

**Item I. A.**

**DRAFT – SUBJECT TO REVIEW AND REVISION**

**USA NIAGARA DEVELOPMENT CORPORATION**

Meeting of the Directors  
Held at the USA Niagara Offices  
222 First Street – 7<sup>th</sup> Floor  
Niagara Falls, New York 14303

With videoconferencing to:

ESD New York City Regional Office  
633 Third Avenue – 37<sup>th</sup> Floor  
New York, NY 10017

March 26, 2024

**MINUTES**

**In Attendance Directors:** Francine DelMonte – Chair  
Scott M. Brydges – Voting Director  
Dr. Chandra Foote – Voting Director

**Present for USA Niagara:** Yvonne Cooper – Acting Corporate Secretary (via videoconference)  
Douglas Janese – Senior Counsel, Legal  
Paul Ray – Senior Project Manager  
John Risio – Project Manager  
LouL Rizek – Officer Manager  
Anthony Vilaro – President (via videoconference)

**Present for ESD:  
(via video conference):** Tiffany Bowie – Director of Finance  
Julia Borukhov – Finance Project Manager  
Eugene Kwiatkowski, Senior Director of Budgeting

**Present for ESD WNY:** Laura Magee – Deputy Director, Public Affairs, WNY  
Paul Tronolone - Vice President, Policy & Planning, WNY

**Also Present:** Andrea Czoop – Chief Operating Officer,  
Jason Murgia – General Manager, Niagara Fall Convention Center

**DRAFT - SUBJECT TO REVIEW AND REVISION**

Following the roll call and confirmation that a quorum was present, the meeting of the Directors of the USA Niagara Development Corporation (“USAN” or the “Corporation”) was called to order at 11:00 a.m. by Chair DelMonte.

Chair DelMonte called the meeting to order and noted that the meeting will be webcast.

Chair DelMonte also noted that the public had been given an opportunity to comment on the Agenda items by submitting their written comments by 5:00 p.m. on Friday and noted that no comments were received from the public.

Chair DelMonte then noted that the Directors had received the relevant written materials in advance of today’s meeting and are free to ask questions

The Chair then asked the Directors if anyone had any potential conflict of interest with regard to any of the items on the Agenda and no conflicts were noted at this time.

The Chair then called for the approval of the Minutes of the July 31, 2023 and September 27, 2023 Directors’ meetings. There being no corrections noted, upon motion duly made and seconded, the following Resolution was unanimously adopted:

APPROVAL OF MINUTES AND RATIFICATION OF ACTIONS TAKEN AT THE JULY 31, 2023 and SEPTEMBER 27, 2023 MEETINGS OF THE DIRECTORS OF THE USA NIAGARA DEVELOPMENT CORPORATION

**DRAFT - SUBJECT TO REVIEW AND REVISION**

RESOLVED, that the Minutes of the meetings of the Corporation held on July 31, 2023 and September 27, 2023 as presented to this meeting, are hereby approved and all actions taken by the Directors present at such meetings as set forth in such Minutes, are hereby in all respects ratified and approved as actions of the Corporation.

\* \* \*

Chair DelMonte then called on Anthony Vilardo to present the next item on the Agenda related to the 2024-2025 Fiscal Year Operating and Capital budgets for the Directors' consideration.

Mr. Vilardo explained that the State Finance Law requires that prior to the commencement of each fiscal year on April 1<sup>st</sup>, the Directors adopt an annual Operating and Capital budget. The 2024-2025 Operating budget is \$626,784 and consists of personnel services that include salary and benefits for four and a half employees and \$163,568 in non-personnel services consisting primarily of costs for the lease, insurance and other administrative expenses for a total budget of \$790,352.

Mr. Vilardo further explained that the Capital budget, in the amount of \$86,049,397 includes design and other soft costs, legal expenses, property management costs, maintenance, insurance, demolition, site clearance, construction and other miscellaneous costs.

Mr. Vilardo noted that the Directors are required to ratify and authorize the Corporation to undertake tasks and incur expenditures consistent with advancing the scope of work contemplated in the proposed budgets.

**DRAFT - SUBJECT TO REVIEW AND REVISION**

Following the full presentation, Chair DelMonte called for questions or comments from the Directors. Hearing none and noting that no comments were received from the public, upon motion duly made and seconded, the following Resolution was unanimously adopted:

USA NIAGARA DEVELOPMENT CORPORATION – Fiscal Year (“FY”) 2024-25 Operating and Capital Budgets Proposals – Approval of the Corporation’s Operating and Capital Budgets for FY 2024 – 25 (April 1, 2024 – March 31, 2025)

---

RESOLVED, that based on the materials presented at this meeting and ordered filed with the Corporation (the “Materials”), the Corporation’s proposed FY 2024-25 Operating and Capital Budgets are hereby approved and adopted in all respects, substantially in the form set forth in the materials and subject to the availability of funds; and be it further

RESOLVED, that the Corporation is hereby authorized to undertake tasks and incur expenditures consistent with advancing the scope of work contemplated in the proposed budgets, subject to the availability of funds; and be it further

RESOLVED, that the Directors shall make individual approvals and authorizations for items under the Capital Budget; and be it further

RESOLVED, that the President or his designees be, and the same hereby are authorized to execute and deliver on behalf of the Corporation all documents, instruments and agreements that the President shall deem necessary and appropriate to carry out these resolutions; and be it further

RESOLVED, that the President or his designees be, and the same hereby are authorized to take any action necessary and appropriate to carry out the foregoing.

\* \* \*

The Chair then called on Mr. Vilaro to present the next item on the Agenda related to the Niagara Falls Convention and Conference Facility Center Operating and Capital budget for the Directors’ consideration.

Mr. Vilaro explained that the proposed calendar year Operating budget for the Convention Center is \$417,054 and the Operating budget for the Old Falls Street is \$847,930 for

**DRAFT - SUBJECT TO REVIEW AND REVISION**

a total budget of \$1,264,984. The proposed Capital budget for the calendar year 2024, is \$235,000 which includes \$181,516 for the Convention Center and \$53,500 for Old Falls Street.

Mr. Vilardo further explained that the Capital budget for the Convention Center in the amount of \$598,570 will be used for digital signage upgrades, audiovisual equipment upgrades, parking lot improvements and emergency repairs. The Capital budget for Old Falls Street in the amount of \$901,430 will be used for new golf carts and an outdoor distribution box used for concerts and cabling. Additional monies will be used for tent replacements, street vendors and a selfie station.

Mr. Vilardo noted that the Directors were being asked to approve USA Niagara's proposed calendar 2024 Operating budget and the Niagara Falls Convention Center and Old Fall Street budgets in an amount not to exceed \$1,500,000 and the first of the calendar year 2025 budget in the amount of \$250,000.

Following the full presentation, Chair DelMonte called for questions or comments from the Directors. Hearing none and noting that no comments were received from the public, upon motion duly made and seconded, the following Resolution was unanimously adopted:

USA NIAGARA DEVELOPMENT CORPORATION – Approval of the Niagara Falls Convention and Conference Facility and Old Falls Street CY 2024 Operating and Capital Budgets; Approval of First Quarter 2025 Funding; and Authorization to Disburse Funds

---

RESOLVED, that based on the materials presented at this meeting and ordered filed with the Corporation (the "Materials"), the Corporation's proposed CY 2024 Niagara Falls Convention and Conference Facility and Old Falls Street Operating and Capital Budgets in a cumulative amount not to exceed \$1,500,000 are hereby approved, and adopted in all respects, substantially in the

**DRAFT - SUBJECT TO REVIEW AND REVISION**

form set forth in the materials and subject to the availability of funds; and be it further

RESOLVED, the Corporation's proposal for first quarter 2025 (calendar quarter) funding for the Niagara Falls Convention and Conference Facility and Old Falls Street in an amount not to exceed \$250,000 is hereby approved, and adopted in all respects, substantially in the form set forth in the Materials and subject to the availability of funds; and be it further

RESOLVED, that the actions of the President or his designees relating to the CY 2024 Niagara Falls Convention and Conference Facility and Old Falls Street Operating and Capital Budgets be approved and ratified, and the same hereby are, authorized to disburse funds substantially in accordance with the CY 2024 Niagara Falls Convention and Conference Facility and Old Falls Street Operating and Capital Budgets with such changes as the President or his designee deems necessary or appropriate; and be it further

RESOLVED, that the President or his designees be, and the same hereby are authorized to execute and deliver on behalf of the Corporation all documents, instruments and agreements that the President shall deem necessary and appropriate to carry out these resolutions; and be it further

RESOLVED, that the President or his designees be, and the same hereby are authorized to take any action necessary and appropriate to carry out the foregoing.

\* \* \*

The Chair then called on Andrea Czoop, Chief Operating Officer for the Niagara Falls Convention Center also known as Destination Niagara and Jason Murgio, General Manager of the Niagara Falls Convention Center to give a presentation Destination Niagara USA Report on Niagara Falls Convention Center/Old Falls Street.

Following the presentation, the Chair called on Mr. Vilardo to present the last item on the Agenda related to a contract amendment for the Directors' consideration.

Mr. Vilardo explained that in 2018, USA Niagara began purchasing vacant parcels near the Niagara Falls State Park to return long-dormant land back to productive use and on July 8, 2022, USA Niagara issued a Request for Proposals ("RFP") titled "Niagara Falls Heritage

**DRAFT - SUBJECT TO REVIEW AND REVISION**

Gateways” to select a qualified architecture and engineering team to provide design and construction services for the project.

Mr. Vilaro noted that Practice for Architecture Urbanism (“PAU”) scored the highest and was approved by the USAN Board for the contract in November of 2022.

Mr. Vilaro explained that the original contract with PAU contained several tasks that were identified as optional and not included in the original contract because the full scope of the project was unknown at the time. Those tasks should be added as they are now required in order to advance the current preferred designs for the project.

Mr. Vilaro further explained that since the original contract did not include expertise related to water features, PAU must supplement their consulting contract team with an additional sub-consultant to perform this work, which will include additional services for structural engineering, lighting design, electrical engineering and all design work related to the proposed signature water feature.

Mr. Vilaro noted that the Directors are being asked to approve three things: 1. make a determination of responsibility with respect to the proposed contractor; 2. authorize the Corporation to enter into a contract amendment with PAU in an amount not to exceed \$341,663; and 3. authorize taking all related actions.

**DRAFT - SUBJECT TO REVIEW AND REVISION**

Following the full presentation, Chair DelMonte called for questions or comments from the Directors. Hearing none and noting that no comments were received from the public, upon motion duly made and seconded, the following Resolution was unanimously adopted:

USA NIAGARA DEVELOPMENT CORPORATION – Consulting Services Amendment –  
Niagara Falls Heritage Gateways Design – Authorization to Enter into a Contract  
Amendment with Practice for Consultant Services and to Take Related Actions

---

BE IT RESOLVED, that upon the basis of the materials presented to this meeting (the “Materials”), a copy of which is hereby ordered filed with the records of the Corporation, the Corporation hereby finds Practice for Architecture Urbanism DPC to be responsible; and be it further

RESOLVED, that the Corporation is hereby authorized to enter into a contract amendment with Practice for Architecture Urbanism DPC in an amount not to exceed THREE HUNDRED FORTY-ONE THOUSAND SIX HUNDRED SIXTY-THREE (\$341,663) for the purposes and services, and substantially on the terms and conditions, set forth in the Materials; and be it further

RESOLVED, that the President of the Corporation or his designee be, and each of them hereby is, authorized to take such action and execute such documents as may be necessary or appropriate to carry out the foregoing resolution.

\* \* \*

There being no further business, the meeting was adjourned at 11:26 a.m.

Respectfully submitted,

Yvonne Cooper  
Acting Corporate Secretary

**Item I. B.**



FOR CONSIDERATION

May 1, 2024

TO: The Directors

FROM: Anthony Vilaro

SUBJECT: USAN Procurement Guidelines

REQUEST FOR: Adoption of Revised Guidelines for the Use, Awarding, Monitoring and Reporting of Procurement Contracts

---

I. Background

Each year the USA Niagara Development Corporation (“USAN” or “the Corporation”) Directors adopt updated and revised Guidelines for the Use, Awarding, Monitoring and Reporting of Procurement Contracts, as mandated by §2879 of the Public Authorities Law (the “Guidelines”). There have been no substantive changes to Executive Orders and discretion to authorities in the past year that would require modification of the proposed 2024 Guidelines (the “2024 Guidelines”). New York State Urban Development Corporation d/b/a Empire State Development (“ESD”) staff reviewed the Guidelines and incorporated the following changes:

- Further clarifying the procedures for setting participation goals for Minority- and/or Women-owned Business Enterprises (MWBES) and Service-Disabled Veteran-Owned Businesses (SDVOBs);
- Reorganizing Section 2.1 (Procurement Process) to make it more readily understood and utilized by staff;
- Clarifying the Contract Approval Process in Section 9 to consolidate provisions and make the process easier to navigate;
- Adding additional details to the Notice to Proceed requirements in Section 9.2(c) to assist staff in more easily administering contracts; and
- Updating and adding section numbering, formatting and hyperlinks to ensure the Guidelines are as consistent, user-friendly and accessible as possible.

Accordingly, the proposed 2024 Guidelines have been revised to incorporate these revisions, as well as the changes for consistency. As with previous Guidelines, the proposed 2024 Guidelines are modeled directly upon ESD's procurement guidelines.

On March 28, 2024, the ESD Board adopted the revised Guidelines (the "2024 Guidelines"), which are designed to govern procurements by ESD and its subsidiaries, such as USAN. A copy of the 2024 Guidelines is attached. Approval is sought for the adoption by the USAN Directors of the 2024 Guidelines.

## II. Procurement Guidelines Summary

The proposed 2024 Guidelines set forth the policies and procedures to be followed by USAN when seeking to contract for goods or services. It should be noted that these Guidelines do not have the force of law, and are intended as a statement of best practices and procedures. No contract is invalid merely because these guidelines have not been followed.

The proposed 2024 Guidelines define the universe of procurement transactions which are subject to the policies and procedures. Generally, all procurements by USAN must be competitively awarded, except where State law provides for non-competitive sourcing (e.g., goods purchased from approved not-for-profit agencies for the blind, and procurements from the Office of General Services centralized contracts list). Based on the expected cost of procured goods and/or services, procurement contracts must be obtained after advertisement in the NYS Contract Reporter, except in limited instances where an exemption is obtained, generally for sole or single source procurements when only one vendor offers the desired goods or services or when a single vendor has unique qualities or experience that obviate a competitive process. The proposed 2024 Guidelines explain the various means of obtaining goods and services in an open, accountable and transparent manner, including incorporation of ESD's Bid Opening Guidelines and the compilation of a procurement record for every covered procurement contract.

The proposed 2024 Guidelines comply with the applicable provisions of the Public Authorities Law, the State Finance Law and the State Tax Law. They are consistent with the State Procurement Council's Guidelines and with the Governor's directive that all State agencies and public authorities make responsible spending decisions, and that they be accountable for sufficient monitoring of their spending to ensure the highest level of fairness, non-discrimination, openness and transparency.

The proposed 2024 Guidelines are intended to be user-friendly and are set forth in a logical and coherent fashion that will assist staff in understanding the procedures to be followed and the substantive rules that govern procurements.

Sources of help to users and information are included as clickable links, and virtually all required forms and ESD policy and procedure documents also can be accessed from within the document by hyperlinks. These links appear in blue font in the hard copy of the proposed 2024 Guidelines presented to the Directors for approval.

