including the fabrication and production of components and maintainability and operational efficiency of the completed project; the effect of proposed work on the existing components and systems; and the historical performance of the proposed components and systems.
- iii. A "Schematic Cost Estimate", indicating that the proposed design can be constructed within the limitations of the Program Budget.

#### (4) Design Manual Phase

- a. Prepare preliminary plans of the Project, including elevations and/or sections, which plans shall be based on the approved schematic design, and the Fund's comments and changes, and shall fully develop graphically the design, scope and concept of the various systems of the Project.
- b. Prepare outline specifications describing building systems, performance criteria, design and composition of all components and systems, and such other work and details as may be required to complete the design of the Project.
- c. Show all relevant furniture, furnishings and equipment, and layouts of all rooms and spaces in the Project.
- d. With respect to any building, prepare an analysis of the relationship of the designed gross and net square foot areas to programmed areas of the Project.
- e. Prepare study perspectives and models illustrating in detail the architectural design of the Project.
- f. Prepare a detailed cost estimate based upon a quantity takeoff of all work necessary for the complete construction of the Project, which estimate is hereinafter referred to as the "Design Manual Cost Estimate". The Design Manual Cost Estimate shall be in sufficient detail to demonstrate to the Fund that the work designed is within the Fund's Program Budget.
- g. Prepare scope descriptions and cost estimates of such feasible design alternatives as will allow for construction contract award flexibility.
- h. Prepare a Design Manual Report acceptable to the Fund, incorporating design decisions, preliminary plans, outline specifications, cost

estimate, time schedules and such other information required by the format of the Design Manual Report.

- i. At the request of the Fund, present the Design Manual Report to State University of New York and Fund representatives.

#### (5) Construction Document Phase

- a. Prepare complete final working drawings which clearly define all architectural, structural, mechanical, electrical, sanitary, heating, equipment and site details, alternates and all other details necessary to complete the design and construction of the Project. The Consultant's compensation, if any, for services in connection with alternates shall be determined in accordance with the provisions of Section D (8) of Article III hereof.
- b. Prepare a complete set of final specifications setting forth in detail and describing the work to be performed by each trade and the finish and the quality of materials and workmanship to be required of the contractor.
- c. Apply to the Labor Department of the State of New York for wage schedules for each construction contract and incorporate the same in the specifications for each contract.
- d. Prepare a detailed cost estimate, based upon the complete contract documents of all work necessary for the complete construction of the Project, which estimate is hereinafter referred to as the "Final Cost Estimate". This Final Cost Estimate shall be consistent with the Program Budget and shall include quantity takeoff of all work and equipment included, with unit prices and markups reflecting current market conditions, without lump sums of any kind. In the event the bids of all qualified, responsible and reliable contractors for the construction of the Project are in excess of the amount of the current Program Budget of the Fund, the Consultant, to the extent necessary, in the Fund's judgment, to bring the cost of the Project within said Program Budget, shall revise, subject to the approval and acceptance by the Fund, all or any part of the drawings and specifications of the Project that the Fund may deem advisable or, if the construction contract for the Project has been awarded by the Fund, the Consultant shall prepare all credit change orders, including any necessary revisions to the drawings and specifications that the Fund may deem advisable to bring the cost of the Project within the said Program Budget. Notwithstanding any other provisions of this Agreement, all of the services to be provided by the Consultant under the provisions of this

paragraph shall be provided without reimbursement of costs or any additional compensation therefor, unless the Fund determines, in its sole discretion, that the factors that caused the variance between the low bid and the said Program Budget were not the responsibility of the Consultant or could not reasonably have been anticipated by the Consultant.

- e. Prepare a Pre-Bid Report, in both hard copy and computer readable form, in accordance with the formats specified by the Fund, which shall include, but not be limited to, the final working drawings, final specifications and Final Cost Estimate. The Pre-Bid Report is to be submitted to the Fund for its review and approval a minimum of four (4) weeks prior to the date set for the advertisement for bids from contractors. The Consultant assumes complete responsibility for the correctness, accuracy and completeness of the final working drawings and final specifications and for their coordination with the work of any subconsultants. The approval of such drawings and specifications by the Fund shall in no way affect or limit this responsibility of the Consultant.
- f. Assemble and distribute the bid documents to prospective bidders and to distribution points designated by the Fund.
- g. Assist the Fund during the bid and award period in the preparation of instructions to bidders, forms of proposals, advertisement for bids, seeking of bidders, opening and analysis of bids, investigation and selection of bidders, and recommendations relative to the award of each contract for the construction of each Project.

#### (6) Construction Phase

- a. Furnish general administration of each construction contract awarded for the Project, including phased work within each contract, until final completion and acceptance by the Fund of the Project.
- b. Furnish such field administration of each construction contract and inspection of the work of each contractor as may be necessary or appropriate to assure that materials and workmanship conform with the contract documents. The Consultant shall use all reasonable care and diligence and exercise its best efforts to assure that the Project is constructed in accordance with the drawings and specifications. The Consultant shall use all reasonable care and diligence and exercise its best efforts to discover any breach of the construction contract, and if it becomes aware of any breach, it shall immediately notify the Fund

thereof. In the event of such breach, the Consultant shall submit to the Fund its recommendations for appropriate remedial action. The Consultant, however, does not guarantee that a contractor will not breach its contract.

- c. Arrange for and/or provide, at regular intervals, and at such times as directed by the Fund, field administration and inspection of each construction contract by home office personnel of the Consultant and its subconsultants who are expert in the technical areas of work involved in the Project. The Consultant shall provide such field administration and inspection not less than twice a month during the Construction Phase and shall require its subconsultants to provide such field administration and inspection not less than twice a month during the Construction Phase when work in the subconsultant's specialty is in progress. Said services shall be provided without additional compensation except that, when the total Direct Labor Cost of the services and a sum equal to 150%, or as identified in Article III, Section D, paragraph 11 herein, of that amount exceeds one half of the Construction Phase fee, and when the cost of additional field services is unrelated to any fault or omission of the Consultant or its subconsultants, the Fund, may provide written approval for payment of all or part of such excess cost in accordance with the provisions of subdivision (3) of Section D and subdivision (2) of Section E of Article III hereof.
- d. Furnish a Field Representative and such assistants as are required, where the same are requested and approved in writing by the Fund, to provide full-time personal field administration of each construction contract and inspection of, and attention to, all the work to be performed by each contractor. The field administration, inspection and attention provided by the Field Representative and/or his or her assistants shall not be in lieu of, or a substitute for, the administration, inspection and attention required to be furnished by the Consultant hereunder, but shall be in addition thereto. The Consultant's compensation for such Field Representative and assistants shall be determined in accordance with the provisions of Section D (7) of Article III hereof.
- e. Obtain and review each contractor's time progress schedule and permit such contractor to commence and continue work only when such schedule is satisfactory. The Consultant shall use all reasonable care and diligence and exercise its best efforts to see that the completion date for the construction of the Project, as set forth in each construction contract, is met, and to this end, it shall periodically review the

construction progress and performance and advise the Fund of same. Each construction contract for the Project shall provide that time is of the essence for the completion and construction of the Project and the Consultant agrees to assist the Fund in achieving the specified completion date and advise the Fund of actions that could be taken to prevent or eliminate delays. The Contractor shall have responsibility for its means and methods of construction and for construction site safety.

- f. Develop with each contractor a time schedule covering the preparation and submission of all shop drawings and samples, which schedule shall be designed to avoid delays during construction and to assure an even flow of work. The Consultant shall utilize all reasonable care and diligence and exercise its best efforts to see that each contractor adheres to such schedules. The Consultant shall review and approve shop drawings and samples furnished by each contractor within fifteen (15) working days of receipt of same; provided, however, the same are submitted in accordance with the aforesaid time schedule. Provide responses to Requests for Information from the Contractors as soon as possible but not later than 15 calendar days from receipt.
- g. Assume complete responsibility for its interpretation of the drawings and specifications. For interpretations affecting contract cost and/or material substitution, concurrence of the interpretation must be obtained from the Fund.
- h. Take positive action, within the limits of the Consultant's authority hereunder and under the provisions of the applicable construction contract, to safeguard the interests of the Fund and the State University of New York whenever necessary or appropriate.
- i. Prepare and submit to the Fund a detailed estimate, evaluation, and recommendation on any proposed change orders or field orders and contractor's proposals for such work. After obtaining the Fund's written approval of a proposed change order, the Consultant shall prepare the change order. Except in the case of an emergency which threatens safety or substantial injury to property, neither the Consultant nor any of its representatives can authorize any change order or field order or change in the work covered by the construction contract without the prior written approval of the Fund. The Consultant's compensation, if any, for services in connection with change orders or field orders shall be determined in accordance with the provisions of Section D (6) of Article III hereof.
- j. Keep records and logs setting forth the field progress, the submission and processing of shop drawings and samples, requests for information and their disposition, non-conformance and open items and their disposition, and the progress of the Project as it relates to each requisition for payment of each contractor.
- k. Review and approve, when the same are satisfactory, partial and final requisitions submitted by each contractor; such review and approval to be based upon the Consultant's records and inspection of the construction work.
- l. Conduct field meetings, at least twice a month, with representatives of the various trades and of the contractors engaged in the construction of the Project and prepare and distribute minutes of such meetings.
- m. Submit monthly progress reports to the Fund during the Construction Phase of the Project based upon personal observation of the Consultant or its staff, which reports shall include, but are not limited to, an analysis of the construction time schedule in relation to field progress and anticipated delays in construction.
- n. Review and approve assembled written guarantees, manuals and record drawings required of each contractor and submit the same to the campus.
- o. Inspect the Project thirty (30) to forty-five (45) days prior to the time the Fund is to take over, use, occupy or operate any part or all of the Project, and furnish a punch list and/or report to the Fund of observed discrepancies, deficiencies and incomplete items for each contractor. The Consultant, together with its subconsultants, shall use all reasonable care and diligence and exercise their best efforts to see that such discrepancies, deficiencies and incomplete items are promptly remedied, and shall monitor and inspect such work items until they are satisfactorily completed.
- p. Use all reasonable care and diligence and exercise its best efforts to see that all discrepancies and deficiencies covered by guarantees provided by each contractor are promptly remedied; inspect the Project forty-five (45) to sixty (60) days prior to the end of the one (1) year general guarantee period; furnish a list and/or report to the Fund observed discrepancies and deficiencies covered by contractor guarantees; and monitor and inspect the performance of the required remedial work.

(7) Additional Specific Services

- a. At each phase, if requested to do so by the Fund, the Consultant shall make a presentation demonstrating the design and plans at that phase, including such models, mock-ups or other presentation aids as may be appropriate. Such presentation shall be made at the Fund headquarters or such other site as the Fund may specify in the request.
- b. Any report, presentation, estimate, schedule or analysis required by this section shall be submitted to the Fund for approval, which approval shall not be unreasonably withheld.
- c. At each phase, the Consultant shall be responsible for reconciling the cost estimate with the Program Budget, and shall make any design changes required to keep the Project within the Program Budget, provided that if the Fund reduces the Program Budget, the Consultant shall be compensated for such changes pursuant to Section D (5) of Article III.
- d. At each phase, the Consultant shall be responsible for coordinating and reviewing commissioning services.

**Study or Investigative Services - (For each Project assigned pursuant to a Work Order):**

Provide services for pre-design Project studies to identify and plan for major issues which have or will have an effect on capital plan budgets and schedules; and special technical, engineering and/or consultation studies as further described in a Work Order Assignment. Studies may include building condition assessment, infrastructure analysis, academic space programming, equipment analysis, surge and construction phasing analysis, testing laboratory services, topographic, utility, traffic volume, air/water quality and property surveys, test borings, and determining the location, measurement and other essential data of existing infrastructure, architectural, structural, mechanical, electrical and utility features in buildings and/or on SUNY campuses.

**Article II Additional Obligations and Responsibilities of the Consultant**

The Consultant shall comply with all obligations and responsibilities in accordance with this Agreement and Work Order Assignments for each Project:

**Section A Sequence of Services**

Except for the Study Services that may be assigned as the initial work for a Project, or as otherwise expressly herein provided, the services described in Article I hereof to be furnished by the Consultant under the Program

Verification Phase, Concept Phase, Schematic Design Phase, Design Manual Phase, Construction Documents Phase, and Construction Phase, shall be rendered in the same sequence as they appear in this Agreement, and, where the Project includes more than one construction contract to be let by the Fund, the Consultant shall provide all of the services required under this Agreement for each such construction contract.

