



## **TERM CONTRACT FOR PROFESSIONAL SERVICES**

### **CHAPTER THREE**

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**ARTICLE 1 – PROFESSIONAL'S GENERAL RESPONSIBILITIES**

**1.1 Professional's Services**

- 1.1.1 The Professional's services consist of those services performed by the Professional, the Professional's employees, and the Professional's Subconsultants and subcontractors.
- 1.1.2 The Professional, as professional advisor and consultant to the Owner for each Project, accepts and acknowledges the relationship of trust and confidence established with the Owner and covenants to furnish professional services to the Owner in an expeditious, economical and proper manner consistent with the Owner's interests and objectives.
- 1.1.3 The relationship created by this Term Contract for Professional Services between the Owner and the Professional is one of independent contractor and it is in no way to be construed as creating any agency relationship between the Owner and the Professional, nor is it to be construed as creating or appointing the Professional as an agent of the Owner for any purpose whatsoever.
- 1.1.4 The Professional shall determine and promptly notify the Owner in writing when extra services are necessary or desirable in connection with each Project.

**1.2 Professional's Performance Of Services**

- 1.2.1 The Professional understands and acknowledges that time is of the essence in completion of each Project and the Owner will incur damages if the Project is not completed on time. The Professional shall at all times carry out its duties and responsibilities as expeditiously as possible and in accordance with the Project Design Schedule, the Project Construction Schedule and in accordance with all other applicable schedules.
- 1.2.2 To promote a working relationship with the Owner based on ethical business practices, the Professional understands and acknowledges that it will provide all services in accordance with the Owner's Ethics Policy as outlined in Article 14 – *Ethical Conduct and Prohibited Interests* of this Chapter Three.
- 1.2.3 The Professional shall not, without the express written permission of the Owner, (i) engage or recommend to the Owner engagement of any consultant, trade contractor, subcontractor or supplier to provide services on behalf of the Professional, Owner or Project in which the Professional has a direct or indirect proprietary or other pecuniary interest; or (ii) call for the use of or by exclusion require or recommend the use of products, materials, equipment, systems, processes or procedures in which the Professional or in which any consultant, trade contractor, subcontractor, or supplier of the Professional has a direct or indirect proprietary or other pecuniary interest.

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- 1.2.4 The Professional shall not have control or charge of construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, nor shall the Professional, for any of the foregoing purposes, be deemed the agent of the Owner.

**1.3 Professional's Duties**

- 1.3.1 The Professional shall cooperate and communicate with the Owner and all other persons or entities required for satisfactory completion of each Project.
- 1.3.2 The Owner may retain other consultants for this project. The Professional shall cooperate, communicate and coordinate its work with the work of such other consultants.
- 1.3.3 The Professional shall comply with all procedural requirements of the Owner and the Client reasonably inferable from Chapter Two – Professional's Required Services and this Chapter Three – General Terms and Conditions.
- 1.3.4 The Professional shall perform all services and prepare all documents in accordance with the requirements of all applicable laws, rules and regulations of all governmental agencies having jurisdiction over the Project.
- 1.3.5 The Professional shall provide documents to the Owner for review in accordance with the Project Design Schedule to allow the Owner reasonable time for review.
- 1.3.6 The Professional shall process documents and provide other reasonably required documents, services and personnel, necessary to (i) obtain construction and other required approval, permits and Certificates of Occupancy for each Project; and, (ii) represent that the Professional's services and work product comply with requirements of governmental agencies having jurisdiction over each Project.
- 1.3.7 The Professional shall immediately make additions, changes and corrections to any documents prepared by the Professional necessitated by design deficiencies, errors and omissions in the Professional's performance of its services. The Professional agrees that the cost to the Professional for such additions, changes and corrections shall be part of the Professional's fee for its required services. Extra costs to the Owner resulting from the Professional's design deficiencies, errors and omissions shall be recoverable from the Professional and/or its Professional Liability Insurance carrier. Acceptance of the Contract Documents by the Owner for purpose of bidding shall not relieve the Professional of any responsibility for design deficiencies, errors or omissions.

**1.4 Professional's Personnel And Consultants**

- 1.4.1 All services rendered by the Professional for each Project shall be performed by or under the immediate supervision of experienced professional(s) licensed and registered in the State of New York possessing expertise in the discipline of the

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service being rendered. If the Professional chooses to subcontract or affiliate with another professional entity or organization for all or any portion of the Professional's scope of services, the Professional shall subcontract with a professional firm with the requisite licensure, skill, experience and expertise to provide the required services. The Professional shall furnish professional services in accordance with sound professional standards consistent with those practiced by professional firms on projects similar in size, complexity and cost to the Project.

- 1.4.2 The Professional shall retain and compensate any consultant(s) required in connection with the Professional's performance of Required Services. The obligations of the Professional's consultant(s) shall inure to the benefit of the Owner. The Professional's agreements with its consultant(s) shall require that in the event of default under, or termination of, this Term Contract For Professional Services, and upon request of the Owner, the Professional's consultant(s) will perform services for the Owner.
- 1.4.3 The Professional shall be responsible for the timely and efficient completion of all services performed by the Professional's consultant(s) in accordance with the requirements of this Term Contract For Professional Services and shall coordinate the work of its sub-consultants. Fees for the Professional's consultant(s) are included in the Professional Contract Price.
- 1.4.4 The Professional shall name a representative (the "Professional's Representative") to serve as the Owner's primary communication contact with the Professional.

**1.5 Professional's Records**

- 1.5.1 The Professional shall, concurrently with performance of its services, prepare substantiating records regarding services rendered, including records of the Professional's Subconsultants.
- 1.5.2 The Professional shall for all services performed in connection with this Term Contract For Professional Services, retain in its records copies of all written communications, and any memoranda of oral communications, related to each Project.
- 1.5.3 Unless otherwise provided, the Professional shall maintain substantiating records for six (6) years after the Project date of Final Completion or for any longer period of time as may be required by law or good construction practice. If the Professional receives notification of a dispute or the commencement of litigation regarding any Project within this six (6) year period, the Professional shall continue to maintain all Project records until final resolution of the dispute or litigation.
- 1.5.4 Upon seven (7) calendar days' written notice, from the effective date of this Term Contract for Professional Services to the latest date described in Subparagraph

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1.5.3, the Professional shall make its records available during normal business hours to the Owner or its authorized representative(s). Owner and its authorized representative(s) shall be entitled to inspect, examine, review and copy the Professional's records at the Owner's reasonable expense, within adequate workspace at the Professional's facilities. Failure by the Professional to supply substantiating records shall be reason to disallow the related costs from amounts which might otherwise be payable by the Owner to the Professional pursuant to this Term Contract For Professional Services. If payment has already been made, amounts disallowed shall be refunded by the Professional to the Owner upon demand.

**1.6 Contamination, Claim And Incident Reporting**

- 1.6.1 The Professional shall immediately notify the Owner both orally and in writing of the presence and location of any environmental contamination of the Site of which it becomes aware or reasonably should become aware, including but not limited to asbestos, Hazardous Substances and petroleum releases.
- 1.6.2 The Professional shall immediately notify the Owner both orally and in writing of the details of all incidents of which it becomes aware which adversely affect or have the potential to adversely affect the quality or progress of the Work including, but not limited to, union jurisdictional disputes, accidents, damages to Work and similar significant occurrences.
- 1.6.3 The Professional shall immediately notify the Owner both orally and in writing of any claim of which it becomes aware made by anyone against the Owner, the Professional, or any consultant, contractor, subcontractor, or supplier or any of them with respect to any Project.

**1.7 Changes To The Contract**

- 1.7.1 The Professional understands and agrees that the Term Contract for Professional Services cannot be changed except as provided herein.
- 1.7.2 No act, omission or course of dealing by the parties shall alter the requirement that modifications of the Term Contract for Professional Services can be accomplished only by written documents signed by the parties.
- 1.7.3 If the Professional disputes a decision (i) that a change has occurred in its scope of services; (ii) whether a change in its scope of services will result in adjustment of its compensation or applicable schedules; or (iii) the amount of any adjustment of compensation or applicable schedules, the Professional shall nevertheless continue to provide its services. However, by doing so, the Professional will not prejudice any claim that it may have with respect to that decision.

