

LOGNUMBER: _____
(For NYCDOE Use Only)

A REQUIREMENTS AGREEMENT FOR SUPPLEMENTAL EDUCATIONAL SERVICES TO ELIGIBLE STUDENTS, entered into as of the 1st day of September, 2011, by and between the **NEW YORK CITY BOARD OF EDUCATION** (hereinafter, referred to as the "Board" or "NYCDOE"), with principal offices at 52 Chambers Street, New York, New York 10007, on behalf of the **OFFICE OF THE DEPUTY CHANCELLOR FOR OPERATIONS** (the "Deputy Chancellor"), and:

Contractor's Legal Business Name: _____
_____ (hereinafter referred to as the "Contractor")

D/B/A Name (If Applicable): _____

Business Address: _____
(as listed on New York City's W9 Form)

Federal Identification Number: _____

Anticipated Service Site(s):

Please indicate where you intend to provide the services contained herein by checking one (1) of the following:

- 1. NYCDOE SCHOOL FACILITY
- 2. NON-NYCDOE SCHOOL FACILITY
- 3. BOTH NYCDOE AND NON- NYCDOE SCHOOL FACILITY

(If Contractor intends on using NYCDOE School Facilities, the Contractor must comply with the "Facility Requirements" section contained herein.)

Estimated Annual Cost:

Estimated No. of enrolled children Under this Agreement: _____

Cost per child per school year: _____ (\$ _____)

Estimated Annual Total Cost of Agreement : _____ (\$ _____)

Transportation:

Does Contractor plan on transporting students by vehicle at any point for any reason during the course of this contract? Please check the appropriate box:

- YES NO

(If Yes, then Contractor must comply with the "Transportation of Students" and the "Insurance" sections herein. Note: The Board is not responsible for paying for transportation of Students under this contract; Contractor's Estimated Cost per child stated above shall not incorporate or include any part of Contractor's transportation cost.)

WITNESSETH

WHEREAS, the Board has a need for supplemental educational services in mathematics, reading, and English language arts in order to meet the goals of the Federal No Child Left Behind (NCLB) Act of 2001, Title I (“Title I,” or the “Act”); and,

WHEREAS, in order for the Board and other school regions throughout New York State, to procure such supplemental educational services in mathematics, reading, and English language arts, pursuant to section 120 of the Regulations of the Commissioner of Education, the New York State Education Department (“NYSED”) issued a Request For Qualifications (the “RFQ”) to identify qualified providers; and,

WHEREAS, NYSED received responses setting forth proposals and, upon review, the proposal submitted by the Contractor herein was deemed by NYSED to be qualified and responsive to the RFQ, and NYSED named the Contractor an approved supplemental educational service provider (an “ASESP” or “Provider”); and,

WHEREAS, the Chancellor approved a request for authorization (the “Request for Authorization”), a copy of which Request for Authorization is incorporated herein and annexed hereto as **Attachment A**, authorizing the Board to enter into a requirements agreement (the “Agreement”) with the Contractor to provide the within described services for a period from September 1, 2011 until August 31, 2014, subject to compliance with all contract requirements and chargeable to appropriate Title I budget codes as required, object code 685; and,

WHEREAS, the Contractor represents that it is ready, willing and able to perform the services as described herein;

NOW, THEREFORE, the Board and Contractor agree as follows:

1. TERM OF THE AGREEMENT

A. The term of this Agreement (the “Term”) shall commence as of September 1, 2011 and shall extend through and terminate on August 31, 2014, unless this Agreement is terminated earlier pursuant to the terms and conditions hereinafter referred to.

B. The Board shall have sole discretion to terminate this Agreement at any time for its convenience upon thirty (30) days prior written notice to the Contractor of the Board’s intention to terminate this Agreement. After termination, the Contractor must cease all work under this Agreement, unless otherwise directed in the notice. The Contractor will be entitled to payment for satisfactory Services performed up to the time of termination, provided that the Board first receives and approves an invoice. No claim for damages may be made or will be allowed to the Contractor because of such termination.

C. If the Contractor violates any provision of this Agreement, the Chancellor or his/her designee may pursue any legal or equitable remedies available to the Board. In addition, the

Chancellor or his/her designee may seek to have the Contractor declared in default by the Executive Director of the Division of Contracts and Purchasing or his/her designee (hereafter, the "Director"). Before the Director shall exercise the right to declare the Contractor in default, the Contractor shall be given an opportunity to be heard upon not less than two (2) days notice; however, it shall be within the discretion of the Director to suspend the Contractor and direct that it cease performing services pursuant to the Agreement pending such opportunity to be heard. It shall also be within the discretion of the Director to provide for such opportunity to be heard to be in writing or in person. In the event that the Director shall determine the Contractor to be in default, the Board may cancel this Agreement and shall thereafter be relieved of all liability hereunder. Notwithstanding the foregoing, the Board may terminate this Agreement immediately without notice in cases in which the Board has reason to believe that the Contractor is performing in a manner which would endanger the health, safety and/or welfare of pupils and/or their families. In such case, the Board shall administer the opportunity to be heard in a post-termination manner. Upon a finding of default, the default determination shall be submitted to the New York City Mayor's Office of Contract Services for inclusion in the VENDEX database.

D. This Agreement shall terminate immediately upon notice from NYSED to the Board of the Contractor's removal from the list of NYSED-approved supplemental education service providers (the "State Approved List"). The Board will provide notice to the Contractor that it has received notice from NYSED that the Contractor has been removed from the State Approved List. Upon removal from the State Approved List, the Contractor must immediately cease all work under this Agreement. The Contractor will be entitled to payment for satisfactory Services performed up to the time of termination stated in such notice, provided that the Board first receives and approves an invoice. No claim for damages may be made or will be allowed to the Contractor because of such termination.

E. The Board shall have the sole discretion to terminate this Agreement if, in the Chancellor's opinion, the Contractor is unable to meet the academic achievement goals and timetables included in Contractor's individual student education plans.

2. SCOPE OF AGREEMENT

This is a requirements agreement for the procurement of such supplemental education services as may be required by a Parent/Guardian and an approved eligible student (individually, an "Approved Eligible Student" or "Student"). This Agreement shall be effective upon the issuance of an approved official purchase order from the Board for the Services described herein. The Board shall not be limited to the procurement of any minimum or maximum amount of Services.

3. SERVICES

A. "Services" shall describe collectively all of the supplemental educational services in English Language Arts/Reading and/or Mathematics, as well as any supplies, materials and

facilities that the Contractor furnishes to, and for the benefit of, such Board students as the parents (the “Parents”) and/or guardians (the “Guardians”) of said Board students may request. The Contractor shall perform the Services in accordance with its State Technical Proposal as approved by the NYSED.

B. The Contractor shall provide the Services only to Approved Eligible Students. An eligible student is defined as a child from a low-income family, as determined by the Board for purposes of allocating funds to schools under Section 1113(c)(1) of the Act. An Approved Eligible Student is a child who has been assigned by the Board to the Contractor’s program as selected by the Parent and/or Guardian as indicated on the “SES Enrollment Form”. Only the Parent and/or Guardian of the eligible student may select the Contractor to provide Services and the Contractor or its subcontractors and/or agents shall not directly solicit students for enrollment in their program.

C. (1) If Contractor is selected by a Parent/Guardian, the Contractor shall provide all the Services described in the Contractor’s work plan (“the “Work Plan”), a copy of which Work Plan is incorporated herein and annexed hereto as **Attachment B**. As contained herein and/or in the Work Plan (**Attachment B**), any words of aspiration (including, but not limited to, “ideally,” “hoped” and/or “hopefully”) and/or expectation (including, but not limited to, “expected,” “anticipated” and/or “if available”) are hereby deemed to be the Contractor’s binding commitment.

(2) If a Parent/Guardian selects the Contractor as an ASESP for his/her Student, the Board will issue an approved official purchase order to the Contractor. The Contractor shall not provide any Services to any Student unless and until the Board issues an approved official purchase order to the Contractor for the Contractor’s provision of Services to said specific Student. Any Services provided by the Contractor to a Student without an approved official purchase order from the Board shall be provided at the Contractor’s sole risk.

(3) If a Parent/Guardian selects the Contractor as an ASESP for his/her Student and the Board has issued an approved official purchase order to the Contractor, Contractor must begin providing services to said Student within 5 calendar days unless Contractor has reached full capacity and informed the Board consistent with Section 3(I) herein.

D. The Contractor agrees that if it hires any Parent/Guardian of any child attending a school in which the Contractor provides or has applied to provide SES services, that Parent/Guardian shall have no involvement on behalf of the Contractor in any matter concerning the Contractor's provision of services to children in that school. The Parent/Guardian shall have no contact on behalf of the Contractor with any employee of the school and/or any Parent/Guardian of a child attending the school and/or any child attending the school. Nothing in this paragraph prevents a Parent/Guardian working for the Contractor from using the Contractor to provide services to his or her child. Nor does it prevent a Parent/Guardian working for the Contractor from representing Contractor at other schools where Contractor's services are being offered provided that no children of that Parent/Guardian are attending said school.

E. The Contractor may not offer or advertise rewards, gifts, incentives, gratuities, payments, or compensation of any kind to parents, Students, the Board, the Board's staff and/or school staff for purposes of, or tending to have the effect of, soliciting enrollment, encouraging parents to switch providers once Students are enrolled, and/or attempting to influence parents, Students, the Board, the Board's staff and/or school staff unless said rewards, gifts and/or incentives is part of Contractor's State approved program. Contractor will remain obligated to (1) submit a written description to the Board before implementing any rewards program; (2) update the Board if said program is changed for any reason; and (3) comply with the State law and/or rule/regulation and/or policy. Contractor's failure to submit written description and/or update will result in the withholding of payment and/or termination of this Agreement. For purposes of this Agreement, any school supplies or related items distributed for the purpose of soliciting enrollment, encouraging parents to switch providers once Students are enrolled (e.g., calculators, backpacks, pens, water bottles etc.), shall be deemed a marketing incentive, the use of which is prohibited. Violation of this provision will result in the withholding of payment or termination of this Agreement or both.

F. Nothing herein shall be deemed to prohibit the use, *as part of* the instructional program, of nominal rewards or incentives as defined in 8 NYCRR section 120.4(f)(8)(xvii). A nominal reward or incentive is defined as an award or incentive that:

- (1) does not exceed a total value of \$ 25 per student per year;
- (2) is directly linked to documented meaningful attendance benchmarks and/or completion of assessment and program objectives; and
- (3) is approved by the commissioner as part of the provider's instructional program.

G. Contractor shall not offer rewards, gifts and/or incentives to parents or guardians of Students under any circumstances.

H. The obtaining of students' confidential information from school employees and/or any Parents/Guardians (unless Parent/Guardian provides information about his/her own child only) for the purpose of soliciting students, parents and/or guardians for enrollment is strictly prohibited and will result in the withholding of payment and/or termination of this Agreement or both.

I. Contractor shall provide written notice to the Board when it has reached full capacity at a given site and no additional child will be enrolled in its program at that site. The Contractor may not reject any Student whose Parent signs up the Student for the Contractor's Services and for whom an official purchase order has been issued by the Board unless Contractor's program is at full capacity. In the performance of the Services and, in particular, in its relations with the Board, Parents and Students, the Contractor shall provide equal opportunity to all qualified persons, and shall not discriminate because of race, creed, color, sex, age, national origin, disability, sexual orientation, marital status, religion, or political beliefs or affiliations.

J. The Contractor shall not require any minimum number of students to participate and/or attend classes nor impose any additional criteria on the admission of eligible Students to its program.

K. The Contractor shall ensure that the instruction it provides and the content it uses are consistent with those of the Board and NYSED and are aligned with New York State learning standards in the areas of English language arts (including reading) and/or mathematics.

L. All Services that the Contractor provides under this Agreement must be for secular, non-partisan, neutral and non-ideological purposes.

M. The Contractor shall perform any and all Services in a competent, professional and timely manner to the reasonable satisfaction of the Chancellor or his/her designee(s). The Chancellor reserves the right to make all final determinations on any issue regarding the administration of this program.

N. The Contractor shall cooperate with the Board in the Board's administration and evaluation of the Services that the Contractor provides, as well as the Board's administration and evaluation of the overall program including, providing accurate and timely monthly certification of attendance, original attendance records, final reports and certifications and any and all other reports, records or data as the Chancellor and/or his designee may request. The Contractor shall allow the Chancellor and/or his designee(s) to visit and observe sessions, to interview the Students and Parents on-site, and to distribute on-site such questionnaires and other materials as the Chancellor shall determine are necessary and/or advisable for the administration and evaluation of the Contractor's Services and overall program.

