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AN

AGREEMENT

BY AND BETWEEN

THE

**BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE  
CITY OF NEW YORK**

AND

**RMC RESEARCH CORPORATION**

OLS CONTRACT LOG No. 17053

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### ATTACHMENTS

<b>Attachment A:</b>	<b>Request for Authorization (“RA”) and Request for Authorization—Public Notice of Award (“RA/PNA”)</b>
<b>Attachment B:</b>	<b>BOE Supplemental “Terms and Conditions” (“T&amp;C”)</b>
<b>Attachment C:</b>	<b>BOE Purchasing Agency Letter</b>
<b>Attachment D:</b>	<b>Contractor’s Budget</b>
<b>Attachment E:</b>	<b>Contractor’s Work Plan</b>
<b>Attachment F:</b>	<b>Contractor’s Proposal</b>
<b>Attachment G:</b>	<b>BOE Request For Proposals (“RFP”) Serial No. R0116 Questions &amp; Answers</b>
<b>Attachment H:</b>	<b>BOE RFP Serial No. R0116</b>

### DOCUMENT HISTORY

**December 5, 2007:** First BOE draft agreement

**BOARD OF EDUCATION OF THE CITY OF NEW YORK**  
**UNEMPLOYMENT INSURANCE CLAIMS SERVICES AGREEMENT**

**AN AGREEMENT** made and entered into as of the first day of August, 2007 by and between the **BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK** (hereinafter expressed as “Board of Education,” “Board,” “BOE,” “New York City Department of Education” or “NYCDOE”<sup>1</sup>), a municipal corporation and school district existing under the laws of the State of New York, with principal offices located at the Tweed Courthouse, 52 Chambers Street, New York, NY 10007-1222, and the **RMC RESEARCH CORPORATION** (hereinafter expressed as “Contractor”), a corporation existing under the laws of the State of Delaware, with principal offices located at the Lincoln Building, 60 East 42<sup>nd</sup> Street, Suite 1345, New York, NY 10165-1345 (hereinafter, each is expressed as a “Party,” and both are expressed collectively as “Parties”).

**W I T N E S S E T H**

**WHEREAS**, on behalf of the BOE Division of Human Resources (herein expressed as “DHR”), the BOE Division of Contracts & Purchasing (herein expressed as “DC&P”) publicly advertised and otherwise circulated a Request for Proposals, Serial No. R0116 entitled, “Peer Observation and Evaluation” (herein expressed as “RFP”), to obtain proposals from private sector sources to furnish specialized professional Services, labor, materials, equipments and supplies necessary to perform all tasks necessary to conduct observations and detailed evaluations of the performance of BOE teachers; and,

**WHEREAS**, the Contractor responded to the RFP by having submitted a proposal to the BOE dated May 11, 2007 (herein expressed as “Proposal”), a work plan also dated May 11, 2007 (herein expressed as “Work Plan”), and a budget also dated May 11, 2007 which the Contract subsequently revised dated December 21, 2007 (herein expressed as “Budget”), all of which formed the basis for the Board’s selection of the Contractor for award of contract to provide the BOE specialized, professional Services in accordance with the terms, conditions and specifications expressed in this Agreement; and,

**WHEREAS**, following the BOE contract authorization process, DC&P and DHR submitted a Request for Authorization (herein expressed as “RA”) to the BOE Office of the Chancellor; and, Chancellor Joel I. Klein approved the RA on August 23, 2007, thus authorizing this Agreement with the Contractor; and, the BOE published the Chancellor’s approval of the RA in a Request for Authorization—Public Announcement of Award (herein expressed as “RA/PNA”) dated August 23, 2007; and,

**WHEREAS**, this is a full value agreement for both professional Services and Goods within the meaning of **Paragraphs 1.4.2 and 1.5** of the BOE standard operating procedures for financial management centers (SOPM No. 3-89, date: 5/89), which was the result of an RFP procedure conducted by DC&P in compliance with **Chapter II** entitled, “Bidding and Contracts,” **Section 10** entitled, “Procurement of Professional and Consulting Services,” of the BOE standard operating procedures for financial management centers (SOPM No. 3-89, date: 5/89); and,

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<sup>1</sup> “NYCDOE” is an abbreviation for “New York City Department of Education,” which are both informal “doing-business-as” (“dba”) names of the Board of Education of the City School District of the City of New York.

**WHEREAS**, the Contractor warrants that it is ready, willing and able to provide the Services and Software to the BOE in compliance with the following terms, conditions and specifications;

**NOW, THEREFORE**, in consideration of the heretofore-recited stipulations and the hereinafter-expressed terms, conditions and specifications, the Board and the Contractor, as the Parties to this Agreement, do hereby stipulate, warrant, agree and covenant both as above and as follows:

**1. COMPOSITION OF THE AGREEMENT.**

The following shall be deemed to constitute and comprise this Agreement for all general and particular intents and purposes and are deemed to be incorporated into, and made part of, this Agreement:

- 1.1. The Board's **Request for Authorization** ("RA") and **Request for Authorization—Public Notice of Award** ("RA/PNA") are "**Attachment A.**"
- 1.2. This Agreement document consisting of pages i-v and 1-48.
- 1.3. The Board's supplemental "Terms and Conditions" (herein expressed as "**T&C**") are "**Attachment B.**" The BOE and the Contractor do hereby stipulate and agree that many provisions of this Agreement are supplemented by the provisions expressed in the **T&C.**
- 1.4. The BOE letter of official purchasing agency appointment is "**Attachment C**" and may also be known as "Purchasing Agency Letter" or "Sales Tax Letter."
- 1.5. The Contractor's **Budget** is "**Attachment D.**"
- 1.6. The Contractor's **Work Plan** is "**Attachment E.**"
- 1.7. The Contractor's **Proposal** is "**Attachment F.**"
- 1.8. The BOE **Request For Proposals** ("**RFP**") **Serial No. R0116 Questions & Answers** document is "**Attachment G.**"
- 1.9. The BOE **RFP Serial No. R0116** is "**Attachment H.**"

**2. ORDER OF GOVERNANCE.**

The BOE and the Contractor do hereby stipulate and agree that, to the extent there shall or may exist any inconsistencies or conflicts between or among any provisions of this Agreement including this Agreement document consisting of pages i-v and 1-48 and Attachments **A** through **H**, the following order of governance is hereby established for every case and for all general and/or particular intents and purposes: first Attachment **A**, second this Agreement document consisting of pages i-v and 1-48, third Attachment **B**, fourth Attachment **C**, fifth Attachment **D**, sixth Attachment **E**, seventh Attachment **F**, eighth Attachment **G**, and ninth and finally Attachment **H**.

### 3. TERM OF REQUIREMENTS AGREEMENT.

This **Paragraph 3** represents the complete understanding and agreement of the Parties regarding the Term of this Requirements Agreement (hereinafter expressed as "Term") all else (*except* the **RA** and **Paragraph 9.1, infra**) to the contrary notwithstanding.

#### 3.1. **TERM.**

##### 3.1.1. Original Period of the Term.

The Original Period of the Term shall commence on August 1, 2007 and extend through and terminate on July 31, 2010 (herein expressed as "Original Period"), unless extended beyond such expiration date or terminated earlier, either pursuant to the terms and conditions herein expressed.

##### 3.1.2. Optional Additional Periods of the Term.

The BOE shall have two (2), distinct options to extend the Term for two (2) Additional Periods of one (1) year each (hereinafter expressed collectively as "Additional Periods") from August 1, 2010 until July 31, 2011 (hereinafter expressed as "First Additional Period") and from August 1, 2011 until July 31, 2012 (hereinafter expressed as "Second Additional Period"). This **Paragraph 3.1.2** shall not derogate, diminish or otherwise affect the Board's right to cancel the balance of the Agreement during the Original Period or the Additional Periods, if any, for any reason(s) expressed herein and/or in the **T&C**. The Chancellor shall have sole discretion to exercise the Board's options to extend for the Additional Periods. If the Chancellor opts to extend for one or both of the Additional Periods, he/she shall provide give notice to the Contractor of each decision at least thirty (30) days before the start of each affected Additional Period, *i.e.*, by not later than the close of business on July 2, 2010 for the First Additional Period, and by not later than July 2, 2011 for the Second Additional Period. If the Chancellor shall not exercise the option to extend for the First Additional Period, such act and/or omission shall cancel automatically the Board's option to extend for the Second Additional Period.

##### 3.1.3. Evaluation Criteria to Extend for Additional Period.

Before the notice deadline for the exercise of each option to extend, as expressed in **Paragraph 3.1.2, supra**, the Chancellor shall review the Contractor's performance and the availability of funds for the continuation of this Agreement. The evaluation expressed in the preceding sentence shall be the basis for the decision by the Chancellor whether or not to exercise the Board's options to extend for the Additional Periods.

#### 3.2. **CONTRACT YEARS.**

Within the Term, distinct "Contract Years" shall start August 1<sup>st</sup> and shall end on July 31<sup>st</sup>, *i.e.*, the First Contract Year shall be from August 1, 2007 to July 31, 2008, the Second Contract Year shall be from August 1, 2008 to July 31, 2009, and the Third Contract Year shall be from August 1, 2009 to July 31, 2010. If the Chancellor shall exercise one or both of the Board's op-

tions to extend the Term for Additional Periods, the Fourth Contract Year shall be from August 1, 2010 to July 31, 2011, and the Fifth Contract Year shall be from August 1, 2011 to July 31, 2012.

#### 4. SERVICES.

Wherever used herein, the term "Services" shall be deemed to describe collectively all professional, supervisory, administrative, managerial, technical, advisory, observational, evaluative, testimonial, report writing, research and other activities as well as all facilities, supplies, materials, machinery, equipment, travel, consultations, appearances and all other cost-incurring and non-cost-incurring activities that the Contractor furnishes to, or for the benefit of, the BOE and/or its appointed officials, officers, executives and other authorized employees. The Contractor shall perform the Services under the general supervision of the Chancellor. The Contractor shall furnish, provide and deliver all of the Services expressed in the **RFP, Proposal, Work Plan and Budget** at the staffing and other levels specified in the **Proposal, Work Plan and Budget**. As contained in **Proposal, Work Plan and/or Budget**, any words of aspiration (such as, but not limited to, "ideally," "hoped" and/or "hopefully") and/or expectation (such as, but not limited to, "expected," "anticipated" and/or "if available") are hereby deemed to be the Contractor's binding commitment. In the provision of the Services, the Contractor shall adhere in every respect to all classifications, methodologies, procedures, instructions, schedules, timelines, priorities, explanations, examples, specifications and other information expressed herein, in the **Proposal**, in the **Work Plan**, in the **Budget**, in any instruction(s) contained in a purchase order(s) that shall be accepted by the Contractor, and/or in any special written instructions from the Chancellor and/or the BOE Contract Manager that shall be accepted by the Contractor. The Contractor hereby stipulates and agrees that time is of the essence with respect to the duties and obligations of, and the performance by, the Contractor under this Agreement. Furthermore, all else (*except* the **RA**) to the contrary notwithstanding, the following terms, conditions and specifications shall prescribe and govern the Contractor's supply, performance and delivery of the Services:

##### 4.1. **ADHERENCE TO THE PROPOSAL, WORK PLAN AND THE BUDGET.**

The Contractor shall provide the Services as set forth herein and in the **Proposal, Work Plan and Budget**. In providing the Services, the Contractor shall adhere in all respects to the specifications, classifications, methodologies, schedules, procedures, instructions, timelines, priorities, explanations, examples, and other information contained in the **Proposal, Work Plan and/or Budget**, acknowledging that time is of the essence with respect to the duties and obligations of, and the performance by, the Contractor under this Agreement.

##### 4.2. **CONTRACTOR'S SKILL, JUDGMENT, EXPERTISE AND BEST EFFORTS.**

The Contractor shall furnish its skill, judgment, expertise and best efforts in the performance of this Agreement. The Contractor shall furnish first quality advice, assistance, coordination, pedagogical observation, pedagogical evaluation, evaluation report writing, hearing testimony, research, development and implementation Services with respect to peer observation and evaluation of teacher performance in the classroom and other professional settings. The Contractor shall cause the Services to be performed in the most expeditious and economical manner consistent with this Agreement and the **RA, RFP, Proposal, Work Plan, Budget, T&C** and the interests of the BOE including, *but* not necessarily limited to, the Board's interest to improve both teacher performance in the classroom and other professional settings and the effectiveness and outcomes



(from a managerial perspective) of disciplinary hearings pertaining to various performance-based allegations involving BOE pedagogical employees. The Contractor shall coordinate with the BOE to pursue and advance the Board's interests. The Contractor shall comply with all applicable BOE bylaws, rules, regulations, policies, guidelines and procedures.

#### **4.3. CONTRACTOR'S TRAINING OF BOE PERSONNEL.**

The Contractor shall provide training to BOE employees, as designated in writing by the Chancellor or the BOE Contract Manager, in accordance with the terms, conditions and specifications expressed in the **Proposal, Work Plan** and/or the **Budget**.

**4.3.1.** The Contractor shall provide quality instruction, training, expert perspectives, and evaluation to include, without limitation, lectures, seminars, workshops, discussions, demonstrations, reviews and tests in keeping with high professional standards. The Contractor shall use *only* qualified teachers, trainers, instructors, administrators and other staff who are familiar with the professional needs of school district staff serving public schools in modern day, large, urban areas.

**4.3.2.** The Contractor must provide all necessary instructional equipment and materials, including audio-visual equipment and student and instructor materials. The Contractor's training materials shall include course syllabi, agenda, instructor guides, *etc.* Such materials shall be provided in hard copy and electronic media.

#### **4.4. THE CONTRACTOR'S WARRANTIES.**

The Contractor does hereby represent and warrant to the BOE as follows:

##### **4.4.1. Performance of the Services.**

The Contractor represents and warrants the following: **(i)** all Services provided under this Agreement shall be provided in a timely, professional, and workmanlike manner consistent with the highest standards of quality and integrity and shall meet the performance standards required under this Agreement; and, **(ii)** no amendment to this Agreement or additional cost or expense shall be required by the Contractor during the Term in order for it to be able to perform the Services in accordance with this Agreement. The Contractor **(i)** is and shall remain fully qualified and able to perform the Services according to the terms of this Agreement within the time and in the manner specified in the contract documents and has and will continue to have sufficient and well qualified personnel to fulfill its duties under this Agreement in the manner required, and **(ii)** has and shall continue to have all licenses and permits required to be maintained under the State laws, rules and regulations or under any other laws or the requirements of any other governmental agency or authority having jurisdiction over the work performed under this Agreement.

##### **4.4.2. Pedagogical Profession Evaluation Industry Best Practices.**

The Contractor shall implement and use Pedagogical Profession Evaluation Industry Best Practices at all times during the Term to identify, observe, evaluate, research, analyze, report, assist, consult, advise, testify, implement, coordinate and otherwise per-



form the Services. The Contractor stipulates and agrees that BOE pedagogical practices and procedures are governed by applicable Federal, State and BOE laws, rules and regulations.<sup>2</sup> The Contractor stipulates and agrees further that pedagogical and evaluation industry trade and professional organizations<sup>3</sup> promulgate a wide range of guidelines that constitute "Pedagogical Profession Evaluation Industry Best Practices." The Contractor shall perform all of the Services under this Agreement in compliance with all applicable Federal, State and BOE laws, rules and regulations as well as Pedagogical Profession Evaluation Industry Best Practices.