**Section B Subconsultants**

- (8) The Consultant shall not engage, contract for or use the services of any subconsultant without obtaining the prior written approval of the Fund. No provision of this Agreement and no approval by the Fund of the scope of the services to be provided by the subconsultants shall, however, be construed as an agreement by the Fund to pay any subconsultant of the Consultant or any person, firm or corporation engaged by, contracted with, or whose services are utilized by the Consultant, or in any way affect the responsibilities of the Consultant hereunder, and, unless otherwise agreed to in writing by the Fund, the fees of any subconsultants retained by the Consultant shall be deemed covered by the Total Fee to be paid by the Fund to the Consultant.
- (9) The Consultant and its Fund-approved subconsultants shall design every part or item of a Project that requires licensed professional design services and shall not delegate the design of any such part or item of the Project to any other person or entity including, but not limited to, contractors, subcontractors, manufacturers, or suppliers or to a design professional hired by the foregoing persons or entities, unless the Fund specifically authorizes such delegation in writing. The procedure for obtaining such authorization and the circumstances where such authorization may be permitted by the Fund are contained in the Fund's Program Directives.
- (10) The Consultant shall execute with each of its subconsultants and shall require all subconsultants to execute with their sub- subconsultants a written agreement which shall bind the latter to the terms and provisions of this Contract insofar as such terms and provisions are applicable to the work to be performed by such subconsultants. The Consultant shall require all subconsultants and sub-subconsultants to promptly, upon request, file with the Consultant and the Fund a conformed copy of such agreements, from which the price and terms of payment may be deleted.

**Section C Personnel**

The Consultant shall be responsible for all personnel assigned by the Consultant or subconsultants to the Project. The Consultant shall submit to the Fund for its approval a list of personnel who will be assigned to the

Project. Once approved by the Fund, such Project staffing will not be changed without the Fund's prior written approval. The consultant and its subconsultants shall employ personnel who have sufficient experience, skills and licenses to properly and satisfactorily complete the assigned work within the time allotted. All such personnel shall be required to cooperate fully with the Fund. In the event the Fund determines, in its sole discretion, that corrective action is required in order to provide satisfactory services or to achieve or maintain cooperation, the Consultant shall replace any person so assigned with a suitable substitute at no additional cost to the Fund.

#### **Section D Coordination**

The Consultant shall designate one person who, on its behalf, shall be responsible for coordinating all of the services to be rendered by the Consultant hereunder. Such addressee shall be subject to the approval of the Fund.

#### **Section E Codes, Regulations and Permits**

- (1) The drawings and specifications prepared by the Consultant shall be in conformity with all applicable laws, rules and regulations, under the requirements of the Program, as defined in Section B of Article I of this Agreement. The Consultant shall be responsible for obtaining all required permits, variances, approvals and clearances from the appropriate federal, state and local authorities with the exception only of such permits, approvals and clearances as are required to be obtained by the contractor or contractors for the Project.
- (2) Attend all conferences and provide all necessary drawings, specifications, documents, calculations, forms, reports and statements required for compliance with the Building Code of New York State, as requested by the Fund who will issue required building permits and certificates of occupancy.
- (3) For all other permits, when directed by the Fund, attend all conferences requested by the applicable authority having jurisdiction, submit all necessary drawings, specifications, documents, calculations, forms, reports and statements for the approval of such authority having jurisdiction and revise any and all drawings and specifications for the Project to comply with the requirements of the aforesaid authority having jurisdiction. However, in the judgment of the Fund, the Consultant will be entitled to extra compensation for revisions and related extra work, in accordance with the provisions of Section D (3) of Article III, if any of such revisions are caused by a change in the requirements of the authority having jurisdiction and are found to be necessary after the Consultant's performance of part of the work to be

revised, and any such conferences, documents, calculations, forms, reports and statements for such other permits that are not otherwise required by Section B of Article I or the Building Code of New York State.

- (4) During design and construction, determine testing requirements required by the Fund and applicable laws, rules and regulations, governmental authorities. Show such testing requirements on the drawings and in the specifications.
  - a. Determine, select and manage providers, firms, and agencies for all third-party tests, inspections and reports required by applicable laws, rules and regulations, governmental authorities, the drawings and specifications, and/or as required by the Fund.
  - b. The Consultant's compensation, if any, for services and costs in connection with providing testing and inspection providers, firms, and agencies to perform third party tests, inspections and reports shall be determined in accordance with the provisions of Section D (4) of Article III hereof.

#### **Section F Patents**

The drawings and specifications prepared by the Consultant shall not, without the prior written approval of the Fund, specify or require any patented or proprietary article, design or process which requires payment by the Fund or the State University of New York of royalties for its use.

#### **Section G Grants and Loans**

In the event that the Fund or the State University of New York is a recipient of or applicant for a grant or loan for the Project from any individual, firm, association, corporation or foundation or from any governmental department or agency, the Consultant, when directed by the Fund, shall attend all conferences requested by the party making the grant or loan, submit all necessary drawings, specifications, documents, forms and estimates for the approval of such party, prepare reports for grant or loan requirements during the Construction Phase and revise any and all drawings and specifications for the Project to comply with the requirements of the aforesaid party in connection with the grant or loan; provided, however, that if, in the judgment of the Fund, any of such revisions are caused by a change in the requirements of the party making the grant or loan and are found to be necessary after the Consultant's performance of part of the work to be revised, the Consultant will be entitled to extra compensation for such revisions and related extra work in accordance with the provisions of Section D (3) of Article III hereof.

## **Section H Reproductions**

The Consultant, at its own cost and expense, shall supply reproductions of plans, specifications, reports and other data and documents pertaining to the Project for its own use, for interoffice use with its subconsultants and for use of the Fund. The Fund shall be entitled to be supplied by the Consultant with six (6) reproductions of any plans, specifications, reports and other data and documents required to be prepared by the Consultant pursuant to Article I hereof, one (1) set in Portable Document Format (.pdf), and other electronic copies as specified in the Fund's Program Directives.

## **Section I Claims**

In the event any claim is made or any action brought in any way relating to the design or construction of any Project, the Consultant, without additional compensation therefor, will diligently render to the Fund any and all architectural and engineering assistance which the Fund may require of the Consultant, including, but not limited to, the preparation of analyses and reports. Notwithstanding the foregoing, the Consultant shall not be required by the Fund, without extra compensation therefor, to prepare mock-ups, make tests or testify at a trial or pre-trial proceeding; provided, however, that the Consultant shall furnish such services at its own cost and expense where it is established by a judicial decree or finding that the aforesaid claim or action has arisen from the negligence of the Consultant or the failure of the Consultant to properly and fully perform its obligations and responsibilities under this Agreement.

## **Section J Changes and/or Revisions**

At any time during the term of this Agreement, the Consultant, upon request of the Fund, shall change and/or revise any and all drawings and specifications of or for the Project.

## **Section K Budgets**

For each of the phases of a Project set forth in Section B of Article I hereof, the Fund shall establish a separate Program Budget, which shall be initially set forth in the Work Order Assignment, and amended by Fund approval of the Consultant's Cost Estimates in each Phase approval. The estimated cost of construction of the Consultant's design of the Project shall at all times be within the applicable Program Budget. In the event that such estimated cost is at any time in excess of the Fund's Program Budget, the Consultant, to the extent necessary in the Fund's judgment to bring the cost of the Project within said Budget, shall revise, at its own cost and expense, subject to the acceptance and approval by the Fund, all or any part of the drawings and specifications of the Project that the Fund may deem advisable. Unless

otherwise directed by the Fund, the cost analysis and all cost estimates referred to in Section B of Article I hereof shall be prepared by a Cost Analyst approved by the Fund and shall be prepared in accordance with the formats prescribed therefor by the Fund.

## **Section L Supervision and Direction**

The services to be performed by the Consultant hereunder shall at all times be subject to the general supervision and direction of the Fund. The Fund shall determine every question of fact which may arise in relation to the interpretation of this Agreement and performance by the parties hereto of their respective obligations and responsibilities hereunder, and the decision of the Fund thereon shall be final, conclusive and binding upon the Consultant unless determined by a court of competent jurisdiction to have been fraudulent, capricious, arbitrary or so grossly erroneous as to necessarily imply bad faith.

## **Section M Intermittent Work and Continuous Project**

The Consultant acknowledges and agrees that the services required by Assignment(s) issued pursuant to this Agreement may be required to be performed intermittently in accordance with available funding and planning decisions. Regardless, the Consultant agrees to perform services necessary for completion of the Project on the terms and conditions of this Agreement and direction of the Fund.

## **Article III Payment for Services**

### **Section A Basic Compensation**

#### **Design Services Fee**

- (1) Except as otherwise specifically provided for herein, as the total compensation for all services rendered by the Consultant up to and including completion of the Construction Document Phase, the Fund shall pay to the Consultant a fee which shall be computed as follows:
  - a. A sum computed by multiplying the appropriate amount in the Schedule of Fees annexed hereto, as determined by the approved Program Verification Phase Program Budget, by 5 percent (which sum shall hereinafter be referred to as the "Program Verification Payment"); plus
  - b. A sum computed by multiplying the appropriate amount in the Schedule of Fees annexed hereto, as determined by the approved Concept Cost Estimate, by 5 percent (which sum shall hereinafter be referred to as the "Concept Payment"); plus

- c. A sum computed by multiplying the appropriate amount in the Schedule of Fees annexed hereto, as determined by the approved Schematic Design Cost Estimate, by 10 percent (which sum shall hereinafter be referred to as the "Schematic Design Payment"); plus
- d. A sum computed by multiplying the appropriate amount in the Schedule of Fees annexed hereto, as determined by the approved Design Manual Cost Estimate, by 25 percent (which sum shall hereinafter be referred to as the "Design Manual Payment"); plus
- e. A sum computed by multiplying the appropriate amount in the Schedule of Fees annexed hereto, as determined by the approved Final Cost Estimate of the project, excluding the field order allowance, by 25 percent (which sum shall hereinafter be referred to as the "Construction Documents Payment").

Notwithstanding any of the provisions of the preceding sentence, in the event that the approved Final Cost Estimate is more than 5 percent in excess of the average of all base bids (excluding alternates) submitted by all bidders, then, and in that event, the average amount of all base bids submitted for construction of the Project, plus 5 percent thereof, shall be used in lieu of the Final Cost Estimate, whenever reference is made to the latter, for the purpose of calculating the Construction Documents Payment.

The total of the sums calculated in accordance with the provisions of subdivisions a through e above is the "Basic Design Fee".

Notwithstanding the foregoing, in the event that the Fund, during one of the Phases of the Project, suspends all or any part of the Project, the Consultant, in lieu of the method hereinabove provided, shall be paid for its services during such Phases as follows: (1) for services performed by the Consultant prior to such suspension, a sum computed by multiplying the appropriate amount in the Schedule of Fees annexed hereto, as determined by the Fund's Program Budget at the time of such suspension, by the applicable percentage set forth above for such Phase and multiplying the product thereof by the percentage of completion of such Phase prior to the suspension; and (2) for services performed by the Consultant following the resumption of all or any part of the Project, a sum computed by multiplying the appropriate amount in the Schedule of Fees annexed hereto, as determined by the approved Cost Estimate at the conclusion of such Phase, by the applicable percentage set forth above for such Phase and multiplying the product thereof by the percentage of

completion of such Phase following the resumption of all or any part of the Project.

In the event that the Fund shall, in its sole discretion, elect to divide the Project into more than one general construction contract, then, from the time that the Fund has made its aforesaid election, the amount of the Consultant's Basic Design Fee and the amount and time of the payments to be made by the Fund thereof shall be separately calculated and determined for each such general construction contract; provided, however, that the following shall not be considered additional general construction contracts: purchase of materials, assignment of subcontracts, designation of subcontractors, division of the Project into a prime contract for general construction work and one or more prime contracts for the major specialty trades (such as electrical, plumbing, heating and ventilating, etc.). In the event that the Fund shall elect to divide the Project, for purposes of separate and independent bidding and letting, into a separate prime contract for general construction work and one or more prime contracts for the aforesaid major specialty trades, then, the Consultant shall be paid for the extra services to be provided by it in connection with the preparation of separate bidding documents and the administration of separate prime contracts either in accordance with the provisions of Section D (3) of Article III or by increasing, from the time that the Fund has made its aforesaid election, the Consultant's Total Fee by an amount equal to 10 percent of the remaining unearned portion of said fee; the manner of payment to be determined by the Fund within sixty (60) days after its award of the last construction contract for the Project.

In the event that the scope of the Project is at any time reduced by the Fund, except where the scope has been reduced to stay within the Fund's Program Budget, the fees previously paid to the Consultant for the work eliminated by the Fund's reduction in the scope of the Project shall thereafter be excluded in determining the amount of the Consultant's Basic Design Fee and the amount of all future payments to be made to the Consultant after such reduction.

- (2) Except as otherwise specifically provided for herein, as the total compensation for all services rendered by the Consultant during and after the Construction Phase of the Project, the Fund shall pay to the Consultant a fee computed by multiplying the appropriate amount in the Schedule of Fees annexed hereto, as determined by the construction cost of the Project, by 30 percent, which fee is hereinafter referred to as the "Basic Construction Phase Fee"; provided, however, in the event that the construction cost of the Project is more than 10 percent in excess of the Fund's Program Budget as of the bid date, the amount determined by adding together the

construction cost of the Project and said Program Budget and dividing the resultant sum in half shall be used in lieu of the construction cost of the Project in determining the Basic Construction Fee. For each general construction contract let by the Fund, the amount of the Consultant's Basic Construction Phase Fee and the amount and time of the payments to be made by the Fund thereof shall be separately calculated and determined.

