



REQUEST
FOR
PROPOSALS

NEW YORK CITY DEPARTMENT OF
DESIGN + CONSTRUCTION

RFP



Pre-Proposal Conference

Submission Deadline

PIN

Project

MICHAEL R. BLOOMBERG
Mayor

DAVID J. BURNEY, AIA
Commissioner

DAVID RESNICK
Associate Commissioner
Architecture & Engineering

DEPARTMENT OF DESIGN AND CONSTRUCTION

REQUEST FOR PROPOSALS

**Requirements Contract
For Construction Management Services**

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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 February 7, 2007 at DDC headquarters, 30-30 Thomson Avenue, Long Island City, NY 11101, in the TSD Training Room on the 3rd Floor. Attendance is recommended but not mandatory to propose on the contract described in this RFP, it is strongly encouraged.

Submission Deadline

The proposer shall deliver, on or before 4:00PM on February 20, 2007, the Proposal in a clearly marked envelope or package. The Proposal shall consist of a clearly marked, sealed package with the Technical Proposal (1 original and 6 copies).

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.

Carol Phoenix (718) 391-1530
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 phoenixca@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 30th 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 or by e-mail, 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 and posted at the DDC 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.

1. Proposals Submission Deadline: Tuesday, February 20, 2007
2. Identify CM: Within four weeks of submission deadline
3. Complete Contract Registration: Approximately three months from date of CM selection.
4. Commence Work: When directed by DDC.

SECTION II. SUMMARY OF THE REQUEST FOR PROPOSALS

A. General

The New York City Department of Design and Construction is seeking up to eight appropriately qualified Construction Management (CM) firms to provide construction management services for various construction projects with estimates no greater than \$25,000,000. The projects for which services are required shall be specified by the Commissioner on a Task Order basis. Such projects may involve any division of DDC and may be located in any of the five Boroughs.

B. Background and Objectives

In order to have Construction Management services performed in a timely manner for various construction projects, DDC intends to have available up to eight requirements contracts. When there is a need for services for a specific project, each firm awarded a contract as a result of this RFP will be invited to submit a Proposal for the Project. An evaluation committee will review, evaluate and score all Proposals, based upon technical evaluation criteria set forth in the RFP for the Project. This evaluation and scoring will determine the CM's Technical Rating. The CM with the highest Technical Rating will be selected for the Project. The Commissioner shall issue a Task Order for the Project to the selected CM. The Task Order process is described in Article 3 of the attached Contract.

C. Joint Ventures and Other Consultant Relationships

There is no minimum requirement for the proportion of work by either of the two joint ventured parties. 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 a joint venture 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 relegated to Exhibit A, which lists the subconsultants.

D. Contract Term/Contract Estimate

The term of the contract awarded from this RFP shall commence on the date set forth in the Advice of Award letter and shall remain in effect for 730 consecutive calendar days. At the Commissioner's sole option, the term of the contract may be (1) extended for one year, and (2) renewed for one year.

For the base term, as well as the one year extension, total payments pursuant to the contract shall not exceed \$5,000,000. Additional funding, in an amount not to exceed \$3,000,000, may be provided in the event the term of the contract is renewed. The estimated value of all task orders to be awarded for each contract is \$5,000,000.

E. Insurance

The Consultant and all subconsultants performing services for this contract must provide the types and amounts of insurance specified in Article 9 of the attached contract. The Proposer is advised to carefully review such insurance requirements.

F. Payment Provisions

Payments for all required services for the Project shall be in accordance with Article 7 of the attached contract. The payment terms are summarized below.

1. Staffing Expenses: The CM shall be paid for staffing expenses for construction management personnel identified in the approved Staffing Plan. Staffing expenses shall be calculated based on direct salary rates for specified personnel, subject to a Multiplier of 1.75. The CM shall not be entitled to payment for staffing expenses for (1) any project executive(s), and/or (2) any personnel not included in the approved Staffing Plan.
2. Fee for Profit: The CM shall be paid a Fee for Profit. The Fee shall be deemed to include the following items: (a) profit, and (b) any costs and expenses for overhead that are in excess of the amount paid to the CM through the Multiplier of 1.75. The amount of the Fee for Profit shall be calculated as a percent of the total actual cost of construction in accordance with the Fee Curve set forth in Attachment 2 to the RFP.

SECTION III. SCOPE OF WORK AND CONTRACT CONDITIONS

A. Construction Management Services

Throughout the term of the Contract, as the need for services arise, the Commissioner shall issue a Request for Proposals (“RFP”) for the Project to the CMs to whom contracts have been awarded. The RFP for the Project shall include the following: (1) information concerning the Project for which services are required, (2) a description of the Proposal to be submitted by the CM. The CM shall not be entitled to compensation for costs incurred in connection with the preparation of Proposals for specific Projects. An evaluation committee will review, evaluate and score all Proposals for the Project, based upon criteria set forth in the RFP for the Project. This evaluation and scoring will determine the CM’s Technical Rating. The CM with the highest Technical Rating will be selected for the Project.

The Commissioner will issue a Task Order to the CM with the highest Technical Rating. The Task Order process is set forth in Article 3 of the attached contract. The CM shall not perform services under the Contract until the Commissioner has issued a Task Order in accordance with Article 3.

The selected CM will be required to provide all services necessary and required for the inspection, management, coordination and administration of the Project, from commencement through substantial completion, final acceptance, and project close-out. The services to be provided by the CM are set forth in Article 6 of the attached contract.

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.

C. CM’s Personnel

The terms and conditions regarding the CM’s obligation to provide personnel for the performance of services for the Project specified in the Task Order are set forth in Article 5 of the attached Contract. The CM agrees, throughout the term of this Contract, to provide personnel for the performance of all required services for the Project, as directed by the Commissioner. The CM shall provide such personnel through its own employees and/or through its Subconsultants.

SECTION IV. FORMAT AND CONTENT OF THE PROPOSAL

- A. Proposal Subdivisions 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.

Submit the proposal in separate, clearly labeled, sealed package as follows:

1. Technical Proposal (1 original and 6 copies): The Technical Proposal should contain all the information requested in Subsection B below, plus completed forms 254 and 255. (These forms are available at <http://www.nyc.gov/html/ddc/html/otherfrm.html>)
- B. Technical Proposal (1 original and 6 copies): The Technical Proposal shall contain the information described below.
1. Cover Letter: Submit a maximum one page cover letter, 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: Provide examples of up to five projects, completed within the last ten years, which are similar to the type of project described in this RFP. Visual materials can take the form of a printed brochure, photographs, drawings or similar images. For each project, the proposer shall provide information indicating whether the project was completed on time and within budget.
 3. Organizational Capability: Demonstrate the organizational capability of the firm. The proposer 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. (The SF-254 form is available at <http://nyc.gov/html/ddc/html/otherfrm.html>)
 4. Key Personnel: Demonstrate the firm's ability to provide qualified personnel. The proposer shall submit a SF-255 Form, which identifies

individual it is able to provide as Key Personnel for projects it may be awarded pursuant to this contract. Key Personnel include the following: Project Executive(s), Project Manager(s) and Assistant Project Manager(s). The proposer shall identify the range of individuals it can provide for these positions. For all individual so identified, the proposer shall submit resumes. (The SF-255 form is available at <http://nyc.gov/html/ddc/html/otherfrm.html>)

5. Statement of Understanding: The Statement of Understanding form (Attachment 1) shall be signed by the proposer and submitted with the Technical Proposal.
6. Acknowledgement of Addenda: The Acknowledgement of Addenda form (Attachment 3) shall be completed by the proposer and submitted with the Technical Proposal.

C. Proposal Package Contents (Checklist)

The Proposal Package should contain the following Materials:

1. Technical Proposal (**1 original and 6 copies**) Sealed, envelope clearly marked as "Technical Proposal", including
 - Statement of Understanding (Attachment 1)
 - Acknowledgement of Addenda (Attachment 3)

SECTION V. PROPOSAL EVALUATION AND CONTRACT AWARD PROCEDURES

1. Selection Process

A DDC evaluation committee, including an independent construction professional, will review, evaluate and score all Proposals pursuant to the criteria described below. This evaluation will determine each proposer's score. DDC reserves the right to interview proposers and visit their offices for the purpose of clarifying their Proposals, after which their initial scores may be re-evaluated. Proposers will be ranked in accordance with their scores, and up to eight firms with the highest scores will be awarded contracts.

2. Proposal Evaluation Criteria

- a. Experience of Firm: (weight 40%)
- b. Key Personnel: (weight 30%)
- c. Organizational Capability: (weight 30%)

3. Basis of Award

The Department of Design and Construction will award contract(s) to the responsible proposer(s) whose proposal(s) is/are 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 Request for Proposals.

4. Supply and Service Report

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

5. 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 to download the VENDEX Questionnaires and a Vendor's Guide to VENDEX or contact DDC's VENDEX Unit at 718-391-1565.

(a) Submission: Vendex Questionnaires (if required) must be submitted directly to the Mayor's Office of Contract Services, ATTN: Vendex, 253 Broadway, 9th 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.

6. Contract Finalization

Upon selection, each 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. Non-Binding Acceptance of Proposals: This RFP does not commit the City to award a contract for any services.
- B. Incurring Proposal Costs: The City of New York is not liable for any costs incurred in the preparation of a response to this RFP.
- C. Confidentiality: The contents of a Proposer's RFP response are not deemed confidential unless the Proposer identifies those portions of its response which it deems confidential, or containing proprietary information, or trade secrets. The Proposer must provide justification as to 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.
- D. Reserved Rights: All proposal material submitted becomes the property of the City and the City reserves the right, at its sole discretion, to:
 - 1. Reject any and all proposals received in response to this RFP;
 - 2. Award a contract to other than the lowest-fee Proposer;
 - 3. Waive, modify or correct any irregularities in proposals received, after prior notification to the Proposer;
 - 4. Use without limitation any or all of the ideas from submitted proposals;
 - 5. Contract for all or selected parts of the Proposer's proposal, selecting from the services offered without affecting the itemized pricing;
 - 6. Extend the time for submission of all proposals after notification to all prospective Proposers;
 - 7. May conduct discussions with offerers submitting acceptable proposals, award may be made without any discussion;
 - 8. Terminate negotiations with a selected Proposer and select the next most responsive Proposer, or take such other action as deemed appropriate if negotiations fail to result in a signed contract within a reasonable time of the commencement of negotiations as determined by the Commissioner;
 - 9. Postpone or cancel this RFP, in whole or in part, and to reject all proposals.

E. Contractual Requirements

1. Any firm awarded a contract as a result of this RFP will be required to sign the City's standard contract. 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 Consultant and the City has no financial obligation to sub-consultants and sub-contractors. 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. 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.

Determinations of interest due shall be made in accordance with the provisions of the Procurement Policy Board Rules and General Municipal Law 3-a.

5. 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, 10th Floor, New York, NY 10007; the telephone number is (212) 669-2323. 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.
6. This Request for Proposals and the resulting contract award(s), if any, unless otherwise stated, are subject to all applicable provision 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 accessing the City's website at www.nyc.gov/ppb.

7. 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 New York City Department of Business Services/Division of Labor Services Employment Report and certification by that office; submission by the proposer of the requisite VENDEX Questionnaires/Certificates of No Charge 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 Local Based Enterprises program and its implementation rules.
8. Pursuant to New York City's Procurement Policy Board 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.
9. 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.
10. 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.

