



**REQUEST  
FOR  
PROPOSALS**

**NEW YORK CITY DEPARTMENT OF  
DESIGN + CONSTRUCTION**

# RFP



**PIN**

**PRE-PROPOSAL CONFERENCE**

**PROJECT**

**SUBMISSION DEADLINE**

**MICHAEL R. BLOOMBERG**  
Mayor

**DAVID J. BURNEY, FAIA**  
Commissioner

**DAVID RESNICK, AIA**  
Deputy Commissioner  
Division of Structures

**DEPARTMENT OF DESIGN AND CONSTRUCTION**

**REQUEST FOR PROPOSALS**

**PROJECT : HWKF2007  
CM / DESIGN / BUILD FOR THE PURCHASE AND INSTALLATION OF NEW ASPHALT  
PLANT EQUIPMENT FOR THE HAMILTON AVENUE ASPHALT PLANT, OPERATED BY  
THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION,  
BOROUGH OF BROOKLYN**

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## PREFACE

The City of New York is committed to achieving excellence in the design and construction of its capital program, and building on the tradition of innovation in architecture and engineering that has contributed to the City's prestige as a global destination. As part of this effort, the Department of Design and Construction ("DDC") is pleased to announce the following contracting opportunity.

### SECTION I. TIMETABLE

#### A. RFP Issuance:

Pre-Proposal Conference: A Pre-Proposal conference will be held at 10:00 AM on Tuesday, December 7, 2010 at DOT Hamilton Avenue Asphalt Plant located at 448 Hamilton Avenue, Brooklyn, NY 11232, in the second floor meeting room. Attendance at this pre-proposal conference is not mandatory to propose on the contract described in this RFP; however, it is strongly encouraged.

Submission Deadline: The proposer shall deliver, on or before 4:00 PM on Tuesday, December 21, 2010, the Proposal in a clearly marked envelope or package. The Proposal shall consist of TWO separate clearly marked, sealed packages containing the following: (1) the Technical Proposal (1 original and 4 copies) and (2) Doing Business Data Form (1 original).

Proposals shall be hand delivered to the contact person at the location listed below. Proposals received after the applicable due date and time prescribed in the RFP are late and will not be accepted except at the discretion of DDC pursuant to the applicable section of the City Procurement Policy Board Rules.

Hemwattie Roopnarine, (718) 391-1375  
Professional Contracts Section  
Department of Design and Construction  
30-30 Thomson Avenue, 4th Floor (Entrance on 30th Place)  
Long Island City, NY 11101  
E-mail: Ramnarah@ddc.nyc.gov

NOTE: Respondents are held responsible for ensuring that the Professional Contract Section receives the RFP response package by the deadline. Respondents are warned not to rely on signed delivery slips from their messenger services. Occasionally packages are delivered to the School Construction Authority located in the same building and the packages are not forwarded to the DDC Professional Contracts Section in a timely manner. Entrance to DDC is on 30<sup>th</sup> Place, not Thomson Avenue despite our Thomson Avenue house number.

#### B. Inquiries:

In the event a proposer desires any explanation regarding the meaning or interpretation of this RFP, such explanation must be requested in writing, no later than one week prior to the submission date prescribed in the RFP. In the event DDC determines that it is necessary to respond to the inquiry in writing, such response will be furnished as an addendum to the RFP to all potential proposers known to have downloaded the RFP. All addenda will be available on DDC's website <http://ddcftp.nyc.gov/rfpweb/>. All inquiries must be directed ONLY to the contact person listed above.

C. Addenda:

Receipt of an addendum to this RFP by a proposer must be acknowledged by attaching an original signed copy of the addendum to the technical proposal. All addenda shall become a part of the requirements for this RFP.

D. RFP Schedule:

The following is the estimated timetable for receipt, evaluation, and selection of proposals. This is only an estimate and is provided to assist responding firms in planning.

- a. Identify Construction Management Firm : Within four weeks of submission deadline.
- b. Contract Registration: Approximately three months from date of Construction Management Firm selection.
- c. Commence Work: When directed by DDC.

**SECTION II. SUMMARY OF THE REQUEST FOR PROPOSALS****A. Background and Objectives of the Project**

The New York City Department of Design and Construction (DDC), Division of Structures, is seeking a Construction Management Firm (CM) to provide all services necessary and required for the Project. The selected CM will be responsible for the management, coordination and supervision of all required design and construction work throughout all phases of the Project, including pre-construction, construction and post construction services. The phases of the Project, as well as the components per phase, are set forth below.

**(1) Pre-Construction Phase**

- Selection of Manufacturer/Installer: The CM will be required to conduct a competitive proposal process and enter into a contract with a qualified manufacturer for the following: (a) dismantling and removal of existing asphalt plant equipment, (b) purchase and installation of new asphalt plant equipment, (c) performance of all plumbing, electrical and structural work required for installation of the new equipment, and (d) providing training services. The manufacturing firms which are qualified to provide and install the new asphalt plant equipment are set forth in Attachment 5 to the RFP.
- Design Services: The CM will be required to identify a design consultant in its proposal for the contract. If the CM has employees on staff who are appropriately qualified to provide the required design services, the CM may so indicate in its proposal. The design consultant will be responsible for the design of all required site work, including the storm water drainage system.
- Selection of Site Work Contractor: The CM will be required to conduct a competitive bid process and enter into a contract with a qualified contractor for the performance of all required site work, including the storm water drainage system.

**(2) Construction Phase**

- Site Work: The CM will be required to inspect, supervise and manage all required site work, including the storm water drainage system.
- Asphalt Equipment: The CM will be required to inspect, supervise and manage the following: (a) dismantling and removal of existing asphalt plant equipment, (b) installation of new asphalt plant equipment, and (c) performance of all plumbing, electrical and structural work required for installation of the new equipment.

**(3) Post Construction Phase**

- Training Services: The CM will be required to make all necessary arrangements for the manufacturer to provide training services at the plant and to perform a dry run of the equipment as part of the training.

The Hamilton Avenue Asphalt Plant is one of the largest of its kind in the City and is owned and operated by the New York City Department of Transportation (DOT). The facility is located on the Gowanus Canal in Brooklyn, New York, in proximity to the elevated roadway "Gowanus Expressway Extension". For many years, the Hamilton Avenue Asphalt Plant has

been on the forefront of asphalt production, combining energy efficiency and recycling to produce a high-quality asphalt product. DOT operates a quality control lab within the plant to monitor and test the product to ensure the quality of the hot mix asphalt purchased by the City from various vendors. The Hamilton Avenue Asphalt Plant is one of few municipally-owned and operated facilities in the country. However, the equipment has now aged beyond its effective operation and requires replacement. There is more wear and tear to the components because DOT mixes 40% recycled asphalt pavement (RAP) with 60% virgin stone to produce approximately 500,000 tons of hot mix asphalt. In addition, the drum component of the plant is already operated past its projected useful life of 2 million tons.

Project Schedule: At the time of Project commencement, the CM will be required to submit a Project Schedule. Such Project Schedule must take into account the operational and logistical concerns set forth below.

- The Hamilton Avenue Asphalt Plant will have to be taken off-line for the period of time necessary for performance of the required work. For operational reasons, it is essential to DOT that this shut down be strictly limited to the period between November 15<sup>th</sup> and March 31<sup>st</sup>.
- The Hamilton Avenue Asphalt Plant is located in a very congested area. Not only are there other construction projects underway in the area, but the site is located next to an elevated roadway, the "Gowanus Expressway Extension". In addition, the Triborough Bridge and Tunnel Authority restricts use of the Verrazano Bridge and other bridge crossing for large deliveries. In light of the congestion and traffic related restrictions, DDC anticipates that it will be necessary to schedule the removal of old equipment from the site, as well as the delivery of new equipment, during other than regular business hours.

B. Site Description

Major operational features of the site include the following: canal-side unloading of aggregate from delivery barges; aggregate stockpiles; reclaimed asphalt pavement (RAP) stockpiles; portable crusher unit, mixing process and emissions control units; asphalt cement / asphalt emulsion and cutback tanks; three heated silos containing hot mix asphalt; loading areas for transferring the hot mix to trucks; and 2,000-gallon aboveground storage tank (AST) used to fuel equipment. A garage bay with its own oil water separator (OWS) houses a small fleet services operation, including four 275-gallon ASTs that store products associated with vehicle maintenance. Drainage from the asphalt mixing portion of the site is channeled to a Site Storm Oil Separator (SSOS) and NYSDOT discharges storm water collected from the Gowanus Expressway via NYSDOT State Pollution Discharge Elimination System (SPDES) permit to this main as well.

DOT has developed a Storm Water Pollution Prevention Plan (SWPPP) and obtained coverage under the SPDES Multi-Sector General Permit (GP-0-06-002). As part of the required design services, the CM's design consultant will need to review and make use of any assessment reports of the current drainage system and SSOS where possible. The site work design, as well as the layout of the new asphalt equipment, must not impact DOT's ability to secure a modification to the existing permit.

C. Joint Ventures and Other Consultant Relationships

There is no minimum requirement for the proportion of work by either of the two joint venture partners. Joint ventures must carry the required insurance either as policies written specifically for the joint venture entity, or by using their existing single entity policies with endorsements written for the joint venture activity.

DDC does not recognize the corporate configuration wherein one company is "in association with" another. Relationships between two or more firms shall be either as joint venture partners or prime consultant/subconsultant. In the event that a proposal is received wherein two or more firms are described as being "in association with" each other, DDC will treat the relationship as one of prime consultant/subconsultant(s). The RFP evaluation will be handled accordingly, and if chosen as a winner, the contract documents will show only the prime firm on the signature page, and all other firms will be relegated to Exhibit A, which lists any subconsultants.

D. Contract Term / Contract Estimate

The term of the contract shall commence as of the date of registration by the Comptroller and shall remain in effect until final acceptance of all required work for the Project and completion of all required CM services. The anticipated time frame for final acceptance of all required work is 730 consecutive calendar days.

The estimated cost of all required construction services for the Project (i.e., site work, removal of old asphalt equipment, and purchase and installation of new equipment) is \$9,500,000.00.

E. Insurance

The CM must provide the types and amounts of insurance specified in the attached Contract. The cost of all insurance determined by the CM to be necessary for the Project is deemed included in the payment provisions set forth in the Contract. The CM is advised to carefully review such insurance requirements.

F. Payment Provisions

Payments for all required services for the project shall be in accordance with the attached contract. The payment terms are summarized below.

1. Staffing Expenses: An allowance will be included in the contract for payment of staffing expenses for design and construction management personnel identified in the approved Staffing Plan. Payment for staffing expenses for design and construction management personnel shall be based upon the actual time spent by such personnel performing required services for the Project and shall be at the direct salary rate per hour per title, determined as described below, subject to a Multiplier for Overhead and Profit.

- Direct Salary Rate Per Hour: In accordance with the Article 42 of the attached contract, an Assigned Employee's Direct Salary Rate per hour shall be the **LESSER** of (1) the Assigned Employee's actual annual direct salary, computed on an hourly basis, or (2) the Maximum Allowable Direct Salary Rate per Hour for the Assigned Employee's title. As indicated in Attachment 2, the Maximum Allowable Direct Salary Rate per hour per title shall be negotiated with the successful proposer.

- Multipliers for Overhead and Profit: As indicated in Attachment 2, two separate Multipliers for Overhead and Profit shall be negotiated with the successful proposer (one applicable to CM Personnel and the other applicable to Design Personnel).
2. Construction Services: An allowance in the amount of **\$9,500,000.00** is included in the contract for payment for construction services required for the Project to be performed by subcontractors. The terms and conditions applicable to payment for construction services are set forth in Article 42 of the attached contract. The CM is not entitled to any mark up on payment to subcontractors for construction services.
  3. Miscellaneous Expenses: An allowance in the amount of **\$210,000.00** is included in the contract for reimbursement for miscellaneous expenses actually incurred by the CM. The terms and conditions applicable to payment for miscellaneous expenses, including the Field Office, are set forth in Article 42 of the attached contract. The CM is not entitled to any mark up on payment for miscellaneous expenses.
  4. Additional Services: An allowance in the amount of **\$400,000.00** is included in the contract for payment for additional services required for the Project. The terms and conditions applicable to payment for additional services are set forth in Article 42 of the attached contract. The CM is not entitled to any mark up on payment for additional services.

**SECTION III. SCOPE OF WORK AND CONTRACT CONDITIONS****A. Scope of Services:**

The selected Construction Management Firm (CM) shall provide all services necessary and required for the inspection, supervision, management, coordination and administration of the Project, so that the required work is properly executed, completed in a timely fashion and conforms to the requirements of the construction documents and to good construction practice. The selected CM will be required to provide such services from Project commencement through substantial completion, final acceptance, and project close-out. The services provided by the CM must comply with all Federal, State and Local Laws governing the operations of an industrial facility. The attached contract sets forth in detail the services to be provided by the CM. The contract describes specific services to be provided, as well as additional services and related services. The proposer is advised to review the contract provisions.

**B. Contract Provisions:**

The services to be provided by the CM and all standards of performance applicable to the required work are set forth in the form of contract, attached hereto and incorporated herein as part of this RFP. Any firm awarded a contract as a result of this RFP will be required to sign this form of contract. For a more complete and thorough description of the scope of services summarized in this section of the RFP, the proposer is advised to review the attached contract.

**C. Staffing Plan for Personnel:**

The terms and conditions regarding the CM's obligation to provide qualified personnel for the Project are set forth in Article 11 of the attached contract. As indicated therein, the CM is required to provide personnel in accordance with the Staffing Plan approved by the Commissioner. Such Staffing Plan must include the Key Personnel identified by the CM in its Technical Proposal.

**D. Construction Work:**

Following DDC/DOT approval of the final design documents, the CM will be required to enter into and supervise subcontracts for all required construction work, including the removal of hazardous materials, if necessary. The CM will be required to conduct a competitive bid procedure with bidders selected by the CM and approved by DDC. The contract outlines the criteria the CM must utilize in selecting subcontractors, as well as the required competitive procedure. An allowance will be provided in the contract for payment for construction work performed by subcontractors.

**E. Required Approvals:**

In order to receive substantial completion of the required work for the project, as well as payment for the same under the contract, the CM must first obtain: (1) the required written approval of any agency having jurisdiction over the work, including without limitation, the

Department of Buildings, the Fire Department, the Department of Environmental Protection, The State Department of Environmental Conservation and (2) all certificates of inspection of the work and (3) all necessary Permits, Plans (all conformance items fully implemented), Certificates and Registrations required by Federal, State and Local regulatory authorities. Additional requirements for a determination of substantial completion are set forth in the contract.

F. Hazardous Materials:

The CM shall, through its subcontractors, be responsible for the removal and/or remediation of hazardous materials in the area of any required demolition. Hazardous materials shall include without limitation asbestos, methane, petroleum, and lead.

The CM shall, through the Allowance for Additional Services, provide independent inspection and/or air monitoring services for any required removal and/or remediation of hazardous materials. Removal and/or remediation of hazardous materials must be completed before the rest of the work in that area can proceed. In the alternative, DDC may provide such services.

G. Liquidated Damages:

In accordance with the contract, DDC will specify an amount of liquidated damages to be included by the CM in each respective subcontract for construction services. Under the contract, the CM must pay to DDC any monies collected as liquidated damages from subcontractors

H. Participation by Minority Owned and Women Owned Business Enterprises in City Procurement:

The contract resulting from this Request for Proposals will be subject to Local Law 129 of 2005, the Minority-Owned and Women-Owned Business Enterprise (M/WBE) program. Please refer to Attachment 6 for information on the M/WBE requirements established for this solicitation and instructions on how to complete the required forms.

I. Compliance with Local Law 34 of 2007:

Pursuant to Local Law 34 of 2007, amending the City's Campaign Finance Law, the City is required to establish a computerized database containing the names of any "person" that has "business dealings with the city" as such terms are defined in the Local Law. In order for the City to obtain necessary information to establish the required database, vendors responding to this solicitation are required to complete the attached Doing Business Data Form and return it with this proposal submission, and should do so in a separate envelope. (If the responding vendor is a proposed joint venture, the entities that comprise the proposed joint venture must each complete a Data Form.) If the City determines that a vendor has failed to submit a Data Form or has submitted a Data Form that is not complete, the vendor will be notified by the agency and will be given four (4) calendar days from receipt of notification to cure the specified deficiencies and return a complete Data Form to the agency. Failure to do so will result in a determination that the proposal submission is non-responsive. Receipt of notification is defined as the day notice is e-mailed or faxed (if the vendor has provided an e-mail address or

fax number), or no later than five (5) days from the date of mailing or upon delivery, if delivered.

J. Project Labor Agreement:

This contract is subject to a Project Labor Agreement (“PLA”) entered into between the City and the Building and Construction Trades Council of Greater New York (“BCTC”) affiliated Local Unions. By submitting a proposal, the proposer agrees that the PLA is binding on the CM and all subcontractors of all tiers. The selected CM will be required to execute a “Letter of Assent” prior to award. The PLA and the Letter of Assent are available at the following website: <http://www.nyc.gov/html/mocs/html/vendors/pla.shtml>.

**SECTION IV. FORMAT AND CONTENT OF THE PROPOSAL**

- A. Proposal Subdivision Instructions: Proposers should provide all information required in the format below. The proposal should be typed on both sides of 8½" X 11" paper. The City of New York requests that all proposals be submitted on paper with not less than 30% post-consumer material content, i.e., the minimum recovered fiber content level for reprographic paper recommended by the United States Environmental Protection Agency (for any changes to that standard please consult: <http://www.epa.gov/epg/products/printing.htm>). Pages should be paginated. The proposal will be evaluated on the basis of its content, not its length. Failure to comply with any of these instructions will not make the proposal non-responsive.
1. Technical Proposal (1 original and 4 copies): The Technical Proposal shall contain all the information requested in Subsection B below, plus completed forms 254 and 255 for the proposer and its design subconsultant. These forms are available at: <http://www.nyc.gov/html/ddc/html/business/otherfrm.shtml>
  2. Fee Proposal (1 original): **To be submitted ONLY upon request.** The Fee Proposal shall consist of all information required by Attachment 2 to the RFP. The proposer must complete Attachment 2 and submit the same as its Fee Proposal. Instructions for completion are included on Attachment 2.
- B. Technical Proposal (1 original and 4 copies): The Technical Proposal for each project shall contain the information described below.
1. Cover Letter: Submit a maximum of three pages, indicating the company name and address, and the name, address and telephone number of the person authorized to represent the firm. **(Be sure to refer to the proper DDC project number and title).**
  2. Experience of Firm & Design Subconsultant:
    - (a) Experience of Firm: The proposer shall provide a description of up to five projects completed within the last eight years, which demonstrate the firm's ability to provide services similar to those required for the Project described in this RFP. For each project submitted, the proposer shall provide information indicating whether the project was completed on time and within budget.
    - (b) Experience of Design Subconsultant: The proposer shall identify the subconsultant that will provide the required design services for the Project. The proposer shall provide a description of up to five projects completed within the last eight years, which demonstrate the design consultant's ability to provide services similar to those required for the Project described in this RFP.

If the proposer has employees on staff who are appropriately qualified to provide the required design services, the proposer shall identify the employees and provide a description of up to five projects completed by such employees within the last eight years.
    - (c) Joint Ventures: If the proposer is a joint venture, the proposer shall delineate the areas of responsibility and expertise of each joint venture partner.
  3. Personnel for the Project: The proposer shall identify the following:

- Construction Management Personnel: For each phase of the Project (Pre-Construction, Construction and Post Construction), the proposer shall identify the individuals who will provide services as Construction Management (CM) Personnel. Of the individuals identified, the proposer shall indicate which individuals will provide services as “Key Personnel”. The proposer shall submit resumes of all individuals identified as CM Personnel. Such individuals must be employees of the proposer.
  - Design Personnel: The proposer shall identify the individuals who will provide services as Design Personnel. Of the individuals identified, the proposer shall indicate which individuals will provide services as “Key Personnel”. The proposer shall submit resumes of all individuals identified as Design Personnel. Such individuals must be employees of the Design Consultant or the proposer.
4. Technical Approach: The proposer shall provide a three page statement describing its technical approach to the Project, including (1) its understanding of the technical issues and complexities of the Project, (2) its methodology for tracking and maintaining the Project’s budget and schedule, and (3) its techniques for problem solving.
  5. Organizational Capability: Demonstrate the organizational capability of the proposing firm and its design subconsultant. As indicated above, the proposer and its design subconsultant shall submit a SF-254 Form, which provides information concerning (1) the number of full-time people currently employed by the firm, (2) the projects on which the firm is currently working, (3) the projects the firm has completed, and (4) future projects to which the firm is committed. All project information shall include the dollar value of the contract, as well as the schedule.
  6. Statement of Understanding: The Statement of Understanding form included as Attachment 1 of this RFP should be signed by a responsible partner or corporate officer of the proposing firm and submitted with firm’s Technical Proposal..
  7. Acknowledgement of Addenda: The Acknowledgement of Addenda form (Attachment 3) serves as the proposer’s acknowledgement of the receipt of addenda to this RFP that may have been issued by the Agency prior to the proposal due date and time. The proposer should complete this form as instructed on the form.

C. Fee Proposal:

Upon written notification, the proposer must submit the Fee Proposal in separate, clearly labeled, sealed package within ten business days of such notice. The proposer must complete the Fee Proposal as per instruction on Attachment 2.

D. Proposal Package Contents (Checklist): The Proposal Package shall contain the following:

1. Technical Proposal (1 original and 4 copies):  
Sealed envelope, clearly marked as “Technical Proposal”, including
  - Statement of Understanding (Attachment 1)
  - Acknowledgement of Addenda (Attachment 3)
2. Doing Business Data Form (1 original) (Attachment 7)  
Sealed envelope clearly marked as “Doing Business Data Form” containing a completed Doing Business Data Form.

**SECTION V. PROPOSAL EVALUATION AND CONTRACT AWARD PROCEDURES**

A. Selection Process:

This is a Quality Based Selection (QBS) project. DDC will rank proposals by technical merit, and negotiate a fair and reasonable price with the highest ranked firm. A DDC/DOT evaluation committee will review, evaluate and score all Technical Proposals in accordance with qualitative and quantitative criteria established in Subsection B below. This evaluation and scoring will determine the proposer's score. DDC reserves the right to interview proposers and visit their offices for the purpose of clarifying their Technical Proposals, after which their scores may be re-evaluated. Proposers shall be ranked in accordance with the scores. The ranking will be submitted to the Executive Consultant Selection Committee (ECSC) who will certify the results and authorize fee negotiation to commence with the highest ranked firm. Should negotiations fail with the highest ranked firm, the ECSC will authorize fee negotiation with the next highest ranked firm. The firm whose proposal is determined to be the most advantageous to the City will be awarded the project.

B. Technical Proposal Evaluation Criteria:

The Technical Proposal evaluation criteria are as follows:

- 1. Experience of Firm and Subconsultant(s) (Weight 25%)
- 2. Personnel – Qualifications and Experience: (Weight 25%)
- 3. Technical Approach: (Weight 30%)
- 4. Organizational Capability: (Weight 20%)

C. Basis of Award:

DDC shall award contract to the responsible proposer whose proposal is determined to be the highest quality and most advantageous to the City, taking into consideration the overall quality of the proposal as measured against factors or criteria as are set forth in the RFP and successful negotiation of an appropriate fee. Such fee negotiation shall commence upon written notification and shall conclude not more than thirty days after receipt of the fee proposal.

D. Supply and Service Employment Report:

Upon selection, each successful proposer will be required to submit one original copy of the Department of Small Business Services Supply and Service Employment Report, a copy of which can be downloaded from <http://www.nyc.gov/html/ddc/html/business/otherfrm.shtml>. Upon written notification, the proposer must submit the Supply and Service Employment Report within ten days of such notification.

E. VENDEX:

Upon selection, each successful proposer will be required to submit proof of filing of the appropriate VENDEX Questionnaires. Upon written notification, the proposer must submit a Confirmation of Vendex Compliance to DDC within five days of official notification. A form for this confirmation is set forth in the RFP.

**The proposer is advised that Vendex Questionnaires and procedures have changed. See [www.nyc.gov/vendex](http://www.nyc.gov/vendex) to download the new VENDEX Questionnaires and a Vendor's Guide to VENDEX or contact DDC's VENDEX Unit at 718-391-1845.**

- (a) Submission: Vendex Questionnaires (if required) must be submitted directly to the Mayor's Office of Contract Services, ATTN: Vendex, 253 Broadway, 9<sup>th</sup> Floor, New York, New York 10007.
- (b) Requirement: Pursuant to Administrative Code Section 6-116.2 and the PPB Rules, proposers may be obligated to complete and submit VENDEX Questionnaires. If required, VENDEX Questionnaires must be completed and submitted before any award of contract may be made or before approval is given for a proposed subcontractor. Non-compliance with these submission requirements may result in the disqualification of the proposal, disapproval of a subcontractor, subsequent withdrawal of approval for the use of an approved subcontractor, or the cancellation of the contract after award.

F. Contract Finalization:

Upon selection, the successful proposer will be asked to finalize a contract with DDC subject to the conditions specified in the RFP and to the agency's standard contract provisions. The contents of the selected proposal, together with this RFP and any addendum(s) provided during the proposal process, may be incorporated into the final contract to be developed by the agency.

**SECTION VI. GENERAL INFORMATION TO PROPOSERS****A. Complaints**

The New York City Comptroller is charged with the audit of contracts in New York City. Any proposer who believes that there has been unfairness, favoritism or impropriety in the proposal process should inform the Comptroller, Office of Contract Administration, 1 Centre Street, Room 835, New York, NY 10007; the telephone number is (212) 669-3000. In addition, the New York City Department of Investigation should be informed of such complaints at its Investigations Division, 80 Maiden Lane, New York, NY 10038; the telephone number is (212) 825-5959.

**B. Applicable Laws**

This Request for Proposals and the resulting contract award(s), if any, unless otherwise stated, are subject to all applicable provisions of New York State Law, the New York City Administrative Code, New York City Charter and New York City Procurement Policy Board (PPB) Rules. A copy of the PPB Rules may be obtained by contacting the PPB at (212) 788-7820.

**C. Contractual Requirements**

1. Any firm awarded a contract as a result of this RFP will be required to sign the City's standard contract for Engineering Inspection Services. A copy of the contract is attached for your information. The requirements for performance of this Project, as well as insurance, payment terms and all other provisions are contained in the contract.
2. Any information which may have been released either orally or in writing prior to the issuance of the RFP shall be deemed preliminary in nature and bind neither the City nor the Proposer.
3. The City will deal only with the Engineer and the City has no financial obligation to sub-consultants and sub-contractors of the Engineer. However, all sub-consultants and sub-contractors are subject to the City's contracting requirements including Equal Employment Opportunity (Executive Order #50 of 1980 as revised).
4. If this is an Infrastructure contract for engineering design services, the Proposer must negotiate with the agency the adoption of a schedule of payments and deliverables. In the event that a satisfactory decision cannot be reached regarding those schedules, the agency reserves the right to award to another proposer.

**D. Contract Award**

Contract award is subject to each of the following applicable conditions and any others that may apply: New York City Fair Share Criteria; New York City MacBride Principles Law; submission by the proposer of the requisite New York City Department of Small Business Services/Division of Labor Services Employment Report and certification by that office; submission by the proposer of the requisite VENDEX Questionnaires/Affidavits of No Change and review of the information contained therein by the New York City Department of Investigation; all other required oversight approvals; applicable provisions of federal, state and local laws and executive orders requiring affirmative action and equal employment opportunity; and Section 6-108.1 of the New York City Administrative Code relating to the Local Based Enterprises program and its implementation rules.

E. Proposer Appeal Rights

Pursuant to the PPB Rules, proposers have the right to appeal Agency non-responsiveness determinations and Agency non-responsibility determinations and to protest an Agency's determination regarding the solicitation or award of a contract.

F. Multi-Year Contracts

Multi-year contracts are subject to modification or cancellation if adequate funds are not appropriated to the Agency to support continuation of performance in any City fiscal year succeeding the first fiscal year and/or if the contractor's performance is not satisfactory. The Agency will notify the contractor as soon as is practicable that the funds are, or are not, available for the continuation of the multi-year contract for each succeeding City fiscal year. In the event of cancellation, the contractor will be reimbursed for those costs, if any, which are so provided for in the contract.

G. Prompt Payment Policy

Pursuant to the PPB Rules, it is the City's policy to process contract payments efficiently and expeditiously. The prompt Payment provisions set forth in the edition of the Procurement Policy Board Rules in effect at the time of this solicitation shall be applicable to payments made under a contract resulting from this solicitation. The provisions require the payment to contractors of interest payments made after the required payment date except as set forth in the Rules.

The contractor (consultant) must submit a proper invoice to receive payment, except where the contract provides that the contractor shall be paid at predetermined intervals without having to submit an invoice for each scheduled payment.

H. Prices Irrevocable

Prices proposed by the proposer shall be irrevocable until contract award, unless the proposal is withdrawn. Proposals may only be withdrawn by submitting a written request to the Agency prior to contract award but after the expiration of 90 days after the opening of proposals. This shall not limit the discretion of the Agency to request proposers to revise proposed prices through the submission of best and final offers and/or the conduct of negotiations.

I. Confidential, Proprietary Information or Trade Secrets

Proposers should give specific attention to the identification of those portions of their proposals that they deem to be confidential, proprietary information or trade secrets and provide any justification of why such materials, upon request, should not be disclosed by the City. Such information must be easily separable from the non-confidential sections of the proposal. All information not so identified may be disclosed by the City.

J. RFP Postponement/Cancellation

The Agency reserves the right to postpone or cancel this RFP in whole or in part, and to reject all proposals.

K. Proposer Costs

Proposers will not be reimbursed for any costs incurred to prepare proposals.

L. VENDEX Fees

Pursuant to PPB Rule 2-08(f)(2), the contractor will be charged a fee for the administration of the VENDEX system, including the Vendor Name Check process, if a Vendor Name Check review is required to be conducted by the Department of Investigation. The contractor shall also be required to pay the applicable required fees for any of its subcontractors for which Vendor Name Check reviews are required. The fee(s) will be deducted from payments made to the contractor under the contract. For contracts with an estimated value of less than or equal to \$1,000,000, the fee will be \$175. For contracts with an estimated value of greater than \$1,000,000, the fee will be \$350.

M. Charter Section 312(a) Certification

The Agency has determined that the contract(s) to be awarded through this Request for Proposals will not directly result in the displacement of any New York City employee.

\_\_\_\_\_  
Agency Chief Contracting Officer

\_\_\_\_\_  
Date

**ATTACHMENT 1**

**STATEMENT OF UNDERSTANDING**

By signing in the space provided below, the undersigned certifies that the respondent (i) has read and understands the scope and requirements of this project, as described in the RFP and all attachments; (ii) has the capacity to execute this project, (iii) agrees to accept payment in accordance with the requirements of this RFP and the standard contract for Construction Management / Design / Build Services, attached hereto, and (iv) will, if its proposal is accepted, enter into the attached Standard Contract with the New York City Department of Design and Construction.

Is the response printed on both sides, on recycled paper containing the minimum percentage of recovered fiber content as requested by the City in the instructions to this solicitation?

- Yes**       **No**

I hereby certify that my firm will carry all types of insurance specified in the contract.

The undersigned further stipulates that the information in this proposal is, to the best of knowledge, true and accurate.

\_\_\_\_\_  
Name of Firm

By: \_\_\_\_\_  
Signature of Partner or Corporate Officer

\_\_\_\_\_  
Date

\_\_\_\_\_  
Print Name

\_\_\_\_\_  
Title

\_\_\_\_\_  
Address

\_\_\_\_\_  
EIN #

\_\_\_\_\_  
Telephone #

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

**ATTACHMENT 2**

**FEE PROPOSAL FORM**

(To be submitted **ONLY** upon request)

**PROJECT: HWKF2007, CM/Design/Build for the Purchase and Installation of New Asphalt Plant Equipment for the Hamilton Avenue Asphalt Plant, Operated by the New York City Department of Transportation, Borough of Brooklyn**

**Submission:** If requested in writing by DDC, the proposer shall submit Attachment 2 as its Fee Proposal. Attachment 2 shall be submitted in a clearly marked, sealed envelope. Submission shall be within ten business days of notice by DDC.

**Negotiation:** DDC will attempt to negotiate the items listed below on a fair and reasonable basis with the highest ranked proposer. If negotiations are not successful, DDC will enter into negotiations with the next highest ranked firm.

CM Services: Multiplier for Overhead and Profit  
Maximum Allowable Direct Salary Rates Per Hour for Required CM Personnel

Design Services: Multiplier for Overhead and Profit  
Maximum Allowable Direct Salary Rates Per Hour for Required Design Personnel

Items Included in Multipliers: For a detailed description of the costs and expenses deemed included in the proposed multipliers, the proposer is directed to Article 42 of the attached contract.

Direct Salary Rates: In accordance with the attached contract, payment for staffing expenses shall be based on the Assigned Employee’s Direct Salary Rate per hour determined and approved by the Commissioner. An Assigned Employee’s Direct Salary Rate per hour shall be the **LESSER** of (1) the Assigned Employee’s actual annual direct salary, computed on an hourly basis, or (2) the Maximum Allowable Direct Salary Rate per hour for the Assigned Employee’s title.

\*\*\*\*\*

**Part 1: Construction Management Services**

**(A) Multiplier for Overhead and Profit:** In the space provided below, the proposer shall indicate a Proposed Multiplier for Overhead and Profit to be applied to direct salary rates for CM Personnel. Such Multiplier is subject to negotiation.

Proposed Multiplier for Overhead and Profit (CM Services): \_\_\_\_\_

- (1) In support of its proposed Multiplier for CM services, the proposer shall submit the following:
  - (a) If the proposer has an “Audited Multiplier for Overhead” that has been accepted by a governmental agency, it shall submit such Audited Multiplier for Overhead, as well as a letter from a governmental agency that engages in capital construction work (city, state or federal) approving or accepting such Audited Multiplier for Overhead. The proposer is advised that DDC has **NO OBLIGATION** to accept an Audited Multiplier for Overhead, even if such multiplier has been approved by a governmental agency.

**ATTACHMENT 2 (continued)**

(b) If the proposer does not have an “Audited Multiplier for Overhead” that has been accepted by a governmental agency, it shall submit Audited Financial Statements for the three (3) most recent fiscal years. Each Financial Statement (Balance Sheet and Income Statement) must have been audited by an independent auditor licensed to practice as a certified public accountant (CPA). Each Financial Statement must include the auditor’s standard report.

(2) DDC reserves the right to require the proposer to submit any records, documentation or accounting data in connection with its proposed Multiplier.

**(B) Maximum Allowable Direct Salary Rates:** The proposer shall submit Proposed Maximum Allowable Direct Salary Rates per hour for all required titles of CM Personnel for the Project. The Maximum Allowable Direct Salary Rate per hour per title shall represent the upper limit of the amount payable under the contract as the Direct Salary Rate per hour for the specified title throughout the term of the Contract, including any extension thereof.

In computing the proposed Maximum Allowable Direct Salary Rates for CM Personnel, the proposer shall NOT INCLUDE any amount or factor for the following costs or payments: (1) any payments for services performed during other than regular business hours (i.e., premium for Night Differential and/or Overtime); (2) any employer payments mandated by law, including without limitation, social security and Medicare taxes, insurance (Worker’s Compensation, Employers Liability, Unemployment); (3) any employer contributions to retirement plans, including without limitation pension and/or deferred compensation plans, and (4) any costs for any other fringe and/or supplemental benefits.

The proposer shall, on a separate sheet attached to its Fee Proposal, submit a list of required titles of CM Personnel and a Maximum Allowable Direct Salary Rate per Hour for each title. The required titles of CM Personnel must be identical to those indicated in the Technical Proposal.

\*\*\*\*\*

**Part 2: Design Services**

**(A) Multiplier for Overhead and Profit:** In the space provided below, the proposer shall indicate a Proposed Multiplier for Overhead and Profit to be applied to direct salary rates for Design Personnel. Such Multiplier is subject to negotiation.

Proposed Multiplier for Overhead and Profit (Design Services): \_\_\_\_\_

(1) In support of its proposed Multiplier for Design services, the proposer shall, on behalf of its Design Consultant, submit the following:

(a) If the proposer’s Design Consultant has an “Audited Multiplier for Overhead” that has been accepted by a governmental agency, it shall submit such Audited Multiplier for Overhead, as well as a letter from a governmental agency that engages in capital construction work (city, state or federal) approving or accepting such Audited Multiplier for Overhead. The proposer is advised that DDC has **NO OBLIGATION** to accept an Audited Multiplier for Overhead, even if such multiplier has been approved by a governmental agency.

**ATTACHMENT 2 (continued)**

(b) If the proposer’s Design Consultant does not have an “Audited Multiplier for Overhead” that has been accepted by a governmental agency, it shall submit the Design Consultant’s Audited Financial Statements for the three (3) most recent fiscal years. Each Financial Statement (Balance Sheet and Income Statement) must have been audited by an independent auditor licensed to practice as a certified public accountant (CPA). Each Financial Statement must include the auditor’s standard report.

(2) DDC reserves the right to require the proposer, on behalf of its Design Consultant, to submit any records, documentation or accounting data in connection with the proposed Multiplier.

**(B) Maximum Allowable Direct Salary Rates:** The proposer shall submit Proposed Maximum Allowable Direct Salary Rates per hour for all required titles of Design Personnel for the Project. The Maximum Allowable Direct Salary Rate per hour per title shall represent the upper limit of the amount payable under the contract as the Direct Salary Rate per hour for the specified title throughout the term of the Contract, including any extension thereof.

In computing the proposed Maximum Allowable Direct Salary Rates for Design Personnel, the proposer shall NOT INCLUDE any amount or factor for the following costs or payments: (1) any payments for services performed during other than regular business hours (i.e., premium for Night Differential and/or Overtime); (2) any employer payments mandated by law, including without limitation, social security and Medicare taxes, insurance (Worker’s Compensation, Employers Liability, Unemployment); (3) any employer contributions to retirement plans, including without limitation pension and/or deferred compensation plans, and (4) any costs for any other fringe and/or supplemental benefits.

The proposer shall, on a separate sheet attached to the Fee Proposal, submit a list of required titles of Design Personnel and a Maximum Allowable Direct Salary Rate per Hour for each title. The required titles of Design Personnel must be identical to those indicated in the Technical Proposal.

The proposer must sign the Fee Proposal in the space provided below.

\_\_\_\_\_  
Name of Proposer

By: \_\_\_\_\_  
Signature of Partner or Corporate Officer

\_\_\_\_\_  
Date

\_\_\_\_\_  
Print Name

\_\_\_\_\_  
Title

\_\_\_\_\_  
Firm

\_\_\_\_\_  
EIN #

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

**ATTACHMENT 3**

**ACKNOWLEDGEMENT OF ADDENDA**

|  |                        |
|--|------------------------|
| TITLE OF THE REQUEST FOR PROPOSALS:<br>HWKF2007, CM/Design/Build for the Purchase and Installation of New Asphalt Plant Equipment for the Hamilton Avenue Asphalt Plant, Operated by the New York City Department of Transportation, Borough of Brooklyn | PIN:<br>8502011VP0005P |
|--|------------------------|

**Instructions: The proposer is to complete Part I or Part II of this form, whichever is applicable, and sign and date this form. This form serves as the proposer's acknowledgement of the receipt of Addenda to this Request for Proposals (RFP) which may have been issued by the Agency prior to the Proposal Due Date and Time**

     Part I

Listed below are the dates of issue for each Addendum received in connection with this RFP.

Addendum # 1, dated \_\_\_\_\_

Addendum # 2, dated \_\_\_\_\_

Addendum # 3, dated \_\_\_\_\_

Addendum # 4, dated \_\_\_\_\_

Addendum # 5, dated \_\_\_\_\_

Addendum # 6, dated \_\_\_\_\_

Addendum # 7, dated \_\_\_\_\_

Addendum # 8, dated \_\_\_\_\_

Addendum # 9, dated \_\_\_\_\_

Addendum #10, dated \_\_\_\_\_



     Part II

No Addendum was received in connection with this RFP.



Proposer Name

Proposer's Authorized Representative:

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

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

Signature: \_\_\_\_\_

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

**ATTACHMENT 4**

**CONFIRMATION OF VENDEX COMPLIANCE**

The Proposer shall submit this Confirmation of VENDEX Compliance

Name of Proposer: \_\_\_\_\_

Proposer's Address: \_\_\_\_\_

Proposer's Telephone Number: \_\_\_\_\_

Proposer's Fax Number: \_\_\_\_\_

Date of Proposal Submission: \_\_\_\_\_

Project ID: \_\_\_\_\_

**VENDEX Compliance:** To demonstrate compliance with VENDEX requirements, the Proposer shall complete either Section (1) or Section (2) below, whichever applies.

- (1) **Submission of Questionnaires to MOCS:** By signing in the space provided below, the Proposer certifies that as of the date specified below, the Proposer has submitted VENDEX Questionnaires to the Mayor's Office of Contract Services, Attn: VENDEX, 253 Broadway, 9th Floor, New York, New York 10007.

Date of Submission: \_\_\_\_\_

By: \_\_\_\_\_  
(Signature of Partner or corporate officer)

Print Name: \_\_\_\_\_

- (2) **Submission of Certification of No Change to DDC:** By signing in the space provided below, the Proposer certifies that it has read the instructions in a "Vendor's Guide to VENDEX" and that such instructions do not require the Proposer to submit VENDEX Questionnaires. The Proposer has completed **TWO ORIGINALS** of the Certification of No Change.

By: \_\_\_\_\_  
(Signature of Partner or corporate officer)

Print Name: \_\_\_\_\_

**ATTACHMENT 5**

**LIST OF MANUFACTURERS**

Stansteel  
12711 Townpark Way  
Louisville, Kentucky 40243  
800-826-0223

Meeker  
516 North Broad Street  
Landsdale, PA 19446  
215-361-2900

Gencor Industries  
5201 North Orange Blossom Trail  
Orlando, FL 32810  
407-290-6000

Astec, Inc.  
4101 Jerome Avenue  
Chattanooga, TN 37407  
423-867-4210

Oswilier Brothers  
19 Adam Street  
Highland Mills, NY 10930  
845-928-2710

**ATTACHMENT 6**

**MWBE PROGRAM**

Requirements for the participation of M/WBEs apply to the subcontract for site work to be performed by a subcontractor under the supervision and control of the Contractor. Such requirements are set forth below. Prior to procurement of the subcontract for site work, the City shall provide the applicable M/WBE requirements to the Contractor in a form entitled "Subcontractor Utilization Plan." The Subcontractor Utilization Plan shall be included by the Contractor in Bid Documents for the subcontract for site work for the Project, as directed by the City.

|  |             |            |
|--|-------------|------------|
| <b>Target Subcontracting Percentage:</b>   |             | <b>25%</b> |
| Participation Goal for Black Americans:    | Unspecified |            |
| Participation Goal for Hispanic Americans: | Unspecified |            |
| Participation Goal for Asian Americans:    | Unspecified |            |
| <b>Total M/WBE Participation Goals</b>     |             | <b>50%</b> |

**ATTACHMENT 6****NOTICE TO ALL PROSPECTIVE CONTRACTORS****PARTICIPATION BY MINORITY-OWNED AND WOMEN-OWNED BUSINESS ENTERPRISES IN  
CITY PROCUREMENT****ARTICLE I. M/WBE PROGRAM**

Local Law No. 129 of 2005 added Section 6-129 to the Administrative Code of the City of New York. The local law creates a program for participation by minority-owned and women-owned business enterprises (MBEs and WBEs) in City procurement. As stated in the Section 6-129, the intent of the program is to address the impact of discrimination on the City's procurement process, and to promote the public interest in avoiding fraud and favoritism in the procurement process, increasing competition for City business, and lowering contract costs. The contract provisions contained herein are made pursuant to Local Law 129, and the rules of the Department of Small Business Services ("DSBS") promulgated thereunder.

If this Contract is subject to the Minority-Owned and Women-Owned Business Enterprise ("M/WBE") program created by Local Law 129, the specific requirements of M/WBE participation for this Contract are set forth in Schedule B of the Contract (entitled the "Subcontractor Utilization Plan"), and are detailed below.

**The Contractor must comply with all applicable M/WBE requirements for this Contract.**

Article I, Part A, below, sets forth provisions related to the participation goals for construction and professional services contracts.

Article I, Part B, below, sets forth miscellaneous provisions related to the M/WBE program.

**PART A****PARTICIPATION GOALS FOR CONSTRUCTION  
AND PROFESSIONAL SERVICES CONTRACTS**

1. The **Target Subcontracting Percentage** applicable to this Contract is set forth on Schedule B, Part I to this Contract (see Page 1, line (1)).

The "**Target Subcontracting Percentage**" is the percentage of the total Contract which Agency anticipates that the prime contractor for this Contract would in the normal course of business award to one or more subcontractors for amounts under \$1 million for construction and professional services.

A prospective contractor may seek a full or partial pre-award waiver of the **Target Subcontracting Percentage** in accordance with Local Law 129 and Part A, Section 10 below. To apply for the a full or partial waiver of the **Target Subcontracting Percentage**, a prospective contractor must complete Part III (Page 4) of Schedule B, and must submit such request no later than seven (7) days prior to the date and time the bids or proposals are due, in writing to the Agency by e-mail at [poped@ddc.nyc.gov](mailto:poped@ddc.nyc.gov) or via facsimile at (718) 391-1866. Bidders/proposers who have submitted

requests will receive a response by no later than two (2) calendar days prior to the date bids or proposals are due, provided, however, that if that date would fall on a weekend or holiday, a response will be provided by close-of-business on the business day before such weekend or holiday date.

2. The **Subcontractor Participation Goals** established for this Contract are set forth on Schedule B, Part I to this Contract (see Page 1, line (2) and/or line (3)).

The **Subcontractor Participation Goals** represent a percentage of the total dollar value of all construction and/or professional services subcontracts under this Agreement for amounts under \$1 million.

3. If **Subcontractor Participation Goals** have been established for this Contract, Contractor agrees or shall agree as a material term of the Agreement that, with respect to the total amount of the Agreement to be awarded to one or more subcontractors pursuant to subcontracts for amounts under \$1 million, Contractor shall be subject to the **Subcontractor Participation Goals**, unless the goals are modified by Agency in accordance with Local Law 129 and Part A, Section 11 below.