In the event that the Fund shall, in its sole discretion, elect to let a single construction contract which includes the Project and work covered by other agreements with the Consultant, the Consultant's Basic Construction Phase Fee hereunder shall, in lieu of the method provided in the preceding paragraph, be computed by either multiplying the appropriate amount in the Schedule of Fees annexed hereto, as determined by the total of the construction cost for all the work covered by the said single construction contract, by 30 percent and by dividing the resultant sum by the proportion that the approved Final Cost Estimate of the Project bears to the total approved Final Cost Estimate for all the work covered by the said single construction contract, or by multiplying the total construction cost by the proportion that the approved Final Cost Estimate of the Project bears to the total approved Final Cost Estimate for all the work covered by said single construction contract, to determine the construction cost apportioned to the Project, for use in computing the Basic Construction Phase Fee allocable to the Project as described above. The Fund shall choose between the methods above and issue its determination in writing.

For the purposes of this Agreement, the term "construction cost" shall mean the accepted bid price, including alternates that are accepted by the Fund, for the Project less the amount of any change orders to the construction contract issued to bring the cost of the Project within the Fund's Program Budget.

- (3) For the purposes of this Agreement, the term "Total Fee" shall mean the total compensation payable to the Consultant under the provisions of subdivisions (1) and (2) of this Section. Except as otherwise expressly provided in the Agreement, all of the services required to be provided by the Consultant hereunder shall be deemed to be covered by the Total Fee and the Consultant shall not be entitled to extra compensation or reimbursement of its expenses in providing the same.
- (4) Notwithstanding the provisions of subdivisions (1) and (2) above, if the bid or bids are not accepted by the Fund within six (6) months after its approval of the final working drawings and final specifications, then, the Consultant, unless it and the Fund otherwise agree in writing, shall be paid only the Basic Design Fee and it shall be deemed to have been released by

the Fund from rendering any additional services hereunder.

### **Study Services Fee**

For Study Services provided by the Consultant, the Fund shall compensate the Consultant in the amount identified in a Work Order Assignment. The amount in a Work Order Assignment will either be on a lump-sum basis or on the basis of the Consultant's Direct Labor Cost plus a sum identified in paragraph 11 in Section D of this Article, plus reimbursable expenses incurred in connection with performing the same. When services are furnished by a person, firm or corporation other than the Consultant, the Work Order Assignment will only authorize payment to the Consultant for such services on the basis of the Consultant's actual expenditure for obtaining such services plus a sum not to exceed 10 percent thereof, as determined by the Fund. However, the Consultant shall not be entitled to said 10 percent override when, in connection with or related to the services furnished by said person, firm or corporation, the Consultant will be compensated by the Fund for the Direct Labor Costs of its technical personnel.

### **Section B Time of Payment of Basic Compensation**

#### **Design Services Fee**

##### (1) Phases

- a. During the Program Verification Phase, the Fund shall make monthly installment payments to the Consultant of the Program Verification Payment, which installment payments shall total a sum equal to 100 percent of the Program Verification Payment.
- b. During the Concept Phase, the Fund shall make monthly installment payments to the Consultant of the Schematic Design Payment, which installment payments shall total a sum equal to 100 percent of the Concept Phase Payment.
- c. During the Schematic Design Phase the Fund shall make monthly installment payments to the Consultant of the Schematic Payment, which installment payments shall total a sum equal to 100 percent of the Schematic Design Payment.
- d. During the Design Manual Phase, the Fund shall make monthly installment payments to the Consultant of the Design Manual Payment, which installment payments shall total a sum equal to 100 percent of the Design Manual Payment.
- e. During the Construction Document Phase the Fund shall make monthly installment payments to the Consultant of the Construction Documents Payment, which installment payments shall total a sum equal to 100 percent of the Construction

Documents Payment. Said payment shall be broken down into two parts; 95 percent of the construction document payment will be paid upon completion of Article 1, Section B (5), items a through e. The remaining 5 percent of the payment will be paid upon completion of Article 1, Section B (5) items f and g.

- (2) The amount of the monthly installment payments referred to in the above subdivision (1) shall be in proportion to the amount of services rendered by the Consultant as determined by the Fund on its receipt of reports from the Consultant as to the progress of the services to be furnished in the respective phases.
- (3) During the Construction Phase the Fund shall make monthly installment payments to the Consultant of the Basic Construction Phase Fee, the amount of which installment payments shall be in proportion to the amount of services rendered by the Consultant, as determined by the Fund, based upon the percentage of the contract completed, which installment payments shall total a sum equal to 100 percent of the Basic Construction Phase Fee. Notwithstanding the foregoing, 4 percent of the Consultant's Basic Construction Phase Fee or five hundred dollars (\$500), whichever is the higher amount, will be retained by the Fund until the end of the one- (1) year general guarantee period.
- (4) At the end of the one (1) year general guarantee period, adjustment shall be made to the payments previously made to the Consultant by increasing or decreasing the same, as the case may be, to make the same equal to the Total Fee. In the event that such adjustment results in additional fees being due to the Consultant, the Fund shall promptly pay to the Consultant such additional fees. In the event that such adjustment results in a reduction of the fees due to the Consultant hereunder, the Consultant, upon demand, shall promptly pay to the Fund any excess payments it has received.

### **Study Services Fee**

The Fund shall make monthly installment payments to the Consultant of the Study Services Fee, as set forth the Fund's "Bulletin on the Payment of Consultant's Fees revised to the date hereof". The amount of the monthly installment payments shall be in proportion to the amount of services rendered by the Consultant as determined by the Fund on its receipt of reports from the Consultant as to the progress of the Study Services to be furnished.

### **Section C Reimbursable Expenses**

- (1) Traveling expenses, including transportation, meals and lodging expenses necessary, in the judgment of the Fund, to the performance of the services of the Consultant and its subconsultants shall be paid for by

the Fund on the basis of the Fund's "Bulletin on Payment of Consultant Fees", as revised to the date hereof; provided, however, that the Fund's obligation to pay for such traveling expenses shall be limited to 10 percent of the Total Fee unless otherwise agreed to in writing by the Fund.

- (2) Except as otherwise provided for in Section H of Article II hereof, all reproductions of plans, specifications, reports and other data and documents requested by and furnished to or on behalf of the Fund and all required application fees in connection with the Project shall be paid for by the Fund on the basis of the Consultant's actual expenditure therefor; provided, however, that the Consultant shall not be entitled to any reimbursement for the cost of typing or drafting of the same.

### **Section D Extra Compensation**

Except when contemplated or required as part of the Consultant's responsibility under this Agreement:

- (1) Final models, photographs and other architectural renderings, as contrasted to study or preliminary models, photographs or other architectural renderings, will be paid for by the Fund either on a lump-sum basis agreed to in writing by the parties hereto or on the basis of the Consultant's Direct Labor Cost plus a sum identified in paragraph 11 in this Section, plus reimbursable expenses incurred in connection with preparing the same; the manner of payment to be determined by the Fund in accordance with paragraph 10 in this Section.
- (2) As-built drawings and Operational and Maintenance Manuals will be paid for by the Fund either on a lump-sum basis agreed to in writing by the parties hereto or on the basis of the Consultant's Direct Labor Cost plus a sum identified in paragraph 11 in this Section, plus reimbursable expenses incurred in connection with preparing the same; the manner of payment to be determined by the Fund in accordance with paragraph 10 in this Section.
- (3) Special technical, engineering and/or consultation services will be paid for by the Fund either on a lump-sum basis agreed to in writing by the parties hereto or on the basis of the Consultant's Direct Labor Cost plus a sum identified in paragraph 11 in this Section, plus reimbursable expenses incurred in connection with performing the same; the manner of payment to be determined by the Fund in accordance with paragraph 10 in this Section.
- (4) Testing laboratory services, topographic, utility, traffic volume, air/water quality and property surveys, test borings, construction progress photos, and, in case of the rehabilitation of an existing building, determining the location, measurement and other essential data of existing architectural, structural, mechanical,

electrical and utility features, the details of which, in the judgment of the Fund, are grossly deficient from a review of existing information and drawings and/or a physical inspection, shall be paid for by the Fund either on a lump-sum basis agreed to in writing by the parties hereto or on the basis of the Consultant's Direct Labor Cost plus a sum identified in paragraph 11 in this Section, plus reimbursable expenses incurred in connection with preparing the same; the manner of payment to be determined by the Fund in accordance with paragraph 10 in this Section.

- (5) Except for changes and/or revisions prepared by the Consultant in order to conform to the project budget, all changes and/or revisions to drawings or specifications, resulting from a significant program change of the State University or the Fund prior to the award of a construction contract shall be paid for by the Fund either on a lump-sum basis agreed to in writing by the parties hereto or on the basis of the Consultant's Direct Labor Cost plus a sum identified in paragraph 11 in this Section, plus reimbursable expenses incurred in connection with preparing the same; the manner of payment to be determined by the Fund in accordance with paragraph 10 in this Section. Notwithstanding any of the other provisions of this paragraph, whenever any program change results in an increase or decrease in the estimated cost of the Project, the Consultant's Basic Design Fee for services rendered prior to said change shall be based on the last approved Cost Estimate and the Consultant's Basic Design Fee for all services rendered after such change shall be based on the approved Cost Estimate for the phase after the change was made.
- (6) All services rendered by the Consultant in connection with any extra work item, included in a change order or field order to a construction contract, which results from either: (a) a program change of the State University of New York or the Fund, or (b) conditions which, in the judgment of the Fund, could not have been reasonably anticipated or foreseen by the Consultant at the time bids for construction of the Project were received, will be paid for by the Fund on the basis of the approved value of said item multiplied by 5 percent. All services rendered by the Consultant in connection with all other extra work items and all deleted work items, included in a change order or field order to a construction contract, shall be deemed to be covered by the Total Fee.
- (7) Notwithstanding any of the other provisions of this Section, all services, including those for which the Consultant would be entitled to extra compensation under any of the other subdivisions of this Section, rendered by a Site Representative or his or her assistants will be paid for by the Fund on the basis of the Consultant's Direct Labor Cost of furnishing such personnel plus 85%. In addition, the Fund will

reimburse the Consultant for such field office expenses (other than salaries and fringe benefits), required or approved in writing by the Fund which, as a result of the nature of the Project, are, in the judgment of the Fund, substantially in excess of those field office expenses normally incurred by a Consultant in furnishing field administration of a construction contract and inspection of construction work.

- (8) Additive and deductive alternates, in which changes in design are involved, as contrasted to a material or equipment substitution or addition which, in the judgment of the Fund, does not involve design changes, will be paid for by the Fund either on the basis of the Consultant's Direct Labor Cost plus a sum identified in paragraph 11 in this Section, plus reimbursable expenses incurred in connection with preparing the same, or on the basis of the amount the Construction Documents Payment would have been increased had the value of such alternates been added to the amount of the approved Final Cost Estimate; the manner of payment to be determined by the Fund within sixty (60) days after the award of the construction contract. For the purposes of the preceding sentence, deductive alternates shall be added to, rather than subtracted from, the Final Cost Estimate and the value of all alternates shall be deemed to be an amount equal to the bid quoted for the alternates by the lowest bidder or, in the event that the lowest bidder does not submit a bid for such alternates, an average of all bids submitted therefor. Notwithstanding the foregoing, unless otherwise agreed to in writing by the Fund, the Consultant shall not be entitled to reimbursement of costs or any additional compensation in connection with any alternates for any construction contract or part thereof which is being rebid because all bids previously received by the Fund were in excess of the amount of the Program Budget of the Fund therefor and were rejected by the Fund.

Notwithstanding the foregoing, all services rendered by the Consultant in connection with alternates that involve a material or equipment substitution, addition or deletion which, in the judgment of the Fund, do not involve design changes, and all services rendered by the Consultant in connection with any additive or deductive alternates prior to the Construction Document Phase shall be deemed covered by the Total Fee unless otherwise agreed to in writing by the Fund.

- (9) In the event the Consultant is caused to furnish services, not provided for herein and not previously performed, as a result of the Fund declaring a contractor in default, damage to the Project by fire or other casualty, or a delay, through no fault or omission of the Consultant, in completion of construction of more than one (1) year after the

specified completion date in a construction contract, the Fund shall pay the Consultant for such services, but, in the case of delayed construction completion, for only those services performed after said one (1) year period, on the basis of the Consultant's Direct Labor Cost plus a sum identified in paragraph 11 in this Section, plus reimbursable expenses incurred in connection with furnishing such services; provided, however, that the Consultant shall not be entitled to extra compensation for monitoring and inspecting either punch list work or guarantee work items except for monitoring and inspection services performed by the Consultant after the expiration of eighteen (18) months from the commencement of the one (1) year general guarantee period.