ACCO Signature

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 requirements contract, 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 insurances 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 Proposer

By: _____
Signature of Partner or Corporate Officer

Date

Print Name

Title

Firm

EIN #

ATTACHMENT 2

STIPULATED FEE FOR PROFIT

Fee for Profit: The CM shall be paid a Fee for Profit, the amount of which shall be calculated as a percent of the total actual cost of construction for the Project in accordance with the Fee Curve set forth below. For the purpose of calculating the Fee for Profit, the total actual cost of construction for the Project shall be as defined in Article 7 of the attached contract. The Fee for Profit shall be paid to the CM during the Construction Phase. When the construction work is 25% complete, the CM shall be paid 25% of the Fee for Profit. When the construction work is 50% complete, the CM shall be paid an additional 25% of the Fee for Profit. When the construction work is 100% complete and the CM has completed all required services for the Project, including close-out services, the CM shall be paid the remaining 50% of the Fee for Profit.

TOTAL ACTUAL CONSTRUCTION COST	Fee for Profit as a Percent of Total Actual Construction Cost	TOTAL ACTUAL CONSTRUCTION COST	Fee for Profit as a Percent of Total Actual Construction Cost
\$8,000,000.00	1.66%	\$32,000,000.00	1.13%
\$9,000,000.00	1.63%	\$33,000,000.00	1.13%
\$10,000,000.00	1.58%	\$34,000,000.00	1.12%
\$11,000,000.00	1.54%	\$35,000,000.00	1.12%
\$12,000,000.00	1.49%	\$36,000,000.00	1.08%
\$13,000,000.00	1.49%	\$37,000,000.00	1.04%
\$14,000,000.00	1.47%	\$38,000,000.00	1.02%
\$15,000,000.00	1.47%	\$39,000,000.00	0.68%
\$16,000,000.00	1.43%	\$40,000,000.00	0.68%
\$17,000,000.00	1.43%	\$41,000,000.00	0.68%
\$18,000,000.00	1.41%	\$42,000,000.00	0.68%
\$19,000,000.00	1.40%	\$43,000,000.00	0.63%
\$20,000,000.00	1.40%	\$44,000,000.00	0.63%
\$21,000,000.00	1.39%	\$45,000,000.00	0.63%
\$22,000,000.00	1.37%	\$46,000,000.00	0.63%
\$23,000,000.00	1.36%	\$47,000,000.00	0.63%
\$24,000,000.00	1.36%	\$48,000,000.00	0.63%
\$25,000,000.00	1.34%	\$49,000,000.00	0.63%
\$26,000,000.00	1.33%	\$50,000,000.00	0.63%
\$27,000,000.00	1.33%		
\$28,000,000.00	1.32%		
\$29,000,000.00	1.31%		
\$30,000,000.00	1.15%		
\$31,000,000.00	1.14%		

ATTACHMENT 3

ACKNOWLEDGEMENT OF ADDENDA

TITLE OF THE REQUEST FOR PROPOSALS:	PIN #:
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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 MOC:** 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: _____

THE CITY OF NEW YORK
DEPARTMENT OF DESIGN AND CONSTRUCTION

30-30 THOMSON AVENUE
LONG ISLAND CITY, NEW YORK NEW YORK 11101

REQUIREMENTS CONTRACT FOR
CONSTRUCTION MANAGEMENT SERVICES

BOROUGH: City Wide / All Five Boroughs

FMS NUMBER: RQ_T

REGISTRATION NUMBER: _____

PIN NUMBER: 8502007RQ0008P

CM: _____

DATE: _____

Standard Requirements Contract
Construction Management Services
January 2007

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 "CM"), located at _____.

WITNESSETH:

WHEREAS, the City desires to have construction management services performed on a requirements basis for various construction projects, and

WHEREAS, the CM has been selected based upon and in consideration of its representation that it can perform the required services set forth herein in a timely and expeditious manner,

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

ARTICLE 1 - Definitions

1.1 "Agreement" shall mean this Agreement which has been signed by the parties, including (1) the Request for Proposals for the Contract, (2) the CM's Proposal for the Contract, (3) the Request for Proposals for the Project, (4) the CM's Proposal for the Project, and (5) the Exhibits set forth below. In the event of any conflict between the Request for Proposals and the CM's Proposal, the Request for Proposals shall prevail.

Exhibit A	Contract Information
Exhibit B	Fee Curve for Fee for Profit

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 "Architect" or "Consultant" 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.

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

1.6 "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).

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

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

1.9 "Contract" or "Contract Documents" shall mean the Agreement and all components thereof, as set forth in Article 1.1.

1.10 "Construction Documents" shall mean the final plans, drawings and specifications for the construction work and all modifications thereto prepared by Consultant(s) engaged by the Department and approved in writing by the Commissioner.

1.11 "Construction Manager" or "CM" or "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.

1.12 "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.

1.13 "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/her duly authorized representative.

1.14 "Drawings" shall mean all graphic or written illustrations, descriptions, explanations, directions, requirements and standards of performance applied to the construction work.

1.15 "Final Acceptance" shall mean the final written acceptance of all required construction work for the Project, as determined by the Commissioner.

1.16 "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.

1.17 "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 of this Agreement through Final Acceptance of the construction work, applicable to or affecting the Project, the Site(s), the construction work, and all employees engaged hereunder.

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

1.19 "Modification" shall mean any written amendment of this Agreement signed by both DDC and the CM.

1.20 "Project" shall mean the Project for which construction management services are required, as specified by the Commissioner on a Task Order basis. The services the CM may be required to provide for the Project are set forth in Article 6.

1.21 "Project Executive" shall mean the person designated by the CM to serve as its principal representative with respect to its obligations hereunder. The Project Executive is identified in the Staffing Plan.

1.22 "Safety Standards" shall mean all laws, union rules and trade or industry custom or codes of any kind whatsoever, in effect from the date of this Agreement through Final Acceptance of the construction work, pertaining to worker safety and accident prevention applicable to the Project and/or the construction 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).

1.23 "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 construction work.

1.24 "Site(s)" shall mean the area(s) upon or in which the construction work is carried on, and such other areas adjacent thereto as may be designated by the Commissioner.

1.22 "Specifications" shall mean all of the directions, requirements and standards of performance applied to the construction work.

1.23 "Subcontractor" shall mean any person, firm, or corporation, other than employees of the CM, who or which contracts with the CM or its subcontractors to furnish, or actually furnishes services, labor, or labor and materials, or labor and equipment hereunder. All subcontractors are subject to the prior written approval of the Commissioner.

1.24 "Substantial Completion" shall mean the written determination by the Commissioner that all required construction work for the Project is substantially complete.

1.25 "Treasurer" shall mean the Commissioner of the Department of Finance of the City of New York.

1.26 "Vendor", as used in the Article entitled "Resolution of Disputes", shall mean the CM.

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 CM shall comply with all local, State and Federal laws, rules and regulations applicable to this Agreement and to the work to be performed hereunder, including without limitation the New York State Labor Law. The CM shall secure all licenses, obtain or cause to be obtained all permits, and pay or cause to be paid all fees required in connection with the performance of services under this Contract.

2.3 The CM shall comply with and shall make sure that all contractors working on the Project comply with Section 24-216(b) of the Administrative Code of the City of New York and with the New York City Noise Control Code and with all regulations issued pursuant to Section 24-216(b) of the Administrative Code or the Noise Control Code.

2.4 It is the intent and understanding of the parties to this contract that each and every provision of law required to be inserted in this contract shall be and is inserted herein. Furthermore, it is hereby stipulated that every such provision is deemed to be inserted herein, and if through mistake or otherwise, any such provision is not inserted in correct form, then this contract shall forthwith upon 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.

ARTICLE 3 - Task Order Process

3.1 General: The CM shall provide, to the satisfaction of the Commissioner, construction management services in accordance with the Task Order process outlined below. The CM's services shall be provided with respect to the Project specified in the Task Order. The services the CM may be required to provide shall be as set forth in Article 6, or as otherwise specified in the Task Order. The CM shall not perform services hereunder until the Commissioner has issued a Task Order.

3.2 Selection Procedure: The selection of the CM to perform services for a Project pursuant to this Contract shall be in accordance with the procedure set forth below. This selection procedure shall be conducted prior to issuance of a Task Order.

3.2.1 Request for Proposals for the Project: As the need for services arises, the Commissioner shall issue a Request for Proposals ("RFP") for the Project to the CM. The RFP for the Project shall include the following: (1) information concerning the Project for which services are required, and (2) a description of the Proposal for the Project to be submitted by the CM.

3.2.2 CM's Proposal: The CM shall not be entitled to compensation for costs incurred in connection with the preparation of Proposals for specific Projects.

3.2.3 Evaluation: An evaluation committee will review, evaluate and score all Proposals for the Project, based upon the technical evaluation criteria set forth in the RFP for the Project. This evaluation and scoring will determine the CM's Technical Rating. The Project will be awarded to the CM with the highest Technical Rating.

3.2.4 Non-Issuance: The Commissioner reserves the right not to issue a RFP for the Project to the CM, if the Commissioner, in his/her sole opinion, determines that the CM may be unable to provide the required services in a

satisfactory and timely fashion.

3.2.5 Task Orders: The Commissioner shall issue a Task Order to the CM selected for the Project. The Commissioner may issue separate and/or supplementary Task Orders to the CM for the performance of services for different phases or portions of the Project. Each Task Order issued hereunder shall include the items set forth below:

- (a) Description of the Project for which services are required
- (b) Construction management services to be performed by the CM
- (c) Project Schedule
- (d) Staffing Plan
- (e) Overall Not to Exceed amount for the services to be performed. Such overall Not to Exceed amount shall be broken down into various amounts and/or allowances, including without limitation the following: (1) Estimated Fee for Profit, (2) Allowance for Staffing Expenses, (3) Allowance for the Field Office, and (4) Allowance for Reimbursable Services.

3.3 Supplementary Task Orders: In the event of any changes to the Task Order, the Commissioner shall issue a Supplementary Task Order to the CM. The CM shall be bound by the terms and conditions of any such Supplementary Task Order issued by the Commissioner.

3.4 Reallocation of Allowance Amounts: Notwithstanding the specific amounts allocated for allowances, as set forth in Task Orders issued hereunder, the Commissioner may, by issuance of a Supplementary Task Order to the CM, reallocate such specific allowance amounts.

3.5 Conflicts: In the event of any conflict between a Task Order issued hereunder and any provision of this Contract, the Contract shall take precedence; except that with respect to the scope of services to be performed, the provisions of the Task Order shall take precedence over Article 6 of this Contract.

3.6 No Right to Reject a Task Order: The CM shall have no right to reject or decline to perform any Task Order issued under the Contract. Accordingly, any rejection of a Task Order by the CM, either expressly made or implied by conduct, shall constitute a material breach of this Contract.

3.7 Work by Others: In the event there is a need for construction management and/or consulting services, the Commissioner reserves the right not to issue a Task Order to the CM and to have the work performed by another CM(s), or by City employees, if the Commissioner, in his sole opinion, determines that the CM may be unable to satisfactorily provide the required services in a timely fashion.

ARTICLE 4 - Time Provisions

4.1 Term of the Contract: The Contract shall commence as of the date of the advice of award and shall remain in effect for the period set forth in Exhibit A.

4.1.1 Extension of Contract: The Commissioner may, for good and sufficient cause, extend the term of this Contract for a cumulative period not to exceed one year from the date of expiration.

4.1.2 Renewal of Contract: At the Commissioner's sole option, the term of this contract may be renewed for the period and for the increased amount set forth in Exhibit A.