4. If **Subcontractor Participation Goals** have been established for this Contract, a prospective contractor shall be required to submit with its bid or proposal, as applicable, a completed Schedule B, Part II Subcontractor Utilization Plan (see Page 2-3) indicating: (a) the percentage of work it intends to subcontract; (b) the percentage of work it intends to award to subcontractors for amounts under \$1 million; (c) in cases where the prospective contractor intends to award subcontracts for amounts under \$1 million, a description of the type and dollar value of work designated for participation by MBEs and/or WBEs; and (d) the general time frames in which such work by MBEs and/or WBEs is scheduled to occur. In the event that this Subcontractor Utilization Plan indicates that the bidder or proposer, as applicable, does not intend to award the **Target Subcontracting Percentage**, the bid or proposal, as applicable, shall be deemed non-responsive, unless Agency has granted the bidder or proposer, as applicable, a pre-award waiver of the **Target Subcontracting Percentage** in accordance with Local Law 129 and Part A, Section 10 below.

**THE BIDDER/PROPOSER MUST COMPLETE THE SUBCONTRACTOR UTILIZATION PLAN INCLUDED HEREIN (SCHEDULE B, PART II). SUBCONTRACTOR UTILIZATION PLANS WHICH DO NOT INCLUDE THE REQUIRED AFFIRMATIONS WILL BE DEEMED TO BE NON-RESPONSIVE, UNLESS A FULL WAIVER OF THE TARGET SUBCONTRACTING PERCENTAGE IS GRANTED (SCHEDULE B, PART III). IN THE EVENT THAT THE CITY DETERMINES THAT VENDOR HAS SUBMITTED A SUBCONTRACTOR UTILIZATION PLAN WHERE THE REQUIRED AFFIRMATIONS ARE COMPLETED BUT OTHER ASPECTS OF THE PLAN ARE NOT COMPLETE, OR CONTAIN A COPY OR COMPUTATION ERROR THAT IS AT ODDS WITH THE AFFIRMATION, THE VENDOR WILL BE NOTIFIED BY THE AGENCY AND WILL BE GIVEN FOUR (4) CALENDAR DAYS FROM RECEIPT OF NOTIFICATION TO CURE THE SPECIFIED DEFICIENCIES AND RETURN A COMPLETED PLAN TO THE AGENCY. FAILURE TO DO SO WILL RESULT IN A DETERMINATION THAT THE BID/PROPOSAL IS NON-RESPONSIVE. RECEIPT OF NOTIFICATION IS DEFINED AS THE DATE NOTICE IS E-MAILED OR FAXED (IF THE VENDOR HAS PROVIDED AN E-MAIL ADDRESS OR FAX NUMBER), OR NO LATER THAN FIVE (5) DAYS FROM THE DATE OF MAILING OR UPON DELIVERY, IF DELIVERED.**

5. Where a Subcontractor Utilization Plan has been submitted, the Contractor shall, within 30 days of issuance by Agency of a notice to proceed, submit a list of proposed persons or entities to which it intends to award subcontracts within the subsequent 12 months. In the case of multi-year contracts, such list shall also be submitted every year thereafter. **PLEASE NOTE: If this Contract is a public works project subject to GML §101(5), i.e., a contract valued at or below \$3M (for projects in New York City) where the bidder is required to identify at the time of bid submission its intended subcontractors for the Wicks trades (plumbing and gas fitting; steam heating, hot water heating, ventilating and air conditioning (HVAC); and electric wiring), the**

**Contractor must identify all those to which it intends to award construction subcontracts for any of the Wicks trades, regardless of what point in the life of the contract such subcontracts will occur, at the time of bid submission.** In the event that the Contractor's selection of a subcontractor is disapproved, the Contractor shall have a reasonable time to propose alternate subcontractors.

6. M/WBE firms must be certified by DSBS in order for the Contractor to credit such firms' participation toward the attainment of the M/WBE participation goals. Such certification must occur prior to the firms' commencement of work as subcontractors. A list of M/WBE firms may be obtained from the DSBS website at [www.nyc.gov/getcertified](http://www.nyc.gov/getcertified), by emailing DSBS at [MWBE@sbs.nyc.gov](mailto:MWBE@sbs.nyc.gov), by calling the DSBS certification hotline at (212) 513-6311, or by visiting or writing DSBS at 110 William St., New York, New York, 10038, 7<sup>th</sup> floor. Eligible firms that have not yet been certified may contact DSBS (as indicated above) in order to seek certification.

7. Where a Subcontractor Utilization Plan has been submitted, the Contractor shall, with each voucher for payment, and/or periodically as Agency may require, submit statements, certified under penalty of perjury, which shall include, but not be limited to, the total amount paid to subcontractors (including subcontractors that are not MBEs or WBEs); the names, addresses and contact numbers of each MBE or WBE hired as a subcontractor pursuant to such plan as well as the dates and amounts paid to each MBE or WBE. The Contractor shall also submit, along with its voucher for final payment, the total amount paid to subcontractors (including subcontractors that are not MBEs or WBEs); and a final list, certified under penalty of perjury, which shall include the name, address and contact information of each subcontractor that is an MBE or WBE hired pursuant to such plan, the work performed by, and the dates and amounts paid to each.

8. If payments made to, or work performed by, MBEs or WBEs are less than the amount specified in the Contractor's Subcontractor Utilization Plan, Agency shall take appropriate action, in accordance with Local Law 129 and Article II below, unless the Contractor has obtained a modification of its Subcontractor Utilization Plan in accordance with Local Law 129 and Part A, Section 11 below.

9. Where a Subcontractor Utilization Plan has been submitted, and the Contractor requests a change order the value of which exceeds 10 percent of the Agreement, Agency shall establish participation goals for the work to be performed pursuant to the change order.

10. Pre-award waiver of **Target Subcontracting Percentage**. Agency may grant a full or partial waiver of the **Target Subcontracting Percentage** to a bidder or proposer, as applicable, who demonstrates—before submission of the bid or proposal—that it has legitimate business reasons for proposing the level of subcontracting in its Subcontractor Utilization Plan. In making its determination, Agency shall consider factors that shall include, but not be limited to, whether the bidder or proposer, as applicable, has the capacity and the bona fide intention to perform the Contract without any subcontracting, or to perform the Contract without awarding the amount of subcontracts for under one million dollars represented by the **Target Subcontracting Percentage**. In making such determination, Agency may consider whether the Subcontractor Utilization Plan is consistent with past subcontracting practices of the bidder or proposer, as applicable, and whether the bidder or proposer, as applicable, has made good faith efforts to identify portions of the Contract that it intends to subcontract.

11. Modification of Subcontractor Utilization Plan. A Contractor may request a modification of its Subcontractor Utilization Plan (**Subcontractor Participation Goals**) after award of this Contract. **PLEASE NOTE: If this Contract is a public works project subject to GML §101(5), i.e., a**

contract valued at or below \$3M (for projects in New York City) where the bidder is required to identify at the time of bid submission its intended subcontractors for the Wicks trades (plumbing and gas fitting; steam heating, hot water heating, ventilating and air conditioning (HVAC); and electric wiring), the Contractor may request a Modification of its Subcontractor Utilization Plan as part of its bid submission. The Agency may grant a request for Modification of a Contractor's Subcontractor Utilization Plan if it determines that the Contractor has established, with appropriate documentary and other evidence, that it made reasonable, good faith efforts to meet the **Subcontractor Participation Goals**. In making such determination, Agency shall consider evidence of the following efforts, as applicable, along with any other relevant factors:

(a) The Contractor advertised opportunities to participate in the Contract, where appropriate, in general circulation media, trade and professional association publications and small business media, and publications of minority and women's business organizations;

(b) The Contractor provided notice of specific opportunities to participate in the Contract, in a timely manner, to minority and women's business organizations;

(c) The Contractor sent written notices, by certified mail or facsimile, in a timely manner, to advise MBEs and WBEs that their interest in the Contract was solicited;

(d) The Contractor made efforts to identify portions of the work that could be substituted for portions originally designated for participation by MBEs and/or WBEs in the Subcontractor Utilization Plan, and for which the Contractor claims an inability to retain MBEs or WBEs;

(e) The Contractor held meetings with MBEs and/or WBEs prior to the date their bids or proposals were due, for the purpose of explaining in detail the scope and requirements of the work for which their bids or proposals were solicited;

(f) The Contractor made efforts to negotiate with MBEs and/or WBEs as relevant to perform specific subcontracts;

(g) Timely written requests for assistance made by the Contractor to Agency's M/WBE liaison officer and to DSBS;

(h) Description of how recommendations made by DSBS and Agency were acted upon and an explanation of why action upon such recommendations did not lead to the desired level of participation of MBEs and/or WBEs.

Agency's M/WBE officer shall provide written notice to the Contractor of the determination.

12. If **Subcontractor Participation Goals** have been established for this Contract, Agency shall evaluate and assess the Contractor's performance in meeting those goals, and such evaluation and assessment shall become part of the Contractor's overall contract performance evaluation.

## **PART B**

### **MISCELLANEOUS**

1. The Contractor shall take notice that, if this solicitation requires the establishment of a Subcontractor Utilization Plan, the resulting contract may be audited by DSBS to determine compliance with Section 6-129. See 6-129(e)(10). Furthermore, such resulting contract may also be examined by the City's Comptroller to assess compliance with the Subcontractor Utilization Plan.
2. Pursuant to DSBS rules, construction contracts that include a requirement for a Subcontractor Utilization Plan shall not be subject to the law governing Locally Based Enterprises set forth in Administrative Code Section 6-108.1.
3. DSBS is available to assist contractors and potential contractors in determining the availability of MBEs and WBEs to participate as subcontractors, and in identifying opportunities that are appropriate for participation by MBEs and WBEs in contracts.
4. Prospective contractors are encouraged to enter into joint ventures with MBEs and WBEs.
5. By submitting a bid or proposal the Contractor hereby acknowledges its understanding of the M/WBE requirements set forth herein and the pertinent provisions of Local Law 129 of 2005, and any rules promulgated thereunder, and if awarded this Contract, the Contractor hereby agrees to comply with the M/WBE requirements of this Contract and pertinent provisions of Local Law 129 of 2005, and any rules promulgated thereunder, all of which shall be deemed to be material terms of this Contract. The Contractor hereby agrees to make all reasonable, good faith efforts to solicit and obtain the participation of M/WBE's to meet the required **Subcontractor Participation Goals**.

## **ARTICLE II. ENFORCEMENT**

1. If Agency determines that a bidder or proposer, as applicable, has, in relation to this procurement, violated Section 6-129 or the DSBS rules promulgated pursuant to Section 6-129, Agency may disqualify such bidder or proposer, as applicable, from competing for this Contract and the Agency may revoke such bidder's or proposer's prequalification status, if applicable.
2. Whenever Agency believes that the Contractor or a subcontractor is not in compliance with Section 6-129 or the DSBS rules promulgated pursuant to Section 6-129, or any provision of this Contract that implements Section 6-129, including, but not limited to any Subcontractor Utilization Plan, Agency shall send a written notice to the Contractor describing the alleged noncompliance and offering an opportunity to be heard. Agency shall then conduct an investigation to determine whether such Contractor or subcontractor is in compliance.
3. In the event that the Contractor has been found to have violated Section 6-129, the DSBS rules promulgated pursuant to Section 6-129, or any provision of this Contract that implements this Section 6-129, including, but not limited any Subcontractor Utilization Plan, Agency may determine that one of the following actions should be taken:
  - (a) entering into an agreement with the Contractor allowing the Contractor to cure the violation;
  - (b) revoking the Contractor's pre-qualification to bid or make proposals for future contracts;
  - (c) making a finding that the Contractor is in default of the Contract;

- (d) terminating the Contract;
- (e) declaring the Contractor to be in breach of Contract;
- (f) withholding payment or reimbursement;
- (g) determining not to renew the Contract;
- (h) assessing actual and consequential damages;

(i) assess liquidated damages or reduction of fees, provided that liquidated damages may be based on amounts representing costs of delays in carrying out the purposes of the program established by Section 6-129, or in meeting the purposes of the Contract, the costs of meeting utilization goals through additional procurements, the administrative costs of investigation and enforcement, or other factors set forth in the Contract;

(j) exercise rights under the Contract to procure goods, services or construction from another contractor and charge the cost of such contract to the Contractor that has been found to be in noncompliance; or

- (k) take any other appropriate remedy.

4. Whenever Agency has reason to believe that an MBE or WBE is not qualified for certification, or is participating in a contract in a manner that does not serve a commercially useful function (as defined in Section 6-129), or has violated any provision of Section 6-129, Agency shall notify the commissioner of DSBS who shall determine whether the certification of such business enterprise should be revoked.

5. Statements made in any instrument submitted to Agency pursuant to Section 6-129 shall be submitted under penalty of perjury and any false or misleading statement or omission shall be grounds for the application of any applicable criminal and/or civil penalties for perjury. The making of a false or fraudulent statement by an MBE or WBE in any instrument submitted pursuant to Section 6-129 shall, in addition, be grounds for revocation of its certification.

6. The Contractor's record in implementing its Subcontractor Utilization Plan shall be a factor in the evaluation of its performance. Whenever a contracting agency determines that a contractor's compliance with a Subcontractor Utilization Plan has been unsatisfactory, the agency shall, after consultation with the city chief procurement officer, file an advice of caution form for inclusion in VENDEX as caution data.

**ATTACHMENT 7****DOING BUSINESS DATA FORM**

DOING BUSINESS ACCOUNTABILITY PROJECT

**QUESTIONS AND ANSWERS ABOUT THE DOING BUSINESS DATA FORM****What is the purpose of this *Data Form*?**

To collect accurate, up-to-date identification information about entities that have business dealings with the City of New York in order to comply with Local Law 34 of 2007 (LL 34), the recently passed campaign finance reform law. LL 34 limits municipal campaign contributions from principal officers, owners and senior managers of these entities and mandates the creation of a *Doing Business Database* to allow the City to enforce the law. The information requested in this *Data Form* must be provided, regardless of whether the entity or the people associated with it make or intend to make campaign contributions. No sensitive personal information collected will be disclosed to the public.

**Why have I received this *Data Form*?**

The contract, franchise, concession, grant or economic development agreement you are proposing on, applying for or have already been awarded is considered a business dealing with the City under LL 34. No proposal or application will be considered and no award will be made unless this *Data Form* is completed. Most transactions valued at more than \$5,000 are considered business dealings and require completion of the *Data Form*. Exceptions include transactions awarded on an emergency basis or by publicly advertised, non-pre-qualified competitive sealed bid. Other types of transactions that are considered business dealings include real property and land use actions with the City.

**What entities will be included in the *Doing Business Database*?**

Entities that hold \$100,000 or more in grants, contracts for goods or services, franchises or concessions (\$500,000 or more for construction contracts), along with entities that hold any economic development agreements or pension fund investment contracts, are considered to be doing business with the City for the purposes of LL 34 and will be included in the *Doing Business Database*. Because all of the business that an entity does or proposes to do with the City will be added together, the *Data Form* must be completed for all covered transactions even if an entity does not currently do enough business with the City to be listed in the *Database*.

**What individuals will be included in the *Doing Business Database*?**

The principal officers, owners and certain senior managers of entities listed in the *Doing Business Database* are themselves considered to be doing business with the City and will also be included in the *Database*.

- **Principal Officers** are the Chief Executive Officer (CEO), Chief Financial Officer (CFO) and Chief Operating Officer (COO), or their functional equivalents. See the *Data Form* for examples of titles that apply.
- **Principal Owners** are individuals who own or control 10% or more of the entity. This includes stockholders, partners and anyone else with an ownership or controlling interest in the entity.
- **Senior Managers** include anyone who, either by job title or actual duties, has substantial discretion and high-level oversight regarding the solicitation, letting or administration of any contract, concession, franchise, grant or economic development agreement with the City. At least one Senior Manager must be listed on the *Data Form* will be considered incomplete.

**I provided some of this information on the VENDEX Questionnaire; do I have to provide it again?**

Although the *Doing Business Data Form* and the VENDEX Questionnaire request some of the same information, they serve entirely different purposes. In addition, the *Data Form* requests information concerning senior managers, which is not part of the VENDEX Questionnaire.

**My organization is proposing on a contract with another firm as a Joint Venture that does not exist yet; how should the *Data Form* be completed?**

A joint venture that does not yet exist must submit *Data Forms* from each of its component firms. If the joint venture receives the award, it must then complete a form in the name of the joint venture.

**Will the information on this *Data Form* be available to the public?**

The names and titles of the officers, owners and senior managers reported on the *Data Form* will be made available to the public, as will information about the entity itself. However, personal identifying information, such as home address, home phone and date of birth, will not be disclosed to the public, and home address and phone number information will not be used for communication purposes.

**No one in my organization plans to contribute to a candidate; do I have to fill out this *Data Form*?**

Yes. All entities are required to return this *Data Form* with complete and accurate information, regardless of the history or intention of the entity or its officers, owners or senior managers to make campaign contributions. The *Doing Business Database* must be complete so that the Campaign Finance Board can verify whether future contributions are in compliance with the law.

**I have already completed a *Doing Business Data Form*; do I have to submit another one?**

Yes. An entity is required to submit a *Doing Business Data Form* each time it proposes on or enters a transaction considered business dealings with the City. However, the *Data Form* has both a No Change option, which only requires an entity to report its EIN and sign the last page, and a Change option, which allows an entity to only fill in applicable information that has changed since the previous completion of the *Data Form*. No entity should have to fill out the entire *Data Form* more than once.

**How does a person remove him/herself from the *Doing Business Database*?**

Any person who believes that s/he should not be listed may apply for removal from the *Database* by submitting a Request for Removal. Reasons that a person would be removed include his/her no longer being the principal officer, owner or senior manager of the entity, or the entity no longer being in business. Entities may also update their database information by submitting an update form. Both of these forms are available online at [www.nyc.gov/mocs](http://www.nyc.gov/mocs) (once there, click MOCS Programs) or by calling 212-788-8104.

**How long will an entity and its officers, owners and senior managers remain listed on the *Doing Business Database*?**

- **Contract, Concession and Economic Development Agreement holders:** generally for the term of the transaction, plus one year.
- **Franchise and Grant holders:** from the commencement or renewal of the transaction, plus one year.
- **Pension investment contracts:** from the time of presentation on an investment opportunity or the submission of a proposal, whichever is earlier, until the end of the contract, plus one year.
- **Line item and discretionary appropriations:** from the date of budget adoption until the end of the contract, plus one year.
- **Contract proposers:** for one year from the proposal date or date of public advertisement of the solicitation, whichever is later.
- **Franchise and Concession proposers:** for one year from the proposal submission date.

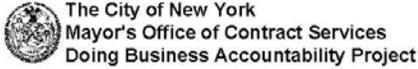
For information on other transaction types, contact the Doing Business Accountability Project.

**What are the new campaign contribution limits for people doing business with the City?**

Contributions to City Council candidates are limited to \$250 per election cycle; \$320 to Borough President candidates; and \$400 to candidates for citywide office. Please contact the NYC Campaign Finance Board for more information at [www.nycffb.info](http://www.nycffb.info), or 212-306-7100.

**The *Data Form* is to be returned to the contracting agency.**

If you have any questions about the *Data Form* please contact the Doing Business Accountability Project at 212-788-8104 or [DoingBusiness@cityhall.nyc.gov](mailto:DoingBusiness@cityhall.nyc.gov).



# Doing Business Data Form

| To be completed by the City Agency prior to distribution |  |
|--|--|
| Agency: DDC  | Transaction ID: 8502011VP0005P   |
| Check One:   | Transaction Type (check one):  |
| <input checked="" type="checkbox"/> Proposal             | <input type="checkbox"/> Concession <input checked="" type="checkbox"/> Contract <input type="checkbox"/> Economic Development Agreement |
| <input type="checkbox"/> Award                           | <input type="checkbox"/> Franchise <input type="checkbox"/> Grant <input type="checkbox"/> Pension Investment Contract                   |

Any entity receiving, applying for or proposing on an award or agreement must complete a Doing Business Data Form (see Q&A sheet for more information). Please either type responses directly into this fillable form or print answers by hand in black ink, and be sure to fill out the certification box on the last page. **Submission of a complete and accurate form is required for a proposal to be considered responsive or for any entity to receive an award or enter into an agreement.**

This Data Form requires information to be provided on principal officers, owners and senior managers. The name, employer and title of each person identified on the Data Form will be included in a public database of people who do business with the City of New York; no other information reported on this form will be disclosed to the public. **This Data Form is not related to the City's VENDEX requirements.**

Please return the completed Data Form to the City Agency that supplied it. Please contact the Doing Business Accountability Project at [DoingBusiness@cityhall.nyc.gov](mailto:DoingBusiness@cityhall.nyc.gov) or 212-788-8104 with any questions regarding this Data Form. Thank you for your cooperation.

### Section 1: Entity Information

Entity Name: \_\_\_\_\_

Entity EIN/TIN: \_\_\_\_\_

|  |
|--|
| <b>Entity Filing Status (select one):</b><br><input type="checkbox"/> Entity has never completed a Doing Business Data Form. <i>Fill out the entire form.</i><br><input type="checkbox"/> Change from previous Data Form dated _____. <i>Fill out only those sections that have changed, and indicate the name of the persons who no longer hold positions with the entity.</i><br><input type="checkbox"/> No Change from previous Data Form dated _____. <i>Skip to the bottom of the last page.</i> |
|--|

Entity is a Non-Profit:  Yes  No

Entity Type:  Corporation (any type)  Joint Venture  LLC  Partnership (any type)  
 Sole Proprietor  Other (specify): \_\_\_\_\_

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

City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_

Phone : \_\_\_\_\_ Fax : \_\_\_\_\_

E-mail: \_\_\_\_\_

Provide your e-mail address and/or fax number in order to receive notices regarding this form by e-mail or fax.

**Section 2: Principal Officers**

Please fill in the required identification information for each officer listed below. If the entity has no such officer or its equivalent, please check "This position does not exist." If the entity is filing a Change Form and the person listed is replacing someone who was previously disclosed, please check "This person replaced..." and fill in the name of the person being replaced so his/her name can be removed from the *Doing Business Database*, and indicate the date that the change became effective.

**Chief Executive Officer (CEO) or equivalent officer**

This position does not exist

The highest ranking officer or manager, such as the President, Executive Director, Sole Proprietor or Chairperson of the Board.

First Name: \_\_\_\_\_ MI: \_\_\_\_\_ Last: \_\_\_\_\_

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

Employer (if not employed by entity): \_\_\_\_\_

Birth Date (mm/dd/yy): \_\_\_\_\_ Home Phone #: \_\_\_\_\_

Home Address: \_\_\_\_\_

This person replaced former CEO: \_\_\_\_\_ on date: \_\_\_\_\_

**Chief Financial Officer (CFO) or equivalent officer**

This position does not exist

The highest ranking financial officer, such as the Treasurer, Comptroller, Financial Director or VP for Finance.

First Name: \_\_\_\_\_ MI: \_\_\_\_\_ Last: \_\_\_\_\_

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

Employer (if not employed by entity): \_\_\_\_\_

Birth Date (mm/dd/yy): \_\_\_\_\_ Home Phone #: \_\_\_\_\_

Home Address: \_\_\_\_\_

This person replaced former CFO: \_\_\_\_\_ on date: \_\_\_\_\_

**Chief Operating Officer (COO) or equivalent officer**

This position does not exist

The highest ranking operational officer, such as the Chief Planning Officer, Director of Operations or VP for Operations.

First Name: \_\_\_\_\_ MI: \_\_\_\_\_ Last: \_\_\_\_\_

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

Employer (if not employed by entity): \_\_\_\_\_

Birth Date (mm/dd/yy): \_\_\_\_\_ Home Phone #: \_\_\_\_\_

Home Address: \_\_\_\_\_

This person replaced former COO: \_\_\_\_\_ on date: \_\_\_\_\_

**Section 3: Principal Owners**

Please fill in the required identification information for all individuals who, through stock shares, partnership agreements or other means, own or control 10% or more of the entity. If no individual owners exist, please check the appropriate box to indicate why and skip to the next page. If the entity is owned by other companies, those companies do not need to be listed. If an owner was identified on the previous page, fill in his/her name and write "See above." If the entity is filing a Change Form, list any individuals who are no longer owners at the bottom of this page. If more space is needed, attach additional pages labeled "Additional Owners."

**There are no owners listed because (select one):**

- The entity is not-for-profit
- There are no individual owners
- No individual owner holds 10% or more shares in the entity
- Other (explain): \_\_\_\_\_

**Principal Owners (who own or control 10% or more of the entity):**

First Name: \_\_\_\_\_ MI: \_\_\_\_\_ Last: \_\_\_\_\_

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

Employer (if not employed by entity): \_\_\_\_\_

Birth Date (mm/dd/yy): \_\_\_\_\_ Home Phone #: \_\_\_\_\_

Home Address: \_\_\_\_\_

First Name: \_\_\_\_\_ MI: \_\_\_\_\_ Last: \_\_\_\_\_

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

Employer (if not employed by entity): \_\_\_\_\_

Birth Date (mm/dd/yy): \_\_\_\_\_ Home Phone #: \_\_\_\_\_

Home Address: \_\_\_\_\_

First Name: \_\_\_\_\_ MI: \_\_\_\_\_ Last: \_\_\_\_\_

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

Employer (if not employed by entity): \_\_\_\_\_

Birth Date (mm/dd/yy): \_\_\_\_\_ Home Phone #: \_\_\_\_\_

Home Address: \_\_\_\_\_

**Remove the following previously-reported Principal Owners:**

Name: \_\_\_\_\_ Removal Date: \_\_\_\_\_

Name: \_\_\_\_\_ Removal Date: \_\_\_\_\_

Name: \_\_\_\_\_ Removal Date: \_\_\_\_\_

Doing Business Data Form

EIN/TIN: \_\_\_\_\_

Page 4 of 4

**Section 4: Senior Managers**

Please fill in the required identification information for all senior managers who oversee any of the entity's relevant transactions with the City (e.g., contract managers if this form is for a contract award/proposal, grant managers if for a grant, etc.). Senior managers include anyone who, either by title or duties, has substantial discretion and high-level oversight regarding the solicitation, letting or administration of any transaction with the City. **At least one senior manager must be listed, or the Data Form will be considered incomplete.** If a senior manager has been identified on a previous page, fill in his/her name and write "See above." If the entity is filing a Change Form, list individuals who are no longer senior managers at the bottom of this section. If more space is needed, attach additional pages labeled "Additional Senior Managers."

**Senior Managers:**

First Name: \_\_\_\_\_ MI: \_\_\_\_\_ Last: \_\_\_\_\_

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

Employer (if not employed by entity): \_\_\_\_\_

Birth Date (mm/dd/yy): \_\_\_\_\_ Home Phone #: \_\_\_\_\_

Home Address: \_\_\_\_\_

First Name: \_\_\_\_\_ MI: \_\_\_\_\_ Last: \_\_\_\_\_

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

Employer (if not employed by entity): \_\_\_\_\_

Birth Date (mm/dd/yy): \_\_\_\_\_ Home Phone #: \_\_\_\_\_

Home Address: \_\_\_\_\_

First Name: \_\_\_\_\_ MI: \_\_\_\_\_ Last: \_\_\_\_\_

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

Employer (if not employed by entity): \_\_\_\_\_

Birth Date (mm/dd/yy): \_\_\_\_\_ Home Phone #: \_\_\_\_\_

Home Address: \_\_\_\_\_

**Remove the following previously-reported Senior Managers:**

Name: \_\_\_\_\_ Removal Date: \_\_\_\_\_

Name: \_\_\_\_\_ Removal Date: \_\_\_\_\_

**Certification**

**I certify that the information submitted on these four pages and \_\_\_\_\_ additional pages is accurate and complete. I understand that willful or fraudulent submission of a materially false statement may result in the entity being found non-responsible and therefore denied future City awards.**

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

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

Entity Name: \_\_\_\_\_

Title: \_\_\_\_\_ Work Phone #: \_\_\_\_\_

**Return the completed Data Form to the agency that supplied it.**

For information or assistance, call the Doing Business Accountability Project at 212-788-8104.

**THE CITY OF NEW YORK**  
**DEPARTMENT OF DESIGN AND CONSTRUCTION**  
**DIVISION OF STRUCTURES**  
**30-30 THOMSON AVENUE**  
**LONG ISLAND CITY, NEW YORK 11101**

**SERVICES:** Design / Construction / Construction Management

**PROJECT:** Purchase and Installation of New Asphalt Plant Equipment  
For the Hamilton Avenue Asphalt Plant Operated by the  
New York City Department of Transportation,  
Borough of Brooklyn

**FMS NUMBER:** HWKF2007

**REGISTRATION  
NUMBER:** \_\_\_\_\_

**PIN NUMBER:** 8502011VP0005P

**E-PIN:** \_\_\_\_\_

**CONTRACTOR:** \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**Telephone:** \_\_\_\_\_  
**Fax:** \_\_\_\_\_

This AGREEMENT, made and entered into this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, by and between the City of New York (the "City") acting by and through the Commissioner of the Department of Design and Construction (the "Commissioner") and \_\_\_\_\_ (the "Contractor"), located at \_\_\_\_\_.

WITNESSETH:

WHEREAS, the City desires to have design, construction, and construction management services performed for the Project described in Exhibit A (the "Project"); and

WHEREAS, the Contractor has been selected based upon and in consideration of its representation that it can perform the required services and complete the Project in the time set forth herein,

NOW, THEREFORE, in consideration of the mutual covenants and conditions contained herein, the parties hereto agree as follows:

ARTICLE 1 - DEFINITIONS

1.1 "Agreement" shall mean this Agreement which has been signed by the parties and each of the various parts of this Agreement set forth below, both as a whole and severally, whether or not existing in final approved form at the time of execution of this Agreement. In the event of any conflict between items 1.1.14 and 1.1.15, item 1.1.14 shall prevail.

- 1.1.1 The Agreement
- 1.1.2 The Budget Director's Certificate
- 1.1.3 The Construction Documents
- 1.1.4 Exhibit A: Contract Information
- 1.1.5 Exhibit B: Staffing Requirements
- 1.1.6 Exhibit C: Partial Payment for Stored Material
- 1.1.7 Exhibit D: Form of Performance and Payment Bonds
- 1.1.8 Exhibit E: Form of Irrevocable Assignment
- 1.1.9 Exhibit F: Project Labor Agreement
- 1.1.10 Exhibit G: MWBE Requirements
- 1.1.11 Exhibit H: Safety Requirements
- 1.1.12 Schedule of Prevailing Wages
- 1.1.13 Advice of Award
- 1.1.14 Request for Proposals for the Contract
- 1.1.15 Contractor's Proposal submitted for the Contract
- 1.1.16 All provisions required by law to be inserted in this Agreement, whether actually inserted or not

1.2 "Agency" shall mean a city, county, borough or other office, position, department, division, bureau, board or commission, or a corporation, institution or agency of government, the expenses of which are paid in whole or in part from the City treasury.

1.3 "Agency Chief Contracting Officer" ("ACCO") shall mean the person designated by the Commissioner to exercise such powers and duties with respect to procurement as are set forth in the Procurement Policy Board Rules.

1.4 "Allowance" shall mean those contract funds allocated for the payment of specific costs and expenses, in accordance with Article 42 hereof.

1.5 "Business Day" shall mean a day other than a Saturday, Sunday or a day on which the executive offices of the Department are not officially open for business.

1.6 "City" shall mean the City of New York.

1.7 "Commissioner" or "Agency Head" shall mean the Commissioner of the Department of Design and

Construction of the City of New York, his/her successors, or duly authorized representative(s).

1.8 "Commissioner's Representative" shall mean the Project Manager designated by the Commissioner or any successor or alternate representative selected by the Commissioner.

1.9 "Comptroller" shall mean the Comptroller of the City of New York, his/her successors, or duly authorized representatives.

1.10 "Consultant" or "Consultant(s)" shall mean any person, firm, partnership or corporation engaged by the Department to furnish architectural, engineering, design, or any other consulting services for the Project.

1.11 "Construction Documents" shall mean the final plans, drawings and specifications and all modifications thereto prepared by consultant(s) engaged by the Department and approved in writing by the Commissioner. Upon such approval, the Construction Documents shall become part of this Agreement, as set forth in Article 1.1.3.

1.12 "Contract" or "Contract Documents" shall mean the various parts of the Agreement set forth in Article 1.1.

1.13 "Contract Work" shall mean everything required to be furnished and done by the Contractor pursuant to the Agreement, except Extra Work.

1.14 "Contractor" shall mean the party of the second part hereto, whether a corporation, firm, or individual, or any combination thereof, and its, their, his or her successors, personal representatives, executors, administrators and assigns, and any person, firm or corporation who or which shall at any time be substituted in the place of the party of the second part under this Contract.

1.15 "Department" or "DDC" shall mean the Department of Design and Construction of the City of New York acting by and through the Commissioner thereof, or his duly authorized representative.

1.16 "Drawings" shall mean all graphic or written illustrations, descriptions, explanations, directions, requirements and standards of performance applied to the Work as detailed and designated in the Construction Documents.

1.17 "Extra Work" shall mean work not reasonably foreseeable at the time of the execution of this Agreement or not reasonably inferable from the Agreement.

1.18 "Final Acceptance" shall mean the final written acceptance of all Work required hereunder, as determined by the Commissioner.

1.19 "Government Entity" shall mean the United States, the State and City of New York, and any and every agency, department, court, commission, or other instrumentality or political subdivision of government of any kind whatsoever, now existing or hereafter created.

1.20 "Law(s)" shall mean each and every law, rule, regulation, order or ordinance of any kind whatsoever issued by any Government Entity, in effect from the date hereof through Final Acceptance, applicable to or affecting the Project, the Site(s), the Construction Documents, the Work, and all employees engaged in Work hereunder.

1.21 "Lien" shall mean any and every lien, lease, security interest, or encumbrance of any kind whatsoever including, but not limited to, a Mechanic's Lien.

1.22 "Materialman" shall mean any person, firm, or corporation, other than employees of the Contractor, who or which contracts with the Contractor or any Subcontractor to fabricate or deliver, or who actually fabricates or delivers, plant, material or equipment to be incorporated into the Work.

1.23 "Mayor" shall mean the Mayor of the City of New York, his successors or duly authorized representatives.

1.24 "Means and Methods of Construction" shall mean the labor, materials in temporary structures, tools, plant and

construction equipment, and the manner and time of their use, necessary to accomplish the result intended by this Agreement.

1.25 "Modification" shall mean any written amendment of this Agreement signed by both the Department and the Contractor.

1.26 "Project" shall mean the Project described in Exhibit A.

1.27 "Project Executive" shall mean the person designated by the Contractor to serve as its principal representative with respect to its obligations under the Contract and to provide, on an as needed basis, executive or management expertise and oversight with respect to the Project. The Project Executive is identified in Exhibit B.

1.28 "Safety Standards" shall mean all laws, union rules and trade or industry custom or codes of any kind whatsoever, in effect from the date hereof through Final Acceptance, pertaining to worker safety and accident prevention applicable to the Project and/or the Work (including, but not limited to, rules, regulations and standards adopted pursuant to the Occupational Safety and Health Act of 1970, as amended from time to time).

1.29 "Samples" shall mean physical examples or specimens, intended to demonstrate workmanship or the characteristics of materials and equipment and/or to establish standards by which the Work will be judged. "Samples" includes (but is not limited to) raw materials, assemblies, completed items, working components or parts thereof, required under this Agreement or by the City to ascertain whether the kind, quality, assembly, construction, workmanship, finish, color, texture, grade or other characteristics of Work submitted by the Contractor conforms to the requirements of the Agreement.

1.30 "Shop Drawing" shall mean any and all drawings, diagrams, layouts, explanations, illustrations, manufacturer's drawings or other written or graphic materials which illustrate any portion of the Work.

1.31 "Site(s)" shall mean the area(s) upon or in which the Contractor's operations hereunder are carried on, and such other areas adjacent thereto as may be designated by the Commissioner's Representative.

1.32 "Specifications" shall mean all of the directions, requirements and standards of performance applied to the Work as detailed and designated in the Construction Documents.

1.33 "Subcontractor" shall mean any person, firm, or corporation, other than employees of the Contractor, who or which contracts with the Contractor or his Subcontractors to furnish, or actually furnishes consulting services, labor, or labor and materials, or labor and equipment, at the site or in the performance of any of the Work hereunder. All Subcontractors are subject to the prior written approval of the Commissioner.

1.34 "Substantial Completion" shall mean the written determination by the Commissioner that all required Work is substantially complete. The terms and conditions that must be satisfied to achieve Substantial Completion are set forth in Article 10.4.

1.35 "Unavoidable Delay" shall mean any delay or obstruction whatsoever in the Work resulting from any act or event which has had (or may reasonably be expected to have) a material adverse effect on Contractor's ability to perform its obligations under this Agreement, if such act or event is beyond the reasonable control of Contractor and such act or event was not (and would not have been) separately or concurrently caused by a negligent or willful act or omission of Contractor and/or could not have been prevented by reasonable actions on Contractor's part. Unavoidable Delay shall include without limitation:

- 1.35.1 acts of God;
- 1.35.2 unforeseeably severe weather conditions;
- 1.35.3 fire, earthquake, explosion, landslide, lightning or flood;
- 1.35.4 epidemic;
- 1.35.5 strikes or lockouts;
- 1.35.6 riots, civil disturbance, insurrection, enemy action or war;

- 1.35.7 injunctions or orders of any Government Entity;
- 1.35.8 embargoes or blockades.

1.36 "Utilities" shall mean any and all utility services and installations whatsoever including, but not limited to, gas, water, electricity, telephone, other telecommunications, steam, sewer and storm sewer, and all piping, wiring, conduit and/or other fixtures of every kind whatsoever related thereto or used in connection therewith.

1.37 "Work" shall mean everything expressly or implicitly required to be furnished and done by the Contractor for the Project pursuant to this Agreement, and shall include both Contract Work and Extra Work.

## ARTICLE 2 - COMPLIANCE WITH LAWS

2.1 Procurement Policy Board Rules: This Contract is subject to the Rules of the Procurement Policy Board of the City of New York ("PPB Rules") in effect at the time of the receipt of proposals for this Contract. In the event of a conflict between the PPB Rules and a provision of this contract, the PPB Rules shall take precedence.

2.2 The Contractor shall comply with all local, State and Federal laws, rules and regulations applicable to this Agreement and to the work to be done hereunder.

2.3 The Contractor shall give or cause to be given all necessary notices, obtain or cause to be obtained all permits, and pay or cause to be paid all fees required in connection with the Work, and comply with all local, state and federal laws, rules and regulations affecting work of this character. These laws, rules and regulations shall take precedence over any requirements of this Contract where a conflict occurs. Nothing herein contained shall, however, be construed as permitting the use of material and equipment of lesser quality than specified hereunder, unless the specified material or equipment violates such laws, rules or regulations.

2.4 The Contractor shall be responsible for applying for and obtaining the required approval of all federal, state and local agencies having jurisdiction over the subject matter hereof. As provided in Article 10.4, such approvals are required for a determination of Substantial Completion.

2.5 In accordance with Section 165 of the State Finance Law, the Contractor agrees that tropical hardwoods, as defined in Section 165 of the State Finance Law, shall not be utilized in the performance of this Contract, except as the same are permitted by the foregoing provision of law.

## ARTICLE 3 - TIME OF ESSENCE

3.1 In performing the services hereunder, the Contractor and the City shall place emphasis on considerations which will aid in expediting the construction of the Project consistent with the construction standards and procedures of the City. The Contractor agrees to use all resources at its command so that the Project is completed in an expeditious fashion by the various Subcontractors and to this end, it shall give constant attention to the adequacy of its own and each Subcontractor's planning, personnel, equipment and the availability of materials and supplies. The Contractor and the City acknowledge that time will be of the essence for the Project and will use their best efforts to prevent delays. If a situation cannot be resolved, the Contractor shall bring it to the immediate attention of the Commissioner.

## ARTICLE 4 - OVERVIEW OF CONTRACTOR'S SERVICES

4.1 The City hereby retains the Contractor to perform the services hereinafter described, on the terms and conditions specified herein, and the Contractor hereby agrees to so serve. The Contractor is familiar with the terms of this Agreement, and the intended use of the Project upon completion of construction. The Contractor hereby certifies that it has the necessary experience, expertise, personnel and resources to fulfill its obligations under this Agreement competently and efficiently. The Contractor agrees to use its best efforts to complete this Project as soon as possible, in a manner meeting the highest professional standards.

4.2 The Contractor shall provide such services as necessary and required, as authorized in writing by the Commissioner, for the completion of the Project. The Contractor's services shall include without limitation,

investigation, planning, design, construction, management, supervision and coordination of all Work necessary and required for the Project, to effectuate its timely completion.

4.3 Project Labor Agreement: This contract is subject to a Project Labor Agreement (“PLA”) entered into between the City and the Building and Construction Trades Council of Greater New York (“BCTC”) affiliated Local Unions. The PLA is binding on the Contractor and all subcontractors of all tiers. The Contractor and its subcontractors are required to execute a “Letter of Assent” prior to award. The PLA and the Letter of Assent are available at the website set forth in Exhibit F.

## ARTICLE 5 - REPRESENTATIONS AND WARRANTIES

5.1 Responsibility and Competency: The Contractor warrants and represents as follows:

5.1.1 that it is financially solvent and sufficiently experienced and competent to perform the Work required by this Agreement, or to cause the same to be performed.

5.1.2 that its employees, agents, consultants, and subcontractors possess the requisite expertise, skill, experience and financial resources to perform the Work as required by this Agreement.

5.1.3 that (1) it is not in arrears to the City of New York upon debt, contract, or taxes; (2) it is not a defaulter, as surety or otherwise, upon any obligation of the City of New York; (3) it has not been declared not responsible or disqualified by any agency of the City of New York or State of New York, and (4) there is not any proceeding pending relating to the responsibility or qualification of the Contractor to receive public contracts.

5.2 Procurement of Agreement: The Contractor represents and warrants that no person or selling agency has been employed or retained to solicit or secure this Agreement upon an agreement or understanding for a commission, percentage, brokerage fee, contingent fee or any other compensation. The Contractor further represents and warrants that no payment, gift or thing of value has been made, given or promised to obtain this or any other agreement between the parties. The Contractor makes such representations and warranties to induce the City to enter into this Agreement and the City relies upon such representations and warranties in the execution hereof.

5.2.1 For a breach or violation of such representations or warranties, the Commissioner shall have the right to annul this Agreement without liability, entitling the City to recover all moneys paid hereunder and the Contractor shall not make claim for, or be entitled to recover, any sum or sums due under this Agreement. This remedy, if effected, shall not constitute the sole remedy afforded the City for falsity or breach, nor shall it constitute a waiver of the City's right to claim damages or refuse payment or to take any other action provided for by law or pursuant to this Agreement.

5.3 Conflicts of Interest: The Contractor represents and warrants that neither it nor any of its directors, officers, members, partners or employees, has any interest nor shall they acquire any interest, directly or indirectly, which would or may conflict in any manner or degree with the performance or rendering of the services herein provided. The Contractor further represents and warrants that in the performance of this Agreement no person having such interest or possible interest shall be employed by it. No elected official or other officer or employee of the City or Department, nor any person whose salary is payable, in whole or in part, from the City Treasury, shall participate in any decision relating to the Agreement which affects his personal interest or the interest of any corporation, partnership or association in which he is, directly or indirectly, interested; nor shall any such person have any interest, direct or indirect, in this Agreement or in the proceeds thereof.

5.4 Fair Practices: The Contractor and each person signing on behalf of the Contractor represents and warrants and certifies, under penalty of perjury, that to the best of its knowledge and belief:

5.4.1 The prices in this Contract have been arrived at independently without collusion, consultation, communication, or agreement, for the purpose of restricting competition, as to any matter relating to such prices with any other proposer or with any competitor;

5.4.2 Unless otherwise required by law, the prices which have been quoted in this contract and in the

proposal submitted by the Contractor have not been knowingly disclosed by the Contractor prior to the proposal opening, directly or indirectly, to any other proposer or to any other competitor, and

5.4.3 No attempt has been made or will be made by the Contractor to induce any other person, partnership or corporation to submit or not to submit a proposal for the purpose of restricting competition.

5.4.4 The fact that the Contractor (a) has published price lists, rates, or tariffs covering items being procured, (b) has informed prospective customers of proposed or pending publication of new or revised price lists for such items, or (c) has sold the same items to other customers at the same prices being bid, does not, without more, constitute a disclosure within the meaning of the above.

## ARTICLE 6 - TERM

6.1 The term of the Contract is set forth in Exhibit A.

## ARTICLE 7 – OWNERSHIP OF DOCUMENTS

7.1 Any and all records or documents prepared by or for the Contractor pursuant to this Agreement, including, but not limited to, office diaries, field diaries, daily records of labor, materials and equipment used, notes, reports, including laboratory and plant inspection reports, designs, drawings, tracings, estimates, specifications, schedules, and/or photographs, shall be the property of the City. During the term of this Agreement and at any time within 7 years thereafter, the Contractor shall, upon demand, promptly deliver such records or documents to the Commissioner, or make such records or documents available to the Commissioner or his authorized representatives for review and reproduction at such place as may be designated by the Commissioner. Thereafter, the City may utilize such records or documents in whole or in part or in modified form and in such manner or for such purposes or as many times as it may deem advisable without employment of or additional compensation to the Contractor.

## ARTICLE 8 - PROJECT SCHEDULE

8.1 The Contractor shall submit a Project Schedule, as directed by DDC. The proposed schedule shall be revised as directed by the Commissioner, until finally approved. Such Project Schedule shall be strictly adhered to by the Contractor.

8.2 When appropriate and directed by the Commissioner, the Project Schedule shall be revised, subject to written approval by the Commissioner. The revised Project Schedule must be strictly adhered to by the Contractor.

8.3 If the Contractor fails to adhere to the Project Schedule, or to the Revised Project Schedule, it must promptly adopt such other or additional means and methods of construction as will make up for the time lost and will assure completion in accordance with such schedule. Such other or additional means and methods of construction shall be at no additional cost to the City. This provision applies to situations where, in the determination of the Commissioner, the Contractor is at fault for failing to adhere to the Schedule.

8.4 Responsibility for Delay: In the event the Project is not completed within the timeframe set forth in the original Project Schedule, the Commissioner shall prepare a report analyzing the causes of the delay and determining responsibility for the same.

8.4.1 If the report indicates that the Contractor, as a result of its actions or inactions, is responsible for the delay, or any portion thereof, the Commissioner shall deduct from any amount due and owing to the Contractor under this Contract, the total amount of staffing expenses paid to the Contractor for the period of the delay, or any portion thereof, for which the Commissioner determines the Contractor is responsible. For the purpose of this deduction, staffing expenses shall mean the Direct Salary Rates for all Assigned Employees times the applicable Multiplier for Overhead and Profit set forth in Exhibit A. If the amount due and owing to the Contractor under this Contract is less than the total amount of the deduction described herein, the Contractor shall be liable for and agrees to pay the difference upon demand by the Commissioner.

8.4.2 If the Contractor files a dispute regarding its responsibility for the delay, or any portion thereof, the Contractor is obligated, while the dispute is pending, to continue performing any required services pursuant to this Contract, and, if demanded by the Commissioner, to pay the amount described in the paragraph above.

