

**CM@ RISK
GENERAL CONDITIONS
FOR
CONSTRUCTION**

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Table of Contents

ARTICLE 1 -- DEFINITIONS..... 5

 SECTION 1.01 - DEFINITIONS 5

ARTICLE 2 -- CONTRACT DOCUMENTS..... 7

 SECTION 2.01 - CAPTIONS 7

 SECTION 2.02 – ELECTRONIC DATA TRANSFER 7

 SECTION 2.03 - OWNER 8

 SECTION 2.04 - NOTICE AND SERVICE THEREOF..... 8

 SECTION 2.05 - NOMENCLATURE..... 8

 SECTION 2.06 - INVALID PROVISIONS 9

 SECTION 2.07 – INTERPRETATION OF CONTRACT DOCUMENTS 9

 SECTION 2.08 - COPIES OF CONTRACT DOCUMENTS..... 9

ARTICLE 3 -- SITE CONDITIONS..... 9

 SECTION 3.01 - SUBSURFACE OR SITE CONDITIONS FOUND DIFFERENT 9

 SECTION 3.02 - VERIFYING DIMENSIONS AND CONDITIONS 10

 SECTION 3.03 - SURVEYS..... 10

ARTICLE 4 -- CONTRACTOR..... 10

 SECTION 4.01 - REPRESENTATIONS OF CONTRACTOR 10

 SECTION 4.02 - ERRORS OR DISCREPANCIES..... 11

 SECTION 4.03 - COORDINATED COMPOSITE DRAWINGS 11

 SECTION 4.04 - MEETINGS..... 11

 SECTION 4.05 - SUPERVISION BY CONTRACTOR 11

 SECTION 4.06 – PROJECT SCHEDULING 11

 SECTION 4.07 - WORKER IDENTIFICATION AND SITE ACCESS CONTROL 12

 SECTION 4.08 - RELATED WORK 13

 SECTION 4.09 – COORDINATION WITH SEPARATE CONTRACTS 13

 SECTION 4.10 - COOPERATION WITH OTHER CONTRACTORS 13

ARTICLE 5 -- MATERIALS AND LABOR..... 14

 SECTION 5.01 - CONTRACTOR'S OBLIGATIONS 14

 SECTION 5.02 - MEANS AND METHODS OF CONSTRUCTION 15

 SECTION 5.03 - CONTRACTOR'S TITLE TO MATERIALS 15

 SECTION 5.04 - COMPARABLE PRODUCTS ("OR EQUAL" CLAUSE)..... 15

 SECTION 5.05 - QUALITY, QUANTITY AND LABELING 16

 SECTION 5.06 - TAX EXEMPTION 16

ARTICLE 6 -- SUBCONTRACTS..... 16

 SECTION 6.01 - SUBCONTRACTING 16

ARTICLE 7 -- CHANGES IN THE WORK..... 17

 SECTION 7.01 - CHANGES 17

 SECTION 7.02 - OVERHEAD AND PROFIT..... 19

 SECTION 7.03 - DEDUCT CHANGE ORDER 21

ARTICLE 8 -- PAYMENT 21

 SECTION 8.01 - PROVISION FOR PAYMENT..... 21

 SECTION 8.02 - SUBSTANTIAL COMPLETION AND REDUCTION OF RETAINAGE 22

 SECTION 8.03 - RELEASE AND CONSENT OF SURETY 23

 SECTION 8.04 - LIENS 23

CM@ RISK GENERAL CONDITIONS for CONSTRUCTION

SECTION 8.05 - WITHHOLDING OF PAYMENTS 23
SECTION 8.06 - LATE PAYMENT 24
SECTION 8.07 - OWNER LIABILITY 24
ARTICLE 9 -- TIME OF COMPLETION..... 24
SECTION 9.01 - TIME OF COMPLETION..... 24
ARTICLE 10 -- CLAIMS AND DISPUTES 25
SECTION 10.01 - NOTIFICATION OF CLAIM 25
SECTION 10.02 - CLAIM FOR EXTRA WORK..... 26
SECTION 10.03 - DAMAGES FOR DELAY 26
SECTION 10.04 - CLAIM FOR ADDITIONAL COST 27
SECTION 10.05 - CONTINUANCE OF THE WORK 27
SECTION 10.06 - RESOLUTION OF CLAIM 27
SECTION 10.07 - LIMITATION ON ACTIONS..... 27
SECTION 10.08 - WAIVER OF CERTAIN CAUSES OF ACTION 27
ARTICLE 11 -- TERMINATION OR SUSPENSION 28
SECTION 11.01 - TERMINATION FOR CAUSE 28
SECTION 11.02 - TERMINATION FOR CONVENIENCE OF OWNER 28
SECTION 11.03 - OWNER'S RIGHT TO DO WORK 28
SECTION 11.04 - SUSPENSION OF WORK..... 28
SECTION 11.05 - STOP WORK 29
ARTICLE 12 -- BENEFICIAL OCCUPANCY 29
SECTION 12.01 - OCCUPANCY PRIOR TO SUBSTANTIAL COMPLETION 29
ARTICLE 13 -- INSPECTION AND ACCEPTANCE 30
SECTION 13.01 - ACCESS TO THE WORK..... 30
SECTION 13.02 - NOTICE FOR TESTING AND INSPECTION..... 30
SECTION 13.03 - REEXAMINATION OF WORK 30
SECTION 13.04 - INSPECTION OF WORK..... 30
SECTION 13.05 - DEFECTIVE OR DAMAGED WORK..... 30
SECTION 13.06 – TESTING OF WORK 30
SECTION 13.07 - FINAL COMPLETION 31
SECTION 13.08 - GUARANTEE..... 31
ARTICLE 14 -- PROTECTION OF PERSONS AND PROPERTY 31
SECTION 14.01 – SITE SAFETY AND PROTECTION 31
SECTION 14.02 - PROTECTION OF WORK 32
SECTION 14.03 - PROTECTION OF LIVES AND HEALTH 32
SECTION 14.04 - RISKS ASSUMED BY THE CONTRACTOR 33
ARTICLE 15--INSURANCE AND BONDS 35
SECTION 15.01 - GENERAL PROVISIONS 35
SECTION 15.02 - SUBMISSION OF INSURANCE..... 35
SECTION 15.03 - INSURANCE PROVIDED BY CONTRACTOR..... 35
SECTION 15.04 - OTHER INSURANCE PROVIDED BY CONTRACTOR..... 37
SECTION 15.05 - STOP WORK ORDER - INSURANCE..... 38
SECTION 15.06 – BUILDER’S RISK..... 38
SECTION 15.07 - BONDS PROVIDED BY CONTRACTOR..... 39
ARTICLE 16 -- GENERAL PROVISIONS OF THE CONTRACT 40
SECTION 16.01 - GENERAL LAW PROVISIONS..... 40
SECTION 16.02 - DIESEL EMISSIONS REDUCTION 40
SECTION 16.03 – STATE AND FEDERAL LABOR LAW PROVISIONS 40

SECTION 16.04 - NONDISCRIMINATION.....	42
SECTION 16.05 - DOMESTIC STEEL.....	43
SECTION 16.06 – GENERAL CONTRACT PROVISIONS	43
SECTION 16.07 - FAILURE TO COMPLY WITH ARTICLE 16	44
ARTICLE 17-- AUDITS/INVESTIGATIONS/ETHICS	44
SECTION 17.01 - OWNER'S RIGHT TO AUDIT.....	44
SECTION 17.02- FALSE STATEMENTS/INFORMATION/DISCLOSURE	44
SECTION 17.03 - OWNER’S RIGHT TO CONDUCT INVESTIGATIONS	45
SECTION 17.04 - DISCLOSURE OF CRIMINAL INVESTIGATION	45
SECTION 17.05 - ANTI-RIOT PROVISIONS	46
SECTION 17.06 - ETHICAL CONDUCT.....	47
ARTICLE 18 -- 2005 PROCUREMENT LOBBYING LAW	48
SECTION 18.01 - LAWS OF 2005	48
SECTION 18.02 - CONTRACTOR'S CERTIFICATIONS.....	49
SECTION 18.03 - TERMINATION PROVISIONS	49
ARTICLE 19 -- EXECUTIVE ORDER NO 125	49
SECTION 19.01 - DETERMINATION OF CONTRACTOR RESPONSIBILITY	49
SECTION 19.02 – NYS VENDOR RESPONSIBILITY QUESTIONNAIRE.....	49
ARTICLE 20 -- OPPORTUNITY PROGRAMS.....	49
SECTION 20.01 - GENERAL PROVISIONS	56
SECTION 20.02 – EQUAL EMPLOYMENT OPPORTUNITY (EEO).....	56
SECTION 20.03 – OPPORTUNITIES FOR MINORITY AND WOMEN-OWNED BUSINESS ENTERPRISES (M/WBE)	56
SECTION 20.04 - GOOD FAITH EFFORTS AND GUIDELINES	56
SECTION 20.05 - WAIVERS	56
SECTION 20.06 - ADMINISTRATION HEARING ON DISQUALIFICATION	56
SECTION 20.07 – COMPLAINTS AND LIQUIDATED DAMAGES - M/WBE PARTICIPATION	56
SECTION 20.08 – REPORTING TO OWNER	56

ARTICLE 1 -- DEFINITIONS

Section 1.01 - Definitions

The following terms as used in the Contract Documents shall be defined as follows:

Addendum or Addenda – Additional provisions of the Contract Documents issued in writing prior to the receipt of bids.

As-built – A set of drawings, specifications and schedule prepared by the Contractor, which include any revisions in the drawings, specifications and schedule during construction, indicating how the Work was actually constructed.

Beneficial Occupancy – The stage in the performance of the Work when a designated portion of the Work is sufficiently complete in accordance with the Contract Documents and prior to Substantial Completion, so the Owner can occupy or utilize such portion of the Work for its intended use, evidenced by the Notice of Beneficial Occupancy executed by the Owner.

Change Order – Written notice, in a standard Owner’s form, to the Contractor, signed by the Contractor and executed by the Owner changing the Contract in accordance with Article 7- Changes in the Work.

Claim - A demand by the Contractor seeking, as a matter of right, adjustment or interpretation of Contract terms, payment of money, an extension of time or other relief with respect to the terms of the Contract. The term Claim also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract.

Client - The entity for whom DASNY is performing services, including subsidiaries, agents, related corporations or fiduciaries of the entity.

Contract Closeout – Final completion and acceptance of the performance of the Work evidenced by the final payment to the Contractor by the Owner.

Construction Manager at Risk – A person, persons, firm, partnership or corporation, regularly engaged in the management of construction projects, who has contracted with the OWNER to submit a Guaranteed Maximum Price (GMP) as defined in the Construction Phase Contract, for the construction of the Project and has assumed the risk that the actual cost of the construction may exceed the GMP. For purposes of this General Conditions Contract, the Construction Manager at Risk is herein referred to as “the Contractor”.

Consultant - A person, persons, firm, partnership or corporation providing Architectural, Engineering, or other professional services, and so designated by the Owner.

Contract - The agreement between the Owner and the Contractor consisting of the Contract Documents.

Contract Documents - The Notice to Bidders, Information for Bidders, Form of Bid, Agreement, Payment Bond, Performance Bond, Insurance, General Conditions, General Requirements, Drawings, Specifications, Addenda, Change Orders, and all provisions of law deemed to be included in the Contract.

Contract Manager – A software program used by the Owner in managing the Work.

Contractor - A person, persons, firm, partnership or corporation with whom the Contract is entered into by the Owner to perform the Work. For purposes of this General Conditions contract the Construction Manager at Risk is herein referred to as “the Contractor”.

Design Professional - A person, persons, firm, partnership or corporation providing Architectural, Engineering, or other professional services, and so designated by the Owner.

Designated Representative – See Owner’s Representative definition.

DASNY - DASNY, a public benefit corporation established by the laws of the state of New York with its principal office located at 515 Broadway, Albany, New York, 12207-2964.

Extra Work - Any work in addition to the Work initially required to be performed by the Contractor pursuant to the Contract Documents.

False Claim – Any claim which is, either in whole or part, false or fraudulent.

False Representation – This action takes place when a person has knowledge of the value of the work and materials supplied, performed or proposed (the “Information”) constituting the Claim, Change Order or Application for Payment and either (i) acts in deliberate ignorance of the truth or falsity of the Information or (ii) acts in reckless disregard of the truth or falsity of the Information.

Forced Change Order –Written notice, in a standard Owner’s form, to the Contractor, without the Contractor’s signature and executed by the Owner changing the Contract Documents in accordance with Article 7 – Changes in the Work.

Furnish - To deliver to the Site ready for installation.

Install - To unload at the delivery point at the Site and perform every operation necessary to establish secure mounting and correct operation at the proper location.

Letter of Intent - Written notice, signed by the Owner, to the Contractor, which accepts the Contractor’s bid and transmits the Agreement, bonds and other documents to the Contractor for signatures.

Means and Methods of Construction - Labor, materials, temporary structures, tools, plant, and construction equipment, and the manner and time of their use, necessary to accomplish the result intended by the Contract Documents.

Notice of Substantial Completion - Written notice, in a standard Owner’s form, to the Contractor, executed by the Owner, accepting the Work of the Contract Documents as Substantial Completion and constitutes start of the guarantee period.

Notice to Proceed - Written notice, signed by the Owner, to the Contractor, that acknowledges receipt by the Owner of the signed Agreement and bonds from the Contractor and directs the Contractor to start performance of the Work; or

Written notice, in a standard Owner’s form, to the Contractor, executed by the Owner, directing the Contractor to proceed in accordance with Article 7 – Changes in the Work or Article 10 – Claims and Disputes.

Owner - DASNY.

Owner's Representative - A person, persons, firm, partnership or corporation so designated by the Owner to act on behalf of the Owner.

P6 Project Management – A software program used by the Owner to monitor performance of the Work.

Project - means all structures, buildings, site work, landscaping, or other improvement to real property of every kind and nature provided for or reasonable inferable from the Construction Documents published at the end of the Pre-Construction Phase of the project by the Project Designer.

Provide - To Furnish and Install the Work complete in place and ready for its intended use.

Shop Drawings - Diagrams, fabrication drawings, illustrations, schedules, test product data, performance charts, catalog cuts and product data that are submitted by the Contractor and illustrate any portion of the Work.

Site - The area within the Contract limit, as indicated by the Contract Documents.

Stop Work Order - Written notice, signed by the Owner, to the Contractor, to cease or hold Work of the Contract Documents; if not followed by an order to resume work, it amounts to termination of the Contract.

Subcontract - An agreement between the Contractor and Subcontractor for Work on the Site.

Subcontractor - A person, persons, firm, partnership or corporation under contract with the Trade Contractor, or under contract with any Subcontractor, to provide labor and material at the Site.

Substantial Completion – The stage in the performance of the Work when all Work is sufficiently complete in accordance with the Contract Documents so the Owner can occupy or utilize the Work for its intended use, evidenced by the Notice of Substantial Completion executed by the Owner.

Trade Contractor – means a firm employed directly by the CM to complete the construction of the project.

Work - All obligations imposed upon the Contractor by the Contract Documents.

ARTICLE 2 -- CONTRACT DOCUMENTS

Section 2.01 - Captions

The tables of contents, titles, captions, headings, running headlines, and marginal notes contained herein and in the Contract Documents are solely to facilitate reference to various provisions of the Contract Documents and in no way affect the interpretation of the provisions to which they refer.

Section 2.02 – Electronic Data Transfer

- A. Electronic data includes, but is not limited to, files produced by Contract Manager, email, word processing, spread sheet, data base, payments, other software programs and all Contract Documents.
- B. The Owner reserves the right to implement an electronic payment program for payments due the Contractor. Prior to implementation, the Owner, in writing, shall notify the Contractor one hundred

twenty (120) days prior to the effective date of the electronic payment program. Commencing on or after the electronic payment effective date, all payments, due the Contractor, shall only be rendered electronically, unless payment by paper check is authorized by the Owner. Commencing on or after the electronic payment effective date, the Contractor, further acknowledges and agrees that the Owner may withhold payments, if the Contractor has not complied with the Owner's policies and procedures relating to the electronic payment program in effect at such time, unless payment by paper check is authorized by the Owner.

- C. Electronic data produced in connection with the Contract is proprietary information of the Owner and to be treated as confidential and not to be disclosed to, or shared with others outside the limits of the Contract without the express written consent of the Owner. The Owner makes no warranty, express or implied, as to the accuracy of the information transferred.
- D. The Contractor shall pay on behalf of the Owner any loss which the Owner becomes legally liable to pay as a result of a claim made against the Contractor by any person or entity, which results directly from an act, error or omission of the Contractor in the provision of electronic data in respect to the Contract.

Section 2.03 - Owner

- A. The meaning and intent of the Contract Documents shall be as interpreted by the Owner. Any change to the Contract Documents must be provided in writing, by the Owner, in accordance with Article 7 – Changes in the Work.
- B. The Owner shall give all orders and directions contemplated under the Contract relative to the execution of the Work. The Owner shall determine the amount, quality, and acceptability of the Work and shall decide all questions that may arise in relation to said Work. The Owner's estimates and decisions shall be final except as otherwise expressly provided.
- C. The Owner may, at its sole discretion, waive certain provisions of the Contract Documents. Such waiver shall only be done in writing and the waiver of one provision shall not act as a waiver of any other provision of the Contract Documents, which shall remain in full force and effect.
- D. Any differences or conflicts concerning performance that may arise between the Contractor and other Contractors performing Work for the Owner shall be adjusted and determined by the Owner.
- E. The Owner may act through an Owner's Representative designated by the Owner.

