

**NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION  
CONSULTANT CONTRACT  
FOR THE PROVISION OF CONSULTING SERVICES  
NYCEDC CONTRACT NO. 56750001  
PROJECT CODE NO. 5675**

# ***CONSULTANT CONTRACT***

Between

**NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION**

and

**AKRF, INC.**

Dated as of May 28, 2014

Relating to

**Environmental Analysis Services**

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# PART I

## SPECIFIC TERMS AND CONDITIONS

New York City Economic Development Corporation (the "Corporation" or "NYCEDC") and the Consultant identified below, in consideration of the mutual covenants contained in this Contract (as defined below) and other valuable and good consideration, do hereby agree to all of the terms and conditions set forth in (i) these Specific Terms and Conditions (Part I) set forth immediately below, (ii) the General Terms and Conditions (Part II) annexed hereto and made a part hereof and (iii) the Appendices (Part III) annexed hereto and made a part hereof.

Capitalized terms shall have the meaning set forth in Appendix A (Definitions and Interpretation) unless otherwise defined in this Contract or the context otherwise requires and the rules of interpretation set forth in Appendix A (Definitions and Interpretation) shall apply to this Contract unless otherwise expressly stated herein.

### 1. The Contract

- 1.1 **Contract:** These Specific Terms and Conditions (Part I), the General Terms and Conditions (Part II) and the Appendices (Part III)
- 1.2 **NYCEDC Contract No.** 56750001
- 1.3 **Contract Date:** The date of the Contract is as of May 28, 2014
- 1.4 **Commencement Date:** The Contract Date
- 1.5 **Term:** The initial Term of this Contract starts on and includes the Contract Date and ends on August 15, 2015 (such end date corresponding to the last date on which the City may expend CDBG-DR Funds under the Grant Agreement, dated August 16, 2013 between the City and HUD). Such initial Term may be extended in accordance with Section 5.3 of this Part I.
- 1.6 **Maximum Contract Price:** One million dollars (\$1,000,000).
- 1.7 **Project:** Environmental analysis services as more fully described in the Scope of Services.
- 1.8 **Project Site:** Various sites in the City to be designated by NYCEDC in Task Orders or Assignments.
- 1.9 **Allowable Additional Costs:** The Allowable Additional Costs, if any, are defined in Appendix B (Scope of Services) and the amount set forth in Appendix C (Payments).
- 1.10 **Retainage:** Not Applicable.
- 1.11 **Retainage Payment Date:** Not Applicable.
- 1.12 **M/WBE Participation Goal:** To the extent practicable depending on the specific Tasks to be performed by Consultant and its Subcontractors (if any), a Participation Goal of up to Fifteen Percent (15%) shall be established for each Task Order or Assignment.

2. **Parties**

2.1 **The Corporation:** New York City Economic Development Corporation, a not-for-profit corporation, organized under the laws of the State of New York.

2.2 **Director:** Marilyn Lee

2.3 **The Consultant:** AKRF, Inc., a New York corporation, having an office at:

AKRF, Inc.  
440 Park Avenue South  
New York, NY 10016

**FEDERAL TAX ID# 13-3433475**

2.4 **Principal:** Peter Liebowitz

2.5 **Person in Charge:** Peter Liebowitz and George Penesis

3. **Notice Parties and Addresses**

3.1 **Notices to the Corporation:**

New York City Economic Development Corporation  
110 William Street  
New York, NY 10038  
Attn: General Counsel

with a copy to:

New York City Economic Development Corporation  
110 William Street  
New York, NY 10038  
Attn: Senior Vice President, Planning Department

3.2 **Notices to the Consultant:**

AKRF, Inc.  
440 Park Avenue South  
New York, NY 10016  
Attn: Peter Liebowitz

4. **Funding Source** The payments to be made to the Consultant by the Corporation pursuant to this Contract will be made from funds identified below and in accordance with all applicable Legal Requirements and the provisions of Appendices H, I and M. The Consultant agrees to comply with the provisions of each of such Appendices.

4.1 **Type of Funds:** CDBG-DR Funds

- 4.2 **Funding Agencies:** HUD
- 4.3 **Inspectors:** HUD and OMB
- 4.4 **Applicable Certifications and Section 3 Clause:** See Appendix I
- 4.5 **Applicable Requirements:** All CDBG-DR Rules applicable to the Project (See Appendix B-1 HUD Supplementary General Conditions)
- 4.6 **Applicable Agreements:** The Subrecipient Agreement, any agreements required by HUD or in connection with the CDBG-DR Funds, and the 2013 Programmatic Agreement. (See Appendix M).

5. **Special Provisions** The provisions set forth below are hereby added to and made part of, or deleted from this Contract, as indicated. In the event any conflict exists between any of the General Terms and Conditions (Part II) of this Contract and these special provisions, these special provisions shall govern.

5.1 **Amendments to Certain Provisions.**

(a) Amendment to Section 4.1.2. The first sentence in Section 4.1.2 of Part II of this Contract is deleted in its entirety and replaced with the following:

*"The Consultant shall submit to the Director, prior to performance of Services for a given Task Order or Assignment by such personnel, resumes of the Consultant's personnel and those of its Subcontractors' personnel who will perform the Services."*

(b) Amendment to Section 5.2.12. Pursuant to Section 9.3(g)(iii) of the Subrecipient Agreement, Section 5.2.12 of Part II of this Contract is deleted in its entirety and replaced with the following:

*"The Consultant shall not make any unauthorized use of copyrighted, trademarked or other protected materials or intellectual property. The Contractor shall defend, indemnify and hold the Corporation, the City and their respective agents and employees, harmless from any and all claims (even if the allegations of the lawsuit are without merit) or judgments for damages and from costs and expenses to which the Corporation, the City or their respective agents and employees may be subject to or which they may suffer or incur allegedly arising out of or in connection with any infringement by the Contractor of any copyright, trade secrets, trademark or patent rights or any other property or personal right of any third party by the Contractor and/or its Subcontractors in the performance of this Contract. The Contractor shall defend, indemnify, and hold the Corporation, the City and their respective agents and employees, harmless regardless of whether or not the alleged infringement arises out of compliance with this Contract's scope of services/scope of work. Insofar as the facts or law relating to any claim would preclude the Corporation, the City or their respective agents and employees from being completely indemnified by the Contractor, the Corporation, the City and their respective agents and employees shall be partially indemnified by the Contractor to the fullest extent permitted by law. The indemnification provisions set forth*

*in this Section 5.2.12 shall not be limited in any way by the Contractor's obligations to obtain and maintain insurance as provided in this Contract."*

(c) Amendment to Section 6.1.1. Pursuant to (i) Section 9.3(g)(ii) of the Subrecipient Agreement, and (ii) Section 4.04(a) and Article 11 of Exhibit C of the City Contract, Section 6.1.1 of Part II of this Contract is deleted in its entirety and replaced with the following:

*"6.1.1 The Consultant shall indemnify, defend and hold harmless the Corporation, the City and their respective agents and employees from any and all claims, judgments or liabilities to which they may be subject because of any negligence or any fault or default of the Consultant, its agents, employees or Subcontractors or the breach of the Consultant's obligations under this Contract. Insofar as the facts or law relating to any such claim, judgment or liability would preclude the Corporation, the City, or their respective agents or employees from being completely indemnified by the Contractor, the Corporation, the City and their respective agents and employees shall be partially indemnified by the Contractor to the fullest extent permitted by law. The indemnification provisions set forth in this Section 6.1.1 shall not be limited in any way by the Contractor's obligations to obtain and maintain insurance as provided in this Contract."*

(d) Amendment to Article 9. Article 9 of Part II of this Contract is deleted in its entirety and replaced with the following:

## **ARTICLE 9**

### **M/WBE REQUIREMENTS**

9.1 M/WBE Program. Local Law No. 129 of 2005 added and Local Law 1 of 2013 amended Section 6-129 of the Administrative Code of the City of New York (hereinafter "Section 6-129"). Section 6-129 establishes a program for participation in City procurement by minority-owned business enterprises ("MBEs") and women-owned business enterprises ("WBEs", together with "MBEs" collectively referred to as "M/WBEs"), certified in accordance with Section 1304 of the City Charter. As stated in Section 6-129, the intent of the program is to address the impact of discrimination on the City's procurement process, and to promote the public interest in avoiding fraud and favoritism in the procurement process, increasing competition for City business and lowering contract costs. The Corporation endorses these goals and has adopted an M/WBE Program to further participation by MBEs and WBEs in the provision of the Services. Consultant shall comply with all requirements of the Corporation's M/WBE Program applicable to this Contract.

9.2 Minority and Women -Owned Business Enterprises. M/WBE firms must be certified by DSBS to credit such firms' participation toward attainment of the Participation Goals. Such certification must occur prior to the firms' commencement of work.

9.3 Participation Goal.

9.3.1 *The Participation Goal for this Contract or Task Order issued pursuant to the Contract is set forth in Part I, Section 1.12. The Participation Goal represents a percentage of the total dollar value of the Contract or Task Order, as applicable, that may be achieved by awarding Subcontracts to firms certified with DSBS as MBEs or WBEs, and/or by crediting the participation of prime contractors and/or qualified joint ventures as provided for in Section 9.3.4, below.*

9.3.2 *The Participation Goal is a material term of this Contract and the Consultant shall be subject to the Participation Goal.*

9.3.3 *A consultant that is an M/WBE shall be permitted to count its own participation toward fulfillment of the Participation Goal; provided that the value of the Consultant's participation shall be determined by subtracting from the total value of the Contract or Task Order, as applicable, any amounts that the Consultant pays to direct Subcontractors.*

9.3.4 *A consultant that is a qualified joint venture shall be permitted to count a percentage of its own participation toward fulfillment of the Participation Goal. The value of the Consultant's participation shall be determined by subtracting from the total value of the Contract or Task Order, as applicable, any amounts that the Consultant pays to direct subcontractors, and then multiplying the remainder by the percentage to be applied to total profit to determine the amount to which an M/WBE is entitled pursuant to the joint venture agreement.*

9.4 Subcontractors Participation Plan.

9.4.1 *The Subcontractors Participation Plan for this Contract shall be determined in the context of each Assignment or Task Order.*

9.4.2 *In the event that the Corporation does not approve a Subcontractor proposed by the Consultant, the Consultant shall have a reasonable time to propose an alternate Subcontractor.*

9.4.3 *If this Contract is a multi-year contract, the Consultant shall submit an updated Subcontractors Participation Plan to the Corporation's Chief Contracting Officer thirty (30) days prior to the anniversary of the Commencement Date in each subsequent year during the Contract Term. The Consultant's updated M/WBE Plan shall be subject to the Corporation's approval and must set forth:*

- (i) the percentage of work the respondent intends to subcontract;*
- (ii) the identity of all proposed M/WBE Subcontractors to which the respondent intends to award subcontracts;*
- (iii) a description of the type and dollar value of work designated for participation by M/WBEs; and*

end. (iv) the time frames in which such work by M/WBEs is scheduled to begin and

9.5 M/WBE Compliance Reports.

9.5.1 The Consultant shall provide the Corporation with written statements ("M/WBE Compliance Reports"), certified under penalty of perjury, reporting the status of the Consultant's compliance with its M/WBE Subcontractor Utilization Plan as set forth in this Section 9.5.

9.5.2 The Consultant shall submit a M/WBE Compliance Report to the Corporation:

- (i) with each Requisition for payment; and/or
- (ii) on a periodic basis as the Corporation may require.

9.5.3 Each M/WBE Compliance Report shall set forth the following for the period covered by the report:

- (iii) the total amount paid to Subcontractors (including Subcontractors that are not MBEs or WBEs);
- (iv) the names, addresses and contact numbers of each MBE or WBE hired as a Subcontractor pursuant to such plan as well as the dates and amounts paid to each MBE or WBE.

