

CONSULTANT'S TERM AGREEMENT (COMMISSIONING)

Project No.: 801XXX-XX

THIS AGREEMENT ("this agreement") made as of MONTH DD, YYYY 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 for and in relation to the commissioning of 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 1 Consultant's 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 the compensation for the services provided 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.
- (2) Periodically advise the Fund of the progress of the services during the design and construction of the Project and any anticipated delay in the same.
- (3) Attend, together with its subconsultants, all conferences, meetings and field visits reasonably required by the Fund. Any additional meetings that may be required by the Consultant to complete their activities and submissions shall be considered to be part of this Agreement. During the construction phase, provide minutes of commissioning meetings.
- (4) Provide written responses within 10 (ten) business days to all written comments submitted by the Fund.
- (5) Coordinate all the services to be provided hereunder with other consultants, contractors or others retained by the Fund or by others for the Project(s).

(6) As required to complete the services to be provided hereunder, review and understand the plans, specifications, reports and other data provided by the Fund's other Project consultants.

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'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.

- (1) Services further defined in a Work Order Assignment, provide services, which may include but are not limited to:
 - a. Identify, document and/or review the Fund's "Project Requirements";
 - b. Review the "Basis of Design" provide by other Consultants;
 - c. Provide complete "Commissioning Plan(s) and Specifications";
 - d. Review the completeness of submittals, functional performance tests, "Operating Instructions and Manuals", plans and schedules for training of Campus personnel and other information submitted by a Contractor;
 - e. Provide seasonal and deferred commissioning, operator training, system manuals, video recording of training, and other post occupancy services;
 - f. Provide surveys and other data for existing facilities, lifecycle studies, full time site representation; and/or
 - g. Provide other special technical, engineering and/or consultation studies as further described in a Work Order Assignment and in accordance with the Fund's Program *Directive 1B-6 Commissioning* <https://sucf.suny.edu/sites/default/files/docs/1B-6.pdf>.

Article 2

Additional Obligations and Responsibilities Of the Consultant

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

Section A Sequence of Services

Except as otherwise expressly herein provided, the services described in Article I hereof to be furnished by the Consultant shall be rendered in the sequence of the design and construction of the Project(s).

Section B Subconsultants

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.

Section C Consultant's Staff/Personnel

The Consultant shall be responsible for all staff assigned by the Consultant or subconsultants to the Project. The Consultant shall submit to the Fund for its review and approval, its proposed staff to be assigned to provide the services required under a Work Order Assignment for this Agreement, including their titles and hourly rates. Once approved by the Fund, such Work Order Assignment staffing will not be changed without the Fund's prior written approval. The Consultant and its subconsultants shall employ staff who have sufficient experience, skills and licenses to properly and satisfactorily complete the assigned work within the time allotted. All such staff 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. The Fund, during the course of a Work Order Assignment, reserves the right to approve staffing levels and substitution of staff previously approved by the Fund. The Consultant may assign titles for staff that it deems appropriate, but agrees to promptly notify the Fund of any title changes for staff approved for a Work Order Assignment.

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 designee shall be subject to the approval of the Fund.

Section E Claims

In the event any claim is made or any action brought in any way relating to the commissioning of the Project, the Consultant, without additional compensation therefor, will diligently render to the Fund any and all technical 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 pretrial 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 F 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 submissions and specifications of or for the Project.

Section G 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.

Article 3 Payment for Services

Section A Compensation for Services

As the compensation for all Consultant and subconsultant services specified in a Work Order Assignment and rendered under the provisions of this Agreement, the Consultant and approved subconsultants will receive payment for time directly and exclusively devoted to the performance of the services specified, in accordance with the approved staff and titles and compensation rates as set forth and attached to in Schedule C, as modified and made a part of a Work Order Assignment”.

- (1) The Fund reserves the right to revise the language and format in the proposed Schedule C, in its sole discretion.
- (2) “Hourly rates” for a title shall be comprised of the labor rates plus overhead, profit, employee benefits and all other costs and expenses incurred in providing the services, based upon acceptable costs for a Work Order Assignment.

- (3) The compensation payable for these services shall not exceed the designated fees approved in the Work Order Assignment.