Section 2.04 - Notice and Service Thereof

Any notice to the Contractor from the Owner relative to any part of the Contract shall be in writing and service considered complete when said notice is sent or delivered in person to the Contractor or authorized representative, at the last address given by the Contractor.

Section 2.05 - Nomenclature

Materials, equipment or other Work described in words that have a generally accepted technical or trade meaning shall be interpreted as having said meaning in connection with the Contract.

Section 2.06 - Invalid Provisions

If any term or provision of the Contract Documents or the application thereof to any person, firm or corporation or circumstance shall, to any extent, be determined to be invalid or unenforceable, the remainder of the Contract Documents, or the application of such terms or provisions to persons, firms or corporations or circumstances other than those to which it is held invalid or unenforceable, shall not be affected thereby and each term or provision of the Contract Documents shall be valid and be enforced to the fullest extent permitted by law.

Section 2.07 – Interpretation of Contract Documents

- A. Should any provision in the Contract Documents be in conflict or inconsistent with the General Conditions or Supplements thereto, the General Conditions or Supplements thereto shall govern.
- B. Figured dimensions shall take precedence over scaled dimensions. Larger scale drawings shall take precedence over smaller scale drawings. Latest addenda shall take precedence over previous addenda and earlier dated drawings and specifications.
- C. Should a conflict occur in or between or among any parts of the Contract Documents that are entitled to equal preference, the better quality or greater quantity of material shall govern, unless the Owner directs otherwise.
- D. Drawings and specifications are complementary. Anything shown on the drawings and not mentioned in the specifications, or mentioned in the specifications and not shown on the drawings, shall have the same effect as if shown or mentioned in both.

Section 2.08 - Copies of Contract Documents

The Owner may furnish to the Contractor up to three (3) paper copies and one electronic (PDF) copy of the Contract Documents without charge. Additional sets may be furnished at the costs of reproduction and mailing.

ARTICLE 3 -- SITE CONDITIONS

Section 3.01 - Subsurface or Site Conditions Found Different

- A. The Contractor acknowledges that the Contract amount set forth in its bid includes such provisions which the Contractor deems sufficient for all subsurface or site conditions the Contractor could reasonably anticipate encountering as indicated in the Contract Documents, or borings, reports, rock cores, foundation investigation reports, topographical maps or other information available to the Contractor or from the Contractor's inspection and examination of the Site prior to submission of bids.
- B. The Owner assumes no responsibility for the correctness of any boring or other subsurface information and makes no representation whatsoever regarding subsurface conditions and test borings, reports, rock cores, foundation investigation and topographical maps which may be made available to the Contractor.
- C. Should the Contractor encounter subsurface or site conditions at the Site materially differing from those shown on or described in or indicated in the Contract Documents, the Contractor shall

immediately give notice to the Owner of such conditions and shall not disturb said conditions until authorized to do so by the Owner.

- D. Subsurface or site conditions found materially differing from those that could have been reasonably anticipated may be cause for change to the Contract amount and time of completion. This determination will be made at the sole discretion of the Owner.

Section 3.02 - Verifying Dimensions and Conditions

- A. The Contractor shall take all measurements at the Site and shall verify all dimensions and conditions at the Site before proceeding with the Work. If said dimensions or conditions are found to be in conflict with the Contract Documents, the Contractor immediately shall refer said conflict to the Owner in writing. The Contractor shall comply with any revised Contract Documents.
- B. During the performance of the Work, the Contractor shall verify all field measurements prior to fabrication of building components or equipment, and proceed with the fabrication to meet field conditions.
- C. The Contractor shall review all Contract Documents to determine exact location of all Work and verify spatial relationships of all the Work. Any question concerning said location or spatial relationships shall be submitted in a manner approved by the Owner.
- D. Special locations for equipment, pipelines, ductwork and other such items of the Work, where not dimensioned on plans, shall be coordinated with other affected Contractors.
- E. The Contractor shall be responsible for the proper fitting of the Work in place.

Section 3.03 - Surveys

Unless otherwise expressly provided in the Contract Documents, the Owner shall furnish the Contractor all surveys of the property necessary for the Work, but the Contractor shall lay out the Work.

ARTICLE 4 -- CONTRACTOR

Section 4.01 - Representations of Contractor

The Contractor represents and warrants:

- A. That it is financially solvent and is experienced in and competent to perform the Work, and has the staff, manpower, equipment, subcontractors, and suppliers available to complete the Work within the time specified for the Contract amount.
- B. That it is familiar with all federal, state, and local laws, ordinances, orders, rules and regulations which may affect the Work.
- C. That any temporary and permanent Work required by the Contract Documents can be satisfactorily constructed, and that said construction will not injure any person or damage any property.
- D. That it has carefully examined the Contract Documents and the Site, and from the Contractor's own investigations is satisfied as to the nature and materials likely to be encountered, the character of equipment and other facilities needed for the performance of the Work, the general and local conditions, and all other materials or items which may affect the Work.

- E. That it is satisfied that the Work can be performed and completed as required in the Contract Documents, and warrants that it has not been influenced by any oral statement or promise of the Owner or the Design Professional.
- F. That it will comply with all applicable local, state, and federal rules and regulations and all applicable construction standards of the Joint Commission on the Accreditation of Healthcare Organizations (JCAHO) and other accrediting agencies and organizations.

Section 4.02 - Errors or Discrepancies

The Contractor shall examine the Contract Documents thoroughly before commencing the Work and report any errors or discrepancies to the Owner, in writing, within five (5) days of discovery.

Section 4.03 - Coordinated Composite Drawings

The Contractor shall prepare coordinated composite drawings clearly showing how the Work of the Contractor is to be performed in relation to the work of other contractors or subcontractors, prepare scaled drawings and sections in the same digital software program, version and operating system as the original contract drawings or in an operating system approved by the Owner.

Section 4.04 - Meetings

The Contractor shall attend all meetings as directed by the Owner.

Section 4.05 - Supervision by Contractor

- A. The Contractor shall provide full-time competent supervision for the duration of the Contract. During the course of on-site work the Contractor shall provide a full-time on-site superintendent who shall have full authority to act for the Contractor at all times. The superintendent must be able to read, write and speak English fluently, as well as communicate with the workers.
- B. If at any time the supervisory staff is not satisfactory to the Owner, the Contractor shall, if directed by the Owner, immediately replace such supervisory staff with other staff satisfactory to the Owner at no additional cost to the Owner.
- C. The Contractor shall remove from the Work any employee of the Contractor or of any Subcontractor when so directed by the Owner.

Section 4.06 – Project Scheduling

- A. The Contractor shall provide a project scheduler, experienced in critical path method (CPM) scheduling. The scheduler's experience and credentials shall be submitted to the Owner for review and acceptance prior to proceeding with scheduling of the Work.
- B. Using the software required by the Owner, the Contractor shall prepare, maintain, and revise the CPM schedule to monitor the progress of all project operations, in accordance with the Contract Documents.
- C. Construction activities shall be interrelated on a single schedule that represents the entire Contract duration from Notice to Proceed to Substantial Completion to Contract Closeout. The Contractor shall

utilize the CPM schedule of network calculation to generate the CPM schedule. The Contractor shall assure all logic constraints are identified between the Work of the Contract and the Work of other Contractors and Owner's Work prior to approval of the CPM schedule.

- D. Review comments made by the Owner on the CPM schedule shall not relieve the Contractor from compliance with requirements of the Contract Documents. The Contractor shall be responsible for scheduling, sequencing, and performing the Work to comply with the requirements of the Contract Documents. The Owner's review comments are offered as a courtesy and are not conditions of Owner acceptance, but are for the general conformance with scheduling requirements and industry scheduling concepts.
- E. The Contractor expressly understands and agrees that no additional compensation shall be paid for any alterations to planned construction sequence to accommodate such revisions. Failure to include any element of work required for the performance of the Work shall not excuse the Contractor from completing all the Work required within the applicable completion date of each phase regardless of the Owner's approval of the precedence diagram.
- F. The Owner may withhold Applications for Payment if the Contractor fails to provide an acceptable project scheduler, network analysis, schedules or revisions thereto in accordance with requirements of project scheduling.

Section 4.07 - Worker Identification and Site Access Control

- A. All employees of the Contractor and every Subcontractor must comply with all site access control and security procedures prescribed by the Owner which may include, but are not limited to, the wearing of Owner issued identification badges, ingress and egress through controlled entry and exit points, and use of card readers or other electronic identity verification devices.
- B. All employees of the Contractor and every Subcontractor, prior to entering the Site for the first time, must obtain an identification badge if issued by the Owner and produce to the Owner a valid form of government-issued photo identification and furnish other background information, including but not limited to the following:

- Full Name
- Last four (4) digits of Social Security Number
- Home Address (#/Street/Apt./City/Zip)
- Contractor/Subcontractor Name
- Job Classification
- Union Local Affiliation, if any

The Owner recognizes that certain information requested above constitutes personal information and will take all reasonable steps to ensure the security and confidentiality of this information as permitted by law.

- C. All employees of the Contractor and every Subcontractor must visibly display on their person, while entering and on the Site, an identification badge if issued by the Owner. In the event said identification badge has not been issued by the Owner, all employees of the Contractor and every Subcontractor must produce a valid form of government-issued photo identification promptly upon request of the Owner. Failure to display such identification or to display or produce such identification in the manner as prescribed by the Owner may result in the employee's non-admittance

to or immediate removal from the Site. The Owner will send written confirmation to the Contractor confirming the action taken, if requested by the Contractor.

Section 4.08 - Related Work

- A. The Contractor should examine the Contract Documents for Work of its Contract and any related work of other contracts, to ascertain the relationship of its Work to any related work of other contracts.
- B. The Owner may contract with a Design Professional, Construction Manager or other consultants to provide services to the Owner. The services enumerated in consultant contracts are for the benefit of the Owner who may choose to utilize any or all of said services. The Contractor has no privity of contract with the Design Professional, Construction Manager or any other consultant that contracts with the Owner and should not assume that all of the services enumerated in said contracts will be provided.

Section 4.09 – Coordination with Separate Contracts

- A. The Owner may award other contracts for work which may proceed simultaneously with the execution of the Work. The Contractor shall coordinate the Contractor's operations with those of other contractors as directed by the Owner. Cooperation shall be required in the arrangements for access, the storage of material, and in the detailed execution of the Work.
- B. The Contractor shall keep informed of the progress and workmanship of other contractors and any subcontractors and shall notify the Owner in writing immediately of lack of progress or defective workmanship on the part of other contractors or subcontractors, where said delay or defective workmanship may interfere with the Contractor's operations.
- C. Failure of a Contractor to keep so informed and failure to give notice of lack of progress or defective workmanship by others shall be construed as acceptance by the Contractor of said progress and workmanship as being satisfactory for proper coordination with the Work.
- D. Where the Contractor shall perform Work in close proximity to work of other contractors or subcontractors, or where there is evidence that Work of the Contractor may interfere with work of other contractors or subcontractors, the Contractor shall assist in arranging space conditions to make satisfactory adjustment for the performance of the Work. If the Contractor performs work in a manner that causes interference with the work of other contractors or subcontractors, the Contractor shall make changes necessary to correct the condition at no additional cost to the Owner.

Section 4.10 - Cooperation with Other Contractors

- A. During the performance of the Work, other contractors may be engaged in performing work. The Contractor shall coordinate the Contractor's Work with the work of said other contractors in such a manner as the Owner may direct.
- B. If the Owner determines that the Contractor is failing to coordinate the Work with the work of other contractors as the Owner has directed:
 - 1. The Owner shall have the right to withhold any payments due under the Contract until the Contractor complies with the Owner's direction; and

2. The Contractor shall assume the defense and pay on behalf of the Owner any and all Claims or judgments or damages and from any costs or damages to which the Owner may be subjected or which the Owner may suffer or incur by reason of the Contractor's failure to promptly comply with the Owner's directions.
- C. If the Contractor notifies the Owner, in writing, that another contractor on the Site is failing to coordinate the work of said Contractor with the Work, the Owner shall investigate the charge. If the Owner finds it to be true, the Owner shall promptly issue such directions to the other contractor with respect thereto as the situation may require. The Owner shall not be liable for any damages suffered by the Contractor by reason of the other contractor's failure to promptly comply with the directions so issued by the Owner, or by reason of another contractor's default in performance.
- D. Should the Contractor sustain any damage through any act or omission of any other contractor having a contract with the Owner or through any act or omission of any subcontractor of said other contractor, the Contractor shall have no Claim against the Owner for said damage.
- E. Should any other contractor having or which shall have a contract with the Owner sustain damage through any act or omission of the Contractor or through any act or omission of a Subcontractor, the Contractor shall reimburse said other contractor for all said damages and shall indemnify and hold the Owner harmless from all said Claims. The Owner's right to indemnification hereunder shall in no way be diminished, waived or discharged, by its recourse to assessment of liquidated damages as provided in the Contract Documents, or by the exercise of any other remedy provided by the Contract or law.
- F. The Owner cannot guarantee the responsibility, efficiency, unimpeded operations or performance of any contractor. The Contractor acknowledges these conditions and shall bear the risk of all delays including, but not limited to, delays caused by the presence or operations of other contractors and delays attendant upon any CPM schedule approved by the Owner and the Owner shall not incur any liability by reason of any delay.

ARTICLE 5 -- MATERIALS AND LABOR

Section 5.01 - Contractor's Obligations

- A. The Contractor shall, comply with all the terms of the Contract Documents and complete all the Work in a good workmanlike manner, within the time specified in the Contract and to the satisfaction of the Owner.
- B. The Contractor shall provide and pay for labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for the proper execution and completion of the Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the Work.
- C. The Contractor shall enforce strict discipline and good order among the Contractor's employees and other persons carrying out the Work. The Contractor shall not permit employment of unfit persons or persons not skilled in tasks assigned to them.
- D. Any labor, materials or means whose employment, or utilization during the course of the Contract may tend to or in any way cause or result in strike, work stoppages, delays, suspension of Work or similar troubles by workers employed by the Contractor, its Subcontractors or material suppliers, or by any of the trades working in or about the Site, or by other Contractors, their Subcontractors or

material suppliers pursuant to other contracts shall not be allowed. Any violation by the Contractor of this requirement may in the sole judgment of the Owner be considered in default and for the Owner to take action against the Contractor as set forth in Article 11 - Termination or Suspension, or such other action as the Owner may deem proper.

Section 5.02 - Means and Methods of Construction

Unless otherwise provided in the Contract Documents, the Means and Methods of Construction shall be such as the Contractor may choose subject to the Owner's right to reject the Means and Methods of Construction proposed by the Contractor, which in the opinion of the Owner:

- Will constitute or create a hazard to the Work or to persons or property.
- Will not produce finished Work in accordance with the terms of the Contract.
- Will be detrimental to the overall progress of the Project.

The Owner's approval of the Contractor's Means and Methods of Construction, or their failure to exercise their right to reject such means and methods, shall not relieve the Contractor of its obligation to complete the Work, nor shall the exercise of such right to reject or create a cause of action for damages.

Section 5.03 - Contractor's Title to Materials

- A. No materials or supplies for the Work shall be purchased by the Contractor or by any Subcontractor subject to any chattel mortgage or under a conditional sale or other agreement by which an interest is retained by any other party. The Contractor warrants that the Contractor has full, good and clear title to all materials and supplies used by the Contractor in the Work, or resold to the Owner pursuant to the Contract Documents free from all liens, Claims or encumbrances.
- B. All materials, equipment and articles that become the property of the Owner shall be new unless specifically stated otherwise.

Section 5.04 - Comparable Products ("Or Equal" Clause)

- A. Whenever a material, article or piece of equipment is identified on the drawings or in the specifications by reference to manufacturers' or vendors' names, trade names, catalogue number, or make, said identification is intended to establish a standard. Any material, article or equipment of other manufacturers and vendors which performs satisfactorily the duties imposed by the design intent may be considered equally acceptable provided that, in the opinion of the Design Professional, the material, article or equipment so proposed is of equal quality, substance and function and the Contractor shall not Provide, Furnish or Install any said proposed material, article or equipment without the prior written approval of the Design Professional. The burden of proof and all costs related thereto concerning the "or equal" nature of the substitute item, whether approved or disapproved, shall be borne by the Contractor.
- B. Any costs savings to an approved comparable product realized by the Contractor shall be shared equal between the Owner (50%) and Contractor (50%).
- C. Where the Design Professional, pursuant to the provisions of this Section, approves a product proposed by the Contractor and said proposed product requires a revision of the Work covered by this Contract, or the work covered by other contracts, all changes in the work of all contracts, revision or

redesign, and all new drawings and details required therefore shall be provided by the Contractor at the cost of the Contractor and shall be subject to the approval of the Design Professional.

- D. No substitution will be permitted which may result in a delay to the Project.

Section 5.05 - Quality, Quantity and Labeling

- A. The Contractor shall furnish materials and equipment of the quality and quantity specified in the Contract.
- B. When materials are specified to conform to any standard, the materials delivered to the Site shall bear manufacturer's labels stating that the materials meet said standards.
- C. The above requirements shall not restrict or affect the Owner's right to test materials as provided in the Contract.
- D. The Contractor shall develop and implement quality control plans to assure itself and the Owner that all Work performed by the Contractor and its Subcontractors complies fully with all contract requirements, and shall submit the plans to the Owner as required by the Contract. See the Submittals Section of the General Requirements. The Contractor's quality control plans shall be independent of any testing or inspection performed by or on behalf of the Owner.