9.5.4 In addition to the foregoing, the Consultant shall submit a final, cumulative M/WBE Compliance Report to the Corporation with its Requisition for Final Payment. The Consultant shall set forth in such final report the information required by Section 9.5.3 in connection with all Services rendered by the Consultant and its Subcontractors during the entire Contract Term.

9.6 Change Orders. If the Consultant requests a change order having a value that exceeds ten percent (10%) of the Contract, the Corporation will establish an M/WBE participation goal for the work to be performed pursuant to the change order.

9.7 Modification of the Consultant's Subcontractors Participation Plan.

9.7.1 The Consultant may request modification of its Subcontractors Participation Plan after the award of the Contract. The Corporation may grant such request if it determines that the Consultant has established, with appropriate documentary and other evidence, that the Consultant has made all reasonable, good faith efforts to meet the Participation Goal set for the Contract.

9.7.2 Good Faith Efforts. Good faith efforts should be documented by respondent requesting a modification and such documentation provided to the Corporation upon the Corporation's request. In determining whether the Consultant has made all reasonable good faith efforts to meet the Contract's Participation Goal, the Corporation will consider, along with

any other relevant factors, evidence submitted by the Consultant showing that the Consultant has, without limitation, conducted the following::

9.7.3 Direct Outreach. The Consultant provided timely notice to M/WBEs of specific opportunities to participate in the Contract;

9.7.4 NYCEDC Assistance. The Consultant submitted timely requests for assistance to the Corporation's M/WBE liaison officer and provides the Corporation with a description of how the Corporation's recommendations were acted upon and an explanation of how action upon such recommendations did not lead to the desired level of participation of M/WBEs;

9.7.5 Advertised Opportunities. The Consultant advertised opportunities to participate in the Contract in general circulation media, trade and professional association publications, small business media and publications of M/WBE organizations;

9.7.6 Follow Up with M/WBEs. The Consultant sent timely written notices to advise M/WBEs that their interest in the Contract was solicited;

9.7.7 Substitution of Work. The Consultant made efforts to identify portions of the Contract Work that could be substituted for portions originally designated for the participation by M/WBEs in the M/WBE Subcontractors Participation Plan and for which the respondent claims an inability to retain M/WBEs;

9.7.8 Meeting with M/WBEs. The Consultant held meetings with M/WBEs prior to the date their proposals were due, for the purpose of explaining in detail the scope and requirements of the work for which their proposals were solicited;

9.7.9 Negotiated with M/WBEs. The Consultant made efforts to negotiate with M/WBEs as relevant to perform specific subcontracts, or acts as suppliers or service providers;

9.7.10 Interested Subcontractor List. The Consultant made efforts to contact interested M/WBEs listed on the Website's Interested Subcontractor list.

9.7.11 The Corporation's M/WBE Director and Chief Contracting Officer will provide written notice to the respondent of the determination.

9.8 Compliance Audits. This Contract may be audited by the Corporation, DSBS and the City Comptroller to determine the Consultant's compliance with the requirements of the Corporation's M/WBE Program and the Consultant's M/WBE Subcontractors Participation Plan.

9.9 Enforcement. In the event the Corporation determines that the Consultant or its Subcontractors have violated the requirements of the Corporation's M/WBE Program or the M/WBE Subcontractors Participation Plan including, without limitation, a determination that the Consultant has made payments to or awarded work to M/WBE Subcontractors in amounts

*less than the amounts specified in the Consultant's M/WBE Subcontractor Utilization Plan (unless the Corporation has permitted the Consultant to modify the Consultant's M/WBE Subcontractors Participation Plan in accordance with Section 9.7), the Corporation may:*

- (v) terminate the Contract;*
- (vi) assess actual and consequential damages for and/or exercise its right to set off any additional expenses the Corporation incurs to complete the Project satisfactorily in accordance with the Corporation's M/WBE Program and in order to meet the Participation Goal set for the Contract including, without limitation, the actual and administrative costs of:
  - (a) meeting the Participation Goal through additional procurements;*
  - (b) payments made to any other consultant retained to complete the Services; and*
  - (c) investigation and enforcement; or**
- (vii) assert any other right or remedy it has under the Contract.*

*9.10 Liquidated Damages for Failure to Fulfill Approved Participation Goals. If the Consultant fails to fulfill its Participation Goals set forth in its Subcontractors Participation Plan or the Participation Goals as modified by the Corporation pursuant to Section 9.7, the Corporation may assess liquidated damages in the amount of ten percent (10%) of the difference between the dollar amount of work required to be awarded to M/WBEs to meet the Participation Goal and the dollar amount the Consultant actually awarded and paid to M/WBEs. In view of the difficulty of accurately ascertaining the loss which the Corporation will suffer by reason of the Consultant's failure to meet the Participation Goals, the foregoing amount is hereby fixed and agreed as the liquidated damages that the Corporation will suffer by reason of such failure, and not as a penalty. The Corporation may deduct and retain out of any monies which may become due under this Contract the amount of any such liquidated damages; and in case the amount which may become due under this Contract shall be less than the amount of the liquidated damages suffered by the Corporation, the Consultant shall be liable to pay the difference.*

*9.11 Statements. Statements made in any instrument submitted to the Corporation in connection with the Corporation's M/WBE Program shall be submitted under penalty of perjury and any false or misleading statement or omission shall be grounds for the application of any applicable criminal and/or civil penalties for perjury.*

*9.12 Evaluations. The Consultant's record in implementing its M/WBE Subcontractor Participation Plan shall be a factor in the evaluation of its performance.*

*(e) Amendments to Definitions. Appendix A to the Contract is amended as follows by:*

*(i) deleting the definition of "M/WBE Utilization Plan" in its entirety and replacing it with the following:*

*"Subcontractors Participation Plan" As described in Part II, Section 9.4.*

## 5.2 Liquidated Damages.

(a) As stated in Section 1.4.1 of Part II of this Contract, the Services to be performed by the Consultant shall at all times be subject to the review, direction and control of the Director, whose decision shall be final and binding upon the Consultant. The Director shall have the right to determine the amount, quality, acceptability and fitness of the Services and her or his approval shall be a condition precedent to the right of the Consultant to receive any compensation under this Contract.

(b) Upon completion of work and as stated in Section 2.1.2 of Part II of this Contract, Requisitions shall be in a form reasonably acceptable to the Corporation and shall be supported by any appropriate or necessary documentation or other evidence relating to the amounts set forth in the Requisition, as the Corporation may reasonably require including, but not limited to invoices, receipts and vouchers from Subcontractors and suppliers, information related to M/WBEs required under Section 9.6 and, where applicable, the time sheets and/or certified payroll reports of the Consultant's staff and its Principal. Failure to provide such appropriate or necessary documentation or other evidence relating to the amounts set forth in the Requisition, as the Corporation may reasonably require, will result in non-payment.

(c) Pursuant to Section 2.1.4 of Part II of this Contract, the Director shall review the Requisitions and the Work Product undertaken by the Consultant for each Task Order or Assignment. If, in her or his judgment, the Services performed with respect to such Task Order or Assignment have been satisfactorily performed in accordance with this Contract, the Director will approve the Requisition. If in her or his judgment, such Services have not been satisfactorily performed in accordance with this Contract, the Director will not approve the Requisition and payment will not be received. All payments to the Consultant will be made in accordance with Article 2 of Part II of this Contract.

(d) In addition, pursuant to Section 2.2.1 of Part II of this Contract, if the Corporation has reasonable grounds for believing that: (i) the Consultant will be unable to perform such Services or any Portion thereof fully and satisfactorily in accordance with any Progress Schedule, or (ii) a meritorious claim exists or will exist against the Corporation, the Consultant or the City arising out of the act, omission or negligence of the Consultant or the Consultant's breach of any provision of this Contract, then the Corporation may withhold payment of any amount otherwise due and payable to the Consultant hereunder. Any amount so withheld may be retained by the Corporation for such period as it may deem advisable to protect the Corporation and the City against any loss and may, after Notice to the Consultant, be applied in satisfaction of any claim herein described.

## 5.3 Contract Term.

(a) At NYCEDC's sole discretion the Contract Term may be extended for up to four (4) extensions of (1) year each; provided, that (a) prior to any such extension NYCEDC has determined in its sole discretion, among other things, that additional CDBG-DR Funds are available, in accordance with applicable Legal Requirements, for disbursement to NYCEDC from the City to pay for any Services performed by Consultant during each such extension, if any; (b) the Subrecipient Agreement has been amended to provide for such additional CDBG-DR Funds, or a new subrecipient agreement between NYCEDC and the City (including any agency, office or other authorized instrumentality thereof) has been entered into and has become effective which provides for such additional CDBG-DR Funds; and (c) at the time of each such extension this Contract shall be in full force and effect and there shall not then exist any uncured default hereunder.

(b) Subject to the provisions of Section 5.3(a), the Corporation shall have the option (each, a "Renewal Option") to renew this Contract and extend the initial Term in accordance with this Section 5.3 (each an "Extension Period"). If the Corporation elects to exercise a Renewal Option, the Corporation shall give Notice to the Consultant of its election to so extend at least thirty (30) days prior to the expiration of the initial Term, or if applicable, the expiring Extension Period. In the event that the Renewal Option is exercised, the Term shall automatically be extended for the Extension Period without the necessity for execution of any amendment, extension or renewal contract. The Extension Period shall be upon all of the same terms, covenants and conditions as were in effect hereunder immediately prior to the commencement of the Extension Period.

This Contract may be executed in counterparts, all of which counterparts, when taken together, shall be deemed a fully executed instrument.

*(Remainder of page intentionally left blank)*

IN WITNESS WHEREOF, the parties hereto have caused this Contract to be duly executed as of the Contract Date hereinabove written.

**NEW YORK CITY ECONOMIC  
DEVELOPMENT CORPORATION**

By: T.M.  
Name: Thomas McKnight  
Title: EVP

**AKRF, INC**

By: George K. Penesis  
Name: GEORGE K. PENESIS  
Title: SR - VICE PRESIDENT

## PART II

### GENERAL TERMS AND CONDITIONS

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## GENERAL TERMS AND CONDITIONS

The Corporation and the Consultant hereby agree as follows:

### ARTICLE 2 PERFORMANCE OF SERVICES

2.1 Services. The Corporation hereby retains and engages the Consultant and the Consultant agrees to perform the Services as described in Appendix B (Scope of Services), attached hereto.

2.2 Time for Performance of Services/Term/Delays and Force Majeure.

2.2.1 The Consultant shall commence the Services upon or promptly after the Commencement Date and receipt of a Notice to Proceed from the Corporation and shall complete the Services and each phase of the Services within the time or times stated for Final Completion as set forth in Appendix B (Scope of Services) and Appendix B-1 (HUD Supplementary General Conditions), and in accordance with any directive given and Progress Schedule approved by the Corporation, unless this Contract is earlier terminated pursuant to Article 3 hereof. Upon request from the Corporation the Consultant shall promptly submit a Progress Schedule to the Corporation.

2.2.2 This Contract shall be for the Term as set forth in Part I, Section 1.5 unless sooner terminated pursuant to Article 3 hereof.

2.2.3 If the Consultant has been delayed and as a result will be unable to complete performance fully and satisfactorily within the time fixed therefor, the Consultant may be granted an extension of time fixed for performance equal to the period the Consultant was actually and necessarily delayed upon submission of evidence of the causes of the delay, subject to the written approval of the Director in his or her sole discretion. The decision of the Director as to the granting of the extension and its length shall be binding upon the Consultant.