4.2 Task Order for the Project: The Task Order for the Project shall commence as of the date of issuance and shall remain in effect until (1) Final Acceptance by the Commissioner of all required construction work for the Project, and (2) completion of all required CM services for the Project. The time frame for completion of all required construction work and all required CM services for the Project is set forth in the Project Schedule. The Project Schedule was submitted by the CM as part of its Proposal for the Project and shall be included in the Task Order. The Project Schedule shall be strictly adhered to by the CM. When appropriate and directed by the Commissioner, the Project Schedule shall be revised, subject to written approval by the Commissioner. The revised Project Schedule shall be strictly adhered to by the CM.

4.3 Responsibility for Delay: In the event the Project is not completed within the timeframe set forth in the original Project Schedule (i.e., the Project Schedule submitted by the CM as part of its Proposal for the Project), the Commissioner shall prepare a report analyzing the causes of the delay and determining responsibility for the same.

4.3.1 If the report indicates that the CM, 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 CM under this Contract, the total amount of staffing expenses paid to the CM for the period of the delay, or any portion thereof, for which the Commissioner determines the CM is responsible.

4.3.2 If the amount due and owing to the CM under this Contract is less than the total amount of staffing expenses paid to the CM for the period of the delay, or any portion thereof, for which the Commissioner determines the CM is responsible, the CM shall be liable for and agrees to pay the difference upon demand by the Commissioner.

4.3.3 If the CM files a dispute regarding its responsibility for the delay, or any portion thereof, the CM 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.

4.3.4 The following shall have no relevance to a determination by the Commissioner that the CM 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 CM or its attorneys in any dispute or proceeding regarding the CM's responsibility for the delay.

4.4 Continuation of the Contract: In the event (1) the CM's services are required for a Project, (2) a Task Order for the Project is issued by the Commissioner and registered by the Comptroller during the term of the Contract, including the last day thereof, and (3) the time frame for completion of the Project extends beyond the term of the Contract, the Contract shall remain in effect for payment purposes only through the time frame for completion of the Project, as set forth in the Task Order or any Supplementary Task Order required to complete the Project. For the purpose of this provision, the term of the Contract shall mean whichever of the following is the latest and actual final period of the Contract: (1) the term of the Contract, (2) the extended term of the Contract, or (3) the renewal term of the Contract.

ARTICLE 5 - The Consultant's Personnel

5.1 General: The CM agrees, throughout the term of the Contract, to provide personnel for the performance of all required construction management services for the Project in accordance with Task Orders issued by the Commissioner. The CM specifically agrees that its employees, agents and consultants shall possess the experience, knowledge and character necessary to qualify them individually for the particular duties they perform.

5.2 Staffing Plan: The CM shall provide personnel in accordance with the Staffing Plan approved by the Commissioner and included in the Task Order.

5.2.1 Contents of Staffing Plan: The CM's Staffing Plan includes the items set forth below.

- (a) Project Executive
- (b) Key CM Personnel: Required titles and specific individual for each title
- (c) Other CM Personnel: Required titles and specific individual for each title
- (d) Direct Salary Rates per hour for all specified personnel (except Project Executive). Direct Salary Rates shall be in accordance with Article 7.
- (e) total estimated hours for each title
- (f) total estimated amount for each title

5.2.2 Project Executive: The Project Executive shall serve as the CM's principal representative with respect to its obligations hereunder. 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 CM shall not be entitled to payment for services provided by any Project Executive(s). Compensation for services provided by any Project Executive(s) is deemed included in the Multiplier.

5.2.3 Key Construction Management (CM) Personnel: The Key CM Personnel 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.

5.2.4 Agreement to Assign: The CM specifically agrees to assign to the Project for its entire duration, the specific individuals identified in the Staffing Plan as the Project Executive and the Key CM Personnel. These individuals were identified by the CM in its Proposal for the Project. Failure by the CM 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 CM, or (2) if the City does not direct the CM to commence work on the Project within nine (9) months of the date on which the CM submitted its Proposal for the Project. Replacement of such Project Executive and/or Key CM Personnel must comply with the conditions set forth below.

5.2.5 Other Construction Management (CM) Personnel: In addition to the Key CM Personnel, other CM personnel were identified by the CM in its Proposal for the Project. Such other CM personnel shall 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.

5.2.6 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 CM's entitlement to payment for services performed by such personnel in accordance with Article 7. As specified therein, the CM 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.

5.2.7 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 is no longer in the employ of the CM.
- (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 CM 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 CM shall remove any personnel and substitute another employee of the CM 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 CM, the Commissioner shall, in writing, direct revisions to the Staffing Plan to decrease the level of staffing to be maintained throughout the delay. The CM shall be paid for the cost of the staffing it is directed by the Commissioner to maintain. Upon termination of the delay, the CM shall restore the level of staffing as directed by the Commissioner.

5.2.8 Overtime Policy: The CM shall provide a statement setting forth its company policy with respect to payment to its employees for services performed during overtime hours. Overtime hours shall be defined as any hours

in excess of eight (8) hours per day, Monday through Friday. The CM's statement regarding its overtime policy shall indicate the following: (1) whether its policy is consistently applied to all clients; (2) the designated classes of employees to whom such policy applies, and (3) the rate of increase to be paid to such employees for services performed during overtime hours.

5.3 Services by CM's Own Employees: The services to be performed hereunder shall be performed by the CM's own employees or its Subconsultant(s), as set forth below, unless otherwise authorized by the Commissioner. The employment of, contract with, or use of the services of any other person or firm by the CM, as independent consultant or otherwise, shall be subject to prior written approval of the Commissioner. However, no provision of this Contract shall be construed as constituting an agreement between the Commissioner and any such person or firm.

5.4 Subconsultants: The CM shall engage the Subconsultant(s) identified in its Proposal for the Project, unless otherwise approved by the Commissioner. Failure by the CM to provide the Subconsultant(s) set forth in Exhibit A shall be grounds for termination for cause in accordance with Article 13. The CM shall be responsible for the performance of services by its Subconsultant(s), including maintenance of schedules, correlation of their work and resolution of all differences between them.

5.4.1 Approval: Subconsultants are subject to the prior written approval of the Commissioner; provided, however, no provision of this Contract shall be construed as constituting an agreement between the Commissioner and any Subconsultant.

5.4.2 Replacement Subconsultants: No substitution for any Subconsultant shall be permitted unless approved by the Commissioner. Any proposed replacement Subconsultant must possess qualifications and experience substantially similar to those of the Subconsultant being replaced and is subject to the prior written approval of the Commissioner. In addition, at the Commissioner's request at any time, the CM shall remove any Subconsultant and substitute another Subconsultant reasonably satisfactory to the Commissioner. The Commissioner may request such substitution at any time, if, in his sole opinion, he determines that any Subconsultant may be unable to satisfactorily provide the required services in a timely fashion.

5.4.3 Payment: Expenses incurred by the CM in connection with furnishing Subconsultants for the performance of required services hereunder are deemed included in the payments by the City to the CM, as set forth in Article 7. The CM shall pay its Subconsultant(s) the full amount they are due from their proportionate share of the requisition, as paid by the City. The CM shall make such payment not later than seven (7) calendar days after receipt of payment from the City.

5.4.4 Subcontracts: The CM shall inform its Subconsultant(s) fully and completely of all terms and conditions of this Contract relating either directly or indirectly to the services to be performed. The CM shall stipulate in subcontracts with its Subconsultant(s) that all services performed shall strictly comply with the requirements of this Contract. If requested by the Commissioner, the CM shall furnish copies of the subcontract with its Subconsultant(s).

5.5 Employees of the CM: The CM is solely responsible for the work and deportment of all its personnel and its Subconsultant(s). These are employees of the CM or its Subconsultant(s) and not of the City.

ARTICLE 6 – Construction Management Services

6.1 General: The CM shall provide, to the satisfaction of the Commissioner, the services set forth below.

6.1.1 Construction Management (CM) Services: The CM shall provide all services necessary and required for the inspection, management, coordination and administration of the Project, so that the required construction work is properly executed, completed in a timely fashion and conforms to the requirements of the construction contract and to good construction practice. The construction management services to be provided by the CM shall include without limitation the services set forth in this Article 6, unless provided otherwise in the Task Order. The CM shall cooperate in all respects with representatives of the Commissioner concerning all aspects of the Project.

(a) The CM shall ascertain the standard practices of the City prior to the performance of services

required by this Contract. All CM services performed hereunder shall be in accordance with these standard practices.

- (b) The Commissioner or his duly authorized representative(s) shall have the right at all times to inspect the work of the CM and contractors.
- (c) The CM's services shall include the management, supervision and coordination of any Reimbursable Services required for the Project.

6.1.2 Field Office: The CM shall provide the field office and all related items in accordance with the requirements set forth in the Task Order. As specified therein, the CM shall be paid a monthly fee for providing the required field office and all related items.

6.1.3 Reimbursable Services: The CM may be directed in writing by the Commissioner to provide Reimbursable Services. Reimbursable Services are described in Article 6.5.

6.1.4 Non-reimbursable Services: Throughout the Project, the CM shall be responsible for providing the non-reimbursable services set forth below. All costs for such services are deemed included in the Multiplier.

- (a) The CM 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.
- (b) The CM shall provide the items set forth below for all personnel performing services for the Project, including any Project Executive(s).
 - (1) transportation, including transportation to the Project site, as well as parking and tolls. The transportation provided shall be vehicular, unless the Project site can be easily accessed by public transportation. CMs and/or Subconsultants that are not located in New York City or its vicinity shall not be entitled to reimbursement for transportation expenses.
 - (2) all necessary CADD or computer usage time
 - (3) all necessary office supplies and/or tools
 - (4) communications equipment and service, including without limitation cellular telephones and beepers, for all personnel assigned to the Project. The telephone and beeper numbers of all personnel assigned to the Project shall be submitted to the Commissioner.
 - (5) hard hats
- (c) In the event the CM is directed in advance in writing by the Commissioner to provide services which require long distance travel, the CM shall be reimbursed for expenses incurred in connection with such long distance. Long distance travel is defined in Article 6.5.

6.2 Services During Pre-Construction Phase: The services to be provided by the CM during the Pre-Construction Phase shall include without limitation the services set forth below, unless provided otherwise in the Task Order.

6.2.1 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 CM 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.

6.2.2 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 CM shall prepare minutes of such meetings in a format authorized by the Commissioner and shall distribute such minutes to all attendees.

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

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

6.2.5 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 CM shall review and provide written comments with respect to design documents for the Project prepared by the Consultant. The CM'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 CM 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 6, the CM shall have no obligation to identify and/or correct professional errors or omissions in the design documents.

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

6.2.6 Review Bid and Contract Documents for the Project and evaluate the same for completeness and compliance with DDC requirements. The CM's review 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 contractors to perform their work. If directed by DDC, the CM shall assist in the preparation of such Bid and Contract Documents for the Project; provided, however, the CM shall have no responsibility for the preparation of design documents or other documents for which Consultant has responsibility.

6.2.7 During the bidding process for the construction contracts, coordinate the work of the Consultant(s) to assure that any required addenda are promptly issued.

6.2.8 Following the receipt of bids, make recommendations to the Commissioner as to the capabilities and qualifications of bidders for the Project, as well as any subcontractors and/or suppliers of equipment and materials

proposed by them.

6.3 Services During Construction Phase: The services to be provided by the CM during the Construction Phase shall include without limitation the services set forth below, unless provided otherwise in the Task Order.

6.3.1 Prior to the commencement of the Work, obtain or verify that the construction contractor(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.

