

Agreement

by and between:

Power Authority of the State of New York;

New York State Office of Parks, Recreation, & Historic Preservation;

New York State Department of Transportation;

USA Niagara Development Corporation; and

City of Niagara Falls, New York

**Construction and Operation Phase
Project Identification Number ("PIN") 5761.90, Contract No. D263753
Niagara Gorge Corridor Project
Parkway Removal – Main Street (NYS Route 104) to Findlay Drive
Niagara Falls, New York**

This Agreement ("Agreement"), made on May 22, 2018, by and between the **Power Authority of the State of New York ("NYPA" or the "Authority")**, a public authority of the State of New York created pursuant to Article 5, Title 1 of the Public Authorities Law, with primary offices at 123 Main Street, White Plains, New York 10601; the **New York State Office of Parks, Recreation, & Historic Preservation ("State Parks")**, an agency within the government of New York State with primary offices at 625 Broadway, Albany, New York 12207; the **New York State Department of Transportation ("NYSDOT")**, an agency within the government of New York State with primary offices at 50 Wolf Road, Albany, New York 12232; the **USA Niagara Development Corporation ("USAN")**, a subsidiary of the New York State Urban Development Corporation d/b/a Empire State Development ("ESD"), a public benefit corporation of the State of New York created pursuant to the New York State Urban Development Corporation Act, with offices at 222 First Street, 7th Floor, Niagara Falls, New York 14303; and the **City of Niagara Falls, New York (the "City")**, a municipal corporation of New York State, with primary offices at 745 Main St, Niagara Falls, NY 14301; (Individually a "Party" or collectively the "Parties").

RECITALS

WHEREAS, in conjunction with the construction of the Niagara Power Project, NYPA built and opened the Robert Moses Parkway (the "Parkway"), now renamed the "Niagara Scenic Parkway", a limited-access expressway extending from I-190, through Niagara Falls State Park, and to NY

Route 18 near Youngstown, NY; and

WHEREAS, lands upon which the Parkway was built are owned by NYPA or the State of New York under the jurisdiction of NYPA or State Parks; and

WHEREAS, as part of the New York State Parkway System, the Parkway is under the jurisdiction of State Parks and maintained by the NYSDOT under agreement with State Parks, is designated as New York State Route 957A, and has portions that are part of the National Highway System designated by the Federal Highway Administration ("FHWA"); and

WHEREAS, in the 1980s a portion of the Parkway that once passed through Niagara Falls State Park adjacent to Prospect Point and the American Falls was removed, dividing the Parkway into two independent sections, a southern portion (hereinafter referred to "Parkway-South") and a northern portion (hereinafter referred to "Parkway-North"); and

WHEREAS, since the 1980s removal of a portion of the Parkway from Niagara Falls State Park, and subsequent changes to portions of the Parkway-North in 2000, the expressway characteristics/features of the Parkway has been cited by some interests as a factor impeding full enjoyment of the world-class natural resources along the Niagara River and associated tourism/visitation potential of these resources, and that this is particularly an issue in the City along the Parkway-South near the Upper Niagara River in Niagara Falls State Park and on the Parkway-North along the rim of the Niagara Gorge; and

WHEREAS, USAN/ESD have been tasked by the Governor's Office to oversee, facilitate, and coordinate various economic development strategies related to the Western New York tourism industry, including public infrastructure projects and public/private redevelopments, in particular those associated with the revitalization of the City; and

WHEREAS, on May 3, 2006, USAN entered into a landmark Memorandum of Understanding ("MOU") with State Parks, NYSDOT, and the City to jointly solicit state/federal funding and oversee planning, engineering, and environmental review efforts necessary to reconfigure two key segments of the Parkway-South and the Parkway-North, and

WHEREAS, USAN helped secure \$2 million in state/federal transportation funds in September 2006 for State Parks' preliminary engineering and environmental review efforts for a one-mile segment of the Parkway-South in Niagara Falls State Park and a Public Scoping Process (i.e., initial planning process) for a segment of the Parkway-North ultimately referred to as the "Niagara Gorge Corridor" ("NGC") from Niagara Falls to Lewiston, both of which were supported by non-federal matching funds from USAN, NYSDOT, and City of Niagara Falls funds, as well as from State

Parks resources (through a grant from NYPA); and

WHEREAS, in accordance with the 2006 MOU, State Parks completed preliminary engineering and state/federal environmental review in 2013 for a project involving the removal of a one-mile segment of the Parkway-South and replacing it with an at-grade, 25 MPH park road (AKA, the "Riverway Project"), and for which USAN/ESD administered a \$11.5 million grant for final engineering, contract documents, and construction and then other construction funds were assembled by NYSDOT, State Parks, and NYPA; and

WHEREAS, State Parks contracted with NYSDOT for construction of the Riverway Project, which was substantially completed in November 2017 with an extension for environmental monitoring and planting to be finished in 2018; and

WHEREAS, also in accordance with the 2006 MOU, in 2008 State Parks competitively procured and retained the services of a design team led by Parsons Transportation Group (hereinafter the "Design Consultant") to provide services related to the Public Scoping Process for the NGC to develop a list possible of broad alignment alternatives for road access in the corridor, including the Parkway-North; and

WHEREAS, after analyses were conducted by the Design Consultant, public involvement sessions held with stakeholders in 2011-2012, and a public meeting on the draft report conducted in February 2013, State Parks issued a Final Public Scoping Report for the Niagara Gorge Corridor Project in October 2013; and

WHEREAS, the Final Public Scoping Report for the NGC, among other items, documented a broad public consensus and consistency with federal requirements for a project that would involve removal of a two-mile segment of the Parkway-North and reconstruction of segments of the City-owned Whirlpool Street and Third Street, and selected improvements to other small City- and State Parks-owned road segments, parking lots, and park facilities that immediately abut the current Parkway corridor, including demolition and re-grading/re-seeding within the City-owned DiFranco Park and improvements at two City-owned parking areas on Whirlpool Street (hereinafter referred to as "Parkway Removal" or the "Project"); and

WHEREAS, on May 15, 2014, USAN and NYPA entered into an agreement with USAN for NYPA to provide up to \$2 million for the Design Consultant to undertake preliminary engineering and environmental review activities for the Project; and

WHEREAS, after close coordination among NYPA, State Parks, NYSDOT, USAN and the City (each a "Party", and collectively the "Parties"); numerous technical design and environmental analyses;

and a series of public and stakeholder meetings, a formal public hearing and a 45-day public comment period, a Final Design Report/Environmental Assessment was issued for the Project in December 2016, setting the basis for a federal Finding of No Significant Impact ("FONSI") issued by the Federal Highway Administration in February 2017 and a Negative Declaration issued by State Parks in January 2017 pursuant to the New York State Environmental Quality Review Act, thus fully completing of the Project's required preliminary engineering and environmental review process; and

WHEREAS, on April 7, 2017, USAN and NYPA entered into an agreement for NYPA to provide up to \$3.5 million for the Design Consultant to undertake final engineering and construction documents and to provide design support services during the construction phase of the Project; and

WHEREAS, between April 2017 and April 2018, in coordination among NYPA, State Parks, NYSDOT, USAN and the City, the Parties have worked with the Design Consultant on various final engineering tasks, including: final design-level survey, abstract request and right-of-way mapping, hazardous waste and radiological investigations and field studies, invasive species investigations, a pre-Advanced Detail Design ("ADP") package, an open house/public information meeting, a full ADP submission and cost estimate, and preliminary and final Plans, Specifications, and Estimate ("PS&E") packages; and

WHEREAS, the Parties now wish to undertake the bidding/letting, construction and construction administration/construction inspection ("CA/CI") efforts necessary to implement the Project; and

WHEREAS, the Parties desire to have NYSDOT undertake the letting, hold the construction contract, and administer and oversee the construction phase of the Project, and that further, although portions of the lands comprising the Project are owned by NYPA, State Parks, and the City, that it would be most efficient to coordinate the construction through NYSDOT given their extensive experience and capacity to contract and oversee complex transportation projects; and

WHEREAS, in addition to the funds previously provided for preliminary engineering, environmental review, and final engineering for the Project, NYPA will authorize the provision of up to \$33 million to NYSDOT toward construction of the Project and the provision of up to \$3.5 million to NYSDOT for CA/CI efforts, subject to NYPA Trustees approval on May 22, 2018; and

WHEREAS, State Parks has authorized the provision of up to \$2 million to NYSDOT toward construction of the Project; and

WHEREAS, the Parties have established terms in this Agreement to set forth their mutual

understanding with respect to the funding and administration of the Project.