(10) Notwithstanding the foregoing and in accordance with time frames set forth in the Agreement, the Consultant shall not be entitled to extra compensation under any of the preceding subdivisions of this Section unless the services to be provided by the Consultant hereunder have been requested and approved in writing by the Fund in advance of the performance of the services as follows:

- a. Any request for extra compensation authorized by this Section shall be submitted in a diligent and timely manner by the Consultant to the Fund for its approval using the Electronic Payment system described in Section I of this Article.
- b. When submitting a request for approval of extra compensation, the Consultant shall allow adequate time for the Fund's review and approval of the request.
- c. Notwithstanding the foregoing, if approval of a request for extra compensation is delayed and performance of the services has begun, and if the Fund determines, in its sole discretion, that the factors causing the delay could not have been reasonably anticipated by the Consultant, then approval of a delayed request shall not be withheld by the Fund solely on the basis of the delay in requesting and approving said request.
- d. Any request from the Consultant for extra compensation may be rejected or modified by the Fund if the Fund determines, in its sole discretion, that the request does not provide fair and reasonable costs for the services or that the requested services are already contemplated or required as part of the Consultant's responsibility under this Agreement.

(11) When payments are made on the basis of the Consultant's Direct Labor Cost, payments will be made in an amount equal to the Direct Labor Cost of the Consultant plus a sum equal to that Direct Labor Cost times **150 percent**.

## **Section E Payment of Reimbursable Expenses and Extra Compensation**

- (1) Requests for payment of reimbursable expenses and extra compensation, and any documentary support thereof required by the Fund, must be submitted prior to the expiration of the one year guarantee period. After the Fund has approved any such request(s) the Consultant shall submit its invoice, which the Fund shall promptly process and pay.
- (2) For the purpose of this Agreement, refer to the Fund's "Bulletin on the Payment of Consultant's Fees", as currently amended, for the definition of "Direct Labor Cost." Direct Labor Cost of members, principals or partners of the firm of the Consultant shall not exceed ninety dollars (\$90) per hour.
- (3) Pursuant to any extra compensation under Section D (1) through (9) of Article III, when services are furnished by a person, firm or corporation other than the Consultant, the Fund will only pay the Consultant for such services on the basis of the Consultant's actual expenditure for obtaining such services plus a sum equal to 10 percent thereof; provided, however, that the Consultant shall not be entitled to said 10 percent override when, in connection with or related to the services furnished by said person, firm or corporation, the Consultant has been or will be compensated by the Fund for the Direct Labor Costs of its technical personnel.
- (4) Whenever any payment to or fee of the Consultant is dependent in whole or in part on the Consultant's costs, the Consultant shall be responsible for maintaining and providing clear and accurate cost and accounting records as to all such costs. The Consultant, at any time during the term of this Agreement or within six (6) years thereafter, shall make such records available to the Fund or its authorized representatives for review and audit. In the event all or any part of such records are not maintained or made available to the Fund, the Fund may withhold or disallow such payment or fee, and, if payment therefor has already been made, the Consultant, upon demand, shall refund to the Fund the amounts so disallowed. Payment to the Consultant and/or approval by the Fund of any invoice submitted by the Consultant shall in no way affect the Consultant's obligations hereunder or the right of the Fund to obtain a refund of any payment to or fee of the Consultant which was in excess of that to which it was lawfully entitled.

## **Section F Reserved**

## **Section G Credit Adjustment to the Fund**

The Fund shall receive any credit set forth in the Work Order Assignment, in the amount or percentage listed

thereon. Each credit shall be first applied, until extinguished in its entirety, against any fee, compensation or expense of the Consultant for which payment is to be made by the Fund pursuant to any of the provisions of this Agreement.

## **Section H Compensation Limit**

Notwithstanding any other provisions of this Agreement, the total amount of compensation paid to the Consultant for its actual, reasonable and necessary costs and expenses of its services under this Agreement shall not exceed \$5,000,000 (Five Million Dollars), which shall be apportioned among the various individual Projects as assigned hereunder, in amounts set by each Work Order Assignment. The total compensation includes basic compensation, reimbursable expenses, and extra compensation, if any, authorized pursuant to this Agreement. A summary of Work Order Assignments issued under this Agreement shall be incorporated in a chart to be part of a Work Order Assignment and shall be formal acknowledgement of a modification of the compensation to be paid to the Consultant under this Agreement.

## **Section I Payment Applications and Payments**

Consultant shall provide complete and accurate billing invoices order to receive payment and, at the request of the Fund, shall use the Fund's electronic payment submittal system in accordance with the Fund's current Bulletin on Payment of Consultant Fees. Billing invoices submitted must contain all information and supporting documentation required by the Contract, the Fund and the State Comptroller. Payment for invoices submitted by the Consultant **shall only be rendered electronically** unless payment by paper check is expressly authorized by the Fund's General Manager, in the General Manager's sole discretion, due to extenuating circumstances. Such electronic payment shall be made in accordance with ordinary State procedures and practices. The Consultant shall comply with the State Comptroller's procedures to authorize electronic payments. Information on electronic payments and requesting a NYS Vendor Id are available at the State Comptroller's website at

<https://www.osc.state.ny.us/state-vendors/portal/enroll-vendor-self-service-portal?redirect=legacy> or by email at [helpdesk@sfs.ny.gov](mailto:helpdesk@sfs.ny.gov). Consultant acknowledges that it will not receive payment on any invoices submitted under this Contract if it does not comply with the State Comptroller's electronic payment procedures, except where the General Manager has expressly authorized payment by paper check as set forth above.

## **Article IV Ownership of Documents**

The plans, drawings, specifications, reports, renderings, models, and other documents, and electronic files to be prepared and furnished by the Consultant pursuant to this Agreement shall be the property of the Fund. Without in any way limiting the foregoing, the Fund expressly reserves the right to make any or all of the documents, including electronic files, available to bidders and contractors. The Consultant shall not publish or disseminate to third parties information pertaining to the Project, or any part or aspect thereof, without first obtaining written approval from the Fund for such publication or dissemination and of the format and content thereof.

Notwithstanding the foregoing, in the event that the Fund uses all or a substantial portion of the final working drawings for the construction of another project, the Fund shall compensate the Architect therefor in such amount as it deems fair and reasonable. In the event of such use, the Fund shall remove the Consultant's name and seal from the documents and the Consultant shall have no liability or responsibility for such use.

## **Article V Surveys, Borings and Test Pit Data**

The Fund shall furnish the Consultant such topographic, utility and property surveys, borings and test pit data as it may have and the Consultant shall obtain topographic, utility and property surveys, borings and test pit data as may be required to complete the final working drawings and final specifications for each of the construction contracts, as provided for in a Work Order Assignment. Additional surveys, borings and data, the acquisition of which is approved in writing by the Fund, shall be paid for by the Fund in accordance with the provisions of Section D (4) of Article III. The Consultant agrees that it will make no claim against the Fund by reason of surveys, borings and data provided by the Fund unless the same are found to be inaccurate and solely as a result thereof the Consultant, in the opinion of the Fund, is caused to revise and/or redesign all or any part of the Project, in which case the Fund will compensate the Consultant for such revision and/or redesign pursuant to the provisions of Section D (5) of Article III hereof.

## **Article VI Termination of Agreement**

### **Section A Personal Services**

This Agreement is intended to secure the personal services of the Consultant because of its ability and reputation and that no responsibility of the Consultant shall be assigned, delegated or transferred without the prior written consent of the Fund.

## **Section B      Death or Disability**

In case of the death or disability of one or more but not all of the persons referred to as Consultant, the rights and duties of the Consultant shall, at the election of the Fund, devolve upon the survivor or survivors of them who shall be obligated to perform the services required under this Agreement and the Fund shall make all payments due under this Agreement to him, her or them.

## **Section C      Termination**

At any time during the effectiveness of this Agreement, the Fund shall have the right upon seven (7) calendar days' written notice to the Consultant to terminate this Agreement and/or any Work Order Assignment or to postpone, delay, suspend or abandon all or any part of any Project. In the event of such termination, postponement, delay, suspension or abandonment, the Consultant shall deliver to the Fund all plans, drawings, specifications, reports and other data and records pertaining to the Project and the Fund shall pay to the Consultant all amounts due in accordance with Article III hereof; provided, however, that if the Fund, after commencement of the Consultant's performance of services hereunder, postpones, delays or suspends the Project and subsequently, directs the resumption of performance of services by the Consultant, the Consultant, if it, in the judgment of the Fund, is caused to do extra work, which it would not have otherwise had to do, as a result thereof, will be entitled to extra compensation for such extra work in accordance with the provisions of Section D (3) of Article III hereof. Except as expressly provided in the previous sentence, such termination, postponement, delay, suspension or abandonment shall not give rise to any cause of action or claim against the Fund for damages, extra remuneration or loss of anticipated profits. In the event such termination, postponement, delay, suspension or abandonment is caused because of the Consultant's failure to fulfill its obligations or responsibilities under this Agreement, the Consultant shall remain liable to the Fund for all damages occasioned by reason of such failure, including, but not limited to, any excess costs incurred in completing the Project by the use or employment of other Consultants.

## **Article VII Liability of the Consultant**

To the fullest extent permitted by law, in addition to any liability or obligations of the Consultant to the Fund that may exist under any other provisions of this Agreement or by statute or otherwise, the Consultant shall assume all risks of liability for its performance, and that of any of its officers, employees, suppliers, subconsultants, subcontractors or agents and shall be solely responsible and liable for all liabilities, losses, damages, costs or expenses, including attorney's fees, arising from any

claim, action or proceeding relating to or in any way connected with the performance of this Agreement, including specifically Work Order Assignments, and covenants and agrees to defend if requested, indemnify and hold harmless the State of New York, State University of New York, the Fund, its agents, officers and employees, from any and all liability, demands, claims, suits, causes of action and losses of whatever kind and nature, arising out of or in connection with its performance of any service or contract resulting from this Agreement, including negligence, active or passive or improper conduct of the Consultant, its officers, subconsultants, agents, suppliers, subcontractors or employees, errors or omissions of the Consultants, its subconsultants, suppliers, agents or employees, or the failure by the Consultant, its officers, subconsultants, agents, subcontractors or employees to perform any obligations or commitments to the State of New York, the State University of New York, the Fund, its agents, officers, and employees, or third parties arising out of or resulting from this Agreement, the performance of the services, or the work performed pursuant to a Work Order Assignment.

To the fullest extent permitted by law, the Consultant shall also indemnify the State of New York, State University of New York, the Fund, its agents, officers and employees for breach of contract not related to professional services.

The Consultant represents it and its subconsultants, subcontractors, agents, employees and officers shall possess the license, experience, knowledge and character necessary to qualify them individually for the particular duties they perform in connection with the Project. For the purpose of this Agreement, the terms "inspection" and/or "administration" shall not be interpreted as the Consultant's guarantee of any contractor's workmanship or that such contractors will not breach their construction contract.

Prior to the commencement of the work to be performed by the Consultant, the Consultant shall submit to the Fund, certificates of insurance showing evidence of compliance with all insurance requirements contained in the contract. Certificates of Insurance (with the exception of Workers' Compensation and Disability) must be provided on an ACORD 25 Certificate of Insurance or equivalent document. Certificates of Insurance shall disclose any deductible, self insured retention, aggregate limit or any exclusion to the policy that materially changes the coverage required by the contract; specify the additional insureds and named insureds as required therein; and be signed by an authorized representative of the insurance carrier or producer. Deductibles or self-insured retentions above \$250,000 are subject to approval by the Fund and additional security may be required. Only original documents with original signatures will be accepted for those documents not emailed directly by the insurance carrier or agent, to [SUCFinsurance@suny.edu](mailto:SUCFinsurance@suny.edu).

All insurance shall provide that the required coverage apply on a primary and not on an excess or contributing basis as to any other insurance that may be available to the Fund for any claim arising from the Consultant's work under this Agreement, or as a result of Consultant's activities.

All insurance shall be maintained with insurance carriers authorized to do business in New York State and rated at least "A" by A.M. Best Company. The Consultant shall cause all insurance to be in full force and effect as of the commencement date of this contract and to remain in full force and effect throughout the term of this Agreement and until final acceptance of each Project under an Assignment, as further required by the contract. Not less than thirty days prior to the expiration date or renewal date, the Consultant shall supply the Fund with updated replacement certificates of insurance and endorsements. The Consultant shall advise the Fund of any letter or notification that cancels, materially changes, or non-renews the policy and Consultant shall require the insurance carrier(s) to copy the Fund on any letter or notification that cancels, materially changes, or non-renews the policy. If required by the Fund, Consultant shall deliver to the Fund within forty-five (45) days of such request, a copy of any or all policies of insurance not previously provided, certified by the insurance carrier as true and complete.

Should the Consultant engage a subconsultant or subcontractor, the Consultant shall impose the insurance requirements in this document on those entities. Consultant shall keep the subconsultant certificates of insurance on file and produce them upon the demand of the Fund.