Section B Reimbursable Expenses

The Fund will reimburse the Consultant for expenses it actually and necessarily incurs, in an amount not to exceed the reimbursable expense amount authorized in a Work Order Assignment and/or as otherwise pre-approved in writing by the Fund as set forth below:

- (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*.
- (2) Reproductions of Contract Documents, reports, and other data and documents requested by and furnished to or on behalf of the Fund shall be paid for by the Fund on the basis of the actual cost thereof to the Consultant.
- (3) Rental costs of sampling and testing equipment, actual costs for single use sampling and testing equipment, laboratory analyses and other approved 3rd party testing shall be paid for on the basis of the Consultant’s actual expenditure therefor.
- (4) The maximum reimbursement for the reimbursables listed in in this Section shall not exceed the amounts approved by the Fund and specified in the Work Order Assignment without the prior written approval by the Fund.

Section C Extra Compensation

A. Except when contemplated or required as part of the Consultant’s responsibility under this Agreement, the Fund may specifically direct the Consultant to provide extra services to be added to a Work Order Assignment, as set forth herein. This authorization allows the Fund to reimburse the Consultant for additional costs and expenses it actually and necessarily incurs as authorized in writing by the Fund as set forth below:

- (1) Additional services caused by significant changes and/or revisions to the design, drawings and/or specifications provided by the Fund’s Design Consultant(s) for the Project, which, in the judgment of the Fund, could not have been reasonably anticipated or foreseen by the Consultant at the time the Work Order Assignment was executed.
- (2) Additional services caused by significant changes and/or revisions to the construction work performed by the Fund’s contractor, which, in the judgment of the Fund, could not have been reasonably anticipated or foreseen by the Consultant at the time the Work Order Assignment was executed.

- (3) Additional services caused by improper performance and/or scheduling of services or work by the Fund's Consultants and/or Contractors, or the Campus.
- (4) Additional services for significant changes and/or additions to systems and assemblies to be commissioned which, in the judgment of the Fund, could not have been reasonably anticipated or foreseen by the Consultant at the time the Work Order Assignment was executed.

B. Additional services desired by the Fund will be authorized in accordance with this Section and treated as extra compensation in accordance with the Fund's extra compensation process set forth the Fund's Program Directive IC-4 Extra Compensation Authorization.

C. Payment will be made on the basis of the for time directly and exclusively devoted to the performance of the extra services authorized in accordance with the Fund approved staff and titles, plus Fund approved reimbursable expenses incurred in connection with performing the same.

D. The Consultant shall not be entitled to extra compensation under this Section unless the services to be provided by the Consultant hereunder have been requested and pre-approved in writing by the Fund as follows:

- (1) 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 H of this Article.
- (2) 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.
- (3) 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 may not be withheld by the Fund solely on the basis of the delay in requesting and approving said request.
- (4) 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.

E. Requests for extra compensation shall be limited to the authorized time period for a Work Order Assignment in accordance with Article XVII of this Agreement.

Section D Total Compensation Limit

Notwithstanding any other provisions of this Agreement, the total compensation set forth in Sections A, B and C of Article III, payable to the Consultant under this Agreement, shall not exceed \$2,000,000 (Two 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.

Section E Payments

The Fund shall make monthly installment payments to the Consultant, as set forth the Fund's current Bulletin on Payment of Consultant Fees. The amount of the monthly installment payments may be in proportion to the amount of services rendered by the Consultant, as determined by the Fund based on reasonable progress to date and/or deliverables received for the Commissioning Services to be furnished. The Consultant shall submit for the Fund's approval a properly executed Application for Payment, on a form prescribed by Article III Section H, together with appropriate backup supporting the amount billed.

Section F Accounting Records

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 G Final Payment

Upon satisfactory completion by the Consultant of all services required by this Agreement or, if this Agreement is terminated by the Fund, all services provided prior to said termination, the Fund shall make a final payment to the Consultant. Acceptance by the Consultant of the final payment shall operate as, and shall be, a release of the Fund from all liability to the Consultant for anything provided or arising in connection with this Agreement. No payment, final or otherwise, by the Fund shall in any way release or affect the obligations and responsibilities of the Consultant hereunder.