#### **4.4.3. Business Requirements.**

The Contractor is fully aware of the Board of Education's business, administrative, operational, pedagogical, legal and labor relations requirements and intended uses for the Services including, *but* not limited to, any intended uses expressed in the **RFP**, and the Services shall satisfy such requirements as discussed in the **RFP**, **Proposal** and **Work Plan** in all material respects. The BOE and the Contractor shall conduct periodic meetings to review the Contractor's fulfillment of BOE business, administrative, operational, pedagogical, legal and labor relations requirements; at each such meeting, the Contractor shall furnish status reports. If the BOE accepts such reports and *unless* the Contractor shall receive written notice otherwise, the Contractor may assume that the Services are satisfying the requirements of this Agreement.

#### **4.4.4. Additional Warranties Expressed in the T&C.**

Reference is hereby made to the additional representations and warranties made by the Contractor hereunder as expressed in the **T&C**.

#### **4.4.5. Remedies for Breach of Warranties.**

In the event that the Services shall not meet the aforementioned warranties, the Contractor shall provide at no charge during the Term the necessary Services required to attain the levels or standards expressed in the said aforementioned warranties. The Contractor shall implement the necessary remedies to cure any failure of the Services to meet the aforementioned warranties.

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<sup>2</sup> Examples of statutes and regulations include, but are not limited to, the following: Individuals with Disabilities in Education Act, 20 U.S.C.S. §§1400, *et seq.*; the State Education Law, §§2554, 2590-f, 2590-g, 2590-h, 3020, and 3020-a; 8(a) N.Y.C.R.R. §100.2; Regulation of the Chancellor • C-31, C-200, C-201, C-205, C-208, and C-240.

<sup>3</sup> Pedagogical profession evaluation industry trade and professional organizations include, but are not necessarily limited to, the National Education Association ("NEA"), the National Teachers Association ("NTA"), the National Science Teachers Association ("NSTA"), the School Administrators Association of New York ("SAANY"), the National Middle School Association ("NMSA"), the Association for Supervision & Curriculum Development ("ASCD"), the American Educational Research Association ("AERA"), the International Reading Association ("IRA"), the National Association for the Education of Young Children ("NAEYC"), the National Staff Development Council ("NSDC"), the National Council of Teachers of Mathematics ("NCTM"), and the American Association of Colleges for Teacher Education ("AACTA").

**4.4.6. Waiver of all Excuses for Breach of Warranties.**

The Contractor stipulates and agrees that it is fully aware of the potential for damages, delays, interruptions and other problems that may be occasioned to and against the Board's system of school buildings and facilities by the Contractor's breach of the foregoing Services warranties. The Contractor hereby further stipulates and agrees that any and all arguments, defenses and/or affirmative defenses based upon *force majeure*, unforeseeability, mistake and all other excuses and reasons are null and void with respect to any breach of the foregoing software warranties. Furthermore, the Contractor does hereby forever waive and relinquish all rights to bring and/or assert any and all arguments, defenses and/or affirmative defenses based upon *force majeure*, unforeseeability, mistake and all other excuses and reasons to avoid the Contractor's obligation to provide and/or deliver appropriate remedies for any breach of the foregoing remedies as expressed in **Paragraph 4.4.5, supra**.

**4.4.7. Elimination of Sales, Excise, Use and Other Taxes.**

The Contractor shall make its best commercial efforts to comply with the provisions expressed at **Paragraph 10, infra**, regarding the elimination of the direct and/or indirect payment of any Federal, State and/or local sales, excise and/or use taxes for equipment, goods and materials supplied under this Agreement as well as the Contractor's faithful actions as an agent of the BOE for the purchase of said equipment, goods and materials specified under this Agreement on the Board's behalf for resale to the BOE.

**4.5. GENERAL PROVISIONS FOR THE SERVICES.**

The following terms, conditions and specifications shall prescribe and govern the Contractor's provision of the Services:

**4.5.1. Contract Managers.**

Each Party shall appoint a qualified Contract Manager who shall serve as such Party's primary day-to-day liaison for the purposes of this Agreement. The Contract Manager shall be authorized by the respective Party to answer all questions posed by the other Party and convey all decisions made by such Party during the Term, and the other Party shall be entitled to rely on such information as conveyed by the Contract Manager. The Contract Managers shall meet on a regular basis to review problems, progress and status of the timeline set forth in the **RFP, Proposal, Work Plan** and/or **Budget**, and they shall report to the Chancellor on an as needed basis. Each Party shall provide written notice to the other Party of the name and contact information of its initial Contract Manager within fifteen (15) Business Days after this Agreement's execution.

**4.5.2. Key Employees.**

**4.5.2.1.** The Contractor shall appoint personnel to fill-in the Contractor's key positions described in the **Proposal, Work Plan** and **Budget** including, *but not limited to*, the Contract Manager (herein expressed as "Key Employees"). By en-

tering into this Agreement, the BOE approves the Key Employees named in the **Proposal, Work Plan and Budget**.<sup>4</sup>

**4.5.2.2.** The Contractor shall cause each Key Employee to devote the time and effort specified in the **Proposal, Work Plan** and/or **Budget** to furnish the Services expressed in this Agreement. The BOE reserves the right to approve all additional Key Employees. All Key Employees under this Agreement shall have appropriate levels of experience and shall be adequately trained to provide the Services according to this Agreement.

**4.5.2.3.** The Contractor acknowledges that the skill and experience of the Key Employees are material elements in the Board's decision to engage the Contractor hereunder. Therefore, in order to ensure timely, cohesive and complete provision of Services, the Contractor shall make all commercially reasonable efforts to ensure that the Key Employees initially assigned to the performance of this Agreement shall continue throughout the Term. The Contractor shall *not*, without the prior approval of the BOE, remove, transfer, replace or reassign any Key Employee to other duties involving comparable employment by the Contractor prior to completion of the first Contract Year. The BOE acknowledges that circumstances may arise, however, which necessitate Key Employees to be substituted, including promotions, termination, sickness, vacation or other similar material changes in their employment circumstance, at which time a replacement Key Employee with a reasonably comparable background and experience may be substituted, subject to the Board's approval as set forth in **Paragraph 4.5.2.4, infra**.

**4.5.2.4.** Before the assignment of any new or replacement Key Employee, the Contractor shall provide the BOE with written information including, *but not* limited to résumés detailing the experience of the candidates for such Key Employee positions. The BOE shall have the right to approve the assignment of a new or replacement Key Employee, which approval shall not be unreasonably withheld or delayed. The BOE shall approve or disapprove any such candidate within twenty (20) Business Days of receipt of the written information and evaluations for such candidate, provided that prior to the expiration of such time period, the BOE may request supplemental information regarding the candidate. The Contractor shall supply the requested supplemental information, to the extent that such information can appropriately be provided to the BOE, within five (5) Business Days, and the BOE shall have ten (10) Business Days after receipt of such information to approve or disapprove any such candidate. In the event that the BOE approves a replacement Key Employee, the Contractor shall make all commercially reasonable efforts to ensure that the replacement Key Employee and the existing Key Employee shall have a minimum twenty (20) Business Days transition period, which period may be waived at the Board's sole discretion in whole or in part. In the event the BOE disapproves a candidate, the Contractor shall pro-

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<sup>4</sup> The BOE approval expressed in this sentence applies to the education, training, skills, knowledge and experience of the Key Employees and does *not* constitute approval or waiver of approval with respect to the provisions of **Paragraph 17, infra**.

vide the BOE with written information on one or more alternative candidates within a reasonable period of time, and the procedures set forth above shall apply.

**4.5.2.5.** The BOE may refuse access to, or require replacement of any Key Employee, if such individual renders, in the sole judgment of the BOE, inadequate or unacceptable performance, or for any other reason the BOE finds such individual does *not* meet its security or responsibility requirements. Upon notice from the BOE, the Contractor shall immediately attempt to find a replacement for such Key Employee in accordance with the procedures set forth in **Paragraph 4.5.2.4, supra**. The replacement Key Employees shall have skills and experience comparable to his or her predecessor.

**4.5.3. Contractor's Workforce.**

**4.5.3.1.** The Contractor shall provide the Workforce necessary to fulfill all of the Contractor's obligations under this Agreement. The Workforce performing work under this Agreement must have appropriate levels of experience and be adequately trained to perform the Services.

**4.5.3.2.** The Contractor shall ensure that the Workforce members **(i)** comply with the terms, conditions, specifications and timelines of this Agreement, **(ii)** are present, punctual and prepared to perform all Services hereunder, **(iii)** furnish all required identification documentation when entering the Sites, and **(iv)** comply with BOE and each BOE site's security and administrative policies.

**4.5.3.3.** The Contractor shall exercise due care and diligence to screen and select the Workforce, and in doing so shall strictly comply with **Paragraph 17, infra**. The Contractor shall verify that each individual in the Workforce is legally authorized to work in the United States. The BOE reserves the right to request legally mandated Contractor-held documentation attesting to the same. The Contractor hereby represents that it does *not* discriminate against individuals on the basis of national origin or citizenship.

**4.5.3.4.** The Contractor shall be solely responsible for the work, employment, direction, discipline, compensation and benefits of the Workforce.

**4.5.3.5.** If the Chancellor shall in good faith determine that any individuals or entities in the Workforce shall have violated any provisions of this Agreement, or shall have rendered unsatisfactory performance of duties and responsibilities under this Agreement, the BOE shall notify the Contractor immediately of the Board's concern, and the Contractor shall execute any and all instructions for suspension, removal or replacement of the affected individuals or entities. Before the issuance of any of the types instructions expressed in the preceding sentence, the BOE shall consult with the Contractor; and, the BOE shall accept and consider any relevant information and/or perspectives from the Contractor, i.e., the Contractor shall have twenty-four (24) hours to submit any such information and/or perspectives after contact from the BOE. In cases of suspension of individuals or

entities in the Workforce, the Contractor shall be prohibited for a period of time to be determined and specified by the Chancellor from utilizing the affected individuals or entities on any portion of any work to be performed under this Agreement or under any other BOE agreement. In cases of removal of individuals or entities from the Workforce, the Contractor shall be permanently prohibited from utilizing the affected individuals or entities on any portion of any work to be performed under this Agreement or under any other BOE agreement. Upon the suspension or removal by the Chancellor of any individuals or entities described herein, the Contractor shall replace the affected individuals or entities, as the case may be, as soon as practical.

#### **4.5.3.6. Enforcement of Applicable State Labor Law Provisions.**

If the Contractor employs or engages workers in skilled and other trades, the Contractor shall be responsible to ensure that all such workers are paid prevailing wages that comply with the State Labor Law, to the extent applicable.

#### **4.5.4. Subcontractors and Affiliates.**

**4.5.4.1.** The Contractor may *not* subcontract the provision of the Services to Subcontractors without prior written approval from the Chancellor in his/her sole and absolute discretion. On the other hand, by entering into this Agreement, the BOE approves those Subcontractors named in the **Proposal, Work Plan and/or Budget**, if any.<sup>5</sup> Notwithstanding the foregoing sentence, the Contractor shall be fully responsible to the BOE for the acts and omissions of any Subcontractors and shall have primary liability for the successful performance of Services according to this Agreement.

**4.5.4.2.** The use of any replacement Subcontractors by the Contractor shall be subject to prior written approval of the Chancellor, i.e., the BOE shall be entitled to withhold approval for any replacement Subcontractors that fail to satisfy minimum BOE standards including, but not limited to, the sufficiency of such Subcontractor's VENDEX questionnaires, if required. The Contractor may delegate the provision of any Services to its Affiliates upon written notice thereof to the BOE, *but* Affiliates shall otherwise be covered by the provisions of this **Paragraph 4.5.4** such as, but not limited to, filing and approval of VENDEX questionnaires.

**4.5.4.3.** The Contractor shall furnish all appropriate information about the Subcontractors that shall be reasonably required by the BOE including, *but not* limited to, VENDEX questionnaires. The BOE shall be entitled to withhold the approval of any Subcontractor, if the Contractor shall fail and/or refuse to provide such information requested by the BOE.

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<sup>5</sup> The BOE approval expressed in this sentence applies to the education, training, skills, knowledge and experience of the Subcontractor(s) and/or Affiliate(s), if any, and does not constitute approval or waiver of approval with respect to the provisions of **Paragraph 17, *infra***.



**4.5.4.4.** The Contractor shall require each Subcontractor and Affiliate that in the course of furnishing Services has access to any BOE Confidential Information, to be bound by **Paragraph 21, *infra***, and **Section 29** of the T&C. The Contractor shall obtain from each Subcontractor and Affiliate a confidentiality and intellectual property statement containing terms substantially similar to the terms contained in **Paragraph 21, *infra***, and **Section 29** of the T&C. In addition, the Contractor shall, at the Board's direction, require each Subcontractor and Affiliate to execute a Confidentiality Agreement, Intellectual Property assignment or license agreement that is reasonably satisfactory to the BOE. The Contractor shall bind each Subcontractor and Affiliate by the terms of this Agreement, as far as applicable, to those Services furnished by the Subcontractor.

**4.5.4.5.** The Contractor shall perform appropriate credit checks on the business entity of each Subcontractor and other background checks on all Subcontractors before allowing them to provide Services hereunder and shall ensure that those selected are and shall be reputable, reliable and financially stable.

**4.5.4.6.** The Contractor's certificate of insurance referred to in **Paragraph 13, *infra***, shall cover any Subcontractors or Affiliates used by the Contractor in performance of this Agreement.

**4.5.5. Equal Opportunity and Non-Discrimination.**

The Contractor shall ensure that in any interaction with the Board's personnel and Educational Community, the Contractor and the Workforce shall give equal opportunity to all persons entitled to receive Services and shall *not* discriminate against such persons for any reason based on race, creed, color, sexual orientation, age, national origin, ethnicity, disability, marital status, religion, or political beliefs or affiliations.

**4.5.6. Pedagogical Employee Files.**

For each BOE pedagogical employee whom the BOE assigns the Contractor to provide the Services hereunder, the Contractor shall develop, maintain and supply a separate and complete Employee File. Each of the Services and/or each segment of the Services provided to, for, or on behalf of, each BOE pedagogical employee shall be noted in the Employee File with, as a minimum, the name of each BOE employee to, for, on, or on behalf of, any Service(s) was performed as well as the dates, times, detailed observations, detailed evaluations, detailed reports, and a summary of all other Services thus rendered. The Chancellor or his/her designee(s) may require additional types of entries. Each Employee File is hereby deemed to be the Board's Confidential Information as defined in **Paragraph 21, *infra***, and in **Section 29** of the T&C.

**4.5.7. Contractor's Materials.**

At no additional cost or expense to the BOE, the Contractor shall furnish all tools, equipment, supplies and materials necessary for the Workforce to furnish the Services satisfactorily. The foregoing shall include, *but* shall not be limited to, personal computers for the Contractor's use. The Contractor shall be solely responsible for said tools, equipment,



supplies and materials, and the BOE shall *not* be responsible in any manner or to any extent whatsoever for any damage thereto or loss thereof. At its sole discretion, the BOE may allow the Contractor and its Workforce to utilize BOE personal computers, printers, photocopying machines, fax machines, *etc.*, at no cost to the Contractor and with no price reduction by the Contractor to the BOE.