ESD subsidiaries are required to approve their own Procurement Guidelines in terms virtually identical to the 2024 Guidelines, with any departure therefrom fully explained by the subsidiary Board. In prior years, the USAN Board voted to deviate from the adopted ESD Guidelines by requiring USAN Board approval for contracts of at least \$150,000, rather than the \$250,000 threshold set forth in the ESD Guidelines. USAN is the only ESD subsidiary utilizing this threshold as all other active subsidiaries now utilize the \$250,000 threshold. It is therefore recommended that the USAN Board adopt the 2024 Guidelines without the deviation approved in past years, so that USAN's adopted procurement guidelines mirror those of other subsidiaries and the parent corporation. This will permit USAN to remain consistent with the 2024 ESD Guidelines and will permit the Corporation to efficiently approve and move contracts forward while still providing appropriate review and oversight of contracts by the USAN Board.

III. Environmental Review

ESD staff on behalf of USAN has determined that approval of the proposed 2024 Guidelines constitutes a Type II action as defined by the New York State Environmental Quality Review Act and the implementing regulations of the New York State Department of Environmental Conservation. No further environmental review is required in connection with the requested approval.

IV. Requested Action

The Directors are requested to adopt the proposed 2024 Guidelines for the Use, Awarding, Monitoring and Reporting of Procurement Contracts, effective as of April 1, 2024.

V. Recommendation

Based on the foregoing, I recommend approval of the requested action.

Attachments

Resolution  
Proposed 2024 Guidelines for the Use, Awarding, Monitoring and Reporting of Procurement  
Contracts

May 1, 2024

USA NIAGARA DEVELOPMENT CORPORATION – 2024 USAN Procurement Guidelines – Adoption of Revised Guidelines for the Use, Awarding, Monitoring and Reporting of Procurement Contracts

---

BE IT RESOLVED, that on the basis of the materials presented to this meeting, a copy of which is hereby ordered to be filed with the records of the Corporation, the proposed 2024 Guidelines for the Use, Awarding, Monitoring and Reporting of Procurement Contracts, a copy of which is attached to the materials, be and hereby is approved and adopted as of April 1, 2024; and the President or his designee is authorized to promulgate the said Guidelines in electronic form and other media for the use of the staff of the Corporation, and to take such other and further action as may be deemed necessary or appropriate to effectuate the foregoing Resolution.

\* \* \*

NEW YORK STATE URBAN DEVELOPMENT CORPORATION

D/B/A EMPIRE STATE DEVELOPMENT

Guidelines Regarding the Use, Awarding, Monitoring  
and Reporting of Procurement Contracts

Effective April 1, 2024

## Table of Contents

1.	Overview and Requirements.....	1
1.1.	Contracts covered, and not covered, by the Guidelines.....	1
1.2.	Types of Procurement Contracts.....	3
1.3.	General Procurement Principles.....	3
2.	Procurement: Overview and Requirements.....	4
2.1.	The Procurement Process Guide.....	4
2.2.	NYS Preferred Sources.....	5
2.3.	OGS Centralized Contracts.....	6
2.3.1.	Commodities Contracts.....	6
2.3.2.	Service Contracts.....	6
2.4.	Discretionary Purchases.....	6
2.5.	Piggyback Contracts.....	7
2.6.	Pre-Qualified Lists.....	7
2.7.	GSA Contracts.....	7
3.	Contract Reporter Exemptions.....	8
3.1.	Reasons for Exemptions.....	8
3.2.	Authorization for Exemptions.....	9
4.	How to Conduct a Competitive Solicitation.....	9
5.	Approval to Advertise.....	10
6.	Contents of ANY Procurement Solicitation.....	11
7.	Types of Solicitations.....	11
7.1.	General Information.....	11
7.2.	Requests for Proposals ("RFP").....	12
7.3.	Requests for Statements of Qualification ("RFQ").....	13
7.4.	Requests for Expressions of Interest ("RFEI").....	13
7.5.	Invitation to Bidders ("ITB").....	13
7.6.	Request for Applications ("RFA").....	14
8.	Compliance with Other Laws.....	14
8.1.	Compliance with State Finance Law § 139-j and 139-k (Lobbying).....	14
8.2.	Compliance with State Tax 220 or Law § 5-a (Sales Tax Registration).....	15
8.3.	Compliance with Executive Order 177 (Prohibiting Contracts with Entities that Fail to Address Discrimination).....	16
8.4.	Compliance with Executive Law Articles 15-A & 17-B: Contractor and Supplier Diversity.....	16
8.5.	Compliance with Iran Divestment Act of 2012.....	19
8.6.	Encouragement of use of New York Businesses as sub-contractors and suppliers....	20
8.7.	Project Sunlight.....	20
8.8.	Publication on ESD Website.....	20
8.9.	Contract Reporter Advertising Process.....	20
8.10.	Selection Criteria.....	21
8.11.	Bid Opening Procedures.....	21
8.12.	Bid Evaluation and Vendor Selection.....	22
8.13.	Determination of Responsibility — "DOR Review" and the VendRep form.....	23
8.13.1.	Cancellation of a Solicitation.....	24

8.14.	Procurement Record.....	24
8.14.1	Post Proposal Submission Activities.....	24
8.15.	Conflicts of Interest.....	25
9.	Contract Approval.....	26
9.1.	Board Materials.....	26
9.2.	ESD Contract and Amendment Approval.....	27
10.	Steps After Contract Approval Is Obtained.....	30
10.1.	Commitment Request Process (for contracts of \$50,000 or more).....	30
10.2.	Contract Reporter Award Notification.....	31
10.3.	[INTENTIONALLY OMITTED]	
10.4.	Division of Budget ("DoB") Approval.....	32
10.5.	OSC Jurisdiction Over Contracts in Excess of \$1 Million.....	32
11.	[INTENTIONALLY OMITTED]	
12.	Monitoring of Procurement Contracts.....	33
13.	Ethical Considerations.....	34
13.1.	Procurement Contracts Involving Former Employees of ESD.....	34
13.2.	Conflicts of Interest.....	34
13.3.	Unfair Advantage Prohibited.....	34
14.	Implementation of These Guidelines.....	35
15.	Reporting.....	35
15.1.	Annual Reports.....	35
16.	Effect on Awarded Contracts.....	35

NEW YORK STATE URBAN DEVELOPMENT CORPORATION  
D/B/A EMPIRE STATE DEVELOPMENT ("ESD")  
Guidelines Regarding the Use, Awarding, Monitoring and  
Reporting of Procurement Contracts

Effective April 1, 2024

**1. Overview and Requirements**

The following guidelines (the "Guidelines") are applicable to the use, awarding, monitoring and reporting of procurement contracts of the New York State Urban Development Corporation, d/b/a Empire State Development and its subsidiaries (collectively, "ESD"), ESD is required to adopt procurement guidelines by Article 9, Title 4 of the Public Authorities Law ("PAL"). The same law requires annual review and updating of the guidelines by the ESD Board of Directors ("Board"), and all subsidiaries Board.

These Guidelines are modeled on the New York State Procurement Guidelines published by the State Procurement Council (the "SPC Guidelines"). The SPC Guidelines apply to all State agencies and thus provide useful guidance for procurement by ESD (which is not a State agency as that term is defined in the SPC Guidelines). The SPC Guidelines cover some issues and procedures rarely encountered by ESD but should be consulted by staff if a situation arises that does not appear to be covered in these Guidelines, since useful guidance may thereby be obtained. View the [SPC Guidelines](#).

In these ESD Guidelines, a person, firm or corporation who wishes to provide goods and/or services to ESD may be called a "**vendor**" or "**offeror**" or, when responding to a public solicitation for qualified vendors or expressions of interest in becoming an ESD vendor, a "**respondent**."

**It is imperative that the proper steps are followed when procuring a vendor. Failure to follow the proper steps such as buying goods or services without proper approvals may leave both the purchaser and Corporation in a vulnerable position. Under no circumstance should anyone acquire goods or services without the necessary approvals or required documents. Please be advised that this apply to both new procurement and amendments or modifications of procurements. Corrective steps including but not limited to restarting an entire procurement process may be taken if ESD Procurement Guidelines are not strictly followed.**

**1.1. Contracts covered, and not covered, by the Guidelines**

Pursuant to PAL § 2879 (2), "**Procurement Contracts**" are any written agreements for the acquisition of goods or services of any kind in the actual or estimated amount equal to five thousand dollars (\$5,000) or more. Contracts which are intended to earn money or other assets or benefits to ESD (often referred to as "**revenue contracts**") are also considered Procurement Contracts for the purposes of these Guidelines.

For purposes of compliance with anti-lobbying laws contained in State Finance Law § 139-j and 139-k (see section 8.1), Procurement Contracts also include the purchase or lease of any interest in real property which involves an estimated annualized expenditure by ESD in excess of fifteen thousand dollars (\$15,000).

**Disposition of property** (real or personal) by ESD is not a procurement covered by these Guidelines but is instead subject to ESD's [Property Disposition Guidelines](#). However, where a property disposition requires a competitive process, that process should be conducted in accordance with these Guidelines to the extent practicable.

**Loans and grants** made by ESD in furtherance of its economic development mission are not Procurement Contracts, but may be subject to certain provisions of these Guidelines, including Office of the State Comptroller ("OSC") review and approval for grants over \$1 million (see p. 23, Section 10.5).

A Contract or Memorandum of Understanding ("MOU") with a sister State agency or authority is not considered a Procurement Contract covered by these Guidelines. Note, however, that appropriate approval(s) as set out in these Guidelines (including Board approval based on the amount and/or duration of the agreement, as well as OSC approval for binding agreements) may apply to MOUs.

In connection with certain of its projects, ESD may need to obtain a license from a governmental agency, authority, or company or a public utility in order to enter the licensor's premises and perform work. As a precondition to receiving the license, ESD can be required to enter into agreements with the licensor that prescribe conditions for work to be performed on the site, including work and/or oversight of work which must be performed by the licensor's personnel or contractors, as well as payment of licensor costs by ESD. Examples include licenses for work on rail and utility facilities. Agreements of this kind, often referred to as "**forced contracts**," are not covered by the competitive solicitation requirements of these Guidelines, because ESD has no discretion or authority with respect to the work to be performed by the licensor's personnel and contractors. However, appropriate approval(s) as set out in these Guidelines (including Board approval based on the amount and/or duration of the agreement) would apply.

Procurement Contracts **under \$50,000** may be handled by **Purchase Order** approved by Department Head, Controller's Office and Contracts Administration. A formal competitive solicitation is not required, but these purchases should be made after obtaining three quotes whenever practicable. For further information, consult the Procurement Coordinator.

Minority and Women-Owned Business Enterprise (MWBE) goal setting applies to any contract in an amount of \$25,000 and greater. The Office of Contractor & Supplier Diversity (OCSA) must assign a MWBE goal or request an exclusion for approval. Exclusions are contracts that do not have subcontracting opportunities or where there is no availability of certified MWBEs to perform or provide specific goods or services. ESD is required to document this by searching the New York State MWBE Directory, and consulting with ESD's assigned Agency Services Analyst or the MWBE Business Development Unit. Exclusions will only be granted if MWBEs are solicited to participate as prime contractors or no MWBEs are available to participate as prime contractors. If

seeking an exclusion and MWBE firms are in the Directory, ESD will need to solicit quotes to these firms to verify if they meet ESD's needs. If these firms don't meet the required needs, ESD must provide adequate documentation and submit the exclusion request to the DMWBE for approval. If not approved, ESD will assign a goal. The prime contractor is required to meet the goal or document good faith efforts to meet the goal.

## **1.2. Types of Procurement Contracts**

The types of goods and services requiring Procurement Contracts include goods and services needed to proceed with an ESD project, or to support the administrative needs of ESD. Procurements of goods cover the entire spectrum of goods, ranging from pens to motor vehicles.

Procurements of personal services include but are not limited to legal, accounting, auditing, management consulting, investment banking, underwriting, financial advice, temporary employees, planning, training, statistical analysis, research, public relations, architectural, engineering, construction, surveying, appraisal, or other services of a consulting, professional or technical nature for a fee, commission or other compensation by a person or persons who are not providing such services as officers or employees of ESD.

Reasons for procuring personal services include:

- a. Requirements of special expertise or unusual qualifications;
- b. Nature, magnitude or complexity of services required;
- c. Lack of sufficient in-house resources, support staff, specialized facilities or equipment;
- d. Short-term or infrequent need for the services; and
- e. Distance of the location(s) where the services must be performed from ESD offices or facilities.

Term Contracts (sometimes referred to as "open retainer" contracts) are also included in and covered by these Guidelines. These contracts may be used when ESD anticipates using a vendor or vendors multiple times over a given period of time. In such cases, a maximum contract period must be specified when the contract is entered into. In all other respects, these Guidelines apply.

## **1.3. General Procurement Principles**

ESD's procurement process is designed to:

- Ensure fair and open competition;
- Guard against favoritism, improvidence, extravagance, fraud and corruption;
- Ensure that the results meet agency needs;
- Provide checks and balances to regulate agency procurement activities; and
- Protect the interests of ESD, the State and taxpayers.

Procurement Contracts are to be awarded on a **competitive basis** to the maximum extent practicable. Such awards are generally made after notice of the procurement opportunity is published in the **New York State Contract Reporter** where the amount of the contract is **\$50,000 or more** and after the evaluation of proposals obtained, whenever practicable, from at least three qualified vendors or respondents, including where practicable at least one State-certified minority-or woman-owned business enterprise ("MWBE") and one service-disabled veteran-owned business ("SDVOB"). (See Section 7: Types of Solicitations). Monetary thresholds may not be avoided by artificially splitting or breaking up contracts into lesser agreements, or entering into a series of agreements, for sums below the dollar thresholds. Also, if a mini bid is completed and the bidders have all submitted costs that are equal to or greater than the threshold of \$50,000, an RFP must be posted on the contract reporter.

All mini bids in the amount of \$25,000 or greater must be forwarded to OCSD to review whether MWBE and/or SDVOB goals will apply to the contract.

Competition in the procurement process serves both ESD and potential vendors by ensuring that the procurement process produces an optimal solution at a reasonable price; and allowing qualified vendors an opportunity to obtain ESD business, while the process guards against inflated pricing, favoritism, fraud and collusion; and allows all qualified vendors an opportunity to obtain ESD business.

## **2. Procurement: Overview and Requirements**

### **2.1. The Procurement Process Guide**

#### **I. Purchases greater than \$5,000 and less than \$50,000**

- Preferred Source: If ESD's procurement needs can be met by a preferred source vendor, you **must** use this option. See section 2.2.
- OGS Centralized Contract: If ESD's needs cannot be met by a preferred source, you may elect to use an OGS Centralized contract. Please follow OGS guidelines of each specific contract as indicated in section 2.3.
- Informal Solicitation: If ESD's needs cannot be met by the above options, you may elect to conduct an informal solicitation, in the following order:
  - Discretionary Purchase: a discretionary purchase through the use of a NYS certified MWBE, SDVOB or a NYS Small Business (see section 2.4).
  - Mini-Bid: a mini-bid from vendors on a current pre-qualified list (see section 2.6) or a mini-bid to a minimum of three vendors equipped to provide services. One of the vendors in each solicitation should be an MWBE/SDVOB whenever practicable (see section 6). Contact the Procurement Unit for further assistance if needed.

- **Emergency/Single Source/Sole Source:** If this is an emergency situation, one vendor is best suited to perform the work, or there is only one vendor that can meet the needs required for service, the initiating department head must justify the need procure the vendor as an Emergency, Single Source or Sole Source in the justification memo and forward it to the Procurement Unit to review.