NOW, THEREFORE, the Parties, in consideration of the foregoing and the mutual covenants contained herein, the Parties entering into this Agreement hereby agree to the following:

I. The Project

The Project and the scope of work (as fully depicted in **Exhibit A**) shall include undertaking all necessary right-of-way, construction, and CA/CI efforts for the implementation of the Project included under the signed and approved contract PS&E package for ***Removal of Route 957A, Niagara Scenic Parkway (Robert Moses Parkway) and Reconstruction of Whirlpool Street and Other Local Roads, City of Niagara Falls, Niagara County, Contract D263753, PIN 5761.90***, which specifically includes:

- A. Phase 1 (Preliminarily scheduled to begin on or about August 2018 and be completed on or about September 2019):
1. Full-depth reconstruction of Whirlpool Street from Cedar Avenue to Findlay Drive as an at-grade, 30-MPH road to accommodate north-south vehicular/bus access; removal of Whirlpool Street from Walnut Avenue to Cedar Avenue; and undertaking a mill and overlay of Whirlpool Street between Walnut Avenue and Main Street, along with installation of new curbs/sidewalks and re-storing the name of this segment to its original name of "Second Street";
 2. Full-depth reconstruction of Third Street from Main Street to Cedar Avenue in a manner consistent with that of Whirlpool Street between Cedar Avenue and Findlay Drive;
 3. Construction/reconstruction of selected segments of streets adjoining or connecting to Whirlpool and Third streets to facilitate a complete network, including but not limited to: extending Walnut Street to the Niagara Gorge Discovery Center; reuse/reconstruction of a former entrance to the RMP as an entry drive for the Niagara Gorge Discovery Center to be known as "Discovery Way"; and repaving of an unimproved segment of Spring Street adjoining Whirlpool Street and Findlay Drive; and
 4. Selected improvements to existing City-owned parking areas on Whirlpool Street: at Ashland Avenue and near the City-owned Train Station at Ontario Avenue.

- B. Phase 2 (Preliminarily scheduled to begin on or about September 2019 and be completed on or about September 2020):
1. Removal of the Parkway (i.e., all vehicular lanes, lanes used for the Robert Moses Parkway Trail and all other Parkway interchange/accessory facilities from Main Street (NYS Route 104) to Findlay Drive;
 2. Demolition/removal the Whirlpool Bridge Plaza viaduct/overpass;
 3. Demolition/removal of all landside spans associated with the former Michigan Central Railroad Bridge, including the viaduct passing over Whirlpool Street, or removal of portions of such spans to allow for a sufficient right-of-way width to construct planned travel lanes and bicycle/pedestrian amenities (sidewalks, multi-purpose trail, crosswalks, etc.) as depicted in the PS&E package for the Project; and
 4. Demolition/removal of all existing/dilapidated service buildings, paved areas, and ball courts within the City-owned DiFranco Park and grading/re-seeding of these demolition areas.
- C. Phase 3 (Preliminarily scheduled to begin on or about March 2020 and be completed on or about June 2021):
1. Restoration of the landscape/habitat on lands reclaimed along the Niagara Gorge rim from the removal of the parkway with native species to the greatest extent practicable;
 2. Construction of a pedestrian/bicycle trail network along the Gorge rim, connecting to other trail systems and adjoining neighborhoods; and
 3. Incorporation of associated selected amenities and betterments associated with the above improvements to property owned by the Niagara Aquarium Foundation.
- D. Parallel & Related work to be done by the Western New York Land Conservancy involving invasive species and feature landscape work on a 3.5-acre NYPA-owned land. Initial invasive species removal efforts are preliminarily scheduled to begin on or about May 2018 and landscape planting be completed by Nov 2021, to be undertaken by the Western New York Land Conservancy (see Exhibit B). The Contract PS&E Package includes components around this area for highway demolition/removal, rough site

grading, and installation of path/trail networks.

II. Project Responsibilities During Construction

- A. NYSDOT shall be the contracting agency on behalf of State Parks and the City for the construction phase of the Project.
- B. NYSDOT and State Parks (through their Design Consultant) shall administer their respective responsibilities on the Project as noted in **Exhibit C**.
- C. NYPA, State Parks, USAN, the City, the Design Consultant shall work in close consultation with NYSDOT in their oversight of the contractor awarded the construction contract for the Project.

III. Project Budget/Sources & Uses

- A. The budget for the Project is as follows:

FUNDING SOURCES (Funds to be provided to NYSDOT):	
NYPA	\$36,500,000
State Parks (by sub-allocation to NYSDOT in SFY 2019-2020)	\$2,000,000
TOTAL	\$38,500,000
FUNDING USES (Uses to be Contracted/Administered by NYSDOT):	
Project Construction Contract	\$35,000,000
Project Construction Administration/Construction Inspection	\$3,500,000
TOTAL	\$38,500,000

- B. Other than costs for NYSDOT in-house and consultant CA/CI services, the Project Budget expressly excludes all in-kind services that may be performed by State Parks, USAN/ESD, the City of Niagara Falls and/or NYPA and none of such costs shall be reimbursed under this Agreement.

IV. Annual Payments

- A. Subject to the terms and conditions set forth herein, NYPA, upon authorization by its Board of Trustees and the execution of this Agreement, shall remit to NYSDOT funds

for 2018 set forth in **Exhibit D**.

- B. NYSDOT shall hold such funds in escrow and periodically release, as needed, to make payments made to the Construction Contractor for bona fide Project-related costs pursuant to the Approved Construction Contract, as well as payments to its consultant and staff in accordance with CA/CI efforts on the Project.
 - C. NYSDOT shall, over the course of the construction phase of the Project, share all approved contractor pay requisitions with representatives of the Parties to track progress on the Project. The Parties agree that NYSDOT's standard procedures/records required under the NYSDOT Manual for Uniform Record Keeping ("MURK") shall serve as the basis of this reporting (e.g., Site Manager Reports CONR22, CONR7, etc.).
 - D. NYSDOT shall, upon NYPA's and State Parks' reasonable requests, provide NYPA and State Parks with a full accounting of funds expended and associated documentation for Project work.
- V. Project Letting and Contract Award.
- A. The Parties recognize that they have been coordinating and provided the opportunity to participate, review, and comment on all phases of final design associated with the Project and have concurred that NYSDOT shall be the contracting entity for the Project construction.
 - B. The Parties have coordinated and been provided the opportunity to participate and comment upon components of the preliminary and final Engineer's Estimate (i.e., final cost estimate for construction of the Project) and have accordingly refined various components of the Project design, adjusted assumed unit quantities, and maintained a minimum 3% of total projected costs for field change items to best ensure remaining within the prescribed construction budget of \$35 million. The Parties have concurred on a goal to achieve a final Engineer's Estimate slightly below the \$35 million budget, to allow for some reasonable fluctuation in bidding conditions, and/or to allow for a reserve to cover possible unforeseen contingencies.
 - C. Upon sign-off and processing of the contract PS&E package, NYSDOT shall let the construction of the Project using its standard procedures.
 - D. If upon bid letting (public reading of accepted bids) and bid analysis, and any other required reviews under state regulations (e.g. Office of State Comptroller), the

presumed low qualified bid is above the Engineer's Estimate and/or the construction budget of \$35 million, the Parties shall consult to determine whether to award the contract. This consultation and concurrence shall include the following:

1. In the event that the presumed low qualified bid is higher than the Engineer's Estimate but still within the Project Budget of \$35 million, the Parties shall consult and determine, based upon best available knowledge, that there are sufficient funds in the Project Budget to reasonably move forward without significant risk and award the construction contract. NYSDOT shall summarize in writing the Parties' collective considerations in reaching this determination and maintain in the Project file.
2. In the event that the presumed low qualified bid is higher than the Project Budget of \$35 million, the Parties shall consult on the following:
 - a) Whether there are elements of the Project that can be removed from the contract to reach a Project cost that is within the \$35 million budget, subject to any limitations on refining contract items after letting;
 - b) Whether the Parties can collectively solicit/secure additional funds to expand the Project Budget to cover the additional costs; or
 - c) Whether to re-let the Project with a refined scope and/or at a different time.

VI. Project Administration

- A. NYSDOT shall lead all aspects of the construction administration for the Project and shall assign an Engineer-in-Charge ("EIC"), as well as additional NYSDOT/Consultant staff responsible for assisting the EIC in all Project administration, coordination, and inspection efforts. NYSDOT shall be the permitting agency for the Project, when applicable, and shall meet all requirements of NYCRR, Title 19, Part 1204 (Uniform Code: Administration and Enforcement by State Agencies).
- B. NYSDOT shall establish a field office in proximity of the Project area, such field office shall provide for a locally-accessible repository for project-related information, and shall provide for a publicly-accessible phone number to access information on the project.
- C. Within 45 days after contract award, the NYSDOT EIC shall establish, schedule, and chair bi-weekly progress meetings with the Project contractor. While other project

meetings are anticipated and expected, the bi-weekly progress meeting shall be the primary venue to report upon and discuss Project issues.