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**ARTICLE 2 – OWNER'S RESPONSIBILITIES**

**2.1 Information**

- 2.1.1 The Owner shall provide the Professional with information reasonably necessary to assist the Professional in performing its services, including, if applicable, the Site legal description and any required survey.
- 2.1.2 If a Project involves an existing structure, the Owner shall provide the Professional with available as-built and record drawings, plans, specifications and structure system information in the Owner's possession with respect to such structure.
- 2.1.3 The Owner shall provide the Professional with the Owner's pertinent Program Requirements, the budgeted Total Project Construction Cost, Project dates and key milestone dates.
- 2.1.4 The Owner shall provide the Professional with all written and tangible material in its possession concerning conditions below ground at the Project Site.
- 2.1.5 The Owner shall provide the Professional with a complete listing of all specified CSI Division 10, 11, 12 and 13 furniture and equipment items, and all existing items to be relocated, including their dimensions, weights, energy consumption and power requirements.
- 2.1.6 The furnishing of information by the Owner to the Professional shall not relieve the Professional of the responsibility to evaluate the information provided by the Owner and to notify the Owner in writing of any additional information needed or services required from the Owner in order for the Professional to perform its services. Any information and tangible material provided by the Owner to the Professional is furnished to the Professional only in order to make complete disclosure of such material in the possession of the Owner and for no other purpose. By furnishing such material, the Owner does not represent, warrant, or guarantee its accuracy either in whole, in part, implicitly or explicitly, and shall have no liability therefor.

**2.2 Owner's General Duties**

- 2.2.1 The Owner shall timely compensate the Professional in accordance with the Term Contract for Professional Services.
- 2.2.2 Unless otherwise required to be provided by the Professional in its scope of services, Owner shall secure and pay for all Project testing.
- 2.2.3 The Owner shall review documents prepared by the Professional. Review by the Owner shall be to ensure that DASNY projects are code compliant and technically sound, and to ensure that the Contract Documents are clear and



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understandable, and generally consistent with the Owner's intent. No review of such documents shall relieve the Professional of any of its responsibilities.

**2.3 Owner's Representative**

2.3.1 The Owner shall name the Owner's Representative to serve as the Professional's primary communication contact with the Owner.

**ARTICLE 3 – INTELLECTUAL PROPERTY AND CONFIDENTIALITY**

**3.1 Nature And Use Of Information**

All information, documents, and electronic media furnished by the Owner to the Professional (i) belong to the Owner; (ii) are proprietary and confidential; (iii) are furnished solely for use on the Owner's Projects; (iv) shall be kept confidential by the Professional; and, (v) shall not be used by the Professional on any other project or in connection with any other person or entity, unless disclosure or use thereof in connection with any matter other than services rendered to the Owner hereunder is specifically authorized in writing by the Owner in advance. The Owner agrees that the Professional will not have any liability to the Owner for any revision of addition to, alteration or deviation from the Instruments of Services occurring subsequent to the Professional's completion of services under the Contract or earlier termination in accordance with the Contract, except where such revision, addition, alteration or deviation is necessary as a result of the Professional's failure to perform its duties under this Contract.

**3.2 Ownership Of Information**

The Schematic Deliverables, the Design Development Deliverables, the Construction Documents, the Bid Documents and any other documents or electronic media prepared by or on behalf of the Professional for each Project are the sole property of the Owner free of any retention rights of the Professional. The Professional hereby grants to the Owner an unconditional right to use, for any purpose whatsoever, the Schematic Deliverables, the Design Development Deliverables, the Construction Documents, the Bid Documents and any other documents or electronic media prepared by or on behalf of the Professional for the Project, free of any copyright claims, trade secrets or other proprietary rights with respect to such documents.

**3.3 Disclosure Of Information**

The Professional shall not disclose any information it receives from the Owner to any other person or entity except to the extent necessary to allow it to perform its duties under this Term Contract for Professional Services.

**3.4 Instructions To Employees**

Because it is difficult to separate proprietary and confidential information from that which

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is not, the Professional shall instruct its employees and agents to regard all information which is not in the public domain as information which is proprietary and confidential.

**3.5 Non-Publication**

Submission or distribution of documents to meet official regulatory requirements or for other required purposes in connection with a Project is not to be construed as publication in derogation of the Owner's common law copyrights or other reserved rights.

**ARTICLE 4 – APPLICABLE LAWS AND DISPUTE RESOLUTION**

**4.1 Applicable Laws**

4.1.1 This Term Contract for Professional Services shall be deemed to be entered into in and shall be interpreted under the laws of the State of New York.

4.1.2 The Professional shall comply with any applicable provisions of Acts of Congress and rules, regulations and requirements of the Government of the United States of America. If federal monies fund a Project, the Professional shall furnish any information and provide any assistance that the Owner deems necessary to prepare any certificates, reports or materials required as a result of obtaining federal monies.

4.1.3 Unless otherwise directed by the Owner, the Professional shall comply with all applicable codes and regulations required by law. Without limiting the generality of the foregoing, compliance with codes and regulations shall include, but shall not be limited to, those of the following that are applicable to the Project:

- (i) Administrative Codes;
- (ii) Zoning Resolutions;
- (iii) New York State Uniform Fire Prevention and Building Code;
- (iv) New York State Energy Conservation and Construction Code;
- (v) Local Zoning Ordinances;
- (vi) Local Building Codes; and
- (vii) New York State Hospital Code.

4.1.4 The Professional and its Subconsultants shall comply fully with all laws governing the protection of lives and health on the Project, including all applicable rules, regulations, codes and bulletins of the New York State Department of Labor, and the Federal Occupational Safety and Health Act of 1970, as amended. The Professional shall report on compliance to the Owner or the Owner's representative as required by the Owner.

4.1.5 Each and every provision of law and clause required by law to be inserted into this Term Contract for Professional Services shall read and shall be enforced as though so included.

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**4.2 Court Actions**

Except as expressly prohibited by law:

- (i) all legal actions hereunder shall be commenced in New York State Supreme Court or any New York Federal District Court having subject matter jurisdiction over the matter in controversy; except that any final judgment may be enforced in other jurisdictions in any manner provided by law;
- (ii) the choice of jurisdiction described in the preceding Subparagraph shall be mandatory and not permissive in nature, thereby precluding the possibility of litigation or trial in any jurisdiction other than that specified herein; and
- (iii) the parties waive any right to assert the doctrine of forum *non conveniens*.

**4.3 Mutual Discussion**

In case of any dispute, claim, or disagreement arising from or relating to a Project or arising out of this Term Contract for Professional Services or the breach thereof, prior to the Professional filing a formal claim submittal pursuant to Paragraph 4.4 of this Chapter Three, the Professional and the Owner shall meet to discuss the basis for the dispute, claim or disagreement and attempt to reach a resolution through mutual discussion.

**4.4 Claim Submittal**

In case of any dispute, claim, or disagreement arising from or relating to a Project or arising out of this Term Contract for Professional Services or the breach thereof that is not resolved pursuant to Paragraph 4.3 of this Chapter Three, the Professional shall:

- 4.4.1 file with the Owner, within fifteen (15) business days after the said dispute, claim or disagreement, a written notice of the basis of the Professional's claim, including a description of the mutual discussion meeting held pursuant to Paragraph 4.3 of this Chapter Three and its outcome, estimated cost, and request for a determination thereof;
- 4.4.2 proceed diligently, pending and subsequent to the determination of the Owner with respect to any said disputed matter, with the performance of the Professional Services in accordance with all instructions of the Owner; and
- 4.4.3 waive all claims for additional compensation or damages upon failure to comply with the provisions of this Article.