## **II. Purchases of \$50,000 or greater**

- **Preferred Source:** If ESD's procurement needs can be met by a preferred source vendor, you **must** use this option. See section 2.2.
- **OGS Centralized Contract:** If ESD's needs cannot be met by a preferred source, you may elect to use an OGS Centralized contract. Please follow OGS guidelines of each specific contract as indicated in section 2.3.
- **Informal Solicitation:** If ESD's needs cannot be met by the above options, you may elect to conduct an informal solicitation, in the following order:
  - **Discretionary Purchase:** a discretionary purchase through the use of a NYS certified MWBE, SDVOB or a NYS Small Business (see section 2.4).
  - **Mini-Bid from a Pre-Qualified List:** a mini-bid from vendors on a current pre-qualified list (see section 2.6). One of the vendors in each solicitation should be an MWBE/SDVOB whenever practicable (see section 6). Contact the Procurement Unit for further assistance if needed.
- If ESD's needs cannot be met by the above options, use a Request for Proposals ("RFP"), Request for Qualifications ("RFQ") or Request for Expressions of Interest (RFEI"), and **advertise in the Contract Reporter** (see section 4) unless this procurement warrants a Contractor Reporter Exemption as set forth herein.
- **Emergency/Single Source/Sole Source:** If this is an emergency situation, one vendor is best suited to perform the work, or there is only one vendor that can meet the needs required for service, a Contract Reporter Exemption request may be appropriate (see Section 3).

### **2.2. NYS Preferred Sources**

Goods and services needed by ESD may be available, without the need for competitive procurement, from New York State Preferred Sources. If a Preferred Source has goods or services available in the form, function and utility required by ESD, at a price not more than 15% above the prevailing market rate, the goods or services should be obtained through the Preferred Source in the following prioritized order: NYS Department of Correctional Services Correctional Industries Program (CORCRAFT); approved charitable non-profit agencies for the blind; and approved charitable non-profit agencies for the severely disabled, qualified programs for the mentally ill, and qualified veterans workshops. For

information on these Preferred Sources, see State Finance Law §162 and the Office of General Services ("OGS") Preferred Sources Guide. The Guide is exhaustive, but the main points are easy to follow.

### **2.3. OGS Centralized Contracts**

Goods and services needed by ESD may be available, without the need for a competitive procurement, through Centralized Contracts held by OGS. Please follow the OGS guidelines for each specific contract.

#### **2.3.1 Commodities Contracts**

The OGS Procurement Services Group (PSG) establishes centralized contracts for commodity contracts in the form, function and utility required by State agencies, for a wide range of items commonly acquired by agencies. If the commodity is available from a centralized contract in form, function and utility consistent with ESD's need, such item may be purchased from the centralized contract. However, ESD may competitively procure items otherwise available on a centralized contract when the resultant price is less.

#### **2.3.2 Service Contracts**

ESD has discretion to use the OGS centralized service contracts list. A wide and diverse range of services from routine maintenance to complex technology-based acquisitions are available through these OGS contracts. Again, ESD may competitively procure items otherwise available on the OGS centralized contract list when the resultant price is less.

### **2.4 Discretionary Purchases**

Pursuant to PAL § 2879(3)(b)(i) and State Finance Law §163(6), ESD may purchase services or commodities from small business concerns, from those certified pursuant to Article 15-A of the Executive Law (MWBEs), from those certified pursuant to Article 17-B of the Executive Law (SDVOBs), or commodities or technology products that are recycled or remanufactured, in an amount up to \$500,000, without a "formal competitive process." In such a case, three quotes should be obtained wherever practicable, and Contract Reporter advertising is advisable when time permits.

Staff should assess whether a formal competitive process, or one that is less formal but still competitive, may best meet ESD's needs. The award of a discretionary purchase contract should be published in the Contract Reporter.

As with any other procurement, for discretionary purchases the initiator must:

- review the Preferred Source list and OGS Centralized Contracts to determine whether the desired goods or services are available to meet ESD's needs;
- ensure that the commodities, services or technology acquired meet ESD's form, function and utility needs;
- document and justify the selection of the vendor;

- document and justify the reasonableness of the price; and
- ensure that ESD buys from responsible vendors.
- Obtain board approval if the contract amount is over \$250,000

## **2.5 Piggyback Contracts**

ESD may find it efficient to establish a contract based on another governmental entity's contract. This is known as "piggybacking" and may be used in accordance with the criteria established by OGS in the Contract Piggybacking Guidelines under State Finance Law § 163(10)(e), available at <https://www.ogs.state.ny.us/procurecounc/pdfdoc/pgbguidelines.pdf>. Note that a piggyback procurement requires approval by the OGS Procurement Services Group — this can be difficult and time-consuming to accomplish, as the OGS staff are not very familiar with public authority procurement policies and practices. For example, if the agency you wish to piggyback on is a State agency, it will have different contractual terms than those used by ESD. This may lead to delay, if OGS decides to seek approval of the proposed ESD contract terms from the Attorney General. Piggybacking is better accomplished when you wish to use a contract established by another public authority (rather than a State Agency).

## **2.6 Pre-Qualified Lists**

Goods and services needed by ESD may be available without the need for full competitive procurement, from a pre-qualified list of vendors that have been vetted for qualifications and pricing. When selecting from a pre-qualified list, solicitations should go out to as many providers on the list as practicable including an MWBE or SDVOB entity if pre-qualified.

When a member of a prequalified firm leaves the firm to one that is not on the prequalified list, the prequalification follows the member. A new contract would be required.

Also, ESD staff will have the option of adding additional vendors to Prequalified Lists for a variety of reasons including but not limited to increasing the number of prequalified vendors to better serve ESD's needs. A list of all current ESD Pre-Qualified Lists will be made available to ESD Staff via ESD's Intranet. A link to exact location will be sent via Broadcast messages to all ESD staff.

If a vendor was procured from a prequalified list that has expired and is not on the current prequalified list, any contract amendment must be accompanied by a contract reporter exemption.

Adoption of the Pre-Qualified Lists by ESD subsidiaries are now covered under ESD's board approval. The subsidiaries no longer have to hold a special session to approve board materials.

## **2.7. GSA Contracts**

ESD is permitted to order from federal General Supply Schedules (GSA) through the GSA Multiple Award Schedule (MAS) program. GSA has already determined the prices of supplies and fixed-price services and rates for services offered at hourly rates under GSA

contracts to be fair and reasonable. However, the originator shall evaluate all responses received using the evaluation criteria provided to the GSA contractors to determine whether the total price is reasonable and represents the best overall value to ESD. The advantages of using this program include competitive pre-negotiated terms, conditions, and competitive prices with the flexibility to seek more discounts.

Please see below link to GSA Multiple Award Schedule program.

<https://www.gsa.gov/travel/plan-book/per-diem-rates/per-diem-rates-results/>

### 3. **Contract Reporter Exemptions**

#### 3.1. **Reasons for Exemptions**

Advertising a procurement in the Contract Reporter is generally required unless specific grounds exist that constitute a reason for exemption. A Contract Reporter exemption may be granted by the Officer(s) specified in Attachment A to these Guidelines, only if any of the following circumstances can be demonstrated:

(a) **Sole Source.** Only one source for the goods or services is available. Three examples of sole source procurements: (i) proprietary software compatible with ESD operating systems that no-one else offers; (ii) a printer's warranty requiring that only a toner cartridge supplied by the manufacturer could be used without voiding the warranty; (iii) a vendor has developed a proprietary system for remediating contaminated land, unavailable from anyone else.

(b) **Single Source.** The required goods or services are available from two or more vendors, but a compelling reason exists to make the award to a particular vendor. A request for a single source exemption must include information about the alternatives considered and justification that price is reasonable. One common example of a single source procurement is where a vendor needs to complete work on a project for which it was originally competitively procured.

*In general, the Corporation's policy is to minimize the use of single source contracts and to maximize the use of competitive procurement methods. Please discuss a contract reporter exemption request early on in the process with Contracts Administration and Procurement Counsel.*

(c) **Emergency Circumstances.** Emergency circumstances exist when an urgent and unexpected situation arises which places public health or safety or the use or conservation of resources at risk and requires immediate action. Poor or late planning does not constitute an emergency. Contracts entered into as a result of an emergency situation should only cover the goods or services reasonably necessary to stabilize, ameliorate or remedy the situation. An example is a hazardous condition at a building owned by ESD: a contractor can be hired immediately to deal with the situation.

**NOTE:** Notwithstanding any Contract Reporter exemption that may be granted for any of the reasons set forth above, a reasonable attempt should be made wherever practicable to solicit at least three competitive bids, with written confirmation of the bids furnished within a reasonable time and maintained in the contract file. Also, any sole or single source contract awarded in the amount of \$50,000 or more should be published in the Contract Reporter (Economic Development Law, §143(4)). This publication requirement does not apply to contract amendments.

### **3.2. Authorization for Exemptions**

The initiator of the proposed contract must complete a Contract Reporter Exemption form, signed by the Officer(s) specified in Attachment A to these Guidelines.

The memorandum requesting the exemption must document in reasonable detail: the circumstances establishing the exemption justification; a description of the goods or services to be acquired via the exemption; description of funding source; any alternatives considered; and the basis for determining that the cost of the proposed contract is reasonable under the circumstances. The Contract Reporter Exemption form can be found [http://intranet.empire.internal/Finance/2022/ContractReporterExemptionRequestForm\\_July%202022.docx](http://intranet.empire.internal/Finance/2022/ContractReporterExemptionRequestForm_July%202022.docx). If the proposed contract amount is over \$250,000 or is a personal services contract that will last more than one year, the exemption authorization should be obtained before ESD Board or President approval. If the proposed amount is \$250,000 or less, and the term of the contract is less than one year, the exemption authorization should be obtained from the Officer(s) specified in Attachment A to these Guidelines, prior to contract execution and the commencement of any services or delivery of any goods.

Note that even if a Contract Reporter exemption is granted, compliance with SFL § 139-j and 139k (Lobbying Laws) and State Tax Law § 5-a must still be satisfied (see Section 8.1, p.12). Where appropriate, a statement from the staff initiator that the price obtained for the goods or service is compatible with market pricing must be presented with the exemption request.

At the time ESD enters into a contract with a single or sole source provider for an amount in \$50,000 or more, ESD should submit an announcement of the contract for publication in the NYS Contract Reporter and must identify the recipient of the contract.

## **4. How to Conduct a Competitive Solicitation**

- **Get Approval to Advertise:** Fill out the ESD Procurement Opportunity Advertisement Approval form for Corporate or Subsidiary and forward it for review along with procurement solicitation material to the Procurement Department for review. See section 5.
- **Approval of Advertisement and Contract Reporter:** When review is completed, material is sent to the Officer(s) specified in Attachment A to these Guidelines for approval. Upon approval, you may submit your solicitation through the Contract

Reporter, with a minimum of 15 business days for responses. Solicitation should also be posted on the ESD and Subsidiary (if applicable) website. See section 8.9.

- **Bid Opening and Selection:** All bids must be submitted via a designated Dropbox which link should be provided in each solicitation. Staff can then conduct a review and selection process. See section 8.11.

In order to avoid the risk of submitting a late bid, ESD suggests that potential bidders submit their bids approximately 24 hours before the deadline.

- **Board Approval:** Once a vendor is selected, staff must obtain Board approval, where required. See section 9.1
- **Preparation of Commitment Package:** Once Board approval is granted; staff must prepare a commitment package and enter it into Peoplesoft for Contract processing. See section 10.1.

## 5. **Approval to Advertise**

Prior written approval of the Officer(s) specified in Attachment A to these Guidelines is required when you need to advertise a procurement opportunity, including Requests for Proposals ("RFPs"), Requests for Statements of Qualifications ("RFQs") and Requests For Expression of Interest ("RFEIs") (See Section 7: Types of Solicitation).

Note also that other approvals may be required to comply with State Division of Budget procedures (see Section 11.4). Submit the ESD Procurement Opportunity Advertisement Approval form (select [Corporate](#) or [Subsidiary](#)) to the appropriate officer at least 10 business days in advance of the relevant New York State Contract Reporter publication submission date (the Contract Reporter is published daily).

## 6. **Contents of ANY Procurement Solicitation**

For all Procurement Contracts (see section 1.1), whether the procurement is formal (such as an RFP, RFQ or RFI) or informal (such as procurement for less than \$50,000, or a Discretionary Purchase from an MWBE or SDVOB for up to \$500,000, or procurement from a pre-qualified list) the same basic information should be included in the solicitation:

- (i) What goods are being sought or what scope of services is desired;
- (ii) What the projected length ("term") of the resultant contract will be;
- (iii) What criteria will be used in evaluating bids, and how those criteria are weighted. For example, price, bidders' expertise, the qualifications of the proposed staff; past history of government contracts, references/testimonials, understanding of ESD's mission, and either diversity practices (commitment to

- sound diversity practices within the firm) or a firm's status as a certified MWBE and/or SDVOB<sup>1</sup>;
- (iv) A schedule of relevant dates (when bid is due, when questions may be asked or briefing meetings/interviews held, etc.);
  - (v) Contact information for a designated contact at ESD is the only person at ESD to whom communications about the solicitation may be directed. Failure to abide by this requirement may result in disqualification of the bidder.
  - (vi) ESD's insurance requirements (obtained from Contract Administration for all solicitations);
  - (vii) ESD's contractor and supplier diversity requirements: MWBE and SDVOB goals, if applicable (goals should be identified before seeking approval to advertise);
  - (viii) Disclosure to bidders that they must be able to demonstrate that they are responsible bidders, in good standing under the laws of New York and capable of fulfilling the requirements of the contract, and untainted by past non-performance or criminality;
  - (xi) A copy of the ESD standard terms and conditions to which the successful bidder will be expected to agree. This will generally be ESD's Schedule A - Standard Terms and Conditions (For [Materials and Services](#) or for [Law Firms](#)). IMPORTANT: ESD's standard terms and conditions must be sent to potential vendors as early in the process as possible, to avoid later disputes about terms.
  - (x) VENDREP Form where needed (See Section 8.13);
  - (xi) Proof that the vendor is authorized to do business in New York State, if services are to be performed in New York State. Generally, this will require NYS Department of State Registration, which can be checked [here](#).
  - (xii) Encouragement of use of New York State businesses as sub-contractors or suppliers (See Section 8.6).

A template for informal solicitation language can be viewed in the below link.

<https://cdn.esd.ny.gov/CorporateInformation/Data/ENCOURAGINGUSEOFNEWYORKSTATEBUSINESSESINCONTRACTPERFORMANCE.pdf>.

## **7. Types of Solicitations**

### **7.1. General Information**

There are a number of procurement techniques available, including Request for Proposals (RFP) and Request for Statements of Qualifications (RFQ) and, rarely, Requests for Expressions of Interest (RFEI). When selecting among these various approaches, the determining factors are:

---

<sup>1</sup> Program regulations provide that ESD can either score a firm's diversity practices or the firm's status as a certified MWBE, but not score both in the same procurement. So, if certified firms are likely to respond, then the solicitation should request proof of certified status. But if it is more likely that no MWBE will respond to a solicitation, the solicitation should request diversity practice information instead. In either event, this factor must not exceed 10% of the overall technical score.

- The importance of price or cost as a component in the review of incoming bids or proposals; and
- The ability to define specifications for goods or services being acquired, or to obtain those specifications from potential vendors (where the RFEI may be useful).