6.3.2 Undertake the following responsibilities with respect to submittals and approvals:

- (a) Implement procedures to be followed by construction contractors for the expeditious processing of submittals, including without limitation shop drawings, material samples and catalogue cuts. Such procedures shall be in accordance with DDC guidelines.
- (b) Make recommendations to the Commissioner regarding the approval of proposed subcontractors and material vendors.

6.3.3 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.
- (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 a reimbursable service, the CM shall retain the services of a qualified laboratory to provide any required testing. Compensation for such laboratory services will be provided to the CM pursuant to the Allowance for Reimbursable 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 set forth below in this Article 6. The CM shall furnish a detailed report to the Commissioner and the Consultant setting forth any discrepancies or deficiencies in the finished Work.
- (f) Inspect the Project and provide a report prior to the expiration of the guarantee period, as set forth below in this Article 6.

6.3.4 Undertake the following responsibilities with respect to the Progress Schedule:

- (a) Review and coordinate proposed Progress Schedule(s), and any updates thereto, submitted by the construction contractor(s) and direct revisions to the Progress Schedule(s) as required by the Commissioner.
- (b) Make recommendations to the Commissioner regarding approval or disapproval of the Progress Schedule(s).
- (c) If necessary, prepare a combined Progress Schedule for the Project in the form of a bar chart or equivalent.

- (d) Monitor compliance with the Progress Schedule(s) by the contractor(s).
- (e) Review the adequacy of the personnel and equipment of the contractor(s) and the availability of necessary materials and supplies to ensure compliance with the Progress Schedule(s).
- (f) Notify the Commissioner of any anticipated delays in fabrication, erection or construction.
- (g) If performance of the work by the contractor(s) falls behind the Progress Schedule(s), advise the Commissioner of the same and make recommendations as to what methods should be adopted to make up for lost time.
- (h) Render assistance when required to minimize delays to the Project caused by labor disputes during construction.

6.3.5 Review and evaluate the means and methods of construction proposed by the construction contractor(s) and advise the Commissioner in the event the CM 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 Construction Documents.

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

- (a) Review the Safety Program(s) developed by the contractor(s) and monitor the adherence of the contractor(s) to such program. The CM shall not be responsible for prescribing, instituting or maintaining a safety program, nor for providing safety engineers.
- (b) Promptly notify the Commissioner and the contractor(s) if the CM observes any hazardous conditions at the site or non-compliance by the contractor(s) with its Safety Program, any applicable safety regulations or contract requirements.
- (d) In the event of an emergency, provide such labor, materials, equipment and supervision necessary to cure such emergency condition. The CM shall immediately notify the Commissioner of any such emergency condition.
- (e) Monitor the activities of the contractor(s) and conditions at the site for conformance with the Construction Documents to ensure that a clean and safe environment is maintained at the site.

6.3.7 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 construction contractor(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, construction contract documents, including all addenda, change orders, supplemental drawings and all other project-related documents. The CM 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 construction contractor(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.

6.3.8 Monitor compliance by the construction contractor(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 LBEs, and (4) requirements for the participation of M/WBE's.

6.3.9 Prepare correspondence or other communications to the construction contractor(s) as required in order to advance the Project, including without limitation letters for the signature of the Commissioner or the Commissioner's Representative.

6.3.10 Undertake the following responsibilities with respect to construction contractor payments:

- (a) Review all requisitions for payments submitted by the construction contractor(s), including without limitation partial payments, payments for extra work, substantial completion and final payments.
- (b) Make recommendations to the Commissioner for approval or disapproval of all contractor requisitions for payment in accordance with the City's procedures.
- (c) Verify all estimates for payments of work performed, computations, as well as field measurements and sketches necessary for payment purposes.
- (d) With respect to each requisition for payments submitted by the construction contractor(s), determine the amount of liquidated damages, back charges or other deductions to be assessed.

6.3.11 Review all applications for extensions of time submitted by the construction contractor(s) and make recommendations to the Commissioner for approval or disapproval thereof in accordance with the City's procedures.

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

6.3.13 Undertake the responsibilities set forth herein with respect to disputes submitted by the construction contractor(s). Disputes shall mean disputes of the kind delineated in the article of the standard construction contract entitled "Resolution of Disputes". Review, evaluate and prepare a recommended determination with respect to disputes filed by the construction contractor(s). The CM'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 contractor, as well as the requirements of the construction contract and the Construction Documents.

6.3.14 Review and evaluate all requests for change orders from the construction contractor(s) and obtain proposals from the contractor(s). Prepare a report to the Commissioner recommending approval or disapproval of the requested change order in accordance with City procedures. Such report shall include the CM's review and evaluation of the following: (1) the validity of the proposed change order, (2) the cost of the proposed change order submitted by the contractor(s), and (3) the quantities of labor, equipment and materials necessary to perform the proposed change order. The CM must be prepared to substantiate the information contained in its report 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 contract. If directed by the Commissioner, the CM 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. If directed by the Commissioner, the CM shall provide cost estimates for the proposed change order.

6.3.15 Schedule and conduct job meetings with the construction contractor(s), Consultant(s), representatives of the Commissioner, the sponsoring agency, regulatory agencies and any other entities or individuals involved with the Project to discuss procedures, performance, progress, problems, coordination, scheduling and related issues. The CM shall prepare minutes of such meetings in a format authorized by the Commissioner and shall distribute such minutes to all attendees.

6.3.16 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 contractor(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 below in this Article 6.
- (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.

6.3.17 Determine the need for and recommend to the Commissioner the institution of default proceeding against the construction contractor(s) or the assessment of liquidated damages. Assist the Commissioner in selecting an alternate contractor(s) to perform the work and assist in evaluating back charges or other deductions to be assessed.

6.3.18 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) Make recommendations to the Commissioner regarding a determination of substantial completion.
- (d) Prepare and/or finalize all necessary punch lists, including completion dates for all items, and expedite execution of the same by the contractor(s).
- (e) Perform the above duties in the event the City is to take over, use, occupy or operate the Project, or any part thereof.

6.3.19 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) Make recommendations to the Commissioner regarding a determination of final acceptance.
- (d) Assemble and deliver to the Commissioner all record "as built" drawings. The CM shall notify the Commissioner of any issues, problems or observations relative to such record drawings.

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

6.3.21 Prior to the expiration of the guarantee period set forth in the construction contract, 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.

6.3.22 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. Such photographs shall be included in each monthly progress report.

6.3.23 Provide or cause to be provided all temporary facilities and utilities as necessary for the

performance of the Work.

6.3.24 Prepare and submit DDC's construction contractor performance evaluation form. Such performance evaluation form shall be completed when fifty percent (50%) of the contract amount has been vouchered and at substantial completion of the Project. The form shall be submitted to DDC no later than fifteen (15) calendar days after each of these events has occurred.

6.3.25 In the event any claim is made or any action brought in any way relating to the design or construction of the Project, the CM shall diligently render to the City all assistance which the City may require. Such services shall be rendered by the CM 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 CM.

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

6.4 Services During Post Construction Phase: The services to be provided by the CM during the Post Construction Phase shall include without limitation the services set forth below, unless provided otherwise in the Task Order.

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

6.4.2 Manage and supervise training sessions provided by the construction contractors for all equipment and/or systems installed.

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

6.4.3 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 contractor payments; (5) record "As Built" Drawings; (6) progress photographs of the construction, and (7) any other Project records required by the Commissioner.

6.5 Reimbursable Services: The CM may be directed to provide Reimbursable Services. Reimbursable 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 items set forth below. The CM shall provide Reimbursable Services, if so directed in writing by the Commissioner. No Reimbursable Services shall be performed by the CM, or paid from the Allowance for Reimbursable Services, unless expressly authorized in advance in writing by the Commissioner. With respect to Reimbursable Services, the CM shall utilize the method of procurement and form of payment directed by the Commissioner. Payment for Reimbursable Services shall be in accordance with Article 7.

6.5.1 Printing of contract documents and reports

6.5.2 Express mail postage, except as otherwise provided herein and excluding mail from the CM's main or home office to the Field Office

6.5.3 Laboratory services for testing of materials and/or items of work

6.5.4 Purchase of long lead items for the construction work

6.5.5 Performance of general conditions items

6.5.6 Long distance travel. In the event the CM is directed in advance in writing by the Commissioner to provide services which require long distance travel, the CM shall be reimbursed for expenses incurred in connection with such long distance travel. 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 CM's home office. Reimbursement for long distance travel expenses shall be as set forth in Article 7. Long distance travel shall not include travel expenses for the CM and/or any Subconsultants that are not located in New York City or its vicinity.

6.5.7 Any other services, determined by the Commissioner to be necessary for the Project.

6.6 Communications in Writing: All recommendations and communications by the CM to the Commissioner that will affect the cost of the Project shall be made or confirmed by it in writing. The Commissioner may also require other recommendations and communications by the CM to be made or confirmed by it in writing. All recommendations relating to proposed changes in the work, work schedules, instructions to contractor(s) and all other matters requiring action by the Commissioner and the contractor(s) shall be made directly to the Commissioner, unless otherwise directed by the Commissioner. After approval by the Commissioner, the CM shall issue instructions directly to the contractor(s).

ARTICLE 7 - Payment Terms and Conditions

7.1 General

7.1.1 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.

7.1.2 Task Orders: The Task Order shall specify an overall Not to Exceed amount for the services to be performed. Such overall Not to Exceed amount shall be broken down into various amounts and/or allowances, including without limitation the following: (1) Estimated Fee for Profit, (2) Allowance for Staffing Expenses, (3) Allowance for the Field Office, and (4) Allowance for Reimbursable Services. In the event the allowance amounts set forth in the Task Order are not sufficient, as determined by the Commissioner, to cover the cost of required services for which allowance amounts are specified, the Commissioner will increase the amounts of such allowances.

7.1.3 Reallocation of Allowance Amounts: Notwithstanding the specific amounts allocated for allowances, as set forth in Task Orders issued hereunder, the Commissioner may, by issuance of a Supplementary Task Order to the Contractor, reallocate such specific allowance amounts.

7.1.4 Guaranteed Minimum: In the event the CM is not issued any Task Orders hereunder and the CM has, throughout the term of the Contract, submitted reasonable Proposals for specific Projects, the City agrees to pay, and the CM agrees to accept, a minimum fee of \$2,500. The CM further agrees that under such circumstances, it has no action for damages or for loss of profits against the City.

7.1.5 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.

7.2 Fee for Profit

7.2.1 The Task Order shall specify an Estimated Fee for Profit. The Fee for Profit shall be paid in accordance with the provisions set forth below.

7.2.2 The CM shall be paid a Fee for Profit, the amount of which shall be calculated as a percent of the total actual cost of construction for the Project in accordance with the Fee Curve set forth in Exhibit B. For the purpose of calculating the Fee for Profit, the total actual cost of construction for the Project shall be as defined below.

(a) Payment: The Fee for Profit shall be paid to the CM during the Construction Phase, in accordance with the breakdown set forth below.

<u>Percent of Work Complete</u>	<u>Percent of Fee for Profit Payable</u>
25% Complete	25%
50% Complete	25%

100% Complete (including completion of all post construction services) 50%

- (b) Interim Percent: For partial payment purposes only, the amount of the Fee for Profit shall be calculated using the percent set forth in the Fee Curve (Exhibit B) for a construction cost that is equal to the amount of the pre-preliminary reconciled construction cost estimate for the Project (the “Interim Percent”). The Commissioner may by written directive modify the Interim Percent based upon revisions to the estimate or the receipt of bid prices for the construction contracts.

