[Please note that before including the below text in a solicitation, you must determine whether the 30% overall goal for participation of minority- and women-owned business enterprises should be revised to more closely reflect the findings of the disparity study, which found the overall availability of minority- and women-owned business enterprises in the market place to be approximately 30%, and you must delete this note! In order for goals under 30% to be placed on a contract, a waiver must first be obtained from the OBD.]

**DOCUMENT 007307**

**SUPPLEMENTARY CONDITIONS – MWBE-EEO**

**CONTRACTOR REQUIREMENTS AND PROCEDURES FOR PARTICIPATION BY New York STATE CERTIFIED MINORITY- AND WOMEN-OWNED BUSINESS ENTERPRISES AND EQUAL EMPLOYMENT OPPORTUNITIES FOR MINORITY GROUP MEMBERS AND WOMEN**

This supplement modifies the General Conditions. Where any part of the General Conditions is modified by this supplement, the unaltered provisions of that part shall remain in effect.

**ARTICLE 16 - REQUIREMENTS FOR UTILIZATION OF MINORITY- AND WOMEN-OWNED BUSINESS ENTERPRISES (MWBEs)**

Add the following:

16.6 Participation by Minority Group Members and Women with Respect to State Contracts: Requirements and Procedures: General Provisions:

16.6.1 OGS is required to implement the provisions of New York State Executive Law Article 15-A and 5 NYCRR Parts 140-145 (“MWBE Regulations”) for all State contracts as defined therein, with a value (1) in excess of $25,000 for labor, services, equipment, materials, or any combination of the foregoing or (2) in excess of $100,000 for real property renovations and construction (the “Work”).

16.6.2 The Contractor agrees, in addition to any other nondiscrimination provision of the Contract and at no additional cost to OGS, to fully comply and cooperate with OGS in the implementation of New York State Executive Law Article 15-A and the regulations promulgated thereunder. These requirements include equal employment opportunities for minority group members and women (“EEO”) and contracting opportunities for MWBEs. Contractor’s demonstration of “good faith efforts” pursuant to 5 NYCRR §142.8 shall be a part of these requirements. These provisions shall be deemed supplementary to, and not in lieu of, the nondiscrimination provisions required by New York State Executive Law Article 15 (the “Human Rights Law”) or other applicable federal, State or local laws.

16.6.3 Failure to comply with all of the requirements herein may result in a finding of non-responsiveness, a finding of non-responsibility, a breach of contract, leading to the withholding of funds, liquidated damages pursuant to Section 27.9 herein, and/or enforcement proceedings as allowed by the Contract and applicable law.

INSERT overall MWBE goals and the MBE AND WBE percentage GOALS, respectively, IN SUBPARAGRAPH 16.7.1 below.

16.7 Contract Goals:

16.7.1 OGS hereby establishes an overall goal of \_\_% for MWBE participation, \_\_% for Minority-Owned Business Enterprises (“MBE”) participation and \_\_% for Women-Owned Business Enterprises (“WBE”) participation (based on the current availability of MBEs and WBEs). The total contract goal can be obtained by utilizing any combination of MBE and /or WBE participation for subcontracting and supplies acquired under this Contract.

16.7.2 For purposes of providing meaningful participation by MWBEs on the Contract and achieving the Contract Goals established in Section 16.7.1 hereof, Contractor should reference the directory of NYS Certified MBWEs found at the following internet address:

 [**https://ny.newnycontracts.com/FrontEnd/VendorSearchPublic.asp?TN=ny&XID=2528**](https://ny.newnycontracts.com/FrontEnd/VendorSearchPublic.asp?TN=ny&XID=2528).

The MWBE Regulations are located at 5 NYCRR §§ 140 – 145. Additionally, Contractor is encouraged to contact the Division of Minority and Women’s Business Development (518) 292-5250; (212) 803-2414; or (716) 846-8200) to discuss additional methods of maximizing participation by MWBEs on the Contract.

16.7.3 Pursuant to 5 NYCRR §142.8, Contractor must document “good faith efforts” to provide meaningful participation by MWBEs as subcontractors or suppliers in the performance of the Contract.

16.7.4 In accordance with Executive Law Section 316-a and 5 NYCRR §142.13, the Contractor acknowledges that if it is found to have willfully and intentionally failed to comply with the MWBE participation goals set forth in the Contract, such a finding constitutes a breach of contract and the Contractor shall be liable to OGS for liquidated or other appropriate damages, as set forth herein.