Generally, contracts for goods are to be awarded on the basis of "lowest price" and contracts for services are to be awarded on the basis of "best value" among responsive and responsible vendors. "Best value" is the basis for awarding service and technology contracts to the vendor that optimizes quality, cost and efficiency, among responsive and responsible vendors. The basis for a "best value" contract award must be, wherever possible, quantifiable. However, all procurement solicitations issued by ESD are to be guided by the same basic principles:

Clarity: Procurement documents should clearly convey to vendors what ESD wants to buy;

Fairness: No vendor should be advantaged over another. All information concerning the solicitation shall be conveyed in writing to all vendors participating in the process, including but not limited to process rules and evaluation criteria (note that vendors must submit a statement of non-collusion (see s. 7.2 below)

Openness: All relevant vendors should have an equal opportunity to respond to the offering.

Disclosure of Selection Criteria: The criteria for awards should be developed before bids/proposals are received. Vendors should know generally the basis upon which their offers are being judged. Note that if cost is weighted below 20%, a written justification for such weighting should be prepared and included in the Procurement Record;

Efficiency: The process should be efficient, fair and able to withstand public scrutiny.

## **7.2. Requests for Proposals ("RFP")**

RFP solicitations may range from relatively uncomplicated procurements to highly complex, long term efforts involving the significant commitment of both ESD and vendor resources. RFPs follow a common format, focusing on a description of tasks including, but not limited to:

- Description of program objectives and background;
- Scope of services to be provided;
- Detailed requirements or specifications (required qualifications of vendors, "what" is needed and "how" services should be provided). Note that the terms of the RFP may not be knowingly tailored to favor a particular vendor;
- Statement of Non-Collusion required by s. 2878 of the Public Authorities Law (responders must certify that they have not colluded with any other responder(s) in their proposal).

Please see below link to view ESD's standard RFP template.

[http://intranet.empire.internal/Finance/2019/RFP\\_Template-June2019v2.docx](http://intranet.empire.internal/Finance/2019/RFP_Template-June2019v2.docx)

### **7.3. Requests for Statements of Qualification ("RFQ")**

RFQs are appropriate for retention of qualified pools of contractors to provide defined types or scopes of services (and, rarely, goods) required by ESD on a regular or semi-regular basis as the need arises. Competitive establishment of a pool or list of pre-qualified vendors is appropriate, for example, in the case of contractors or property appraisers. If ESD has established a list of pre-qualified contractors, unless services will be rendered by all qualified vendors at rates not to exceed a pre-set maximum, three quotes should be obtained from vendors on the list, and/or from vendors known to ESD outside the list. Amendments to contracts with vendors selected from a pre-qualified list should also follow this mini-bid process (and comply with all requirements in Section 9.2).

Where a vendor's eligibility to be on a pre-qualified list is contingent upon the vendor's agreement that professional services will be rendered at pre-established rates, or will not exceed certain limits, this solicitation should be accomplished through an RFP.

After ESD has established a list of pre-qualified vendors, staff may enter into open retainer contracts (sometimes called "Term Contracts") with one or more vendors on the list, for no set dollar amount but, in the case of personal services, not to exceed a term of three years. This process facilitates the use of purchase orders against the contract, and Board or President/CEO approval, if required, can be obtained at such time as a scope of services and dollar amount are identified, or if the term will be extended beyond one year. All transactions executed as part of a Term Contract will follow standard approval procedures as per sections 9 and 10 of these guidelines. Please consult with Procurement and Legal if you wish to enter into such an arrangement.

Please see below link to view ESD's standard RFQ template.  
<http://intranet.empire.internal/Finance/2023/RFQ-Template-Feb-23.docx>

### **7.4. Requests for Expressions of Interest ("RFEI")**

RFEIs are generally appropriate when ESD does not know the precise scope of services or goods required and wishes to obtain this information from prospective vendors. An example would be a proposal for adaptive re-use of ESD or other State surplus property, where the re-use is likely to be dependent on the prospective respondents' needs or ideas.

### **7.5 Invitation to Bidders ("ITB")**

Invitation to Bidders ("ITB") are used strictly for construction related projects. Usually, in such case, the scope of work is predetermined and well defined. The only determining factor in choosing the preferred vendor is cost. Utilization of this process means that there is no opportunity to negotiate prices, fee structures, or level of services with a preferred vendor or vendors.

Upon receipt of bids submitted on or before the deadline

Please see below link to view ESD's standard ITB template and a sample bid form.  
<http://intranet.empire.internal/Finance/2022/ITB-Template-10-2022.docx>  
<http://intranet.empire.internal/Finance/2022/ITB-Bid-Form-sample.docx>

## **7.6 Requests for Applications ("RFA")**

RFA are often used for grant and loan disbursements. It is not considered as a Procurement. Although, some of the procurement forms are included in an RFA.

Please see below link to view ESD's standard RFA template.

<http://intranet.empire.internal/Finance/2022/RFA-Template-10-2022.docx>

## **8. Compliance with Other Laws**

### **8.1. Compliance with State Finance Law 4 139-i and 139-k (Lobbying)**

State Finance Law ("SFL") § 139-j and 139-k apply to all Procurement Contracts over \$15,000, regardless of whether the contract was competitively bid.

Among other things, SFL § 139-j and 139-k: (i) govern permissible communications between potential vendors, and staff of ESD, its subsidiaries, or other involved governmental entities during the procurement process; (ii) require the disclosure of such communications, as well as prior determinations of vendor non-responsibility; and (iii) establish sanctions for knowing and willful violations of such provisions, including disqualification from eligibility for an award of any contract. Specifically, SFL § 139-j and 139-k require that only permitted ESD and subsidiary contact person(s) identified in solicitation materials may communicate with potential bidders regarding the solicitation, from the issuance of the earliest written notice of a Request for Proposal through the final award and approval of any resulting contract. This period is defined by law as the "Restricted Period."

SFL § 139-j (6)(b) also requires potential vendors to complete the Offeror's Affirmation of Understanding and Agreement to comply with ESD's procedures relating to permissible contacts. This written affirmation is deemed to apply to any amendments to a procurement submitted by ESD after an initial affirmation is received with an initial bid.

SFL § 139-k governs the disclosure of prior non-responsibility determinations by potential vendors. SFL § 139-k (5) requires potential vendors to certify that the information they provide to ESD for consideration in its determination of vendor responsibility is true and accurate. Therefore, all prospective vendors must complete and submit two forms mandated by SFL § 139j and § 139-k as part of their proposals: 1) [the Offeror's Affirmation of Understanding and Agreement.](#), and 2) [the Offeror's Disclosure of Prior Non-Responsibility Determinations.](#)

When contacted during the Restricted Period, ESD staff must obtain the following information: the name, address, telephone number, place of principal employment and occupation of the person or organization making the contact. Further, ESD staff must inquire whether the person or organization making the contact was the offeror or retained, employed or designated by the offeror. All such recorded contacts must be included in the procurement record for the procurement contract.

In addition, ESD staff must record any contacts that reasonably appear to be an attempt to influence the procurement process as well as contacts with staff members other than the designated contact person(s) during the Restricted Period of procurement. However, SFL § 139-j and 139-k do not prohibit an offeror from communicating with a member of the State legislature or legislative staff about a government procurement, provided such member of the State legislature or legislative staff is acting in his or her official capacity. If a vendor is found to have knowingly and willfully violated the State Finance Law provisions, that prospective vendor and its subsidiaries, related or successor entities will be determined to be a non-responsible vendor, and will not be awarded any contract issued pursuant to the solicitation. Two such findings of non-responsibility within a four-year period can result in debarment from obtaining any New York State government procurement contract.

For further guidance, ESD staff engaged in the procurement process should review [ESD's policy regarding permissible lobbying contacts](#), and the [required language for solicitations by ESD and its subsidiaries](#) to ensure compliance with SFL § 139-j and 139-k. See also the OGS website on procurement lobbying, found at <https://ogs.ny.gov/acpl>.

Note that, once a recommended vendor has been selected after compliance with the competitive bidding process, it may be necessary for staff members to negotiate contract terms, etc., with the designated vendor. Those negotiations are not prohibited, and need not be conducted only by the designated contact person, although it is good practice to have the contact person present. However, any communication from a person other than the vendor that may reasonably be considered to be an effort to influence the negotiation of a contract (either positively or negatively) is an impermissible contact and must be reported as such. For example: an ESD employee who is in the process of negotiating the terms of a land development deal which the Board has not approved, receives a call from an outside person saying that the vendor should get more development land because the vendor has a wonderful track record. Such a call constitutes lobbying and must be reported as such. The caller should be informed that the call will be reported and asked to communicate directly with the designated contact person in the future.

## **8.2. Compliance with State Tax ST-220 or Law 5-a (Sales Tax Registration)**

State Tax Law § 5-a prohibits ESD and its subsidiaries from approving any contract valued at more than \$100,000 with any entity if that entity or any of its affiliates, subcontractors or affiliates of any subcontractor makes sales within New York State of tangible personal property or taxable services having a value over \$300,000 during the four quarters preceding the proposed contract date, and is not registered with the Department of Taxation and Finance ("DTF") for sales and compensating use tax purposes.

Accordingly, all respondents to a solicitation where the amount of the contract is expected to exceed \$100,000 must include in their responses a properly completed [Form ST-220-CA](#). However, if a vendor is not registered with DTF because of a lack of sales of over \$300,000 within the relevant period, the vendor must submit an [affidavit so certifying](#). Note also that § 5a does not apply to contracts for architectural, engineering or surveying services. If in doubt, contact the ESD legal department after having reviewed [DTF Publication 223](#).

Failure to include a properly completed form ST-220-CA or affidavit may be a basis for considering any such response incomplete. However, the vendor or respondent should be given an opportunity to cure such failure, because some agencies do not require the form until contract signing, and vendors may not realize that ESD practice is different. Only the primary respondent vendor completes Form ST-220-CA, but Schedule A to Form ST 220-CA requires detailed information from the vendor's sub-contractors, such as tax ID number, etc. If applicable, certificates of authority evidencing registration with DTF for sales tax purposes must be attached by the prime vendor and all the sub-contractors.

Further in accordance with the requirements of § 5-a, any contract resulting from a solicitation will require periodic updating of the certifications contained in Form ST-220-CA.

### **8.3. Compliance with Executive Order 177 (Prohibiting Contracts with Entities that Fail to Address Discrimination)**

EO 177, issued on February 3, 2018, directs all State agencies, including public authorities, to amend their procurement procedures to prevent contracting with entities that have institutional policies or practices that fail to address the harassment and discrimination of individuals on the basis of their age, race, creed, color, national origin, sexual orientation, gender identity, Military status, sex, marital status, disability, or other protected basis. As of June 1, 2018, all ESD contracts must contain a representation that the vendor's policies or practices do not fail to address harassment and discrimination.

### **8.4. Compliance with Executive Law Articles 15-A & 17-B: Contractor and Supplier Diversity**

#### **Background**

All Procurement Contracts must comply with the requirements of New York Executive Law Article 15-A, which governs the New York State MWBE Program. The purpose of the MWBE Program is to eliminate historic barriers to participation by minority and women-owned business enterprises in State contracting. The MWBE Program contributes significantly to ESD's mission of promoting a growing State economy; encouraging business investment and job creation; and supporting diverse, prosperous local economies across the State. Staff should be familiar with the [MWBE Operations Primer](#) published by the Division of Minority and Women's Business Development to ensure compliance with MWBE-related laws and requirements.

All Procurement Contracts must also comply with the requirements of New York Executive Law Article 17-B, which acknowledges that SDVOBs strongly contribute to the economies of the State and the nation. Staff should familiarize themselves with the [SDVOB Operations Guidance and the Guidelines for the Use of Set Aside Contracts with SDVOBs](#) published by the Office of General Services (“OGS”), Division of Service-Disabled Veterans' Business Development to ensure compliance with SDVOB-related laws and requirements.

**ESD staff are expected to encourage the use of MWBEs and SDVOBs in all procurements, including any amendments to existing contracts. Staff must reach out to the Office of Contractor and Supplier Diversity ("OCSD") as early as possible in the procurement process**

**in order to facilitate goal setting for each contract.** Additionally, upon advertising a solicitation for a new opportunity, staff should consider publicly posting a list of State-certified MWBEs or SDVOBs who have expressed interest in subcontracting opportunities in connection with the solicitation. Click here for an example of how to advertise interested MWBEs and SDVOBs:

[https://esd.ny.gov/sites/default/files/rfp/M\\_WB\\_E%20BGA%202019%20Listing%20of%20Certified%20Firms%20Expressing%20Interest.pdf](https://esd.ny.gov/sites/default/files/rfp/M_WB_E%20BGA%202019%20Listing%20of%20Certified%20Firms%20Expressing%20Interest.pdf)

### **Executive Order 162**

Pursuant to Executive Order Number 162 ("EO 162"), all New York State contracts, agreements and procurements issued and executed on or after June 1, 2017 require contractors to submit detailed workforce utilization reports that include the job title and gross wages of each employee of a contractor and subcontractor performing work on a State contract either or each employee in the contractor's and subcontractor's entire workforce, if the individuals working directly on a State contract cannot be identified. A State contract includes all agreements in excess of \$25,000 for services and commodities, and all agreements in excess of \$100,000 for construction. Contractors and subcontractors performing work on construction contracts with a total value in excess of \$100,000 are required to submit workforce utilization reports to on a monthly basis, within ten (10) days of the end of that month. Contractors and subcontractors performing work on commodities and service contracts with a total value in excess of \$25,000 are required to submit workforce utilization reports to on a quarterly basis within ten (10) days of the end of that quarter.

### **Goal setting**

All State contracts, including revenue contracts, as defined in State Finance Law Section 139-j, exceeding \$25,000 for commodities and/or services, and \$100,000 for construction **must** be assessed for MWBE & SDVOB goals. For ESD's purposes, a State contract includes commodities procurements, professional services contracts, loans, grants, and leases of real property involving construction, demolition, replacement, and major repairs or renovation.

OCSD is responsible for ensuring ESD's compliance with the MWBE and SDVOB Programs. OCSD works with ESD program staff (project managers, program directors, originators and procurement officers) to determine if a contract is eligible for MWBE and SDVOB goal setting, exempted from goal setting, or excluded from goal setting.

"Exemptions" are defined contracts which are excluded from MWBE and SDVOB goal setting. Some examples of exemptions are wages, benefits, and other employee-expenditures; debt service; travel reimbursement; utilities; OGS centralized services; sole source contracts (subject to there being no MWBE or SDVOB available to participate as sub-contractor when subcontracting is appropriate); postage; telephones; operating transfers; certain rentals and repairs; and special departmental charges (i.e. unemployment insurance and tuition reimbursement).

"Exclusions" are contracts that either do not have subcontracting opportunities or no availability of certified MWBEs or SDVOBs to perform or provide specific goods or services. In cases where a contract is awarded by a means other than an RFP, including, but not limited to discretionary purchases and single source contracts, **DMWBD/OGS will only grant an exclusion if MWBEs**

**or SDVOBs are solicited to participate as prime contractors or no MWBEs or SDVOBs are available to participate as prime contractors.**

It is important to know multi programs projects cannot be assessed on a single goal rather individual contracts must be assessed for goals.

OCSD may determine that an MWBE goal below the agency-specific goal of 30% is appropriate because there are limited or no subcontracting opportunities and/or limited or no availability of certified MWBEs to perform or provide specific good or services. All goals of less than 30% MWBE participation, must be forwarded to the Executive Chamber for review and must include documentation to reflect the reason for goal reduction.

