

Date

**Client**  
Project Name  
Contract No.

**PRE-CONSTRUCTION PHASE**

**CONTRACT**

This Contract, dated as of [ ], 20\_\_, is entered into by and between the Dormitory Authority of the State of New York, a body corporate and politic of the State of New York, constituting a public benefit corporation created pursuant to Title 4 of Article 8 of the Public Authorities Law, as amended and having its principal office and place of business at 515 Broadway, Albany, New York, 12207-2964 (“DASNY” or the ‘Owner’) and [ ], whose office is located at \_\_\_\_\_, (the “CONSTRUCTION MANAGER-BUILD” or the “CM”).

**WHEREAS**, the OWNER intends to \_\_\_\_\_,  
hereinafter referred to as the Project;

**WHEREAS**, the OWNER requires Construction Management Services during the Pre-Construction Phase, the specific nature of said Services and responsibilities as described herein; and

**WHEREAS**, the OWNER and the CM have agreed to an amount of compensation and date of completion for said services.

**NOW, THEREFORE**, the OWNER and the CM hereby mutually covenant and agree as follows:

**DEFINITIONS**

All other definitions are included in the General Conditions and are attached hereto.

**APPROVED CONSTRUCTION BUDGET** is the OWNER’s designated budget for the total project construction cost, which includes the estimated value of all Trade Contracts, General Conditions expenses, design contingency, escalation and the CM MCP Contingency. General Conditions expenses are generally defined as work, services or facilities to support the overall construction effort. Examples include but are not limited to; field offices, temporary services, fencing, site security, etc.

**CONSTRUCTION MANAGER-BUILD (CM)** means a Construction Manager who has contracted to submit a Maximum Contract Price (MCP) for the construction of the Project, and has assumed the risk that the actual cost of the construction may exceed the MCP.

**MAXIMUM CONTRACT PRICE (MCP)** is the amount the OWNER has agreed to pay the CM for the costs of the project subject to the terms of this Contract, including all construction costs, and all other projected costs including, the CM’s fees, the CM’s MCP contingency and the General Conditions Cost. The MCP will not include the CM’s Pre-Construction costs.

**PROJECT DESIGNER** means the firm or firms of architects or engineers or both (and their consultants) which have undertaken to design the Project pursuant to a contract with the OWNER (Hereinafter: the Design Contract).

**TRADE CONTRACTOR** means a firm employed directly by the CM to complete portions of the construction of the project.

### **ARTICLE I: SCOPE OF SERVICES**

The CM's Services shall include, but not be limited to, all Articles of this Contract and all Services enumerated in Appendix "A", entitled SCOPE OF SERVICES, (hereinafter the Work), which is attached to and made a part hereof.

1. The OWNER has the right to authorize early bid packages, which shall be issued and awarded as per the terms and conditions of the CONSTRUCTION PHASE CONTRACT agreement.

### **ARTICLE II: ADDITIONAL SERVICES**

The OWNER reserves the right to direct the CM to provide Additional Services and the CM shall provide said Additional Services when so directed.

### **ARTICLE III: EXTRA WORK**

See General Conditions, Article 7.

### **ARTICLE IV: M/WBE AND SDVOB CONTRACT GOALS**

The N.Y.S. certified Minority and Women-owned Business Enterprise (M/WBE) and Service-Disabled Veteran-Owned Businesses (SDVOB) goals for this contract are % MBE, % WBE, and % SDVOB. The goals refer to the utilization of M/WBE and SDVOB sub-consultants on DASNY Professional Services Contracts.

### **ARTICLE V: CONSULTANTS**

The OWNER may retain a Consultant or Consultants to furnish Services throughout the term of this Contract, and the CM shall cooperate with said Consultant or Consultants.

### **ARTICLE VI: PROVISION FOR PAYMENT**

#### A. Pre-Construction Phase Services

For satisfactory performance of all Pre-Construction Phase Services pursuant to Appendix "A", the OWNER shall pay, and the CM agrees to accept, as full compensation, the following:

1. Actual Direct Salary of all technical employees of the CM assigned to the Project. Actual Direct Salary, as used herein, shall not include allowances for insurance, payroll taxes, or other benefits listed in item A.2., Fringe Benefits.

For the purpose of this Article, Technical Employees shall mean employees trained in areas of technical competence, such as architecture, engineering, drafting, survey, and related specialties, but shall not include clerical, typing or stenographic assistance, or principals. Pay rates for technical employees and their appropriate titles are listed in Appendix "B", entitled SCHEDULE OF APPROVED PERSONNEL CLASSIFICATIONS AND MAXIMUM DIRECT SALARY RATES, which is attached to and made a part hereof.

Certified payroll records for all employees for which reimbursement is sought under Article VI.A. shall be supplied to the OWNER upon request and made available to the OWNER for inspection

or audit at the OWNER's option at any time during the life of this Contract and for a period of six (6) years after final payment.

Reimbursement to the CM for Actual Direct Salary costs for Pre-Construction Phase Services shall Not Exceed \_\_\_\_\_ and 00/100 Dollars (\$ \_\_\_\_\_).

2. Fringe Benefits are the cost to the CM of Fringe Benefits applicable to Actual Direct Salary costs pursuant to Article VI.A.1. above. Allowable Fringe Benefit items as provided for herein shall be limited to the following specific items:

- a. F.I.C.A.;
- b. Federal Unemployment Insurance;
- c. State Unemployment Insurance;
- d. NYS Workers Compensation;
- e. Life Insurance;
- f. Accidental Death and Dismemberment;
- g. NYS Disability Insurance;
- h. Group Hospitalization;
- i. Pension Plan; and
- j. Group Travel Accident Insurance
- k. Vacation, holiday and sick leave in accordance with CM's leave policy

Reimbursement to the CM for Fringe Benefit costs for Pre-Construction Phase Services shall be paid at \_\_\_% of the Actual Direct Salary costs and shall Not Exceed \_\_\_\_\_ and 00/100 Dollars (\$ , .00).

Total Actual Direct Salaries and Fringe Benefits \$ , , NTE

3. Pre-Construction Phase Fee is currently estimated in the amount of \_\_\_\_\_ and 00/100 Dollars (\$ .00).

The Pre-Construction Phase Fee, pursuant to Article VI.A.3., is not a fixed fee and is payable as a percentage of the total monthly cost for Actual Direct Salaries.

The fee shall be \_\_\_% of the total cost for Actual Direct Salary expended during the month.

4. Miscellaneous Reimbursable Costs as approved by the OWNER. An allowance for Miscellaneous Reimbursable Costs is hereby established in the Not to Exceed amount of \_\_\_\_\_ and 00/100 Dollars (\$ , .00).

5. Consultant's Costs as approved by the OWNER. An allowance for Consultant Costs is hereby established in the Not to Exceed amount of [insert written dollar amount] and 00/100 Dollars (\$0.00).

6. The MAXIMUM AMOUNT PAYABLE to the CM for all Services required pursuant to this Pre-Construction Phase shall be the sum of paragraphs 1., 2., 3.,4., and 5. of Article VI.A. and shall Not Exceed \_\_\_\_\_ and 00/100 Dollars (\$ , , .00).

The MAXIMUM AMOUNT PAYABLE is summarized in Appendix "C", entitled SUMMARY OF PAYMENTS, which is attached to and made a part hereof.

Payments for Services shall be made monthly based on actual services performed by the CM as approved by the OWNER. Payments shall be requisitioned on the OWNER's form, **PROFESSIONAL SERVICES CONTRACT PAYMENT REQUISITION** with accompanying payroll copy, and other appropriate backup. Payroll copy shall show the names and rates of pay of all personnel performing services during the payment period, and their position classification. Only said form shall be used for reimbursement of Services.

Payment to the CM shall only be rendered electronically, unless payment by paper check is authorized in writing by the OWNER. The CM further acknowledges and agrees that the OWNER may withhold payments, if the CM has not complied with the OWNER's requirements relating to the electronic payment program in effect at such time, unless payment by paper check is authorized in writing by the OWNER.

The CM is required to submit payment requests to the OWNER, on behalf of subconsultants, within thirty (30) days of receiving approvable subconsultant invoices.

The OWNER may, at its sole discretion deny payment to the Professional for: 1) failure to invoice for services within 90 days of the services being rendered, 2) invoices provided without proper back-up documentation as defined in the contract.

#### **ARTICLE VII: WITHHOLDING OF PAYMENTS**

The OWNER may withhold from the CM 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, CM, 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 CM or Subconsultant;
4. to assure payment of fines, liquidated damages and penalties which may be imposed on the CM pursuant to the provisions of this Contract; or
5. to assure payment of fines and penalties which may be imposed on the CM pursuant to Article 17 - Affirmative Action in Appendix D, Section 17.1 paragraph D., subdivisions 6.g and 6.h. The estimated amount of said fines and penalties shall be the difference between the planned dollar amount of MBE/WBE sub-contract awards and the actual dollar amount of such awards.

#### **ARTICLE VIII: FINAL PAYMENT AND RELEASE**

Final payment shall be made to the CM upon satisfactory completion and acceptance by the OWNER of all services required, by the CM pursuant to this Contract, or all services performed prior to the termination of said Contract if so terminated and upon submission of a certification that all subconsultants/trade contractors have been paid their full and agreed compensation.

Acceptance by the CM of final payment hereunder shall operate as, and shall be, a release to the OWNER from all claims and liability to the CM and its successors, legal Representatives, and assigns for anything done or furnished under or arising out of the provisions of this Contract. No payment, final or otherwise, shall release the CM from any obligations under this Contract.

#### **ARTICLE IX: OWNER'S PROCEDURE**

The CM agrees to comply with all procedural requirements of the OWNER as they apply to reports or other aspects of the Project. In addition, during the Pre-Construction Phase of this Contract, the CM shall comply with all procedural requirements of the Client. Client is herein defined as the entity for whom the OWNER is performing services, including subsidiaries, agents, related corporations, or fiduciaries.

**ARTICLE X: INSURANCE PROVIDED BY THE CM**

See General Conditions, Article 15.

