



# **CONTRACT FOR PROFESSIONAL SERVICES**

## **CHAPTER THREE**

### **GENERAL TERMS AND CONDITIONS**

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**PREAMBLE**

The Professional is advised that, pursuant to specific provisions of this Contract for Professional Services, DASNY expects the Professional to provide design services that are coordinated amongst the Professional, subconsultants and various trade disciplines, and to deliver a design and associated documents that are coordinated, code-compliant and constructable. If at any time DASNY determines that the design fails to meet such parameters, the Professional is obligated to timely remedy such defects at its own cost.

The Professional is further advised, pursuant to specific provisions of this Contract for Professional Services, that (1) DASNY, as the Owner, is the entity charged with implementing the Project, from design through completion of construction, including authority over, among others, its consultants and contractors engaged with and on behalf of various Client agencies and entities, that (2) the Professional's services require and involve DASNY direction, authorization, review and approval, typically provided in coordination with its Client agencies and entities, as well with regulatory authorities' requirements, reviews and approvals, and that (3) the Professional is advised that authorization and direction to the Professional for, among other things, the scope of work to be performed, to proceed, for changes and/or for additional work, shall be provided solely by DASNY and its duly authorized representatives, without which the Professional is proceeding at its own risk.

This Preamble is not exhaustive. Please refer to the individual contractual provisions of this Contract for Professional Services for their specific legal meaning and intent.

**ARTICLE 1 – PROFESSIONAL'S RESPONSIBILITIES**

**Section 1.1 – Professional's Services**

- 1.1.1 The Professional's services consist of those services performed by the Professional, the Professional's employees, and the Professional's Subconsultants, Subcontractors and suppliers.
- 1.1.2 The Professional, as professional advisor and consultant to the Owner for the Project, accepts and acknowledges the relationship of trust and confidence established with the Owner and covenants to furnish professional services to the Owner in an expeditious, economical and proper manner consistent with the Owner's interests and objectives.
- 1.1.3 The Professional shall determine and promptly notify the Owner in writing when extra services are necessary or desirable in connection with the Project.

**Section 1.2 – Professional's Performance Of Services**

- 1.2.1 The Professional understands and acknowledges that time is of the essence in completion of the Project and the Owner will incur damages if the Project is not completed on time. The Professional shall at all times carry out its duties and responsibilities as expeditiously as possible and in accordance with the Project Design Schedule, the Project Construction Schedule and in accordance with all other applicable schedules.
- 1.2.2 To promote a working relationship with the Owner based on ethical business practices, the Professional understands and acknowledges that it will provide all

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services in accordance with the Owner's Ethics Policy as outlined in section 10.5 of this Chapter Three.

- 1.2.3 The Professional shall not, without the express written permission of the Owner, (i) engage or recommend to the Owner engagement of any Subconsultant, Subcontractor or supplier to provide services on behalf of the Professional, Owner or Project in which the Professional has a direct or indirect proprietary or other pecuniary interest; or (ii) call for the use of or by exclusion require or recommend the use of products, materials, equipment, systems, processes or procedures in which the Professional or in which any Subconsultant, Subcontractor, or supplier of the Professional has a direct or indirect proprietary or other pecuniary interest.
- 1.2.4 The Professional shall not have control or charge of construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the work, nor shall the Professional, for any of the foregoing purposes, be deemed the agent of the Owner.

**Section 1.3 – Professional's Duties**

- 1.3.1 The Professional shall cooperate, coordinate and communicate with the Owner and all other persons or entities required for satisfactory completion of the Project.
- 1.3.2 The Owner may retain Subconsultants, Subcontractors and/or suppliers for this Project. The Professional shall cooperate, communicate and coordinate its work with the work of such other Subconsultants, Subcontractors and/or suppliers.
- 1.3.3 The Professional shall comply with all procedural requirements of the Owner and the Client reasonably inferable from Chapter Two – Professional's Required Services and this Chapter Three – General Terms and Conditions.
- 1.3.4 The Professional shall deliver submissions to the Owner that are complete, coordinated, code compliant and constructible. Submissions failing to meet such criteria shall be redeveloped and delivered to the Owner at no additional cost to the Owner and shall have no schedule impact to the Project.
- 1.3.5 The Professional shall specify and require the use of domestically sourced products and materials for the construction of the Project. The Professional may apply to the Owner for a waiver of this requirement, and shall identify the desired non-domestic products and materials and shall support its application for a waiver with justification that the cost of acquiring the domestic product and/or material is unreasonable, or where such product and/or material is not available in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality. The Owner, in consultation with the Client, shall issue its determination to the Professional in writing.

The Professional shall identify the desired products and shall apply for any such waiver prior to or at completion of the design development phase, when practicable, and shall incorporate any authorized non-domestic materials into the 100% documents.

- 1.3.6 The Professional shall perform all services and prepare all documents in accordance with the requirements of all applicable laws, rules and regulations of all governmental agencies having jurisdiction over the Project.

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- 1.3.7 The Professional shall provide documents to the Owner for review in accordance with the Project Design Schedule to allow the Owner reasonable time for review.
- 1.3.8 The Professional shall process documents and provide other reasonably required documents, services and personnel, necessary to (i) obtain construction and other required approval, permits and Certificates of Occupancy for the Project; and, (ii) represent that the Professional's services and work product comply with requirements of governmental agencies having jurisdiction over the Project.
- 1.3.9 The Professional shall immediately make additions, changes and corrections to any documents prepared by the Professional necessitated by design deficiencies, errors and omissions in the Professional's performance of its services. The Professional agrees that the cost to the Professional for such additions, changes and corrections shall be part of the Professional's fee for its required services. Extra costs to the Owner resulting from the Professional's design deficiencies, errors and omissions shall be recoverable from the Professional and/or its Professional Liability Insurance carrier. Owner is vested with the authority to determine whether the Professional has committed a design deficiency, error or omission which necessitates such an addition, change or correction. Acceptance of the Contract Documents by the Owner for purpose of bidding shall not relieve the Professional of any responsibility for design deficiencies, errors or omissions.

**Section 1.4 – Professional's Personnel And Consultants**

- 1.4.1 All services rendered by the Professional for the Project shall be performed by or under the immediate supervision of experienced professional(s) licensed and registered in the State of New York possessing expertise in the discipline of the service being rendered. If the Professional chooses to subcontract or affiliate with another professional entity or organization for all or any portion of the Professional's scope of services, the Professional shall subcontract with a professional firm with the requisite licensure, skill, experience and expertise to provide the required services. The Professional shall furnish professional services in accordance with sound professional standards consistent with those practiced by professional firms on projects similar in size, complexity and cost to the Project.
- 1.4.2 The Professional shall retain and compensate any Subconsultants, Subcontractors and suppliers required in connection with the Professional's performance of this Contract for Professional Services. The obligations of the Professional's Subconsultants, Subcontractors and suppliers shall inure to the benefit of the Owner. The Professional's agreements with its Subconsultants shall require that in the event of default under, or termination of, this Contract for Professional Services, and upon request of the Owner, the Professional's Subconsultant(s) will perform services for the Owner.
- 1.4.3 The Professional shall be responsible for the timely and efficient completion of all services performed by the Professional's Subconsultants, Subcontractors and suppliers in accordance with the requirements of this Contract for Professional Services and shall coordinate the work of its Subconsultants, Subcontractors and suppliers. Fees for the Professional's Subconsultants, Subcontractors and suppliers are included in the Professional Contract Price.

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- 1.4.4 The Professional shall name a representative (the "Professional's Representative") to serve as the Owner's primary communication contact with the Professional.

**Section 1.5 – Professional's Records**

- 1.5.1 The Professional shall, concurrently with performance of its services, prepare substantiating records regarding services rendered, including records of the Professional's Subconsultants.
- 1.5.2 The Professional shall for all services performed in connection with this Contract for Professional Services, retain in its records copies of all written communications, and any memoranda of oral communications, related to the Project.
- 1.5.3 Unless otherwise provided, the Professional shall maintain substantiating records for six (6) years after the Project date of Final Completion or for any longer period of time as may be required by law or good construction practice. If the Professional receives notification of a dispute or the commencement of litigation regarding the Project within this six (6) year period, the Professional shall continue to maintain all Project records until final resolution of the dispute or litigation.
- 1.5.4 Upon seven (7) calendar days' written notice, from the effective date of this Contract for Professional Services to the latest date described in Subsection 1.5.3 of this Chapter Three, the Professional shall make its records available during normal business hours to the Owner or its authorized representative(s). Owner and its authorized representative(s) shall be entitled to inspect, examine, review and copy the Professional's records at the Owner's reasonable expense, within adequate workspace at the Professional's facilities. Failure by the Professional to supply substantiating records shall be reason to disallow the related costs from amounts which might otherwise be payable by the Owner to the Professional pursuant to this Contract for Professional Services. If payment has already been made, amounts disallowed shall be refunded by the Professional to the Owner upon demand.

**Section 1.6 – Contamination, Claim And Incident Reporting**

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



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**Section 1.7 – Changes to The Contract for Professional Services**

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

**ARTICLE 2 – OWNER'S RESPONSIBILITIES**

**Section 2.1 – Information**

- 2.1.1 The Owner shall provide the Professional with information reasonably necessary to assist the Professional in performing its services, including, if applicable, the Site legal description and any required survey.
- 2.1.2 If the Project involves an existing structure, the Owner shall provide the Professional with available as-built and record drawings, plans, specifications and structure system information in the Owner's possession with respect to such structure.
- 2.1.3 The Owner shall provide without limitation the Professional with the Owner's pertinent Program Requirements, the Approved Construction Budget, Project dates and key milestone dates.
- 2.1.4 The Owner shall provide the Professional with all written and tangible material in its possession concerning conditions below ground at the Project Site.
- 2.1.5 The Owner shall provide the Professional with a complete listing of all Owner-specified CSI Division 10, 11, 12 and 13 furniture and equipment items, and all existing items to be relocated, including their dimensions, weights, energy consumption and power requirements.
- 2.1.6 The furnishing of information by the Owner to the Professional shall not relieve the Professional of the responsibility to evaluate the information provided by the Owner and to notify the Owner in writing of any additional information needed or services required from the Owner in order for the Professional to perform its services. Any information and tangible material provided by the Owner to the Professional is furnished to the Professional only in order to make complete disclosure of such material in the possession of the Owner and for no other purpose. By furnishing such material, the Owner does not represent, warrant, or guarantee its accuracy either in whole, in part, implicitly or explicitly, and shall have no liability therefor.

**Section 2.2 – Owner's General Duties**

- 2.2.1 The Owner shall timely compensate the Professional in accordance with the Contract for Professional Services.

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2.2.2 Unless otherwise required to be provided by the Professional in its scope of services, Owner shall secure and pay for all Project testing.

2.2.3 The Owner shall review documents prepared by the Professional. No review of such documents shall relieve the Professional of any of its responsibilities.

**Section 2.3 – Owner’s Representative**

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

**ARTICLE 3 – INTELLECTUAL PROPERTY AND CONFIDENTIALITY**

**Section 3.1 – Nature And Use Of Information**

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

**Section 3.2 – Ownership Of Information**

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

**Section 3.3 – Disclosure Of Information**

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

**Section 3.4 – Instructions To Employees**

Because it is difficult to separate proprietary and confidential information from that which is not, the Professional shall instruct its employees and agents to strictly regard all information which is not in the public domain as information which is proprietary and confidential.

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**Section 3.5 – Non-Publication**

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

**ARTICLE 4 – DISPUTE RESOLUTION**

**Section 4.1 – Mutual Discussion**

In case of any Claim arising from or relating to the Project or arising out of this Contract for Professional Services or the breach thereof, prior to the Professional filing a formal Claim submittal pursuant to this section, the Professional and the Owner shall meet to discuss the basis for the Claim and attempt to reach a resolution through mutual discussion.

**Section 4.2 – Claim Submittal**

In case of any Claim arising from or relating to the Project or arising out of this Contract for Professional Services or the breach thereof that is not resolved pursuant to Section 4.1 of this Chapter Three, the Professional shall:

- 4.2.1 file with the Owner, within fifteen (15) business days after the said Claim, a written notice of the basis of the Professional's Claim, including a description of the mutual discussion meeting held pursuant to Section 4.3 of this Chapter Three and its outcome, estimated cost, and request for a determination thereof; and
- 4.2.2 proceed diligently, pending and subsequent to the determination of the Owner with respect to any said disputed Claim, with the performance of the Professional Services in accordance with all instructions of the Owner.
- 4.2.3 The Professional agrees that it shall waive and release any and all Claims for additional compensation, damages or other relief upon failure to strictly comply with the provisions of this Article.

**Section 4.3 – Facilitative Mediation**

If the parties cannot resolve any Claim arising from or relating to the Project or arising out of this Contract for Professional Services or the breach thereof through Claim Submittal, the parties may in good faith participate in private, non-binding facilitative mediation seeking a just and equitable solution satisfactory to all parties.