16.7.5 In accordance with 5 NYCRR § 142.8, Contractors must document their good faith efforts toward utilizing MWBEs on the Contract. Evidence of required good faith efforts shall include, but not be limited to, the following:

a. A list of the general circulation, trade, and MWBE-oriented publications and dates of publications in which the Contractor solicited the participation of certified MWBEs as subcontractors/suppliers, copies of such solicitations, and any responses thereto.

b. A list of certified MWBEs appearing in the Empire State Development (“ESD”) MWBE directory that were solicited for this Contract. Provide proof of dates or copies of the solicitations and copies of the responses made by the certified MWBEs. Describe specific reasons that responding certified MWBEs were not selected.

c. Descriptions of the Contract documents/plans/specifications made available to certified MWBEs by the Contractor when soliciting their participation and steps taken to structure the scope of work for the purpose of subcontracting with, or obtaining supplies from, certified MWBEs.

d. A description of the negotiations between the Contractor and certified MWBEs for the purposes of complying with the MWBE goals of this Contract.

e. Dates of any pre-bid, pre-award, or other meetings attended by Contractor, if any, scheduled by OGS with certified MWBEs whom OGS determined were capable of fulfilling the MWBE goals set in the Contract.

f. Other information deemed relevant to the request.

16.7.6 The goal for participation in the conduct of the Work is expressed as a percentage equal to the dollar value of the Work performed divided by the Contract Sum. Where the cost to the Contractor of a single item of equipment exceeds twenty-five percent (25%) of the total contract price and where the Contractor has shown good faith efforts to obtain such equipment from MWBE manufacturers and suppliers, and was unsuccessful in obtaining the equipment from an MWBE, the cost of such equipment shall be deducted from the contract sum prior to computing the MWBE participation.

16.7.7 The MWBE utilization credit for Work performed by MWBEs will be determined as follows:

a. Where an MWBE is not the Contractor - MWBE utilization credit will vary depending on how the MWBE performs Work under the Contract, as follows:

 i. Where the MWBE performs Work under the Contract as a subcontractor, MBE or WBE utilization credit will be 100% of the dollar value of the Work performed by the MBE or WBE.

 ii. Where the MWBE performs Work under the Contract as a manufacturer, MBE or WBE utilization credit will be 100% of the dollar value of the Work performed by the MBE or WBE.

 iii. Where the MWBE assists in the performance of the Work under the Contract as a supplier, MBE or WBE utilization credit will be 60% of the dollar value of the Work performed by the MBE or WBE.

 iv. Where the MWBE assists in the performance of the Work under the Contract as a broker, MBE or WBE utilization credit will be equal to the percentage of the commission, or the mark-up percentage, of the items brokered, applied to the dollar value of the Work performed by the MBE or WBE.

b. Where the Contractor is a joint venture including one or more MWBEs as joint venturers, MBE or WBE utilization credit will be the Contract Sum multiplied by the percentage of the joint venture's profits (or losses) that are to accrue to the MWBE joint venturer(s) under the joint venture agreement.

c. Where any MWBE is the Contractor or where the Contractor is a joint venture consisting entirely of MWBEs, and the Contractor can document good faith efforts to subcontract to MWBE subcontractors and/or suppliers - the Contract Sum.

Add the following articles:

## ARTICLE 26 – EQUAL EMPLOYMENT OPPORTUNITY (EEO)

26.1 The provisions of Article 15-A of the Executive Law and the rules and regulations promulgated thereunder pertaining to equal employment opportunities for minority group members and women shall apply to all Contractors, and any subcontractors, awarded a subcontract over $25,000 for labor, services, including legal, financial and other professional services, travel, supplies, equipment, materials, or any combination of the foregoing, to be performed, or rendered or furnished to, the contracting State agency (“the Work”) except where the Work is for the beneficial use of the Contractor.

26.1.1 Contractor and Subcontractors shall undertake or continue existing EEO programs to ensure that minority group members and women are afforded equal employment opportunities without discrimination because of race, creed, color, national origin, sex, age, disability, or marital status. For these purposes, EEO shall apply in the areas of recruitment, employment, job assignment, promotion, upgrading, demotion, transfer, layoff or termination, and rates of pay or other forms of compensation. This requirement does not apply to: (i) the performance of work or the provision of services or any other activity that is unrelated, separate, or distinct from the Contract; or (ii) employment outside New York State.

26.1.2 By entering into this Contract, Contractor certifies that the text set forth in clause 12 of Appendix A, attached hereto and made a part hereof, is Contractor’s equal employment opportunity policy. In addition, Contractor agrees to comply with the Non-Discrimination Requirements set forth in clause 5 of Appendix A.