### **Waiver Requests**

A firm responding to a solicitation or already engaged on an ESD contract, after making good faith efforts to achieve the maximum feasible portion of an MWBE and/or SDVOB participation goal, may submit a [Waiver Request Form](#) to OCSD with appropriate information documenting its "good faith efforts" to meet its goals. The waiver process includes reviews by: OCSD Compliance Manager and the OCSD Director. The Executive Chamber must approve MWBE waiver requests before a waiver can be issued.

MWBE waivers must be sought even if the overall MWBE goal is met but either the Minority-owned Business Enterprise or the Women-owned Business Enterprise component of the MWBE goal is not met in part or in full. SDVOB waivers must be sought if the assessed goal is not achieved.

"Good Faith Efforts" are the actions that all contractors must demonstrate to certify they have performed their due diligence to solicit MWBE and SDVOB participation in support of their State contract goals. Good Faith Efforts requirements are outlined in 5 NYCRR §142.8 (MWBEs) and 9 NYCRR § 252.2(n) (SDVOBs). A waiver of MWBE or SDVOB goals will not be granted unless the contractor has provided documentation of good faith efforts. In addition to completing a waiver request form, the contractor shall also provide OCSD with supporting information including, but not limited to:

- A statement setting forth the basis for the waiver request;
- The names of general circulation, and trade association publications in which certified MWBE/SDVOBs were solicited for the purposes of complying participation goals related to this contract;
- A list identifying the date(s) that all solicitations for certified MWBE/SDVOB participation were published in any of the above publications;
- A list of all certified MWBEs appearing in the [NYS Directory of Certified Firm](#); and all certified SDVOBs appearing in the [OGS Directory](#) that were solicited for purposes of complying with the participation goals;
- Copies of notices, dates of contact, letters, and other correspondence as proof that solicitations were made in writing and copies of such solicitations to all certified MWBEs/SDVOBs;
- Copies of responses to solicitations received from certified MWBEs/SDVOBs;
- Copies of bid prices from all respondents to a solicitation; and

- A description of any contract documents, plans, or specifications made available to certified MWBEs/SDVOBs for purposes of soliciting bids and the date and manner in which these documents were made available.

In the event that a waiver is not granted or approved by one or all of the above parties, OCSD may assess liquidated damages or seek settlement in accordance with the MWBE and/or SDVOB Regulations and the provisions of the contract language.

Where practical, feasible and appropriate, ESD shall promote and encourage participation by MWBEs and SDVOBs in the selection and award of all contracts. Such MWBE and SDVOB participation shall be documented in a regular supplement, prepared by OCSD, for inclusion in the quarterly and annual reports made by Contracts Administration to the Board. To assist in the gathering of this information, the originator must provide OCSD with a completed Utilization Plan of MWBE and, separately, SDVOB Participation, from the potential contract awardee, for OCSD's review and approval, prior to contract award. The required forms are accessible at: <https://esd.ny.gov/office-contractor-and-supplier-diversity> (scroll down to "Non-Discrimination and Contractor & Supplier Diversity Forms").

#### **8.5. Compliance with Iran Divestment Act of 2012**

Every bid or proposal made to ESD pursuant to a competitive solicitation as provided in these Guidelines must contain the following statement, signed by the bidder or respondent and affirmed as true under penalty of perjury:

"By submission of this bid, each bidder and each person signing on behalf of any bidder certifies, and in the case of a joint bid each party thereto certifies as to its own organization, under penalty of perjury, that to the best of its knowledge and belief that each bidder is no on the list created pursuant to paragraph (b) of subdivision 3 of section 165-a of the State finance law The list in question is maintained by OGS and is available here:

<http://www.ogs.ny.gov/about/regs/docs/ListofEntities.pdf>. No bid that fails to certify compliance with this requirement may be accepted as responsive, unless the bidder includes a statement in compliance with the Iran Divestiture Act (contact the Legal Department for guidance in such a case).

#### **8.6. Encouragement of use of New York Businesses as sub-contractors and suppliers.**

The Secretary to the Governor has issued a directive that provides that all vendors who anticipate using sub-contractors or suppliers to fulfill procurement contracts must be encouraged (but not required) to use New York State businesses. All procurement solicitations of any kind must include specific language aimed at such encouragement. The model language can be found at <http://intranet.empire.intemal/Finance/USEOFNYSBUSINESSES.pdf>

## **8.7. Project Sunlight**

Project Sunlight is an important component of the Public Integrity Reform Act of 2011. Under this law, State governmental entities specified in the law are required to cooperate with the Office of General Services (OGS) and identify in a database developed by OGS all individuals, firms or other entities (other than State or local governmental agencies) that appear before such entity on behalf of themselves or in a representative capacity on behalf of a client or customer for any of various specified purposes. This includes appearances related to (a) procurement, (b) ratemaking, (c) regulatory matters, (d) judicial or quasi-judicial proceedings, (e) adoption or repeal of a rule or regulation.

Project Sunlight's reporting requirement for procurement appearances applies to those appearances that are for the purpose of procuring a State contract, irrespective of whether there is a governmental procurement planned. Thus, reporting is required for appearances relating to State contracts for which a Restricted Period under the Procurement Lobbying Law has not been established and without regard to whether a governmental procurement is anticipated. Appearances during the Restricted Period—whether they are bid clarification meetings or bid interviews or any other permissible contact under the State Finance Law do not need to be reported. As well as, appearances following the award of a State contract do not need to be reported.

## **8.8. Publication on ESD Website**

Competitive solicitations must be made available on the ESD (and subsidiary, if applicable) website after advertisement in the NYS Contract Reporter. This website is also the appropriate place to post Questions and Answers regarding the procurement.

## **8.9. Contract Reporter Advertising Process**

As stated above, ESD must advertise in the New York State Contract Reporter all contracts for the acquisition of goods and services of \$50,000 or more, unless an exemption is granted. In order to access the online system and place the advertisement, the initiator should contact Contracts Administration.

The minimum time for vendors to respond to a Contract Reporter solicitation is 15 business days (i.e., Saturdays, Sundays and legal holidays are excluded). The Contract Reporter website provides authorized users with a publication calculator tool in order to calculate the earliest due date for a solicitation.

Where practicable, staff members responsible for a proposed Procurement Contract should make reasonable efforts to identify potential vendors in addition to those identified through the Contract Reporter. This may be done by obtaining referrals from other governmental entities that may have similar requirements, reviewing reference directories, mailing solicitation materials to industry associations and/or known vendors and mailing to lists of appropriate MWBEs, listed at <https://ny.newnycontracts.com/FrontEndNendorSearchPublic.asp>, as well as any appropriate SDVOBs, listed at <https://online.ogs.nv.gov/SDVOB/search>

## **8.10. Selection Criteria**

Written selection criteria shall generally be established for each proposed Procurement Contract and shall be included in any written solicitation materials. The relative weighting of the selection criteria should be set out in the RFP wherever practicable and, in the absence of written weighting, each criterion shall be deemed to have the same weight.

The selection criteria shall generally include price as an important factor to be considered in the selection process; however, many ESD procurements are based on "Best Value," which allows for factors other than price to be considered. Such factors commonly include the quality of goods and services, the experience of the vendor and specific expertise with respect to the goods or services to be supplied. See also Section 7.1 above if price is weighted at less than 20%.

Starting in January 2020, for MWBE prime contractors, a ten percent bidding credit was established for low-bid construction projects subject to public buildings law §8 that are up to \$1.4 million in value.

## **8.11. Bid Opening Procedures**

In an effort to be more environmentally conscious, ESD has recently moved toward electronic submissions of bids/proposals/applications via drop boxes. A specific dropbox is created for each solicitation. Proposals/Bid Forms/Applications must be submitted on time and compliant with RFP/RFQ/RFA/or ITB requests. There is no bid opening for electronic submission. The entire process is controlled by the Procurement Unit. Documents submitted via any other method other than the drop box will not be accepted.

Although Mini-bids are handled by the originating department, Procurement should be informed before the solicitation process starts to ensure compliance. Procurement will conduct audits of ESD mini-bids process on a quarterly basis.

However, there might be circumstances under which, because of the size of the expected proposals or other reasons, ESD reverts back to the old model of having proposals/bids submitted via hard copies. In such case, bidders will have to adhere to the below format. Proposals should be received by the Procurement Unit (unless the Procurements Senior Director in charge of the solicitation directs otherwise), and immediately should be stamped with the date and time of receipt. **Do not open any bid packages for any reason before the formal bid opening.** ESD staff members representing Contracts Administration, Procurements, Legal and the initiating Department/Subsidiary should be present at bid openings in person or by teleconference. Bids shall be opened by the Procurement Senior Director or his/her designee, and the time and date of receipt shall be entered into the Bid Log, which must be signed by all staff members present. Teleconference participants must confirm their presence by email to the Procurements Director. The Bid Log shall also record the presence of SFL 139j-k and ST-220 forms in the bid.

A Public Bid Opening is required for Public Works contract solicitations, pursuant to UDC Act § 11 (which incorporates by reference State Finance Law § 135). This section generally covers bids for construction work on public projects, and may include preparatory work such as demolition, asbestos

abatement and the like. ESD or a subsidiary must be a party to the contract, which must involve the use of laborers, mechanics or workers (not, for example, architects and engineers). Construction contracts must be awarded to the lowest qualified and responsible bidder. See UDC Act § 11. The definition of a "Public Work" is more a matter of art than law: if in doubt as to whether the contract is for Public Work, contact the Legal Department for guidance. Please ESD and its subsidiaries typically use Information to Bidders (ITB) for this type of work. Because the bids are submitted electronically, the Public Bid Opening mentioned in the afore paragraph has been replaced by a Public Bid Announcement. This type of announcement is usually conducted via a conference call.

### **8.12. Bid Evaluation and Vendor Selection**

The initiating Department Head should establish, as early as practicable prior to bid opening, a team of at least three ESD staff members with relevant knowledge and experience of the goods and/or services being procured. One member should come from Contracts Administration or Finance. The Procurement Unit controls and monitors the integrity of the entire procurement process. The Procurement Director must be present at the first meeting held for planning an RFP through the approval of the selected bidder by ESD's Board of Directors; In order to maintain transparency, the Procurement Director will serve as the only liaison between the Procurement Unit and Potential bidders. As such, the primary and secondary contact names on the RFP should be those of the Procurement Directors. At times, the Procurement Director can serve on the Review Committee, but must always be present to monitor the integrity of the procurement process. The Procurement Director will assign staff if there is a conflict and the Procurement Director is unable to attend. It is possible to have one or more non-ESD team members join the review team, where those persons have specific knowledge of the procurement subject, or a specific role to play in the administration of the contract with the successful bidder. This involvement of non-ESD persons is appropriate because § 2824 (1) of the Public Authorities Law permits authorities such as ESD to "take into consideration the views and policies of any elected official or body, or other person" in the exercise of its powers and duties, provided that ESD must "apply independent judgment in the best interest of the authority, its mission and the public." If non-ESD staff is included in the review team, the team must be expanded in number such that a majority will always be ESD staff members.

Analysis of the proposals and/or bids submitted, and the award of the contract shall be documented in reasonable detail. Award to anyone other than the low bidder must include in the documentation the reason the low bidder was not selected. ESD always seeks to award the best value proposal.

In an effort to streamline and bring a level of uniformity to the process, both the Q&A matrix and the scoring matrix will be provided and maintained by the Procurement Director. All members of the Review Committee must complete and sign scoring sheets that rate each bidder according to the selection criteria and weighting set out in the RFP. Scoring sheets must not include anything other than numerical ratings (i.e., no comments/opinions/notes, etc.). Original scoring sheets must be signed and submitted to only the Procurement Director as part of the Procurement Record.

### **8.13. Determination of Responsibility — "DoR" and the VendRep Form**

Pursuant to State Finance Law § 139-j (7), ESD or the Subsidiary Board must determine that a vendor or respondent is a responsible contractor, prior to approving the award of a contract. In any event, whether or not a formal Determination of Responsibility ("DoR") is sought from the relevant Board, the initiator should ensure that all vendors are "responsible." **For all procurements, the initiator must submit a memo to the Procurements Director attesting that the initiator conducted both a DoR and a thorough review of the VendRep.** View [Determination of Responsibility form](#). In addition to consulting the resources listed on the Determination of Responsibility form, staff may find it useful to consult OSC's list of suggested resources, at <http://www.osc.State.ny.us/vendrep/webresources.htm>, or review OGS's bulletin of [best practices](#) for determining vendor responsibility.

#### **Category and Factors to be considered include but not limited to:**

- a) Financial and Organizational and Capacity: Assets, liabilities, recent bankruptcies, equipment, facilities personnel resources and expertise, and proper auditing and accounting controls.
- b) Legal Authority: Authority to do business in New York State, licenses, and registrations.
- c) Integrity: Criminal indictments or convictions, civil fines and injunctions imposed by other agencies, anti-trust investigations, ethical violations, tax delinquencies, or debarment by federal, State or local governments.
- d) Previous Contract Performance: Report of less satisfactory performances, early contract termination for cause, contract abandonment, court determination of breach of contract.

It is imperative that the DOR is conducted very early in the process in order to avoid wasting time on proposals for bidders that might be ineligible.

- The OSC VendRep Questionnaire, which should be used wherever possible and is required for all purchases of \$100,000 or more. This form seeks information about the vendor, its affiliates and subsidiaries, officers and owners, past responsibility determinations by agencies and investigations/prosecutions. It must be notarized, and false statements may be actionable and, in some cases, may be criminal. The VendRep forms for different types of vendors can be accessed here: [www.osc.state.ny.us/vendrep/webresources.htm](http://www.osc.state.ny.us/vendrep/webresources.htm).

If a vendor is considered to be non-responsible, steps must be taken to afford the vendor due process rights, including an opportunity to explain its position in writing and, in some cases, at a meeting. Consult the ESD Legal Department in such cases, after having reviewed the Information at <https://ny.spro.ogs.ny.gov/sites/default/files/uploaded/OSCBestPracticeforVendorResponsibility.pdf>.

Pursuant to Governor Cuomo's Executive Order No. 192, issued on January 15, 2019, all vendors, suppliers, service firms and most other contractors to State agencies and Public Authorities (such as ESD), must remain "responsible" throughout the term of the contract. There are serious consequences if contractors fail to maintain responsibility. This requirement is expressly included in ESD standard contracts, being set forth in Schedule A.

#### **8.13.1. Cancellation of a Solicitation**

On occasion, the competitive solicitation process does not yield any satisfactory responses and ESD wishes to pursue other methods of procurement. To notify the public that ESD has cancelled a solicitation, the initiator should (1) inform all respondents via phone call (which should be documented for the procurement record), letter or email of the cancellation and (2) publish or post notice of the cancellation in each place that the solicitation was published (usually the Contract Reporter and the ESD website) for no less than 2 weeks. If the decision is made to re-advertise the opportunity, the project team should scrutinize the initial solicitation document to determine whether any restrictions can be lifted, or the document can otherwise be revised to produce better results.

#### **8.14. Procurement Record**

The initiator shall be responsible for creating and maintaining a record of the procurement process. Such record shall contain documentation related to the procurement process, any competitive solicitation exemption, proposals and/or bids received, scoring sheets, vendor responsibility documentation and other documents prepared or used by the bid reviewers in their vendor selection process. Note that final scoring sheets must be sent to the Procurements Director before a contract is executed.