**4.5 Facilitative Mediation**

If the parties cannot resolve any dispute, claim, question, or disagreement arising from or relating to a Project or arising out of this Term Contract for Professional Services or the breach thereof through Claim Submittal, the parties may in good faith participate in

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private, non-binding facilitative mediation seeking a just and equitable solution satisfactory to all parties.

- 4.5.1 All parties to a mediation shall promptly provide all other parties to the mediation with copies of essential documentation relevant to the support or defense of the matter being mediated.
- 4.5.2 The parties shall not be required to mediate for a period greater than ninety-one (91) calendar days unless otherwise agreed to in writing by the parties. The parties shall share equally any administrative costs and fees of such proceedings, but shall each be responsible for expenses otherwise incurred.
- 4.5.3 In the event that the statute of limitations would run during the required mediation period, either party may institute litigation so as to avoid the running of such statute upon the condition that such party immediately seek a stay of such litigation pending the conclusion of the mediation period.
- 4.5.4 During the course of mediation, any party to the mediation may apply for injunctive relief from any court of competent jurisdiction until the mediation period expires or the dispute is otherwise resolved.

**4.6 Conflicting Dispute Resolution Provisions**

Neither party to this Term Contract for Professional Services shall enter into any contract with regard to a Project which directly or indirectly gives the right to resolve any dispute with, involving, or affecting the other to any other person or legal entity which is in conflict with the dispute resolution procedures required by this Article.

**4.7 Arbitration Preclusion**

In case of a dispute relating to a Project, or arising out of this Term Contract for Professional Services, no party to this Term Contract for Professional Services shall be required to participate in or be bound by, any arbitration proceedings.

**ARTICLE 5 – TERMINATION OR SUSPENSION**

**5.1 Termination for Cause**

If the Professional defaults by failing to substantially perform, in accordance with the terms of this Term Contract for Professional Services, as determined by the Owner, the Owner may give written notice to the Professional (i) terminating this Term Contract for Professional Services effective seven (7) calendar days from the date of notice; or (ii) setting forth the nature of the default and requesting the Professional initiate cure within seven (7) calendar days from the date of notice. At any time thereafter, if the Professional fails to initiate cure upon the request of the Owner and continue such cure until complete, the Owner may give notice to the Professional of immediate termination. If the Owner terminates this Term Contract for Professional Services pursuant to this

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paragraph, and it is subsequently determined by a court of competent jurisdiction that the Professional was not in default, then in such event said termination shall be deemed a termination for convenience as set forth in Paragraph 5.2 of this Chapter Three.

**5.2 Termination for Convenience or Suspension of Project**

The Owner may at any time give written notice to the Professional terminating this Term Contract for Professional Services or suspending all Projects, in whole or in part, for the Owner's convenience and without cause. If the Owner terminates this Term Contract for Professional Services or suspends all Projects, the Professional shall immediately reduce its staff, services and outstanding commitments in order to minimize the cost of termination or suspension.

**5.3 Payment In Case Of Termination or Suspension of Project**

- 5.3.1 If this Term Contract For Professional Services is terminated by the Owner pursuant to Paragraph 5.1 of this Chapter Three, no further payment shall be made to the Professional until completion of the Project(s). At such time, the Professional's compensation shall, at the Owner's option, be calculated (i) subject to the last sentence of this Subparagraph, on the basis of services actually performed and approved by the Owner and expenses actually incurred from the date of the last approved *Professional Services Contract Payment Requisition* up to the effective termination date; or (ii) on the basis of the payment terms set forth elsewhere herein. In either case, the Professional's compensation shall be reduced by all costs and damages incurred by the Owner as a result of the default of the Professional.
- 5.3.2 If this Term Contract For Professional Services is (i) terminated by the Owner pursuant to Paragraph 5.2 of this Chapter Three; or (ii) suspended more than four (4) months by the Owner pursuant to Paragraph 5.2 of this Chapter Three, the Professional's compensation shall be calculated on the basis of services actually performed and approved by the Owner and expenses actually incurred from the date of the last approved *Professional Services Contract Payment Requisition* up to the effective termination or suspension date and reasonable costs associated with termination or suspension. In no event shall the Professional be entitled to compensation in excess of the Professional Contract Price.
- 5.3.3 If this Term Contract for Professional Services is suspended less than four (4) months by the Owner pursuant to Paragraph 5.2 of this Chapter Three, the Professional specifically agrees that such suspension, interruption or delay of the performance of the services pursuant to this item shall not increase the cost of the Professional Services.
- 5.3.4 Time of completion set forth in the Project Design Schedule may be extended to such time as the Owner determines shall compensate for the time lost by the suspension, interruption or delay; such determination shall be set forth in writing

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by the Owner.

**ARTICLE 6 – MISCELLANEOUS PROVISIONS**

**6.1 Integration**

The Term Contract for Professional Services represents the entire and integrated agreement between the Owner and the Professional, and supersedes all prior negotiations, representations or agreements, either written or oral, for each Project. The Term Contract for Professional Services may be amended only by written instruments signed by both the Owner and the Professional, and is subject to such reasonable modifications as may be required by the Owner's lender(s) or insurer(s), if any.

**6.2 Severability**

If any provision of the Term Contract for Professional Services, or the application thereof, is determined to be invalid or unenforceable, the remainder of that provision and all other provisions of this Term Contract for Professional Services shall remain valid and enforceable.

**6.3 Waiver**

No provision of this Term Contract for Professional Services may be waived except by written agreement of the parties. A waiver of any provision on one occasion shall not be deemed a waiver of that provision on any subsequent occasion, unless specifically stated in writing. A waiver of any provision shall not affect or alter the remaining provisions of this Term Contract For Professional Services.

**6.4 Strict Compliance**

No failure of the Owner to insist upon strict compliance by the Professional with any provision of this Term Contract For Professional Services shall operate to release, discharge, modify, change or affect any of the Professional's obligations.

**6.5 Third-Party Beneficiaries**

This Term Contract For Professional Services shall inure solely to the benefit of the parties hereto and their successors and assigns, and, except as provided in Subparagraph 1.4.2 of this Chapter Three, nothing contained in this Term Contract For Professional Services is intended to or shall create a contractual relationship with, or any rights or cause of action in favor of, any third party against either the Owner or the Professional.

**6.6 Survival**

All provisions of this Term Contract For Professional Services that contain continuing obligations shall survive its expiration or termination.

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**6.7 Assignment**

The Professional shall not assign this Term Contract For Professional Services in whole or in part without prior written consent of the Owner, however, the Owner may assign this Term Contract For Professional Services in whole or in part without prior written consent of the Professional.

**6.8 Death of the Professional**

- 6.8.1 If the Professional is an individual and that Professional shall die prior to completed performance of this Term Contract for Professional Services, then the payment to the estate of the Professional, pursuant to this Term Contract For Professional Services, shall be made as if the Projects or any part thereof had been suspended or altered on the date of the death of the Professional.
- 6.8.2 If the Professional is a partnership and a partner shall die prior to completed performance of this Term Contract for Professional Services, the Owner may, at its discretion, deem the Projects, or any part thereof, suspended or altered on the date of the death of the Professional or any date thereafter which the Owner selects, and the payment to the estate of the deceased Professional or the partnership, pursuant to this Term Contract For Professional Services, shall be made as if the Projects or any part thereof had been suspended or altered on the date of the death of the Professional, or such other date thereafter selected by the Owner.
- 6.8.3 The Owner shall have the right to the immediate possession of all files of the Professional relating to the Projects, all plans and specifications in regard to the Projects, and shall have a right to retain the services of another Professional to complete the Projects.
- 6.8.4 If the Professional is any form of limited liability company or corporation, then this Article 6.8 shall not be applicable.

**ARTICLE 7 – DAMAGES AND REMEDIES**

**7.1 Services, Reimbursement And Deductions**

If the Professional fails to perform its duties the Professional shall, without compensation by the Owner, provide and process all documents, and provide other services required as a result of the Professional's failure to perform and shall promptly reimburse the Owner for any costs or damages incurred by the Owner. The Owner shall also have the right to deduct from payments to the Professional any costs or damages incurred, or which may be incurred, by the Owner as a result of the Professional's failure to perform.