Section 5.06 - Tax Exemption

- A. The Owner is exempt from payment of federal, state, and local taxes; sales and compensating use taxes of the State of New York and of cities and counties on all materials and supplies incorporated into the completed Work. These taxes are not to be included in bids. This exception does not apply to tools, machinery, equipment or other property leased by or to the Contractor or a Subcontractor, or to supplies and materials which, even though they are consumed, are not incorporated into the completed Work, and the Contractor and Subcontractors shall be responsible for and pay any and all applicable taxes, including sales and compensating use taxes, on said leased tools, machinery, equipment or other property and upon all said unincorporated supplies and materials.
- B. The Contractor and Subcontractors shall obtain any and all necessary certificates or other documentation from the appropriate governmental agency or agencies, and use said certificates or other documentation as required by law, rule or regulation.

ARTICLE 6 -- SUBCONTRACTS

Section 6.01 - Subcontracting

- A. The Contractor may utilize the services of Subcontractors, subject to the limits prescribed in Section 7.0 – Approval of Subcontractors/Subcontract Limits stated in the Information for Bidders. Exceeding stated limits, without prior written approval by the Owner, may be cause for Contract termination.
- B. The Contractor shall submit to the Owner the name of each proposed Subcontractor as required by the Contract. The Owner reserves the right to disapprove any proposed Subcontractor and such disapproval shall not result in additional cost to the Owner. If requested by the Owner, the Contractor shall provide copies of any and all Subcontract and purchase order agreements related to the Work.

- C. The Contractor's use of Subcontractors shall not diminish the Contractor's obligation to complete the Work. The Contractor shall control and coordinate the Work of Subcontractors and be fully responsible for the acts and omissions of Subcontractors, and of persons either directly or indirectly employed by Subcontractors. The Contractor shall be responsible for all guarantees and warranties provided by Subcontractors.
- D. The Contractor shall be responsible for requiring each Subcontractor, to extent of the Work to be performed by such Subcontractor, to be bound to the Contractor by all the terms, conditions and requirements of the Contract Documents, and to assume towards the Contractor all the obligations and responsibilities which the Contractor, by the Contract Documents, assumes toward the Owner.
- E. Nothing contained in the Contract or any subcontract shall create any contractual relationship between Subcontractors and the Owner.
- F. In selecting a Subcontractor, the Contractor shall consider whether the Subcontractor appears on any list of entities debarred or suspended from doing business with a government entity, including the List of Parties Excluded from Federal Procurement and Non-procurement Programs published by the U.S. General Services Administration. The Contractor shall not Subcontract with any Subcontractor on the List of Employers Ineligible To Bid On Or Be Awarded Any Public Contract, published by the NYS Department of Labor Bureau of Public Work. The Contractor shall not Subcontract with any Subcontractor on the debarment list published by the NYS Workers' Compensation Board pursuant to Section 141-b of the NYS Workers' Compensation Law.
- G. Prior to or after award of the Contract, if requested by the Owner, the Contractor shall require a Subcontractor to submit a NYS Vendor Responsibility Questionnaire and a DASNY Vendor Questionnaire.
- H. The Contractor shall submit a NYS Vendor Responsibility Questionnaire and a DASNY Vendor Questionnaire to the Owner for each Subcontractor proposed for the Work with a subcontract value of two million dollars (\$2,000,000) or greater. Refer to Article 19 – Executive Order No. 125.
- I. After execution of the Contract, the Owner will provide to the Contractor copies of the Owner's Code of Business Ethics Certification form. The Contractor is required to have each Subcontractor, at all tiers, complete the form prior to the Subcontractor beginning work. The completed forms are to be filed by the Contractor with the Owner. A failure to comply with this requirement may result in the Subcontractor(s) being removed from the Project Site.

ARTICLE 7 -- CHANGES IN THE WORK

Section 7.01 - Changes

- A. Without invalidating the Contract, the Owner, in writing, may order changes in the Work by altering, adding or deducting from the Work of the Contract. For all approved changes in the Work, the Owner shall issue to the Contractor, a Notice to Proceed followed by an executed Change Order form, processed through Contract Manager, which both forms shall include a change request number. No alteration to these forms shall be accepted and no payment shall be due the Contractor until said forms are issued and executed by the Owner. If the Substantial Completion date is affected by a change, an increase or decrease to the duration, in days shall be included on the Change Order form.

1. The Owner may process a Forced Change Order if the Contractor disagrees with the changes in the Work. The Contractor must comply with the changes in the Work, and continue with the Work pursuant to Article 10 - Claims and Disputes.
- B. The Contract sum may be increased or decreased by one or more of the following methods, as determined by the Owner:
1. By applying the applicable unit price or prices contained in the Contract Documents, or negotiated pursuant to the provisions of this Article. Unit prices are limited to the quantities specified in the Contract Documents or Change Order. Quantities greater than specified in the Contract Documents or Change Order are subject to negotiations by the Owner.
 2. By estimating the fair and reasonable cost of the changes in the Work or deleted Work.
 3. By determining the actual cost of the changes in the Work and considering the following:
 - a. Labor, including all wages, required wage supplements and insurance required by law, paid to employees below the rank of superintendent directly employed at the Site. Minimum wages are the prevailing rate of wages defined by the NYS Department of Labor. Actual wages in excess, paid by the Contractor, may be considered by the Owner.
 - b. Premiums or taxes paid by the Contractor for worker's compensation insurance, unemployment insurance, FICA tax and other payroll taxes as required by law, net of actual and anticipated refunds and rebates.
 - c. Premiums for liability insurance associated with Change Order Work.
 - d. Materials associated with Change Order Work.
 - e. Equipment, excluding hand tools, which in the judgment of the Owner, would have been or will be employed in the Work. The Owner may employ the use of rental rates it deems most appropriate from the "Green Book", the "Blue Book", or from the Associated General Contractors of America. In no case will the equipment rental cost exceed the purchase price of the equipment. Self-owned equipment is defined to include equipment rented from Contractor-controlled or loosely affiliated companies. It is the duty of the Contractor to utilize either rented or self-owned equipment that is of a nature and size appropriate for the Work to be performed. The Owner reserves the right to determine reasonable and appropriate equipment sizing, and at the Owner's discretion, it may adjust the costs allowed to reflect a smaller or less elaborate piece of equipment more suitable for performance of the changes in the Work.
 - f. To determine the daily and hourly rate of self-owned equipment, the monthly rate shall be divided by twenty-two (22) to establish a daily rate; or by one hundred and seventy-six (176) to establish the hourly rate. The operating cost listed in the "Blue Book" would be added to this rate to establish the billable rate.
- C. For each proposed changes in the Work, the Contractor shall submit to the Owner, within the time frame provided by the Owner, the following information:
1. A detailed proposal of labor, material and equipment costs for the proposed changes in the Work. The Contractor and Subcontractors shall use the Owner's Contractor and Subcontractor proposal forms, which are available directly from the Owner or from DASNY's website <http://www.dasny.org>.
 2. The Contractor's and Subcontractor's proposals must provide a notarized statement as follows:

"I hereby certify that the value for the labor, material and equipment that comprise the proposals, represents the value of said work, material and equipment for the work performed or to be performed, pursuant to the Contract between the undersigned and DASNY."

3. Signed and notarized labor rate worksheet to determine hourly rates for each classification of worker associated with the proposed changes in the Work. The Contractor shall use the Owner's labor rate worksheets, which are available directly from the Owner or from DASNY's website <http://www.dasny.org>. The Contractor agrees to provide additional documentation to further verify labor and material costs at the Owner's request.
 4. Narrative and fragment schedule, which describes the impact on the CPM schedule in duration days associated with the proposed changes in the Work.
- D. Each Contractor's and Subcontractor's proposals shall be reviewed by the Owner consistent with the requirements of Article 7 – Changes in the Work. Upon the Owner's approval, and with appropriate approval authority, the Owner shall issue, to the Contractor, the Notice to Proceed and execute the Change Order form between the Contractor and the Owner.
- E. Any information representing the value of the Work performed, materials supplied and equipment utilized contained in the Contractor's and Subcontractor's proposals that constitutes False Representation may subject the undersigned party to criminal charges, including NYS Penal Law Sections 175.35 (Offering a False Instrument for Filing) and 210.40 (False Statement) and/or Title 18 U.S.C. Sections 1001 (False and Fraudulent Statements) and/or termination of the Contract for cause and civil prosecution under Article XIII of the State Finance Law – the New York False Claims Act.
- F. The compensation specified in the executed Change Order includes full payment for the changes in the Work covered thereby, and the Contractor waives all rights to any other compensation for the changes in the Work, damage or expense.
- G. The Contractor shall furnish satisfactory bills, payrolls and vouchers covering all items of cost and when requested by the Owner shall give the Owner access to all accounts and records relating thereto, including records of Subcontractors and material suppliers. This information shall not be used as a basis to reduce compensation for Change Order work items for which the Owner has accepted the Contractor's proposal consistent with paragraph "C" of this section, providing the work was performed in a manner consistent with the accepted proposal.
- H. At Substantial Completion, the Owner may address increased bonding costs which may have resulted from changes in the Work. The Contractor must provide satisfactory proof and paid invoice of increased costs. The Owner will not pay overhead and profit on any increased costs for bonding.

Section 7.02 - Overhead and Profit

Note: This section may be supplemented by the CM's own General Conditions to the extent the CM's markup provisions differ, but in no event shall Trade Contractor or Sub-contractor markups exceed the amounts stated in this Section. Furthermore, only the trade contractors and their Sub-contractors are entitled to markups provided for in this section. The CM shall only receive their fee in accordance with the Construction Phase and General Conditions Work Phase Contracts. Also see Sections 9, 13 and 14 of Appendix A of the Construction Phase Contract for provisions related to change orders.

- A. See Example A for changes in the Work performed directly by the Contractor, whether a base cost is arrived at by estimated cost or actual cost method; add to base cost a sum equal to twenty percent. See Exception - Paragraph "D".

Example A:

Contractor base cost	\$1,000
20% overhead and profit	<u>200</u>
Total	\$1,200

- B. See Example B for changes in the Work performed by a Subcontractor under contract with the Contractor, where estimated or actual cost is Ten Thousand Dollars (\$10,000.00) or less; add to the base cost a sum equal to twenty percent of cost, for the benefit of the Subcontractor. For the benefit of the Contractor; add an additional sum equal to ten percent of the Subcontractor's base cost.

Example B:

Subcontractor base cost	\$1,000
20% Subcontractor overhead and profit	<u>200</u>
Subcontractor Total	\$1,200
10% Contractor overhead and profit on base cost	<u>100</u>
Total	\$1,300

- C. See Example C for changes in the Work performed by a Subcontractor, under contract with the Contractor, which exceeds a base cost of Ten Thousand Dollars (\$10,000) in estimated or actual cost; add to the base cost a sum equal to twenty percent of cost for the benefit of the Subcontractor. For the benefit of the Contractor; add an additional sum equal to ten percent of the first Ten Thousand Dollars (\$10,000) of the Subcontractor's base cost, plus five percent of the next Ninety Thousand Dollars (\$90,000) of the Subcontractor's base cost, plus three percent of any sum in excess of One Hundred Thousand Dollars (\$100,000) of the Subcontractor's base cost.

Example C:

Subcontractor base cost	\$200,000
20% Subcontractor over head and profit	<u>40,000</u>
Subcontractor Total	\$240,000
10% Contractor overhead and profit on first \$10,000 base cost	1,000
5% on next \$90,000 base cost	4,500
3% on base cost over \$100,000	<u>3,000</u>
Total	\$248,500

- D. See Example D for overhead and profit on major equipment such as: switchgear, transformers, air handling units, boilers, etc. For extra equipment purchases by the Contractor or Subcontractors which exceeds a base cost of Ten Thousand dollars (\$10,000) in estimated or actual cost; add to the base cost for the benefit of the Contractor a sum equal to ten percent of the first Ten Thousand dollars (\$10,000) of the vendor's base cost plus five percent of the next Ninety Thousand dollars (\$90,000) of the vendor's base cost, plus three percent of any sum in excess of One Hundred Thousand dollars (\$100,000) of the vendor's base cost. If the equipment is supplied by the Subcontractor, the Contractor is entitled to a maximum of ten (10) percent of the first Ten Thousand dollars (\$10,000) of the base cost.

Example D:

Vendor base cost	\$200,000
10% Contractor or Subcontractor overhead and profit on first \$10,000 base cost	1,000
5% on next \$90,000 base cost	4,500
3% on base cost over \$100,000	<u>3,000</u>
Contractor or Subcontractor Total	\$208,500
10% Contractor overhead and profit on first \$10,000 base cost when equipment	

is supplied by the Subcontractor, no other mark-up allowed	<u>1,000</u>
Total	\$209,500

- E. See Example E for overhead and profit on a material only Change Order. For increased material purchases by the Contractor or Subcontractors which exceed a base cost of Ten Thousand dollars (\$10,000) in estimated or actual costs; add to the base cost for the benefit of the Contractor a sum equal to ten percent of the first Ten Thousand dollars (\$10,000) of the supplier's cost plus five percent of the next Ninety Thousand dollars (\$90,000) of the supplier's cost, plus three percent of any sum in excess of One Hundred Thousand dollars (\$100,000) of the supplier's cost. If the material is supplied by the Subcontractor, the Contractor is entitled to a maximum of ten (10) percent of the first Ten Thousand dollars (\$10,000) of the base cost.

Example E:

Material cost (net difference between original contract and revised)	\$200,000
10% Contractor or Subcontractor overhead and profit on first \$10,000 base cost	1,000
5% on next \$90,000 base cost	4,500
3% on base cost over \$100,000	<u>3,000</u>
Contractor or Subcontractor Total	\$208,500
10% Contractor overhead and profit on first \$10,000 base cost when material is supplied by the Subcontractor, no other mark-up allowed	<u>1,000</u>
Total	\$209,500

- F. Other than the overhead and profit described in Section 7.02A, no further overhead and profit will be allowed for changes to the Work performed by a Subcontractor under contract with the Contractor or for major equipment or material supplier determined to be an affiliate of the Contractor. An affiliate is considered any firm or entity in which the Contractor or any individual listed on the NYS Vendor Responsibility Questionnaire that either owns 5% or more of the shares of, or is one of the five largest shareholder, a director, officer, partner or proprietor of said Subcontractor, major equipment or material supplier.

1. The determination of an affiliate firm or entity will be made at the sole discretion of the Owner.

- G. No overhead and profit shall be made for changes in the Work performed by a Subcontractor not under direct contract with the Contractor. No overhead and profit shall be paid on the premium portion of overtime pay. Where the changes in the Work involve both, an increase and a reduction in similar or related Work, the overhead and profit allowance shall be applied only to the cost of the increase that exceeds the cost of the reduction.

Section 7.03 - Deduct Change Order

The amount of credit to be allowed by the Contractor to the Owner for a deletion or change which results in a decrease in the Contract amount shall be as determined by the Owner.

ARTICLE 8 -- PAYMENT

Section 8.01 - Provision for Payment

- A. The Contractor shall complete and submit to the Owner for review, the detailed Schedule of Values (*a form in the Contract Document, which establishes the minimum level of payment detail to formulate an initial Application for Payment*) included in the Contract Documents prior to the Contractor's first Application for Payment (*a form provided by the Owner which provides*

certification by the Contractor for payment). It is understood and the Contractor acknowledges that the Schedule of Values is included as an administrative tool for the purpose of illustrating a format and minimum level of detail required, and shall not be considered as delineating the Contractor's scope of Work. The Owner may require the Contractor to revise its Schedule of Values. Further, the Owner reserves the right to accept only those cost distributions which, in the Owner's opinion, are reasonable, equitably balanced and correspond to the estimated quantities in the Contract Documents.

- B. The Owner shall not approve any billing request until the Owner approves the Schedule of Values.
- C. The Owner may make a partial payment to the Contractor on the basis of an approved Contractor's pencil copy (*a form provided by the Owner which establishes a billing request from the Contractor and when approved by the Owner, formulates the Application for Payment*) billing request of the Work performed during each preceding business month. The Owner shall retain five percent (5%) of the amount of each said billing request.
- D. Any partial payment made shall not be construed as a waiver of the right of the Owner to require the fulfillment of all the terms of the Contract.
- E. In preparing the Contractor's pencil copy billing request, material delivered to the Site and properly stored and secured at the Site and material approved to be stored off-site under such conditions as the Owner shall prescribe, may be taken into consideration. All costs related to the storage of materials are the sole responsibility of the Contractor.
- F. The Owner will provide an agreement for materials stored off-site and specific forms that the Contractor must complete and submit with any billing request for such material. Required information includes, but is not limited to: a general description of the material; a detailed list of the materials; a pre-approved storage area; segregation and identification of the material; insurance covering full value against all risks of loss or damage, with non-cancellation provision; immediate replacement agreement in event of loss or damage; agreement to pay the expense of all inspections of the material; ownership provisions; delivery guarantee; project completion statement; bill of sale, releases, and inventory.
- G. All monthly billing requests submitted by the Contractor shall be in the form and manner approved by the Owner. The Contractor shall furnish such affidavits, vouchers and receipts as to delivery and payment for materials as required by the Owner to substantiate each and every billing request.
- H. Timely payment by the Owner to the Contractor is governed by Section 2880 of the Public Authorities Law. Timely payment (7 days) by the Contractor to the Subcontractor is governed by Section 139-f of the State Finance Law.