- D. Each of the Agreement Parties shall assign at least one staff member to serve as a Project Point of Contact (POC) for the construction phase, including but not limited to attendance at bi-weekly progress meetings. Each POC shall be an employee of the respective agency/Authority and will be responsible for:
 - 1. Contacting any appropriate agency/Authority personnel;
 - 2. Coordinating agency/Authority responsibilities, including accepting Written notices and telephone calls;
 - 3. Ensuring continuity/consistency in agency/Authority operations/procedures; and
 - 4. Represent the agency/Authority in the first instance in resolving or attempting to resolve any ambiguities, disputes, or inter-agency/Authority issues that may arise out of this Agreement.
 - 5. The Parties agree that for the purposes of Project construction contract interpretation, any and all official communications, directions, mandates, field refinements, scheduling, and/or coordination with the Project's construction contractor and subcontractors shall be made only through the NYSDOT EIC and/or his/her designee.
- E. NYSDOT shall, on a reasonable and timely basis, provide the Parties with copies or access to copies of all relevant documents relating to the work performed, including but not limited to: its own separate work orders, meeting minutes, reports, photographs, test results, and any other documents/items related to the Project work.
- F. Change Orders/Unanticipated Budget Overruns.
 - 1. The NYSDOT EIC shall track all Project quantities and costs and shall report at the bi-weekly progress meetings of any claims of differing fields conditions, additional work claims, and/or requests for change orders by the construction contractor and shall investigate the reasonableness of such claims and report to the Parties accordingly.
 - 2. NYSDOT EIC shall manage the field change and any other budget reserves and regularly assess and report to the Parties on the overall budget status for the

construction of the Project, using reasonable estimates of future expenditures. Prior to each bi-weekly meeting, NYSDOT must provide a printed or electronic copy of a report to NYPA and all Parties demonstrating the Project's cost and schedule health.

3. In the event that the NYSDOT EIC estimates that the number/costs associated with contractor claims and/or change order requests on the Project, when added to reasonably anticipated future expenditures on the Project, exceeds the Project construction budget of \$35 million, he/she shall alert and consult with the Parties on whether to award the change order. In considering such approval by NYSDOT, the Parties shall:
 - a) Identify what work elements of the Project could be removed from the contract to allow for NYSDOT's approval of the change order yet stay within the \$35 million budget, subject to any limitations on refining contract items after letting; and/or
 - b) Work together to solicit/secure additional funds to expand the Project Budget to cover the change order and restore the eliminated work to the Project contract.

NYSDOT shall summarize in writing the Parties' collective considerations in reaching consensus on such change orders affecting the overall Project budget and maintain in the Project file.

- G. Cooperation and Joint Responsibilities. The Parties hereby agree to cooperate to the best of their ability with each other and with other third parties with the respect to resolution of the issues involving the Project. In the event the Parties are unable to agree on the resolution of a dispute hereunder at the staff level, POC from each agency/Authority, or his/her designee, will meet within ten (10) business days to resolve the dispute. In the event they are unable to resolve the dispute at this meeting, they may agree to further appropriate dispute resolution procedures.

VII. Project Site Access During Construction and After Project Completion

- A. The Parties may issue NYSDOT construction access permits upon request in the interim period before this Agreement is approved by the Office of the State Comptroller. In consideration of the coordination undertaken among the Parties on the planning, final design, and letting of the Project, for the term of the Project construction, NYSDOT, its

contractors, and their subcontractors are hereby provided full access to lands owned by NYPA, State Parks, and the City comprising the Project area to allow constructing the improvements summarized in Section I. A. of this Agreement and contained in the approved contract PS&E package, subject to the terms, conditions, and insurance requirements of this Agreement and any NYPA land use permits. This access will not be revoked during the construction of the Project. The Parties understand that the Project will result in new and modified permanent features in the Project area, and the Parties agree to allow the placement of these permanent features on their property and for these features to remain on their property for the reasonable useful life of the permanent features, and to undertake maintenance as described in Section X of this Agreement. NYPA, City, and/or Niagara Falls Water Board access to their respective facilities at or near the sewer plant in the lower Niagara Gorge (i.e., via the NYPA-owned Sewer Plant Road) shall not be impeded during construction of the Project or after its completion and expiration of any NYPA land access permits for the Project, including this Agreement.

- B. Use of any lands owned by any of the Parties outside the Project limits for Project-related activities such as but not limited to staging, storage, employee parking, etc. that are not otherwise discussed in this Agreement or the approved contract PS&E package shall be individually coordinated/approved between NYSDOT's contractor and the party that is the owner of the subject property, and may require construction access permits.
- C. In recognition of the varying and abutting land ownership among the City, State Parks, and NYPA comprising the Project area and the need to effectively coordinate upkeep, maintenance, and periodic occurrences for monitoring/minor repairs/improvements along shared boundaries containing street/trail rights-of-way and park open space, NYPA, State Parks, and the City hereby agree for a period of five years following the Project's completion of construction to permit periodic access without official permits by each of the agencies/Authority along the respective boundaries of the remaining/former Whirlpool Street right-of-way and adjoining State Parks and NYPA lands situated west of this right-of-way. Prior to accessing such property, the following pre-requisites/procedures must be met:
 - 1. The work shall be limited to maintenance, monitoring, facility/infrastructure investigations, and minor improvements and shall not require mechanical excavation;

2. The entity accessing the property shall provide written notification to the owner at least 10 business days prior to the scheduled work and outline the scope of the work to be completed and its duration, receive verbal approval from the owner, and work with the owner to accommodate the request subject to any safeguards the owner requires; and
3. The entity accessing the property shall require its workers or contractors to carry proper levels of insurance, as set forth or determined by the property owner, and include the property owner as additionally insured during the period of the work.

VIII. Hazardous, Contaminated and Radiological Soils/Waste/Materials.

- A. The Parties acknowledge the likely presence of hazardous, contaminated, and radiological soils/wastes/materials within the Project area that will likely be encountered during the course of construction of the Project. Accordingly, as part of the preliminary design, environmental review, and final design of the Project, extensive screenings and in-field investigations have been conducted to inform the final scope of the Project and the quantiles/costs included in the final Engineer's estimate.
- B. Over the course of construction, NYSDOT shall ensure that contractors conducting ground-disturbing activities in the Project area adhere to NYSDOT specifications and the Project's approved PS&E Package including chain of custody requirements and procedures regarding the handling, staging, management, and disposal/disposition of such hazardous, contaminated, and radiological soils/wastes/materials. NYSDOT shall ensure that its contractors properly coordinate with NYPA, State Parks, and the City on the management of these soils/waste streams and comply with all applicable laws with respect thereto and NYPA land use permits.
- C. Each of POCs from NYPA, State Parks, and the City shall proactively identify and make available those persons responsible for approval of various procedures and actions that will need to be taken by NYSDOT's contractors in the management of these soils/waste streams and set up regular and agreed-upon procedures to best expedite soils management activities including but not limited to:
 1. Locating pre-approved staging/stockpiling areas on each of the respective land owners' property and segregation of excavated soils/materials until appropriate disposal;

2. Coordinating on testing procedures, staging, transport and disposition and associated sign-offs;
3. The signing/execution of any waste disposal manifests and/or other documentation (as official representative from NYPA, State Parks, or City) that is required for soils/materials excavated from each of the respective land owners' property; and
4. Coordination/consultation with other federal and state regulatory agencies, as required.

IX. Discovery of Archaeological/Human Remains

- A. As part of the preliminary design and environmental review of the Project, State Parks and FHWA consulted with the New York State Historic Preservation Office ("SHPO") in accordance with Section 106 of the National Historic Preservation Act. FHWA and State Parks concluded in consultation with SHPO that the Project would result in no adverse effect on historic and archaeological resources eligible for the State/National Registers of Historic Places. However, over the course of construction, contractors would nevertheless be subject to special procedures if human remains are encountered.
- B. NYSDOT shall ensure that contractors in the Project area adhere to the following procedures if any human remains are encountered during construction:
 1. The contractor or entity conducting ground-disturbing activities shall stop work and secure the site.
 2. NYSDOT shall notify/advise the Agreement Parties, the Niagara County Medical Examiner, the Niagara Falls Police Department, and the SHPO.
 3. The appropriate descendant community (ies) associated with the remains shall be notified, so that the remains may be exhumed and treated in an appropriate manner.
 4. Once the Medical Examiner and a qualified archaeologist retained by NYSDOT or NYSDOT's contractor indicate that all remains and associated funerary objects have been properly exhumed and removed, construction may proceed.
- C. If Native American human remains are found, all procedures specified above shall be followed, and consultation with appropriate Native American Tribes will also be

initiated, as specified in the Native American Graves Protection and Repatriation Act {P.L. 501-601 (25 USC 3001 et seq.)}.