**7.2 General Indemnity**

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To the fullest extent permitted by law, the Professional shall defend if requested, protect, indemnify and hold harmless the Owner and the Owner's Related Parties from and against any and all liability, loss, claims, demands, suits, costs, fees, interest and expenses (including actual fees and expenses of attorneys, expert witnesses, and other consultants), by whomsoever brought and regardless of the legal theories upon which premised, including, but not limited to those arising out of bodily injury to, or sickness or death of, any person, or property damage or destruction (including loss of use), which may be imposed upon, incurred by or asserted against the Owner or the Owner's Related Parties allegedly or actually arising out of or resulting from any negligent act, error or omission or any intentional misconduct (i) of the Professional; or (ii) of the Professional's consultants, subcontractors or suppliers; or (iii) of the agents, employees or servants of the Professional or its consultants, subcontractors or suppliers. The Professional shall also indemnify the Owner for breach of contract not related to professional services.

7.2.1 Upon the conclusion of any such action, proceeding or lawsuit, should a final binding determination of responsibility be made that allocates responsibility to the Owner, the Client or the Owner's related parties, 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 Professional the percentage of uninsured defense costs that the Professional incurred based upon an apportionment of the Owner's allocated responsibility.

**7.3 Intellectual Property Indemnity**

To the fullest extent permitted by law, the Professional shall defend, protect, hold harmless, and indemnify the Owner and the Owner's Related Parties from and against any and all liability, loss, claims, demands, suits, costs, fees and expenses (including actual fees and expenses of attorneys, expert witnesses, and other consultants), by whomsoever brought or alleged, for infringement of patent rights, copyrights, or other intellectual property rights, except with respect to designs, processes or products of a particular manufacturer expressly required by the Owner in writing. If the Professional has reason to believe the use of a required design, process or product is an infringement of a patent, the Professional shall be responsible for such loss unless such information is promptly given to the Owner.

**7.4 Non-Exclusivity Of Owner's Remedies**

The Owner's selection of one or more remedies for breach of this Term Contract For Professional Services shall not limit the Owner's right to invoke any other remedy available to the Owner under this Term Contract For Professional Services or by law.

**7.5 Waiver Of Damages**

The Professional shall not be entitled to, and hereby waives any monetary claims for or damages arising from or related to, lost profits, lost business opportunities, unabsorbed



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overhead or any indirect consequential damages.

**7.6 Interest**

The Owner is entitled to interest on all amounts due from the Professional that remain unpaid thirty (30) calendar days after the amount is deemed due, whether as a result of a resolution of a dispute or otherwise. Any such interest shall be calculated by the same method as set forth in Article 8 below.

**ARTICLE 8 – PAYMENT TO PROFESSIONAL**

**8.1 General Requirements**

- 8.1.1 All payment requests must be made on the Owner's *Professional Services Contract Payment Requisition*.
- 8.1.2 The Professional shall pay its Subconsultants the full amount due to them from their proportionate share of each requisition for payment submitted by the Professional and paid by the Owner. The Professional shall make said payments no later than seven (7) calendar days from receipt of payment from the Owner.
- 8.1.3 The signature of the Professional on any payment requisition shall constitute the Professional's certification to the Owner that (i) the Professional has billed the Owner for all services rendered by it and any of the Professional's Consultants and subcontractors through the date of the payment requisition; (ii) the services listed in the payment requisition have progressed to the level indicated and have been performed as required by the Contract Documents; (iii) that the reimbursable expenses have been reasonably incurred; and, (iv) that the amount requested is currently due and owing.

**8.2 Payment Of Reimbursable Expenses**

Payment requisitions for expenses shall, in addition to the requisition requirements contained in Paragraph 8.1 of this Chapter Three, be accompanied by such documentation or supporting data as the Owner may require. The Professional shall:

- (i) be reimbursed only for expenses listed in Chapter One – Project Terms And Conditions, Appendix A, Item D.
- (ii) set forth with particularity the nature and cost of the expense item being billed, and attach the written authorization, if any, required for such item; and,
- (iii) bill expenses at actual cost or prevailing rate and without addition of administrative charge, multiplier or surcharge.

**8.3 Withholding of Payments**

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The Owner may withhold from the Professional any part of any payment as may, in the judgment of the Owner, be necessary:

- (1) to assure payment of just claims of any persons supplying labor or materials for the Work;
- (2) to protect the Owner from loss due to defective Work not remedied;
- (3) to protect the Owner, Client, Construction Manager (if applicable) or other such entities as identified by the Owner as additional insureds from loss due to failure to defend, loss due to injury to persons or damage to the Work or property of others caused by the act or neglect of the Professional or its Subconsultants;
- (4) to assure payment of fines, liquidated damages and penalties that may be imposed on the Professional pursuant to the provisions of this Term Contract for Professional Services; or

#### **8.4 Final Payments**

- 8.4.1 Final payment shall be made to the Professional upon satisfactory completion and acceptance by the Owner of all required services performed by the Professional pursuant to this Term Contract For Professional Services, or all required services performed prior to the termination of this Term Contract for Professional Services if so terminated, and upon submission of a certification that all Subconsultants have been paid their full and agreed upon compensation.
- 8.4.2 Acceptance by the Professional of final payment hereunder shall operate as, and shall be, a release to the Owner from all claims and liability to the Professional and its successors, legal representatives and assigns for anything done or furnished under or arising out of the provisions of the Term Contract For Professional Services except as provided for in Subparagraph 7.2.1 of this Chapter Three. No payment, final or otherwise, shall release the Professional from any obligations under this Term Contract For Professional Services.

#### **8.5 Late Payment**

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

#### **8.6 False Statements and Information Submitted with Payment Requisitions**

- 8.6.1 False statements, information or data submitted on or with applications for payment may result in one or more of the following actions by the Owner:
- (i) termination of the Term Contract For Professional Services;

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- (ii) disapproval of future contracts and subcontracts;
- (iii) withholding of final payment on the Term Contract For Professional Services;
- (iv) civil and/or criminal prosecution.

8.6.2 These provisions are solely for the benefit of the Owner, and any action or non-action hereunder by the Owner shall not give rise to any liability on the part of the Owner.

**ARTICLE 9 – GENERAL INSURANCE REQUIREMENTS**

**9.1 General Insurance Requirements**

9.1.1 Unless otherwise required, each insurance policy except the Professional's professional liability policy:

- (i) shall be issued by an insurance company 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;
- (ii) shall be kept in force throughout performance of the Professional's services and for three (3) years after the end of such performance;
- (iii) shall be an occurrence policy; and,
- (iv) shall be evidenced by a certificate of insurance acceptable to the Owner which provides that the coverage evidenced thereby shall not be a reduction in the limits of liability or canceled without thirty (30) days' prior written notice to the Owner.

9.1.2 Should the Professional fail to provide or maintain any insurance required by this Term Contract For Professional Services, the Owner may, after providing written notice to the Professional, purchase insurance covering the Professional and charge back such purchase to the Professional.