Section 8.02 - Substantial Completion and Reduction of Retainage

- A. After the Owner has determined Substantial Completion of the Work, as evidence by the executed Notice of Substantial Completion, the Contractor shall submit to the Owner, for Owner's approval, a detailed estimate of the value of the known remaining items of Work as set forth by the Owner and a schedule of completion for said items of Work. The Owner shall review that estimate and make the final determination.

- B. The Owner, when all the Work is at Substantial Completion, shall pay to the Contractor the balance due the Contractor pursuant to the Contract less:
1. Two (2) times the value of any remaining items of Work to be completed or corrected.
 2. An amount necessary to satisfy any and all Claims, liens or judgments against the Contractor.
- C. As the remaining items of Work are completed and accepted by the Owner, the Owner shall pay the appropriate amount pursuant to the duly completed and submitted monthly billing request.
- D. The list of remaining Work items may be expanded to include additional items of corrective or completion Work until final Contract Closeout by the Owner. Appropriate payments may be withheld to cover the value of these items pursuant to this Section.
- E. The Contractor may request from the Owner a reduction of retainage upon Substantial Completion of the Work or when a phase of the Work is accepted by the Owner.
- F. The acceptance by the Contractor of the first payment of reduction of retainage shall be and shall operate as a release to the Owner of all Claims by and all liability to the Contractor for all items in connection with the Work and for every act and neglect of the Owner and others relating to or arising out of the Work. This provision may be waived only by the Owner's Office of Counsel. No payment, final or otherwise, shall operate to release the Contractor or the Contractor's sureties from any obligations under this Contract or the performance or payment bonds.

Section 8.03 - Release and Consent of Surety

Notwithstanding any other provision of the Contract Documents to the contrary, reduction of retainage and/or the final Application for Payment pursuant to Section 17.02 shall not become due until the Contractor submits to the Owner a General Release and Consent of Surety to said payment and completes all Work and provides all documents as evidenced by the executed Notice of Substantial Completion as required by the Contract in form and content acceptable to the Owner. No payment, final or otherwise, shall operate to release the Contractor or the Contractor's sureties from any obligations under this Contract or the performance or payment bonds.

Section 8.04 - Liens

Upon the Owner's receipt of a lien, a sum which shall be one and one-half (1 1/2) times the amount stated to be due in the notice of lien shall be deducted from the current payment due the Contractor. This sum shall be withheld until the lien is discharged.

Section 8.05 - Withholding of Payments

- A. The Owner may withhold from the Contractor any part of any payment as may, in the judgment of the Owner, be necessary:
1. To assure payment of just claims of any entity supplying labor, materials or equipment for the Work.
 2. To protect the Owner from loss due to defective Work not remedied.
 3. To protect the Owner, Client, Construction Manager or Consultant from loss due to failure to defend, loss due to injury to persons or damage to the Work or property of other Contractors, Subcontractors or others caused by the act or neglect of the Contractor or Subcontractors.

4. To assure payment of fines and penalties, this may be imposed on the Contractor pursuant to the provisions of the contract.
 5. To assure payment of fines and penalties that may be imposed on the Contractor pursuant to Article 20 - Opportunity Programs. The estimated amount of said fines and penalties shall be the difference between the planned dollar amount of M/WBE sub-contract awards and the actual dollar amount of such awards.
 6. To protect and make whole the Owner from a contractor's non-compliance to the requirements set forth in Article 15 – Insurance and Bonds.
 7. Damage claimed to have been caused directly or indirectly by the failure of the Contractor to perform the Work of the Contract in strict accordance with the Contract Documents.
- B. The Owner shall have the right to apply any such amounts so withheld in such a manner as the Owner may deem proper to satisfy said claims, fines and penalties, or to secure said protection. Said application of the money shall be deemed payments for the account of the Contractor.

Section 8.06 - Late Payment

Timeliness of payment and any interest to be paid to the Contractor for late payment shall be governed by Section 2880 of the Public Authorities Law, to the extent required by law.

Section 8.07 - Owner Liability

- A. The provisions of Article 8 are solely for the benefit of the Owner, and any action or non-action here under by the Owner shall not give rise to any liability on the part of the Owner.
- B. The Contractor shall comply with the requirements of Section 10.07 – Limitations on Actions.

ARTICLE 9 -- TIME OF COMPLETION

Section 9.01 - Time of Completion

- A. The Work shall commence at the time stated in the Notice to Proceed and shall be completed no later than the date of Substantial Completion specified in the Contract. Notwithstanding anything to the contrary, a schedule submitted by the Contractor showing Substantial Completion earlier than that specified in the Contract shall not entitle the Contractor to any additional cost in the event the earlier date is not realized.
- B. It is hereby understood and mutually agreed, by and between the Contractor and the Owner, that Substantial Completion of the Work, as specified in the Contract, is an essential condition of the Contract.
- C. The Contractor agrees that the Work shall be prosecuted regularly, diligently and cooperatively with other contractors at such rate of progress as shall insure full completion thereof within the time specified. It is expressly understood and agreed, by and between the Contractor and the Owner, that the time for Substantial Completion of the Work described herein is reasonable.
- D. It is further agreed that time is of the essence for each and every portion of the Work. In any instance in which additional time is allowed for Substantial Completion of the Work, the new date of Substantial Completion established by said extension shall be of the essence. The Contractor shall not be charged with liquidated damages or any excess cost if the Owner determines that the Contractor is without fault and that the delay in Substantial Completion of the Work is due:

1. To any preference, priority or allocation order duly issued by the Government of the United States or the State of New York.
 2. To an unforeseeable cause beyond the control and without the fault of, or negligence of the Contractor, and approved by the Owner, including, but not limited to, acts of God or of public enemy, acts of the Owner, fires, epidemics, quarantine, restrictions, strikes, freight embargoes and unusually severe weather.
 3. To any delays of Subcontractors or suppliers occasioned by any of the causes specified in Subsections 1 and 2 of this paragraph the Contractor shall, within ten (10) days from the beginning of any such delay, notify the Owner in writing of the causes of the delay.
- E. The date of Substantial Completion may be extended by a Change Order or approval of the updated critical path method schedule, by the Owner.
- F. If the Contractor shall neglect, fail or refuse to obtain Substantial Completion within the date specified, or any proper extension thereof granted by the Owner, the Contractor agrees to pay to the Owner for loss of beneficial use of the Work of the Contract an amount specified in the Contract, not as a penalty, but as liquidated damages, for each and every calendar day that the Contractor is in default. Default shall include abandonment of the Work by the Contractor.
- G. Said amount of liquidated damages is agreed upon by and between the Contractor and the Owner because of the impracticability and extreme difficulty of fixing and ascertaining the actual damages which the Owner would sustain for loss of beneficial use of the Work of the Contract in the event of delay in Substantial Completion, and said amount is agreed to be the amount of damages sustained by the Owner and said amount may be retained from time to time by the Owner.
- H. The foregoing liquidated damages are intended to compensate the Owner only for the loss of beneficial use of the Work of the Contract. In addition, the Contractor shall be liable to the Owner, to the fullest extent permitted by law, for whatever actual damages (other than actual loss of beneficial use) the Owner may incur as a result of any actions or inactions of the Contractor or its Subcontractors including, without limitation, interest expense and carrying costs, liabilities to other Contractors working on the project or other third parties, job extension costs, and other losses incurred by the Owner. The provisions of this paragraph are for the exclusive use of the Owner, and shall not accrue to other contractors or third parties.

ARTICLE 10 -- CLAIMS AND DISPUTES

Section 10.01 - Notification of Claim

- A. A written notice of Claim shall be delivered concurrently to the Owner's Project Manager and Cost Control Unit by the Contractor within fifteen (15) working days after occurrence of the event giving rise to such Claim or within fifteen (15) working days after the Contractor first recognizes the condition giving rise to the Claim, whichever is earlier. Burden of proving the Owner's receipt of Claim shall be the Contractor's responsibility.
- B. Within ninety (90) working days of the initial notice of Claim, the Contractor shall substantiate the Claim and document the nature of the Claim and provide supporting cost data, Contractor's original cost estimate, P6 Project Management schedule demonstrating alleged impact and correlation to the Claim and a Contractor affidavit stating the following:

“I hereby certify that the value assigned the work, material and equipment that comprise the Claim, represents the actual value of said work, material and equipment pursuant to the Contract between the undersigned and DASNY.”

1. The Contractor shall provide, every thirty (30) days thereafter for as long as such damages are incurred, verified statements of the details and the amounts of such damages, together with documentary evidence of such damages.
 2. Failure of the Contractor to comply and submit the requirements stated in Section 10.01 may result in rejection of Claim.
- C. The Contractor shall provide the Owner’s Project Manager one (1) paper copy of the documented Claim and mail two (2) paper copies of the documented Claim to:
- DASNY
Cost Control Unit
515 Broadway
Albany, NY 12207-2964
- D. The value of any Claim, if allowed, shall be determined by the methods described in Article 7 – Changes in the Work.
- E. Any information representing the actual value of the Work and material contained in the Claim that constitutes False Representation, may subject the undersigned party to criminal charges, including NYS Penal Law Sections 175.35 (Offering a False Instrument for Filing) and 210.40 (False Statement) and/or Title 18 U.S.C. Sections 1001 (False and Fraudulent Statements) and/or Termination of the Contract for Cause and civil prosecution under Article XIII of the State Finance Law – the New York False Claims Act.

Section 10.02 - Claim for Extra Work

- A. If the Contractor wishes to make Claim for an increase in the Work of the Contract, or that any action or omission of the Owner is contrary to the terms and provisions of the Contract, a Claim shall be filed in accordance with the procedure herein.
- B. No payment for Extra Work shall be allowed unless directed by a Notice to Proceed executed by the Owner.
- C. The Contractor's failure to comply with any or all parts of this Article 10 shall be deemed to be:
 1. A conclusive and binding determination on the part of the Contractor that a Notice to Proceed, Work, action or omission does not involve Extra Work.
 2. A waiver by the Contractor of all claims for additional compensation or damages as a result of a Notice to Proceed, Work, action or omission.

Section 10.03 - Damages for Delay

Compensation by the Owner for any delay or hindrance from any cause whatsoever may be made by the Owner as provided by Section 9.01 E, by extending the date for Substantial Completion as specified in the Contract or by increasing the amount of the Contract. Denial of additional time may not entitle the Contractor to additional costs. No payment for increased cost, charge, expense or damage of any kind shall act as a waiver of the Owner’s right to compensate the Contractor solely by extending the date for

Substantial Completion. Failure of the Owner to respond in writing to a written request for additional time within thirty (30) days shall be deemed a denial of the request.

Section 10.04 - Claim for Additional Cost

If the Contractor wishes to make Claim for an increase in the Contract sum, a Claim shall be filed in accordance with the procedure herein. Denial of additional costs may not entitle the Contractor to additional time.

Section 10.05 - Continuance of the Work

Unless otherwise agreed in writing, the Contractor shall proceed diligently with said Claim and with the performance of the Work. The Contractor agrees that no default, act or omission of the Owner shall constitute a material breach of Contract entitling the Contractor to cancel or rescind the same or to suspend or abandon the performance of the Work.

Section 10.06 - Resolution of Claim

- A. Any resolution or determination by the Owner of a Claim shall be final, binding and conclusive on the Contractor. Within ten (10) working days after receiving notice of the Owner's resolution, the Contractor may file a written statement with the Owner that the Contractor reserves the Contractor's rights under the Contract in connection with the matters covered by said resolution or determination.
- B. At its discretion, the Owner may resolve any Claim without waiving its rights under the Contract.

Section 10.07 - Limitation on Actions

- A. No action or proceeding shall lie in favor of or shall be maintained by the Contractor against the Owner unless such action shall be commenced within six (6) months after the earliest following event:
 - 1. The date the Notice of Substantial Completion is executed by the Owner.
 - 2. Receipt, by the Owner, of the Contractor's final Application for Payment, if no Notice of Substantial Completion is issued.
 - 3. The date of termination if the Contract is terminated by the Owner.
- B. Filing an action or initiating a proceeding prior to Substantial Completion may be grounds for Termination for Convenience.
- C. No action or proceeding shall be brought against the Owner in any location other than Albany County unless the Owner specifically consents, in writing, to a change of venue.
- D. In the event that a judgment is obtained against the Owner, the Contractor agrees to accept no more than three percent (3%) interest, per annum on the judgment amount.

Section 10.08 - Waiver of Certain Causes of Action

No action or proceeding shall lie or shall be maintained by the Contractor, nor anyone claiming under or through the Contractor, against the Owner upon any claim arising out of or based upon the Contract, relating to the giving of notices or information.

ARTICLE 11 -- TERMINATION OR SUSPENSION

Section 11.01 - Termination for Cause

- A. In the event that any provision of the Contract is violated by the Contractor or by any Subcontractor, the Owner may serve written notice upon the Contractor and upon the Contractor's surety, if any, of the Owner's intention to terminate the Contract. Such notice shall contain the reasons for the intention to terminate the Contract upon a date specified by the Owner. The Contractor will be allowed an opportunity to show why its Contract should not be terminated for cause. If the violation or delay shall not cease or arrangements satisfactory to the Owner are not made, the Contract shall terminate upon the date so specified by the Owner.
- B. In the event of any such termination, the Owner may take over the Work and prosecute the Contract to completion and take possession of and may utilize such materials, appliances, and equipment on the Site and necessary or useful in completing the Work. The Contractor and Contractor's surety shall be liable to the Owner for all costs incurred by the Owner.
- C. In the event the termination for cause is determined to be improper, the termination shall be deemed a termination pursuant to Section 11.02 – Termination for Convenience of Owner.

Section 11.02 - Termination for Convenience of Owner

- A. The Owner, at any time, may terminate the Contract in whole or in part. Any such termination shall be effected by delivering to the Contractor a notice of termination specifying the extent to which performance of Work under the Contract is terminated and the date upon which the termination becomes effective. Upon receipt of the notice of termination, the Contractor shall act promptly to minimize the expenses resulting from the termination.
- B. The Owner shall pay the Contractor for Work of the Contract performed by the Contractor and accepted by the Owner for the period extending from the date of the last approved Application for Payment up to the effective date of the termination, including retainage, pursuant to Article 7 – Changes in the Work. In no event shall the Contractor be entitled to compensation in excess of the total consideration of the Contract.
- C. In the event of such termination the Owner may take over the Work and prosecute the Contract to completion and may take possession of and may utilize such materials, appliances, and equipment on the Site and necessary or useful in completing the Work.

Section 11.03 - Owner's Right to do Work

The Owner at any time may notify the Contractor, that the Owner will have the Work of the Contract or any part thereof, performed by others, without terminating the Contract or prejudice to any other right the Owner may have. The Owner may recover any and all costs related to such Work and deduct the value of such Work from the Contract amount.

Section 11.04 - Suspension of Work

- A. The Owner may order the Contractor in writing to suspend, delay or interrupt performance of all or any part of the Work for a reasonable period of time as the Owner may determine. The order shall contain the reason or reasons for issuance which may include, but is not limited to, latent field

conditions, substantial program revisions, acquisition of rights of way or real property, financial crisis, labor disputes, civil unrest, expired insurance, or acts of God.

- B. Upon receipt of a suspension order, the Contractor shall, as soon as practicable, cease performance of the Work as ordered and take immediate affirmative measures to protect such work from loss or damage.
- C. The Contractor specifically agrees that such suspension, interruption or delay of the performance of the Work shall not increase the cost of performance of the Work. However, to the extent that the suspension of the Work is through no fault of the Contractor, the Owner may consider requests for compensation provided that the justification is submitted in accordance with Article 10 – Claims and Disputes.
- D. The date of Substantial Completion of the Work may be extended by change order to compensate the Contractor for the time lost by the suspension, interruption or delay.

Section 11.05 - Stop Work

- A. Should the Contractor fail to comply with the terms of the Contract, the Owner, at any time, by written order to the Contractor, can require the Contractor to stop all, or any part, of the Work called for by the Contract. The order shall be specifically identified as a Stop Work Order. Upon receipt of the order, the Contractor shall immediately comply with its terms and take reasonable steps to protect the work covered by the order during the period of work stoppage. The Owner, at its option shall either:
 - 1. Cancel the Stop Work Order after the Contractor has successfully remedied the cause of the Stop Work Order.
 - 2. Invoke any other provision of Article 11 – Termination or Suspension.
- B. The Contractor shall not be entitled to an increase in time or costs as a result of the Stop Work Order.

ARTICLE 12 -- BENEFICIAL OCCUPANCY

Section 12.01 - Occupancy Prior to Substantial Completion

- A. If, before Substantial Completion, the Owner desires Beneficial Occupancy of any part of the Work, the Owner shall have the right to do so, and the Contractor shall in no way interfere with or object to Beneficial Occupancy. Payment for operational costs of project systems at time of Beneficial Occupancy shall be borne by the Owner, unless otherwise specified by the Contract.
- B. Said Beneficial Occupancy (1) shall not constitute acceptance of space, systems, materials or elements of the Work and (2) shall not affect the obligations of the Contractor for Work which is not in accordance with the requirements of the Contract or other obligations of the Contractor under the Contract.
- C. Should the Contractor request Owner acceptance of any project system related to the protection of life or property, prior to Beneficial Occupancy or Substantial Completion, the Owner may accept such system, however, the cost of maintaining such system in operating condition, and labor costs to operate the system including costs for remote public safety personnel, shall be borne by the Contractor. The guarantee period will begin from the date of Beneficial Occupancy.