7.2.3 Total Actual Construction Cost: For the purpose of the Fee Curve (Exhibit B), the total actual cost of construction for the Project shall be defined as the total dollar value of all required construction work for the Project, calculated in accordance with bid prices contained in the construction contract(s), which have been accepted by the Commissioner and paid for thereunder. The total actual cost of construction for the Project shall be determined by the Commissioner upon completion of the Project, and his determination shall be final, binding and conclusive. Such total actual cost of construction for the Project shall not include the items set forth below.

- (a) any amounts for change orders to the construction contracts; provided, however, change orders which increase the scope of Work shall be included in computing the total actual construction cost to the extent that such change orders cumulatively exceed five (5%) percent of the total dollar value of all construction Work as described above;
- (b) any amounts for the assessment of liquidated damages which has been deducted from the total price for the construction contract(s) for the Project;
- (c) any allowance amounts or otherwise designated amounts for construction work, whether for specified lump sum items or for unit price items, included in the original price for the construction contract(s) which remain unexpended at the conclusion of the Project;
- (d) any amounts for bonus payments to the construction contractor(s), whether payment is by change order or through allowances provided in the construction contract(s);
- (e) any amounts for work omitted from the construction contract(s), and
- (f) any amounts for construction work which is determined to be defective, unsatisfactory or not in accordance with the construction contract(s).

7.2.4 Total Fee for Profit: Upon completion of all required services by the CM, the total Fee for Profit for the Project shall be determined as follows: the total actual cost of construction for the Project, as defined above, shall be multiplied by the applicable percent set forth in the Fee Curve (Exhibit B). For total actual construction costs between the dollar levels designated in the Fee Curve, the Fee for Profit shall be interpolated on a straight line basis. The Fee Curve set forth in Exhibit B shall apply to the Contract term and any extension thereof. Partial payments to the CM of the estimated Fee for Profit shall be subject to the adjustment set forth below.

- (a) In the event the total of all partial payments of the estimated Fee for Profit is more than the total Fee for Profit determined hereunder, the City shall deduct and retain such excess out of the amount due and owing to the CM. In the event the amount due and owing to the CM is less than the amount of such excess payment of the Fee for Profit, the CM shall be liable to pay the difference upon demand by the Commissioner.
- (b) In the event the total of all partial payments of the estimated Fee for Profit is less than the total Fee for Profit determined hereunder, the City shall pay such difference to the CM.

7.3 Staffing Expenses

7.3.1 Allowance: The Task Order shall specify an allowance amount for payment of the CM’s staffing expenses for those construction management personnel who have been assigned to the Project and are identified in the Staffing Plan approved by the Commissioner (the “Assigned Personnel” or the “Assigned Employee”). The CM 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.

7.3.2 Payment: For any week during which an Assigned Employee performed services for the Project,

payment to the CM 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 a Multiplier of **1.75**; provided, however, the Multiplier shall **NOT** apply to any increase in the Assigned Employee's Direct Salary Rate per hour for authorized services performed during overtime hours.

- (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 CM received written authorization from the Commissioner to have the Assigned Employee perform services during overtime hours, the employee's Direct Salary Rate per hour may be subject to an increase for such overtime hours, 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, and (4) any overtime 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 indirect administrative tasks, or (3) any other time keeping category consistent with standard accounting practices.
- (d) The costs deemed included in the Multiplier are set forth in Article 7.3.7 below.

7.3.3 Equitable Reduction: The amount of payment to the CM 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 CM for that week, less any non-billable hours, is less than the total number of hours actually billed by the CM 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 CM 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 CM for the week in question, less any non-billable hours, as defined above.
- (b) total number of hours actually billed by the CM to all entities for the Assigned Employee's services for the week in question, including the number of hours billed for this Project

7.3.4 Direct Salary Rates: Direct Salary Rates per hour for each Assigned Employee shall be determined and approved in writing by the Commissioner, as set forth below.

- (a) For each Assigned Employee, the CM shall submit such employee's actual annual direct salary, as defined below. In addition, the CM shall submit any records or documentation requested by the Commissioner to verify the Assigned Employee's actual annual direct salary rate, including without limitation, the CM's payroll register for the past twelve (12) months.
 - (1) 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) all payments for services performed during overtime hours, as defined below; (2) all employer payments mandated by law, including without limitation, social security and medicare taxes, insurance (Worker's Compensation, Employers Liability, Unemployment); (3) all employer contributions, if any, to retirement plans, including without limitation pension and/or deferred compensation plans, and (4) all costs for any and all other fringe and/or supplemental benefits.

- (2) To compute an Assigned Employee's actual annual direct salary per hour, the Assigned Employee's actual annual direct salary, as defined above, shall be divided by 2080.
- (b) For each Assigned Employee, the Commissioner shall determine and approve in writing the Direct Salary Rate per hour to be paid for such employee. Once determined and approved by the Commissioner, the Assigned Employee's Direct Salary Rate shall not be eligible for any increase whatsoever, except for the increase described in Article 7.3.5 below. Any such increase must be approved in writing by the Commissioner.

7.3.5 Increases in Direct Salary Rates: Subject to the limitation set forth below, the Assigned Employee's Direct Salary Rate per hour, determined and approved by the Commissioner, shall be subject to increases, as provided for herein. The first such increase shall be made at the beginning of the calendar year which is at least one year after the commencement of the Contract, i.e., in the month of January of the year which is at least one year after the date of the advice of award. Subsequent increases shall be made on a yearly basis at the beginning of each calendar year for the remainder of the contract term or any extension thereof. Such increases shall be based upon any increase in the Employment Cost Index for Professional, Specialty and Technical Occupations, published by the U.S. Department of Labor, Bureau of Labor Statistics (the "Index"). If the Index declines or shows no increase, rates shall not be increased. Any increases in the All Inclusive Hourly Rates shall be applied on a prospective basis only.

- (a) The CM shall not be entitled to payment of any increase in an Assigned Employee's Direct Salary Rate per hour unless the total amount of such increase is actually paid in full by the CM to the Assigned Employee.

7.3.6 Adjustment for Overtime: The Commissioner may authorize the CM in advance in writing to have an Assigned Employee perform services during overtime hours. Overtime hours shall be defined as any hours in excess of eight (8) hours per day, Monday through Friday. In the event of such authorization, for services performed during overtime hours, the Assigned Employee's Direct Salary Rate per hour, determined by the Commissioner as set forth above, shall be increased by a factor of 50%; provided, however, the CM shall **NOT** be entitled to such increase in the Assigned Employee's Direct Salary Rate per hour for services performed during overtime hours, unless the following two conditions are met: (1) the CM has a company wide policy in effect that is consistently applied to all clients and that provides for payment at increased rates to designated classes of employees for services performed during overtime hours, and (2) the total amount of such increase is actually paid in full by the CM to the Assigned Employee. Any such increase in the Assigned Employee's Direct Salary Rate per hour for services performed during overtime hours shall **NOT** be subject to the Multiplier set forth above. With respect to any Assigned Employee for whom an increase in the Direct Salary Rate per hour is requested for services performed during overtime hours, the CM shall provide a certification stating that the two conditions set forth herein have been met.

7.3.7 Multiplier: The Multiplier of 1.75 shall be deemed to include all costs and expenses for overhead incurred by the CM in connection with providing services for the Project, including expenses for management and administration. The CM agrees to make no claim for overhead expenses in excess of the Multiplier provided for herein. The Multiplier shall include, without limitation, the items of expense set forth below:

- (a) All expenses for compensation paid to personnel of the CM (other than construction management personnel identified in the approved Staffing Plan, except for the Project Executive). Such other personnel of the CM shall include without limitation all officers, principals, employees and personnel of the CM, serving in whatever capacity, including any Project Executive(s). Compensation for such other personnel is deemed included in the Multiplier. 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 those construction management personnel identified in the approved Staffing Plan that are in excess of the Direct Salary Rates for such personnel payable

hereunder. Compensation for such personnel shall include without limitation: (1) wages and/or salaries that are in excess of the Direct Salary Rate payable hereunder; (2) all payments mandated by law, including without limitation, social security and medicare taxes, insurance (Worker's Compensation, Employers Liability, Unemployment); (2) employer contributions, if any, to retirement plans, including without limitation pension and/or deferred compensation plans; (3) all payments for compensated absence time, including without limitation vacation time, sick time, personal time and holidays, and (4) costs for any and all other fringe and/or supplemental benefits.

- (c) All expenses in connection with providing the required Field Office and all related items, as specified in the Task Order, that are in excess of the payments provided for in the Task Order.
- (d) All expenses in connection with the performance of services, including without limitation: (1) expenses for non-reimbursable services, as set forth in Article 7, (2) meals, and (3) lodging.
- (e) All expenses for 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, accounting fees and bookkeeping expenses, electronic data processing services, including programming and rental equipment, dues and subscriptions, stationery, printing, copying, postage, and any other office expenses or overhead costs, except as otherwise expressly provided in this Agreement.
- (f) All expenses for applicable taxes of any kind whatsoever, including without limitation, federal, state and local income tax and any franchise or other business taxes.
- (g) All expenses for insurance coverage determined by the CM to be necessary for the performance of all required services hereunder, including without limitation: (1) all insurance required by this Contract; (2) all insurance required by law, and (3) all other insurance maintained by the CM, including without limitation, burglary and theft, general fidelity and payroll insurance.
- (h) All expenses in connection with losses due to theft or robbery sustained by CM.
- (i) All expenses in connection with fixed capital or moneys borrowed, including interest.
- (j) All expenses with respect to legal services.
- (k) All management, administrative or overhead expenses of any kind whatsoever, including such expenses in connection with providing Reimbursable Services.

7.3.8 Representations: With respect to staffing expenses, the CM 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 in the Task Order. 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.

7.4 Field Office

7.4.1 Allowance: If the CM is required to provide a Field Office for the Project, the Task Order shall specify an allowance amount for payment for the same. For the complete provision of the required Field Office and all related items, as specified in the Task Order, the CM shall be paid a monthly fee in accordance with the terms and conditions set forth in the Task Order.

7.5 Reimbursable Services

7.5.1 Allowance: If the CM is required to provide Reimbursable Services for the Project, the Task Order shall specify an allowance amount for reimbursement of expenses actually incurred by the CM in providing Reimbursable Services. Reimbursable Services are defined in Article 6.5. No Reimbursable Services shall be provided by the CM, or reimbursed from the allowance, unless expressly authorized in a written directive from the Commissioner. For Reimbursable Services in excess of \$150, such written authorization must be provided in advance of the expenditure.

7.5.2 With respect to Reimbursable Services, the CM shall utilize the method of procurement and form of payment directed by the Commissioner. The Commissioner shall provide written instructions to the CM regarding the

cost of Reimbursable Services for which the CM must solicit competitive bids.

7.5.3 Payment for Reimbursable Services, except for long distance travel as set forth below, shall be the actual and reasonable cost incurred by the CM for such services.

7.5.4 Payment for long distance travel, as set forth in Article 6.5, 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."

7.5.5 The CM shall not be entitled to any mark-up with respect to Reimbursable Services.

7.5.6 In the event the Commissioner directs the CM to provide Reimbursable Services and such Reimbursable Services require the CM, through its personnel, to provide technical or professional services, the CM shall be paid for staffing expenses for its personnel through the Allowance for Staffing Expenses.

7.5.7 In the event the CM is directed, as a Reimbursable Service, to purchase any items and/or equipment, such items and/or equipment shall, unless otherwise directed by the Commissioner, be the sole property of the City upon delivery to the designated location. The CM shall prepare and maintain an accurate inventory of all items and/or equipment which it is directed to purchase pursuant to the Allowance for Reimbursable Services. Such inventory shall be provided to the City upon request. Upon completion of the required work, as directed by the Commissioner, the CM shall turn such items and/or equipment over to the City.