3.I SPECIAL PROVISIONS FOR THE PROVISION OF NCLB SUPPLEMENTAL EDUCATIONAL SERVICES

In addition, Contractor agrees to comply with the following special provisions:

A. For each Student who registers for Contractor's Services, Contractor shall provide the following information:

- (1) the location where Services will be provided to the Student;
- (2) the initiation date, frequency and duration of Services to be provided to the Student;
- (3) for eligible students with disabilities under IDEA and eligible students who are individuals with disabilities covered by section 504 of the Rehabilitation Act of 1973 (29 U.S.C. section 794), the Contractor shall set the goals, method of measurement and a timetable consistent with such student's individualized education program pursuant to the Individuals with Disabilities Education Act or the student's section 504 plan, where applicable;

- (4) a detailed statement of the Student's achievement goals based upon such Student's specific education needs;
- (5) a description of how the Student's progress will be measured;
- (6) a timetable for improving the Student's achievement;
- (7) a written description of how each Student's Parents, teacher(s) and the Board will be regularly informed, no less frequently than on a quarterly basis, of the Student's progress;
- (8) a description of the program to be used; and
- (9) a method for tracking the attendance of each Student in the Contractor's program.

B. Contractor agrees to the following procedures and policies for NCLB-SES implementation:

- (1) Contractor shall provide Services only during non-school hours. The Contractor shall *not* provide Services to any Student during the regular school day. Contractor acknowledges that the Board, at its sole discretion, may change the definition of the regular school day at any time during the Term. In the event of any change, the Contractor shall adjust the hours that it offers its Services in order to avoid any conflict with the regular school day. The Services provided by the Contractor to any Student must be in addition to any and all educational services provided to said Student, including, but not limited to, mandated after school or summer school activities, and may not supplant any such educational services.
- (2) During the Term of this Agreement, the Contractor shall provide the direct, personal Services of those individuals named and/or described in its proposal to NYSED and in the Work Plan (**Attachment B**) and of such managerial and staff employees as are necessary to fulfill all the terms, conditions and specifications of this Agreement. The Contractor alone shall be responsible for the work of its personnel, as well as for their direction, discipline, compensation and benefits.
- (3) Contractor does hereby stipulate and agree that the instructional Services it provides under this Agreement shall be provided under the general instructional leadership of a New York State certified teacher pursuant to section 120.4(d)(2)(iii) of the Regulations of the Commissioner of Education. If the services are provided by Board employee(s), such services must be provided pursuant to the conditions contained in the waiver(s) issued by the Conflicts of Interest Board.
- (4) Contractor shall not increase the ratio of instructors to New York State certified teachers from the ratio stated in the Work Plan (**Attachment B**).

- (5) During the Term of this Agreement, the Contractor shall not increase the ratio of Students to instructors from the ratio stated in the Work Plan (**Attachment B**)
- (6) Contractor may not directly offer gifts or funds to any NYCDOE schools or its staff, faculty or leadership for any reason unless approved by the Chancellor and/or his designee(s). Any donations to the Board are to be made to the Fund for Public Schools;
- (7) Contractor shall inform parents they can only register with one ASESP;
- (8) Contractor shall hire a compliance officer or identify/designate an employee to ensure that the program is in compliance with all applicable federal, state and local regulations, policies and procedures, and adheres to the terms and conditions of this Agreement;
- (9) **(a) Contractor must report to the Office of the Special Commissioner of Investigations (“SCI”) any violation of this Agreement or violation of any Board and/or NYSED policies or regulations;**
(b) Contractor must report to the Board’s NCLB-SES Program Implementation Director if Contractor or any of its employees witness or become aware of any impropriety conducted by any Board employee;
(c) If Contractor is the subject of any SCI investigation, Contractor shall not request any documentation from the Board without fully apprising the Board of SCI’s investigation;
(d) Contractor shall not mislead, delay, interfere or otherwise hinder an ongoing investigation by SCI, the Board, the Comptroller of the City of New York (the “Comptroller”), the Comptroller of the State of New York (the “State Comptroller”), and any designee of the Board or the Comptroller or the State Comptroller.
- (10) Contractor shall use only NYCDOE attendance sheets for the purposes of recording attendance. Any other version of attendance sheets will be deemed incomplete and insufficient for purposes of calculating reimbursement for Services. In addition, attendance sheets shall:
 - (a) indicate the start time and end time of each Student’s tutoring session and must be signed by the Student at the start and conclusion of each session; and
 - (b) be signed by instructors and countersigned by supervisors (Providers who deliver services in student homes must secure Parent signature);
- (11) Contractor agrees that all non-Board employees must sign in and sign out of NYCDOE school buildings and wear visible ID badges. If Contractor provides

services on non-NYCDOE property, Contractor agrees that all Staff shall wear visible ID badges identifying themselves as Contractor's Staff;

- (12) Contractor shall maintain on-site, a roster of all Staff providing Services to Students. Current and accurate Staff rosters must be available for inspection at any time, including on-site visits, at the request of the Program Director and/ or the Chancellor and/or his designee.
- (13) Contractor shall obtain emergency contact information for each Student. At the end of each session, the Contractor's Staff shall remain with the Student until the Student's Parent or Guardian arrives. Student(s) shall not be left unattended at any time. In the event of an emergency, the Contractor must contact the person indicated as the emergency contact and remain with the Student until said emergency contact person arrives.
- (14) Contractor shall not use any parent coordinator, school principal, assistant principal, teacher, guidance counselor, and/or any student to promote its program;
- (15) Contractor agrees to comply with the code of ethics (the "Code of Ethics"), which is attached hereto and made a part hereof as **Attachment E**.
- (16) If the Contractor provides Services over the Internet, through use of a web site, the Contractor shall comply with the Board's Internet Acceptable Use Policy, which policy is incorporated by reference, and made a part hereof, as if fully attached hereto (available at <http://schools.nyc.gov/Offices/FinanceandAdministration/DIIT/WebServices/iaup/default.htm>)
- (17) If during the Term of this Agreement, the Contractor anticipates interruption or cancellation of scheduled Services for any reason, the Contractor shall submit notification of such interruption or cancellation, in writing, to the NCLB Program Director at the address set forth in Section 22 of this Agreement for giving notices. The Contractor is responsible for submitting said notice within 24 hours of the anticipated interruption or cancellation. If scheduled Services are to be cancelled for periods lasting more than 5 school days, the Contractor shall submit written notice 15 business days prior to the first day of such cancellation. Failure to provide adequate written notice for an extended interruption or cancellation of Services may result in termination of this Agreement.

4. REPORTS

- A. Contractor is required to retain all original records relevant to the provision of supplemental educational services for a period of no less than six (6) years following termination

of this Agreement. If records are originally in an electronic format, all such records must be made available in hard-copy format.

B. Contractor shall provide the Board, the Student's school, and the Parent/Guardian of each Student enrolled in its program with a progress report (the "Progress Report") no fewer than four (4) times per year for each year of the Term of this Agreement. In each Progress Report for each Student, the Contractor shall provide information regarding the Student's attendance, a description of how the supplemental education Services were delivered to such Student, and a description of the progress of each such Student. The Progress Report shall be in a format determined by the Board and, to the extent practicable, in a language or other mode of communication that the Parents can readily understand. Reports are to be maintained at the service sites(s) or, if Services are rendered at the Student's home or online, at the Contractor's place of business, during the years of service and thereafter retained by Contractor for six (6) years from termination of the Agreement. Reports are subject to review by city, state, and federal monitors.

C. Contractor shall provide the Board with a final written report (the "Final Report") no later than August 31st – or any other "Final Report Due Date" established by the Board - of each year of the Term of this Agreement, in a format prescribed by NYSED, which format will be provided to the Contractor. In the Final Report, the Contractor shall summarize the progress of all Students for whom the Contractor has provided Services during the relevant year of the Term of this Agreement.

D. The Contractor shall submit a final and accurate certification of attendance (the "Final Certification of Attendance") no later than July 15th – or any other "Final Certification Due Date" established by the Board – for each year during the Term of this Agreement.

E. LATE REPORTING. In the event that the Contractor can not comply with the Final Certification Due Date, the Contractor may submit a written request for a (30) day extension, addressed to the attention of the NCLB Program Director, no later than (30) days prior to the established Final Certification Due Date. The request for extension shall explain in detail, the reason for the Contractor's anticipated inability to timely certify. The Contractor is required to submit Final Certification of Attendance, *unless and until* such time as the extension is granted by the Board and the Contractor is notified of the approved extension. If no extension is granted and the Contractor fails to comply with Section 4(D) herein, the Board shall have the right to impose liquidated damages in the amount of 5% of the amount of any outstanding invoices and set off such amount from any monies due and owing to the Contractor.

5. DISCIPLINE OF STUDENTS

A. Corporal Punishment of students is strictly prohibited.

B. Contractor must comply with the Chancellors Regulations A-412, A-414, A-420, A-421, and A-432. A copy of said Regulations are incorporated into this Agreement as if fully attached hereto and made a part of this Agreement (available at <http://schools.nyc.gov/RulesPolicies/ChancellorsRegulations/default.htm>)

C. In the event a child is the subject of an alleged corporal punishment incident or is otherwise injured at the facility, Contractor shall immediately inform the student's family and the NCLB/SES Director by telephone. Contractor must submit a written report to NCLB/SES Director within one (1) school day of the alleged incident or injury. Contractor shall fully cooperate in connection with any inquiry pertaining to the alleged incident and/or injury.

6. COST OF THE SERVICES; PAYMENT

A. If the Contractor provides the Services and Reports as described in this Agreement and in the Work Plan (**Attachment B**) in compliance with the terms, conditions and specifications of this Agreement, the Board will pay the Contractor such per-Student unit rates for the Services provided as the Contractor has specified in the budget detail, a copy of which Budget Detail is incorporated herein and annexed hereto as **Attachment C**. Additionally, Contractor must honestly and truthfully complete the "Proposed Cost Detail Workbook, as made available by the Board in the 2011 Application to Enter into Contract for ASESP. Contractor must keep a copy of the Proposed Cost Detail Workbook on file for the duration of this Agreement. Contractor has a continuing obligation to inform the Board at the beginning of each school year if costs decrease so as to allow Contractor to offer services to the Board at a lower hourly rate in accordance with Section 6(F)(2) herein.

B. The entire cost to the Board is estimated as the amount indicated on the front page of this Agreement for each full year of this Agreement, or part thereof, chargeable to appropriate Title I budget codes, object code 685, contingent on evidence of satisfactory delivery of Services. In addition, at no time during the Term of this Agreement will the per-Student unit rate indicated on the front page of this Agreement exceed the maximum NYSED approved per pupil allocation for the then applicable school year (hereinafter referred to as the "PPA"), or the Contractor's actual per-Student unit cost as determined based on the Contractor's proposed cost submissions to the Board, whichever is less.

(1) For each school year that the Contractor's per-Student unit rate *exceeds* the current PPA during the Term of this Agreement, the Contractor is required to reduce costs to comply with the PPA and to amend their current contract in accordance with **Section 20** of this Agreement. Without prior NYSED approval, the Contractor *may not* reduce costs by modifying the substance of the academic program contained in the Contractor's Work Plan. (Cost reductions should be limited to program **costs** only e.g., staff salary, overhead, etc.). In order to begin the amendment process (available at <http://schools.nyc.gov/Offices/DCP/Vendor/NoChildLeftBehind/Default.htm>), the Contractor is required to submit the following:

- (a) A cover memorandum explaining any and all cost reduction modifications to the Contractor's Work Plan and/ or Budget Detail; and,
- (b) An electronic version of the Contractor's current Work Plan, which indicates in high-lighted text or 'red-line' edited text, any and all cost reduction modifications; and,
- (c) An electronic version of the Contractor's revised Budget Detail reflecting a per- Student unit rate consistent with or less than the NYSED maximum approved PPA for the upcoming school year during which the Contractor intends to provide Services.

(2) The Contractor agrees to comply with all necessary submittal requests as may be required by the Board to amend the Contractor's current contract. The Board may prohibit the Contractor from enrolling students and/or certifying and providing Services in an upcoming school year until the Contractor's current contract is amended to reflect a program budget and costs which are consistent with or less than the current NYSED maximum approved PPA. If Services are provided during a school year in which the Contractor's per-Student unit rate exceeds the current maximum NYSED approved PPA, and the Contractor has failed to amend their contract; the Contractor may not be compensated or otherwise credited under the terms, conditions and specifications of this Agreement.

(3) For each year that the Contractor's per-Student unit rate is *equal to or less than* the current PPA during the Term of this Agreement and there is no amendment required; the Contractor shall continue to provide Services in accordance with the last Board approved budget and contracted-for rate.

C. Billing for Services shall be in the form of detailed itemized invoices submitted by the Contractor on a monthly basis, using the web-based electronic system. The Contractor shall upload, submit and certify all necessary Student attendance data on a monthly basis. Failure to enter accurate attendance data and submit invoices in a timely manner each month, will delay payment. In addition, the Contractor certifies that any provision in this Agreement notwithstanding, the Board shall only make payment for Services actually provided to Students by the Contractor, for the number of hours of Services actually provided to Students by the Contractor, and only upon the submission of substantiated invoices in a form satisfactory to the Board. The invoices submitted for payment must bear the certification of the Chancellor or his designee(s) that all of the Services for which payment is demanded have been performed in a satisfactory manner. The maximum amount payable on any invoice shall be limited to the numbers of Students to whom Service is provided by the Contractor to the Board multiplied by the per-Student rate stated in the Budget Detail (**Attachment C**). The Board will not approve any invoice that includes ineligible students, ineligible Staff or for hours that exceed the maximum allowable as per this Agreement.

D. The Board shall process payment within a commercially reasonable period from the date of submission of properly certified and substantiated monthly invoices, verified student attendance data and reports.