Section H Electronic 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/enrollvendor-self-service-portal?redirect=legacy> or by email at 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 4 Ownership of Documents

The plans, drawings, specifications, reports, 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 others for their use in designing, constructing or operating the systems associated with this Project. 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 documents for the construction of another project, the Fund may compensate the Consultant therefor in such amount as it deems fair and reasonable.

Article 5 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 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 specifications, reports and other data and records pertaining to the Project and the Fund may 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 C 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 6 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 Consultant, 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 Agreement. Certificates of Insurance (with the exception of Workers' Compensation and Disability) must be provided on an ACORD 25 Certificate of Insurance, or an equivalent form that is approved by the Fund. 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 Agreement; 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.

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 Agreement and to remain in full force and effect throughout the term of the Agreement and until the completion

of any Work Order Assignment(s) initiated under this Agreement. 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 the 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, the 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 on those entities the general insurance requirements of this Article and the Agreement. Required insurance limits shall be determined commensurate with the work of the subconsultant or subcontractor. The Consultant shall keep the subconsultant or subcontractor 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 Agreement, 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, 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

Workers Compensation and Disability Benefits as required by New York State.

iii. Comprehensive Business Automobile Liability Insurance

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 Agreement 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. Professional Liability Insurance

Consultant shall procure and maintain during and for a period of three (3) years after the completion of the Agreement, professional liability insurance with a limit of \$2,000,000 per claim and in the aggregate. 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 if the 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 Agreement 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 7

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 and 5 NYCRR Parts 142-144 ("MWBE Regulations") for all State contracts as defined therein, with a value (1) in excess of \$25,000 for labor, services, equipment, materials, or any combination of the foregoing or (2) in excess of \$100,000 for real property renovations and construction.
- B. The Consultant agrees, in addition to any other nondiscrimination provision of the Contract 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. These requirements include equal employment opportunities for minority group members and women ("EEO") and contracting opportunities for certified minority and women-owned business enterprises ("MWBEs"). 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 withholding of funds or such other actions, liquidated damages pursuant to this Article, or enforcement proceedings as allowed by the Contract and New York State Executive Law Section 316.
- D. Consultant will include the provisions of this Article in each and every Agreement and/or Contract in such a manner that the provisions of this Article will be binding upon each subconsultant and Contractor 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 Staff.

The Consultant shall be bound by and comply with all the duly promulgated and lawful MWBE Regulations of the New York State Department of Economic Development's Division of Minority and Women's Business Development pertaining thereto and the provisions of Article 15-A of the New York State Executive Law.

2. Contract Goals

- A. For purposes of this procurement, the Fund hereby establishes goals of **15%** for Minority-Owned Business Enterprises (MBE) participation and **15 %** for Women-Owned Business Enterprises ("WBE") participation (based on the current availability of qualified MBEs and WBEs).
- B. For purposes of providing meaningful participation by MWBEs on the Contract and achieving the Contract 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/>
- C. Where MWBE 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, subcontractors in the performance of the Contract. 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 Contract, 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. Where it appears that a Consultant cannot, after a good faith effort, comply with the MWBE participation requirements, Consultant may submit a waiver application pursuant to the provisions of New York State Executive Law Section 313 and the MWBE Regulations.

3. Equal Employment Opportunity (EEO)

- A. Consultant agrees to be bound by the provisions of Article 15-A and the MWBE Regulations promulgated by the Division of Minority and Women's Business Development of the Department of Economic Development (the "Division"). If any of these terms or provisions conflict with applicable law or regulations, such laws and regulations shall supersede these requirements.
- B. Consultant shall comply with the following provisions of Article 15-A:

- i. Consultant and sub-consultants 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, Consultant shall submit an EEO policy statement to the Fund within ten (10) calendar days after a receipt of a request thereof.
- iii. If Consultant or sub-consultants do not have an existing EEO policy statement contact the Fund to obtain 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 on State contracts.
 - b. The Consultant shall state in all solicitations or advertisements for employees that, in the performance of the contract, all qualified applicants will be afforded equal employment opportunities without discrimination because of race, creed, color, national origin, sex, age, disability or marital status.