X. Maintenance Responsibility of Completed Project Components

Existing jurisdiction, ownership and maintenance responsibility for all improvements and facilities to be constructed under the Project shall not change unless specifically called out in Drawing Numbers MJT-01 to MJT-04 and MJP-01 to MJP-13 of the Contract PS&E package (see Exhibit A), which Exhibit can be summarized as follows for major elements of the Project:

- A. The City shall be responsible for maintenance of pavement, sidewalks, drainage, signs, lighting, and landscaping within the rights-of-way of Whirlpool Street, Third Street, Sewer Plant Access Road, and other local, City-owned roads improved as part of the Project, and shall be responsible for all improvements within DiFranco Park and on City-owned parking lots;
- B. State Parks shall be responsible for maintenance of pavement, sidewalks, drainage, signs, lighting, and landscaping along certain State Parks road segments (e.g., Discovery Way and Findlay Drive), trolley ways, and parking lots within Niagara Falls State Park; and
- C. State Parks, under an existing agreement with NYPA, will be responsible for maintenance of open space plaza/lawn areas, trails, plaza/trailhead parking, and other open space areas outside of the Whirlpool Street ROW westerly to the Gorge Rim.

XI. New York State Contracting Requirements

NYSDOT shall ensure/monitor that the Construction contract complies with various New York State contracting/vendor requirements, including but not limited to: **Appendix A – Standard Clauses for New York State Contracts**, Article 220 of the NYS Labor Law regarding prevailing wages, Minority- and Women-Owned Business Establishment (“M/WBE”) contracting goals, NYS-based subcontracting goals, and NYS Comptroller requirements regarding responsible vendors. The Parties agree that NYSDOT’s standard procedures and tracking mechanisms, including but not limited to NYSDOT’s Equitable Business Opportunities (“EBO”) web-based

systems for M/WBE contracting/participation, shall be the basis for such compliance and reporting.

XII. Books & Recordkeeping

NYSDOT shall keep accurate books and records of accounts to reasonably document the actual cost and expenses incurred for the Project relating to this Agreement. Such books and records shall be kept in accordance with NYSDOT MURK requirements and shall be consistent with generally accepted accounting practices. All such books and records shall be available for review by authorized representatives of NYPA upon reasonable advanced written request (of not less than ten (10) days), any such review to be conducted at NYSDOT offices during customary business hours. The obligations under this Article shall expire six (6) years from the end of the term of the Agreement.

XIII. Notices

Each notice required hereunder shall be in writing and shall be deemed given upon receipt by the other party, if personally delivered or transmitted via facsimile with electronic confirmation of receipt, or three days after dispatch by certified mail, return receipt requested. Notices shall be sent to the following addresses:

A. To NYPA:

New York Power Authority
123 Main Street
White Plains, NY 10601
ATTN: Cindy Bradford/Andrea Luongo

With a copy to:

New York Power Authority
123 Main Street
White Plains, New York 10601
ATTN: Legal Department

B. To State Parks:

NYS Office of Parks, Recreation, & Historic Preservation
Western Region Director
Prospect Street, P.O. Box 1132
Niagara Falls, NY 14303

C. To NYSDOT:

NYS Department of Transportation
Region 5 Director
100 Seneca Street
Buffalo, NY 14203

D. To USAN:

USA Niagara Development Corporation
222 First Street, 7th Floor
Niagara Falls, New York 14303
ATTN: President

E. To the City of Niagara Falls:

City of Niagara Falls
745 Main Street
P.O. Box 69
Niagara Falls, NY 14302-0069
ATTN: Mayor

XIV. No Assignment

This Agreement and the rights hereunder may not be assigned by any of the Parties hereto without the written consent of the Parties.

XV. Governing Law

This Agreement shall be governed and construed in accordance with the laws of New York State.

XVI. Conflict of Interest

No member director, official or employee of any Party hereto has or shall have any personal interest, direct or indirect, in the Project, nor shall any such member, director, official or employee participate in any decision relating to any of the foregoing which effects his or her personal interest or the interest of any corporation, partnership or association in which he or she is directly or indirectly interested.

XVII. Severability

If any term or provision of this Agreement or the application thereof to any person or circumstances shall to any extent be held invalid or unenforceable, the remainder of this Agreement, or the application of such term or provisions to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby, and every other term and provision of this Agreement shall be valid and be enforced to the fullest extent permitted by law.

XVIII. Insurance

- A. NYSDOT shall require for the full term of the Construction phase of the Project that its contractor, subcontractors, and consultants have insurance coverages naming the "Power Authority of the State of New York", the "New York State Office of Parks, Recreation, and Historic Preservation", the "New York State Urban Development Corporation d/b/a Empire State Development", the "USA Niagara Development Corporation", and the "City of Niagara Falls", and each of these Party's officers, directors, commissioners, employees, trustees, representatives, contractors, agents successors and assigns, as additional insureds.
- B. NYSDOT affirms that the contractor, subcontractors, and consultants shall be required to carry appropriate coverages in accordance with NYSDOT standard contract requirements.
- C. Upon reasonable request of any of the Parties, NYSDOT shall provide evidence that such insurance requirements have been obtained.
- D. NYSDOT shall require its contractors to notify the Parties at least 30 days prior to cancellations or modification of any insurance, and NYSDOT will require its contractors to notify the Parties of any known accidents and/or claims, including without limitation accidents or claims involving bodily injury (excluding injuries requiring only minimal first aid treatments), death or property damage, arising on or within the area where the applicable work under the Project is performed. This notification shall be in writing and be made as soon as practicable after any accident or claim.

XIX. Indemnification; Obligation to Defend

NYSDOT shall ensure that, to the maximum extent permitted by law, all of its contractors and its associated consultants shall at all times indemnify, defend (at each Party's option and

counsel satisfactory to each Party), and hold the Parties harmless from and against any and all damages, losses, claims (including, without limitation, claims of actions relating to injury to or death of any person or damage to property), demands, suits recoveries, costs and expenses, court costs, reasonable attorney's fees, and all other obligations arising out of the negligence, lawful or unlawful act or omission, or intentional misconduct of NYSDOT's contractors and/or consultants or their respective officers, directors, agents, representatives and employees arising out of the Project or work on the Project, except when the claim giving rise to the foregoing obligation is caused solely by the negligence, intentional misconduct or unlawful act by one of the Parties under this Agreement or any person or entity for whom a Party under this Agreement is responsible.

NYSDOT shall ensure that its contractors and/or consultants shall take prompt action to defend and indemnify each of the Parties and their respective officers, directors, commissioners employees, trustees, representatives, contractors, agents successors and assigns, against claims, actual or threatened, but in no event later than notice by a Party to NYSDOT of the service of a notice, demand, summons, complaint, petition or other service of process against a Party alleging damage, injury, liability, or expenses that may be subject to indemnification hereunder.

XX. Entireties.

This Agreement constitutes the entire understanding among the Parties with respect to the Project.

XXI. Amendments

This Agreement may be amended only by written instrument executed by the Parties hereto.

XXII. Term of Agreement

The term of this Agreement shall commence upon the date of Office of State Comptroller approval pursuant to State Finance Law Section 112, and shall expire upon the completion of the Project, but no later than December 30, 2026, unless the Parties mutually agree in writing to an extension of the expiration date. In the event, at the end of the term, that any amounts for the Construction or CA/CI have not been paid to NYSDOT by NYPA or State Parks pursuant to this Agreement, NYSDOT shall remit the balances to the respective entities, unless such funds are needed to pay for costs already incurred but not yet invoiced for Project-related expenses.

XXIII. Executory Clause.

In accordance with Section 41 of the State Finance Law no party will have any financial liability under this Agreement beyond funds available for this Agreement.

IN WITNESS WHEREOF, the parties hereto have signed this Agreement as of the date set forth above.