**ARTICLE XI: INSURANCE PROVIDED BY THE OWNER**

A. The OWNER shall, except as otherwise specified, at all times during the period of construction and until physical completion and acceptance, procure and maintain, at the cost and expense of the OWNER, "All Risk" Builders Risk Insurance. The CM and its trade contractors shall be covered for their work. Losses up to and including five thousand dollars (\$5,000) shall be borne by the CM. Reimbursement for loss, if any, is to be made payable to the OWNER on behalf of and for the Named Insureds as their interests may appear. 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.

B. Coverage shall include sublimits 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 Named Insured to the OWNER'S Risk Management Unit.

**ARTICLE XII: PROTECTION OF RIGHTS, PERSONS AND PROPERTY**

See General Conditions, Article 14.

**ARTICLE XIII: HOLD HARMLESS**

See General Conditions, Article 14.

**ARTICLE XIV: OWNER'S RIGHT TO AUDIT AND INSPECT RECORDS**

See General Conditions, Article 17.

**ARTICLE XV: APPENDIX "D" ADDITIONAL ITEMS**

Attached to and made a part hereof is Appendix "D", entitled ADDITIONAL ITEMS.

**ARTICLE XVI: ASSIGNMENT**

The CM shall not assign the Contract in whole or in part without prior written consent of the OWNER, however, the OWNER may assign the Contract in whole or in part without prior written consent of the CM.

**ARTICLE XVII: THE CONTRACT DOCUMENTS**

The Contract for Construction Management Services between the OWNER and the CM sets forth the CM's scope of services and is comprised of the following documents:

- this **Pre-Construction Phase Contract**, and all attached documents and appendices;

- the **OWNER's "Request for Proposal"**, and all attached documents and appendices, incorporated herein by reference; and
- the **CM's Response to the OWNER's Request for Proposal**, and all attached documents and appendices as approved by the OWNER, incorporated herein by reference.

#### **ARTICLE XVIII: INTERPRETATION**

In the event of any discrepancy, disagreement or ambiguity among the following documents, they shall be given preference in the following order to interpret and to resolve such discrepancy, disagreement or ambiguity:

1. Pre-Construction Phase Contract
2. OWNER's Request for Proposal
3. CM's Response to the OWNER's Request for Proposal.

#### **ARTICLE XIX: TIME OF COMPLETION**

For the purposes of this Contract, the planned Start Date is \_\_\_\_\_, 20\_\_\_\_, and the planned Completion Date for the Pre-Construction Phase shall be \_\_\_\_\_, 20\_\_\_\_.

**SIGNATURES**

**IN WITNESS WHEREOF**, the parties hereto have set their hands as of the date first written above.

**Dormitory Authority of the State of New York**  
**515 Broadway**  
**Albany, NY 12207-2964**

By \_\_\_\_\_

Title: Authorized Officer

Date: \_\_\_\_\_

**Firm Name**  
**Firm Address**  
**Firm Address**

By \_\_\_\_\_  
Authorized Officer/Signatory

Title \_\_\_\_\_

Date: \_\_\_\_\_

SAMPLE

**NEW YORK STATE ACKNOWLEDGEMENT – DASNY**

State of New York

County of \_\_\_\_\_) ss:

On the \_\_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_, before me, the undersigned, personally appeared:

\_\_\_\_\_ **(NAME)**

personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

\_\_\_\_\_

**Signature of Notary**

*Stamp or seal containing printed name, county of qualification of notary public and expiration date of notary commission*

**NEW YORK STATE ACKNOWLEDGEMENT – Contractor/Consultant**

State of New York

County of \_\_\_\_\_) ss:

On the \_\_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_, before me, the undersigned, personally appeared:

\_\_\_\_\_ **(NAME)**

personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

\_\_\_\_\_

**Signature of Notary**

*Stamp or seal containing printed name, county of qualification of notary public and expiration date of notary commission*



## APPENDIX "A"

### SCOPE OF SERVICES

#### PRE-CONSTRUCTION PHASE SERVICES

The Construction Manager-Build (CM) services shall consist of providing Pre-Construction Phase services as required, including the submission of a Maximum Contract Price (MCP) as defined herein, acceptable to the OWNER.

#### 1. Project Review

- 1.1 The CM shall meet with the OWNER, the Project Designers and any other design team members to fully understand the Program, the design documents, the Project scope and all other pertinent aspects of the Project.
- 1.2 The CM shall become an integral part of the Project Team that will coordinate the development and progress of the design and construction processes. During the design phase of the project the CM shall work closely with the Owner, the Project Designers and any other design team members to produce a design that meets the Owner's program, budget and schedule requirements and minimizes changes during construction.
- 1.3 The CM shall develop a Construction Management Plan for the Project. In preparing the Construction Management Plan, the CM shall consider the Owner's schedule, budget, and design requirements. The CM shall then develop various alternatives for the sequencing and management of the Project and shall make recommendations to the Owner. The plan shall address how the CM will implement procedural and administrative aspects of the project during the design, bidding, construction and close-out phases. The Plan shall be presented to the Owner for review at the conclusion of the Pre-Schematic phase. Items to be addressed in the Plan shall include but are not limited to: processes for design review, value engineering, constructability review, cost estimating, approach to General Conditions work, trade contractor pre-qualification, receipt and opening of trade contractor bids, schedule preparation, schedule and budget management, shop drawings, submittals, RFIs, QA/QC during design and construction phases, turnover documentation, LEED requirements, building commissioning and training on building systems.
- 1.4 The CM shall conduct a Construction Market Survey to provide current information regarding the availability of local trade contractors, labor, materials and equipment, bidding climate, M/WBE and SDVOB availability and other economic factors related to the Project. A report of the Construction Market Survey shall be provided to the Owner at the conclusion of the Pre-Schematic phase. Periodic updates to the survey shall be provided if requested by the Owner.

#### 2. Consultation During Project Development

The CM work together with the Project Designer to leverage the CM's knowledge and expertise from the beginning of the design process. Meetings shall occur at the earliest stage of design to review the proposed design concept(s) with the goal of producing a design that maximizes the building efficiencies, meets the program requirements and is cost effective.

The CM shall attend regularly scheduled meetings with the Project Designers and consultants during the Design Phases established by the contract between the OWNER and the Project Designer, to advise them on matters relating to site use, value engineering, selection of materials, building methods, construction details, building systems and equipment, phasing, coordination, sequencing, scheduling, cost and constructability.

#### 3. Value Analysis

- 3.1 The CM shall, after a complete review of the Project Program, evaluate the designs available at the time of the CM's commencement of Pre-Construction services, and obtain an understanding of the intent of the OWNER and the Project Designer, provide value analysis services and offer cost savings suggestions and best value recommendations to the OWNER. All recommendations shall be in writing and must be fully reviewed with the Project Designer and OWNER, and approved by the OWNER prior to implementation. It is anticipated that the value analysis will occur at the Pre-Schematic, Schematic and 60% design development, and 100% Construction Documents submission phases.
- 3.2 Value analysis efforts shall result in a design that is most effective in first costs as well as long term operational costs relative to issues of energy use and facility maintainability. The value analysis deliverable from the CM shall include life cycle cost analyses as may be required to assist the Project Designer to achieve an appropriate balance between costs, aesthetics and function for the building systems and materials being contemplated in the design.
- 3.3 Value analysis efforts shall also take into consideration applicable constructability issues.
- 3.4 The CM shall promptly notify the OWNER and Project Designers in writing upon observing any features in the design that appear to be ambiguous, confusing, conflicting or erroneous.
- 3.5 All value analysis studies must be provided on a timely basis within the design schedule.

#### 4. Project Scheduling

- 4.1 The CM shall be responsible for the preparation, monitoring and managing of the schedule during the Pre-Construction, bidding, construction and close-out phases of the project. It is understood that the Project Designer will be managing all aspects of the design schedule, and will and will provide schedule input related to design phase activities to the CM throughout the design phase. For the purposes of the Pre-Construction contract, the CM shall prepare an overall project schedule, including, but not limited to, the following elements: various design phases of the project (and associated design submission dates), constructability reviews, estimates and reconciliation for the various phases, trade bid scoping, trade bidding and award, any proposed early bid packages, development and approval of MCP and a preliminary construction schedule (showing major milestones, such as: Notice to Proceed, major construction milestones, date of substantial completion and associated punch list work).
- 4.2 See General Requirements Section 013200 for project scheduling requirements.

#### 5. Constructability Reviews

- 5.1 The CM shall review the design throughout the Pre-Construction phase as to constructability, including without limitation all issues identified in the CM's Proposal. With respect to each such issue, the CM shall submit a written report to both the OWNER and the Project Designers. At a minimum, each such written report shall contain: (1) A description of the constructability issue with background information; (2) a summary of the CM's in-depth study/research; and, (3) written recommendations for addressing the issue. These reviews shall ensure that good building practices are incorporated into the design documents and identify whether the project sequencing is viable and design elements can be built in a manner that is safe, expeditious and cost effective. These reviews shall be conducted at Pre-Schematic, Schematic, 60% Design Development and 100% Construction Document phases.
- 5.2 The Project Designer will undertake a geo-technical analysis to determine the basis for the foundation design for the building. The CM shall review the geo-technical report and provide constructability comments regarding the proposed foundation design. The CM shall advise if it deems additional investigation necessary. If the Owner agrees, the Owner will make arrangements for additional investigation.