2.2.4 Subject to the Corporation's determination and approval, the Corporation may extend the time or times for performance of the Services where such performance has been substantially obstructed, hindered or delayed by reason of acts of Force Majeure. The Consultant shall have no claim against the Corporation or the City for any loss or damage sustained by the Consultant nor for any extra compensation in the form of an increase in the Maximum Contract Price, or otherwise, through such delay, hindrance or obstruction.

2.3 Complete Work and Timing and Sequence/Meetings. It is the intent of the parties that the provisions of this Contract shall not be construed so as to limit the Services, but that the Services shall include all acts necessary to fully and finally complete the work described in Appendix B (Scope of Services) hereof. The Consultant shall schedule and perform the Services in a manner so as to permit their completion diligently and expeditiously. The Principal, the Person in Charge and such other Representatives of the Consultant as may be required under the

circumstances shall be available to meet with the Director or her or his designee as often as necessary to effectively perform the Services, and as often as may be specified in Appendix B (Scope of Services).

#### 2.4 Authority of Director/Performance of Services.

2.4.1 The Services to be performed by the Consultant shall at all times be subject to the review, direction and control of the Director, whose decision shall be final and binding upon the Consultant. The Director shall have the right to determine the amount, quality, acceptability and fitness of the Services and her or his approval shall be a condition precedent to the right of the Consultant to receive any compensation under this Contract. The Director shall act reasonably in exercising her or his authority under this Contract. The Director and any other person or agent duly authorized to act for and on behalf of the Corporation shall not, by virtue of such authority or action, be liable in any manner to the Consultant.

2.4.2 The Consultant shall perform all of the Services in a prudent and professional manner, in accordance with standards and practices as are customary for such Services in the New York City Metropolitan Statistical Area and in accordance with Industry Best Practices.

#### 2.5 Changes to the Services.

2.5.1 The Consultant shall not make any changes in the Services without prior authorization in writing from the Director. The Consultant shall revise or correct any Work Product submitted in accordance with this Contract until accepted by the Director and accepted by all agencies whose approval is required by law, without additional compensation or time extension. Any changes to the performance of the Services or the Work Product which are necessary due to improper performance of the Services, a defect of design, unworkability of details or other fault or error of the Consultant shall be made by the Consultant, also without additional compensation or time extension.

2.5.2 The Director shall have the right to alter the Services; provided, that if the Consultant believes that any work or services that it has been directed to perform as a result of such alteration is beyond the Scope of Services and constitutes Extra Work, the Consultant shall so Notify the Director within three (3) days of such directive. The Director shall determine whether such altered Services are (i) within the Scope of Services; or (ii) Extra Work that is substantially within the general purview of the Scope of Services and constitutes an Allowable Additional Cost; or (iii) Extra Work requiring an amendment to the Scope of Services and the Contract. The Director's determination shall be final, binding and conclusive.

2.5.3 The Director reserves the right to reduce the Scope of Services under this Contract by Notice to the Consultant specifying the nature and extent of such reduction. The Consultant shall be compensated for all Services satisfactorily performed prior to the reduction and for Services satisfactorily performed thereafter. If said reduction results in a credit for the Corporation, such credit shall be immediately due and owing to Corporation, and the Consultant shall either pay such credit to the Corporation or the Corporation may withhold the credit amount

from any future payments by the Corporation to the Consultant, at the exclusive option of the Corporation.

2.6 Equipment.

2.6.1 The Consultant, at its own expense, shall secure all supplies, materials and equipment required to perform and complete the Services.

2.6.2 The Consultant, at its sole cost and expense, shall bear the risk of loss for any supplies, materials and equipment used to perform the Services whether such loss arises by reason of fire, theft, vandalism, negligence or any other cause whatsoever. Consultant, at its sole cost and expense, shall promptly replace or repair all such lost, stolen or damaged supplies, materials and equipment.

2.6.3 The Consultant, at its sole cost and expense, shall maintain all of its supplies, materials and equipment in good working and serviceable order so as to enable the Consultant to perform the Services in a first-class and professional manner.

2.6.4 The Consultant shall be solely responsible for the means and methods and the safety and protection of all its employees and shall assume all liability for injuries, including death, that may occur to such employees due to the act, omission, negligence, fault or default of the Consultant.

2.7 Services Subject to City Contract, Indemnification and Third Party Beneficiary. This Contract is a subcontract under the City Contract. The Consultant acknowledges that it has reviewed the City Contract and agrees to comply with the City Contract with respect to the Services and not to violate, or through its acts or failure to act cause the Corporation to violate, the City Contract. The Consultant agrees to defend, indemnify and hold harmless the Corporation from any claim, liability or judgment to which the Corporation may be subject because of any such action or failure to act. The City shall be a third party beneficiary of this Contract and shall have a direct cause of action against the Consultant in the event that any claim be made or any cause of action be brought against the Corporation or City or if the Consultant breaches this Contract.

2.8 Acts to be Performed by the Corporation. The Corporation shall perform the following acts in connection with this Contract:

2.8.1 The Corporation shall make available to the Consultant all relevant technical data (subject to the provisions of Part II, Section 5.3 herein) in regard to the Contract which is in the possession of the Corporation.

2.8.2 The Corporation shall designate a Project Manager to serve as a liaison between the Corporation and the Consultant.

**ARTICLE 3**  
**COMPENSATION**

3.1 Payments.

3.1.1 Subject to, and in accordance with this Article 2, the Corporation shall pay to the Consultant, and the Consultant agrees to accept, in full consideration for the Services, and for all expenses of the Consultant in connection therewith, including Subcontractors' Costs and Allowable Additional Costs, an amount not to exceed the Maximum Contract Price, payable as provided for in this Section 2.1 and in Appendix C (Payments).

3.1.2 All Requisitions shall be submitted by the Consultant to the Corporation's accounts payable department. Such Requisitions shall be in a form reasonably acceptable to the Corporation and shall be supported by any appropriate or necessary documentation or other evidence relating to the amounts set forth in the Requisition, as the Corporation may reasonably require including, but not limited to invoices, receipts and vouchers from Subcontractors and suppliers, information related to M/WBEs required under Section 9.6 and, where applicable, the time sheets and/or certified payroll reports of the Consultant's staff and its Principal.

3.1.3 Each Requisition submitted to the Corporation by the Consultant shall constitute a representation that, except as specifically set forth in the Requisition, as of the date of the Requisition, all representations and warranties made by the Consultant in Article 7 are true, complete and accurate as if made as of the date of the submission of the Requisition.

3.1.4 The Director shall review the Requisitions and the Work Product. If, in her or his judgment, the Services have been satisfactorily performed in accordance with this Contract, the Director will approve the Requisition. All payments to the Consultant will be made in accordance with this Article 2.

3.1.5 Subject to Section 3.5, Final Payment will be due only upon Final Completion.

3.1.6 The Consultant, with the Director's prior approval, may exceed the Maximum Payment allocated to a particular Portion of the Services if the Consultant by Notice determines that the Maximum Payment initially allocated to the Portion is insufficient to adequately perform the Portion of the Services and if the Consultant demonstrates to the Director a savings with respect to another Portion of the Services which is at least equal to the amount of such excess. However, notwithstanding the above, in no event shall the Corporation pay the Consultant more than the Maximum Contract Price.

3.2 Miscellaneous Payment Provisions.

3.2.1 In addition to its rights under Section 9.10, if the Corporation shall have reasonable grounds for believing that:

(i) the Consultant will be unable to perform the Services or any Portion thereof fully and satisfactorily in accordance with any Progress Schedule, or

(ii) a meritorious claim exists or will exist against the Corporation, the Consultant or the City arising out of the act, omission or negligence of the Consultant or the Consultant's breach of any provision of this Contract, then the Corporation may withhold payment of any amount otherwise due and payable to the Consultant hereunder. Any amount so withheld may be retained by the Corporation for such period as it may deem advisable to protect the Corporation and the City against any loss and may, after Notice to the Consultant, be applied in satisfaction of any claim herein described.

3.2.2 The Corporation shall not be deemed to have released the Consultant from any claim or liability, or to have waived any cause of action arising from any breach of this Contract by virtue of making payments to the Consultant.

3.2.3 Upon acceptance by the Consultant of the Final Payment to be paid pursuant to this Contract, the Consultant agrees that it shall be deemed to have fully released the Corporation and the City from any and all claims, demands and causes of action whatsoever which the Consultant has or may have against the Corporation or the City in connection with this Contract and, upon the request of the Corporation, shall execute a release to such effect.

3.2.4 All payments to the Consultant under this Contract shall be subject to all applicable Legal Requirements.

3.3 Electronic Funds Transfers. All payments due under this Contract in excess of \$100,000 shall be made by Electronic Funds Transfer. Upon execution of this Contract, and in no event later than its submission of its first Requisition, the Consultant shall complete and submit to the Corporation the "EFT Vendor Payment Enrollment Form" annexed to Appendix C (Payments). The Consultant shall update such information to the extent necessary for EFT payments to be made. The Corporation shall not be obligated to make any payment in excess of \$100,000 unless such information is provided and shall be entitled to rely solely on the information provided by the Consultant. Payments to the Corporation shall be made by check unless the Corporation Notifies the Consultant to make payments by EFT.

#### **ARTICLE 4** **SUSPENSION OR TERMINATION**

##### **4.1 Delay, Postponement or Suspension of Work.**

4.1.1 The Corporation shall have the right to delay, postpone or suspend the Services, or any Portion thereof, immediately or upon a specified date, for a period of not more than ninety (90) days, upon Notice to the Consultant, for any reason deemed by the Corporation to be in its interest. The Consultant and all of its Subcontractors and Representatives shall cease all Services, or any specified Portion thereof, immediately or as of the date specified in the Notice.

4.1.2 Any such delay, postponement or suspension shall not give rise to any cause of action for damages against the Corporation or the City, but the Term specified in Part I of this

Contract and the Consultant's time for performance of the Services shall be extended for the period of the delay, postponement or suspension.

4.1.3 In the event of any delays, postponements or suspensions, the Consultant shall resume the Services upon the date specified in the Notice or upon such other date as the Corporation may thereafter specify by Notice.

4.2 Termination for Convenience. The Corporation shall have the right to terminate the Services, or any Portion thereof, immediately or upon a specified date, upon Notice to the Consultant and for any reason deemed by the Corporation to be in its interest.

4.3 Defaults and Termination for Cause.

4.3.1 In addition to any other right that the Corporation may have, upon the occurrence of an Event of Default, the Corporation shall have the right to declare the Consultant in default and terminate this Contract, in whole or in part, for cause, by giving Notice to the Consultant of the cause and the date of such termination.

4.3.2 An Event of Default shall be deemed to have occurred if any of the following events has occurred, each an "Event of Default":

(i) The Consultant fails to assign workers, order materials or enter into subcontracts in a manner sufficient to permit completion of the Services, or any Portion thereof, within the time limits of the Progress Schedule or in accordance with any Progress Schedule approved by the Corporation;

(ii) The Consultant fails to complete the Services, or any Portion thereof, within the time limits provided in this Contract or any Progress Schedule approved by the Corporation;

(iii) The Consultant materially violates any term, covenant or provision of this Contract;

(iv) The Consultant materially fails to comply with any Applicable Requirements or any Applicable Agreements;

(v) Any representation or warranty made by the Consultant in Article 7 or in any other Article in this Contract shall prove to be untrue or be breached;

(vi) The Consultant becomes insolvent, files for bankruptcy or is adjudged a debtor in possession;

(vii) The Consultant voluntarily, or by operation of law, assigns, transfers, conveys or otherwise disposes of its interest in this Contract or its right to receive funds hereunder without the prior written consent of the Corporation;

(viii) The Consultant fails to comply with the M/WBE Requirements in Article 9;  
or

(ix) The Consultant or any of its officers, directors, partners, members, five (5%) percent shareholders, principals or other persons substantially involved in its activities, commits

any of the acts or omissions specified as the grounds for debarment in the City's *Procurement Policy Board Rules*.