- 4.3.1 All parties to a mediation shall promptly provide all other parties to the mediation with copies of essential documentation relevant to the support or defense of the matter being mediated.
- 4.3.2 The parties shall share equally any administrative costs and fees of such proceedings, but shall each be responsible for expenses otherwise incurred.
- 4.3.3 Any party to the mediation may terminate the mediation at any time for any reason.

**Section 4.4 – Conflicting Dispute Resolution Provisions**

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

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**Section 4.5 – Arbitration Preclusion**

In case of a Claim relating to the Project, or arising out of this Contract for Professional Services, no party to this Contract for Professional Services shall be required to participate in or be bound by, any arbitration proceedings, except where otherwise required by law.

**ARTICLE 5 – TERMINATION OR SUSPENSION**

**Section 5.1 – Termination for Cause**

If the Professional defaults by failing to substantially perform, in accordance with the terms of this Contract for Professional Services, as determined by the Owner, the Owner may give written notice to the Professional (i) terminating this Contract for Professional Services effective seven (7) calendar days from the date of notice; or (ii) setting forth the nature of the default and requesting the Professional initiate cure within seven (7) calendar days from the date of notice. At any time thereafter, if the Professional fails to initiate cure upon the request of the Owner and continue such cure until complete, the Owner may give notice to the Professional of immediate termination. If the Owner terminates this Contract for Professional Services pursuant to this section, and it is subsequently determined by a court of competent jurisdiction that the Professional was not in default, then in such event said termination shall be deemed a termination for convenience as set forth in Section 5.2 of this Chapter Three.

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

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

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

- 5.3.1 If this Contract for Professional Services is terminated by the Owner pursuant to Section 5.1 of this Chapter Three, no further payment shall be made to the Professional until completion of the Project. At such time, the Professional's compensation shall, at the Owner's option, be calculated (i) subject to the last sentence of this section, on the basis of services actually performed and approved by the Owner and expenses actually incurred from the date of the last approved Professional Services Contract Payment Requisition up to the effective termination date; or (ii) on the basis of the payment terms set forth elsewhere herein. In either case, the Professional's compensation shall be reduced by all costs and damages incurred by the Owner as a result of the default of the Professional.
- 5.3.2 If this Contract for Professional Services is (i) terminated by the Owner pursuant to Section 5.2 of this Chapter Three; or (ii) suspended more than four (4) months by the Owner pursuant to Section 5.2 of this Chapter Three, the Professional's compensation shall be calculated on the basis of services actually performed and approved by the Owner and expenses actually incurred from the date of the last approved Professional Services Contract Payment Requisition up to the effective termination or suspension date and reasonable costs associated with termination or suspension. In no event shall the Professional be entitled to compensation in excess of the Professional Contract Price.

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- 5.3.3 If this Contract for Professional Services is suspended less than four (4) months by the Owner pursuant to Section 5.2 of this Chapter Three, the Professional specifically agrees that such suspension, interruption or delay of the performance of the services pursuant to this item shall not increase the cost of the Professional Services.
- 5.3.4 Time of completion set forth in the Project Design Schedule may be extended to such time as the Owner determines shall compensate for the time lost by the suspension, interruption or delay; such determination shall be set forth in writing by the Owner.

**ARTICLE 6 – DAMAGES AND REMEDIES**

**Section 6.1 – Services, Reimbursement and Deductions**

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

**Section 6.2 – General Indemnity**

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

- 6.2.1 Upon the conclusion of any such action, proceeding or lawsuit, should a final binding determination of responsibility be made that allocates responsibility to the Owner, the Client or the Owner's related parties, the Owner agrees that the obligation to indemnify and hold harmless shall not be applicable to the portion of any uninsured money judgment for which the Owner is responsible, and the Owner agrees to pay the Professional the percentage of uninsured defense costs that the Professional incurred based upon an apportionment of the Owner's allocated responsibility.

**Section 6.3 – Intellectual Property Indemnity**

To the fullest extent permitted by law, the Professional shall protect, hold harmless, and indemnify the Owner and the Owner's Related Parties from and against any and all liability, loss, claims, demands, suits, costs, fees and expenses (including actual fees and expenses of attorneys, expert witnesses, and other consultants), by whomsoever brought or alleged, for infringement of patent rights, copyrights, or other intellectual property rights,

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except with respect to designs, processes or products of a particular manufacturer expressly required by the Owner in writing. If the Professional has reason to believe the use of a required design, process or product is an infringement of a patent, the Professional shall be responsible for such loss unless such information is promptly given to the Owner.

**Section 6.4 – Non-Exclusivity Of Owner’s Remedies**

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

**Section 6.5 – Waiver Of Damages**

The Professional shall not be entitled to, and hereby waives any monetary Claims for or damages arising from or related to, lost profits, lost business opportunities, unabsorbed overhead or any consequential damages. The Professional shall not be entitled to, and hereby waives, any Claim for damages for delay.

**Section 6.6 – Interest**

The Owner is entitled to interest on all amounts due from the Professional that remain unpaid thirty (30) calendar days after the amount is deemed due, whether as a result of a resolution of a dispute or otherwise. Any such interest shall be calculated by the same method as set forth in Article 7 below.

**ARTICLE 7 – PAYMENT TO PROFESSIONAL**

**Section 7.1 – General Requirements**

- 7.1.1 All payment requests must be made on the Owner’s Professional Services Contract Payment Requisition.
- 7.1.2 Payment to the Professional shall only be rendered electronically, unless payment by paper check is authorized in writing by the Owner. The Professional further acknowledges and agrees that the Owner may withhold payments, if the Professional 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.
- 7.1.3 The Professional shall pay its Subconsultants the full amount due to them from their proportionate share of each requisition for payment submitted by the Professional and paid by the Owner. The Professional shall make said payments no later than seven (7) calendar days from receipt of payment from the Owner.
- 7.1.4 The signature of the Professional on any payment requisition shall constitute the Professional’s certification to the Owner that (i) the Professional has billed the Owner for all services rendered by it and any of the Professional’s Consultants and Subcontractors through the date of the payment requisition; (ii) the services listed in the payment requisition have progressed to the level indicated and have been performed as required by the Contract Documents; (iii) that the reimbursable expenses have been reasonably incurred; and, (iv) that the amount requested is currently due and owing.

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**Section 7.2 – Payment of Reimbursable Expenses**

Payment requisitions for expenses shall, in addition to the requisition requirements contained in Section 7.1 of this Chapter Three, be accompanied by such documentation or supporting data as the Owner may require. The Professional shall:

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

**Section 7.3 – Withholding of Payments**

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

- (i) to assure payment of just claims of any persons supplying labor or materials in connection with the Project and Contract for Professional Services;
- (ii) to protect the Owner and/or Client from loss due to defective work not remedied;
- (iii) to protect the Owner, Client, Construction Manager (if applicable) or other such entities as identified by the Owner as additional insureds from loss due to injury to persons or damage to the work or property of others caused by the act or neglect of the Professional or its Subconsultants;
- (iv) to assure payment of fines, liquidated damages and penalties that may be imposed on the Professional pursuant to the provisions of this Contract for Professional Services;
- (v) to assure payment of fines and penalties that may be imposed on the Professional pursuant to Articles 9, 14 and 15 of this Chapter Three. The estimated amount of said fines and penalties shall be the difference between the planned dollar amount of M/WBE subcontract awards and the actual dollar amount of such awards; or
- (vi) where the Owner determines, in its sole discretion, that the Professional must submit additional backup to reasonably justify the contents of the Application for Payment.

**Section 7.4 – Final Payments**

7.4.1 Final payment shall be made to the Professional upon satisfactory completion and acceptance by the Owner of all required services performed by the Professional pursuant to this Contract for Professional Services, or all required services performed prior to the termination of this Contract for Professional Services if so terminated, and upon submission of a certification that all Subconsultants and Subcontractors have been paid their full and agreed upon compensation.

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

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- 7.4.3 Professional agrees that submission of its final invoice for payment more than one-hundred and eighty (180) days from completion of the last phase of assigned work is grounds for Owner to reject such final invoice and for Professional to waive any right to payment in connection with such final invoice.

**Section 7.5 – Late Payment**

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

**Section 7.6 – False Statements and Information Submitted with Payment Requisitions**

- 7.6.1 False statements, information or data submitted on or with applications for payment may result in one or more of the following actions by the Owner:
- (i) termination of the Contract for Professional Services;
  - (ii) disapproval of future contracts and subcontracts;
  - (iii) withholding of final payment on the Contract for Professional Services;
  - (iv) civil and/or criminal prosecution.
- 7.6.2 These provisions are solely for the benefit of the Owner, and any action or non-action hereunder by the Owner shall not give rise to any liability on the part of the Owner.

**ARTICLE 8 – INSURANCE**

**Section 8.1 – General Provisions**

- 8.1.1 The Professional and Subconsultants shall not violate, or permit to be violated, any term or condition of their insurance policies, and shall at all times satisfy the safety requirements of the Owner and of the insurance companies issuing such policies.
- 8.1.2 The Professional and Subconsultants shall maintain in force all insurance required to be procured by them under this Contract for Professional Services until issuance of the Notice of Physical Completion by the Owner except where this Contract for Professional Services requires an insurance policy to be maintained for a period beyond issuance of the Notice of Physical Completion in which case the Professional and Subconsultants shall maintain such insurance policy in force for the specified period beyond issuance of the Notice of Physical Completion.
- 8.1.3 All insurance required to be procured and maintained by the Professional and Subconsultants under this Contract for Professional Services shall be procured from insurance companies licensed to do business in the State of New York by the NYS Department of Financial Services and rated at least A- by A.M. Best and Company, or meet such other requirements as are acceptable to the Owner in its sole and exclusive discretion.
- 8.1.4 All insurance policies required to be procured and maintained by the Professional and Subconsultants under this Contract for Professional Services shall include a provision or endorsement that the policy shall not be canceled, materially changed, or not renewed without at least thirty (30) calendar days written notice to the Owner except for non-payment in which case notice to the Owner shall be provided as required by law.



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- 8.1.5 All insurance policies required to be procured and maintained by the Professional and Subconsultants under this Contract for Professional Services shall include a provision or endorsement that at least thirty (30) calendar days prior to the expiration of the policy, evidence from the carrier of renewal or replacement of the policy by the carrier, with terms and limits no less favorable than the expiring policy, or written notice from the carrier that the policy will not be renewed or replaced by the carrier, shall be delivered to the Owner.
- 8.1.6 All insurance policies required to be procured and maintained by the Professional and Subconsultants under this Contract for Professional Services shall be written on an occurrence basis except where this Contract for Professional Services explicitly allows otherwise.
- 8.1.7 All insurance policies required to be procured and maintained by the Professional and Subconsultants under this Contract for Professional Services shall include a provision or endorsement that the Owner and the Client(s) shall not be responsible for any claim expenses and loss payments within the deductible or the self-insured retention and that the Professional or Subconsultant shall be solely responsible for all claim expenses and loss payments within the deductible or self-insured retention. At any time this Contract for Professional Services requires the Professional or any Subconsultant to maintain an insurance policy, the Owner may require the Professional or any Subconsultant to provide proof, acceptable to the Owner in its sole discretion, that the Professional or Subconsultant has assets or security sufficient to satisfy all deductible or self-insured obligations under such insurance policy for which the Professional or Subconsultant may be liable under the claims pending or reasonably possible against the Professional or Subconsultant at the time the Owner requires the proof. A failure of the Professional or Subconsultant to provide such proof is a failure of the Professional or Subconsultant to maintain the insurance required by the Contract for Professional Services or to provide the Owner with evidence of valid and in-force insurance coverage required by the Contract for Professional Services.
- 8.1.8 All insurance policies required to be procured and maintained by the Professional and Subconsultants under this Contract for Professional Services shall include a provision or endorsement that there shall be no right of subrogation against the Owner, Client(s), or Construction Manager. If any of the Professional's policies or any of the policies of any Subconsultant prohibit such a waiver of subrogation, the Professional or Subconsultant shall secure the necessary permission to grant this waiver of subrogation. Any and all such permission shall be confirmed by a manuscript endorsement to the relevant insurance policy or policies and a certified copy of the endorsement shall be provided to the Owner.
- 8.1.9 Each liability and protective liability insurance policy required to be procured and maintained by the Professional and Subconsultants under this Contract for Professional Services shall include a provision or endorsement that the coverage afforded the Owner, Client(s) and Construction Manager (if applicable) under such policy shall be primary and non-contributory and that such policy shall be primary to any other insurance policy maintained by the Owner, by the Client(s) or by the Construction Manager (if applicable). Any other insurance policy maintained by the Owner, by the Client(s) or by the Construction Manager (if applicable) shall be in excess of and shall not contribute with the Professional's or Subconsultant's insurance policy, regardless of the "other insurance" clause contained in the

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Owner's, Client(s)'s or Construction Manager's (if applicable) own policy of insurance or the Professional's or Subconsultant's insurance policies.