POWER AUTHORITY OF THE STATE OF NEW YORK

By: _____

Print Name/Title: _____

Date: _____

Acknowledgement

STATE OF NEW YORK

COUNTY OF _____

On the _____ day of _____ in the year _____, before me, the undersigned notary public, personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

Notary Public

Printed Name: _____

My Commission Expires:

NEW YORK STATE OFFICE OF PARKS, RECREATION, & HISTORIC PRESERVATION

By: _____

Print Name/Title: _____

Date: _____

Acknowledgement

STATE OF NEW YORK

COUNTY OF _____

On the _____ day of _____ in the year _____, before me, the undersigned notary public, personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

Notary Public

Printed Name: _____

My Commission Expires:

NEW YORK STATE DEPARTMENT OF TRANSPORTATION

By: _____

Print Name/Title: _____

Date: _____

Acknowledgement

STATE OF NEW YORK

COUNTY OF _____

On the _____ day of _____ in the year _____, before me, the undersigned notary public, personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

Notary Public

Printed Name: _____

My Commission Expires:

USA NIAGARA DEVELOPMENT CORPORATION

By: _____

Print Name/Title: _____

Date: _____

Acknowledgement

STATE OF NEW YORK

COUNTY OF _____

On the _____ day of _____ in the year _____, before me, the undersigned notary public, personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

Notary Public

Printed Name: _____

My Commission Expires:

CITY OF NIAGARA FALLS, NEW YORK

By: _____

Print Name/Title: _____

Date: _____

Acknowledgement

STATE OF NEW YORK

COUNTY OF _____

On the _____ day of _____ in the year _____, before me, the undersigned notary public, personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

Notary Public

Printed Name: _____

My Commission Expires:

EXHIBIT A:

Plans, Specifications, and Estimates Package

Removal of Route 957A, Niagara Scenic Parkway (Robert Moses Parkway) and Reconstruction of Whirlpool Street and Other Local Roads, City of Niagara Falls, Niagara County

Contract D263753; PIN 5761.90

(by reference)

EXHIBIT B:

**Landscape Plan – Landscapes of Place
Associated with Niagara Gorge Restoration Effort
Western New York Land Conservancy**

23 February 2018

[illegible]

EXHIBIT C:

Allocation of Responsibility of Project Tasks

Removal of Route 957A, Niagara Scenic Parkway (Robert Moses Parkway) Main Street to Findlay Drive and Reconstruction of Whirlpool Street and Other Local Roads, City of Niagara Falls, Niagara County

Contract D263753; PIN 5761.90

Construction Project Type Phases, Sub-Phases/Tasks, and Allocation of Responsibility

Instructions: Enter an "X" to indicate the appropriate Phase, then assign the responsibility for *each applicable Sub-phase task* by entering an "X" in either the NYSDOT column to allocate the task to State Labor Forces or a State Contract, or enter an "X" in the other appropriate column to indicate a task allocated to State Parks (through their Final Design Consultant).

PHASE/SUB-PHASE	Allocation of Responsibility	
	NYSDOT	State Parks, City, USAN, and/or NYPA ¹
<u>X</u> A1. Preliminary Engineering ("PE") and Final Engineering Phases		
1. Scoping: Prepare and distribute all required project reports, including an Expanded Project Proposal (EPP) or Scoping Summary Memorandum (SSM), as appropriate.	Completed	Completed
2. Perform data collection and analysis for design, including traffic counts and forecasts, accident data, land use and development analysis and forecasts.	Completed	Completed
3. Preliminary Design: Prepare and distribute Design Report/Design Approval Document (DAD), including environmental analysis/assessments, and other reports required to demonstrate the completion of specific design sub-phases or tasks and/or to secure the approval/authorization to proceed.	Completed	Completed
4. Review and circulate all project reports, plans, and other project data to obtain the necessary review, approval, and/or other input and actions required of other NYSDOT units and external agencies.	Completed	Completed
5. Obtain aerial photography and photogrammetric mapping.	Completed	Completed
6. Perform all surveys for mapping and design.	Completed	Completed
7. Detailed Design: Perform all project design, including preparation of plan sheets, cross-sections, profiles, detail sheets, specialty items, shop drawings, and other items required in accordance with the <i>Highway Design Manual</i> , all Highway Design (including pavement evaluations, taking and analyzing cores; design of pavement mixes and applications procedures), preparation of any necessary bridge site data package and all Structural Design (including any necessary hydraulic analyses, foundation design), all design of highway appurtenances and systems (e.g., Signals, IVHS facilities), and maintenance and protection of traffic plans. FRA criteria will apply to rail work.	Completed	Completed

¹ Working and coordinating collectively with the Design Consultant, which is contracted with State Parks, with costs reimbursed by USAN with NYPA funds.

PHASE/SUB-PHASE	Allocation of Responsibility	
	NYS DOT	State Parks, City, USAN, and/or NYPA ¹
8. Perform landscape design (including erosion control).	Completed	Completed
9. Design environmental mitigation, where appropriate, in connection with: noise readings, projections, air quality monitoring, emissions projections, hazardous waste, asbestos, determination of need for cultural resources survey.	Completed	Completed
10. Prepare demolition contracts, utility relocation plans/contracts, and any other plans and/or contract documents required to advance, separately, any portions of the project which may be more appropriately progressed separately and independently.	Completed	Completed
11. Compile PS&E package, including all plans, proposals, specifications, estimates, notes, special contract requirements, and any other contract documents necessary to advance the project to construction.	Completed	Completed
12. Conduct any required soils and other geological investigations.	Completed	Completed
13. Obtain utility information, including identifying the locations and types of utilities within the project area, the ownership of these utilities, and prepare utility relocation plans and agreements, including completion of Form HC-140, titled Preliminary Utility Work Agreement.	Completed	Completed
14. Determine the need and apply for any required permits, including U. S. Coast Guard, U. S. Army Corps of Engineers, Wetlands (including identification and delineation of wetlands), SPDES, NYSDOT Highway Work Permits, and any permits or other approvals required to comply with local laws, such as zoning ordinances, historic districts, tax assessment and special districts.	X (In Process of Completion)	X (In Process of Completion)
15. Prepare and execute any required agreements, including: <ul style="list-style-type: none"> • Railroad force account • Maintenance agreements for sidewalks, lighting, signals, betterments. • Betterment Agreements • Utility Work Agreements for any necessary Utility Relocations of privately-owned utilities. 	X (In Process of Completion)	X (In Process of Completion)
16. Provide overall supervision/oversight of design to assure conformity with Federal and State design standards or conditions, including final approval of PS&E by NYSDOT	X	
<u>X</u> A2. Right-of-Way (ROW) Incidentals		
1. Prepare ARM or other mapping, showing preliminary taking lines.		Completed
2. Prepare Right-of-Way (ROW) mapping.		Completed

PHASE/SUB-PHASE	Allocation of Responsibility	
	NYSDOT	State Parks, City, USAN, and/or NYPA ¹
3. Obtain abstracts of title and certify those having an interest in right-of-way to be acquired.	X	
4. Secure Appraisals and perform Appraisal Review.	X	
5. Establish an amount representing just compensation.	X	
6. Determine whether any de minimis or other exemption from public hearing that would otherwise be required by the Eminent Domain Procedure Law is applicable.	X	
7. Conduct any public hearings and/or informational meetings as may be required by the Eminent Domain Procedures Law, and are not exempt from hearing requirements per paragraph A2-6 above, including the provision of stenographic services, preparation and distribution of transcripts, and response to issues raised at such meetings.	N/A	N/A
8. Prepare a Table of Right-of-Way Acquisitions for inclusion in the Design Report.	Completed	Completed
9. Prepare relocation plans, if required.	N/A	N/A
<u>X</u> B. Right of Way (ROW) Acquisition		
<p>1. Perform all Right-of-Way (ROW) Acquisition work, including negotiations with property owners, acquisition of properties and accompanying legal work, payments to and/or deposits on behalf of property owners; Prepare, publish, and pay for any required legal notices; and all other actions necessary to secure title to, possession of, and entry to required properties. If NYSDOT is to acquire property on behalf of the Municipality, the Municipality agrees to accept delivery of title to any and all permanent property rights acquired for the project (other than any rights of way acquired for a reverse betterment or other project involving an Interstate or state highway) and the Municipality directs its signatory to this agreement to accept delivery of the deed(s) from NYSDOT conveying the acquired property upon completion of the Project or sooner at the mutual agreement of NYSDOT and the municipality.</p> <p>When the Municipality performs Right-of-Way Acquisition work it shall designate the local responsible official for making key decisions regarding the acquisition process (e.g., adoption of a minimum payment; setting the just compensation amount; approval of administrative or legal settlements; need or conditions for releases of encumbrances; signing the acquisition maps; commencement of condemnation proceedings; signing the right-of-way clearance certificate; and other administrative decisions as necessary).</p>	X	
2. Provide required relocation assistance.	N/A	N/A