E. This Agreement and all consideration hereunder are subject to pre-audit and post-audit by the Board, the Comptroller of the City of New York (the “Comptroller”), the Comptroller of the State of New York (the “State Comptroller”), or any other public agency with authority to conduct such audit, and any designee of the Board or the Comptroller or the State Comptroller. No audit by the Board shall be binding upon the Comptroller. In the event that an audit shall find violations of contract, Contractor shall be liable for all costs related to the audit(s).

E. No Fee Charging. The Contractor shall not charge fees to, nor seek any payment and/or compensation of any kind whatsoever from, the Students or their Parents for the Services that the Contractor provides to the Students under this Agreement.

F. (1) Billing of all charges shall be in accordance with the price quotations expressly specified in the Work Plan (**Attachment B**) and in the Budget Detail (**Attachment C**). The Contractor shall not increase any price(s) for any of the Services during the Term of this Agreement unless Contractor applies for an Amendment Application and substantiates the basis for a rate increase.

(2) If at any time during the Term of this Agreement, the price(s) of any one or more aspects of the Services shall be reduced to a level below the price(s) specified herein, the Board shall be entitled to such reduced price(s) as of the effective date(s) of each such reduction or series of reductions. The Contractor shall provide the Board with written notification of such reduction(s) and, upon receipt of such notice(s), this Agreement (specifically the Work Plan (**Attachment B**) and the Budget Detail (**Attachment C**) shall be deemed amended to reflect such price reduction(s) retroactively to the effective date(s) of the reduction(s). The Board and the Contractor agree that any such amendment of this Agreement for purposes of price reduction(s) shall be deemed to have occurred automatically without the necessity of any further action by either or both of the parties upon receipt by the Board of the Contractor’s written notice(s) to such effect, all else in the Attachments (except **Attachment A**) to the contrary notwithstanding.

(3) If for any reason the Board shall pay for any aspect(s) of the Services at previously higher price(s) after the effective date(s) of price reduction(s), the Board shall be entitled to a refund from the Contractor of the difference(s) between the previously higher price(s) and the reduced price(s). Whether discovered by the Board or the Contractor, the Contractor shall promptly return and/or refund to the Board the said difference(s). Whereupon if the Contractor discovers any such difference(s), the Contractor shall give prompt written notice to the Board. At its option, the Board may choose to recover the said difference(s) via deduction(s) from any other payment(s) that are or may become due to the Contractor under this Agreement. The Contractor’s obligation to return and/or refund any such difference(s) shall be and remain an obligation of the Contractor and its heirs, executors, administrators, trustees, successors

and/or assigns, jointly and/or severally, which obligation shall survive the termination of this Agreement.

(4) The Contractor's failure and/or refusal to provide any notice and/or to perform any of the terms and conditions as specified in this **Paragraph F** shall be deemed to be a material breach of this Agreement.

7. FACILITY REQUIREMENTS

A. The Contractor may provide the Services to Students either on NYCDOE school premises or on non-NYCDOE school premises.

B. If the Contractor intends to provide Services on NYCDOE school premises:

(1) Contractor acknowledges that this Contract does not guarantee the use of space in any of the Board's eligible schools. Contractor must separately apply to the respective building principal for use of classroom space. Authorization to utilize NYCDOE school space shall only be granted by the School Principal pursuant to the Extended Use Form (the "Permit").

(2) Contractor will comply with all the rules and regulations of Permit holders. Contractor must pay in advance all applicable permit fees (the "Permit Fee(s)"), including, but not limited to, associated costs for additional security. Failure to comply with all NYCDOE rules and regulations may result in the revocation of the permit.

(3) For all services conducted in NYCDOE classroom space, Contractor agrees to discount its invoice(s) for services per child by nine percent (9%) (the "Facility Usage Discount"). The Board, at its sole discretion, may change the Facility Usage Discount before the beginning of any school year during the term of this Agreement. The Board will apply only one rate during any single School Year. In the event that the Board changes the Facility Usage Discount, Contractor must discount its invoice(s) by the rate then in existence.

(4) The Contractor shall restrict its use of NYCDOE premises, including, but not limited to, space, facilities, personnel, services, equipment, and materials, to its performance of the Services under this Agreement. The Contractor shall not cause or allow the conduct of any other business, except for the Services and other matters connected with this Agreement, on NYCDOE property or with NYCDOE facilities, personnel, services, equipment, materials and so forth.

C. If the Contractor provides Services to Students on non-NYCDOE school premises:

- (1) The Contractor shall provide to the Board a certificate of occupancy issued by the Buildings Department of the City of New York, or the Contractor's local county equivalent, that clearly demonstrates that the Contractor's Facility is appropriate for the instructional purposes the Contractor seeks to provide. Certificates of occupancy must specify that the Contractor's facility is designated as "classroom space".
- (2) All buildings, premises, equipment and furnishings used for the Program shall be safe, durable and suitable for the comfort and care of the students. They shall comply with all applicable requirements of the Americans with Disabilities Act and shall be provided and maintained in a state of good repair and sanitation.
- (3) Contractor shall, during the entire Term of this Agreement, disclose to the Board all building and fire code violations issued with respect to the space used for program operations including all common areas of the building utilized by students within three days of issuance. Contractor must immediately commence corrections of violations. Contractor's program will be suspended until said corrections cure the violation(s).
- (4) The Contractor represents that the facility where the students are located is in compliance with all applicable federal, state and local laws or regulations regarding the inspection for, containment and removal of friable asbestos containing materials located on the premises of the Contractor and the premises contains no contaminants and other environmental health risks. Contractor is obligated to report all environmental health risks in writing to the Board's NCLB-SES Implementation Director within twenty-four (24) hours.
- (5) The Board may terminate the Agreement upon one (1) day notice if said violations create a hazardous condition to the students. In the event of said termination the Board shall be obligated for payment for Services rendered through the termination date and thereafter shall have no further obligation to Contractor.
- (6) Contractor shall ensure that the facility complies with the New York City Childhood Lead Poisoning Prevention Act of 2003.

8. TRANSPORTION OF STUDENTS

A. If Contractor transports Students at any time during the term of this agreement, Contractor must use an NYCDOE contracted bus vendor, if one is available (See <http://www.opt-osfns.org/opt/>). If no NYCDOE contracted coach bus vendor is available, Contractor must maintain and attach hereto a Certificate of Insurance that demonstrates that Contractor has Commercial Motor Vehicle Liability Insurance in accordance with the provisions set forth in Section 9 of this Agreement that insures the vendor, the vendor's agents, the Board of Education and the City of New York during the performance of work under this contract against all present and future claims for bodily injury, sickness, disease, death and property damages which may arise because of a motor vehicle accident. The limit of liability shall be at least

\$5,000,000.00 for all injuries sustained in any one occurrence. The limit of liability required for property damage shall be at least **\$100,000.00** for one claimant and at least **\$200,000.00** for two or more claimants in any one accident. Such damages shall include all injury to, or destruction of, property of such claimant as well as the loss of use occasioned by the accident. Should the Contractor retain a Subcontractor to perform any of the services mentioned in this paragraph, it is the Contractor's responsibility to insure that Subcontractor maintains the same types of insurance coverage in accordance with the requirements and amounts indicated herein.

B. Contractor hereby warrants and agrees to indemnify and hold NYCDOE and the City of New York harmless from all claims, damages, judgments, losses, liabilities, costs, expenses, attorney fees and compensation, whether in contract or tort, arising out of personal injury, including death or property damage, sustained or alleged to have been sustained in whole or in part by any or all persons whatsoever as a result of or arising out of any act or omission of the Contractor, its agents or employees, or caused or resulting from any deleterious substance in any of the products supplied or while the equipment, supplies, etc., are being delivered or the service-work is being performed under this contract, whichever instance is applicable.

C. Vehicles must be no more than 10 years old. All services must be in conformance with New York State Department of Transportation (NYSDOT) and United States Department of Transportation (USDOT) regulations, in addition to the requirements of this contract. All vehicle operators must be 19-A certified as per the NYS Department of Motor Vehicles Bus Driver Certification Unit. Drivers must carry all licenses and certifications with them at all times while transporting students.

9. INSURANCE

A. The Contractor shall obtain all required insurance coverage from insurers licensed by the New York State Superintendent of Insurance to do business in New York State. Not later than thirty- (30) days after the date of execution of this Agreement and before the start of any of the Services under this Agreement, the Contractor shall submit to the Board evidence of the insurance specified herein together with all supporting documentation reasonably deemed necessary by the Chancellor or his/her designee(s). The Contractor shall arrange with its carrier(s) to have the Board and the City of New York appear as additional insured parties on every policy and certificate of insurance for all required coverage. The Contractor shall not obtain or use any insurance policy(ies) or contract(s) for purposes of this Agreement that contains any endorsement exclusions relating to an additional insured's negligence, relating to the maintenance, use and operation of an additional insured's realty or personalty, or relating to any other activities by an additional insured that arise from, or in the context of, this Agreement. The Contractor shall transmit one (1) copy each of all insurance policies and certificates of insurance to the Board of Education of the City of New York, to the name and address provided herein for the giving of notices. The Board's receipt of such certificates shall be a condition precedent to any payment by the Board to the Contractor under this Agreement. Furthermore, the Contractor shall transmit an informational copy of this Agreement to its insurance carrier(s) together with a cover letter(s); the cover letter(s) shall identify the Contractor's insurance policy(ies) and/or account number(s) that alerts and informs the carrier(s) of the existence of this

Agreement and the particular insurance provisions contained herein. The Contractor shall maintain the hereinafter-prescribed levels of insurance coverage throughout the Term.

B. The Contractor shall maintain the following types of insurance coverage for the duration of this Agreement:

(1) Workers' Compensation Insurance, including Employer's Liability Insurance, as prescribed by the laws of New York State or of the state of the Contractor's domicile.

(2) Comprehensive general liability insurance shall insure the Contractor and its agents, employees, officers, directors, owners, partners, subcontractors or any other representatives (the Contractor's "employees"), and the Board and the City of New York as additional insured, during the operation of this Agreement, against claims for bodily injury, including death, disease and property damage as shall arise because of any services performed by the Contractor, or its employees, either directly or indirectly, or because of any negligent act of the Contractor or its employees. The limit of liability under this comprehensive general liability coverage shall be in an amount not less than One Million Dollars (\$1,000,000.00) per occurrence, for personal injury, and in an amount not less than One Hundred Thousand Dollars (\$100,000.00) for one (1) claimant in any one (1) occurrence but not more than Two Hundred Thousand Dollars (\$200,000.00) for two (2) or more claimants for property damage sustained, as well as the loss of use, if any, occasioned by the occurrence.

(3) If Contractor provides transportation to students, as indicated on the front page of this Agreement, Contractor must maintain and attach hereto a Certificate of Insurance that demonstrates that Contractor has Commercial Motor Vehicle Liability Insurance in accordance with the provisions set forth in Section 9 of this Agreement that insures the vendor, the vendor's agents, the Board of Education and the City of New York during the performance of work under this contract against all present and future claims for bodily injury, sickness, disease, death and property damages which may arise because of a motor vehicle accident. The limit of liability shall be at least **\$5,000,000.00** for all injuries sustained in any one occurrence. The limit of liability required for property damage shall be at least **\$100,000.00** for one claimant and at least **\$200,000.00** for two or more claimants in any one accident. Such damages shall include all injury to, or destruction of, property of such claimant as well as the loss of use occasioned by the accident..

C. All policies of insurance must be written on an occurrence basis, except for Workers' Compensation Insurance, including Employer's Liability Insurance, and must be issued by companies licensed and admitted, or authorized to do business, in the State of New York, having a rating of at least "A-" (Excellent) and a financial rating of "X," as rated by the most recent Best's Insurance Rating Guide. The Contractor's General Liability policy must be endorsed:

- (1) to name the Board and the City of New York as additional insured;
- (2) to allow severability of interests and rights of cross-claim; and

(3) to provide that the policy must not be canceled, or its coverage reduced, without at least thirty (30) days' prior written notice to the Board.

D. Insurance coverage in the amounts provided for herein shall not constitute a limit of the Contractor's liability and shall not relieve the Contractor for any liability that might exceed such amounts, nor shall the Board be precluded from taking such other actions as are available to the Board under any other provisions of this Agreement or otherwise.

E. The Contractor shall transmit prompt notice of each coverable accident or occurrence to the Contractor's appropriate insurer(s) with such transmittal to occur not later than required under the Contractor's insurance policy(ies) or contract(s). The Contractor shall transmit notice of each coverable accident or occurrence to the Chancellor's designee(s) within five (5) school calendar days of the affected accident or occurrence.

F. Policies shall not be invalidated by reason of violation of any of its terms or any of the terms of any other policy issued by the insurance company to the Contractor.

10. CONFIDENTIALITY

A. "Confidential Information" means: (i) any personally identifiable information related to Board students, student families or guardians, teachers, staff, agents and/or volunteers obtained by or furnished to the Contractor; (ii) any information marked "confidential" or any other information that a reasonable person under similar circumstances would consider to be confidential or proprietary at the time of disclosure, notwithstanding a failure to make it or identify it as such; and (iii) all derived information, findings, analysis, data (personally identifiable and aggregate data), reports or other information learned or developed and based thereon; whether in oral, written, graphic, or machine-readable form. Confidential Information includes, but is not limited to, names, addresses, contact information, school, school district, grades or other reviews, scores, analysis or evaluations, records, correspondence, activities or associations, financial information, social security numbers or other identifying numbers or codes, date of birth or age, gender, religion, sexual preference, national origin, socio-economic status (including free/reduced lunch status), race, ethnicity, special education status, or English Language Learner status.