- 8.1.10 Any Professional Contract Documents, including but not limited to the Request for Proposal, but excluding Change Orders, may require any of the Professional and Subconsultants to provide at its or their expense any other form or limit of insurance necessary to secure the interests of the Owner or Client(s).
- 8.1.11 Notwithstanding any other provision of the Contract for Professional Services, the Owner, in a Change Order or Contract Amendment, may require the Professional and any or all Subconsultants to provide, at the expense of the Owner, any other form or limit of insurance in addition to the insurance requirements of the original Contract for Professional Services necessary to secure the interests of the Owner, Client(s), or Construction Manager (if applicable).
- 8.1.12 Neither the procurement nor the maintenance of any type of insurance by the Owner, the Client(s), the Professional or the Construction Manager shall in any way be construed or deemed to limit, discharge, waive or release the Professional or any Subconsultant from any of the obligations or risks accepted by the Professional and Subconsultants or to be a limitation on the nature or extent of said obligations and risks or to be a limitation of any obligation to defend, indemnify, hold harmless and procure insurance for the Owner, Client(s) and Construction Manager.
- 8.1.13 All provisions of General Terms and Conditions Article 8-- Insurance are to the fullest extent permitted by law. One purpose of this Contract for Professional Services is to allocate, to the fullest extent permitted by law, all risk of loss to the Professional, each Subconsultant, and the insurers of each. Each insurance company from which Owner or Client(s) has directly purchased an insurance policy is a third-party beneficiary of the Professional's and each Subconsultant's obligations to procure insurance.
- 8.1.14 Professional is responsible for ensuring that each Subconsultant obtains and maintains in the required amount each type of insurance policy required by this Contract for Professional Services and that such insurance policy provides the Owner, Client(s) and Construction Manager with the coverage required by this Contract for Professional Services.
- 8.1.15 Professional agrees and acknowledges that, because the Professional (and not the Owner or Client[s]) is responsible for performance of the duties and obligations set forth in this Contract for Professional Services for completion of the Project, the Professional, through the use of insurance, intends to allocate all losses to such insurance to protect itself and the Owner and Client(s).

**Section 8.2 – Submission of Insurance**

- 8.2.1 Owner will not execute the Contract for Professional Services unless the Professional shall submit to the Owner or the Owner's designee proof of insurance in such forms as requested and deemed acceptable by the Owner, indicating the Project, and showing evidence of all insurance required under the Contract for Professional Services. Upon the Owner's request, the Professional shall provide a copy of each insurance policy required by the Contract for Professional Services certified by the insurance carrier as a true and complete copy. The Owner may request such a certified copy of a policy at any time and may make such requests

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as often as the Owner, in its sole and exclusive discretion, deems necessary. Each request may be for a certified copy of one or more policies. In addition, the Professional shall provide copies of certificates of insurance to the Construction Manager, if applicable. Certificates of insurance, notwithstanding anything to the contrary contained on the Certificate of Insurance, when submitted to the Owner, constitute a warranty by the Professional and its insurance agent or broker, that the insurance coverage described is in effect for the policy term shown.

- 8.2.2 The Professional shall submit to the Owner or Owner's designee insurance certificates (Accord 25, or equivalent as determined by the Owner), copies of declaration pages, schedules of forms and endorsements, copies of all named insured endorsements, all endorsements of the policy granting coverage to the Owner, Client(s), and Construction Manager (if applicable), and such other documents requested by the Owner as proof of insurance for the Professional. All insurance submittals must be approved by the Owner or the Owner's designee prior to the Professional's commencement of work.
- 8.2.3 Upon the Owner's request, the Professional shall submit to the Owner or Owner's designee proof of insurance for one or more Subconsultants, in such forms as requested and deemed acceptable by the Owner, indicating the Project, and showing evidence of all insurance required under the Contract for Professional Services. Upon the Owner's request, the Professional shall provide a copy of each insurance policy of the Subconsultant or Subconsultants required by the Contract for Professional Services and certified by the insurance carrier as a true and complete copy. The Owner may request such a certified copy of a policy at any time and may make such requests as often as the Owner, in its sole and exclusive discretion, deems necessary. Each request may be for a certified copy of one or more policies for one or more Subconsultants. In addition, the Professional shall provide copies of certificates of insurance to the Construction Manager, if applicable. Certificates of insurance of the Subconsultants, notwithstanding anything to the contrary contained on the Certificate of Insurance, when submitted to the Owner by the Professional, constitute a warranty by the Professional, the Subconsultant and the Subconsultant's insurance agent or broker, that the insurance coverage described is in effect for the policy term shown.
- 8.2.4 Upon request of the Owner made any time after bids are opened, the Professional shall submit insurance certificates (Accord 25, or equivalent as determined by the Owner), copies of declaration pages, schedules of forms and endorsements, copies of all named insured endorsements, all endorsements of the policy granting coverage to the Owner, Client(s), and Construction Manager (if applicable), and such other documents requested by the Owner as proof of insurance for a Subconsultant. Owner may request proof of insurance for one or more Subconsultants at the same or at different times and may request proof of insurance for a particular Subconsultant as often as Owner, in its sole and exclusive discretion, determines is necessary.

**Section 8.3 – Insurance Provided by the Professional**

- 8.3.1 Prior to award of the Contract for Professional Services, the Professional shall procure, at its sole cost and expense, and shall maintain in force at all times required by this Contract for Professional Services all of the insurance required under this Contract for Professional Services. Each Subconsultant shall procure,

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at its sole cost and expense, prior to the Professional submitting to the Owner the name of such Subconsultant and prior to such Subconsultant commencing performance of any of the work, and each Subconsultant shall maintain in force at all times required by this Contract for Professional Services all of the insurance required under this Contract for Professional Services. The insurance that the Professional and each Subconsultant shall procure and maintain under this Contract for Professional Services includes, but is not limited to, the following:

1. Workers' Compensation (including occupational disease) and Employer's Liability insurance. Full New York State Workers' Compensation and Employer's Liability coverage shall be provided and evidenced by one of the following certificates **(Acord certificates are not acceptable)**:
  - a. C-105.2 (September '15, or most current version) - Certificate of NYS Workers' Compensation Insurance Coverage. The insurance carrier shall provide a completed form as evidence of in-force coverage.
  - b. U-26.3 – (or any replacement) NYS Insurance Fund Certificate of Workers' Compensation Coverage. The NYS Insurance Fund shall provide a completed form as evidence of in-force coverage.
  - c. GSI-105.2(2/02 or most current version) - Certificate of Participation in Workers' Compensation Group Board-approved self-insurance. The NYS Workers' Compensation Board's Self Insurance Office or the Professional's Group Self Insurance Administrator shall provide a completed form.
  - d. SI-12 (5/09 or most current version) Affidavit Certifying That Compensation Has Been Secured. The NYS Workers' Compensation Board's Self Insurance Office or the Professional's Self Insurance Administrator shall provide a completed form.
2. Disability Benefits insurance. Full New York State Disability Benefits coverage for the benefit of such employees as are required to be covered by the New York State Disability Benefits Law shall be provided and evidenced by one of the following certificates:
  - a. DB-120.1 (September 15, or most current version) - Certificate Of Insurance Coverage Under the NYS Disability Benefits Law.
  - b. DB-155 (9/16) – Compliance with Disability Benefits Law. The NYS Workers' Compensation Board's Self Insurance Office shall provide a completed form.
  - c. CE 200 Certificate of Attestation of Exemption. (Note: this form will only be accepted as evidence of an exemption from providing Disability Benefits insurance as required by law. The Dormitory Authority of the State of New York will not accept this as an exemption from providing Worker's Compensation Insurance.) The Certificate may be obtained from the NYS Workers Compensation Board's website at <http://www.wcb.state.ny.us>. The CE 200 cannot be used for multiple projects; therefore, a new form shall have to be completed prior to award of any subsequent contract.
3. Commercial General Liability (CGL) insurance. The CGL insurance policy shall cover the liability of the Professional or Subconsultant for bodily injury,

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property damage, and personal/advertising injury arising from performance of the work or operations or presence at or in the vicinity of the Site of the Contract for Professional Services. The limits under such policy shall not be less than the following: the limit for each occurrence shall be at least \$2,000,000; the general aggregate limit shall be at least \$4,000,000; the personal and advertising injury limit shall be at least \$1,000,000; the Fire Damage Legal Liability shall be at least \$50,000; and the Products Completed Operations limit shall be at least \$4,000,000. The limits may be provided through a combination of primary and umbrella and/or excess liability policies. Coverage shall provide and encompass at least the following:

- a. If the Professional or Subconsultant proposes the use of a policy other than the ISO form CG 00 01 12 07, the Professional or Subconsultant shall provide the proposed policy to the Owner which, in its sole and exclusive discretion, will determine whether the proposed policy provides equivalent coverage. The Professional or Subconsultant shall pay Owner any attorney fees and other costs incurred by Owner in determining whether the proposed policy provides equivalent coverage. Owner will select the attorney providing advice on the proposed policy.
- b. ISO Endorsement Forms CG 20 10 04 13 and CG 20 37 04 13, or their equivalents, specifically naming as additional insureds the Dormitory Authority, Client(s), any other entities as required by the Professional Contract Documents, and if applicable, the Construction Manager (if applicable) and for form CG 20 37 04 13 or its equivalent, specifically listing the Project location. In the event said endorsements or equivalents are not able to be provided, the Owner may accept, at the Owner's sole discretion, CG 20 38 04 13 or its equivalent or other manuscript endorsements providing equivalent coverage.
- c. If the Professional or Subconsultant proposes the use of an endorsement or endorsements other than the ISO Endorsement Forms CG 20 10 04 13 and CG 20 37 04 13, the Professional or Subconsultant shall provide the proposed endorsement(s) to the Owner or the Owner's designee which, in its sole and exclusive discretion, will determine whether the proposed endorsements provide equivalent coverage. Professional and Subconsultant shall pay Owner any attorney fees and other costs incurred by Owner in determining whether the proposed endorsements provide equivalent coverage. Owner will select the attorney providing advice on the proposed endorsements.
- d. Additional insured status for Owner, Client(s), Construction Manager and any other entities as required by the Professional Contract Documents shall apply during the Products/Completed Operations phase as well as during the course of performance of the work of the Contract for Professional Services.
- e. The policy provisions required by Section 8.01 of this Chapter Three.
- f. Excavation, Collapse and Underground Hazards.
- g. Independent consultants/subconsultants.

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- h. Blanket Written Contractual Liability covering all indemnity agreements, including all indemnity obligations contained in the Contract for Professional Services, and covering tort liability of another assumed in a contract.
  - i. Products and completed operations coverage for a term no less than three years commencing upon issuance by the Owner of the Notice of Physical Completion.
  - j. Premises liability.
  - k. Defense and/or indemnification obligations, including obligations assumed under this Contract for Professional Services.
  - l. Cross liability for additional insureds.
  - m. Professional and Subconsultant means and methods.
  - n. Liability resulting from Section 240 or Section 241 of the NYS Labor Law.
  - o. ISO Endorsement CG 25 03 11 85 or its equivalent applying the policy's general aggregate limit separately to the Project.
  - p. The maximum deductible or self-insured retention shall be \$50,000.
  - q. No endorsement or provision in the policy shall exclude coverage for Owner, Client(s), or Construction Manager for any liability when the injured party is an employee of Professional or any Subconsultant.
  - r. No endorsement or provision in the policy shall require privity of contract between the Owner and Subconsultant or between the Client(s) and the Professional or Subconsultant or between the Construction Manager and the Professional or Subconsultant in order for the Owner, the Client(s), or the Construction Manager to have coverage as an insured on such insurance policy.
  - s. If the Professional or Subconsultant must provide a Railroad Protective Liability insurance policy, the CGL exclusion for work within fifty (50) feet of railroad property must be deleted.
  - t. No endorsement or provision in the policy shall have a height limitation or exclusion.
  - u. No endorsement or provision in the policy shall have a classification exclusion with respect to work performed for the Owner, Client(s), and Construction Manager.
  - v. Owner, Client(s), and Construction Manager shall be covered for any and all liability arising out of acts or omissions of Professional and any Subconsultant.
4. Commercial Automobile Liability insurance. The Commercial Automobile Liability insurance policy shall cover liability arising out of the use of any motor vehicle in connection with the Contract for Professional Services, including owned, leased, hired and non-owned vehicles bearing or, under the circumstances under which they are being used, required by the laws of NYS to bear, license plates. The policy shall have a combined single limit for bodily injury and property damage of at least \$1,000,000. The limit may be provided

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through a combination of primary and umbrella and/or excess liability policies. If the Contract for Professional Services involves the removal of hazardous waste or otherwise transporting Hazardous Materials, pollution liability coverage for covered autos shall be provided by endorsement CA 99 48 03 06 or CA 00 12 03 06 and the Motor Carrier Act Endorsement (MCS90) shall be attached to the policy.