4.4 Effects of Termination for Convenience or for Cause.

4.4.1 The Contract, or such portion of the Contract described in the Notice of termination, shall terminate as of the termination date set forth in the Notice given pursuant to Section 3.3.1, or immediately if no date is specified.

4.4.2 Upon receipt of a Notice of termination for cause or for convenience, the Consultant shall cease any or all Services, immediately or on the date specified, in accordance with the terms of the Notice.

4.4.3 Termination, whether for convenience or for cause, shall not give rise to any cause of action for damages against the Corporation or the City.

4.4.4 Within ten (10) days after the effective date of termination, the Consultant shall surrender and turn over to the Corporation all Work Product and any other materials related to this Contract requested by the Corporation including all materials, equipment and supplies purchased by the Consultant on behalf of the Corporation in connection with this Contract.

4.5 Payment Upon Termination.

4.5.1 Upon termination with or without cause, the Consultant shall promptly present to the Corporation a verified statement of all costs actually incurred prior to the date of termination, together with all documents in the Consultant's possession related thereto that the Corporation may demand in order to verify such statement of costs including canceled checks, subcontracts, and paid receipts and bills from Subcontractors. The Corporation will review the statement of costs and review or audit any supporting documentation provided by or in the Consultant's possession. The Corporation will Notify the Consultant of the results of such review or audit and the amount approved for payment.

4.5.2 If the termination was without cause, the Consultant shall receive such equitable compensation for such Services as shall, in the judgment of Director, have been satisfactorily performed by the Consultant up to the date of the termination, such compensation to be fixed by the Corporation after consultation with the Consultant, subject to any rights of audit provided herein. Such payment will be processed by the Corporation after Consultant provides all information and documentation required hereunder. Such payment shall constitute full and Final Payment to the Consultant.

4.5.3 If the termination was for cause, the Consultant shall receive such equitable compensation for such Services as shall, in the judgment of Director, have been satisfactorily performed by the Consultant up to the date of the termination, such compensation to be fixed by the Corporation, subject to any rights of audit provided herein, and subject to set-off by the Corporation for any additional expenses the Corporation incurs to complete the Project

satisfactorily, including the expenses of engaging another consultant and the costs set forth in Section 9.10(ii). The sum of (i) such additional expenses incurred to the Corporation for the completion of the Project, and (ii) payments made to the Consultant prior to the termination of the Contract shall hereafter be referred to as the "Contract Completion Costs".

(i) If the Contract Completion Costs exceed the Maximum Contract Price, Consultant shall pay such difference to the Corporation, as described in Section 3.5.4 below.

(ii) If the Contract Completion Costs are less than the Maximum Contract Price; provided, that the Consultant has provided all information and documentation required by this Section, the Corporation will pay to the Consultant, an amount equal to the lesser of (a) the difference between the Maximum Contract Price and the Contract Completion Costs, or (b) such amount, when added to sums previously paid to Consultant, equitably compensates Consultant for Services satisfactorily performed up to the date of termination. Such payment will be made as further described in Section 3.5.4 below.

4.5.4 If the termination was for cause, the Corporation will, upon full completion of the Project, deliver a written notice to the Consultant advising the Consultant that the Project has been completed and setting forth the Contract Completion Costs. If the Contract Completion Costs exceed the Maximum Contract Price, the Consultant shall promptly pay such difference to the Corporation upon receipt of such notice. If the Contract Completion Costs are less than the Maximum Contract Price, then, subject to (i) the Consultant's providing to the Corporation all information and documentation required by this Section, and (ii) any other applicable provisions of this Contract including Sections 3.5.5 and 3.5.6 hereof, the Corporation will pay the Consultant the amount described in Section 3.5.3(ii). Such payment shall constitute full and Final Payment to the Consultant.

4.5.5 The Corporation need not wait until the completion of the Services to seek the enforcement of its rights against the Consultant if there has been a termination for cause, but no monies shall be due or payable to the Consultant terminated for cause until the Services are completed.

4.5.6 The provisions of this Section 3.5 shall be in addition to any other rights the Corporation may have under this Contract, any Applicable Requirements, any Applicable Agreement, or otherwise, in law or in equity.

4.6 No Release. Termination of this Contract, whether by expiration of its Term or otherwise, shall not release the Consultant from any liability to the Corporation or from the Consultant's indemnification and other obligations under this Contract that have not been specifically terminated pursuant to this Article of the Contract.

**ARTICLE 5**  
**PERSONNEL AND SUBCONTRACTORS**

5.1 Personnel.

5.1.1 The Consultant shall employ at its own expense all personnel and retain all Subcontractors as may be required to perform the Services, and shall be solely responsible for their work, compensation, direction and conduct during the performance of this Contract. The personnel of the Consultant and any Subcontractor shall cooperate fully with the personnel of the Corporation including the Director, and, in the event any personnel of the Consultant or any Subcontractor fails to cooperate, the Consultant shall relieve them of their duties of performance under this Contract.

5.1.2 The Consultant shall submit to the Director, prior to performance of Services by such personnel, resumes of the Consultant's personnel and those of its Subcontractors' personnel who will perform the Services. The experience and training of such personnel is a material inducement for the Corporation to enter into this Contract and make payment for the Services. The Consultant and its Subcontractors are expected to use such personnel to perform the Services. If the Consultant or a Subcontractor proposes to substitute any other personnel for those heretofore identified, it shall assign persons with equivalent or better experience and training and shall submit the resumes of such proposed substitute personnel to the Director and obtain the Director's prior approval of the substitution. Notwithstanding anything contained herein to the contrary, all personnel furnished by the Consultant as required under this Contract shall be employees of the Consultant or approved Subcontractors of the Consultant and not employees or subcontractors of the Corporation or the City.

5.2 Subcontractors.

5.2.1 The Consultant is authorized to enter into subcontracts for specialized professional services as required for performance of the Services subject to the prior written approval of the Director as to the Subcontractor, the scope of services, compensation, and the Principal or other member(s) of the Consultant's staff responsible for supervising the performance of the Subcontractor's activities. The Consultant, and not the Corporation, is responsible for the Subcontractor's work, acts and omissions.

5.2.2 The Consultant shall pay any Subcontractors approved by the Corporation for work that has been satisfactorily performed no later than thirty (30) days from the date of Consultant's receipt of payments from the Corporation.

5.2.3 The Consultant is solely responsible for the payments to the Subcontractors. Upon receipt of evidence of Consultant default hereunder with respect to its obligations to make payments to its Subcontractors, the Corporation reserves the right, after three (3) calendar days prior Notice, to retain any money due the Consultant and pay directly for labor, materials, equipment, Services and all other obligations of the Consultant and to deduct the amount of any such direct payments from any payments or amounts then due or thereafter to become due to the Consultant.

5.2.4 The Consultant shall inform all Subcontractors fully of the terms and conditions of this Contract. All subcontracts shall provide that:

- (i) there is no privity of contract between the Subcontractor and the Corporation or the City;
- (ii) neither the Corporation nor the City will incur any liability by virtue of any act, omission, negligence, or obligation of the Subcontractor or the Consultant;
- (iii) the Subcontractor shall indemnify, defend and hold harmless the Corporation and the City, their agents, employees, members, directors, officials and officers against any and all claims, judgments or liabilities to which they may be subject (including any and all claims for injuries to persons (including death) and damage to property) because of any negligence or any fault or default of the Subcontractor, its agents, employees or subcontractors or the breach of the Subcontractor's obligations under the subcontract;
- (iv) the Subcontractor's Requisitions shall conform to the same requirements and include the representations, warranties and agreements set forth in Sections 2.1.2 and 2.1.3;
- (v) the "Events of Default" set forth in Section 3.3.2 as grounds for termination for cause shall be "Events of Default" and grounds for termination of the Subcontractor for cause;
- (vi) the subcontract may be assigned without the written consent of the Subcontractor to the City, NYCEDC or any other corporation, agency or instrumentality having authority to accept the assignment; and
- (vii) all work and services performed under the subcontract shall strictly comply with the requirements of this Contract.

If the Consultant fails to include the provisions set forth in this Section 4.2.4 in any subcontract, the Consultant hereby agrees to indemnify, defend and hold harmless the Corporation and the City and their Representatives against any and all claims, damages, awards, judgments, liabilities, expenses, fines, penalties, costs and/or fees incurred by or imposed upon the Corporation and the City and their Representatives, including reasonable fees, as a result of said failure.

5.2.5 The Consultant shall provide the Corporation with a list of all Subcontractors employed for the performance of the Services whose subcontract amount totals \$25,000 or more. The Consultant will furnish each such Subcontractor whose Subcontract amount totals less than \$100,000 with the Corporation's internal qualification and background investigation forms. The Consultant will furnish each such subcontractor whose subcontract amount totals \$100,000 or more with the Mayor's Office of Contracts Investigations Forms. These forms will be provided by the Corporation to the Consultant. The Consultant shall cause each such Subcontractor to fill out and complete the forms in a timely fashion but in no event later than the commencement of the Services performed by such Subcontractor pursuant to its subcontract.

5.3 Person in Charge. The Consultant has designated a Person-in-Charge who will have primary responsibility to perform and/or supervise and coordinate the performance of the Services. Substitution of said person shall be made only with the prior written approval of the

Director. Failure to make such person(s) available to the extent necessary to perform the Services skillfully and promptly shall be a material violation of the terms of this Contract.

## **ARTICLE 6**

### **DOCUMENTS AND MATERIALS**

6.1 **Approval.** All Work Product to be prepared or furnished by the Consultant pursuant to this Contract or publicizing the work of the Consultant hereunder must be:

- (i) approved in writing by the Director before any Work Product or publication as to the work of the Consultant shall be considered accepted and before any distribution;
- (ii) revised by the Consultant in accordance with the directions of the Director prior to approval; and
- (iii) prepared so as not to violate any provisions of law including the City Charter and the Administrative Code of the City.

6.2 **Work Product.**

6.2.1 All Work Product is the exclusive property of the Corporation. The Corporation may use any Work Product prepared by the Consultant in such manner, for such purposes, and as often as the Corporation may deem advisable, in whole, in part or in modified form, in all formats now known or hereafter to become known, without further employment of or additional compensation to the Consultant.

6.2.2 The Consultant shall not use, transmit, display, publish or otherwise license such Work Product without the Corporation's prior written consent.

6.2.3 The Work Product shall be considered "work-made-for-hire" within the meaning and purview of Section 101 of the United States Copyright Act, 17 U.S.C. § 101, and the Corporation is the copyright owner thereof and of all aspects, elements and components thereof in which copyright protection might subsist. To the extent that the Work Product does not qualify as a "work-made-for-hire", the Consultant hereby irrevocably transfers, assigns and conveys exclusive copyright ownership in and to the Work Product to the Corporation, free and clear of any liens, claims or other encumbrances. The Consultant shall retain no copyright or other intellectual property interest in the Work Product.

6.2.4 To the extent that the Work Product does not qualify as a "work-made-for hire", Consultant acknowledges the existence, if any, of its statutory moral rights as those rights are described in 17 U.S.C. § 106A(a), and knowingly executes this Contract on the following terms: (i) this waiver applies to the Work Product and to any promotional materials connected with the Work Product; (ii) the Consultant hereby expressly and forever waives any and all rights under 17 U.S.C. § 106A, and any rights arising under U.S. federal or state law or under the laws of any other country that conveys rights of the same nature as those conveyed by 17 U.S.C. § 106A, or any other type of moral right or *droit moral*.