9.1.3 At any time that the coverage provisions and limits on the policies required per Article 8 of Chapter One – Project Terms And Conditions do not meet the provisions and limits set forth therein, the Professional shall immediately cease work on the Project. The Professional shall not resume work on the Project until authorized to do so by the Owner. Any delay or time lost as a result of the Professional not having insurance required by this Term Contract For Professional Services shall not give rise to a delay claim or any other claim against the Owner or the Client

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- 9.1.4 The Professional shall secure, pay for and maintain Property Insurance coverage for the protection against the loss of owned, borrowed or rented equipment and tools, including any tools owned by employees, and any tools or equipment owned, borrowed or rented by the Professional. The requirement to secure and maintain such insurance coverage is solely for the benefit of the Professional. Failure of the Professional to secure such insurance or to maintain an adequate level of coverage shall not render the Additional Insureds, or their agents and employees responsible for any losses, and the Additional Insureds, their agents and employees shall have no such liability.
- 9.1.5 Neither the procurement nor the maintenance of any type of insurance by the Owner and the Professional shall in any way be construed or be deemed to limit, discharge, waive or release the Professional from any of the obligations and risks accepted by the Professional or to be a limitation on the nature or extent of said obligations and risks.
- 9.1.6 The same conditions as are applicable to the Professional under these insurance requirements shall be applicable to the Professional's Subconsultants. However, the Professional shall keep the Subconsultant Certificates of Insurance on file and produce them upon the demand of the Owner.
- 9.1.7 The Professional and its Subconsultants 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 the insurance companies issuing such policies. The Professional shall take every precaution against injuries to persons or damage to property. The Professional shall establish and maintain safety procedures in connection with its work as required by the current New York State Labor Law and regulations of the Occupational Safety and Health Administration as applicable.
- 9.1.8 Notwithstanding any other provision of this Article, the Owner may require the Professional to provide, at the expense of the Owner, any other form or limit of insurance necessary to secure the interests of the Owner.

**9.2 Professional Liability Insurance Requirements**

- 9.2.1 The Professional's professional liability policy(ies):
- (i) shall be issued by an insurance company 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;
  - (ii) shall be kept in force throughout performance of the Professional's services and for five (5) years after the end of such performance if on a claims-made policy;
  - (iii) may be a claims-made policy; and,
  - (iv) shall be evidenced by a certificate of insurance acceptable to the Owner

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which provides that the coverage evidenced thereby shall not be canceled, non-renewed or a reduction in the limits of liability without thirty (30) days' prior written notice to the Owner.

Written proof of this extended reporting period must be provided to the Owner prior to expiration or cancellation.

The Professional shall purchase at its sole expense extended Discovery Clause coverage of up to three (3) years after work is completed if coverage is canceled or not renewed.

9.2.2 If applicable, the Professional's Asbestos Professional Liability policy:

- (i) shall provide coverage of the Professional's negligence, errors or omissions in rendering or failing to render services of an engineering or consulting nature arising out of specifications, installation, modification, abatement, replacement or approval of products, materials or processes containing asbestos, and the failure to advise of or detect the existence or the proportions of asbestos.
- (ii) If applicable, Asbestos Professional Liability, with a limit of two million dollars (\$2,000,000.00) each claim/ \$2,000,000 annual aggregate and a maximum self-insured retention of one hundred thousand Dollars (\$100,000.00) or an amount acceptable to the Owner.

9.2.3 If applicable, the Professional's Environmental Engineers and Consultants Professional Liability policy:

- (i) shall provide coverage of the Professional's negligence, errors or omissions in rendering or failing to render services of an engineering or consulting nature arising out of their environmental engineering or consulting.
- (ii) If applicable, Environmental Engineers and Consultants Professional Liability, with a limit of two million dollars (\$2,000,000.00) each claim/ \$2,000,000 annual aggregate and a maximum self-insured retention of one hundred thousand Dollars (\$100,000.00), or an amount acceptable to the Owner, for Professionals involved in the removal, repair, installation and testing of underground petroleum storage tanks or in petroleum remediation operations, or Professionals engaged in or performing Work related to excavation, loading, transporting or unloading of hazardous and/or contaminated materials.

### **9.3 Certificates Of Insurance**

Certificates of Insurance must be submitted by the Professional and approved by the Owner prior to the commencement of the Work. Certificates of Insurance shall provide for thirty (30) days written notice to the Owner prior to the cancellation, non-renewal

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change in deductible or self-insured retention requirements, or a reduction of benefits of any policy. Submission of the Certificates of Insurance constitutes a warranty by the Professional that the insurance coverage described is in effect for the policy term shown. Upon the request of the Owner, the Professional shall furnish the Owner with certified copies of each policy.

**9.4 Effect Of Insurance**

Compliance with insurance requirements shall not relieve the Professional of any responsibility to indemnify the Owner for any liability to the Owner as specified in any other provision of this Term Contract For Professional Services and the Owner shall be entitled to pursue any remedy in law or equity if the Professional fails to comply with the contractual provisions of this Term Contract For Professional Services. Indemnity obligations specified elsewhere in this Term Contract For Professional Services shall not be negated or reduced by virtue of any insurance carrier's (i) denial of insurance coverage for the occurrence or event which is the subject matter of the claim; or (ii) refusal to defend any named insured.

**9.5 Priority**

Insurance coverage (including any deductible or self-insured retention) required from persons or entities other than the Owner or the Owner's Related Parties shall be deemed primary to any coverage provided by the Owner or the Owner's Related Parties.

**9.6 Property Damage Disclaimer**

The Owner shall not be liable, and shall provide no insurance, for any loss or damage incurred by the Professional or its consultants, or by their agents and employees, to tools, machinery, equipment and other property owned by them, regardless of whether such losses are insured by them. The Professional hereby releases and discharges the Owner and its Related Parties of and from all liability to the Professional, and to anyone claiming by, through or under the Professional, by subrogation or otherwise, on account of any loss or damage to such tools, machinery, equipment or other property, however caused.

**ARTICLE 10 – NONDISCRIMINATION**

During the performance of this Term Contract for Professional Services, the Professional agrees to the following clauses A. through G:

- A. The Professional will not discriminate against any employees or applicant for employment because of race, creed, color, sex, national origin, age, disability or marital status.
- B. If directed to do so by the State Commissioner of Human Rights, the Professional will send to each labor union or representative of workers with which the Professional has or is bound by a collective bargaining or other agreement or understanding, a notice, to be

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provided by the State Commissioner of Human Rights, advising said labor union or representative of the provisions of clauses A. through G. of this Chapter Three (hereinafter referred to as "nondiscrimination clauses"). If the Professional was directed to do so by the Owner as part of the proposal or negotiation of the Term Contract For Professional Services, the Professional shall request said labor union or representative to furnish a written statement that said labor union or representative will not discriminate because of race, creed, color, sex, national origin, age, disability or marital status, and that said 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 Term Contract For Professional Services shall be in accordance with the purposes and provisions of these nondiscrimination clauses. If said labor union or representative fails or refuses to comply with said request that it furnish such a statement, the Professional shall promptly notify the State Commissioner of Human Rights of said failure or refusal.

- C. If directed to do so by the State Commissioner of Human Rights, the Professional 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 clauses A. and B. and such provisions of the State's laws against discrimination as the State Commissioner of Human Rights shall determine.
- D. The Professional will state, in all solicitations or advertisements for employees placed by or on behalf of the Professional, that all qualified applicants will be afforded equal employment opportunities without discrimination because of race, creed, color, sex, national origin, age, disability, or marital status.
- E. The Professional will comply with the provisions of Sections 290-299 of the Executive Law and with the Civil Rights Laws, will furnish all information and reports deemed necessary by the State Commissioner of Human Rights under these nondiscrimination clauses and said sections of the Executive Law, and will permit access to the Professional's books, records, and accounts by the State Commissioner of Human Rights, the Attorney General, and the Commissioner of Labor for the purpose of investigation to ascertain compliance with these nondiscrimination clauses and said sections of the Executive Law and Civil Rights Laws.
- F. This Term Contract For Professional Services may be forthwith canceled, terminated, or suspended in whole or in part, by the contracting agency upon the basis of a finding made by the State Commissioner of Human Rights that the Professional has not complied with these nondiscrimination clauses, and the Professional may be declared ineligible for future contracts made by or on behalf of the State or public authority or agency of the State, until the Professional satisfies the State Commissioner of Human Rights that the Professional has established and is carrying out a program in conformity with the provisions of these nondiscrimination clauses. Said 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

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to the Professional, and an opportunity has been afforded the Professional to be heard publicly in accordance with the Executive Law. Said sanctions may be imposed and remedies invoked independently of or in addition to sanctions and remedies otherwise provided by law.