5. Umbrella and/or Excess Liability insurance. When the limits of the CGL, Commercial Auto Liability or Employers' Liability policies procured are insufficient to meet the limits specified in the preceding sections, Commercial Umbrella or Excess Liability policies shall be procured and maintained provided, however, that the total amount of insurance coverage is at least equal to the requirements specified in the preceding sections. The Commercial Umbrella or Excess Liability policies shall follow the same form as the CGL, Commercial Automobile Liability and Employers Liability insurance policies required in the preceding sections. The Umbrella and/or Excess Liability policies shall be primary to any other insurance maintained by the Owner or Client(s) or Construction Manager or any other additional insured. Any other insurance maintained by the Owner, the Client(s), the Construction Manager, or any other additional insured shall be in excess of and shall not contribute with the Professional's or Subconsultant's Umbrella or Excess Liability insurance policies, regardless of the "other insurance" clause contained in the Owner's or Client(s)'s or Construction Manager's or other additional insured's own policy of insurance or the Professional's or Subconsultant's insurance policies.
6. Professional Liability insurance: Each of the Professional and any Subconsultant performing any work in connection with this Contract for Professional Services shall procure and maintain Professional Liability Insurance or Errors and Omissions Liability Insurance, as applicable, for the work with a minimum insurance limit of not less than Five (5) million dollars issued to and covering damage for liability imposed on the Professional or Subconsultant by this Contract for Professional Services or law arising out of any negligent act, error, or omission in the rendering of or failure to render professional services required by this Contract for Professional Services. This insurance may be issued on a claims-made policy form and shall be maintained for no less than three (3) years after issuance by the Owner of the Notice of Physical Completion. The policy, at the sole expense of the Professional or Subconsultant, shall have extended Discovery Clause coverage of at least three (3) years after issuance by the Owner of the Notice of Physical Completion if the policy is cancelled or not renewed. The maximum deductible or self-insured retention is \$100,000.

- 8.3.2 Notwithstanding any other provision of the Contract for Professional Services to the contrary and to the fullest extent permitted by law, Professional shall be liable for all costs and fees, including counsel fees, incurred by or on behalf of the Owner, the Client(s) or the Construction Manager in any action brought by or against the Owner, Client(s) or Construction Manager concerning insurance coverage owed to Owner, Client(s) or Construction Manager by any insurer for which Professional or any Subconsultant represented that the Owner, Client(s) and Construction

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Manager would be an insured or would benefit in any way if a claim was brought against Owner, Client(s) and Construction Manager .

**Section 8.4 – Other Insurance Provided by Professional**

8.4.1 The Professional and each Subconsultant shall also procure and maintain as required by Subsections 8.1.2 and 8.3.1 of this Chapter Three, the following insurance:

1. United States Longshore and Harbor Workers' Compensation Act and Jones Act: When, to perform the work in connection with this Contract for Professional Services, the Professional or any Subconsultant is engaged in activities on or near a shoreline or on or near the navigable waterways of the United States or when any part of the work is connected to water related activities, the Workers' Compensation policy referenced above of the Professional and any such Subconsultant shall be endorsed to provide Jones Act and United States Longshore and Harbor Workers' Act coverage.
2. Professional's Pollution Liability insurance: When the work in connection with this Contract for Professional Services includes abatement, removal, repair, replacement, enclosure, encapsulation or disposal of any pollutants, which include but are not limited to, petroleum, petroleum products, mold, asbestos, lead or any other Hazardous Material, the Professional or any Subconsultant performing work involving any of the pollutants, shall procure and maintain in full force and effect pollution legal liability insurance with limits of at least \$2,000,000 providing coverage for bodily injury and property damage, including loss of use of damaged property or of property that has not been physically injured and coverage that encompasses at least the following:
  - a. Endorsement specifically naming as additional insureds: Dormitory Authority, the Client(s), and if applicable, the Construction Manager and other entities specified on the sample certificate of insurance provided by the Owner in the bidding documents.
  - b. The policy provisions required by Section 8.1 of this Chapter Three.
  - c. A maximum deductible or self-insured retention of \$50,000.
  - d. Coverage for actual, alleged or threatened emission, discharge, dispersal, seepage, release or escape of pollutants, including any loss, cost or expense incurred as a result of any cleanup of pollutants or in the investigation, settlement or defense of any claim, suit or proceedings against the Owner, Client(s) or Construction Manager arising from the work in connection with this Contract for Professional Services.
  - e. Coverage shall be provided until three years after the Owner issues the Certificate of Physical Completion.
3. Railroad Protective Liability insurance: If any work of the Contract for Professional Services is to be performed on or within fifty (50) feet of a railroad property or railroad right of way or will require entrance upon railroad property or right of way or will require assignment of a railroad employee, the Professional shall provide and maintain a Railroad Protective Liability policy with the policy limits required by the owner(s) of the railroad. For purposes of

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this section, a subway is a railroad. The policy form shall be ISO-RIMA or an equivalent form approved by the owner(s) of the railroad. The railroad owner(s) shall be the named insured on the policy and the definition of "physical damage to property" shall mean direct and accidental loss of or damage to all property of any named insured and all property in any named insured's care, custody, or control. If the Professional shall provide a Railroad Protective Liability insurance policy, the Professional and any Subconsultant performing on or within fifty (50) feet of railroad property or railroad right of way or entering railroad property or right of way or requiring assignment of a railroad employee shall have their CGL insurance policy endorsed to delete the exclusion of coverage for work within fifty (50) feet of railroad property.

4. Unmanned Aircraft System (UAS) Insurance: Any Professional or Subconsultant proposing the use of any Unmanned Aircraft System for any purpose on a Project, including but not limited to investigation, surveying, photography, inspections or observation, shall comply with all of Owner's policies and procedures regarding such use and shall provide coverage, in the form of an Unmanned Aircraft System (UAS) endorsement to the Commercial General Liability Coverage required above or Aircraft Liability Coverage with a minimum limit of \$1,000,000. Such coverage shall name the Owner and any required third parties as additional insureds.
5. Marine Protection & Indemnity insurance and Hull & Machinery insurance: Each of the Professional and any Subconsultant performing any work in connection with this Contract for Professional Services on navigable water or connected to water-related activities or with marine operations, shall procure and maintain Marine Protection & Indemnity insurance and Hull & Machinery insurance. Hull & Machinery coverage shall be provided for the total value of the watercraft and equipment used in the work on navigable water or connected to water-related activities or with marine operations. The Professional shall obtain a Marine Protection & Indemnity Liability insurance policy for all navigable water, water-related or marine activities or operations under the Contract for Professional Services with a minimum limit of \$2,000,000. The Owner, the Client(s) and, if applicable, the Construction Manager and other entities specified on the sample certificate of insurance provided by the Owner in the bidding documents shall be additional insureds on the Marine Protection & Indemnity Liability insurance policy. The Marine Protection & Indemnity Liability insurance policy shall provide coverage that encompasses at least the following:
  - a. The policy provisions required by Section 8.1 of this Chapter Three.
  - b. A maximum deductible or self-insured retention of \$50,000.
  - c. Coverage shall be provided until the Owner issues the Certificate of Physical Completion.
  - d. Endorsement specifically naming as additional insureds: Dormitory Authority, the Client(s), and if applicable, the Construction Manager and other entities specified on the sample certificate of insurance provided by the Owner in the bidding documents.

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**Section 8.5 – Stop Work Order - Insurance**

- 8.5.1 All insurance certificates are valid for one (1) year from the date the certificate is signed/stamped, or until policy expiration, whichever is earlier. The Professional shall be responsible to submit updated insurance certificates to the Owner or the Owner's designee thirty (30) calendar days prior to any insurance certificate expiration date.
- 8.5.2 Failure of the Professional or any Subconsultant to maintain the insurance required by the Contract for Professional Services or to provide the Owner or the Owner's designee with evidence of valid and in-force insurance coverage required by the Contract for Professional Services shall result in a Stop Work Order pursuant to General Terms and Conditions Article 5 – Termination or Suspension and/or withholding of payment to the Professional.
- 8.5.3 At any time that the coverage provisions and limits on the policies required herein do not meet the provisions and limits set forth above, the Professional or Subconsultant shall immediately cease work on the Project. The Professional or Subconsultant shall not resume work on the Project until authorized to do so by the Owner or the Owner's designee.
- 8.5.4 Any delay or time lost as a result of the Professional or Subconsultant not having proper insurance required by this Contract for Professional Services or not providing the Owner or the Owner's designee with evidence of valid and in force insurance required by the Contract for Professional Services shall not give rise to a delay Claim or any other Claim against the Owner. Further, the Professional may be liable to other consultants for costs incurred by reason of the Professional's, Subconsultant's or Subcontractor's failure to provide insurance.

**Section 8.6 – Subcontractor Insurance Requirements**

To the extent that the Professional or any Subconsultant retains any Subcontractor in connection with the Project, such Subcontractor's insurance obligations are identical to the obligations placed upon Subconsultants pursuant to Sections 8.1, 8.2, 8.3, 8.4 and 8.5 of Chapter Three of this Contract for Professional Services, except that Subsections 8.1.2 and 8.3.1 (6) of this Chapter Three shall not apply to any Subcontractor. Notwithstanding the above, such Subcontractors shall only be required to maintain its insurance policies until Notice of Physical Completion or as otherwise directed by Owner.

**ARTICLE 9 – GENERAL PROVISIONS**

**Section 9.1 – Standard Provisions**

- 9.1.1 This Contract for Professional Services and its enforcement, and any controversy arising out of or relating to the making or performance of this Contract for Professional Services, shall be governed by and construed in accordance with the law of the State of New York, without regard to the New York principles of conflicts-of law and except where the United States supremacy clause requires otherwise.
- 9.1.2 Each and every provision of law and clause required by law to be inserted in the Contract for Professional Services shall be deemed to be inserted therein and the Contract for Professional Services shall read and shall be enforced as though so included therein.

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- 9.1.3 The Professional shall comply fully with all applicable laws, rules, and regulations, and as applicable, the Building Code of New York State or Building Code of the City of New York.
- 9.1.4 The Professional agrees that the Contract for Professional Services shall be deemed executory to the extent of moneys available from either: (1) the proceeds of bonds issued by the Dormitory Authority for the Contract for Professional Services, (2) moneys made available by the Client to the Owner for the Contract for Professional Services, (3) other moneys made available to the Owner from whatever source specifically for the Contract for Professional Services and no liability shall be incurred by the Owner beyond moneys available therefore.
- 9.1.5 The relationship created by the Contract for Professional Services between the Owner and the Professional is one of an independent contractor and it is no way to be construed as creating an agency relationship between the Owner and the Professional nor is it to be construed as, in any way or under any circumstances, creating or appointing the Professional as an agent of the Owner for any purpose whatsoever.
- 9.1.6 Except as provided herein, this Contract for Professional Services and each and every provision hereof and thereof is for the exclusive benefit of the Parties hereto and not for the benefit of any third party. Nothing in the Contract for Professional Services shall create or shall give to third parties any claim or right of action against the Owner, the State of New York, the Client, or any institution at which the work is being carried out beyond such as may legally exist irrespective of the Contract for Professional Services; however, it is understood that the Client is an intended third party beneficiary of the Contract for Professional Services for the purposes of recovering any damages caused by the Professional.
- 9.1.7 The Professional shall not assign the Contract for Professional Services in whole or in part without prior written consent of the Owner. Any attempt to assign the Contract for Professional Services in whole or in part without prior written consent of the Owner is null and void. As a condition to consent to the assignment, the Owner shall require each proposed assignee to establish, to the satisfaction of the Owner in its sole and exclusive discretion, that the assignee is responsible and, if applicable, has the experience to perform the work in connection with this Contract for Professional Services. If the Owner consents to an assignment and if the Professional assigns all or part of any moneys due or to become due under the Contract for Professional Services, the instrument of assignment shall contain a clause substantially to the effect that the Professional and assignee agree that the assignee's right in and to any moneys due or to become due to the Professional shall be subject to all prior claims for services rendered or materials supplied in connection with the performance of the work. The Owner reserves the right to assign this Contract for Professional Services in whole or in part without the consent of the Professional. Unless otherwise agreed by the Parties hereto in a separate writing, no permitted assignment described in this section shall relieve the assigning Party from any of its obligations under this Contract for Professional Services. However, the assignee may be required by the assigning Party to agree to indemnify and hold harmless the assigning Party from some or all of its obligations under this Contract for Professional Services.
- 9.1.8 This Contract for Professional Services shall be binding upon and shall inure to the

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benefit of the Parties hereto and their respective successors and permitted assignees.