8.4.3 The following shall have no relevance to a determination by the Commissioner that the Contractor is responsible for the delay, or any portion thereof: (a) approval by the Commissioner of any time extension(s), and/or (2) approval by the Commissioner of any revised Project Schedule. Any such approval(s) by the Commissioner shall not be referred to or offered in evidence by the Contractor or its attorneys in any dispute or proceeding regarding the Contractor's responsibility for the delay.

## ARTICLE 9 – DESIGN SERVICES

9.1 General: The Contractor shall, through its Design Consultant, provide all design services required for the Project, as directed by the Commissioner. The Design Consultant for the Project is identified in Exhibit A. The required design services shall be provided in accordance with the description of the phases of the Project, as set forth in Exhibit A.

9.1.1 Approval: Professional design services required hereunder shall be provided by persons or firms licensed by the State of New York. Any consultant performing such services is subject to the prior written approval of the Commissioner. If an approved consultant elects to subcontract any portion of its subcontract, the proposed subconsultant is subject to the prior written approval of the Commissioner. The Commissioner's approval of a consultant or subconsultant shall not relieve the Contractor of any of its responsibilities, duties and liabilities hereunder.

9.1.2 Removal of Consultant: An approved consultant performing professional design services hereunder shall not be removed without the prior written approval of the Commissioner. The Commissioner reserves the right to require the Contractor to remove and replace an approved consultant.

9.1.3 Contractor's Responsibility for Consultant: The Contractor shall be solely responsible to the City for the acts, defaults, errors or omissions of its consultant(s) and of such consultant's officers, agents and employees, each of whom shall, for this purpose, be deemed to be the agent or employee of the Contractor to the extent of its subcontract.

9.1.2 Staffing Plan: The Contractor shall, through its Design Consultant, provide staffing for the required design services in accordance with the Staffing Plan approved by the Commissioner. The Staffing Plan shall be submitted within ten (10) business days after execution of the Contract, or as otherwise directed by the Commissioner. Such Staffing Plan must be approved by the Commissioner prior to commencement of design services hereunder.

9.2.1 Contents of Staffing Plan: The Staffing Plan shall include the items set forth below.

- (a) Key Design Personnel: Individuals named in Exhibit B as Key Design Personnel
- (b) Other Design Personnel: Required titles and specific individual for each title
- (c) Direct Salary Rate per hour for each specified individual (except any Principal), as determined by the Commissioner. The Direct Salary Rate per hour shall be the **LESSER** of (1) the individual's actual annual direct salary, computed on an hourly basis in accordance with Article 42, or (2) the Maximum Allowable Direct Salary Rate per hour for the specified title set forth in Exhibit B.
- (d) Total estimated hours per title per Phase (Pre-Construction, Construction and Post Construction)
- (e) Total estimated amounts per title per Phase (Pre-Construction, Construction, and Post Construction)
- (f) Total estimated amount for all required titles

9.2.2 Payment for Staffing: The specific personnel identified in the Staffing Plan, except for any Principal, shall be considered assigned personnel for the purpose of the Contractor's entitlement to payment for services performed by such personnel in accordance with Article 42. As specified therein, the Contractor shall not be entitled to payment for staffing expenses for: (1) any Principal(s), and (2) any personnel not included in the approved Staffing Plan. Compensation for such personnel is deemed included in the Multiplier(s).

9.2.3 Applicable Provisions: The following provisions of Article 11 apply in their entirety to the staffing plan for design services: 11.2.4, 11.2.7, 11.2.8 and 11.3.

9.3 Design Services: The Design Consultant shall be responsible for the design of all required site work, including the storm water drainage system. The storm water drainage system shall include the following: an oil/water separator, sedimentation tank, repairs to existing pipelines and drainage elements, catch basins, catch basin sumps, and other components of the drainage system required for regulatory compliance.

9.3.1 Components of Design Services: Design services shall include without limitation the following:

- (a) Preparation of coordinated final design documents for all required site work for the Project (plans, drawings and specifications).
- (b) Obtaining all required regulatory approvals of the design
- (c) Review and approval of shop drawings
- (d) Preparation of supplementary drawings, if necessary
- (e) Preparation of original drawings reflecting as-built conditions

9.3.2 Criteria for Services: All required design services shall be in accordance with the following: (1) the Design Consultant Guide, except as otherwise directed by the Commissioner, (2) Specific Requirements provided by DOT, and (3) all applicable local, state and federal laws, rules and regulations, including without limitation, the New York City Building Code.

9.3.3 Engineer of Record: All original drawings shall bear all required stamps of approval, including the seal and signature of the Engineer of Record, and shall be accompanied by all necessary applications, certificates, or permits of all local, state and federal agencies having jurisdiction over the Project.

9.3.4 Approvals: All required deliverables, including cost estimates, are subject to review and written approval by the Commissioner. All final design documents are subject to approval by all regulatory agencies whose approval of the design is required, including without limitation, the New York City Department of Transportation.

9.3.5 Patented and Proprietary Items: The Consultant shall not, without the prior written approval of the Commissioner, specify for the Project, or necessarily imply the required use of any article, product, material, fixture or form of construction, the use of which is covered by a patent, or which is otherwise exclusively controlled by a particular firm or group of firms.

The Contractor shall be liable to and hereby agrees to defend, indemnify and hold harmless the City against all claims against the City for infringement of any copyright or patent rights of systems, graphs, charts, designs, drawings or specifications furnished by the Contractor in the performance of this Contract.

9.3.6 Project Schedule: The Consultant shall perform all required design services for the Project and submit all required deliverables in accordance with the Project Schedule.

9.3.7 Tropical Hardwoods: In accordance with Section 165 of the New York State Finance Law, design documents prepared by the Consultant shall not specify the use of tropical hardwoods, as defined in Section 165 of the State Finance Law, except as such use is permitted by the foregoing provision of law.

9.4 Subcontract Requirements: The subcontract(s) between the Contractor and the consultant(s) for design services hereunder shall be in accordance with the provisions set forth below, unless otherwise authorized in a written directive from the Commissioner.

- (a) Such subcontracts shall require that all design services comply with all criteria and requirements set forth in this Contract.
- (b) Such subcontracts shall contain provisions approved in advance by the Commissioner regarding the time for completion of all required design services.

- (c) Such subcontracts shall require that the consultant carry the following types and amounts of insurance, unless an exemption is expressly authorized in advance in writing by the Commissioner: (1) comprehensive general liability insurance in the minimum amount of \$1,000,000 per occurrence (combined single limit), \$2,000,000 aggregate, with the City of New York named as an additional insured thereunder; (2) worker's compensation insurance, as required by New York State Law; (3) employer's liability insurance, in the minimum amount of \$1,000,000 per occurrence, and (4) professional liability insurance in the minimum amount of \$1,000,000 per claim, if the consultant is retained to perform professional services. The subcontract shall require that such professional liability insurance shall remain in effect for a minimum period of two years following substantial completion of all required work. All policies shall be in compliance with the requirements of Article 23 and shall be issued by companies that meet the criteria set forth therein. Proof of Insurance shall be provided to the City in accordance with Article 23.
- (d) Such subcontracts shall contain a provision regarding the resolution of disputes between the consultant and the Contractor. Such provision shall conform to the requirements set forth in Article 10.2.3 (g).
- (e) Such subcontracts shall require that the consultant agree not to make any claims against the City, its officers, agents or employees, by reason of such subcontract or any acts or omissions of the Contractor; provided however, such restrictions shall not apply to disputes submitted by consultant pursuant to dispute resolution provisions contained in the subcontract.
- (f) Such subcontracts shall include a provision requiring the Subcontractor to make payment to each of its Subcontractors or suppliers for Work performed under this Contract in the same manner and within the same time period set forth in Article 43 ("Prompt Payment").

9.5 Indemnification: The Contractor shall indemnify and hold the City of New York harmless from any and all claims or judgments for damages and from costs and expenses to which the City may be subjected or which it may suffer or incur arising out of any error, omission or negligent act in the performance of design services.

## ARTICLE 10 - CONSTRUCTION WORK

10.1 General: The Contractor shall, through its subcontractors, provide all construction work required for the Project, as directed by the Commissioner. The required construction work shall be provided in accordance with the description of the phases of the Project, as set forth in Exhibit A. If determined to be necessary by the Commissioner, such construction work shall include the removal and/or remediation of hazardous materials in the area of any required construction and/or demolition, if necessary. Hazardous materials shall include, without limitation, asbestos, methane petroleum and lead.

10.1.1 Limitation: In subcontracts entered into pursuant to this Contract, the Contractor shall not employ or otherwise engage, or cause or permit any subcontractor or sub-subcontractor at whatever tier to employ or otherwise engage: (a) the Contractor, (b) any subsidiary, affiliate or parent of the Contractor, or (c) any person whose immediate family member is employed by the Contractor at a salary in excess of ten thousand dollars (\$10,000.00) per annum, to perform work hereunder without the prior written approval of the Commissioner. For purposes of this Section, the term "immediate family member" shall mean a wife, husband, son, daughter, mother, father, brother, brother-in-law, sister, sister-in-law, son-in-law, daughter-in-law, mother-in-law, father-in-law, aunt, uncle, niece, nephew, stepparent or stepchild.

10.2 Subcontracts for Construction Work: As authorized in a written directive from the Commissioner, the Contractor shall enter into subcontracts for all construction work required for the Project. The required construction work includes the following: (a) Asphalt Equipment, including dismantling and removal of existing asphalt plant equipment, purchase and installation of new asphalt plant equipment, and performance of all plumbing, electrical and structural work required for installation of the new equipment, and (b) Site Work, including the storm water drainage system, and

10.2.1 Competitive Proposal Procedure for Asphalt Equipment: Before entering into the subcontract for Asphalt Equipment, the Contractor shall conduct a competitive proposal procedure. Such competitive proposal procedure shall be in accordance with all DDC requirements, including without limitation, the items set forth below:

- (a) The Contractor shall prepare a Request for Proposals ("RFP") for the required Asphalt Equipment and shall submit the same to the Commissioner for review and approval prior to issuance. The RFP shall include the following items:
  - (1) Proposal Requirements: The RFP shall require the proposer to submit a proposal that includes the following: (a) time for completion, (b) layout of equipment, and (c) total price for all required services.
  - (2) Performance Criteria: The RFP shall include performance criteria applicable to the Asphalt Equipment to be provided. Such performance criteria shall be provided by DDC.
  - (3) Form of Subcontract: The RFP shall include a form of subcontract that complies with the requirements set forth below.
  - (4) Project Labor Agreement: The RFP shall require the selected proposer to execute a "Letter of Assent" agreeing to be bound by the terms of the PLA.
- (b) The Contractor shall distribute the RFP to the list of firms provided by DDC.
- (c) Contracting firms submitting proposals shall be required to complete and submit all forms or documentation the Commissioner may require.
- (d) The Contractor shall submit the proposals to the Commissioner for his/her review and evaluation.
- (e) The Contractor shall award the subcontract to the proposer approved in writing by the Commissioner.

10.2.2 Competitive Bid Procedure for Site Work: Before entering into the subcontract for Site Work, including the storm water drainage system, the Contractor shall conduct a competitive bid procedure. Such competitive bid procedure shall be in accordance with all DDC requirements, including without limitation, the items set forth below:

- (a) The Contractor shall prepare a Request for Bids ("RFB") for the required Site Work, including the storm water drainage system, and shall submit the same to the Commissioner for review and approval prior to issuance. The RFB shall include the following items:
  - (1) Bid Form. If so directed, the Contractor shall use the Bid Form provided by DDC.
  - (2) Form of subcontract. Such subcontract shall comply with the requirements set forth below.
  - (3) Requirements applicable to bidders, as specified by DDC, including without limitation, requirements for MWBE participation and safety requirements. The Contractor shall comply with directions from DDC regarding the review of requirements included in the RFB. After the receipt of bids, DDC shall determine bidder compliance with such requirements.
- (b) The Contractor shall prepare a list of contracting firms to receive the RFB (the "Selected Bidders List"). Selected Bidders must comply with the following items:
  - (1) Requirements specified by DDC, including without limitation, (a) compliance with the Project Labor Agreement (PLA), and (b) acceptable Safety Questionnaire. DDC shall provide forms regarding these requirements and shall determine bidder compliance with the same.
  - (2) Criteria set forth in the PPB Rules (Criteria for Prequalification, as well as Criteria for Responsibility). Such criteria are summarized below.
    - (a) Financial capability and availability of appropriate resources
    - (b) Technical expertise and experience with similar projects
    - (c) Organization, staffing and ability to undertake the work
    - (d) Satisfactory record of performance, confirmed by references
    - (e) Satisfactory record of business integrity
    - (f) Record of compliance with all laws, rules, regulations and executive orders applicable to the work
    - (g) Demonstration that the bidder has a valid license for the work, unless expressly authorized otherwise by the Commissioner (applicable to electrical and plumbing work only)
    - (h) Satisfactory safety record

- (c) The Contractor shall submit the Selected Bidders List to the Commissioner for review and approval prior to issuance of the RFB. Such Selected Bidders List shall include the following items: (1) names of firms proposed as bidders; (2) criteria used for inclusion on the list, and (3) documentation demonstrating compliance by each firm with the criteria for inclusion on the list.
- (d) The Contractor shall issue the RFB to a minimum of twelve (12) firms and shall receive a minimum of six (6) sealed bids for the required construction work. The Contractor shall advise the Commissioner in writing not less than three (3) business days in advance of the bid opening. The Commissioner's Representative must be present at the bid opening.
- (e) Contracting firms submitting bids shall be required to complete and submit all forms or documentation the Commissioner may require.
- (f) The Contractor shall submit a tabulation of the bids received to the Commissioner for his/her review and approval. If any bid received by the Contractor contains conditions and/or exclusions, the Contractor shall provide written notification of the same to the Commissioner. The Contractor shall proceed as directed by the Commissioner.
- (g) The Contractor shall award the subcontract to the lowest responsive and responsible bidder approved in writing by the Commissioner.
- (h) In the event less than six bids are received, no subcontract shall be awarded, unless the Contractor obtains the prior written approval of the Commissioner.

10.2.3 Subcontract Requirements: Subcontracts between the Contractor and subcontractors for construction work for the Project shall be in accordance with the provisions set forth below, unless otherwise authorized in a written directive from the Commissioner.

- (a) Such subcontracts shall require that all labor performed and all material furnished shall strictly comply with all requirements of this Agreement.
- (b) Such subcontracts shall contain the DDC General Conditions, including the Addendum to the General Conditions, and the DDC Safety Requirements. Such subcontracts shall contain provisions approved in advance by the Commissioner regarding: (1) time for completion; (2) assessment of liquidated damages, and (3) warranties and/or guarantees.
- (c) Such subcontracts shall contain the same terms and conditions with respect to: (1) method of payment and retained percentages, as set forth in Article 42; (2) substantial completion, as set forth in Article 10.4; (3) method of payment for extra work, as set forth in Article 28; (4) extension of time, as set forth in Article 10.5; (5) termination without cause, as set forth in Article 45; (6) termination for cause, as set forth in Article 46; (7) omitted work, as set forth in Article 31; (8) tax exemption, as set forth in Article 49, and (9) no damage for delay, as set forth below.

The Contractor shall include in all subcontracts a provision whereby the subcontractor agrees to make no claim for damages for delay in the performance of this Contract occasioned by any act or omission to act of the City or any of its representatives, and agrees that any such claim shall be fully compensated for by an extension of time to complete performance of the work as provided herein.

- (d) ***This paragraph shall only apply if the Contractor is so directed in writing by DDC.*** Such subcontracts shall require that all subcontractors whose subcontracts are in excess of \$500,000 provide performance and payment bonds, each of which shall be in an amount equal to 100% of the subcontract price and shall name the Contractor as obligee thereunder. Such bonds shall be provided by a surety company licensed and authorized to do business in the State of New York. Such bonds shall be identical in all respects to the form of bonds attached hereto as Exhibit D, with no variations, additions, or deletions to such form of bonds. Premiums for required bonds must be included in the subcontractor's bid price. The subcontractor shall be required to submit two (2) originals of such bonds, one of which shall be submitted to the City by the Contractor immediately after receipt. With respect to performance and payment bonds submitted by subcontractors hereunder, the Contractor agrees, immediately upon receipt of the bonds, to execute an irrevocable assignment in accordance with the form of assignment attached hereto as Exhibit E. The Contractor shall submit such executed assignment to the City at the time it submits the original bonds.

- (e) Such subcontracts shall require that the subcontractor carry the types and amounts of insurance set forth in Schedule A of the General Conditions, which will be provided by the City. All required policies shall be in accordance with the terms and conditions set forth in Article 23 of this Contract. Proof of Insurance shall be provided to the City in accordance with Article 23.3.
- (f) Such subcontracts shall contain the following articles and shall require subcontractor compliance with the same.
  - (1) Article 38: Labor Law Requirements
  - (2) Article 39: Payroll Reports
  - (3) Article 41: Noise Control Code Provisions
  - (4) Article 43: Prompt Payment
  - (5) Article 51: Locally Based Enterprise Program
  - (6) Article 49: Supplies, Labor, Services Materials and Tax Exemption
  - (7) Article 65: Ultra Low Sulfur Diesel Fuel
  - (8) Article 66: Ultra Low Sulfur Diesel Fuel (Consolidated Construction Act)
  - (9) Article 68: Participation by Minority-Owned and Women-Owned Business Enterprises in City Procurement (applicable only to the subcontract for site work).
- (g) Such subcontracts shall contain a provision regarding the resolution of disputes between the subcontractor and the Contractor. Such provision shall conform to the requirements set forth below.
  - (1) Such provision shall provide that all disputes the subcontractor may have of the kind delineated in Article 29 of this Agreement shall be resolved by the City in accordance with Article 29 and the PPB Rules. As set forth in Article 11, disputes submitted by a subcontractor to the Contractor must be submitted by the Contractor to the City for resolution in accordance with Article 29.
  - (2) Such provision shall provide that all terms, conditions, requirements and limitations set forth in Article 29, including the limitation on judicial review, shall apply to disputes submitted by the subcontractor, except as otherwise provided in paragraph (3) below.
  - (3) Such provision shall provide that subcontractor disputes and related material shall be submitted to the Contractor, not to the City. Such provision shall contain time frames specified by the Contractor for the submission of disputes and related material by the subcontractor to the Contractor. Such time frames shall be reasonable and substantially similar to the time frames set forth in Article 29.
  - (4) Such provision shall provide that the subcontractor agrees that it has no right to submit a dispute to the City.
- (h) Such subcontracts shall require that the subcontractor agree not to make any claims against the City, its officers, agents or employees, by reason of such subcontract or any acts or omissions of the Contractor; provided however, such restrictions shall not apply to (1) demands filed by subcontractors pursuant to Article 10.6 hereof, or (2) disputes submitted by subcontractors pursuant to dispute resolution provisions contained in the subcontract, as described in paragraph (g) above.
- (i) Such subcontracts shall stipulate that the subcontractor, without any further notification or other process, gives its unconditional consent for its insurance carrier to release directly to the City documentation verifying its actual rate for workers' compensation insurance.

10.2.4 Payment to Subcontractors: Payment by the Contractor to subcontractors shall be in accordance with the provisions set forth below:

- (a) The Contractor shall pay all subcontractors for and on account of work performed by such subcontractors in accordance with the terms of their respective subcontracts. If required by the Commissioner, the Contractor shall submit satisfactory evidence that it has made such payment.
- (b) The Contractor shall include on each requisition for payment the following data: subcontractor name, value of the subcontract, total amount previously paid to subcontractor for work previously requisitioned, and the amount, including retainage, to be paid to the subcontractor for work included

in the requisition.

10.2.5 Approval of Subcontractors: All subcontractors and the dollar amounts of their subcontracts are subject to the prior written approval of the Commissioner. If an approved subcontractor elects to subcontract any portion of its subcontract, the proposed sub-subcontractor and the dollar amount of its sub-subcontract are subject to the prior written approval of the Commissioner. No subcontractor or sub-subcontractor shall be permitted on the site until such written approval as required herein has been obtained. Any proposed change order to any subcontract(s) hereunder is subject to the prior written approval of the Commissioner. The Commissioner's approval of a subcontractor shall not relieve the Contractor of any of its responsibilities, duties and liabilities hereunder.

10.2.6 Contractor's Responsibility for Subcontractors: In the event of default by any of the Contractor's Subcontractors, the following conditions shall apply:

- (a) The Contractor shall not be entitled to any payment whatsoever for any and all expenses, including without limitation staffing and/or administrative expenses, incurred by the Contractor in connection with the process of defaulting such Subcontractor and/or the bidding and/or other procedures involved in obtaining another Subcontractor to complete the required Work.
- (b) The Contractor shall be responsible to compensate the City for any and all expenses, including without limitation administrative and/or professional design costs, incurred by the City in connection with the process of defaulting such Subcontractor and/or the bidding and/or other procedures involved in obtaining another Subcontractor to complete the required work. The Commissioner shall determine the amount of any such expenses incurred by the City and such determination shall be final, binding and conclusive upon the Contractor.

10.3 Liquidated Damages: The Commissioner shall specify an amount of liquidated damages to be included in each subcontract for construction work for the Project. As directed by the Commissioner, the Contractor shall include such specified liquidated damage amount in each subcontract for construction work for the Project.

10.3.1 Any and all moneys collected by the Contractor as liquidated damages from its Subcontractors shall be paid by the Contractor to the City.

10.3.2 In each subcontract for construction work, the Contractor shall include a provision expressly giving the City a right of action against the Subcontractor in the event such subcontractor fails to pay any liquidated damages determined to be due and owing under the subcontract.

#### 10.4 Requirements for Substantial Completion

10.4.1 Substantial Completion of the required construction work shall occur when, in the sole determination of the Commissioner, all of the conditions set forth below have been satisfied.

- (a) Contractor has obtained and delivered to the Commissioner: (1) the required written approval of any agency having jurisdiction over the work, including without limitation, the Department of Buildings, the Fire Department and the Department of Environmental Protection; (2) all certificates of inspection for the Work, and (3) a temporary Certificate of Occupancy for the Work.
- (b) Contractor has completed all training sessions required by the City for equipment and/or systems installed for the Project.
- (c) All utilities specified or required under the Contract are connected and function properly.
- (d) The City can use and occupy the facility for the intended use and purpose.
- (e) Contractor and the Commissioner's Representative have agreed in writing upon the Final Punch List and the date for Final Acceptance of all required Work, including completion of all Punch List items, or, if they are unable to agree, the Commissioner's Representative has prepared and issued in writing to the Contractor the Final Punch List and the date of Final Acceptance.
- (f) All Work, except the items on the Final Punch List as approved by the Commissioner's Representative, is complete in all respects and is in compliance with the Contract to the satisfaction of the Commissioner's Representative.

- (g) Contractor has delivered to the Commissioner's Representative a final verified statement of claims as described in Article 42 of the Agreement.
- (h) Contractor has submitted to the Commissioner written certification that Contractor has paid all taxes and fees (including real property taxes and income or franchise taxes) due and payable by Contractor to the City prior to Substantial Completion.
- (i) Contractor has submitted written certification that all of the foregoing conditions have been satisfied and the Commissioner has approved Contractor's certification.

10.4.2 The Commissioner, in his/her sole discretion, may make a determination of Substantial Completion with respect to the work of a particular subcontract. In the event that the Commissioner makes such a determination:

- (a) The Commissioner may reduce the amount of retainage held by the Department, applicable to the particular subcontract, to one percent (1%), pursuant to Article 42.4.4; and
- (b) The applicable period of maintenance and guarantee, set forth in Article 25, shall not begin until the date of Substantial Completion of the Project, as described in Article 10.4.1.

10.4.3 Alternatively, Substantial Completion shall occur on any date certified by the Commissioner, who shall have discretion to waive any of the foregoing conditions.

10.5 Extensions of Time for Subcontracted Work: If the performance of construction work by Subcontractors hereunder is delayed for a reason set forth in Article 10.5.1 below, the Contractor may be allowed a reasonable extension of time. An extension of time for subcontracted work may be granted only by the Commissioner, upon written application by the Contractor.

10.5.1 Grounds for Extension: If such application is made, the Contractor shall be entitled to an extension of time for delay in completion of subcontracted work, if such delay is caused solely: (1) by the acts or omissions of the City, its officers, agents or employees; or (2) by the act or omissions of other contractors; or (3) by unavoidable delay, as defined in Article 1.35 hereof, or other supervening conditions entirely beyond the control of either party hereto. The Contractor shall, however, be entitled to an extension of time for such causes only for the number of days of delay which the Commissioner may determine to be due solely to such causes, and then only if the Contractor shall have strictly complied with all of the requirements of Articles 8, 16, and 17 hereof.

10.5.2 Extension for Concurrent Causes of Delay: The Contractor shall not be entitled to receive a separate extension of time for each of several causes of delay operating concurrently, but, if at all, only for the actual period of delay in completion of the subcontracted work as determined by the Commissioner, irrespective of the number of causes contributing to produce such delay. If one of several causes of delay operating concurrently results from any act, fault or omission of the Contractor or of his Subcontractors or materialmen, and would of itself (irrespective of the concurrent causes) have delayed the subcontracted work, no extension of time will be allowed for the period of delay resulting from such act, fault or omission. The determination made by the Commissioner shall be binding and conclusive on the Contractor. The granting of an application for an extension of time for causes of delay other than those herein referred to shall be entirely within the discretion of the Commissioner.

Permitting the Contractor to continue with the subcontracted work after the time fixed for its completion has expired, or after the time to which such completion may have been extended has expired, or the making of any payment to the Contractor after such time, shall in no way operate as a waiver on the part of the City of any of its rights under this Contract.

10.5.3 Application for Extension of Time: Before the Contractor's request for a time extension for subcontracted work may be approved, the Contractor must within five (5) days after commencement of the condition which allegedly has caused or is causing the delay, submit a written application to the Commissioner identifying:

- (a) the Contractor; the Subcontractor; the Contract registration number; and Project description;
- (b) liquidated damage assessment rate, as specified in the subcontract;
- (c) original subcontract bid amount;
- (d) the original subcontract start date and completion date;

- (e) any previous time extensions granted (number and duration); and
- (f) the extension of time requested.

In addition, the application for extension of time shall set forth in detail:

- (a) the nature of each alleged cause of delay in completing the work;
- (b) the date upon which each such cause of delay began and ended and the number of days attributable to each such cause;
- (c) a statement that the Contractor waives all claims except for those delineated in the application, and the particulars of any claims which the Contractor does not agree to waive. For time extensions for final completion payments, the application shall include a detailed statement of the dollar amounts of each element of claim item reserved; and
- (d) a statement indicating the Contractor's understanding that the time extension is granted only for the purpose of permitting continuation of subcontract performance and payment for work performed and that the City retains its right to conduct an investigation and assess liquidated damages as appropriate in the future.

10.5.4 Determination of Time Extensions: Time extensions for subcontracted work shall be determined in writing by the Commissioner.

10.5.5 Delay Analysis: For extensions of time for final completion payments for subcontracted work, the ACCO shall prepare a written analysis of the delay (including a preliminary determination of the causes of delay, the beginning and end dates for each such cause of delay, and whether the delays are excusable under the terms of the Contract). The report shall be made a part of the agency contract file.

10.5.6 Assessment of Liquidated Damages: In the case of final completion payments for subcontracted work, liquidated damages shall be assessed as determined by the delay analysis. However, neither the failure to assess liquidated damages at this time, nor the report itself, nor the granting of a time extension at final completion, shall operate as a waiver or release of any claim the City may have against the Subcontractor for either actual or liquidated damages.

## 10.6 Payment Guarantee

10.6.1 In the event the terms of this Contract do not require the Contractor or its Subcontractor(s) to provide a payment bond, the City shall, in accordance with the terms of this Article, guarantee payment of all lawful demands for: (a) wages and compensation for labor performed and/or services rendered, and (b) materials, equipment, and supplies provided, whether incorporated into the Work or not, when demands have been filed with the City as provided hereinafter by any person, firm, or corporation which furnished labor, material, equipment, supplies, or any combination thereof, in connection with the Work performed hereunder (hereinafter referred to as the "beneficiary") at the direction of the City, the Contractor or its Subcontractor(s). For the purpose of this Article 10.6, Subcontractor shall mean any person, firm, or corporation, other than employees of the Contractor, who or which contracts with the Contractor to furnish, or actually furnishes, labor, or labor and materials, or labor and equipment, at the site or in the performance of any of the Work hereunder.

10.6.2 The provisions of Article 10.6.1 above, are subject to the following limitations and conditions.

- (a) The guarantee is made for the benefit of all beneficiaries as defined in Article 10.6.1, above, provided that those beneficiaries strictly adhere to the terms and conditions of this Article 10.6.2.
- (b) Nothing in this Article shall prevent a beneficiary providing labor, services or material for the work from suing the Contractor or its Subcontractor(s) for any amounts due and owing the beneficiary by the Contractor or its Subcontractor(s).
- (c) All demands made against the City pursuant to this Article shall be made within four (4) months from the date payment is due on the invoice or invoices submitted by the beneficiary to the Contractor or its Subcontractor(s) for labor or work done or for materials or supplies delivered, or, if the demand is for wages, four (4) months from the date the wages were due to be paid to the beneficiary.

- (d) All demands made against the City by such beneficiary shall be presented to the Commissioner's Representative along with all written documentation concerning the demand which the Commissioner's Representative deems appropriate or necessary, which may include, but shall not be limited to: the subcontract or sub-subcontract; any invoices presented to the Contractor or subcontractor for payment; the notarized statement of the beneficiary that the demand is due and payable, that a request for payment has been made of the Contractor or Subcontractor and that the demand has not been paid by the Contractor or Subcontractor within the time allowed for such payment by the subcontract or sub-subcontract, and copies of any correspondence between the beneficiary and the Contractor or Subcontractor concerning such demand. The City shall notify the Contractor or Subcontractor that a demand has been made. The Contractor or Subcontractor shall inform the City of any defenses to the demand, and shall forward to the City any documents the City requests concerning the demand.
- (e) The City shall make payment only if, after considering all defenses presented by the Contractor or Subcontractor, it determines that the payment is due and owing to the beneficiary making the demand.
- (f) The City will not initiate the payment process of this Article or make payment on a demand where the beneficiary making the demand has filed a lien against the Work or otherwise sues the City prior to receiving a written notice from the City that it will not pay the demand.
- (g) No beneficiary shall be entitled to interest from the City, or to any other costs, including but not limited to attorney's fees.

10.6.3 Upon the receipt by the City of a demand pursuant to this Article, the City may withhold from any payment otherwise due and owing to the Contractor under this Contract an amount sufficient to satisfy the demand.

- (a) In the event the City determines that the demand is valid, the City shall notify the Contractor of such determination and the amount thereof, and direct the Contractor to immediately pay such amount to the beneficiary. In the event the Contractor, within seven (7) days of receipt of such notification from the City, fails to pay the beneficiary, such failure shall constitute an automatic and irrevocable assignment of payment by the Contractor to the beneficiary for the amount of the demand determined by the City to be valid. The Contractor, without further notification or other process, hereby gives its unconditional consent to such assignment of payment to the beneficiary and authorizes the City, on its behalf, to take all necessary actions to implement such assignment of payment, including without limitation the execution of any instrument or documentation necessary to effectuate such assignment.
- (b) In the event that the amount otherwise due and owing to the Contractor by the City is insufficient to satisfy such demand, the City may, at its option, require payment from the Contractor of an amount sufficient to cover such demand and exercise any other right to require or recover payment which the City may have under Law or Contract.
- (c) In the event the City determines that the demand is invalid, any amount withheld pending the City's review of such demand shall be paid to the Contractor; provided, however, no lien has been filed. In the event a lien has been filed, the terms and conditions set forth in Article 24 shall apply.

10.6.4 The provisions of this Article shall not prevent the City and the Contractor from resolving disputes in accordance with the rules of the Procurement Policy Board, where applicable.

10.6.5 In the event the City determines that the beneficiary is entitled to payment pursuant to this Article, such determination and any defenses and counterclaims raised by the Contractor shall be taken into account in evaluating the Contractor's performance.

10.6.6 Nothing in this Article shall relieve the Contractor of the obligation to pay the claims of all persons with valid and lawful claims against the Contractor relating to the work.

10.6.7 The Contractor shall not require any performance, payment or other bonds of any Subcontractor, unless required by Article 10.2.3(d).

10.6.8 The payment guarantee made pursuant to this Article shall be construed in a manner consistent with Section 137 of the State Finance Law and shall afford to persons furnishing labor or materials to the Contractor or his

Subcontractors in the prosecution of the Work under this Contract all of the rights and remedies afforded to such persons by such section, including but not limited to, the right to commence an action against the **City** on the payment guarantee provided by this Article within the one year limitations period set forth in Section 137(4)(b).

#### ARTICLE 11 - CONSTRUCTION MANAGEMENT SERVICES

11.1 General: The Contractor shall provide, to the satisfaction of the Commissioner, all services necessary and required for the inspection, supervision, management, coordination and administration of the Project, so the required construction work is successfully completed in a timely fashion. The Contractor shall provide construction management services as directed by the Commissioner. The services to be provided by the Contractor shall include without limitation the services set forth in this Article. The Contractor shall fully cooperate with representatives of the Commissioner concerning all aspects of the Project.

11.2 Staffing Plan: The Contractor shall provide staffing for the required CM services in accordance with the Staffing Plan approved by the Commissioner. The Staffing Plan shall be submitted within ten (10) business days after execution of the Contract, or as otherwise directed by the Commissioner. Such Staffing Plan must be approved by the Commissioner prior to commencement of CM services hereunder.

11.2.1 Contents of Staffing Plan: The Staffing Plan shall include the items set forth below.

- (a) Key CM Personnel: Individuals named in Exhibit B as Key CM Personnel
- (b) Other CM Personnel: Required titles and specific individual for each title
- (c) Direct Salary Rate per hour for each specified individual (except Project Executive), as determined by the Commissioner. The Direct Salary Rate per hour shall be the **LESSER** of (1) the individual's actual annual direct salary, computed on an hourly basis in accordance with Article 42, or (2) the Maximum Allowable Direct Salary Rate per hour for the specified title set forth in Exhibit B.
- (d) Total estimated hours per title per Phase (Pre-Construction, Construction and Post Construction)
- (e) Total estimated amounts per title per Phase (Pre-Construction, Construction, and Post Construction)

11.2.2 Project Executive: The Project Executive, identified in Exhibit B, shall serve as the Contractor's principal representative with respect to its obligations under this contract. Such Project Executive shall be responsible for coordinating the activities of personnel performing services and for providing, on an as needed basis, executive or management expertise and oversight with respect to the Project. The Contractor shall not be entitled to reimbursement for services provided by any Project Executive(s). Compensation for services provided by any Project Executive(s) is deemed included in the Multiplier.

11.2.3 Key Construction Management (CM) Personnel: The Key CM Personnel, identified in Exhibit B, shall provide all services necessary and required for the inspection, supervision, management, coordination and administration of the Project, so the required construction work is properly executed, completed in a timely fashion and conforms to the requirements of the Construction Documents, as well as to good construction practice.

11.2.4 Agreement to Assign: The Contractor specifically agrees to assign to the Project for its entire duration, the specific individuals identified in the Staffing Plan (Exhibit B) as the Project Executive and the Key CM Personnel. These individuals were identified by the Contractor in its Proposal for the Contract. Failure by the Contractor to provide any of the individuals identified in the Staffing Plan as Project Executive and/or Key CM Personnel shall be considered a material breach of the Contract and grounds for termination for cause. Replacement of such Project Executive and/or Key CM Personnel will only be permitted in the following circumstances: (1) if the designated individual is no longer employed by the Contractor, or (2) if the City does not direct the Contractor to commence work on the Project within six (6) months of the date on which the Contractor submitted its Proposal for the Contract. Replacement of such Project Executive and/or Key CM Personnel must comply with the conditions set forth below.

11.2.5 Other Construction Management (CM) Personnel: In addition to the Key CM Personnel, other CM personnel were identified by the Contractor in its Proposal for the Contract. Such other CM personnel will provide services that are supportive or ancillary to the services provided by the Key CM Personnel. Replacement of such CM

personnel must comply with the conditions set forth below.

11.2.6 Payment for Staffing: The specific personnel identified in the Staffing Plan, except for any Project Executive(s), shall be considered assigned personnel for the purpose of the Contractor's entitlement to payment for services performed by such personnel in accordance with Article 42. As specified therein, the Contractor shall not be entitled to payment for staffing expenses for: (1) any Project Executive(s), and (2) any personnel not included in the approved Staffing Plan. Compensation for such personnel is deemed included in the Multiplier(s).

11.2.7 Revisions to the Staffing Plan: Any revisions to the Staffing Plan are subject to the prior written approval of the Commissioner.

- (a) Replacement Personnel: No substitutions for assigned personnel shall be permitted unless the proposed replacement has received the prior written approval of the Commissioner. Replacement personnel must possess qualifications substantially similar to those of the personnel being replaced. As set forth above, replacement of the Project Executive and/or the Key CM Personnel will not be permitted unless the designated individual dies or is no longer in the employ of the Contractor.
- (b) Changes by the Commissioner: The Commissioner reserves the right to direct changes to the Staffing Plan, including without limitation, modifying the titles of personnel necessary for the Project and increasing or decreasing the personnel assigned to the Project, based upon the scope of the required Work. The Contractor shall increase or decrease the personnel assigned to the Project, as directed by the Commissioner.
- (c) Removal of Personnel: At the Commissioner's request at any time, the Contractor shall remove any personnel and substitute another employee of the Contractor reasonably satisfactory to the Commissioner. The Commissioner may request such substitution at any time, in his/her sole discretion.
- (d) Revisions Due to Delay: In the event completion of the Project is delayed for any reason, including without limitation, strike, work stoppage, severe weather conditions or other circumstances not due to the fault of the Contractor, the Commissioner shall, in writing, direct revisions to the Staffing Plan to decrease the level of staffing to be maintained throughout the delay. The Contractor shall be reimbursed for the cost of the staffing it is directed by the Commissioner to maintain. Upon termination of the delay, the Contractor shall restore the level of staffing as directed by the Commissioner.

11.2.8 Night Differential/Overtime: The Contractor and its Design Consultant shall each provide a statement describing its company policy with respect to payment of a premium for services performed during other than regular business hours (i.e., premium for Night Differential and/or Overtime). The statement describing the policy shall indicate: (1) whether the policy is consistently applied to all clients; (2) the designated class(s) of employees to whom such policy applies, and (3) the premium or rate of increase to be paid to employees for such services. For the purpose of payment, the policy regarding payment of a premium for services performed during other than regular business hours is subject to approval by the Commissioner. Approval shall only be given if the policy is reasonable, consistently applied to all clients and in accordance with standard practice in the industry. Payment of a premium for services performed during other than regular business hours is subject to the limitation set forth in Article 42.

11.3 Non-Reimbursable Services: Throughout the Project, the Contractor and its Design Consultant shall be responsible for providing the non-reimbursable services set forth below. Except as otherwise provided below, all costs for such non-reimbursable services are deemed included in each respective Multiplier.

11.3.1 The Contractor and its Design Consultant shall provide overnight delivery of the following Project documents: (1) bid and contract documents; (2) all required submittals, including without limitation shop drawings, material samples and catalogue cuts; (3) change orders; (4) documents with respect to payment, and (5) any other critical communications and/or documents.

11.3.2 The Contractor and its Design Consultant shall provide transportation, including parking and tolls, for the Project Executive(s) and all personnel assigned to the Project, except as otherwise provided below. The transportation provided shall be vehicular, unless the Project site can be easily accessed by public transportation.

- (a) In the event the Contractor and/or its Design Consultant is directed in advance in writing by the Commissioner to provide services which require long distance travel, the Contractor and/or its Design Consultant shall be reimbursed for expenses incurred in connection with such long distance travel.
- (b) Long distance travel shall mean travel which is in excess of 75 miles from whichever of the following is closer to the destination: (1) Columbus Circle, or (2) the home office of the Contractor or its Design Consultant.
- (c) Reimbursement for long distance travel expenses shall be as set forth in Article 42.5.

11.3.3 The Contractor and its Design Consultant shall provide communications equipment and service, including without limitation cellular telephones, for the Project Executive(s) and all personnel assigned to the Project. The telephone numbers of all personnel assigned to the Project shall be submitted to the Commissioner.

11.4 Services During Pre-Construction Phase: The Contractor shall provide construction management services during the Pre-Construction Phase, as directed in writing by the Commissioner. Such construction management services shall include without limitation the services set forth below.

11.4.1 Review and evaluate the overall budget for the Project, taking into account all funds available or to be made available, and identify amounts, including contingencies, available for each major activity, including design, construction, and construction management. The budget for the Project must take into consideration any anticipated increases in the cost of labor and/or material. The Contractor shall provide monthly reports to the Commissioner updating the budget for the Project, including a comparison of the original budget with current disbursements and the estimated cost to complete.

11.4.2 Schedule and conduct meetings with representatives of the Commissioner, the Consultant(s), the sponsoring agency, regulatory agencies and any other entities or individuals involved with the Project. The Contractor shall prepare minutes of such meetings in a format authorized by the Commissioner and shall distribute such minutes to all attendees.

11.4.3 Prepare correspondence or other communications to the Consultant(s) as required in order to advance the Project.

11.4.4 Take appropriate action to ensure that all required filings with regulatory agencies with respect to the design have been made.

11.4.5 Reports: Provide reports with respect to design documents at various stages of the design process, as directed by the Commissioner. Unless otherwise specified, such reports shall include the items set forth below.

- (a) Review of Design Documents: The Contractor shall review and provide written comments with respect to design documents for the Project prepared by the Consultant. The Contractor's review and comments shall address the issues set forth below.
  - (1) constructability;
  - (2) coordination;
  - (3) economy and efficiency;
  - (4) construction methods and materials;
  - (5) availability of materials and labor;
  - (6) minimalization of impact on agency operations;
  - (7) division of the Work for the purpose of bidding, taking into account such factors as the type or scope of Work to be performed, time of performance, availability of labor, community relations and other pertinent data relating to the various trades involved;
  - (8) time of performance;
  - (9) compliance with the required scope of Work;
  - (10) compliance with criteria set forth in the DDC Guide for Consultants;
  - (11) compliance with DDC comments;

- (12) avoidance of possible conflicts and overlapping jurisdiction among the Subcontractors performing Work for the Project, including recommended solutions for the elimination of such conflicts or overlaps, and
- (13) avoidance of inconsistencies, problems, delays and change orders during the construction process.

In addition to and without limiting the foregoing, the Contractor shall, as part of its review of the design documents, (1) identify any issues that may generate problems during construction; (2) make recommendations for any changes in the Work it considers necessary or desirable, and (3) make any observations or raise any concerns it may have concerning the design or the structural integrity of the same. Notwithstanding anything to the contrary contained in this Article 11, the Contractor shall have no obligation to identify and/or correct professional errors or omissions in the design documents.

- (b) Detailed Cost Estimate: The Contractor shall provide a detailed cost estimate for the Project, based upon design documents prepared by the Consultant.

11.4.6 Prepare Bid and Contract Documents for the Project that are complete and comply with all DDC requirements. The Contractor shall ensure that the Bid and Contract Documents include all construction Work, as well as the DDC General Conditions. If required for the Project, such General Conditions shall include provisions for temporary facilities necessary to enable the Subcontractors to perform their work. The Contractor shall have no responsibility for the preparation of design documents or other documents for which Consultant has responsibility.

11.4.7 During the bidding process for the construction subcontracts, make recommendations to the Commissioner to coordinate the work of the Consultant(s) to assure that any required addenda are promptly issued.

11.4.8 Perform all services with respect to the process of bidding and awarding subcontracts as set forth in Article 10.

11.5 Services During Construction Phase: The Contractor shall provide construction management services during the Construction Phase, as directed by the Commissioner. Such construction management services shall include without limitation the services set forth below.

11.5.1 Prior to the commencement of the Work, obtain or verify that the Subcontractor(s) have obtained all necessary permits, certificates, licenses or approvals, required for the performance of the Work by the New York City Building Code, the Electrical Code or any other applicable law, rule or regulation of any government entity. Assure that no Work proceeds in the absence of such necessary permits, certificates, licenses or approvals.

11.5.2 Transmit, or ensure that the Subcontractor(s) have transmitted, to the Consultant all required submittals, including without limitation shop drawings, material samples and catalogue cuts. Such transmittals shall be in accordance with DDC guidelines.

11.5.3 Undertake the following responsibilities with respect to the inspection of the Work:

- (a) Provide technical inspection, supervision and coordination of the Work on the Project until final completion of the Work and Final Acceptance thereof by the Commissioner, verifying that the materials furnished and Work performed are in accordance with all requirements of the Construction Documents, and that Work on the Project is progressing on schedule. DDC shall engage an independent consultant to provide Controlled Inspection services.
- (b) Provide offsite plant inspection of fabricated and/or raw materials to be used on the Project, as directed by the Commissioner, to insure conformance with the material specifications of the Construction Documents.
- (c) Take appropriate action to prevent the installation of Work, or the furnishing of material or equipment, which has not been properly approved or otherwise fails to conform to the Construction Documents, and inform Commissioner promptly of such action and the reasons for and outcome of such action.

- (d) Supervise the performance of all inspections, quality control tests, or any other tests required by law, rule or regulation or by the Construction Documents, to ensure that such tests are performed in a satisfactory and timely fashion. Such tests shall include without limitation, semi-controlled or off-site inspections and controlled inspections and testing of soils, welding, cement, concrete, masonry, structural or reinforcing steel or any other material or equipment. If directed by the Commissioner in writing as an additional service, the Contractor shall retain the services of a qualified laboratory to provide any required testing. Compensation for such laboratory services will be provided to the Contractor pursuant to the Allowance for Additional Services.
- (e) Inspect the Project in conjunction with the Consultant and the Commissioner's Representative on a periodic basis and prior to Substantial Completion, occupancy by the City, or Final Acceptance, as described in Articles 11.5.17 and 11.5.18 below. The Contractor shall furnish a detailed report to the Commissioner and the Consultant setting forth any discrepancies or deficiencies in the finished Work.
- (f) Take all appropriate action through its Subcontractors for the repair, replacement, restoration or rebuilding, as the Commissioner may determine, of any discrepancies or deficiencies in the finished Work.
- (g) Inspect the Project and provide a report prior to the expiration of the guarantee period set forth in the Construction Documents, as described in Article 11.5.20 below.
- (h) Take all appropriate action through its Subcontractors for the repair, replacement, restoration or rebuilding, as the Commissioner may determine, of any finished Work in which defects of materials or workmanship may have appeared or to which damage may have occurred because of such defects, during the applicable guarantee period.