#### **4.5.8. BOE Facilities.**

For all Services furnished on Board premises, the BOE shall ensure that adequate space, as required by the nature of the Contractor's activity, shall be furnished at no cost to the Contractor at each site where Services and/or other activities are to be supplied, delivered and/or otherwise provided. During the Term, the BOE shall provide the Contractor with office space, at no cost to the Contractor, at such BOE premises as the Chancellor or the BOE Contract Manager shall specify in writing, which office space shall include desks, telephones, internet access points and one (1) analog line for one Contractor-supplied fax machine. In accordance with the provisions expressed at **Paragraph 4.5.10, *infra***, the Contractor shall be responsible for the safe, lawful disposal of any and all Hazardous Materials and/or wastes that it and/or its Workforce produce, bring and/or generate in the course of the provision of any of the Services.

#### **4.5.9. Contractor Use of BOE Facilities.**

The Contractor shall restrict its use of the Board's premises, personnel, services, and property to the provision of the Services under this Agreement. The Contractor shall *not* cause or allow the conduct of any other business, *except* for the provision of Services and other matters in connection with this Agreement on the Board's premises, or with BOE personnel, services or property. Use of BOE facilities by the Contractor does *not* constitute a leasehold interest and/or other interest in favor of the Contractor. The Contractor and/or its Workforce shall keep all BOE facilities in good order, clean, free of debris and any and all fire and/or safety hazards, and the Contractor and/or its Workforce shall *not* cause or permit waste or damage to such facilities and shall *not* use such facilities for any unlawful purposes and/or acts. The Contractor and Workforce shall perform all Services in a physically non-destructive and physically non-intrusive manner. The Contractor shall comply with all applicable laws and regulations including, *but* not limited to, all of BOE standards policies and procedures that are provided to the Contractor in writing about access to and use of BOE facilities including, *but* not limited to, procedures for the physical security of BOE facilities and Business Hours. The Contractor shall *not* make any improvements or changes involving structural, mechanical, or electrical alterations to BOE facilities without the Board's prior written approval. When BOE facilities are no longer required for performance of the Services, the Contractor shall return such facilities to the BOE in substantially the same condition as when the Contractor shall have begun use of such facilities, subject to reasonable wear and tear. The Contractor shall *not* cause the breach of any lease agreements governing use of BOE facilities. The foregoing shall apply with equal force and effect to the Workforce. The Workforce providing Services under this Agreement shall *not* engage in any gainful employment other than that directly connected with the provision of Services at the same time such Persons actually furnish Services.

**4.5.10. Waste and Disposal.**

The Contractor shall be responsible, at the Contractor's sole expense, for the safe and lawful handling or disposal of any and all Hazardous Materials or wastes that the Contractor or the Workforce bring or generate in the course of the provision and/or delivery of any of the Services hereunder.

**4.5.11. BOE Evaluation of Services.**

The Contractor shall cooperate with the BOE to evaluate the Services under this Agreement. The Contractor shall permit the Board, its agents, employees and/or volunteers to visit and observe sites while Services are being furnished and to interview BOE and Contractor staff and distribute Board questionnaires and other materials.

**4.6. COMMUNICATIONS ACCESS TO THE CONTRACTOR.**

The Contractor shall establish and maintain throughout the Term at its sole cost and expense a local City area code or toll free telephone number, so that the Chancellor, the BOE Contract Manager and/or other BOE representatives may call for the Services and to report any problems regarding the same. During the Term, the Contractor shall establish and maintain at its sole cost and expense a telephone number for receipt of "fax" transmissions from the Chancellor and/or other BOE representatives. During the Term, the Contractor shall establish and maintain at its sole cost and expense an email transmission and receipt system for sending and receiving emails to and from the Chancellor and/or other BOE representatives. The City local or toll free telephone number for telephone access must be maintained during the Term to operate and receive calls twenty-four (24) hours per day, seven (7) days per week, fifty-two (52) weeks per year *via* (i) a live person(s) at the Contractor's offices to receive calls during Business Hours, (ii) a commercial telephone answering or paging service, (iii) a tape, compact disc or other recording machine integrated into the telephone line to record incoming calls, and/or (iv) any combination of the foregoing approved by the Chancellor. The telephone number for "fax" transmissions and the email system must be maintained during the Term to operate twenty-four (24) hours per day, seven (7) days per week, fifty-two (52) weeks per year.

**5. FINANCIAL STABILITY OF THE CONTRACTOR.****5.1. FINANCIAL CONDITION OF THE CONTRACTOR.**

The Contractor represents and warrants that it has, and promises that it shall maintain during the Term, a financial condition commensurate with the requirements of this Agreement. If, during the Term, the Contractor shall experience a change in its financial condition that may adversely affect its ability to perform under this Agreement, then it shall provide immediate written notice to the BOE of such change.

**5.2. PUBLIC FILINGS.**

The Contractor shall provide to the BOE copies, which may be in electronic form, of all reports filed with the United States Securities and Exchange Commission (hereinafter expressed as "SEC") by (i) RMC Research Corporation, and (ii) any other Person directly or indirectly Control-

ling the Contractor that is required to register shares under the Securities Exchange Act of 1934, on SEC Forms 10-K, 10-Q and 8-K (and any successor forms) promptly after they are filed with the United States Securities and Exchange Commission. The BOE reserves the right to request additional information or evidence of the satisfactory financial stability of the Contractor or any Person directly or indirectly Controlling the Contractor.

### 5.3. MATERIAL FACTS.

The Contractor hereby represents that the material facts, whether technical, financial or otherwise, relating to its qualifications to provide the Services in accordance with the terms and conditions of this Agreement, have been disclosed.

## 6. OWNERSHIP OR RELATIONAL CHANGES.

After execution of this Agreement, the Contractor shall be obligated to notify the Chancellor and the BOE Contract Manager in writing within ten (10) calendar days in the event of a change(s) in any of the following: (i) 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), officers and/or directors of the Contractor; (ii) Affiliates that are directly or indirectly involved in the performance of this Agreement; (iii) Subcontractors directly or indirectly involved in the performance of this Agreement; (iv) transfer payees or payment assignees; and, (v) any relationship that might involve or create a conflict of interest.

## 7. COST OF AGREEMENT.

In accordance with the **RA**, the cost of this Agreement throughout the Term shall be in an estimated amount for each Contract Year of Three Hundred Thirty Thousand Dollars (\$330,000.00). The Contractor does hereby stipulate and agree that the amount expressed in the preceding sentence shall be derived solely from such BOE Tax Levy funding codes as the Chancellor shall prescribe with notice to the Contractor. The Contractor shall make no demand for, nor be entitled to receive, any compensation from any funding sources other than Tax Levy funds attributable to the BOE district and other codes expressed in the preceding sentence. The Contractor stipulates and agrees that the BOE shall not be obligated to pay any amounts of money under this Agreement that shall exceed by more than ten percent (10%) the aggregate amount per Contract Year expressed in the first sentence of this **Paragraph 7**, *unless* the BOE Division of Human Resources first shall have obtained an amendment to the **RA** or an amended **RA** approving such additional expenditures.

### 7.1. NO PRICE INCREASES DURING THE TERM.

The Contractor shall *not* increase the price of any Services to the BOE during the Term *except* as expressly stated to the contrary in the **Budget**. If at any time during the Term, the price of any of the Services of the Contractor shall be reduced, the BOE shall be entitled to such reduced price on the effective date of such reduction. In such event, the Contractor shall give immediate written notice to the BOE; whereupon, this Agreement shall be deemed amended retroactively to the effective date of such a price reduction. With respect to the preceding sentence, such amendment shall be automatic without the need for any further action by the Parties upon the Contractor's provision of the affected notice to the BOE.

## 8. PAYMENT TERMS AND CONDITIONS.

The following terms, conditions and specifications shall prescribe and govern all payments by the BOE to the Contractor for all general and particular intents and purposes under this Agreement, all else (*except* the RA) to the contrary notwithstanding:

### 8.1. PAYMENTS MADE PURSUANT TO THE BUDGET.

If the Contractor shall observe the terms, conditions and specification of this Agreement well and faithfully, the Contractor shall be entitled to receive as compensation for Services actually performed payments in the estimated amount per Contract Year expressed in **Paragraph 7**, *supra*, in conformity with the terms and conditions expressed herein, in the **Budget** and in the **T&C**. To receive payment according to the schedule listed in the **Budget**, the Contractor must first have furnished the Services as specified in the **Proposal** and **Work Plan**, that correspond to the tasks and activities summarized in the **Budget**.

### 8.2. THE CONTRACTOR SHALL SUBMIT INVOICES TO RECEIVE PAYMENTS.

Not more frequently than monthly, the Contractor shall submit an invoice to the Board in a form reasonably acceptable to the Chancellor. The Contractor shall state clearly on each invoice all Services performed, all equipment and materials furnished, and all charges incurred for the same during the previous month or greater period, in conformity with the specifications expressed herein, in the **Budget** and the **T&C**. All else to the contrary notwithstanding, the Board shall make payments to the Contractor only for work performed and for equipment and materials furnished and only upon submittal of a substantiated invoice(s). Each invoice submitted for payment must bear the certification of the Chancellor that all of the Services for which payment is demanded shall have been performed in a satisfactory manner. The maximum amount payable upon an invoice shall be limited to the amount the Contractor actually shall have expended, incurred or accrued as demonstrated by the submittal of supporting documentation. The Contractor shall not incur any expenses that are not ordinary, necessary and reasonable in the context of performing this Agreement or that are contrary to law and/or public or BOE policy. The Board shall not be required to approve or to pay any invoice(s) until all reports and/or deliverables specified hereunder and due at the time of the submittal of the affected invoice(s) shall have been received and accepted. Subject to the Contractor's compliance with this Agreement, the BOE shall ensure that the Contractor receives payments for the approved expenses on invoices within ninety (90) days after receipt of each such invoice by the BOE.

### 8.3. DOCUMENTARY SUPPORT FOR CHARGES ON INVOICES.

The Contractor shall support each invoice with contemporaneously kept documents including, but not limited to, time records, third party invoices and pay vouchers, as such are reasonably deemed necessary by the Chancellor. The Contractor shall certify that the itemized charges, for which the Contractor seeks payment, are for costs actually incurred and Services actually performed under the terms and conditions of this Agreement. The Contractor shall make available all books, records, reports and other materials reasonably deemed necessary by the Chancellor to substantiate the validity of claims for payment. This Agreement and all consideration hereunder are subject to pre-audit and post-audit by the Chancellor, the Comptroller or their designee(s).



#### 8.4. CONTRACTOR REFUNDS OF UNDOCUMENTED CHARGES.

If the Contractor shall fail or refuse to provide sufficient evidence acceptable to the Chancellor to support any and all of the Contractor's charges for the Services, the Board shall not be required to pay Compensation regarding such items and may, if such Compensation shall have been paid already, require the Contractor to refund the full amount of all such payments. The Contractor's failure and/or refusal to comply with the terms, conditions and specifications of this Agreement shall constitute a material breach, and the Board shall be entitled to refuse payment to the Contractor and to demand prompt refund of any payments that shall have been made already. In the event of such a demand by the Board, the Contractor shall be obligated to make a prompt refund of any and all payments that shall have been made.

#### 8.5. BOE PAYMENTS FOR SUBCONTRACTORS.

BOE payments, if any, for approved Subcontractors that the Contractor may use under this Agreement shall not exceed the rate(s) expressed in the **Budget**. Subcontractors may be paid only for the number of hours actually worked. Subcontractors shall *not* be entitled to the Contractor's employee Fringe Benefits on top of their sub-contractual rates, and the Board shall *not* be liable to pay for the same. Subcontractors shall not be used for clerical duties or functions. The Workforce may receive no more than one day's pay for each day worked. The Contractor shall maintain detailed résumés for all members of the Workforce used for this Agreement, which résumés the Contractor shall make available on request by the Chancellor.

#### 8.6. OVERHEAD COSTS.

The Contractor shall be reimbursed only for Overhead Costs expressly specified in the **Budget** and only to the extent that such costs shall not exceed a total amount calculated by the following formula: the Contractor's total direct labor costs multiplied by a fraction, the numerator of which shall be the total of all the Contractor's Overhead Costs during the Term for all of the operations, and the denominator of which shall be the total of all the Contractor's direct labor charges during the Term for all of its operations (hereinafter expressed as "Overhead Formula"). To the extent that the Overhead Formula can only be verified at the end of a given Contract Year or the overall Term, the foregoing shall not prevent the Contractor from invoicing and receiving monthly payments for Overhead Costs, as specified in **Paragraph 8.2, supra**, in the **Budget** and the **T&C**.

#### 8.7. TRANSPORTATION COSTS AND ACCOMMODATION COSTS.

The Contractor shall make no demand for, nor be entitled to receive, any reimbursement of Transportation Costs and/or Accommodation Costs, *unless* such costs are expressly detailed in the **Budget**, and only to the extent the Contractor actually expends funds for this purpose up to the maximum amount expressed in the **Budget**.

#### 8.8. PREPARATION COSTS.

Preparation Costs (*aka* Initial Costs) are *not* allowable under this Agreement, and the Contractor shall make no demand for, nor be entitled to receive, any reimbursement for Preparation Costs. Preparation Costs are hereby defined as costs of a non-recurring nature arising in the early stages of operations and incurred in preparing to perform the Services required under this Agree-

ment including, *but* not necessarily limited to, costs of initial management and personnel organization, planning, fees paid to an employment agency to recruit or hire personnel for the Services required to be performed under this Agreement, and similar activities. All Preparation Costs shall be segregated in the Contractor's books and records.

#### **8.9. CONTRACTOR EFFICIENCY.**

The Contractor, in the performance of its obligations hereunder, shall utilize the most efficient available technology for the purpose of reducing the cost and time of such performance. The BOE shall have the right to disallow any increased costs resulting from the Contractor's imprudence or inefficiency.

#### **8.10. CONTRACTOR'S MAINTENANCE OF RECORDS.**

The Contractor shall retain and maintain for six (6) years from the date of termination of this Agreement adequate time, payroll, personnel, expense and other supporting records relating to all of the Products and Services as well as such other tapes, records, cards, invoices, papers and other forms of records—together with any and all computer hardware, software and/or other equipment and materials necessary to render them intelligible—as are necessary to assure a proper accounting in accordance with the "Generally Accepted Auditing Standards" (hereinafter expressed as "GAAS") and/or the "Generally Accepted Governmental Auditing Standards" (hereinafter expressed as "GAGAS") of the funds payable under this Agreement.

#### **8.11. FINAL PAYMENT.**

The BOE shall not be required to make any Final Payment to the Contractor under this Agreement until the following shall have occurred: (a) the Chancellor shall have received, accepted and approved all documents required under this Agreement; and, (b) the Chancellor shall have determined that the Contractor shall have fulfilled all of the terms, conditions and specifications of this Agreement. Final Payment to the Contractor shall constitute a general release of the BOE and the City from any and all claims and liability for anything done, furnished, provided, supplied or relating to the Services furnished and/or for any act of commission and/or omission by the BOE, the City or any of their elected or appointed officials, members, officers, agents, employees, students, volunteers, contractors and/or contractor employees.