- 9.1.9 The Owner is exempt from the terms of fair-trade agreements for sales to the Contract for Professional Services.
- 9.1.10 Inasmuch as the Professional can be compensated adequately by money damages for any breach of the Contract for Professional Services which might be committed by the Owner, the Professional agrees that no default, act or omission of the Owner shall constitute a material breach of the Contract for Professional Services entitling the Professional to cancel or rescind the Contract for Professional Services or to suspend or abandon performance of the Contract for Professional Services; and the Professional hereby waives any and all rights and remedies to which the Professional might otherwise be or become entitled to because of any wrongful act or omission of the Owner saving only the Professional's right to money damages.
- 9.1.11 No action or proceeding shall lie or shall be maintained by the Professional, nor anyone claiming under or through the Professional, against the Owner upon any Claim arising out of or based upon the Contract for Professional Services, relating to the giving of notices or information.
- 9.1.12 No action or proceeding shall lie in favor of or shall be maintained by the Professional against the Owner unless such action shall be commenced within one year after the earliest following event:
- (i) The date the Owner executes the Notice of Physical Completion.
  - (ii) Receipt, by the Owner, of the Professional's final Application for Payment, if no Notice of Physical Completion is issued.
  - (iii) Written demand, by the Owner to the Professional, for the Professional to submit its final Application for Payment to the Owner; if no Notice of Physical Completion is issued.
  - (iii) The date of termination if the Owner terminates the Contract for Professional Services.
- 9.1.13 The Owner and Professional agree to submit to the exclusive jurisdiction of the Commercial Division, New York Supreme Court, which shall hear any dispute, Claim or controversy arising in connection with or relating to this Contract for Professional Services, including, but not limited to the validity, breach, enforcement, or termination thereof. The parties waive any right to assert the doctrine of forum *non conveniens*, and any final judgment may be enforced in other jurisdictions in any manner provided by law. The choice of jurisdiction described herein shall be mandatory and not permissive in nature, thereby precluding the possibility of litigation or trial in any jurisdiction other than that specified herein.
- 9.1.14 No action or proceeding shall be brought against the Owner in any location other than Albany County unless the Owner specifically consents, in writing, to a change of venue. The Professional expressly waives the right to a trial by jury in any action or proceeding brought against the Owner.
- 9.1.15 If the Professional obtains a judgment against the Owner in any action or proceeding, the Professional agrees to accept no more than three percent (3%)

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interest, per annum, on the amount of the judgment.

- 9.1.16 Neither Professional nor its Subconsultants, Subcontractors nor suppliers, shall place or maintain, or permit to be placed or maintained, any sign, bill, or poster on or about the Premises without the prior consent of Owner's Representative.
- 9.1.17 Each Party has reviewed and discussed this Contract for Professional Services with counsel and agrees that this Contract for Professional Services shall not be construed by applying any rule of construction providing for interpretation against the drafting Party.
- 9.1.18 The Professional shall comply with any applicable provisions of Acts of Congress and rules, regulations and requirements of the Government of the United States of America. If federal monies fund the Project, the Professional shall furnish any information and provide any assistance that the Owner deems necessary to prepare any certificates, reports or materials required as a result of obtaining federal monies. The Professional shall report on compliance with any applicable law, regulation or other source of legal authority to the Owner or the Owner's representative as required by the Owner.
- 9.1.19 No failure of the Owner to insist upon strict compliance by the Professional with any provision of this Contract for Professional Services shall operate to release, discharge, modify, change or affect any of the Professional's obligations.
- 9.1.20 The Contract for Professional Services represents the entire and integrated agreement between the Owner and the Professional, and supersedes all prior negotiations, representations or agreements, either written or oral, for the Project. The Contract for Professional Services may be amended only by written instruments signed by both the Owner and the Professional, and is subject to such reasonable modifications as may be required by the Owner's lender(s) or insurer(s), if any. The legal relationship between the Owner and the Professional shall be governed solely by the Contract for Professional Services and no rights shall arise on any other basis, including but not limited to, oral agreement, partial performance, estoppel, conduct of the parties, course of conduct or any other course of dealing involving the Project or any other project. The meaning and intent of the provisions of the Contract for Professional Services shall be interpreted solely by the Owner.
- 9.1.21 The Owner may, at its sole and exclusive discretion, waive certain provisions of the Contract for Professional Services. Such waiver shall only be done by written instrument signed by a duly authorized officer of the Owner, and any such waiver shall apply solely in accordance with its terms and shall not act as a waiver of any provision of the Contract for Professional Services, or estoppel against the enforcement thereof, in connection with any subsequent or separate event involving the Project or other projects.
- 9.1.22 If any term or provision of the Contract for Professional Services or the application thereof to any natural person, partnership, limited liability company, corporation or other legal entity or circumstance shall, to any extent, be determined to be invalid or unenforceable, the remainder of the Contract for Professional Services, or the application of such terms or provisions to natural persons, partnerships, limited liability companies, corporations or other legal entities or circumstances other than those to which it is held invalid or unenforceable, shall not be affected thereby and

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each term or provision of the Contract for Professional Services shall be valid and be enforced to the fullest extent permitted by law. It is the intent of the Owner and the Professional that all provisions of the Contract for Professional Services shall be construed to be valid under applicable law and shall be enforced to the maximum extent possible.

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

9.1.24 Death of the Professional:

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

9.1.25 Professional Conduct:

- (i) The Professional acknowledges and agrees that professionally appropriate conduct is a material obligation of this Contract for Professional Services. All employees, officers and representative of Professional shall conduct themselves professionally in all communications in connection with the Project, including but not limited to communications with Subconsultants, Subcontractors and other contractors.
- (ii) Use of abusive, threatening, vulgar or other offensive language, whether written or oral, is a breach of the obligation set forth this Subsection 9.1.25 (i) of Chapter Three.
- (iii) Professional will receive a warning in writing from Owner upon breach of the obligation set forth in Subsection 9.1.25 (i) of Chapter Three. Professional agrees that any subsequent breach of this Subsection 9.1.25 (i) of Chapter Three committed after receipt of the written warning is grounds for the Owner to terminate this Contract for Professional Services for cause, or for the Owner to avail itself of any other remedy at law.

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- (iv) The Professional shall include the provisions set forth in paragraphs (i) and (ii) of this Subsection 9.1.25 of Chapter Three in every subcontract with Subcontractors or Subconsultants in such a manner that the requirements of these provisions will be binding upon each Subcontractor and Subconsultant in connection with the Contract for Professional Services.

9.1.26 Words of one gender shall be deemed and construed to include correlative words of the other genders. Unless the context shall indicate otherwise, words importing the singular number shall include the plural number and vice versa.

**Section 9.2 – Diesel Emissions Reduction**

- 9.2.1 The Professional shall certify that heavy duty diesel vehicles, as defined in the NYS Environmental Conservation Law (ECL) Section 19-0323 and Title 6 of the New York Codes Rules and Regulations, Part 248 (6 NYCRR 248), will comply with the rules, regulations and provisions pursuant to ECL Section 19-0323, and 6 NYCRR 248, which requires the use of Best Available Retrofit Technology and Ultra Low Sulfur Diesel to the extent required by law unless specifically waived by the NYS Department of Environmental Conservation (DEC). Qualification for a waiver will be the responsibility of the Professional.
- 9.2.2 Annually, as required by DEC, but no later than March 1<sup>st</sup>, the Professional shall complete and submit directly to the Owner, via electronic mail, the Regulated Entity Vehicle Inventory Form and Regulated Entity and the Contractors Annual Report Form, found on the DEC website for vehicles used on the Project for the preceding calendar year.

**Section 9.3 – State and Federal Labor Law Provisions**

- 9.3.1 All applicable provisions of NYS Labor Law shall be carried out in the performance of the Contract for Professional Services.
- 9.3.2 Where required by New York State Labor Law, Sections 220 and 220-d as amended, the Professional specifically agrees that:
1. No worker, in the employ of the Professional, any Subconsultant or Subcontractor or any other person doing or contracting to do the whole or any part of the work contemplated by the Contract for Professional Services shall be permitted or required to work more than eight (8) hours in any one (1) calendar day and more than five (5) days in any one week, except in the extraordinary emergencies set forth in NYS Labor Law.
  2. The wages paid for a legal day's work shall be not less than the prevailing rate of wages as defined by NYS Labor Law. Each laborer, worker or mechanic employed by the Professional, any Subconsultant or Subcontractor or any other person doing or contracting to do the whole or any part of the work contemplated by the Contract for Professional Services shall be paid not less than the prevailing rate of wages as defined by NYS Labor Law and shall be provided not less than the supplements as required by NYS Labor Law.
  3. The minimum hourly rate of wage to be paid and supplements provided shall be not less than that required by the NYS Labor Law and as shall be designated by the Commissioner of Labor of the State of New York.
  4. The Professional and all Subconsultants and Subcontractors shall post in a

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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 workers engaged in the performance of the work and all deductions, if any, required by law to be made from unpaid wages actually earned by any worker so engaged.

5. The Professional and all Subconsultants and Subcontractors shall provide each worker a written notice of the prevailing wage rate for each of the worker's particular job classifications on each pay stub and, as required by the NYS Labor Law, written notice that includes the telephone number and address for the Department of Labor and a notice informing all workers of their right to contact the Department of Labor if a worker is not receiving the proper prevailing rate of wages and/or supplements for a worker's particular job classification.
6. The Professional shall be responsible for obtaining prevailing wage rate updates directly from the NYS Department of Labor, either by accessing its website <http://www.labor.state.ny.us> or a written request to the Bureau of Public Works.

9.3.3 The minimum wage rates, if any, specified for apprentices shall apply only to persons working with the tools of the trade which such persons are learning under the direct supervision of journeyman mechanics as an individual registered in an apprenticeship program which is duly registered with the Commissioner of Labor of the State of New York in conformity with the NYS Labor Law. Except as otherwise required by law, the number of apprentices in each trade or occupation employed by the Professional or any Subconsultant or Subcontractor shall not exceed the number permitted by the applicable standards of the NYS Department of Labor, or, in the absence of such standards, the number permitted under the usual practice prevailing between the unions and the employers' association of the respective trades or occupations.

9.3.4 All workers of the Professional and all Subconsultants and Subcontractors shall be paid in accordance with the provisions of the NYS Labor Law. Where applicable, the Professional and all Subconsultants shall submit to the Owner original copies of the Professional and Subconsultant Certifications form and Certified Payroll forms in accordance with payment procedures and otherwise upon request. The Professional and all Subconsultants and Subcontractors shall prepare and keep original payrolls or transcripts thereof in compliance with NYS Labor Law Section 220, subdivision 3-a, and shall file transcripts of such payrolls with the Owner as required by NYS Labor Law Section 220, subdivision 3-a. Filing the transcripts of such payrolls with the Owner as required by NYS Labor Law Section 220, subdivision 3-a is a condition precedent to payment of any sums due and owing Professional or any Subconsultants or Subcontractors for work performed upon the Project.

9.3.5 The Professional agrees that, in case of underpayment of wages to any worker engaged in the work by the Professional or any Subconsultant or Subcontractor, the Owner shall withhold from the Professional out of payments due an amount sufficient to pay such worker the difference between the wages required to be paid under the Contract for Professional Services and the wages actually paid such worker for the total number of hours worked, and that the Owner may disburse



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such amount so withheld by the Owner for and on account of the Professional to the worker to whom such amount is due. The Professional further agrees that the amount to be withheld pursuant to this section may be in addition to the amounts and percentages to be retained by the Owner pursuant to other provisions of the Contract for Professional Services.

9.3.6 Pursuant to subdivision 3 of Section 220 and Section 220-d of the NYS Labor Law the Contract for Professional Services shall be forfeited and no sum paid for any work done thereunder upon the Professional's, Subconsultant's or Subcontractor's second conviction for willfully paying or providing less than:

1. The stipulated wage scale or supplement as established by the fiscal officer.
2. The stipulated minimum hourly wage scale and supplements as designated by the Commissioner of Labor of the State of New York.

9.3.7 If the Project is Federally funded in part or whole and therefore subject to the requirements of the Davis Bacon Act, the U.S. Department of Labor's government-wide implementation of the Act, or to Federal program legislation, the Professional shall pay the higher of either NYS Department of Labor prevailing wage rates or wages established for the locality of the project by the U.S. Department of Labor.

**Section 9.4 – Nondiscrimination**

9.4.1 To the extent required by Article 15 of the NYS Executive Law (also known as the Human Rights Law) and all other NYS and United States statutory and constitutional non-discrimination provisions, the Professional shall not discriminate against any employee or applicant for employment because of race, creed, color, sex (including gender identity or expression), national origin, sexual orientation, military status, age, disability, predisposing genetic characteristics, marital status or domestic violence status.

9.4.2 If the Professional is directed to do so by the Owner, the Professional shall request each employment agency, labor union or authorized representative of workers with which the Professional has a collective bargaining agreement or other agreement or understanding, to furnish a written statement that such employment agency, labor union or representative will not discriminate on the basis of race, creed, color, sex (including gender identity or expression), national origin, sexual orientation, military status, age, disability, predisposing genetic characteristics or marital status, and that such union or representative will affirmatively cooperate in the implementation of the Professional's obligations under Articles 15 and 15A of the NYS Executive Law.

9.4.3 The Professional shall state, in all solicitations or advertisements for employees, that in the performance of the Contract for Professional Services, all qualified applicants will be afforded equal employment opportunities without discrimination because of race, creed, color, national origin, sex (including gender identity or expression), sexual orientation, military status, age, disability, predisposing genetic characteristics or marital status.

9.4.4 The Professional shall include the provisions of Subsections 9.4.1, 9.4.2 and 9.4.3 of this Chapter Three in every subcontract and purchase order in such a manner that such provisions will be binding upon each Subconsultant, Subcontractor and

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vendor as to the operations for the Contract for Professional Services to be performed within the State of New York.