11.5.4 Undertake the following responsibilities with respect to the Project Schedule:

- (a) Review proposed Project Schedule(s), and any updates thereto, submitted by the Subcontractor(s) and direct the Subcontractor(s) to revise the same as necessary to comply with the Contractor's Project Schedule.
- (b) Take appropriate action to ensure compliance with the Contractor's Progress Schedule.
- (c) Review the adequacy of the personnel and equipment of the Subcontractor(s) and the availability of necessary materials and supplies to ensure compliance with the Project Schedule.
- (d) Notify the Commissioner of any anticipated delays in fabrication or construction.
- (e) Take appropriate action to minimize delays to the Project caused by labor disputes during construction.
- (f) If performance of the Work by the Subcontractor(s) falls behind the Project Schedule, advise the Commissioner of the same and make recommendations as to what methods should be adopted to make up for lost time.

11.5.5 Review and evaluate the means and methods of construction proposed by the Subcontractor(s) and direct changes as necessary in the event the Contractor reasonably believes that such proposed means and methods of construction will constitute or create a hazard to the work, or persons or property, or will not produce finished work in accordance with the terms of the Construction Documents.

11.5.6 Undertake the following responsibilities with respect to the safety of the site:

- (a) Perform all CM responsibilities set forth in the DDC Safety Requirements (Exhibit H).
- (b) Review all Safety Programs and Site Safety Plan(s) developed by the Subcontractor(s) and direct revisions to the same as necessary prior to submission to DDC.
- (c) Take appropriate action to enforce Subcontractor compliance with (1) Safety Program, (2) Site Safety Plan, (3) DDC Safety Requirements, and (4) all applicable regulations that pertain to construction safety.
- (d) Promptly notify the Commissioner and the Subcontractor(s) if the Contractor observes any hazardous conditions at the site or non-compliance by the Subcontractor(s) with its Safety Program, Site Safety Plan, DDC Safety Requirements, any applicable safety regulations or subcontract requirements.
- (e) Take or cause to be taken precautions to minimize the risk of injury to persons and damage to property resulting from or arising out of the Work.

- (f) In the event of an emergency, provide such labor, materials, equipment and supervision necessary to cure such emergency condition. The Contractor shall immediately notify the Commissioner of any such emergency condition.

11.5.7 Undertake the following responsibilities with respect to Project record keeping:

- (a) Keep accurate and detailed written records of the progress of the Project during all stages of planning and construction.
- (b) Maintain a daily job diary or log book describing all activities which occurred on the Project on a daily basis, including without limitation, all Work accomplished, the number of workers, identified by trade, employed at the site by the Subcontractor(s), the number of hours worked, material shortages, labor difficulties, weather conditions, visits by officials, decisions reached, specific problems encountered, general and specific observations, and all other pertinent data relative to the performance of the Work.
- (c) Maintain accurate, orderly and detailed files and written records and documents regarding the Project, including without limitation, correspondence, minutes and/or reports of job conferences, progress reports, shop drawings and other submissions, subcontract documents, including all addenda, change orders, supplemental drawings and all other Project-related documents. The Contractor shall provide any records, documents or information concerning the Project to the Commissioner as directed.
- (d) With respect to work to be performed on a time-and-materials, unit cost, or similar basis, requiring the keeping of records and computation therefrom, maintain cost accounting records in accordance with the City's procedures.
- (e) Ensure that record "As Built" Drawings are produced and kept current by the Subcontractor(s) in accordance with the requirements of the Construction Documents.
- (f) All Project records, including without limitation those specified above, shall be available to the Commissioner at all times immediately upon request, and the Commissioner shall have the right to remove such Project records and make copies thereof.

11.5.8 Monitor compliance by the Subcontractor(s) with the following requirements applicable to the Work: (1) New York State Labor Law; (2) Americans with Disabilities Act (ADA); (3) requirements for the participation of M/WBEs, and (4) requirements for the participation of LBEs.

11.5.9 Undertake the following responsibilities with respect to Subcontractor payments:

- (a) Review all requisitions for payments submitted by the Subcontractor(s), including without limitation partial payments, payments for extra work, Substantial Completion and final payments.
- (b) Verify all estimates for payments of Work performed, computations, as well as field measurements and sketches necessary for payment purposes.
- (c) With respect to each requisition for payments submitted by the Subcontractor(s), determine the amount of liquidated damages, back charges or other deductions to be assessed.
- (d) Contractor's requisitions for payment for construction Work performed by Subcontractors, submitted in accordance with Article 42 hereof, shall be based upon and in accordance with Subcontractor requisitions for payment reviewed and approved by the Contractor.

11.5.10 Review and approve or disapprove applications for extensions of time submitted by the Subcontractor(s). The Contractor's request for a time extension for construction Work performed by Subcontractors, submitted for Commissioner approval in accordance with Article 10 hereof, shall be based upon and in accordance with Subcontractor applications for extensions of time reviewed and approved by the Contractor.

11.5.11 Review, evaluate and respond to requests from Subcontractors for explanatory information and/or interpretation of the meaning and intent of the Construction Documents. The Contractor shall confer with the Consultant, ascertain the Consultant's interpretation and prepare a response to the Subcontractor setting forth the Consultant's interpretation. In the event the Subcontractor disagrees with such interpretation, the Contractor shall prepare a detailed report to the Commissioner setting forth the Consultant's interpretation, the Subcontractor's interpretation and that by the Contractor.

11.5.12 Undertake the following responsibilities with respect to Subcontractor requests for change orders:

- (a) Review, evaluate and make a decision with respect to the validity of all written Subcontractor requests for change orders. The Contractor's decision as to the validity of the proposed Subcontractor change order shall be in writing and shall provide a reasonably detailed explanation for the decision based upon the information presented by the Subcontractor and the requirements of the Construction Documents.
- (b) If the Contractor decides that the Subcontractor's request for a change order is not valid, it shall provide such written decision to the Subcontractor, with a copy of the same to the Commissioner.
- (c) If the Contractor decides that the Subcontractor's request for a change order is valid, the Contractor shall prepare the proposed Subcontractor change order and submit the same to the Commissioner for approval. Such proposed Subcontractor change order shall include or be accompanied by the following: (1) the Contractor's written decision as to the validity of the change order, (2) the cost proposal submitted by the Subcontractor, (3) the Contractor's evaluation of such cost proposal, (4) the Contractor's own cost estimate of the quantities of labor, equipment and materials required for the performance of the proposed change order. The Contractor must be prepared to substantiate the information with respect to the change order to the Commissioner, the Engineering Audit Officer, the Comptroller and any other agency having jurisdiction in this area. The Commissioner will make all final determinations regarding change orders, modifications and additions to the Construction Documents.
- (d) If the Commissioner approves the Contractor's request for a Subcontractor change order, the Contractor shall negotiate a price, i.e., a lump sum price or unit prices, for the performance of the proposed change order work and submit the same to the Commissioner for his approval.

11.5.13 Conduct job meetings with the Subcontractor(s), Consultants, representatives of the Commissioner, interested city agencies and any other entities or individuals involved with the Project to discuss procedures, performance, progress, problems, scheduling and related issues. The Contractor shall prepare minutes of such meetings in a format authorized by the Commissioner and shall distribute such minutes to all attendees.

11.5.14 Undertake the following responsibilities with respect to Project reports:

- (a) Submit written progress reports to the Commissioner on a monthly basis, unless otherwise directed. Such reports shall be based upon the most current information and shall include, without limitation:
  - (1) Progress Schedule, including information concerning the Work of the construction Subcontractor(s) and the percentage of completion of the Work;
  - (2) Change Order Tracking Sheet, indicating the number and amount of change orders;
  - (3) Shop Drawing Log Schedule;
  - (4) Fabrication and Delivery Schedule;
  - (5) Budget for the Project, including a comparison of the original budget with current disbursements and the estimated cost to complete, and
  - (6) Progress photographs, as set forth in Article 11.5.21.
- (b) Provide reports regarding the Work as may be directed by the Commissioner, incorporating such information, interpretation, detail or back-up material as may be required by the Commissioner.

11.5.15 Undertake the responsibilities set forth below with respect to disputes submitted by its subcontractors. Disputes shall mean disputes of the kind delineated in Article 29 of this Agreement.

- (a) Review, evaluate and prepare a recommended determination with respect to disputes filed by its subcontractors. The Contractor's recommendation shall be in writing, and shall contain a clearly stated, reasoned explanation for the determination based upon the information and evidence presented by the subcontractor, as well as the requirements of the subcontract and the Construction Documents.
- (b) The Contractor shall submit the dispute filed by its subcontractor to the City for resolution in

accordance with Article 29 of this Agreement. The Contractor's submission shall be accompanied by the recommended determination described above.

11.5.16 Determine the need for and undertake default proceedings against the Subcontractor(s). In the event of default by a Subcontractor, the Contractor shall promptly submit for Commissioner approval an alternate Subcontractor(s) to perform the Work.

11.5.17 Undertake the following responsibilities with respect to Substantial Completion of the Project:

- (a) Inspect the Project in conjunction with the Consultant and the Commissioner's Representative at the time of Substantial Completion.
- (b) Furnish a detailed report to the Commissioner and the Consultant setting forth any discrepancies or deficiencies in the finished Work.
- (c) Take all appropriate action through its Subcontractors for the repair, replacement, restoration or rebuilding, as the Commissioner may determine, of any discrepancies or deficiencies in the finished Work.
- (d) Finalize all necessary Punch Lists, including completion dates for all items, and expedite execution of the same by its Subcontractors.
- (e) Perform the above duties in the event the City is to take over, use, occupy or operate any part or all of the Project.

11.5.18 Undertake the following responsibilities with respect to Final Acceptance of the Project:

- (a) Inspect the Project in conjunction with the Consultant and the Commissioner's Representative at the time of Final Acceptance.
- (b) Furnish a detailed report to the Commissioner and the Consultant setting forth any discrepancies or deficiencies in the finished Work.
- (c) Take all appropriate action through its Subcontractors for the repair, replacement, restoration or rebuilding, as the Commissioner may determine, of any discrepancies or deficiencies in the finished Work.
- (d) Assemble and deliver to the Commissioner all record "As Built" Drawings. The Contractor shall notify the Commissioner of any issues, problems or observations relative to such drawings.

11.5.19 Collect guarantees from the manufacturer, maintenance and operations manuals, keying schedules and other data required of the Subcontractor(s), and maintain photographic records, material and equipment delivery records, visual aids, charts and graphs.

11.5.20 Undertake the following responsibilities with respect to maintenance and guarantee obligations:

- (a) Prior to the expiration of the guarantee period set forth in Article 25 hereof, inspect the Project and furnish a report to the Commissioner describing in detail any finished Work in which defects of materials or workmanship may have appeared or to which damage may have occurred because of such defects, during the applicable guarantee period.
- (b) Take all appropriate action through its Subcontractors for the repair, replacement, restoration or rebuilding, as the Commissioner may determine, of any finished Work in which defects of materials or workmanship may have appeared or to which damage may have occurred because of such defects, during the applicable guarantee period.

11.5.21 Take photographs to document the progress of the construction Work. Such photographs shall be taken on a bi-weekly basis until Substantial Completion of the Work. As indicated in Article 11.5.14, such photographs shall be included in each monthly progress report.

11.5.22 Provide or cause to be provided all temporary facilities and utilities as necessary for the performance of the Work.

11.5.23 In the event any claim is made or any action brought in any way relating to the design or construction of the Project, the Contractor shall diligently render to the City all assistance which the City may require. Such services shall be rendered by the Contractor without additional fee or other compensation, except for the costs and expense of personnel who were assigned to the Project as job-site or management staff, or comparable personnel if those who were assigned to the Project are no longer employed by the Contractor.

11.5.24 Perform such other Project related services as may from time to time be directed by the Commissioner.

11.6 Services During Post Construction Phase: The Contractor shall provide construction management services during the Post Construction Phase, as directed by the Commissioner. Such construction management services shall include without limitation the services set forth below. The Post Construction Phase shall commence upon determination by the Commissioner that the Project is Substantially Complete.

11.6.1 Manage and supervise the delivery and installation of fixtures, furniture and equipment for the Project, as specified by the City.

11.6.2 Manage and supervise training sessions provided by the Subcontractors for all equipment and/or systems installed.

11.6.3 Assist the Commissioner in obtaining permanent Certificates of Occupancy for the Project.

11.6.4 Submit to the Commissioner originals of all final Project records, including without limitation, (1) all reports for the Project, including inspector's reports, as well as laboratory and plant testing reports; (2) all certificates, warranties and guarantees from manufacturers; (3) office and/or field diaries or log books; (4) all original records with respect to Subcontractor payments; (5) record "As Built" Drawings; (6) progress photographs of the construction, and (7) any other Project records required by the Commissioner.

11.7 Additional Services: The Contractor may be directed to provide additional services. Additional services shall be such services determined by the Commissioner to be necessary for the expeditious completion of the Project, and may include without limitation, the performance of general conditions work and/or the purchase of miscellaneous items.

## ARTICLE 12 - CHARACTER OF THE WORK

12.1 Unless otherwise expressly provided in this Agreement, the Work must be performed in accordance with the best, modern practice, with materials and workmanship of the highest quality, to the satisfaction of the Commissioner. All materials required for the Work shall be free from all defects, of the best available grade and quality, entirely satisfactory for the purpose intended, furnished in ample quantities to prevent delays, and in accordance with all requirements of this Agreement.

## ARTICLE 13 - MEANS AND METHODS OF CONSTRUCTION

13.1 Unless otherwise expressly provided in this Agreement, the means and methods of construction shall be such as the Contractor may choose; subject, however, to the Commissioner's right to reject means and methods proposed by the Contractor which: (1) will constitute or create a hazard to the Work, or to persons or property; or (2) will not produce finished Work in accordance with the terms of the Agreement.

13.2 The Commissioner's approval of the Contractor's means and methods of construction, or his failure to exercise his right to reject such means or methods, shall not relieve the Contractor of his obligation to accomplish the result intended by the Agreement; nor shall the exercise of such right to reject create a cause of action for damages.

## ARTICLE 14 - INSPECTION

14.1 During the progress of the Work and up to the date of Final Acceptance of all required Work, the Contractor shall at all times afford the representatives of the City every reasonable, safe and proper facility for inspecting all Work

done or being done at the Site and also the manufacture or preparation of materials and equipment at the place of such manufacture or preparation.

14.2 The Contractor's obligation hereunder shall include the uncovering or taking down of finished Work and its restoration thereafter, provided, however that the order to uncover, take down and restore shall be in writing, and further provided that if Work thus exposed proves satisfactory, such uncovering or taking down and restoration shall be considered an item of extra Work to be paid for in accordance with the provisions of Article 26 hereof.

14.3 Inspection and approval by the Commissioner's Representative of finished Work or of work being performed, or of materials and equipment at the place of manufacture or preparation, shall not relieve the Contractor of his obligation to perform the Work in strict accordance with the Agreement. Finished or unfinished Work found not to be in strict accordance with the Agreement shall be replaced as directed by the Commissioner's Representative, even though such Work may have been previously approved and paid for.

14.4 Rejected Work and materials must be promptly taken down and removed from the Site, which must at all times be kept in a reasonably clean and neat condition.

#### ARTICLE 15 - PROTECTION OF WORK AND OF PERSONS AND PROPERTY

15.1 During the performance of the Work and up to the date of Final Acceptance, the Contractor shall be under an absolute obligation to protect the finished and unfinished Work against any damage, loss, injury, theft and/or vandalism and in the event of such damage, loss, injury, theft and/or vandalism, it shall promptly replace and/or repair such Work, as the Commissioner's Representative shall determine to be preferable. The obligation to deliver finished Work in strict accordance with the Contract prior to Final Acceptance shall be absolute and shall not be affected by the Commissioner's Representative's approval of, or failure to prohibit, the Means and Methods of Construction used by the Contractor.

15.2 During the performance of the Work and up to the date of Final Acceptance, the Contractor shall take all reasonable precautions to protect the persons and property of the City and of others from damage, loss or injury resulting from the Contractor's, and/or its Subcontractors' operations under this Contract. The Contractor's obligation to protect shall include the duty to provide, place or replace and adequately maintain at or about the Site suitable and sufficient protection such as lights, barricades, and enclosures.

15.3 The Contractor shall make a full and complete report in writing to the Commissioner's Representative within three (3) Days after the happening of any loss, damage or injury to Work, persons or property, or any accidents arising out of the operations of the Contractor and/or its Subcontractors under this Contract. The Contractor shall notify in writing the Commissioner (pursuant to Article 23), the Comptroller, the commercial general liability insurance carrier, and, where applicable, the worker's compensation and/or other insurance carrier, of any such loss, damage, injury, or accident, and any claim or suit arising therefrom, immediately, but not later than 20 days after such event. The Contractor's notice to the commercial general liability insurance carrier must expressly specify that "this notice is being given on behalf of the City of New York as Additional Insured as well as [the Contractor] as Named Insured." If the Contractor fails to give any of the foregoing notices to any appropriate insurance carrier in a timely manner, the Contractor shall indemnify the City for all losses, judgments, settlements and expenses, including reasonable attorneys' fees, arising from an insurer's disclaimer of coverage citing late notice by or on behalf of the City.

15.3.1 Notice to the Comptroller pursuant to Article 15.3 shall specify the name of the Contractor, the number of this Contract, the date of the occurrence, the location (street address and borough) of the occurrence, the identity of the persons or things injured, damaged or lost, and the name of the insurance carrier that issued the commercial general liability insurance policy pursuant to Article 23.1.1 of this Contract. Such notice shall be sent to the Insurance Unit, NYC Comptroller's Office, 1 Centre Street – Room 1222, New York, N.Y. 10007.

15.4 The Contractor shall indemnify, defend and hold the City, its employees and agents harmless against any and all claims, liens, demands, judgments, penalties, fines, liabilities, settlements, damages, costs and expenses of whatever kind or nature (including, without limitation, attorneys' fees and disbursements), known or unknown, contingent or otherwise, allegedly arising out of or in any way related to the operations of the Contractor and/or its Subcontractors in

the performance of this Contract or from the Contractor's and/or its Subcontractors' failure to comply with any of the provisions of this Contract or of the Law. Insofar as the facts and Law relating to any claim would preclude the City from being completely indemnified by the Contractor, the City shall be partially indemnified by the Contractor to the fullest extent provided by Law.

15.5 The provisions of this Article shall not be deemed to create any new right of action in favor of third parties against the Contractor or the City.

#### ARTICLE 16 - REQUEST FOR INFORMATION OR APPROVAL

16.1 From time to time as the Work progresses and in the sequence indicated by the approved Project Schedule, the Contractor may submit to the Commissioner a specific request in writing for each item of information or approval required by him. These requests must state the latest date upon which the information or approval is actually required by the Contractor, and must be submitted sufficiently in advance thereof to allow the Commissioner a reasonable time to act upon such submissions or any necessary re-submissions thereof.

16.2 The Contractor shall not have any right to an extension of time on account of delays due to his failure to submit his requests for the required information for the required approval in accordance with the above requirements.

#### ARTICLE 17 - NOTICE AND DOCUMENTATION OF DELAY DAMAGES AND OTHER DAMAGES; PRODUCTION OF FINANCIAL RECORDS

17.1 After the commencement of any condition which is causing or may cause a delay in completion of the Work, including conditions for which the Contractor may be entitled to an extension of time, the following notifications and submittals are required:

17.1.1 Within seven (7) Days after the commencement of such condition, the Contractor must notify the Commissioner's Representative in writing of the existence, nature and effect of such condition upon the approved Project Schedule and the Work, and must state why and in what respects, if any, the condition is causing or may cause a delay.

17.1.2 If the Contractor shall claim to be sustaining damages for delay, by reason of any act or omission of the City or its agents, it shall submit to the Commissioner within forty-five (45) Days from the time such damages are first incurred, and every thirty (30) Days thereafter for as long as such damages are incurred, verified statements of the details and the amounts of such damages, together with documentary evidence of such damages. The Contractor may submit any of the above statements within such additional time as may be granted by the Commissioner in writing upon written request therefor. Failure of the Commissioner to respond in writing to a written request for additional time within thirty (30) Days shall be deemed a denial of the request. On failure of the Contractor to fully comply with the foregoing provisions, such claims shall be deemed waived and no right to recover on such claims shall exist. Damages that the Contractor may claim in any action arising under or by reason of this Contract shall not be different from or in excess of the statements made and documentation provided pursuant to this Article.

17.2 Failure of the Contractor to strictly comply with the requirements of Article 17.1.1 may, in the discretion of the Commissioner, be deemed sufficient cause to deny any extension of time on account of delay arising out of such condition. Failure of the Contractor to strictly comply with the requirements of Articles 17.1.1 and 17.1.2 shall be deemed a conclusive waiver by the Contractor of any and all claims for damages for delay arising from such condition and no right to recover on such claims shall exist.

17.3 When appropriate and directed by the Commissioner's Representative, the Project Schedule shall be revised by the Contractor until finally approved by the Commissioner's Representative. The revised Project Schedule must be strictly adhered to by the Contractor.

17.4 If the Contractor shall claim to be sustaining damages by reason of any act or omission of the City or its agents, it shall submit to the Commissioner within forty-five (45) Days from the time such damages are first incurred, and every thirty (30) Days thereafter for as long as such damages are incurred, verified statements of the details and the

amounts of such damages, together with documentary evidence of such damages. The Contractor may submit any of the above statements within such additional time as may be granted by the Commissioner in writing upon written request therefor. Failure of the Commissioner to respond in writing to a written request for additional time within thirty (30) Days shall be deemed a denial of the request. On failure of the Contractor to fully comply with the foregoing provisions, such claims shall be deemed waived and no right to recover on such claims shall exist. Damages that the Contractor may claim in any action or dispute resolution procedure arising under or by reason of this Contract shall not be different from or in excess of the statements and documentation made pursuant to this Article.

17.5 In addition to the foregoing statements, the Contractor shall, upon notice from the Commissioner, produce for examination at the Contractor's office, by the Commissioner's Representative, all of its books of account, bills, invoices, payrolls, subcontracts, time books, daily reports, bank deposit books, bank statements, check books, canceled checks, showing all of its acts and transactions in connection with or relating to or arising by reason of this Contract, and submit itself and persons in its employment, for examination under oath by any person designated by the Commissioner or Comptroller to investigate claims made or disputes against the City under this Contract. At such examination, a duly authorized representative of the Contractor may be present.

17.6 In addition to the statements required under Article 30 and this Article, the Contractor and/or its Subcontractor shall, within thirty (30) Days upon notice from the Commissioner or Comptroller, produce for examination at the Contractor's and/or Subcontractor's office, by a representative of either the Commissioner or Comptroller, all of its books of account, bid documents, financial statements, accountant workpapers, bills, invoices, payrolls, subcontracts, time books, daily reports, bank deposit books, bank statements, check books, canceled checks, showing all of its acts and transactions in connection with or relating to or arising by reason of this Contract. Further, the Contractor and/or its Subcontractor shall submit any person in its employment, for examination under oath by any person designated by the Commissioner or Comptroller to investigate claims made or disputes against the City under this Contract. At such examination, a duly authorized representative of the Contractor may be present.

17.7 Unless the information and examination required under Article 17.6 is provided by the Contractor and/or its Subcontractor upon thirty (30) Days notice from the Commissioner or Comptroller, or upon the Commissioner's or Comptroller's written authorization to extend the time to comply, the City shall be released from all claims arising under, relating to or by reason of this Contract, except for sums certified by the Commissioner or Comptroller to be due under the provisions of this Contract. It is further stipulated and agreed that no person has the power to waive any of the foregoing provisions and that in any action or dispute resolution procedure against the City to recover any sum in excess of the sums certified by the Commissioner or Comptroller to be due under or by reason of this Contract, the Contractor must allege in its complaint and prove, at trial or during such dispute resolution procedure, compliance with the provisions of this Article.

17.8 In addition, after the commencement of any action or dispute resolution procedure by the Contractor arising under or by reason of this Contract, the City shall have the right to require the Contractor to produce for examination under oath, up until the trial of the action or hearing before the Contract Dispute Resolution Board, the books and documents described in Article 17.6 and submit itself and all persons in its employ for examination under oath. If this Article is not complied with as required, then the Contractor hereby consents to the dismissal of the action or dispute resolution procedure.

#### ARTICLE 18 - DETERMINING DATE OF COMPLETION

18.1 Final inspection of the Work by the Commissioner's Representative shall be made within 10 days after receipt of the Contractor's written request therefor. The Work will be deemed complete as of the date of such inspection if, upon such inspection, the Commissioner's Representative finds that no further Work remains to be done. The Commissioner will then issue a certificate of completion and acceptance of the Work.

18.2 Request for Reinspection. However, if such inspection, in the opinion of the Commissioner's Representative, reveals items of Work still to be performed, the Contractor shall promptly perform them and then request a reinspection. If, upon any reinspection, the Commissioner's Representative determines that the Work is complete, the date of completion shall be deemed to be the actual date of such reinspection, which shall be made not more than 10 days after the date of the request therefor.

ARTICLE 19 - EXTENSION OF TIME

19.1 Upon written application by the Contractor, the Agency Chief Contracting Officer may grant an extension of time for performance of the Contract. Said application must state, at a minimum, in detail, each cause for delay, the date the cause of the alleged delay occurred, and the total number of delay in days attributable to such cause. The ruling of the Agency Chief Contracting Officer shall be final and binding as to the allowance of an extension and the number of days allowed.

ARTICLE 20 - OCCUPATION OR USE PRIOR TO COMPLETION

20.1 If before final completion of the Work specified hereunder, it shall be deemed necessary by the Commissioner to take over, use, occupy or operate any part of the completed Work, the Commissioner shall have the right so to do and the Contractor will not in any way interfere with or object to the use, occupation or operation of such Work by the City after receipt of notice in writing by the Commissioner that such Work or part thereof will be used by the City on and after the date specified in such notice.

20.2 Should such action be taken by the Commissioner, the Contractor's guarantee on that part of the Work placed into use shall begin on the date such use by the City shall begin, and the Contractor shall be entitled to a return of so much of the retained percentages as have been withheld under Article 42, as security for the faithful performance of the Work which the Commissioner may take over, use, occupy or operate under this Article, except so much thereof as may be retained under Article 25 hereof.

20.3 Immediately prior to such occupancy or use, inspection of the part to be occupied or used will be made by the Commissioner's Representative, and the Contractor will be furnished in writing with a statement of the Work, if any, still to be done on such part. If any part of the completed or partly completed Work is taken over for use, occupation or operation under this Article, then the Commissioner may issue a determination of Substantial Completion with respect to such Work.

ARTICLE 21 - CHANGED CONDITIONS

21.1 Should the Contractor encounter during the progress of the Work, subsurface conditions at the site materially differing from any shown on any documents furnished by the Commissioner or such subsurface conditions as could not reasonably have been anticipated by the Contractor and were not anticipated by the City, which conditions will materially affect the cost of the Work to be done under the Contract, the attention of the Commissioner must be called immediately to such conditions before they are disturbed. The Commissioner shall thereupon promptly investigate the conditions. If he finds that they do so materially differ, or that they could not reasonably have been anticipated by the Contractor and were not anticipated by the City, the Contract may be modified with his written approval. Any increase in cost resulting therefrom shall be in accordance with Article 26 and the Procurement Policy Board Rules.

ARTICLE 22 - ASSIGNMENTS

22.1 The Contractor shall not assign, transfer, convey or otherwise dispose of this Contract, or of its rights, obligations, duties, in whole or in part, or of its right to execute it, or its right, title or interest in or to it or any part thereof, or assign, by power of attorney or otherwise any of the moneys due or to become due under this contract, unless the prior written consent of the Commissioner shall first be obtained thereto, and the giving of any such consent to a particular assignment shall not dispense with the necessity of such consent to any further or other assignments. Any such assignment, transfer, conveyance or other disposition without such consent shall be void.

22.2 Such assignment, transfer, or conveyance shall not be valid until filed in the office of the Department of Design and Construction and of the Treasurer with the written consent of the Commissioner endorsed thereon or attached thereto.

22.3 Failure of the Contractor to obtain the required prior written consent of the Commissioner to such an assignment, transfer or conveyance, shall be cause for termination for cause, at the option of the Commissioner; and, if

so terminated, the City shall thereupon be relieved and discharged from any further liability and obligation to the Contractor, its assignees or transferees, and all Moines that may become due under the contract shall be forfeited to the City, except so much thereof as may be necessary to pay the Contractor's employees.

22.4 The provisions of this Article shall not be construed to hinder, prevent or affect an assignment by the Contractor for the benefit of creditors made pursuant to the statutes of the State of New York.

22.5 The Contractor hereby assigns, sells and transfers to the City of New York all right, title and interest in and to any claims and causes of action arising under the antitrust laws of New York State or of the United States relating to the particular goods or services purchased or procured by the City under this Contract.

22.6 This Contract may be assigned by the City to any corporation, agency or instrumentality having authority to accept such assignment.

## ARTICLE 23 - INSURANCE

23.1 Required Insurance (All Project Phases): From the date the Contractor is first ordered to commence work and throughout the entire term of this Contract, the Contractor must effect and maintain the following types and amounts of insurance. Such insurance shall be issued by companies that meet the standards set forth in this Article 23.

23.1.1 Commercial General Liability Insurance: The Contractor shall provide a Commercial General Liability policy (with the types of coverage indicated below) in the minimum amount of \$1,000,000 per occurrence (combined single limit for bodily injury and property damage), \$2,000,000 aggregate. Such policy shall be in the Contractor's name, shall name the City of New York as an additional insured thereunder. Such policy shall protect the Contractor and the City of New York from claims for property damage and/or bodily injury, including accidental death, which may arise from operations under this Contract, whether such operations are performed by the Contractor or anyone directly or indirectly employed by him/her. The coverage provided must be "occurrence" based; "claims made" coverage will not be accepted. The general liability insurance policy provided shall include, without limitation, the following types of coverage: Comprehensive Liability, Broad Form Property Damage, Premises Operations Liability, Products/Completed Operations Liability, Contractual Liability (including tort liability of another assumed in a contract), Medical Payments, Independent Contractors, Personal Injury (contractual exclusion deleted), Explosion, Collapse and Underground Property. The general liability insurance policy provided shall include the following endorsements:

- (a) The City of New York, together with its officials and employees, is an Additional Insured under this policy.
- (b) Notice under the Policy to the Additional Insured shall be addressed to the Commissioner of the Department of Design and Construction, 30-30 Thomson Avenue, Long Island City, New York, New York, 11101.
- (c) Notice of Accident shall be given to the Company by the Insured within one hundred twenty (120) days after notice of such accident has been sent to the Commissioner of the Department of Design and Construction.
- (d) Notice of Claim shall be given to the Company within one hundred twenty (120) days after such notice shall be filed with the Comptroller of the City of New York.
- (e) Notice of Claim to the Company by the Insured of an accident or claim on the site shall constitute notice by the City to the Company.
- (f) Notice of Cancellation of Policy, as set forth in Article 23.3.4 below.
- (g) The presence of representatives of the City at the Site shall not invalidate this policy.

23.1.2 Worker's Compensation and Disability Benefits Insurance: The Contractor shall provide Worker's Compensation Insurance, inclusive of Disability Benefits, in accordance with the Laws of the State of New York on behalf of all employees providing services under this Contract.

23.1.3 Employers' Liability Insurance: The Contractor shall provide Employers' Liability Insurance in the amount of \$1,000,000 per occurrence. Such policy shall provide compensation due to bodily injury by accident or

disease sustained by any employee of the insured arising out of and in the course of his/her employment by the insured.

23.1.4 Automobile Liability Insurance: The Contractor shall provide liability insurance in the amount of \$1,000,000 per occurrence (combined single limit), covering all owned, non-owned and hired vehicles to be used in connection with this contract. Such policy shall name the City of New York as an additional insured thereunder.

23.2 Additional Required Insurance (Construction Phase): In addition to the insurance specified above, the Contractor must, during the Construction Phase of the Project, effect and maintain the following types and amounts of insurance, unless otherwise directed in writing by the Commissioner. For the purpose of this Article 23, the Construction Phase shall commence as of the date on which the Contractor is ordered to commence construction work and up to the date of Final Acceptance of all required Work at the Site, including punch list work as certified in writing by the Commissioner's Representative. Such insurance shall be issued by companies that meet the standards set forth in this Article 23.

23.2.1 Commercial General Liability Insurance: The Contractor shall provide a Commercial General Liability Insurance policy. Such policy shall be in the Contractor's name and shall name the City of New York as additional insured thereunder. This insurance policy shall protect the City of New York, the Contractor and his/her subcontractors performing work at the site from claims for property damage and/or bodily injury, including accidental death, which may arise from operations under this Agreement, whether such operations are performed by the Contractor or anyone directly or indirectly employed by him/her. The general liability coverage provided during the Construction Phase must comply with all requirements specified in Article 23.1.1 above.

23.2.2 Insurance Requirements for Subcontractors: The Contractor is required, in accordance with Article 10, to include insurance requirements in subcontracts for the Project. Insurance requirements for subcontracts are set forth in Schedule A of the General Conditions, which will be provided by the City.

23.2.3 Builders' Risk Insurance: As a general rule, the insurance requirements for subcontracts set forth in Schedule A will include a requirement that the subcontractor provide Builder's Risk insurance. As an exception to this general rule, the Commissioner may, in writing, direct the Contractor to provide Builders' Risk insurance for the entire Project, or some designated portion thereof. In such case, the Commissioner will delete from Schedule A the requirement that the subcontractor provide Builder's Risk insurance. If so directed in writing by the Commissioner, the Contractor shall provide Builders' Risk Insurance. In such case, costs incurred by the Contractor to provide the required Builder's Risk insurance shall be reimbursed by the City in accordance with Article 42.

The Builders' Risk Insurance policy shall cover all risks in completed value form. Such policy shall cover the total value of work for the Project, (or such portion of the work as may be designated by the City), as well as the value of any equipment, supplies and/or materials for the Project that may be in storage (on or off the Site) or in transit. The policy shall provide coverage for the cost of removing debris, including demolition as may be legally necessary by the operation of any law, ordinance or regulation, and for loss or damage to any owned, borrowed, leased or rented capital equipment, tools, including tools of their agents and employees, staging towers and forms, and property of the City held in their care, custody and control. The Builders' Risk policy shall contain the following endorsements:

- (a) The City and the Contractor shall be named as loss payee for the Work in order of precedence, as their interest may appear; and
- (b) In the event the loss occurs at an occupied facility, the policy shall permit occupancy without the consent of the Insurance Company; and
- (c) In the event that the insurance policy has been issued by a mutual insurance company, the following language shall be included: "The City of New York is not liable for any premium or assessment under this policy of insurance. The First Named Insured is solely liable therefore."

### 23.3 General Requirements for Insurance Policies

23.3.1 All required insurance policies shall be maintained with companies that may lawfully issue the required policy and have an A.M. Best rating of at least A-7 or a Standard and Poor's rating of at least AA, unless prior written approval is obtained from the Mayor's Office of Operations.

23.3.2 All required insurance policies shall be in a form acceptable to the City and shall contain no exclusions or endorsements which are not acceptable to the City.

23.3.3 The omission of any endorsements or clauses required by this Article 23 will be considered cause for rejection of the policy.

23.3.4 All required policies shall be endorsed to provide as follows: "This policy shall not be canceled, terminated, modified or changed by the Insurance Company unless at least thirty (30) Days prior written notice is sent to the Named Insured by Certified Mail and also sent by Registered Mail to both the Commissioner and to Comptroller's Office, attn: Office of Contract Administration, Municipal Building, Room 835, New York, New York 10007."

23.3.5 The Contractor shall be solely responsible for the payment of all premiums for all required policies and all deductibles to which such policies are subject, whether or not the City of New York is an insured under the policy.

#### 23.4 Proof of Insurance

23.4.1 Within ten (10) Days of advice of award, the Contractor shall, for each policy required under this Contract (other than builders risk insurance), file a Certificate of Insurance with the Commissioner. Such certificates shall certify insurance coverage in all ways in conformance with this article and shall include the following text: "The above-named broker/producer represents and warrants to the City that it is an Additional Insured under the insurance policies listed herein and that such policies are in full compliance with the Contract, including Article 23."

23.4.2 If the Contractor is required to provide builders' risk insurance, it shall file a Certificate of Insurance with the Commissioner as directed, but in any event no later than ten (10) Days prior to commencement of the Work. Within a reasonable time after filing the Certificate of Insurance, the Contractor shall furnish an original and a copy of the Builders' Risk policy, if required. The policy shall be stamped PAID, or receipted bills demonstrating payment of premiums shall be submitted with the policy.

23.4.3 Certificates confirming renewals of insurance shall be submitted not less than thirty (30) days prior to the expiration date of coverage until all operations under this contract are deemed completed.

23.4.4 Pursuant to Sections 57 and 220 of the New York State Workers' Compensation Law, the Contractor has submitted proof of workers' compensation and disability benefits coverage to the Department.

#### 23.5 Operations at the Site

23.5.1 The Contractor shall not commence any operations at the site or adjacent thereto unless and until all required insurance has been submitted to and accepted by the Commissioner.

23.5.2 The Contractor shall be responsible for providing continuous insurance coverage as required by this contract and shall be authorized to work at the site only during the effective period of all required coverage.

23.5.3 In the event that any of the required insurance policies lapse, are revoked, suspended or otherwise terminated, for whatever cause, the Contractor shall immediately stop all work at the site, and shall not recommence work at the site until authorized in writing to do so by the Commissioner. Upon quitting the site, the Contractor shall leave all plant, materials, equipment, tools and supplies on the site. Contract time shall continue to run during such periods and no extensions of time will be granted. Furthermore, the Commissioner may declare the Contractor in default for failure to maintain required insurance.

23.5.4 The Contractor shall promptly notify the Commissioner of any accidents causing bodily injury or property damage arising in the course of operations under the contract.

#### 23.6 Indemnification

23.6.1 If the persons or property of the City or of others sustains loss, damage or injury as a result of the operations of the Contractor or his subcontractors in the performance of this contract, or from his or their failure to comply with any of the provisions of this contract, or of law, the Contractor shall indemnify and hold the City harmless from any and all costs and expenses which the City may be subjected to or which it may suffer or incur by reason thereof.

23.6.2 The Contractor shall indemnify and hold the City of New York harmless from any and all claims or judgments for damages and from costs and expenses to which the City may be subjected or which it may suffer or incur by reason of the Contractor's failure to comply with the insurance provisions of this contract.

23.6.3 Each party agrees that it waives claims against the other party for any consequential damages that may arise out of the work performed pursuant to this Contract.

#### ARTICLE 24 - MONEY RETAINED AGAINST CLAIMS

24.1 If any claim shall be made by any person, firm or corporation against the City or against the Contractor and the City: (1) for an alleged loss, damage or injury of the kind referred to in Article 15 hereof which, in the opinion of the Comptroller, may not be covered by the general liability insurance policy, or, which, together with previously filed claims, is in excess of the amount payable under such policies; or (2) for an infringement of copyrights or patents or use of patented articles, tools, etc.; or (3) for damage claimed to have been caused directly or indirectly by the failure of the Contractor to perform the Work in strict accordance with this Contract: the amount of such claim, or so much thereof as he may deem necessary, may be withheld by the Comptroller, as security against such claim, from any money due hereunder, until such time as the commencement of an action thereon would be barred by law or until final adjudication of such action by a Court of competent jurisdiction. The Comptroller, in his discretion, may permit the Contractor to substitute other satisfactory security in lieu of the moneys so withheld.

24.2 If no action is commenced upon such claim within the time limited thereof by law, the Comptroller, upon written demand by the Contractor, shall return the amount so withheld without interest.

24.3 If an action on such claim is timely commenced and the liability of the City, or the Contractor, or both, shall have been established therein by a final judgment of a Court of competent jurisdiction, or if such claim shall have been admitted by the Contractor to be valid, the Comptroller shall pay such judgment or admitted claim out of the moneys retained by him under the provisions of this Article, and return the balance, if any, without interest, to the Contractor.

24.4 Liens: If any time before or within thirty days after the whole Work herein agreed to be performed, is completed and accepted by the City, any persons claiming to have performed any labor or furnished any material toward the performance or completion of this Agreement shall file with the Department and with the Commissioner of Finance of the City any notice as is described in the Lien Law, or any act of the Legislature of the State of New York, the City shall retain, from the moneys due or to become due under this Agreement, so much of such moneys as shall be sufficient to pay the amount claimed in said notice, together with the reasonable costs of any action or actions brought or that may be brought to enforce such Lien. The moneys so retained shall be held by the City until the Lien thereon created by the said act and the filing of the said notice shall be discharged pursuant to law.

#### ARTICLE 25 - MAINTENANCE AND GUARANTY

25.1 The Contractor must promptly repair, replace, restore or rebuild, as the Commissioner may determine, any finished Work in which defects of materials or workmanship may appear or to which damage may occur because of such defects, during the one-year period subsequent to the date of Substantial Completion of the Work required hereunder, except where other periods of maintenance and guarantee are provided for.

25.2 As security for the faithful performance of its obligations hereunder, the Contractor, upon filing his requisition for the Substantial Completion payment hereunder, shall deposit with the Commissioner a sum equal to 1% of the value of the construction Work certified for payment in cash or certified check upon a state or national bank and trust company or a check of such bank and trust company signed by a duly authorized officer thereof and drawn to the order

of the Comptroller; or obligations of the City of New York, which the Comptroller may approve as of equal value with the sum so required.

25.3 In lieu of the above, the Contractor may make such security payment to the City by authorizing the Commissioner in writing to deduct the amount from the Substantial Completion payment hereunder, which shall be deemed the deposit required above.

25.4 If the Contractor has faithfully performed all his obligations hereunder, the Commissioner shall so certify to the Comptroller within five (5) days after the expiration of one (1) year from the date of Substantial Completion of the Work required hereunder. The sum shall be repaid to the Contractor without interest within thirty (30) days after certification by the Commissioner to the Comptroller that the Contractor has faithfully performed all his obligations hereunder.

25.5 Notice by the Commissioner to the Contractor to repair, replace, rebuild or restore such defective or damaged Work shall be timely if given not later than ten (10) days subsequent to the expiration of the one-year period or other periods provided herein.

25.6 If the Contractor shall fail to repair, rebuild or restore such defective or damaged Work promptly after receiving such notice, the Commissioner shall have the right to have the Work done by others and to deduct the cost thereof from the amount so deposited hereunder. The balance, if any, shall be returned to the Contractor without interest. If the amount so deposited be insufficient to cover the cost of such work, the Contractor shall be liable to pay such deficiency on demand by the Commissioner.

25.7 The Commissioner's Representative certificate setting forth the fair and reasonable cost of repairing, replacing, rebuilding or restoring any damaged or defective Work when performed by one other than the Contractor shall be binding and conclusive as to the amount thereof upon the Contractor.

25.8 The Contractor shall obtain all manufacturer's warranties and guaranties of all equipment and materials required by this Agreement in the name of the City of New York and shall deliver same to the City.

#### ARTICLE 26 - CONTRACT CHANGES

26.1 Changes may be made to this Contract only as duly authorized by the Agency Chief Contracting Officer or his or her designee. Contractors deviating from the requirements of an original purchase order or contract without a duly approved change order document, or written contract modification or amendment, do so at their own risk. All such changes, modifications and amendments will become a part of the original Contract. Work so ordered must be performed by the Contractor.

26.2 Contract changes will be made only for Work necessary to complete the Work included in the original scope of the Contract, and for non-material changes to the scope of the Contract. Changes are not permitted for any material alteration in the scope of the Project. Contract changes may include any contract revision deemed necessary by the Contracting Officer. The Contractor may be entitled to a price adjustment for extra work performed pursuant to a written change order. If any part of the Contract Work is necessarily delayed by a change order, the Contractor may be entitled to an extension of time for performance. Adjustments to price shall be computed in one or more of the following ways: (1) by agreement of a fixed price; (2) by unit prices specified in the contract; (3) by time and material record; and/or (4) in any other manner approved by the City Chief Procurement Officer.

26.3 Where the cost of the change order has been negotiated in the absence of established cost history, the costs are subject to verification.

26.4 All payments for change orders are subject to pre-audit by the Engineering Audit Officer and may be post-audited by the Comptroller. If the audits reveal that the Contractor's costs for the change order work were inaccurately stated during negotiations, the Agency shall recoup the amount by which the costs were inaccurately stated by proportionately reducing the price of the change order. This remedy is not exclusive and in addition to all other rights and remedies of the City.

ARTICLE 27 - AUDIT AND EXAMINATION

27.1 This Contract and all payments hereunder shall be subject to examination by the Engineering Audit Officer of DDC and post-audit by the Comptroller of the City of New York in accordance with Law.

ARTICLE 28 - METHODS OF PAYMENT FOR EXTRA WORK

28.1 Extra Work: The price to be paid for Extra Work ordered pursuant to Article 26, and performed by the Contractor's subcontractor with its own forces, shall be as set forth herein. For Extra Work where payment is by agreement on a fixed price, the price to be paid for such Extra Work shall be the fair and reasonable cost of the items set forth below. For Extra Work where payment is on a time and material basis, the price to be paid for such Extra Work shall be the actual and reasonable cost of the items set forth below.

28.1.1 Necessary materials (including transportation to the Site);

28.1.2 Necessary direct labor, the cost of which shall be comprised of the items set forth below:

- (a) prevailing wages and supplemental benefits, as defined in Labor Law Section 220
- (b) Payroll Taxes, defined as State Unemployment Insurance ("SUI"), Federal Unemployment Insurance ("FUI") and payments pursuant to the Federal Insurance Contributions Act ("FICA")
- (c) workers' compensation insurance, as set forth in Article 10.2.2(e) of this Contract. The cost of workers' compensation insurance shall be based upon the average rate for such insurance for the applicable class(es) of labor, in accordance with the most recent schedule promulgated by the New York State Workers' Compensation Board.

28.1.3 Sales and personal property taxes, if any, required to be paid on materials not incorporated into such Extra Work;

28.1.4 Maintenance, operation and rental of, or reasonable rental value of subcontractor-owned, necessary plant and equipment other than small tools. Subcontractor-owned equipment is defined to include equipment rental companies affiliated with or controlled by the subcontractor, as determined by the Commissioner. Payment rates for the use of subcontractor-owned plant and equipment shall be in accordance with the provisions of Joint Directive No. 1 issued by the Mayor's Office of Construction and the Comptroller. The applicable directive shall be that in effect at the time of the bid opening for the subcontract;

28.1.5 Necessary installation and dismantling of such plant and equipment (including transportation to and from the Site), if any;

28.1.6 Reasonable rental costs of non-subcontractor-owned necessary plant and equipment other than small tools. In no event shall the amount paid to the subcontractor for such rental exceed the lower of the actual value of such equipment or the book value of such equipment;

28.1.7 Any insurance coverage expressly required by the City for the performance of the Extra Work which is different than the types of insurance required by Article 10.2.2(e), other than workers' compensation insurance;

28.1.8 Twenty (20%) percent of the total of items in Articles 28.1.1 through 28.1.5 as compensation for overhead and profit, except that no percentage for overhead and profit will be allowed on (a) Payroll Taxes, (b) workers' compensation insurance, (c) the premium portion of overtime pay, and/or (d) sales and personal property taxes. Overhead shall include without limitation, all costs and expenses in connection with administration, management superintendence, small tools, insurance required by Article 10.2.2(e), other than worker's compensation insurance, and performance and payment bonds;

28.1.9 Five (5%) percent of the total of items in Article 28.1.6 and 28.1.7 as compensation for overhead and profit.

28.2 Where the Extra Work is performed in whole or in part by other than the subcontractor's own forces, the subcontractor shall be paid, subject to audit by the Engineering Audit Officer, the cost of such Work computed in accordance with Article 28.1 above, plus an additional allowance of five (5%) percent to cover the subcontractor's overhead and profit.