## 6. Construction Cost Model / Estimates

- 6.1 The CM shall develop a project cost estimate (independent from any similar cost estimate required of the Project Designers) that shall be updated as needed, but at a minimum at the time of each submission within the design phase during which the CM is performing Pre-Construction Services. Cost estimates to be done by the CM at Pre-Schematic, Schematic Design, 60% Design Development and 100% Construction Documents submissions. The CM shall coordinate its format with that of the Project Designers to facilitate ease of comparison of the two estimates. Cost estimates from the CM shall be submitted to the OWNER no later than ten (10) working days after receipt of the design submission from the Project Designers.
- 6.2 Each CM cost estimate shall include the total estimated cost of the trade contracts as well as the CM's General Conditions. The General Conditions shall be kept separate from the Trade Contracts. As part of the completion of the 100% Cost Estimate the CM shall establish a preliminary Trade Contract Breakdown that will ultimately become the MCP Trade Contract Breakdown when finalized. The CM shall assign estimated costs to each line item in the Trade Contract Breakdown.
- 6.3 Each CM cost estimate, along with each Designer's cost estimate, will be reviewed by the OWNER for reasonableness and compatibility with the Approved Construction Budget. Meetings and negotiations between OWNER, Project Designers and the CM will be held to resolve questions and differences that may occur between the Designer's and CM's estimates. The CM shall work with the OWNER and Project Designer to reach a mutually acceptable reconciled estimate.
- 6.4 In the event that the reconciled estimate exceeds the Approved Construction Budget, the OWNER may direct the CM, (without additional compensation to the CM), to work in conjunction with the Project Designers to redesign the facility as necessary to maintain the Project Program within the Approved Construction Budget.
- 6.5 The Approved Construction Budget for the Project is to fall within the following range:  
  
(PM to insert Approved Construction Budget)

## 7. Review and Coordination of Contract Documents

- 7.1 The CM shall review the drawings and specifications as they are being prepared, recommending alternative solutions whenever design details affect costs, construction feasibility or schedules. The CM shall notify the Project Designers and the OWNER in writing upon observing any features in the plans or specifications which appear to be ambiguous, confusing, conflicting or erroneous. The reviews shall also identify missing scope items in relation to the trade packages that the CM intends to procure. These reviews shall be conducted at Pre-Schematic, Schematic Design, 60% Design Development, and 100% Construction Document phases.
- 7.2 The CM shall provide a thorough interdisciplinary coordination review of the Construction Drawings and Specifications before the Trade Contracts are put out to bid. The review shall be performed utilizing a structured and industry-accepted process including the use of "clash detection" software. The CM shall review the final documents to see that all comments have been incorporated prior to bidding, including design review comments submitted by the OWNER.
- 7.3 By virtue of the final review by the CM referenced in Section 7.2 above, all ambiguous, confusing, conflicting and/or erroneous features discovered in the plans or specifications by the CM or OWNER during the review process shall be deemed to be corrected, and any associated costs shall be included in the CM's MCP.

7.4 Following approval of the 60% Design Development submission and cost estimate the CM shall provide to the Owner the scoping document that sets forth the scope of work for each trade contract package. This shall be submitted to the Owner for review at least 30 days prior to the 100% Construction Documents submission.

## 8. Maximum Contract Price (MCP)

8.1 Following reconciliation and approval of the 100% Construction Document estimate, (at a time mutually agreed upon between the OWNER and the CM), the CM will provide to the OWNER a proposed MCP submission which will include all trade contract values (based on actual trade bids received by the CM), and all other project costs including without limitation, the CM construction phase fee, the CM-MCP contingency pursuant to Section 11 of this Appendix, and the General Conditions allowance. The MCP submission shall set out each trade contract amount, the CM's fixed fee, the General Conditions reimbursable cost items including on-site field staff, and all project related costs including but not limited to labor and material, performance bonds, personnel payroll benefits, and the CM MCP contingency. The MCP submission will not include the CM's Pre-Construction costs. It is important to note, that unlike a Guaranteed Maximum Price (GMP) associated with a CM at Risk contract, the MCP associated with this CM-Build contract is developed after obtaining actual bids from the trade contractors, as outlined in Section 9 below.

8.2 The trade bids included as part of the MCP shall be obtained using the approved 100% Construction Documents. Included with its MCP proposal, if requested by the Owner, the CM shall provide two complete, bound sets of the drawings, specifications, plans, sketches, instructions, requirements, materials, equipment specifications, and other information or documents that fully describe the Project as developed at the time of the MCP and that are relevant to the establishment of the MCP.

In developing the MCP submission package, the CM shall coordinate efforts with the Project Designer and the Owner to identify qualifications, clarifications, assumptions, exclusions, value engineering and any other factors relevant to the establishment of the MCP. The CM shall review the development of the MCP submission with the OWNER on an ongoing basis to address clarifications of scope and pricing, distribution of contingencies, schedule assumptions, exclusions and other matters relevant to the establishment of the MCP. The use of general allowances in subcontracts is prohibited. The use of specific allowances may be permitted. Any specific allowances must be submitted by the CM to the Owner for approval, on a case by case basis.

8.3 The MCP shall include the CM's lump sum fee for the management of the trade work and the general conditions. The lump sum fee includes all CM home office costs, including officers as well as home office and local office support staff, together with all CM overhead costs and profit. The fee shall also include all required services of a home office Project Executive, by whatever name called and includes the management of the General Conditions work. No additional overhead or profit on direct labor for the construction phase will be paid beyond the construction phase fee.

8.4 In the event that the proposed MCP exceeds the Approved Construction Budget, the CM shall work with the Project Designers (without additional compensation to the CM), to redesign the Facility as necessary to maintain the Project program and meet the Approved Construction Budget as follows:

- a. After consultation with the OWNER, the CM shall coordinate and cooperate with the Project Team to alter and re-draft Construction Documents as necessary to accomplish the required reduction in cost.

- b. The CM shall analyze the Project Designer's modified Construction Documents, and make recommendations to the OWNER as to ways and methods to reduce the costs of constructing the project to a sum which does not exceed the Approved Construction Budget.
- c. The CM shall develop and provide to the OWNER an MCP in connection with the re-drafted and altered Construction Documents to accomplish the necessary reductions in cost.

The OWNER has the right to reject any proposed MCP as originally submitted, or as adjusted. In the event, the Construction Contract will not be executed and the project will be cancelled or put on hold, at the discretion of the Owner, the Contract will be terminated according to its terms.

Notwithstanding anything in the contract to the contrary, the CM shall perform the work set forth in this Section without additional compensation.

- 8.5 The CM's detailed construction cost estimates and MCP will be reviewed by the OWNER for reasonableness and compatibility with the Approved Construction Budget. Meetings and negotiations between OWNER, Project Designers and the CM will be held to resolve questions and differences that may occur between the Approved Construction Budget, the CM's cost estimate and corresponding MCP. If at any time the Approved Construction Budget is exceeded, the CM shall work with the OWNER and Project Designers to reach a mutually acceptable MCP.
- 8.6 Upon acceptance by the OWNER, the CM's MCP, as approved, shall become a part of the OWNER-Construction Manager Construction Phase Contract. Within 10 days after the execution of the construction contract the CM shall provide the OWNER with a Performance Bond and a Labor and Material Payment Bond each for 100% of the MCP per the OWNER's Standard Forms.
- 8.7 Following the OWNER acceptance of the proposed MCP, the CM shall continue to monitor the development of the Construction Documents so that when complete, the Construction Documents adequately incorporate and resolve all qualifications, assumptions, clarifications, exclusions and value engineering issues identified in the MCP proposal.

## 9. Trade Contracts Prequalification, Bid and Award

- 9.1 The CM shall adhere to the following procedures while obtaining their trade bids that will be included as part of the MCP:
  - a. Formal Advertising - For the purpose of obtaining expressions of interest from responsible bidders, formal advertising entails:
    - (1) Preparation of a listing of specific bid packages on which competitive pricing will be solicited; and
    - (2) Publicizing the invitation for expressions of interest in bidding through distribution to prospective bidders, posting in public places, publication in newspapers and construction trade journals, and such other means as may be appropriate, including minority trade organizations, in sufficient time to enable prospective bidders to prepare and submit their expressions of interest and qualifications and submit their bids before the time estimated for receipt of bids.
  - b. Pre-qualification of Bidders - Bidders will be required to meet specified qualifications before being invited to submit a bid on a separate bid package. The OWNER reserves the right to review and approve the qualification criteria prior to advertising by the CM.

The CM shall have the discretion to evaluate and select subcontractors who are invited to bid on the basis of the subcontractor's prior experience and success on similar projects, technical capacity, achievement of MWBE and SDVOB goals, and past record of compliance with Articles 15-A and 17-B of the New York State Executive Law.

To facilitate the pre-qualification of bidders, each bid package included in the consolidated announcement per paragraphs a. 1. and 2. above shall be described in sufficient detail to inform prospective bidders of the nature and scope of the work and shall contain instructions to interested bidders for submitting qualifications. Prospective bidders must identify the bid package(s) for work they intend to perform. They must also submit their years of experience in performing said work on contracts of similar size and complexity. The CM may establish its own pre-qualification process, but such process must include: (1) determining whether any prospective bidder has been subject within the past five years to a debarment by the New York State Department of Labor or by the New York State Workers Compensation Board; (2) determining the status of the bidder's registration with the New York State Department of State; (3) identifying any serious Occupational Safety and Health Administration (OSHA) violations by the bidder; and (4) requiring each bidder to disclose whether, within the past five years, it has been debarred by, found not responsible by, or lost its prequalification status from, any public agency. (Note: information regarding the first three items is publicly available at no charge through the respective agencies websites.)

The Owner will provide a Pre-Qualification Checklist for use by the CM. (See Appendix D) When the CM through its bid process has identified the first and second apparent low bidders for each bid package, the CM shall require those first and second apparent low bidders whose bids exceed \$2 million to submit to the OWNER a completed NYS Vendor Responsibility Questionnaire and a completed DASNY Vendor Questionnaire (DVQ), including financial statements. The OWNER reserves the right to require that any apparent first or second low bidder, regardless of the amount of their bid, submit a VRQ and DVQ. The owner will review the VRQs and DVQs. In concert with the CM, the OWNER will also review the history and qualifications of the first and second apparent low bidders, and inform the CM of any bidders it disapproves. The CM shall require each bidder to provide a Non-Collusive Bidding Certification form with their bid. The CM shall also provide same form with each bid package. The Owner will provide said form. (See Appendix E)

- c. Following receipt of bids from the trade contractors, the CM shall meet with each bidder to review scope, cost, schedule, MWBE/SDVOB participation, bid exclusions or qualifications and any other pertinent elements related to the submitted bid. This process may result in changes to bid prices. The CM shall provide a report to the Owner that indicates original bid amounts, any changes to said amounts and a narrative describing the reason(s) for any changes. Upon completion of this bid review process, the CM shall select subcontractors based on the lowest bid, except that with the Owner's prior approval, subcontractors may be selected on a "best value" basis if the CM demonstrates to the Owner's satisfaction that the subcontractor it proposes to select would be in the best interests of achieving the Project budget, schedule and/or achievement of MWBE/SDVOB goals.
- d. If after a review of all submitted bids, the CM concludes that the selected bidder for any bid package exceeds the CM's budget line item for such package, or if less than three bids are received in response to the invitation to submit a bid on any bid package, one of the following procedures shall be followed, subject to the owner's review and approval of justification submitted by the CM:
  - (1) Revise all or any part of the Bid Documents for the Project that the OWNER in conjunction with the CM may deem advisable, at no cost to the OWNER, to bring the lowest responsible bid within the CM's budget line for such package; or

- (2) The CM shall negotiate with the lowest bidders to reduce the price of the bid package to a cost which will not exceed the budget line item price; or
- (3) The CM shall reject all bids and issue a revised invitation to bid approved by the OWNER; or
- (4) The CM shall award to the low bidder for a price above the budget line item; or
- (5) The CM shall perform the Work itself for the amount of the budget line item price if c. (2) cannot be accomplished, and if the OWNER approves of same.

