Appendix E
The Department of Financial Services
Standard Contract Clauses

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SECTION 1 - TERMS AND CONDITIONS

The Solicitation, the Bidder's Proposal, and the Contract award that result from this Request for Proposals ("RFP") are subject to and incorporate the following terms and conditions.

1.1 STAFFING

All employees, subcontractors, and agents of the Contractor performing work under this Contract must meet or exceed the professional, technical, and training qualifications set forth in this Contract and must comply with all security and administrative requirements of the Department that are communicated to the Contractor. The Department reserves the right to conduct a security background check or otherwise approve any employee, subcontractor, or agent furnished by Contractor and to refuse access to or require replacement of any personnel for cause based on professional, technical, or training qualifications, quality of work, change in security status, or non-compliance with the Department's security or other requirements. Such approval shall not relieve the Contractor of the obligation to perform all work in compliance with the Contract. The Department reserves the right to reject and/or bar from any facility for cause any employee, subcontractor, or agent of the Contractor.

It is understood that the staff designated in the Contractor's proposal will be the staff working on the project. If there is a need to add a new staff member, or Contractor needs to replace an existing staff member, then the Department must have an opportunity to review the new staff member's credentials and approve the new staff member before the staff member can begin to work on the project.

1.2 CONSULTANT DISCLOSURE

The requirements of New York State Finance Law ("State Finance Law") §§ 8 and 163 regarding Consultant Disclosure are hereby incorporated into this Contract.

1.3 TERMINATION

(a) The Contractor and the Department may mutually agree, in writing, to terminate this Contract at any time. Except as provided below, the Department may also unilaterally terminate this Contract at any time and for any reason, or for no reason, by e-mailing written notice to the Contractor at least ten (10) calendar days prior to such intended termination date. The following list, which is not exhaustive, provides examples of potential Department reasons to terminate. In no case shall the Department's termination of the Contract be deemed a breach thereof, nor shall the Department be liable for any damages for lost profits or otherwise, that may be sustained by the Contractor as a result of such termination.

i) **For Failure to Supply**: In the event that the Contractor has not supplied the Department with the Services or Deliverables purchased by the date specified in the Contract, the Department may terminate the Contract immediately upon delivery of e-mail notice to Contractor.

ii) **For Violation of New York Tax Law § 5-a:** The Department may terminate the Contract if it is found that the certification filed by the Contractor in accordance with New York Tax Law § 5-a is not timely filed during the term of the Contract, or the certification furnished was intentionally false or intentionally incomplete, in accordance with 1.3(a) above.

iii) **For Non-Responsibility, Including Violating State Finance Law §§ 139-j and 139-k:**

The Department may find the Contractor non-responsible and terminate the Contract immediately if, and only if, the Department first:

A. notifies the Contractor by e-mail that the Department has preliminarily determined that Contractor is non-responsible;

B. provides the Contractor, within a reasonable time from receipt of such notice, with the opportunity to file a written appeal;

C. at the Department's discretion, holds a hearing to determine any questions of fact that may arise; and

D. promptly makes a final determination regarding responsibility.

iv) **Upon Conviction of Certain Crimes:** The Department may terminate the Contract if, during the contract period, the Department discovers that a member, partner, director, or officer of Contractor has been convicted of one or more of the following offenses: Bribery Involving Public Servants and Related Offenses as defined in New York Penal Law ("Penal Law") Article 200; Corrupting the Government as defined in Penal Law Article 496 ; or Defrauding the Government as defined in Penal Law § 195.20.

(b) **Suspension of Work:** The Department, in its sole discretion, may suspend any or all activities under the Contract at any time by notifying the Contractor of the suspension. If the Department suspends any activities under the Contract, it will provide the Contractor with an e-mail notice that provides the reason(s) for and extent of the suspension. Upon issuance of the notice, the Contractor must comply with the suspension order. Activity may resume if and when the Department issues an e-mail notice authorizing a resumption of the work that had been suspended.