28.3 Where a change is ordered, involving both Extra Work and omitted or reduced subcontract Work, the subcontract price shall be adjusted, subject to audit by the EAO, in an amount based on the difference between the cost of such Extra Work and of the omitted or reduced Work. The cost of such Extra Work and of such omitted or reduced Work shall be computed based upon applicable subcontract unit prices. Where there are no applicable subcontract unit prices, the cost of such Extra Work and of such omitted or reduced subcontract Work shall be computed in accordance with the Articles 28.1.1 through 28.1.7. If the cost of such Extra Work exceeds the costs of such omitted or reduced subcontract Work, the subcontract price shall be increased by the difference, plus percentages for overhead and profit as provided in Articles 28.1.8 and 28.1.9. If the cost of the omitted or reduced subcontract Work exceeds the cost of the Extra Work, then the subcontract price shall be reduced by the difference.

28.5 Where the Contractor and the Commissioner can agree upon another method of payment for Extra Work in accordance with Article 26.2, or for Extra Work ordered in connection with omitted work, such method, subject to audit by the EAO, may, at the option of the Commissioner, be substituted for the cost plus a percentage method; provided in Article 28.1; provided, however, that if the Extra Work is performed by a sub-subcontractor engaged by a subcontractor, the subcontractor shall not be entitled to receive more than an additional allowance of five (5%) percent for overhead and profit over the cost of such sub-subcontractor's Work as computed in accordance with Article 28.1.

28.6 Unless the parties agree on a lump sum payment for Extra Work, requests for payment for Extra Work performed by construction Subcontractors shall be accompanied by signed time sheets, documenting by date the actual hours worked by specific personnel for whom payment is requested, and any other data as may be requested by the Commissioner.

28.7 The Contractor shall not be entitled to any mark-up whatsoever on payments for Extra Work ordered pursuant to Article 26 hereof performed by Subcontractors.

28.8 Overrun of Unit Price Item: The provisions set forth below shall apply to overruns of unit price items which the Contractor, through its subcontractor, is directed to provide. An overrun is any quantity of a unit price item which the Contractor, through its subcontractor, is directed to provide which is in excess of one hundred twenty five (125%) percent of the estimated quantity for that item set forth in the bid schedule.

28.8.1 For any unit price item, the Contractor's subcontractor will be paid at the unit price bid for any quantity up to one hundred twenty five (125%) percent of the estimated quantity for that item set forth in the bid schedule. If during the progress of the Work, the actual quantity of any unit price item required to complete the Work approaches the estimated quantity for that item, and due to errors, site conditions, changes in design, or any other reason, it appears that the actual quantity of any unit price item necessary to complete the Work will exceed the estimated quantity for that item by twenty-five (25%) percent, the Contractor shall immediately notify the Commissioner's Representative of such anticipated overrun. The Contractor's subcontractor shall not be compensated for any quantity of a unit price item provided which is in excess of one hundred twenty five (125%) percent of the estimate quantity for that item set forth in the bid schedule without written authorization from the Commissioner's Representative.

28.8.2 If the actual quantity of any unit price item necessary to complete the Work will exceed one hundred twenty five (125%) percent of the estimated quantity for that item set forth in the bid schedule, the City reserves the right and the Contractor, through its subcontractor, agrees to negotiate a new unit price for such item. In no event shall such negotiated new price exceed the unit bid price. If the City and Contractor, through its subcontractor, cannot agree on a new unit price, then the City shall order the Contractor and the Contractor, through its subcontractor agrees to provide additional quantities of the item on a time and material basis for the actual and reasonable cost as determined under Article 28.1, but in no event at a unit price exceeding the unit price bid.

## ARTICLE 29 - RESOLUTION OF DISPUTES

1. All disputes between the City and the Contractor of the kind delineated in this Article that arise under, or by virtue of, this Contract shall be finally resolved in accordance with the provisions of this article and the PPB Rules. This procedure for resolving disputes of the kind delineated herein shall be the exclusive means of resolving such disputes.

- (a) This Article shall not apply to disputes concerning matters dealt with in other sections of the PPB Rules, or to disputes involving patents, copyrights, trademarks, or trade secrets (as interpreted by the courts of New York State) relating to proprietary rights in computer software.
- (b) This Article shall apply only to disputes about the scope of work delineated by the Contract, the interpretation of Contract documents, the amount to be paid for extra work or disputed work performed in connection with the Contract, the conformity of the Contractor's work to the Contract, and the acceptability and quality of the Contractor's work; such disputes arise when the Engineer, Resident Engineer, Engineering Audit Officer, or other designee of the Commissioner makes a determination with which the Contractor disagrees.

2. All determinations required by this Article shall be made in writing, clearly stated, with a reasoned explanation for the determination based on the information and evidence presented to the party making the determination. Failure to make such determination within the time required by this Article shall be deemed a non-determination without prejudice that will allow application to the next level.

3. During such time as any dispute is being presented, heard, and considered pursuant to this Article, the Contract terms shall remain in force and effect and the Contractor shall continue to perform Work as directed by the ACCO or the Engineer. Failure of the Contractor to continue Work as directed shall constitute a waiver by the Contractor of its claim.

4. Presentation of Dispute to Commissioner.

- (a) Notice of Dispute and Agency Response. The Contractor shall present its dispute in writing ("Notice of Dispute") to the Commissioner within thirty (30) days of receiving written notice of the determination or action that is the subject of the dispute. This notice requirement shall not be read to replace any other notice requirements contained in the Contract. The Notice of Dispute shall include all the facts, evidence, documents, or other basis upon which the Contractor relies in support of its position, as well as a detailed computation demonstrating how any amount of money claimed by the Contractor in the dispute was arrived at. Within thirty (30) days after receipt of the detailed written submission comprising the complete Notice of Dispute, the Engineer, Resident Engineer, Engineering Audit Officer, or other designee of the Commissioner, shall submit to the Commissioner all materials he or she deems pertinent to the dispute. Following initial submissions to the Commissioner, either party may demand of the other the production of any document or other material the demanding party believes may be relevant to the dispute. The requested party shall produce all relevant materials that are not otherwise protected by a legal privilege recognized by the courts of New York State. Any question of relevancy shall be determined by the Commissioner shall be final. Willful failure of the Contractor to produce any requested material whose relevancy the Contractor has not disputed, or whose relevancy has been affirmatively determined, shall constitute a waiver by the Contractor of its claim.
- (b) Commissioner Inquiry. The Commissioner shall examine the material and may, in his or her discretion, convene an informal conference with the Contractor, the ACCO, the Engineer, Resident Engineer, Engineering Audit Officer, or other designee of the Commissioner, to resolve the issue by mutual consent prior to reaching a determination. The Commissioner may seek such technical or other expertise as he or she shall deem appropriate, including the use of neutral mediators, and require any such additional material from either or both parties as he or she deems fit. The Commissioner's ability to render, and the effect of, a decision hereunder shall not be impaired by any negotiations in connection with the dispute presented, whether or not the Commissioner participated therein. The Commissioner may or, at the request of any party to the dispute, shall compel the participation of any other contractor with a contract related to the work of this Contract and that contractor shall be bound by the decision of the Commissioner. Any contractor thus brought into the dispute

resolution proceeding shall have the same rights and obligations under this Article as the Contractor initiating the dispute.

- (c) **Commissioner Determination.** Within thirty (30) days after the receipt of all materials and information, or such longer time as may be agreed to by the parties, the Commissioner shall make his or her determination and shall deliver or send a copy of such determination to the Contractor, the ACCO and the Engineer, Resident Engineer, Engineering Audit Officer, or other designee of the Commissioner, as applicable, together with a statement concerning how the decision may be appealed.
- (d) **Finality of Commissioner Decision.** The Commissioner's decision shall be final and binding on all parties, unless presented to the Contract Dispute Resolution Board ("CDRB") pursuant to this Article. The City may not take a petition to the CDRB. However, should the Contractor take such a petition, the City may seek, and the CDRB may render, a determination less favorable to the Contractor and more favorable to the City than the decision of the Commissioner.

5. **Presentation of Dispute to the Comptroller.** Before any dispute may be brought by Contractor to the CDRB, the Contractor must first present its claim to the Comptroller for his or her review, investigation, and possible adjustment.

- (a) **Time, Form, and Content of Notice.** Within thirty (30) days of receipt of a decision by the Commissioner, the Contractor shall submit to the Comptroller and to the Commissioner a Notice of Claim regarding its dispute with the Agency. The Notice of Claim shall consist of (i) a brief written statement of the substance of the dispute, the amount of money, if any, claimed and the reason(s) the Contractor contends the dispute was wrongly decided by the Commissioner; (ii) a copy of the decision of the Commissioner, and (iii) a copy of all materials submitted by the Contractor to the Agency, including the Notice of Dispute. The Contractor may not present to the Comptroller any material not presented to the Commissioner, except at the request of the Comptroller.
- (b) **Agency Response.** Within thirty (30) days of receipt of the Notice of Claim, the Agency shall make available to the Comptroller a copy of all material submitted by the Agency to the Commissioner in connection with the dispute. The Agency may not present to the Comptroller any material not presented to the Commissioner, except at the request of the Comptroller.
- (c) **Comptroller Investigation.** The Comptroller may investigate the claim in dispute and, in the course of such investigation, may exercise all powers provided in sections 7-201 and 7-203 of the New York City Administrative Code. In addition, the Comptroller may demand of either party, and such party shall provide, whatever additional material the Comptroller deems pertinent to the claim, including original business records of the Contractor. Willful failure of the Contractor to produce within fifteen (15) days any material requested by the Comptroller shall constitute a waiver by the Contractor of its claim. The Comptroller may also schedule an informal conference to be attended by the Contractor, Agency representatives, and any other personnel desired by the Comptroller.
- (d) **Opportunity of Comptroller to Compromise or Adjust Claim.** The Comptroller shall have forty-five (45) days from his or her receipt of all materials referred to in 5(c) to investigate the disputed claim. The period for investigation and compromise may be further extended by agreement between the Contractor and the Comptroller, to a maximum of ninety (90) days from the Comptroller's receipt of all the materials. The Contractor may not present its petition to the CDRB until the period for investigation and compromise delineated in this paragraph has expired. In compromising or adjusting any claim hereunder, the Comptroller may not revise or disregard the terms of the contract between the parties.

6. **Contract Dispute Resolution Board.** There shall be a Contract Dispute Resolution Board composed of:

- (a) the chief administrative law judge of the Office of Administrative Trials and Hearings ("OATH") or his/her designated OATH administrative law judge, who shall act as chairperson, and may adopt operational procedures and issue such orders consistent with this section as may be necessary in the execution of the

CDRB's functions, including, but not limited to, granting extensions of time to present or respond to submissions;

- (b) the City Chief Procurement Officer ("CCPO") or his/her designee; any designee shall have the requisite background to consider and resolve the merits of the dispute and shall not have participated personally and substantially in the particular matter that is the subject of the dispute or report to anyone who so participated, and
- (c) a person with appropriate expertise who is not an employee of the City. This person shall be selected by the presiding administrative law judge from a prequalified panel of individuals, established and administered by OATH, with appropriate background to act as decision-makers in a dispute. Such individuals may not have a contract or dispute with the City or be an officer or employee of any company or organization that does, or regularly represent persons, companies, or organizations having disputes with the City.

7. Petition to CDRB. In the event the claim has not been settled or adjusted by the Comptroller within the period provided in this section, the Contractor, within thirty (30) days thereafter, may petition the CDRB to review the Commissioner's determination.

- (a) Form and Content of Petition by Contractor. The Contractor shall present its dispute to the CDRB in the form of a Petition, which shall include (i) a brief written statement of the substance of the dispute, the amount of money, if any, claimed, and the reason(s) the Contractor contends that the dispute was wrongly decided by the Commissioner; (ii) a copy of the written decision of the Commissioner; (iii) copies of all materials submitted by the Contractor to the Agency; (iv) a copy of the written decision of the Comptroller, if any, and (v) copies of all correspondence with, and material submitted by the Contractor to, the Comptroller's Office. The Contractor shall concurrently submit four complete sets of the Petition: one to the Corporation Counsel (Attn: Commercial and Real Estate Litigation Division), and three to the CDRB at OATH's offices, with proof of service on the Corporation Counsel. In addition, the Contractor shall submit a copy of the statement of the substance of the dispute, cited in (i) above, to both the Commissioner and the Comptroller.
- (b) Agency Response. Within thirty (30) days of receipt of the Petition by the Corporation Counsel, the Agency shall respond to the statement of the Contractor and make available to the CDRB all material it submitted to the Commissioner and Comptroller. Three complete copies of the Agency response shall be submitted to the CDRB at OATH's offices and one to the Contractor. Extensions of time for submittal of the Agency response shall be given as necessary upon a showing of good cause or, upon the consent of the parties, for an initial period of up to thirty (30) days.
- (c) Further Proceedings. The CDRB shall permit the Contractor to present its case by submission of memoranda, briefs, and oral argument. The CDRB shall also permit the Agency to present its case in response to the Contractor by submission of memoranda, briefs, and oral argument. If requested by the Corporation Counsel, the Comptroller shall provide reasonable assistance in the preparation of the Agency's case. Neither the Contractor nor the Agency may support its case with any documentation or other material that was not considered by the Comptroller, unless requested by the CDRB. The CDRB, in its discretion, may seek such technical or other expert advice as it shall deem appropriate and may seek, on its own or upon application of a party, any such additional material from any party as it deems fit. The CDRB, in its discretion, may combine more than one dispute between the parties for concurrent resolution.
- (d) CDRB Determination. Within forty-five (45) days of the conclusion of all submissions and oral arguments, the CDRB shall render a written decision resolving the dispute. In an unusually complex case, the CDRB may render its decision in a longer period of time, not to exceed ninety (90) days, and shall so advise the parties at the commencement of this period. The CDRB's decision must be consistent with the terms of the Contract. Decisions of the CDRB shall only resolve matters before the CDRB and shall not have precedential effect with respect to matters not before the CDRB.
- (e) Notification of CDRB Decision. The CDRB shall send a copy of its decision to the Contractor, the ACCO, the Engineer, the Comptroller, the Corporation Counsel, the Comptroller, the CCPO, and the PPB. A decision in

favor of the Contractor shall be subject to the prompt payment provisions of the PPB Rules. The Required Payment Date shall be thirty (30) days after the date the parties are formally notified of the CDRB's decision.

(f) Finality of CDRB Decision. The CDRB's decision shall be final and binding on all parties. Any party may seek review of the CDRB's decision solely in the form of a challenge, filed within four months of the date of the CDRB's decision, in a court of competent jurisdiction of the State of New York, County of New York pursuant to Article 78 of the Civil Practice Law and Rules. Such review by the court shall be limited to the question of whether or not the CDRB's decision was made in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion. No evidence or information shall be introduced or relied upon in such proceeding that was not presented to the CDRB in accordance with this Article.

8. Any termination, cancellation, or alleged breach of the Contract prior to or during the pendency of any proceedings pursuant to this Article shall not affect or impair the ability of the Commissioner or the CDRB to make a binding and final decision pursuant to this Article.

### ARTICLE 30 – RECORD KEEPING FOR EXTRA OR DISPUTED WORK

30.1 While the Contractor or any of its Subcontractors is performing Extra Work on a Time and Material Basis ordered by the Commissioner under Article 28, or is performing disputed Work, or complying with a determination or order under protest in accordance with Article 29 hereof, in each such case the Contractor shall furnish the Commissioner's Representative daily with three (3) copies of written statements signed by the Contractor's representative at the Site showing:

30.1.1 The name and number of each Worker employed on such Work or engaged in complying with such determination or order, the number of hours employed, and the character of the Work each is doing; and

30.1.2 The nature and quantity of any materials, plant and equipment furnished or used in connection with the performance of such Work or compliance with such determination or order, and from whom purchased or rented.

30.2 A copy of such statement will be countersigned by the Commissioner's Representative, noting thereon any items not agreed to or questioned, and will be returned to the Contractor within two (2) Days after submission.

30.3 The Contractor and its Subcontractors, when required by the Commissioner, or the Comptroller, shall also produce for inspection, at the office of the Contractor or Subcontractor, any and all of its books, bid documents, financial statements, vouchers, records, daily job diaries and reports, and canceled checks, and any other documents relating to showing the nature and quantity of the labor, materials, plant and equipment actually used in the performance of such Work, or in complying with such determination or order, and the amounts expended therefor, and shall permit the Commissioner and the Comptroller to make such extracts therefrom, or copies thereof, as they or either of them may desire.

30.4 In connection with the examination provided for herein, the Commissioner, upon demand therefor, will produce for inspection by the Contractor such records as the Agency may have with respect to such Extra or disputed Work performed under protest pursuant to order of the Commissioner, except those records and reports which may have been prepared for the purpose of determining the accuracy and validity of the Contractor's claim.

30.5 Failure to comply strictly with these requirements shall constitute a waiver of any claim for extra compensation or damages on account of the performance of such Work or compliance with such determination or order.

### ARTICLE 31 - OMITTED WORK

31.1 If any Work in a lump sum subcontract, or if any part of a lump sum item in a unit price, lump sum, or percentage-bid subcontract is omitted by the Commissioner pursuant to Article 33, the subcontract price, subject to audit by the Engineering Audit Officer, shall be reduced by a pro rata portion of the lump sum bid amount based upon the percent of Work omitted, subject to Article 31.4. For the purpose of determining the pro rata portion of the lump

sum bid amount, the bid breakdown submitted in accordance with Article 42 shall be considered, but shall not be the determining factor.

31.2 If the whole of a lump sum item or units of any other item is so omitted by the Commissioner in a unit price, lump sum, or percentage-bid subcontract, then no payment will be made therefore, except as provided in Article 31.4.

31.3 For units that have been ordered but are only partially completed, the unit price shall be reduced by a pro rata portion of the unit price bid based upon the percentage of Work omitted, subject to Article 31.4.

31.4 In the event the subcontractor, with respect to any omitted Work, has purchased any non-cancelable material and/or equipment that is not capable of use except in the performance of the subcontract and has been specifically fabricated for the sole purpose of the subcontract, but not yet incorporated into the Work, the subcontractor shall be paid for such material and/or equipment, as set forth below; provided, however, such payment is contingent upon the subcontractor's delivery of such material and/or equipment in acceptable condition to a location designated by the City.

31.4.1 Payment for such material and/or equipment shall be in accordance with Article 28, subject to the following modification. For the purpose of payment hereunder, the percentage for overhead and profit set forth in Article 28.1.8 shall be reduced from twenty (20%) percent to five (5%) percent.

31.5 The Contractor and its subcontractors agree to make no claim for damages or for loss of overhead and profit with regard to any omitted Work.

#### ARTICLE 32 - THE COMMISSIONER'S REPRESENTATIVE

32.1 The Commissioner's Representative shall be the representative of the Commissioner, and subject to review by the Commissioner, shall have the power, in the first instance, to inspect the performance of the Work and exercise such other authority as the Commissioner may delegate. He shall not however, have the power to issue an Extra Work order, except as specifically designated in writing by the Commissioner.

#### ARTICLE 33 - THE COMMISSIONER

33.1 The Commissioner, in addition to those matters elsewhere herein expressly made subject to his determination, direction or approval, shall have the power: (a) to review and determine any and all questions in relation to this Agreement and its performance; and (b) to modify or change this Agreement so as to require: (i) the performance of Extra Work (subject, however, to the limitations specified in Article 26 hereof); or (ii) the omission of Work whenever he deems it in the interest of the City to do so; or both; and (c) to postpone, delay, suspend or terminate the whole or any part of the Work, whenever in his judgment such action is required in the interest of the City.

#### ARTICLE 34 - NO ESTOPPEL

34.1 Neither the City nor any department, officer, agent or employee thereof, shall be bound, precluded or estopped by any determination, decision, approval, order, letter, payment or certificate made or given under or in connection with this Agreement by the City, the Commissioner, the Commissioner's Representative, or any other officer, agent or employee of the City, either before or after the final completion and acceptance of the Work and payment therefor:

34.1.1 from showing the true and correct classification, amount, quality or character of the Work actually done; or that any such determination, decision, order, letter, payment or certificate was untrue, incorrect or improperly made in any particular, or that the Work or any part thereof does not in fact conform to the requirements of this Agreement; and

34.1.2 from demanding and recovering from the Contractor any overpayments made to him, or such damages as it may sustain by reason of his failure to perform each and every part of his Agreement in strict accordance with its terms, or both.

#### ARTICLE 35 - EMPLOYEES

35.1 The Contractor and its Subcontractors shall not employ on the Work:

35.1.1 anyone who is not competent, faithful and skilled in the Work for which he shall be employed; and whenever the Commissioner shall inform the Contractor, in writing, that any employee is, in his opinion, incompetent, unfaithful or disobedient, he shall be discharged from the Work forthwith, and shall not again be employed upon it; or

35.1.2 any labor, materials or means whose employment, or utilization during the course of this Agreement, may tend to or in any way cause or result in strikes, Work stoppages, delays, suspension of Work or similar troubles by workers employed by the Contractor or his Subcontractors, or by any of the trades working in or about the buildings and premises where Work is being performed under this Agreement, or by other contractors or their subcontractors pursuant to other contracts, or on any other building or premises owned or operated by the City of New York, its agencies, departments, boards or authorities. Any violation by the Contractor of this requirement may, upon certification of the Commissioner, be considered as proper and sufficient cause for terminating the Contractor for cause and taking such action as set forth in Article 46 hereof, or such other action as the Commissioner may deem proper; or

35.1.3 in accordance with Section 220.3.e of the New York State Labor Law, any apprentice, unless he is registered individually, under a bona fide program registered with the New York State Department of Labor. The allowable ratio of apprentices to journeymen in any craft classification shall not be greater than the ratio permitted to the Contractor as to his Work force on any job under the registered program. Any employee listed on a payroll at an apprentice wage rate, who is not registered as above shall be paid the wage rate determined by the Comptroller of the City of New York for the classification of Work being actually performed. The Contractor or Subcontractor will be required to furnish written evidence of the registration of his program and apprentices as well as all the appropriate ratios and wage rates, for the area of the construction prior to using any apprentices on the Contract Work.

35.2 If the total cost of the Work under this Contract is at least two hundred fifty thousand dollars, all laborers, workers, and mechanics employed in the performance of the Contract on the public work site, either by the Contractor, Subcontractor or other person doing or contracting to do the whole or a part of the work contemplated by the contract, shall be certified prior to performing any Work as having successfully completed a course in construction safety and health approved by the United States department of labor's occupational safety and health administration that is at least ten hours in duration.

#### ARTICLE 36 - NO DISCRIMINATION

36.1 As required by New York State Labor Law Section 220.e, it is agreed between the parties hereto as follows:

36.1.1 That in the hiring of employees for the performance of Work under this Agreement or any subcontract hereunder, neither the Contractor, Subcontractor, nor any person acting on behalf of such Contractor or Subcontractor, shall by reason of race, creed, color or national origin discriminate against any citizen of the State of New York who is qualified and available to perform the Work to which the employment relates;

36.1.2 That neither the Contractor, Subcontractor, nor any person on his behalf shall, in any manner discriminate against or intimidate any employee hired for the performance of Work under this Agreement on account of race, creed, color or national origin;

36.1.3 That there may be deducted from the amount payable to the Contractor by the City under this Agreement a penalty of five dollars for each person for each calendar day during which such person was discriminated against or intimidated in violation of the provisions of this Agreement; and

36.1.4 That this Agreement may be canceled or terminated by the City and all moneys due or to become due hereunder may be forfeited, for a second or any subsequent violation of the terms or conditions of this section of the Agreement.

36.1.5 The aforesaid provisions of this section covering every contract for or on behalf of the State or a municipality for the manufacture, sale or distribution of materials, equipment or supplies shall be limited to operations

performed within the territorial limits of the State of New York.

36.2 As required by New York City Administrative Code Section 6-108:

36.2.1 It shall be unlawful for any person engaged in the construction, alteration or repair of building or engaged in the construction or repair of streets or highways pursuant to a contract with the City or engaged in the manufacture, sale or distribution of materials, equipment or supplies pursuant to a contract with the City to refuse to employ or to refuse to continue in any employment any person on account of the race, color or creed of such person.

36.2.2 It shall be unlawful for any person or any servant, agent or employee of any person, described in subdivision 36.2.1 above, to ask, indicate or transmit, orally or in writing, directly or indirectly, the race, color or creed or religious affiliation of any person employed or seeking employment from such person, firm or corporation.

36.2.3 Disobedience of the foregoing provisions shall be deemed a violation of a material provision of this Agreement.

36.2.4 Any person, or the employee, manager or owner of or officer of such firm or corporation who shall violate any of the provisions of this section shall, upon conviction thereof, be punished by a fine of not more than one hundred dollars or by imprisonment for not more than thirty days, or both.

#### ARTICLE 37 - EQUAL EMPLOYMENT OPPORTUNITY

37.1 This Contract is subject to the requirements of Executive Order No. 50 (1980) as revised ("E.O. 50") and the Rules and Regulations promulgated thereunder. No contract will be awarded unless and until these requirements have been complied with in their entirety. By signing this contract, the Contractor agrees that:

37.1.1 The Contractor will not engage in any unlawful discrimination against any employee or applicant for employment because of race, creed, color, national origin, sex, age, disability, marital status, sexual orientation or citizenship status with respect to all employment decisions including, but not limited to, recruitment, hiring, upgrading, demotion, downgrading, transfer, training, rates of pay or other forms of compensation, layoff, termination, and all other terms and conditions of employment;

37.1.2 When it subcontracts, the Contractor will not engage in any unlawful discrimination in the selection of subcontractors on the basis of the owners', partners' or shareholders' race, color, creed, national origin, sex, age, disability, marital status, sexual orientation or citizenship status;

37.1.3 The Contractor will state in all solicitations or advertisements for employees placed by or on behalf of the Contractor that all qualified applicants will receive consideration for employment without regard to race, creed, color, national origin, sex, age, disability, marital status, sexual orientation or citizenship, or that it is an equal employment opportunity employer;

37.1.4 The Contractor will send to each labor organization or representative or workers with which it has a collective bargaining agreement or other contract or memorandum of understanding, written notification of its equal employment opportunity commitments under E. O. 50 and the rules and regulations promulgated thereunder; and

37.1.5 The Contractor will furnish all information and reports including an Employment Report before the award of the contract which are required by E. O. 50, the rules and regulations promulgated thereunder, and orders of the Director of the Office of Labor Services ("DLS"), and will permit access to its books, records and accounts by DLS for the purposes of investigation to ascertain compliance with such rules, regulations, and orders.

37.2 The Contractor understands that in the event of its noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, such noncompliance shall constitute a material breach of the contract and noncompliance with the E. O. 50 and the rules and regulations promulgated thereunder. After a hearing held pursuant to the rules of DLS, the Director of DLS may direct the imposition by the Commissioner of any or all of the following sanctions:

- 37.2.1 disapproval of the Contractor;
- 37.2.2 suspension or termination of the contract;
- 37.2.3 declaring the Contractor in default; or
- 37.2.4 in lieu of any of the foregoing sanctions, the Director may impose an employment program.

The Director of the DLS may recommend to the Department head that a Board of Responsibility be convened for purposes of declaring a contractor who has repeatedly failed to comply with E.O. 50 and the rules and regulations promulgated thereunder to be nonresponsible

37.3 The Contractor agrees to include the provisions of the foregoing paragraphs in every subcontract in the amount of \$750,000 or more to which it becomes a party, unless exempted by E. O. 50 and the rules and regulations promulgated thereunder, so that such provisions will be binding upon each subcontractor. The Contractor will take such action with respect to any subcontract as may be directed by the Director of DLS as a means of enforcing such provisions, including sanctions for noncompliance.

37.4 The Contractor further agrees that it will refrain from entering into any contract or contract modification subject to E. O. 50 and the rules and regulations promulgated thereunder with a subcontractor who is not in compliance with the requirements of E. O. 50 and the rules and regulations promulgated thereunder.

#### ARTICLE 38. LABOR LAW REQUIREMENTS

Labor Law Compliance: The Contractor shall take appropriate action to ensure compliance by its subcontractors with the Labor Law.

Subcontracts: The Contractor shall include the provisions of this Article 38 set forth below in all subcontracts for construction Work for the Project.

#### LABOR LAW REQUIREMENTS

38.1 The Contractor shall strictly comply with all applicable provisions of the Labor Law, as amended. Such compliance is a material term of this Contract.

38.2 The Contractor specifically agrees, as required by Labor Law Section 220 and 220-d, as amended, that:

38.2.1 Hours of Work: No laborer, worker, or mechanic in the employ of the Contractor, Subcontractor or other person doing or contracting to do the whole or a part of the Work contemplated by this Contract shall be permitted or required to work more than eight (8) hours in any one (1) calendar Day, or more than five (5) Days in any one (1) week, except as provided in the Labor Law and in cases of extraordinary emergency including fire, flood, or danger to life or property, or in the case of national emergency when so proclaimed by the President of the United States of America.

38.2.2 In situations in which there are not sufficient laborers, workers and mechanics who may be employed to carry on expeditiously the Work contemplated by this Contract as a result of such restrictions upon the number of hours and days of labor, and the immediate commencement or prosecution or completion without undue delay of the Work is necessary for the preservation of the Site and/or for the protection of the life and limb of the persons using the same, such laborers, workers, and mechanics shall be permitted or required to work more than eight (8) hours in any one (1) Day; or five (5) Days in any one (1) week; provided, however, that upon application of any Contractor, the Commissioner shall have first certified to the Commissioner of Labor of the State of New York (hereinafter "Commissioner of Labor") that such public Work is of an important nature and that a delay in carrying it to completion would result in serious disadvantage to the public; and provided, further, that such Commissioner of Labor shall have determined that such an emergency does in fact exist as provided in Labor Law Section 220.2.

38.2.3 Failure of the Commissioner to make such a certification to the Commissioner of Labor shall not entitle the Contractor to damages for delay or for any cause whatsoever.

38.2.4 Prevailing Rate of Wages: The wages to be paid for a legal day's Work to laborers, workers, or mechanics employed upon the Work contemplated by this Contract or upon any materials to be used thereon shall not be less than the "prevailing rate of wage" as defined in Labor Law Section 220, and as fixed by the Comptroller in the attached Schedule of Wage Rates and in updated schedules thereof. The prevailing wage rates and supplemental benefits to be paid are those in effect at the time the Work is being performed.

38.2.5 Requests for interpretation or correction in the Information for Bidders include all requests for clarification of the classification of trades to be employed in the performance of the Work under this Contract. In the event that a trade not listed in the Contract is in fact employed during the performance of this Contract, the Contractor shall be required to obtain from the Agency the prevailing wage rates and supplementary benefits for the trades used and to complete the performance of this Contract at the price at which the Contract was awarded.

38.2.6 Minimum Wages: Except for employees whose wage is required to be fixed pursuant to Labor Law Section 220, all persons employed by the Contractor and any Subcontractor in the manufacture or furnishing of the supplies, materials, or equipment, or the furnishing of work, labor, or services, used in the performance of this Contract, shall be paid, without subsequent deduction or rebate unless expressly authorized by Law, not less than the sum mandated by Law. Minimum wages shall be the rates fixed by Federal Law and regulations.

38.3 Working Conditions: No part of the Work, labor or services shall be performed or rendered by the Contractor in any plants, factories, buildings or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of this Contract. Compliance with the safety, sanitary and factory inspection Laws of the state in which the Work is to be performed shall be prima facie evidence of compliance with this article.

38.4 Prevailing Wage Enforcement: The Contractor agrees to pay for all costs incurred by the City in enforcing prevailing wage requirements, including the cost of any investigation conducted by or on behalf of the Agency or the Comptroller, where the City discovers a failure to comply with any of the requirements of this Article 38 by the Contractor or its Subcontractor(s). The Contractor also agrees, that should it fail or refuse to pay for any such investigation, the Agency is hereby authorized to deduct from a Contractor's account an amount equal to the cost of such investigation.

38.4.1 The Labor Law Section 220 and Section 220-d, as amended, provide that this Contract shall be forfeited and no sum paid for any Work done hereunder on a second conviction for willfully paying less than:

- (a) The stipulated wage scale as provided in Labor Law Section 220, as amended, or
- (b) Less than the stipulated minimum hourly wage scale as provided in Labor Law Section 220-d, as amended.

38.4.2 For any breach or violation of either Working Conditions and Minimum Wages, the party responsible therefore shall be liable to the City for liquidated damages, which may be withheld from any amounts due on any Contracts with the City of such party responsible, or may be recovered in suits brought by the Corporation Counsel in the name of the City, in addition to damage for any other breach of this Contract, a sum equal to the amount of any underpayment of wages due to any employee engaged in the performance of this Contract. In addition, the Commissioner shall have the right to cancel Contracts and enter into other Contracts for the completion of the original Contract, with or without public letting, and the original Contractor shall be liable for any additional cost. All sums withheld or recovered as deductions, rebates, refunds, or underpayment of wages hereunder, shall be held in a special deposit account and shall be paid without interest, on order of the Comptroller, directly to the employees who have been paid less than minimum rates of pay as set forth herein and on whose account such sums were withheld or recovered, provided that no claims by employees for such payments shall be entertained unless made within two (2) years from the date of actual notice to the Contractor of the withholding or recovery of such sums by the City.

38.4.3 A determination by the Comptroller that a Contractor and/or its Subcontractor willfully violated Labor Law Section 220 will be forwarded to the City's five District Attorneys for review.

38.4.4 The Contractor's or Subcontractor's noncompliance with this article and Labor Law Section 220 may result in an unsatisfactory performance evaluation and the Comptroller may also find and determine that the Contractor or Subcontractor willfully violated the New York Labor Law.

- (a) An unsatisfactory performance evaluation for noncompliance with this article may result in a determination that the Contractor is a non-responsible bidder on subsequent procurements with the City and thus a rejection of a future award of a contract with the City, as well as any other sanctions provided for by Law.
- (b) Labor Law Section 220-b, as amended, provides that when two (2) final determinations have been rendered against a Contractor or Subcontractor within any consecutive six (6) year period determining that such Contractor or Subcontractor has willfully failed to pay the prevailing rate of wages or to provide supplements in accordance with the Labor Law and this article, whether such failures were concurrent or consecutive and whether or not such final determinations concerning separate public work projects are rendered simultaneously, such Contractor or Subcontractor shall be ineligible to submit a bid on or be awarded any public work contract with the City for a period of five (5) years from the second final determination. If the final determination involves the falsification of payroll records or the kickback of wages or supplements, the Contractor or Subcontractor shall be ineligible to submit a bid on or be awarded any public work contract with the City for a period of five (5) years from the first final determination.
- (c) Labor Law Section 220, as amended, provides that the Contractor or Subcontractor found to have violated this article may be directed to make payment of wages or supplements including interest found to be due, and the Contractor or Subcontractor may be directed to make payment of a further sum as a civil penalty in an amount not exceeding twenty-five (25%) percent of the total amount found to be due.

38.5 The Contractor and its Subcontractors shall within ten (10) Days after mailing of a Notice of Award or written order, post in prominent and conspicuous places in each and every plant, factory, building, and structure where employees of the Contractor and its Subcontractors engaged in the performance of this Contract are employed, notices furnished by the City, in relation to prevailing wages and supplements, minimum wages and other stipulations contained in Sections 220 and 220-h of the Labor Law, and the Contractor and its Subcontractors shall continue to keep such notices posted in such prominent and conspicuous places until Final Acceptance of the supplies, materials, equipment, or Work, labor, or services required to be furnished or rendered under this Contract.

38.6 The Contractor shall strictly comply with all of the provisions of Articles 38.6.1 through 38.6.5, and provide for all workers, laborers or mechanics in its employ, the following:

38.6.1 Notices Posted At Site: Post, in a location designated by the City, schedules of prevailing wages and supplements for this Project, a copy of all re-determinations of such schedules for the Project, the Workers' Compensation Law Section 51 notice, all other notices required by law to be posted at the Site, the City notice that this Project is a public works Project on which each worker is entitled to receive the prevailing wages and supplements for the occupation at which he or she is working, and all other notices which the City directs the Contractor to post. The Contractor shall provide a surface for such notices which is satisfactory to the City. The Contractor shall maintain and keep current such notices in a legible manner and shall replace any notice or schedule which is damaged, defaced, illegible or removed for any reason. The Contractor shall post such notices before commencing any Work on the Site and shall maintain such notices until all Work on the Site is complete; and

38.6.2 Daily Site Sign-in Sheets: Maintain daily Site sign-in sheets, and require that Subcontractors maintain daily Site sign-in sheets for its employees, which include blank spaces for an employee's name to be both printed and signed, job title, date started and Social Security number, the time the employee began Work and the time the employee left Work, until Final Acceptance of the supplies, materials, equipment, or Work, labor, or services to be furnished or rendered under this Contract unless exception is granted by the Comptroller upon application by the Agency. In the alternative, subject to the approval of the CCPO, the Contractor and Subcontractor may maintain an electronic or biometric sign-in system, which provides the information required by this Article 38.6.2; and

38.6.3 Individual Employee Information Notices: Distribute a notice, to each worker, laborer or mechanic

employed under this Contract, in a form provided by the Agency, that this Project is a public work project on which each worker, laborer or mechanic is entitled to receive the prevailing rate of wages and supplements for the occupation at which he or she is working. If the total cost of the Work under this Contract is at least two hundred fifty thousand dollars, such notice shall also include a statement that, that each worker, laborer or mechanic be certified prior to performing any Work as having successfully completed a course in construction safety and health approved by the United States department of labor's occupational safety and health administration that is at least ten hours in duration. Such notice shall be distributed to each worker before he or she starts performing any Work of this Contract and with the first paycheck after July first of each year. Worker, laborer or mechanic includes employees of the Contractor and all Subcontractors and all employees of suppliers entering the Site. At the time of distribution, the Contractor shall have each worker, laborer or mechanic sign a statement, in a form provided by the Agency, certifying that the worker has received the notice required by this article, which signed statement shall be maintained with the payroll records required by this Contract; and

- (a) The Contractor and each Subcontractor shall notify each worker, laborer or mechanic employed under this Contract in writing of the prevailing rate of wage for their particular job classification. Such notification shall be given to every worker, laborer and mechanic on their first pay stub and with every pay stub thereafter; and

38.6.4 Site Laminated Identification Badges: Provide laminated identification badges which indicate the worker's, laborer's or mechanic's name, trade, employer's name and employment starting date (month/day/year). Further, require as a condition of employment on the Site, that each and every worker, laborer or mechanic wear the laminated identification badge at all times and that it may be seen by any representative of the City; and

38.6.5 Language Other Than English Used On Site: Provide the ACCO notice when three (3) or more employees (worker and/or laborer and/or mechanic) on the Site, at any time, speak a language other than English. The ACCO will then provide the Contractor the notices in Article 38.6.1 in that language or languages as may be required. The Contractor is responsible for all distributions under Article 38; and

38.6.6 Provision of Records: The Contractor and Subcontractor(s) shall produce within five (5) Days on the Site of the Work and upon a written order of the Commissioner, the Commissioner's Representative, the ACCO, the Agency EAO, or the Comptroller, such records as are required to be kept by this Article 38.6; and

38.6.7 If this Contract is for an amount greater than \$1,000,000, checks issued by the Contractor to covered employees shall be generated by a payroll service or automated payroll system (an in-house system may be used if approved by the Agency). For any subcontract for an amount greater than \$750,000, checks issued by a Subcontractor to covered employees shall be generated by a payroll service or automated payroll system (an in-house system may be used if approved by the Agency); and

38.6.8 The failure of the Contractor or Subcontractor(s) to comply with the provisions of Articles 38.6.1 through 38.6.7 may result in the Commissioner declaring the Contractor or Subcontractor(s) in default and/or the withholding of payments otherwise due under the Contract.

38.7 The Contractor and its Subcontractors shall keep such employment and payroll records as are required by Section 220 of the Labor Law.

38.8 At the time the Contractor makes application for each partial payment and for final payment, the Contractor shall submit to the Commissioner a written payroll certification, in the form provided by this Contract, of compliance with the prevailing wage, minimum wage and other provisions and stipulations required by Labor Law Section 220 and of compliance with the training requirements of Labor law section 220-h set forth in Article 35.2. This certification of compliance with the provisions of this article shall be a condition precedent to payment and no payment shall be made to the Contractor unless and until each such certification shall have been submitted to and received by the Commissioner.

38.9 This Contract is executed by the Contractor with the express warranty and representation that the Contractor is not disqualified under the provisions of Section 220 of the Labor Law for the award of the Contract.

38.10 Any breach or violation of any of the foregoing shall be deemed a breach or violation of a material provision of this Contract, and grounds for cancellation thereof by the City.

#### ARTICLE 39 - PAYROLL REPORTS

Compliance: The Contractor shall take appropriate action to ensure compliance by its subcontractors with the payroll requirements set forth herein.

Subcontracts: The Contractor shall include the provisions of this Article 39 set forth below in all subcontracts for construction Work for the Project.

#### PAYROLL REPORTS

39.1 The Contractor shall maintain on the Site the original payrolls or transcripts thereof which the Contractor and its Subcontractor(s) are required to maintain pursuant to Labor Law Section 220. The Contractor and Subcontractor(s) shall submit original payrolls or transcripts, subscribed and affirmed by it as true, with each and every payment requisition. The Contractor and Subcontractor(s) shall produce within five (5) Days on the Site of the Work and upon a written order of the Commissioner, Commissioner's Representative, the ACCO, the Agency EAO, or the Comptroller, such original payrolls or transcripts thereof, subscribed and affirmed by it as true, and the statements signed by each worker pursuant to this Contract. In addition, the Contractor and Subcontractor(s) shall furnish to the Commissioner's Representative upon written demand any other information to satisfy the Commissioner's Representative that this Contract and the Labor Law, as to the hours of employment and rates of wages, are being observed. The Contractor shall maintain the payrolls or transcripts thereof for six (6) years from the date of completion of the Work on this Contract.

39.2 When directed by the Commissioner's Representative, the Contractor or Subcontractor shall provide an attendance sheet for each Day on which Work is performed on the Site. Such attendance sheet shall be in a form acceptable to the Agency and shall provide information for employees of the Contractor and Subcontractor(s).

#### ARTICLE 40 - DUST HAZARDS

40.1 Should a harmful dust hazard be created in performing the Work of this Agreement, for the elimination of which appliances or methods have been approved by the Board of Standards and Appeals of the State of New York, such appliances and methods shall be installed, maintained, and effectively operated during the continuance of such harmful dust hazard. Failure to comply with this provision after notice shall make this Agreement void.

#### ARTICLE 41 - NOISE CONTROL CODE PROVISIONS

41.1 In accordance with the provisions of Section 24-216(b) of the Administrative Code of the City ("Administrative Code"), Noise Abatement Contract Compliance, devices and activities which will be operated, conducted, constructed or manufactured pursuant to this Contract and which are subject to the provisions of the City Noise Control Code shall be operated, conducted, constructed, or manufactured without causing a violation of the Administrative Code. Such devices and activities shall incorporate advances in the art of noise control development for the kind and level of noise emitted or produced by such devices and activities, in accordance with regulations issued by the Commissioner of the Department of Environmental Protection.

41.2 The Contractor agrees to comply with Section 24-219 of the Administrative Code of the City ("Administrative Code") and implementing rules codified at 15 Rules of the City of New York ("RCNY") Section 28-100 et. seq. In accordance with such provisions, the Contractor, if the Contractor is the responsible party under such regulations, shall prepare and post a Construction Noise Mitigation Plan at each work site, in which the Contractor shall certify that all construction tools and equipment have been maintained so that they operate at normal manufacturers operating specifications. If the Contractor cannot make this certification, it must have in place an Alternative Noise Mitigation Plan approved by the New York City Department of Environmental Protection. In addition, the Contractor's certified Construction Noise Mitigation Plan is subject inspection by the Department of Environmental Protection in

accordance with 15 RCNY §28-101. No Contract work may take place at a worksite unless there is a Construction Noise Mitigation Plan or approved Alternative Noise Mitigation Plan in place. In addition, the Contractor shall create and implement a noise mitigation training program. Failure to comply with these requirements may result in fines and other penalties pursuant to the applicable provisions of the Administrative Code and RCNY.

## ARTICLE 42 - PAYMENT TERMS AND CONDITIONS

### 42.1 General

42.1.1 Total Payments: Total payments for all services performed and all expenses incurred pursuant to this Agreement shall not exceed the amount set forth in Exhibit A.

42.1.2 Executory Only: This Agreement shall be deemed executory only to the extent of the moneys appropriated and available for the purpose of the Agreement and no liability or account thereof shall be incurred beyond the amount of such moneys. It is therefore understood that neither this Agreement nor any representation by any public employee or officer creates any legal or moral obligation to request, appropriate or make available moneys for the purpose of this Agreement.

42.1.3 Allowances: In the event the allowance amounts described in this Article are not sufficient, as determined by the Commissioner, to cover the cost of the items of required Work for which allowance amounts are specified, the City will increase the amounts of such allowances. Notwithstanding the specific amounts allocated for allowances, as set forth in Exhibit A, the Commissioner may, by issuance of a “No Cost Change Order” to the Contractor, reallocate such specific allowance amounts within this Article 42.