In addition, the CM and the OWNER may agree to the need for negotiation of bid prices where same are within budget line item cost estimate: this service is included in the foregoing task (2)

If the foregoing tasks (1) and (2) are directed, there shall be no reduction of the scope or quality of the Project for any bid package in order to accomplish the Work of the Project.

- e. If the low bid for any bid package appears to be too low, and it appears that the bidder would be unable to complete the contract at the price bid, the CM shall so notify the OWNER. The OWNER, in concert with the CM, will review the bid price breakdown, and the history of the bidding contractor, in accordance with Executive Order 170.1, Uniform Guidelines for Responsibility Determinations. Assuming the OWNER agrees with the CM that the bid price is too low, or that the history of the bidding contractor raises serious concerns about the contractor's ability to perform the Work in a timely and satisfactory manner, and such agreement shall not be unreasonably withheld, the CM will proceed to review the next low bidder, in like manner if necessary.

- f. Trade Contractor Bids

The CM shall notify the Owner of the date, time and location for receipt of Trade Contractor bids so that the Owner may attend bid openings. The CM shall record the bids and provide a bid tabulation to the Owner.

- g. Contract Awards

1. The CM shall be responsible for making all sub-contract awards, after following the process outlined in 4.1a, b, c, d, e and f herein. CM shall supply the OWNER with its bid evaluations, descoping analysis, rationale, recommendation for award in advance of executing any subcontracts. The OWNER reserves the right to reject an intended award, in any instance where the OWNER's review of the prequalified bidder would result in withdrawal of said pre-qualification. Upon owner's approval of the recommendation to award for each subcontract, the CM shall provide copies of the executed subcontracts for each trade package.

2. One or more Principal Trade Contract packages shall be prepared for each of the General Construction, Electrical, Mechanical, Fire Protection, and Plumbing divisions of the work of the Project. The CM may prepare Principal Trade Contract packages for other divisions or subdivisions of the work. Each Principal Trade Contractor may be required by the CM to provide such bonds and insurance as the CM may require in the contract package.

- 9.2 The CM may at any time prior to the prequalification of bidders, identify and define other Specialty Contract packages which the CM determines may be helpful in the timely, cost-effective construction of the Project.

- 9.3 The CM shall include the OWNER's General Conditions and General Requirements in each Trade Contract Bid Package. The General Requirements may be edited as appropriate in order to adapt them to the specific Bid Package.
- 9.4 All contract documents between the CM and the Trade Contractors shall be made available for review by the OWNER.
- 9.5 The use of general allowances in subcontracts is prohibited. The use of specific allowances may be permitted. Any specific allowances must be submitted by the CM to the Owner for approval, on a case by case basis.

#### 10.0 Early Bid Packages

- 10.1 The OWNER may elect to authorize the CM to bid and award early packages following the process described in the above section. The CM will initially recommend to the OWNER an award for each trade for these early packages and an estimate of General Condition's costs. The estimated value agreed to with the OWNER for each early package will be the value utilized when establishing the MCP. The CM's cost associated with these early packages will be reimbursed by the OWNER as part of the Construction Phase Contract. The CM shall not incur any subcontractor costs for construction of the Work without the prior written authorization of the OWNER. Should the OWNER accept the early bid packages and reject the final MCP, the provisions of Section 12 of this Pre-Construction contract will be followed.
- 10.2 All Trade Contracts awarded with the approval of the OWNER prior to the rejection of the Final MCP may be assigned to the OWNER. The OWNER shall pay to the CM, any reasonable costs incurred by the CM as a result of this assignment.

#### 11. CM-MCP Contingency:

- 11.1 The MCP shall include a CM construction contingency (CM-MCP Contingency) in an amount approved by the OWNER, to help reduce the risks assumed by the CM in providing the MCP for the Project. The OWNER and the CM acknowledge that the contingency is included to make adjustment for eventualities which have not been taken into precise account in the establishment of the MCP, including but not limited to: (1) contract default by trade contractors; (2) unanticipated market conditions; (3) those circumstances where the actual cost of an item exceeds the amount allocated to such item in the schedule of values, assuming all remedies pursuant to section 4.1 of the Construction Phase contract have been exhausted; (4) corrections in the work provided the CM has exhausted all reasonable means to obtain correction of same from the responsible Trade Contractor; (5) interfacing, coordination or scope omissions between and from the various work categories and (6) claims from sub-contractors.
- 11.2 The CM-MCP Contingency is not allocated to any particular item of the Cost of the Work, and is established for the CM's use as may be required for increases in costs as noted above. It is understood that the amount of the CM-MCP contingency is the maximum sum available to the CM to cover costs incurred as a result of such unanticipated causes or details, and that cost overruns in excess of the amount of the CM-MCP contingency will be borne by the CM.
- 11.3 The CM will notify the OWNER and Project Designer in writing of the CM's intent to apply any part of the CM-MCP contingency to any item within the Cost of the Work prior to any such application. The CM shall not implement the use of this contingency without the written approval of the OWNER. The CM shall fully document the change on its copy of the construction documents.
- 11.4 The amount of the CM-MCP contingency is to be reviewed by the OWNER as part of its review of the MCP. No set amount or percentage for the CM-MCP contingency will be agreed to prior to the submittal



of the MCP. The OWNER retains the right to specifically request revisions to the amount of the CM-MCP contingency prior to the OWNER's acceptance and approval of the MCP.

12. Non-Acceptance of the MCP and Termination of OWNER/Construction Manager Contract.

12.1 The OWNER, at its sole discretion, may decline to accept the CM's MCP for the project and thereupon without penalty, the Contract shall be terminated according to its terms.

12.2 In any event, such termination shall likewise terminate all further services and obligations of the CM under this Pre-Construction contract. The CM shall accept the amount negotiated for Pre-Construction services as full and complete reimbursement of all costs and services performed by the CM for Pre-Construction Services and shall not be entitled to any further amount for services set forth under or related to this contract. Thereafter, the OWNER shall have the right to continue its activities to place the project under construction with no obligation or restriction regarding the CM and with full Ownership and use of any data and information developed during Pre-Construction activities. Should the OWNER continue to place the project under construction, the CM is precluded from bidding on any part of the work as a Trade Contractor.

12.3 Termination under this Section is in addition to the termination provisions set forth elsewhere in the Contract including, but not limited to, the General Conditions.

13. Ownership of Documents

All data, information, material and matter of any nature and all copies thereof in any and all forms whatsoever developed by the CM or in the CM's possession or control relating to the Project are the property of the OWNER and shall be turned over to the OWNER within ten (10) days after the OWNER's request.

14. Pre-Construction Deliverables

The following table A1 includes, but is not limited to the written deliverables required as part of the Pre-Construction Services (see Scope of Services text for complete details):

**TABLE A1**

Deliverables
Pre-Schematic Phase; <ol style="list-style-type: none"><li>1. Value Analysis</li><li>2. Cost Estimate</li><li>3. Design Review and Coordination Comments</li><li>4. Constructability Comments</li><li>5. Construction Management Plan</li><li>6. Market Study</li></ol>
Schematic Phase; <ol style="list-style-type: none"><li>1. Value Analysis</li><li>2. Cost Estimate</li><li>3. Design Review and Coordination Comments</li><li>4. Constructability Comments</li><li>5. Comments on Geo-Technical Report</li></ol>
60% DD Phase <ol style="list-style-type: none"><li>1. Value Analysis</li><li>2. Cost Estimate</li><li>3. Design Review and Coordination Comments</li><li>4. Constructability Comments</li><li>5. Trade Contract Breakdwon</li><li>6. Scoping Document</li></ol>
100% CD Phase <ol style="list-style-type: none"><li>1. Value Analysis</li><li>2. Cost Estimate</li><li>3. Design Review and Coordination Comments</li><li>4. Constructability Comments</li><li>5. MCP Document</li></ol>

**APPENDIX "B"**

**SCHEDULE OF APPROVED PERSONNEL CLASSIFICATIONS  
AND MAXIMUM DIRECT SALARY RATES**

CLASSIFICATIONS

APPROVED MAXIMUM  
DIRECT HOURLY RATES (1)

(1) Salaries

Approved Maximum Daily Rates are those maximum rates in effect through \_\_\_\_\_, 20\_\_\_\_. Maximum Hourly Rates may be adjusted at the beginning of each salary year. Any adjustment is subject to review and pre-approval of the Director, Procurement and will not require a formal Amendment to this Contract.

(2) Assignment of Personnel

Assignment and time durations of all Construction Management Personnel assigned to the Project by the CM shall be subject to the approval of the OWNER. The OWNER may request the CM to remove from the Project any employee the OWNER deems incompetent, careless, or otherwise objectionable and replace said employee with more suitable personnel. The OWNER may also approve additional personnel classifications if deemed necessary.

(3) Monthly Requisitions

All payment requisitions must account for the time of all personnel by name, title, and approved daily rates.

(4) The Consumer Price Index for New York - Northeastern New Jersey area shall be used as a guide for any rate adjustment negotiation.