#### **8.12. ELECTRONIC INVOICING AND PAYMENT SYSTEMS.**

The Contractor shall use its best efforts to develop and use the ability to interface in an effective and error-free manner with the Board's electronic invoicing and payment systems. To the greatest extent feasible, the Contractor shall submit all invoices and supporting documentation electronically to the BOE.

#### **8.13. TIMING OF PAYMENTS BY BOE.**

The BOE shall not be deemed to have received an invoice earlier than the first (1<sup>st</sup>) day that the BOE shall be open for business each month with respect to the preceding month in which Services shall have been performed and accepted. The date of payment of an invoice shall be either the date that the payment shall be electronically wired to the Contractor or the date that the check



shall be issued by the Comptroller on behalf of the BOE. If the Contractor shall enroll in the Board's electronic invoicing and payment system,<sup>6</sup> the BOE shall wire payments electronically to the Contractor. The BOE shall notify the Contractor in the event of a change in the BOE or the City payment method policy that results in the termination of electronic wire payments.

#### **8.14. DISPUTED PAYMENTS.**

If the BOE shall, in good faith, dispute any of the Contractor's invoices, in whole or in part, the BOE shall provide the Contractor with written notice of each such dispute before the date any disputed payment shall become due and owing. In each such notice, the BOE shall state the basis for the Board's dispute. The BOE shall pay the undisputed amount as set forth in this **Paragraph 8**. The Contract Managers shall meet not later than ten (10) Business Days after the Contractor receives the Board's dispute notice and shall enter into good faith negotiations aimed at resolving the payment dispute. If the Contract Managers shall be unable to reach a mutually satisfactory resolution of each such dispute within the succeeding thirty (30) Business Days, the Parties shall attempt to resolve such disputed item(s) in accordance with **Paragraph 19, infra**. Pending resolution of the dispute, each of the Parties shall continue to perform their obligations hereunder. If the dispute resolution efforts fail, each Party may exercise its rights at law or in equity. The Board's rights to Liquidated Damages or to adjustment of the Contractor's charges and/or Compensation under this Agreement shall not be affected by the fact that the BOE shall have elected not to dispute or shall have failed to dispute any of the Contractor's invoices.

### **9. TERMINATION AND CANCELLATION.**

#### **9.1. CANCELLATION FOR THE CONVENIENCE OF THE BOE.**

Anything in **Paragraph 3, supra**, to the contrary notwithstanding, the BOE shall have the option at any time during the Term to cancel this Agreement for its own convenience upon provision of thirty (30) days advance written notice to the Contractor. The Chancellor shall have sole discretion and power to exercise the Board's option to cancel this Agreement pursuant to the preceding sentence. The BOE shall cease to have any obligation or liability whatsoever to the Contractor for any costs that shall or may accrue after the effective date of the termination, *except* as set forth in **Paragraphs 9.3 and 9.4, infra**. The preceding sentence notwithstanding, any purchase order(s) issued by the BOE before the cancellation notice date shall be and remain in full force and effect and shall be subject to the terms, conditions and specifications herein expressed, and the BOE shall be liable to pay for the same. *Unless* directed otherwise in writing by the Chancellor, the Contractor's obligation to provide Services ordered prior to the effective date of any termination shall survive any such termination. The Contractor shall *not* make any claim for damages resulting from such cancellation.

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<sup>6</sup> The BOE electronic invoicing and payment system is administered by the BOE Division of Financial Operations ("DFO"); for information materials and an enrollment application, please contact DFO Executive Director Vincent A. Giordano at (718) 935-3521 or [vagiord@schools.nyc.gov](mailto:vagiord@schools.nyc.gov). To enroll in the system, the Contractor must agree in advance to a two percent (2%) prompt payment discount to defray DFO's software and administrative costs for the system.

**9.2. CANCELLATION DUE TO DEFAULT OF THE CONTRACTOR.****9.2.1. Definition of Default.**

“Default” means the occurrence of any of the following:

**9.2.1.1.** The discovery that a representation made in this Agreement by the Contractor was false when made, if the nature and magnitude of the misrepresentation was such as to have had a probable and material effect upon Board’s decision to engage the Contractor or upon the negotiations as to the other terms, conditions and/or specifications of this Agreement;

**9.2.1.2.** A judicial declaration of the Contractor’s insolvency; the Contractor’s repeated persistent failure to pay its debts in the normal course of business; the entrance of the Contractor into receivership or any similar arrangement or composition with creditors generally; the filing of a voluntary or involuntary petition that is *not* dismissed within sixty (60) days for the bankruptcy, reorganization, dissolution, or winding-up of the Contractor; a general assignment for the benefit of creditors of the Contractor; or a seizure or a sale of a material part of the Contractor’s property by or for the benefit of any creditor or governmental agency;

**9.2.1.3.** An assignment or attempted assignment by the Contractor in violation of this Agreement;

**9.2.1.4.** Disbarment of the Contractor from performing Services with respect to business with the Federal or State government; and/or,

**9.2.1.5.** A material breach by the Contractor of any of its other obligations under this Agreement and **(i)** the Contractor’s failure to cure such breach within thirty (30) days after the Contractor shall have received written notice of such breach, or **(ii)** if the failure is *not* one that could reasonably be corrected within thirty (30) days, **(a)** the Contractor’s failure to adopt, within thirty (30) days after receiving notice of such breach, a plan to cure such breach within a time period *not* longer than sixty (60) days after the Contractor shall have received notice of the breach, *unless* the BOE shall grant an extension of time, or **(b)** the Contractor’s failure to cure such breach within such sixty (60)-day period, *unless* the BOE shall grant an extension of time.

**9.2.2. Exceptions to Default.**

Anything in **Paragraph 9.2.1**, *supra*, to the contrary notwithstanding, the Contractor shall *not* be deemed to be in Default in the following circumstances:

**9.2.2.1.** The Board’s failure to allow the Contractor, Subcontractors or Workforce access to BOE premises in a timely manner, *provided*, that such failure shall have a material adverse effect upon the Contractor’s ability to perform and provide the Services in accordance with the timelines set forth in this Agreement;

**9.2.2.2.** The Board's failure to provide an adequate operating environment including, *but* not limited to, electrical power, telephone, water, and appropriate facilities needed to sustain the ordinary working environment, *provided*, that such failure shall have a material adverse effect upon the Contractor's ability to perform and provide the Services within the timelines set in this Agreement; and/or,

**9.2.2.3.** The Board's failure to provide or obtain the necessary permits and consents required for the Contractor to perform and provide the Services, *provided*, that such failure shall have a materially adverse effect upon the Contractor's ability to perform and provide the Services within the timelines set forth in this Agreement.

**9.2.3. BOE Termination of Agreement upon a Finding of Default.**

Upon a finding by the Chancellor or a Person(s) designated by the Chancellor that the Contractor shall have caused and/or permitted a Default, the BOE may terminate this Agreement effective immediately upon the Board's transmittal to the Contractor of written notice of such a default finding and termination. The BOE shall cease to have any obligation or liability whatsoever to the Contractor for any costs that shall or may accrue after the effective date of the termination including, *but* not limited to, any liability under **Paragraph 9.4, *infra*, except** as set forth in **Paragraph 9.3, *infra***. Upon a finding of default in violation of this Agreement, 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.

**9.3. OUTSTANDING INVOICES.**

The BOE shall pay the Contractor all undisputed invoices outstanding on the cancellation, termination or expiration date of this Agreement for Services rendered that were accepted by the BOE in accordance with the terms of this Agreement.

**9.4. OUTSTANDING ORDERS.**

*Except* as provided in **Paragraph 9.2.3, *supra***, neither the Contractor nor the BOE shall be relieved of its obligations under this Agreement with respect to purchase orders that shall have been issued by the BOE prior to the cancellation, termination or expiration of this Agreement.

**10. DISENGAGEMENT.**

**10.1. GENERAL OBLIGATIONS.**

The Contractor shall achieve a complete transition of the Services being terminated from the Contractor and the Subcontractors to the BOE, or to any replacement provider designated by the BOE, without any interruption of or adverse impact on the Services or any other services furnished by Third Parties (hereinafter expressed as "Disengagement"). The Contractor shall cooperate with the BOE and any new service provider and otherwise promptly take all steps required to assist the BOE in effecting a complete Disengagement. The Contractor shall provide all information regarding the Services or as otherwise needed for Disengagement including, but not limited to,

data conversion, interface specifications, and related professional services. The Contractor shall provide for the prompt and orderly conclusion of all work, as the BOE may direct, including, but not limited to, completion or partial completion of projects, documentation of work in process, and other measures to assure an orderly transition to the BOE or its designee.

#### **10.2. DISENGAGEMENT PERIOD.**

The disengagement period (hereinafter expressed as "Disengagement Period") shall begin: (i) six (6) months prior to the expiration of the Term, or (ii) if this Agreement or any portion of the Services is terminated by either party prior to the expiration of the Term, upon receipt of a termination notice by the other Party. The Contractor's obligation to provide the Disengagement Services shall not cease until a Disengagement satisfactory to the BOE including, but not limited to, the performance by the Contractor of all asset-transfers and other obligations of the Contractor provided in this **Paragraph 10** shall have been completed.

#### **10.3. DISENGAGEMENT SERVICES.**

During the Disengagement Period, the Contractor shall provide Disengagement Services to accomplish a complete transition of the Services being terminated to the BOE or to any replacement provider designated by the BOE, without any interruption of, or adverse impact on, the BOE. The Contractor's obligations to provide the Services and Software shall not cease until the disengagement has been completed, including the performance by the Contractor of the Disengagement Services set forth in **Paragraph 10.5, infra**, to the Board's satisfaction.

#### **10.4. COST OF DISENGAGEMENT SERVICES.**

All Disengagement Services shall be performed by the Contractor at no additional cost to the BOE beyond the maximum amount of money that the BOE has authorized in the **RA** (see **Paragraph 7, supra**) for total expenditure during the Term. Anything in **Paragraph 10.1, supra**, to the contrary notwithstanding, the Contractor shall remain obligated to provide the Disengagement Services for up to twelve (12) months after any such expiration or termination date, at rates that are the lower of: (i) the applicable rates set forth in the **Budget & Payment Schedule**, or (ii) eighty percent (80%) of Contractor's best commercially-available rates for similar Services to other comparable governmental customers, *provided*, such rates do not involve expenditures by the BOE beyond the available funds as expressed in the preceding sentence.

#### **10.5. DESCRIPTION OF DISENGAGEMENT SERVICES.**

The Contractor shall cooperate with the BOE or its designated service provider and shall promptly perform any Services required to assist in effecting a complete disengagement (herein expressed as "Disengagement Services") of this Agreement or of any portion thereof, including, but not limited to, the following:

**10.5.1.** Performance of all obligations and activities contained in the Disengagement Plan as described in **Paragraphs 10.7 through 10.10, infra**.

**10.5.2.** Providing complete and sufficient information (including all information belonging to the BOE then being utilized by Contractor) regarding the Services and Software.

**10.5.3.** Prompt and orderly conclusion of all work, as the BOE may reasonably direct, including completion or partial completion of tasks and documentation of work in process.

**10.5.4.** After such Disengagement Services are performed and completed, surrendering to the BOE any space on the Board's premises that are occupied by the Contractor.

**10.5.5.** Delivering to the BOE any BOE property that is held by the Contractor.

**10.5.6.** Securing, at no cost to the BOE or its designee, the right to use and benefit from any contracts or licenses between the Contractor and Third Parties or manufacturers/suppliers that provide Services or Third Party Products, whether by way of assignment of such contracts or licenses or otherwise.

**10.5.7.** Providing to the BOE or its designee irrevocable, royalty-free, nontransferable, nonexclusive, perpetual license to use any generic components and residual technology in connection with the Board's use of the Software and the right to make derivative works necessary to the BOE or its designee to continue to perform the Services during the Disengagement Period and thereafter.

**10.5.8.** Offering to the BOE or its designee the right to receive maintenance and support (including all Updates, Enhancements and Upgrades) to the Software for as long as the BOE or its designee wishes, at a rate that is the lower of the State contract rates or other rate negotiated by the Parties, in good faith.

**10.5.9.** Delivering to the BOE copies of all the Board's Confidential Information and Work Product, and any other BOE data (excluding data for archival purposes or warranty support) or in the case of Confidential Information, at the Board's election, certify in writing that the Board's Confidential Information has been destroyed.

#### **10.6. NO INTERRUPTION OR ADVERSE IMPACT.**

The Contractor shall cooperate with the BOE and all of the Board's other contractors to ensure a smooth transition at the time of Disengagement with **(i)** no interruption of the Services and Software, **(ii)** no adverse impact on the provision of Services, the Board's use and operation of the Software or the Board's business and activities, **(iii)** no interruption of any services and/or software provided by Third Parties, and **(iv)** no adverse impact on the provision of services software provided by Third Parties.

#### **10.7. DISENGAGEMENT PLAN.**

On or before March 31, 2008, *supra*, the Contractor shall provide a draft Disengagement Plan to the BOE for its approval. Such time period may be extended by written agreement of the Parties according to the Change Request procedure. Once approved, that document shall be the "Disengagement Plan." The Contractor shall update the Disengagement Plan within sixty (60) days from the end of each Contract Year and shall provide copies of such update to the BOE for its approval. The Disengagement Plan's purpose shall be to enable the BOE or its designees to perform the Disengagement Services upon the termination of the Disengagement Period and to elimi-



nate or minimize any disruption to the Services (including the Disengagement Services) as a result of the transition of Services from the Contractor to the BOE or its designees.

#### **10.8. CONTENTS OF DISENGAGEMENT PLAN.**

The Contractor shall ensure that the Disengagement Plan reflects the understandings of the parties set forth in this **Paragraph 10** including, but not limited to, the following: **(i)** a description of Key Employees, Subcontractors, Workforce and other resources necessary to effect the Disengagement Services as efficiently as possible, **(ii)** a timetable and process for effecting the Disengagement Services, **(iii)** all Service Levels that shall be applicable to the Disengagement Services, and **(iv)** the Contractor shall assist the BOE to select the appropriate hardware or software needed by the BOE or its designees to provide the Disengagement Services.

#### **10.9. IMPLEMENTATION OF THE DISENGAGEMENT PLAN.**

At all times after BOE approval of the initial Disengagement Plan, the Contractor shall ensure that it is able to deploy all necessary resources to complete the Disengagement Services, on thirty (30) days notice, according to the Disengagement Plan. The Contractor shall comply with the Disengagement Plan and do all things reasonably necessary to fulfill its responsibilities relating thereto and shall ensure that all Subcontractors comply with the Disengagement Plan.

#### **10.10. CONTRACTOR'S FAILURE TO COMPLY WITH DISENGAGEMENT PLAN.**

The Contractor stipulates and agrees that any refusal by the Contractor to provide, or any material breach in the provision of, the Disengagement Services according to the Disengagement Plan will cause the BOE to suffer irreparable harm for which adequate remedies are not available at law. Therefore, the Contractor stipulates and agrees that the BOE shall be entitled to seek specific performance and/or injunction to enforce its rights to receive Disengagement Services from the Contractor in compliance with the Disengagement Plan. In the event that the BOE obtains specific performance or injunctive relief due to Contractor's failure and/or refusal to provide Disengagement Services, or material breach in the provision of Disengagement Services, the Contractor shall reimburse the BOE for the costs and expenses incurred by the BOE, including reasonable legal fees and disbursements, in seeking such specific performance or injunctive relief.