### 42.2 Multipliers

42.2.1 Multiplier for Design Personnel: The Multiplier to be used to calculate payment to the Contractor for staffing expenses for design personnel is set forth in Exhibit A (the “Multiplier for Design Personnel”). The Multiplier for Design Personnel shall be deemed to include: (1) all expenses incurred by the Design Consultant in the performance of all required design services for the Project [except as specified in paragraph (a) below], (2) all expenses related to management, administration and oversight, including, without limitation, any time spent by principals performing such duties, (3) all expenses related to overhead, and (4) any anticipated profit. The Multiplier for Design Personnel shall include, but not be limited to, the items set forth below:

- (a) All expenses for compensation paid to personnel of the Design Consultant [other than compensation for those design personnel identified in the approved Staffing Plan, except for any Principal(s)]. Such other personnel of the Design Consultant shall include without limitation all officers, principals, employees and personnel of the Design Consultant, serving in whatever capacity, including the Principal. Compensation shall include without limitation: (1) wages and/or salaries; (2) all payments mandated by law, including without limitation, social security and medicare taxes, insurance (Worker’s Compensation, Employers Liability, Unemployment); (3) employer contributions, if any, to retirement plans, including without limitation pension and/or deferred compensation plans; (4) all payments for compensated absence time, including without limitation vacation time, sick time, personal time and holidays, and (5) costs for any and all other fringe and/or supplemental benefits.
- (b) All expenses for compensation paid to design personnel identified in the approved Staffing Plan that are in excess of compensation for such personnel payable hereunder. Compensation for such personnel shall include without limitation the items listed in item (a) above.
- (c) All expenses incurred in connection with the performance of all required design services, including without limitation, expenses for (1) non-reimbursable services, as set forth in Article 11, (2) lodging, (3) meals, and (4) expediting costs.
- (d) All expenses with respect to home office general facilities including, but not limited to, rental cost or depreciation factor, light, heat and water, telephone charges, including all charges for calls to the job site and DDC (except for long distance calls to other locations as specifically required by the Commissioner), sales, estimating expenses, accounting fees and bookkeeping expenses, electronic data processing services, including programming and rental equipment, dues and subscriptions,

- stationery, printing, postage, and any other office or miscellaneous expenses, except as otherwise expressly provided in an allowance for miscellaneous expenses and/or additional services.
- (e) All expenses with respect to applicable taxes of any kind whatsoever, including without limitation, federal, state and local income tax and any franchise or other business taxes.
  - (f) All expenses for insurance coverage determined by the Design Consultant to be necessary for the performance of all required services hereunder, including without limitation: (1) all insurance required under this Contract; (2) all insurance required by law, and (3) all other insurance maintained by the Design Consultant in the course of business, including without limitation, burglary and theft, general fidelity and payroll insurance.
  - (g) All expenses for any losses for theft or robbery sustained by the Design Consultant.
  - (h) All expenses with respect to fixed capital, including interest thereon or on monies borrowed.
  - (i) All expenses with respect to legal services.
  - (j) All management, administrative or overhead expenses of any kind whatsoever incurred by the Design Consultant, including such expenses incurred in the performance of additional services.
  - (k) Profit.

42.2.2 Multiplier for Construction Management Personnel: The Multiplier to be used to calculate payment to the Contractor for staffing expenses for construction management personnel is set forth in Exhibit A (the "Multiplier for CM Personnel"). The Multiplier for CM Personnel shall be deemed to include: (1) all expenses incurred by the Contractor in the performance of all required CM services for the Project [except as specified in paragraph (a) below], (2) all expenses related to management, administration and oversight, including, without limitation, any time spent by any Project Executive(s) performing such duties, (3) all expenses related to overhead, and (4) any anticipated profit. The Multiplier for CM Personnel shall include, but not be limited to, the items set forth below:

- (a) All expenses for compensation paid to personnel of the Contractor [other than compensation for those CM personnel identified in the approved Staffing Plan, except for any Project Executive(s)]. Such other personnel of the Contractor shall include without limitation all officers, principals, employees and personnel of the Contractor, serving in whatever capacity, including the Project Executive. Compensation shall include without limitation: (1) wages and/or salaries; (2) all payments mandated by law, including without limitation, social security and medicare taxes, insurance (Worker's Compensation, Employers Liability, Unemployment); (3) employer contributions, if any, to retirement plans, including without limitation pension and/or deferred compensation plans; (4) all payments for compensated absence time, including without limitation vacation time, sick time, personal time and holidays, and (5) costs for any and all other fringe and/or supplemental benefits.
- (b) All expenses for compensation paid to CM personnel identified in the approved Staffing Plan that are in excess of compensation for such personnel payable hereunder. Compensation for such personnel shall include without limitation the items listed in item (a) above.
- (c) All expenses incurred in connection with the performance of all required CM services, including without limitation, expenses for (1) non-reimbursable services, as set forth in Article 11, (2) lodging, (3) meals, (4) expediting costs, and (5) management and/or administration of the Design Consultant
- (d) All expenses with respect to home office general facilities including, but not limited to, rental cost or depreciation factor, light, heat and water, telephone charges, including all charges for calls to the job site and DDC (except for long distance calls to other locations as specifically required by the Commissioner), sales, estimating expenses, accounting fees and bookkeeping expenses, electronic data processing services, including programming and rental equipment, dues and subscriptions, stationery, printing, postage, and any other office or miscellaneous expenses, except as otherwise expressly provided in an allowance for miscellaneous expenses and/or additional services.
- (e) All expenses with respect to applicable taxes of any kind whatsoever, including without limitation, federal, state and local income tax and any franchise or other business taxes.
- (f) All expenses for insurance coverage determined by the Contractor to be necessary for the performance of all required services hereunder, including without limitation: (1) all insurance required under this Contract; (2) all insurance required by law, and (3) all other insurance maintained by the Contractor in the course of business, including without limitation, burglary and theft, general fidelity and payroll insurance.
- (g) All expenses for any losses for theft or robbery sustained by Contractor.

- (h) All expenses with respect to fixed capital, including interest thereon or on monies borrowed.
- (i) All expenses with respect to legal services.
- (j) All management, administrative or overhead expenses of any kind whatsoever incurred by the Contractor, including such expenses incurred in the performance of additional services or the provision of miscellaneous items hereunder.
- (k) Profit.

#### 42.3 Staffing Expenses

42.3.1 Allowance: An allowance in the amount set forth in Exhibit A is established for payment of the Contractor's staffing expenses for those design and construction management personnel who have been assigned to the Project and are identified in the Staffing Plan(s) approved by the Commissioner (the "Assigned Personnel" or the "Assigned Employee"). The Contractor shall not be entitled to payment for staffing expenses for: (1) any Project Executive(s), (2) any Principals(s) of the Design Consultant, and (3) any personnel not included in the approved Staffing Plan(s). Payment of staffing expenses is subject to retainage, as set forth below.

- (a) Payment to Design Consultant: The Contractor agrees to pay its Design Consultant the full amount of staffing expenses for design personnel, computed in accordance with the provisions set forth below. The Contractor shall not be entitled to reduce payments to the Design Consultant as compensation for overhead and/or management expenses incurred by the Contractor with respect to the Design Consultant. All such expenses incurred by the Contractor are deemed included in the Multiplier for CM Personnel.

42.3.2 Payment: For any week during which an Assigned Employee performs services for the Project, payment to the Contractor for such employee's services for that week shall be calculated as follows: Multiply the amount set forth in paragraph (a) by the number set forth in paragraph (b), and then multiply the result by the applicable Multiplier set forth in Exhibit A. For design personnel, utilize the Multiplier for Design Personnel, and for CM personnel, utilize the Multiplier for CM Personnel. Such Multipliers shall **NOT** apply to any increase in the Assigned Employee's Direct Salary Rate per hour for authorized services performed during other than regular business hours. All payments are subject to retainage, as set forth below.

- (a) Assigned Employee's Direct Salary Rate per hour, as determined and approved in writing by the Commissioner in accordance with the provisions set forth below. In the event the Contractor receives written authorization from the Commissioner to have an Assigned Employee perform services during other than regular business hours, the employee's Direct Salary Rate per hour may be subject to an increase, as provided below.
- (b) Total number of hours set forth on time sheets completed by the Assigned Employee for the week(s) in question during which the Assigned Employee actually performed services for this Project. This total number of hours shall **NOT** include the following: (1) any hours the Assigned Employee spent commuting; (2) any non-billable hours, as defined below; (3) any hours during which the Assigned Employee performed services for any other project; (4) any hours the Assigned Employee spent performing services for the Project for which the Contractor is not entitled to compensation, and (5) any hours other than regular business hours, unless otherwise authorized in advance, in writing by the Commissioner.
- (c) Non-billable hours shall be defined as any hours set forth time sheets completed by the Assigned Employee which have been allocated to any category or function other than services performed for this Project. Non-billable hours shall include without limitation: (1) compensated absence time, including without limitation vacation time, sick time, personal time and holidays; (2) performance of administrative tasks, or (3) any other time keeping category consistent with standard accounting practices.

42.3.3 Equitable Reduction: The amount of payment to the Contractor for services performed for the Project by an Assigned Employee, calculated as set forth above, shall be subject to an equitable reduction if, for the week during which an Assigned Employee performed services for the Project, the total number of hours for which the Assigned Employee was actually paid by the Contractor for that week, less any non-billable hours, is less than the total

number of hours actually billed by the Contractor to all entities for the Assigned Employee's services for that week, including the number of hours billed for this Project. In such event, the amount of payment to the Contractor for services performed by an Assigned Employee for the week in question, calculated as set forth above, shall be reduced by multiplying such amount by the following: the fractional number resulting from the division of the number set forth in item (a) below by the number set forth in item (b).

- (a) total number of hours for which the Assigned Employee was actually paid by the Contractor for the week in question, less any non-billable hours, as defined above.
- (b) total number of hours actually billed by the Contractor to all entities for the Assigned Employee's services for the week in question, including the number of hours billed for this Project

42.3.4 Direct Salary Rates: The Direct Salary Rate per hour for each Assigned Employee shall be determined and approved by the Commissioner in accordance with the provisions set forth below. Upon approval by the Commissioner, the Direct Salary Rate per hour for each Assigned Employee shall be included in the Staffing Plan.

- (a) For each Assigned Employee, the Commissioner shall determine and approve in writing the Direct Salary Rate per hour to be paid for such employee. An Assigned Employee's Direct Salary Rate per hour shall be whichever of the following is **LESS**: (1) Actual Annual Direct Salary Rate per hour for the Assigned Employee, computed as described below, or (2) Maximum Allowable Direct Salary Rate per hour for the Assigned Employee's title, as set forth in Exhibit B.
- (b) For each Assigned Employee, the Contractor shall submit such employee's actual annual direct salary, as well as such salary computed on an hourly basis, as described below. The Contractor shall also submit any records or documentation requested by the Commissioner to verify the Assigned Employee's actual annual direct salary, including without limitation, the Contractor's payroll register for the past twelve (12) months, as well as the payroll register for its Design Consultant.
  - (i) An Assigned Employee's actual annual direct salary shall be the salary amount directly payable to such employee on an annual basis and shall **NOT INCLUDE** any amount for the following costs or payments: (1) any payments for services performed during other than regular business hours (i.e., premium for Night Differential and/or Overtime); (2) any employer payments mandated by law, including without limitation, social security and Medicare taxes, insurance (Worker's Compensation, Employers Liability, Unemployment); (3) any employer contributions to retirement plans, including without limitation pension and/or deferred compensation plans, and (4) any costs for any other fringe and/or supplemental benefits.
  - (ii) To compute an Assigned Employee's actual annual direct salary on an hourly basis, the Assigned Employee's actual annual direct salary, as defined above, shall be divided by 2080.
- (c) Once determined and approved by the Commissioner as set forth above, the Assigned Employee's Direct Salary Rate per hour shall not be eligible for any increase whatsoever, except for the increase described in Article 42.3.5 below. Any such increase must be approved in writing by the Commissioner.
- (d) The Direct Salary Rate per hour for an Assigned Employee, determined and approved by the Commissioner, may be adjusted in accordance with Article 42.3.6 below, in the event the Contractor receives written authorization from the Commissioner in the particular instance to have the Assigned Employee perform services during other than regular business hours.

42.3.5 Increases in Direct Salary Rates: If the Contractor or its Design Consultant increases the actual annual direct salary of an Assigned Employee, the employee's approved Direct Salary Rate per hour, as indicated in the Staffing Plan, shall be subject to an increase, subject to the limitations set forth below. An employee's approved Direct Salary Rate per hour shall be eligible for an increase at the following times: one (1) year after the commencement date (i.e., the date on which the Contract is registered by the Comptroller), and thereafter, on a yearly basis, on the

anniversary of commencement date, for the remainder of the term of the Contract, including any extension thereof.

- (a) Any increase in an employee's approved Direct Salary Rate per hour shall be based on the Employment Cost Index for Professional, Specialty and Technical Occupations, published by the U.S. Dept. of Labor, Bureau of Labor Statistics (the "Index"), as determined by the Engineering Audit Office ("EAO").
- (b) Any increase in an employee's approved Direct Salary Rate per hour shall be based on whatever increase may have occurred in the Index for the **PRIOR YEAR ONLY**, as determined by EAO. If for the prior year, the Index showed an increase, the Direct Salary Rate shall be increased. If, for the prior year, the Index declined or showed no increase, the Direct Salary Rate shall remain unchanged. Any increase in an employee's approved Direct Salary Rate shall be applied on a prospective basis only.
- (b) Increase(s) to an Assigned Employee's Direct Salary Rate per hour shall only be permitted to the extent such increase(s) do not result in a Direct Salary Rate per hour that exceeds the Maximum Allowable Direct Salary Rate per hour for the employee's title, as set forth in Exhibit B. Increase(s) to an Assigned Employee's Direct Salary Rate per hour shall not be permitted if such increase(s) would result in a Direct Salary Rate per hour that exceeds the Maximum Allowable Direct Salary Rate per hour for the employee's title, as set forth in Exhibit B.
- (c) An employee's Direct Salary Rate per hour shall not be increased unless the total amount of such increase is actually paid in full by the Contractor or its Design Consultant to the Assigned Employee, as determined by the Commissioner. The Contractor or its Design Consultant shall submit its payroll register to verify the amount actually paid to the Assigned Employee.

42.3.6 Night Differential / Overtime: The Commissioner may authorize the Contractor and/or its Design Consultant in advance in writing to have an Assigned Employee perform services during other than regular business hours. In the event of such authorization, the Contractor and/or its Design Consultant shall be entitled to payment of a premium or increase in the Assigned Employee's Direct Salary Rate per hour for such services, subject to the limitations set forth below. Any premium or increase payable hereunder shall not be subject any Multiplier.

- (a) The policy is subject to approval by the Commissioner in accordance with Article 11.
- (b) The premium for Night Differential shall not exceed ten (10%) percent of the Assigned Employee's Direct Salary Rate per hour, and the premium for Overtime shall not exceed fifty (50%) percent of such Direct Salary Rate.
- (c) The Contractor and/or its Design Consultant shall not be entitled to payment of any premium unless the total amount of such premium is actually paid in full to the Assigned Employee, as evidenced by the payroll register.

42.3.7 Representations: With respect to staffing expenses, the Contractor covenants and represents the following: (1) it shall incur only those staffing expenses which are necessary and reasonable, based on standard practice in the construction industry, to complete the Project, and (2) it shall ensure that staffing expenses do not exceed the Allowance for Staffing Expenses provided for herein. Any deviations or anticipated deviations from the Allowance for Staffing Expenses, even those deviations which do not involve an increase in such allowance, will not be paid, unless approved in advance in writing by the Commissioner.

#### 42.4 Construction Work

42.4.1 An allowance in the amount set forth in Exhibit A is established for payment for construction work for the Project performed by Subcontractors under the supervision and control of the Contractor.

42.4.2 The total amount to be paid from the Allowance for Construction Work shall not exceed the cumulative total of the amounts for which subcontracts for construction work for the Project are awarded pursuant to Article 10 and the amounts of any change orders to such subcontracts. No amounts shall be paid from the Allowance

for Construction Work, unless the Commissioner has given prior written approval to the amount of award of the subcontract and the amount of any change orders thereto, as required by Article 10.

42.4.3 Bid Breakdown of Subcontract Price: Upon commencement of construction, the Contractor shall submit a bid breakdown of construction costs on a per subcontract basis, and any other information that may be required by the Commissioner. The breakdown for each subcontract must be approved in writing by the Commissioner's Representative. No partial payment will be made until the bid breakdown is approved. The breakdown shall be used for checking the Contractor's requests for partial payment for construction work performed by Subcontractors and shall not be binding on the Commissioner for any purpose whatsoever.

42.4.4 Partial Payments: Partial payments to the Contractor for construction work performed by Subcontractors shall be on the basis of and in proportion to the percentage of completion of all construction work required under the subcontract, as determined by the Commissioner. Until Substantial Completion, the Commissioner shall deduct and retain 5% of the value of the construction work certified for payment in each partial payment voucher. Upon determination by the Commissioner that the work required is substantially complete, the retainage shall be reduced to 1% of the value of the construction work certified for payment in each partial payment voucher, which amount shall be retained by the City in accordance with the Article 25 hereof.

- (a) With respect to construction work, partial payments may be made for materials, fixtures and equipment in advance of their actual incorporation in the work, subject to approval by the Commissioner and compliance with the requirements set forth in Exhibit D.
- (b) In connection with every partial payment requisition for construction work, the Contractor shall also submit a verified statement in the prescribed form setting forth the information required under Section 220(a) of the Labor Law.

42.4.5 Substantial Completion Requisition: Upon written determination by the Commissioner that the work is substantially complete, the Contractor shall submit a requisition for a Substantial Completion payment. The Contractor must submit the following with such requisition:

- (a) Final verified statement of any and all alleged claims against the City, and any pending dispute resolution procedures in accord with the PPB Rules and this Contract, in any way connected with or arising out of this Contract (including those as to which details may have been furnished pursuant to Articles 17, 29 and 30 hereof). With respect to each such claim, the Contractor shall set forth the total amount thereof, the various items of labor and materials included therein, and the alleged value of each item; and if the alleged claim be one for delay, the alleged cause of each such delay, the period or periods of time, giving the dates when the Contractor claims the performance of the work or a particular part thereof, was delayed, and an itemized statement and breakdown of the amount claimed for each such delay. With reference to each such claim, the Commissioner and the Comptroller shall have the same right to inspect, and to make extracts or copies of, books, vouchers, records, etc., of the Contractor or the Subcontractor, as referred to in Articles 17, 29 and 30 hereof. Nothing contained in this Article is intended to or shall relieve the Contractor from the obligation of giving timely notice of claims pursuant to Articles 17, 29 and 30 hereof. The Contractor is warned that unless such claims are completely set forth as herein required, the Contractor, upon acceptance of the Substantial Completion payment pursuant to this Article, will have waived any such claims arising out of the Work for which payment is requested.
- (b) Final written complete punch list and a date for completion of all required work. The punch list and completion date are subject to the written acceptance of the Commissioner.
- (c) If required, a request for a substantial or final extension of time.

42.4.6 Substantial Completion Payment: The Commissioner shall issue a voucher calling for payment to the Contractor of any part or all of the balance due for work for which payment is requested, including moneys retained hereunder, less any and all deductions authorized to be made by the Commissioner, under this Contract or by law, and less twice the amount the Commissioner considers necessary to ensure the completion of the balance of the Work. No further partial payments shall be made to the Contractor after the Commissioner determines that the Work is substantially complete, except the Substantial Completion payment and any requisitions for partial payment that were

properly filed with the Commissioner prior to the date of Substantial Completion; provided, however, the Commissioner may grant a waiver for further partial payments after the date of Substantial Completion to permit payments for change order work and/or release of retainage and deposits pursuant to Article 25. Such waiver shall be in writing.

42.4.7 Final Payment: After Final Acceptance by the Commissioner of the Work, the Contractor shall submit all required certificates and documents, together with a requisition for the balance claimed to be due, less the amount authorized to be retained for maintenance under Article 25 hereof. A verified statement similar to that required in connection with applications for partial payments shall also be submitted to the Commissioner.

42.4.8 Requisition for Final Payment: The Contractor must also submit with the final requisition for Work performed any amendments to the final verified statement of any and all alleged claims against the City, and any pending dispute resolution procedures in accord with the PPB Rules and this Contract, in any way connected with or arising out of the Work performed for which payment is requested (including those as to which details may have been furnished pursuant to Articles 17, 29 and 30 hereof) that have occurred subsequent to Substantial Completion, setting forth with respect to each such claim the total amount thereof, the various items of labor and materials included therein, and the alleged value of each such item. With reference to each permissible claim, the Commissioner and the Comptroller shall have the same right to inspect, and to make extracts or copies of, the books, vouchers, records, etc., of the Contractor or Subcontractor, as referred to in Articles 17, 29 and 30 hereof. Nothing contained in this Article, is intended to or shall relieve the Contractor from the obligation of giving timely notice of claims pursuant to Articles 17, 29 and 30 hereof. The Contractor is warned that unless such claims are completely set forth as herein required, the Contractor upon acceptance of the final payment, pursuant to Article 44 hereof, will have waived any such claims arising out of the Work performed for which payment is requested.

42.4.9 Voucher for Final Payment: Upon determining the balance due for Work for which payment is requested, other than on account of claims, the Commissioner's Representative will prepare and certify, and the Commissioner will approve, a voucher for final payment in that amount less any and all deductions authorized to be made by the Commissioner under Contract or by law. Such voucher shall thereupon be filed with the Comptroller and a copy thereof delivered to the Contractor. The Commissioner shall certify the voucher for final payment for Work performed for which payment is requested following completion and acceptance of the work, provided all requests for extensions of time have been acted upon, if required. Payment pursuant to such final voucher, less any deductions authorized to be made by the Commissioner under Contract or by law, shall constitute final payment in accordance with Article 44 hereof.

42.4.10 Substantial Completion Per Subcontract: In the event the Commissioner, pursuant to Article 10.4.2 hereof, makes a determination of Substantial Completion with respect to the work of a particular subcontract, the payment terms set forth in this Article 42 shall apply on the basis of such subcontract; provided, however, release of retainage shall be determined in accordance with Article 10.4.2(a).

42.4.11 The Contractor shall not be entitled to any mark-up whatsoever on payments for construction Work performed by Subcontractors hereunder.

#### 42.5 Miscellaneous Expenses

42.5.1 An allowance in the amount set forth in Exhibit A is established for reimbursement for miscellaneous expenses. The Contractor shall be reimbursed for expenses actually incurred in the procurement of miscellaneous items in accordance with the terms and conditions set forth below.

- (a) No miscellaneous expenses shall be incurred by the Contractor, or reimbursed from this allowance, unless expressly authorized in a written directive from the Commissioner. For miscellaneous expenses in excess of \$150, such written authorization must be provided in advance of the expenditure.
- (b) In the event the Contractor is directed to purchase any item(s) pursuant to this allowance, such item(s) shall, unless otherwise directed by the Commissioner, be the sole property of the City upon delivery to the designated location. Upon completion of the required work, as directed by the Commissioner,

- the Contractor shall turn such item(s) over to the City.
- (c) With respect to miscellaneous expenses, the Contractor shall utilize the method of procurement and form of payment directed by the Commissioner.
  - (d) Reimbursement for miscellaneous expenses shall be the actual and reasonable cost of the same, with no mark-up for the Contractor's overhead and profit. Requests for reimbursement for miscellaneous expenses shall be accompanied by receipted bills or any other data required by the Commissioner.
  - (e) Reimbursement for long distance travel expenses, as set forth in Article 11, shall be in accordance with the normal travel allowances of the City of New York for its own employees as provided in Comptroller's "Directive #6, Travel, Meals, Lodging and Miscellaneous Agency Expenses." The Contractor shall not be entitled to any mark-up with respect to long distance travel expenses. Requests for reimbursement for long distance travel expenses shall be accompanied by receipted bills or any other data required by the Commissioner.
  - (f) Miscellaneous items shall be those items determined by the Commissioner to be necessary for the Project and shall include without limitation the items set forth below.
    - (1) Field Office specified by DDC
    - (2) Equipment specified by DDC
    - (3) Printing of monthly reports, as well as bid and contract documents for subcontracts for required construction work
    - (4) Express mail postage, except as otherwise provided in Article 11
    - (5) Builder's Risk Insurance for the Project, if directed by the Commissioner
    - (6) Long distance travel, as set forth in Article 11

#### 42.6 Additional Services

42.6.1 An allowance in the amount set forth in Exhibit A is established for reimbursement for the provision of additional services hereunder. Additional services shall be as defined in Article 11. No additional services shall be provided by the Contractor, or reimbursed from this allowance, unless expressly authorized in advance in a written directive from the Commissioner.

42.6.2 With respect to additional services, the Contractor shall utilize the method of procurement and form of payment directed by the Commissioner.

42.6.3 Reimbursement for additional services shall be the actual and reasonable cost of the same, with no mark-up for the Contractor's overhead and profit.

#### 42.7 Requisitions for Payment

42.7.1 Requisitions for payment may be submitted as the work progresses, but not more often than once a month. Requisitions shall be in the authorized form and shall set forth the services performed by the Contractor and the total amount of partial payment requested. The total amount of partial payment requested shall be broken down into the following categories, to the extent the category applies to the payment period: (1) Staffing Expenses; (2) Construction Work; (3) Miscellaneous Expenses, and (4) Additional Services. The Contractor shall submit one original and two copies of each requisition for payment. Requisitions for payment shall be accompanied by the documentation set forth below.

- (a) Project Progress Report: The Contractor shall submit a current report indicating (1) the percentage of completion of all required Work for the Project, and (2) the services the Contractor was directed to provide during the payment period.
- (b) Construction Work: For any period for which the Contractor is requesting payment for construction Work, the Contractor shall submit the documentation set forth below:
  - (1) Current report indicating: (1) the name and type of construction work performed by each first tier Subcontractor, and (2) the percentage of completion of all required construction work

under that subcontract. A first tier Subcontractor shall mean a Subcontractor directly engaged by the Contractor.

- (2) Certified copies of payroll reports for all Subcontractors of whatever tier which have performed construction Work for the Project.
- (c) Staffing Expenses: For any period for which the Contractor is requesting payment for staffing expenses for an Assigned Employee, the Contractor shall submit the documentation set forth below:
- (1) Assigned Employee's name and title.
  - (2) Commissioner approval of the Assigned Employee, either approved Staffing Plan or documentation approving the Assigned Employee as a replacement.
  - (3) Assigned Employee's direct salary rate determined and approved by the Commissioner and included in the Staffing Plan;
  - (4) Number of hours worked each day by the Assigned Employee for the week(s) in question. The number of hours per day shall be broken down to indicate the number of regular business hours and the number of non-regular business hours. The Multiplier shall not apply to any increase in the Assigned Employee's Direct Salary Rate per hour for authorized services performed during other than regular business hours.
  - (5) Detailed time sheets completed by the Assigned Employee for the week(s) in question. Such detailed time sheets shall reflect all hours of service by the Assigned Employee, including without limitation: (1) actual hours during which the employee performed services for the Project, (2) actual hours during which the employee performed services for other projects, (3) non-billable hours, as defined above, (4) actual hours, if any, during which the Assigned Employee performed services for the Project for which the Contractor is not entitled to compensation, and (5) any non-regular business hours.
  - (6) Copy of the payroll register of the Contractor and its Design Consultant for the week(s) in question reflecting the amount actually paid to the Assigned Employee for that week.
  - (7) If applicable, copy of the Commissioner's approval of the policy regarding payment of a premium for services performed during other than regular business hours.
- (d) Miscellaneous Expenses: For any period for which the Contractor is requesting reimbursement for expenses incurred for miscellaneous items, the Contractor shall submit: (1) a report describing the miscellaneous items the Contractor was directed to provide, and (2) receipted bills or any other data required by the Commissioner.
- (e) Additional Services: For any period for which the Contractor is requesting reimbursement for expenses incurred for additional services, the Contractor shall submit: (1) a report describing the additional services the Contractor was directed to provide, and (2) receipted bills or any other data required by the Commissioner.

42.7.3 All payments hereunder are contingent upon the Contractor's satisfactory performance of the required services. The Commissioner is authorized to make deductions for any Work performed hereunder which he/she determines to be unsatisfactory.

42.7.4 Following the receipt of a satisfactory requisition for payment, the Commissioner's Representative will prepare, and the Commissioner will approve, a voucher in the amount certified for partial payment, less any and all deductions authorized to be made by the Commissioner under any terms of this Agreement or by law. This voucher will thereupon be filed with the Comptroller, with a copy thereof available to the Contractor if requested.

42.8 Electronic Funds Transfer: In accordance with Section 6-107.1 of the New York City Administrative Code, the Contractor agrees to accept payments under this Agreement from the City by electronic funds transfer. An electronic funds transfer is any transfer of funds, other than a transaction originated by check, draft or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument or computer or magnetic tape so as to order, instruct or authorize a financial institution to debit or credit an account. Prior to the first payment made under this Agreement, the Contractor shall designate one financial institution or other authorized payment agent and shall

complete the "EFT Vendor Payment Enrollment Form" (available at <http://www.nyc.gov/dof>) in order to provide the Commissioner of Finance with information necessary for the Contractor to receive electronic funds transfer payments through the designated financial institution or authorized payment agent. The crediting of the amount of a payment to the appropriate account on the books of a financial institution or other authorized payment agent designated by the Contractor shall constitute full satisfaction by the City for the amount of the payment under this agreement. The account information supplied by the Contractor to facilitate the electronic funds transfer shall remain confidential to the fullest extent provided by law.

42.8.1 The agency head may waive the application of the requirements herein to payments on contracts entered into pursuant to §315 of the City Charter. In addition, the Commissioner of the Department of Finance and the Comptroller may jointly issue standards pursuant to which the contracting agency may waive the requirements hereunder for payments in the following circumstances: (i) for individuals or classes of individuals for whom compliance imposes a hardship; (ii) for classifications or types of checks; or (iii) in other circumstances as may be necessary in the interest of the City.

#### ARTICLE 43 - PROMPT PAYMENT

43.1 The Prompt Payment provisions of the Procurement Policy Board ("PPB") Rules in effect at the time of the solicitation for this Contract shall be applicable to payments hereunder. The provisions require the payment to contractors of interest on payments made after the required payment date, except as otherwise provided in the PPB Rules. The Contractor must submit a proper invoice to receive payment, except where the Contract provides that the Contractor will be paid at predetermined intervals without having to submit an invoice for each scheduled payment. Determination of interest due will be made in accordance with the provisions of the PPB Rules. If the Contractor is paid interest, the proportionate share of that interest shall be forwarded by the Contractor to its Subcontractor(s).

43.2 The Contractor shall pay each Subcontractor (including a materials supplier) not later than seven (7) days after receipt of payment out of amounts paid to the Contractor by the City for work performed by the Subcontractor or supplier under this Contract.

43.3 If Contractor fails to make any payment to any Subcontractor or Materialman within seven (7) days after receipt of payment by the City pursuant to section 43.2 herein, then the Contractor shall pay interest on amounts due to such Subcontractor or Materialman at a rate of interest in effect on the date such payment is made by the Contractor computed in accordance with section 756-b (1)(b) of the NY General Business Law. Accrual of interest shall commence on the day immediately following the expiration of the seventh day following receipt of payment to the Contractor by the City and shall end on the date on which payment is made.

#### ARTICLE 44 - ACCEPTANCE OF FINAL PAYMENT

44.1 The acceptance by the Contractor, or by anyone claiming by or through it, of final payment, whether such payment be made pursuant to any judgment of any Court, or otherwise, shall constitute and operate as a release to the City from any and all claims of and liability to the Contractor for anything heretofore done or furnished for the Contractor relating to or arising out of this Contract and the Work done hereunder, and for any prior act, neglect or default on the part of the City or any of its officers, agents or employees, excepting only a claim against the City for the amounts deducted or retained in accordance with the terms and provisions of this Contract by law, and excepting any claims, not otherwise waived, or any pending dispute resolution procedures which are contained in the verified statement filed with the Contractor's substantial and final requisitions pursuant to Article 42.

44.2 The Contractor is warned that the execution by it of a release, in connection with the acceptance of any final payment, containing language purporting to reserve claims other than those herein specifically excepted from the operation of this Article, or those for amounts deducted by the Commissioner from the final requisition or by the Comptroller from the final payment as certified by the Commissioner's Representative and approved by the Commissioner, shall not be effective to reserve such claims, anything stated to the Contractor orally or in writing by any officer, agent or employee of the City to the contrary notwithstanding.

44.3 Should the Contractor refuse to accept any final payment as tendered by the Comptroller, it shall constitute a

waiver of any right to interest thereon.

44.4 The Contractor, however, shall not be barred from commencing an action for breach of contract under this provision to the extent permitted by Law and by the terms of the Contract provided that a detailed and verified statement of claim is served upon the Department and Comptroller not later than forty (40) days after the mailing of such final payment. The statement shall specify the items upon which the claim will be based and any such claim shall be limited to such items.

44.5 The provisions of this Article 44 shall apply to final payment(s) for work performed pursuant to subcontracts hereunder.

#### ARTICLE 45 - RIGHTS OF COMMISSIONER TO POSTPONE AND TERMINATE AGREEMENT

45.1 The Commissioner shall have the right, upon ten (10) days prior written notice to the Contractor, to postpone, delay, suspend or terminate all or any portion of the services to be performed by the Contractor under this Contract, or any additions thereto or modifications thereof, at any time and for any reason deemed to be in the City's interest. In such event, the Contractor shall be paid such amount, determined by the Commissioner, as shall fairly compensate him, in accordance with Article 42, for services satisfactorily performed prior to the termination date, or for non-cancelable orders for material and/or equipment that is not capable of use except in the performance of this Contract and has been specifically fabricated for the sole purpose of this Contract and not incorporated into the Work, subject to audit by the Department and post-audit by the Comptroller. Such postponement, delay, suspension or termination shall not give rise to any cause of action for damages or extra remuneration against the City, other than that provided for herein.

#### ARTICLE 46 - TERMINATION OF THIS AGREEMENT FOR CAUSE

46.1 If in the sole determination of the Commissioner: (1) the Contractor fails to perform any of the terms, covenants or provisions of this Agreement on its part to be performed, or (2) the Contractor fails to progress with the Work called for under this Agreement in a satisfactory manner, or (3) the conduct of the Contractor is such that the interests of the City are likely to be impaired or prejudiced, or (4) the Contractor shall violate any of the terms, covenants or provisions of this Agreement, then the Commissioner may, upon written notice to the Contractor, immediately terminate this Agreement for cause.

46.2 Upon such termination, the Contractor shall be entitled to payment of such amount, to be determined by the Commissioner, and subject to post-audit by the Comptroller, as shall fairly compensate him for the work satisfactorily performed prior to the termination date; provided, however, that the Commissioner shall deduct from such amount and from any amount due and payable to the Contractor prior to the termination date, but withheld or not paid, the total amount of additional expenses incurred by the City in order satisfactorily to complete the Work required to be performed by the Contractor under this Agreement, including the expense of engaging another Contractor for this purpose. If such additional expense shall exceed the amounts otherwise due and payable to the Contractor hereunder, the Contractor shall pay the City the full amount of such excess incurred by the City.

46.3 The Commissioner's determination upon which the termination of this Agreement for cause is based, as set forth in Article 46.1, shall be conclusive, final and binding on the parties and such a finding shall preclude the Contractor from commencing a plenary action for any damages relating to the Contract. If the Contractor protests the determination of the Commissioner, the Contractor may commence a lawsuit in a court of competent jurisdiction of the State of New York under Article 78 of the New York Civil Practice Law and Rules.

#### ARTICLE 47 - ACTIONS UPON TERMINATION

47.1 In the event of termination with or without cause, the Contractor shall, upon receipt of such notice, take the following actions:

47.1.1 Stop Work on the date specified in the notice;

47.1.2 Take such action as may be necessary for the protection and preservation of the City's materials and property;

- 47.1.3 Cancel all cancelable orders for material and equipment;
- 47.1.4 Assign to the City and deliver to the Site or any other location designated by the Commissioner, any non-cancelable orders for material and/or equipment that is not capable of use except in the performance of this Agreement and has been specifically fabricated for the sole purpose of this Agreement and not incorporated in the Work;
- 47.1.5 Take no action which will increase the amounts payable by the City under this Agreement.

#### ARTICLE 48 - CLAIMS AND ACTIONS THEREON

48.1 No claim against the City for damages for breach of contract or compensation for Extra Work shall be made or asserted in any action or proceeding at law or in equity, unless the Contractor shall have strictly complied with all requirements relating to the giving of notice and of information with respect to such claims all as herein before provided.

48.2 Nor shall any such action or proceeding be instituted or maintained on any such claims unless such action or proceeding be commenced within one year after the date of the filing in the office of the Comptroller of the final payment voucher pursuant to Article 42; except that an action or proceeding on a claim for moneys deducted, retained or withheld under the provisions of this Agreement or by law, must be commenced within one year after the date of final payment hereunder or after such moneys become due and payable hereunder, whichever is later, and further except that an action or proceeding on a claim based upon the Commissioner's exercise of the right to terminate this Agreement for cause must be commenced within six months after the date the Commissioner exercises such right to terminate for cause.

#### ARTICLE 49 - SUPPLIES, LABOR, SERVICES, MATERIALS AND TAX EXEMPTION

49.1 The City is exempt from payment of Federal, State, local taxes and Sales and Compensating Use Taxes of the State of New York and of cities and counties on all materials and supplies sold to the City pursuant to the provisions of this Agreement. These taxes are not to be included in requests for payment. However, this exemption does not apply to tools, machinery, equipment or other property leased by or to the Contractor or a Subcontractor, or to supplies and materials which even though they are consumed, are not incorporated into the completed Work (consumable supplies), and the Contractor and his Subcontractors shall be responsible for and pay any and all applicable taxes, including Sales and Compensating Use Taxes, on such leased tools, machinery, equipment or other property and upon all such unincorporated supplies and materials.

49.2 The Contractor and its Subcontractors agree to sell and the City agrees to purchase all supplies and materials, other than consumable supplies, required, necessary or proper for or incidental to the construction of the Project covered by this Agreement. The sum paid under this Agreement for such supplies and materials shall be in full payment and consideration for the sale of such supplies and materials herein.

49.3 The purchase by the Contractor through its Subcontractors of the supplies and materials sold hereunder shall be a purchase or procurement for resale and therefore not subject to the New York State or New York City Sales or Compensating Use Taxes or any such taxes of cities or counties. The sale of such supplies and materials by the Contractor to the City is exempt from the aforesaid sales or compensating use taxes. With respect to such supplies and materials, the Contractor, at the request of the City, shall furnish to the City such bills of sale and other instruments as may be required by it, properly executed, acknowledged and delivered assuring to the City title to such supplies and materials, free of liens or encumbrances, and the Contractor shall mark or otherwise identify all such materials as the property of the City.

49.4 Title to all materials to be sold by the Contractor to the City pursuant to the provisions of the Agreement shall immediately vest in and become the sole property of the City upon delivery of such supplies and materials to the Site and prior to its becoming a part of the permanent structure. Notwithstanding such transfer of title, the Contractor shall have the full and continuing responsibility to install such materials and supplies in accordance with the provisions of this Agreement, protect them, maintain them in a proper condition and forthwith repair, replace and make good any damage thereto, theft or disappearance thereof, and furnish additional materials in place of any that may be lost, stolen or rendered unusable, without cost to the City, until such time as the Work covered by the Agreement is fully accepted

by the City. Such transfer of title shall in no way affect any of the Contractor's obligations hereunder. In the event that, after title has passed to the City, any of such supplies and materials are rejected as being defective or otherwise unsatisfactory, title to all such supplies and materials shall be deemed to have been transferred back to the Contractor.

49.5 The purchase by Subcontractors of supplies and materials to be sold hereunder shall also be a purchase or procurement for resale to the Contractor (either directly or through other subcontractors) and therefore not subject to the aforesaid Sales or Compensating Use Taxes, provided that the subcontract agreements provide for the resale of such supplies and materials prior to and separate and apart from the incorporation of such supplies and materials into the permanent construction and that such subcontract agreements are in a form similar to this Agreement with respect to the separation of the sale of materials from the Work and labor, services, consumable supplies and any other matters to be provided, and provided further that the subcontract agreements provide separate prices for (1) materials and (2) all other services and matters. Such separation shall actually be followed in practice, including the separation of payments for supplies and materials from the payments for other Work and labor and other things to be provided.

49.6 The Contractor and his Subcontractors and materialmen shall obtain any and all necessary Contractor Exempt Purchase Certificates or resale certificates from the appropriate governmental agency or agencies, and furnish a Contractor Exempt Purchase Certificate or resale certificate to all persons, firms or corporations from which they purchase supplies and materials for the performance of the Work covered by this Agreement.

49.7 In the event any of the provisions of this Article 49 shall be deemed to be in conflict with any other provisions of this Agreement or create any ambiguity, then the provision of this Article shall control.

#### ARTICLE 50 - NO CLAIM AGAINST OFFICERS, AGENTS OR EMPLOYEES

50.1 No claim whatsoever shall be made by the Contractor against any officer, agent or employee of the City for, or on account of, anything done or omitted to be done in connection with this Agreement.

50.2 The Contractor shall require each Subcontractor or consultant to agree in its subcontract not to make any claim against the City, its officers, agents or employees, by reason of such subcontract, or any acts or omissions of the Contractor; provided however, such restrictions shall not apply to (a) demands filed by subcontractors pursuant to Article 10.6 hereof, or (b) disputes submitted by subcontractors pursuant to dispute resolution provisions contained in the subcontract, as described in Article 10.2.2 (g) hereof.

#### ARTICLE 51 - LOCALLY BASED ENTERPRISE PROGRAM

51.1 This Contract is subject to the requirements of Administrative Code Section 6-108.1 and regulations promulgated thereunder. The Contractor shall not award any subcontract for construction Work hereunder unless and until these requirements have been complied with in their entirety.

51.2 The provisions set forth below shall apply to all subcontracts for construction Work hereunder entered into by the Contractor. The Contractor shall include the provisions set forth below in all subcontracts for construction Work hereunder.

51.2.1 Unless specifically waived by the Commissioner with the approval of the Office of Economic and Financial Opportunity, if any portion of the subcontract is sub-subcontracted, not less than ten percent of the total dollar amount of the subcontract shall be awarded to locally based enterprises ("LBEs"); except that where less than ten percent of the total dollar amount of the subcontract is sub-subcontracted, such lesser percentage shall be so awarded.

51.2.2 The Subcontractor shall not require performance and payment bonds from LBE sub-subcontractors.

51.2.3 If the Subcontractor has indicated prior to award that no work will be sub-subcontracted, no work shall be sub-subcontracted without the prior approval of the Commissioner, which shall be granted only if the Subcontractor makes a good faith effort beginning at least six weeks before the work is to be performed to obtain LBE sub-subcontractors to perform the work.

51.2.4 If the Subcontractor has not identified sufficient LBE sub-subcontractors prior to award, it shall sign a letter of compliance stating that it complies with Administrative Code §6-108.01, recognizes that achieving the LBE requirement is a condition of its subcontract, and shall submit documentation demonstrating its good faith efforts to obtain LBEs. After award, the Subcontractor shall begin to solicit LBE's to perform sub-subcontracted work at least six weeks before the date such work is to be performed and shall demonstrate that a good faith effort has been made to obtain LBE's on each sub-subcontract until it meets the required percentage.

51.3 Failure of the Contractor to comply with the requirements of Administrative Code §6-108.01 and the regulations promulgated thereunder shall constitute a material breach of contract. Remedy for such breach of contract may include the imposition of any or all of the following sanctions:

- 51.3.1 reducing the Contractor's compensation by an amount equal to the dollar value of the percentage of the LBE sub-subcontracting requirement not complied with;
- 51.3.2 declaring the Contractor in default;
- 51.3.3 where non-compliance is by an LBE, de-certifying and declaring the LBE ineligible to participate in the LBE program for a period of up to three years.

#### ARTICLE 52 - PARTICIPATION IN AN INTERNATIONAL BOYCOTT

52.1 The Contractor agrees that neither the Contractor nor any substantially owned affiliated company is participating or shall participate in an international boycott in violation of the provisions of the Export Administration Act of 1979, as amended, or the regulations of the United States Department of Commerce promulgated thereunder.

52.2 Upon the final determination by the Commerce Department or any other agency of the United States as to, or conviction of the Contractor or a substantially-owned affiliated company thereof, participation in an international boycott in violation of the provisions of the Export Administration Act of 1979, as amended, or the regulations promulgated thereunder, the Comptroller may, at his option, render forfeit and void this Contract.

52.3 The Contractor shall comply in all respects, with the provisions of Section 6-114 of the Administrative Code of the City of New York and the rules and regulations issued by the Comptroller thereunder.

#### ARTICLE 53 - INVESTIGATIONS

53.1 The parties to this agreement agree to cooperate fully and faithfully with any investigation, audit or inquiry conducted by a State of New York (State) or City of New York (City) governmental agency or authority that is empowered directly or by designation to compel the attendance of witnesses and to examine witnesses under oath, or conducted by the Inspector General of a governmental agency that is a party in interest to the transaction, submitted bid, submitted proposal, contract, lease, permit or license that is the subject of the investigation, audit or inquiry.

53.1.1 If any person who has been advised that his or her statement, and any information from such statement, will not be used against him or her in any subsequent criminal proceeding refuses to testify before a grand jury or other governmental agency or authority empowered directly or by designation to compel the attendance of witnesses and to examine witnesses under oath concerning the award of or performance under any transaction, agreement, lease, permit, contract, or license entered into with the City, the State, or any political subdivision or public authority thereof, or the Port Authority of New York and New Jersey, or any local development corporation within the City, or any public benefit corporation organized under the laws of the State of New York, or;

53.1.2 If any person refuses to testify for a reason other than the assertion of his or her privilege against self incrimination in an investigation, audit or inquiry conducted by a City or State governmental agency or authority empowered directly or by designation to compel the attendance of witnesses and to take testimony under oath, or by the Inspector General of the governmental agency that is a party in interest in, and is seeking testimony concerning the award of, or performance under, any transaction, agreement, lease permit, contract, or license entered into with the City, the State, or any political subdivision thereof or any local development corporation within the City then;

53.1.3 The Commissioner or agency head whose agency is a party in interest to the transaction, submitted

bid, submitted proposal, contract, lease, permit, or license shall convene a hearing, upon no less than five (5) days written notice to the parties involved to determine if any penalties should attach for the failure of a person to testify.

53.1.4 If any non-governmental party to the hearing requests an adjournment, the commissioner or agency head who convened the hearing may, upon granting the adjournment, suspend any contract, lease, permit, or license pending the final determination pursuant to Article 53.3 below without the City incurring any penalty or damages for delay or otherwise.

53.2 The penalties which may attach a final determination by the commissioner or agency head may include but shall not exceed:

53.2.1 The disqualification for a period not to exceed five (5) years from the date of an adverse determination for any person, or any entity of which such person was a member at the time the testimony was sought, from submitting bids for, or transacting business with, or entering into or obtaining any contract, lease, permit or license with or from the City; and/or

53.2.2 The cancellation or termination of any and all such existing City contracts, leases, permits or licenses that the refusal to testify concerns and that have not been assigned as permitted under this agreement, nor the proceeds of which pledged, to an unaffiliated and unrelated institutional lender for fair value prior to the issuance of the notice scheduling the hearing, without the City incurring any penalty or damages on account of such cancellation or termination; monies lawfully due for goods delivered, work done, rentals, or fees accrued prior to the cancellation or termination shall be paid by the City.