The Consultant shall obtain and maintain in full force and effect, the following insurance with limits not less than those described below and as required by the terms of the contract, or as required by law, whichever is greater:

- i. Commercial General Liability Insurance Which coverage shall include, but not be limited to coverage for bodily injury, property damage, personal/advertising injury, premises liability, independent contractors, blanket contractual liability including tort liability of another assumed in contract, liability arising from all work and operations under this Agreement, defense and indemnification obligations, including those assumed under contract, cross liability coverage for additional insureds, products/completed operations for a term no less than three years commencing upon acceptance of the work of each Project, explosion, collapse, and underground hazards, contractor means and methods, liability resulting from Section 240 or Section 241 of the NYS Labor Law, and products/completed operations with a limit of not less

than \$2,000,000 for each occurrence and general aggregate limit of not less than \$2,000,000.

- ii. Workers Compensation and Disability Benefits as required by New York State.
- iii. Comprehensive Business Automobile Liability Insurance with a limit of no less than \$1,000,000 each accident covering liability arising out of the use of any motor vehicle in connection with the work, including owned, leased, hired, and non-owned vehicles bearing, or, under the circumstances under which they are being used, required by the Motor Vehicle Laws of the State of New York to bear license plates. Such policy shall name the State of New York, State University of New York, and the Fund as additional insureds. If the contract involves the removal of hazardous waste from the project site or otherwise transporting hazardous materials, pollution liability coverage for covered autos shall be provided by form CA 99 48 03 06 or CA 00 12 03 06 and the Motor Carrier Act Endorsement (MCS90) shall be attached.
- iv. Consultant shall procure and maintain during and for a period of three (3) years after the completion of the contract, Errors and Omissions liability insurance with a limit of \$2,000,000 per claim. Such insurance shall apply, but not be limited to, any negligent act, error, or omission in the rendering or failing to render professional services required under the Agreement and/or Work Order Assignment and if any Project involves abatement, removal, repair, replacement, enclosure, encapsulation, and/or disposal of any hazardous material or substance, it may not exclude bodily injury, property damage, pollution or asbestos related claims, testing, monitoring, measuring, or laboratory analyses. If applicable, the Consultant shall provide coverage of the Consultant's negligent act, error, or omission in rendering or failing to render professional services required by this Contract arising out of specifications, installation, modification, abatement, replacement or approval of products, materials or processes containing pollutants, and the failure to advise of or detect the existence or the proportions of pollutants. The professional liability insurance may be issued on a claims-made policy form, in which case the Professional shall procure at its sole expense, extended Discovery Clause coverage of up to three (3) years after work is completed if coverage is cancelled or not renewed. Written proof of this extended reporting period must be provided to the Fund prior to expiration or cancellation.

When the limits of the CGL, Auto, and/or Employers Liability policies procured are insufficient to meet the limits specified, the Consultant shall procure and maintain commercial Umbrella and/or Excess Liability policies with limits in excess of the primary, provided, however, that the total amount of insurance coverage

is at least equal to the requirements set forth above. Such policies shall follow the same form as the primary.

Unless otherwise agreed to in writing by the Fund, policies must be endorsed to provide that there shall be no right of subrogation against the Fund. To the extent that any of the policies of insurance prohibit such a waiver of subrogation, Consultant shall secure the necessary permission to make this waiver.

Except as otherwise specifically provided herein or agreed in writing, policies must be written on an occurrence basis. The insurance policy(ies) shall name the Fund, State University of New York, and State of New York, its officers, agents, and employees as additional insureds thereunder. The additional insured requirement does not apply to Workers' Compensation, Disability or Professional Liability coverage.

Neither the procurement nor the maintenance of such insurance shall in any way affect or limit the obligations, responsibilities or liabilities of the Consultant hereunder.

Nothing in this Article or in this Agreement shall create or give to third parties any claim or right of action against the Consultant or the Fund beyond such as may legally exist irrespective of this Article or this Agreement.

## **Article VIII Minority and Women Owned Business Enterprise Participation/Equal Employment Opportunity**

### **(1) General Provisions**

- a. The Fund is required to implement the provisions of New York State Executive Law Article 15-A, 5 NYCRR Parts 140-145 of the New York Codes, Rules and Regulations ("NYCRR"), and Executive Order No. 162 dated January 9, 2017 ("E.O. 162"), for all State contracts as defined therein, with a value (1) in excess of \$25,000 for labor, services, equipment, materials, or any combination of the foregoing or (2) in excess of \$100,000 for real property renovation and/or construction.
- b. The Consultant agrees, in addition to any other nondiscrimination provision of the Agreement, and at no additional cost to the Fund, to fully comply and cooperate with the Fund in the implementation of New York State Executive Law Article 15-A, the regulations promulgated thereunder, and E.O. 162. These requirements include equal employment opportunities for minority group members and women ("EEO") and contracting opportunities for New York State-certified minority and women-owned business

enterprises ("MWBEs"). Consultant's demonstration of "good faith efforts" pursuant to 5 NYCRR §142.8 shall be a part of these requirements. These provisions shall be deemed supplementary to, and not in lieu of, the nondiscrimination provisions required by New York State Executive Law Article 15 (the "Human Rights Law") or other applicable federal, state or local laws.

- c. Failure to comply with all of the requirements herein may result in a finding of non-responsiveness, non-responsibility and/or a breach of contract, leading to the assessment of liquidated damages pursuant to Section 7 of this Article, withholding of funds and other such remedies as may be available to the Fund pursuant to the Agreement and applicable law, including but not limited to proposal rejection or contract termination for cause.
- d. The Consultant will include the provisions of this Article in each and every agreement, contract, and/or subcontract with each and every subconsultant and supplier in such a manner that the provisions of this Article will be binding upon each subconsultant and consultant as to work in connection with and related to this Agreement. All subconsultants must be approved by the Fund and the MWBE Utilization plans are subject to approval by both the Fund's Opportunities Program and Design and Construction Staff.

### **(2) Agreement Goals**

- a. For purposes of this Agreement the Fund hereby establishes goals of **15%** for New York State-certified Minority-Owned Business Enterprises (MBE) participation and **15%** for New York State-certified Women-Owned Business Enterprises ("WBE") participation (collectively, "MWBE Agreement Goals") based on the current availability of MBEs and WBEs.
- b. For purposes of providing meaningful participation by MWBEs on the Agreement and achieving the MWBE Agreement Goals established in Section 2A hereof, Consultant should reference the directory of New York State Certified MBWEs found at the following internet address: <https://ny.newnycontracts.com>.

Additionally, the Consultant is encouraged to contact the Fund's Opportunities Program Office at (518) 320-1650. The consultant can also reach out to the Division of Minority and Women's Business Development at (212) 803-2414 to discuss additional methods of maximizing participation by MWBEs on the Agreement.

- c. Where MWBE Agreement Goals have been established herein, pursuant to 5 NYCRR §142.8, Consultant must document “good faith efforts” to provide meaningful participation by MWBEs as sub-consultants, suppliers in the performance of the Agreement. In accordance with Section 316-a of Article 15-A and 5 NYCRR §142.13, the Consultant acknowledges that if Consultant is found to have willfully and intentionally failed to comply with the MWBE participation goals set forth in the Agreement, such a finding constitutes a breach of contract and the Consultant shall be liable to the Fund for liquidated or other appropriate damages, as set forth herein.
- d. The Consultant understands that only sums paid to MWBEs for the performance of a commercially useful function, as that term is defined in 5 NYCRR §140.1, may be applied towards the achievement of the applicable MWBE participation goal. The portion of a contract with an MWBE serving as a supplier, that shall be deemed to represent the commercially useful function performed by the MWBE, shall be 60 percent of the total value of the contract. The portion of a contract with an MWBE serving as a broker, that shall be deemed to represent the commercially useful function performed by the MWBE, shall be the monetary value for fees, or the markup percentage, charged by the MWBE.
- e. The Consultant must document “good faith efforts,” pursuant to 5 NYCRR §142.8, to provide meaningful participation by MWBE’s as subconsultants in the performance of the Agreement. Such documentation shall include, but not necessarily be limited to:
  - i. Evidence of outreach to MWBEs;
  - ii. Any responses by MWBE’s to the Consultant’s outreach;
  - iii. Copies of advertisements for participation by MWBEs in appropriate general circulation, trade and minority or women-oriented publications;
  - iv. The dates of attendance at any pre-bid, pre-award or other meetings, if any, scheduled by the Fund with MWBEs; and
  - v. Information describing specific steps undertaken by the Consultant to reasonably structure the Agreement scope of work to maximize opportunities for MWBE participation.

Where it appears that the Consultant is unable to comply with the MWBE Agreement Goals, the Consultant may submit in writing for the Fund’s consideration, the reasons for the Consultant’s

inability to meet any or all of the participation requirements together with a detailed explanation of the efforts taken by the Consultant to obtain the required MWBE participation pursuant to the provisions of New York State Executive Law Section 313 and the MWBE Regulations.

(3) Equal Employment Opportunity (EEO)

- a. The provisions of Article 15-A of the Executive Law, the rules and regulations promulgated thereunder, and E.O. 162 pertaining to equal employment opportunities for minority group members and women shall apply to this Agreement.
- b. In performing the Agreement, the Consultant shall:
  - i. Ensure that the Consultant and each sub-consultant performing work on the Agreement shall undertake or continue existing EEO programs to ensure that minority group members and women are afforded equal employment opportunities without discrimination because of race, creed, color, national origin, sex, age, disability or marital status. For these purposes, EEO shall apply in the areas of recruitment, employment, job assignment, promotion, upgrading, demotion, transfer, layoff, or termination and rates of pay or other forms of compensation.
  - ii. Prior to the execution of the Agreement, the Consultant shall submit an EEO policy statement to the Fund within ten (10) calendar days after a receipt of a request thereof.
  - iii. If the Consultant or sub-consultants do not have an existing EEO policy statement, the Fund may require the Consultant, or subconsultant to adopt a model statement.
  - iv. The Consultant’s EEO policy statement shall include the following language:
    - a. The Consultant will not discriminate against any employee or applicant for employment because of race, creed, color, national origin, sex, age, disability or marital status, will undertake or continue existing EEO programs to ensure that minority group members and women are afforded equal employment opportunities without discrimination, and shall make and document its conscientious and active efforts to employ and utilize minority group members and women in its work force.
    - b. The Consultant shall state in all solicitations or advertisements for employees that, in the performance of the

Agreement, all qualified applicants will be afforded equal employment opportunities without discrimination because of race, creed, color, national origin, sex, age, disability or marital status.

- c. The Consultant will include provisions of subdivisions a through c of this subsection iv and paragraph E of this Section 3, which provides for relevant provisions of the Human Rights Law, in every subcontract in such a manner that the requirements of the subdivisions will be binding upon each subconsultant as to work in connection with the Agreement.

c. Staffing Plan

To ensure compliance with E. O. 162 and this Section, the Consultant shall, in connection with any proposal in excess of \$250,000, and as a condition of contract award, submit a staffing plan to document the composition of the proposed workforce to be utilized in the performance of the Agreement, or where required, information on the consultant's total work force, including apprentices, broken down by the specified categories listed, including ethnic background, gender, and Federal occupational categories. Prior to the execution of the Agreement and within ten (10) calendar days after a receipt of a request thereof, Consultant shall submit the staffing plan to the Fund. The form of the staffing plan shall be supplied by the Fund, to document the composition of the proposed workforce to be utilized in the performance of the Contract by the specified categories listed, including ethnic background, gender, and Federal occupational categories.

d. Workforce Utilization Report

- i. After award of the Agreement, the Consultant shall submit a Workforce Utilization Report and shall require each and every subconsultant to submit a Workforce Utilization Report, in such form and manner as shall be required by the Fund, on a quarterly basis during the term of the Agreement.
- ii. Separate forms shall be completed by the Consultant and each subconsultant.
- iii. Pursuant to E. O. 162, in addition to required EEO information, the Consultant and its subconsultants are also required to include in such report gross wages paid to each of their employees for the work performed by such employees on the contract, on a quarterly basis.

- e. Consultant shall comply with the provisions of the Human Rights Law, all other State and Federal statutory and constitutional non-discrimination provisions. The Consultant and its subconsultants shall not discriminate against any employee or applicant for employment because of race, creed (religion), color, sex, national origin, sexual orientation, military status, age, disability, predisposing genetic characteristic, marital status or domestic violence victim status, and shall also follow the requirements of the Human Rights Law with regard to non-discrimination on the basis of prior criminal conviction and prior arrest.

(4) MWBE Utilization Plan

- a. The Consultant represents and warrants that Consultant has submitted a subconsultant/MW/SDV Staffing List (MWBE Utilization Plan) at the time of submission of the proposal, qualifications, or negotiated Agreement.
- b. Consultant agrees to adhere to such MWBE Utilization Plan for the performance of the Agreement.
- c. Consultant further agrees that a failure to submit and/or use such MWBE Utilization Plan shall constitute a material breach of the terms of the Agreement. Upon the occurrence of such a material breach, the Fund shall be entitled to any remedy provided herein, including but not limited to, a finding that the Consultant is non-responsive.