(c) **Payment for Work Completed Prior to Contract Termination Date:** The Contractor shall not impose any costs on the Department if the Department terminates this Contract, other than costs otherwise due to the Contractor for Services accepted by the Department pursuant to the terms and provisions of this Contract prior to the time of such termination. Upon any termination, the Contractor shall only be entitled to compensation for accepted Commodities and Services delivered up to the date of termination. The Department reserves the right to seek reimbursement *pro rata* for any Commodities and Services that will not be used after the date of termination.

1.4 BILLING

The Contractor shall provide complete and accurate itemized invoices upon the acceptance by the Department of the Services/Commodities and/or Deliverables, unless specified otherwise within this Contract, to be reviewed and approved by the Department. Electronic submission of invoices is required, and invoices can be e-mailed to accountspayable@dfs.ny.gov. Invoices shall contain all required information along with all supporting documentation.

The Department will make payment in accordance with the State Finance Law, upon receipt of such invoices, and upon approval of such invoices by the Department, in accordance with State procedures and practices. Electronic payments are required. Therefore, Contractors must enroll with the New York State Office of the State Comptroller ("OSC"`) to authorize electronic payments by logging into the SFS Vendor Portal to complete an online form. If there are any questions, OSC may be contacted by e-mail at eCommerce@osc.ny.gov.

DELIVERABLE ACCEPTANCE:

The Department will be responsible for review and acceptance of the Services/Commodities and/or Deliverables. Acceptance of the Services/Commodities and/or Deliverables shall be in accordance with the following:

(a) **Notification**: The Contractor will submit to the Department written notification indicating the Services/Commodities and/or Deliverables that were completed, a summary of each of the completed Services/Commodities and/or Deliverables, and a copy of the completed Deliverable(s) ("Notification"), if necessary.

(b) **Acceptance Criteria**: The acceptance criteria for the Services/Commodities and/or Deliverables shall be its substantial conformance to the requirements and descriptions set forth in any Contract ("Acceptance Criteria").

(c) **Acceptance**: The Department shall have a twenty (20) business day acceptance period, unless otherwise mutually agreed to by the Department and Contractor, to approve Services/Commodities and/or Deliverables that conform in all material respects to the Acceptance Criteria. The acceptance period shall begin upon transmittal by Contractor to the Department of written Notification the Services/Commodities and/or Deliverables have been completed and are ready for approval; and shall be counted from and include the first business day following the delivery of the Notification to the Department.

The Department shall provide Contractor with:

- written approval of the Services/Commodities and/or Deliverables; OR
- a written statement which identifies in reasonable detail, with references to the applicable Acceptance Criteria, all of the deficiencies preventing approval ("Deficiencies").

All Services/Commodities and/or Deliverables shall require the written approval by the Department that such Services/Commodities and/or Deliverables confirm in all material respects with the Acceptance Criteria.

The Contractor shall have ten (10) business days (or such other period mutually agreed to by the Department and Contractor) to complete all such corrective actions or changes in order for such Services/Commodities and/or Deliverables to conform in all material respects with the Acceptance Criteria. The count of such business days shall begin on the first business day following Contractor's receipt of the written statement of Deficiencies and/or required corrective actions identified by the Department.

The Department shall have twenty (20) business days to review the revised Services/Commodities and/or Deliverables (or such other period mutually agreed to by the Department and Contractor) and to notify Contractor in writing of acceptance or rejection in accordance with the foregoing provisions of this Section. If the Department has not approved the Services/Commodities and/or Deliverables after correction by Contractor, the Department and Contractor may mutually agree to further steps to correct outstanding material deficiencies. However, in no event shall the total time allocated for review, correction and re-review of material Deficiencies in Services/Commodities and/or Deliverables exceed ninety (90) days.

The Department shall have final sign-off responsibility on all Services/Commodities and/or Deliverables. Service/Commodities s and/or Deliverables may be provided concurrently to the Department for review and acceptance in accordance with this Section.