53.3 The Commissioner or agency head shall consider and address in reaching his or her determination and in assessing an appropriate penalty the factors in Articles 53.3.1 and 53.3.2 below. He or she may also consider, if relevant and appropriate, the criteria established in Articles 53.3.3 and 53.3.4 below in addition to any other information which may be relevant and appropriate;

53.3.1 The party's good faith endeavors or lack thereof to cooperate fully and faithfully with any governmental investigation or audit, including but not limited to the discipline, discharge, or disassociation of any person failing to testify, the production of accurate and complete books and records, and the forthcoming testimony of all other members, agents, assignees or fiduciaries whose testimony is sought.

53.3.2 The relationship of the person who refused to testify to any entity that is a party to the hearing, including, but not limited to, whether the person whose testimony is sought has an ownership interest in the entity and/or the degree of authority and responsibility the person has within the entity.

53.3.3 The nexus of the testimony sought to the subject entity and its contracts, leases, permits or licenses with the City.

53.3.4 The effect a penalty may have on an unaffiliated and unrelated party or entity that has a significant interest in an entity subject to penalties under 53.2 above, provided that the party or entity has given actual notice to the commissioner or agency head upon the acquisition of the interest, or at the hearing called for in 53.1.3 above gives notice and proves that such interest was previously acquired. Under either circumstance the party or entity must present evidence at the hearing demonstrating the potential adverse impact a penalty will have on such person or entity.

#### 53.4 Definitions Used in this Article

53.4.1 The term "license" or "permit" as used herein shall be defined as a license, permit, franchise or concession not granted as a matter of right.

53.4.2 The term "person" as used herein shall be defined as any natural person doing business alone or associated with another person or entity as a partner, director, officer, principal or employee.

53.4.3 The term "entity" as used herein shall be defined as any firm, partnership, corporation, association, or

person that receives monies, benefits, licenses, leases, or permits from or through the City or otherwise transacts business with the City.

53.4.4 The term "member" as used herein shall be defined as any person associated with another person or entity as a partner, director, officer, principal or employee.

53.5 In addition to and notwithstanding any other provision of this agreement the Commissioner or Agency Head may in his or her sole discretion terminate this agreement upon not less than three (3) days written notice in the event consultant fails to promptly report in writing to the Commissioner of Investigation of the City of New York any solicitation of money, goods, requests for future employment or other benefit or thing of value, by or on behalf of any employee of the City or other person, firm corporation or entity for any purpose which may be related to the procurement or obtaining of this agreement by the consultant, or affecting the performance of this contract.

#### ARTICLE 54 - ALL PRIOR WRITTEN OR ORAL AGREEMENTS EXCLUDED

54.1 The written agreement contains all the terms and conditions agreed upon by the parties hereto, and no other agreement, oral or otherwise, regarding the subject matter of this agreement shall be deemed to exist or to bind any of the parties hereto, or to vary any of the terms contained herein.

#### ARTICLE 55 - HEADINGS NOT BINDING

55.1 Article, Section and Chapter headings and the Table of Contents are inserted for convenience only and are not to be considered in the construction or interpretation of any provision hereof.

#### ARTICLE 56 - ERRORS

56.1 If this Agreement contains any errors, inconsistencies, ambiguities or discrepancies, including typographical errors, the Contractor shall request a clarification of same by writing to the Commissioner whose decision shall be binding on the parties.

#### ARTICLE 57 - UNLAWFUL PROVISIONS DEEMED STRICKEN FROM CONTRACT

57.1 If this Agreement contains any unlawful provision not an essential part of the Agreement and which shall not appear to have been a controlling or material inducement to the making thereof, the same shall be deemed of no effect and shall, upon notice by either party, be deemed stricken from the Agreement without affecting the binding force of the remainder.

#### ARTICLE 58 - ALL LEGAL PROVISIONS DEEMED INCLUDED

58.1 It is the intent and understanding of the parties to this Agreement that each and every provision of law required to be inserted in this Agreement shall and is inserted herein, and if, through mistake or otherwise, any such provision is not inserted, or is not inserted in correct form, then this Agreement shall forthwith upon the application of either party be amended by such insertion so as to comply strictly with the law and without prejudice to the rights of either party hereunder.

#### ARTICLE 59 - WAIVER

59.1 Waiver by the City of a breach of any provision of this Agreement shall not be deemed to be a waiver of any other subsequent breach and shall not be construed to be a modification of the terms of the Agreement unless and until the same be agreed to in writing by the Commissioner.

#### ARTICLE 60 - ALL DEFENSES RESERVED

60.1 Each and every defense, right and remedy that the City has under this Agreement is not exclusive and it is in addition to and concurrent with all other defenses, right and remedies which the City has under this Agreement and

which the City otherwise has, will have, or may have under law, equity, or otherwise.

ARTICLE 61 - CHOICE OF LAW, CONSENT TO JURISDICTION AND VENUE

61.1 This Agreement shall be deemed to be executed in the City of New York, State of New York, regardless of the domicile of the Contractor, and shall be governed by and construed in accordance with the laws of the State of New York.

61.2 The parties agree that any and all claims asserted by or against the City arising under this Agreement or related thereto shall be heard and determined either in the courts of the United States located in New York City ("Federal Courts") or in the courts of the State of New York ("New York State Courts") located in the City and County of New York. To effect this agreement and intent, the Contractor agrees:

61.2.1 If the City initiates any action against the Contractor in Federal Court or in New York State Court, service of process may be made on the Contractor either in person, wherever such Contractor may be found, or by registered mail addressed to the Contractor at its address as set forth in this Agreement, or to such other address as the Contractor may provide to the City in writing; and

61.2.2 With respect to any action between the City and the Contractor in New York State Court, the Contractor hereby expressly waives and relinquishes any rights it might otherwise have (1) to move to dismiss on grounds of forum non conveniens; (2) to remove to Federal Court, and (3) to move for a change of venue to a New York State Court outside New York County.

61.2.3 With respect to any action between the City and the Contractor in Federal Court located in New York City, the Contractor expressly waives and relinquishes any right it might otherwise have to move to transfer the action to a United States Court outside the City of New York.

61.2.4 If the Contractor commences any action against the City in a court located other than in the City and State of New York, upon request of the City, the Contractor shall either consent to a transfer of the action to a court of competent jurisdiction located in the City and State of New York or, if the court where the action is initially brought will not or cannot transfer the action, the Contractor shall consent to dismiss such action without prejudice and may thereafter reinstitute the action in a court of competent jurisdiction in New York City.

61.3 If any provision(s) of this Article is held unenforceable for any reason, each and all other provision(s) shall nevertheless remain in full force and effect.

ARTICLE 62 - SERVICES OF NOTICES

62.1 The Contractor hereby designates the business address on page 1 of this Agreement as the place where all notices, directions or other communications to the Contractor may be delivered, or to which they may be mailed. Actual delivery of any such notice, direction or communication to the aforesaid place or deposit of the same in a postpaid wrapper addressed thereto in any post office box regularly maintained by the United States post Office Department, shall be conclusively deemed to be sufficient service thereof upon the Contractor as of the date of such delivery or deposit.

62.2 Such address may be changed at any time by an instrument in writing executed and acknowledged by the Contractor and delivered to the Commissioner.

62.3 Nothing herein contained shall, however, be deemed to preclude or render inoperative the service of any notice, direction or other communication upon the Contractor personally, or, if the Contractor is a corporation, upon any officer or director thereof.

62.3 The City hereby designates the following as its address for the service of any notice pursuant to this Agreement:

Department of Design and Construction

30-30 Thomson Avenue  
Long Island City, New York 11101  
Attention: David Resnick, Deputy Commissioner

#### ARTICLE 63 - MODIFICATION

63.1 In addition to the authority of the Commissioner to order Extra Work pursuant to Article 26 hereof or omit certain Work pursuant to Article 33 hereof, this Agreement may be modified from time to time in a writing signed by both parties in order to carry out and complete more fully and perfectly the Work agreed to be performed under this Agreement, provided, however, in no event shall such modification exceed the cost limitation approved by the Bureau of the Budget.

#### ARTICLE 64 - MacBRIDE PRINCIPLES PROVISIONS

64.1 Notice to all Prospective Contractors: Local Law No. 34 of 1991 became effective on September 10, 1991 and added section 6-115.1 to the Administrative Code of the City of New York. The local law provides for certain restrictions on City contracts to express the opposition of the people of the City of New York to employment discrimination practices in Northern Ireland and to encourage companies doing business in Northern Ireland to promote freedom of work place opportunity.

64.2 Pursuant to Section 6-115.1, prospective contractors for contracts to provide goods or services involving an expenditure of an amount greater than ten thousand dollars, or for construction involving an amount greater than fifteen thousand dollars, are asked to sign a rider in which they covenant and represent, as a material condition of their contract, that any business operations in Northern Ireland conducted by the contractor and any individual or legal entity in which the contractor holds a ten percent or greater ownership interest and any individual or legal entity that holds a ten percent or greater ownership interest in the contractor will be conducted in accordance with the MacBride Principles of nondiscrimination in employment.

64.3 Prospective contractors are not required to agree to these conditions. However, in the case of contracts let by competitive sealed bidding, whenever the lowest responsible bidder has not agreed to stipulate to the conditions set forth in this notice and another bidder who has agreed to stipulate to such conditions has submitted a bid within five percent of the lowest responsible bid for a contract to supply goods, services or construction of comparable quality, the contracting entity shall refer such bids to the Mayor, the Speaker or other officials, as appropriate, who may determine, in accordance with applicable law and rules, that it is in the best interest of the city that the contract be awarded to other than the lowest responsible bidder pursuant to Section 313(b)(2) of the City Charter.

64.4 In the case of contracts let by other than competitive sealed bidding, if a prospective contractor does not agree to these conditions, no agency, elected official or the Council shall award the contract to that bidder unless the entity seeking to use the goods, services or construction certifies in writing that the contract is necessary for the entity to perform its functions and there is no other responsible contractor who will supply goods, services or construction of comparable quality at a comparable price.

64.5 In accordance with section 6-115.1 of the Administrative Code of the City of New York, the Contractor stipulates that such Contractor and any individual or legal entity in which the Contractor holds a ten percent or greater ownership interest and any individual or legal entity that holds a ten percent or greater ownership interest in the Contractor either (a) have no business operations in Northern Ireland, or (b) shall take lawful steps in good faith to conduct any business operations they have in Northern Ireland in accordance with the MacBride Principles, and shall permit independent monitoring of their compliance with such principles.

64.6 For purposes of this section, the following terms shall have the following meanings: "MacBride Principles" shall mean those principles relating to nondiscrimination in employment and freedom of work place opportunity which require employers doing business in Northern Ireland to:

- 64.6.1 increase the representation of individuals from under represented religious groups in the work force, including managerial, supervisory, administrative, clerical and technical jobs;

- 64.6.2 take steps to promote adequate security for the protection of employees from under represented religious groups both at the work place and while traveling to and from work;
- 64.6.3 ban provocative religious or political emblems from the work place;
- 64.6.4 publicly advertise all job openings and make special recruitment efforts to attract applicants from under represented religious groups;
- 64.6.5 establish layoff, recall and termination procedures which do not in practice favor a particular religious group;
- 64.6.6 abolish all job reservations, apprenticeship restrictions and different employment criteria which discriminate on the basis of religion;
- 64.6.7 develop training programs that will prepare substantial numbers of current employees from underrepresented religious groups for skilled jobs, including the expansion of existing programs and the creation of new programs to train, upgrade and improve the skills of workers from underrepresented religious groups;
- 64.6.8 establish procedures to assess, identify and actively recruit employees from underrepresented religious groups with potential for further advancement; and
- 64.6.9 appoint a senior management staff member to oversee affirmative action efforts and develop a timetable to ensure their full implementation.

64.7 The Contractor agrees that the covenants and representations in Article 64.5 above are material conditions to this contract. In the event the contracting entity receives information that the Contractor who made the stipulation required by this section is in violation thereof, the contracting entity shall review such information and give the Contractor an opportunity to respond. If the contracting entity finds that a violation has occurred, the entity shall have the right to declare the Contractor in default and/or terminate this Contract for cause and procure the supplies, services or work from another source in any manner the entity deems proper. In the event of such termination, the Contractor shall pay to the entity, or the entity in its sole discretion may withhold from any amounts otherwise payable to the Contractor, the difference between the Contract price for the uncompleted portion of this Contract and the cost to the contracting entity of completing performance of this Contract either itself or by engaging another contractor or contractors. In the case of a requirement contract, the Contractor shall be liable for such difference in price for the entire amount of supplies required by the contracting entity for the uncompleted term of its Contract. In the case of a construction contract, the contracting entity shall also have the right to hold the Contractor in partial or total default in accordance with the default provisions of this Contract, and/or may seek debarment or suspension of the Contractor. The rights and remedies of the entity hereunder shall be in addition to, and not in lieu of, any rights and remedies the entity has pursuant to this Contract or by operation of law.

#### ARTICLE 65 – ULTRA LOW SULFUR DIESEL FUEL

Ultra Low Sulfur Diesel Fuel: In accordance with the provision of Section 24-163.3 of the New York City Administrative Code, the Contractor specifically agrees as follows:

I. Definitions: For the purpose of this Article, the following definitions apply:

A. “Contractor” means any person or entity that enters into a Public Works Contract with a City agency, or any person or entity that enters into an agreement with such person or entity, to perform work or provide labor or services related to such Public Works Contract.

B. “Lower Manhattan” means the area of New York County consisting of the area to the south of and within Fourteenth Street.

C. “Motor Vehicle” means any self-propelled vehicle designed for transporting persons or property on a street or highway.

D. “Nonroad Engine” means an internal combustion engine (including the fuel system) that is not used in a Motor Vehicle or a vehicle used solely for competition, or that is not subject to standards promulgated under section 7411 or section 7521 of title 42 of the United States Code, except that this term shall apply to internal combustion engines used to power generators, compressors or similar equipment used in any construction program or project.

E. "Nonroad Vehicle" means a vehicle that is powered by a Nonroad Engine, fifty horsepower and greater, and that is not a Motor Vehicle or a vehicle used solely for competition, which shall include, but not be limited to, excavators, backhoes, cranes, compressors, generators, bulldozers and similar equipment, except that this term shall not apply to horticultural maintenance vehicles used for landscaping purposes that are powered by a Nonroad Engine of sixty-five horsepower or less and that are not used in any construction program or project.

F. "Public Works Contract" means a contract with a City agency for a construction program or project involving the construction, demolition, restoration, rehabilitation, repair, renovation, or abatement of any building, structure, tunnel, excavation, roadway, park or bridge; a contract with a City agency for the preparation for any construction program or project involving the construction, demolition, restoration, rehabilitation, repair, renovation, or abatement of any building, structure, tunnel, excavation, roadway, park or bridge; or a contract with a City agency for any final work involved in the completion of any construction program or project involving the construction, demolition, restoration, rehabilitation, repair, renovation, or abatement of any building, structure, tunnel, excavation, roadway, park or bridge.

G. "Ultra Low Sulfur Diesel Fuel" means diesel fuel that has a sulfur content of no more than fifteen parts per million.

## II. Ultra Low Sulfur Diesel Fuel

A. All Contractors shall use Ultra Low Sulfur Diesel Fuel in diesel-powered Nonroad Vehicles in the performance of this contract.

B. Notwithstanding the requirements of paragraph A, Contractors may use diesel fuel that has a sulfur content of no more than thirty parts per million to fulfill the requirements of this Part II, where the Commissioner of the New York City Department of Environmental Protection ("DEP Commissioner") has issued a determination that a sufficient quantity of Ultra Low Sulfur Diesel Fuel is not available to meet the needs of City agencies and Contractors. Any determination made pursuant to this subdivision shall expire after six months unless renewed.

C. Contractors shall not be required to comply with this Part II where the agency letting this contract makes a written finding, which is approved, in writing, by the DEP Commissioner, that a sufficient quantity of Ultra Low Sulfur Diesel Fuel, or diesel fuel that has a sulfur content of no more than thirty parts per million is not available to meet the requirements of Section 24-163.3 of the Administrative Code, provided that such Contractor in its fulfillment of the requirements of this contract, to the extent practicable, shall use whatever quantity of Ultra Low Sulfur Diesel Fuel or diesel fuel that has a sulfur content of no more than thirty parts per million is available. Any finding made pursuant to this subdivision shall expire after sixty days, at which time the requirements of this Part II shall be in full force and effect unless the agency renews the finding in writing and such renewal is approved by the DEP Commissioner.

D. Contractors may check on determinations and approvals issued by the DEP Commissioner pursuant to Section 24-163.3 of the Administrative Code, if any, at [www.nyc.gov/dep](http://www.nyc.gov/dep) or by contacting the Department issuing this solicitation.

E. The requirements of this Part II do not apply where they are precluded by federal or State funding requirements or where the contract is an emergency procurement.

F. The requirements of this Part II do not apply to Public Works Contracts entered into or renewed prior to June 19, 2004.

## III. BEST AVAILABLE TECHNOLOGY

A. All Contractors shall utilize the best available technology for reducing the emission of pollutants for diesel-powered Nonroad Vehicles in the performance of this contract. For determinations of best available technology for each type of diesel-powered Nonroad Vehicle, Contractors shall comply with the regulations of the City Department of Environmental Protection, as and when adopted, Chapter 14 of Title 15 of the Rules of the City of New York (RCNY). The Contractor shall fully document all steps in the best available technology selection process and shall furnish such

documentation to the Department or the DEP Commissioner upon request. The Contractor shall retain all documentation generated in the best available technology selection process for as long as the selected best available technology is in use.

B. No Contractor shall be required to replace best available technology for reducing the emission of pollutants or other authorized technology utilized for a diesel-powered Nonroad Vehicle in accordance with the provisions of this Part III within three years of having first utilized such technology for such vehicle.

C. This Part III shall not apply to any vehicle used to satisfy the requirements of a specific Public Works Contract for fewer than twenty calendar days.

D. The Contractor shall not be required to comply with this Part III with respect to a diesel-powered Nonroad Vehicle under the following circumstances:

1. Where the agency makes a written finding, which is approved, in writing, by the DEP Commissioner, that the best available technology for reducing the emission of pollutants as required by those paragraphs is unavailable for such vehicle, Contractor shall use whatever technology for reducing the emission of pollutants, if any, is available and appropriate for such vehicle.
2. Where the DEP Commissioner has issued a written waiver based upon the Contractor having demonstrated to the DEP Commissioner that the use of the best available technology for reducing the emission of pollutants might endanger the operator of such vehicle or those working near such vehicle, due to engine malfunction, Contractor shall use whatever technology for reducing the emission of pollutants, if any, is available and appropriate for such vehicle, which would not endanger the operator of such vehicle or those working near such vehicle.
3. In determining which technology to use for the purposes of subsections (D)(1) and (D)(2) above, Contractor shall primarily consider the reduction in emissions of particulate matter and secondarily consider the reduction in emissions of nitrogen oxides associated with the use of such technology, which shall in no event result in an increase in the emissions of either such pollutant.
4. Contractors shall submit requests for a finding or a waiver pursuant to this subsection (D) in writing to the DEP Commissioner, with a copy to the ACCO of the Department issuing the solicitation. Any finding or waiver made or issued pursuant to subsections (D)(1) and (D)(2) above shall expire after one hundred eighty days, at which time the requirements of subsection A shall be in full force and effect unless the agency renews the finding, in writing, and the DEP Commissioner approves such finding, in writing, or the DEP Commissioner renews the waiver, in writing.

E. The requirements of this Part III do not apply where they are precluded by federal or State funding requirements or where the contract is an emergency procurement.

IV. Section 24-163 of the Administrative Code. Contractors shall comply with Section 24-163 of the New York City Administrative Code related to the idling of the engines of motor vehicles while parking.

## V. COMPLIANCE

A. Contractor's compliance with these provisions may be independently monitored. If it is determined that the Contractor has failed to comply with any provision of this rider, any costs associated with any independent monitoring incurred by the City shall be reimbursed by the Contractor.

B. Any Contractor who violates any provision of this Article, except as provided in subsection (C) below, shall be liable for a civil penalty between the amounts of one thousand and ten thousand dollars, in addition to twice the amount of money saved by such Contractor for failure to comply with this Article.

C. No Contractor shall make a false claim with respect to the provisions of this Article to a City agency. Where a Contractor has been found to have done so, such Contractor shall be liable for a civil penalty of twenty thousand dollars, in addition to twice the amount of money saved by such Contractor in association with having made such false claim.

## VI. REPORTING

A. For all Public Works Contracts covered by this Article, the Contractor shall report to the Department the following information:

1. The total number of diesel-powered Nonroad Vehicles used to fulfill the requirements of this Public Works Contract;
2. The number of such Nonroad Vehicles that were powered by Ultra Low Sulfur Diesel Fuel;
3. The number of such Nonroad Vehicles that utilized the best available technology for reducing the emission of pollutants, including a breakdown by vehicle model and the type of technology;
4. The number of such Nonroad Vehicles that utilized such other authorized technology in accordance with Part III, including a breakdown by vehicle model and the type of technology used for each such vehicle;
5. The locations where such Nonroad Vehicles were used; and
6. Where a determination is in effect pursuant to Part II.B or II.C, detailed information concerning the Contractor's efforts to obtain Ultra Low Sulfur Diesel Fuel or diesel fuel that has a sulfur content of no more than thirty parts per million.

B. The Contractor shall submit the information required by Paragraph A at the completion of work under the Public Works Contract and on a yearly basis no later than August 1 throughout the term of the Public Works Contract. The yearly report shall cover work performed the preceding fiscal year (July 1- June 30).

### ARTICLE 66 – ULTRA LOW SULFUR DIESEL FUEL COORDINATED CONSTRUCTION ACT FOR LOWER MANHATTAN

In accordance with the Coordinated Construction Act for Lower Manhattan, as amended:

I. DEFINITIONS: For purposes of this Article, the following definitions apply:

A. "Lower Manhattan" means the area to the south of and within the following lines: a line beginning at a point where the United States pierhead line in the Hudson river as it exists now or may be extended would intersect with the southerly line of West Houston street in the borough of Manhattan extended, thence easterly along the southerly side of West Houston street to the southerly side of Houston street, thence easterly along the southerly side of Houston street to the southerly side of East Houston street, thence northeasterly along the southerly side of East Houston street to the point where it would intersect with the United States pierhead line in the East river as it exists now or may be extended, including tax lots within or immediately adjacent thereto.

B. "Lower Manhattan Redevelopment Project" means any project in Lower Manhattan that is funded in whole or in part with federal or State funding, or any project intended to improve transportation between Lower Manhattan and the two air terminals in the City of New York known as LaGuardia Airport and John F. Kennedy International Airport, or between Lower Manhattan and the air terminal in Newark known as Newark Liberty International Airport, and that is funded in whole or in part with federal funding.

C. "Nonroad Engine" means an internal combustion engine (including the fuel system) that is not used in a Motor Vehicle or a vehicle used solely for competition, or that is not subject to standards promulgated under section 7411 or section 7521 of title 42 of the United States Code, except that this term shall apply to internal combustion engines used to power generators, compressors or similar equipment used in any construction program or project.

D. "Nonroad Vehicle" means a vehicle that is powered by a Nonroad Engine, fifty horsepower and greater, and that is not a Motor Vehicle or a vehicle used solely for competition, which shall include, but not be limited to, excavators, backhoes, cranes, compressors, generators, bulldozers and similar equipment, except that this terms shall not apply to horticultural maintenance vehicles used for landscaping purposes that are powered by a Nonroad Engine of sixty-five horsepower or less and that are not used in any construction program or project.

E. "Ultra Low Sulfur Diesel Fuel" means diesel fuel that has a sulfur content of no more than fifteen parts per million.

II. REQUIREMENTS: Contractors and subcontractors are required to use only Ultra Low Sulfur Diesel Fuel to power the diesel-powered Nonroad Vehicles with engine horsepower (HP) rating of 50 HP and above used on a Lower Manhattan Redevelopment Project and, where practicable, to reduce the emission of pollutants by retrofitting such Nonroad Vehicles with oxidation catalysts, particulate filters, or technology that achieves lowest particulate matter emissions.

ARTICLE 67 VENDEX QUESTIONNAIRES

67.1 Requirement: Pursuant to Administrative Code Section 6-116.2 and the PPB Rules, the Contractor may be obligated to complete and submit VENDEX Questionnaires. If required, Vendex Questionnaires must be completed and submitted before any award of contract may be made or before approval is given for a proposed subcontractor. Non-compliance with these submission requirements may result in the disqualification of the proposal or the Consultant, disapproval of a subcontractor, subsequent withdrawal of approval for the use of an approved subcontractor, or the cancellation of the contract after its award.

67.2 Submission: Vendex Questionnaires must be submitted directly to the Mayor’s Office of Contract Services, ATTN: Vendex, 253 Broadway, 9<sup>th</sup> Floor, New York, New York 10007. In addition, the Contractor must submit a Confirmation of Vendex Compliance to the Department.

67.3 Obtaining Forms: Vendex Questionnaires, as well as detailed instructions, may be obtained at [www.nyc.gov/vendex](http://www.nyc.gov/vendex). The Contractor may also obtain Vendex forms and instructions by contacting the ACCO or the contact person for this contract.

ARTICLE 68: PARTICIPATION BY MINORITY-OWNED AND WOMEN-OWNED BUSINESS ENTERPRISES IN CITY PROCUREMENT

Subcontractor Utilization Plan: Requirements for the participation of M/WBEs apply to the subcontract for site work to be performed by a subcontractor under the supervision and control of the Contractor. Prior to procurement of the subcontract for site work, the City shall provide the applicable M/WBE requirements to the Contractor in a form entitled “Subcontractor Utilization Plan.” The Subcontractor Utilization Plan sets forth key information regarding requirements for M/WBE participation in the subcontract for site work. The Subcontractor Utilization Plan includes the Target Subcontracting Percentage, as well as Subcontractor Participation Goals. The Subcontractor Utilization Plan shall be included by the Contractor in Bid Documents for the subcontract for site work. Bids that do not include the required affirmations, as determined by DDC, shall be deemed non-responsive.

Subcontract for Site Work: The Contractor shall include the language set forth below in the subcontract for site work.

NOTICE TO ALL PROSPECTIVE CONTRACTORS

PARTICIPATION BY MINORITY-OWNED AND WOMEN-OWNED BUSINESS ENTERPRISES IN CITY PROCUREMENT

ARTICLE I. M/WBE PROGRAM

Local Law No. 129 of 2005 added Section 6-129 to the Administrative Code of the City of New York. The local law creates a program for participation by minority-owned and women-owned business enterprises (MBEs and WBEs) in City procurement. As stated in the Section 6-129, the intent of the program is to address the impact of discrimination on the City’s procurement process, and to promote the public interest in avoiding fraud and favoritism in the procurement process, increasing competition for City business, and lowering contract costs. The contract provisions contained herein are made pursuant to Local Law 129, and the rules of the Department of Small Business Services (“DSBS”) promulgated thereunder.

If this Contract is subject to the Minority-Owned and Women-Owned Business Enterprise (“M/WBE”) program created by Local Law 129, the specific requirements of M/WBE participation for this Contract are set forth in

the Subcontractor Utilization Plan, and are detailed below.

The Contractor must comply with all applicable M/WBE requirements for this Contract. Article I, Part A, below, sets forth provisions related to the participation goals for construction and professional services contracts. Article I, Part B, below, sets forth miscellaneous provisions related to the M/WBE program.

#### PART A: PARTICIPATION GOALS FOR CONSTRUCTION AND PROFESSIONAL SERVICES CONTRACTS

1. The Target Subcontracting Percentage applicable to this Contract is set forth in the Subcontractor Utilization Plan (Part I) included in this Contract [see First Page, line (1)]. (The Subcontractor Utilization Plan is included in the Bid Booklet.) The "Target Subcontracting Percentage" is the percentage of the total Contract which Agency anticipates that the prime contractor for this Contract would in the normal course of business award to one or more subcontractors for amounts under \$1 million for construction and professional services.

A prospective contractor may seek a full or partial pre-award waiver of the Target Subcontracting Percentage in accordance with Local Law 129 and Part A, Section 10 below. To apply for the a full or partial waiver of the Target Subcontracting Percentage, a prospective contractor must complete the Subcontractor Utilization Plan (Part III), and must submit such request no later than seven (7) days prior to the date and time the bids or proposals are due, in writing to the Agency by e-mail at [poped@ddc.nyc.gov](mailto:poped@ddc.nyc.gov) or via facsimile at (718) 391-1885. Bidders/proposers who have submitted requests will receive a response by no later than two (2) calendar days prior to the date bids or proposals are due, provided, however, that if that date would fall on a weekend or holiday, a response will be provided by close-of-business on the business day before such weekend or holiday date.

2. The Subcontractor Participation Goals established for this Contract are set forth in the Subcontractor Utilization Plan (Part I) included in this Contract [see First Page, line (2) and/or line (3)]. The Subcontractor Participation Goals represent a percentage of the total dollar value of all construction and/or professional services subcontracts under this Agreement for amounts under \$1 million.

3. If Subcontractor Participation Goals have been established for this Contract, Contractor agrees or shall agree as a material term of the Agreement that, with respect to the total amount of the Agreement to be awarded to one or more subcontractors pursuant to subcontracts for amounts under \$1 million, Contractor shall be subject to the Subcontractor Participation Goals, unless the goals are modified by Agency in accordance with Local Law 129 and Part A, Section 11 below.

4. If Subcontractor Participation Goals have been established for this Contract, a prospective contractor shall be required to submit with its bid or proposal, as applicable, a completed Subcontractor Utilization Plan (Part II) (see Second and Third Pages) indicating: (a) the percentage of work it intends to subcontract; (b) the percentage of work it intends to award to subcontractors for amounts under \$1 million; (c) in cases where the prospective contractor intends to award subcontracts for amounts under \$1 million, a description of the type and dollar value of work designated for participation by MBEs and/or WBEs; and (d) the general time frames in which such work by MBEs and/or WBEs is scheduled to occur. In the event that this Subcontractor Utilization Plan indicates that the bidder or proposer, as applicable, does not intend to award the Target Subcontracting Percentage, the bid or proposal, as applicable, shall be deemed non-responsive, unless Agency has granted the bidder or proposer, as applicable, a pre-award waiver of the Target Subcontracting Percentage in accordance with Local Law 129 and Part A, Section 10 below.

**THE BIDDER/PROPOSER MUST COMPLETE THE SUBCONTRACTOR UTILIZATION PLAN (PART II) INCLUDED IN THE RFP. SUBCONTRACTOR UTILIZATION PLANS WHICH DO NOT INCLUDE THE REQUIRED AFFIRMATIONS WILL BE DEEMED TO BE NON-RESPONSIVE, UNLESS A FULL WAIVER OF THE TARGET SUBCONTRACTING PERCENTAGE IS GRANTED (SUBCONTRACTOR UTILIZATION PLAN, PART III). IN THE EVENT THAT THE CITY DETERMINES THAT VENDOR HAS SUBMITTED A SUBCONTRACTOR UTILIZATION PLAN WHERE THE REQUIRED AFFIRMATIONS ARE COMPLETED BUT OTHER ASPECTS OF THE PLAN ARE NOT COMPLETE, OR CONTAIN A COPY OR COMPUTATION ERROR THAT IS AT ODDS WITH THE AFFIRMATION, THE VENDOR WILL BE NOTIFIED BY THE AGENCY AND WILL BE GIVEN FOUR (4) CALENDAR DAYS FROM RECEIPT OF NOTIFICATION TO CURE THE SPECIFIED DEFICIENCIES AND RETURN A COMPLETED PLAN TO THE AGENCY. FAILURE TO DO SO WILL RESULT IN A DETERMINATION THAT THE BID/PROPOSAL IS NON-RESPONSIVE. RECEIPT OF NOTIFICATION IS DEFINED AS THE DATE NOTICE IS EMAILED OR FAXED (IF THE VENDOR HAS PROVIDED AN EMAIL ADDRESS OR FAX NUMBER), OR NO LATER THAN FIVE (5) DAYS FROM THE DATE OF MAILING OR UPON DELIVERY, IF DELIVERED.**

5. Where a Subcontractor Utilization Plan has been submitted, the Contractor shall, within 30 days of issuance by Agency of a notice to proceed, submit a list of proposed persons or entities to which it intends to award subcontracts within the subsequent 12 months. In the case of multi-year contracts, such list shall also be submitted every year thereafter. In the event that the Contractor's selection of a subcontractor is disapproved, the Contractor shall have a reasonable time to propose alternate subcontractors.

6. M/WBE firms must be certified by DSBS in order for the Contractor to credit such firms' participation toward the attainment of the M/WBE participation goals. Such certification must occur prior to the firms' commencement of work as subcontractors. A list of M/WBE firms may be obtained from the DSBS website at [www.nyc.gov/getcertified](http://www.nyc.gov/getcertified), by emailing DSBS at [MWBE@sbs.nyc.gov](mailto:MWBE@sbs.nyc.gov), by calling the DSBS certification hotline at (212) 513-6311, or by visiting or writing DSBS at 110 William St., New York, New York, 10038, 7<sup>th</sup> floor. Eligible firms that have not yet been certified may contact DSBS (as indicated above) in order to seek certification.

7. Where a Subcontractor Utilization Plan has been submitted, the Contractor shall, with each voucher for payment, and/or periodically as Agency may require, submit statements, certified under penalty of perjury, which shall include, but not be limited to, the total amount paid to subcontractors (including subcontractors that are not MBEs or WBEs); the names, addresses and contact numbers of each MBE or WBE hired as a subcontractor pursuant to such plan as well as the dates and amounts paid to each MBE or WBE. The Contractor shall also submit, along with its voucher for final payment, the total amount paid to subcontractors (including subcontractors that are not MBEs or WBEs); and a final list, certified under penalty of perjury, which shall include the name, address and contact information of each subcontractor that is an MBE or WBE hired pursuant to such plan, the work performed by, and the dates and amounts paid to each.

8. If payments made to, or work performed by, MBEs or WBEs are less than the amount specified in the Contractor's Subcontractor Utilization Plan, Agency shall take appropriate action, in accordance with Local Law 129 and Article II below, unless the Contractor has obtained a modification of its Subcontractor Utilization Plan in accordance with Local Law 129 and Part A, Section 11 below.

9. Where a Subcontractor Utilization Plan has been submitted, and the Contractor requests a change order the value of which exceeds 10 percent of the Agreement, Agency shall establish participation goals for the work to be performed pursuant to the change order.

10. Pre-award waiver of Target Subcontracting Percentage. Agency may grant a full or partial waiver of the Target Subcontracting Percentage to a bidder or proposer, as applicable, who demonstrates—before submission of the bid or proposal—that it has legitimate business reasons for proposing the level of subcontracting in its Subcontractor Utilization Plan. In making its determination, Agency shall consider factors that shall include, but not be limited to, whether the bidder or proposer, as applicable, has the capacity and the bona fide intention to perform the Contract without any subcontracting, or to perform the Contract without awarding the amount of subcontracts for under one million dollars represented by the Target Subcontracting Percentage. In making such determination, Agency may consider whether the Subcontractor Utilization Plan is consistent with past subcontracting practices of the bidder or proposer, as applicable, and whether the bidder or proposer, as applicable, has made good faith efforts to identify portions of the Contract that it intends to subcontract.

11. Modification of Subcontractor Utilization Plan. A Contractor may request a modification of its Subcontractor Utilization Plan (Subcontractor Participation Goals) after award of this Contract. The Agency may grant such request if it determines that the Contractor has established, with appropriate documentary and other evidence, that it made reasonable, good faith efforts to meet the Subcontractor Participation Goals. In making such determination, Agency shall consider evidence of the following efforts, as applicable, along with any other relevant factors:

- (a) The Contractor advertised opportunities to participate in the contract, where appropriate, in general circulation media, trade and professional association publications and small business media, and publications of minority and women's business organizations;
- (b) The Contractor provided notice of specific opportunities to participate in the contract, in a timely manner, to minority and women's business organizations;

- (c) The Contractor sent written notices, by certified mail or facsimile, in a timely manner, to advise MBEs and WBE's that their interest in the contract was solicited;
- (d) The Contractor made efforts to identify portions of the work that could be substituted for portions originally designated for participation by MBEs and/or WBEs in the contractor utilization plan, and for which the Contractor claims an inability to retain MBE's or WBE's;
- (e) The Contractor held meetings with MBEs and/or WBEs prior to the date their bids or proposals were due, for the purpose of explaining in detail the scope and requirements of the work for which their bids or proposals were solicited;
- (f) The Contractor made efforts to negotiate with MBEs and/or WBEs as relevant to perform specific subcontracts;
- (g) Timely written requests for assistance made by the Contractor to Agency's M/WBE liaison officer and to DSBS;
- (h) Description of how recommendations made by DSBS and Agency were acted upon and an explanation of why action upon such recommendations did not lead to the desired level of participation of MBEs and/or WBE's.

Agency's M/WBE officer shall provide written notice to the Contractor of the determination.

12. If Subcontractor Participation Goals have been established for this Contract, Agency shall evaluate and assess the Contractor's performance in meeting those goals, and such evaluation and assessment shall become part of the Contractor's overall contract performance evaluation.

#### PART B: MISCELLANEOUS

1. The Contractor shall take notice that, if this solicitation requires the establishment of a Subcontractor Utilization Plan, the resulting contract may be audited by DSBS to determine compliance with Section 6-129. See 6-129(e)(10). Furthermore, such resulting contract may also be examined by the City's Comptroller to assess compliance with the Subcontractor Utilization Plan.

2. Pursuant to DSBS rules, construction contracts that include a requirement for a Subcontractor Utilization Plan shall not be subject to the law governing Locally Based Enterprises set forth in Administrative Code Section 6-108.1.

3. DSBS is available to assist contractors and potential contractors in determining the availability of MBEs and WBEs to participate as subcontractors, and in identifying opportunities that are appropriate for participation by MBEs and WBEs in contracts.

4. Prospective contractors are encouraged to enter into joint ventures with MBEs and WBEs.

5. By submitting a bid or proposal the Contractor hereby acknowledges its understanding of the M/WBE requirements set forth herein and the pertinent provisions of Local Law 129 of 2005, and any rules promulgated thereunder, and if awarded this Contract, the Contractor hereby agrees to comply with the M/WBE requirements of this Contract and pertinent provisions of Local Law 129 of 2005, and any rules promulgated thereunder, all of which shall be deemed to be material terms of this Contract. The Contractor hereby agrees to make all reasonable, good faith efforts to solicit and obtain the participation of M/WBE's to meet the required Subcontractor Participation Goals.

#### ARTICLE II. ENFORCEMENT

1. If Agency determines that a bidder or proposer, as applicable, has, in relation to this procurement, violated Section 6-129 or the DSBS rules promulgated pursuant to Section 6-129, Agency may disqualify such bidder or proposer, as applicable, from competing for this Contract and the Agency may revoke such bidder's or proposer's prequalification status, if applicable.

2. Whenever Agency believes that the Contractor or a subcontractor is not in compliance with Section 6-129 or the DSBS rules promulgated pursuant to Section 6-129, or any provision of this Contract that implements Section 6-129, including, but not limited to any Subcontractor Utilization Plan, Agency shall send a written notice to the Contractor describing the alleged noncompliance and offering an opportunity to be heard. Agency shall then conduct an investigation to determine whether such Contractor or subcontractor is in compliance.

3. In the event that the Contractor has been found to have violated Section 6-129, the DSBS rules promulgated pursuant to Section 6-129, or any provision of this Contract that implements this Section 6-129, including, but not limited any Subcontractor Utilization Plan, Agency may determine that one of the following actions should be taken:

- (a) entering into an agreement with the Contractor allowing the Contractor to cure the violation;
- (b) revoking the contractor's pre-qualification to bid or make proposals for future contracts;
- (c) making a finding that the contractor is in default of the contract;
- (d) terminating the contract;
- (e) declaring the contractor to be in breach of contract;
- (f) withholding payment or reimbursement;
- (g) determining not to renew the contract;
- (h) assessing actual and consequential damages;
- (i) assess liquidated damages or reduction of fees, provided that liquidated damages may be based on amounts representing costs of delays in carrying out the purposes of the program established by Section 6-129, or in meeting the purposes of the contract, the costs of meeting utilization goals through additional procurements, the administrative costs of investigation and enforcement, or other factors set forth in the contract;
- (j) exercise rights under the contract to procure goods, services or construction from another contractor and charge the cost of such contract to the contractor that has been found to be in noncompliance; or
- (k) take any other appropriate remedy.

4. Whenever Agency has reason to believe that an MBE or WBE is not qualified for certification, or is participating in a contract in a manner that does not serve a commercially useful function (as defined in Section 6-129), or has violated any provision of Section 6-129, Agency shall notify the commissioner of DSBS who shall determine whether the certification of such business enterprise should be revoked.

5. Statements made in any instrument submitted to Agency pursuant to Section 6-129 shall be submitted under penalty of perjury and any false or misleading statement or omission shall be grounds for the application of any applicable criminal and/or civil penalties for perjury. The making of a false or fraudulent statement by an MBE or WBE in any instrument submitted pursuant to Section 6-129 shall, in addition, be grounds for revocation of its certification.

6. The Contractor's record in implementing its Subcontractor Utilization Plan shall be a factor in the evaluation of its performance. Whenever a contracting agency determines that a contractor's compliance with a Subcontractor Utilization Plan has been unsatisfactory, the agency shall, after consultation with the city chief procurement officer, file an advice of caution form for inclusion in VENDEX as caution data.

IN WITNESS WHEREOF, the Commissioner, on behalf of the City of New York, and the Contractor, have executed this agreement in quadruplicate, two of which are to remain with the Commissioner, another to be filed with the Comptroller of the City, and the fourth to be delivered to the Contractor.

THE CITY OF NEW YORK:

By: \_\_\_\_\_  
Deputy Commissioner

CONTRACTOR:

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

Print Name: \_\_\_\_\_

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

EIN: \_\_\_\_\_

APPROVED AS TO FORM AND CERTIFIED  
AS TO LEGAL AUTHORITY

\_\_\_\_\_  
Acting Corporation Counsel

DATE \_\_\_\_\_

ACKNOWLEDGMENT BY CORPORATION

State of \_\_\_\_\_ County of \_\_\_\_\_ ss:

On this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_ before me personally came \_\_\_\_\_, who being by me duly sworn, did depose and say that he/she resides in the City of \_\_\_\_\_ that he is the \_\_\_\_\_ of \_\_\_\_\_, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation; and that he signed his name thereto by like order.

\_\_\_\_\_  
Notary Public or Commissioner of Deeds

ACKNOWLEDGMENT BY COMMISSIONER

State of \_\_\_\_\_ County of \_\_\_\_\_ ss:

On this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_ before me personally came \_\_\_\_\_, to me known and known to me to be the Deputy Commissioner of the Department of Design and Construction of the City of New York, the person described as such in and who as such executed the foregoing instrument and he acknowledged to me that he executed the same as Deputy Commissioner for the purposes therein mentioned.

\_\_\_\_\_  
Notary Public or Commissioner of Deeds

**EXHIBIT A**

**CONTRACT INFORMATION**

- **Project:** Purchase and Installation of New Asphalt Plant Equipment For the Hamilton Avenue Asphalt Plant Operated by the New York City Department of Transportation
  
- **Design Consultant:** \_\_\_\_\_
  
- **Total Not to Exceed Amount:** \$ \_\_\_\_\_  
(Addition of the Allowances listed below)
  - Allowance for Staffing Expenses: \$ \_\_\_\_\_
  - Allowance for Construction Work: \$ 7,000,000.00
  - Allowance for Miscellaneous Expenses: \$ 210,000.00
  - Allowance for Additional Services: \$ 400,000.00
  
- **Term of Contract:** The Contract shall commence as of the date of registration by the Comptroller and shall remain in effect until Final Acceptance of all required construction work for the Project and completion of all required services. The time frame for Final Acceptance of all required construction work for the Project and completion of all required services is 730 consecutive calendar days.
  
- **Multipliers:** Multipliers for Overhead and Profit applicable to the Contractor and the Design Consultant are set forth below.
  - Multiplier for Design Personnel: \_\_\_\_\_
  - Multiplier for CM Personnel: \_\_\_\_\_
  
- **Phases:** The phases of the Project, as well as the components per phase, are set forth below.
  - (1) **Pre-Construction Phase**
    - **Selection of Manufacturer/Installer:** The Contractor shall conduct a competitive proposal process and enter into a contract with a qualified manufacturer for the following: (a) dismantling and removal of existing asphalt plant equipment, (b) purchase and installation of new asphalt plant equipment, (c) performance of all plumbing, electrical and structural work required for installation of the new equipment, and (d) providing training services. A list of manufacturing firms which are qualified to provide and install the new asphalt plant equipment will be provided by DDC.
    - **Design Services:** The Contractor shall, through its Design Consultant identified in this Exhibit A, be responsible for the design of all required site work, including the storm water drainage system.
    - **Selection of Site Work Subcontractor:** The Contractor shall conduct a competitive bid process and enter into a subcontract with a qualified subcontractor for the performance of all required site work, including the storm water drainage system.

(2) Construction Phase

- Site Work: The Contractor shall inspect, supervise and manage all required site work, including the storm water drainage system.
- Asphalt Equipment: The Contractor shall inspect, supervise and manage the following: (a) dismantling and removal of existing asphalt plant equipment, (b) installation of new asphalt plant equipment, and (c) performance of all plumbing, electrical and structural work required for installation of the new equipment.

(3) Post Construction Phase

- Training Services: The Contractor will be required to make all necessary arrangements for the manufacturer to provide training services at the plant and to perform a dry run of the equipment as part of the training.

**EXHIBIT B**

**STAFFING REQUIREMENTS**

Key Personnel: The Contractor specifically agrees to assign to the Project for its entire duration, the individuals identified below as Key Personnel. These individuals were identified by the Contractor in its Proposal for the Contract.

Key Construction Management Personnel

| Title  | Name  |
|--------|-------|
| _____: | _____ |
| _____: | _____ |
| _____: | _____ |
| _____: | _____ |

Key Design Personnel

| Title  | Name  |
|--------|-------|
| _____: | _____ |
| _____: | _____ |
| _____: | _____ |
| _____: | _____ |

Staffing Requirements: Staffing requirements for the Project are set forth below, including: (1) required titles of personnel for the Project, (2) qualifications requirements per title, and (3) Maximum Allowable Direct Salary Rate per hour per title.

| <b>Titles of CM Personnel</b> | <b>Qualifications</b> | <b>Maximum Allowable Direct Salary Rate per Hour</b> |
|-------------------------------|-----------------------|--|
| _____                         | _____                 | _____  |
| _____                         | _____                 | _____  |
| _____                         | _____                 | _____  |
| _____                         | _____                 | _____  |
| _____                         | _____                 | _____  |
| _____                         | _____                 | _____  |
| _____                         | _____                 | _____  |

| <b>Titles of Design Personnel</b> | <b>Qualifications</b> | <b>Maximum Allowable Direct Salary Rate per Hour</b> |
|-----------------------------------|-----------------------|--|
| _____                             | _____                 | _____  |
| _____                             | _____                 | _____  |
| _____                             | _____                 | _____  |
| _____                             | _____                 | _____  |
| _____                             | _____                 | _____  |
| _____                             | _____                 | _____  |
| _____                             | _____                 | _____  |

## EXHIBIT C

### PARTIAL PAYMENT FOR STORED MATERIAL

The Commissioner may authorize partial payment for certain materials, fixtures and equipment, prior to their incorporation in the Work, but only in strict accordance with and subject to all the terms and conditions set forth in Paragraphs 1 through 16 below. The Contractor may request such partial payment on behalf of its Subcontractors.