6.2.5 The Consultant represents and warrants that, except for material which is in the public domain and non-original material that meets the requirements of Section 5.2.6, the Work Product:

- (i) shall be wholly original material not published elsewhere;
- (ii) shall not violate any copyright, trademark or other applicable law; and
- (iii) shall not, to the best of Consultant's knowledge, constitute a defamation or invasion of the right of privacy or publicity, or an infringement of any kind, of any rights of any third party.

6.2.6 The Consultant represents and warrants that to the extent that the Work Product incorporates non-original material, the Consultant shall obtain and provide the Corporation with copies of all necessary permissions and clearances, in writing, for the use of such non-original material under this Contract. Since some licenses for materials may be for a limited duration, the Consultant shall provide and/or specify the following to the Corporation with respect to all non-original materials included in its Work Product:

- (i) all information as to any durational limitations on use;
- (ii) any requirement that a notice be displayed in connection with display, including the specific owner of the rights to be credited, and any limitation on the use under the Consultant's license; and
- (iii) a statement certified by the Principal verifying the foregoing in the form annexed hereto as Appendix D (Form of Certified Statement).

Consultant will update the foregoing information and promptly provide such updates to the Corporation during the Term.

6.2.7 The Consultant acknowledges that the Corporation or the City may, in their sole discretion, register copyright in the Work Product with the U.S. Copyright Office or any other government agency authorized to grant registrations to copyright. The Consultant will cooperate in this effort, and agrees to provide any further documentation necessary to accomplish this.

6.2.8 The Consultant agrees that the Corporation and the City may use the Consultant's name and the names, biographies and likenesses of its members, in advertising and promotion related to the Work Product, and in any and all ancillary products related to the Services regardless of the format in which such use occurs.

6.2.9 Prior to acceptance of any Work Product by the Director, upon the Director's request and within a reasonable time following delivery of the Work Product, the Consultant shall submit revised Work Product incorporating any revisions, changes or alterations reasonably requested by the Director. If the original Work Product or the revised Work Product is not acceptable to the Director, the Corporation shall have the right to use the Work Product, to

prepare or finalize the Work Product or to commission a third party to do so without further employment of or compensation to the Consultant.

6.2.10 The Consultant acknowledges that the decision to accept the Work Product for use, incorporation, transmission, display or publication is within the sole discretion of the Director.

6.2.11 Consultant agrees that it will cooperate in providing any other documentation necessary to effectuate the intent of this Section of the Contract.

6.2.12 The Consultant shall not make any unauthorized use of copyrighted, trademarked or other protected materials or intellectual property and agrees to defend, indemnify and hold harmless the Corporation and the City and their respective officers, officials, agents, members, directors, and employees against any damage or liability arising out of the Consultant's infringement or unauthorized use of any such material or property.

### 6.3 Confidential Information.

6.3.1 The Consultant shall hold all Confidential Information provided by the Corporation in the strictest confidence. Consultant agrees to:

- (i) use the Confidential Information solely for evaluation and the performance of the Services under this Contract;
- (ii) not disclose the Confidential Information outside of its Subcontractors who have agreed in advance in writing to be bound by the terms of this Section 5.3 and its employees and to limit dissemination to only those Subcontractors and employees who have a need to know it in order to accomplish the Services;
- (iii) execute any confidentiality agreements required by any governmental or other entities or individuals which provide any information, records, data, materials, documents or electronic files to Consultant for use in performance of the Services; and
- (iv) not disclose the Confidential Information for three (3) years following Final Completion.

6.3.2 Consultant represents that it has adequate safeguards and procedures to protect the confidentiality of records and information and to limit dissemination only to authorized employees as necessary for the performance of the Services. All Confidential Information provided to Consultant shall remain the property of the Corporation.

6.3.3 Consultant agrees that money damages would not be a sufficient remedy in the event of any breach of this Section 5.3 and that, in addition to all other remedies which may be available, the Corporation shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach. Consultant shall defend, hold harmless and indemnify the Corporation for any and all claims, losses, expenses and/or damages arising out of breach of this Section 5.3 or unauthorized use of the Confidential Information.

**ARTICLE 7**  
**INDEMNIFICATION, CLAIMS AND INSURANCE**

7.1 **Indemnification of the Corporation and the City.**

7.1.1 The Consultant shall indemnify, defend and hold harmless the Corporation and the City, their agents and employees from any and all claims, judgments or liabilities to which they may be subject because of any negligence or any fault or default of the Consultant, its agents, employees or subcontractors or the breach of the Consultant's obligations under the Contract.

7.1.2 The Consultant shall be solely responsible for all injuries to persons, including death, or damage to property sustained during its operations and work under this Contract resulting from any negligence, fault or default of the Consultant or of its employees, authorized agents, servants, independent contractors or subcontractors retained by the Consultant pursuant to this Contract. The Consultant agrees to indemnify, defend and hold the Corporation and the City harmless from any liability upon any and all claims for injuries to persons (including death) and damage to property on account of negligence, fault or default of the Consultant, its employees, authorized agents, servants, independent contractors and subcontractors retained by the Consultant.

7.2 **Claims or Actions Against the Corporation.**

7.2.1 The Consultant shall look solely to the funds appropriated by the Corporation for this Contract for the satisfaction of any claim or cause of action the Consultant may have against the Corporation in connection with this Contract or the failure of the Corporation to perform any of its obligations hereunder. In no event shall the Corporation's aggregate liability hereunder in connection herewith or related to the performance of the Services exceed the Maximum Contract Price.

7.2.2 Upon acceptance by the Consultant of the Final Payment to be paid pursuant to this Contract, the Consultant agrees that it shall be deemed to have released the Corporation from any and all claims, causes of action, and liability to the Consultant, its Representatives, successors and assigns, in connection with this Contract or the performance of the Services.

7.2.3 No member, director, employee, servant, officer, agent or other person authorized to act on behalf of the Corporation shall have any personal liability in connection with this Contract or any failure of the Corporation to perform its obligations hereunder.

7.2.4 No person or entity shall have any right against the Director or any member, director, employee, servant or officer, agent of the City or the Corporation or other person authorized to act on their behalf or any claim against the City or the Corporation by reason of the failure or refusal to withhold money pursuant to Section 2.2.1 hereof.

7.2.5 The Consultant agrees that no cause of action against the Corporation in connection with this Contract or the Services shall lie or be maintained by the Consultant, its

successors or assigns unless such action is commenced within six months after (i) the termination of this Contract, or (ii) the accrual of the cause of action, whichever is earlier.

7.2.6 If any claim is made or any action brought relating to this Contract or the Services, whether or not the Consultant is a party, the Consultant shall diligently render to the Corporation any and all assistance that the Corporation may require of the Consultant, without compensation.

7.2.7 The provisions of this Section shall not waive, limit or in any way prejudice any other right of the Corporation or the City.

### 7.3 Insurance.

7.3.1 At all times during the performance of the work or Services in connection with this Contract or for such other time periods as the Corporation may require, the Consultant, at its sole cost and expense, shall purchase and maintain the insurance described in this Section 6.3 and the annexed Appendix E (Insurance Requirements), as may be applicable and as may be required by the Corporation.

7.3.2 Consultant shall purchase and maintain insurance with insurance companies that:

- (i) are acceptable to the Corporation;
- (ii) are rated A:X or better by A.M. Best Company; and
- (iii) are licensed to issue such insurance by the New York State Department of Insurance.

7.3.3 The insurance policies purchased and maintained by the Consultant shall:

- (i) be in form and substance satisfactory to the Corporation;
- (ii) be in the minimum face policy amounts set forth in Appendix E;
- (iii) list all individuals and entities identified in Appendix E as Additional Insureds except in the case of any workers' compensation, U.S. Harbor Workers' Long Shoremen's Compensation Act, automobile liability and professional liability policies required to be maintained hereunder; and
- (iv) contain the provisions set forth in Appendix E (Insurance Requirements).

7.3.4 Coverage for the individuals and entities identified in Appendix E (Insurance Requirements) as Additional Insureds shall be written into those policies set forth in Section 6.3.3(iii) as an endorsement at least as broad as ISO Form CG 20 10 (07/04 ed.).

7.3.5 The Consultant shall make and maintain timely premium payments for all policies required hereunder.

7.3.6 The Consultant shall require that each of its Subcontractors, prior to the commencement of their work, purchase and maintain, or be covered by, at no cost or expense to the Corporation or the City, the same types and amounts of insurance and meet all of the same requirements as required of the Consultant as set forth in this Article 6 and Appendix E (Insurance Requirements). The Consultant hereby covenants and warrants that its Subcontractors shall purchase and maintain the policies required by this Section in the amounts and for the periods required by this Section.

7.3.7 Prior to the commencement of the Services the Consultant shall forward to the Corporation's Contract Administration and Procurement Department at least three (3) original certificates of insurance for each policy required for compliance with this Contract, for itself and its Subcontractors substantially as set forth in Appendix E (Insurance Requirements). The Consultant shall also provide an original certificate of insurance to each of the Additional Insureds. All such original certificates of insurance shall be attached to a duly executed "Insurance Broker Certificate" in the form attached to Appendix E (Insurance Requirements)

7.3.8 The Consultant shall provide the Corporation and the Additional Insureds written confirmation of the renewal of any policy required hereunder at least thirty (30) days prior to the expiration of any such policy.

7.3.9 Unless otherwise agreed to in writing by the Corporation, the types of insurance to be purchased and maintained by the Consultant and its Subcontractors are as follows:

(i) Workers' Compensation, Disability Benefits, and Employer's Liability Insurance. The Consultant shall purchase and maintain and shall require each of its Subcontractors to purchase and maintain workers' compensation and disability benefits insurance in statutory amounts, and employer's liability insurance for all of its employees engaged in the Services in the amounts set forth in Appendix E (Insurance Requirements). The failure of the Consultant to comply with this Section 6.3.8(i) shall make this Contract voidable at the option of the Corporation.

(ii) Commercial General Liability. The Consultant shall purchase and maintain commercial general liability insurance, including owner's protective liability insurance, to protect the Corporation, the City and the Additional Insureds, the Consultant and its Subcontractors against any and all claims for property damage, personal injury and death arising out of the Services performed by the Consultant and its Subcontractors, and any work incidental thereto. The commercial general liability insurance policy must also include products and completed operations coverage, which shall include a provision that coverage will extend for a period of at least twelve (12) months from the date of final completion and acceptance by the Corporation of all of the Services. The certificate of insurance must indicate that such insurance is on a "per occurrence" and an aggregate basis. The commercial general liability policy shall be in a form at least as broad in coverage as ISO Form CG 00 01 (10/01). The additional insured protection must be as broad as coverage that would be afforded through use of ISO Forms CG 20 26, CG 20 33 and CG 20 37. The liability policy(ies) certificate of insurance must indicate cross-liability coverage providing severability of interests so that, except with respect to the limits of insurance, and any rights or duties specifically assigned to the first named insured, coverage will respond as

if separate policies were in force for each insured. If at any time the commercial general liability policy should be canceled, terminated, or modified so that the insurance is not in effect as above required, then the Consultant shall suspend performance of the Services if the Corporation shall so direct. If the Contract is so suspended, no extension of time shall be due on account thereof. If the Contract is not suspended, whether or not because of omission of the Corporation to order suspension, then the Corporation may, at its sole option, obtain insurance affording coverage equal to that required hereunder, the cost of such insurance to be payable by the Consultant to the Corporation.

(iii) Automobile Liability Insurance. The Consultant shall purchase and maintain automobile liability insurance covering all automobiles used in connection with the work or Services under this Contract whether owned, non-owned and/or hired automobiles.