(5) Waivers

- a. If the Consultant, after making good faith efforts, is unable to achieve the MWBE Agreement Goals stated herein, the Consultant may submit a request for a waiver through a method provided by the Fund. Such waiver request must be supported by evidence of the Consultant's good faith efforts to achieve the maximum feasible MWBE participation towards the applicable MWBE Agreement Goals. If the documentation included with the waiver request is completed, the Fund shall evaluate the request and issue a written notice of approval or denial within twenty (20) business days of receipt.
- b. If the Fund, upon review of the MWBE Utilization Plan, quarterly MWBE Consultant Compliance Reports described in Section 6 below, or any other relevant information, determines that the Consultant is failing or refusing to comply with the MWBE Agreement Goals, and no waiver has been issued in regard to such non-compliance, the Fund may issue a notice of deficiency to the Consultant. The Consultant must respond to the

notice of deficiency within seven (7) business days of receipt. Such response may include a request for partial or total waiver of MWBE Agreement goals.

(6) MWBE Consultant Compliance Report

- a. The Consultant is required to submit an MWBE Consultant Compliance Report to the Fund with every application for payment or by request of the Fund and such report must document the progress made towards achievement of the MWBE Agreement Goals.
- b. Consultant shall file with the Fund reports in the electronic form prescribed by the Fund regarding actions taken pursuant to this Article as well as a list of and value of subcontracts.
- c. Consultant shall permit access to its books, records and accounts by the Fund for purposes of investigation to ascertain compliance with the provisions of this Article. The Consultant shall include this provision in every subcontract so that such provision will be binding upon each subconsultant.
- d. Failure to comply with the foregoing requirements entitles the Fund to take such action as the withholding of funds, suspension or termination of the Agreement or such other actions or enforcement proceedings as allowed by the Agreement. Such failure may also result in a finding of non-responsiveness, non-responsibility and/or a breach of the Agreement.

(7) Liquidated Damages - MWBE Participation

- a. Where the Fund determines that Consultant is not in compliance with the requirements of the Agreement and refuses to comply with such requirements, or if Consultant is found to have willfully and intentionally failed to comply with the MWBE Agreement Goals, Consultant shall be obligated to pay liquidated damages to the Fund.
- b. Such liquidated damages shall be calculated as an amount equaling the difference between:
  - i. All sums identified for payment to MWBEs had the Consultant achieved the contractual MWBE goals; and
  - ii. All sums actually paid to MWBEs for work performed or materials supplied under the Agreement.

In the event a determination has been made which requires the payment of liquidated damages and such identified sums have not been withheld by the Fund, Consultant shall pay such liquidated damages to the Fund within sixty (60) days after they are assessed. Provided, however if the Consultant has filed a complaint with the Director of the Division of Minority and Woman Business

Development pursuant to 5 NYCRR §142.12, the liquidated damages shall be payable only in the event of a determination adverse to the Consultant following the complaint process.

**Article IX Use of Service-Disabled Veteran-Owned Business Enterprises in Contract Performance**

- (1) Section 40 of New York State Veterans Services Law acknowledges that Service-Disabled Veteran-Owned Businesses (SDVOBs) strongly contribute to the economies of the State and the nation. As defenders of our nation and in recognition of their economic activity in doing business in New York State, the Consultant for this Agreement for design-engineering services agrees to, at no additional cost to the Fund, fully comply and cooperate with the Fund's implementation of New York State Veterans Services Law Section 40 and provide opportunities for SDVOBs in the fulfillment of the requirements of this Agreement. SDVOBs can be readily identified on the directory of certified businesses at: <https://online.ogs.ny.gov/SDVOB/search>.
- (2) The Consultant is strongly encouraged to the maximum extent practical and consistent with legal requirements of the State Finance Law and the Executive Law to use responsible and responsive SDVOBs in purchasing and utilizing commodities, services and technology that are of equal quality and functionality to those that may be obtained from non-SDVOBs. Furthermore, Consultants are reminded that they must continue to utilize small, minority and women-owned businesses consistent with current State law
- (3) Utilizing SDVOBs in State contracts will help create more private sector jobs, rebuild New York State's infrastructure, and maximize economic activity to the mutual benefit of the Consultant and its SDVOB partners. SDVOBs will promote the Consultant's optimal performance under the Agreement, thereby fully benefiting the public sector programs that are supported by associated public procurements.
- (4) Public procurements can drive and improve the State's economic engine through promotion of the use of SDVOBs by the Consultant. The Fund, therefore, expects Consultants to provide maximum assistance to SDVOBs in the performance of services for this Agreement. The potential participation by all kinds of SDVOBs will deliver great value to the State and its taxpayers.
- (5) For the purposes of this Agreement, the Fund hereby establishes the goal of 6% participation for SDVOBs. For the purposes of providing meaningful participation by SDVOBs on the Agreement and achieving the Agreement Goal, the Consultant should

reference the directory of New York State Certified SDVOBs at the following internet address: <https://online.ogs.ny.gov/SDVOB/search>.

- (6) Damages – SDVOB Participation: Any Consultant who willfully and intentionally fails to comply with the SDVOB participation requirements of the SDVOB regulations set forth in 9 NYCRR Section 252, and as set forth in this Agreement, shall be liable to the Fund for damages as otherwise specified in this agreement, and shall provide for other appropriate remedies on account of such breach. Damages shall be calculated based on the actual cost incurred by the Fund related to the Fund's expenses for personnel, supplies and overhead related to establishing, monitoring and reviewing certified SDVOB enterprise programmatic goals.
- (7) The Consultant is required to submit a Compliance Report to the Fund in every application for payment or by request of the Fund and such report must document the progress made towards achievement of the SDVOB goal of the Agreement

## **Article X Provisions Required to be Inserted by Law**

Each and every provision required by law to be inserted in this Agreement, including, but not limited to, the applicable provisions set forth in Appendix "A" which is attached hereto and made a part hereof, shall be deemed to be inserted herein and this Agreement shall be read and enforced as though it were included herein and, in the event any such provision is not inserted or is not correctly inserted, then, upon the application of either party, this Agreement shall forthwith be physically amended to make such insertion or correction. For the purpose of Appendix "A", the word "Contractor" therein shall be deemed to refer to the Consultant.

## **Article XI Release of the Fund**

The acceptance by the Consultant or any person claiming under the Consultant of final payment made under this Agreement shall operate as and shall be a release of the Fund from all claims by and liability to the Consultant, its successors, legal representatives and assigns, for anything done or furnished under the provisions of this Agreement, Work Order Assignment, or in connection with the Project.

## **Article XII General Provisions**

### **Section A Approval**

Wherever in this Agreement action is to be taken by or approval given by the Fund, such action or approval may

be taken or given by any officer or employee of the Fund duly designated to act on behalf of the Fund.

### **Section B Delays or Omissions**

No delay or omission by the Fund or the Consultant to exercise any right or remedy accruing to it under the terms of this Agreement or existing at law or in equity or by statute or otherwise shall be construed as a waiver of any of the provisions of this Agreement or of any such right or remedy and no such delay or omission shall impair any such right or remedy or be construed to be a waiver of or acquiescence in the act or acts or omission or omissions to act giving rise to the accruals of such right or remedy, nor shall it affect the Fund's or the Consultant's rights or remedies upon the occurrence of any subsequent event of the same or of a different nature.

### **Section C Captions**

The captions of Articles and Sections of this Agreement are intended for convenience and for reference purposes only and in no way define, limit or describe the scope or intent thereof, or of this Agreement or in any way affect this Agreement.

### **Section D Singular - Plural; Male - Female**

As used in this Agreement, the singular of any word or designation, whenever necessary or appropriate, shall include the plural and vice versa, and the masculine gender shall include the female and neuter genders and vice versa.

### **Section E Actions or Proceedings Against the Fund**

No action or proceeding shall lie or be maintained by the Consultant, or anyone claiming under or through the Consultant against the Fund or any of its trustees, officers, agents or employees, upon any claim arising out of or based upon this Agreement or any breach thereof or by reason of any act or omission of the Fund or its trustees, officers, agents or employees, unless such action or proceeding is instituted in the Supreme Court of the State of New York in and for the County of Albany and such action or proceeding is commenced within one (1) year after the Fund's acceptance of the construction work, or termination of this Agreement, whichever shall first occur.

### **Section F Entire Agreement**

This Agreement constitutes the entire agreement between the parties hereto and supersedes all previous understandings and agreements with respect to the Project or any of the provisions hereof. No statement, promise, condition, understanding, inducement, or

representation, oral or written, expressed or implied, which is not contained herein shall be binding or valid and this Agreement shall not be changed, modified or altered in any manner except by an instrument in writing executed by the parties hereto.

Conflicts between the documents shall be resolved in the following order of precedence:

- (1) Appendix "A" Standard Clauses
- (2) Consultant's Term Agreement including the Schedule of Fees
- (3) Work Order Assignment for the specified project

### Article XIII Notices

- (1) All notices permitted or required hereunder shall be in writing and shall be transmitted either:
  - (a) via certified or registered United States mail, return receipt requested;
  - (b) by personal delivery;
  - (c) by expedited delivery service; or
  - (d) by email.

Such notices shall be addressed as follows or to such difference addresses as the parties may from time to time designate:

#### **The State University Construction Fund**

##### **FUND CONTACT**

##### **CONTACT TITLE**

H. Carl McCall SUNY Building,

353 Broadway

Albany, NY 12246

Telephone Number: 518.XXX.XXXX

E-mail address: [Name@suny.edu](mailto:Name@suny.edu)

##### **Consultant**

**Consultant Name.**

**Contact, Title**

**ADDRESS, ADDRESS**

**CITY, STATE ZIP**

Telephone Number: XXX.XXX.XXXX

E-mail address: [name@xxx.com](mailto:name@xxx.com)

- (2) Any such notice shall be deemed to have been given either at the time of personal delivery or, in the case of expedited delivery service or certified or registered United States mail, as of the date of first attempted delivery at the address and in the manner provided herein, or in the case of email, upon receipt.
- (3) The parties may, from time to time, specify any new or different address in the United States as their address for purpose of received notice under this Agreement by giving fifteen (15) days written notice to the other party in accordance herewith. The parties agree to mutually designate individuals as their

respective representatives for the purpose of receiving notices under this Agreement. Additional individuals may be designated in writing by the parties for purposes of implementation and administration/billing, resolving issues and problems and/or for dispute resolutions.

### Article XIV Iran Energy Sector Divestment

Pursuant to New York State Finance Law §165-a, Iran Divestment Act of 2012 (Act), the Office of General Services is required to post on its web site a list of persons who have been determined to engage in investment activities in Iran ("prohibited entities list"), as defined by the Act. New York State Public Authorities Law § 2879-c, with certain exceptions, prohibits the Fund from entering into or awarding a Contract with persons identified on the prohibited entities list and requires that the person (as defined in paragraph (e) of subdivision one of section one hundred sixty five-a of the state finance law) entering into the contract with the Fund certify, under penalty of perjury, that it is not on the prohibited entities list. By signing this Agreement with the Fund, each person (as defined in paragraph (e) of subdivision one of section one hundred sixty five-a of the state finance law) and each person signing on behalf of any other party certifies, and in the case of a joint bid or proposal or partnership each party thereto certifies as to its own organization, under penalty of perjury, that to the best of its knowledge and belief that each person is not on the prohibited entities list.

### Article XV State Finance Law § 139-k

The Consultant certifies that all information provided to the Fund with respect to State Finance Law Section 139-k is complete, true and accurate.

The Fund reserves the right to immediately terminate this contract in the event that is found that the certification filed by the Consultant in accordance with State Finance Law 139-k was intentionally false or intentionally incomplete.

### Article XVI Vendor Responsibility

- (1) The Consultant shall at all times during the Agreement term remain responsible. The Consultant agrees, if requested by the Fund, to present evidence of its continuing legal authority to do business in New York State, integrity, experience, ability, prior performance and organizational and financial capacity.
- (2) The Fund, at its sole discretion, reserves the right to suspend any or all activities under this Agreement and/or a Work Order Assignment, at any time, when the Fund discovers information that calls into question the responsibility of the Consultant. In the event of such suspension, the Consultant will be given written

notice outlining the particulars of such suspension. Upon issuance of such notice, the Consultant must comply with the terms of the suspension order. Agreement activity may resume at such time as the Fund issues a written notice authorizing a resumption of performance under the Agreement.

- (3) Upon written notice to the Consultant, and a reasonable opportunity to be heard with appropriate Fund officials or staff, the Consultant may be terminated by the Fund at the Consultant's expense where the Consultant is determined by the Fund to be non-responsible. In such event, the Fund may complete the contractual requirements in any manner that the Fund may deem advisable and pursue available legal or equitable remedies for breach.
- (4) In no case shall termination of the Agreement or a Work Oder Assignment by the Fund be deemed a breach by the Fund thereof, nor shall the Fund be liable for any damages or lost profits or otherwise,

which may be sustained by Consultant as a result of such termination.