#### **8.14.1 Post Proposal Submission Activities - Debriefing of Unsuccessful Respondents**

With respect to unsuccessful respondents, a debriefing is available upon request. The solicitation must include information advising bidders that a debriefing may be requested by any unsuccessful offeror, within 15 calendar days of notification by ESD that the proposal or bid submitted by the unsuccessful offeror was not selected for an award. Debriefing is typically conducted by video conference, over the phone, or through written correspondence. The purpose of the debriefing is to be open and transparent, and to promote future competition. The debriefing should address strengths, weakness; and provide other relevant information that ESD used to determine best value, including the qualitative and quantitative analysis used in assessing the relative merits of the proposal. The Procurement Director is responsible for debriefing unsuccessful respondents and all correspondence must come from Procurement. ESD is precluded from disclosing the content of any other proposal during the debriefing that would jeopardize the integrity of the procurement or impede contract negotiations.

## **8.15 Conflicts of Interest**

Respondents must have read, understood and comply with the provisions of the conflict of interest attestation found here: <https://esd.ny.gov/sites/default/files/Conflict-of-Interest-Attestation-June-2019.pcif>

ESD shall have the right to disqualify any Respondent to this RFP or terminate any contract entered into as a result of this RFP should ESD determine that the Respondent has violated any of these requirements.

**a. Gifts and Offers of Employment:** Respondent has not and shall not during this procurement and during the negotiation of any contract resulting from this procurement, offer to any employee, member or director of ESD, any gift, whether in the form of money, services, loan, travel, entertainment, hospitality, thing or promise, or in any other form, under circumstances in which it could reasonably be inferred that the offer was intended to influence said employee, member or director, or could reasonably be expected to influence said employee, member or director, in the performance of the official duty of said employee, member or director or was intended as a reward for any official action on the part of said employee, member or director. Respondent may not make any offers of employment or discuss the possibility of such offers with any employee, member or director of ESD who is involved in this procurement and/or resulting contract negotiation within at least 30 days from the time that the employee's involvement in this matter closed.

**b. Disclosure of Potential Conflicts:** Respondent shall disclose any existing or contemplated relationship with any other person or entity, including relationships with 15 any member, shareholders of 5% or more, parent, subsidiary, or affiliated firm, which would constitute an actual or potential conflict of interest or appearance of impropriety, relating to other clients/customers/employers of the Respondent or former officers and employees of ESD, in connection with your rendering services enumerated in this RFP. If a conflict does or might exist, Respondent must describe how it would eliminate or prevent it.

**c. Disclosure of Ethics Investigations:** Respondent must disclose whether it, or any of its members, shareholders of 5% or more, parents, affiliates, or subsidiaries, have been the subject of any ongoing investigation or disciplinary action by the New York State Commission on Public Integrity or its predecessor State entities (collectively, "Commission"), and if so, a description must be included indicating how any matter before the Commission was resolved or whether it remains unresolved.

## 9. Contract Approval

Procurement Contracts for goods with a total value of **up to \$250,000** must be approved by the Officer(s) specified in Attachment A to these Guidelines. Board approval is not required for these contracts, but if the contract value is **between \$50,000 and \$250,000** (or whatever amount the applicable subsidiary board approval threshold is), it must also be approved by the President of ESD (or the applicable subsidiary) or his or her designee.

Procurement Contracts for personal services contracts with a total value **up to \$250,000** that will be completed within one year must be approved by the Officer(s) specified in Attachment A to these Guidelines. Board approval is not required for these contracts, but if the contract value is **between \$50,000 and \$250,000** (or whatever amount the applicable subsidiary board approval threshold is), it must be approved by the President of ESD (or the applicable subsidiary) or his or her designee.

Procurement Contracts with a total value **in excess of \$250,000**, as well as any personal service contracts for any amount with a term greater than one year, must be approved by the ESD (or applicable subsidiary) Board.

For the purposes of this section, several types of service contracts are not considered “personal service contracts, and therefore do not require approval by the ESD (or applicable subsidiary) Board unless the total value of the contract exceeds \$250,000 in the aggregate through its term, inclusive of any contract amendments or extensions. These non-personal service contracts include but are not limited to: insurance policies; warranties; product maintenance or service contracts; product support contracts, software as a subscription (“SaaS”) contracts and true leases. If you are uncertain whether a particular contract is a personal or non-personal service contract, please contact the Procurement Unit for the appropriate guidance.

In addition to the requirements above, all contracts with a technology component must be approved by ESD's Information Security Officer or designee prior to execution or Board approval.

### 9.1. Board Materials

The initiator writes a memorandum from the respective Department Head to the Officer(s) specified in Attachment A to these Guidelines, explaining the need for the contract. View [Model Directors' Materials for Procurement Contracts](#) (these materials can also be used for obtaining approval of the President or his or her designee by adding a [CEO/Designee Approval Cover Memo](#)). The Board materials must set out:

- a. the need for goods and services;
- b. a brief description of the goods or services needed;
- c. the expected maximum cost of the proposed goods or services;
- d. the selection process used to determine an award based on best value, or where not quantifiable, the justification which demonstrates the best value will be achieved; and
- e. the funding sources.

## 9.2. ESD Contract and Approval - Contracts Over One Year.

- a. If staff anticipates that a contract may need to be extended beyond one year, ensure that Board approval is requested and that the materials and resolution specifically permit an extension of the contract. Once Board approval is obtained, the contract with the vendor must contain a clause that specifically permits extension. If the contract does not contain such a clause, and the contract needs to be extended, Contract Reporter advertising is required unless an exemption is granted. If a contract has already been presented to the board and it needs to be extended because the work took longer than expected; A No Cost Time Extension can be provided without further board approval as long as sufficient funds remain to cover the work that needs to be done.
- b. **Contracts for personal services** to be rendered over a period of more than one year, regardless of the amount of the contract, which must have been approved by the Board, must in addition be reviewed annually by the ESD (or subsidiary) Directors, pursuant to Public Authorities Law § 2879.3(b)(ii). The initiating Department Head must provide an annual report setting forth the status of all continuing services contracts, together with justification for the continuance of such contracts for the next year. This annual status report can be made to Contracts Administration by filling out a contract summary/contract status report. The annual status reports will thus serve to clarify the need to continue existing multi-year service provider contracts. Note also that warranty and product maintenance/support/lease contracts (including but not limited to auto and equipment leases) are not considered personal service contracts.
- c. Contract documents should be fully executed and delivered by both parties prior to the commencement of any work. However, if in the discretion of the initiating Department Head it is essential that work on the contract be commenced before the formal contract documents have been approved, and before Board or President approval if required, the officer named in Attachment A to these Guidelines may issue a letter authorizing a contractor to commence work pending completion and execution of formal contract documents ("**Notice to Proceed**"), provided that:
  - i. the contract is not subject to OSC approval (See Section 10.5); and
  - ii. the authorization contained in the Notice to Proceed is (a) \$250,000 or less and (b) does not exceed 20% of the total contract value; and
  - iii. the initiating Department Head seeking the Notice to Proceed obtains in advance, via memorandum (with copies sent to Contract Administration and Procurement) an explanation in reasonable detail the need for the immediate commencement of contract

performance, and the written authorization of the Officer(s) specified in Attachment A to these Guidelines.

- iv. Notice to Proceed can be used prior or after board approval and has a lifespan of just one year. No more than one Notice to Proceed can be used per contract.

All Notices to Proceed shall include:

- a) A statement or scope of the tasks the vendor will commence and/or complete pursuant to the Notice to Proceed;
- b) The fees and other costs for completing the tasks, including hourly fees and anticipated numbers of hours or fees for each completed task, as appropriate; and
- c) Any deliverables and/or milestones that the vendor is expected to provide/meet while working pursuant to the Notice to Proceed.

#### d. Contract Amendments

- i. **Amendments to existing contracts** generally follow the same process as new contracts, i.e., any amendment over \$50,000 needs to be advertised in the Contract Reporter, exempted, or awarded to a firm on a pre-qualified list after soliciting bids from three other firms including at least one MWBE firm and one SDVOB firm. An Amendment Package must be sent to Contracts Administration for approval and processing (see Commitment Request Package on the next page for guidance). The same documents, such as justification memo/contract status report, commitment request form and/or standard amendment form must be generated. If the proposed amendment will involve a new Contract Reporter advertisement or other solicitation, the requirements of SFL §139-j and 139-k and State Tax Law § 5-a will apply, and in any case, new certifications may be required. Note that an amendment to an existing contract that causes the aggregate amount of the contract to exceed \$1 million may be subject to OSC approval, regardless of the amount of the amendment and source of funds. If the proposed amendment will be for a different scope of work, the process for a new contract should be followed
- ii. Amendments that increase the **contract amount** to more than \$250,000 must be approved by the ESD (or subsidiary) Directors. Amendments for less than 10% of the original contract amount (or the contract amount as subsequently approved by the Board) may be executed by the ESD officer named in Attachment A to these Guidelines without further Board approval, unless the amendment

increases the contract to an amount above \$250,000 and Directors' approval has not been previously obtained.

- iii. If a proposed amendment to a contract for personal services will increase the **term** of the contract to more than one year, Board approval is necessary, and Contract Reporter advertising is necessary unless (i) as discussed in paragraph (a) above, the original contract contained a clause specifically permitting extension; or (ii) the amendment is awarded to a vendor on a pre-qualified list following wherever practicable the receipt of three quotes from other vendors on the list including at least one from a certified MWBE or SDVOB fir; or (iii) the amendment increases the term of the contract by not more than three months, and approval for the extension is given by the person named in Attachment A to these Guidelines If the amendment will increase the amount of time or other terms of the contract but **will not increase the contract amount**, the initiator need not submit a new Commitment Request Package. Additionally, if the amendment will only increase the length of the contract with no other changes, Board approval is not required as this is deemed a “no cost time extension” amendment.
- iv. In the case of contracts for more than \$1 million, where the initiator anticipates that unforeseen contingencies and changes of scope may arise and require changes in the contract amount, Board approval should be sought from the outset for amendment of the contract up to 10% of the amount approved, to be executed without further Board approval by the Chief Executive Officer and/or the Chief Financial Officer of the corporation. Note that such an amendment may require OSC review and approval (see section 10.5). If in doubt, consult the Legal Department.

**Example A:** Original contract for \$100,000 was awarded competitively. The initiator wishes to amend the contract for an additional \$5,000. Because the amendment is for less than \$50,000 it does not require advertisement or an exemption, and because it will not increase the total contract amount to more than \$250,000\* and is less than 10% of the original contract amount, it does not require Board approval. This example also assumes that the amendment will not extend personal services beyond one year, and so will not require Board approval.

\*Some subsidiaries have lower monetary thresholds for board approval.

**Example B:** Original contract for \$40,000 was awarded via purchase order. Due to unforeseen circumstances, the initiator wishes to amend the contract for an additional \$20,000. Because the amendment will bring the total revised amount over the threshold of \$50,000, it can no longer be treated as a requisition. Staff will take the necessary steps to complete a sequence package.

**Example C:** Original contract for \$5 million was awarded competitively and approved by the Board and by OSC. The Board also approved the power to amend the contract to reflect an increase in the scope of services/goods, in an amount not to exceed 10% of the original approved amount, with the amendment to be approved by the CEO/CFO. The initiator wishes to amend the contract for an additional \$300,000. Because the amendment is less than 10%, and the contract has previously been approved by the Board, no further Board approval is necessary, but Contract Reporter advertising is still necessary, unless an exemption is granted (see section 3.2 above).

**Example D:** Original contract for \$100,000 was awarded to a firm on a Board-approved pre-qualified list. The initiator wishes to amend the contract for an additional \$50,000 and extend the term beyond one year. Because the amendment will extend the contract term beyond one year, Board approval is necessary. However, because the firm was pre-qualified through a competitive process no further contract reporter advertising is necessary (but the initiator should solicit bids from three other firms on the list where practicable, including at least one MWBE and one SDVOB).

## **10. Steps After Contract Approval Is Obtained**

### **10.1. Commitment Request Process (for contracts of \$50,000 or amendments that bring the total revised amount over the threshold of \$50,000)**

- a. The contract initiator should assemble and submit via Peoplesoft a Commitment Request Package containing the following documents:
  1. [A Commitment Request Form \(composed in Peoplesoft\).](#)
  2. [A Contract Summary/Justification Memorandum](#) (composed in PeopleSoft) explaining the need for the procurement and the method of procurement used.

One (1) completed original of the [Standard Form Contract - Short Form for Goods/Services](#) or [Standard Form Amendment or Modification of Contract](#) with: (i) Schedule A (conditions applicable to procurements of goods/services or legal services); (ii) Schedule B (Participation By Minority and Women-Owned Business Enterprises: Requirements and Procedures); (iv) Schedule B-1 (Participation by Service-Disabled Veteran-Owned Businesses with Respect to State Contracts); (v) Appendix A (ST-220 Contractor Certification Form pursuant to Tax Law § 5-a); (vi) Appendix B (Compliance with SFL § 139-j and 139-k, the Offeror's Affirmation of Understanding and Agreement pursuant to SFL §139-j; and (vii) Appendix C (Offeror). Disclosure of Prior Non-Responsibility Determinations under SFL § 139-k). Remember that the provisions and the requirements of the proposed contract must be specific and stated in clear and unambiguous terms so they are fully understood by the contracting parties. It is important that the contract clearly specify what is expected of both the contractor and ESD, and the method of payment to the contractor. The clearer and more specific the contract, the easier it will be to monitor. The terms of the contract should include, but not be limited to:

- the scope and purpose of the contract;
- the description of the services to be performed;
- the location where the work is to be performed;

- the standards to be used to measure performance (e.g. units of services, number and nature of clients served, target dates, etc.);
  - the level of expertise that is required to perform the tasks, the cost and the method payment of the contract;
  - the projected starting date and the contract period;
  - the finished product or the services to be delivered;
  - record-keeping and reporting requirements, including a statement that ESD and any relevant State agency has the right to audit the contractor's records;
3. Written explanation of the DOR review. View [Determination of Responsibility form](#). For contracts valued at \$100,000 or more, staff must also submit a VendRep Form completed by the vendor (not applicable to vendors outside NY).
  4. ESD/Subsidiary Board of Directors or CEO/designee approval, if applicable. View [sample Board materials](#) and [CEO/Designee Approval Cover Memo](#).
  5. Depending on the procurement method used: (i) the Contract Reporter advertisement and posting of bid results and internal approval to advertise and the scoring sheet/bid opening log; or (ii) an approved exemption letter; or (iii) the OGS Centralized Contract; or (iv) a copy of the relevant Board-approved prequalified list.
    - a. All appropriate insurance certificates, as approved by the ESD Insurance Administrator, a copy of the appropriate officer's approval and a copy of the RFP, if applicable. Note that all contractors must have evidence of Workers' Compensation and Disability Insurance coverage.
    - b. Contract Administration routes and tracks the commitment package and obtains necessary approvals from various ESD departments via PeopleSoft.
    - c. Upon full approval and execution, the original copy of the fully executed contract or amendment is sent by Contract Administration to the vendor.
    - d.

## **10.2. Contract Reporter Award Notification**

A contract is considered awarded when it is executed (signed) by all parties. If a contract is awarded after a Contract Reporter Solicitation, the award, along with the Schedule of MWBE and SDVOB Participation (and/or Disadvantaged Business Enterprise Participation, where applicable), must be posted on the Contract Reporter system. This posting will be done by Contracts Administration.