1. The Contractor shall submit to the Commissioner a written request, in quadruplicate, for payment for materials purchased or to be purchased for which it desires to be paid prior to their actual incorporation in the Work. The request shall be accompanied by a schedule of the types and quantities of materials, and shall state whether such materials are to be stored on or off the site.
2. Where the materials are to be stored off the site, they shall be stored at a place other than the Contractor's or Subcontractor's premises (except with the written consent of the Commissioner) and under the conditions prescribed or approved by the Commissioner. The Contractor shall set apart and separately store at the place or places of storage all materials and shall clearly mark same "PROPERTY OF THE CITY OF NEW YORK", and further, shall not at any time move any of said materials to another off-site place of storage without the prior written consent of the Commissioner. Materials may be removed from their place of storage off the site for incorporation in the work upon approval of the Commissioner's Representative.
3. Where the materials are to be stored at the site, they shall be stored at such locations as shall be designated by the Commissioner's Representative and only in such quantities as, in the opinion of the Commissioner's Representative, will not interfere with the proper performance of the Work by the Contractor or by other contractors then engaged in performing work on the site. Such materials shall not be removed from their place of storage on the site except for incorporation in the Work, without the approval of the Commissioner's Representative.
4. **INSURANCE**
  - a. **STORAGE OFF-SITE:** Where the materials are stored off the site and until such time as they are incorporated in the Work, the Contractor shall fully insure such materials against any and all risks of destruction, damage or loss including but not limited to fire, theft, and any other casualty or happening. The policy of insurance shall be payable to the City of New York. It shall be in such terms and amounts as shall be approved by the Commissioner and shall be placed with a company duly licensed to do business in the State of New York. The Contractor shall deliver the original and one copy of such policy or policies marked "Fully Paid" to the Commissioner.
  - b. **STORAGE ON THE SITE:** Where the materials are stored at the site, the Contractor shall furnish satisfactory evidence to the Commissioner that they are properly insured against loss, by endorsements or otherwise, under the policy or policies of insurance obtained by the Contractor to cover losses to materials owned or installed by him. The policy of insurance shall cover fire and extended coverage against windstorm, hail, explosion and riot attending a strike, civil commotion, aircraft, vehicles and smoke.
  - c. Subject to approval by the Commissioner, the above described insurance may be provided by the Contractor's Subcontractor.
5. All costs, charges and expenses arising out of the storage of such materials, shall be paid by the Contractor and the City hereby reserves the right to retain out of any partial or final payment made under the Contract an amount sufficient to cover such costs, charges and expenses with the understanding that the City shall have and may exercise any and all other remedies at law for the recovery of such cost, charges and expenses. There shall be no increase in the Contract price for such costs, charges and expenses and the Contractor shall not make any claim or demand for compensation therefor.
6. The Contractor shall pay any and all costs of handling and delivery of materials, to the place of storage and from the place of storage to the site of the work; and the City shall have the right to retain from any partial or final payment an amount sufficient to cover the cost of such handling and delivery.
7. In the event that the whole or any part of these materials are lost, damaged or destroyed in advance of their satisfactory incorporation in the Work, the Contractor at his own cost, shall replace such lost, damaged or

- destroyed materials of the same character and quality. The City will reimburse the Contractor for the cost of the replaced materials to the extent, and only to the extent, of the moneys actually received by the City under the policies of insurance hereinbefore referred to. Until such time as the materials are replaced, the City will deduct from the value of the stored materials or from any other money due under the Contract, the amount paid to the Contractor for such lost, damaged or destroyed materials.
8. Should any of the materials paid for the City hereunder be subsequently rejected or incorporated in the Work in a manner or by a method not in accordance with the Contract Documents, the Contractor shall remove and replace such defective or improperly incorporated material with materials complying with the Contract Documents. Until such materials are replaced, the City will deduct from the value of the stored materials or from any other money due the Contractor, the amount paid by the City for such rejected or improperly incorporated materials.
  9. Payments for the cost of materials made hereunder shall not be deemed to be an acceptance of such materials as being in accordance with the Contract Documents, and the Contractor always retains and must comply with his duty to deliver to the site and properly incorporate in the Work only materials which comply with the Contract Documents.
  10. The Contractor shall retain any and all risks in connection with the damage, destruction or loss of the materials paid for hereunder to the time of delivery of the same to the site of the Work and their proper incorporation in the Work in accordance with the Contract Documents.
  11. The Contractor shall comply with all laws and the regulations of any governmental body or agency pertaining to the priority purchase, allocation and use of the materials.
  12. When requesting payment for such materials, the Contractor shall submit with the partial estimate duly authenticated documents of title, such as bills of sale, invoices or warehouse receipts, all in quadruplicate. The executed bills of sale shall transfer title to the materials from the Contractor to the City (in the event that the invoices state that the material has been purchased by a Subcontractor, bills of sale in quadruplicate will also be required transferring title to the materials from Subcontractor to the Contractor).
  13. Where the Contractor, with the approval of the Commissioner has purchased unusually large quantities of materials in order to assure their availability for the Work, the Commissioner at his option, may waive the requirements of paragraph "12" provided the Contractor furnishes evidence in the form of an affidavit of the Contractor in quadruplicate, and such other proof as the Commissioner may require, that he is the sole owner of such materials and has purchased them free and clear of all liens and other encumbrances. In such event, the Contractor shall pay for such materials and submit proof thereof, in the same manner as provided in paragraph "12" hereof, within seven (7) days after receipt of payment therefor from the Comptroller. Failure on the part of the Contractor to submit satisfactory evidence that he has paid in full for all such materials shall preclude him from payments under the Contract.
  14. The Contractor shall include in each succeeding partial estimate requisition a summary of materials stored which shall set forth the quantity and value of materials in storage, on or off the site, at the end of each preceding estimate period; the amount removed for incorporation in the Work; the quantity and value of materials delivered during the current period and the total value of materials on hand for which payment thereof will be included in the current payment estimate.
  15. Upon proof to the satisfaction of the Commissioner of the actual cost of such materials and upon submission of proper proof of title as required under paragraph "12" or "13" hereof, payment will be made therefore to the extent of 85%, provided however, that the cost so verified, established and approved shall not exceed the estimated cost of such materials included in the approved detailed breakdown estimate submitted in accordance with Article 42 of the Contract; if it does, the City will pay only 85% approved estimated cost.
  16. Upon the incorporation in the Work of any such materials, which have been paid for in advance of such incorporation in accordance with the foregoing provisions, payment will be made for such materials incorporated in the Work pursuant to Article 42 of the Contract, less any sums paid pursuant to paragraph "15" herein.

**EXHIBIT D**  
**FORM OF PERFORMANCE AND PAYMENT BONDS**

**PERFORMANCE BOND 1**

**PERFORMANCE BOND**

KNOW ALL MEN BY THESE PRESENTS; That we; \_\_\_\_\_  
hereinafter referred to as the "Principal", and \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

hereinafter referred to as the "Surety" ("Sureties") are held and firmly bound to \_\_\_\_\_

hereinafter referred to as the "CM", or to its successors, or to its assigns in the penal sum of \_\_\_\_\_  
\_\_\_\_\_

(\$ \_\_\_\_\_) Dollars, lawful money of the United States, for the payment of which said sum of money well and truly to be made, we, and each of us, bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, the Principal is about to enter, or has entered, into a Contract in writing with the CM for \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

a copy of which Contract is annexed to and hereby made a part of this bond as though herein set forth in full;

NOW, THEREFORE, the conditions of this obligation are such that if the Principal, his or its representatives or assigns, shall well and faithfully perform the said Contract and all modifications, amendments, additions and alterations thereto that may hereafter be made, according to its terms and its true intent and meaning, including repair and/or replacement of defective Work and guarantees of maintenance for the periods stated in the Contract, and shall fully indemnify and save harmless the CM from all cost and damage which it may suffer by reason of failure so to do, and shall fully reimburse and repay the CM for all outlay and expense which the CM may incur in making good any such default, and shall protect the said CM against, and pay any and all amounts, damages, costs and judgments which may or shall be recovered against said CM or any of its officers or agents of which the said CM may be called upon to pay any person or corporation by reason of any damages arising or growing out of the doing of said Work, or the repair or maintenance thereof, or the manner of doing the same, or the neglect of the said PRINCIPAL, or his (their, its) agents or servants, or the improper performance of the said Work by the said PRINCIPAL, or his (their, its) agents or servants, or the infringement of any patent or patent rights by reason of the use of any materials furnished or work done as aforesaid or otherwise, then this obligation shall be null and void, otherwise to remain in full force and effect.

The Surety (Sureties), for value received, hereby stipulates and agrees, if requested to do so by the CM, to fully perform and complete the Work to be performed under the Contract, pursuant to the terms, conditions, and covenants thereof, if the CM determines that the Principal, for any cause, has failed or neglected to fully perform and complete such Work. The Surety (Sureties) further agrees to commence and diligently perform the Work specified in the Contract, including physical site work, within twenty-five (25) business days after written notice thereof from the

**PERFORMANCE BOND 2**

CM and to complete all Work within such time as the CM may fix. The Surety and the CM reserve all rights and defenses each may have against the other; provided, however, that the Surety expressly agrees that its reservation of rights shall not provide a basis for non-performance of its obligation to commence and to complete all Work as provided herein.

The Surety (Sureties), for value received, for itself and its successors and assigns, hereby stipulates and agrees that the obligation of said Surety (Sureties) and its bond shall be in no way impaired or affected by any extension of time, modification, omission, addition, or change in or to the said Contract or Work to be performed thereunder, or by any payment thereunder, or by any payment thereunder before the time required therein, or by any waiver of any provisions thereof, or by any assignment, subletting or other transfer thereof or of any Work to be performed or any moneys due or to become due thereunder; and said Surety (Sureties) does hereby waive notice of any and all of such extensions, modifications, omissions, additions, changes, payments, waivers, assignments, subcontracts and transfers, and hereby expressly stipulates and agrees that any and all things done and omitted to be done by and in relation to assignees, subcontractors, and other transferees shall have the same effect as to said Surety (Sureties) as though done or omitted to be done by or in relation to said Principal. The Surety (Sureties), for value received, for itself and its successors and assigns, hereby stipulates and agrees that the obligation of said Surety (Sureties) and its bond shall be in no way impaired or affected by any assignment by the CM of its rights, title and interest in and to such bond, and said Surety (Sureties) hereby waives notice of any such assignment by the CM.

IN WITNESS WHEREOF, the Principal and the Surety (Sureties) have hereunto set their hands and seals, and such of them as are corporations have caused their corporate seals to be hereunto affixed and these presents to be signed by their proper officers, this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

(Seal) \_\_\_\_\_(L.S.)  
Principal

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

(Seal) \_\_\_\_\_  
Surety

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

(Seal) \_\_\_\_\_  
Surety

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

(Seal) \_\_\_\_\_  
Surety

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

**PERFORMANCE BOND 3**

Bond Premium Rate \_\_\_\_\_

Bond Premium Cost \_\_\_\_\_

If the Contractor (Principal) is a partnership, the bond should be signed by each of the individuals who are partners.

If the Contractor (Principal) is a corporation, the bond should be signed in its correct corporate name by a duly authorized officer, agent, or attorney-in-fact.

There should be executed an appropriate number of counterparts of the bond corresponding to the number of counterparts of the Contract.

ACKNOWLEDGMENT OF PRINCIPAL, IF A CORPORATION

State of \_\_\_\_\_ County of \_\_\_\_\_ ss:

On this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_ before me personally came \_\_\_\_\_, who being by me duly sworn, did depose and say that he/she resides in the City of \_\_\_\_\_ that he is the \_\_\_\_\_ of \_\_\_\_\_, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation; and that he signed his name thereto by like order.

\_\_\_\_\_  
Notary Public or Commissioner of Deeds

ACKNOWLEDGMENT OF PRINCIPAL, IF A PARTNERSHIP

State of \_\_\_\_\_ County of \_\_\_\_\_ ss:

On this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_ before me personally appeared \_\_\_\_\_ to me known, and known to me to be one of the members of the firm of \_\_\_\_\_ described in and who executed the foregoing instrument; and he acknowledged to me that he executed the same as and for the act and deed of said firm.

\_\_\_\_\_  
Notary Public or Commissioner of Deeds

ACKNOWLEDGMENT OF PRINCIPAL, IF AN INDIVIDUAL

State of \_\_\_\_\_ County of \_\_\_\_\_ ss:

On this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_ before me personally appeared \_\_\_\_\_ to me known, and known to me to be the person described in and who executed the foregoing instrument and acknowledged that he executed the same.

\_\_\_\_\_  
Notary Public or Commissioner of Deeds

Each executed bond should be accompanied by: (a) appropriate acknowledgments of the respective parties; (b) appropriate duly certified copy of Power of Attorney or other certificate of authority where bond is executed by agent, officer or other representative of Principal or Surety; (c) a duly certified extract from By-Laws or resolutions of Surety under which Power of Attorney or other certificate of authority of its agent, officer or representative was issued, and (d) certified copy of latest published financial statement of assets and liabilities of Surety.

\* \* \* \* \*

Affix Acknowledgments and Justification of Sureties.

**PAYMENT BOND 1**

**PAYMENT BOND**

KNOW ALL MEN BY THESE PRESENTS, That we, \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

hereinafter referred to as the "Principal", and \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

hereinafter referred to as the "Surety" ("Sureties") are held and firmly bound to

\_\_\_\_\_

hereinafter referred to as the "CM", or to its successors, or to its assigns in the penal sum of

\_\_\_\_\_  
\_\_\_\_\_

\$(\_\_\_\_\_) Dollars, lawful money of the United States, for the payment of which said sum of money well and truly to be made, we, and each of us, bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, the Principal is about to enter, or has entered, into a Contract in writing with the CM for

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

a copy of which Contract is annexed to and hereby made a part of this bond as though herein set forth in full;

NOW, THEREFORE, the conditions of this obligation are such that if the Principal, his or its representatives or assigns and other Subcontractors to whom Work under this Contract is sublet and his or their successors and assigns shall promptly pay or cause to be paid all lawful claims for

(a) Wages and compensation for labor performed and services rendered by all persons engaged in the prosecution of the Work under said Contract, and any amendment or extension thereof or addition thereto, whether such persons be agents servants or employees of the Principal or any such Subcontractor, including all persons so engaged who perform the work of laborers or mechanics at or in the vicinity of the site of the Project regardless of any contractual relationship between the Principal or such Subcontractors, or his or their successors or assigns, on the one hand and such laborers or mechanics on the other, but not including office employees not regularly stationed at the site of the Project; and

(b) Materials and supplies (whether incorporated in the permanent structure or not), as well as teams, fuels, oils, implements or machinery furnished, used or consumed by said Principal or any Subcontractor at or in the vicinity of the site of the Project in the prosecution of the Work under said Contract and any amendment or extension thereof or addition thereto; then this obligation shall be void, otherwise to remain in full force and effect.

This bond is subject to the following additional conditions, limitations and agreements:

## PAYMENT BOND 2

(a) The Principal and Surety (Sureties) agree that this bond shall be for the benefit of any materialmen or laborer having a just claim, as well as the CM.

(b) All persons who have performed labor, rendered services or furnished materials and supplies, as aforesaid, shall have a direct right of action against the Principal and his, its or their successors and assigns, and the Surety (Sureties) herein, or against either or both or any of them and their successors and assigns. Such persons may sue in their own name, and may prosecute the suit to judgment and execution without the necessity of joining with any other persons as party plaintiff.

(c) The Principal and Surety (Sureties) agree that neither of them will hold the CM liable for any judgment for costs of otherwise, obtained by either or both of them against a laborer or materialman in a suit brought by either a laborer or materialman under this bond for moneys allegedly due for performing work or furnishing material.

(d) The Surety (Sureties) or its successors and assigns shall not be liable for any compensation recoverable by an employee or laborer under the Workmen's Compensation Law.

(e) In no event shall the Surety (Sureties), or its successors or assigns, be liable for a greater sum than the penalty of this bond or be subject to any suit, action or proceeding hereon that is instituted by any person, firm, or corporation hereunder later than two years after the complete performance of said Contract and final settlement thereof.

The Principal, for himself and his successors and assigns, and the Surety (Sureties), for itself and its successors and assigns, do hereby expressly waive any objection that might be interposed as to the right of the CM to require a bond containing the foregoing provisions, and they do hereby further expressly waive any defense which they or either of them might interpose to an action brought hereon by any person, firm or corporation, including Subcontractors, materialmen and third persons, for work, labor, services, supplies or material performed rendered, or furnished as aforesaid upon the ground that there is no law authorizing the CM to require the foregoing provisions to be placed in this bond.

And the Surety (Sureties), for value received, for itself and its successors and assigns, hereby stipulates and agrees that the obligation of said Surety (Sureties), and its bonds shall be in no way impaired or affected by any extension of time, modification, omission, addition, or change in or of the said Contract or the work to be performed thereunder, or by any payment thereunder before the time required therein, or by any waiver of any provisions thereof, or by any assignment, subletting or other transfer thereof or of any part thereof, or of any Work to be performed, or any moneys due to become due thereunder and said Surety (Sureties) does hereby waive notice of any and all of such extensions, modifications, omissions, additions, changes, payments, waivers, assignments, subcontracts and transfers, and hereby expressly stipulates and agrees that any and all things done and omitted to be done by and in relation to assignees, Subcontractors, and other transferees shall have the same effect as to said Surety (Sureties) as though done or omitted to be done or in relation to said Principal. The Surety (Sureties), for value received, for itself and its successors and assigns, hereby stipulates and agrees that the obligation of said Surety (Sureties) and its bond shall be in no way impaired or affected by any assignment by the CM of its rights, title and interest in and to such bond, and said Surety (Sureties) hereby waives notice of any such assignment by the CM.

**PAYMENT BOND 3**

IN WITNESS WHEREOF, the Principal and the Surety (Sureties) have hereunto set their hands and seals, and such of them as are corporations have caused their corporate seals to be hereunto affixed and these presents to be signed by their proper officers, this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

(Seal) \_\_\_\_\_(L.S.)  
Principal  
By: \_\_\_\_\_

(Seal) \_\_\_\_\_  
Surety  
By: \_\_\_\_\_

(Seal) \_\_\_\_\_  
Surety  
By: \_\_\_\_\_

(Seal) \_\_\_\_\_  
Surety  
By: \_\_\_\_\_

If the Contractor (Principal) is a partnership, the bond should be signed by each of the individuals who are partners.

If the Contractor (Principal) is a corporation, the bond should be signed in its correct corporate name by a duly authorized officer, agent, or attorney-in-fact.

There should be executed an appropriate number of counterparts of the bond corresponding to the number of counterparts of the Contract.

**PAYMENT BOND 4**

ACKNOWLEDGMENT OF PRINCIPAL, IF A CORPORATION

State of \_\_\_\_\_ County of \_\_\_\_\_ ss:

On this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_ before me personally came \_\_\_\_\_, who being by me duly sworn, did depose and say that he/she resides in the City of \_\_\_\_\_ that he is the \_\_\_\_\_ of \_\_\_\_\_, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation; and that he signed his name thereto by like order.

\_\_\_\_\_  
Notary Public or Commissioner of Deeds

ACKNOWLEDGMENT OF PRINCIPAL, IF A PARTNERSHIP

State of \_\_\_\_\_ County of \_\_\_\_\_ ss:

On this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_ before me personally appeared \_\_\_\_\_ to me known, and known to me to be one of the members of the firm of \_\_\_\_\_ described in and who executed the foregoing instrument; and he acknowledged to me that he executed the same as and for the act and deed of said firm.

\_\_\_\_\_  
Notary Public or Commissioner of Deeds

ACKNOWLEDGMENT OF PRINCIPAL, IF AN INDIVIDUAL

State of \_\_\_\_\_ County of \_\_\_\_\_ ss:

On this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_ before me personally appeared \_\_\_\_\_ to me known, and known to me to be the person described in and who executed the foregoing instrument and acknowledged that he executed the same.

\_\_\_\_\_  
Notary Public or Commissioner of Deeds

Each executed bond should be accompanied by: (a) appropriate acknowledgments of the respective parties; (b) appropriate duly certified copy of Power of Attorney or other certificate of authority where bond is executed by agent, officer or other representative of Principal or Surety; (c) a duly certified extract from By-Laws or resolutions of Surety under which Power of Attorney or other certificate of authority of its agent, officer or representative was issued, and (d) certified copy of latest published financial statement of assets and liabilities of Surety.

\* \* \* \* \*

Affix Acknowledgments and Justification of Sureties.

**EXHIBIT E**

THIS AGREEMENT made and entered into this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, by and between \_\_\_\_\_ (hereinafter the "CM"), located at \_\_\_\_\_, and the City of New York, Department of Design and Construction (hereinafter the "City"), located at 30-30 Thomson Avenue, Long Island City, New York.

**WITNESSETH:**

WHEREAS the City has entered into a certain contract with the CM, bearing Comptroller's Registration Number \_\_\_\_\_ (hereinafter the "Contract"); and

WHEREAS pursuant to the Contract, the CM is obligated to subcontract certain work and to obtain payment and performance bonds from the subcontractors; and

WHEREAS pursuant to the Contract, the CM has agreed to assign all its rights, title and interest under the subject bonds, in the manner set forth herein;

NOW, THEREFORE, in consideration of the mutual promises and covenants set forth herein, the parties hereto do hereby agree as follows:

The CM hereby makes an irrevocable assignment to the City of all its rights, title and interest in and to the below described performance and payment bonds, including any subrogation or other right of the CM to receive any payments that may become due and owing by the Surety thereunder:

Performance and Payment Bonds (Bond # \_\_\_\_\_) issued to \_\_\_\_\_, by \_\_\_\_\_, designating \_\_\_\_\_ as Obligee, with respect to a contract for \_\_\_\_\_

provided, however, this assignment shall become effective only upon the happening of one or more of the events set forth below:

- (1) The Commissioner of the Department of Design and Construction, or his authorized designee, in his sole and absolute discretion, determines in writing that:
  - (a) The CM has been terminated for cause with respect to the Contract; or
  - (b) The CM has been terminated without cause with respect to the Contract; or
  - (c) The CM has abandoned the Contract; or
  - (d) The CM has failed to make demand upon the Surety to perform its obligations under the above described bond(s), when circumstances have warranted that such action should be taken and the City has so notified the CM in writing.
- (2) A voluntary or involuntary petition in bankruptcy has been filed by or against the CM, or, in the event the CM is a joint venture, a voluntary or involuntary petition in bankruptcy has been filed by or against either or both of the joint venture partners acting as the CM.

IN WITNESS WHEREOF, the parties hereto do set their hands and agree as follows.

CM: \_\_\_\_\_ City of New York, Department of Design and Construction:

By: \_\_\_\_\_ By: \_\_\_\_\_  
Title: \_\_\_\_\_ David Resnick  
Deputy Commissioner

ACKNOWLEDGMENT BY CORPORATION

State of \_\_\_\_\_ County of \_\_\_\_\_ ss:

On this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_ before me personally came \_\_\_\_\_, who being by me duly sworn, did depose and say that he/she resides in the City of \_\_\_\_\_ that he is the \_\_\_\_\_ of \_\_\_\_\_, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation; and that he signed his name thereto by like order.

\_\_\_\_\_  
Notary Public or Commissioner of Deeds

ACKNOWLEDGMENT BY COMMISSIONER

State of \_\_\_\_\_ County of \_\_\_\_\_ ss:

On this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_ before me personally came \_\_\_\_\_, to me known and known to me to be the Deputy Commissioner of the Department of Design and Construction of The City of New York, the person described as such in and who as such executed the foregoing instrument and he acknowledged to me that he executed the same as Deputy Commissioner for the purposes therein mentioned.

\_\_\_\_\_  
Notary Public or Commissioner of Deeds

## EXHIBIT F

### PROJECT LABOR AGREEMENT

Project Labor Agreement: This contract is subject to a Project Labor Agreement (“PLA”) entered into between the City and the Building and Construction Trades Council of Greater New York (“BCTC”) affiliated Local Unions. The PLA is binding on the Contractor and all subcontractors of all tiers. The Contractor and its subcontractors are required to execute a “Letter of Assent” prior to award. The PLA and the Letter of Assent are available at the following website:

<http://www.nyc.gov/html/mocs/html/vendors/pla.shtml>.

**EXHIBIT G**

**M/WBE REQUIREMENTS**

Requirements for the participation of M/WBEs apply to the subcontract for site work to be performed by a subcontractor under the supervision and control of the Contractor. Such requirements are set forth below. Prior to procurement of the subcontract for site work, the City shall provide the applicable M/WBE requirements to the Contractor in a form entitled "Subcontractor Utilization Plan." The Subcontractor Utilization Plan shall be included by the Contractor in Bid Documents for the subcontract for site work for the Project, as directed by the City.

|  |             |            |
|--|-------------|------------|
| <b>Target Subcontracting Percentage:</b>   |             | <b>25%</b> |
| Participation Goal for Black Americans:    | Unspecified |            |
| Participation Goal for Hispanic Americans: | Unspecified |            |
| Participation Goal for Asian Americans:    | Unspecified |            |
| <b>Total M/WBE Participation Goals</b>     |             | <b>50%</b> |

**EXHIBIT H**

**CITY OF NEW YORK  
DEPARTMENT OF DESIGN AND CONSTRUCTION  
SAFETY REQUIREMENTS**

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**THE DDC SAFETY REQUIREMENTS INCLUDE THE FOLLOWING SECTIONS:**

- I. POLICY ON SITE SAFETY**
- II. PURPOSE**
- III. DEFINITIONS**
- IV. RESPONSIBILITIES**
- V. SAFETY QUESTIONNAIRE**
- VI. SAFETY PROGRAM AND SITE SAFETY PLAN**
- VII. KICK-OFF/PRE-CONSTRUCTION MEETINGS AND SAFETY REVIEW**
- VIII. EVALUATION DURING WORK IN PROGRESS**
- IX. SAFETY PERFORMANCE EVALUATION**

## I. POLICY ON SITE SAFETY

The City of New York Department of Design and Construction (DDC) is committed to a policy of injury and illness prevention and risk management for construction work that will ensure the safety and health of the workers engaged in the projects and the protection of the general public. Therefore, it is DDC's policy that work carried out by Contractors on DDC jobsites must, at a minimum, comply with applicable federal, state and city laws, rules and regulations, including without limitation:

- ❑ U. S. Department of Labor 29 Code of Federal Regulations (CFR) Part 1926 and applicable Sub-parts of Part 1910 – U.S. Occupational Safety and Health Administration (OSHA) including, but not limited to “Respiratory Protection” (29 CFR 1910.134), “Permit-Required Confined Spaces” (29 CFR 1910.146), and “Hazard Communication” (29 CFR 1910.1200);
- ❑ New York State Department of Labor Industrial Code Rule 23 – Protection in Construction, Demolition and Excavation;
- ❑ New York City Construction Codes, Title 28
- ❑ NYC Department of Transportation Title 34 Chapter 2 – Highway Rules
- ❑ New York State Department of Labor Industrial Code Rule 753
- ❑ NYC Local Law No. 113 (2005) Noise Control Code

In addition, all regulations promulgated by the NYC Department of Transportation, including requirements for Maintenance and Protection of Traffic (MPT), are applicable when contained in contract specifications. While MPT is a significant component of work in our Infrastructure Division, it does not supersede or exempt Contractors from complying with other applicable health and safety standards (for example, excavating and trenching standards, operation of heavy equipment and compliance with City environmental and noise regulations).

## II. PURPOSE

The purpose of this policy is to ensure that Contractors perform their work and supervise their employees in accordance with all applicable federal, state and city rules and regulations. Further, Contractors will be expected to minimize or eliminate jobsite and public hazard, through a planning, inspection, auditing and corrective action process. The goal is to control risks so that injuries, illnesses and accidents to contractors' employees, DDC employees and the general public, as well as damage to city-owned and private property, are reduced to the lowest level feasible.

## III. DEFINITIONS

**Agency Chief Contracting Officer (ACCO):** The ACCO shall mean the person delegated authority by the Commissioner to organize and supervise the procurement activity of subordinate Agency staff in conjunction with the CCPO.

**Competent Person:** As defined by OSHA, an individual who is capable of identifying existing and predictable hazards in the surroundings or working conditions that are unsanitary, hazardous, or dangerous to employees or the general public, and who has authorization to take prompt corrective measures to eliminate them.

**Construction Safety Auditor:** A representative of the QACS Construction Safety Unit who provides inspection and assessment services to enhance health and safety on all DDC construction projects. The activities of the Construction Safety Auditor include performing site surveys, reviewing health and safety plans, reviewing construction permits, and rendering technical advice and assistance to DDC Resident Engineers and Project Managers.

**Construction Safety Unit:** A part of QACS within the Division of Technical Support that assesses contractor safety on DDC jobsites and advises responsible parties of needed corrective actions.

**Construction Superintendent:** A representative of the contractor responsible for overseeing performance of the required construction work. This individual must engage in sound construction practices, and is responsible to maintain a safe work site. In the case of a project involving the demolition, alteration or new construction of buildings, the

Construction Superintendent must be licensed by the NYC Department of Buildings.

**Contractor:** For purposes of these Safety Requirements, the term “Contractor” shall mean any person or entity that enters into a contract for the performance of construction work on a DDC project. The term “Contractor” shall include any person or entity which enters into any of the following types of contracts: (1) a prime construction contract for a specific project, (2) a prime construction contract using the Job Order Contracting System (“JOCS Contract”), and (3) a subcontract with a CM/Builder (“First Tier Subcontract”).

**Director - Quality Assurance and Construction Safety (QACS):** Responsible for the operations of the QACS Construction Safety Unit and the DDC Site Safety management programs.

**Job Hazard Assessment (JHA):** A process of identifying site-specific hazards that may be present during construction and establishing the means and methods to reduce or eliminate those hazards.

**Jobsite Safety Coordinator:** A person designated by the Contractor to be onsite during all activities. This individual shall have received, at a minimum, the OSHA 10-hour construction safety program. Other examples of acceptable training are the 30-hour OSHA Safety and Health Standards for the Construction Industry training program (OSHA 510) or a degree/certificate in a safety and health from a college-level curriculum. This person does not necessarily have to be dedicated full-time to site safety, but must have sufficient experience and authority to undertake corrective action and must qualify to be a competent person. For certain projects, as defined in NYC Construction Codes – Title 28, this person may be required to have a Site Safety Manager’s License issued by the NYC DOB.

**Qualified Person:** As defined by OSHA, an individual who, by possession of a recognized degree, certificate, license or professional standing, or who by extensive knowledge, training, and experience, has successfully demonstrated his or her ability to solve problems relating to the subject matter, the work, or the project. Qualified Persons are required under regulation to address issues pertaining, but without limit, to fall protection, scaffold design and trenching and shoring, among others.

**Resident Engineer (RE) / Construction Project Manager (CPM):** Representative of the Commissioner duly designated by the Commissioner to be his/her representative at the site of the work. (The RE/CPM may be a third-party consultant, including a CM, retained by DDC.)

**Safety Program:** Established by the Contractor that covers all operations of that Contractor and establishes the Contractor’s overall safety policy, regulatory compliance plan and minimum safety standards. The Safety Program must be submitted prior to the commencement of work at the site and is subject to review and acceptance by the Construction Safety Unit.

**Safety Questionnaire:** Used by DDC to evaluate Contractor’s current and past safety performance. It is required to be completed by all Contractors initially when submitting bids for Construction work, or when being pre-qualified and updated annually or as requested by the DDC.

**Site Safety Plan:** A site-specific safety plan developed by the Contractor for a specific project. The Site Safety Plan must identify hazards associated with the project, and include specific safety precautions and training appropriate and necessary to complete the work. The Site Safety Plan must be submitted prior to the commencement of work at the site and is subject to review and acceptance by the Construction Safety Unit.

**Unsafe or Unhealthy Condition:** A condition that could be potentially hazardous to the health and safety of personnel or the public, and/or damaging to equipment, machinery, property or the environment.

**Weekly Safety Meetings:** Weekly documented jobsite safety meetings, given to all jobsite personnel by contractor, with the purpose of discussing general safety topics and job specific requirements encountered at the DDC work site.

#### **IV. RESPONSIBILITIES**

All persons who manage, perform, and provide support for construction projects shall conduct operations in compliance

with the requirements identified in this Policy and all applicable governing regulatory agency requirements and guidelines pertaining to safety in construction.

**A. Resident Engineer / Construction Project Manager / Construction Manager**

- Monitors the issuance of safety- related permits, approvals and drawings and maintains copies on site.
- Monitors construction-related work activities to confirm that they are conducted in accordance with DDC policies and all applicable regulations that pertain to construction safety.
- Maintains documentation and periodically attends weekly safety meeting.
- Notifies the Construction Safety Unit and the ACCO's Insurance and Risk Management Unit of project- related accidents and emergencies, as per DDC's Construction Safety Emergency Protocol.
- Gathers facts related to all accidents and prepares DDC Accident Reports.
- Notifies the Construction Safety Unit of outside regulatory agency inspections and forwards a copy of the inspection report within three days of its receipt.
- Monitors the conditions at the site for conformance with the Site Safety Plan and DDC construction documents.
- Notifies the contractor and DDC in the event that any condition or activity exists that is not in compliance with the Site Safety Plan, applicable federal, state or local codes or any condition that presents a potential risk of injury to the public or workers or possible damage to property.
- Notifies DDC of any emergency condition and directs the contractor to provide such labor, materials, equipment and supervision to abate such conditions.
- Reports gross safety violations to the Construction Safety Unit immediately.

**B. Contractors**

- Complete a Safety Questionnaire and submit with its bid or as part of a pre-qualification package.
- Provide a Written Job Hazard Assessment (JHA) that identifies expected safety issues of the work to be performed. JHA shall be included with the Site Safety Plan submitted by the contractor.
- Submit a Site Safety Plan and Safety Program within 15 days of issuance of the Notice to Proceed, or as otherwise directed. The Site Safety Plan and Safety Program are subject to review and acceptance by the Construction Safety Unit prior to the commencement of work at the site. The Site Safety Plan shall be revised and updated as necessary.
- Ensure that all employees are aware of the hazards associated with the project through formal and informal training and/or other communications. Conduct and document weekly safety meetings for the duration of the project. Documentation to be provided to the RE/CPM/CM on a monthly basis.
- Name a Construction Superintendent, if required.
- Name a Job Site Safety Coordinator. The Contractor will be required to identify the Job Site Safety Coordinator in the Site Safety Plan.
- Comply with all mandated federal, state and local safety and health rules and regulations.
- Comply with all provisions of the Site Safety Plan.
- As part of the Site Safety Plan, prepare a site specific MPT (if not otherwise provided in the contract documents) and comply with all of its provisions.
- Conduct and document site-specific safety orientation for Contractor personnel to review the hazards associated with the project as identified in the Site Safety Plan and the specific safety procedures and controls that will be used to protect workers, the general public and property. The Job Site Safety Coordinator will conduct this training prior to mobilization and provide documentation to the RE/CPM/CM.
- Provide, replace and adequately maintain at or around the project site, suitable and sufficient signage, lights, barricades and enclosures (fences, sidewalk sheds, netting, bracing, etc.).
- Report unsafe conditions or hazards to the DDC RE/CPM/CM as soon as practical, but no more than 24 hours after discovery, and take action to remove or abate such conditions.
- Report any accident involving injuries to workers or the general public, as well as property damage, to the DDC RE/CPM/CM within two (2) hours.
- Notify the DDC RE/CPM/CM within two (2) hours of the start of an inspection by any regulatory agency personnel, including OSHA.
- Maintain all records pertaining to all required compliance documents and accident and injury reports.
- Respond to DDC recommendations on safety, which shall in no way relieve the Contractor of its responsibilities for

safety on the project. The Contractor has sole responsibility for safety.

## **V. SAFETY QUESTIONNAIRE**

DDC requires that all Contractors provide information regarding their current and past safety and environmental performance and programs. This will be accomplished by the use of the DDC Safety Questionnaire. As a part of the bid submittal package, the contractor must submit a completed DDC Safety Questionnaire listing their workers' compensation experience modification rating and OSHA Incidence Rates for the three (3) years prior to the date of the bid opening. DDC may request a Contractor to update its Questionnaire at any time or to provide more detailed information. The Contractor must provide the requested update within 30 days.

The following criteria will be used by DDC in reviewing the Contractor's responsibility, which will be based on the information provided on the questionnaire:

- Criteria 1: OSHA Injury and Illness Rates (I&IR) are no greater than the average for the industry (based on the most current Bureau of Labor Statistics data for the Contractors SIC code); and
- Criteria 2: Insurance workers compensation Experience Modification Rate (EMR) equal to or less than 1.0; and
- Criteria 3: Any willful violations issued by OSHA or NYC DOB within the last three years; and
- Criteria 4: A fatality (worker or member of public) experienced on or near Contractor's worksite within the last three (3) years; and
- Criteria 5: An unacceptable rating by QACS based on past performance on DDC projects; and
- Criteria 6: Contractor has in place an acceptable corporate safety program and its employees shall have completed all documented relative safety training; and
- Criteria 7: Contractor shall provide OSHA Injury Records (currently OSHA 300 Log) for the last three (3) years.

If the Contractor fails to meet the basic criteria listed above, the Construction Safety Unit may request, through the ACCO, more detail concerning the Contractor's safety experience. DDC may request the Contractor to provide copies of, among other things, OSHA records, OSHA and DOB citations, EPA citations and written Safety Programs.

## **VI. SAFETY PROGRAM AND SITE SAFETY PLAN**

Within fifteen (15) days of issuance of the Notice to Proceed, or as otherwise directed, the Contractor shall submit the following: (1) Safety Program, and (2) Site Safety Plan. The Safety Program shall set forth the Contractor's overall safety policy, regulatory compliance plan and minimum safety standard, and the Site Safety Plan shall identify hazards associated with the project, and include specific safety precautions and training appropriate and necessary to complete the work. The Safety Program and the Site Safety Plan are subject to review and acceptance by the Construction Safety Unit prior to the commencement of work at the site. Failure by the contractor to submit an acceptable Site Safety Plan and Safety Program shall be grounds for default.

The Site Safety Plan shall apply to all Contractor and subcontractor operations, and shall have at a minimum, the following elements. Each element shall be described in a separate section in the written document. It may be necessary to modify the basic format for certain unique or high-risk projects (such as tunnels or high-rise construction). The basic elements are as follows:

1. **Responsibility and Organization:** Identify the person or persons with authority and responsibility for implementing the Site Safety Plan. Provide an organization chart and define levels of authority and responsibility. Identify the Competent Person, the Construction Superintendent (if required), the Job Safety Coordinator and the Qualified Person required for this project.
2. **Communication:** Establish a system for communicating with employees and subcontractors on matters relating to worker and public safety and health and environmental protection, including provisions designed to encourage employees to inform the employer of hazards at the worksite without fear of reprisal. An emergency response notification protocol is to be established that also includes after hours contact numbers. The plan must also include provisions for weekly safety meetings held by the Job Site Safety Coordinator.

3. Job Hazard Assessment: A written document submitted by the contractor, used to identify expected job hazards and public safety risks and state the specific means and methods to reduce, control or eliminate those hazards. This part of the Site Safety Plan must also include how on-going evaluations of those risks and hazards will be carried out, including plans for periodic inspections to identify unsafe conditions, work practices and public safety hazards.
4. Accident/Exposure Investigation: Establish a procedure to investigate and report occupational and public injury or illness, property damage, vehicle accidents or other mishaps.
5. Hazard Correction: Establish means, methods and/or procedures for correcting unsafe or unhealthy conditions that might be exposing both the public and workers to hazards. Corrective actions must be taken immediately when observed or discovered. Should an imminent hazard exist which cannot be immediately abated without endangering employees, the public and/or property, remove or restrict all exposed persons from the area except those necessary to correct the existing condition. Employees necessary to correct the hazardous condition shall be provided the necessary safeguards. When corrective actions cannot be taken immediately, temporary measures should be taken until such time permanent measures are taken to eliminate the potential risks or hazards
6. Training: Describe site-specific hazard training programs. In addition to the required safety orientation, additional site specific training, in the form of required weekly safety meetings, will be required. Contractors must also initiate training when: a) new employees are hired; b) employees are given new job assignments for which training has not been previously received; c) new substances, processes, procedures or equipment are introduced that might represent a new public or worker hazard; d) the employee is made aware of a new or previously unrecognized hazard; e) new supervisors are assigned to familiarize themselves with the safety and health hazards to which employees under their immediate direction and control may be exposed; and f) after a jobsite incident or accident has occurred.
7. Recordkeeping: Establish procedures to maintain records of scheduled and periodic inspections, weekly safety meetings, and training records. Updated records shall be maintained at the jobsite, accessible to the Construction Safety Auditors and/or Quality Assurance Auditors/RE/CPM, and retained in accordance with DDC policy.

The most critical component of the Site Safety Plan is the Job Hazard Assessment section. This section must address specific hazards that are anticipated throughout the project. Each Site Safety Plan must address, at a minimum:

- Public and pedestrian safety
- Fall protection
- Electrical hazards
- Scaffolding
- Fire protection
- Emergency notification & response
- Housekeeping / debris removal
- Dust control
- Maintenance and protection of traffic
- Trenching and excavating
- Heavy equipment operations
- Material / equipment storage
- Environmental contamination
- Sheeting and shoring
- Alcohol and Drug Abuse Policy

The following additional hazards must be addressed, if applicable, based on the contract safety specifications and/or the results of the JHA (the list is not all-inclusive):

- Basic Personal Protective Equipment
- Compressed Air
- Compressed Gas Cylinders
- Cranes, Derricks and Hoists
- Demolition
- Electrical safety
- Excavations and Trenching
- Fall Protection – Floor openings/Stairways
- Fall Protection – Guardrails Toe boards etc

- Fall Protection – Leading Edge
- Fall Protection – Personal Fall Protection Devices
- Fire Protection and Fire Prevention
- Hazard Communication (RIGHT TO KNOW)
- Hazardous Energy & Lock Out / Tag Out
- Housekeeping/ Sanitation
- Maintenance and Protection of Traffic (MPT)
- Man Lifts /Aerial Lifts
- Marine Operations
- Motor Vehicle Safety
- Overhead Power lines
- Permit Required Confined Space
- Portable Ladders
- Powered Actuated Tools
- Powered Material Handling Equipment
- Scaffolds – Mobile
- Scaffolds – Stationary
- Scaffolds – Suspended
- Slings
- Steel Erection
- Welding and Cutting (Hot Work)
- Airborne Contaminants – Particulates – General
- Asbestos
- Blood borne Pathogens
- Hearing Protection
- Lead in Construction
- Mercury in Construction
- PCB's
- Respiratory Protection
- Silica
- Thermal Stress
- West Nile Virus
- Rodents and Vermin
- Noise Mitigation Plan

Certain DDC programs, such as Job Order Contracting System (JOCS), may not necessarily require Site Safety Plans. The JOCS contractor will be required to submit a Safety Program. In addition, certain DDC Operating Units may establish program or client-specific safety requirements. The contractor's Site Safety Plan must address such program or client specific safety requirements.

## **VII. KICK-OFF MEETINGS/PRE-CONSTRUCTION AND SAFETY REVIEW**

As part of the construction kick-off meeting, a Site Safety Plan review will be part of the agenda. A QACS representative will participate in this meeting with the contractor prior to the start of the project for the purpose of:

- A. Reviewing the safety issues detailed in the contract.
- B. Reviewing the Site Safety Plan.
- C. Reviewing any new issues or information that was not previously addressed.
- D. Discussing planned inspections and audits of the site by DDC personnel.

## **VIII. EVALUATION DURING WORK IN PROGRESS**

The Contractor's adherence to these Safety Requirements will be monitored throughout the project. This will be

accomplished by the following:

- A. Use of a safety checklist by a representative of the Construction Safety Unit or other designated DDC representative or Consultant during regular, unannounced inspections of the job site. Field Exit Conferences will be held with the RE/CPM, Contractor Superintendents or Safety Representatives.
- B. The RE/CPM will continually monitor the safety and environmental performance of the contractor's employees and work methods. Deficiencies shall be brought to the attention of the contractor's representative on site for immediate correction. The DDC representative will maintain a written record of these deficiencies and forward them to the Construction Safety Unit on a weekly basis. Any critical deficiencies shall be immediately reported to QACS phone# (718) 391-1624 or (718) 391-1911.
- C. If the Contractor's safety performance during the project is not up to DDC standards (safety performance measure, accident/incident rate, etc.) the Director- QACS, or designee will meet with the Contractor's safety representative, the DDC project manager, the RE/CPM, or the DDC Environmental Specialist (if environmental issues are involved ). The purpose of this meeting is to 1) determine the level of non-compliance; 2) explain and clarify the safety/environmental provisions; 3) agree on a future course of action to correct the deficiencies.
- D. If the deficiencies continue to occur with inadequate attention by the contractor, this shall, among other remedies available, be grounds for default.
- E. The contractor shall inform the Construction Safety Unit and ACCO Insurance and Risk Management Unit of all medical injuries or illnesses that require doctors' treatment resulting from an on-the-job incident within 24 hours of the occurrence. The Construction Safety Unit shall also be immediately informed of all fatalities, catastrophic accidents with more than one employee hospitalized, any injuries to members of the general public and major equipment damage (e.g., property damage, equipment rollovers, loads dropped from crane). QACS shall maintain a record of all contractor injuries and illnesses during the project and provide regular reports to the Agency.
- F. The Construction Safety Unit shall be immediately notified at the start of any NYS-DOL/ NYC-COSH/ OSHA/ EPA inspections. The Director of Quality Assurance & Construction Safety shall maintain a log of all contractor OSHA/EPA inspections and citations during the project.

#### **IX. SAFETY PERFORMANCE EVALUATION**

The contractor's safety record, including all DDC inspection results, will be considered as part of the Contractor's performance evaluation at the conclusion of the project. Poor safety performance during the course of the project shall be a reason to rate a Contractor unsatisfactory which will be reflected in the City's Vendex system and will be considered for future procurement actions as set forth in the City's Procurement Policy Board Rules.