- D. The Contractor shall continue the performance of the Work in a manner that shall not unreasonably interfere with said use, occupancy and operation by the Owner.

ARTICLE 13 -- INSPECTION AND ACCEPTANCE

Section 13.01 - Access to the Work

The Owner shall at all times have access to the Work and the Contractor shall provide proper facilities for access.

Section 13.02 - Notice for Testing and Inspection

If the Contract Documents, the Owner's instructions, laws, rules, ordinances, or regulations require that any Work be inspected or tested, the Contractor shall give the Owner a minimum of three (3) work days, unless otherwise specified, written notice of readiness of the Work for inspection or testing and the date fixed for said inspection or testing.

Section 13.03 - Reexamination of Work

Reexamination of any part of the Work may be ordered by the Owner, and if so ordered the Work must be uncovered by the Contractor. If said Work is found to be in accordance with the Contract, the Owner shall pay the cost of reexamination. If said Work is not found to be in accordance with the Contract, the Contractor shall pay the cost of reexamination and replacement.

Section 13.04 - Inspection of Work

All Work, all materials whether or not incorporated in the Work, all processes of manufacture, and all methods of construction shall be, at all times and places, subject to the inspection of the Owner, and the Owner shall be the final judge of the quality and suitability of the Work, materials, processes of manufacture, and methods of construction for the purposes for which said Work, materials, processes of manufacture, and methods of construction are used. Any Work not approved by the Owner shall be reconstructed, made good, replaced or corrected immediately by the Contractor including all work of other Contractors destroyed or damaged by said removal or replacement. Rejected material shall be removed immediately from the Site. Acceptance of material and workmanship by the Owner shall not relieve the Contractor from the Contractor's obligation to replace all Work that is not in full compliance with the Contract.

Section 13.05 - Defective or Damaged Work

If, in the opinion of the Owner, it is undesirable to replace any defective or damaged materials or to reconstruct or correct any portion of the Work damaged or not performed in accordance with the Contract Documents, the Contract amount shall be reduced, which in the judgment of the Owner, shall be deemed equitable.

Section 13.06 – Testing of Work

All materials and equipment used in the Work shall be subject to testing in accordance with accepted standards to establish conformance with the Contract Documents and suitability for intended use or as directed by the Owner. Any Work covered or concealed without the approval or consent of the Owner, shall be uncovered for examination. No testing by the Owner or by a testing laboratory on behalf of the

Owner relieves the Contractor of the responsibility to maintain quality control of materials, equipment and installation to conform to the requirements of the Contract Documents. The Owner may order additional testing for any test results below specified minimums. Additional cost for testing, professional services and any other expenses related to the additional testing shall be at the Contractor's expense. The Owner may deduct such costs from moneys due the Contractor.

Section 13.07 - Final Completion

No previous inspection shall relieve the Contractor of the obligation in the performance of the Work in accordance with the Contract. No payment, either partial or full, by the Owner to the Contractor shall excuse any failure by the Contractor to comply fully with the Contract Documents. The Contractor shall remedy all defects and deficiencies, paying the cost of any damage to other Work. Final payment to the Contractor constitutes final completion and acceptance of all the Work of the Contract Documents and constitutes Contract Closeout.

Section 13.08 - Guarantee

The Contractor shall, in all respects, guarantee the Work to the Owner and be responsible for all material, equipment and workmanship of the Work. The Contractor shall forthwith repair, replace or remedy in a manner approved by the Owner, any material, equipment, workmanship, or other part of the Work found by the Owner to be defective or otherwise faulty and not in compliance with the Contract Documents, which defect or fault appears during the minimum period of one (1) year, or such longer period as may be prescribed by the Contract, from the date of Substantial Completion or any part thereof, by the Owner. The Contractor shall also pay for any damage to the Work resulting from said defect or fault or damage to other work.

ARTICLE 14 -- PROTECTION OF PERSONS AND PROPERTY

Section 14.01 – Site Safety and Protection

- A. The Contractor and each subcontractor shall comply with all applicable rules, regulations, codes and bulletins of the New York State Department of Labor and to the standards imposed under the Federal Occupational Safety and Health Act of 1970, as amended.
- B. The Contractor shall be responsible for the initiation, maintenance and supervision of safety precautions and programs in connection with the Work. The Contractor shall designate a responsible person at the Site whose duties shall include maintaining site safety pursuant to OSHA and any other applicable requirement, conducting weekly tool box meetings with its workers, and providing the Owner with a copy of meeting minutes.
- C. The Owner shall provide the Contractor with copies of the Owner's safety orientation booklet. The Contractor shall provide a copy to each of its workers and to each worker of its subcontractors prior to each worker starting Work. The Contractor shall maintain documentation that each worker received a copy of the Owner's safety orientation booklet prior to the worker starting Work.
- D. The Contractor shall, at all times: (1) guard the Owner's property from damage or loss in connection with the Work (2) guard and protect the Contractor's Work and adjacent property (3) replace or make good any said loss or damage unless said loss or damage is caused directly by the Owner.
- E. The Contractor shall protect all adjoining property and shall repair or replace any said property damaged or destroyed during the progress of the Work.

Section 14.02 - Protection of Work

- A. The Contractor shall be responsible for the safety, efficiency and adequacy of the Contractor's Work, plant, appliances and methods, and for any damage which may result from the failure or the improper construction, maintenance, or operation of such Work, plant, appliances and methods.
- B. The Contractor shall have full responsibility to protect and maintain all materials and supplies on and off site in proper condition and forthwith repair, replace and make good any damage thereto until final acceptance and completion. The Contractor shall maintain an inventory of all materials and supplies for the Project that are delivered to the Site or approved for off-site storage facilities.
- C. The Contractor shall immediately report any loss, theft, burglary, vandalism or damage of materials or installed work to the Owner by phone and facsimile as soon as it is discovered. If vandalism, theft, or burglary is suspected as the cause of the loss, the Contractor shall notify Site security personnel and the municipal police, protect the place of the loss until released from protection by the Owner, and insure that no potential evidence relating to the loss is removed from the place of the loss.
- D. Any insurance claim alleging damage to the Work and delay or acceleration costs shall be submitted pursuant to Article 10 – Claims and Disputes.
- E. A claim for damage to the Work shall also include the following:
 - 1. A copy of a police report (if applicable).
 - 2. A complete inventory of damaged or lost items including:
 - a. Description of each item.
 - b. Purchase date and proof of delivery of each item.
 - c. Supplier from whom purchased.
 - d. Serial number (if applicable).
 - e. Price of each item.
 - 3. The name, address and telephone number of the person who controlled the lost or damaged items immediately before the loss or damage.
 - 4. The name, address and telephone number of the person who discovered the loss or damage.
 - 5. A written description of how the loss or damage occurred.
- F. The Owner may refuse any claim from the Contractor under this section unless all of the items required in this section are provided to the Owner and are to the satisfaction of the Owner.

Section 14.03 - Protection of Lives and Health

- A. The Contractor shall notify the Owner immediately of any incident, accident, illness or injury that occurred on the Project Site. The Contractor shall follow-up and provide the Owner with a copy of Form C-2, Employers Report of Injury/Illness within twenty-four (24) hours of any incident, accident, illness or injury and a copy of the recorded OSHA Log.
- B. The Contractor shall maintain a record of all cases of death, illness or injury requiring medical attention, hospitalization or causing loss of time from work, arising out of and in the course of employment of Work of the Contract.

- C. The Contractor shall preserve and safeguard the area of any incident, accident, illness or injury where the person required emergency medical treatment. The Contractor shall secure the area and not allow any material object or property to be altered, changed, moved or removed from the area and post a person at the area to protect it. Safeguarding and protecting the area shall only be abandoned by the Contractor upon release by the Owner. The Contractor shall provide the Owner a list of witnesses that includes the full name, home address, occupation and telephone number of each person.
- D. If, in the performance of the Work, a harmful hazard is created for which appliances or methods of elimination have been approved by regulatory authorities, the Contractor shall install, maintain and operate said appliances or methods.
- E. Failure of the Contractor to comply with provisions of this Article shall be deemed a breach of Contract and the Owner may impose a payment penalty on the Contractor for any act of non-compliance. The payment penalty shall not exceed one twentieth (1/20) of the contract price or a maximum of One Thousand Dollars (\$1,000) for each time the Contractor fails to perform or to provide the information, reports, forms, etc. required in this section. This payment penalty is not exclusive, the Owner may avail itself of any other contractual remedy available.

Section 14.04 - Risks Assumed by the Contractor

- A. To the fullest extent permitted by law, the Contractor solely assumes the following distinct and several risks whether said risks arise from acts or omissions, whether supervisory or otherwise, of the Owner, of the Client, of any Subcontractor, of third persons or from any other cause, including difficulties which may be encountered in the performance of the Work, whether said risks are within or beyond the control of the Contractor and whether said risks involve any legal duty, primary or otherwise, imposed upon the Owner, excepting only risks which arise from faulty designs as shown by the drawings and specifications, unforeseen obstacles or from the negligence of the Owner or the Owner's members, officers, representatives or employees that caused the loss, damage or injuries hereinafter set forth:
1. The risk of loss or damage, includes direct or indirect damage or loss, of whatever nature to the Work or to any plant, equipment, tools, materials or property furnished, used, installed or received by the Owner, the Construction Manager, the Contractor or any Subcontractor, material men or workmen performing services or furnishing materials for the Work. The Contractor shall bear said risk of loss or damage until Substantial Completion or until completion or removal of said plant, equipment, tools, materials or property from the Site and the vicinity thereof, whichever event occurs last. In the event of said loss or damage, the Contractor immediately shall repair, replace or make good any said loss or damage.
 2. The risk of claims, just or unjust, by third persons against the Contractor or the Owner, the Client, and the Construction Manager on account of wrongful death, bodily injuries and property damage, direct or consequential, loss or damage of any kind whatsoever arising or alleged to arise out of or as a result of or in connection with the performance of the Work, whether actually caused by or resulting from the performance of the Work, or out of or in connection with the Contractor's operations or presence at or in the vicinity of the Site. The Contractor shall bear the risk for all deaths, injuries, damage or losses sustained or alleged to have been sustained prior to Substantial Completion of the Work. The Contractor shall bear the risk for all deaths, injuries, damages or losses sustained or alleged to have been sustained resulting from the Contractor's negligence or alleged negligence which is discovered, appears, or is manifested after acceptance by the Owner.

3. The Contractor assumes entire responsibility and liability for any and all damage or injury of any kind or nature whatsoever, including death resulting there from, to all persons, whether employees of the Contractor or otherwise, and to all property, caused by, resulting from, arising out of, or occurring in connection with the performance of the Work. If any person shall make said claim for any damage or injury, including death resulting there from, or any alleged breach of any statutory duty or obligation on the part of the Owner, the Client, the Owner's Representative, Construction Manager, servants and employees, the Contractor shall assume the defense and pay on behalf of the Owner, the Client, the Owner's Representative, the Construction Manager, servants and employees, any and all loss, expense, damage or injury that the Owner, the Client, the Owner's Representative, Construction Manager, servants and employees, may sustain as the result of any claim, provided however, the Contractor shall not be obligated to indemnify the Owner, the Client, the Owner's Representative, Construction Manager, servants and employees for their own negligence, if any.
 4. The Contractor agrees to assume, and pay on behalf of the Owner, the Client, and the Owner's Representative, Construction Manager, servants and employees, the defense of any action at law or equity which may be brought against the Owner, the Client and the Owner's Representative, Construction Manager, servants and employees. The assumption of defense and liability by the Contractor includes, but is not limited to, the amount of any legal fees associated with defending, all costs of investigation, expert evaluation and any other costs including any judgment or interest or penalty that may be entered against the Owner, the Client, and the Owner's Representative, Construction Manager, servants and employees, in any said action.
 5. The Contractor is advised that the Work of the Contract may impose certain obligations and requirements mandated by the U.S. Department of Labor Occupational Safety and Health Administration regulations, Title 29 CFR Part 1926.62 Lead Exposure in Construction, relative to the potential exposure to lead by its employees. The Contractor assumes entire responsibility and liability for complying fully in all respects with these regulations.
- B. The Contractor's obligations under this Article shall not be deemed waived, limited or discharged by the enumeration or procurement of any insurance for liability for damages. The Contractor shall notify its insurance carrier within twenty four (24) hours after receiving a notice of loss or damage or claim from the Owner or Owner's Client. The Contractor shall make a claim on its insurer specifically under the provisions of the contractual liability coverage and any other coverage afforded the Owner or the Client including those of being an additional insured where applicable.
- C. Neither final acceptance of the Work nor making any payment shall release the Contractor from the Contractor's obligations under this Article. The enumeration elsewhere in the Contract of particular risks assumed by the Contractor or of particular claims for which the Contractor is responsible shall not be deemed to limit the effect of the provisions of this Article or to imply that the Contractor assumes or is responsible for only risks or claims of the type enumerated; and neither the enumeration in this Article nor the enumeration elsewhere in the Contract of particular risks assumed by the Contractor of particular claims for which the Contractor is responsible shall be deemed to limit the risks which the Contractor would assume or the claims for which the Contractor would be responsible in the absence of said enumerations.
- D. Upon the conclusion of any action, proceeding or lawsuit, should a final binding determination of responsibility be made which allocates responsibility to the Owner, the Client, or the Owner's members, officers, employees, or representatives, the Owner agrees that the obligation to indemnify and hold harmless shall not be applicable to the portion of any uninsured money judgment for which the Owner is responsible, and the Owner agrees to pay the Contractor the percentage of uninsured

defense costs which the Contractor incurred based upon an apportionment of the Owner's allocated responsibility.

ARTICLE 15--INSURANCE AND BONDS

Section 15.01 - General Provisions

- A. The Contractor and Subcontractors shall not violate, or permit to be violated, any term or condition of their insurance policies, and shall at all times satisfy the safety requirements of the Owner and of the insurance companies issuing such policies.
- B. All insurance required to be procured and maintained must be procured from insurance companies licensed to do business in the State of New York and rated at least B+ by A.M. Best and Company, or meet such other requirements as are acceptable to the Owner.
- C. Notwithstanding any other provision in this Article, the Owner may require the Contractor to provide, at the expense of the Owner, any other form or limit of insurance necessary to secure the interests of the Owner.
- D. Neither the procurement nor the maintenance of any type of insurance by the Owner, the Contractor or the Construction Manager shall in any way be construed or deemed to limit, discharge, waive or release the Contractor from any of the obligations or risks accepted by the Contractor or to be a limitation on the nature or extent of said obligations and risks.

Section 15.02 - Submission of Insurance

- A. Prior to execution of the Contract, the Contractor shall submit one original certificate of insurance, indicating the Project and showing evidence of all insurance required under the Contract. Upon the Owner's request, the Contractor shall provide certified copies of each type of insurance policy required by the Contract. In addition, the Contractor shall provide copies of certificates of insurance to the Construction Manager, if applicable. Certificates of insurance, when submitted to the Owner, constitute a warranty by the Contractor that the insurance coverage described is in effect for the policy term shown.
- B. The Contractor shall mail original insurance certificates and bonds to the address noted below. All insurance certificates and bonds must be approved by the Owner prior to the Contractor's commencement of Work.

DASNY
Procurement Unit
515 Broadway
Albany, NY 12207-2964

Section 15.03 - Insurance Provided by Contractor

- A. The Contractor and each Subcontractor of every tier shall procure and maintain all of the insurance required under this Article until all Work of the Contract is complete and accepted by the Owner and the Consent of Surety is executed for final payment.
 - 1. Workers' Compensation (including occupational disease) and Employer's Liability New York Statutory Endorsement with a minimum limit of \$1,000,000 as evidenced by one of the following certificates (**Acord certificates are no longer acceptable**):

- a. C-105.2 (September '07, or most current version) - Certificate of NYS Workers' Compensation Insurance. The insurance carrier shall provide a completed form as evidence of in-force coverage.
 - b. U-26.3 - Certificate of Workers Compensation Insurance from the State Insurance Fund. The State Insurance Fund shall provide a completed form as evidence of in-force coverage.
 - c. GSI-105.2/SI-12 - Certificate of Workers Compensation Self Insurance. The NYS Workers' Compensation Board's Self Insurance Office or the Contractor's Group Self Insurance Administrator shall provide a completed form.
2. Disability Benefits:
- a. DB-120.1 (May '06, or most current version) - Certificate of Disability Benefits. The insurance carrier shall provide a completed form as evidence of in-force coverage.
 - b. DB-155 - Certificate of Disability Self Insurance. The NYS Workers' Compensation Board's Self Insurance Office shall provide a completed form.
 - c. CE-200 – Certificate of Attestation of Exemption. (Note: this form will only be accepted as evidence of an exemption from providing Disability Benefits insurance as required by law. DASNY will not accept this as an exemption from providing Worker's Compensation Insurance). The Certificate may be obtained from the NYS Workers Compensation Board's website at <http://www.wcb.state.ny.us>. The CE-200 cannot be used for multiple projects; therefore a new form shall have to be completed prior to award of any subsequent contracts.
3. Commercial General Liability (CGL) with a combined single limit for bodily injury, personal injury and property damage of at least \$2,000,000 per occurrence and aggregate; and Products Liability and Completed Operations with an Aggregate limit of \$2,000,000. The limit may be provided through a combination of primary and umbrella and/or excess liability policies. Coverage shall provide and encompass at least the following:
- a. Written on an occurrence form.
 - b. Include ISO Endorsement CG 20 10 11/85 or its equivalent.
 - c. An endorsement naming DASNY and if applicable, the Construction Manager, the Client and other entities as additional insured as specified on the sample certificate of insurance in the Bidding Documents. Additional insured status shall apply during the Products/Completed Operations phase as well as during the course of the Work.
 - d. Policies shall be endorsed to be primary as respects the coverage afforded the additional insured and such policy shall be primary to any other insurance maintained by the Owner. Any other insurance maintained by the Owner shall be in excess of and shall not contribute with the Contractor's or Subcontractor's insurance, regardless of the "other insurance" clause contained in the Owner's own policy of insurance. A copy of the endorsement reflecting this requirement may be requested by the Owner.
 - e. Excavation, Collapse and Underground Hazards (where applicable).
 - f. Independent Contractors.
 - g. Blanket Written Contractual Liability covering all indemnity agreements, including all indemnity obligations contained in the General Conditions.
 - h. Products and completed operations coverage for a term no less than three years.
4. Commercial Automobile Liability and Property Damage Insurance covering all owned, leased, hired and non-owned vehicles used in connection with the Work, with a combined single limit for bodily injury and property damage of at least \$1,000,000 each person and accident. The limit may be provided through a combination of primary and umbrella and/or excess liability policies.