1.5 NOTICE

Unless otherwise provided by law, any notice, request, demand, or other communication that the Contract requires or provides must be sent to the Department shall be in writing and shall be deemed to have been duly delivered if sent by e-mail, provided such notice is addressed to the following Department business units:

NYS Department of Financial Services
Office of Financial Management
One Commerce Plaza, 99 Washington Avenue, Suite #1850
Albany, NY 12257
E-mail: RFP@dfs.ny.gov

NYS Department of Financial Services
Office of General Counsel
One Commerce Plaza, 99 Washington Avenue, Suite #1700
Albany, NY 12257
E-mail: counsel@dfs.ny.gov

1.6 CONFIDENTIAL INFORMATION

The term "Confidential Information" as used herein includes all electronic or hard copy information, records, and communications that Contractor has gained or will gain access to in the course of rendering services under this Contract, including, but not limited to, any information, records, or communications that the Department or the State, regardless of form or medium of disclosure (e.g., verbal, hard copy, or electronic) or source of information (e.g., the Department, other state agencies, regulated entities, electronic systems, federal government, or third -party contractors) provides to the Contractor, its officers, agents, employees, and subcontractors or that Contractor, its officers, agents, employees, and subcontractors obtain, discover, derive, or otherwise become aware of as a result of Contractor's performance of services under this Contract. Contractor shall maintain the security, confidentiality, integrity, and availability of all Confidential Information in accordance with Appendix C hereto in the performance of its activities under the Contract. Contractor shall ensure that its officers, agents, employees, partners, and subcontractors, if any, are fully aware of the obligations arising under this Contract and shall take all commercially reasonable steps to ensure their compliance to prevent unauthorized use, access, or disclosure of Confidential Information. Failure by Contractor or its officers, agents, employees, and subcontractors to fully comply with these requirements shall be deemed a failure to meet Contractor's obligations under this Contract and may result in the Department suspending, canceling, and/or terminating the Contract for cause or to pursue any other legal or equitable remedies available.

1.7 DEPARTMENT PROPERTY AND OWNERSHIP

All information and materials received under this Contract by the Contractor from the Department are and shall remain the sole and exclusive property of the Department, and the Contractor shall have no right, title, or interest in, or to any such information or materials by virtue of their use or possession hereunder by the Contractor.

The Contractor grants to the Department a perpetual, nonexclusive, royalty-free, unlimited use license to use, execute, reproduce, display, modify and distribute any pre-existing software, tools or techniques delivered by the Contractor under this Contract.

Any written reports, opinions and advice rendered by the Contractor shall become the sole and exclusive property of the Department, and the Contractor shall have no right, title, or interest in or to any such information or materials by virtue of their use or possession hereunder by the Contractor.

Contractor(s) will retain all rights, title, and interest in and to all materials developed by it prior to the effective date of this Contract(s) and/or developed outside of Contractor's obligations hereunder.

1.8 CONFLICTS OF INTEREST

The Contractor represents and warrants that it has no conflict, actual or perceived, that would prevent it from performing its duties and responsibilities under this Contract. The Contractor shall disclose the relationships it has had with entities regulated by the Department during the

two years prior to the date of this Contract. During the term of this Contract, the Contractor shall disclose any relationships it proposes to enter into with insurance companies or other persons or entities regulated by the Department. These disclosures must contain all facts material to any actual or potential conflict of interest. The Department may consider and approve, in writing, alternative guidelines proposed by the Contractor to redress any actual or perceived conflict of interest only when the Department deems such action appropriate.

1.9 PUBLICITY

The Contractor shall not prepare or release, or cause to be prepared or released, any public notice or announcement concerning this Contract or performance under this Contract. Public notice or announcement includes, but is not limited to, notices published on or in connection with the Contractor's website. The Contractor shall not plan, conduct, or cause to be planned or conducted, or take part in, any news or other conference concerning this Contract, or work performed pursuant to it, without the Department's prior written approval. The Contractor shall not make public or publicize its relationship with the Department, nor use the Department's name, without the Department's prior written approval. The Contractor will not be permitted to use in any manner the Department's logos, or any official mark of New York State without prior written approval by the Department. The Department reserves the right, in its sole discretion, to withhold approval. In the event the Department approves such use, then any use of the logos or official marks shall strictly comply with the terms and conditions set forth by the Department.