### **11. TAXES.**

#### **11.1. ELIMINATION OF FEDERAL, STATE AND LOCAL TAXES.**

The BOE hereby represents that it is a municipal corporation as defined under the Education Law and the General Construction Law of the State of New York, and as such is exempt from the payment of Federal, State or local sales, excise, compensating use, or gross receipts taxes, as provided under the U.S. Internal Revenue Code and the Tax Law of the State of New York. The Contractor shall use all commercially reasonable efforts to comply with the provisions set forth herein for the elimination of all payments of such taxes for otherwise taxable goods, supplies, equipment, services, and so forth, that the Contractor shall purchase in the provision of the Services under this Agreement for purposes of resale to the BOE, and the Contractor shall pass along all related savings to the BOE.



## 11.2. CONTRACTOR AS A PURCHASING AGENT.

**11.2.1.** The BOE hereby appoints, designates and approves the Contractor to be and to act as the Board's official purchasing agent for purposes of this Agreement, to purchase or otherwise lawfully acquire Third Party Services, Third Party Products and so forth that the Contractor shall reasonably and ordinarily need for purposes of resale to the BOE and otherwise to furnish the Services under this Agreement. The Contractor hereby accepts the BOE appointment to act as the Board's official purchasing agent as set forth in the preceding sentence. This agency appointment shall be limited strictly to the purposes of the Contractor's provision of the Third Party Services, Third Party Products and so forth under this Agreement and for no other purposes. In furtherance thereof, the BOE shall furnish to the Contractor an agency appointment letter on official NYCDOE letterhead stationery that the Contractor shall utilize in all of its purchases or other forms of lawful acquisition from the Contractor's suppliers, sellers, Subcontractors or other sources. The said letter is referenced as the Purchasing Agency Letter in **Paragraph 1.4, supra**.

**11.2.2.** The Contractor shall present a copy of the Purchasing Agency Letter or such other necessary documentation provided by the BOE, to each supplier, seller, Subcontractor or other source from or with whom the Contractor purchases or otherwise lawfully acquires goods, commodities, materials, supplies, equipment, hardware, software, services, and so forth for purposes of resale to the BOE in performing this Agreement. For each such transaction, the Contractor shall use all commercially reasonable efforts to obtain full exemption from all applicable Federal, State and local sales, excise, compensating use, gross receipts and other applicable taxes.

**11.2.3.** The Contractor's invoices to the BOE for Services purchased from the Contractor shall *not* include any sales tax. The Contractor shall use its best efforts to cooperate with the BOE and with any Third Party to ensure that no sales taxes will be payable by the Contractor or by the BOE with respect to Third Party Products and Third Party Services that are purchased from Third Parties by the Contractor on behalf of the BOE.

**11.2.4.** The Contractor's agreements with, and purchase orders to, any Third Party manufacturers, seller, suppliers and/or service providers as well as all Subcontractors in connection with the Services delivered and performed hereunder shall specify that the Contractor is a purchasing agent for the BOE. All checks that the Contractor issues for payment to Third Party manufacturers, seller, suppliers and/or service providers as well as all Subcontractors in connection with the Services delivered and performed hereunder shall specify that the Contractor is a purchasing agent for the BOE.

**11.2.5.** In the event that any Subcontractors or Subcontractor's employees shall make any purchases or other forms of lawful acquisition on the Contractor's behalf pursuant to this Agreement for purposes of resale to the BOE, the Contractor shall require such Subcontractors or Subcontractor employees, as the case may be, to use all commercially reasonable efforts to seek and obtain the appropriate sales, excise, use and other tax exemptions on the Board's behalf. In furtherance thereof, the BOE shall furnish to the Contractor, upon written request, a letter on official NYCDOE letterhead stationery of the purchasing agency appointment of each such Subcontractor or Subcontractor's employee that the said person

or entity shall utilize in all of his/her/its purchases or other forms of lawful acquisition from any affected suppliers, sellers, and other sources.

**11.2.6.** If the Contractor needs any assistance, advice or modification(s) regarding its agency appointment letter(s), the Contractor shall provide written notice of such request to Michael P. Coneys, Esq., Attorney (or his successor), New York City Department of Education, Office of Legal Services, The Tweed Courthouse, 52 Chambers Street, Room 308, New York, NY 10007-1222; telephone: (212) 374-3442; fax (212) 374-5596; e-mail address at [mconeys@schools.nyc.gov](mailto:mconeys@schools.nyc.gov).

## **12. LIENS AND ENCUMBRANCES.**

If any liens and/or encumbrances shall be filed in connection with the performance of the Services and the Contractor shall receive notice thereof, the Contractor shall, upon receiving such notice, immediately give written notice thereof to the BOE Contract Manager. If the BOE shall be making, and/or shall have made, payments to the Contractor according to the terms this Agreement, the Contractor shall (i) act itself and/or give written direction to the responsible Subcontractor(s) and/or other Person(s) to discharge the lien(s) of record by bonding or otherwise in accordance with the terms of the applicable contract(s), and (ii) act itself and/or give written direction to the responsible Subcontractor(s) and/or other Person(s) to take such further action as the BOE reasonably may request. If any supplier(s) and/or other Person(s) employed or otherwise engaged by the Contractor shall file a lien(s) for work, labor, services or materials performed or supplied in relation to the Services for which a sum of money previously shall have been paid by the BOE to the Contractor and which the Contractor shall have failed and/or refused to turn or pay over to the said lienor(s), then, in such event, the Contractor shall be required to bond or otherwise discharge such lien(s) within thirty (30) days of receipt of notice from the BOE of the filing of such lien(s).

## **13. CONTRACTOR'S REPORTS.**

The Contractor shall comply fully with all BOE requests for fiscal, programmatic, progress and all other types of reports. Progress reports shall include, but shall not be limited to, the type(s) of Services provided, the date(s) of the Services and, where applicable, achievement data. The Contractor shall provide all reports in formats and frequencies reasonably determined by the Chancellor.

### **13.1. ANNUAL REPORTS.**

The Contractor shall submit an Annual Report in a form and manner reasonably acceptable to the Chancellor, in which the Contractor shall explain its performance and conduct of the Agreement during the preceding Contract Year with specific references to the Services described herein and in the **RFP, Proposal, Work Plan and Budget**. Each Annual Report shall contain the Contractor's data on the teachers, other pedagogical employees, schools, pupils, and other aspects of the Educational Community upon which the Contractor's Services have or shall have direct and indirect impacts, together with the Contractor's conclusions and estimates about the likely success of its work to protect and advance BOE activities and interests. The Contractor shall comply with all reasonable requirements of the Chancellor about submittal of drafts, number of final copies to be furnished to the BOE, and any other reports or documents that the Chancellor reasonably deems appropriate. The Contractor shall present each Annual Report within a reasonable time but not

later than sixty (60) calendar days after the end of each Contract Year. The BOE may withhold any Final Payment until receipt and acceptance of the Contractor's Annual Report for the Third Contract Year.

### **13.2. FINAL REPORT.**

The Contractor shall submit a Final Report in a form and manner reasonably acceptable to the Chancellor or his/her designee(s), in which the Contractor shall explain its overall performance and conduct of the Agreement during the Term with specific references to the Services described herein and in the **RFP, Proposal, Work Plan and Budget**. The Final Report shall be separate from the last Annual Report that the Contractor shall submit pursuant to **Paragraph 13.1, supra**. The Final Report shall contain the Contractor's data on the teachers, other pedagogical employees, schools, pupils, and other aspects of the Educational Community upon which the Contractor's Services have or shall have direct and indirect impacts, together with the Contractor's conclusions and estimates about the likely success of its work to protect and advance BOE activities and interests. The Contractor shall comply with all reasonable requirements of the Chancellor about the submittal of drafts, number of final copies to be furnished to the Board, and any other reports or documents that the Chancellor reasonably deems appropriate. The Contractor shall present the Final Report within a reasonable time but not later than sixty (60) calendar days after the final termination date of this Agreement. The BOE may withhold any Final Payment until receipt and acceptance of the Contractor's Final Report.

## **14. INSURANCE.**

The following terms, conditions and specifications shall prescribe and govern the Contractor's obligations with respect to insurance for all general and particular intents and purposes under this Agreement, all else *except* the **RA** to the contrary notwithstanding.

### **14.1. CONTRACTOR'S SUPPLY OF INSURANCE COVERAGE.**

The Contractor shall *not* start or supply any Services *until* the Contractor shall have obtained at the Contractor's own expense all of the insurance required hereunder and *until* such insurance shall have been approved by the Chancellor. The Contractor shall *not* allow any Subcontractor to start or supply any Services under any subcontract *until* all insurance required of the Subcontractor shall have been so obtained and approved by the Contractor. Approval of insurance required of the Contractor will be granted *only* after submission to the Chancellor of original certificates of insurance signed by authorized representatives of the insurers or, at the request of the Chancellor, certified copies of the required insurance policies.

### **14.2. DURATION OF COVERAGE AND SUPPLY OF CERTIFICATES OF INSURANCE.**

All insurance required hereunder shall be in force during the Term and for two years after the expiration or other termination of this Agreement, in accordance with provisions expressed at **Paragraph 14.8.iv, infra**. Original certificates signed by authorized representatives of the insurers or, at the request of the Chancellor or his/her designee(s), certified copies of insurance policies,

evidencing that the required insurance is in effect, shall be provided at the outset of the Term,<sup>7</sup> and as updates are needed, to both the BOE Contract Manager and the “New York City Department of Education, Division of Contracts & Purchasing, 65 Court Street, Room 1201, Brooklyn, NY 11201-4954, Attention: Risk/Insurance Management,” during the Term and for two years after the completion of all Services and other work hereunder or the expiration or other termination of this Agreement, whichever shall occur later. Every certificate of insurance and certified copy of an insurance policy submitted hereunder must display the National Association of Insurance Commissioners (commonly expressed as “NAIC”) five-digit code number applicable to each insurer as displayed on each such certificate of insurance and on each certified copy of an insurance policy.

#### 14.3. SUBCONTRACTOR INSURANCE.

The Contractor shall require all Subcontractors and Affiliates to maintain commercial general liability insurance, business auto liability insurance, professional liability/errors and omissions liability and indemnity insurance, and workers compensation insurance, and employers liability insurance to the same extent required of the Contractor in **Paragraphs 14.8.1, 14.8.2, 14.8.3<sup>8</sup>** and **14.8.4, *infra*, unless** and to the extent any such requirement is expressly waived or amended by the Chancellor in writing. The Contractor shall furnish each Subcontractor’s and each Affiliate’s certificates of insurance and/or certified copies of insurance policies to the BOE Contract Manager immediately upon request.

#### 14.4. NOTICE OF CANCELLATION, NON-RENEWAL OR MATERIAL REDUCTION.

Each insurance policy required hereunder shall be endorsed to provide that the policy is *not* subject to cancellation, non-renewal or material reduction in coverage *until* thirty (30) days prior written notice shall have been given to both the Chancellor and to the “New York Department of Education, Office of Purchasing Management, 65 Court Street, Room 1201, Brooklyn, NY 11201-4954, Attention: Risk/Insurance Management.” The preceding sentence notwithstanding, the notice for Worker’s Compensation insurance shall *not* be less than fourteen (14) days before the termination or non-renewal of such insurance coverage. Before the effective date of the cancellation or non-renewal, the Contractor shall provide evidence of replacement coverage, which shall also be subject to the terms of this Agreement.

#### 14.5. REQUESTS FOR WAIVER OF PARTICULAR INSURANCE REQUIREMENTS.

If the Contractor and/or a Subcontractor and/or Affiliate do *not* meet this Agreement’s insurance requirements, the Contractor may send a written request to the Chancellor for a written waiver of the insurance requirement(s) not met, or written approval of alternate insurance coverage, self-insurance or group self-insurance arrangements. If the Contractor shall fail and/or refuse to submit the type of request expressed in the preceding sentence, or if the Chancellor shall fail

<sup>7</sup> The term “at the outset of the Term,” as used in this **Paragraph 14.2**, is hereby defined as either (i) the commencement date of the Term as expressed in **Paragraph 3, *supra***, or (ii) the date on which the BOE notifies the Contractor that the BOE plans imminently to submit this Agreement to the Comptroller for registration, whichever date shall occur earlier.

<sup>8</sup> A Subcontractor and/or Affiliate shall be required to maintain errors and omissions liability and indemnity insurance *only* in the event that such Subcontractor and/or Affiliate furnishes coverable types of professional services that the Contractor uses to perform the Services under this Agreement and for which the Contractor, Subcontractor and/or Affiliate may be liable to the BOE and/or any Third Party.



and/or refuse to approve the request, the Contractor and each affected Subcontractor and Affiliate must comply with this Agreement's specified insurance requirements.

#### **14.6. INSURANCE COVERAGE QUALITY.**

All required insurance coverages must be underwritten by insurers eligible to issue the required policy or policies and acceptable to the Chancellor. The insurers must also have a policyholders' rating of "A-" or better, and a financial size of "Class X" or better in the latest evaluation by A.M. Best Company, or a rating of at least "AA" by Standard & Poors, *unless* the Chancellor shall grant specific, written approval for an exception.

#### **14.7. INSURANCE POLICY DEDUCTIBLES OR RETENTIONS.**

Any deductibles or retentions in excess of Five Thousand Dollars (\$5,000.00) shall be disclosed by the Contractor and each Subcontractor and shall be subject to advance written approval by the Chancellor or his/her designee(s). Any deductible or retention amounts elected by the Contractor or imposed by the Contractor's and/or any Subcontractor's insurer(s) shall be the sole responsibility of the Contractor and/or the affected Subcontractor.

#### **14.8. THE CONTRACTOR'S INSURANCE.**

The Contractor shall purchase and maintain the following insurance coverages which shall be written for *not* less than the limits specified below or required by law, whichever is greater.

**14.8.1.** Commercial general liability (hereinafter expressed as "CGL") insurance or its equivalent for bodily injury, personal injury and property damage including loss of use,<sup>9</sup> with minimum limits of:

- \$1,000,000 each occurrence;
- \$1,000,000 personal and advertising injury;
- \$2,000,000 general aggregate; and
- \$2,000,000 products/completed operations aggregate.

This CGL insurance shall include coverage for all of the following:

- i. General aggregate limit applying on a per project basis;
- ii. Liability arising from premises and operations;

<sup>9</sup> Some CGL insurance policies contain, either as a limitation or endorsement exclusion, a provision stating that electronically stored data does not constitute "property" for the purposes of coverage under the areas of "bodily injury" and/or "property damage." If the Contractor's CGL insurance policy contains such a limitation and/or exclusion, the Contractor must obtain additional insurance coverage to protect against the loss of electronically stored data. Examples of such additional insurance include, but are not necessarily limited to, "Cyber-Business Liability & Indemnity Insurance," "Data Processing Equipment Liability & Indemnity Insurance," and/or "Electronic Commerce & Communications Insurance." Such additional insurance must comply in every respect with the general requirements expressed herein for CGL and other types of insurance.