## APPENDIX "C"

### SUMMARY OF PAYMENTS

#### A. PRE-CONSTRUCTION PHASE

1. Actual Direct Salaries

2. Fringe Benefits

3. Pre-Construction Phase Fee

4. Miscellaneous Reimbursable Costs

5. Consultant's Costs

6. MAXIMUM AMOUNT PAYABLE

Payment for services shall be made monthly based on actual services performed by the CM as approved by the OWNER. Payments shall be requisitioned on the OWNER's form, PROFESSIONAL SERVICES CONTRACT PAYMENT REQUISITION, with a completed M/WBE Compliance Report, individual timesheets or a summary report thereof as may be required by the OWNER, and other appropriate supporting documentation. Timesheets and/or payroll registers shall show the names, actual rates of pay, position classifications and hours worked for all personnel performing services during the payment period. Payment requisitions in any other format will not be accepted.

NTE = Not to Exceed

LS= Lump Sum

AE= Actual Expense (supporting documentation required)

**APPENDIX "D"**  
**ADDITIONAL ITEMS**  
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## 1. 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 performance of the Work.
- B. The CONSTRUCTION MANAGER specifically agrees, as required by Labor Law, Sections 220 and 220-d as amended, that:
- 1) no laborer, workmen, or mechanic, in the employ of the CONSTRUCTION MANAGER, Subconsultant, or other person doing or contracting to do the whole or any part of the work contemplated by this Contract 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;
  - 2) the wages paid for legal day's work shall be not less than the prevailing rate of wages as defined by law;
  - 3) the minimum hourly rate of wages to be paid shall be not less than that stated in this Contract and shall be designated by the Commissioner of Labor of the State of New York; and
  - 4) the CONSTRUCTION MANAGER 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.
- C. 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 CONSTRUCTION MANAGER 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.
- D. All employees of the CONSTRUCTION MANAGER 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.
- E. The CONSTRUCTION MANAGER agrees that, in case of underpayment of wages to any worker engaged in the Work by the CONSTRUCTION MANAGER or any Subconsultant, the OWNER shall withhold from the CONSTRUCTION MANAGER, out of payments due, an amount sufficient to pay said worker the difference between the wages required to be paid under this Contract 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 on account of the CONSTRUCTION MANAGER to the employees to whom said amount is due. The CONSTRUCTION MANAGER 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 Contract.
- F. Pursuant to subdivision 3 of section 220 and section 220-d of the Labor Law this Contract may be forfeited and no sum paid for any work done thereunder on a second conviction for willfully paying less than:
- 1) the stipulated wage scale as set forth in Labor Law; Section 220, subdivision 3, as amended,  
or

- 2) less than the stipulated minimum hourly wage scale as specified in Labor Law, Section 220-d, as amended.

G. The CONSTRUCTION MANAGER specifically agrees, as required by the Labor Law, Section 220-e, as amended, that:

- 1) in the hiring of employees for the performance of work under this 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 CONSTRUCTION MANAGER, nor any person acting on behalf of said CONSTRUCTION MANAGER 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;
- 2) no CONSTRUCTION MANAGER, nor any person on behalf of said CONSTRUCTION MANAGER or Subconsultant shall, in any manner, discriminate against or intimidate any employee hired for the performance of work under this Contract on account of race, creed, color, sex, or national origin;
- 3) there may be deducted from the amount payable to the CONSTRUCTION MANAGER, by the OWNER under this Contract, 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 Contract; and
- 4) this Contract 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 Contract.

H. The CONSTRUCTION MANAGER specifically agrees to certify its payrolls and keep these certified records on site and available, and provide copies to the OWNER upon request.

## **2. NONDISCRIMINATION**

During the performance of this Contract, the CONSTRUCTION MANAGER agrees as follows:

- A. The CONSTRUCTION MANAGER 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 Commissioner of Human Rights, the CONSTRUCTION MANAGER will send to each labor union or representative of workers with which the CONSTRUCTION MANAGER 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 said labor union or representative of the CONSTRUCTION MANAGER's Contract under clauses A. through G. (hereinafter called "nondiscrimination clauses"). If the CONSTRUCTION MANAGER was directed to do so by the contracting agency as part of the proposal or negotiation of this Contract, the CONSTRUCTION MANAGER 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 Contract 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 CONSTRUCTION MANAGER shall promptly notify the State Commissioner of Human Rights of said failure or refusal.

- C. If directed to do so by the Commissioner of Human Rights, the CONSTRUCTION MANAGER 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 CONSTRUCTION MANAGER will state, in all solicitations or advertisements for employees placed by or on behalf of the CONSTRUCTION MANAGER, 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 CONSTRUCTION MANAGER 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 CONSTRUCTION MANAGER's books, records, and accounts by the State Commissioner of Human Rights, the Attorney General, and the Commissioner of Labor of the State of New York 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 Contract 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 CONSTRUCTION MANAGER has not complied with these nondiscrimination clauses, and the CONSTRUCTION MANAGER 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 CONSTRUCTION MANAGER satisfies the State Commissioner of Human Rights that the CONSTRUCTION MANAGER 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 to the CONSTRUCTION MANAGER, and an opportunity has been afforded the CONSTRUCTION MANAGER 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 CONSTRUCTION MANAGER 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 CONSTRUCTION MANAGER 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 CONSTRUCTION MANAGER 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 CONSTRUCTION MANAGER shall promptly so notify the Attorney General, requesting the Attorney General to intervene and protect the interests of the State of New York.

### **3. PROVISIONS REQUIRED BY LAW DEEMED INSERTED**

Each and every provision of law and clause required by law to be inserted into this Contract shall be deemed to be inserted herein and this Contract shall read and shall be enforced as though so included.



**4. COMPLIANCE WITH LAWS, RULES, AND REGULATIONS**

The CONSTRUCTION MANAGER shall comply fully with all applicable laws, rules, and regulations.

**5. CONTRACT DEEMED EXECUTORY**

The CONSTRUCTION MANAGER agrees that the Contract shall be deemed executory to the extent of moneys available from either (i) the proceeds of bonds issued by the Authority for the Contract, or (ii) moneys made available by the Client for the Contract, or (iii) other non-Authority moneys made available from whatever source specifically for the Contract and no liability shall be incurred by the Owner beyond moneys available therefore.

**6. OWNERSHIP OF DOCUMENTS**

Original drawings and specifications will become the property of the OWNER, and the CONSTRUCTION MANAGER may not use the drawings and specifications for any purpose not relating to the Project without the OWNER's consent. The CONSTRUCTION MANAGER may retain such reproductions of drawings and specifications as the CONSTRUCTION MANAGER may reasonably require. Upon completion of the Work or any early termination of this Contract, the CONSTRUCTION MANAGER will promptly furnish the OWNER with the complete set of original record prints. All such original drawings and specifications shall become the property of the OWNER who may use them, without the CONSTRUCTION MANAGER's permission, for any proper purpose including, but not limited to, additions to or completion of the Project.

**7. TERMINATION**

**A. Termination for Cause**

1. In the event that any provision of the Contract is violated by the CONSTRUCTION MANAGER or by any Subconsultant, the OWNER may serve written notice upon the CONSTRUCTION MANAGER 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. If the violation or delay shall not cease or arrangements satisfactory to the OWNER shall not be made, the Contract shall terminate upon the date so specified by the OWNER. In the event of any such termination, the OWNER may take over the Work and prosecute same to completion by Contract or otherwise for the account and at the expense of the CONSTRUCTION MANAGER shall be liable to the OWNER for all costs occasioned the OWNER thereby. In the event of such termination the OWNER may take possession of and may utilize such materials, appliances, and plant as may be on the Site and necessary or useful in completing the Work.
2. If, after notice of termination of the CONSTRUCTION MANAGER under the provisions of paragraph (a) of this clause, it is determined that the failure to perform this contract is due to causes beyond the control and without the fault or negligence of the CONSTRUCTION MANAGER, Termination for Cause shall be deemed to have been issued pursuant to the clause of this contract entitled "Termination for Convenience" and the rights and obligations of the parties hereto shall in such event be governed by such clause.

**B. Termination for Convenience**

1. The OWNER, at any time, may terminate this Contract in whole or in part. Any such termination shall be effected by mailing or delivering to the CONSTRUCTION MANAGER a written notice of termination specifying the extent to which performance of Work under this Contract is terminated and the date upon which said termination becomes effective. Upon receipt of the notice of termination, the CONSTRUCTION MANAGER shall act promptly to minimize the expenses resulting from said termination. The OWNER shall pay the CONSTRUCTION MANAGER for actual expenses incurred

by the CONSTRUCTION MANAGER and approved by the OWNER, including fringe benefits and fee, for the period extending from the date of the last approved payment requisition up to the effective date of the termination, but in no event shall the CONSTRUCTION MANAGER be entitled to compensation in excess of the total consideration of the Contract. In the event of said termination, the OWNER may take over the Work and prosecute same to completion by contract or otherwise and may take possession of and may utilize such materials, appliances, and plant as may be on the site and necessary or useful to complete the Work.

2. In the event of said termination, the OWNER may take over the Work and prosecute same to completion by contract, assignment of Subcontracts or otherwise and may take possession of and may utilize such materials, appliances as may be on the Project Site and necessary or useful to complete the Work.

## **8. SUSPENSION OR ALTERATION**

- A. The OWNER may order the CONSTRUCTION MANAGER 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 shall not be limited to, the following: latent field conditions, substantial program revisions, acquisition of rights-of-way or real property, financial crisis, labor disputes, civil unrest, or Acts of God.
- B. Upon receipt of a suspension order, the CONSTRUCTION MANAGER 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 CONSTRUCTION MANAGER specifically agrees that such suspension, interruption, or delay of the performance of the Work pursuant to this Item shall not increase the cost of performance of the Work of this Contract.
- D. Time of Completion of the Work may be extended to such time as the OWNER determines shall compensate for the time lost by the suspension, interruption, or delay, such determination to be set forth in writing.

## **9. LAWS OF THE STATE OF NEW YORK**

This Contract shall be governed by the Laws of the State of New York.