9.4.5 Pursuant to NYS Labor Law, Section 220-e, the Professional specifically agrees:

1. That in the hiring of employees for the performance of work under the Contract for Professional Services or any subcontract hereunder, or for the manufacture, sale or distribution of materials, equipment or supplies hereunder, but limited to operations performed within the territorial limits of the State of New York, no Professional, Subconsultant nor Subcontractor, nor any person acting on behalf of such Professional, Subconsultant or Subcontractor, shall by reason of race, creed, color, national origin, sex (including gender identity or expression), sexual orientation, military status, age, disability, predisposing genetic characteristics or marital status discriminate against any citizen of the State of New York who is qualified and available to perform the work to which the employment relates.
2. That no Professional, Subconsultant nor Subcontractor, nor any person on behalf of such Professional, Subconsultant or Subcontractor, shall, in any manner, discriminate against or intimidate any employee hired for the performance of work under the Contract for Professional Services on account of race, creed, color, national origin, sex (including gender identity or expression), sexual orientation, military status, age, disability, predisposing genetic characteristics or marital status.
3. That there may be deducted from the amount payable to the Professional, by the Owner under the Contract for Professional Services, a penalty of fifty dollars (\$50.00) for each person for each calendar day during which such person was discriminated against or intimidated in violation of the terms of the Contract for Professional Services.
4. That the Contract for Professional Services may be canceled or terminated by the Owner and all moneys due or to become due hereunder may be forfeited for a second or any subsequent violation of the terms or conditions of this Subsection 9.4.5 of Chapter Three.

9.4.6 The Professional specifically agrees to certify its payrolls and keep these certified records on site and available, and to provide copies to Owner upon request.

9.4.7 Failure to Comply with Article 9 - The Owner will not be responsible for any Claim arising from compliance with this Article 9.

**ARTICLE 10 – RECORDS/AUDITS/INVESTIGATIONS/ETHICS**

**Section 10.1 – Preparation of Records/Owner's Right to Inspect Records and to Audit**

The Professional shall, concurrently with performance of its services, prepare substantiating records regarding services rendered, including records of the Professional's Subconsultants. This obligation includes, but is not limited to, the obligation to retain in its records copies of all written communications, and any memoranda of oral communications, related to the Project. Unless otherwise provided, the Professional shall maintain substantiating records for six (6) years after the Project date of Final Completion or for any longer period of time as may be required by law or reasonable and ordinary industry practices. If the Professional receives notification of a dispute or the commencement of litigation regarding the Project within this six (6) year period, the

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Professional shall continue to maintain all Project records until final resolution of the dispute or litigation. Upon seven (7) calendar days' written notice, from the effective date of this Contract for Professional Services, the Professional shall make its records available during normal business hours to the Owner or its authorized representative(s). Owner and its authorized representative(s) shall be entitled to inspect, examine, review and copy the Professional's records at the Owner's reasonable expense, within adequate workspace at the Professional's facilities. Failure by the Professional to supply substantiating records shall be reason to disallow the related costs from amounts which might otherwise be payable by the Owner to the Professional pursuant to this Contract for Professional Services. If payment has already been made, amounts disallowed shall be refunded by the Professional to the Owner upon demand.

**Section 10.2 – False Statements/Information/Disclosure**

Failure to comply with Section 10.1 of Chapter Three of this Contract for Professional Services, providing False Representations, false statements or inaccurate information submitted in accordance with the Contract for Professional Services, including but not limited to, an Application for Payment, a Claim or a Change Order, a filing or system entry related to MBE/WBE/SDVOB participation requirements or False Representations, false statements, or inaccurate information submitted to the Owner, or a determination that the Professional participated in the kick-back of wages may result in one or more of the following actions:

- (i) Termination of the Contract for Professional Services for cause.
- (ii) Rejection of future bids or proposals or disapproval of a contract or subcontract.
- (ii) Withholding of payments.
- (iii) Criminal prosecution.
- (iv) Civil prosecution under Article XIII of the NYS State Finance Law – the New York False Claims Act.
- (v) Rejection of a Claim or Change Order.
- (vi) Deduction of the Owner's cost of an audit from the Contract for Professional Services amount.

**Section 10.3 – Owner's Right to Conduct Investigations**

- 10.3.1 The Professional agrees to cooperate fully and faithfully with any investigation, audit or inquiry conducted by the Owner.
- 10.3.2 The Professional shall grant the Owner the right to examine all books, records, files, accounts, computer records, documents, and correspondence, including electronically-stored information, in the possession or control of the Professional, its subsidiaries and affiliated companies and any other company directly or indirectly controlled by the Professional, relating to the Contract for Professional Services. These shall include, but not be limited to: agreements with Subconsultants, Subcontractors and/or suppliers; bid files; payroll and personnel records; cancelled checks; correspondence; memoranda; daily reports of work completed that day; schedules; reports; audits; vendor qualification records; original estimate files; Change Order/Contract Amendment estimate files; detailed worksheets; Subconsultant, Subcontractor 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

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documentation for the aforesaid books and records.

- 10.3.3 At the Owner's request, said materials shall be provided in a computer readable format, where available. At the request of the Owner, the Professional shall execute such documents, if any, as are necessary to give the Owner access to Contract for Professional Services -related books, documents, or records, which are, in whole or part, under control of the Professional but not currently in the Professional's physical possession. The Professional shall not enter in to any agreement with a Subconsultant, Subcontractor, or supplier, in connection with the Contract for Professional Services, that does not contain a right to audit clause in favor of the Owner. The Professional shall assist the Owner in obtaining access to past and present Subconsultant, Subcontractor, 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 Subconsultants, Subcontractors and suppliers pertaining to the Contract for Professional Services, and, if appropriate, enforce the right-to-audit provisions of such agreements.
- 10.3.4 The Professional shall assist the Owner in obtaining access to, interviews with, and information from all former and current persons employed and/or retained by the Professional, for purposes of the Contract for Professional Services.
- 10.3.5 The Professional shall require each Subconsultant and Subcontractor to include in all agreements that the Subconsultant or Subcontractor may hereinafter enter into with any and all Subcontractors and suppliers, in connection with the Contract for Professional Services, a right-to-audit clause in favor of the Owner conferring rights and powers of the type outlined in this Section 10.3 of Chapter Three of this Contract for Professional Services. The Professional shall not enter into any agreement with a Subconsultant or Subcontractor in connection with the Contract for Professional Services that does not contain such a provision. The Professional shall not make any payments to a Subconsultant, Subcontractor, or supplier from whom the Professional has failed to obtain and supply to the Owner complete, accurate, and truthful information in compliance with a request from the Owner to the Professional.
- 10.3.6 Any violation of the provisions of this Article 10.3 of this Contract for Professional Services shall justify termination of this Contract for Professional Services and may result in the Owner's rejection of the Professional's bids or proposals for future contracts and the deduction of the Owner's cost of an audit from the Contract for Professional Services amount.

**Section 10.4 – Disclosure of Criminal Investigation**

- 10.4.1 The Professional shall immediately notify the Owner in the event that any owner, partner, director, officer or employee of the Professional, or its affiliated companies as identified in the NYS Vendor Responsibility Questionnaire, are subpoenaed or questioned in connection with any business-related criminal investigation, whether or not the owner, partner, director, officer or employee is, or is believed to be, the subject or target of such investigation, or is notified or otherwise learns that any owner, partner, director, officer or employee of the Professional or its affiliated companies is under investigation for an alleged business-related violation of criminal law, or in the event that any premises or records of the Professional are searched pursuant to a search warrant seeking evidence of a crime or crimes,

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unless otherwise precluded by law enforcement authorities.

- 10.4.2 The Professional shall immediately notify the Owner in the event that any owner, partner, director, officer or employee of the Professional or its affiliated companies as identified in the NYS Vendor Responsibility Questionnaire, the firm itself, or one of its affiliated companies is indicted or charged in an accusatory instrument for any business-related violation of local, state or federal criminal law, unless otherwise precluded by law enforcement authorities.
- 10.4.3 In the event that any owner, partner, director, officer, or employee of the Professional is indicted or charged in an accusatory instrument for any business-related violation of local, state, or federal criminal law relating to this Contract for Professional Services or any other Dormitory Authority contract, the Owner may require the Professional to remove said owner, partner, director, officer, or employee from any direct involvement in the affairs of the Professional as it relates to this Contract for Professional Services and all other Dormitory Authority contracts until the criminal matter is resolved. In the event that any owner, partner, director, officer, or employee of the Professional is convicted of a business-related violation of local, state, or federal criminal law, the Owner may require the Professional to permanently remove said individual from any direct involvement in the affairs of this Contract for Professional Services and all other Dormitory Authority contracts.
- 10.4.4 In the event that the Professional or any owner, partner, director, officer, or employee of the Professional is convicted or enters into an agreement as a remedy to the alleged commission of a criminal act of a business-related violation of local, state, or federal criminal law or regulatory violation, the Owner may schedule a hearing with the Professional to determine the Professional's responsibility to continue work under this Contract for Professional Services and other Dormitory Authority contracts. Following this hearing, the Owner may, at its sole discretion, take one or more of the following actions:
1. Terminate this Contract for Professional Services.
  2. Require the Professional, at its own expense, to hire an independent private-sector inspector general to monitor its activities, institute procedures and conduct internal inquiries, in a manner prescribed by the Owner.
  3. Take any other remedial action deemed appropriate.

**Section 10.5 – Ethical Conduct**

- 10.5.1 Officers and employees of the Owner are bound by Sections 73, 73-a and 74 of the NYS Public Officers Law. In addition, no officer, employee, architect, attorney, engineer, inspector, or consultant of or for the Owner authorized on behalf of the Owner to exercise any legislative, executive, administrative, supervisory, or other similar functions in connection with the Contract for Professional Services or the work, shall become personally interested, directly or indirectly, in the Contract for Professional Services, material supply contract, subcontract, insurance contract, or any other contract pertaining to the work.
- 10.5.2 Section 73(5) of the NYS Public Officers Law expressly prohibits the Professional, or its agents, from directly or indirectly offering or giving any gift having more than nominal value to an employee of the Owner under circumstances in which it could

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be reasonably inferred the gift was intended to influence the employee in the performance of their official duties or was intended as a reward for the employee's official action. 1. In addition to the prohibition of Section 73(5) of the NYS Public Officers Law, the Dormitory Authority has a "zero tolerance" policy with respect to the solicitation, acceptance, or receipt of gifts from disqualified sources. Therefore, the Professional and its agents shall 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 Professional or its agents. Violations of these gift provisions may be grounds for immediate Contract termination and/or referral for civil action or criminal prosecution.

- 10.5.3 To promote a working relationship with the Owner based on ethical business practices, the Professional is expected to:
1. Furnish all services to the Owner as contractually required and specified.
  2. Submit complete and accurate reports to the Owner and its representatives as required.
  3. Not seek, solicit, demand or accept any information, verbal or written, from the Owner or its representatives that provides an unfair advantage over a competitor.
  4. Not engage in any activity or course of conduct that restricts open and fair competition on Owner-related projects and transactions.
  5. Not engage in any course of conduct with Owner employees or its representatives that constitutes a conflict of interest, in fact or in appearance.
  6. Not offer or give any unlawful gifts or gratuities, or engage in bribery or other criminal activity.
- 10.5.4 The Owner encourages the Professional to advance and support ethical business conduct and practices among its directors, officers, and employees, preferably through the adoption of corporate ethics awareness training programs and written codes of conduct.
- 10.5.5 Although the Professional may employ relatives of Owner employees, the Owner shall be made aware of such circumstances as soon as possible, preferably in writing, to ensure a conflict of interest situation does not arise. The Owner reserves the right to request that the Professional modify the work assignment of a relative of an Owner employee where a conflict of interest, or the appearance thereof, is deemed to exist.
- 10.5.6 The Professional may hire former employees of the Owner. However, as a general rule, former employees of the Owner may neither appear nor practice before the Owner, nor receive compensation for services rendered on a matter before the Owner, for a period of two years following their separation from service with the Owner. In addition, former employees of the Owner are subject to a "lifetime bar" from appearing before the Owner or receiving compensation for services regarding any transaction in which they personally participated or which was under their active consideration during their tenure with the Owner.
- 10.5.7 The Professional agrees to notify the Owner's Office of Professional Integrity at 866-750-7867 or [Integrity@DASNY.org](mailto:Integrity@DASNY.org) of any activity by an employee of the

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Owner that is inconsistent with the contents of this Section 10.5 of Chapter Three of this Contract for Professional Services.

- 10.5.8 Any violation of this Section 10.5 of Chapter Three of this Contract for Professional Services shall justify termination of this Contract for Professional Services and may result in Owner's rejection of the Professional's bids or proposals for future agreements.