## **10.3. [INTENTIONALLY OMITTED]**

#### **10.4. Division of Budget ("DoB") Approval**

Under DOB Bulletin B-1184, approval for certain procurements over \$500 is required. In general, if a State or legislative appropriation is the source of funds, approval is needed. A web-based application known as the "Agency Spending Controls Application" process is used to obtain prior approval. DOB approval is not required when the funding source for the procurement comes from a non-State source (e.g., a developer of an ESD project), where at least 75% of the procurement cost will be reimbursed by federal funds, or when the procurement is needed to address an immediate threat to public health and/or safety. DOB mandated forms are used in cases where approval is required. ESD has implemented the cost control measures described in Bulletin B1184. All spending not involving Federal reimbursement of at least 75 percent, presenting an immediate threat to public health and/or safety or whose funding source is from a Third Party is subject to the preapproval process specified in the Budget Bulletin utilizing forms established by

DOB known as Attachment A. An Attachment B form was also created for spending involving Federal reimbursement of at least 75% or presenting a public health and/or safety issue.

For instructions and forms, see the ESD Employee Intranet: [Financial Resources](#). If in doubt, contact the ESD Controller's Department for guidance.

#### **10.5. OSC Jurisdiction Over Contracts in Excess of \$1 Million**

Under Public Authorities Law § 2879-a (effective March 1, 2010), ESD must make certain communications to OSC about certain types of contracts valued at more than one million dollars. OSC has issued final regulations implementing this law, and OSC approval shall be deemed part of these Guidelines. A memorandum explaining the application and procedures involved in OSC approval has been circulated to all relevant staff and may be viewed [here](#).

**"Eligible Contracts"** are contracts in excess of one million dollars that are either: (i) to be paid for in whole or in part by State appropriations; or (ii) noncompetitively awarded (regardless of the funding source).

**"Eligible Contract Amendment"** is any modification to (A) an Eligible Contract; or (B) a contract executed after March 1, 2010 where the value as amended is in excess of \$1 million where (i) the contract as amended will be funded in whole or in part by State appropriations; or (ii) the contract was originally awarded noncompetitively; or (iii) the contract was originally awarded competitively but the modification was "neither contemplated nor provided for" in the original solicitation (i.e., new scope).

- ESD must annually report to OSC all Eligible Contracts/Amendments that it anticipates in the next fiscal year and revise such report within 30 days of learning of any significant changes to the annual report.
- ESD must give OSC 10 days' notice before (i) publishing a solicitation that ESD expects will result in an Eligible Contract/Amendment that was not previously reported to OSC or (ii) executing a noncompetitive Eligible Contract/Amendment that was not previously reported to OSC.

- ESD must file all Eligible Contracts/Amendments that are not subject to OSC approval (see following paragraph) with OSC within 60 days of execution. Certain Eligible Contracts/Amendments that are the subject of a written notice must also be approved by OSC within 90 days after the contract is signed. A list of active written notices can be viewed here. If approval by OSC has not been obtained, the signed contract "shall not be a valid enforceable contract."  
**All submissions to and communications with OSC are to be handled by Contracts Administration only. Submit nothing to OSC directly.**

OSC has confirmed that contracts for the sale of real property for an amount over \$1 million are covered by the Property Disposition Guidelines and are not subject to OSC review and approval under PAL § 2879-a.

## **11. [INTENTIONALLY OMITTED]**

## **12. Monitoring of Procurement Contracts**

Performance of Procurement Contracts must be monitored by the initiating Department to ensure that the scope of work or services to be provided are being/have been performed; that use of ESD personnel, supplies and facilities is documented; that the MWBE and SDVOB requirements, as provided by OCSD, are being met; and that the established starting and completion dates for major components of the contract are being/have been met.

ESD employees assigned the responsibility of monitoring the work should be familiar with the type of work being performed and with the specific terms of the contract, including MWBE and SDVOB participation goals.

The frequency and manner in which the vendor's performance will be monitored should be clearly stated to the vendor and directly related to the terms of the contract.

Written documentation pertaining to vendor performance, such as progress reports, site visit reports, payment and expenditure data, Memoranda of verbal discussions, MWBE and SDVOB utilization plans and written correspondence should be maintained and reviewed by the initiating Department.

Periodic visits to the work sites should be made where appropriate to review work in progress and work completed. Site visit reports should be completed and include the observations of pertinent matters, such as the number and type of persons employed by the vendor, adequacy of the facilities and equipment, and quality of performance, including any deficiencies in the performance of the work, which may have an impact on satisfactory completion of the project.

The evaluation of the vendor's performance should take into consideration the quantity and quality of the work performed; the timeliness of submission of contract deliverables; the adequacy of cost and performance records and other supporting documentation; the ability of the vendor to meet

MWBE and SDVOB participation goals; and whether the extent of performance, to date, is commensurate with the amount the contractor has been paid.

All MWBE and SDVOB performance should be reported to OCSD.

Performance that is below expectations or established standards should be reported to ESD management immediately. All deficiency reports should be specific and in writing. Management should review deficiency reports and take appropriate action, which may include termination of a contract.

**All invoices presented for payment should be reviewed by the person who is monitoring the contract and approved by the respective Department Head. No payment should be made unless the work is satisfactory and in accordance with the terms of the contract. Approval on the Payment Authorization form attests to this. ESD's prompt payment procedures can be found at 21 NYCRR 4214.3, available [here](#).**

### **13. Ethical Considerations**

#### **13.1 Procurement Contracts Involving Former Employees of ESD**

Public Officers Law § 73 and ESD's Ethics [Policies](#) impose restrictions on former ESD officers and employees deriving compensation from ESD contracts or appearing before ESD. Accordingly, evaluation team members should carefully review lists of all proposed staff submitted by vendors to identify any former ESD employees. If a former ESD employee is identified, review his/her employment history to ensure it is appropriate and allowable. Direct any questions to the ESD Ethics Officer.

#### **13.2 Conflicts of Interest**

All actions of ESD staff, including but not limited to procurement, are subject to ESD's Ethics Policies and the provisions of Public Officers Law §§ 73 and 74. Evaluation team members should ensure that they do not have any conflict of interest with respect to any bidder, and should alert the ESD Ethics Officer immediately upon identifying any potential conflict. For particularly large or complex solicitations, especially where outside consultants are assisting with the evaluation process, the project team should consider having each member of the evaluation team complete an [Evaluation Conflict Disclosure Statement](#). Procurement counsel can advise on how to use this form.

#### **13.3 Unfair Advantage Prohibited**

Firms that develop or draft specifications, requirements, statements of work, or requests for bids or proposals for a procurement must be excluded from competing in any resulting procurement.

## **14. Implementation of These Guidelines**

ESD's Legal Department, in conjunction with Contracts Administration, shall be responsible for preparing for approval by the CEO such supplemental procedures as may be required to effectively implement these Guidelines, as well as preparing proposed amendments to the Guidelines for approval by the CEO and the ESD Directors when and as required.

## **15. Reporting**

### **15.1. Annual Reports**

Annually, ESD's VP/Contract Administration shall prepare for the Directors' review a report on Procurement Contracts as of the end of each fiscal year, summarizing procurement activity by ESD for the period of the report, including a listing of all contracts entered into, the selection process used to select vendors, the status of existing Procurement Contracts and required Schedules of MWBE Participation. ESD's VP/Contract Administration shall also prepare, on an annual basis, a report for submission to:

- a. The Division of Budget;
- b. The Department of Audit and Control;
- c. The Senate Finance Committee;
- d. The Assembly Ways and Means Committee;
- e. Members of the public (upon receipt of reasonable requests therefor); and
- f. The Commissioner of Economic Development.

The reports shall include these Guidelines, any amendments thereto, and an explanation of the amendments.

## **16. Effect on Awarded Contracts**

Nothing contained in these Guidelines shall be deemed to alter, affect the validity of, modify the terms of, or impair any contract or agreement made or entered into in violation of, or without compliance with, these Guidelines. These Guidelines reflect best and customary practice but are not intended to be rules of law. Note, however, that certain contracts may not be "valid or enforceable" without OSC approval. (See Section 10.5)

# **Item I. C.**



FOR CONSIDERATION

May 1, 2024

TO: The Directors

FROM: Anthony Vilaro

SUBJECT: Property Disposition Guidelines

REQUEST FOR: Adoption of Property Disposition Guidelines, Appointment of Contracting Officer and Authorization to Take Related Actions

---

I. Background

The Public Authorities Accountability Act, Chapter 766 of the 2005 Laws of New York was signed into law in 2006 and was amended by the Public Authorities Reform Act of 2009 (collectively, the “Act”). The Act establishes standards for the governance and operation of public authorities such as New York State Urban Development Corporation d/b/a Empire State Development (“ESD”) and its subsidiaries, including USA Niagara Development Corporation (“USAN”).

Title 5-A of the Act requires the annual adoption of guidelines with respect to property disposition. On March 28, 2024, ESD Directors adopted the 2024 Guidelines Regarding Disposition of Property (the “Guidelines”). A copy of ESD’s Guidelines is attached. USAN Directors are being requested to adopt the Guidelines on behalf of USAN.

II. Guidelines Regarding Disposition of Property

In conformity with the Act, as amended and described below, the Guidelines generally provide for:

- a. appointment of a contracting officer;
- b. disseminating and posting the Guidelines;
- c. inventory and reporting of status of corporation property; and
- d. obligations of the corporation with respect to pricing and methods of disposition.

The obligations with respect to pricing generally require disposition of property at no less than fair market value as determined after publicly advertising for bids. Property consists of both real

and personal property and appraisals are required for disposition of real property and certain other not readily valued property.

The most significant exceptions to the bidding requirement are negotiated transfers to the State or any political subdivision and circumstances described in Section 7 of the Guidelines. These exceptions can permit sole sourcing.

Section 7 of the Guidelines provides for disposing of property without soliciting bids or for less than fair market value. If the transfer is to a government or other public entity or the purpose of the transfer is within the purpose or mission of the Corporation, disposal is permitted. If not, the transfer is subject to denial by the governor, senate or assembly. In a permitted sale below fair market value or without bids, certain transactional information must be submitted to the Board, which must make a written determination that there is no reasonable alternative to the transfer.

Finally, for most larger negotiated transactions, including exchanges, leases and real property dispositions, an explanatory statement of the transaction must be sent 90 days in advance of such disposal to the Comptroller, Director of the Budget, Commissioner of General Services and the Legislature.

This year, the Guidelines are being amended to change the Contracting Officer from the Vice President – Contract Administration, ESD to the Executive Vice President, Real Estate Development, ESD or his/her designee as the disposition of real property is under the purview of the Real Estate Department. The Vice President – Contract Administration shall continue to participate in all relevant discussions regarding the disposition of real property for compliance and risk management/insurance purposes.

### III. Environmental Review

ESD staff has determined that the requested approval of Property Disposition Guidelines and appointment of an officer constitutes a Type II action as defined by the New York State Environmental Quality Review Act ("SEQRA") and the implementing regulations of the New York State Department of Environmental Conservation. No further environmental review is required in connection with this approval. At such time that any property disposition is proposed, it would be subject to environmental review pursuant to SEQRA.

### IV. Requested Action

The Directors are requested to adopt the attached Guidelines; appoint the Executive Vice President, Real Estate Development, ESD or his/her designee (or any successor Executive Vice President) the Contracting Officer for purposes of the Guidelines; and to authorize the taking of related actions.

V. Recommendation

Based on the foregoing, I recommend approval of the requested actions.

Attachments

Resolution

ESD 2024 Disposition Guidelines

May 1, 2024

USA NIAGARA DEVELOPMENT CORPORATION (“USAN”) – Property Disposition Guidelines – Adoption of Property Disposition Guidelines; Appointment of Contracting Officer; and Authorization to Take Related Actions

---

WHEREAS, USAN wishes to comply with Title 5-A of the Public Authorities Accountability Act, as amended by the Public Authorities Reform Act of 2009 (collectively, the “Act”), which mandates that public benefit corporations including USAN prepare annual Guidelines regarding Disposition of Property (the “Guidelines”) attached hereto; and

WHEREAS, Empire State Development (“ESD”) has prepared the Guidelines in accordance with the Act; and

WHEREAS, USAN has reviewed said Guidelines and found them to be satisfactory; and

WHEREAS, the Guidelines require the appointment of a Contracting Officer;

NOW, THEREFORE, IT IS HEREBY RESOLVED, that based on the materials presented at this meeting, a copy of which is ordered to be filed with the records of the Corporation, (the “Materials”), the Guidelines, a copy of which is attached to the Materials, be and hereby are approved and adopted on behalf of USAN; and it is further

RESOLVED, that the Executive Vice President, Real Estate Development, ESD or his/her designee (or any successor Executive Vice President) is hereby appointed as USAN Contracting Officer as required and set forth in the Guidelines; and it is further

RESOLVED, that the President and his designee(s) be, and each of them hereby is, authorized to take such action and execute such documents as may be necessary or appropriate to carry out the foregoing Resolutions and implement the Guidelines and to take all related actions.

\* \* \*

NEW YORK STATE URBAN DEVELOPMENT  
CORPORATION D/B/A EMPIRE STATE DEVELOPMENT

GUIDELINES REGARDING DISPOSITION OF PROPERTY

I. Definitions. As used herein, unless a different meaning is required by the context.

1. “Contracting Officer” shall mean the Executive Vice President, Real Estate Development, ESD or his/her designee (or any successor Executive Vice President) who shall be appointed by resolution of the Board of Directors to be responsible for the disposition of property.

2. “Dispose” or “disposal” shall mean transfer of title or any other beneficial interest in personal or real property in accordance with these guidelines.

3. “Property” shall mean personal property in excess of five thousand dollars in value, real property, and any inchoate or other interest in such property, to the extent that such interest may be conveyed to another person for any purpose, excluding an interest securing a loan or other financial obligation of another party.

II. Duties of the Corporation with respect to guidelines related to the disposal of property.

1. a. The Contracting Officer shall be responsible for the Corporation’s compliance with, and enforcement of these guidelines.

b. The Corporation’s contracting activities shall comply with Title 5-A of the Public Authorities Law, the New York State Urban Development Act (the “Act”) and any other applicable law for the disposal of property.

c. These guidelines shall be annually reviewed and approved by the Board of Directors.

d. On or before the thirty-first day of March in each year, the Corporation shall file with the comptroller a copy of the guidelines most recently reviewed and approved by the Corporation, including the name of the Corporation’s designated Contracting Officer. At the time of filing such guidelines with the comptroller, the Corporation shall also post such guidelines on the Corporation’s internet website. Guidelines on the Corporation’s internet website shall be maintained on such website at least until the procurement guidelines for the following year are posted on such website.

2. Inventory. The Corporation shall:

- a. maintain adequate inventory controls and accountability systems for all property under its control;
- b. periodically inventory such property to determine which property shall be disposed of;
- c. produce a written report of such property in accordance with subdivision three of this section;
- d. transfer or dispose of such property as promptly as possible in accordance with Section III.

3. Reporting

a. The Corporation shall publish, not less frequently than annually, a report listing all real property of the Corporation. Such report shall include a list and full description of all real and personal property disposed of during such period. The report shall contain the price received by the Corporation and the name of the purchaser for all such property sold by the Corporation during such period.

b. The Corporation shall deliver copies of such report to the comptroller, the director of the budget, the commissioner of general services, the legislature and Authorities Budget Office.

III. Disposal of Corporation's property.

1. Supervision and direction. Except as otherwise provided in this section, the Contracting Officer shall have supervision and direction over the disposition of property of the Corporation.

2. Custody and control. The custody and control of the property of the Corporation, pending its disposition, and the disposal of such property, shall be performed by the Corporation or by the commissioner of general services when so authorized under this section.