## **10. CODES**

Unless otherwise directed by the OWNER, the CONSTRUCTION MANAGER 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 which are applicable:

- A. Administrative Codes
- B. Zoning Resolutions
- C. State Building Code, NYS Uniform Fire Prevention and Building Code, latest edition
- D. Local Zoning Ordinances
- E. Local Building Codes
- F. State Hospital Code

If Federal Aid is obtained for any facilities described herein, then any and all regulations imposed by the participating Federal Agency shall be complied with in the performance of this Contract.

**11. GOVERNMENT PROVISIONS**

The CONSTRUCTION MANAGER shall comply with any applicable provisions or Acts of Congress, rules, regulations, and requirements of the Government of the United State of America. If there is a grant of money or loan of money by the Government of the United States of America for the Project, then the CONSTRUCTION MANAGER shall furnish any information and provide any assistance which the OWNER deemed necessary for the preparation of any certificates, reports, or materials required as a result of obtaining said grant or loan.

**12. COOPERATION**

The CONSTRUCTION MANAGER shall render any assistance which the OWNER may require with respect to any claim or action in any way relating to the CONSTRUCTION MANAGER's services during or subsequent to the design or construction of the Project including, without limitation, review of claims, preparation of technical reports and participation in negotiations both before and after it has otherwise completed performance of the Contract and without any additional compensation therefore.

**13. LATE PAYMENT**

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

**14. DEATH OF THE CONSTRUCTION MANAGER**

If the CONSTRUCTION MANAGER is an individual and that CONSTRUCTION MANAGER shall die prior to the said completed performance of this Contract, then the payment to the estate of said CONSTRUCTION MANAGER, pursuant to this Contract, shall be made as if the Project or any part thereof had been suspended or altered on the date of the death of the CONSTRUCTION MANAGER. If the CONSTRUCTION MANAGER is a partnership and a partner shall die prior to the completed performance of this Contract, the OWNER, in the OWNER's discretion, may deem the Project or any part thereof, suspended or altered on the date of said death or any date thereafter which the OWNER selects, and the payment to the estate of the deceased CONSTRUCTION MANAGER or the partnership, pursuant to this Contract, shall be made as if the Project or any part thereof had been suspended or altered on the date of said death or such other date thereafter selected by the OWNER. The OWNER shall have the right to the immediate possession of all files of the CONSTRUCTION MANAGER relating to the Project, all plans and specifications in regard to the Project, and shall have a right to retain the services of another CONSTRUCTION MANAGER to complete the Project. If the CONSTRUCTION MANAGER is a professional or other corporation, then this paragraph shall not be applicable.

**15. OWNER-CONSTRUCTION MANAGER RELATIONSHIP**

The relationship created by this Contract between the OWNER and CONSTRUCTION MANAGER is one of independent CONSTRUCTION MANAGER and it is in no way to be construed as creating any agency relationship between the OWNER and the CONSTRUCTION MANAGER nor is it to be construed as, in any way or under any circumstances, creating or appointing the CONSTRUCTION MANAGER as an agent of the OWNER for any purpose whatsoever.

**16. PROTECTION OF LIVES AND HEALTH**

Each CONSTRUCTION MANAGER and Subconsultant shall comply fully with all applicable provisions of the laws of the State of New York, the United States of America, and with all applicable rules and regulations, adopted or promulgated, by agencies or municipalities of the State of New York or the United States of America. The CONSTRUCTION MANAGER's and Subconsultant's attention is specifically called to the applicable rules and 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. The CONSTRUCTION MANAGER shall report on compliance to the OWNER or OWNER's Representative.

**17. AFFIRMATIVE ACTION AND NYS BUSINESS AND LABOR PARTICIPATION**

- A. The CONSTRUCTION MANAGER agrees, in addition to any other nondiscrimination provision of the Contract and at no additional cost to the OWNER, to fully comply with and cooperate in the implementation of an Affirmative Action Plan designed to provide for equal employment opportunities for Minorities and Women, and a goal oriented Utilization Plan for Minority/Women Business Enterprise (M/WBE) participation in the performance of the Work, in such form and substance as herein stated. Failure to demonstrate good faith efforts to meet its CONSTRUCTION MANAGER's Workforce Utilization Plan will be a primary consideration for future responsibility determinations. The CONSTRUCTION MANAGER further agrees to incorporate all Affirmative Action provisions of the Contract in all subcontracts, regardless of tier.
- B. The CONSTRUCTION MANAGER must submit to the OWNER, and the prospective Subconsultant's must submit to the CONSTRUCTION MANAGER, an Affirmative Action Plan which demonstrates its best efforts to provide for equal employment opportunities for Minorities and Women, and a goal oriented Utilization Plan for MBE/WBE participation in the performance of the Work, in such form and substance as may be required by the OWNER. A meeting to review these submissions may be scheduled by the OWNER.
- C. These Affirmative Action 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.
- D. In Accordance with Article 15A of the Executive Law and in conformance with the Regulations promulgated by the Minority and Women's Business Development Division of the New York State Department of Economic Development, the CONSTRUCTION MANAGER agrees to be bound by the following clauses. In any circumstances of uncertainty or conflict, the Regulations of the Minority and Women's Business Development Division supersede this information.
  - 1) Utilization Plan; Waivers
    - a. The CONSTRUCTION MANAGER shall submit to the OWNER a Utilization Plan on forms provided by the OWNER within ten days of notification of selection. The Utilization Plan shall list all Subconsultants and suppliers the CONSTRUCTION MANAGER intends to use on the Contract and indicate which ones are M/WBEs. The Utilization Plan shall be prepared to achieve the participation goals indicated in the Request for Proposal.
    - b. The OWNER will review the Utilization Plan and will issue to the CONSTRUCTION MANAGER a written notice of acceptance or deficiency within 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 Contract scope of work which the OWNER has determined can be reasonably structured by the CONSTRUCTION MANAGER 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 Utilization Plan.
    - c. The CONSTRUCTION MANAGER shall respond to the notice of deficiency within seven 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 CONSTRUCTION MANAGER and direct the CONSTRUCTION MANAGER to submit, within five business days, a request for a partial or total waiver of M/WBE participation goals on forms provided by the OWNER. Failure to file the waiver form in a timely manner may be grounds for disqualification of the proposal.

- d. The CONSTRUCTION MANAGER who has made good faith efforts to obtain commitments from M/WBE Subconsultant's and suppliers prior to submitting its Utilization Plan may submit a request for waiver at the same time it submits its Utilization Plan. If a request for waiver is submitted with the Utilization Plan and is not accepted by the OWNER at that time, the provisions of clauses b. and c., regarding the notice of deficiency and written remedy will apply. In this case, the CONSTRUCTION MANAGER may submit a second request for waiver as directed by the OWNER.
- e. If the CONSTRUCTION MANAGER does not submit a Utilization Plan, remedy deficiencies in a Utilization Plan, submit a request for waiver, or if the OWNER determines that the Utilization Plan does not indicate that the M/WBE participation goals will be met and/or that the CONSTRUCTION MANAGER has failed to document good faith efforts, the OWNER may disqualify the CONSTRUCTION MANAGER as being not-responsible.
- f. The CONSTRUCTION MANAGER shall attempt to utilize, in good faith, any MBE or WBE identified within its Utilization Plan, at least to the extent indicated in the Plan.

## 2) Administration Hearing on Disqualification

- a. If the OWNER disqualifies a CONSTRUCTION MANAGER for any of the reasons set forth in 1) e. above, the CONSTRUCTION MANAGER shall be entitled to an administrative hearing, on the record, before a hearing officer appointed by the OWNER to review the determination of disqualification and non-responsibility of the CONSTRUCTION MANAGER.
- 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 30 days of notice given by certified mail, return receipt requested, rendering such final administrative determination in accordance with the provisions of Section 313 of the Executive Law.

## 3) Good Faith Efforts

In order to show that it has made good faith efforts to comply with the M/WBE participation goals of this Contract, the CONSTRUCTION MANAGER shall submit such documentation as will enable the OWNER to make a determination in accordance with the criteria set forth in Section 313 of the Executive Law and the Rules and Regulations promulgated there under.

All firms that are awarded contracts by DASNY should use these Guidelines for the preparation of all "good faith efforts" documentation. If your firm incurs difficulty in meeting your Minority and Women-owned Business Enterprises (M/WBE) goals, these Guidelines can be utilized to assist your firm in preparing the required "good faith efforts" documentation.

Responses to information in the Guidelines should be given in an item-by-item format following the numerical sequence as presented and submitted with your Request for Waiver to the Office of Opportunity Programs. If you fail to adequately document and respond to each item, it may result in a finding of non-compliance. If you need assistance, please contact the Office of Opportunity Programs at (518) 257-3465 (Upstate) or (212) 273-5111 (Downstate).

## GUIDELINES

1. Attach a copy of your completed Utilization Plan in accordance with your contractual M/WBE goals established in the DASNY contract.
2. 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.
3. 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. Include dates and copies of solicitation made.
4. 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.
5. Provide a list of any pre-bid, pre-award, or other meetings attended with New York State certified minority or women owned businesses.
6. 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.
7. Did your firm seek additional assistance from the DASNY Office of Opportunity Programs or one of DASNY's Technical Assistance providers? Please provide documentation of your interaction.
8. 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?
9. Provide a description of all relevant contract documents, plans or specifications, or documents describing the scope of work which were 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.
10. 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?
11. 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?

12. List any special considerations and/or concerns, which are preventing adequate New York State certified minority and women-owned business enterprises to participate.

4) Executive Order 162

- a. Pursuant to Executive Order 162 (9 NYCRR 8.162) dated January 9, 2017, the CONSTRUCTION MANAGER and its Subconsultants and Subcontractors are required to submit quarterly *E.O. 162 Workforce Utilization Reports* for contracts with a total contract value of Twenty-Five Thousand 00/100 Dollars (\$25,000.00) or more. All *E.O. 162 Workforce Utilization Reports* are to be submitted within 10 days of the end of each quarter by following the online reporting process set forth in section 15.02 (D). The *E.O. 162 Workforce Utilization Reports* will require the CONSTRUCTION MANAGER and its Subconsultants and Subcontractors to, among other things, report the gross wages paid to each of their employees for the Work performed by such employees on the Contract.