7.5.8 Requests for payment for Reimbursable Services shall be accompanied by receipted bills or any other data required by the Commissioner.

7.6 Requisitions for Payment

7.6.1 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 CM and the total amount of partial payment requested. The total amount of partial payment requested shall be broken down into the following categories: (1) Fee for Profit, (2) Staffing Expenses, (3) Field Office, and (4) Reimbursable Services. The CM shall submit one (1) original and two (2) copies of each requisition for payment. Requisitions must be accompanied by the documentation set forth below.

- (a) Project Progress Report: The CM shall submit a current report indicating (1) the percentage of completion of all required Work for the Project, and (2) the services the CM provided during the payment period.
- (b) Staffing Expenses: For any period for which the CM is requesting payment for staffing expenses for an Assigned Employee, the CM 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;
 - (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 this Project; (2) actual hours during which the employee performed services for other projects, and (3) non-billable hours, as defined above;
 - (6) Copy of the CM's payroll register for the week(s) in question reflecting the amount actually paid by the CM to the Assigned Employee for that week,
 - (7) Certification described in Article 7.3.6, if applicable.

- (d) Field Office: For any period for which the CM is requesting payment of the monthly fee for the Field Office, as specified in the Task Order, the CM shall submit: (1) the Commissioner's written certification for the month(s) in question stating that the CM has provided the Field Office and all related items in full compliance with the specifications set forth in the Task Order, and (2) a statement of the date on which such certification was first issued. As provided in the Task Order, payment of the monthly fee shall commence for the first month after the month in which the Commissioner first provides such written certification.
- (e) Reimbursable Services: For any period for which the CM is requesting reimbursement for expenses incurred for Reimbursable Services, the CM shall submit: (1) a report describing the services the CM was directed to provide, and (2) receipted bills or any other data required by the Commissioner.

7.6.2 All payments hereunder are contingent upon the CM's satisfactory performance of the required services. The Commissioner is authorized to make deductions for any services performed which he/she determines to be unsatisfactory.

7.6.3 Following the receipt of a satisfactory requisition for payment, 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 CM if requested.

7.7 Prompt Payment

7.7.1 The prompt payment provisions of the PPB Rules in effect at the time of the solicitation for this Contract shall be applicable to payments made under this contract. The provisions require the payment to contractors of interest on payments made after the required payment date, except as set forth in the PPB Rules.

7.7.2 The CM must submit a proper invoice to receive payment.

7.7.3 Determination of interest due shall be made in accordance with the PPB Rules and General Municipal Law 13-a.

7.7.4 If the CM is paid interest, the proportionate share of that interest shall be forwarded by the CM to its subcontractor(s).

7.8 Acceptance of Final Payment: The acceptance by the CM or its assignees of the final payment under this contract, whether by voucher, judgment of any court of competent jurisdiction or any other administrative means, shall constitute and operate as a general release to the City from any and all claims of and liability to the CM arising out of the performance of this contract.

ARTICLE 8 - Authorized Action

8.1 Wherever under this Agreement action is to be taken or approval given by the City, such action or approval may be taken or given only by the Commissioner or such person as may be designated in writing by the Commissioner to act on behalf of the City, for such purpose. The CM shall not act or rely upon any purported direction or approval by any other person on behalf of the City.

8.2 The Commissioner, through his/her duly authorized representative, the Assistant Commissioner, will, in writing, designate a City employee to review the performance of the CM and to serve as the Commissioner's Representative with respect to this Agreement. The CM shall be responsible to the Commissioner's Representative.

ARTICLE 9 - Insurance

9.1 Required Insurance: From the date the CM is first ordered to commence work and throughout the term of

this Contract, the CM must effect and maintain the following types and amounts of insurance.

9.1.1 Comprehensive General Liability Insurance: The CM shall provide a policy of comprehensive general liability insurance 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 CM's name, shall name the City of New York as an additional insured thereunder. Such policy shall protect the CM 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 CM 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 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 below.
- (g) The presence of representatives of the City at the Site shall not invalidate this policy.

9.1.2 Worker's Compensation Insurance: The CM shall provide Worker's Compensation Insurance in accordance with the Laws of the State of New York on behalf of all employees providing services under this Contract.

9.1.3 Employers Liability Insurance: The CM shall provide Employers Liability Insurance in the minimum 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 or in the course of his/her employment by the insured.

9.2 General Requirements for Insurance Policies

9.2.1 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.

9.2.2 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.

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

9.2.4 All required policies shall be endorsed to provide as follows: "This policy shall not be cancelled, 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."

9.2.5 The CM 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.

9.2.6 In his sole discretion, the Commissioner may, subject to the approval of the Comptroller and the Law Department, accept letters of credit and/or custodial accounts in lieu of required Insurance.

9.3 Proof of Insurance

9.3.1 On or before the commencement of work pursuant to this Contract, the CM shall submit to the Commissioner two certificates of Insurance for all policies required under this contract, together with originals of all endorsements required hereunder.

9.3.2 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 have been completed.

9.3.3 The CM shall be responsible for providing continuous insurance coverage as required by this contract and shall be authorized to provide services hereunder only during the effective period of all required coverage.

9.3.4 The CM shall promptly notify the Commissioner of any accidents causing bodily injury or property damage arising in the course of operations under this Contract.

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

ARTICLE 10 - Indemnification

10.1 If persons or property of the City, or of others sustain loss, damage or injury resulting, either directly or indirectly from the acts, conduct, omissions, negligence, carelessness or lack of good faith of the CM or its officers, agents, employees, or any person, firm, company, agent or others engaged by the CM hereunder, in their performance of this Contract, or from his or their failure to comply with any of the provisions of this Contract or of law, the CM shall indemnify and hold the City harmless from any and all claims and judgments for damages and from costs and expenses to which the City may be subjected or which it may suffer or incur by reason thereof.

10.2 The CM shall indemnify and hold harmless the Commissioner and the City, each officer, agent and employee of the Commissioner and the City, against all claims against any of them for bodily injury or wrongful death or property damage arising out of the negligent performance of services or caused by any negligent act of the CM or anyone employed by the CM, in the performance of this Contract.

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

10.4 The rights and remedies of the City provided herein shall not be exclusive and are in addition to any other rights and remedies provided by law or by this Contract.

10.5 In the event that any City property is lost or damaged, except for normal wear and tear, then the City shall have the right to withhold further payments hereunder for the purpose of set-off, in sufficient sums to cover such loss or damage.

ARTICLE 11 - CM Independent Contractor

11.1 The relationship of the CM to the City shall be that of independent contractor, and the CM shall have no authority to bind the City in any way with third parties.

ARTICLE 12 - Relationship Between CM and Others

12.1 Nothing contained herein shall be deemed to create a contractual relationship between the CM and the Consultant or any of the contractors, subcontractors or material suppliers on the Project, nor shall anything contained

herein be deemed to give any third party any claim or right of action against the City or the CM beyond such as may otherwise exist without regard to this Agreement.

ARTICLE 13 - Provisions for Termination

13.1 Rights of Commissioner to Postpone and Terminate: The Commissioner shall have the right upon ten (10) days written notice to the CM, to postpone, delay, suspend or terminate all or any portion of the services to be performed by the CM 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 CM shall be paid such amount as determined by the Commissioner as shall fairly compensate him, in accordance with Article 7 hereof, for services satisfactorily performed prior to the termination date. 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.

13.2 Termination for Cause: In the event that the CM: (a) fails to perform any of the terms, covenants or provisions of this Agreement on its part to be performed; or (b) fails to progress with the work called for under this Agreement in a manner considered satisfactory to the Commissioner; or (c) if in the judgment of the Commissioner, the conduct of the CM is such that the interests of the City are likely to be impaired or prejudiced; or (d) if the CM shall violate any of the terms, covenants or provisions of this Agreement, then the Commissioner may, upon written notice to the CM, immediately terminate this Agreement for cause. Upon such termination, the CM shall be entitled to payment of such amount, to be determined by the Commissioner, as shall fairly compensate it, in accordance with Article 7 hereof, for services satisfactorily performed prior to the termination date, provided, however, that (1) no allowance shall be included for termination expenses, and (2) the Commissioner shall deduct from such amount and from any amount due and payable to the CM hereunder, 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 CM under this Agreement, including the expense of engaging another CM for this purpose. If such additional expense shall exceed the amounts otherwise due and payable to the CM hereunder, the CM shall pay the City the full amount of such excess incurred by the City.

ARTICLE 14 – Resolution of Disputes

1. Except as provided in 1(a) and 1(b) below, all disputes between the City and the vendor that arise under, or by virtue of, this contract shall be finally resolved in accordance with the provisions of this section and Section 4-09 of the Rules of the Procurement Policy Board (“PPB Rules”). This procedure shall be the exclusive means of resolving any such disputes.

- (a) This section 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) For construction and construction-related services this section 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 vendor’s work to the contract, and the acceptability and quality of the vendor’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 vendor disagrees.

2. All determinations required by this section shall be 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 section 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 section, the contract terms shall remain in full force and effect and the vendor shall continue to perform work in accordance with the contract and as directed by the Agency Chief Contracting Officer (“ACCO”) or Engineer, Resident Engineer, Engineering Audit Officer, or other designee of the Commissioner. Failure of the vendor to continue the work as

directed shall constitute a waiver by the vendor of any and all claims being presented pursuant to this section and a material breach of contract.

4. Presentation of Dispute to Agency Head.

- (a) Notice of Dispute and Agency Response. The vendor shall present its dispute in writing (“Notice of Dispute”) to the Agency Head within the time specified herein, or, if no time is specified, 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 vendor relies in support of its position, as well as a detailed computation demonstrating how any amount of money claimed by the vendor in the dispute was arrived at. Within thirty (30) days after receipt of the complete Notice of Dispute, the ACCO or, in the case of construction or construction-related services, the Engineer, Resident Engineer, Engineering Audit Officer, or other designee of the Commissioner, shall submit to the Agency Head all materials he or she deems pertinent to the dispute. Following initial submissions to the Agency Head, 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 Agency Head whose decision shall be final. Willful failure of the vendor to produce any requested material whose relevancy the vendor has not disputed, or whose relevancy has been affirmatively determined, shall constitute a waiver by the vendor of its claim.
- (b) Agency Head Inquiry. The Agency Head shall examine the material and may, in his or her discretion, convene an informal conference with the vendor and the ACCO and, in the case of construction or construction-related services, 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 Agency Head 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 Agency Head’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 Agency Head participated therein. The Agency Head may or, at the request of any party to the dispute, shall compel the participation of any other vendor with a contract related to the work of this contract and that vendor shall be bound by the decision of the Agency Head. Any vendor thus brought into the dispute resolution proceeding shall have the same rights and obligations under this section as the vendor initiating the dispute.
- (c) Agency Head 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 Agency Head shall make his or her determination and shall deliver or send a copy of such determination to the vendor and ACCO and, in the case of construction or construction-related services, the Engineer, Resident Engineer, Engineering Audit Officer, or other designee of the Commissioner, together with a statement concerning how the decision may be appealed.
- (d) Finality of Agency Head Decision. The Agency Head’s decision shall be final and binding on all parties, unless presented to the Contract Dispute Resolution Board (“CDRB”) pursuant to this section. The City may not take a petition to the CDRB. However, should the vendor take such a petition, the City may seek, and the CDRB may render, a determination less favorable to the vendor and more favorable to the City than the decision of the Agency Head.