- iii. Liability arising from the actions of independent (sub)contractors;
- iv. Liability arising from products and completed operations with such coverage to be maintained for two years after completion of all Services;
- v. Contractual liability including protection for the Contractor from bodily injury and property damage claims arising out of liability assumed under this Agreement; and,
- vi. Liability arising from the explosion, collapse, or underground (XCU) hazards.

**14.8.2.** Business auto liability insurance or its equivalent with a minimum limit of One Million Dollars (\$1,000,000.00) per accident and including coverage for all the following: liability arising out of the ownership, maintenance or use of any auto; and, automobile contractual liability.

**14.8.3.** Professional liability insurance and errors and omissions liability and indemnity insurance to cover the Services performed by, and/or on behalf of, the Contractor including, *but* not necessarily limited to, all coverable types of professional services that the Contractor uses to perform the Services with a minimum limit of One Million Dollars (\$1,000,000.00) per occurrence for each discrete type of insurance.

**14.8.4.** Workers compensation insurance with statutory benefits, and Employers Liability as required in the State of New York. If outside New York, Employers Liability insurance with minimum limits of:

- \$100,000 each accident for bodily injury by accident;
- \$100,000 each employee for bodily injury by disease; and,
- \$500,000 policy limit for bodily injury by disease.

**14.8.5.** Umbrella excess liability or excess liability insurance or its equivalent with minimum limits of:

- \$4,000,000 per occurrence;
- \$5,000,000 aggregate for other than products/completed operations and auto liability; and,
- \$5,000,000 products/completed operations aggregate;

and, including all following coverages on the applicable schedule of underlying insurance:

- i. Commercial general liability;
- ii. Business auto liability; and,
- iii. Employer's liability (outside of New York).

**14.8.6.** The BOE, the City and their elected and appointed officials, agents, agents, employees, and authorized volunteers shall be listed as additional insureds on the Contractor's commercial general liability insurance and umbrella excess or excess liability insurance, and on each Subcontractor's commercial general liability insurance policies with respect to liability arising out of the Contractor's and each Subcontractor's products and/or Services provided under this Agreement. Such coverage shall extend to cover the additional insureds for liability arising out of the following:

- i. On-going operations;
- ii. Owner's general supervision of installation and/or services as provided by the Contractor and each Subcontractor under this Agreement; and,
- iii. Products and completed operations.

The commercial general liability policy and the umbrella excess liability or excess liability policies, if required herein, must include additional insured language, which shall afford liability coverage for all of the exposures listed above in **i**, **ii** and **iii**, as follows:

"This policy is amended to include as insureds the Board of Education of the City of New York ('BOE'), the City of New York ('City') and BOE and City elected and appointed officials, agents, employees, and authorized volunteers, but only for liability arising out of 'your product' or 'your work' for the BOE by or for you."

**Special Note:** ISO forms CG2009 and CG2010 entitled, "Additional Insured—Owners, Lessees or Contractors—Scheduled Person or Organization" (previously Forms A and B, respectively), and CG2033 entitled, "Additional Insured—Owners, Lessees or Contractors—Automatic Status When Required in Construction Agreement with You," are **NOT ACCEPTABLE**. The above wording is required as a manuscript endorsement or on each certificate of insurance as decided in the reasonable discretion of the Chancellor.

**14.8.7.** Insurance provided to the BOE, the City and their elected and appointed officials, agents, employees, and authorized volunteers as specified herein, including, **but** not limited to, umbrella and excess liability or excess liability policies, shall apply separately to each insured against whom claim is made or suit is brought, **except** with respect to the limits of insurance. (Any cross suits or cross liability exclusion shall be deleted from Contractor's liability insurance policies required herein.) Every insurance policy required hereunder shall contain a severability of interest clause.

**14.8.8.** Insurance provided to the BOE, the City and their elected and appointed officials, officers, agents, employees, and authorized volunteers as specified herein shall be primary, and any other insurance, self-insurance, coverage, or indemnity available to the BOE, the City and their elected and appointed officials, agents, employees, and authorized volunteers shall be excess of and non-contributory with insurance, self-insurance, coverage or indemnity provided to the BOE, the City and their elected and appointed officials, agents, employees, and authorized volunteers as specified herein.

**14.9. CLAIMS MADE INSURANCE POLICIES.**

If any liability insurance purchased by the Contractor shall have been issued on a "claims made" basis, the Contractor must agree to comply with the following additional conditions:

**14.9.1.** The Contractor shall maintain each such "claims made" coverage and shall provide an insurance certificate(s) evidencing each such "claims made" coverage for a period of two (2) years after the Board's final payment hereunder. Such certificate(s) must show a retroactive date no later than the start of the Services under this Agreement; *or*,

**14.9.2.** The Contractor shall purchase an extended (minimum two years) reporting period endorsement for each such "claims made" policy in force as of the date of final acceptance and evidence the purchase of this extended reporting period endorsement by means of a certificate of insurance or a copy of the endorsement itself. Such certificate or copy of the endorsement shall evidence a retroactive date no later than the beginning of the Services under this Agreement.

**14.9.3.** If the Contractor provides any insurance that is issued on a "claims made" basis, the Contractor may *not* change from such type of coverage to insurance issued on a "per occurrence" basis either during the Term or the two-year post-Term coverage period. The reason for this rule is the probability of gaps in insurance coverage that might occur as a result of such a switch in coverage types.

**14.9.4.** For every "claims made" policy that the Contractor uses to comply with the requirements of this Agreement, the Contractor must arrange for a licensed insurance broker to specify in writing to the BOE whether the policy provides *only* a "duty-to-reimburse" (defense litigation costs, other defense costs and other claims management costs undertaken by the insurer erode the coverage limits) or provides for a "duty-to-defend" (defense litigation costs, other defense costs and other claims management costs undertaken by the insurer are separate from, and in addition to, the coverage limits).

**14.10. LIABILITY COVERAGE AMOUNTS DO NOT LIMIT CONTRACTOR'S OBLIGATIONS.**

The minimum coverage limit amounts and types of insurance coverage expressed in this Agreement shall *not* be construed in any manner whatsoever to limit the nature and/or extent of the Contractor's responsibility and liability under this Agreement to protect, defend, pay on behalf of, indemnify and hold harmless the Board and the City as hereinafter provided.

**14.11. WAIVER OF SUBROGATION.**

The BOE and the Contractor hereby waive their respective rights to subrogation against the other with respect to any claims or defenses as to which any indemnification relates.

**15. LIMITATION OF LIABILITY.**

For any and all Claims against the Contractor that shall or may arise out of or in connection with this Agreement, where liability is not otherwise set forth in this Agreement as being "without limitation," and regardless of the basis on which the claim is made, the Contractor shall be fully liable for di-

rect damages resulting from the negligent, gross negligent and/or reckless actions and/or omissions of its agents, employees and/or partners. Unless otherwise specifically enumerated in this Agreement or in any Attachment as being “without limitation,” neither Party shall be liable for consequential, indirect, special, punitive or economic consequential damages, even if advised of the possibility of such damages. In addition to any other remedies available to the BOE at law or equity and upon notice to the Contractor, the BOE may exercise its set-off rights in accordance with **Section 40** entitled, “Set-Off,” of the **T&C** and retain such monies from amounts due the Contractor, or may proceed against, as may be necessary to satisfy any claim for damages, penalties, costs and the like asserted by or against them.

## **16. INDEMNIFICATION.**

The following terms and conditions shall prescribe and govern the Board’s and the Contractor’s rights, privileges, prerogatives, duties and obligations with respect to protection, defense, indemnification and hold harmless for all general and particular intents and purposes under this Agreement:

### **16.1. INFRINGEMENT INDEMNIFICATION CLAIMS.**

The following terms and conditions shall prescribe and govern the Board’s and the Contractor’s rights, privileges, prerogatives, duties and obligations with respect to patent, copyright, trademark, trade secret and other infringement issues:

**16.1.1.** To the fullest extent permitted by law, the Contractor shall protect, defend, pay on behalf of, indemnify and hold harmless the BOE, the City, and their elected and appointed officials, employees, volunteers and others working on behalf of the BOE and/or the City (hereinafter expressed as “BOE Indemnitees”), without limitation, from and against any and all losses, damages, expenses (including reasonable attorney fees), claims, demands, judgments, suits, allegations, liabilities and costs (hereinafter expressed as “Claims”) against any BOE Indemnitee(s) resulting from or arising out of any action for infringement of a any patent, copyright, trademark, trade secret or other Third Party proprietary right, with respect to the Services rendered hereunder, *provided*, that BOE shall give Contractor **(i)** prompt written notice of any Claim, **(ii)** the opportunity to take over, settle or defend such Claim at the Contractor’s sole expense, and **(iii)** commercially reasonable assistance in the defense of any such Claim at the expense of the Contractor, *provided, however*, that the Contractor shall *not* be relieved of its indemnification obligations hereunder for failure by the BOE to provide prompt written notice of any Claim. The Contractor shall obtain BOE approval before entering into any compromise that would impose any liability or obligation on any BOE Indemnitee(s), which approval shall not be withheld unreasonably.

**16.1.2.** In addition to the foregoing, if the use and/or provision of Services shall be enjoined for any reason or if the Contractor believes that use and/or provision of the Services may be enjoined, the Contractor shall have the right, at its own expense and sole discretion to take action in the following order of precedence: **(i)** to procure for the BOE the right to continue using such items or parts thereof, as applicable, **(ii)** to modify the item or parts so that they become non-infringing and of at least equal quality and performance, **(iii)** to replace said items or parts thereof, as applicable, with non-infringing items or parts of at least equal quality and performance, or **(iv)** if none of the foregoing is commercially reasonable,

then provide monetary compensation to BOE up to the dollar amount payable for such Services under this Agreement.

**16.1.3.** If an action at law or equity is commenced against any BOE Indemnitee(s) arising out of a claim that Services under this Agreement infringe any patent, copyright, trademark, trade secret or other third party proprietary right and the Contractor is of the reasonable opinion that the allegations in such action in whole or in part are *not* covered by the indemnification and defense provisions set forth in this Agreement, the Contractor shall immediately notify the BOE in writing and shall specify to what extent the Contractor believes that it is and/or is not obligated to protect, defend, pay on behalf of, and indemnify any BOE Indemnitee(s) under the terms and conditions of this Agreement. The Contractor shall in such event protect the interests of the BOE Indemnitee(s), the BOE and City and secure a continuance to permit the BOE to appear and defend its interests in cooperation with the Contractor as is appropriate including, but not limited to, any jurisdictional defenses that the BOE and/or the City may have.

**16.1.4.** The Contractor's infringement indemnification, protection, defense, payment on behalf of, and hold harmless obligations hereunder shall be without limitation.

## **16.2. OTHER INDEMNIFICATION CLAIMS.**

The following provisions shall prescribe and govern the Board's and the Contractor's rights, privileges, prerogatives, duties and obligations regarding all other indemnification, protection, defense, payment on behalf of, and hold harmless issues:

**16.2.1.** The Contractor shall protect, defend, pay on behalf of, indemnify and hold harmless the BOE Indemnitees for any Claims arising from a breach of the representations, warranties, covenants and/or obligations of the Contractor set forth in the Agreement, whether or not the conduct constituting such breach is that of Contractor and/or of its partners, Affiliates, employees, agents and/or Subcontractors, *except* to the extent that any Claim(s) shall result from the gross negligence or willful misconduct of a BOE Indemnitee.

**16.2.2.** The Contractor's protection, defense, indemnification and hold harmless obligations with respect to the representations, warranties and covenants in **Paragraph 16.2.1, supra**, shall be without limitation.

**16.2.3.** The Contractor shall be fully liable, without limitation, for the actions of its partners, Affiliates, employees, agents and/or Subcontractors and shall fully protect, defend, pay on behalf of, indemnify and save harmless the BOE Indemnitees from suits, actions, damages and costs of every name and description relating to **(i)** personal injury, **(ii)** damage to real or personal tangible property caused by fault or negligence of Contractor, its agents, employees, partners or Subcontractors, **(iii)** gross negligence or willful misconduct, and/or **(iv)** breach of confidentiality obligations, *provided, however*, that the Contractor shall *not* be obligated to protect, defend, pay on behalf of, and/or indemnify for that portion of any claim, loss or damage arising hereunder due to the grossly negligent, reckless and/or willful act and/or omission of the BOE and/or BOE Indemnitee.



**16.2.4.** In the event that a Claim at law or equity that is referred to in this **Paragraph 16.2, et seq.**, is commenced against any BOE Indemnitee and the Contractor is of the opinion that the allegations in such action in whole or in part are *not* covered by the protection, defense, indemnification and hold harmless provisions set forth in this Agreement, the Contractor shall immediately notify the BOE in writing and shall specify to what extent the Contractor believes it is obligated to protect, defend, pay on behalf of, indemnify and hold harmless under the terms and conditions of this Agreement. In such event, the Contractor shall protect the interests of the BOE and the City and secure a continuance to permit the BOE and/or City to appear and defend their interests in cooperation with the Contractor as is appropriate, including any jurisdictional defenses BOE may have.

### **16.3. INDEMNIFICATION BY SUBCONTRACTORS AND AFFILIATES.**

In every agreement between the Contractor and every Subcontractor and/or Affiliate, the Contractor shall include provisions requiring each such Subcontractor and/or Affiliate to indemnify, protect, defend, pay on behalf of, and hold harmless the BOE, the City and the Contractor under terms and conditions not materially different from those expressed in this **Paragraph 16** and **Paragraph 15, supra**.

### **17. PERSONNEL CLEARANCE.**

The Contractor agrees that, in the Chancellor's discretion, the Contractor's employees, Subcontractors and Subcontractor employees engaged in the performance of this Agreement may be subject to security, health and/or other clearance procedures administered by the Board including, without limitation, fingerprint checks. The Chancellor shall determine whether and to what extent any one or more of the Contractor's employees, Subcontractors and Subcontractor employees subject to security, health and/or other clearance procedures shall be denied access to New York City Public Schools pupils, parents, volunteers and/or employees for security, health and/or other reasons. If the Chancellor shall deny such access to any one or more of the Contractor's employees, Subcontractors and Subcontractor employees, the Contractor shall abide by the following: (i) the Board shall notify the Contractor and the individuals and/or entities of the specific grounds for the decision and will afford the individuals and/or entities an opportunity to present information on his/her/its own behalf; (ii) immediately upon notification, the Contractor shall remove and bar the affected individuals and/or entities from any contact with New York City Public School pupils, parents, staff and/or supervisors in the course of the performance of this Agreement, unless and until the decision is reversed or modified; and, (iii) immediately, the Contractor shall assign another employee(s), Subcontractor(s) and/or Subcontractor employee(s) to fulfill the duties and responsibilities of the removed individuals and/or entities related to the performance of this Agreement, unless and until the decision is reversed or modified. The Contractor or its employees, Subcontractors and/or Subcontractor employees shall be solely obligated to bear the costs of all security, health and/or other clearance procedures that involve fees or other costs for any and all persons and/or entities required to undergo such procedures. The Contractor shall make no demand for, nor be entitled to receive, any additional compensation of any kind for any and all fees and costs for clearance procedures as well as any and all costs arising from the debarment of any one or more of its employees, Subcontractors and Subcontractor employees under these security, health or other clearance procedures.