5. Umbrella and/or Excess Liability policies used to follow the form of the CGL, Automobile Liability and Employers Liability limits shown above may be warranted to be in excess of limits provided by primary CGL, Automobile Liability and Employer's Liability, but not excess to other insurance maintained by the Owner. The Contractor shall provide a copy of the umbrella and/or excess liability policy declarations page and the underlying schedule of insurance upon the Owner's request. Coverage shall provide and encompass at least the following:
 - a. Written on an occurrence form.
 - b. Include ISO Endorsement CG 20 10 11/85 or its equivalent.
 - c. An endorsement naming DASNY and, if applicable, the Construction Manager, the Client, and other entities as additional insured as specified on the sample certificate of insurance in the bidding documents.
6. The Contractor shall secure, pay for, and maintain property insurance necessary for protection against the loss of owned, borrowed or rented capital equipment and tools, including any tools owned by employees, and any tools or equipment, staging towers, and forms owned, borrowed or rented by the Contractor. The requirement to secure and maintain such insurance is solely for the benefit of the Contractor. Failure of the Contractor to secure such insurance or to maintain adequate levels of coverage shall not render the additional insured or their agents and employees responsible for any losses; and the additional insured, their agents and employees shall have no such liability.

Section 15.04 - Other Insurance Provided by Contractor

- A. United States Longshoremen and Harbor Workers' Compensation Act: When the Contractor and/or Subcontractors are engaged in maritime activities on or near the navigable waterways of the United States, the Workers' Compensation policy referenced above shall be endorsed to provide this coverage.
- B. Asbestos Abatement Liability: The Contractor or Subcontractors performing any Work which involves asbestos shall provide asbestos liability insurance with a limit of \$2,000,000 per occurrence and aggregate. Coverage shall provide and encompass at least the following:
 1. An endorsement naming DASNY and if applicable, the Construction Manager, the Client, and other entities as additional insured as specified on the sample certificate of insurance in the Bidding Documents.
 2. Coverage shall be on an occurrence basis.
- C. Pollution Liability for Hazardous/Contaminated Materials: The Contractor or Subcontractors performing Work involving pollutants, including but not limited to excavation, removal, repair, installation, testing, and petroleum remediation operations for underground petroleum storage tanks shall provide coverage that encompasses at least the following:
 1. Pollution Liability with a combined single limit of \$2,000,000 per occurrence and aggregate.
 2. Endorsement naming the following as additional insured's: DASNY and if applicable, the Construction Manager, and other entities specified on the sample certificate of insurance provided by the Owner, if coverage is on an occurrence basis.
 3. If coverage is on a claims-made policy form then an extended reporting provision of up to three years after Work is completed is required. If coverage is cancelled or not renewed, then the

Contractor shall purchase the extended reporting provision for a period of three years for claims made during the project but reported after the cancellation of the coverage.

4. A maximum Self-Insured Retention of \$50,000, or an amount approved by the Owner.
- D. Railroad Protective Liability: The Contractor and Subcontractors providing Work of the Contract in close proximity to railways that the Contractor determines will require entrance upon railway right of way shall provide Railroad Protective Liability coverage on policy forms AASHO or ISO-RIMA.
1. For information and use, the Transit Authority provides the following information: A Railroad Protective Liability policy covering the Work of the Contract and affording protection for damages arising out of bodily injuries or death, an injury to or destruction of property, shall be required.
 2. The Protective Liability insurance policy (I.S.O. Form CG 00 35 11 85 or equivalent) must name the New York City Transit Authority (NYCTA), Manhattan and Bronx Surface Transit Operating Authority (MaBSTOA), Staten Island Rapid Transit Operating Authority (SIRTOA), Metropolitan Transportation Authority (MTA), its subsidiaries and affiliated companies, the City of New York and all other indemnified parties as Named Insured with limits of liability of \$2,000,000 each occurrence on a combined single limit basis the aggregate shall be at least \$4,000,000 for bodily injuries, including death and personal injuries to persons and for damage to property and physical damage to all property owned by, leased by or in the care, custody and control of the Transit Authority.

Section 15.05 - Stop Work Order - Insurance

- A. All insurance certificates are valid for one (1) year from the date the certificate is signed/stamped, or until policy expiration, whichever is earlier. Certificates shall provide thirty (30) days written notice prior to the cancellation, non-renewal, or reduction in the limits of liability of any policy. The Contractor shall be responsible to submit updated insurance certificates thirty (30) days prior to any insurance certificate expiration date.
- B. Failure of the Contractor to maintain and provide the Owner with evidence of valid and in-force insurance coverage shall result in a Stop Work Order pursuant to Article 11 – Termination or Suspension and/or withholding of payment to the Contractor.
- C. At any time that the coverage provisions and limits on the policies required herein do not meet the provisions and limits set forth above, the Contractor shall immediately cease Work on the Project. The Contractor shall not resume Work on the Project until authorized to do so by the Owner.
- D. Any delay or time lost as a result of the Contractor not having proper insurance required by this Article shall not give rise to a delay claim or any other claim against the Owner. Further, the Contractor may be liable to other contractors for costs incurred by reason of the Contractor's failure to provide insurance.

Section 15.06 – Builder's Risk

- A. The Owner will provide Builder's Risk for all projects, except for those projects listed in paragraph B.
 1. The Owner shall, except as otherwise specified, at all times during the period of construction and until Substantial Completion, procure and maintain, at the cost and expense of the Owner "All

Risk” Builder’s Risk Insurance. The Contractor and Subcontractors will be covered for the Work of the Contract. Losses up to and including \$5,000 shall be borne by the Contractor. Reimbursement for loss, if any, is to be made payable to the Owner. The Owner shall, at the Owner’s sole discretion, have power to adjust and to settle with the insurer any loss or claim under said insurance.

2. Coverage shall include sub-limits for property in transit and for property in storage on and off the job site. Specific higher limits for transit/storage are available as circumstances may require upon request by any Contractor or Subcontractor to the Owner.
- B. The Contractor shall provide Builder’s Risk for all OMH/OPWDD/OASAS projects, or when otherwise specified.
1. The Contractor shall maintain until the date of Substantial Completion, All Risk Builder’s Risk completed Value Form, with coverage for the value of the Work of the Contract except for excavation work, planting and seeding, and Work buried in the ground other than wiring and walking tunnels. When applicable, the Contractor’s Interest Completed Value form may be used. The extended coverage endorsement may include a loss deductible acceptable to the Owner. Losses up to and including the deductible provision shall be borne by the Contractor.
 2. Each Builder’s Risk policy shall include the following endorsement:

“It is made a condition of this insurance that until the Owner issues the Notice of Substantial Completion to the Contractor, occupancy of the premises shall not require consent of the insurer, nor shall such occupancy be the basis for a rate adjustment.”
 3. Builder’s Risk policies shall be issued by insurance companies authorized to conduct such business under the laws of the State of New York, shall name DASNY, the Contractor Loss Payees as their interests may appear and shall run until the date of Substantial Completion. Policies expiring on a fixed date before Substantial Completion shall be renewed not less than thirty (30) days before such expiration date. Such policy shall not be changed by endorsement without the knowledge and consent of the Owner and in particular, no notice of cancellation by the insurer shall be effective until sixty (60) days after such notice is received by the Owner.
 4. The Owner may withhold the Contractor’s payment for Work which is required to be insured until original binder or policies for the Builder’s Risk are provided to the Owner pursuant to Section 15.06.

Section 15.07 - Bonds Provided by Contractor

- A. The Contractor shall provide a performance bond in an amount at least equal to 100% of the Contract sum as security for the faithful performance of the Contract. The Contractor shall also provide a payment bond in an amount at least equal to 100% of the Contract sum for the payment of all persons performing labor or providing materials in connection with the Work of the Contract. The Contractor shall execute bond forms included as part of the Contract Documents.
- B. If at any time the Owner shall become dissatisfied with any surety or sureties upon the performance bond or the payment bond, or if for any other reason said bonds shall cease to be adequate security to the Owner, the Contractor shall, within five (5) days after notice from the Owner to do so, substitute an acceptable bond or bonds in such form and sum and signed by such other surety or sureties as may be satisfactory to the Owner. The Contractor shall pay the premiums on said

bond or bonds. No further payments shall be deemed due nor shall be made until the new surety or sureties shall have furnished an acceptable bond or bonds to the Owner.

- C. The surety company, on all bonds, shall be authorized to do business in the State of New York and rated at least B+ by A.M. Best and Company, or meet such other requirements as are acceptable to the Owner.

ARTICLE 16 -- GENERAL PROVISIONS of the CONTRACT

Section 16.01 - General Law Provisions

- A. The laws of the State of New York shall govern the Contract.
- B. Each and every provision of law and clause required by law to be inserted in the Contract shall be deemed to be inserted therein and the Contract shall read and shall be enforced as though so included therein.
- C. The Contractor shall comply fully with all applicable laws, rules and regulations, and as applicable, Building Code of New York State or Building Code of the City of New York.

Section 16.02 - Diesel Emissions Reduction

- A. The Contractor shall certify that all heavy duty vehicles, as defined in the NYS Environmental Conservation Law (ECL) section 19-0323 and Title 6 of the New York Codes Rules and Regulations, Part 248 (6NYCRR 248), will comply with the rules, regulations and provisions pursuant to ECL section 19-0323, and 6 NYCRR 248, which requires the use of Best Available Retrofit Technology and Ultra Low Sulfur Diesel unless specifically waived by the NYS Department of Environmental Conservation (DEC). Qualification for a waiver will be the responsibility of the Contractor.
- B. Annually, as required by DEC, but no later than March 1st, the Contractor shall complete and submit directly to the Owner, via electronic mail, the Regulated Entity Vehicle Inventory Form and Regulated Entity and the Contractors Annual Report Form, found on the DEC website <http://www.dec.state.ny.gov> for vehicles used on the Project for the preceding calendar year.
- C. The Contractor shall certify to the Owner, and submit with each application for payment, the Contractor and Subcontractor Certifications form, which states that the Contractor agrees to comply with the provisions of Section 16.02.

Section 16.03 – State and Federal Labor Law Provisions

- A. It is hereby agreed that all applicable provisions of the Labor Law of the State of New York shall be carried out in the performance of the Work.
- B. The Contractor specifically agrees, as required by Labor Law, Sections 220 and 220-d as amended, that:
 - 1. No worker, in the employ of the Contractor, all Subcontractors or other person doing or contracting to do the whole or any part of the Work contemplated by the Contract shall be permitted or required to work more than eight (8) hours in any one (1) calendar day and more than five (5) days in any one week, except in the extraordinary emergencies set forth in the Labor Law.

2. The wages paid for a legal day's work shall be not less than the prevailing rate of wages as defined by law.
 3. The minimum hourly rate of wage to be paid and supplement provided should be not less than that stated in the Contract and as shall be designated by the Commissioner of Labor of the State of New York.
 4. The Contractor and all Subcontractors shall post in a prominent and accessible place on the Site, a legible notice of all minimum wage rates and supplements to be paid or provided for the various classes of workers engaged in the performance of the Work and all deductions, if any, required by law to be made from unpaid wages actually earned by any worker so engaged.
 5. The Contractor and all Subcontractors shall provide a notice to all workers of the prevailing wage rate for all worker's particular job classification on each pay stub and to post a notice at commencement of the Work that includes the telephone number and address for the Department of Labor and a notice informing all workers of their right to contact the Department of Labor if a worker is not receiving the proper prevailing rate of wages and/or supplements for a worker's particular job classification.
 6. The Contractor shall be responsible for obtaining prevailing wage rate updates directly from the New York State Department of Labor, either by accessing its website <http://www.labor.state.ny.us> or a written request to the Bureau of Public Works.
- C. The minimum wage rates, if any, herein specified for apprentices shall apply only to persons working with the tools of the trade which such persons are learning under the direct supervision of journeyman mechanics. Except as otherwise required by law, the number of apprentices in each trade or occupation employed by the Contractor or any Subcontractor shall not exceed the number permitted by the applicable standards of the New York State Department of Labor, or, in the absence of such standards, the number permitted under the usual practice prevailing between the unions and the employers' association of the respective trades or occupations.
- D. All workers of the Contractor and all Subcontractors shall be paid in accordance with the provisions of the Labor Law. The Contractor and all Subcontractors shall submit original copies of the Contractor and Subcontractor Certifications form and Certified Payroll forms in accordance with payment procedures and otherwise upon request.
- E. The Contractor agrees that, in case of underpayment of wages to any worker engaged in the Work by the Contractor or any Subcontractor, the Owner shall withhold from the Contractor out of payments due an amount sufficient to pay such worker the difference between the wages required to be paid under the Contract and the wages actually paid such worker for the total number of hours worked, and that the Owner may disburse such amount so withheld by the Owner for and on account of the Contractor to the worker to whom such amount is due. The Contractor further agrees that the amount to be withheld pursuant to this paragraph may be in addition to the percentages to be retained by the Owner pursuant to other provisions of the Contract.
- F. Pursuant to subdivision 3 of section 220 and section 220-d of the Labor Law the Contract shall be forfeited and no sum paid for any Work done there under upon a Contractor's or Subcontractor's second conviction for willfully paying or providing less than:
1. The stipulated wage scale or supplement as established by the fiscal officer.
 2. The stipulated minimum hourly wage scale as designated by the Commissioner of Labor of the State of New York.
- G. If the project is Federally funded in part or whole and therefore subject to the requirements of the Davis Bacon Act, the U.S. Department of Labor's government-wide implementation of the Act, or to

Federal program legislation, the Contractor must pay the higher of either New York State prevailing wage rates or wages established for the locality of the project by the Federal Department of Labor.

- H. The Contractor specifically agrees that all workers engaged on the Site, whether employees of the Contractor, Subcontractor, or other person performing or contracting to do any part of the Work, shall be certified as having successfully completed the OSHA 10 hour construction safety and health course.

Section 16.04 - Nondiscrimination

During the performance of the Work, the Contractor agrees as follows:

- A. If directed to do so by the Commissioner of Human Rights, the Contractor will send to each labor union or representative of workers with which the Contractor has or is bound by a collective bargaining or other agreement or understanding, a notice, to be provided by the State Commissioner of Human Rights, advising such labor union or representative of the Contractor's agreement under clauses A through E (hereinafter called "non-discrimination clauses"). If the Contractor was directed to do so by the Owner as part of the bid or negotiation of this Contract, the Contractor shall request such labor union or representative to furnish a written statement that such labor union or representative will not discriminate because of race, creed, color, sex, national origin, age, disability or marital status, and that such labor union or representative will cooperate, within the limits of its legal and contractual authority, in the implementation of the policy and provisions of these nondiscrimination clauses and that it consents and agrees that recruitment, employment and the terms and conditions of employment under this Contract shall be in accordance with the purposes and provisions of these nondiscrimination clauses. If such labor union or representative fails or refuses to comply with such a request that it furnish such a statement, the Contractor shall promptly notify the State Commissioner of Human Rights of such failure or refusal.
- B. If directed to do so by the Commissioner of Human Rights, the Contractor will post and keep posted in conspicuous places, available to employees and applicants for employment, notices to be provided by the State Commissioner of Human Rights setting forth the substance of the provisions of these nondiscrimination clauses and such provisions of the State's laws against discrimination as the State Commissioner of Human Rights shall determine.
- C. The Contractor will comply with the provisions of Section 290-299 of the Executive Law and with the Civil Rights Law, will furnish all information and reports deemed necessary by the State Commissioner of Human Rights under these nondiscriminatory clauses and such sections of the Executive Law, and will permit access to the Contractor's books, records and accounts by the State Commissioner for the purposes of investigation to ascertain compliance with these nondiscrimination clauses and such sections of the Executive Law and Civil Rights Law.
- D. This Contract may be forthwith canceled, terminated or suspended, in whole or in part, by the Owner upon the basis of a finding made by the State Commissioner of Human Rights that the Contractor has not complied with these nondiscrimination clauses, and the Contractor may be declared ineligible for future contracts made by or on behalf of the State or a public authority or agency of the State, until the Contractor satisfies the State Commissioner of Human Rights that the Contractor has established and is carrying out a program in conformity with the provisions of these nondiscrimination clauses. Such finding shall be made by the State Commissioner of Human Rights after conciliation efforts by the Commissioner have failed to achieve compliance with these nondiscrimination clauses and after a verified complaint has been filed with the Commissioner, notice thereof has been given to the Contractor and an opportunity has been afforded the Contractor to be

heard publicly in accordance with the Executive Law. Such sanctions may be imposed and remedies invoked independently of or in addition to sanctions and remedies otherwise provided by law.