(iv) Umbrella/Excess Liability Coverage. The Consultant shall purchase and maintain umbrella/excess liability insurance, specifically listing commercial general liability, comprehensive automobile liability and employer's liability as primary coverages, to protect the Corporation, the City, the Additional Insureds, the Consultant and its Subcontractors from any and all claims in excess of the underlying policy limits for such primary coverages. The certificate of insurance must indicate that such insurance afforded by this Section 6.3.9(iv) is on a "per occurrence" basis and an aggregate basis.

(v) If applicable, any additional policies described in Appendix E (Insurance Requirements).

7.3.10 As a condition precedent to payment of any amounts owing to the Consultant by the Corporation, the Consultant shall, unless otherwise expressly agreed to in writing by the Corporation, provide to the Corporation the original certificates of insurance required under this Contract and shall on demand provide true copies of policies and endorsements to policies showing compliance with the insurance requirements set forth in this Article 6 and Appendix E (Insurance Requirements).

7.3.11 The policies to be maintained by the Consultant hereunder that are subject to the Additional Insured requirements set forth in Section 6.3.3(iii) shall constitute the primary coverage for claims arising out of this Contract, and shall state that insurance, if any, carried by the Corporation, the City or the Additional Insureds will not be called upon to contribute to a loss that would otherwise be paid by the Consultant's insurer. The Consultant shall comply with the provisions of all policies required pursuant to this Contract, and shall give the insurer, the Corporation, the City and the Additional Insureds due and timely Notice of all claims, accidents and losses promptly upon its acquiring knowledge of the same.

7.3.12 The insurance provisions of this Article 6 shall be in addition to any rights that the Corporation, the City and the Additional Insureds may have under any hold harmless and indemnification provisions of this Contract and any other right provided by this Contract or by law. The Consultant shall not violate or permit to be violated any term or condition of the policies.

7.3.13 The Commercial General Liability and Umbrella Excess Liability Coverage policies must be endorsed to show that these primary and/or excess policies are to be considered primary and non-contributory. In addition, the Commercial General Liability and Umbrella/Excess Liability Coverage policies must provide that (i) the Additional Insured protection afforded under the Consultant's policies shall be primary and not on an excess or contributing basis with any policies which may be available to the Corporation, and (ii) that the Consultant's policies, primary and excess, must be exhausted before implicating any Corporation policy available.

7.3.14 In order to ensure vertical erosion of liability limits provided by the Consultant under this Contract, the Consultant agrees to permit the Corporation's staff and/or the Corporation's insurance consultants to review the Consultant's liability policy language for all liability policies and to endorse those policies to clarify the hierarchy of policies in the event of a claim.

## **ARTICLE 8**

### **REPRESENTATIONS AND WARRANTIES**

The Consultant represents and warrants that:

8.1 The Consultant is duly organized, validly existing and in good standing under the laws of its jurisdiction of formation, and has all requisite power and authority to authorize, execute, deliver and perform this Contract in accordance with its terms. The Consultant is authorized to do business in the City of New York.

8.2 The authorization, execution and delivery of this Contract, and compliance with the provisions hereof, do not and will not conflict with or constitute a violation of or default under any statute, indenture, mortgage, deed of trust or other agreement or instrument to which the Consultant is bound, or, to the knowledge of the Consultant, any order, rule or regulation of any court or governmental agency or body having jurisdiction over the Consultant or any of its activities or properties.

8.3 The Consultant has not been asked to pay, and has neither offered to pay, nor paid, any illegal consideration, whether monetary or otherwise, in connection with the procurement of this Contract.

8.4 The Consultant has not employed any person to solicit or procure this Contract, and has not made and shall not make, except to full-time employees of the Consultant, any payment or any agreement for the payment of any commission, percentage, brokerage, contingent fee or any other compensation in connection with the procurement of this Contract.

8.5 The Consultant has not acquired nor will it acquire any interest of any nature, direct or indirect (including any interest in land in an area related to the Services or any interest in any corporation, partnership, or other entity with any such interest), which would conflict in any manner or degree with the performance of the Services. The Consultant further represents and

covenants that in the performance of this Contract no person having any such conflicting interest shall be employed by the Consultant.

8.6 The Consultant is not in arrears to the City upon any debt, contract or taxes and is not a defaulter, as surety or otherwise, upon any obligation to the City, and has not been declared not responsible, or disqualified, by any agency of the City, nor is there any proceeding pending relating to the responsibility or qualification of the Consultant to receive public contracts. The Consultant represents that it has paid all applicable New York City income, excise and other taxes for all years it has conducted business activities in New York City.

8.7 All questionnaires and/or disclosure forms delivered by the Consultant and its Representatives to the Corporation to date are, to the best of the Consultant's knowledge, true and correct in all material respects; no material change has occurred in the circumstances of the Consultant, or any of its principals or affiliated persons or entities since the respective dates upon which such disclosure forms were executed that would otherwise require disclosure on such forms; and such disclosure forms do not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make any statement contained in such form not misleading.

## **ARTICLE 9**

### **APPLICABLE LAWS, RULES AND REGULATIONS**

9.1 New York Law Governs; New York Courts. The Contract shall be governed by and construed in accordance with the laws of the State of New York. Any and all claims asserted by or against the Corporation arising under this Contract or related hereto shall be heard and determined either in the Federal Courts, located in the City or in the New York State Courts located in the City and County of New York. To effect this agreement and intent, the Consultant agrees as follows:

9.1.1 If the Corporation initiates any action against the Consultant in Federal Court or in New York State Court, service of process may be made on the Consultant in person, wherever the Consultant may be found, or by registered mail addressed to the Consultant at its address as set forth in this Contract, or to such other address as the Consultant shall have provided to the Corporation in writing.

9.1.2 With respect to any action between the Corporation and the Consultant in New York State Court, the Consultant hereby expressly waives and relinquishes any rights it might otherwise have (i) to move to dismiss on grounds of forum non conveniens, and (ii) to move for a change of venue to a New York State Court outside New York County.

9.1.3 With respect to any action between the Corporation and the Consultant in Federal Court located in the City, the Consultant expressly waives and relinquishes any right it might otherwise have to move to transfer the action to a Federal Court outside the City.

9.1.4 If the Consultant commences any action against the Corporation in a court located other than in the City and State of New York, then, upon request of the Corporation, the

Consultant 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 pending will not or cannot transfer the action, the Consultant shall consent to dismiss such action without prejudice and may thereafter reinstitute the action in a court of competent jurisdiction in the City.

9.2 Modification Required by Law. The parties agree that each and every provision of federal or state or local law, rule, regulation or order, required to be inserted in this Contract, is deemed by this reference to be so inserted in its correct form, and upon the application of either party, this Contract shall be amended by the express insertion of any such provision not so inserted or so inserted incorrectly so as to comply strictly with the law, without prejudice to the rights of either party.

9.3 Compliance with the Law. The Consultant agrees that all acts to be performed by it in connection with this Contract shall be performed in strict conformity with all Legal Requirements, including without limitation, Applicable Requirements and Applicable Agreements. Failure by the Consultant to abide by such Legal Requirements shall be a material default under this Contract.

9.4 Equal Employment Opportunity/Employment Reports.

9.4.1 The Consultant shall comply with the applicable provisions of the Equal Employment and Affirmative Action Compliance for Non-Construction Contracts Addendum (the "Executive Order No. 50 (1980) Supply and Service Rider" or "E.O. 50") attached hereto as Appendix F and made a part hereof. Appendix F shall be attached to and made a part of any subcontract entered into by the Consultant pursuant to this Contract that exceeds \$100,000.

9.4.2 The Consultant covenants that it shall complete and submit and shall require all Subcontractors to complete and submit Employment Reports (as required by E.O. 50) to the Corporation, forms of which can be found at [www.nycedc.com](http://www.nycedc.com) in the section identified in Appendix G (E.O. 50 Employment Report Form and Instructions). If the Consultant cannot access or download forms of such Employment Reports, the Corporation may, upon request by the Consultant, send the Consultant copies of such forms.

9.4.3 Intentionally deleted.

9.4.4 The Consultant shall give consideration to employing City residents who are economically disadvantaged or are eligible under any applicable Legal Requirements including the Workforce Investment Act of 1998, and who have qualifications and skills commensurate with the requirements for the position available. To the greatest extent feasible, the Consultant shall give opportunities for training and employment to lower income persons in the City.

9.4.5 The provisions of this Section 8.4 shall be deemed supplementary to, and not in lieu of, or in substitution for, the applicable provisions of the New York State Labor Law relating to non-discrimination, and other applicable Legal Requirements.

9.5 Minimum Wages. Except for any employees whose prevailing wage is required to be fixed pursuant to Section 220, et seq. and Section 230, et seq. of the New York State Labor Law, which employees shall be paid such prevailing wage, all persons employed by the Consultant or any subcontractor in the manufacture or furnishing of the supplies, materials, or equipment, or the furnishing of work, labor or services, used in the performance of this Contract, shall be paid, without subsequent deduction or rebate unless expressly authorized by law, not less than the minimum hourly rate required by law, unless a higher amount is required pursuant to any other provision of this Contract.

9.6 No Tropical Hardwoods. Tropical hardwoods, as defined in Section 165 of the New York State Finance Law, shall not be used in the performance of this Contract except as expressly permitted by the foregoing provision of law.

9.7 Sales and Use Tax.

9.7.1 The Consultant acknowledges that the Corporation and the City are exempt from sales and use taxes imposed by Article 28 of the New York State Tax Law for purchases of tangible personal property, to the extent that such property is used to alter, maintain or improve, and becomes an integral component part of real property. This exemption does not apply to tools, machinery, equipment or other property leased by the Corporation's contractors and subcontractors or to supplies, materials or other property that are consumed in the construction or for any reason not incorporated into real property.

9.7.2 The Consultant shall inform its Subcontractors of this exemption and shall advise its Subcontractors to exclude sales and use taxes from their bids, as applicable.

9.8 MacBride Principles. The Consultant stipulates and agrees to comply with the MacBride Principles.

9.9 Iran Divestment Act. The Consultant shall comply with Section 165-a of the New York State Finance Law.

9.10 Doing Business Data Form Requirements.

9.10.1 Local Law No. 34 of 2007 amended the City's Campaign Finance Law and required the City to establish a database containing the names of any "person" that has "business with the city", as such terms are defined in LL 34. The Consultant shall comply with all requirements of LL 34 applicable to this Contract.

9.10.2 The Consultant shall complete and submit a Doing Business Data Form in the form which can be found at [www.nycedc.com](http://www.nycedc.com) prior to the Corporation's execution of this Contract. If the Consultant cannot access or download such form, the Corporation may, upon request by the Consultant, send the Consultant a copy of such form. The Consultant's failure to complete and submit a Doing Business Data Form and/or its submission of a form that is not accurate or complete may result in appropriate sanctions.

**ARTICLE 10**  
**M/WBE REQUIREMENTS**

10.1 M/WBE Program. Local Law No. 129 of 2005 added Section 6-129 to the Administrative Code of the City of New York. The local law creates a program for participation by minority and women-owned business enterprises (MBEs and WBEs) in City procurement. As stated in the Section 6-129, the intent of the program is to address the impact of discrimination on the City's procurement process, and to promote the public interest in avoiding fraud and favoritism in the procurement process, increasing Project for City business and lowering contract costs. The Corporation endorses these goals and participation by MBEs and WBEs in the provision of the Services. The following goals and provisions are integral to achieve these goals. The Consultant shall comply with all requirements of the Corporation's M/WBE Program applicable to this Contract.

10.2 Minority and Women -Owned Business Enterprises. In order to be considered M/WBEs for purposes of this Contract, the M/WBEs must have received certification as such by DSBS.