B. Contractor agrees to:

(i) Hold the Confidential Information of the Board in strict confidence and not to disclose Confidential Information of the Board to any third parties nor make use of such Confidential Information for its own benefit or for the benefit of another, or for any use other than the purpose of this Agreement.

(ii) Only disclose the Confidential Information of the Board to its employees or agents who need to know the Confidential Information of the Board, and in those instances, only to the extent justifiable by that need, and ensure that all such entities and personnel comply with the terms of this Agreement.

(iii) Adhere in every respect to the law, Board policy and the Chancellor's regulations concerning confidentiality of personally identifiable pupil records, including Chancellor's Regulation A-820.

(iv) Hold all individually identifiable information obtained, learned or developed by Contractor confidential pursuant to applicable provisions of the Family Educational Rights and Privacy Act (20 U.S.C. 1232g) and any applicable regulations promulgated thereunder. Contractor understands that the release of confidential information to persons or agencies not authorized to receive such information is a violation of US federal law.

(v) Whenever required by Board and upon termination of this Agreement, Contractor shall promptly surrender (or destroy if surrender is not practicable) all Confidential Information of the Board and all media containing same to the Board and certify, in writing, that all of the foregoing materials have been surrendered or destroyed in accordance with this Agreement.

C. Unauthorized disclosure of Confidential Information by the Contractor, its subcontractors, consultants and agents may result in civil and/or criminal penalties under New York State and Federal laws. Moreover, in addition to all other remedies that Board may have, the Board shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any breach of confidentiality.

11. SECURITY CLEARANCE

(a) Definitions.

1 Designated Security Clearance Office shall mean the Board's Office of Personnel Investigations or any other division/office/unit designated by the Chancellor or his designees to carry out, in whole or in part, the Board's Security Clearance Procedures.

Personnel Eligibility Tracking System (PETS) shall mean the Board's online database available at <https://www.nycenet.edu/Offices/DHR/pets/login.aspx> that allows the Contractor to enter Staff information into an electronic roster (the "PETS Roster" or "Electronic Roster") in order to monitor the eligibility status of each Staff member. The term "PETS" shall also include any subsequent system that the Board designates for handling the monitoring of eligibility of Contractor's Staff.

2 Eligibility Clearance Procedures include, but is not limited to, the Board's fingerprinting procedures, background investigations, Contractor's compliance with and the Board's monitoring of PETS, and any other procedures identified by the Board's Designated

Security Clearance Office and as may be revised as necessary to ensure the safety and well-being of Students.

3 Staff shall include any and all of Contractor's, or its subcontractors' (if any), employees, officers, directors, members, partners, agents, volunteers or consultants who, at any time during the Term of this Agreement, (i) have direct contact with Students; or (ii) work in or visit a location during times that Students are present unless such contact is only on an incidental and supervised basis; or (iii) provide online services to Students and have contact with Students via telephone, email or internet; (iv) have regular access to Students' confidential information and (v) Contractor's staff member(s) who updates and maintains PETS rosters. Contractor's Staff shall also include any Staff who become affiliated with Contractor or its Subcontractors after execution of this Agreement.

4 Students shall mean any student enrolled in any New York City Public School or placed into a program that is the subject of this Agreement.

(b) **Procedures.**

(1) Contractor agrees not to hire or retain any person who refuses to participate in the Eligibility Clearance Procedures; who has not completely and truthfully reported information concerning his or her criminal convictions; who is within the category of Staff required to sign a Release, but refuses to do so; or who has been deemed ineligible for employment by the Board.

(2) The Eligibility Clearance Procedures are a condition precedent to each Staff member providing services under this Agreement. Contractor shall ensure that each Staff member is prohibited from having contact with Students and Students' confidential information until:

- a. Contractor has entered Staff members' information into PETS.
- b. The Board's HR Connect Walk-in Center (located at 65 Court Street, Room 102, Brooklyn, New York 11201) has fingerprinted and the Board's Designated Security Clearance Office has cleared each Staff member.

(3) Contractor is required to furnish to the designated Office and other offices as the Board may designate, any and all documents and information regarding prior criminal records and arrest information **immediately** following Contractor's receipt of the documents and information.

(4) Contractor has a continuing obligation to review and maintain its PETS Roster throughout the Term of this Agreement:

- (i) Contractor must contemporaneously update information upon hiring new Staff, removing Staff, and/or identifying new contact information for its PETS Roster.

- (ii) Contractor must respond within one business day, or within a shorter period time if required by the Designated Security Clearance Office, to any notification and/or request for more information generated by PETS. Contractor must immediately remove Staff from contact with Students, access to Student information and/or, if appropriate, access to PETS, if deemed ineligible based upon any notification generated by PETS, screen-shot displayed in the PETS application or as otherwise directed by the Designated Security Clearance Office.
 - (iii) Contractor shall certify on a monthly basis that the PETS Roster is accurate and complete.
- (5) Contractor shall grant the Board access to all Staff members' personnel records upon request, in accordance with applicable law, for the purpose of conducting a background check and monitoring compliance with Security Clearance Procedures.
- (6) The Chief Executive Officer of the Division of Human Resources ("DHR") for the Board or his/her designees shall determine, on an ongoing basis, whether and to what extent any of Contractor's Staff shall be eligible to provide services under this Agreement for security reasons. The Board shall have the right to require the immediate removal of any Staff member who is the subject of an investigation by DHR pending a final determination. In the event the Chief Executive Officer of DHR or his/her designees determines that any of Contractor's Staff is ineligible, the Contractor does hereby consent and agree to abide by the following:
- (i) The Board will notify the Contractor and the individual and/or entity of its decision upon request by the contractor and will afford the individual and/or entity an opportunity to present information on his/her/its own behalf; and,
 - (ii) Immediately upon notification, the Contractor shall remove and bar the affected individual and/or entity from providing any services in furtherance of this Agreement, unless and until the decision is reversed or modified; and,
 - (iii) Immediately upon notification, the Contractor shall assign another eligible Staff member to fulfill the duties and responsibilities of the removed individual and/or entity in connection with the performance of this Agreement, unless and until the decision is reversed or modified. The foregoing does not relieve the Contractor of its obligation to comply with the staffing requirements set forth in this Agreement.
 - (iv) Contractor shall make no demand for, nor be entitled to receive, any additional compensation for costs arising from the ineligibility for security clearance reasons of any one or more of its Staff.
- (7) Contractor shall be responsible to pay for all fingerprinting costs at the time of fingerprinting.

(8) Contractor's Staff are covered by the notification procedures and additional requirements relating thereto set forth in Chancellor's Regulation C-105 in cases of arrest.

(9) Any waiver of the Security Clearance Procedures set forth herein or approval required hereunder shall not be effective unless in writing by the Chancellor or his designee.

(c) **Compliance.**

A. The Contractor understands and acknowledges that payment for Services under this Agreement is conditioned, in part, upon the Contractor's compliance with this "Security Clearance" Article and that in accepting payment, the Contractor represents that the Contractor is in full compliance. The Contractor shall not be paid for Services performed by any individual listed on Contractor's PETS Roster who was not fingerprinted and eligible to work as required by the Board.

B. Contractor's failure to comply with any provision under this "Security Clearance" Article may result in the withholding of payment and/or termination of this Agreement at the discretion of the Board. Additionally, in the event that Contractor fails to comply with any provision in this "Security Clearance" Article, the Board shall have the right to impose liquidated damages in the amount of Three Hundred Dollars (\$300.00) per day and set-off such amount from any monies due and owing to the Contractor until Contractor complies with the applicable provision.

12. OWNERSHIP OR RELATIONAL CHANGES

Subsequent to execution of this Agreement, the Contractor shall be obligated to notify the Chancellor or his designee(s) in writing within ten (10) calendar days in the event of a change(s) in any of the following: **(A)** beneficial owners (including, without limitation, parent and over-parent entities), limited or general partners, silent or apparent partners, major shareholders (more than five percent stock ownership), elected or appointed officials, officers and/or directors of the Contractor; **(B)** subsidiary and/or affiliated entities that are directly or indirectly involved in the performance of this Agreement; **(C)** transfer payees or payment assignees; and **(D)** any relationship that might involve or create a conflict of interest.

13. CHANCELLOR'S AUTHORITY

The supervisory and disciplinary authority of the Chancellor, regional superintendents, principals and other Board managerial employees over the staff, pupils and facilities of the City School Region of the City of New York shall not be diminished in any manner nor to any extent whatsoever by this Agreement.

14. CHANCELLOR'S APPROVAL

The Contractor does hereby consent, acknowledge, stipulate and agree that any and all exhibitions, performances, instructional services, materials and/or resources to be utilized in the performance of this Agreement not referenced in the Work Plan (**Attachment C**) and/or in the Budget Detail (**Attachment D**) shall be subject to the prior approval of the Chancellor or his designee(s).

15. CHANCELLOR'S DESIGNEE(S)

For all general and particular intents and purposes wherever mentioned in this Agreement, the Chancellor's designee shall be the Director of NCLB/SES Implementation and/or the Executive Director of the Division of Contracts and Purchasing and/or such other person(s) whom the Chancellor shall designate from time to time with written notice to the Contractor.

16. NON-LIABILITY OF THE BOARD

A. The relationship of the Contractor to the Board shall be that of independent contractor. The Contractor and its employees, in accordance with its status as an independent contractor, covenants and agrees that it will conduct itself in accordance with such status, that it will neither hold itself out as nor claim to be an officer or employee of the Board or City of New York, that it will not make any claim, demand or applications to or for any right or privilege applicable to an officer or employee of the Board or City of New York including but not limited to Workers' Compensation coverage, unemployment insurance benefits, social security coverage, or retirement membership or credits.

B. All personnel of the Contractor shall be within the employ of the Contractor only, which alone shall be responsible for their work, the direction thereof, and their compensation. Nothing in this Agreement shall impose any liability or duty on the Board or the City of New York for the acts, omissions, liabilities, or obligations of the Contractor or any person, firm, company, agency, association, corporation, or organization engaged by the Contractor as expert, consultant, independent contractor, specialist, trainee, employee, servant, or agent, or for taxes of any nature, including, but not limited to, unemployment insurance, worker's compensation, disability benefits, social security, or, except as specifically provided in this Agreement, to any person, firm or corporation. Without limiting the foregoing, neither the Board nor the City of New York shall be liable for any payment made or any obligation incurred in connection with the discharge of any employee by the Contractor.

C. The Contractor shall be solely responsible for all physical injuries or death to its agents, servants, or employees or to any other person, or damage to any property sustained during its operations and work on the project under this Agreement resulting from any act of omission or commission or error in judgment of any of its officers, trustees, employees, agents, servants or independent contractors.

17. SUBCONTRACTING

A. The Contractor shall not enter into any subcontract for the performance of its obligations, in whole or in part, under this Agreement without the prior approval by the Board of the subcontractor. In the event that Contractor uses a subcontractor or consultant for services indirectly related to the supplemental education services contemplated in this agreement, Contractor shall notify the Board immediately. All subcontracts must be in writing.

B. Prior to entering into any such subcontract for an amount greater than Five Thousand Dollars (\$5,000), the Contractor shall submit a written request for the approval of the proposed subcontractor to the Board giving the name and address of the proposed subcontractor and the portion of the services that it is to perform and furnish. At the request of the Board, a copy of the proposed subcontract shall be submitted to the Board. The proposed subcontractor's VENDEX Questionnaire must be submitted, if required, within thirty (30) Days after the Board has granted preliminary approval of the proposed subcontractor. Upon the request of the Board, the Contractor shall provide any other information demonstrating that the proposed subcontractor has the necessary facilities, skill, integrity, past experience and financial resources to perform the specified services in accordance with the terms and conditions of this Agreement. The Board shall make a final determination in writing approving or disapproving the subcontractor after receiving all requested information. For proposed subcontracts that do not exceed Twenty-five Thousand Dollars (\$25,000), the Board's approval shall be deemed granted if the Board does not issue a written approval or disapproval within forty-five (45) Days of the Board's receipt of the written request for approval or, if applicable, within forty-five (45) Days of the Board's acknowledged receipt of fully completed VENDEX Questionnaires for the subcontractor.

C. All subcontracts shall contain provisions specifying that:

1. The work performed by the subcontractor must be in accordance with the terms of the agreement between the Board and the Contractor;
2. Nothing contained in the agreement between the Contractor and the subcontractor shall impair the rights of the Board;
3. Nothing contained in the agreement between the Contractor and the subcontractor, or under the agreement between the Board and the Contractor, shall create any contractual relation between the subcontractor and the Board;
4. The subcontractor specifically agrees to be bound by provisions in this Agreement regarding Non-Discrimination, Equal Employment Opportunity Requirements, Confidentiality, and Cooperation with Audits and Investigations and specifically agrees that the Board may enforce such provisions directly against the subcontractor as if the Board were a party to the subcontract;
5. The specific consideration for the Subcontractor's services, including any monetary exchange between the parties and the basis upon which payment will be made; and
6. That the Subcontractor may not enter into second-tier subcontracting contracts for performance of services for the Board without the prior

written approval of the Board, and any such subcontracts must contain all of the provisions set forth herein. The Contractor remains responsible for submission and approval of any second-tier subcontracts.