The Contractor will include the provisions of Clause 26.1.2 and Clause 26.3 of this Article, which provides for relevant provisions of the Human Rights Law, in every subcontract in such a manner that the requirements of the subdivisions will be binding upon each subcontractor as to work in connection with the Contract.

26.2 New York State Contract System Workforce Utilization Reporting Module (Construction)

The Contractor shall submit, and shall require each of its subcontractors to submit, a Workforce Audit throughout the term of this Contract, by the 10th day of each month to report the actual workforce utilized during the previous month in the performance of the Contract by the specified categories listed including ethnic background, gender, and Federal occupational categories. Contractor shall coordinate with its subcontractors to ensure that all workers associated with this Contract are properly counted and reported. To prepare the report, Contractor and its subcontractors shall use the New York State Contract System Workforce Audit Module found at the following website:

**https://ny.newnycontracts.com/**

The Workforce Audit must be submitted electronically in the New York State Contract System (NYSCS). Separate audits shall be completed by Contractor and all subcontractors. In limited instances, the Contractor or subcontractor may not be able to separate out the workforce utilized in the performance of the Contract from its total workforce. When a separation can be made, the Contractor or subcontractor shall submit the Workforce Audit and indicate that the information provided relates to the actual workforce utilized on the Contract. When the workforce to be utilized on the Contract cannot be separated out from the Contractor's or subcontractor's total workforce, the Contractor or subcontractor shall submit the Workforce Audit and indicate that the information provided is the Contractor's or subcontractor’s total workforce during the subject time frame, not limited to work specifically performed under the Contract.

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

**ARTICLE 27- MWBE COMPLIANCE**

27.1 By entering into a Contract with OGS, Contractor certifies that it has submitted a completed MWBE Utilization Plan via the New York State Contract System (NYSCS) prior to contract award and will follow such Plan for the performance of MWBEs on the Contract pursuant to the prescribed MWBE goals set forth in Section 16.7.1 of this Supplement. The NYSCS may be accessed at [**https://ny.newnycontracts.com**](https://ny.newnycontracts.com/). The Utilization Plan shall list the MWBEs the Bidder intends to use to perform the Contract, a description of the Contract scope of work the Bidder intends the MWBE to perform to meet the goals on the Contract, and the estimated, or if known, actual dollar amounts to be paid to an MWBE. If Contractor is unable to submit such Plan through the NYSCS, Contractor certifies that it used Form BDC 328 (Contractor’s Utilization Plan) to submit the Plan. The BDC 328 form is available for download at https://ogs.ny.gov/mwbe/forms.

27.2 By entering into the Contract, Bidder/Contractor understands that only sums paid to MWBEs for the performance of a commercially useful function, as that term is defined in 5 NYCRR § 140.1, may be applied towards the achievement of the applicable MWBE participation goal. When an MWBE is serving as a broker on the Contract, only 25 percent of all sums paid to a broker shall be deemed to represent the commercially useful function performed by the MWBE.

27.3 OGS will review the submitted MWBE Utilization Plan and advise the Bidder of OGS’ acceptance or issue a notice of deficiency within 30 calendar days of receipt. Contractor understands that making false representations or including information evidencing a lack of good faith as part of, or in conjunction with, the submission of a Utilization Plan is prohibited by law and may result in penalties including, but not limited to, termination of a contract for cause, loss of eligibility to submit future bids, and/or withholding of payments.

27.4 Contractor further agrees that a failure to submit and/or use such MWBE Utilization Plan shall constitute a material breach of the terms of the Contract. Upon the occurrence of such a material breach, OGS shall be entitled to any remedy provided herein, including but not limited to, a finding of Contractor non-responsiveness.

27.5 Access to the Contractor's Books: The Contractor shall permit access to its books, records and accounts by the State for purposes of investigation to ascertain compliance with the provisions of this Article. The contractor shall include this provision in every subcontract so that such provision will be binding upon each subcontractor.

27.6 If the Contractor, after making good faith efforts, is unable to comply with MWBE goals, the Contractor may submit an Application for MWBE Waiver form (BDC 333) documenting good faith efforts by the Contractor to meet such goals. If the documentation included with the waiver request is complete, OGS shall evaluate the request and issue a written notice of acceptance or denial within twenty (20) business days of receipt.

27.7 If OGS, upon review of the MWBE Utilization Plan and updated Contractors list of Subcontractors and Suppliers determines that Contractor is failing or refusing to comply with the Contract goals and no waiver has been issued in regards to such non-compliance, OGS may issue a notice of deficiency to the Contractor. The Contractor must respond to the notice of deficiency within seven (7) business days of receipt. Such response may include a request for partial or total waiver of MWBE Contract Goals.