### **Article XVII Severability**

If any provision of the Agreement or Work Order Assignment, or the application thereof, is determined to be invalid or unenforceable, the remainder of those provisions and all other provisions of the Agreement and/or Work Order Assignment shall remain valid and enforceable.

### **Article XVIII Time of Performance**

This Agreement shall be in effect for thirty-six (36) months from the date of the Notice to Proceed issued for this Term Agreement or until the completion of any Project initiated during the thirty-six (36) month period, whichever is longer.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

STATE UNIVERSITY CONSTRUCTION FUND

Consultant

By \_\_\_\_\_ By \_\_\_\_\_  
*Signature* *Signature*

Printed Name \_\_\_\_\_ Printed Name \_\_\_\_\_

Title \_\_\_\_\_ Title \_\_\_\_\_

Date \_\_\_\_\_

Federal ID # \_\_\_\_\_

SFS ID # \_\_\_\_\_  
*(If Corporation, affix Corporate Seal)*

SUCF Project No. XXXXXX-XX

Contract No. D00XXXX

**ACKNOWLEDGMENTS**

(ACKNOWLEDGMENT BY INDIVIDUAL)

STATE OF NEW YORK )  
 ) SS.:  
COUNTY OF )

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

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

(ACKNOWLEDGMENT BY PARTNERSHIP)

STATE OF NEW YORK )  
 ) SS.:  
COUNTY OF )

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

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

(ACKNOWLEDGMENT BY CORPORATION)

STATE OF NEW YORK )  
 ) SS.:  
COUNTY OF )

On this \_\_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_\_ before me personally came \_\_\_\_\_, to me known, who, being duly sworn, did depose and say that he/she/they reside(s) in \_\_\_\_\_; that he/she/they is (are) the \_\_\_\_\_ (president) or other officer or director or attorney in fact duly appointed) of the \_\_\_\_\_ name of corporation), the corporation described in and which executed the foregoing instrument; that he/she/they signed his/her/their name(s) thereto by authority of the Board of Directors of said corporation.

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

## SCHEDULE OF FEES

COST ESTIMATE OR CONSTRUCTION COST				BASIC FEE				ADJUSTMENT TO BASIC FEE
\$0	to	\$20,000			14.00%			
20,001	to	30,000	2,680	plus	10.50%	over	20,000	
30,001	to	40,000	3,840	plus	9.00%	over	30,000	
40,001	to	50,000	4,840	plus	8.38%	over	40,000	
50,001	to	70,000	6,000	plus	7.95%	over	50,000	
70,001	to	90,000	7,980	plus	7.60%	over	70,000	
90,001	to	110,000	9,800	plus	7.40%	over	90,000	
110,001	to	130,000	11,550	plus	7.30%	over	110,000	
130,001	to	150,000	13,180	plus	7.20%	over	130,000	
150,001	to	170,000	14,760	plus	7.15%	over	150,000	
170,001	to	190,000	16,180	plus	7.10%	over	170,000	
190,001	to	210,000	17,440	plus	7.05%	over	190,000	
210,001	to	230,000	18,720	plus	7.00%	over	210,000	
230,001	to	250,000	19,940	plus	6.95%	over	230,000	
250,001	to	300,000	21,360	plus	6.90%	over	250,000	
300,001	to	350,000	24,870	plus	6.85%	over	300,000	
350,001	to	400,000	28,280	plus	6.75%	over	350,000	BASIC FEE PLUS TBD%
400,001	to	450,000	31,600	plus	6.65%	over	400,000	
450,001	to	500,000	34,730	plus	6.50%	over	450,000	
500,001	to	550,000	37,680	plus	6.40%	over	500,000	
550,001	to	600,000	40,440	plus	6.30%	over	550,000	
600,001	to	650,000	43,000	plus	6.20%	over	600,000	
650,001	to	700,000	45,500	plus	6.10%	over	650,000	
700,001	to	1,000,000	49,300	plus	6.00%	over	700,000	
1,000,001	to	1,500,000	68,000	plus	5.97%	over	1,000,000	
1,500,001	to	2,000,000	97,300	plus	5.85%	over	1,500,000	
2,000,001	to	2,500,000	125,830	plus	5.60%	over	2,000,000	
2,500,001	to	3,000,000	153,830	plus	5.25%	over	2,500,000	
3,000,001	to	3,500,000	180,080	plus	5.00%	over	3,000,000	
3,500,001	to	100,000,000	\$205,080	plus	4.70%	over	3,500,000	
100,000,001	or	over			To Be Negotiated			

**Appendix "A"**  
**Standard Clauses For New York State Contracts**

The parties to the attached contract, license, lease, amendment or other agreement of any kind (hereinafter, "the contract" or "this contract") agree to be bound by the following clauses which are hereby made a part of the contract (the word "Contractor" herein refers to any party other than the State or the State University Construction Fund, whether a contractor, licensor, licensee, lessor, lessee or any other party; the State University Construction Fund shall hereinafter be referred to as the "Fund"):

**1. EXECUTORY CLAUSE.** In accordance with Section 41 of the State Finance Law, the State and the Fund shall have no liability under this contract to the Contractor or to anyone else beyond funds appropriated and available for this contract.

**2. NON-ASSIGNMENT CLAUSE.** In accordance with Section 138 of the State Finance Law, this contract may not be assigned by the Contractor or its right, title or interest therein assigned, transferred, conveyed, sublet or otherwise disposed of without the State's or the Fund's previous written consent, and attempts to do so are null and void. Notwithstanding the foregoing, such prior written consent of an assignment of a contract let pursuant to Article XI of the State Finance Law may be waived at the discretion of the Fund and with the concurrence of the State Comptroller where the original contract was subject to the State Comptroller's approval, where the assignment is due to a reorganization, merger or consolidation of the Contractor's business entity or enterprise. The Fund retains its right to approve an assignment and to require that any Contractor demonstrate its responsibility to do business with the Fund. The Contractor may, however, assign its right to receive payments without the Fund's prior written consent unless this contract concerns Certificates of Participation pursuant to Article 5-A of the State Finance Law.

**3. COMPTROLLER'S APPROVAL.** (a) In accordance with Section 112 of the State Finance Law and Section 373 of the Education Law, the State Comptroller's approval is required for the following contracts: (i) goods, services, construction and construction-related services which exceed \$75,000 and (ii) purchases utilizing an Office of General Services centralized contract which exceed \$200,000;

(b) If this contract exceeds the threshold amounts listed above in Paragraph 3(a), or, if this is an amendment for any amount to a contract which, as so amended, exceeds said threshold amounts, or if, by this contract, the State or the Fund agrees to give something other than money when the value or reasonably estimated value of such consideration exceeds \$25,000, it shall not

be valid, effective or binding upon the Fund or the State and the Fund and the State shall bear no liability, until it has been approved by the State Comptroller or the pertinent pre-audit review period has elapsed without State Comptroller approval or rejection and such contracts are filed in his or her office.

**4. WORKERS' COMPENSATION BENEFITS.** In accordance with Section 142 of the State Finance Law, this contract shall be void and of no force and effect unless the Contractor shall provide and maintain coverage during the life of this contract for the benefit of such employees as are required to be covered by the provisions of the Workers' Compensation Law.

**5. NON-DISCRIMINATION REQUIREMENTS.** To the extent required by Article 15 of the Executive Law (also known as the Human Rights Law) and all other State and Federal statutory and constitutional non-discrimination provisions, the Contractor will not discriminate against any employee or applicant for employment, nor subject any individual to harassment, because of age, race, creed, color, national origin, citizenship or immigration status, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, or domestic violence victim status or because the individual has opposed any practices forbidden under the Human Rights Law or has filed a complaint, testified, or assisted in any proceeding under the Human Rights Law. Furthermore, in accordance with Section 220-e of the Labor Law, if this is a contract for the construction, alteration or repair of any public building or public work or for the manufacture, sale or distribution of materials, equipment or supplies, and to the extent that this contract shall be performed within the State of New York, Contractor agrees that neither it nor its subcontractors shall, by reason of race, creed, color, disability, sex, or national origin: (a) discriminate in hiring against any New York State citizen who is qualified and available to perform the work; or (b) discriminate against or intimidate any employee hired for the performance of work under this contract. If this is a building service contract as defined in Section 230 of the Labor Law, then, in accordance with Section 239 thereof, Contractor agrees that neither it nor its subcontractors shall by reason of race, creed, color, national origin, age, sex or disability: (a) discriminate in hiring against any New York State citizen who is qualified and available to perform the work; or (b) discriminate against or intimidate any employee hired for the performance of work under this contract. Contractor is subject to fines of \$50.00 per person per day for any violation of Section 220-e or Section 239 as well as possible termination of this contract and forfeiture of all

moneys due hereunder for a second or subsequent violation.

**6. WAGE AND HOURS PROVISIONS.** If this is a public work contract covered by Article 8 of the Labor Law or a building service contract covered by Article 9 thereof, neither Contractor's employees nor the employees of its subcontractors may be required or permitted to work more than the number of hours or days stated in said statutes, except as otherwise provided in the Labor Law and as set forth in prevailing wage and supplement schedules issued by the State Labor Department. Furthermore, Contractor and its subcontractors must pay at least the prevailing wage rate and pay or provide the prevailing supplements, including the premium rates for overtime pay, as determined by the State Labor Department in accordance with the Labor Law. Additionally, effective April 28, 2008, if this is a public work contract covered by Article 8 of the Labor Law, the Contractor understands and agrees that the filing of payrolls in a manner consistent with Subdivision 3-a of Section 220 of the Labor Law shall be a condition precedent to payment by the Fund of any Fund approved sums due and owing for work done upon the project.

**7. NON-COLLUSIVE BIDDING CERTIFICATION.** In accordance with Section 139-d of the State Finance Law, if this contract was awarded based upon the submission of bids, Contractor affirms, under penalty of perjury, that its bid was arrived at independently and without collusion aimed at restricting competition. Contractor further affirms that, at the time Contractor submitted its bid, an authorized and responsible person executed and delivered to the Fund a non-collusive bidding certification on Contractor's behalf.

**8. INTERNATIONAL BOYCOTT PROHIBITION.** In accordance with Section 220-f of the Labor Law and Section 139-h of the State Finance Law, if this contract exceeds \$5,000, the Contractor agrees, as a material condition of the contract, that neither the Contractor nor any substantially owned or affiliated person, firm, partnership or corporation has participated, is participating, or shall participate in an international boycott in violation of the federal Export Administration Act of 1979 (50 USC App. Sections 2401 et seq.) or regulations thereunder. If such Contractor, or any of the aforesaid affiliates of Contractor, is convicted or is otherwise found to have violated said laws or regulations upon the final determination of the United States Commerce Department or any other appropriate agency of the United States subsequent to the contract's execution, such contract, amendment or modification thereto shall be rendered forfeit and void. The Contractor shall so notify the State Comptroller within five (5) business days of such conviction, determination or disposition of appeal (2 NYCRR § 105.4).

**9. SET-OFF RIGHTS.** The State and the Fund shall have all common law, equitable and statutory rights of set-off. These rights shall include, but not be limited to, the State's and the Fund's option to withhold for the purposes of set-off any moneys due to the Contractor under this contract up to any amounts due and owing to the State or the Fund with regard to this contract or any other Fund contract, as well as any other contract with any State department or agency, including any contract for a term commencing prior to the term of this contract, plus any amounts due and owing to the State or the Fund for any other reason including, without limitation, tax delinquencies, fee delinquencies or monetary penalties relative thereto. The State and the Fund shall exercise their set-off rights in accordance with normal State practices including, in cases of set-off pursuant to an audit, the finalization of such audit by the State, the Fund, its representatives, or the State Comptroller.

**10. RECORDS.** The Contractor shall establish and maintain complete and accurate books, records, documents, accounts and other evidence directly pertinent to performance under this contract (hereinafter, collectively, the "Records"). The Records must be kept for the balance of the calendar year in which they were made and for six (6) additional years thereafter. The State Comptroller, the Attorney General and any other person or entity authorized to conduct an examination, as well as the Fund and any other agencies involved in this contract, shall have access to the Records during normal business hours at an office of the Contractor within the State of New York or, if no such office is available, at a mutually agreeable and reasonable venue within the State, for the term specified above for the purposes of inspection, auditing and copying. The Fund shall take reasonable steps to protect from public disclosure any of the Records which are exempt from disclosure under Section 87 of the Public Officers Law (the "Statute") provided that: (i) the Contractor shall timely inform an appropriate Fund official, in writing, that said Records should not be disclosed; and (ii) said Records shall be sufficiently identified; and (iii) designation of said records as exempt under the Statute is reasonable. Nothing contained herein shall diminish, or in any way adversely affect, the State's or the Fund's right to discovery in any pending or future litigation.