D. The Contractor agrees that it is as fully responsible to the Board for the acts and omissions of its subcontractors and of persons either directly or indirectly employed by such subcontractors as it is for the acts and omissions of any person directly employed by it.

E. For determining the value of a subcontract, all subcontracts with the same subcontractor shall be aggregated.

F. The Board may revoke the approval of a subcontractor granted or deemed granted pursuant to Paragraphs (A) and (B) of this section if revocation is deemed to be in the interest of the Board in writing on no less than ten (10) Days notice unless a shorter period is warranted by considerations of health, safety, integrity issues or other similar factors. Upon the effective date of such revocation, the Contractor shall cause the subcontractor to cease all work under the Agreement. The Board shall not incur any further obligation for services performed by such subcontractor pursuant to this Agreement beyond the effective date of the revocation. The Board shall pay for services provided by the subcontractor in accordance with this Agreement prior to the effective date of revocation.

G. The Board's approval of a subcontractor shall not relieve the Contractor of any of its responsibilities, duties and liabilities under this Agreement. At the request of the Board, the Contractor shall provide the Board a copy of any subcontract.

H. Individual employer-employee contracts are not subcontracts subject to the requirements of this Section.

I. Payments made under the terms of any subcontract for services under this Agreement must be supported with documentation that includes dated invoices and work performed.

18. INCORPORATION OF ADDITIONAL TERMS AND CONDITIONS

A. For all general and particular intents and purposes, the following is hereby incorporated by this reference into this Agreement as if set forth herein in its entirety: the Board's standard "Terms and Conditions," which document is incorporated herein and annexed hereto as **Attachment D**. In the event of a conflict between the body of this Agreement and the terms and conditions, the body of this Agreement shall prevail.

B. INCORPORATION OF CONTRACTOR'S NYSED APPROVED TECHNICAL PROPOSAL.
If there is any discrepancy between the Contractor's Work Plan (**Attachment B**) and the Contractor's Technical Proposal approved by NYSED or the Contractor's Budget Detail (**Attachment C**) and the Contractor's Technical Proposal approved by NYSED, the Contractor's Technical Proposal will govern in both cases. Said Technical Proposal is incorporated by reference and made a part of this Agreement as if fully attached hereto.

**19. INCORPORATION OF ATTACHMENTS;
ORDER OF GOVERNANCE**

A. The following Attachments are annexed to this Agreement, incorporated herein, and made a part of this Agreement.

<u>Attachment</u>	<u>Attachment Name</u>
A	REQUEST FOR AUTHORIZATION
B	CONTRACTOR'S WORK PLAN
C	CONTRACTOR'S BUDGET DETAIL
D	BOARD'S TERMS AND CONDITIONS
E	CODE OF ETHICS

B. In the event of conflict between any Attachments incorporated herein by reference and this document, the following order of governance shall apply: first, **Attachment A**; second, this document; third, **Attachment D**; fourth, **Attachment E**; fifth, Contractor's Technical Proposal approved by NYSED, sixth, **Attachment C**; and, last, **Attachment B**.

20. ENTIRE UNDERSTANDING OF THE PARTIES; AMENDMENT

A. This Agreement represents the entire understanding between the parties, and no other prior or contemporaneous agreement(s), made orally or in writing, regarding the subject matter of this Agreement shall be deemed to exist or to bind any of the parties, or to vary any of the terms contained herein.

B. This Agreement shall not be modified or amended, except in writing, signed by the parties, in conformance with Terms and Conditions (**Attachment D**). Applications for amendment must be submitted in accordance with the procedures and timetables described on the Board's Division of Contracts and Purchasing NCLB- SES website (available at <http://schools.nyc.gov/Offices/DCP/Vendor/NoChildLeftBehind/Default.htm>).

**21. SUPPLEMENTAL EDUCATIONAL SERVICES PROVIDER
CERTIFICATION**

A. By signing the foregoing agreement Contractor certifies that any ensuing program and activity resulting from this Agreement, will be conducted in accordance with the technical proposal submitted by the Contractor to the New York State Education Department, and all applicable federal and state laws and regulations. Among them specifically, to provide appropriate accommodations and supports to students with disabilities to ensure such students benefit from supplemental educational services.

B. The Contractor further certifies that all documentation submitted pursuant to this Agreement contains truthful and accurate information.

C. The aggregate of all approved official purchase orders for all NCLB-SES contracted providers in any given year during the Term of this Agreement shall not be issued in excess of the appropriations then available therefore, and if issued through inadvertence or otherwise, shall be deemed null and void and utterly invalid. The Board shall have no liability for payment of same.

22. NOTICES

Any notices or communications between the parties, that are required to be provided, or that the parties desire to provide, relating to the performance of this Agreement, shall be given in writing and shall be made by postage prepaid, registered or certified mail, return receipt requested, or by overnight delivery by Federal Express or by other reputable courier service, to the addresses set forth below.

Board: New York City Department of Education 65 Court Street, 12 th Floor Brooklyn, New York 11201	Contractor: Address indicated on front page of the Agreement.
Attention: NCLB/SES Program Implementation Director	

23. AFFIRMATION OF RESPONSIBILITY AND PAID TAXES

The Contractor, whose taxpayer identification number is stated on the signature page herein, affirms and declares that said Contractor is not in arrears to the City of New York upon any debt, contract or taxes and is not a defaulter, as a surety or otherwise, upon any obligation to the City of New York, and has not been declared not responsible, or disqualified, by any agency of the City of New York, nor is there any proceeding pending relating to the responsibility or qualification of the Contractor to receive public contracts except as stated in the affirmation pertaining to the foregoing which has been furnished to the Board.

24. DUTY TO REPORT

The Contractor represents and warrants that neither it nor any of its directors, officers, members, partners or employees, has any interest nor shall they acquire any interest, directly or indirectly, which would or may conflict in any manner or degree with the performance or rendering of the services herein provided. The Contractor further represents and warrants that in the performance of this Agreement no person having such interest or possible interest shall be employed by it. The Contractor and its employees, agents and Subcontractors must report to the Special Commissioner of Investigations (“SCI”) any such interest or possible interest. The Contractor and its employees, agents and Subcontractors must also report to the SCI any criminal activity that they have knowledge of concerning the execution or the performance of this Agreement. The Contractor must inform, in writing, each employee, agent, and Subcontractor of his/her duty to report.

NO FURTHER TEXT ON THIS PAGE.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year written on the first page of the Agreement.

**NEW YORK CITY BOARD
OF EDUCATION**

("Contractor")

By: _____
Sharon Greenberger
Chief Operating Officer

By: _____
Signature of Authorized Person

Approved as to description of Services,
Budget and as to Availability of Funds:

Print Name of Authorized Person

By: _____
Name:
Title:

Print Title of Authorized Person

Approved as to Legal Sufficiency:

Taxpayer ID Number (**REQUIRED**)

ONLY)

(For Non Profit Organizations

Number

Charities Bureau Registration

By: _____
Name: Cara Marie Molloy, Esq.
Title: Agency Attorney
Division of Contracts and Purchasing

TERMS AND CONDITIONS

1. Definitions

- A. Words used in this Agreement shall have their ordinary meanings in the English language, except that scientific, technical, specialized or foreign words shall be given their appropriate scientific, specialized or foreign meanings, and definitions specifically provided elsewhere in the Agreement shall apply.
- B. The following words, names and titles shall have the following meanings:
- (1) "The Board" means the Board of Education of the City School District of the City of New York.
 - (2) "The City" means the City of New York.
 - (3) "Contract Budget Detail" means the document attached to and incorporated into the Agreement explaining and limiting how funds paid hereunder are to be expended by the Contractor.
 - (4) "The Comptroller" and "The Commissioner of Finance" mean the Comptroller and the Commissioner of Finance of the City, respectively.
 - (5) "The Chancellor" means the Chancellor of the Board.
 - (6) "Approved," "Required," "Directed," "Specified," "Designated" or "Deemed Necessary," unless otherwise expressed, mean approved, required, directed, specified, designated, or deemed necessary, as the case may be by the Chancellor or his designee.
 - (7) "Completion" means full and complete compliance with every requirement of the Agreement by the Contractor as certified by the Chancellor or his designee.
 - (8) "Final Payment" means (i) the payment or refund by the Board or City of any moneys that exhausts the amount of money made available under the Agreement or (ii) any payment marked "Final Payment."

2. Captions

The headings of this Agreement, the paragraphs, and subparagraphs of the Agreement, and of any attachments, are included solely for convenience and reference, and they shall not be used in any way to interpret this Agreement.

3. Conditions Precedent

This Agreement shall not become effective or binding upon the Board until: (1) it shall have been approved as to legal sufficiency by the Board's Office of Legal Services; (2) it shall have been executed by the Chancellor; (3) it shall have been approved as to legal authority by the New York City Law Department; (4) it shall have been registered by the Comptroller; (5) it shall have been approved by the New York State Education Department, if applicable; and, (6) the Comptroller shall have issued a certificate indicating there remains unexpended and unapplied a balance of the appropriation or fund applicable hereto sufficient to pay the estimated expense of performing the Agreement as certified by the Board. A Requirement Agreement for an extended period will require an endorsement upon the Agreement from time to time as services and/or items and

materials are ordered, of the sufficiency of the appropriation applicable towards the payment for said services and/or materials as and when ordered. (Rev. 4/16/01)

4. Compliance with Laws

In connection with the performance of this Agreement, the Contractor shall comply with all applicable laws, rules and regulations. The parties hereto agree that every provision of law required to be inserted herein be deemed a part hereof. It is further agreed that if any such provision is not inserted or is incorrectly inserted, through mistake or otherwise, this Agreement shall be deemed amended so as to comply strictly with the Law.

5. Unlawful Provisions Void

If this Agreement contains any unlawful provisions or portions thereof, they shall be deemed deleted from the Agreement and the remainder of the Agreement shall remain in full force and effect. If the deletion of such provision frustrates the purpose of this Agreement, either party may make application to the Chancellor's designee for relief. (Rev. 10/4/02)

6. Religious Activity Prohibited

There shall be no religious worship, instruction, proselytizing, or other religious activity in connection with the performance of this Agreement.

7. Political Activity Prohibited

No Board property provided to the Contractor hereunder for the purposes of this Agreement shall be used for any political activity or to further the election or defeat of any candidate for public office. As used herein the term "Board property" shall include, but not be limited to, supplies, work sites, funds advanced and services.

8. Publication and Publicity

The Contractor or anyone employed by the Contractor may not publish the results of its participation or findings in the performance of this Agreement without the prior written approval of the Chancellor or his designee. All approved publications shall acknowledge that the program is supported by funds from the Board. Five true copies of each approved publication shall be furnished to the Board without charge. (8/29/88)

9. Copyright

If the Contractor or anyone employed by the Contractor shall write, record or otherwise produce copyrightable material within the scope or in furtherance of this Agreement, the Board shall be considered the author for purposes of copyright, renewal of copyright, and termination of copyright and, unless expressly waived in a written instrument signed by the Chancellor or his designee, the owner of all of the rights comprised in the copyright. (6/88)

10. Patents

Any invention or discovery arising out of or developed in furtherance of this Agreement shall be promptly and fully reported to the Board. The Board shall have the exclusive right to apply for patent protection on such invention or discovery and to determine how the rights in said invention or discovery, including rights under any patent issued thereon, shall be disposed of and administered.

11. Accounting for Property

If any property is acquired by the Contractor with funds provided by the Board under this Agreement, the property shall be deemed purchased by the Board for the use of the Contractor during the term of the Agreement shall be permanently embossed "Property of New York City Board of Education" and shall be returned to the Board, at the Contractor's expense, within thirty (30) days after the end of said term, unless the Contractor is otherwise notified in writing by the Chancellor or his designee. (6/21/88)

12. Non-Reimbursable Expenses

The following items may not be claimed as a direct or indirect cost of the Services provided under this Agreement:

- a. rental expense of apartments;
- b. interest on loans;
- c. penalties for delinquent filing of tax returns;
- d. political or charitable contributions;
- e. advertising and promotions;
- f. legal expenses;
- g. key-man life insurance premiums;
- h. federal, state and city income taxes, state and city franchise taxes, and any costs for the preparation of such tax returns;**
- i. expenses incurred in preparing for operations;
- j. cost of employee meals and lodging except when traveling outside the City and pursuant to the Contract Budget Detail of this Agreement;
- k. entertainment, gratuities, and any other items of a personal nature;
- l. long distance telephone calls unless directly related to the services provided under the terms of this Agreement;
- m. any expense not ordinary, necessary or reasonable in the performance of the Agreement.