**18. CONSENT TO JURISDICTION, CHOICE OF LAW AND VENUE.**

The Board and the Contractor do hereby stipulate, consent and agree that any and all claims, actions, disputes, appeals, proceedings and/or special proceedings against the Board, the City of New York and/or the Contractor arising under this Agreement and/or related in any way or to any extent whatsoever thereto shall be heard and determined either in the courts of the United States of America located in the City of New York (hereinafter expressed as "Federal Court[s]"), the courts of the State of New York located in the City and the County of New York (hereinafter expressed as "State Court[s]"), or the courts of the City and Counties of New York located in the City and County of New York (hereinafter expressed as "City Court[s]"). Furthermore, the Board and the Contractor do hereby stipulate, consent and agree that this Agreement and any and all claims, actions, disputes, appeals, proceedings and/or special proceedings arising from this Agreement shall be governed solely by the laws of the State of New York. To effect this agreement and intent, the Board and the Contractor do hereby acknowledge, stipulate, consent, warrant, covenant and agree as follows:

**18.1.** If the Board and/or the City of New York shall initiate any claim, action, dispute, appeal, proceeding and/or special proceeding against the Contractor in Federal Court, State Court or City Court, service of process may be made upon the Contractor by certified or registered mail addressed to the Contractor at its last known address as the Contractor shall have provided it to the Board in writing;

**18.2.** With respect to any claim, action, dispute, appeal, proceeding and/or special proceeding in State Court or City Court between the Board and/or the City of New York, on the one hand, and the Contractor, on the other hand, the Contractor does hereby waive and relinquish any rights it might otherwise have **(a)** to move to dismiss on grounds of *forum non conveniens*, **(b)** to remove to any Federal Court outside of the City and State of New York, and/or **(c)** to move for a change of venue to a State Court or a City Court outside of New York County;

**18.3.** With respect to any claim, action, dispute, appeal, proceeding and/or special proceeding in a Federal Court located in the City of New York between the Board and/or the City of New York, on the one hand, and the Contractor, on the other hand, the Contractor does hereby waive and relinquish any rights it might otherwise have to move to transfer the claim, action, dispute, appeal, proceeding and/or special proceeding to a Federal Court outside of the boundaries of the City of New York; and,

**18.4.** If the Contractor shall institute, bring, commence, file or otherwise start any claim, action, dispute, appeal, proceeding and/or special proceeding against the Board and/or the City of New York in a court other than in the City and State of New York (or any claim, action, dispute, appeal, proceeding and/or special proceeding in a State Court or a City Court in any venue other than New York County), the Contractor shall consent, upon request by the Board and/or the City of New York, either to a transfer of the claim, action, dispute, appeal, proceeding and/or special proceeding to a court of competent jurisdiction located in the City and State of New York (or in any claim, action, dispute, appeal, proceeding and/or special proceeding in a State Court or a City Court, to a court of competent jurisdiction within the venue of New York County) or, if the Contractor shall consent, to dismiss any such claim, action, dispute, appeal, proceeding and/or special proceeding without prejudice with the allowance that the Contractor may thereafter reinstitute the claim, action, dispute, appeal, proceeding and/or special proceeding in a court of competent jurisdiction lo-

cated in the City and State of New York (or in any claim, action, dispute, appeal, proceeding and/or special proceeding in a State Court or a City Court, in a court of competent jurisdiction within the venue of New York County).

## **19. DISPUTE RESOLUTION.**

### **19.1. PRESCRIPTION OF ADMINISTRATIVE DISPUTE RESOLUTION.**

If the Contractor shall be unable to resolve its differences concerning any determination by an authorized representative of the BOE (the Chancellor, his/her designee(s) and/or the BOE Contract Manager only), the Contractor may initiate a dispute pursuant to the procedure set forth in this **Paragraph 19**. Exhaustion of these dispute resolution procedures shall be a precondition to any claim, action, lawsuit, proceeding and/or special proceeding permitted hereunder.

### **19.2. ADMINISTRATIVE DISPUTE RESOLUTION RULES AND PROCEDURES.**

The Contractor does hereby authorize and delegate the Disputes Resolution Officer (hereinafter expressed as "DRO") 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, but not limited to, claims in the nature of breach of Contract, and/or fraud or misrepresentation before or after contract award), and the DRO's decision shall be conclusive, final and binding on the Contractor and its heirs, successors, assigns and representatives. In each case, the DRO's decision may be based on such assistance as he/she may find desirable including, but not limited to, the advice of experts. The effect of the DRO's decision shall not be impaired and/or waived by any negotiations or settlement offers in connection therewith, and/or by any prior decision of others, which prior decisions shall be deemed subject to review, and/or by any termination or cancellation of this Agreement. All such disputes shall be submitted in writing by the Contractor to the DRO for his/her decision, together with all evidence and other pertinent information with regard to such questions and/or disputes in order that a fair and reasonable decision may be made. The Contractor shall send written notice to the Chancellor and the BOE Contractor Manager of each application for redress to the DRO together with a photocopy of all documents submitted to the DRO. In each dispute case, the BOE may submit a written response or answer to the petition together with all evidence and other pertinent information regarding such questions and/or disputes. (The BOE shall send a copy of its response or answer together with a copy of all evidence or other information submitted to the DRO.) The DRO shall render his/her decision in writing and deliver a copy of same to the representatives of the BOE and the Contractor. The technical rules of evidence shall not apply to the dispute resolution process expressed in this **Paragraph 19**. As a designee of the Chancellor, the DRO may conduct sworn depositions of relevant witnesses, although such depositions shall not be mandatory and shall be within the reasonable discretion of the DRO to determine whether necessary.

### **19.3. DESIGNATION OF DRO.**

The Contractor and the BOE do hereby appoint, approve, designate and authorize the Executive Director of the BOE Division of Contracts & Purchasing (or the successor title of a comparable executive function) to be and to act as the DRO for all general and particular intents and purposes under this Agreement. If the DC&P Executive Director shall be unavailable due to vacation,

sick leave, workload or other reason, the BOE and the Contractor hereby stipulate and agree that the DC&P Executive Director may designate a substitute to serve in his/her stead.

#### **19.4. DISMISSAL.**

If the Contractor shall fail to exhaust the dispute resolution procedures and remedies as set forth in this **Paragraph 19**, the Contractor shall consent, upon a request from the BOE and/or the City, to dismiss such claim, action, appeal, lawsuit, proceeding or special proceeding without prejudice with the allowance that the Contractor may re-institute such claim, action, lawsuit, appeal, proceeding or special proceeding before the DRO.

#### **19.5. APPEAL FROM DRO DECISIONS.**

If the Contractor protests a decision of the DRO, the Contractor may commence a lawsuit in Supreme Court, New York County under Article 78 of the State Civil Practice Law and Rules, it being understood that the review of the Court shall be limited to the question of whether or not the DRO's determination is arbitrary, capricious or so grossly erroneous as to evidence bad faith. No evidence or information shall be introduced or relied upon in such an action, proceeding or special proceeding that has not been presented to the DRO prior to the DRO making his/her decision.

#### **19.6. ACCRUAL OF CLAIMS.**

Neither the requirements of this **Paragraph 19** nor the time necessary for compliance therewith, however, shall affect the time to have accrued for purpose of any statute controlling claims, actions, proceedings and/or special proceedings against the BOE. The time of such accrual shall be determined without reference to this **Paragraph 19**.

### **20. NOTICE OF CLAIM.**

The Contractor stipulates and agrees that, before instituting, bringing, commencing, filing or otherwise starting any claim, action, dispute, appeal, proceeding and/or special proceeding against the BOE and/or the City before or in any Federal Court, State Court or City Court regarding any matter arising from this Agreement, the Contractor must and shall comply with the notice of claim provisions of the State Education Law, §§2562 and 3813. The foregoing requirement includes, but is not limited to, any and all litigation arising from any decision(s) of the DRO under **Paragraph 19, supra**. By delegation of the Chancellor, all service of process upon the BOE including, but not limited to, notices of claim shall be filed with the Board of Education of the City School District of the City of New York, • New York City Law Department, 100 Church Street, Room 4-313, New York, NY 10007-2601, or with such other agent and/or at such other location as the BOE shall specify with notice to the Contractor. The Contractor stipulates and agrees that the statutory notice of claim requirements referenced in the first sentence of this **Paragraph 20** are binding upon the Contractor and its Affiliates.

### **21. CONFIDENTIALITY.**

#### **21.1. CONFIDENTIAL INFORMATION.**

**21.1.1.** "Confidential Information" includes, but is not be limited to, the following: **(i)** all personally identifiable information about BOE employees, the family members and domes-



tic partners of BOE employees, BOE pupils, and the family members and/or guardians of BOE pupils; (ii) information furnished by one Party to the other Party in connection with the performance of this Agreement including, but not limited to, all reports and studies containing such information; (iii) trade secrets, technical and non-technical information or data related to formulas, patterns, designs, compilations, systems, databases, equipment, communications networks, programs, inventions, methods, techniques, drawings, processes; (iv) marketing information, proposals, finance information, accounting, billing, record keeping, identity and information related to actual or potential suppliers and contractors, and agreements with third parties; (v) information pertaining to BOE utilization of the Services; (vi) research, development, existing and future products and services including, but not limited to, the pricing and specifications thereof, (vii) Third Party confidential information disclosed to one Party by the other Party, (viii) any disclosures between the Parties related to the Services or otherwise related to this Agreement whether made prior to, contemporaneous with, or following the execution of this Agreement *excluding* the documents comprising this Agreement such as, but not limited to, the **Proposal, Work Plan and Budget**; and/or, (ix) 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.

**21.1.2.** "Confidential Information" shall not include any information that is: (i) in the public domain at the time of receipt or which comes into the public domain thereafter through no act of the Receiving Party in breach of this Agreement, (ii) demonstrated to have been known to the Receiving Party prior to disclosure by the Disclosing Party, (iii) disclosed with the prior written approval of the Disclosing Party, (iv) demonstrated to have been independently developed by the Receiving Party without reference to the Confidential Information, (v) disclosed to the Receiving Party by a Third Party under conditions permitting such disclosure, without breach of this Agreement, and/or (vi) disclosed as required by court order, subpoena, other validly issued administrative or judicial notice or order and/or as a matter of applicable law, *provided, however*, that in the event disclosure is required of the Receiving Party under the provision of any law or court order, the Receiving Party will (a) promptly notify the Disclosing Party of the obligations to make such disclosure sufficiently in advance of the disclosure, if possible, to allow the Disclosing Party to seek a protective order, and (b) disclose such Confidential Information only to the extent allowed under a protective order, if any, or necessary to comply with the law or court order.

**21.1.3.** The Contractor stipulates and agrees that any and all forms, documents, questionnaires, work papers and other forms of information, which the Contractor and/or its Subcontractors and/or Affiliates use to elicit information under this Agreement from Board teachers, administrators, employees, pupils, pupil parents and/or guardians, and/or other pupil family members shall not contain any personally identifiable or traceable information, data, marks or images pertaining to BOE pupils, pupil parents and/or guardians, and/or other pupil family members. The Contractor and its Subcontractors and Affiliates, if any, shall adhere in every respect to the law, Board policy and the Chancellor's regulations concerning confidentiality of pupil records. The Contractor shall submit to the Board any and all information and data that the Contractor and/or its subcontractors collect pursuant to this Agreement.



**21.2. FREEDOM OF INFORMATION.**

If Confidential Information provided by the Contractor or a Subcontractor to the BOE shall be subject to any federal or state freedom of information law or other disclosure request, the BOE shall notify the Contractor of the same, if such notification is permitted under the applicable law.

**21.3. ACCESS TO AND USE OF CONFIDENTIAL INFORMATION.**

Each Party shall be a "Disclosing Party" regarding Confidential Information provided to the other, and each Party shall be a "Receiving Party" regarding the receipt of Confidential Information from the other. The Receiving Party shall preserve in confidence such Confidential Information and prevent disclosure thereof to third parties. The Receiving Party shall further restrict disclosure of such Confidential Information to Subcontractors and Workforce who have a "need to know." Confidential Information delivered by the Disclosing Party to the Receiving Party shall be used solely for the purpose of providing the Services hereunder. No other use of Confidential Information is granted without the express written consent of the Disclosing Party.

**21.4. COMPLIANCE WITH SECURITY AND CONFIDENTIALITY REQUIREMENTS.**

The Subcontractors and Workforce shall abide by all applicable security policies and procedures of the BOE, both present and future, particularly in its use of computer facilities in any BOE premises and shall not provide access to any BOE premises to a Third Party who is not under an obligation of confidentiality in accordance with this Agreement. The Contractor shall inform the Subcontractors and Workforce of the requirements of this **Paragraph 21** and shall enforce compliance with these requirements.

**21.5. IRREPARABLE HARM.**

Each Party acknowledges that any disclosure or misappropriation of Confidential Information of the other Party in violation of this Agreement could cause irreparable harm, the amount of which may be extremely difficult to estimate, thus making any remedy at law inadequate. Each Party therefore stipulates and agrees that the other Party shall have the right to obtain an order restraining any breach or threatened breach of this Agreement and for any other relief as such Party reasonably deems appropriate. This right shall be in addition to any other remedy available in law or equity.

**22. SURVIVAL.**

The provisions of **Paragraphs 1, 2, 4.4, 4.5.8, 4.5.9, 4.5.10, 7, 8.4, 8.10, 8.11, 8.14, 9.3, 9.4, 10, 13, 14, 15, 16, 18, 19, 20, 21, 22, 23, and 28, and Sections 1, 2, 4, 5, 8, 9, 10, 14, 15, 17, 18, 19, 20, 21, 25, 29, 30, 31, 33, 34, 35 and 40** of the T&C shall survive termination, cancellation or expiration of this Agreement for whatever cause including, *but* not limited to, the completion and discharge of obligations by both Parties to this Agreement or mutual agreement to terminate this Agreement by both the Parties hereto.

## 23. DEFINITIONS.

### 23.1. GENERAL PRINCIPLES OF INTERPRETATION.

**23.1.1.** The definitions given for words and phrases herein shall apply equally to both the singular and the plural forms of the words and phrases defined. Whenever the context may require, any pronoun shall include the corresponding masculine, feminine and neuter forms. Whenever the words “include,” “includes,” “including,” “such as” and/or “like” are used in this Agreement, they shall be deemed to be followed by the words “without limitation.” The words “aforementioned,” “hereby,” “herein,” “hereinafter,” “hereof,” “heretofore,” “hereunder,” “*infra*,” “*supra*,” and words of similar import refer to this Agreement as a whole and not merely to the specific paragraph, section, provision or clause in which such word appears, *unless* the context shall otherwise require.

**23.1.2.** All references herein to Attachments, Schedules, Sections and Paragraphs shall be deemed references to this Agreement, *unless* the context shall otherwise require.

**23.1.3.** The use of boldface type and/or underlining in this Agreement is intentional, and such use is meant to draw a Party’s attention to the importance of a term, condition, specification, rule, procedure, exception and/or other issue expressed herein. The use of italics is generally to denote Latin words, other foreign words and/or specialized terminology.

**23.1.4.** All other words used in this Agreement, shall have their ordinary meanings in the English language, *except* that scientific, technical, specialized, legal or foreign words or phrases, shall be given their appropriate scientific, technical, specialized, legal or foreign meanings.