10.3 Target Subcontracting Percentage. The Target Subcontracting Percentage is the percentage of the total Contract that the Corporation anticipates that the Consultant would in the normal course of business award to one or more Subcontractors for amounts under \$1 million. The Target Subcontracting Percentage applicable to this Contract is set forth in Part I, Section 1.12.1. The Consultant shall be subject to said Target Subcontracting Percentage.

10.4 Participation Goal. The Participation Goal is expressed as a percentage that represents the total dollar value of subcontracts under this Contract for amounts under \$1 million to be performed by M/WBEs compared to the total dollar value of all subcontracts under this Contract for amounts under \$1 million. The Participation Goal applicable to this Contract is set forth in Part I, Section 1.12.2. The Consultant shall be subject to the Participation Goal, unless the Corporation grants a modification of this goal pursuant to Section 9.8.

10.5 Consultant's M/WBE Utilization Plan.

10.5.1 The M/WBE Utilization Plan for this Contract is annexed hereto as Appendix L (Doing Business Data Form).

10.5.2 In the event that the Corporation does not approve a Subcontractor proposed by the Consultant, the Consultant shall have a reasonable time to propose alternate Subcontractors.

10.5.3 If this Contract is extended beyond the Initial Term, the Consultant shall submit an updated M/WBE Utilization Plan to the Corporation's Chief Contracting Officer 30 days prior to the anniversary of the Commencement Date in each subsequent year during the Term as extended. The Consultant's updated M/WBE Plan shall be subject to the Corporation's approval and must set forth:

- (i) the percentage of work the Consultant intends to subcontract;

(ii) the percentage of work the Consultant intends to award to Subcontractors for amounts under \$1 million;

(iii) the identity of all proposed Subcontractors to which the Consultant intends to award subcontracts;

(iv) in cases where the Consultant intends to award subcontracts for amounts under \$1 million, a description of the type and dollar value of work designated for participation by MBEs and/or WBEs; and

(v) the time frames in which such work by MBEs and/or WBEs is scheduled to begin and end.

#### 10.6 M/WBE Compliance Reports.

10.6.1 The Consultant shall provide the Corporation with written statements ("M/WBE Compliance Reports"), certified under penalty of perjury, reporting the status of the Consultant's compliance with its M/WBE Utilization Plan as set forth in this Section 9.6.

10.6.2 The Consultant shall submit a M/WBE Compliance Report to the Corporation:

- (i) with each Requisition for payment; and/or
- (ii) on a periodic basis as the Corporation may require.

10.6.3 Each M/WBE Compliance Report shall set forth the following for the period covered by the report:

- (i) the total amount paid to Subcontractors (including Subcontractors that are not MBEs or WBEs);
- (ii) the names, addresses and contact numbers of each MBE or WBE hired as a Subcontractor pursuant to such plan as well as the dates and amounts paid to each MBE or WBE.

10.6.4 In addition to the foregoing, the Consultant shall submit a final, cumulative M/WBE Compliance Report to the Corporation with its Requisition for Final Payment. The Consultant shall set forth in such final report the information required by Section 9.6.3 in connection with all Services rendered by the Consultant and its Subcontractors during the entire Contract Term.

10.7 Change Orders. If the Consultant requests a change order having a value that exceeds 10 percent of the Contract, the Corporation will establish an M/WBE participation goal for the work to be performed pursuant to the change order.

10.8 Modification of the Consultant's M/WBE Utilization Plan. The Consultant may request modification of its M/WBE Utilization Plan after the award of the Contract. The Corporation may grant such request if it determines that the Consultant has established, with appropriate

documentary and other evidence, that the Consultant has made all reasonable, good faith efforts to meet the Participation Goal set for the Contract. In making such determination, the Corporation will consider, along with any other relevant factors, evidence submitted by the Consultant showing that the Consultant has, without limitation, and as applicable:

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

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

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

(iv) made efforts to identify portions of the work that could be substituted for portions originally designated for participation by MBEs and/or WBEs in the Consultant's M/WBE Utilization Plan, and for which the Consultant claims an inability to retain MBEs or WBEs;

(v) held meetings with MBEs and/or WBEs prior to the date its proposal was due, for the purpose of explaining in detail the scope and requirements of the work for which its proposals was solicited;

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

(vii) submitted timely written requests for assistance to the Corporation's M/WBE liaison officer and to DSBS;

(viii) submitted a statement as to how recommendations made by DSBS and the Corporation were acted upon and an explanation of why action upon such recommendations did not lead to the desired level of participation of MBEs and/or WBEs.

10.8.2 The Corporation's M/WBE Director and Chief Contracting Officer will provide written notice to the Consultant of the determination.

10.9 Compliance Audits. This Contract may be audited by the Corporation, DSBS and the City Comptroller to determine the Consultant's compliance with the requirements of the Corporation's M/WBE Program and the Consultant's M/WBE Utilization Plan.

10.10 Enforcement. In the event the Corporation determines that the Consultant or its Subcontractors have violated the requirements of the Corporation's M/WBE Program or the M/WBE Utilization Plan including a determination that the Consultant has made payments to or awarded work to M/WBE Subcontractors in amounts less than the amounts specified in the Consultant's M/WBE Utilization Plan (unless the Corporation has permitted the Consultant to modify the Consultant's M/WBE Utilization Plan in accordance with Section 9.8), the Corporation may:

- (i) terminate the Contract;
- (ii) assess actual and consequential damages for and/or exercise its right to set off any additional expenses the Corporation incurs to complete the Project satisfactorily in accordance with the Corporation's M/WBE Program and in order to meet the Participation Goal, if any, set for the Contract including the actual and administrative costs of:
  - (a) meeting the Participation Goal through additional procurements;
  - (b) payments made to any other consultant retained to complete the Services; and
  - (c) investigation and enforcement;
- (iii) remove the Consultant from the list of qualified consultants maintained by the Corporation and/or file an advice of caution form for inclusion in VENDEX as caution data; or
- (iv) assert any other right or remedy it has under the Contract.

10.11 Statements. Statements made in any instrument submitted to the Corporation in connection with the Corporation's M/WBE Program shall be submitted under penalty of perjury and any false or misleading statement or omission shall be grounds for the application of any applicable criminal and/or civil penalties for perjury.

10.12 Evaluations. The Consultant's record in implementing its M/WBE Utilization Plan shall be a factor in the evaluation of its performance.

## **ARTICLE 11**

### **MISCELLANEOUS**

11.1 Consultant as Independent Contractor. Notwithstanding anything contained herein to the contrary including the provisions of Section 5.2 hereof, it is specifically understood and agreed that in the performance of the terms, covenants and conditions of this Contract, the Consultant and its Representatives shall not be deemed to be acting as agents, servants or employees of the Corporation or the City by virtue of this Contract or by virtue of any approval, permit, license, grant, right, or other authorization given by the City or the Corporation or any of their Representatives in connection with this Contract, but shall be deemed to be independent contractors performing work or professional services for the Corporation, and shall be deemed solely responsible for all acts taken by them pursuant to this Contract.

11.2 Assignment. This Contract is intended to secure the Services of the Consultant or a competent Representative or Representatives of the Consultant approved by the Director. The Consultant shall not assign, convey, subcontract, or transfer this Contract or the Consultant's rights hereunder without the written consent of the Director, which Consent shall be manifested by Notice. The Corporation shall have the right to assign, convey, subcontract or transfer this Contract or the Corporation's rights hereunder without the written consent of the Consultant to

the City or any other corporation, agency or instrumentality having authority to accept the assignment.

11.3 Right to Inspect. The Corporation, the City Comptroller, the Inspectors and any other individual or entity authorized under any Legal Requirement shall have the right on reasonable Notice to inspect the operations and records of the Consultant and its Subcontractors relating to this Contract.

11.4 Maintenance of Records. In order to facilitate any audit provided herein, the Consultant agrees to maintain accurate, readily auditable records and accounts with supporting documentation in accordance with generally accepted accounting principles of the Services performed by it, its employees, and its Subcontractors under this Contract and of all financial accounts and transactions maintained or undertaken in connection with this Contract, including, but not limited to, time cards and records reflecting the nature of the work performed and time consumed, bank statements, cancelled checks, bills and receipts, Requisitions, and deposit slips, and to make such records available for inspection and audit in the City by the Corporation, the City, the Inspectors and any other individual or entity authorized under any Applicable Requirements or Applicable Agreement upon reasonable Notice. Said records shall be maintained for a period of six years after termination of this Contract.

11.5 Modification in Writing. Subject to Section 10.13, no modification, amendment, waiver or release of any provision of this Contract or of any right, obligation, claim or cause of action arising hereunder shall be valid or binding for any purpose unless in writing and duly executed by the party against whom the same is asserted.

11.6 Captions. The tables of contents and captions of this Contract are for convenience of reference only and in no way define, limit or describe the scope or intent of the Contract or in any way affect this Contract.

11.7 Completeness. This Contract 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 Contract shall be deemed to exist or to bind either of the parties hereto.

11.8 Severability. If any clause, provision or section of this Agreement be ruled invalid by any court of competent jurisdiction, the invalidity of such clause, provision or section shall not affect any of the remaining provisions hereof.

11.9 Notices.

11.9.1 Each Notice, demand, request or other communication in connection with this Contract shall be either: (i) served in person, with delivery of service acknowledged in writing by the party receiving the same; (ii) sent by nationally known overnight delivery service or telefax; or (iii) deposited in the U.S. mails, first class mail, postage prepaid, and addressed to the respective address herein set forth in Part I, Section 3 or to such other address as may be specified by Notice sent in accordance herewith.

11.9.2 Every Notice hereunder shall be deemed to have been given: (i) at the date of receipt by the respective party in the case of personal delivery, overnight delivery or telefax and (ii) five (5) Business Days after the date of deposit in the first class U.S. mails.

11.10 Non-Waiver. Failure of the Corporation or its Representatives to enforce or otherwise require the performance of any of the terms and conditions of this Contract, at the time or in the manner that said terms and conditions are set forth herein, shall not be deemed a waiver of any such terms or conditions by the Corporation and the same may be selectively enforced or raised as a basis of a claim or cause of action at the option of the Corporation.

11.11 Refusal to Testify.

11.11.1 The Consultant agrees to cooperate fully and faithfully with any investigation, audit or inquiry conducted by a State or 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.

11.11.2 If:

(i) any person who has been advised that her or his statement, and any information from such statement, will not be used against her or him 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 PANYNJ, or the Corporation, or any local development corporation within the City, or any public benefit corporation organized under the laws of the State of New York, or

(ii) any person refuses to testify for a reason other than the assertion of her or his 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 the Corporation, or any local development corporation within the City,

(iii) then the commissioner or agency head (each of which is hereinafter referred to as the "Commissioner") whose agency is a party in interest to the transaction, submitted bid, submitted proposal, contract, lease, permit, or license involved in such investigation, audit or inquiry shall convene a hearing, upon not 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.

11.11.3 If any non-governmental party to the hearing requests an adjournment, the Commissioner who convened the hearing or the Corporation may, upon the Commissioner granting the adjournment, suspend any contract, lease, permit, or license pending the final determination pursuant to subsection 10.11.5 below without the City or the Corporation incurring any penalty or damages for delay or otherwise.

11.11.4 The Corporation or the City may impose the following penalties after a final determination by the Commissioner that penalties should attach for the failure of a person to testify:

(i) the disqualification for a period not to exceed five (5) years from the date of an adverse determination of 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 or the Corporation, as the case may be; and/or

(ii) the cancellation or termination of any and all such existing City or Corporation contracts, leases, permits or licenses that the refusal to testify concerns and that have not been assigned as permitted under this Contract, 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 or the Corporation incurring any penalty or damages on account of such cancellation or termination; monies lawfully due for goods delivered, work done, rentals, or fees accrued prior to the cancellation or termination shall be paid by the City or the Corporation, as the case may be.