For monthly reporting in connection with Executive Order 162, reports are to be submitted electronically as follows:

1. Log-in (<https://ny.newnycontracts.com>) or visit the NYSCS Account Look Up (<https://ny.newnycontracts.com/frontend/usersearchpublic.asp>) and follow the on-screen directions to look up your firm's account and then access the secure System. Contact Customer Support via any of the System links if you have any questions while attempting to access your account.
2. Go to View>> My Workforce Audits.
3. View Workforce Audits by status, dates, contract, and contract type (Prime/Subcontractor).
4. The System will notify contractors to log in to review and record the workforce details for the applicable audit.
5. Complete all required reporting on a timely basis..

5) CONSTRUCTION MANAGER's Failure to Meet M/WBE Participation Goals

- a. If the CONSTRUCTION MANAGER, after making good faith efforts, is unable to comply with a Contract's M/WBE participation goals, the CONSTRUCTION MANAGER may submit a request for a partial or total waiver on forms provided by the OWNER documenting good faith efforts by the CONSTRUCTION MANAGER to meet such goals. If the documentation required with the request for waiver is complete, the OWNER shall evaluate the request and issue a written notice of acceptance or denial within 20 days of receipt.
- b. If the OWNER, upon review of the CONSTRUCTION MANAGER's Utilization Plan and compliance reports, determines that the CONSTRUCTION MANAGER is failing or refusing to comply with the Contract's M/WBE participation goals, and no waiver has been issued in regards to such non-compliance, the OWNER may issue a notice of deficiency to the CONSTRUCTION MANAGER. The CONSTRUCTION MANAGER must respond to the notice to deficiency within seven days of receipt. Such response may include a request for partial or total waiver of M/WBE participation goals.

6) CONSTRUCTION MANAGER and OWNER Complaints; Arbitration

- a. Subsequent to the award of this Contract, if the CONSTRUCTION MANAGER submits a request for waiver of M/WBE participation goals and the OWNER denies the request or fails to respond in any way within 20 days of receiving it, or

if the CONSTRUCTION MANAGER has received a written determination from the OWNER that the CONSTRUCTION MANAGER is failing or refusing to comply with goals, the CONSTRUCTION MANAGER may file a complaint with the Director, Division of Minority and Women's Development in the Department of Economic Development ("Director"), according to the provisions of Section 316 of the Executive Law. The complaint must be filed within 20 days of the OWNER's receipt of the request for waiver, if the OWNER has not responded in that time, or within 20 days of a notification that the request has been denied by the OWNER or within 20 days of receipt of notification from the OWNER that the CONSTRUCTION MANAGER is failing or refusing to comply with goals.

- b. If the CONSTRUCTION MANAGER fails or refuses to comply with goals for participation by M/WBEs as established by this Contract, the OWNER may file a complaint with the Director pursuant to Section 316 of the Executive Law.
- c. A complaint shall set forth the facts and circumstances giving rise to the complaint together with a demand for relief.
- d. The party filing a complaint, whether the CONSTRUCTION MANAGER 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.
- e. 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 30 days of receipt of the complaint the Director is unable to resolve the complaint to the satisfaction of the OWNER and the CONSTRUCTION MANAGER, the complaint shall be referred to the American Arbitration Association for resolution pursuant to Section 316 of the Executive Law and the applicable requirements of Article 75 of the Civil Practice Law and Rules.
- f. Upon conclusion of the arbitration proceeding, the arbitrator 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 CONSTRUCTION MANAGER. The award of the arbitrator with respect to the alleged violation of the Contract or the refusal of the OWNER to grant a waiver shall be final and may be vacated or modified only as provided by Article 75 of the Civil Practice Law and Rules.
- g. Upon conclusion of the arbitration proceedings and the rendition of an award, the arbitrator will also recommend to the Director a remedy including, if appropriate, the imposition of sanctions, fines or penalties. The Director will either (i) adopt the recommendation of the arbitrator; (ii) determine that no sanctions, fines or penalties should be imposed; or (iii) modify the recommendation of the arbitrator, provided that such modification shall not expand upon any sanction recommended or impose any new sanction, or increase the amount of any recommended fine or penalty.
- h. The Director, within ten days of receipt of the arbitrator's award and recommendations, will issue a determination of such matter and shall cause a copy of such determination to be served upon the respondent by personal service or by certified mail, return receipt requested. The determination of the Director as to the imposition of fines, sanctions, or penalties shall be reviewable pursuant to Article 78 of the Civil Practice Law and Rules.



- i. The determination of the OWNER or the CONSTRUCTION MANAGER 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 CONSTRUCTION MANAGER the estimated amount of the fines and penalties which may be imposed pursuant to subdivisions 6.g. and 6.h. of this paragraph. Said amounts shall be the difference between the planned dollar amount of MBE/WBE sub-contract awards and the actual dollar amount of such awards.

7) Subcontracts

The CONSTRUCTION MANAGER will include the provisions of paragraphs 3. and 6. above in every subcontract, in such manner that such provisions will be binding upon the Subconsultant as to work in connection with this Contract.

- E. The following forms are to be used in submitting Affirmative Action Plans and are hereby made a part of the Contract:

- 1) Utilization Plan (AAP 1.0)
- 2) Six-Month Utilization Workforce Projection Schedule (EEO 4.0)
- 3) Compliance Report (AAP 7.0)
- 4) Request for Waiver (AE - AAP 8.0)
- 5) Good Faith Efforts Guidelines (AAP 9.0)

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

1. In the event this Contract is in the amount of one million dollars or more, the CONSTRUCTION MANAGER shall document their efforts to encourage the participation of New York State business enterprises as suppliers and subconsultants. Documented efforts by the CONSTRUCTION MANAGER shall consist of showing that such CONSTRUCTION MANAGER 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 CONSTRUCTION MANAGER determines that New York State business enterprises are not available to participate on such Contract as subconsultants or suppliers, the CONSTRUCTION MANAGER shall provide a Statement indicating the method by which such determination was made. If the CONSTRUCTION MANAGER does not intend to use subconsultants on such contract, the CONSTRUCTION MANAGER shall provide a Statement verifying such intent.
2. In the event this Contract is in the amount of one million dollars or more, the CONSTRUCTION MANAGER 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 Contract 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.

**18. NYS VENDOR RESPONSIBILITY QUESTIONNAIRE & CONTINUING INTEGRITY**

- A. In order to assist the OWNER in determining the responsibility and reliability of the vendor selected 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.
- B. When directed by the OWNER, prior to the award of any Contract valued at \$10,000 or more, the Professional shall, within ten days following either oral or written notice that it must comply, submit evidence of a duly executed NYS Vendor Responsibility Questionnaire (VRQ) to the OWNER.

The Owner requires the Professional to file the VRQ online via the New York State VendRep System (the "System") and submit a copy of the certification page to the Owner. To enroll in and use the System, see the System Instructions at [http://www.osc.state.ny.us/vendrep/vendor\\_index.htm](http://www.osc.state.ny.us/vendrep/vendor_index.htm) or go directly to the VendRep System online at <https://portal.osc.state.ny.us>. The Professional must provide their New York State Vendor Identification Number when enrolling. To request assignment of a Vendor ID or for System assistance, contact the Office of the State Comptroller's ("OSC") Help Desk at 866-370-4672 or 518- 408-4672 or by email at [ciohelpdesk@osc.state.ny.us](mailto:ciohelpdesk@osc.state.ny.us).

- C. The information contained in the NYS Vendor Responsibility Questionnaire will serve as an informational resource to aid the OWNER in making an award determination.
- D. The Professional shall at all times during the Contract term remain responsive and responsible. The Professional shall also monitor each subconsultant or subcontractor for responsiveness and responsibility at all times during the Contract term. The Professional agrees, if requested by the President of the 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. The Professional shall immediately notify Owner of any material or adverse information pertaining to the Professional or any Subconsultant, regardless of tier.
- E. The President of the 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 in to question the responsibility of the Professional. In the event of such suspension, the Professional will be given written notice outlining the particulars of such suspension. Upon issuance of such notice, the Professional shall comply with the terms of the suspension order. Contract activity may resume at such time as the President of the Owner or his or her designee issues a written notice authorizing a resumption of performance under the Contract.
- F. Notwithstanding any other provision of this Contract, upon written notice to the Professional, and a reasonable opportunity to be heard with the appropriate Owner officials or staff, the Contract may be terminated by the President of the Owner or his or her designee at the Professional's expense where the Professional is determined by the President of the Owner or his or her designee to be non-responsible. In such event, the President of the 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 the breach.
- G. In selecting a Subconsultant or Subcontractor, the Professional shall consider whether the proposed Subconsultant or Subcontractor appears on any list of entities debarred or suspended from doing business with a government entity, including the current list of companies or individuals that have been declared ineligible to receive Federal contracts published by the System for Award Management. The Professional shall not Subcontract with any entity 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 Professional shall not Subcontract with any entity on the

debarment list published by the NYS Workers' Compensation Board pursuant to Section 141-b of the NYS Workers' Compensation Law. The Professional shall not subcontract with any entity on the list of Non-Responsible Entities maintained by the NYS Office of General Services pursuant to Executive Order No. 192.

- H. In selecting a Subconsultant or Subcontractor, the Professional shall also consider whether the proposed Subconsultant or Subcontractor has legal authority to do business in New York State and possesses the integrity, experience, qualifications, and organizational and financial capacity to perform Work on the Project.
- I. Prior to award of a Contract, the Professional shall require any Subconsultant or Subcontractor, with a subcontract value of two million dollars (\$2,000,000) or greater, to submit to the Owner a certified NYS Vendor Responsibility Questionnaire For Profit Construction (CCA-2) for review. At any time during the term of the Contract, the Owner may request, and the Professional, Subconsultant or Subcontractor shall provide, a NYS Vendor Responsibility Questionnaire For Profit Construction (CCA-2) for any Subcontractor performing Work on the Project for review. Additionally, the Owner or Professional may require a Subconsultant or Subcontractor to update, recertify and resubmit a previously submitted NYS Vendor Responsibility Questionnaire For Profit Construction (CCA-2) to the Owner upon request. Refer to General Conditions Article 19 – Executive Order No. 125.