1.10 RELATIONSHIP

The Contractor is an independent contractor and may neither hold itself out as nor claim to be an officer, employee, or subdivision of the State of New York, nor make any claim, demand, or application to or for any right based upon any different status. No staff member, officer, director, or person employed by the Contractor in connection with this Contract shall be considered or deemed to be an employee of the State of New York or represent him or herself as an employee of the State of New York.

1.11 LEGAL ASSISTANCE

The Contractor must provide its own legal defense and technical assistance at its own expense in response to challenges arising out of or related to the duties and responsibilities of the Contractor.

1.12 LIABILITY AND INDEMNIFICATION

The Contractor assumes all risks in the performance of all its activities authorized by this Contract. The Contractor hereby covenants and agrees to defend, indemnify and hold harmless the People of the State of New York; the New York State Executive Department; the New York State Department of Financial Services; and its Superintendents, officers, agents, employees and assigns against all liabilities, claims, suits, actions, judgments, costs, expenses, demands, losses, damages, or injury, arising out of this Contract, of whatsoever kind and nature including death or injury to person, damage or loss of property, all attorneys' fees and other costs of investigating and defending against such claims, liabilities, losses, damages, expenses,

accidents or occurrences. The Contractor shall be fully liable for the actions of its agents, employees, partners and subcontractors and shall fully defend, indemnify and hold the People of the State of New York; the New York State Executive Department; the New York State Department of Financial Services; and its Superintendents, officers, agents, employees harmless from suits, actions, proceedings, claims, losses, damages, and costs (including reasonable attorney fees) of every name and description relating to personal injury and damage to real or personal tangible property caused by any intentional act or negligence of Contractor, its agents, employees, partners, and subcontractors, which shall arise from or result directly or indirectly from this Contract, without limitation; provided, however, that the Contractor shall not be obligated to indemnify the Department for any claim, loss or damage arising hereunder to the extent caused by the negligent act, failure to act, gross negligence or willful misconduct of the Department. The Contractor shall be responsible for such liabilities that arise at any time prior to termination of this Contract, whether direct or indirect, and whether caused or contributed to by the Contractor, its contractors, subcontractors, agents, or employees. The Contractor's responsibility under this section shall not be limited to the required or available insurance coverage.

The Department shall give Contractor: (i) prompt e-mail notice of any action, claim or threat of suit, or other suit for which Contractor is required to fully indemnify the Department; (ii) the opportunity to take over, settle or defend such action, claim or suit at Contractor's sole expense, and (iii) assistance in the defense of any such action, claim or suit at the expense of the Contractor. Notwithstanding the foregoing, the State reserves the right to join such action, at its sole expense, if it determines there is an issue involving a significant public interest.

In the event that such action or proceeding at law or in equity is commenced against the Department arising out of a claim for death, personal injury or damage to real or personal tangible property caused by any intentional or willful act, gross negligence, or negligence of Contractor, its agents, employees, partners or subcontractors, which shall arise from or result directly or indirectly from the Commodities and Services supplied under this Contract, and Contractor is of the opinion that the allegations in such action or proceeding in whole or in part are not covered by the indemnification and defense provisions set forth in the Contract, Contractor shall immediately notify the Department and the New York State Office of the Attorney General ("OAG") in writing and shall specify to what extent Contractor believes it is obligated to defend and indemnify. Contractor shall in such event protect the interests of the Department and attempt to secure a continuance to permit the State and the Department to appear and defend their interests in cooperation with Contractor, as is appropriate, including any jurisdictional defenses the State and the Department may have. In the event of a dispute regarding the defense, the Contractor and the OAG shall try to reach amicable resolution, but the OAG shall have the final determination on such matters

1.13 WARRANTIES

Title and Ownership: Contractor warrants and represents that it has (i) full ownership, clear title free of all liens, or (ii) the right to transfer or deliver specified license rights to any Commodities acquired by the Department under this Contract. Contractor shall be solely liable for any costs of acquisition associated therewith. Contractor shall indemnify the Department and hold the Department harmless from any damages and liabilities (including reasonable attorneys' fees and costs) arising from any breach of Contractor's warranties as set forth in

this Contract.