5. Presentation of Dispute to the Comptroller. Before any dispute may be brought by the vendor to the CDRB, the vendor 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 Agency Head, the vendor shall submit to the Comptroller and to the Agency Head a Notice of Claim regarding its dispute with the agency. The Notice of Claim shall consist of (i) a brief statement of the substance of the dispute, the amount of money, if any, claimed and the reason(s) the vendor contends the dispute was wrongly decided by

the Agency Head; (ii) a copy of the decision of the Agency Head, and (iii) a copy of all materials submitted by the vendor to the agency, including the Notice of Dispute. The vendor may not present to the Comptroller any material not presented to the Agency Head, 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 Agency Head in connection with the dispute. The agency may not present to the Comptroller any material not presented to the Agency Head, 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 vendor. Willful failure of the vendor to produce within fifteen (15) days any material requested by the Comptroller shall constitute a waiver by the vendor of its claim. The Comptroller may also schedule an informal conference to be attended by the supplier, 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 vendor and the Comptroller, to a maximum of ninety (90) days from the Comptroller's receipt of all the materials. The vendor 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, or in the case of disputes involving construction, the Director of the Office of Construction 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 vendor, within thirty (30) days thereafter, may petition the CDRB to review the Agency Head determination.

- (a) Form and Content of Petition by Vendor. The vendor shall present its dispute to the CDRB in the form of a Petition, which shall include (i) a brief statement of the substance of the dispute, the amount of money, if any, claimed, and the reason(s) the vendor contends that the dispute was wrongly decided by the Agency Head; (ii) a copy of the decision of the Agency Head; (iii) copies of all materials submitted by the vendor to the agency; (iv) a copy of the decision of the Comptroller, if any, and (v) copies of all correspondence with,

and material submitted by the vendor to, the Comptroller's Office. The vendor 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 vendor shall submit a copy of the statement of the substance of the dispute, cited in (i) above, to both the Agency Head 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 vendor and make available to the CDRB all material it submitted to the Agency Head and Comptroller. Three complete copies of the agency response shall be submitted to the CDRB at OATH's offices and one to the vendor. 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 Board shall permit the vendor to present its case by submission of memoranda, briefs, and oral argument. The Board shall also permit the agency to present its case in response to the vendor 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 vendor 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 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 vendor, the ACCO, the Corporation Counsel, the Comptroller, the CCPO, the Office of Construction, the PPB, and, in the case of construction or construction-related services, the Engineer, Resident Engineer, Engineering Audit Officer, or other designee of the Commissioner. A decision in favor of the vendor 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 Section 4-09 of the PPB Rules.

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

ARTICLE 15 - Services Furnished by the City

15.1 The City, through the personnel of DDC, or by retaining the services of a Consultant, or through allowances in the construction contract(s), shall furnish for the use of the CM pile driving inspection, topographic surveys, inspection of concrete materials at mix plant and at job-site and such other services as the Commissioner, in his sole

discretion, deems appropriate.

15.2 At the request of the CM, the City shall furnish, at its own expense, off-site inspections and tests of steel, cement asphalt aggregates, concrete sewer and drainage pipe, and such other materials.

15.3 The Commissioner may direct the CM to provide any of the above described services as Reimbursable Services in accordance with Article 6 hereof.

ARTICLE 16 - Contract Changes

16.1 Changes may be made to this contract only as duly authorized by the Agency Chief Contracting Officer or his or her designee. CMs deviating from the requirements of the 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 CM.

16.2 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 work. Contract changes may include any contract revision deemed necessary by the Agency Chief Contracting Officer.

16.3 The CM 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 CM may be entitled to an extension of time for performance.

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

16.5 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 CM'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 17 - Accounting Records

17.1 The CM shall maintain complete, detailed and accurate cost and accounting records as to all costs. During the term of this Agreement and at any time within seven years thereafter, the CM shall make such records available to the City or its authorized representatives for review and audit at such place or places as may be designated by the Commissioner. In the event the Commissioner authorizes the CM to retain the services of consultants or subcontractors for which the CM will be entitled to reimbursement hereunder, the CM agrees to include in all its contracts with such consultants and subcontractors a requirement that they maintain complete, detailed and accurate cost and accounting records as to all their costs relating to the services and materials furnished by them under such contracts and that during the term of this Agreement and at any time within seven years thereafter, if required by the Commissioner, they will make such records available to the City or its authorized representatives for review and audit at such places as may be designated by the Commissioner.

17.2 In the event all or any part of such records are not maintained by the CM, its consultants or subcontractors, or made available to the City as provided, herein, any item not supported by reason the insufficiency or unavailability of such records shall at the election of the Commissioner or the Comptroller, be disallowed and, if payment therefor has already been made, the CM, upon demand, shall refund to the City the amounts so disallowed. Payments to the CM or approval by the Commissioner of any application for payment submitted by the CM, shall in no way affect the CM's obligation hereunder or the right of the City to obtain a refund of any payment to the CM which is in excess of that to which it was lawfully entitled.

ARTICLE 18 - Audit and Examination

18.1 This Contract and all payments hereunder, as well as direct salary rate information and history submitted by the CM, shall be subject to audit and examination by the Engineering Audit Officer of the Department of Design and Construction and post-audit by the Comptroller of the City in accordance with Law.

ARTICLE 19 - Moneys Withheld

19.1 When the Commissioner shall have reasonable grounds for believing that: (1) the CM will be unable to perform this contract fully and satisfactorily within the time fixed for performance; or (2) a meritorious claim exists or will exist against the CM or the City arising out of the negligence of the CM or the CM's breach of any provision of this contract; then the Commissioner or the Comptroller may withhold payment of any amount otherwise due and payable to the CM hereunder. Any amount so withheld may be retained by the City for such period as it may deem advisable to protect the City against any loss and may, after written notice to the CM, be applied in satisfaction of any claim herein described. This provision is intended solely for the benefit of the City, and no person shall have any right against the Commissioner or claim against the City by reason of the Commissioner's failure or refusal to withhold moneys. No interest shall be payable by the City on any amounts withheld under this provision. This provision is not intended to limit or in any way prejudice any other right of the City.

ARTICLE 20 - Ownership of Documents

20.1 Any and all records or documents prepared by or for the CM pursuant to this Contract, including, but not limited to, office diaries, field diaries, engineers' and inspectors' diaries, daily records of labor, materials and equipment used, notes, designs, reports, including laboratory and plant inspection reports, drawings, tracings, estimates, specifications, schedules, charts, graphs, maps and/or photographs, shall be the property of the City. During the term of this Contract and at any time within seven years thereafter, the CM shall, upon demand, promptly deliver such records or documents to the Commissioner, or make such records available to the Commissioner or his authorized representative 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 CM.

ARTICLE 21 - Patented and Proprietary Items

21.1 The CM 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 CM in the performance of this Agreement.

21.2 The CM shall not, without the prior written approval of the Commissioner, specify for the Project, or necessarily imply the required use of any article, products, materials 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.

ARTICLE 22 - CM's Performance

22.1 The CM shall be liable to the City for all losses, expenses and damage caused by the failure of the CM properly to perform its obligations under this Agreement and the CM shall not be entitled to any compensation for services or reimbursement for costs or expenses with respect to any such obligations not properly performed by it hereunder

ARTICLE 23 - Claims - Limitation of Action

23.1 No action shall be maintained by the CM, his successors or assigns, against the City on any claim based upon or arising out of this Contract unless such action shall be commenced within six (6) months after the date of filing of the voucher for final payment hereunder in the office of the Comptroller, or within six (6) months of the termination or conclusion of this contract, or within six (6) months after the accrual of the cause of action, whichever is earliest.

ARTICLE 24 - No Claim Against Officer, Agents or Employees

24.1 The CM agrees to not make any claim 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 Contract.

24.2 The CM shall require each subcontractor to the CM to agree in his contract not to make any claim against the City, its officers, agents or employees, by reason of such contract, or any acts or omissions of the CM.

24.3 Nothing in this contract shall be construed to give any person other than the City and the CM any legal or equitable right, remedy or claim under this contract; but it shall be held to be for the sole and exclusive benefit of the City and the CM.

ARTICLE 25- Notices

25.1 Except as otherwise provided herein, any notice, approval, acceptance, request, bill, demand or statement hereunder from either party to the other shall be in writing and shall be deemed to have been given when either delivered personally or deposited in a U.S. mail box in a postage-prepaid envelope, addressed to the other party. Either party may at any time change such address by delivering or mailing, as aforesaid, to the other party a notice stating the change and the changed address.

ARTICLE 26 - Investigations

26.1 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.

26.1.1 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;

26.1.2 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;

26.1.3 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.

26.1.4 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 26.3 below without the City incurring any penalty or damages for delay or otherwise.

26.2 The penalties which may attach a final determination by the commissioner or agency head may include but shall not exceed:

26.2.1 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

26.2.2 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; moneys lawfully due for goods delivered, work done, rentals, or fees accrued prior to the cancellation or termination shall be paid by the City.

26.3 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 26.3.1 and 26.3.2 below. He or she may also consider, if relevant and appropriate, the criteria established in Articles 26.3.3 and 26.3.4 below in addition to any other information which may be relevant and appropriate;

26.3.1 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.

26.3.2 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.

26.3.3 The nexus of the testimony sought to the subject entity and its contracts, leases, permits or licenses with the City.

26.3.4 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 26.2 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 26.1.3 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.

26.4 Definitions Used in this Article

26.4.1 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.

26.4.2 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.

26.4.3 The term "entity" as used herein shall be defined as any firm, partnership, corporation, association, or person that receives moneys, benefits, licenses, leases, or permits from or through the City or otherwise transacts business with the City.

26.4.4 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.

26.5 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 27 - Assignments

27.1 The CM shall not assign, transfer, convey or otherwise dispose of this Contract, or his right to execute it, or his right, title or interest in or to it or any part thereof, or assign, by power of attorney or otherwise any of the monies due or to become due under this contract, unless the previous 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.

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

27.3 Failure to obtain the previous written consent of the Commissioner to such an assignment, transfer or conveyance, shall justify, at the option of the Commissioner, the revocation and annulment of this Contract. The City shall thereupon be relieved and discharged from any further liability and obligation to the CM, his assignees or transfers, and the Contractor and his assignees shall forfeit and lose all monies theretofore earned under the Contract, except so much as may be required to pay the Contractor's employees; provided, however, that nothing herein contained shall 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.

27.4 The CM 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.

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

ARTICLE 28 - Unlawful Provisions

28.1 If this Contract contains any unlawful provisions, not an essential part of the Contract and which appear not to have been a controlling or material inducement to the making thereof, the same shall be deemed of no effect and shall, upon the application of either party, be stricken from the Contract without affecting the binding force of the Contract as it shall remain after omitting such provision.

ARTICLE 29 - Errors

29.1 If this Contract contains any errors, inconsistencies, ambiguities or discrepancies, including typographical errors, the CM shall request a clarification of the same by writing to the Commissioner, whose decision shall be binding upon the parties.

ARTICLE 30 - Representations, Warranties and Affirmations

30.1 Procurement of Agreement: The CM 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 CM 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 CM 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.

30.1.1 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 CM 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.

30.2 Conflict of Interest: The CM 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 CM 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.

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

30.3.1 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 competition;

30.3.2 Unless otherwise required by law, the prices which have been quoted in this contract and on the proposal submitted by the CM have not been knowingly disclosed by the CM prior to the proposal opening, directly or indirectly, to any competitor; and

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

30.3.4 The fact that the CM (1) has published price lists, rates, or tariffs covering items being procured, (2) has informed prospective customers of proposed or pending publication of new or revised price lists for such items, or (3) has sold the same items to other customers at the same prices being bid, does not, in itself, constitute a disclosure within the meaning of the above.