- E. The Contractor will include the provisions of these nondiscrimination clauses in every Subcontractor purchase order in such a manner that such provisions will be binding upon each Subcontractor or vendor as to the operation to be performed within the State of New York. The Contractor will take such action in enforcing such provisions of such Subcontract or purchase order as the State Commissioner of Human Rights or the Owner may direct, including sanctions or remedies for noncompliance. If the Contractor becomes involved in or is threatened with litigation with a Subcontractor or vendor as a result of such direction by the State Commissioner of Human Rights or the Owner, the Contractor shall promptly so notify the Attorney General requesting the Attorney General to intervene and to protect the interests of the State of New York.
- F. Pursuant to Labor Law, Section 220-e, the Contractor specifically agrees:
1. That in the hiring of employees for the performance of Work under the Contract or any subcontract hereunder, or for the manufacture, sale or distribution of materials, equipment or supplies hereunder, but limited to operation performed within the territorial limits of the State of New York, no Contractor, Subcontractor, nor any person acting on behalf of such Contractor or Subcontractor, shall by reason of race, creed, color, disability, sex or national origin discriminate against any citizen of the State of New York who is qualified and available to perform the Work to which the employment relates.
 2. That no Contractor, Subcontractor, nor any person on behalf of such Contractor or Subcontractor shall, in any manner, discriminate against or intimidate any employee hired for the performance of work under the Contract on account of race, creed, color, disability, sex or national origin.
 3. That there may be deducted from the amount payable to the Contractor, by the Owner under the Contract, a penalty of fifty dollars (\$50.00) for each person for each calendar day during which such person was discriminated against or intimidated in violation of the terms of the Contract.
 4. That the Contract may be canceled or terminated by the Owner and all moneys due or to become due hereunder may be forfeited for a second or any subsequent violation of the terms or conditions of this section of the Contract, or when one final determination involves the falsification of payroll records or the kickback of wages and/or supplements.

Section 16.05 - Domestic Steel

DASNY is required to comply with all provisions of Title 4 of Article 9 of the Public Authorities Law and in accordance therewith, the Owner may require that structural steel, reinforcing steel or other major steel items to be incorporated into the Work of the Contract in excess of \$100,000 be produced or made in whole or substantial part in the United States, its territories or possessions.

Section 16.06 – General Contract Provisions

- A. The Contractor agrees that the Contract shall be deemed executory to the extent of moneys available from either: (1) the proceeds of bonds issued by DASNY for the Contract, (2) moneys made available by the Client for the Contract, (3) other non-DASNY moneys made available from whatever source specifically for the Contract and no liability shall be incurred by the Owner beyond moneys available therefore.
- B. The relationship created by the Contract between the Owner and the Contractor is one of an independent contractor and it is no way to be construed as creating an agency relationship between

the Owner and the Contractor nor is it to be construed as, in any way or under any circumstances, creating or appointing the Contractor as an agent of the Owner for any purpose whatsoever.

- C. It is understood that the Client is an intended third party beneficiary of the Contract for the purposes of recovering any damages caused by the Contractor.
- D. The Contractor shall not assign the Contract in whole or in part without prior written consent of the Owner. If the Contractor assigns all or part of any moneys due or to become due under the Contract, the instrument of assignment shall contain a clause substantially to the effect that the Contractor and assignee agree that the assignee's right in and to any moneys due or to become due to the Contractor shall be subject to all prior claims for services rendered or materials supplied in connection with the performance of the Work. The Owner reserves the right to assign this Contract in whole or in part without the consent of the Contractor.
- E. Nothing in the Contract shall create or shall give to third parties any claim or right of action against the Owner, the State of New York, the Client, and the Construction Manager, or any institution at which the Work is being carried out beyond such as may legally exist irrespective of the Contract.
- F. The Owner is exempt from the terms of fair trade agreements for sales to the Contract.

Section 16.07 - Failure to Comply with Article 16

- A. The Owner will not be responsible for any Claim arising from compliance with this Article 16.
- B. The Contract shall be void and of no effect unless the Contractor complies with this Article 16.

ARTICLE 17-- AUDITS/INVESTIGATIONS/ETHICS

Section 17.01 - Owner's Right to Audit

The Contractor shall maintain and keep, for a period of at least six (6) years after the date of final Application for Payment, all records and other data relating to the Work, including records of Subcontractors and material suppliers. The Owner shall have the right to inspect and audit all records and other data of the Contractor, Subcontractors and material suppliers relating to the Work. The costs of an audit, bourn by the Owner, may be deducted from the Contract amount.

Section 17.02- False Statements/Information/Disclosure

Failure to comply with Section 17.01, providing False Representations, false statements or inaccurate information submitted with Contract Documents, including but not limited to, an Application for Payment, a Claim or a Change Order, or False Representations, false statements, or inaccurate information submitted to the Owner, or a determination that the Contractor participated in the kick-back of wages may result in one or more of the following actions:

1. Termination of the Contract for cause, pursuant to Section 11.01.
2. Rejection of future bids or disapproval of a contract and subcontract.
3. Withholding of payments.
4. Criminal prosecution.
5. Civil prosecution under Article XIII of the State Finance Law – the New York False Claims Act.

6. Rejection of a Claim or Change Order.

Section 17.03 - Owner's Right to Conduct Investigations

- A. The Contractor agrees to cooperate fully and faithfully with any investigation, audit or inquiry conducted by the Owner.
- B. The Contractor shall grant the Owner the right to examine all books, records, files, accounts, computer records, documents and correspondence, including electronically-stored information, in the possession or control of the Contractor, its subsidiaries and affiliated companies and any other company directly or indirectly controlled by the Contractor, relating to the Contract. These shall include, but not be limited to: Subcontracts; bid files; payroll and personnel records; cancelled checks; correspondence; memoranda; reports; audits; vendor qualification records; original estimate files; change order/amendment estimate files; detailed worksheets; Subcontractor, consultant and supplier proposals for both successful and unsuccessful bids; back-charge logs; any records detailing cash, trade, or volume discounts earned; insurance proceeds, rebates or dividends received; payroll and personnel records; tax returns, and the supporting documentation for the aforesaid books and records.
- C. At the Owner's request, said materials shall be provided in a computer readable format, where available. At the request of the Owner, the Contractor shall execute such documents, if any, as are necessary to give the Owner access to Contract-related books, documents or records, which are, in whole or part, under control of the Contractor but not currently in the Contractor's physical possession. The Contractor shall not enter into any agreement with a Subcontractor, consultant or supplier, in connection with the Contract, that does not contain a right to audit clause in favor of the Owner. The Contractor shall assist the Owner in obtaining access to past and present Subcontractor, consultant and supplier amendment/change order files (including detailed documentation covering negotiated settlements), accounts, computer records, documents, correspondence, and any other books and records in the possession of Subcontractors, consultants and suppliers pertaining to the Contract, and, if appropriate, enforce the right-to-audit provisions of such agreements.
- D. The Contractor shall assist the Owner in obtaining access to, interviews with, and information from all former and current persons employed and/or retained by the Contractor, for purposes of the Contract.
- E. The Contractor shall require each Subcontractor to include in all agreements that the Subcontractor may hereinafter enter into with any and all Subcontractors, consultants and suppliers, in connection with the Contract, a right-to-audit clause in favor of the Owner conferring rights and powers of the type outlined in this section. The Contractor shall not enter into any Subcontract with a Subcontractor in connection with the Contract that does not contain such a provision. The Contractor shall not make any payments to a Subcontractor, consultant or supplier from whom the Contractor has failed to obtain and supply to the Owner complete, accurate and truthful information in compliance with a request from the Owner to the Contractor.
- F. Any violation of the provisions of this Article shall justify termination of this Contract and may result in the Owner's rejection of the Contractor's bids or proposals for future contracts.

Section 17.04 - Disclosure of Criminal Investigation

- A. The Contractor shall immediately notify the Owner in the event that any owner, partner, director, officer or employee of the Contractor, or its affiliated companies as identified in the NYS Vendor

Responsibility Questionnaire, are subpoenaed or questioned in connection with any business-related criminal investigation, whether or not the owner, partner, director, officer or employee is, or is believed to be, the subject or target of such investigation, or is notified or otherwise learns that any owner, partner, director, officer or employee of the Contractor or its affiliated companies is under investigation for an alleged business-related violation of criminal law, or in the event that any premises or records of the Contractor are searched pursuant to a search warrant seeking evidence of a crime or crimes, unless otherwise precluded by law enforcement authorities.

- B. The Contractor shall immediately notify the Owner in the event that any owner, partner, director, officer or employee of the Contractor or its affiliated companies as identified in the NYS Vendor Responsibility Questionnaire, the firm itself, or one of its affiliated companies is indicted or charged in an accusatory instrument for any business-related violation of local, state or federal criminal law, unless otherwise precluded by law enforcement authorities.
- C. In the event that any owner, partner, director, officer or employee of the Contractor is indicted or charged in an accusatory instrument for any business-related violation of local, state or federal criminal law relating to this or any other DASNY Contract, the Owner may require the Contractor to remove said owner, partner, director, officer or employee from any direct involvement in the affairs of the Contractor as it relates to this Contract and all other DASNY contracts until the criminal matter is resolved. In the event that any owner, partner, director, officer or employee of the Contractor is convicted of a business-related violation of local, state or federal criminal law, the Owner may require the Contractor to permanently remove said individual from any direct involvement in the affairs of this and all other DASNY contracts.
- D. In the event that the Contractor or any owner, partner, director, officer or employee of the Contractor is convicted of a business-related violation of local, state or federal criminal law, the Owner may schedule a hearing with the Contractor to determine the Contractor's responsibility to continue work under this Agreement and other DASNY contracts. Following this hearing, the Owner may, at its sole discretion, take one or more of the following actions:
1. Terminate the Agreement.
 2. Require the Contractor, at its own expense, to hire an independent private-sector inspector general to monitor its activities, institute procedures and conduct internal inquiries, in a manner prescribed by the Owner.
 3. Increase retainage in an amount not to exceed ten percent (10%).
 4. Take any other remedial action deemed appropriate.

Section 17.05 - Anti-Riot Provisions

- A. The Contractor agrees that no part of the Agreement funds shall be used to make payments, give assistance, or supply services, in any form, to any individual convicted in any federal, state, or local court of competent jurisdiction for inciting, promoting, or carrying on a riot, or engaging in any group activity resulting in material damage to property or injury to persons found to be in violation of federal, state or local laws designed to protect persons or property.
- B. The Contractor and each Subcontractor shall notify their employees of all rules and regulations adopted pursuant to Article 129-A of the Education Law of the State of New York. The Contractor at the Site shall post notices containing the text of the aforementioned rules and regulations.

Section 17.06 - Ethical Conduct

- A. Officers and employees of the Owner are bound by Sections 73, 73-a and 74 of the *New York State Public Officers Law*. In addition, no officer, employee, architect, attorney, engineer, inspector or consultant of or for the Owner authorized on behalf of the Owner to exercise any legislative, executive, administrative, supervisory or other similar functions in connection with the Contract or the Work, shall become personally interested, directly or indirectly, in the Contract, material supply contract, subcontract, insurance contract, or any other contract pertaining to the Work.
- B. Section 73(5) of the *Public Officers Law* expressly prohibits the Contractor, or its agents, from directly or indirectly offering or giving any gift having more than nominal value to an employee of the Owner under circumstances in which it could be reasonably inferred the gift was intended to influence the employee in the performance of their official duties or was intended as a reward for the employee's official action.
1. In addition to the prohibition of Section 73(5) of the *Public Officers Law*, DASNY has a "zero tolerance" policy with respect to the solicitation, acceptance or receipt of gifts from disqualified sources. Therefore, the Contractor and its agents should refrain from offering or giving anything of value to an employee of the Owner. Employees of the Owner may not solicit any gift, gratuity, stipend or thing of value from the Contractor or its agents. Violations of these gift provisions may be grounds for immediate Contract termination and/or referral for civil action or criminal prosecution.
- C. To promote a working relationship with the Owner based on ethical business practices, the Contractor is expected to:
1. Furnish all goods, materials and services to the Owner as contractually required and specified.
 2. Submit complete and accurate reports to the Owner and its representatives as required.
 3. Not seek, solicit, demand or accept any information, verbal or written, from the Owner or its representatives that provides an unfair advantage over a competitor.
 4. Not engage in any activity or course of conduct that restricts open and fair competition on Owner-related projects and transactions.
 5. Not engage in any course of conduct with Owner employees or its representatives that constitutes a conflict of interest, in fact or in appearance.
 6. Not offer or give any unlawful gifts or gratuities, or engage in bribery or other criminal activity.
- D. The Owner encourages the Contractor to advance and support ethical business conduct and practices among its directors, officers and employees, preferably through the adoption of corporate ethics awareness training programs and written codes of conduct.
- E. Although the Contractor may employ relatives of Owner employees, the Owner must be made aware of such circumstances as soon as possible, preferably in writing, to ensure a conflict of interest situation does not arise. The Owner reserves the right to request that the Contractor modify the work assignment of a relative of an Owner employee where a conflict of interest, or the appearance thereof, is deemed to exist.
- F. The Contractor may hire former employees of the Owner. However, as a general rule, former employees of the Owner may neither appear nor practice before the Owner, nor receive compensation for services rendered on a matter before the Owner, for a period of *two years* following their separation from service with the Owner. In addition, former employees of the Owner are subject to a "lifetime bar" from appearing before the Owner or receiving compensation for services regarding any

transaction in which they personally participated or which was under their active consideration during their tenure with the Owner.

- G. The Contractor agrees to notify the Owner's Office of Internal Affairs at 518-257-3193 of any activity by an employee of the Owner that is inconsistent with the contents of this Section.
- H. Any violation of Section 17.06 shall justify termination of this Agreement and may result in Owner's rejection of the Contractor's bids or proposals for future agreements.
- I. Contractor shall at all times during the Contract term remain responsible. Contractor agrees, if requested by the President of Owner or his or her designee, to present evidence of its continuing legal authority to do business in New York State, integrity, experience, ability, prior performance, and organizational and financial capacity.
- J. The President of Owner or his or her designee, in his or her sole discretion, reserves the right to suspend any or all activities under this Contract, at any time, when he or she discovers information that calls into question the responsibility of Contractor. In the event of such suspension, Contractor will be given written notice outlining the particulars of such suspension. Upon issuance of such notice, Contractor must comply with the terms of the suspension order. Contract activity may resume at such time as the President of Owner or his or her designee issues a written notice authorizing a resumption of performance under the Contract.
- K. Notwithstanding any other provision of this Contract, upon written notice to Contractor, and a reasonable opportunity to be heard with the appropriate Owner officials or staff, the Contract may be terminated by the President of Owner or his or her designee at Contractor's expense where Contractor is determined by the President of Owner or his or her designee to be non-responsible. In such event, the President of Owner or his or her designee may complete the contractual requirements in any manner he or she may deem advisable and pursue available legal or equitable remedies for breach.
- L. By entering into this Contract, Contractor certifies, under the penalties of perjury, that Contractor is not on the list created pursuant to paragraph (b) of subdivision 3 of section 165-a of the State Finance Law. Contractor further certifies that Contractor will not utilize on this Contract any Subcontractor that is identified on the list created pursuant to paragraph (b) of subdivision 3 of section 165-a of the State Finance Law.
- M. During this Contract, should Owner receive information that a person (as defined in New York State Finance Law §165-a) is in violation of the above-referenced certifications, Owner 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 Owner shall take such action as may be appropriate and provided for by law, rule, or contract, including, but not limited to, seeking compliance, recovering damages, or declaring the Contractor in default.

ARTICLE 18 -- 2005 PROCUREMENT LOBBYING LAW

Section 18.01 - Laws of 2005

Chapter 1 of the Laws of 2005, as amended by Chapter 596 of the Laws of 2005, require bidders to affirm their understanding of and agree to comply with State Finance Law § 139.j (3) and § 139-j (6) (b), certify their compliance with State Finance Law § 139-k (5), disclose prior non-responsibility determinations

under State Finance Law § 139-j, and to certify that the information they provide with respect to State Finance Law § 139-j and § 139-k is complete, true and accurate.

Section 18.02 - Contractor's Certifications

For any contract \$15,000 or more each Contractor shall submit, with its bid, on the form provided herewith, *2005 Procurement Lobbying Law – Certification*, pursuant to State Finance Law § 139-j and § 139-k. The information contained in *2005 Procurement Lobbying Law – Certification*, pursuant to State Finance Law § 139-j and § 139-k will serve as an informational resource to aid the Owner in making an award determination.

Section 18.03 - Termination Provisions

The Owner reserves the right to terminate this Contract in the event it is found that the certification filed by the Contractor in accordance with State Finance Law § 139-j and § 139-k, as such may be amended or modified, was intentionally false or intentionally incomplete. Upon such finding, the Owner may exercise its right pursuant to Section 11.01 – Termination for Cause.

ARTICLE 19 -- EXECUTIVE ORDER NO 125

Section 19.01 - Determination of Contractor Responsibility

In order to assist the Owner in determining the responsibility and reliability of the lowest bidder for the Contract and to effectuate the directives of Executive Order No. 125, the Council of Contracting Agencies has adopted procedures to collect and exchange relevant information among Contracting Agencies.