3. Method of disposition. Subject to Section II of these guidelines, the Corporation may dispose of property for not less than the fair market value of such property by sale, exchange, or transfer, for cash, credit, or other property, with or without warranty, and upon such other terms and conditions as the Contracting Officer deems proper, and it may execute such documents for the transfer of title or other interest in property and take such other action as it deems necessary or proper to dispose of such property under the provisions of this section. Provided, however, that no disposition of real property, or any interest in real property, shall be made unless an appraisal of the value of such property has been made by an independent appraiser and included in the record of the transaction and, provided further, that no disposition of any property, which because of its unique nature or the unique circumstances of the proposed

transaction is not readily valued by reference to an active market for similar property, shall be made without a similar appraisal.

4. Sales by the commissioner of general services. When it shall be deemed advantageous to the state, the Corporation may enter into an agreement with the commissioner of general services where under such commissioner may dispose of property of the Corporation under terms and conditions agreed to by the Corporation and the commissioner of general services. In disposing of any such property of the Corporation, the commissioner of general services shall be bound by the terms of this title and references to the Contracting Officer shall be deemed to refer to such commissioner.

5. Validity of deed, bill of sale, lease or other instrument. A deed, bill of sale, lease, or other instrument executed by or on behalf of the Corporation, purporting to transfer title or any other interest in property under these guidelines shall be conclusive evidence of compliance with the provisions of these guidelines insofar as concerns title or other interest of any bona fide grantee or transferee who has given valuable consideration for such title or other interest and has not received actual or constructive notice of lack of such compliance prior to the closing.

6. Bids for disposal; advertising; procedure; disposal by negotiation; explanatory statement.

a. all disposals or contracts for disposal of property of the Corporation made or authorized by the Contracting Officer shall be made after publicly advertising for bids except as provided in paragraph c of this subdivision.

b. Whenever public advertising for bids is required under paragraph a of this subdivision:

(i) the advertisement for bids shall be made at such time prior to the disposal or contract, through such methods, and on such terms and conditions as shall permit full and free competition consistent with the value and nature of the property;

(ii) all bids shall be publicly disclosed at the time and place stated in the advertisement; and

(iii) the award shall be made with reasonable promptness by notice to the responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the state, price and other factors considered; provided, that all bids may be rejected when it is in the public interest to do so.

c. Disposals and contracts for disposal of property may be negotiated or made by public auction without regard to paragraphs a and b of this subdivision but subject to obtaining such competition as is feasible under the circumstances, if:

(i) the personal property involved has qualities separate from the utilitarian purpose of such property, such as artistic quality, antiquity, historical significance, rarity, or other quality of similar effect, that would tend to increase its value, or if the personal property is to be sold in such quantity that, if it were disposed of under paragraphs a and b of this subdivision, would adversely affect the state or local market for such property, and the estimated fair market value of such property and other satisfactory terms of disposal can be obtained by negotiation;

(ii) the fair market value of the property does not exceed fifteen thousand dollars;

(iii) bid prices after advertising therefore are not reasonable, either as to all or some part of the property, or have not been independently arrived at in open competition;

(iv) the disposal will be to the state or any political subdivision, and the fair market value of the property and other satisfactory terms of disposal are obtained by negotiation; or

(v) under the circumstances permitted by section 7; or

(vi) such action is otherwise authorized by law.

d. (i) An explanatory statement shall be prepared of the circumstances of each disposal by negotiation of:

(A) any personal property which has an estimated fair market value in excess of fifteen thousand dollars;

(B) any real property that has an estimated fair market value in excess of one hundred thousand dollars, except that any real property disposed of by lease or exchange shall only be subject to clauses (C) and (D) of this subparagraph;

(C) any real property disposed of by lease if the estimated annual rent over the term of the lease is in excess of fifteen thousand dollars;

(D) any real property or real and related personal property disposed of by exchange, regardless of value or any property any part of the consideration for which is real property.

(ii) Each such statement shall be transmitted to the persons entitled to receive copies of the report required under section II of these guidelines not less than ninety days in advance of such disposal, and a copy thereof shall be preserved in the files of the Corporation.

e. For purposes of Section c(ii), (v) and Section d of this paragraph 6 when an appraisal is not feasible or practical, fair market value shall be determined by the board of directors based on the recommendation of the Contracting Officer. In making such recommendation, the Contracting Officer shall make due inquiry of values of comparable property including, as appropriate, geographic location, use, occupancy, condition, obsolescence, outstanding debts, taxes and liens and intended future use.

7. Disposal of property for less than fair market value

(a) No asset owned, leased or otherwise in the control of a public authority may be sold, leased, or otherwise alienated for less than its fair market value except if:

(i) the transferee is a government or other public entity, and the terms and conditions of the transfer require that the ownership and use of the asset will remain with the government or any other public entity;

(ii) the purpose of the transfer is within the purpose, mission or governing statute of the public authority; or

(iii) in the event a public authority seeks to transfer an asset for less than its fair market value to other than a governmental entity, which disposal would not be consistent with the authority's mission, purpose or governing statutes, such authority shall provide written notification thereof to the governor, the speaker of the assembly, and the temporary president of the senate, and such proposed transfer shall be subject to denial by the governor, the senate, or the assembly. Denial by the governor shall take the form of a signed certification by the governor. Denial by either house of the legislature shall take the form of a resolution by such house. The governor and each house of the legislature shall take any such action within sixty days of receiving notification of such proposed transfer during months of January through June, provided that if the legislature receives notification of such proposed transfer during the months of July through December, the legislature may take any such action within sixty days of January first of the following year. If no such resolution or certification is performed with sixty days of such notification of the proposed transfer to the governor, senate and assembly, the public authority may effectuate such transfer. Provided, however, that with respect to a below market transfer by a local authority that is not within the purpose, mission or governing statute of the local authority, if the governing statute provides for the approval of such transfer by the executive and legislative branches of the political subdivision in which such local authority resides, and the transfer is of property obtained by the authority from that political subdivision, then such approval shall be sufficient to permit the transfer.

(b) In the event a below fair market value asset transfer is proposed, the following information must be provided to the authority board and the public:

- (i) a full description of the asset;
- (ii) an appraisal of the fair market value of the asset and any other information establishing the fair market value sought by the board.
- (iii) a description of the purpose of the transfer, and a reasonable statement of the kind and amount of the benefit to the public resulting from the transfer, including but not limited to the kind, number, location, wages or salaries of jobs created or preserved as required by the transfer, the benefits, if any, to the communities in which the asset is situated as are required by the transfer.
- (iv) a statement of the value to be received compared to the fair market value;
- (v) the names of any private parties participating in the transfer, and if different than the statement required by subparagraph (iv) of this paragraph, a statement of the value to the private party; and
- (vi) the names of other private parties who have made an offer for such asset, the value offered, and the purpose for which the asset was sought to be used.

(c) Before approving the disposal of any property for less than fair market value, the board of an authority shall consider the information described in paragraph b of this subdivision and make a written determination that there is no reasonable alternative to the proposed below market transfer that would achieve the same purpose of such transfer.

Dated: March 28, 2024

# **Item II. A.**



**FOR CONSIDERATION**

May 1, 2024

**TO:** The Directors

**FROM:** Anthony Vilaro

**SUBJECT:** Procurement of Demolition and Site Preparation Services

**REQUEST FOR:** Authorization to Enter into a Contract for Demolition and Site Preparation Services; Authorization to Make a Determination of No Significant Effect on the Environment; and to Take Related Actions

---

**CONTRACT NEED AND JUSTIFICATION**

**I. Contract Summary**

**Contractor:** Atlantic Contracting Partners, LLC

**Scope of Services:** Demolition and Site Preparation Services

**Contract Term:** 60 days from award (anticipated start date June 1, 2024; anticipated completion August 1, 2024).

**Contract Amount:** Not to exceed \$761,310 (\$692,100 final base contract amount plus \$69,210 contingency)

**Funding Source:** NYS Budget Appropriations made available through the Buffalo Regional Innovation Cluster. No USAN Corporate funds will be used to fund the contract.

## II. Background

USA Niagara Development Corporation (“USAN”) purchased 217 Old Falls Street and 333 First Street (“the Site”) in March 2019 through a strategic land acquisition program intended to assemble and revive long-dormant properties located near Niagara Falls State Park. The program is a continuation of USAN’s efforts to expand the density of uses in downtown to reestablish a year-round, sustainable neighborhood.

On March 20, 2023, the USAN Board of Directors approved Community Services for Every1 as the Preferred Developer to undertake the First Street Apartment Building Development Project located at the northern portion of the Site. Currently, USAN is pursuing a development opportunity for the remaining portion of the Site, but there will likely be a time period when the southern portion of the Site is vacant. To limit the impacts associated with a vacant site in the heart of the City’s tourist district, USAN will design and construct interim improvements to activate the site and create new opportunities for food and beverage sales on Old Falls Street. Interim improvements will include temporary landscaping, seating, restrooms, lighting, utility hookups for food trailers and other recreational amenities.

To enable the construction of the interim improvements and the future developments, USAN intends to demolish the 85,000 square foot building that is currently on the Site (formerly known as the Native Center) and divide the Site into a northern portion and a southern portion.

In September 2023, USAN contracted with The LiRo Group (“LiRo”) for engineering and construction administration services associated with the Site. To date, LiRo has provided USAN with all documents required for the demolition and site work, final design services to permit public competitive bidding, and will continue to provide construction oversight services to facilitate completion of the proposed contract work.

## III. Contractor Selection Process

In order to procure a qualified general contractor, USAN advertised in the New York State Contract Reporter on March 3, 2024. USAN and LiRo followed all standard ESD bidding procedures. Pre-bid meetings/walk throughs were held on March 15<sup>th</sup> and April 3, 2024. The basis for award of a contract was set forth as the lowest responsible bidder on the base contract.

Three bids were received by USAN on April 11, 2024, at 4:00 p.m. USAN is proposing to enter into a contract with the lowest responsive bidder, Atlantic Contracting Partners, LLC. Contractors and their base bid price are listed below.

<b>Contractor</b>	<b>Base Bid Price (Basis of Award)</b>
Laubacker Enterprises, Inc.	\$1,046,930
Regional Environmental Demolition, Inc.	\$798,270
Atlantic Contracting Partners, LLC	\$692,100

Atlantic Contracting Partners, LLC (“Atlantic”) has performed well over 4,000 projects which involve various aspects of demolition, interior dismantling, environmental abatement and site work. They have successfully completed projects in the public and private sector on a coast to coast basis. Their extensive experience includes all types of manufacturing facilities, chemical plants, automotive plants, shuttered factories, and other large structures such as hospitals, office buildings, hotels, academic campuses and commercial real estate. Atlantic has worked for various federal, state, and local government agencies.

Pursuant to State Finance Law Section 139-j and 139-k and the Corporation’s policy related thereto, staff has; a) considered proposed contractor’s ability to perform the services provided for in the proposed contract; and b) consulted the list of offerers determined to be non-responsible bidders and debarred offerers maintained by the New York State Office of General Services. Based on the foregoing, staff considers the proposed contractor to be responsible.

#### IV. Scope of Work

The contract work includes protection of adjacent structures, properties, and utilities; asbestos abatement and removal of universal wastes; building demolition; disposal and recycling of demolition materials; and grading and restoration in preparation for future development of the Site. All demolition material is required to be properly disposed off-site by the contractor.

#### V. Contract Term, Price and Funding

The contract term will be approximately 60 calendar days from the award date, estimated to be in June 2024. The substantial completion date is estimated to be July 1, 2024, with a final completion date expected by August 1, 2024.

The method of payment shall be periodic lump sum payments upon verification of the work completed. The Contract amount with Atlantic to complete the above scope of work shall not exceed \$692,100 plus a contingency of 10% of the base contract amount, or \$761,310. The contingency fund would be reserved to cover for any unforeseen contract expenses and would not be added to the contract amount unless approved and documented by USAN staff.

The funding source will be NYS Budget Appropriations made available through the Buffalo Regional Innovation Cluster. No USAN Corporate funds will be used to fund the contract.

#### VI. Non-Discrimination and Contractor & Supplier Diversity

ESD’s Non-Discrimination and Contractor & Supplier Diversity policies will apply to this Contract. The Recipient shall be required to include minorities and women in any job opportunities created, to solicit and utilize Minority and Women Business Enterprise (MWBES) and Service-Disabled Veteran-owned Businesses (SDVOBs) for any contractual opportunities generated in connection with the Contract and shall be required to use Good Faith Efforts (pursuant to 5 NYCRR §142.8

and 9 NYCRR § 252.2(m)) to achieve an overall MWBE Participation Goal of 30% and an SDVOB Participation Goal of 6% related to the total value of USAN funding.

## VII. Environmental Review

ESD, as lead agency, completed an environmental review of the proposed demolition, pursuant to the requirements of the State Environmental Quality Review Act and the implementing regulations of the New York State Department of Environmental Conservation. This review found that the proposed contract is an Unlisted Action that would not result in significant adverse impacts on the environment. Therefore, ESD staff recommend that the Directors make a Determination of No Significant Effect on the Environment.

While the Project Site is not listed or eligible for listing on the State and National Registers of Historic Places (“S/NRHP”), because it is adjacent to a S/NRHP-listed property (the First Presbyterian Church at 311 First Street), USAN consulted with the State Historic Preservation Office (“SHPO”) of the NYS Office of Parks, Recreation and Historic Preservation, pursuant to the requirements of Section 14.09 of the State Historic Preservation Act. A property protection plan developed in consultation with SHPO has been included in the specifications of the contract to avoid impacts to the First Presbyterian Church during demolition activities.

## VIII. Requested Action

The Directors are requested to (1) make a determination of responsibility with respect to the proposed contractor; (2) authorize the Corporation to enter into a contract with Atlantic Contracting Partners, LLC for a final base contract amount not to exceed \$692,100 plus a \$69,210 contingency for a total contract amount of \$761,310; (3) make a determination of no significant effect on the environment; and (4) to authorize the taking of all related actions.

## IX. Recommendation

Based on the foregoing, I recommend approval of the requested actions.

## X. Attachments

Resolution

May 1, 2024

USA Niagara Development Corporation – Procurement of Demolition and Site Preparations Services – Authorization to Enter into a Contract for Demolition and Site Preparation Services; Authorization to Make a Determination of No Significant Effect on the Environment; and to Take Related Actions

---

BE IT RESOLVED, that upon the basis of the materials presented to this meeting (the “Materials”), a copy of which is hereby ordered filed with the records of the Corporation, the Corporation hereby finds Atlantic Contracting Partners, LLC to be responsible; and be it further

RESOLVED, that the Corporation is hereby authorized to enter into a contract with Atlantic Contracting Partners, LLC for a base contract amount of SIX HUNDRED NINETY-TWO THOUSAND ONE HUNDRED DOLLARS (\$692,100), plus a contingency in the amount of SIXTY NINE THOUSAND TWO HUNDRED TEN DOLLARS (\$69,210) for a total contract amount not to exceed SEVEN HUNDRED SIXTY ONE THOUSAND THREE HUNDRED TEN DOLLARS (\$761,310) for the purposes and services, and substantially on the terms and conditions, set forth in the Materials; and be it further

RESOLVED, that based on the Materials submitted to the Directors with respect to the contract, the Corporation hereby determines that the proposed action will not have a significant effect on the environment; and be it further

RESOLVED, that the President of the Corporation or his designee be, and each of them hereby is, authorized to take such action and execute such documents as may be necessary or appropriate to carry out the foregoing resolution.

\* \* \*