PHASE/SUB-PHASE	Allocation of Responsibility	
	NYS DOT	State Parks, City, USAN, and/or NYPA ¹
3. Conduct condemnation proceedings, court, and any other legal actions required to acquire properties.	N/A	N/A
4. Monitor all ROW Acquisition work and activities, including review and processing of payments to property owners.	X	
5. Provide right-of-way Clearance Certificate at appropriate time prior to construction.	X	
6. Conduct property management activities, including establishment and collection of occupancy and use permit fees, building maintenance and repairs, and any other activities necessary to sustain properties and/or tenants until the sites are vacated, demolished, or otherwise used for the construction project.	X	
7. Subsequent to completion of the Project, conduct ongoing property management activities in a manner consistent with applicable Federal, State and local requirements including, as applicable, the development of any ancillary uses, establishment and collection of rent, property maintenance and any other related activities.		As noted on MJT-01 to MJT-04 and MJP-01-to MJP-13 of the approved PS&E package for the Project.
<u>X</u> C. Construction (C), Supervision (C/S) and Inspection (C/I) Phase		
1. Advertise contract lettings and distribute contract documents to prospective bidders.	X	
2. Conduct all contract lettings, including receipt, opening, and analysis of bids, evaluation/certification of bidders, notification of rejected bids/bidders, and awarding of the construction contract(s).	X	
3. Receive and process bid deposits and verify any bidder's insurance and bond coverage that may be required.	X	
4. Compile and submit Contract Award Documentation Package.	X	
5. Review and approve any proposed subcontractors, vendors, or suppliers.	X	
6. Conduct and control all construction activities in accordance with the plans and proposal for the project. Maintain accurate, up-to-date project records and files, including all diaries and logs, to provide a detailed chronology of project construction activities. Procure or provide all materials, supplies and labor for the performance of the work on the project, and insure that the proper materials, equipment, human resources, methods and procedures are used.	X	

PHASE/SUB-PHASE	Allocation of Responsibility	
	NYSDOT	State Parks, City, USAN, and/or NYPA ¹
7. Inspection and approval of materials such as bituminous concrete, Portland cement concrete, structural steel, concrete structural elements, landscaping soils, and landscaping and/or their components to be used, according to the requirements of, NYSDOT. State Parks shall make or require provision for such materials inspection in any contract or subcontract documents that includes materials that are subject to inspection and approval in accordance with the applicable NYSDOT design and construction standards associated with the project. State Parks, in cooperation with NYSDOT, may provide alternative specifications and/or performance measures for landscaping materials as necessary, in coordination with NYSDOT.	X	X
8. Design and/or re-design the project or any portion of the project that may be required because of conditions encountered during construction.	X	
9. Administer construction contract, including the review and approval of all contractor requests for payment, orders-on-contract, force account work, extensions of time, exceptions to the plans and specifications, substitutions or equivalents, and special specifications.	X	
10. Review and approve all shop drawings, fabrications details, and other details of structural work.	X	
11. Administer all construction contract claims, disputes or litigation.	X	
12. Perform final inspection of the completed work to determine and verify final quantities, prices, and compliance with plans specifications, and such other construction engineering supervision and inspection work necessary to conform to Municipal and State requirements, including the final acceptance of the project.	X	

EXHIBIT D:

Annual Schedule of Payments to NYSDOT

**Removal of Route 957A, Niagara Scenic Parkway (Robert Moses Parkway) and Reconstruction of
Whirlpool Street and Other Local Roads, City of Niagara Falls, Niagara County**

Contract D263753; PIN 5761.90

<p align="center">Annual Payments to NYSDOT</p> <p align="center">Construction & Construction Administration/Construction Inspection (CA/CI)¹</p> <p align="center">Removal of Route 957A, Niagara Scenic Parkway (Robert Moses Parkway) and Reconstruction of Whirlpool Street and Other Local Roads, City of Niagara Falls, Niagara County</p> <p align="center">Contract D263753; PIN 5761.90</p> <p align="center"><i>(Based on Estimated Cash Flow from Final Advanced Detailed Design Cost Estimate Last Update: 28 FEB 2018)</i></p>					
Year²	2018	2019	2020	2021	TOTAL
NYPA payments to NYSDOT (Hard Construction & CA/CI ³)	\$6,750,000	\$13,600,000	\$12,800,000	\$3,350,000	\$36,500,000
State Parks payments to NYSDOT (Hard Construction only)	\$0	\$2,000,000 ⁴	\$0	\$0	\$2,000,000
TOTAL					\$38,500,000

Notes:

¹ Payment schedule only covers funds to NYSDOT for hard construction and CA/CI. NYPA has separate agreement with USAN to provide up to \$3.5 million in funds to cover consultant costs for final design and design support services during construction.

² 2018 payment to be made upon execution of this Agreement; subsequent annual payments made in January of each year.

³ \$33 million allotted for hard construction and \$3.5 million allotted for NYSDOT CA/CI expenses and consultants.

⁴ State Parks payment to be made by sub-allocation to NYSDOT in SFY 2019-2020.

Appendix A:
Standard Clauses for New York State Contracts

STANDARD CLAUSES FOR NYS CONTRACTS

The parties to the attached contract, license, lease, amendment or other agreement of any kind (hereinafter, "the contract" or "this contract") agree to be bound by the following clauses which are hereby made a part of the contract (the word "Contractor" herein refers to any party other than the State, whether a contractor, licensor, licensee, lessor, lessee or any other party):

1. EXECUTORY CLAUSE. In accordance with Section 41 of the State Finance Law, the State shall have no liability under this contract to the Contractor or to anyone else beyond funds appropriated and available for this contract.

2. NON-ASSIGNMENT CLAUSE. In accordance with Section 138 of the State Finance Law, this contract may not be assigned by the Contractor or its right, title or interest therein assigned, transferred, conveyed, sublet or otherwise disposed of without the State's previous written consent, and attempts to do so are null and void. Notwithstanding the foregoing, such prior written consent of an assignment of a contract let pursuant to Article XI of the State Finance Law may be waived at the discretion of the contracting agency and with the concurrence of the State Comptroller where the original contract was subject to the State Comptroller's approval, where the assignment is due to a reorganization, merger or consolidation of the Contractor's business entity or enterprise. The State retains its right to approve an assignment and to require that any Contractor demonstrate its responsibility to do business with the State. The Contractor may, however, assign its right to receive payments without the State's prior written consent unless this contract concerns Certificates of Participation pursuant to Article 5-A of the State Finance Law.

3. COMPTROLLER'S APPROVAL. In accordance with Section 112 of the State Finance Law (or, if this contract is with the State University or City University of New York, Section 355 or Section 6218 of the Education Law), if this contract exceeds \$50,000 (or the minimum thresholds agreed to by the Office of the State Comptroller for certain S.U.N.Y. and C.U.N.Y. contracts), or if this is an amendment for any amount to a contract which, as so amended, exceeds said statutory amount, or if, by this contract, the State agrees to give something other than money when the value or reasonably estimated value of such consideration exceeds \$10,000, it shall not be valid, effective or binding upon the State until it has been approved by the State Comptroller and filed in his office. Comptroller's approval of contracts let by the Office of General Services is required when such contracts exceed \$85,000 (State Finance Law Section 163.6-a). However, such pre-approval shall not be required for any contract established as a centralized contract through the Office of General Services or for a purchase order or other transaction issued under such centralized contract.

4. WORKERS' COMPENSATION BENEFITS. In accordance with Section 142 of the State Finance Law, this

contract shall be void and of no force and effect unless the Contractor shall provide and maintain coverage during the life of this contract for the benefit of such employees as are required to be covered by the provisions of the Workers' Compensation Law.

5. NON-DISCRIMINATION REQUIREMENTS. To the extent required by Article 15 of the Executive Law (also known as the Human Rights Law) and all other State and Federal statutory and constitutional non-discrimination provisions, the Contractor will not discriminate against any employee or applicant for employment because of race, creed, color, sex (including gender identity or expression), national origin, sexual orientation, military status, age, disability, predisposing genetic characteristics, marital status or domestic violence victim status. Furthermore, in accordance with Section 220-e of the Labor Law, if this is a contract for the construction, alteration or repair of any public building or public work or for the manufacture, sale or distribution of materials, equipment or supplies, and to the extent that this contract shall be performed within the State of New York, Contractor agrees that neither it nor its subcontractors shall, by reason of race, creed, color, disability, sex, or national origin: (a) discriminate in hiring against any New York State citizen who is qualified and available to perform the work; or (b) discriminate against or intimidate any employee hired for the performance of work under this contract. If this is a building service contract as defined in Section 230 of the Labor Law, then, in accordance with Section 239 thereof, Contractor agrees that neither it nor its subcontractors shall by reason of race, creed, color, national origin, age, sex or disability: (a) discriminate in hiring against any New York State citizen who is qualified and available to perform the work; or (b) discriminate against or intimidate any employee hired for the performance of work under this contract. Contractor is subject to fines of \$50.00 per person per day for any violation of Section 220-e or Section 239 as well as possible termination of this contract and forfeiture of all moneys due hereunder for a second or subsequent violation.