**23.1.5.** Reference is hereby made to the Definitions set forth in the T&C. Reference is hereby made to definitions expressed in other provisions and footnotes in this Agreement, which shall be fully effective and shall govern within the contexts expressed for them.

### 23.2. DEFINITIONS.

Capitalized terms in this Agreement shall have the meanings ascribed to them below. Paragraph references are to the Paragraphs of this Agreement. Section references are to the Sections of the T&C.

“**Accommodations Costs**” shall mean the costs of Workforce lodging and/or meals associated with any travel that such personnel may undertake in the course of the Services.

“**Affiliate**” means, with respect to a Party, any Person directly or indirectly Controlling, Controlled by or under common Control with, such Party.

“**Agreement**” means the documents composing the evidence of the agreement between the BOE and the Contractor including, and limited to, those documents set forth in **Paragraph 1**, *supra*.

“**Annual Report**” shall have the meaning set forth in **Paragraph 13.1**, *infra*.

“**Attachments**” means the attachments incorporated by reference into, and made part of, this Agreement under **Paragraph 1**, *supra*, and listed in the table of contents, *except* as otherwise expressly provided.

“**Board of Education of the City School District of the City of New York,**” “**BOE,**” “**Board,**” “**Board of Education,**” “**New York City Department of Education,**” “**Department**” and “**NYCDOE**” shall have the meaning set forth in the **Preamble**, *supra*, and in the State Education Law, §§ 2551, 2554, 2590 *et seq.*

“**BOE Indemnitees**” shall have the meaning set forth in **Paragraph 16.1.1**, *supra*.

“**Budget**” shall have the meaning set forth in the recitals and in **Paragraphs 1.5** and **4**, *supra*, and the said **Budget & Payment Schedule** is annexed hereto as **Attachment E**.

“**Business Day**” means the days of the year when BOE administrative offices shall be open for regular business in accordance with the Board’s official “Scheduled Closings of Learning Support Centers, Regional Operations Centers and Central Headquarters Offices,” as published, updated, revised or otherwise changed on the BOE website, [www.nycenet.edu](http://www.nycenet.edu).

“**Business Hours**” means the hours during each Business Day when the BOE shall be open for business, i.e., from eight o’clock in the forenoon (8:00 a.m.) through five o’clock in the afternoon (5:00 p.m.) Eastern Time.

“**Chancellor**” means Joel I. Klein, Chancellor and chief executive officer of the Board of Education, or his successor(s) as well as the following: (i) Kristen Kane, Chief Operating Officer, or her successor(s);<sup>10</sup> (ii) Dr. Elizabeth Arons, BOE Senior Human Resources Policy Advisor, or her successor(s); (iii) Lawrence E. Becker, BOE Chief Executive for Human Resources, or his successor(s); or, (iv) such other person(s) whom the BOE shall designate periodically with written notice to the Contractor. In addition, the term “Chancellor” shall have the meaning set forth in the State Education Law, § 2590. In the event of conflicting instructions from two or more of the aforementioned persons, the Contractor shall make a written request for conflict resolution to the “New York City Department of Education, Office of Deputy Chancellor for Finance & Administration, 52 Chambers Street, Room 320, New York, NY 10007-1222.”

“**City**” shall mean the City of New York or any political subdivision and/or public authority thereof.

“**City Courts**” shall have the meaning set forth in **Paragraph 18**, *infra*.

“**Claims**” shall have the meaning set forth in **Paragraph 16.1.1**, *supra*.

“**Comptroller**” means the Comptroller of the City.

“**Confidential Information**” shall have the meaning set forth in **Paragraph 21.1.1**, *supra*.

“**Contract Manager(s)**” shall have the meaning set forth in **Paragraph 4.5.1**, *supra*.

“**Contract Year**” shall have the meaning set forth in **Paragraph 3.2**, *supra*.

“**Contractor**” shall have the meaning set forth in the **Preamble**, *supra*.

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<sup>10</sup> The BOE Chief Operating Officer shall act as the Chancellor under this Agreement *only* for purposes of execution of this Agreement.

**“Control”** (including the terms “controlling,” “controlled by” and “under common control”) means the possession, directly or indirectly, of the power to direct or cause the direction of the management policies of a Person, whether through the ownership of voting securities, by contract or credit agreement, as trustee or executor, and other forms of influence such as legal, political, financial or otherwise.

**“Default”** shall have the meaning set forth in **Paragraph 9.2.1, supra**.

**“Direct Costs”** mean the total cost for personnel and OTPS incurred by the Contractor exclusively for the performance and fulfillment of this Agreement.

**“Disclosing Party”** shall have the meaning set forth in **Paragraph 21.3, supra**.

**“Disengagement”** shall have the meaning set forth in **Paragraph 10.1, supra**.

**“Disengagement Period”** shall have the meaning set forth in **Paragraph 10.2, supra**.

**“Disengagement Services”** shall have the meaning set forth in **Paragraphs 10.3 and 10.5, supra**.

**“Division of Contracts & Purchasing”** and **“DCP”** shall mean the functional unit of the BOE with responsibility for the school district’s general purchasing planning, administration and operations.

**“Division of Financial Operations”** and **“DFO”** shall mean the functional unit of the BOE with responsibility for planning, administration and operations of the school district’s general accounting, financial, payroll administration, and other administrative functions.

**“Division of Human Resources”** and **“DHR”** mean the functional unit of the BOE with responsibility for the school district’s human resources and personnel planning, administration and operations.

**“Educational Community”** means the BOE school district’s staff, pupils, pupils’ families or guardians, volunteers and invitees.

**“Federal Courts”** shall have the meaning set forth in **Paragraph 18, supra**.

**“Final Report”** shall have the meaning set forth in **Paragraph 13.2, infra**.

**“Final Payment”** means (i) the payment or refund by the BOE or the City of any moneys that exhausts the amount of money encumbered under the Agreement, (ii) the last payment made by the BOE or the City upon an invoice or other notice from the Contractor signaling the material completion of the Services (notwithstanding retainage, if any), or (iii) any payment marked “Final Payment by the BOE.”

**“Fringe Benefits”** is defined to include (i) regular compensation paid during authorized absences from the job for annual leave (e.g., vacation), sick leave or military leave, *provided*, such are granted under an established leave system and the cost thereof is allocated equitably among all the Contractor’s activities and balance sheet accounts, (ii) employee benefits in the form of an employer’s contribution or expenses for social security, employee life and health insurance coverage, unemployment insurance, worker’s compensation insurance, severance pay and other benefits systematically paid by the Contractor to all classes of its employees before the date of execution of this Agreement, and (iii) other benefits allowed under the U.S. Internal Revenue Code. As expressed in **Paragraphs 8.4,**

*supra*, the BOE shall **not** be liable for the payment of BOE and/or the Contractor's Fringe Benefits for Subcontractors or Subcontractor employees. Fringe Benefits shall constitute a portion of the calculation of Overhead Costs expressed in **Paragraph 8.6, *supra***.

**"Intellectual Property"** means any patent rights, copyrights, trade secrets, trade names, trademarks, service marks, moral rights, know-how and any other similar rights or intangible assets recognized under laws or international conventions in any country or jurisdiction in the world, as intellectual creations to which rights of ownership accrue, and all registrations, applications, disclosures, renewals, extensions, continuations or reissues of the foregoing now or hereafter existing in any country or jurisdiction in the world.

**"Key Employees"** shall have the meaning set forth in **Paragraph 4.5.2.1, *supra***.

**"Occupational Safety & Health Laws"** shall mean all applicable federal, state or local statutes, laws, regulations, rules, ordinances, codes, licenses, orders or permits of any governmental entity relating to environmental matters including, **but** not limited to, the following: (i) the Occupational Safety & Health Act of 1970, as amended (29 U.S.C. § 651 *et seq.*); (ii) 29 C.F.R. § 1902.1 *et seq.*; (iii) the State Labor Law, §§ 27, 27-a, 200 *et seq.*, 240 *et seq.*; (iv) 12 N.Y.C.R.R. §§ 12-1.1 *et seq.*, 36-1.1 *et seq.*, 38.0 *et seq.*, 50.1 *et seq.*, 56-1.1 *et seq.*, 800.1 *et seq.*; and, (viii) similar State, regional, City and BOE provisions.

**"Other Than Personnel Services"** and **"OTPS"** mean all services and expenses directly attributable to the performance and fulfillment of this Agreement. The term shall include, but shall not be limited to, data entry, programming, computer time, reproduction costs, mailing costs, travel costs, *etc.*

**"Party"** and **"Parties"** shall have the meaning set forth in the **Preamble, *supra***.

**"Person"** means any natural person, corporation, limited liability company, limited liability partnership, general partnership, limited partnership, trust, association, governmental organization or agency, political subdivision, body politic, or other legal person or entity of any kind, legally constituted.

**"Preparation Costs"** shall have the meaning set forth in **Paragraph 8.1, *supra***.

**"Purchasing Agency Letter"** shall have the meaning set forth in **Paragraph 1.4, *supra***, and is hereto annexed at **Attachment C**.

**"Receiving Party"** shall have the meaning set forth in **Paragraph 21.3, *supra***.

**"Request for Authorization"** and **"RA"** shall have the meaning set forth in the recitals in **Paragraph 1.1, *supra***, and the said **RA** is annexed hereto as part of **Attachment A**.

**"Request for Authorization—Public Notice of Award"** and **"RA/PNA"** shall have the meaning set forth in **Paragraph 1.1, *supra***, and the said **RA/PNA** is annexed hereto as part of **Attachment A**.

**"Request for Proposals"** and **"RFP"** shall have the meaning set forth in the recitals and in **Paragraph 1.9, *supra***, and the said **RFP** is annexed hereto as **Attachment H**.

**"Services"** means the Contractor's Services, any Subcontractor Services and Third Party Services rendered by and/or through Contractor under this Agreement and shall include, **but** shall not be limited to, all activities to be performed by or through the Contractor, any



Subcontractor and/or other Third Party, as expressed in **Paragraph 4, *supra***, the **RFP**, the **Proposal**, the **Budget** and/or the **T&C**.

“**State**” shall mean the State of New York or any political subdivision or public authority thereof.

“**Subcontractor**” means any Person other than the Contractor who provides Services to the BOE pursuant to an agreement with the Contractor. Any Contractor’s Affiliate that provides Services to the BOE pursuant to such an agreement shall be deemed a Subcontractor.

“**T&C**” means the supplemental Terms and Conditions identified in **Paragraph 1.3, *supra***, and attached hereto as **Attachment B**.

“**Term**” shall have the meaning set forth in **Paragraph 3, *supra***.

“**Third Party**” means any Person other than the Parties, their respective Affiliates, directors, officers, employees, agents and representatives.

“**Third Party Products**” shall mean any item, piece or component of goods that is originated by a Third Party.

“**Third Party Services**” shall mean any Services that are originated by a Third Party.

“**Transportation Costs**” shall mean the costs of Workforce travel *via* land, sea and/or air common carriers, hired and/or rented vehicles, and/or personal vehicles associated with any travel that such personnel may undertake in the course of the Services.

“**Pedagogical Profession Evaluation Industry Best Practices**” shall have the meaning set forth in **Paragraph 4.4.2, *supra***.

“**Workforce**” means the Key Employees and the Contractor employees, agents and representatives as well as any Subcontractor and/or their employees, agents and representatives.

#### **24. BOE AUTHORITY.**

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

#### **25. NO FEE CHARGING.**

The Contractor shall *not* charge fees to, nor seek any payment and/or compensation of any kind whatsoever from, Board employees, pupils, pupil parents and/or guardians, and/or other pupil family members for the Services that the Contractor provides under this Agreement. The same shall apply to the Contractor’s employees and subcontractors.

#### **26. BOE APPROVAL.**

The Contractor does hereby stipulate and agree that all exhibitions, performances, instructional services, materials and/or resources to be utilized in the performance of this Agreement shall be subject to the prior approval of the Chancellor or his/her designee(s).

**27. AFFIRMATION OF RESPONSIBILITY AND PAID TAXES.**

The Contractor hereby affirms and declares that the Contractor is *not* in arrears to the City of New York upon any debt, contract and/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 City of New York agency, nor is there any proceeding pending regarding 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 BOE.

**28. MODIFICATIONS TO T&C.**

The T&C is hereby amended as follows:

**28.1.** Sections 32 and 45 of the T&C entitled, "Indemnification," and "Indemnification Language," respectively, are hereby deleted in favor of the provisions expressed at Paragraphs 15 and 16, *supra*.

[NO FURTHER TEXT APPEARS ON THIS PAGE.]

IN WITNESS WHEREOF, the Board of Education of the City School District of the City of New York has executed this Agreement with RMC Research Corporation as of the day and year first above written.

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK

Comptroller's Office  
Central Imaging Facility  
**ORIGINAL**

By: [Signature]  
Photeine Anagnostopoulos, Chief Operating Officer  
for the Chancellor

BOARD OF EDUCATION ACKNOWLEDGMENT

STATE OF NEW YORK }  
                                  } SS.:  
COUNTY OF NEW YORK }

On this 10 day of March, 2008, before me, the undersigned, a Notary Public in and for said State, personally appeared one Photeine Anagnostopoulos, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that she executed the same in her capacity, and that by her signature on the instrument, the individual or person upon behalf of which the individual acted, executed the instrument.

ARLEN LANGONIA  
Notary Public, State of New York  
No. 114401693  
Qualified in Suffolk County  
Commission Expires March 30, 2010

[Signature]  
NOTARY PUBLIC

Comptroller's Office  
Central Imaging Facility  
**ORIGINAL**

Approval as to description of services and availability of funds:

[Signature]  
BOE Division of Human Resources

Approval as to legal sufficiency:

[Signature]  
BOE Office of Legal Services



PEER OBSERVATION AND EVALUATION SERVICES AGREEMENT

IN WITNESS WHEREOF, RMC Research Corporation has executed this Agreement with the Board of Education of the City School District of the City of New York as of the day and year first above written.

RMC RESEARCH CORPORATION

By: Everett Barnes  
(Signature)  
President  
(Title)

ORIGINAL  
Comptroller's Office  
Central Imaging Facility

INSURANCE DOCUMENT  
INSTRUCTIONS: All evidence of insurance such as, but not limited to, insurance certificates, as required in Paragraph 13, supra, must be submitted to the BOE at the time of the Contractor's return of executed duplicate originals.

Taxpayer Identification No. 520819071 (required)

CONTRACTOR ACKNOWLEDGMENT

STATE OF NEW YORK }  
                                  } SS:  
COUNTY OF NEW YORK }

On this 1<sup>st</sup> day of FEBRUARY, 2008, before me, the undersigned, a Notary Public in and for said State, personally appeared one EVERETT BARNES, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that she executed the same in her capacity, and that by her signature on the instrument, the individual or person upon behalf of which the individual acted, executed the instrument.

Janet C. Merkley  
NOTARY PUBLIC

JANET C MERKLEY  
NOTARY PUBLIC, NEW HAMPSHIRE  
My Commission Expires Sep 3, 2008

ORIGINAL  
Comptroller's Office  
Central Imaging Facility



My Commission Expires Sep 3 2008  
NOTARY PUBLIC, NEW HAMPSHIRE  
JANET C MERKLEY