13. Limitation on Overhead

Notwithstanding any provision of this Agreement to the contrary, the Contractor shall be reimbursed for overhead costs equal to the lesser of either (1) the amount specified in the Contract Budget Detail of this Agreement or (2) the amount calculated by multiplying the total direct labor cost plus fringe benefits stated in the Contract Budget Detail of this Agreement by a fraction, the numerator of which shall be the total of all the Contractor's overhead costs during the term of this Agreement for all operations, and the denominator of which shall be the total of all of the Contractor's direct labor costs plus fringe benefits during the Term of this Agreement for all operations.

14. No Extra Compensation

The Contractor shall not seek, ask for, demand, sue for or recover, as extra compensation or otherwise, any sum for labor, materials or Services other than the compensation agreed upon and fixed.

15. Invoices and Payments

The Contractor shall furnish proof of performance with each invoice, and shall comply with all Board requirements concerning the manner in which invoices are to be submitted. The Contractor shall not be entitled to demand or receive full or partial payment, until each and every one of the provisions of this Agreement is complied with, and the Chancellor or his designee shall have given written certification to that effect. Nothing contained herein shall be construed to affect the right hereby reserved by the Board to reject the whole or any portion of the performance, should said certification be inconsistent with the terms of this Agreement, or otherwise erroneously given.

16. Cancellation of Grant Funding

If the goods or Services to be provided hereunder are to be paid for, in whole or in part, by means of grant funding received by the Board from federal, state, city or private sources, the obligation to pay the Contractor shall be subject to the continuing availability of said funding. The Board shall notify the Contractor within five (5) business days from the date the Board receives written notice of the cancellation of grant funding, in whole or in part, whereupon the Contractor may cease further performance of this Agreement to the extent said performance would not be supported by grant funding. However, the Board may, at its option, require completion of performance of this Agreement by the Contractor upon giving written assurance, signed by the Chancellor or his designee, within fifteen (15) business days of the date the Board receives written notice of such cancellation, that the completed performance of this Agreement shall be supported by other available funds.

17. No Estoppel

The Board, City, and their respective departments, divisions and offices, shall not be precluded or estopped by a statement or document issued by or on behalf of the Board or the City, from indicating the true value of Services performed and supplies furnished by the Contractor or by any other person pursuant to or as a result of this Agreement, or from indicating that any such return or certificate is untrue or incorrect in any particular, or that the Services performed and supplies furnished or any part thereof do not in fact conform to the provisions of the Agreement. Notwithstanding any such statement or document, or payment in accordance therewith, the Board and the City shall not be precluded or estopped from demanding and recovering from the Contractor such damages as may be sustained by reason of the Contractor's failure to comply with the provisions of this Agreement.

18. Acceptance of Final Payment

Receipt and negotiation by the Contractor, or by any person claiming under this Agreement, of the Final Payment hereunder, notwithstanding whether such payment be made pursuant to any judgment or order of any court, shall constitute a general release of the Board from any and all claims and liability for anything done, furnished, or relating to the labor, materials, or services provided, or for any act of omission or commission of the Board or its agents and employees. Said release shall be effective against the Contractor and the Contractor's representatives, heirs, executors, administrators, successors, and assigns.

19. Claims - Limitation of Action

No action at law or equity shall be maintained by the Contractor, its successors or assigns, against the Board on any claim based upon or arising out of this Agreement, or out of anything done in connection with this Agreement, unless such action shall be commenced within six (6) months after the date of filing of the voucher for final payment hereunder or within six (6) months of the required completion date for the services performed hereunder, whichever is sooner. None of the provisions of Article 2 of the Civil Practice Law and Rules shall apply to any action against the Board arising out of this Agreement.

20. Notices

The Contractor's address stated on page 1 of this Agreement is hereby designated as the place where all notices, letters or other communications directed to the Contractor shall be served, mailed or delivered. Any notice, letter or other communication directed to the Contractor and delivered to such address, or sealed in a post-paid wrapper and deposited in any post office box regularly maintained by the United States Postal Service, shall be deemed sufficient service thereof upon the Contractor. Said address may be changed at any time by an instrument in

writing, executed and acknowledged by the Contractor and delivered to the Chancellor's designee. Nothing herein contained shall be deemed to preclude or render inoperative personal delivery of any notice, letter or other communication, written or oral, to the Contractor. Whenever it shall be necessary or required to prove the delivery of any notice, an affidavit describing such delivery shall be conclusive evidence of such delivery.

21. Amendments and Waivers

- A. This Agreement may be amended by a written instrument signed by an authorized officer for the Contractor, and by the Chancellor or his designee. No amendment materially affecting the substance hereof shall be effective unless authorized by the Chancellor, and a copy of said authorization is attached to the amendment and incorporated therein. (Rev. 11/27/02)
- B. No waiver by the Board of any term or condition hereof shall be effective unless in writing and signed by the Chancellor or his designee. Any waiver shall be specifically limited to its terms, and shall not be deemed applicable to subsequent like circumstances.

C. Any purported oral amendment or waiver shall be void.

22. Suspension of Deliveries

The Chancellor or his designee, may postpone, delay, or suspend the delivery of the goods or Services, or any part thereof, without additional compensation to the Contractor. In such event, (A) the time established for performance by the Contractor of any duty during the Term of this Agreement may, at the Contractor's option, be extended for the number of days the Contractor was delayed by said suspension, postponement, or delay provided the Term is not thereby extended; however, (B) the Term may, at the Board's option, be extended for the number of days the Contractor was delayed by said suspension, postponement, or delay.

23. Cancellation

- A. If the Contractor violates any provision of this Agreement, the Chancellor or his designee may pursue any legal or equitable remedies available to the Board. In addition, the Chancellor or his designee may seek to have the Contractor declared in default by a panel to be designated by the Chancellor. In the event that the Chancellor's designee shall determine the Contractor to be in default, the Board may cancel this Agreement and shall thereafter be relieved of all liability hereunder. Upon a finding of default in violation of this contract, the Contractor shall be deemed not responsible and disqualified from bidding for a period of four years, unless in such finding of default, a lesser penalty is imposed by reason of mitigating circumstances. (Rev. 10/4/02)
- B. In the event of breach of this Agreement by the Contractor, the Board shall have the right to cancel and terminate said Agreement, and the Contractor shall be liable to the Board for any additional cost of completion of the within services, the Board's other costs in connection with the termination, reletting and completion of the services. All such costs, along with any liquidated damages for delay provided herein, may be assessed by the Board against the Contractor and deducted by the Board from payment to be made to the Contractor under this or any other Agreement at any time between the Contractor and the Board or City. In the event that said costs exceed all sums owed at the termination date of this Agreement, the Contractor shall pay the amount of such excess to the Board upon notice from the Board of said amount, and in the event that said costs and liquidated damages are less than the sum payable under this Agreement as if same had been completed by the Contractor, the Contractor shall forfeit all claims to the difference to the Board. If the Board undertakes to secure the services or any part thereof under this section of the Agreement, the certificate of the Chancellor or his designee indicating the amount of services secured, the cost and excess cost, if any, of completing this

Agreement, and the amount of liquidated damages hereunder, shall be conclusive and binding upon the Contractor, its assigns and all other claimants.

24. Board Determination

The Chancellor or his designee shall in all cases determine the acceptability of the labor, materials, or Services which are delivered pursuant to this Agreement, including but not limited to their quality, delivery, and condition, and shall in all cases decide every question which may arise relative to the performance of this Agreement. The Contractor may not rely upon, and the Board shall not be bound by, any explanations, determinations or other statements by or from the Board which are not in writing and signed by the Chancellor or his designee.

25. Investigations

25.1 The Contractor agrees to cooperate fully and faithfully with any investigation, audit or inquiry conducted by a State of New York (State) or City of New York (City) governmental agency or authority that is empowered directly or by designation to compel the attendance of witnesses and to examine witnesses under oath, or conducted by the 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.

25.2(a) If any person who has been advised that his or her statement, and any information from such statement, will not be used against him or her in any subsequent criminal proceeding refuses to testify before a grand jury or governmental agency or authority empowered directly or by designation to compel the attendance of witnesses and to examine witnesses under oath concerning the award of, or performance under, any transaction, agreement, lease, permit, contract, or license entered into with the City, the State, or any political subdivision or public authority thereof, or the Port Authority of New York and New Jersey, or any local development corporation within the City, or any public benefit corporation organized under the laws of the State of New York; or,

25.2(b) If any person refuses to testify for a reason other than the assertion of his or her privilege against self-incrimination in an investigation, audit or inquiry conducted by a City or State governmental agency or authority empowered directly or by designation to compel the attendance of witnesses and to take testimony under oath, or by the governmental agency that is a party in interest in, and is seeking testimony concerning the award of, or performance under, any transaction, agreement, lease, permit, contract, or license entered into with the City, the State, or any political subdivision thereof or any local development corporation within the City, then:

25.3(a) The commissioner or agency head whose agency is a party in interest to the transaction, submitted bid, submitted proposal, contract, lease, permit, or license may convene a hearing, upon not less than (5) days written notice to the parties involved to determine if any penalties should attach for the failure of a person to testify.

25.3(b) If any non-governmental party to the hearing requests an adjournment, the commissioner or agency head who convened the hearing may, upon granting the adjournment, suspend any contract, lease, permit, or license pending the final determination pursuant to paragraph 25.5 below without the City and Board incurring any penalty or damages for delay or otherwise.

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

(a) The disqualification for a period not to exceed five (5) years from the date of an adverse determination for any person, or any entity of which such person was a member at the time the testimony was sought, from submitting bids for, or transacting business with, or entering into or obtaining any contract, lease, permit or license with or from the City and Board; and/or

- (b) The cancellation or termination of any and all such existing City and Board contracts, leases, permits or licenses that the refusal to testify concerns and that have not been assigned as permitted under this agreement, nor the proceeds of which pledged, to an unaffiliated and unrelated institutional lender for fair value prior to the issuance of the notice scheduling the hearing, without the City and Board 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 Board.
- 25.5 The Commissioner or agency head shall consider and address in reaching his or her determination and in assessing an appropriate penalty the factors in paragraphs (a) and (b) below. He or she may also consider, if relevant and appropriate, the criteria established in paragraphs (c) and (d) below in addition to any other information which may be relevant and appropriate:
- (a) The party's good faith endeavors or lack thereof to cooperate fully and faithfully with any governmental investigation or audit, including but not limited to the discipline, discharge, or disassociation of any person failing to testify, the production of accurate and complete books and records, and the forthcoming testimony of all other members, agents, assignees or fiduciaries whose testimony is sought.
- (b) 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.
- (c) The nexus of the testimony sought to the subject entity and its contracts, leases, permits or licenses with the City and the Board.
- (d) 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 25.4 above, provided that the party or entity has given actual notice to the commissioner or agency head upon the acquisition of the interest, or at the hearing called for in 25.3(a) above gives notice and proves that such interest was previously acquired. Under either circumstances the party or entity must present evidence at the hearing demonstrating the potential adverse impact a penalty will have on such person or entity.
- 25.6 (a) 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.
- (b) The term "person" as used herein shall be defined as any natural person doing business alone or associated with another person or entity as a partner, director, officer, principal or employee.
- (c) The term "entity" as used herein shall be defined as any firm, partnership, corporation, association, or person that receives monies, licenses, leases, or permits from or through the City or Board or otherwise transacts business with the City or Board.
- (d) The term "member" as used herein shall be defined as any person associated with another person or entity as a partner, director, officer, principal or employee.
- 25.7 In addition to and notwithstanding any other provisions of this agreement, the commissioner or agency head may in his or her sole discretion terminate this agreement upon not less than three (3) days written notice in the event the Contractor fails to promptly report in writing to the Commissioner of Investigation of the City of New York any solicitation of money, goods, requests

for future employment or other benefit or thing of value, by or on behalf of any employee of the City or Board, or other person, firm, corporation or entity for any purpose which may be related to the procurement or obtaining of this agreement by the Contractor or affecting the performance of this agreement.