- G. The Professional will include the provisions of clauses A. through F. in every subcontract or purchase order in such a manner that said provisions will be binding upon each Subconsultant or vendor as to operations to be performed within the State of New York. The Professional will take such action in enforcing said provisions of said subcontract or purchase order as the State Commissioner of Human Rights or the contracting agency may direct, including sanctions or remedies for non-compliance. If the Professional becomes involved in or is threatened with litigation with a Subconsultant or vendor as a result of said direction by the State Commissioner of Human Rights or the contracting agency, the Professional shall promptly so notify the Attorney General, requesting the Attorney General to intervene and protect the interests of the State of New York.

**ARTICLE 11 – NEW YORK STATE LABOR AND BUSINESS PARTICIPATION**

The Professional agrees to fully comply and cooperate with DASNY's policy to promote New York State business and labor participation.

- 11.1 In the event this Term Contract For Professional Services is in the amount of one million dollars or more, the Professional shall document their efforts to encourage the participation of New York State business enterprises as suppliers and Subconsultants. Documented efforts by the Professional shall consist of showing that such Professional has (a) solicited bids or proposals, in a timely and adequate manner, from New York State business enterprises including certified minority and women-owned business, or (b) contacted the New York State Department of Economic Development to obtain listings of New York State business enterprises, or (c) placed notices for Subconsultants and suppliers in newspapers, journals and other trade publications distributed in New York State, or (d) participated in Subconsultant outreach conferences. If the Professional determines that New York State business enterprises are not available to participate on such Term Contract For Professional Services as Subconsultants or suppliers, the Professional shall provide a Statement indicating the method by which such determination was made. If the Professional does not intend to use Subconsultants on such Term Contract For Professional Services, the Professional shall provide a Statement verifying such intent.
- 11.2 In the event this Term Contract For Professional Services is in the amount of one million dollars or more, the Professional shall submit post award compliance reports documenting their efforts to notify New York State residents of employment opportunities arising in New York State out of such Term Contract For Professional Services by listing any such positions with the Department of Labor, or providing for such notification in such manner as is consistent with existing collective bargaining contracts or agreements.



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**ARTICLE 12 – LABOR LAW PROVISIONS**

It is hereby agreed that all applicable provisions of the Labor Law of the State of New York shall be carried out in performance of the Work.

- 12.1 The Professional specifically agrees, as required by Labor Law, Sections 220 and 220-d as amended, that:
- (i) no laborer, workmen, or mechanic, in the employ of the Professional, Subconsultant, or other person doing or contracting to do the whole or any part of the work contemplated by this Term Contract For Professional Services shall be permitted or required to work more than eight hours in any one calendar day or more than five days in any one week, except in the emergencies set forth in the Labor Law;
  - (ii) the wages paid for legal day's work shall be not less than the prevailing rate of wages as defined by law;
  - (iii) the minimum hourly rate of wages to be paid shall be not less than that stated in this Term Contract For Professional Services and shall be designated by the Commissioner of Labor of the State of New York; and
  - (iv) the Professional and every Subconsultant shall post in a prominent and accessible place on the Site, a legible statement of all minimum wage rates and supplements to be paid or provided for the various classes of laborers and mechanics to be engaged in the Work and all deductions, if any, required by law to be made from unpaid wages actually earned by the laborers and mechanics so engaged.
- 12.2 The minimum wage rates, if any, herein specified for apprentices shall apply only to persons working with the tools of the trade that said 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 Professional or any Subconsultant shall not exceed the number submitted by the applicable standards of the New York State Department of Labor, or, in the absence of said standards, the number permitted under the usual practice prevailing between the unions and the employer's association of the respective trades or occupations.
- 12.3 All employees of the Professional and each Subconsultant shall be paid in accordance with the provisions of the Labor Law. Certified payroll copies shall be provided to the Owner upon request.
- 12.4 The Professional agrees that, in case of underpayment of wages to any worker engaged in the Work by the Professional or any Subconsultant, the Owner shall withhold from the Professional, out of payments due, an amount sufficient to pay said worker the difference between the wages required to be paid under this Term Contract For Professional Services and rates actually paid said worker for the total number of hours worked and that the Owner may disburse said amount so withheld by the Owner for and

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on account of the Professional to the employees to whom said amount is due. The Professional 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 this Term Contract for Professional Services.

- 12.5 Pursuant to subdivision 3 of section 220 and section 220-d of the Labor Law this Term Contract For Professional Services may be forfeited and no sum paid for any work done thereunder on a second conviction for willfully paying less than:
- (i) the stipulated wage scale as set forth in Labor Law; Section 220, subdivision 3, as amended, or
  - (ii) less than the stipulated minimum hourly wage scale as specified in Labor Law, Section 220-d, as amended.
- 12.6 The Professional specifically agrees, as required by the Labor Law, Section 220-e, as amended, that:
- (i) in the hiring of employees for the performance of work under this Term Contract for Professional Services 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 Professional, nor any person acting on behalf of said Professional or Subconsultant, shall by reason of race, creed, color, 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;
  - (ii) no Professional, nor any person on behalf of said Professional or Subconsultant shall, in any manner, discriminate against or intimidate any employee hired for the performance of work under this Term Contract for Professional Services on account of race, creed, color, sex, or national origin;
  - (iii) there may be deducted from the amount payable to the Professional, by the Owner under this Term Contract for Professional Services, a penalty of Fifty and 00/100 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 this Term Contract for Professional Services; and
  - (iv) this Term Contract for Professional Services may be canceled or terminated by the Owner and all money 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 this Term Contract for Professional Services.
- 12.7 The Professional specifically agrees to certify its payrolls and keep these certified records on site and available, and provide copies to the Owner upon request.

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**ARTICLE 13 – NYS VENDOR RESPONSIBILITY QUESTIONNAIRE**

- 13.1 In order to assist the Owner in determining the responsibility and reliability of the Professional selected for the Term Contract for Professional Services 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.
- 13.2 When directed by the Owner, prior to the award of any Term Contract for Professional Services valued at \$10,000 or more, the Professional shall, within ten days following either oral or written notice that it must comply, submit, in the form provided by the Owner, a duly executed NYS Vendor Responsibility Questionnaire to the Owner at the following address:
- DASNY  
Contractor Responsibility Information Officer  
Procurement Department  
515 Broadway  
Albany, New York 12207
- 13.3 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 14 – ETHICAL CONDUCT AND PROHIBITED INTERESTS**

- 14.1 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, attorney, engineer, inspector or professional 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 Term Contract for Professional Services or the Work, shall become personally interested, directly or indirectly, in the Term Contract for Professional Services, material supply contract, subcontract, insurance contract, or any other contract pertaining to the Work.
- 14.2 Section 73(5) of the *Public Officers Law* expressly prohibits the Professional, 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, could reasonably be expected to influence the employee in the performance of their official duties, or was intended as a reward for the employee's official action.
- 14.2.1 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 Professional 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

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thing of value from the Professional or its agents. Violations of these gift provisions may be grounds for immediate termination of the Term Contract for Professional Services and/or referral for civil action or criminal prosecution.

- 14.3 To promote a working relationship with the Owner based on ethical business practices, the Professional is expected to:
- (i) furnish all goods, materials and services to the Owner as contractually required and specified;
  - (ii) submit complete and accurate reports to the Owner and its agents as required;
  - (iii) not seek, solicit, demand or accept any information, verbal or written, from the Owner or its agents that provides an unfair advantage over a competitor;
  - (iv) not engage in any activity or course of conduct that restricts open and fair competition on Owner-related projects and transactions;
  - (v) not engage in any course of conduct with Owner employees or its agents that constitutes a conflict of interest, in fact or in appearance; and
  - (vi) not offer or give any unlawful gifts or gratuities, or engage in bribery or other criminal activity.
- 14.4 The Owner encourages the Professional 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.
- 14.5 Although the Professional 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 Professional modify the work assignment of a relative of an Owner employee where a conflict of interest, or the appearance thereof, is deemed to exist.
- 14.6 The Professional 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.
- 14.7 The Professional 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 Article.
- 14.8 Any violation of these provisions shall justify termination of this Term Contract for Professional Services and may result in Owner's rejection of the Professional's bids or proposals for future contracts.