Virus Warranty: The Contractor represents and warrants that any Commodities acquired under the Contract by the Department does not contain any known viruses. Contractor is not responsible for viruses introduced at the Department's site.

Date/Time Warranty: Contractor warrants that the Solution furnished pursuant to this Contract shall, when used in accordance with its documentation, be able to accurately process date/time data (including, but not limited to, calculating, comparing, and sequencing) transactions, including leap year calculations. If the individual parts of a Commodity furnished pursuant to this Contract must perform as a package or system, this warranty shall apply to the Commodity as a system.

Where Contractor is providing ongoing services, including but not limited to: i) consulting, integration, code or data conversion; ii) maintenance or support services; iii) data entry or processing; or iv) contract administration services (e.g. billing, invoicing, claim processing), Contractor warrants that services shall be provided in an accurate and timely manner without interruption, failure or error due to inaccuracy of Contractor's business operations in processing date/time data (including, but not limited to, calculating, comparing, sequencing) various date/time transitions, including leap year calculations. Contactor shall be responsible for damages resulting from any delays, errors or untimely performance resulting therefrom, including, but not limited to, the failure or untimely performance of such services.

This Date/Time Warranty shall survive beyond termination of this contract through a) ninety (90) days; or b) the Contractor's or Commodity manufacturer/developer's stated date/time warranty, whichever is longer. Nothing in this warranty shall be construed to limit any rights or remedies otherwise available under this Contract for breach of warranty.

Workmanship Warranty: Contractor warrants that the services acquired under this Contract will be provided in a professional and workmanlike manner in accordance with the applicable industry standards, if any. The Department must notify Contractor of any services warranty deficiencies within 90 calendar days from performance of the services that gave rise to the warranty claim.

Survival of Warranties: All warranties contained in this Contract shall survive the termination of this Contract.

Prompt Notice of Breach: The Department shall promptly notify the Contractor in writing of any claim of breach of any warranty provided herein.

Additional Warranties: Where Contractor, Commodity manufacturer or Service provider generally offers additional or more advantageous warranties than those set forth herein, Contractor shall offer or pass through any such warranties to the Department.

No Limitation of Rights: The rights and remedies of the State and the Department provided in this section are in addition to and do not limit any rights afforded to the State and the Department by any other section of the Contract.

1.14 CONTRACTOR RESPONSIBILITY

Contractor shall at all times during the contract term remain responsible. Contractor agrees, if requested by the Superintendent or her designee, to present evidence of its continuing legal authority to do business in New York State, integrity, experience, ability, prior performance, and organizational and financial capacity.

The Superintendent, or her designee, in her sole discretion, reserves the right to suspend any or all activities under this Contract, at any time, if she discovers information that calls into question the responsibility of the Contractor. In the event of such suspension, Contractor will be given written notice outlining the particulars of such suspension. Upon issuance of such notice, Contractor must comply with the terms of the suspension order. Contract activity may resume at such time as the Superintendent, or her designee, issues a written notice authorizing a resumption of performance under the Contract.

Upon written notice to Contractor, and a reasonable opportunity to be heard with appropriate Department officials or staff, the Contract may be terminated by the Superintendent, or her designee, at Contractor's expense where Contractor is determined by the Superintendent to be non-responsible. In such event, the Superintendent, or her designee, may complete the contractual requirements in any manner she may deem advisable and pursue available legal or equitable remedies for breach.