6. WAGE AND HOURS PROVISIONS. If this is a public work contract covered by Article 8 of the Labor Law or a building service contract covered by Article 9 thereof, neither Contractor's employees nor the employees of its subcontractors may be required or permitted to work more than the number of hours or days stated in said statutes, except as otherwise provided in the Labor Law and as set forth in prevailing wage and supplement schedules issued by the State Labor Department. Furthermore, Contractor and its subcontractors must pay at least the prevailing wage rate and pay or provide the prevailing supplements, including the premium rates for overtime pay, as determined by the State Labor Department in accordance with the Labor Law. Additionally, effective April 28, 2008, if this is a public work contract covered by Article 8 of the Labor Law, the Contractor understands and agrees that the filing of payrolls in a manner consistent with Subdivision 3-a of Section 220 of the Labor Law shall be a condition precedent to payment by the State of any State approved sums due and owing for work done upon the project.

7. NON-COLLUSIVE BIDDING CERTIFICATION. In accordance with Section 139-d of the State Finance Law, if this contract was awarded based upon the submission of bids, Contractor affirms, under penalty of perjury, that its bid was arrived at independently and without collusion aimed at restricting competition. Contractor further affirms that, at the time Contractor submitted its bid, an authorized and responsible person executed and delivered to the State a non-collusive bidding certification on Contractor's behalf.

8. INTERNATIONAL BOYCOTT PROHIBITION. In accordance with Section 220-f of the Labor Law and Section 139-h of the State Finance Law, if this contract exceeds \$5,000, the Contractor agrees, as a material condition of the contract, that neither the Contractor nor any substantially owned or affiliated person, firm, partnership or corporation has participated, is participating, or shall participate in an international boycott in violation of the federal Export Administration Act of 1979 (50 USC App. Sections 2401 et seq.) or regulations thereunder. If such Contractor, or any of the aforesaid affiliates of Contractor, is convicted or is otherwise found to have violated said laws or regulations upon the final determination of the United States Commerce Department or any other appropriate agency of the United States subsequent to the contract's execution, such contract, amendment or modification thereto shall be rendered forfeit and void. The Contractor shall so notify the State Comptroller within five (5) business days of such conviction, determination or disposition of appeal (2NYCRR 105.4).

9. SET-OFF RIGHTS. The State shall have all of its common law, equitable and statutory rights of set-off. These rights shall include, but not be limited to, the State's option to withhold for the purposes of set-off any moneys due to the Contractor under this contract up to any amounts due and owing to the State with regard to this contract, any other contract with any State department or agency, including any contract for a term commencing prior to the term of this contract, plus any amounts due and owing to the State for any other reason including, without limitation, tax delinquencies, fee delinquencies or monetary penalties relative thereto. The State shall exercise its set-off rights in accordance with normal State practices including, in cases of set-off pursuant to an audit, the finalization of such audit by the State agency, its representatives, or the State Comptroller.

10. RECORDS. The Contractor shall establish and maintain complete and accurate books, records, documents, accounts and other evidence directly pertinent to performance under this contract (hereinafter, collectively, "the Records"). The Records must be kept for the balance of the calendar year in which they were made and for six (6) additional years thereafter. The State Comptroller, the Attorney General and any other person or entity authorized to conduct an examination, as well as the agency or agencies involved in this contract, shall have access to the Records during normal business hours at an office of the Contractor within the State of New York or, if no such office is

available, at a mutually agreeable and reasonable venue within the State, for the term specified above for the purposes of inspection, auditing and copying. The State shall take reasonable steps to protect from public disclosure any of the Records which are exempt from disclosure under Section 87 of the Public Officers Law (the "Statute") provided that: (i) the Contractor shall timely inform an appropriate State official, in writing, that said records should not be disclosed; and (ii) said records shall be sufficiently identified; and (iii) designation of said records as exempt under the Statute is reasonable. Nothing contained herein shall diminish, or in any way adversely affect, the State's right to discovery in any pending or future litigation.

11. IDENTIFYING INFORMATION AND PRIVACY NOTIFICATION. (a) Identification Number(s). Every invoice or New York State Claim for Payment submitted to a New York State agency by a payee, for payment for the sale of goods or services or for transactions (e.g., leases, easements, licenses, etc.) related to real or personal property must include the payee's identification number. The number is any or all of the following: (i) the payee's Federal employer identification number, (ii) the payee's Federal social security number, and/or (iii) the payee's Vendor Identification Number assigned by the Statewide Financial System. Failure to include such number or numbers may delay payment. Where the payee does not have such number or numbers, the payee, on its invoice or Claim for Payment, must give the reason or reasons why the payee does not have such number or numbers.

(b) Privacy Notification. (1) The authority to request the above personal information from a seller of goods or services or a lessor of real or personal property, and the authority to maintain such information, is found in Section 5 of the State Tax Law. Disclosure of this information by the seller or lessor to the State is mandatory. The principal purpose for which the information is collected is to enable the State to identify individuals, businesses and others who have been delinquent in filing tax returns or may have understated their tax liabilities and to generally identify persons affected by the taxes administered by the Commissioner of Taxation and Finance. The information will be used for tax administration purposes and for any other purpose authorized by law. (2) The personal information is requested by the purchasing unit of the agency contracting to purchase the goods or services or lease the real or personal property covered by this contract or lease. The information is maintained in the Statewide Financial System by the Vendor Management Unit within the Bureau of State Expenditures, Office of the State Comptroller, 110 State Street, Albany, New York 12236.

12. EQUAL EMPLOYMENT OPPORTUNITIES FOR MINORITIES AND WOMEN. In accordance with Section 312 of the Executive Law and 5 NYCRR 143, if this contract is: (i) a written agreement or purchase order instrument, providing for a total expenditure in excess of \$25,000.00, whereby a contracting agency is committed to expend or does expend funds in return for labor, services, supplies, equipment, materials or any combination of the foregoing, to be performed

for, or rendered or furnished to the contracting agency; or (ii) a written agreement in excess of \$100,000.00 whereby a contracting agency is committed to expend or does expend funds for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements thereon; or (iii) a written agreement in excess of \$100,000.00 whereby the owner of a State assisted housing project is committed to expend or does expend funds for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements thereon for such project, then the following shall apply and by signing this agreement the Contractor certifies and affirms that it is Contractor's equal employment opportunity policy that:

(a) The Contractor will not discriminate against employees or applicants for employment because of race, creed, color, national origin, sex, age, disability or marital status, shall make and document its conscientious and active efforts to employ and utilize minority group members and women in its work force on State contracts and will undertake or continue existing programs of affirmative action to ensure that minority group members and women are afforded equal employment opportunities without discrimination. Affirmative action shall mean recruitment, employment, job assignment, promotion, upgradings, demotion, transfer, layoff, or termination and rates of pay or other forms of compensation;

(b) at the request of the contracting agency, the Contractor shall request each employment agency, labor union, or authorized representative of workers with which it has a collective bargaining or other agreement or understanding, to furnish a written statement that such employment agency, labor union or representative will not discriminate on the basis of race, creed, color, national origin, sex, age, disability or marital status and that such union or representative will affirmatively cooperate in the implementation of the Contractor's obligations herein; and

(c) the Contractor shall state, in all solicitations or advertisements for employees, that, in the performance of the State contract, all qualified applicants will be afforded equal employment opportunities without discrimination because of race, creed, color, national origin, sex, age, disability or marital status.

Contractor will include the provisions of "a", "b", and "c" above, in every subcontract over \$25,000.00 for the construction, demolition, replacement, major repair, renovation, planning or design of real property and improvements thereon (the "Work") except where the Work is for the beneficial use of the Contractor. Section 312 does not apply to: (i) work, goods or services unrelated to this contract; or (ii) employment outside New York State. The State shall consider compliance by a contractor or subcontractor with the requirements of any federal law concerning equal employment opportunity which effectuates the purpose of this section. The contracting agency shall determine whether the imposition of the requirements of the provisions hereof duplicate or conflict with any such federal law and if such duplication or conflict

exists, the contracting agency shall waive the applicability of Section 312 to the extent of such duplication or conflict. Contractor will comply with all duly promulgated and lawful rules and regulations of the Department of Economic Development's Division of Minority and Women's Business Development pertaining hereto.