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- 14.9 Professional shall at all times during the Contract term remain responsible. Professional 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.
- 14.10 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 Professional. In the event of such suspension, Professional will be given written notice outlining the particulars of such suspension. Upon issuance of such notice, Professional 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.
- 14.11 Notwithstanding any other provision of this Contract, upon written notice to Professional, 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 Professional's expense where Professional 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.
- 14.12 By entering into this Contract, Professional certifies, under the penalties of perjury, that Professional is not on the list created pursuant to paragraph (b) of subdivision 3 of section 165-a of the State Finance Law. Professional further certifies that Professional will not utilize on this Contract any Subconsultant that is identified on the list created pursuant to paragraph (b) of subdivision 3 of section 165-a of the State Finance Law.
- 14.13 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 Professional in default.

**ARTICLE 15 – COOPERATION WITH INVESTIGATIONS**

- 15.1 The Professional agrees to cooperate fully and faithfully with any investigation, audit or inquiry conducted by the Office of Internal Affairs (“OIA”) of the Owner or any other duly authorized representative of the Owner (“Representative”).
- 15.2 The Professional shall grant the OIA or the Representative 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 Professional, its subsidiaries and affiliated companies and any other company directly or

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indirectly controlled by the Professional, relating to the Professional. 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, Professional 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. At the OIA's or the Representative's request, said materials shall be provided in a computer readable format, where available. At the request of the OIA or the Representative, the Professional shall execute such documents, if any, as are necessary to give the OIA or the Representative access to books, documents or records related to this Term Contract for Professional Services which are, in whole or part, under control of the Professional but not currently in the Professional's physical possession. The Professional shall not enter into any agreement with a Subcontractor, professional or supplier, in connection with this Term Contract for Professional Services, that does not contain a right-to-audit clause in favor of the Owner. The Professional shall assist the OIA or the Representative in obtaining access to past and present Subcontractor, professional 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, professionals and suppliers pertaining to this Term Contract for Professional Services, and, if appropriate, enforce the right-to-audit provisions of such agreements.

- 15.3 The Professional shall assist the OIA or the Representative in obtaining access to, interviews with, and information from all former and current persons employed and/or retained by the Professional, for purposes of this Term Contract for Professional Services.
- 15.4 The Professional shall require each Subcontractor to include in all agreements that the Subcontractor may hereinafter enter into with any and all Subcontractors, professionals and suppliers, in connection with this Term Contract for Professional Services, a right-to-audit clause in favor of the Owner conferring rights and powers of the type outlined in this section. The Professional shall not enter into any Subcontract with a Subcontractor in connection with this Term Contract for Professional Services that does not contain such a provision.
- 15.5 The Professional shall not make any payments to a Subcontractor, professional or supplier from whom the Professional has failed to obtain and supply to the OIA or the Representative complete, accurate and truthful information in compliance with a request from the OIA or the Representative to the Professional.
- 15.6 Any violation of the provisions of this Article shall justify termination of this Term Contract for Professional Services and may result in the Owner's rejection of the Professional's bids or proposals for future contracts.

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**ARTICLE 16 – 2005 PROCUREMENT LOBBYING LAW**

- 16.1 Chapter 1 of the Laws of 2005, as amended by Chapter 596 of the Laws of 2005, requires proposers to affirm their understanding of and agreement 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.
- 16.2 For any contract \$15,000 or more each proposer shall submit, with its proposal, on the form provided herewith, *SFL 139 Form 1: Professional's Certifications Pursuant to SFL § 139-j and § 139-k*. The information contained in *SFL 139 Form 1: Professional's Certifications Pursuant to SFL § 139-j and § 139-k* will serve as an informational resource to aid the Owner in making an award determination.
- 16.3 The Owner reserves the right to terminate this contract in the event it is found that the certification filed by the Professional 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 termination right, such termination constituting a termination for cause, by providing written notification to the Professional in accordance with the terms of Article 5.1 of this Contract – Termination for Cause.

**ARTICLE 17 - WICKS LAW COMPLIANCE**

- 17.1 The Wicks Law was first legislatively enacted early in the twentieth century. The original law, along with some subsequent amendments to it over the years, requires the preparation of several separate construction contract document bid packages for certain trade work on public works projects in New York State. The Professional shall perform all of the services related to this Contract in strict compliance with all provisions of the Wicks Law.
- 17.2 The Professional shall review recent reforms to the original Wicks Law, as they are contained in the adopted 2008-2009 New York State Budget Bill. There are changes in the construction dollar value of the public works projects requiring compliance with the Wicks Law, and the effect of Project Labor Agreements, if they are utilized under Section 222 of the Labor Law. July 1, 2008 is the effective date for these revisions to the Wicks Law.
- 17.3 Certain programs and projects are exempt from application of the Wicks Law. The Professional shall review with the Owner any interpretation on their part that a project need not comply with the Wicks Law before preparing the construction contract document bid packages for a project.

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**ARTICLE 18 – ELECTRONIC PAYMENTS PROGRAM**

18.1 DASNY reserves the right to implement an electronic payment program (“Electronic Payment Program”) for all payments due to Professional hereunder. Prior to implementing an Electronic Payment Program, DASNY shall provide Professional written notice one hundred twenty days prior to the effective date of such Electronic Payment Program (“Electronic Payment Effective Date”). Commencing on or after the Electronic Payment Effective Date, all payments due hereunder to Professional shall only be rendered electronically, unless payment by paper check is expressly authorized by DASNY. Commencing on or after the Electronic Payment Effective Date Professional further acknowledges and agrees that DASNY may withhold any request for payment hereunder, if Professional has not complied with DASNY’s Policies and Procedures relating to its Electronic Payment Program in effect at such time, unless payment by paper check is expressly authorized by DASNY.

**ARTICLE 19 – DEFINITIONS**

When one of the following capitalized words, terms or phrases is used in this Term Contract for Professional Services, it shall be interpreted or construed first as defined below, second according to its generally-accepted meaning in the construction industry, and third according to its common and customary usage.

**Additional Insured:** An entity, including but not limited to, the Owner’s Related Parties, the Contractor, and the Construction Manager, designated by the Owner to be included in an endorsement to the Professional’s Commercial General Liability Policy naming such entity as an additional insured under said policy.

**Approved Construction Budget:** The Owner’s designated budget for the Cost of Construction, as indicated on the Pre-design Scope, Budget and Schedule Confirmation Form.

**Basis of Design:** Documentation of the primary concepts and assumptions, influencing design decisions to comply with the design intent. The basis of design specifically describes the systems, components, conditions, and methods chosen to meet the design intent.

**Client:** The entity for whom the Owner is performing services, including subsidiaries, agents, related corporations, entities or fiduciaries.

**Commissioning:** A quality control process that is intended to ensure that specified components and systems have been installed and properly started-up and then functionally tested to verify and document proper operation through all specified modes of operation and conditions. In addition, training of operations and maintenance personnel, identified by the Owner, is verified and final project operations and maintenance documents are reviewed for completeness.

**Commissioning Agent:** The entity responsible for carrying out the detailed planning and implementation of the commissioning process. The commissioning agent can be an individual, an organization, or a team with individuals from more than one organization.



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**Commissioning Authority:** The Owner's representative responsible for ensuring that the commissioning process is properly executed. The commissioning authority leads the commissioning process and makes final recommendations to the Owner regarding the performance of the commissioned building systems. The commissioning authority can be an individual, an organization, or a team with individuals from more than one organization.

**Commissioning Plan:** The document prepared for each project that describes all aspects of the commissioning process including schedules, responsibilities, documentation requirements, and functional performance test requirements. The level of detail depends on the scope of commissioning specified.

**Commissioning Professional:** The entity contracted directly by the Owner to provide the services of the Commissioning Authority.