**19. PROHIBITED INTERESTS/ETHICAL CONDUCT - CONSTRUCTION MANAGERS**

- 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, Consultant, attorney, engineer, inspector or CONSTRUCTION MANAGER 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 CONSTRUCTION MANAGER, 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.

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 thing of value from the CONSTRUCTION MANAGER 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 CONSTRUCTION MANAGER 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 agents as required,
  - 3) 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,

- 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 agents that constitutes a conflict of interest, in fact or in appearance, and
  - 6) not offer or give any unlawful gifts or gratuities, or engage in bribery or other criminal activity.
- D. The Owner encourages the CONSTRUCTION MANAGER 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 CONSTRUCTION MANAGER 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 CONSTRUCTION MANAGER 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 CONSTRUCTION MANAGER 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 CONSTRUCTION MANAGER agrees to notify the Owner’s Office of Professional Integrity at 866-750-7867 of any activity by an employee of the Owner that is inconsistent with the contents of this Section.
- H. Any violation of these provisions shall justify termination of this Contract and may result in Owner’s rejection of the CONSTRUCTION MANAGER’s bids or proposals for future contracts.

## **20. COOPERATION WITH INVESTIGATIONS**

The CONSTRUCTION MANAGER agrees to cooperate fully and faithfully with any investigation, audit or inquiry conducted by the Office of Professional Integrity (“OPI”) of the OWNER or any other duly authorized representative of the OWNER (“Representative”).

The CONSTRUCTION MANAGER shall grant the OPI 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 CONSTRUCTION MANAGER, its subsidiaries and affiliated companies and any other company directly or indirectly controlled by the CONSTRUCTION MANAGER, relating to the CONSTRUCTION MANAGER. 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, CONSTRUCTION MANAGER 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 OPI’s or the Representative’s request, said materials shall be provided in a computer readable format, where available. At the request of the OPI or the Representative, the CONSTRUCTION MANAGER shall execute such documents, if any, as are necessary to give the OPI or the Representative access to Contract-related books, documents or records which are, in whole or part, under control of the CONSTRUCTION MANAGER but not currently in the CONSTRUCTION MANAGER’s physical possession. The CONSTRUCTION MANAGER shall not enter into any agreement with a Subcontractor, CONSTRUCTION MANAGER or supplier, in

connection with the Contract, that does not contain a right to audit clause in favor of the OWNER. The CONSTRUCTION MANAGER shall assist the OPI or the Representative in obtaining access to past and present Subcontractor, CONSTRUCTION MANAGER 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, CONSTRUCTION MANAGERS and suppliers pertaining to the Contract, and, if appropriate, enforce the right-to-audit provisions of such agreements.

The CONSTRUCTION MANAGER shall assist the OPI or the Representative in obtaining access to, interviews with, and information from all former and current persons employed and/or retained by the CONSTRUCTION MANAGER, for purposes of the Contract.

The CONSTRUCTION MANAGER shall require each Subcontractor to include in all agreements that the Subcontractor may hereinafter enter into with any and all Subcontractors, CONSTRUCTION MANAGERS 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 CONSTRUCTION MANAGER shall not enter into any Subcontract with a Subcontractor in connection with the Contract that does not contain such a provision.

The CONSTRUCTION MANAGER shall not make any payments to a Subcontractor, CONSTRUCTION MANAGER or supplier from whom the CONSTRUCTION MANAGER has failed to obtain and supply to the OPI or the Representative complete, accurate and truthful information in compliance with a request from the OPI or the Representative to the CONSTRUCTION MANAGER.

Any violation of the provisions of this Article shall justify termination of this Contract and may result in the OWNER's rejection of the CONSTRUCTION MANAGER's bids or proposals for future contracts.

**21. FALSE STATEMENTS/INFORMATION**

- A. False statements, information or data submitted on or with applications for payment may result in one or more of the following actions:
- 1) Termination of the Contract
  - 2) Disapproval of future contracts and sub-contracts
  - 3) Withholding of final payment on the Contract
  - 4) Civil and/or criminal prosecution
- B. 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.

**22. INVALID PROVISIONS**

If any term or provision of the Contract 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, 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 shall be valid and be enforced to the fullest extent permitted by law.

**23. CONFLICTING TERMS**

In the event of a conflict between or among any parts of the Contract, including Appendices thereto, the better quality, greater quantity, or more costly part shall govern, unless the OWNER directs otherwise.

**24. GREEN AND CLEAN STATE BUILDINGS**

- A. The Professional shall, to the maximum extent practicable, follow guidelines for the construction of “Green Buildings”, including guidelines set forth in Tax Law Section 19, which created the Green Buildings Tax Credit, and the United States Green Building Council’s LEED (Leadership in Energy and Environmental Design) rating system, in all buildings subject to the requirements of New York State Executive Order 88, issued December 28, 2012.
- B. The Professional shall be required to demonstrate compliance with the New York State Executive Order 88 requirement that new buildings achieve at least a twenty (20) percent improvement in energy efficiency performance relative to levels required by the State’s Energy Conservation Construction Code, as amended. For substantial renovation of existing buildings, the buildings shall achieve at least a ten (10) percent improvement in energy performance.
- C. The Professional shall incorporate energy-efficient criteria consistent with ENERGY STAR and any other energy efficiency levels as may be designated by the New York State Energy Research and Development Authority (NYSERDA) into all specifications developed for new construction and renovation.
- D. The Professional shall use the services of a Technical Assistance Provider approved by NYSERDA. The Technical Assistance Provider shall assist the Professional in analyzing the design and providing recommendations to maximize energy efficiency and to promote the eligibility of the capital cost incentives included in NYSERDA’s New Construction Program. Assistance shall include any requisite modeling and other requisite analysis.

**25. 2005 PROCUREMENT LOBBYING LAW**

- A. 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.
- B. 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.
- C. 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.

**26. NONCOMPLIANCE**

This Contract may be void and of no effect unless the CONSTRUCTION MANAGER complies with each of the provisions of these **ADDITIONAL ITEMS**.

## Appendix "E"

### CM-Build Sub-Contractor Pre-qualification checklist

Instructions: This form is to be completed by the Construction Manager in accordance with DASNY CM-Build Construction Phase Contract, Section 4.1 b - Pre-qualification of Bidders. In pre-qualifying the bidder the CM must include: (1) determining whether any prospective bidder has been subject within the past five years to a debarment by the New York State Department of Labor or by the New York State Workers Compensation Board; (2) determining the status of the bidder's registration with the New York State Department of State; (3) identifying any serious Occupational Safety and Health Administration (OSHA) violations by the bidder; and (4) requiring each bidder to disclose whether, within the past five years, it has been debarred by, found not responsible by, or lost its prequalification status from, any public agency.

For a list of available resources and websites to assist in determine the responsibility and pre-qualifying bidders can be found in the Vendor Responsibility Resource Guide at URL: [http://www.osc.state.ny.us/vendrep/documents/vendrep/resource\\_guide.pdf](http://www.osc.state.ny.us/vendrep/documents/vendrep/resource_guide.pdf)

Project Number: \_\_\_\_\_

Project Name: \_\_\_\_\_ Bid Package: \_\_\_\_\_

Subcontractor: \_\_\_\_\_ Contact Name: \_\_\_\_\_

Mailing Address: \_\_\_\_\_ Phone Number: \_\_\_\_\_

Email Address: \_\_\_\_\_

- |  | <u>Yes</u>               | <u>No</u>                |
|--|--------------------------|--------------------------|
| 1. NYS DOL Debarment within the past five (5) years  | <input type="checkbox"/> | <input type="checkbox"/> |
| 2. NYS Workers Compensation Board Debarment within the past five (5) years   | <input type="checkbox"/> | <input type="checkbox"/> |
| 3. Found Not Registration with NYS Department of State   | <input type="checkbox"/> | <input type="checkbox"/> |
| 4. Debarment from other Public Agencies within the past five (5) years   | <input type="checkbox"/> | <input type="checkbox"/> |
| 5. Found Not Responsible by a Public Agency within the past five (5) years   | <input type="checkbox"/> | <input type="checkbox"/> |
| 6. Lost Prequalification Status by a Public Agency within the past five (5) years  | <input type="checkbox"/> | <input type="checkbox"/> |
| 7. Upon review was it determined that the Subcontractor is not Financially Stable  | <input type="checkbox"/> | <input type="checkbox"/> |
| 8. OSHA Serious Violations within the past three (3) years   | <input type="checkbox"/> | <input type="checkbox"/> |
| 9. Upon review was it determined that the Subcontractor did not demonstrate experience on contracts of similar size and complexity | <input type="checkbox"/> | <input type="checkbox"/> |
| 10. Was adverse Information identified based on reference check of listed references   | <input type="checkbox"/> | <input type="checkbox"/> |

*\*Documentation of reference checks for listed references conducted as part of the pre-qualification review must be attached to this form.*

Comments: \_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
Reviewer Name (print)

\_\_\_\_\_  
Title

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

## Appendix F

### Non-Collusive Bidding Certification Form

#### Non-collusive Bidding Certification

By submission of this bid, each bidder and each person signing on behalf of any bidder certifies, and, in the case of a joint bid, each party thereto certifies as to its own organization, under penalty of perjury, that to the best of its knowledge and belief:

1. The prices in the bid have been arrived at independently without collusion, consultation, communication or agreement, for the purpose of restricting competition, as to any matter relating to such prices with any other bidder or with any competitor;
2. Unless otherwise required by law, the prices which have been quoted in the bid have not been knowingly disclosed by the bidder and will not knowingly be disclosed by the bidder prior to opening, directly or indirectly, to any other bidder or to any competitor; and
3. No attempt has been made or will be made by the bidder to induce any other person, partnership, or corporation to submit or not to submit a bid for the purpose of restricting competition.

Date: \_\_\_\_\_

Firm's Legal Name: \_\_\_\_\_

Street Address: \_\_\_\_\_

City, State, Zip Code: \_\_\_\_\_

By: \_\_\_\_\_

(Signature of Officer)

Title: \_\_\_\_\_

Officer Name: \_\_\_\_\_

(Print)

Phone Number: \_\_\_\_\_

Fax Number: \_\_\_\_\_

E-Mail Address: \_\_\_\_\_

Taxpayer ID or Social Security Number: \_\_\_\_\_