C. Staffing Plan

To ensure compliance with this Section, the Consultant shall submit a staffing plan to document the composition of the proposed workforce to be utilized in the performance of the Contract, 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.

D. Workforce Utilization Report

After award of the contract, the Consultant shall submit to the Fund a work force utilization report, in a form and manner required by the Fund, of the work force actually utilized on this Agreement, broken down by specified ethnic background, gender, and Federal occupational categories or other appropriate categories specified by the Fund.

E. Consultant shall comply with the provisions of the Human Rights Law, all other State and Federal statutory and constitutional non-discrimination provisions. Consultant and sub consultants 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.

4. Subconsultant/MWBE Staffing List

- A. The Consultant represents and warrants that Consultant has submitted a Subconsultant/MWBE Staffing List at the time of submission of the proposal, qualifications, or negotiated contract.
- B. Consultant agrees to use such Subconsultant/MWBE Staffing List for the performance of MWBEs on the Contract pursuant to the prescribed MWBE goals set forth in this Article.
- 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 Contract. 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 of Consultant non-responsiveness.

5. Compliance Report

Consultant is required to submit a 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 goals of the Contract.

6. Liquidated Damages - MWBE Participation

- A. Where the Fund determines that Consultant is not in compliance with the requirements of the Contract and refuses to comply with such requirements, or if Consultant is found to have willfully and intentionally

failed to comply with the MWBE participation goals, Consultant shall be obligated to pay to the Fund liquidated damages.

B. Such liquidated damages shall be calculated as an amount equaling the difference between:

- 1. All sums identified for payment to MWBEs had the Consultant achieved the contractual MWBE goals; and
- 2. All sums actually paid to MWBEs for work performed or materials supplied under the Contract.

C. 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 by the Fund unless prior to the expiration of such sixtieth day, the Consultant has filed a complaint with the Director of the Division of Minority and Woman Business Development pursuant to Subdivision 8 of Section 313 of the Executive Law in which event the liquidated damages shall be payable if the Director renders a decision in favor of the Fund.

Article 8

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

1. Article 17-B of New York State Executive 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 Executive Law Article 17-B 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 9 Provisions Required 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 10 Release of the Fund

The acceptance by the Consultant or any person claiming under the Consultant of final payment made under this Agreement or Work Order Assignment 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 11 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 Work Order Assignment 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 six months after the completion of any Work Order Assignment initiated under this Agreement, or termination of this Agreement or Work Order Assignment, 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. State University Construction Fund Appendix "A"
2. Consultant's Term Agreement
3. Work Order Assignment for the specified project

Article 12 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;
- (d) by expedited delivery service; or
- (e) by email.

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

The State University Construction Fund

CONTACT NAME, Title

H. Carl McCall SUNY Building

353 Broadway, Albany, NY 12246

Telephone Number: 518-320-XXXX

E-mail address: FName.LName@suny.edu

Consultant

CONSULTANT NAME

CONTACT, TITLE

ADDRESS

CITY, STATE ZIP

Telephone Number: xxx.xxx.xxxx

E-mail address: email@xxxx.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 facsimile transmission or 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 receiving 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 purposes of receiving notices under this Agreement. Additional individuals may be designated in writing by the parties for purposes of implementation and administration/ billing, resolving issues and problems and/or for dispute resolution.

Article 13 Iran Energy Sector Divestment Compliance

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 Agreement 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 14 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 Agreement 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 15 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 Order 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 16 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 17 Duration of Agreement

This Agreement shall be in effect for thirty-six (36) months from the date of receipt of the Notice to Proceed issued for this Term Agreement or until the completion of commissioning services of any Work Order Assignment 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

By _____

Printed Name _____

Title _____

CONSULTANT

By _____

Printed Name _____

Title _____

Date _____

Federal ID # _____

SFS ID # _____

(If Corporation, affix Corporate Seal)

SUCF Project No. 801XXX-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

State University Construction Fund Appendix “A” Standard Clauses 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 the Fund or the State and the Fund and the State

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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
<https://ny.newnycontracts.com/FrontEnd/searchcertifiedirectory.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.

SAMPLE