30.4 Affirmations: The CM affirms and declares that it is not in arrears to the City of New York upon debt, contract or taxes and is not a defaulter, as surety or otherwise, upon obligation to the City of New York, and has not been declared not responsible, or disqualified, by any agency of the City of New York, nor is there any proceeding pending relating to the responsibility or qualification of the CM to receive public contracts.

ARTICLE 31 - No Discrimination

31.1 As required by New York State Labor Law Section 220 (e), the parties hereto agree as follows:

31.1.1 That in the hiring of employees for performance of work under this contract or any subcontract hereunder neither the CM, subcontractor, nor any person acting on behalf of such CM or subcontractors 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;

31.1.2 That neither the CM, subcontractor, or any person on his behalf shall, in any manner, discriminate against or intimidate any employee hired for the performance of work under this contract on account of race, creed, color or national origin;

31.1.3 That there may be deducted from the amount payable to the CM by the City under this contract 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 contract; and

31.1.4 That this contract 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 contract.

31.1.5 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.

31.2 As required by New York City Administrative Code, Section 6-108

31.2.1 It shall be unlawful for any person engaged in the construction, alteration or repair of buildings 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.

31.2.2 It shall be unlawful for any person or any servant, agent, or employee of any person, described in subdivision 31.2.1 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.

31.2.3 Disobedience of the foregoing provisions shall be deemed a violation of a material provision of this contract.

31.2.4 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 32 - Equal Employment Opportunity

32.1 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 CM agrees that:

32.1.2 The CM 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 or sexual orientation 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;

32.1.3 When it subcontracts, the CM will not engage in any unlawful discrimination in the selection of subcontractors on the basis of the owner's race, color, creed, national origin, sex, age, disability, marital status or sexual orientation;

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

32.1.5 The CM 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

32.1.6 The CM 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 Department of Business Services, Division 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.

32.2 The CM 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: (1) disapproval of the CM; (2) suspension or termination of the contract; (3) declaring the CM in default, or (4) in lieu of any of the foregoing sanctions, the Director may impose an employment program.

32.3 The CM agrees to include the provisions of the foregoing paragraphs in every subcontract or purchase order in excess of \$50,000.00 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 or vendor. The CM will take such action with respect to any subcontract or purchase order as may be directed by the Director of DLS as a means of enforcing such provisions including sanctions for noncompliance.

32.4 The CM 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 33 - All Prior Written or Oral Agreements Excluded

33.1 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 34 - Head Notes and Marginal Notations

34.1 Notations in the margins and headnotes are not part of the contract and are for reference purposes only. They in no way define, limit or describe scope or intent of the article or section of the Agreement nor in any way affect this Agreement.

ARTICLE 35 - Dust Hazards

35.1 Should a harmful dust hazard be created in performing the work of this contract, 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, by the CM. Failure to comply with this provision after notice shall make this contract void.

ARTICLE 36 - Participation in an International Boycott

36.1 The CM agrees that neither the CM nor any substantially-owned affiliated company has participated, 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.

36.2 Upon the final determination by the Commerce Department or any other agency of the United States as to, or conviction of the CM 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.

36.3 The CM shall comply in all respect, 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 37 - Effective and Binding

37.1 This contract shall neither be binding nor effective unless:

37.1.1 Approved by the Mayor pursuant to the provisions of Executive Order No. 42, dated October 9, 1975 in the event the Executive Order requires such approval.

37.1.2 Certified by the Mayor (Mayor's Fiscal Committee created pursuant to Executive Order No. 43,

dated October 14, 1975) that performance thereof will be in accordance with the City's financial plan.

37.1.3 Approved by the New York State Financial Control Board (Board) pursuant to the New York State Financial Emergency Act for the City of New York, as amended, (the "Act"), in the event regulations of the Board pursuant to the Act require such approval.

37.1.4 It has been authorized by the Mayor, and the Comptroller shall have endorsed his certificate, that there remains unexpended and unapplied a balance of the appropriation of funds applicable thereto sufficient to pay the estimated expense of carrying out this agreement.

37.2 The requirements of this section shall be in addition to, and not in lieu of, any approval or authorization otherwise required for this Contract to be effective and for the expenditure of City funds.

ARTICLE 38 - Choice of Law, Consent to Jurisdiction and Venue

38.1 This Contract shall be deemed to be executed in the City of New York, regardless of the domicile of the CM, and shall be governed by and construed in accordance with the laws of the State of New York.

38.2 The parties agree that any and all claims asserted by or against the City arising under this Contract 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 CM agrees:

38.2.1 If the City initiates any action against the CM in Federal Court or in New York State Court, service or process may be made on the CM, either in person, wherever such CM may be found, or by registered mail addressed to the CM at its address as set forth in this Contract, or to such other address as the CM may provide to the City in writing; and

38.2.2 With respect to any action between the City and the CM in New York State Court, the CM 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.

38.2.3 With respect to any action between the City and the CM in Federal Court located in New York City, the CM 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.

38.2.4 If the CM commences any action against the City in a court located other than in the City and State or New York, upon request of the City, the CM 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 CM shall consent to dismiss such action without prejudice and may thereafter reinstitute the action in a court of competent jurisdiction in New York City.

38.3 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 39 - Waiver

39.1 Waiver by the City of a breach of any provision of this Contract 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 Contract unless and until the same be agreed to in writing by the Commissioner.

ARTICLE 40 - All Defenses Reserved

40.1 Each and every defense, right and remedy that the City has under this Contract is not exclusive and it is in

addition to and concurrent with all other defenses, right and remedies which the City has under this Contract and which the City otherwise has, will have, or may have under law, equity, or otherwise.

ARTICLE 41 - MacBride Principles Provisions

41.1 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.

41.2 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.

41.3 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.

41.4 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.

41.5 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.

41.6 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:

- 41.6.1 increase the representation of individuals from under represented religious groups in the work force, including managerial, supervisory, administrative, clerical and technical jobs;
- 41.6.2 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;
- 41.6.3 ban provocative religious or political emblems from the work place;
- 41.6.4 publicly advertise all job openings and make special recruitment efforts to attract applicants from under represented religious groups;
- 41.6.5 establish layoff, recall and termination procedures which do not in practice favor a particular religious group;
- 41.6.6 abolish all job reservations, apprenticeship restrictions and different employment criteria which discriminate on the basis of religion;

- 41.6.7 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;
- 41.6.8 establish procedures to assess, identify and actively recruit employees from underrepresented religious groups with potential for further advancement; and
- 41.6.9 appoint a senior management staff member to oversee affirmative action efforts and develop a timetable to ensure their full implementation.

41.7 The contractor agrees that the covenants and representations in Article 42.5 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 42 - CM Report Information

42.1 A copy of each report submitted by the CM to any City official or to any officer, employee, agent or representative of a City department, agency, commission or body or to any corporation, association or entity whose expenses are paid in whole or in part from the City treasury shall be furnished to the Commissioner of the department to which such report was submitted or, if not a City department, then to the chief controlling officer or officers of such other office or entity. A copy of such report shall also be furnished to the Director of the Mayor's Office of Contract Services for matters related to construction or to the Director of the Mayor's Office of Operations for all other matters.

ARTICLE 43 - Vendex Questionnaires

43.1 Requirement: Pursuant to Administrative Code Section 6-116.2 and the PPB Rules, the CM 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 CM, disapproval of a subcontractor, subsequent withdrawal of approval for the use of an approved subcontractor, or the cancellation of the contract after its award.

43.2 Submission: Vendex Questionnaires must be submitted directly to the Mayor's Office of Contract Services, ATTN: Vendex, 253 Broadway, 9th Floor, New York, New York 10007. In addition, the CM must submit a Confirmation of Vendex Compliance to the Department.

43.3 Obtaining Forms: Vendex Questionnaires, as well as detailed instructions, may be obtained at www.nyc.gov/vendex. The CM may also obtain Vendex forms and instructions by contacting the ACCO or the contact person for this contract.

ARTICLE 44 – 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 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 45 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.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement in triplicate, the day and year first above written, one copy to remain with the Commissioner, one copy to be filed with the Comptroller of the City of New York and one copy to be delivered to the CM.

THE CITY OF NEW YORK

By: _____
Deputy Commissioner

CONSTRUCTION MANAGER:

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

- Division: Any Division of DDC

- Type of Projects: New Construction or Renovation Projects
Estimated Construction Cost: \$25,000,000 or less

- Borough(s): City Wide – All Five Boroughs

- Total Amount: Not to Exceed: \$5,000,000

- Contract Time Frame
 - Contract Term: 730 consecutive calendar days (“ccds”)
 - Extension of Contract Term: 365 consecutive calendar days
 - Renewal of Contract Term: 365 consecutive calendar days
 - Renewal Amount: Not to Exceed \$3,000,000

- Subconsultant(s): _____

EXHIBIT B

FEE CURVE FOR FEE FOR PROFIT

Fee for Profit: The CM shall be paid a Fee for Profit, the amount of which shall be calculated as a percent of the total actual cost of construction for the Project in accordance with the Fee Curve set forth below. For the purpose of calculating the Fee for Profit, the total actual cost of construction for the Project shall be as defined in Article 7 of the Contract. The Fee for Profit shall be paid to the CM during the Construction Phase. When the construction work is 25% complete, the CM shall be paid 25% of the Fee for Profit. When the construction work is 50% complete, the CM shall be paid an additional 25% of the Fee for Profit. When the construction work is 100% complete and the CM has completed all required services for the Project, including close-out services, the CM shall be paid the remaining 50% of the Fee for Profit.

TOTAL ACTUAL CONSTRUCTION COST	Fee for Profit as a Percent of Total Actual Construction Cost	TOTAL ACTUAL CONSTRUCTION COST	Fee for Profit as a Percent of Total Actual Construction Cost
\$8,000,000.00	1.66%	\$32,000,000.00	1.13%
\$9,000,000.00	1.63%	\$33,000,000.00	1.13%
\$10,000,000.00	1.58%	\$34,000,000.00	1.12%
\$11,000,000.00	1.54%	\$35,000,000.00	1.12%
\$12,000,000.00	1.49%	\$36,000,000.00	1.08%
\$13,000,000.00	1.49%	\$37,000,000.00	1.04%
\$14,000,000.00	1.47%	\$38,000,000.00	1.02%
\$15,000,000.00	1.47%	\$39,000,000.00	0.68%
\$16,000,000.00	1.43%	\$40,000,000.00	0.68%
\$17,000,000.00	1.43%	\$41,000,000.00	0.68%
\$18,000,000.00	1.41%	\$42,000,000.00	0.68%
\$19,000,000.00	1.40%	\$43,000,000.00	0.63%
\$20,000,000.00	1.40%	\$44,000,000.00	0.63%
\$21,000,000.00	1.39%	\$45,000,000.00	0.63%
\$22,000,000.00	1.37%	\$46,000,000.00	0.63%
\$23,000,000.00	1.36%	\$47,000,000.00	0.63%
\$24,000,000.00	1.36%	\$48,000,000.00	0.63%
\$25,000,000.00	1.34%	\$49,000,000.00	0.63%
\$26,000,000.00	1.33%	\$50,000,000.00	0.63%
\$27,000,000.00	1.33%		
\$28,000,000.00	1.32%		
\$29,000,000.00	1.31%		
\$30,000,000.00	1.15%		
\$31,000,000.00	1.14%		