26. Reports, Inspection and Records

- A. The Contractor shall promptly provide all reports required by the Board, including without limitation, financial, program, statistical, analytical, narrative and progress reports. Unless otherwise provided herein, the final payment hereunder shall not be made until all reports have been submitted and approved by the Board.
- B. The Contractor shall, until six (6) years after completion of its services hereunder or six years after date of termination of this Agreement, whichever is later, maintain and retain complete and correct books and records relating to all aspects of the Contractor's obligations hereunder. Records must be maintained separately, so as to identify clearly the hours charged to this Agreement and be distinguishable from all other hours charged which are not related to this Agreement.
- C. The Contractor shall make its staff, and premises, books, records, operations, and Services provided under this Agreement, and those of its subcontractors, available to the Board and to any person, agency or entity designated by the Board, at any time, for program, audit, fiscal audit, inspection, observation, sampling, visitation and evaluation, and shall render all assistance and cooperation for said purposes. The Contractor agrees to attend, upon demand, any investigation conducted by the Board to produce any records and other documents required by the Board at that investigation, to cooperate with the Board, and to give sworn testimony pertaining to those documents or the subject of the investigation; provided only that the investigation, testimony, records and documents relate to the subject of the Contractor's relationship with the Board of Education. If a corporation, partnership or government agency, the Contractor agrees to require its officers, employees and partners to comply with the foregoing.
- D. In its record keeping the Contractor shall also comply with all federal, state and local laws and regulations pertaining to such records, including, without limitation, the regulations of the Comptroller, and shall require its subcontractors to do likewise.
- E. In the event that any federal, state or local government agency, or other public or private agency conducts an audit of any of the Contractor's operations which pertains directly or indirectly to the goods and services provided pursuant to this Agreement, within five (5) working days after receipt by the Contractor of notice of the commencement of such audit the Contractor shall give notice of such commencement to the Board; and within five (5) working days after receipt by the Contractor of a copy of any resulting interim or final audit report, the Contractor shall supply one copy thereof to the Board. (6/24/88)

27. Non-Assignment of Contract

The Contractor shall give its personal attention to the faithful performance of this Agreement. The Contractor covenants that it will not assign, transfer, convey, sublet or otherwise dispose of this Agreement or its right, title or interest therein or its power to execute such Agreement, to any other person or corporation without the previous written consent of the Chancellor or his designee. Request for permission to assign a contract shall be submitted in writing to the Chancellor's designee, Executive Director of the Division of Contracts and Purchasing, 65 Court Street, Brooklyn, New York 11201. A non-refundable processing fee of \$250.00 for contract amounts less than \$100,000.00 and \$500.00 for contract amounts \$100,000.00 or greater shall be submitted with the request. Said fee shall be by check or money order and made payable to the New York City Board of Education, Division of Contracts and Purchasing. The Chancellor's

designee shall grant or deny such requests after consultation with the appropriate Division or Office, the decision is final and binding. If the Contractor in any way violates the terms of this provision, the Board shall have the right to cancel and terminate this Agreement, and the Board shall thereupon be relieved from all liability hereunder. Nothing contained herein shall be construed to affect an assignment by the Contractor for the benefit of its creditors made pursuant to the statutes of the State of New York. No right under this Agreement, or to any monies due or to become due hereunder, shall be asserted against the Board or the City in law or in equity by reason of a purported assignment of this Agreement, or any part thereof, or of any monies due or to become due hereunder, unless authorized as aforesaid. (Rev.11/27/02)

28. Contractor's Staff

The Contractor shall employ or contract for the services of only competent workmen, consultants, independent contractors and other employees as are, or reasonably may be, necessary for the performance of the Services hereunder.

The Contractor warrants that it shall be solely responsible for its employees' work, direction, safety and compensation. (6/84)

The Contractor agrees to replace immediately any employee, and not engage such employee in the performance of this Agreement, if the Contractor is notified in writing that, in the opinion of either the Chancellor, a Community Superintendent, or their designees, such employee is incompetent or otherwise impedes the performance of the services hereunder.

29. Confidentiality of Records

All personally identifiable student and staff information obtained by or furnished to the Contractor by the Board, and all reports and studies containing such information prepared or assembled by the Contractor, are to be kept strictly confidential by the Contractor and shall not be provided or disclosed to any third party without the express written permission of the Chancellor or his designee. The Contractor shall limit access to such material in its control to those of its employees performing services pursuant to this Agreement strictly on a need to know basis. The Contractor shall restrict its use of the information to its performance under this Agreement and shall return all such material to the Board upon the completion of the services herein.

30. Testimony

If the project which is the subject matter of this Agreement at any time becomes involved in a proceeding, to which the Board or the City is a party, before any court, board, tribunal, panel, arbitrator, referee or agency, the Contractor shall provide such knowledgeable witnesses as the Board shall require, free of additional compensation of any kind. Nothing herein shall require the Contractor to provide testimony in any proceeding in which it is a party with interests opposed to those of the Board.

31. No Personal Liability

Neither the Chancellor, nor any board members, nor any officer, employee, agent or representative of the Board or of the City shall be personally liable, based upon any theory of law or equity, to the Contractor or to any party claiming on behalf of or through the Contractor, under this Agreement, or by reason of any individual's actions or failure to act in any way connected with this Agreement, whether or not the action shall have been within or without an individual's scope of authority. The scope of this provision includes personal injury to any personal interest (commercial or otherwise), physical injury (including death), property damages, and any pecuniary damages where such injuries or damages result from or arise out of negligence. The Contractor further waives any and all rights to make a claim or commence an action or special proceeding, in law or equity, against any of the aforementioned individuals, and the Contractor

hereby assigns its complete right, title, and interest in any such claim, action, or special proceeding to the Board. (Rev. 12/12/02)

32. Indemnification

The Contractor shall protect, indemnify and hold harmless the Board and the City from any and all claims, suits, actions, costs and damages to which the Board and the City may be subjected by reason of injury to person or property, or wrongful death, as may result of any act, omission, carelessness, malpractice or incompetence of the Contractor, or anyone employed or engaged by the Contractor, in connection with the performance of this Agreement. (12/19/02)

33. Conflicts of Interest

A. Except as stated in paragraph B, no non-governmental Contractor may have on its Board of Directors (or comparable body), employ or have under contract for services (1) any present full-time officer or employee of the City of New York or the Board of Education or any part-time officer or employee of the Board, or (2) any present full-time officer or employee of the City on leave from the City or the Board or any part-time officer or employee of the Board currently on leave from the Board. Generally, the Conflicts of Interest Board may grant waivers of this provision, if an employee or officer is not involved in the Contractor's business with the City or the Board. Said waivers are discretionary and must be approved prior to the commencement of services by that individual. The Board of Education's Ethics Officer must be contacted if an officer or employee wishes to request a waiver. (Rev. 12/12/02)

B. No Board of Education officer or employee may serve as an unpaid member of a Board of Directors (or comparable body) of a non-governmental not-for-profit Contractor without the permission of the Chancellor. To obtain this permission, the officer or employee must contact the Board of Education's Ethics Officer. All other City officers or employees may serve as unpaid members of Boards of Directors (or comparable body) of a non-governmental not-for-profit Contractor, if the officer or employee has no involvement with the Contractor's business with the City or the Board. (Rev. 11/27/02)

C. No officer or employee of the Board of Education, or the officer or employee's spouse/ domestic partner or unemancipated child(ren) can have an ownership interest in the contractor, defined as an interest which exceeds five percent of the firm or an investment of \$32,000 in cash or other form of commitment, whichever is less, and any lesser interest when the officer or employee or spouse, unemancipated child(ren), or domestic partner exercises managerial control or responsibility regarding any such firm. For Contractors with stock that is publicly traded, compliance with this subparagraph C is the obligation of Board of Education employees and officers. (1/16/03)

D. No former officer or employee of the Board may appear before the Board on behalf of a non-governmental Contractor within one year of the former officer or employee's termination of service with the Board. An appearance before the Board includes all communications with the Board. However, a former employee of the Board is not prohibited from serving on a non-governmental Contractor's Board of Directors (or comparable body), or from employment or contracting for services with the Contractor, provided that the former employee does not appear before the Board within one year of the termination of service with the Board.

E. No former officer or employee of the City (including the Board) may have any involvement on behalf of a non-governmental Contractor with any aspect of a contract, including services under that contract, if that former officer or employee was involved substantially and personally with any aspect of that contract while employed by the City. Any former City employee whose duties for the City or the Board involved a contract shall contact the New York City Conflicts of Interest Board for

clarification before having any involvement with the contract on behalf of a non-governmental Contractor or any other private interest.

F. The Contractor warrants that, other than a bona fide employee or contractor regularly working as a sales representative for the Contractor, no person, selling agency, or other entity has solicited or secured this Agreement, or has been employed or retained to do so, for a commission, percentage, brokerage fee or contingent fee.

G. The Contractor shall not give, and warrants that it has not given or promised to give, any gift to a community school board member, school leadership team member or to any officer, employee or other person whose salary is payable in whole or part from Board or City funds, or other funds under this Agreement. The word "gift" shall include, without limitation, money, tangible goods, services, loans, promises or negotiable instruments. (2/13/01)

H. If the Contractor violates any provision of this paragraph, the Board may, at its option: (1) cancel and terminate this Agreement and be relieved of all liability hereunder; (2) deduct all amounts paid by the Contractor or other value given by the Contractor in violation of this paragraph from payments made or to be made to the Contractor under this or any other Agreement at any time; (3) require the refund of any funds paid hereunder; (4) any combination of the foregoing; or (5) any other action the Board deems necessary and appropriate as permitted by law. Any breach of the warranties or violation of the provisions of this paragraph shall be grounds to find the Contractor or its principals as not a responsible bidder on other Board or City contracts.

I. Provider shall adhere to the Central Board of Education policy on Conflicts of Interest, the Chancellor's Regulations on Conflicts of Interest C-110, and the New York City Charter provisions on Conflicts of Interest which are hereby incorporated by reference as if fully attached hereto.

34. Antitrust

The Contractor assigns to the Board its right, title and interest in and to any claim or cause of action arising under the antitrust laws of New York State or the United States relating to the goods or Services purchased or procured by the Board pursuant to this Agreement.

35. Merger and Choice of Law

This written Agreement constitutes the entire agreement of the parties, and no other prior or contemporaneous agreement, oral or otherwise, regarding the subject matter of this Agreement shall be deemed to exist or bind any of the parties hereto, or to vary any of the terms contained herein. This Agreement shall be governed and construed in accordance with the laws of the State of New York without regard to its conflict of law rules.

36. Participation in an International Boycott

A. The Contractor agrees that neither it nor any substantially-owned affiliated company is participating or shall participate in an international boycott in violation of the provisions of the Export Administration Act of 1979, as amended, or the regulations of the United States Department of Commerce promulgated thereunder.

B. Upon the final determination by the Commerce Department or any other agency of the United States that the Contractor or a substantially-owned affiliated company thereof, participated, or is participating, in an international boycott in violation of the provisions of

the Export Administration Act of 1979, as amended, or the regulations promulgated thereunder, the Chancellor or his designee may, at his option, render forfeit and void this contract. (1/12/89)

37. No Discrimination

- A. The Contractor will strictly comply with all applicable Federal, State and Local laws pertaining to the subject of discrimination on any ground, as they may now read or as they may hereafter be amended.
- B. The Contractor is, and will remain, an Equal Opportunity Employer. In addition to the other requirements of this paragraph 37, the Contractor shall provide equal opportunity for all qualified persons, and shall not discriminate in employment because of race, creed, gender, color, age, sexual orientation, national origin, handicapping condition, marital status, or religion and shall promote the full realization of equal opportunity. (Rev. 9/20/88)
- C. Pursuant to the provisions of the New York State Labor Law, the Contractor agrees, in its operations performed within the State of New York:
 - (1) That in the hiring of employees for the performance of work under this contract or any subcontract hereunder, neither the contractor, subcontractor, nor any person acting on behalf of such contractor or subcontractor, shall by reason of race, creed, color, sex or national origin discriminate against any citizen of the State of New York who is qualified and available to perform the work to which the employment relates;
 - (2) That no contractor, subcontractor, nor any person on his behalf shall, in any manner, discriminate against or intimidate any employee hired for the performance of work under this contract on account of race, creed, color, sex or national origin;
 - (3) That there may be deducted from the amount payable to the contractor by the state or municipality under this contract a penalty of five dollars for each person for each calendar day during which such person was discriminated against or intimidated by the contractor or subcontractor, or anyone acting on behalf of the contractor in violation of the provisions of the contract;
 - (4) That this contract may be cancelled or terminated by the state or municipality, and all moneys due or to become due hereunder may be forfeited, for a second or any subsequent violation of the terms or conditions of this section of the contract;
 - (5) The aforesaid provisions of this section covering every contract for or on behalf of the state or a municipality for the manufacture, sale or distribution of materials, equipment or supplies shall be limited to operations performed within the territorial limits of the State of New York; and
 - (6) That the Board is, for purposes of this subparagraph C., a "state or municipality." (Rev. 11/25/96)

38. Equal Employment Opportunity Requirements for Professional Contractors

- A. Definition of Terms for the Implementation of a Program of Affirmative Action.

The following terms, when used in this paragraph, shall have the meanings given for them.

- (1) "Employee": Any person employed full or part-time in any capacity by the Contractor or sub-contractor.
- (2) "Minority Groups and Affected Classes": Blacks, Hispanics (Non-European), Asian Americans, American Indians, females and individuals with handicapping conditions.
- (3) "Program of Affirmative Action": A detailed, result-oriented set of written procedures submitted by a Contractor or sub-contractor which when implemented with conscious effort results in compliance with the Equal Opportunity Policy herein, through full utilization and equal treatment of minorities, women and individuals with handicapping conditions at all levels and in all segments of the Contractor's or sub-contractor's work force. An effective Program of Affirmative Action shall include but not necessarily be limited to, the following elements: (Rev. 9/20/88)
 - (a) Development or reaffirmation of the Contractor's or sub-contractor's Equal Opportunity Policy;
 - (b) Dissemination of the Policy;
 - (c) Responsibility for implementation;
 - (d) A survey and analysis of employment at all levels and in all categories and aspects of the Contractor's or sub-contractor's work force, which determines if and at which levels, categories, and aspects there is an underutilization of minority and female employees;
 - (e) An analysis of employment policies and practices, including but not limited to seniority systems, recruitment, training, promotion, insurance and job benefits and their effects upon minorities, women and individuals with handicapping conditions;
 - (f) Corrective actions taken, or to be taken, toward the elimination of any employment policy or practice having a discriminatory effect on minority group members and women; and
 - (g) Description of the Contractor's efforts to engage, as sub-contractors, bona fide minority business enterprises and female enterprises.
- (4) "Goals and Timetables": Projected levels of achievement resulting from an analysis by the Contractor or sub-contractor of its deficiencies, and of what it can reasonably do to remedy them within a specified time period.
- (5) "Underutilization": Having fewer minorities, women and individuals with handicapping conditions in a particular job classification than would reasonably be expected by their availability in the appropriate labor force.
- (6) "The Office": The Office of Equal Opportunity of the Board.