**Commissioning Report:** The document prepared during the acceptance phase of the commissioning process after all functional performance tests are completed. It summarizes the results of the commissioning process, including conformance to the contract documents, the design intent and the as-built system performance.

**Construction Completion:** Acceptance by the Owner of the Work as evidenced by a *Notification of Construction Completion* executed by the Contractor, the Professional and the Owner.

**Construction Contract Price:** The dollar amount for which a Contractor agrees to perform the Work set forth in a Contract for Construction.

**Construction Documents:** Plans, specifications, change orders, revisions, addenda, and other information that set forth in detail the Work.

**Construction Manager:** A person, persons, firm, partnership, limited liability company or corporation, regularly engaged in the management of construction projects, and so designated by the Owner.

**Construction Schedule:** The timetable that sets forth pertinent dates for timely completion of the Work.

**Contract Documents:** The set of documents comprising the Owner's contract boilerplate, including, but not limited to, the *Contract for Construction*, the *Notice to Bidders*, the *Information for Bidders*, the *Supplement to Information for Bidders*, the *Form of Bid*, the *Form of Bid Bond*, the *Performance Bond*, the *Labor and Material Payment Bond*, the *General Conditions*, the *General Requirements*, the *Supplemental General Requirements*, the *Addenda*, and any other supplementary data and forms as may be provided by the Owner.

**Contract for Construction:** A written agreement between the Owner and a Contractor for provision of goods, products, materials, equipment, systems, management, supervision, labor and services required to construct all or part of a Project, comprised of the Contract Documents and the Construction Documents.

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**Contract for Professional Services:** This written agreement between the Owner and the Professional identified in Contract Parties of Chapter One of this agreement for the provision of Professional Services.

**Contractor:** An entity, including but not limited to a general contractor, a trade contractor or a construction manager, engaged directly by the Owner pursuant to a Contract for Construction.

**Cost of Construction:** The total cost to the Owner to complete construction of the Project, including, total building and site work costs, allowable design and bid contingencies, general conditions whether provided by a trade contractor or construction manager; and an appropriate cost escalation factor.

**Designer:** An entity, including but not limited to an architect or engineer, that designs the system(s) to be commissioned and provides the (i) design intent, (ii) the basis of the design and (iii) the full sequences of operation for all equipment and systems to the Commissioning Authority.

**Design Intent:** Documentation of the ideas and concepts considered by the Owner to be important to the project, based on information gathered during the early stages of design (programming, conceptual, pre-schematic). The design intent must include at a minimum a narrative description of the systems, what the objectives of the systems are and how the systems will meet those objectives. It also should include facility functional and environmental needs. The design intent is developed by the design professional(s) from descriptions provided by the building owner. The design intent document shall include specifically, but not limited to the following items:

<i>General description of the building type</i>	<i>Applicable codes</i>
<i>Building code occupancy category</i>	<i>Fire/Life safety requirements</i>
<i>Particular needs (air purity, outside air volume, noise)</i>	<i>HVAC systems selection</i>
<i>Processes that require special environments</i>	<i>Light levels</i>
<i>Climatic design conditions</i>	<i>Overall building pressurization</i>
<i>Conditioned space and/or Interior design conditions</i>	<i>Special envelope requirements</i>
<i>Relative pressurization of adjacent spaces</i>	
<i>Operation and maintenance staff training</i>	
<i>Operation and maintenance manual organization</i>	
<i>Special systems such as security, video, and voice data systems</i>	
<i>Emergency operation during utility outage</i>	

**Extra Services:** The services defined in Paragraph 9.2 of Chapter Two – Professional's Required Services.

**Final Completion:** The stage of construction when the Work has been completed in accordance with the Contract for Construction and the Owner has received all documents and items necessary for closeout of the Work.

**Hazardous Substances:** The term "Hazardous Substance" shall have the same meaning and definition as set forth in the Comprehensive Environmental Response Compensation and Liability Act as amended, 42 USC § 6901 et seq., and regulations promulgated thereunder

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(collectively "CERCLA") and any corresponding state or local law or regulation, and shall also include: (a) any Pollutant or Contaminant as those terms are defined in CERCLA; (b) any Solid Waste or Hazardous Constituent as those terms are defined by, or are otherwise identified by, the Resource Conservation and Recovery Act as amended, 42 USC § 6901 et seq., and regulations promulgated thereunder (collectively "RCRA") and any corresponding state or local law or regulation; (c) crude oil, petroleum and fractions of distillates thereof; (d) any other material, substance or chemical defined, characterized or regulated as toxic or hazardous under any applicable law, regulation, ordinance, directive or ruling; and, (e) any infectious or medical waste as defined by any applicable federal or state laws or regulations.

**Inspect:** The periodic visual observation of construction work for the purpose of ascertaining that the work is in compliance with the Construction Documents and consistent with the design intent.

**Multiplier:** The factor by which the cost of the Professional's direct labor expended on the Project is multiplied to determine the total payment to the Professional for its direct labor, overhead and profit.

**Notification of Construction Completion:** The Owner's document declaring the Work complete and accepted by the Owner.

**Owner:** DASNY, a public benefit corporation with its principal office located at 515 Broadway, Albany, New York, 12207-2964.

**Owner's Related Parties:** Any parent, subsidiary, client or affiliated entities of the Owner, including the respective officers, trustees, office holders, directors, shareholders, partners, and employees of each.

**Professional:** An entity, including but not limited to an architect or engineer, engaged directly by the Owner to provide design, architectural, engineering or other professional services.

**Professional Contract Price:** The total cost of all services performed by the Professional and its Subconsultants, and all reimbursable expenses incurred by the Professional and its Subconsultants, to comply with all the requirements of this Term Contract for Professional Services.

**Professional Services:** The services and related items required to design or engineer all or part of a Project to comply with all the requirements of this Term Contract for Professional Services.

**Project:** Any of the planned rehabilitation and construction undertakings as more specifically described in Article 1 of Chapter Two and the Work Authorizations issued under this Term Contract for Professional Services.

**Project Construction Schedule:** The timetable that sets forth the required relationships between, and pertinent dates for, required completion of construction services, coordination services and related activities.

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**Project Design Schedule:** The timetable that sets forth the required relationships between, and pertinent dates for, required completion of design and engineering services, Construction Documents and related activities.

**Reimbursable Expenses:** Customary, necessary and reasonable expenses incurred by the Professional and/or its Subconsultants in the performance of the Professional's Required Services including, but not limited to, transportation, living and administrative expenses directly related to the Project, and reimbursed by the Owner pursuant to Paragraph 5.3 of Chapter One – Project Terms And Conditions and Paragraph 8.2 of Chapter Three – General Terms and Conditions.

**Sequence of Operations:** How the systems will react to changing conditions to achieve the proper operation of the system. The sequence must include the intended modes of operation, the steps needed to enact each mode, and the data that determines what, when, and how a step is performed.

**Site:** The geographical location of the Project, usually defined by legal boundary lines, and the location characteristics including, but not limited to, grades and lines of streets, alleys, pavements and adjoining structures, rights-of-way, restrictions, easements, encroachments, zoning, deed restrictions, existing buildings and improvements, and service and utility lines.

**Subconsultant:** An entity, including but not limited to, an architect or engineer, engaged directly by the Professional, for the provision of services and related items required to design or engineer part or all of the Project, as described and agreed to in the Term Contract for Professional Services.

**Technical Assistance Provider:** An individual, organization or team of individuals from more than one organization designated by the New York State Energy Research and Development Authority (NYSERDA) to provide technical assistance under its New York Energy \$mart<sup>SM</sup> programs.

**Term Contract for Professional Services:** This written agreement between the Owner and the Professional identified in Contract Parties of Chapter One of this agreement for the provision of Professional Services.

**Work Authorization:** The document(s) evidencing the Owner's authorization to perform Professional Services under this Term Contract for Professional Services and detailing the specific Professional Services to be performed and the compensation therefore.