1.15 FORCE MAJEURE

A force majeure occurrence is an event or effect that cannot be reasonably anticipated or controlled and is not due to the negligence or willful misconduct of the affected party. Force majeure includes, but is not limited to, acts of God, acts of war, acts of public enemies, terrorism, strikes, fires, explosions, actions of the elements, floods, or other similar causes beyond the control of the Contractor or the Department in the performance of the Contract where non-performance, by exercise of reasonable diligence, cannot be prevented.

The affected party shall e-mail notice to the other party of any force majeure occurrence as soon as the delay is known and provide the other party with a written contingency plan to address the force majeure occurrence, including specificity on quantities of materials, tooling, people, and other resources that will need to be redirected to another facility and the process of redirecting them. Furthermore, the affected party shall use its commercially reasonable efforts to resume proper performance within an appropriate period of time. Notwithstanding the foregoing, if the force majeure condition continues beyond thirty (30) days, the parties to the Contract shall jointly decide on an appropriate course of action that will permit fulfillment of the parties' objectives under the Contract.

The Contractor agrees that in the event of a delay or failure of performance by the Contractor under the Contract due to a force majeure occurrence:

a. The Department may purchase from other sources (without recourse to and by the Contractor for the costs and expenses thereof) to replace all or part of the Commodity and Services which are the subject of the delay, which purchases may be deducted from the Contract quantities without penalty or liability to the Department, or

b. The Contractor will provide the Department with access to the Commodity and Services first in order to fulfill orders placed before the force majeure event occurred. The Department agrees that it shall accept allocated performance or deliveries during the occurrence of the force majeure event.

Neither the Contractor nor the Department shall be liable to the other for any delay in or failure of performance under the Contract due to a force majeure occurrence. Any such delay in or failure of performance shall not constitute default or give rise to any liability for damages. The existence of such causes of such delay or failure shall extend the period for performance to such extent as determined by the Contractor and the Department to be necessary to enable complete performance by the Contractor if reasonable diligence is exercised after the cause of delay or failure has been removed.

Notwithstanding the above, at the discretion of the Department where the delay or failure will significantly impair the value of the Contract to the Department, the Department may terminate the Contract or the portion thereof which is subject to delays, and thereby discharge any unexecuted portion of the Contract or relative part thereof.

In addition, the Department reserves the right to make an equitable adjustment in the Contract terms and/or pricing should extreme and unforeseen volatility in the marketplace affect pricing or the availability of supply. "Extreme and unforeseen volatility in the marketplace" is defined as market circumstances which meet the following criteria: (i) the volatility is due to causes outside the control of Contractor; (ii) the volatility affects the marketplace or industry, not just the particular Contract source of supply; (iii) the effect on pricing or availability of supply is substantial; and (iv) the volatility so affects Contractor's performance that continued performance of the Contract would result in a substantial loss to the Contractor. In the event of a dispute between the Contractor and the Department, such dispute shall be resolved in accordance with the OSC Procedure for Protests; provided, however, that nothing in this clause shall excuse the Contractor from performing in accordance with the Contract as changed.

1.16 REMEDIES FOR BREACH

Any breach of any of the terms of this Contract by the Contractor may result in immediate and irreparable injury to the Department and will authorize recourse to injunction and/or other specific performance as well as to all other legal or equitable remedies to which the Department may be entitled.

Unless otherwise specified by the Department, in the event the Contractor fails to observe or perform any term or condition of the Contract and such failure remains uncured after ten (10) calendar days following e-mail notice from the Department, it may exercise all rights and remedies available at law or in equity. Notwithstanding the foregoing, if such failure is of a nature that it cannot be cured completely within fifteen (10) calendar days and Contractor shall have commenced its cure of such failure within such period and shall thereafter diligently pursue all steps necessary to cure such failure, such ten (10) day period may, in the sole discretion of the Department, be extended for a reasonable period in no event to exceed thirty (30) calendar days. It is understood and agreed that the rights and remedies available to the Department in the event of breach shall include but not be limited to the following:

a. **Cover/Substitute Performance:** In the event of Contractor's material, uncured breach, the Department may, with or without issuing a formal solicitation: (i) purchase from other sources; or (ii) if the Department is unsuccessful after making reasonable attempts, under the circumstances then-existing, to timely obtain acceptable replacement(s) of equal or comparable quality, the Department may acquire acceptable replacement(s) of lesser or greater quality. Such purchases may be deducted from the Contract quantity without penalty or liability to the Department.