**11. IDENTIFYING INFORMATION AND PRIVACY NOTIFICATION.** (a) Identification Number(s). Every invoice or New York State Claim for Payment submitted to the Fund by a payee, for payment for the sale of goods or services or for transactions (e.g., leases, easements, licenses, etc.) related to real or personal property must include the payee's identification number. The number is any or all of the following: (i) the payee's Federal employer identification number, (ii) the payee's Federal social security number, and/or (iii) the payee's Vendor Identification Number assigned by the Statewide Financial System. Failure to include such number or

numbers may delay payment. Where the payee does not have such number or numbers, the payee, on its invoice or Claim for Payment, must give the reason or reasons why the payee does not have such number or numbers.

(b) Privacy Notification. (1) The authority to request the above personal information from a seller of goods or services or a lessor of real or personal property, and the authority to maintain such information, is found in Section 5 of the State Tax Law. Disclosure of this information by the seller or lessor to the Fund or the State is mandatory. The principal purpose for which the information is collected is to enable the State to identify individuals, businesses and others who have been delinquent in filing tax returns or may have understated their tax liabilities and to generally identify persons affected by the taxes administered by the Commissioner of Taxation and Finance. The information will be used for tax administration purposes and for any other purpose authorized by law. (2) The personal information is requested by the purchasing unit of the Fund contracting to purchase the goods or services or lease the real or personal property covered by this contract or lease. The information is maintained in the Statewide Financial System by the Vendor Management Unit within the Bureau of State Expenditures, Office of the State Comptroller, 110 State Street, Albany, New York 12236.

**12. EQUAL EMPLOYMENT OPPORTUNITIES FOR MINORITIES AND WOMEN.** In accordance with Section 312 of the Executive Law and 5 NYCRR Part 143, if this contract is: (i) a written agreement or purchase order instrument, providing for a total expenditure in excess of \$25,000.00, whereby a contracting agency is committed to expend or does expend funds in return for labor, services, supplies, equipment, materials or any combination of the foregoing, to be performed for, or rendered or furnished to the Fund; or (ii) a written agreement in excess of \$100,000.00 whereby the Fund is committed to expend or does expend funds for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements thereon; or (iii) a written agreement in excess of \$100,000.00 whereby the owner of a State assisted housing project is committed to expend or does expend funds for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements thereon for such project, then the following shall apply and by signing this agreement the Contractor certifies and affirms that it is Contractor's equal employment opportunity policy that:

(a) The Contractor will not discriminate against employees or applicants for employment because of race, creed, color, national origin, sex, age, disability or marital status, shall make and document its conscientious and active efforts to employ and utilize minority group members and women in its work force on

State contracts and will undertake or continue existing programs of affirmative action to ensure that minority group members and women are afforded equal employment opportunities without discrimination. Affirmative action shall mean recruitment, employment, job assignment, promotion, upgradings, demotion, transfer, layoff, or termination and rates of pay or other forms of compensation.

(b) at the Fund's request, the Contractor shall request each employment agency, labor union, or authorized representative of workers with which it has a collective bargaining or other agreement or understanding, to furnish a written statement that such employment agency, labor union or representative will not discriminate on the basis of race, creed, color, national origin, sex, age, disability or marital status and that such union or representative will affirmatively cooperate in the implementation of the Contractor's obligations herein; and

(c) the Contractor shall state, in all solicitations or advertisements for employees, that, in the performance of the State contract, all qualified applicants will be afforded equal employment opportunities without discrimination because of race, creed, color, national origin, sex, age, disability or marital status.

Contractor will include the provisions of "a," "b," and "c" above, in every subcontract over \$25,000.00 for the construction, demolition, replacement, major repair, renovation, planning or design of real property and improvements thereon (the "Work") except where the Work is for the beneficial use of the Contractor. Section 312 does not apply to: (i) work, goods or services unrelated to this contract; or (ii) employment outside New York State. The State and the Fund shall consider compliance by a contractor or subcontractor with the requirements of any federal law concerning equal employment opportunity which effectuates the purpose of this clause. The Fund shall determine whether the imposition of the requirements of the provisions hereof duplicate or conflict with any such federal law and if such duplication or conflict exists, the Fund shall waive the applicability of Section 312 to the extent of such duplication or conflict. Contractor will comply with all duly promulgated and lawful rules and regulations of the Department of Economic Development's Division of Minority and Women's Business Development pertaining hereto.

**13. CONFLICTING TERMS.** In the event of a conflict between the terms of the contract (including any and all attachments thereto and amendments thereof) and the terms of this Appendix A, the terms of this Appendix A shall control.

**14. GOVERNING LAW.** This contract shall be governed by the laws of the State of New York except where the Federal supremacy clause requires otherwise.

**15. LATE PAYMENT.** Timeliness of payment and any interest to be paid to Contractor for late payment shall be governed by Article 11-A of the State Finance Law to the extent required by law. For the purposes of Article 11-A of the State Finance Law, the Controller's Office of the State University Construction Fund, whose mailing address is the H. Carl McCall SUNY Building, 353 Broadway, Albany, New York 12246, is the Fund's designated payment office.

**16. NO ARBITRATION.** Disputes involving this contract, including the breach or alleged breach thereof, may not be submitted to binding arbitration (except where statutorily authorized), but must, instead, be heard in a court of competent jurisdiction of the State of New York.

**17. SERVICE OF PROCESS.** In addition to the methods of service allowed by the State Civil Practice Law & Rules ("CPLR"), Contractor hereby consents to service of process upon it by registered or certified mail, return receipt requested. Service hereunder shall be complete upon Contractor's actual receipt of process or upon the Fund's receipt of the return thereof by the United States Postal Service as refused or undeliverable. Contractor must promptly notify the Fund, in writing, of each and every change of address to which service of process can be made. Service by the Fund to the last known address shall be sufficient. Contractor will have thirty (30) calendar days after service hereunder is complete in which to respond.

**18. PROHIBITION ON PURCHASE OF TROPICAL HARDWOODS.** The Contractor certifies and warrants that all wood products to be used under this contract award will be in accordance with, but not limited to, the specifications and provisions of Section 165 of the State Finance Law, (Use of Tropical Hardwoods) which prohibits purchase and use of tropical hardwoods, unless specifically exempted, by the State or any governmental agency or political subdivision or public benefit corporation. Qualification for an exemption under this law will be the responsibility of the contractor to establish to meet with the approval of the State.

In addition, when any portion of this contract involving the use of woods, whether supply or installation, is to be performed by any subcontractor, the prime Contractor will indicate and certify in the submitted bid proposal that the subcontractor has been informed and is in compliance with specifications and provisions regarding use of tropical hardwoods as detailed in Section 165 of the State Finance Law. Any such use must meet with the approval of the State and the Fund; otherwise, the bid may not be considered responsive. Under bidder certifications, proof of qualification for exemption will be

the responsibility of the Contractor to meet with the approval of the State.

**19. 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 any 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.

**20. OMNIBUS PROCUREMENT ACT OF 1992.** It is the policy of New York State to maximize opportunities for the participation of New York State business enterprises, including minority- and women-owned business enterprises as bidders, subcontractors and suppliers on its procurement contracts.

Information on the availability of New York State subcontractors and suppliers is available from:

NYS Department of Economic Development  
Division for Small Business and Technology  
Development  
625 Broadway  
Albany, New York 12245  
Telephone: 518-292-5100

A directory of certified minority- and women-owned business enterprises is available from:

NYS Department of Economic Development  
Division of Minority and Women's Business  
Development  
633 Third Avenue, 33rd Floor  
New York, NY 10017  
646-846-7364  
email: [mwbebusinessdev@esd.ny.gov](mailto:mwbebusinessdev@esd.ny.gov)  
<https://ny.newnycontracts.com/FrontEnd/searchcertifieddirectory.asp>

The Omnibus Procurement Act of 1992 (Chapter 844 of the Laws of 1992, codified in State Finance Law § 139-i and Public Authorities Law § 2879(3)(n)-(p)) requires that by signing this bid proposal or contract, as applicable, Contractors certify that whenever the total bid amount is greater than \$1 million:

(a) The Contractor has made reasonable efforts to encourage the participation of New York State Business Enterprises as suppliers and subcontractors, including certified minority- and women-owned business enterprises, on this project, and has retained the documentation of these efforts to be provided upon request to the State;

(b) The Contractor has complied with the Federal Equal Employment Opportunity Act of 1972 (P.L. 92-261), as amended;

(c) The Contractor agrees to make reasonable efforts to provide notification to New York State residents of employment opportunities on this project through listing any such positions with the Job Service Division of the New York State Department of Labor or providing such notification in such manner as is consistent with existing collective bargaining contracts or agreements. The Contractor agrees to document these efforts and to provide said documentation to the Fund upon request; and

(d) The Contractor acknowledges notice that the State may seek to obtain offset credits from foreign countries as a result of this contract and agrees to cooperate with the State in these efforts.

**21. RECIPROCITY AND SANCTIONS PROVISIONS.** Bidders are hereby notified that if their principal place of business is located in a country, nation, province, state or political subdivision that penalizes New York State vendors, and if the goods or services they offer will be substantially produced or performed outside New York State, the Omnibus Procurement Act of 1994 and 2000 amendments (Chapter 684 and Chapter 383, respectively, codified in State Finance Law § 165(6) and Public Authorities Law § 2879(5)) require that they be denied contracts which they would otherwise obtain. NOTE: As of May 2023, the list of discriminatory jurisdictions subject to this provision includes the states of South Carolina, Alaska, West Virginia, Wyoming, Louisiana and Hawaii.

**22. COMPLIANCE WITH BREACH NOTIFICATION AND DATA SECURITY LAWS.** Contractor shall comply with the provisions of the New York State Information Security Breach and Notification Act (General Business Law §§ 899-aa and 899-bb and State Technology Law § 208.

**23. COMPLIANCE WITH CONSULTANT DISCLOSURE LAW.** If this is a contract for consulting services, defined for purposes of this requirement to include analysis, evaluation, research, training, data processing, computer programming, engineering, environmental, health, and mental health services, accounting, auditing, paralegal, legal or similar services, then, in accordance with Section 163 (4)(g) of the State Finance Law (as amended by Chapter 10 of the Laws of 2006), the Contractor shall timely, accurately and properly comply with the requirement to submit an annual employment report for the contract to the Department of Civil Service and the State Comptroller.

**24. PROCUREMENT LOBBYING.** To the extent this agreement is a "procurement contract" as defined by

State Finance Law §§ 139-j and 139-k, by signing this agreement the contractor certifies and affirms that all disclosures made in accordance with State Finance Law §§ 139-j and 139-k are complete, true and accurate. In the event such certification is found to be intentionally false or intentionally incomplete, the Fund may terminate the agreement by providing written notification to the Contractor in accordance with the terms of the agreement.

**25. CERTIFICATION OF REGISTRATION TO COLLECT SALES AND COMPENSATING USE TAX BY CERTAIN STATE CONTRACTORS, AFFILIATES AND SUBCONTRACTORS.** To the extent this agreement is a contract as defined by Tax Law § 5-a, if the contractor fails to make the certification required by Tax Law § 5-a or if during the term of the contract, the Department of Taxation and Finance or the Fund discovers that the certification, made under penalty of perjury, is false, then such failure to file or false certification shall be a material breach of this contract and this contract may be terminated, by providing written notification to the Contractor in accordance with the terms of the contract, if the Fund determines that such action is in the best interests of the State.

**26. IRAN DIVESTMENT ACT.** By entering into this Agreement, Contractor certifies in accordance with State Finance Law § 165-a that it is not on the "Entities Determined to be Non-Responsive Bidders/Offerers pursuant to the New York State Iran Divestment Act of 2012" ("Prohibited Entities List") posted at: <https://ogs.ny.gov/iran-divestment-act-2012>

Contractor further certifies that it will not utilize on this Contract any subcontractor that is identified on the Prohibited Entities List. Contractor agrees that should it seek to renew or extend this Contract, it must provide the same certification at the time the Contract is renewed or extended. Contractor also agrees that any proposed Assignee of this Contract will be required to certify that it is not on the Prohibited Entities List before the contract assignment will be approved by the Fund.

During the term of the Contract, should the Fund receive information that a person (as defined in State Finance Law § 165-a) is in violation of the above-referenced certifications, the Fund will review such information and offer the person an opportunity to respond. If the person fails to demonstrate that it has ceased its engagement in the investment activity which is in violation of the Act within 90 days after the determination of such violation, then the Fund shall take such action as may be appropriate and provided for by law, rule, or contract, including, but not limited to, imposing sanctions, seeking compliance, recovering damages, or declaring the Contractor in default.

The Fund reserves the right to reject any bid, request for assignment, renewal or extension for an entity that appears on the Prohibited Entities List prior to the award, assignment, renewal or extension of a contract, and to pursue a responsibility review with respect to any entity that is awarded a contract and appears on the Prohibited Entities list after contract award.

**27. ADMISSIBILITY OF REPRODUCTION OF CONTRACT.** Notwithstanding the best evidence rule or

any other legal principle or rule of evidence to the contrary, the Contractor acknowledges and agrees that it waives any and all objections to the admissibility into evidence at any court proceeding or to the use at any examination before trial of an electronic reproduction of this contract, in the form approved by the State Comptroller, if such approval was required, regardless of whether the original of said contract is in existence.