**Section 10.6 – Continuing Integrity**

- 10.6.1 The Professional shall, at all times during the Contract for Professional Services term, remain responsive and responsible. The Professional shall also monitor all Subconsultants and Subcontractors for responsiveness and responsibility at all times during the Contract term. The Professional agrees, if requested by the President of Owner or his or her designee, to present evidence of its continuing legal authority to do business in New York State, integrity, experience, ability, prior performance, and organizational and financial capacity. The Professional shall immediately notify Owner of any material or adverse information pertaining to the Professional or any Subconsultant or Subcontractor, regardless of tier.
- 10.6.2 The President or Owner or his or her designee, in his or her sole discretion, reserves the right to suspend any or all activities under this Contract for Professional Services, at any time, when he or she discovers information that calls in to question the responsibility of Professional. In the event of such suspension, Professional will be given written notice outlining the particulars of such suspension. Upon issuance of such notice, Professional shall comply with the terms of the suspension order. Contract activity may resume at such time as the President of Owner or his or her designee issues a written notice authorizing a resumption of performance under the Contract for Professional Services.
- 10.6.3 Notwithstanding any other provision of this Contract for Professional Services, upon written notice to Professional, and a reasonable opportunity to be heard with the appropriate Owner officials or staff, the Contract for Professional Services may be terminated by the President of Owner or his or her designee at Professional's expense where Professional is determined by the President of Owner or his or her designee to be non-responsible. In such event, the President of Owner or his or her designee may complete the contractual requirements in any manner he or she may deem advisable and pursue available legal or equitable remedies for the breach.

**Section 10.7 – Iran Divestment**

- 10.7.1 By entering into this Contract for Professional Services, Professional certifies, under the penalties of perjury, that Professional is not on the list created pursuant to paragraph (b) of subdivision 3 of Section 165-a of the NYS State Finance Law. Professional further certifies that Professional will not utilize on this Contract for Professional Services any Subconsultant or Subcontractor that is identified on the list created pursuant to paragraph (b) of subdivision 3 of Section 165-a of the NYS State Finance Law.
- 10.7.2 During this Contract for Professional Services, should Owner receive information that a person (as defined in NYS State Finance Law §165-a) is in violation of the above-referenced certifications, Owner will review such information and offer the person an opportunity to respond. If the person fails to demonstrate that it has

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ceased its engagement in the investment activity which is in violation of the Act within 90 days after the determination of such violation, then Owner shall take such action as may be appropriate and provided for by law, rule, or contract, including, but not limited to, seeking compliance, recovering damages, or declaring the Professional in default.

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

**Section 11.1 – Policy**

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

**Section 11.2 – Documentation**

In the event this Contract for Professional Services is in the amount of one million dollars or more, the Professional shall document their efforts to encourage the participation of New York State business enterprises as suppliers and Subconsultants. Documented efforts by the Professional shall consist of showing that such Professional has (a) solicited bids or proposals, in a timely and adequate manner, from New York State business enterprises including certified minority and women-owned business, or (b) contacted the New York State Department of Economic Development to obtain listings of New York State business enterprises, or (c) placed notices for Subconsultants and suppliers in newspapers, journals and other trade publications distributed in New York State, or (d) participated in Subconsultant outreach conferences. If the Professional determines that New York State business enterprises are not available to participate on such Contract for Professional Services as Subconsultants or suppliers, the Professional shall provide a Statement indicating the method by which such determination was made. If the Professional does not intend to use Subconsultants on such Contract for Professional Services, the Professional shall provide a Statement verifying such intent.

**Section 11.3 – Submission of Reports**

In the event this Contract for Professional Services is in the amount of one million dollars or more, the Professional shall submit post award compliance reports documenting their efforts to notify New York State residents of employment opportunities arising in New York State out of such Contract for Professional Services by listing any such positions with the Department of Labor, or providing for such notification in such manner as is consistent with existing collective bargaining contracts or agreements.

**ARTICLE 12 – 2005 PROCUREMENT LOBBYING LAW**

**Section 12.1 – Procurement Lobbying Law**

Professional shall affirm their understanding of and agree to comply with NYS State Finance Law § 139-j (3) and § 139-j (6) (b), certify their compliance with NYS State Finance Law § 139-k (5), disclose prior non-responsibility determinations under NYS State Finance Law § 139-j, and shall certify that the information they provide with respect to NYS State Finance Law § 139-j and § 139-k is complete, true, and accurate. Professional hereby reaffirms its understanding of an agreement to comply with NYS State Finance Law § 139-j (3) and § 139-j (6) (b), re-certifies its



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compliance with NYS State Finance Law § 139-k (5) and recertifies that the information it provided with respect to NYS State Finance Law § 139-j and § 139-k is complete, true, and accurate.

**Section 12.2 – Professional’s Certifications**

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.

**Section 12.3 – Termination Provisions**

The Owner reserves the right to terminate this Contract for Professional Services in the event it is found that the certification filed by the Professional in accordance with NYS State Finance Law § 139-j and § 139-k, as such may be amended or modified, was intentionally false or intentionally incomplete. Upon such finding, the Owner may exercise its right pursuant to Section 5.1 of Chapter Three this Contract for Professional Services – Termination for Cause.

**ARTICLE 13 – EXECUTIVE ORDER NO. 125**

**Section 13.1 – Determination of Professional Responsibility**

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

**Section 13.2 – NYS Vendor Responsibility Questionnaire**

- 13.2.1 When directed by the Owner, prior to the award of any Contract for Professional Services valued at \$10,000 or more, the Professional shall, within ten days following either oral or written notice that it must comply, submit, in the form provided by the Owner, a duly executed NYS Vendor Responsibility Questionnaire to the Owner. Owner may request an undated NYS Vendor Responsibility Questionnaire for the Professional or for any Subconsultant or Subcontractor as often as the Owner, in its sole and exclusive discretion, deems necessary to carry out the Owner’s duties and responsibilities under this Contract for Professional Services.
- 13.2.2 The information contained in the NYS Vendor Responsibility Questionnaire will serve as an informational resource to aid the Owner in making an award determination and in making other determinations for this Contract for Professional Services.

**ARTICLE 14 – OPPORTUNITY PROGRAMS**

**Section 14.1 – General Provisions**

- 14.1.1 The Dormitory Authority is required to implement the provisions of NYS Executive Law Article 15-A and Parts 140 through 145 of Title 5 of the NYCRR for all State contracts (as defined in such statute and regulations) with a value:
  - 1. in excess of \$25,000 for labor, services, equipment, materials, or any combination of the foregoing; or
  - 2. in excess of \$100,000 for real property renovations and construction.

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- 14.1.2 The Professional agrees, in addition to any other nondiscrimination provision of the Contract for Professional Services and at no additional cost to the Owner, to fully comply and cooperate with the Owner in the implementation of NYS Executive Law ARTICLE 15-A, PARTICIPATION BY MINORITY GROUP MEMBERS AND WOMEN WITH RESPECT TO STATE CONTRACTS, and the regulations promulgated thereunder. These requirements include: equal employment opportunities for minority group members and women (EEO), and contracting opportunities for NYS certified minority and women-owned business enterprises (MWBES). The Professional's demonstration of good faith efforts pursuant to 5 NYCRR § 142.8 shall be a part of these requirements. These provisions shall be deemed supplementary to, and not in lieu of the nondiscrimination provisions required by NYS Executive Law Article 15 (the Human Rights Law) and other applicable federal, state and local laws.
- 14.1.3 Failure to comply with all requirements in this Article 14 of this Contract for Professional Services may result in a finding of non-responsiveness, non-responsibility, breach of contract or any combination of the foregoing leading to the assessment of liquidated damages pursuant to Section 14.6 of Chapter Three of this Contract for Professional Services and other remedies available to the Owner pursuant to the Contract for Professional Services and applicable law.

**Section 14.2 – Equal Employment Opportunity (EEO)**

- 14.2.1 The provisions of NYS Executive Law Article 15-A, and the rules and regulations promulgated thereunder pertaining to equal employment opportunities for minority group members and women shall apply to the Contract for Professional Services.
- 14.2.2 The Professional shall:
1. Undertake or continue, and ensure each Subconsultant and Subcontractor shall undertake or continue, existing EEO programs to ensure that minority group members and women are afforded equal employment opportunities without discrimination because of race, creed, color, national origin, sex, age, disability, or marital status. For these purposes, EEO shall apply in the areas of recruitment, employment, job assignment, promotion, upgrading, demotion, transfer, layoff, or termination and rates of pay or other forms of compensation.
  2. Submit an EEO policy statement to the Owner within seventy-two (72) hours after the date of the execution of the Contract for Professional Services.
  3. Adopt a model EEO policy statement and require each Subconsultant and Subcontractor to adopt a model EEO policy statement if the Subconsultant or Subcontractor does not have an existing EEO policy statement, and if the Owner requires the Professional, Subconsultant or Subcontractor to adopt a model EEO policy statement.
  4. Have a Professional's EEO policy statement that shall include the following language:
    - a. The Professional will not discriminate against any employee or applicant for employment because of race, creed, color, national origin, sex, age, disability, or marital status, will undertake or continue existing

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EEO programs to ensure that minority group members and women are afforded equal employment opportunities without discrimination, and shall make and document its conscientious and active efforts to employ and utilize minority group members and women in its work force.

- b. The Professional shall state in all solicitations or advertisements for employees that, in the performance of the Contract for Professional Services, all qualified applicants will be afforded equal employment opportunities without discrimination because of race, creed, color, national origin, sex, age, disability, or marital status.
- c. The Professional shall request each employment agency, labor union, or authorized representative of workers with which it has a collective bargaining or other agreement or understanding, to furnish a written statement that such employment agency, labor union, or representative will not discriminate on the basis of race, creed, color, national origin, sex age, disability or marital status and that such union or representative will affirmatively cooperate in the implementation of the Professional's obligations herein.

- 5. The Professional shall include the provisions of paragraphs (a) through (c) of this Subsection 14.2.2 (4) of this Chapter Three and Subsection 14.2.5 of this Chapter Three of this Contract for Professional Services, which provides for relevant provisions of the Human Rights Law, in every subcontract in such a manner that the requirements of these provisions will be binding upon each Subconsultant and Subcontractor as to work in connection with the Contract for Professional Services.

14.2.3 Pursuant to Executive Order 162 (9 NYCRR 8.162) dated January 9, 2017, the Professional 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 14.2.4 of this Chapter Three. The *E.O. 162 Workforce Utilization Reports* will require the Professional 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 in connection with the Contract for Professional Services.

14.2.4 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).

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

**Section 14.3 – Opportunities for Minority and Women-Owned Business Enterprises (MWBE)**

- 14.3.1 The Owner has established goals for the participation in this Contract for Professional Services of NYS certified minority-owned business enterprises (“MBE”) and NYS certified women-owned business enterprises (“WBE” and collectively with MBEs, “MWBE”). The goals (collectively, MWBE Contract Goals) are set forth in Chapter One of this Contract for Professional Services.
- 14.3.2 The Professional represents and warrants that, as a condition for award of the Contract for Professional Services, the Professional shall submit a Statewide Utilization Management Plan (“SUMP”) via the NYS Contract System (NYSCS) which lists all proposed Subconsultants and Subcontractors including an identification of the NYS certified MWBE Subconsultants and Subcontractors the Professional intends to use to perform the work of the Contract for Professional Services and to achieve the MWBE Contract Goals indicated in the Request for Proposal. In addition, or alternatively, Professional may have submitted a request for a waiver. Professional shall update the SUMP as required to ensure all reported information is up-to-date.
- 14.3.3 The Owner will review the MWBE Utilization Plan and will issue to the Professional a written notice of acceptance or deficiency within 20 days of its receipt. A notice of deficiency shall include (i) the name of any MBE/WBE/SDVOB which is not acceptable for the purpose of complying with the MBE/WBE/SDVOB participation goals and the reasons why it is not acceptable; (ii) elements of the Professional’s Required Services which the Owner has determined can be reasonably structured by the Professional to increase the likelihood of participation in the Contract for Professional Services by MBE/WBE/SDVOBs; and (iii) other information which the Owner determines to be relevant to the Utilization Plan.
- 14.3.4 The Professional who has made good faith efforts to obtain commitments from MBE/WBE/SDVOB entities prior to submitting its Utilization Plan, but was unsuccessful in securing any, or sufficient, commitments from MBE/WBE/SDVOB entities, may submit a request for waiver at the same time it submits its Utilization Plan by adding a justification statement in step 3 of the submittal in the NYS Contract System. Additional documentation of good faith efforts may be required upon review by DASNY. If a request for waiver is submitted with the Utilization

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Plan and is not accepted by the Owner at that time, the Professional may submit a second request for waiver as directed by the Owner.

- 14.3.5 If the Professional 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 MBE/WBE/SDVOB participation goals will be met and/or that the Professional has failed to document good faith efforts, the Owner may disqualify the Professional as being not-responsible or avail itself of any other remedy available at law.
- 14.3.6 Professional agrees to adhere to the MWBE Utilization Plan in the performance of the Contract for Professional Services. Professional shall not change the Utilization Plan without the prior written approval of the Owner. Professional further agrees that failure to adhere to the MWBE Utilization Plan shall constitute a material breach of the Contract for Professional Services and upon such breach, the Owner shall be entitled to any remedy provided in the Contract for Professional Services or by law, including but not limited to a finding that the Professional is non-responsible.
- 14.3.7 The Professional understands that only sums paid to MWBEs for the performance of a commercially useful function, as that term is defined in 5 NYCRR § 140.1 may be applied towards the achievement of the applicable MWBE Contract Goal. The portion of a subcontract with an MWBE serving as a supplier that shall be deemed to represent the commercially useful function performed by the MWBE shall be 60% of the total value of the subcontract. The portion of a subcontract with an MWBE serving as a broker that shall be deemed to represent the commercially useful function performed by the MWBE shall be the monetary value for fees, or the markup percentage, charged by the MWBE. The Owner will audit the Professional's efforts to achieve the MWBE Contract Goals through the NYSCS.