Section 19.02 – NYS Vendor Responsibility Questionnaire

- A. For any Contract valued at \$10,000 or more, the NYS Vendor Responsibility Questionnaire shall be submitted as requested by the Owner.
- B. The information contained in the NYS Vendor Responsibility Questionnaire will serve as an informational resource to aid the Owner in making an award determination.

ARTICLE 20 -- OPPORTUNITY PROGRAMS

Section 20.01 - General Provisions

The Contractor agrees, in addition to any other nondiscrimination provision of the Contract and at no additional cost to the Owner, to fully comply and cooperate with the Owner in the implementation of NYS Executive Law ARTICLE 15-A, PARTICIPATION BY MINORITY GROUP MEMBERS AND WOMEN WITH RESPECT TO STATE CONTRACTS. These requirements include: equal employment opportunities for minority group members and women (EEO), plus contracting opportunities for certified minority and women-owned business enterprises (M/WBE). The Contractor's demonstration of good faith efforts shall also be a part of these requirements.

- A. These provisions shall be deemed supplementary to, and not in lieu of the nondiscrimination provisions required by NYS Labor Law or other applicable federal, state or local laws.

Section 20.02 – Equal Employment Opportunity (EEO)

- A. The Contractor agrees to be bound in accordance with NYS Executive Law Article 15-A, and in conformance with Regulations promulgated by the Division of Minority and Women's Business Development of the NYS Department of Economic Development. In any circumstances of uncertainty or conflict, the Regulations of the Division of Minority and Women's Business Development supersede this information.
- B. Implementation of NYS Executive Law Article 15-A by the Owner shall require the Contractor to be bound by the following clauses and provide the Owner with the following information:
1. The Contractor and Subcontractors 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.
 2. The Contractor shall submit an EEO policy statement to the Owner within seventy two (72) hours after the date of the Letter of Intent to award Contract.
 3. If a Contractor or Subcontractor does not have an existing EEO policy statement, the Owner may provide the Contractor or Subcontractor a model plan.
 4. The Contractor's EEO policy statement shall include the following:
 - a. The Contractor will not discriminate against any employee or applicant for employment because of race, creed, color, national origin, sex, age, disability or marital status, will undertake or continue existing EEO programs to ensure that minority group members and women are afforded equal employment opportunities without discrimination, and shall make and document its conscientious and active efforts to employ and utilize minority group members and women in its work force.
 - b. The Contractor shall state in all solicitations or advertisements for employees that, in the performance of the contract, all qualified applicants will be afforded equal employment opportunities without discrimination because of race, creed, color, national origin, sex, age, disability or marital status.
 - c. 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.
 5. The Contractor shall submit a Six Month Workforce Utilization Schedule prior to commencement of the Work of the Contract.
 6. To ensure continuous compliance with Section 20.02 during the life of the Contract, the Contractor and Subcontractors shall submit to the Owner a Monthly Workforce Utilization Report.

7. The Contractor shall include the provisions of Section 20.02 in each Subcontract in such a manner that the requirements will be binding upon each Subcontractor.

Section 20.03 – Opportunities for Minority and Women-Owned Business Enterprises (M/WBE)

- A. The Contractor agrees to be bound in accordance with NYS Executive Law Article 15-A, and in conformance with Regulations promulgated by the Division of Minority and Women's Business Development of the NYS Department of Economic Development. In any circumstances of uncertainty or conflict, the Regulations of the Division of Minority and Women's Business Development supersede this information.
 - B. Implementation of NYS Executive Law Article 15-A, by the Owner shall require the Contractor to be bound by the following clauses and provide the Owner with the following information:
 - C. The Owner requires the Contractor to submit a Statewide Utilization Management Plan (“SUMP”) via the NYS Contract System. Hard copies of the plan will no longer be accepted and no award can be made without an approved plan. Please login to the NYS Contract System at <https://ny.newnycontracts.com> to view and complete the SUMP. If you are a new user, click on **Account Lookup**” to identify your account by company name. You can then **"Request New User"** to be set up so that you can access the account. **It is important that the staff member who is responsible for reporting payment information for your firm is also set up as a user in the System.** Email notifications regarding the approval/denial of the plan will come from the New York State Contract System so please ensure the address is listed in your contacts to avoid messages being deleted as spam. If you have any questions regarding the submittal of the SUMP, please contact Rachel Scaccia at 518-257-3358 (rsaccia@dansy.org). If you have any questions regarding MWBE Utilization, please contact Thomas Christian, Assistant Director, OPG Upstate at 518-257-3795 (tchristian@dasny.org) or Wayne Benjamin, Assistant Director, OPG Downstate at 212-273-5114 (wbenjamin@dasny.org).
1. The Contractor shall submit to the Owner, the Statewide Utilization Management Plan (“SUMP”) within seventy two (72) hours after being notified of low bid status. The SUMP shall list all proposed subcontractors and material purchases including an identification of the NYS Empire State Development Corporation (“ESD”) certified M/WBE Subcontractors and suppliers the Contractor intends to use to perform the Work of the Contract and to achieve the participation goals established in the Contract Documents. The **Scope Verification Form** shall accompany the SUMP for each M/WBE subcontractor listed on the SUMP. Only NYS ESD certified M/WBEs are to be submitted in the SUMP and will qualify for M/WBE credit. The Owner or ESD can assist the Contractor in locating NYS certified M/WBEs.
 2. The Owner will review the SUMP and issue the Contractor a notice of acceptance or deficiency within twenty (20) days of its receipt. A notice of deficiency shall include (i) the name of any M/WBE which is not acceptable for the purpose of complying with the M/WBE participation goals and the reasons why it is not acceptable; (ii) elements of the Work of the Contract, which the Owner has determined can be reasonably structured by the Contractor to increase the likelihood of participation in the Contract by M/WBEs; and (iii) other information which the Owner determines to be relevant to the SUMP.
 3. The Contractor shall respond to the notice of deficiency within seven (7) business days of receipt by submitting to the Owner a written remedy in response to the notice of deficiency. If the written remedy that is submitted is not timely or is found by the Owner to be inadequate, the

Owner shall notify the Contractor and direct the Contractor to submit, within five (5) business days, a Request for Waiver. Failure to file the waiver form in a timely manner may be grounds for disqualification of the bid.

4. The Contractor who has written documentation of good faith efforts to obtain commitments from M/WBE Subcontractors and suppliers prior to submitting the SUMP may submit a request for waiver form at the same time it submits the SUMP. If a Request for Waiver is submitted with the SUMP and is not accepted by the Owner, the provisions of clauses (i) and (ii) regarding the notice of deficiency and written remedy will apply. In this case, the Contractor may submit a second Request for Waiver as directed by the Owner.
5. If the Contractor does not submit a SUMP, remedy deficiencies in the SUMP, submit a Request for Waiver, or if the Owner determines that the SUMP does not indicate that the M/WBE participation goals will be met and/or that the Contractor has failed to document good faith efforts, the Owner may disqualify the Contractor as being not-responsible.
6. The Contractor shall attempt to utilize, in good faith, any M/WBE identified within the SUMP, at least to the extent indicated in the SUMP.
7. The Contractor shall submit to the Owner, within thirty (30) days from the acceptance of the SUMP, copies of executed subcontract agreements and the excepted schedule of values for each M/WBE subcontractor or fully executed purchase order agreements to M/WBEs suppliers identified on the accepted Utilization Plan. Each executed agreement shall include reference to the Contract.
8. The Contractor shall submit to the Owner detailed invoices or requisitions from M/WBEs, which identifies service, materials, equipment and supplies applicable to the Contract.

Section 20.04 - Good Faith Efforts and Guidelines

- A. The Contractor must demonstrate it has made good faith efforts to comply with the requirements of the Contract Documents and submit documentation to enable the Owner to make a determination for compliance with the provisions of this Article.
- B. The Contractor shall utilize the following guidelines in preparing good faith efforts documentation:
 1. Attach a copy of the completed SUMP in accordance with M/WBE goals established in the Contract Documents.
 2. Submit a written request for a referral list of M/WBE's certified by Empire State Development by trade or service from the Opportunity Programs Group for subcontracting and procurement opportunities.
 3. Contact all the Empire State Development certified M/WBEs posted in the list of interested subcontractors and suppliers posted on the Dormitory Authority's website:
<http://www.dasny.org/construc/bidops/03C2.php>
 4. Provide a record of advertisements placed in general circulation, trade and minority and women oriented publications. Include the name of publications and dates of advertisements.

5. Submit documentation that clearly demonstrates that you contacted all the M/WBEs identified through the outreach activities outlined above to determine their capacity to perform the applicable scope of work.
 6. Provide a record of ALL written solicitations made to New York State certified minority and women-owned business enterprises obtained from the directory of certified businesses and/or the outreach efforts specified above. Include dates and copies of solicitation made.
 7. Provide a record of ALL responses received from New York State certified minority and women-owned business enterprises to any such advertisements and solicitations made. Include dates and copies of any written responses.
 8. Provide a list of any pre-bid, pre-award, or other meetings attended with New York State certified minority or women owned businesses.
 9. List the efforts undertaken to subdivide portions of the work into smaller components in order to increase New York State certified minority and women-owned business enterprise participation.
 10. Did your firm seek additional assistance from one of the Owner's Technical Assistance providers? If yes please provide documentation of your interaction.
 11. Did your firm solicit any New York State certified minority and women-owned business enterprises located outside the region where the scope of work is to be performed? If so, what actions were taken to contact and assess the financial ability of those firms to participate?
 12. Provide a description of all relevant contract documents, plans or specifications, or documents describing the scope of work which was made available to New York State certified minority and women-owned business enterprises for the purposes of soliciting their bids. Include the dates and manner in which these documents were made available.
 13. Were the same subcontract terms and conditions offered to New York State certified minority and women-owned business enterprises as those offered in the ordinary course of business and to other subcontractors?
 14. Did your firm engage in direct in person or telephone negotiations with NYS certified M/WBE firms where quotes originally submitted were deemed as too high?
 15. Has your firm made payments for work performed by New York State certified minority and women-owned business enterprises in a timely fashion for past work so as to facilitate continued performance by the certified businesses?
 16. List any special considerations and/or concerns, which are preventing adequate New York State certified minority and women-owned business enterprises to participate.
- C. Responses to information in the Guidelines above should be given in an item-by-item format following the numerical sequence as presented and submitted with the Request for Waiver to the Owner. If the Contractor fails to adequately document and respond to each item, it may result in a finding of non-compliance. For assistance, please contact the Owner's Opportunity Programs Group at 518- 257-3465 - Upstate or 212-273-5111 - Downstate.

Section 20.05 - Waivers

- A. If the Contractor, after making good faith efforts, is unable to comply with M/WBE goals, the Contractor may submit a Request for Waiver documenting good faith efforts by the Contractor to meet such goals. If the documentation included with the waiver request is complete, the Owner shall evaluate the request and issue a written notice of acceptance or denial within twenty (20) days of receipt.
- B. If the Owner, upon review of the SUMP and updated Compliance Reports, determines that the Contractor is failing or refusing to comply with the Contract Document goals and no waiver has been issued in regards to such non-compliance, the Owner may issue a notice of deficiency to the Contractor. The Contractor must respond to the notice to deficiency within seven (7) days of receipt. Such response may include a request for partial or total waiver of M/WBE participation goals.

Section 20.06 - Administration Hearing on Disqualification

- A. If the Owner disqualifies a bid for any of the reasons set forth in Section 20.02, the Contractor shall be entitled to an administrative hearing, on the record, before a hearing officer appointed by the Owner to review the determination of disqualification of the bid and determination of non-responsibility of the Contractor.
- B. The hearing officer's determination shall be the final determination of the Owner. Such final administrative determination shall be reviewable by a proceeding brought pursuant to Article 78 of the Civil Practice Law and Rules, provided such proceeding is commenced within thirty (30) days of notice given by certified mail, return receipt requested, rendering such final administrative determination in accordance with the provisions of Executive Law Article 15-A, §-313.

Section 20.07 – Complaints and Liquidated Damages - M/WBE Participation

- A. If the Owner determines that the Contractor is not in compliance with the requirements of this Article and the Owner is unsuccessful in its efforts to resolve the matter and bring the Contractor into compliance with the requirements, the Owner may file a complaint with the Director of the Division of Minority and Women's Development in the Department of Economic Development ("Director") according to the provisions of Executive Law Article 15-A, §§ 313 & 316 or may assess liquidated damages pursuant to § 316-a.
- B. Subsequent to the award of this Contract, if the Contractor submits a Request for Waiver of Minority and Women-Owned Business Enterprises ("M/WBE") participation goals and the Owner denies the request or fails to respond within twenty (20) days of receiving it, or if the Contractor has received a written determination from the Owner that the Contractor has failed or refused to comply with the provisions of this Article, the Contractor may file a complaint with the Director in accordance with the provisions of Executive Law Article 15-A, §§ 313 & 316.
- C. The complaint must be filed within twenty (20) days of the Owner's receipt of the Request for Waiver. If the Owner fails to respond in that time, or within twenty (20) days of a notification that the request has been denied by the Owner or within twenty (20) days of receipt of notification from the Owner that the Contractor has failed or refused to comply with the goals.
 - 1. A complaint shall set forth the facts and circumstances giving rise to the complaint together with a demand for relief.

2. The party filing a complaint, whether the Contractor or the Owner, shall deliver a copy to the other party. Both the complaint and the copy shall be delivered by either personal service or by certified mail, return receipt requested.
 3. Upon receipt of a complaint, the Director shall provide the party against whom the complaint has been filed with an opportunity to respond to the complaint. If within thirty (30) days of receipt of the complaint the Director is unable to resolve the complaint to the satisfaction of the Owner and the Contractor, the complaint shall be referred to the Division of Minority and Women Business Development's hearing officers. Upon conclusion of the administrative proceeding, the hearing officer will submit to the Director his or her award regarding the alleged violation of the Contract or refusal of the Owner to grant a waiver request by the Contractor and recommendations regarding the imposition of fines, sanctions or penalties.
 4. The Director, within ten (10) days of receipt of the hearing officer's decision, will issue a determination of such matter and shall cause a copy of such determination to be served upon the contractor by personal service or by certified mail, return receipt requested. The decision of the hearing officer as to the imposition of fines, sanctions, or penalties shall be reviewable pursuant to Article 78 of the Civil Practice Law and Rules.
 5. The penalties imposed for any violation which is premised upon either a fraudulent or intentional misrepresentation by the Contractor or the Contractor's willful and intentional disregard of the M/WBE participation requirement included in the Contract may include a determination that the Contractor shall be ineligible to submit a bid to any contracting agency or be awarded any such Contract for up to one year following the final determination.
 6. If a Contractor has previously been debarred, the penalties imposed for any subsequent violations, if such violation occurs within five years of the first violation, may result in debarment for up to five (5) years after the final determination. Such information shall be posted on the Division of Minority and Women Business Development's web site.
 7. The determination of the Owner or the Contractor to proceed with a complaint shall not preclude the Owner, in its discretion, from pursuing any other remedies which it may have pursuant to law and Contract, including withholding from payments to the Contractor the estimated amount of the fines and penalties which may be imposed pursuant to this Article. Said amounts shall be the difference between the planned dollar amount of M/WBE subcontract awards and the actual dollar amount of such awards.
- D. In lieu of the complaint procedures set forth in paragraphs "A" through "C" of this Article, if the Owner determines that the Contractor willfully and intentionally fails to comply with the requirements of this Article, the Contractor shall be obligated to pay to the Owner liquidated damages in an amount not to exceed two hundred thousand dollars (\$200,000) to compensate the Owner for estimated expenses that would otherwise be incurred by the Owner to enforce the provisions of this Article and Article 15-A of the Executive Law, including enforcement proceedings against the Contractor pursuant to Section 316 of the Executive Law. The Contractor shall pay such liquidated damages to the Owner within sixty (60) days after they are assessed by the Owner unless prior to the expiration of such sixtieth day, the Contractor shall file a complaint with the Director pursuant to subdivision 8 of Section 313 of the Executive Law.

Section 20.08 – Reporting to Owner

- A. The Contractor shall complete the following reports and submit as indicated to establish and update EEO and M/WBE requirements during the life of the Contract. Reports not submitted at such time shall be cause for the Owner to delay implementing scheduled payment to the Contractor. The listed reports are hereby made a part of the Contract and copies are included in the Contract Documents and template forms are also available on the Dormitory Authority's web site, <http://www.dasny.org>. To become more familiar with the Opportunity Program Requirements, a Pre Bid Meeting Outline is available on the Dormitory Authority's website.
1. **Statewide Utilization Management Plan ("SUMP"):** the Contractor shall submit to the Owner within seventy two (72) hours after the date of the Letter of Intent. If a request for waiver will be submitted, part C of the Utilization Plan shall be completed along with the applicable documentation of the good faith efforts.
 2. **Scope Verification Form:** the Contractor shall submit with the Utilization Plan, completed forms for each M/WBE subcontractor listed on the plan. Incomplete or non-submittal of the form will delay approval of the Utilization Plan.
 3. **Six Month Workforce Utilization Schedule:** the Contractor shall submit to the Owner prior to commencement of the Work of the Contract.
 4. **Compliance Report:** the Contractor shall submit an updated report with each Application for Payment request.
 5. **Weekly Workforce Report:** the Contractor shall maintain at the Project Site for the Owner's review.
 6. **Monthly Work Force Utilization Report:** the Contractor shall submit to the Owner an updated report each month during the life of the Contract.