27.8 **Monthly MWBE Contractor Compliance Report**

27.8.1 In accordance with 5 NYCRR § 142.10, Contractor is required to report Monthly MWBE Contractor Compliance to OGS during the term of the Contract for the preceding month’s activity, documenting progress made towards achievement of the Contract MWBE goals. OGS requests that all Contractors use the NYSCS to report subcontractor and supplier payments made by Contractor to MWBEs performing work under the Contract. The NYSCS may be accessed at [**https://ny.newnycontracts.com**](https://ny.newnycontracts.com/). This is a New York State-based system that all State agencies and authorities will be implementing to ensure uniform contract compliance reporting throughout New York State.

27.8.2 When a Contractor receives a payment from OGS under an OGS contract, it is the Contractor’s responsibility to pay its subcontractors and suppliers in a timely manner. On or after the first day of each month, the Contractor will receive an e-mail or fax notification (“audit notice”) indicating that a representative of its company needs to log-in to the NYSCS to report the company’s MWBE subcontractor and supplier payments for the preceding month. The Contractor must also report when no payments have been made to a subcontractor or supplier in a particular month with entry of a zero dollar value in the NYSCS. Once subcontractor and supplier payments have been entered into the NYSCS, the subcontractor(s) and supplier(s) will receive an email or fax notification advising them to log into the NYSCS to confirm that they actually received the reported payments from the Contractor. It is the Contractor’s responsibility to educate its MWBE subcontractors and suppliers about the NYSCS and the need to confirm payments made to them in the NYSCS.

27.8.3 To assist in the use of the NYSCS, OGS recommends that all Contractors and MWBE subcontractors and suppliers sign up for the following two webinar trainings offered through the NYSCS: “Introduction to the System – Vendor Training” and “Contract Compliance Reporting - Vendor Training” to become familiar with the NYSCS. To view the training schedule and to register visit:

[**https://ny.newnycontracts.com/events.asp**](https://ny.newnycontracts.com/events.asp).

27.8.4 As soon as possible after the Contract is approved, Contractor should visit https://ny.newnycontracts.com and click on “Account Lookup” to identify the Contractor’s account by company name. Contact information should be reviewed and updated if necessary by choosing “Change Info.” It is important that the staff member who is responsible for reporting payment information for the Contractor be listed as a user in the NYSCS. Users who are not already listed may be added through “Request New User.” When identifying the person responsible, please add “- MWBE Contact” after their last name (i.e., John Doe – MWBE Contact) to ensure that the correct person receives audit notices from the NYSCS. NYSCS Technical Support should be contacted for any technical support questions by clicking on the links for “Contact Us & Support” then “Technical Support” on the NYSCS website.

27.8.5 If Contractor is unable to report MWBE Contractor Compliance via the NYSCS, Contractor must submit Contractor’s Monthly Payment Report on Form BDC 58 to OGS, by the 10th day of each month during the term of the Contract, for the preceding month’s activity to: OGS OBD, 29th Floor Corning Tower, Empire State Plaza, Albany, NY 12242. Phone: 518-486-9284; Fax: 518-486-9285.

27.8.6 It is the Contractor’s responsibility to report subcontractor and supplier payments. Failure to respond to payment audits in a timely fashion through the NYSCS, or by paper to OGS, may jeopardize future payments pursuant to the MWBE liquidated damages clause in Section 27.9 below.

27.9 Liquidated Damages – MWBE Participation

27.9.1 Where OGS determines that Contractor is not in compliance with the requirements of the Contract and Contractor refuses to comply with such requirements, or if Contractor is found to have willfully and intentionally failed to comply with the MWBE participation goals, Contractor shall be obligated to pay liquidated damages to OGS.

27.9.2 Such liquidated damages shall be calculated as an amount equaling the difference between:

a. All sums identified for payment to MWBEs had the Contractor achieved the contractual MWBE goals; and

b. All sums actually paid to MWBEs for work performed or materials supplied under the Contract.

27.9.3 After the Contractor has been afforded the process it is due, if OGS determines that Contractor is liable for liquidated damages and such identified sums have not been withheld by OGS, Contractor shall pay such liquidated damages to OGS within sixty (60) days after they are assessed. Provided, however, that if the Contractor has filed a complaint with the Director of the Division of Minority and Women’s Business Development pursuant to 5 NYCRR § 142.12, liquidated damages shall be payable only in the event of a determination adverse to the Contractor following the complaint process.

27.10 Any suspicion of fraud, waste, or abuse involving the contracting or certification of MWBEs shall be immediately reported to ESD’s Division of Minority and Women’s Business Development at (855) 373-4692.