**Section 14.4 – Good Faith Efforts**

- 14.4.1 In order to show that it has made good faith efforts to comply with the MBE/WBE/SDVOB participation goals of this Contract for Professional Services, the Professional 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 thereunder, including but not limited to 9 NYCRR 142.5.

All firms selected to perform on DASNY contracts that include MBE/WBE/SDVOB requirements, should use the following Guidelines for the preparation of MBE/WBE and SDVOB Utilization Plans and all supporting "good faith efforts" documentation. If your firm incurs difficulty in meeting your Minority and Women-owned Business Enterprises, or Service-Disabled Veteran-Owned Business (MBE/WBE/SDVOB) goals, these Guidelines can be utilized to assist your firm in preparing the required 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 Opportunity Programs Group. 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 OPG at (518) 257-3706 (Upstate) or (212) 273-5038 (Downstate).

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**GUIDELINES**

Attach a copy of the completed Utilization Plan in accordance with MBE/WBE/SDVOB goals established in the Professional Contract Documents.

Submit a written request for a referral list of M/WBE's certified by NYS Empire State Development or SDVOB's certified by OGS Division of Service-Disabled Veteran's Business Development by trade or service from the Opportunity Programs Group for subcontracting and procurement opportunities.

Provide a record of written solicitations made to certified MBE/WBE/SDVOB's obtained from the NYS Empire State Development directory of certified businesses located at: <https://ny.newnycontracts.com> and the directory of OGS Division of Service-Disabled Veteran's Business Development certified businesses located at: <http://www.ogs.ny.gov/Core/SDVOBA.asp>. Include dates and copies of solicitations made.

Contact all the NYS Empire State Development certified MBE/WBEs and OGS Division of Service-Disabled Veteran's Business Development certified SDVOB's posted in the list of interested subcontractors and suppliers posted on the DASNY's website: <http://www.dasny.org/construc/bidops/03C2.php>.

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.

Submit documentation that clearly demonstrates that you contacted all the MBE/WBE/SDVOB's identified through the outreach activities outlined above to determine their capacity to perform the applicable scope of work.

Provide a record of ALL responses received from NYS certified minority and women-owned business enterprises and OGS certified service-disabled veteran-owned businesses to any such advertisements and solicitations made. Include dates and copies of any written responses.

Provide a list of any pre-bid, pre-award, or other meetings attended with NYS certified minority or women owned businesses or OGS certified service-disabled veteran-owned businesses.

List the efforts undertaken to subdivide portions of the work into smaller components in order to increase NYS certified minority and women-owned business enterprise participation or OGS certified service-disabled veteran-owned business participation.

Did your firm solicit any NYS certified minority and women-owned business enterprises or OGS certified service-disabled veteran-owned businesses 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?

Provide a description of all relevant contract documents, plans or specifications, or documents describing the scope of work which was made available to NYS certified minority and women-owned business enterprises or OGS certified service-disabled veteran-owned businesses for the purposes of soliciting their bids. Include the dates and manner in which these documents were made available.

Were the same subcontract terms and conditions offered to NYS certified minority and women-owned business enterprises and OGS certified service-disabled veteran-owned businesses as those offered in the ordinary course of business and to other subcontractors?

Did your firm engage in direct in person or telephone negotiations with NYS certified M/WBE firms or OGS certified SDVOB firms where quotes originally submitted were deemed as too high?

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Has your firm made payments for work performed by NYS certified minority and women-owned business enterprises or OGS certified service-disabled veteran-owned businesses in a timely fashion for past work so as to facilitate continued performance by the certified businesses?

List any special considerations and/or concerns, which are preventing adequate NYS certified minority and women-owned business enterprises or OGS certified service-disabled veteran-owned businesses to participate.

- 14.4.2 The Professional will include the provisions of this Subsection 14.4.1 of this Chapter Three in every agreement with a Subconsultant and Subcontractor, in such manner that such provisions will be binding upon the Subconsultant and Subcontractor as to work in connection with this Contract for Professional Services.

**Section 14.5 – Waivers**

- 14.5.1 If the Professional, after making good faith efforts satisfactory to the Owner, is unable to achieve the MWBE Contract Goals, the Professional may submit a request for a partial or total waiver at the same time it submits its Utilization Plan by adding a justification statement in step 3 of the submittal in the NYS Contract System. Additional documentation of good faith efforts may be required upon review by DASNY. 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.
- 14.5.2 If the Owner, upon review of the SUMP, the MWBE Utilization Plan, the NYSCS and any other relevant information, determines that the Professional is failing or refusing to comply with the MWBE Contract Goals and no waiver has been issued in regard to such non-compliance, the Owner may issue a notice of deficiency to the Professional. The Professional shall respond to the notice to deficiency within seven (7) business days of receipt. Such response may include a request for partial or total waiver of MWBE Contract Goals.

**Section 14.6 – Damages - MWBE Participation**

- 14.6.1 If the Owner determines that the Professional is not in compliance with the requirements of this Article 14 and the Professional refuses to comply with the requirements of this Article 14, or if the Professional is found to have willfully and intentionally failed to comply with the MWBE Contract Goals, then: (1) the Professional shall be obligated to pay the Owner liquidated damages; or (2) the Professional shall be obligated to pay the Owner other appropriate damages; or (3) the Owner shall receive one or more other appropriate remedies, unless the Owner elects to pursue its remedies under NYS Executive Law Section 316. If the Owner declines to pursue its remedies under NYS Executive Law Section 316, the Owner may elect to pursue one or more of liquidated damages, other appropriate damages, and one or more other appropriate remedies.
- 14.6.2 If the Owner decides to assess liquidated damages, the Professional shall be obligated to pay to the Owner liquidated damages in an amount equal to the difference between all sums identified for payment to MWBEs if the Professional had achieved the MWBE Contract Goals and all sums actually paid to MWBEs for performance of work under the Contract for Professional Services. If such liquidated damages have not been withheld by the Owner, the Professional shall pay such liquidated damages to the Owner within sixty (60) days after they are

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assessed. provided, however, that if the Professional has filed a complaint with the Director of the Division of Minority and Women's Business Development pursuant to 5 NYCRR §142.2, liquidated damages shall be payable only in the event of a determination adverse to the Professional following the complaint process. The liquidated damages are intended to compensate the Owner only for the Owner's damage if the Owner determines that the Professional is not in compliance with the requirements of Sections 14.3, 14.4 and 14.5 of this Chapter Three and the Professional refuses to comply with the requirements of Sections 14.3, 14.4 and 14.5 of this Chapter Three, or if the Professional is found to have willfully and intentionally failed to comply with the MWBE Contract Goals. In addition, the Professional shall be liable to the Owner to the fullest extent permitted by law for:

1. whatever other appropriate damages the Owner may incur; or
2. any other appropriate remedy to which the Owner may be entitled as a result of the Professional's refusal to comply with the requirements of this Article 14 outside the requirements of Sections 14.3, 14.4, 14.5 of this Chapter Three and the MWBE Contract Goals.

Other appropriate damages include, but are not limited to, the expenses for personnel, supplies and overhead incurred by the Owner to administer and enforce the requirements of this Article 14 other than the requirements of Sections 14.3, 14.4, 14.5 of this Chapter Three and the MWBE Contract Goals.

**Section 14.7 – Reporting to Owner**

The Professional shall complete the reports and submit as indicated to establish and update EEO requirements during the life of the Contract for Professional Services. Reports not submitted at such time shall be cause for the Owner to delay payment to the Professional. The listed reports are a requirement of the Contract for Professional Services and copies and template forms are also available on the Dormitory Authority's web site. The Professional shall submit to the Owner all executed agreements and purchase orders for all MWBE/SDVOB Subcontractors/suppliers who were approved on the Utilization Plan no later than 30 days after award of the Contract for Professional Services.

**ARTICLE 15 – SERVICE-DISABLED VETERAN OWNED BUSINESSES**

**Section 15.1 – General Provisions**

Article 17-B of the NYS Executive Law provides for more meaningful participation in public procurement by certified Service-Disabled Veteran – Owned Businesses (SDVOB), thereby further integrating such businesses in to New York State's economy. The Dormitory Authority recognizes the need to promote the employment of service-disabled veterans and to ensure that certified SDVOBs have opportunities for maximum feasible participation in the performance of Dormitory Authority contracts.

**Section 15.2 – Contract with Goals**

- 15.2.1 If of this Contract for Professional Services established an overall goal for SDVOB participation and Professional submitted an SDVOB Utilization Plan that was accepted by the Dormitory Authority, Professional shall follow the accepted SDVOB Utilization Plan. Professional, by award of the Contract for Professional Services, certified that Professional shall follow the submitted and accepted SDVOB Utilization Plan for the performance of SDVOBs on the



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Contract for Professional Services.

- 15.2.2 Professional shall not change the accepted SDVOB Utilization Plan without the prior written consent of the Dormitory Authority. Any modifications or changes to the accepted SDVOB Utilization Plan after award of the Contract for Professional Services to the Professional shall be reported to the Dormitory Authority on a revised SDVOB Utilization Plan. As part of a revised SDVOB Utilization Plan, the Professional may request a partial or total waiver of the goal for SDVOB participation but such request must be made prior to submission of the Application for Payment for the final payment on the Contract for Professional Services. Professional shall make and shall document good faith efforts to provide meaningful participation by SDVOBs as Subconsultants, Subcontractors or suppliers in the performance of the Contract for Professional Services. The revised SDVOB Utilization Plan is not effective unless and until it is accepted by the Dormitory Authority. If the revised SDVOB Utilization Plan is not accepted by the Dormitory Authority, the Dormitory Authority shall issue a notice of deficiency and the Professional shall proceed as set forth in Subsection 15.2.4 of this Chapter Three.
- 15.2.3 Professional shall report to the Dormitory Authority Monthly SDVOB Contract Compliance during the Contract for Professional Services documenting the preceding month's progress towards implementing the accepted SDVOB Utilization Plan and achieving the SDVOB goals for the Contract for Professional Services. This information shall be submitted to the Dormitory Authority in the manner and at the times directed by the Dormitory Authority.
- 15.2.4 If the Dormitory Authority, upon review of the SDVOB Utilization Plan and the Monthly SDVOB Compliance reports determines that the Professional is failing or refusing to comply with the Contract SDVOB goals and no waiver has been issued with respect to such non-compliance, the Dormitory Authority may issue a notice of deficiency to the Professional. The Professional shall respond to the notice of deficiency within seven (7) business days of receipt. Such response may include a request for partial or total waiver of the Contract SDVOB goals.
- 15.2.5 Professional shall make and shall document its good faith efforts to utilize SDVOBs in the performance of the Contract for Professional Services. Evidence of required good faith efforts includes but is not limited to: 1. Copies of solicitations to SDVOBs and any responses thereto; 2. Explanation of the specific reason(s) each SDVOB responding to a Professional's solicitation was not selected; 3. Dates of any pre-bid, pre-award or other meetings attended by Professional, if any, scheduled by the Dormitory Authority with certified SDVOBs which the Dormitory Authority determined were capable of fulfilling the SDVOB goals in the Contract for Professional Services; 4. Information describing the specific steps undertaken to reasonably structure the scope of subcontracts and material orders for the purpose of subcontracting with, or obtaining materials from, SDVOBs; 5. Other information relevant to the waiver request. Guidelines for documentation of good faith efforts are set forth above in Section 14.4 of this Chapter Three.
- 15.2.6 Professional's failure to use SDVOBs in accordance with the accepted SDVOB Utilization Plan or any accepted revised SDVOB Utilization Plan shall be a

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material breach of the Contract for Professional Services and upon such breach, the Dormitory Authority shall be entitled to any remedy provided in the Contract for Professional Services, by law or regulation or at law or in equity, including but not limited to a finding the Professional is non-responsible. If the Dormitory Authority finds the Professional willfully and intentionally fails to comply with the Contract SDVOB goals, the Professional shall pay damages to the Dormitory Authority as set forth in 9 NYCRR § 252.2(s).

**Section 15.3 – Contract with No Goals**

If this Contract for Professional Services does not establish an overall goal for SDVOB participation, Professional, Subconsultants and Subcontractors are still strongly encouraged and expected to consider SDVOBs in the fulfillment of the requirements of the Contract for Professional Services in recognition of the service and sacrifices made by service-disabled veterans and in recognition of their economic activity in doing business in New York State. The Professional is encouraged to make good faith efforts to promote and assist in the participation of SDVOBs in performance of the Contract for Professional Services as Subconsultants, Subcontractors and suppliers.