13. CONFLICTING TERMS. In the event of a conflict between the terms of the contract (including any and all attachments thereto and amendments thereof) and the terms of this Appendix A, the terms of this Appendix A shall control.

14. GOVERNING LAW. This contract shall be governed by the laws of the State of New York except where the Federal supremacy clause requires otherwise.

15. LATE PAYMENT. Timeliness of payment and any interest to be paid to Contractor for late payment shall be governed by Article 11-A of the State Finance Law to the extent required by law.

16. NO ARBITRATION. Disputes involving this contract, including the breach or alleged breach thereof, may not be submitted to binding arbitration (except where statutorily authorized), but must, instead, be heard in a court of competent jurisdiction of the State of New York.

17. SERVICE OF PROCESS. In addition to the methods of service allowed by the State Civil Practice Law & Rules ("CPLR"), Contractor hereby consents to service of process upon it by registered or certified mail, return receipt requested. Service hereunder shall be complete upon Contractor's actual receipt of process or upon the State's receipt of the return thereof by the United States Postal Service as refused or undeliverable. Contractor must promptly notify the State, in writing, of each and every change of address to which service of process can be made. Service by the State to the last known address shall be sufficient. Contractor will have thirty (30) calendar days after service hereunder is complete in which to respond.

18. PROHIBITION ON PURCHASE OF TROPICAL HARDWOODS. The Contractor certifies and warrants that all wood products to be used under this contract award will be in accordance with, but not limited to, the specifications and provisions of Section 165 of the State Finance Law, (Use of Tropical Hardwoods) which prohibits purchase and use of tropical hardwoods, unless specifically exempted, by the State or any governmental agency or political subdivision or public benefit corporation. Qualification for an exemption under this law will be the responsibility of the contractor to establish to meet with the approval of the State.

In addition, when any portion of this contract involving the use of woods, whether supply or installation, is to be performed by any subcontractor, the prime Contractor will indicate and certify in the submitted bid proposal that the subcontractor has been informed and is in compliance with specifications and

provisions regarding use of tropical hardwoods as detailed in §165 State Finance Law. Any such use must meet with the approval of the State; otherwise, the bid may not be considered responsive. Under bidder certifications, proof of qualification for exemption will be the responsibility of the Contractor to meet with the approval of the State.

19. MACBRIDE FAIR EMPLOYMENT PRINCIPLES. In accordance with the MacBride Fair Employment Principles (Chapter 807 of the Laws of 1992), the Contractor hereby stipulates that the Contractor either (a) has no business operations in Northern Ireland, or (b) shall take lawful steps in good faith to conduct any business operations in Northern Ireland in accordance with the MacBride Fair Employment Principles (as described in Section 165 of the New York State Finance Law), and shall permit independent monitoring of compliance with such principles.

20. OMNIBUS PROCUREMENT ACT OF 1992. It is the policy of New York State to maximize opportunities for the participation of New York State business enterprises, including minority and women-owned business enterprises as bidders, subcontractors and suppliers on its procurement contracts.

Information on the availability of New York State subcontractors and suppliers is available from:

NYS Department of Economic Development
Division for Small Business
Albany, New York 12245
Telephone: 518-292-5100
Fax: 518-292-5884
email: opa@esd.ny.gov

A directory of certified minority and women-owned business enterprises is available from:

NYS Department of Economic Development
Division of Minority and Women's Business Development
633 Third Avenue
New York, NY 10017
212-803-2414
email: mwbecertification@esd.ny.gov
<https://ny.newnyccontracts.com/FrontEnd/VendorSearchPublic.asp>

The Omnibus Procurement Act of 1992 requires that by signing this bid proposal or contract, as applicable, Contractors certify that whenever the total bid amount is greater than \$1 million:

(a) The Contractor has made reasonable efforts to encourage the participation of New York State Business Enterprises as suppliers and subcontractors, including certified minority and women-owned business enterprises, on this project, and has retained the documentation of these efforts to be provided upon request to the State;

(b) The Contractor has complied with the Federal Equal Opportunity Act of 1972 (P.L. 92-261), as amended;

(c) The Contractor agrees to make reasonable efforts to provide notification to New York State residents of employment opportunities on this project through listing any such positions with the Job Service Division of the New York State Department of Labor, or providing such notification in such manner as is consistent with existing collective bargaining contracts or agreements. The Contractor agrees to document these efforts and to provide said documentation to the State upon request; and

(d) The Contractor acknowledges notice that the State may seek to obtain offset credits from foreign countries as a result of this contract and agrees to cooperate with the State in these efforts.

21. RECIPROCITY AND SANCTIONS PROVISIONS. Bidders are hereby notified that if their principal place of business is located in a country, nation, province, state or political subdivision that penalizes New York State vendors, and if the goods or services they offer will be substantially produced or performed outside New York State, the Omnibus Procurement Act 1994 and 2000 amendments (Chapter 684 and Chapter 383, respectively) require that they be denied contracts which they would otherwise obtain. NOTE: As of May 15, 2002, the list of discriminatory jurisdictions subject to this provision includes the states of South Carolina, Alaska, West Virginia, Wyoming, Louisiana and Hawaii. Contact NYS Department of Economic Development for a current list of jurisdictions subject to this provision.

22. COMPLIANCE WITH NEW YORK STATE INFORMATION SECURITY BREACH AND NOTIFICATION ACT. Contractor shall comply with the provisions of the New York State Information Security Breach and Notification Act (General Business Law Section 899-aa; State Technology Law Section 208).

23. COMPLIANCE WITH CONSULTANT DISCLOSURE LAW. If this is a contract for consulting services, defined for purposes of this requirement to include analysis, evaluation, research, training, data processing, computer programming, engineering, environmental, health, and mental health services, accounting, auditing, paralegal, legal or similar services, then, in accordance with Section 163 (4-g) of the State Finance Law (as amended by Chapter 10 of the Laws of 2006), the Contractor shall timely, accurately and properly comply with the requirement to submit an annual employment report for the contract to the agency that awarded the contract, the Department of Civil Service and the State Comptroller.

24. PROCUREMENT LOBBYING. To the extent this agreement is a "procurement contract" as defined by State Finance Law Sections 139-j and 139-k, by signing this agreement the contractor certifies and affirms that all disclosures made in accordance with State Finance Law

Sections 139-j and 139-k are complete, true and accurate. In the event such certification is found to be intentionally false or intentionally incomplete, the State may terminate the agreement by providing written notification to the Contractor in accordance with the terms of the agreement.

25. CERTIFICATION OF REGISTRATION TO COLLECT SALES AND COMPENSATING USE TAX BY CERTAIN STATE CONTRACTORS, AFFILIATES AND SUBCONTRACTORS.

To the extent this agreement is a contract as defined by Tax Law Section 5-a, if the contractor fails to make the certification required by Tax Law Section 5-a or if during the term of the contract, the Department of Taxation and Finance or the covered agency, as defined by Tax Law 5-a, discovers that the certification, made under penalty of perjury, is false, then such failure to file or false certification shall be a material breach of this contract and this contract may be terminated, by providing written notification to the Contractor in accordance with the terms of the agreement, if the covered agency determines that such action is in the best interest of the State.

26. IRAN DIVESTMENT ACT. By entering into this Agreement, Contractor certifies in accordance with State Finance Law §165-a that it is not on the "Entities Determined to be Non-Responsive Bidders/Offerers pursuant to the New York State Iran Divestment Act of 2012" ("Prohibited Entities List") posted at:

<http://www.ogs.ny.gov/about/regs/docs/ListofEntities.pdf>

Contractor further certifies that it will not utilize on this Contract any subcontractor that is identified on the Prohibited Entities List. Contractor agrees that should it seek to renew or extend this Contract, it must provide the same certification at the time the Contract is renewed or extended. Contractor also agrees that any proposed Assignee of this Contract will be required to certify that it is not on the Prohibited Entities List before the contract assignment will be approved by the State.

During the term of the Contract, should the state agency receive information that a person (as defined in State Finance Law §165-a) is in violation of the above-referenced certifications, the state agency will review such information and offer the person an opportunity to respond. If the person fails to demonstrate that it has ceased its engagement in the investment activity which is in violation of the Act within 90 days after the determination of such violation, then the state agency shall take such action as may be appropriate and provided for by law, rule, or contract, including, but not limited to, imposing sanctions, seeking compliance, recovering damages, or declaring the Contractor in default.

The state agency reserves the right to reject any bid, request for assignment, renewal or extension for an entity that appears on the Prohibited Entities List prior to the award, assignment, renewal or extension of a contract, and to pursue a responsibility review with respect to any entity that is awarded

a contract and appears on the Prohibited Entities list after contract award.