   Withhold Payment: In any case where a reasonable question of material, uncured non-performance by Contractor arises, payment may be withheld in whole or in part at the discretion of the Department.

b. **Bankruptcy:** In the event that the Contractor files, or there is filed against Contractor, a petition under the U.S. Bankruptcy Code during the term of this Contract, the Department may, at its discretion, make application to exercise its right to set-off against monies due the debtor or, under the doctrine of recoupment, be credited the amounts owed by the Contractor arising out of the same transactions.

c. **Reimbursement of Costs Incurred:** The Contractor agrees to reimburse the Department promptly for any and all additional costs and expenses for acquiring an acceptable replacement. Should the cost of cover be less than the Contract price, the Contractor shall have no claim to the difference. The Contractor covenants and agrees that in the event suit is successfully prosecuted for any default on the part of the Contractor, all costs, and expenses, including reasonable attorney's fees, shall be paid by the Contractor. Where the Contractor fails to timely deliver pursuant to the guaranteed delivery terms of the Contract, the Department may obtain replacement(s) temporarily and the cost of the replacement(s) shall be deducted from the Contract quantity without penalty or liability to the Department.

d. **Deduction/Credit:** Sums due as a result of these remedies may be deducted or offset by the Departmentfrom payments due, or to becomedue, the Contractor on the same or another transaction. If no deduction or only a partial deduction is made in such fashion the Contractor shall pay to the Department the amount of such claim or portion of the claim still outstanding, on demand. the Department reserves the right to determine the disposition of any rebates, settlements, restitution, or damages that arise from the administration of the Contract.

1.17 ASSIGNMENT OF CLAIMS

Contractor hereby assigns to the State any and all claims for overcharges associated with this Contract that may arise under the antitrust laws of the United States, 15 USC § 1, et seq. and the antitrust laws of the State of New York, General Business Law § 340, *et seq*.

1.18 COOPERATION WITH THIRD PARTIES

The Contractor shall be responsible for fully cooperating with any third party, including but not limited to other contractors or subcontractors of the Department, as necessary to ensure delivery or performance of the Contract.

1.19 INDEMNIFICATION RELATING TO INFRINGEMENT

The Contractor shall also defend, indemnify and hold the Department harmless from all suits, actions, proceedings, claims, losses, damages, and costs of every name and description (including reasonable attorney fees), relating to a claim of infringement of a patent, copyright, trademark, trade secret, or other proprietary right provided such claim arises solely out of the Solution as supplied by the Contractor, and not out of any modification to the Solution made by the Department or by someone other than Contractor at the direction of the Department without Contractor's approval; provided, however, that the Contractor shall not be obligated to indemnify the Department for any claim, loss or damage arising hereunder to the extent caused by the negligent act, failure to act, gross negligence or willful misconduct of the Department.

The Department shall give Contractor: (i) prompt written notice of any action, claim or threat of suit alleging infringement, (ii) the opportunity to take over, settle or defend such action, claim or suit at Contractor's sole expense, and (iii) assistance in the defense of any such action, claim or suit at the expense of the Contractor. Notwithstanding the foregoing, the State reserves the right to join such action, at its sole expense, if it determines there is an issue involving a significant public interest.

If usage of the Solution shall be enjoined for any reason or if Contractor believes that it may be enjoined, Contractor shall have the right, at its own expense and sole discretion to take action in the following order of precedence: (i) to procure for the Department the right to continue usage; (ii) to modify the Commodities and Services so that usage becomes non-infringing and is of at least equal quality and performance; or (iii) replace such Commodities and Services or parts thereof, as applicable, with non-infringing Commodities and Services of at least equal quality and performance. If the above remedies are not available, the parties shall terminate the Contract, in whole or in part as necessary and applicable, provided that the Department is given a refund for any amounts paid for the period during which usage was not feasible.