B. Required Program of Affirmative Action

- (1) The Contractor is required to identify and eliminate overt and covert discriminatory practices and implement the Program of Affirmative Action. Upon demand of the Office the Contractor shall submit to the Office a detailed written Program of Affirmative Action (hereinafter referred to as a "P.A.A."). In the event the Contractor submits a P.A.A. not acceptable to the Office, the Office will require the correction or revision of the P.A.A. to its satisfaction.
- (2) In the event the Contractor fails to submit such an acceptable P.A.A. within the time specified in the demand, the Contractor may be declared in default. The Director shall be the sole judge of the P.A.A.'s acceptability. The P.A.A. shall:
 - (a) Apply to all Board of Education professional services contracts with the Contractor;
 - (b) Encompass all phases of the employment process, including evaluation of job classification to ensure job relatedness, recruitment, selection, validity of examinations, retention, layoffs, seniority, assignments, training, promotion, salary and benefits;
 - (c) Fulfill the following requirements:
 - (i) Include measurable goals, reasonable timetables and specific programs to be implemented by the contractor to identify and eliminate deficiencies in employment practices with respect to the underutilization of members of minority groups and members of affected classes;
 - (ii) Include a statement of the present utilization of minority group members and women in the Contractor's work force and a projection of the minority utilization in the Contractor's work force for the life of the Contract and for at least a one-year period succeeding its completion. This statement and projection shall include present and projected (1) rates of hiring and promotion of minority group members and women in specific job categories at each wage rate within each level of employment and according to major organizational unit, and (2) percentages of minority group and women utilization in specific job categories at each wage rate within each level of employment, and according to major organizational work force;
 - (iii) Include all of the Contractor's facilities within New York City as well as those facilities located elsewhere within the continental limits of the United States;
 - (iv) Specify the union(s) or other employee organizations to which the Contractor's employees belong, and shall include commitments to good faith efforts to effect Equal Opportunity changes directly or indirectly, in programs by such unions or organizations to recruit, train, qualify or otherwise select members, if such changes are deemed necessary. The P.A.A. shall also include a copy of any agreement with an employee association which affects employment policies and practices;
 - (v) Be submitted in such format as shall be specified by the Director of the Office;

- (vi) Include a commitment to submit to the Director a separate P.A.A., of the form (i) to (v) hereof, for each subcontractor prior to approval of the subcontractor by the Board of Education;
- (vii) Include a written evidence or proof which shows that minority entrepreneurs have been solicited and given an equal opportunity to submit proposals and that such proposals have been given equal consideration for award;
- (viii) Contain commitments as to goals for minority and affected classes employment and adoption of equal employment practices not less strict than the commitments contained in the Contractor's most recent P.A.A. which was approved by the Office.

C. Compliance Inspection Report

Upon demand of the Office the Contractor shall, within the specified time, submit to the Office a Compliance Inspection Report. The completed Compliance Inspection Report must be returned to the Office within such time as is specified in the requisition for information accompanying the report form.

D. Conferences

The Contractor shall attend such conferences as shall be required by the Office for the purpose of acquainting it with the statutory and contractual requirements and what specific measures shall constitute an acceptable P.A.A.

E. Implementation of P.A.A.

During the Term of the Contract, the Contractor shall successfully implement the P.A.A. approved by the Office.

F. Default

If, in the opinion of the Office, the Contractor has breached any of the requirements of paragraphs 36 or 37 hereof it may seek to have the Contractor declared in default by the Chancellor's designee as provided elsewhere herein. (Rev. 10/10/02)

For further information concerning these rules, regulations or procedures, contractors may consult with the Office of Equal Opportunity of the Board.

39. MacBride Principles Provisions for Board of Education Contractors

ARTICLE I. MACBRIDE PRINCIPLES

PART A

In accordance with section 6-115.1 of the Administrative Code of the City of New York, the Contractor stipulates that such Contractor and any individual or legal entity in which the Contractor holds a ten percent or greater ownership interest and any individual or legal entity that holds a ten percent or greater ownership interest in the Contract either (a) have no business operations in Northern Ireland, or (b) shall take lawful steps in good faith to conduct any business operations they have in Northern Ireland in accordance with the MacBride Principles, and shall permit independent monitoring of their compliance with such principles.

PART B

For purposes of this section, the following terms shall have the following meanings:

"MacBride Principles" shall mean those principles relating to nondiscrimination in employment and freedom of workplace opportunity which require employers doing business in Northern Ireland to:

- (1) increase the representation of individuals from underrepresented religious groups in the work force, including managerial, supervisory, administrative, clerical and technical jobs;
- (2) take steps to promote adequate security for the protection of employees from underrepresented religious groups both at the workplace and while traveling to and from work;
- (3) ban provocative religious or political emblems from the workplace;
- (4) publicly advertise all job openings and make special recruitment efforts to attract applicants from underrepresented religious groups;
- (5) establish layoff, recall and termination procedures which do not in practice favor a particular religious group;
- (6) abolish all job reservations, apprenticeship restrictions and different employment criteria which discriminate on the basis of religion;
- (7) develop training programs that will prepare substantial numbers of current employees from underrepresented religious groups for skilled jobs, including the expansion of existing programs and the creation of new programs to train, upgrade and improve the skills of workers from underrepresented religious groups;
- (8) establish procedures to assess, identify and actively recruit employees from underrepresented religious groups with potential for further advancement; and
- (9) appoint a senior management staff member to oversee affirmative action efforts and develop a timetable to ensure their full implementation.

ARTICLE II. ENFORCEMENT OF ARTICLE I.

The Contractor agrees that the covenants and representations in Article I above are material conditions to this contract. In the event the contracting entity receives information that the Contractor who made the stipulation required by this section is in violation thereof, the contracting entity shall review such information and give the Contractor an opportunity to respond. If the contracting entity finds that a violation has occurred, the entity shall have the right to declare the Contractor in default and/or terminate this contract for cause and procure the supplies, services or work from another source in any manner the entity deems proper. In the event of such termination, the Contractor shall pay to the entity, or the entity in its sole discretion may withhold from any amounts otherwise payable to the Contractor, the difference between the contract price for the uncompleted portion of this contract and the cost to the contracting entity of completing performance of this contract either itself or by engaging another contractor or contractors. In the case of a requirements contract, the Contractor shall be liable for such difference in price for the entire amount of supplies required by the contracting entity for the uncompleted term of its contract. In the case of a construction contract, the contracting entity shall also have the right to hold the Contractor in partial or total default in accordance with the default provisions of this contract, and/or may seek debarment or suspension of the Contractor. The rights and remedies of the entity hereunder shall be in addition to, and not in lieu of, any rights and remedies the entity

has pursuant to this contract or by operation of law. (8/92)

40. Set-Off Rights

The Board shall have all of its common law, equitable and statutory rights of set-off. These rights shall include, but not be limited to, the Board's option to withhold for the purposes of set-off any moneys due and owing to the Board with regard to this Agreement, any other agreement with the Board, including any agreement for a term commencing prior to the term of this Agreement, plus any amounts due and owing to the Board for any other reason. The Board shall exercise its set-off rights in accordance with normal Board practices including, in cases of set-off pursuant to an audit, the finalization of such audit by the Board, its representatives, or the State or City Comptroller. (1/95)

41. Non-Collusive Bidding

If this Agreement was awarded by the Board based upon the submission of bids or proposals, Contractor warrants under penalty of perjury, that its bid or price quotation was arrived at independently and without collusion aimed at restricting competition. (10/92)

42. Intentionally Left Blank (Burma Provision Deleted 9/6/01)

43. Intentionally Left Blank (Year 2000 Compliance Required Deleted 11/27/02)

44. Fair and Ethical Business Practices

A. Fair and Ethical Business Practices shall be strictly adhered to during the term of this Agreement. During the term of this Agreement, Contractor shall not:

- (1) File with a government office or employee, a written instrument which intentionally contains a false statement or false information;
 - (2) Intentionally falsify business records;
 - (3) Give, or offer to give, money, gifts or anything of value or any other benefit to a labor official or public servant with intent to influence that labor official or public servant with respect to any of his or her official acts, duties or decisions as a labor official or public servant;
 - (4) Give or offer to give, money, gifts or anything of value or any other benefit to a labor official or public servant for any reason;
 - (5) Give, or offer to give, money, gifts or other benefit(s) to an official or employee of a private business with intent to induce that official or employee to engage in unethical or illegal business practices;
 - (6) Knowingly participate in the criminal activities of any organized crime group, syndicate or "family," nor shall any person employed by or associated with any such organized crime "family," syndicate or group participate through criminal means in any of the business affairs of Contractor.
- B. Contractor certifies throughout the term of this Agreement, that there have been no changes in circumstances, conditions or status of Contractor's qualification(s) as reflected in Contractor Questionnaire or other such documents submitted to the Board. Any

change in the information provided by Contractor in its questionnaire currently on file with the Board must be immediately reported to the Board. In addition, Contractor shall immediately notify the Board of any of the following events if it becomes known that any director, partner, officer, member or employee of Contractor, or any shareholder owning 5% of more of Contractor's membership interests:

- (1) is the subject of investigation involving any violation of criminal law or other federal, state or local law or regulation by any governmental agency; or
- (2) is arrested, indicted or named as an unindicted co-conspirator in any indictment or other accusatory instrument; or
- (3) is convicted of any felony under state or federal law and/or any misdemeanor involving a business-related crime. (10/8/98)

45. Indemnification Language

The Contractor shall defend, indemnify and hold the Department and the City harmless from and against any and all claims, suits, damages, judgments, liabilities, costs, and expenses, including reasonable attorneys' fees, to which they may be subject because of or related to any claim that the Copyrightable Materials or their use constitutes an infringement by the Contractor or a violation by the Contractor of the copyright, patent, trademark, or any other property or personal right of any third party. For the purposes of this provision, "Copyrightable Materials" shall include any reports, documents, data, photographs, software, and/or other materials provided pursuant to this agreement, regardless of whether the copyright in such materials is or shall be owned by the Department, the Contractor, or third parties. This indemnification shall survive the termination or expiration of this Agreement. This indemnification provision shall not be limited in any way by the Contractor's obligations to obtain insurance as provided under this Agreement. Furthermore, Contractor shall defend and settle at its sole expense all suits or proceedings brought against Contractor arising out of the foregoing. However, in cases involving software, no such settlement shall be made that prevents the Department from continuing to use the software without the Department's prior written consent, which consent shall not be withheld unreasonably. 1/15/03

46. Dispute Resolution Procedure

- A. In the event the Contractor and the Board are unable to resolve their differences concerning a determination by the Board, the Contractor may initiate a dispute in accordance with the procedure set forth in this Section 46. Exhaustion of these dispute resolution procedures by Contractor shall be a precondition to any lawsuit permitted hereunder.
- B. The Dispute Resolution Officer ("DRO") selected by the Executive Director of the Division of Contracts and Purchasing shall be authorized to decide all questions of any nature whatsoever arising out of, under or in connection with, or in any way related to or on account of, this Agreement (including claims in the nature of breach of contract or fraud or misrepresentation before or subsequent to contract award) and the DRO's decision shall be conclusive, final and binding on the parties. The DRO's decision may be based on such assistance as s/he may find desirable, including advice of experts. The effect of the DRO's decision shall not be impaired or waived by any negotiations or settlement offers in connection therewith, or by any prior decision of others, which prior decisions shall be deemed subject to review, or by any termination or cancellation of this Agreement.
- C. All such disputes shall be submitted in writing by the Contractor to the DRO, together with all evidence and other pertinent information with regard to such questions, in order that a fair and impartial decision may be made. The Board Contract Manager may submit to

the DRO all materials that s/he deems pertinent to the dispute. The DRO shall render a decision in writing and deliver a copy of same to the parties within forty-five (45) days of the conclusion of submission of all materials and information, or such longer time as may be agreed to by the parties. In an unusually complex case, the DRO may render his or her decision in a longer period of time, not to exceed ninety (90) days or such longer time as may be agreed to by the parties, and shall so advise the parties at the commencement of this period. The DRO'S decision shall be deemed a final agency action.

- D. During such time as any dispute is being presented, heard, and considered pursuant to this Section 46, the terms of this Agreement shall remain in full force and effect and the Contractor shall continue to provide any services in accordance with this Agreement. Failure of the Contractor to continue to provide services shall constitute a material breach of contract.
- E. If the Contractor protests the determination of the DRO, the Contractor may commence a lawsuit in Supreme Court, County of New York under Article 78 of the New York Civil Practice Law and Rules. Such review of the Court shall be limited to the question of whether or not the DRO's decision was made in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion. No evidence or information shall be introduced or relied upon in such an action or proceeding that has not been presented to the DRO prior to the making of his or her decision.