11.11.5 The Commissioner shall consider and address, in reaching her or his determination, and the Corporation and the Commissioner shall consider and address, in assessing an appropriate penalty, the factors in subparagraphs (i) and (ii) below. The Commissioner and the Corporation may also consider, if relevant and appropriate, the criteria established in subparagraphs (iii) and (iv) below in addition to any other information which may be relevant and appropriate:

(i) The entity'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.

(ii) 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.

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

(iv) 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 subsection 10.11.4 above); provided, that the party or entity has given actual notice to the Commissioner upon the acquisition of the interest, or at the hearing called for in subsection 10.11.2(2) 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.

11.11.6 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.

11.11.7 The term “entity” as used herein shall mean any firm, partnership, corporation, association, joint venture or person that receives monies, benefits, licenses, leases or permits from or through the City or otherwise transacts business with the City.

11.11.8 The term “member” as used herein shall mean any person associated with another person or entity as a partner, director, officer, principal or employee.

11.11.9 The term “person” as used herein shall mean any natural person doing business alone or associated with another person or entity as a partner, director, officer, principal or employee.

11.12 No Political Activity. The Consultant agrees that there shall be no political activity or any activity to further the election or defeat of any candidate for public, political or party office as a part of or in connection with this Contract, nor shall any of the funds provided under this Contract be used for such purposes.

11.13 Right to Amend. Upon request by the Corporation, from time to time the Consultant and the Corporation shall enter into amendments or other modifications to the terms of this Contract as necessary or appropriate to give full effect to all Legal Requirements, including any requirements arising in connection with the CDBG-DR Rules or the use of CDBG-DR Funds as the funding source for this Contract as provided in Part I, Section 4. In connection with the foregoing, upon receipt of any such request from the Corporation, the Consultant shall cooperate with the Corporation in good faith for the purpose of promptly negotiating and entering into any such amendments or other modifications.

**NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION  
CONSULTANT CONTRACT  
FOR THE PROVISION OF CONSULTING SERVICES  
NYCEDC CONTRACT NO. 5575-0001  
PROJECT CODE NO. 5575**

**PART III**

**APPENDICES**

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**APPENDIX A**

**DEFINITIONS AND INTERPRETATION**

**Definitions**

The defined terms listed below shall have the following corresponding meanings in the annexed Contract (as defined herein) unless otherwise defined or the context otherwise requires.

“Additional Insured”	All individuals and entities listed as such in <u>Appendix E</u> (Insurance Requirements)
“Allowable Additional Costs”	As defined in <u>Appendix B</u> (Scope of Services)
“Applicable Agreements”	Various governing agreements related to the Funds, the Project and/or this Contract, including any specific “Applicable Agreements” identified in <u>Part I</u> or set forth in <u>Appendix M</u> (Applicable Agreements), and any other governing agreement or MOU with the City, State and/or federal governments, or any agency thereof
“Applicable Requirements”	Any and all federal, state and local laws, statutes, rules, regulations and orders applicable to this Contract, the Funds or the Project, including any specific “Applicable Requirements” identified in <u>Part I</u>
“Art Commission”	Art Commission of the City of New York
“Business Day”	Any day other than a Saturday, Sunday, legal holiday, a day on which the City is closed for business, or a day on which banking institutions in the City are authorized by law or executive order to close.
“CDBG-DR Funds”	As defined in the Scope of Services
“CDBG-DR Rules”	As defined in the Scope of Services
“City”	The City of New York
“City Contract”	The Amended and Restated Contract between the City and the Corporation, dated as of June 30, 2005 and the Amended and Restated Maritime Contract between the City and the Corporation, dated as of June 30, 2005, as applicable, as each may be amended, restated and/or revised from time to time
“City Comptroller”	Comptroller of the City or his or her designee

“Commencement Date”	The date upon which the Consultant shall commence the Services as stated in <u>Part I, Section 1.4</u>
“Comptroller General”	The United States Comptroller General
“Project”	As identified in <u>Part I, Section 1.7</u> , and as more fully described in the Scope of Services.
“Confidential Information”	Any and all information, records, data, materials, documents, electronic files or Work Product provided by NYCEDC and/or the City or any of its agencies to the Consultant except that which (i) shall have otherwise become publicly available through no fault of Consultant or its Representatives; (ii) becomes available to the Consultant on a nonconfidential basis from a source other than NYCEDC, the City or any of its agencies; or (iii) is known by the Consultant prior to its receipt from NYCEDC, the City or any of its agencies without any obligations of confidentiality with respect thereto
“Consultant”	The entity or person contracted by the Corporation to perform the Services pursuant to this Contract, as identified in <u>Part I, Section 2.3</u>
“Consultant’s Underlying Intellectual Property”	The Consultant’s analytical concepts, approaches, methodologies, or formats developed by the Consultant’s staff, and to other materials not prepared for delivery to the Corporation and also including any derivatives, improvements, enhancements or extensions of the Consultant’s Underlying Intellectual Property conceived, reduced to practice, or developed during the term of this Contract that are not uniquely applicable to the Corporation
“Contract”	The Contract between the Consultant and the Corporation to which this <u>Appendix A</u> is annexed, as defined in <u>Part I, Section 1.1</u>
“Contract Completion Costs”	As defined in <u>Section 3.5.3</u>
“Contract Date”	The date of this Contract, as stated in <u>Part I, Section 1.3</u>
“Corporation”	New York City Economic Development Corporation, a not-for-profit corporation organized pursuant to the Not-for-Profit Corporation Law of the State of New York.
“CPL”	Contractor Pollution Liability Insurance

“DBEs”	Disadvantaged Business Enterprises
“Director”	The person set forth in <u>Part I, Section 2.2</u> , or such other person as may be subsequently designated by the Corporation by Notice
“Disability Benefit”	A type of insurance to be purchased and maintained by the Consultant and its Subcontractors, in statutory amounts, for all of its employees engaged in the Services
“DCAS”	New York City Department of Citywide Administrative Services
“DCP”	New York City Department of City Planning
“DEP”	New York City Department of Environmental Protection
“Division”	Division of Labor Services of DSBS
“DOB”	New York City Department of Buildings
“Doing Business Data Form”	The form annexed at <u>Appendix M</u> (Doing Business Data Form) to be completed by the Consultant and submitted to the Corporation pursuant to LL 34
“DOS”	New York City Department of Sanitation
“DOT”	New York City Department of Transportation
“DPR”	New York City Department of Parks and Recreation
“DSBS”	New York City Department of Small Business Services
“Electronic Funds Transfer (EFT)”	Any transfer of funds, other than a transaction originated by check, draft or similar paper instrument, that is initiated through an electronic terminal, telephonic instrument or computer or magnetic tape so as to order, instruct, or authorized a financial institution to debit or credit an account
“E.O. 50”	Executive Order No. 50 (1980), as amended or revised from time to time
“Employment Report”	Required by Executive Order 50, these reports are to be completed and submitted to the Corporation in the form annexed to this Contract as <u>Appendix G</u> (E.O. 50 Employment Report Form and Instructions)

“Event of Default”	As described in <u>Part II, Section 3.3.2</u>
“Extra Work”	A significant alteration to the work or Services that the Consultant has been directed to perform by the Director as described in <u>Part II, Section 1.5.2</u>
“FDNY”	New York City Fire Department
“Federal Courts”	United States Federal Courts located in New York City
“FHWA”	United States Federal Highway Administration
“Final Completion”	The performance of all Services contemplated in this Contract to the satisfaction of the Director
“Final Payment ”	The last payment by the Corporation to the Consultant under the Contract upon Final Completion or as provided in <u>Part II, Sections 3.5.2 and 3.5.4</u> , subject to any Retainage
“Force Majeure”	Any of the following acts and events that occur without the negligence or fault, and beyond the reasonable control, of Consultant and that of any of its successors, heirs, assigns, and/or Representatives and of which Consultant has given the Corporation express written notice within three (3) days after the commencement of the alleged cause of the delay, hindrance, or obstruction: governmental preemption in connection with a national emergency, war or act of war, insurrection, riot, act of public enemy, terrorist acts, labor disputes, accidents, mechanical failure and acts of God (including fire, flood or abnormal adverse weather conditions not reasonably anticipatable)
“FTA”	United States Federal Transit Administration
“Funding Agencies”	All federal, State or local agencies or entities that are the source of the Funds including any specific “Funding Agencies” identified in <u>Part I</u>
“Funds”	All funds from the federal, State or local sources to be applied to payments for Services under this Contract including any specific “Funds” identified in <u>Part I</u>
“HUD”	United States Department of Housing and Urban Development.

“IDA”	New York City Industrial Development Agency, a corporate governmental agency constituting a body corporate and politic and a public benefit corporation organized pursuant to Article 18-A of the General Municipal Law of the State of New York
“Industry Best Practices”	Those practices, methods, techniques, standards and procedures prevailing during the Term of the Contract which are generally applied or accepted nationally for use by top-tier, first class and high quality consulting firms and/or other service providers in connection with the performance of services similar to the Services in a professional, environmentally sustainable, economic and efficient manner.
“Inspectors”	All individuals or entities specifically identified as “Inspectors” in <u>Part I</u> , if any
“Insurer”	Any insurance company retained by the Consultant pursuant to <u>Part II, Section 6.3.2</u>
“Landmarks Preservation Commission”	The City of New York Landmarks Preservation Commission
“Legal Requirements”	All applicable laws, rules, regulations, ordinances, codes and orders of all federal, state and local governmental authorities, agencies, departments or bureaus having jurisdiction over and which affect the work and/or Services under this Contract including all Applicable Agreements and all Applicable Requirements
“Local Law 34 (LL 34) ”	Local Law No. 34 of 2007, as it may be amended or superseded
“LPC”	City of New York Landmarks Preservation Commission
“MacBride Principles”	Those principles relating to nondiscrimination in employment and freedom of workplace opportunities that requires employers doing business in Northern Ireland to comply with specific terms set forth in Section 6-115.1 of the City’s Administrative Code
“Maximum Contract Price”	The maximum amount that may be paid for the Services under the Contract, as stated in <u>Part I, Section 1.6</u>

“Maximum Payment”	The maximum amount payable for each Portion of the Services during a billing period
“MBEs”	Minority-owned Business Enterprises
“M/WBE Compliance Reports”	As described in <u>Part II, Section 9.5</u>
“M/WBEs”	MBEs and WBEs, collectively
“M/WBE Utilization Plan”	As described in <u>Part II, Section 9.5</u>
“MOU”	Memorandum of Understanding
“New York State Courts”	Courts of the State of New York in the City and County of New York
“Notice”	Any written notice, demand, request, instruction, advice, directive or other communication in connection with this Contract to be delivered to a party designated in <u>Part I, Section 3</u> , for the receipt of notice in the manner set forth in <u>Part II, Section 10.9.1</u>
“Notice to Proceed”	Written Notice from the Corporation to the Consultant to proceed with the Services or any portion thereof
“Notify”	To give a Notice pursuant to <u>Part II, Section 10.9.1</u>
“NYCDEP”	New York City Department of Environmental Protection
“NYCEDC”	The Corporation
“NYCTA”	New York City Transit Authority
“NYPD”	New York City Police Department
“NYSDEC”	New York State Department of Environmental Conservation
“NYSDOH”	New York State Department of Health
“NYSDOS”	New York State Department of State
“NYSDOT”	New York State Department of Transportation
“OMB”	New York City Office of Management and Budget
“OPRHP”	New York State Office of Parks, Recreation and Historic Preservation