In the event that an action or proceeding at law or in equity is commenced against the Department arising out of a claim that the Department's use of the Solution under the Contract infringes any patent, copyright, trademark, trade secret or proprietary right, and Contractor is of the opinion that the allegations in such action or proceeding in whole or in part are not covered by the indemnification and defense provisions set forth on the Contract, Contractor shall immediately notify the Department and the OAG in writing and shall specify to what extent Contractor believes it is obligated to defend and indemnify. Contractor shall in such event protect the interests of the Department and attempt to secure a continuance to permit the State and the Department to appear and defend their interests in cooperation with Contractor, as is appropriate, including any jurisdictional defenses the State and the Department may have. In the event of a dispute regarding the defense, the Contractor and the OAG shall try to reach an amicable solution, but the OAG shall have the final determination on such matters. This constitutes the Department's sole and exclusive remedy for infringement of a patent, copyright, trademark, trade secret, or other proprietary right.

1.20 CYBER SECURITY POLICY

The Contractor warrants, covenants, and represents that, in the performance of the Contract, Contractor, its agents, Subcontractors, officers, distributors, resellers, and employees will

comply fully with all security procedures of the Department set forth in Appendix C – Information Security & Cyber Security Requirements, and in Appendix D – Primary Security and Privacy Mandates, or otherwise communicated in advance to the Contractor, including but not limited to physical, facility, documentary, and cyber security rules, procedures, and protocols.

1.21 WAIVER

No failure or delay on the part of the Department in exercising any right, power, or remedy hereunder shall operate as a waiver thereof. No single or partial exercise of any such right, power or remedy shall preclude any other or further exercise thereof or the exercise of any other right, power or remedy. The remedies provided for herein are cumulative and are not exclusive of any remedies that may be available to any party at law or in equity or otherwise.

1.22 ENTIRE CONTRACT

This Contract sets forth the entire agreement and understanding of the parties relating to the subject matter contained in this Contract except as to those matters or agreements expressly incorporated herein by reference. No covenant, representation, or condition not expressed in this Contract shall be effective to interpret, change, or restrict the express provisions of this Contract. This Contract supersedes any and all prior agreements, whether written or oral, relating to the subject matter contained in this Contract. This Contract shall not be amended, changed, or otherwise modified except in a written document, signed by both parties, and approved by OSC.

1.23 BINDING CONTRACT

The covenants and agreements contained in this Contract shall be binding upon the parties hereto and upon their respective executors, administrators, legal representatives, heirs, successors, distributees, and assigns. The rights or obligations granted or allocated to the Contractor in this Contract may not be assigned without the prior written consent of the Department.

1.24 SEVERABILITY

In the event any provision of this Contract is determined to be contrary to law or unenforceable for any reason whatsoever, such determination shall not in any way affect the validity or enforceability of the balance of this Contract or any other term or condition hereof.

1.25 GOVERNING LAW

This Contract shall be governed by the laws of the State of New York. Any disputes arising out of this Contract shall be heard in a court of competent jurisdiction in the State of New York.

1.26 ORDER OF PRECEDENCE

Conflict among the Contract documents shall be resolved in the following order of precedence:

1.) Appendix A – Standard Clauses for New York State Contracts;
2.) The Contract document setting forth the final agreement between the parties;
3.) The Department's Responses to Submitted Questions and/or any clarifications to the Appendices, Attachments, or Exhibits to IFB # C000606;
4.) IFB# C000606 – Audio-Visual Equipment Design Services, including all of its Appendices and Attachments (except Appendix A); and
5.) The Contractor's Proposal.

All prior agreements, representations, statements, negotiations, and undertakings between the Department and the Contractor are superseded.