

**ATLANTIC YARDS COMMUNITY DEVELOPMENT CORPORATION**

at Long Island University's Brooklyn Campus  
Library Learning Center – 515C Conference Room (5<sup>th</sup> Floor)  
One University Plaza (at Flatbush and DeKalb Avenues)  
Brooklyn, New York 11201

**Meeting of the Directors**

Friday  
February 6, 2015 at 4:00 pm

PROPOSED AGENDA

CORPORATE ACTION

1. Ratification of Actions of the Incorporator and Sole Shareholder; Ratification of By-Laws; Adoption of Corporate Seal
2. Officers of the Corporation – Appointment of Officers
3. AYCDC Procurements Guidelines – Adoption of Guidelines for the Use, Awarding, Monitoring and Reporting of Procurement Contracts
4. Establishment of Pre-Qualified Counsel List – Approval of Pre-Qualified Counsel

FOR INFORMATION

5. President's Report – Corporate Update (Oral Report)
6. Public Comments

# Item 1

FOR CONSIDERATION

February 6, 2015

TO: The Directors

FROM: Marion Phillips, III

SUBJECT: First Meeting of the Directors of the Atlantic Yards Community Development Corporation

REQUEST FOR: Ratification of Actions of the Incorporator and Sole Shareholder;  
Ratification of By-Laws; and Adoption of Corporate Seal

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I. Background

At their June 27, 2014 meeting, the Board of Directors of the New York State Urban Development Corporation, d/b/a Empire State Development ("ESD") authorized the formation of Atlantic Yards Community Development Corporation (the "Corporation") as a wholly owned subsidiary of ESD. The purpose of the Corporation is to monitor and oversee ESD's Atlantic Yards Land Use Improvement and Civic Project.

The Certificate of Incorporation of the Corporation was filed with the Secretary of State of the State of New York on November 25, 2014 and a copy of the Certificate of Incorporation together with the receipt issued by the Department of State was filed in the minute book of the Corporation.

ESD as Sole Shareholder of the Corporation ratified the appointments, by action without a meeting, of the following individuals who now currently comprise the entire Board of Directors of the Corporation as appointed by the office opposite their name:

Kenneth Adams	Governor of the State of New York
Julene Beckford	Governor of the State of New York
Liz Harris	Governor of the State of New York
Rachel Gold	Governor of the State of New York
Joseph Chan	Governor of the State of New York
Shawn V. Austin	Governor of the State of New York
Sharon Daughtry	Governor of the State of New York
<b>To Be Appointed</b>	Governor of the State of New York
Tamara McCaw	Governor of the State of New York
Linda Reardon	Speaker of the New York Assembly
Monsignor Kieran Harrington	President Pro Tem of the New York State Senate
Jaime Stein	Mayor of the City of New York

Barika X. Williams  
Bertha Lewis

Speaker of the New York City Council  
Brooklyn Borough President

The Incorporator adopted By-laws for the regulation of the affairs of the Corporation and a copy of the By-laws was inserted in the minute book of the Corporation. The Sole Shareholder subsequently ratified these By-laws.

The proposed corporate seal of the Corporation, bearing an inscription containing the name of the Corporation, the year of its incorporation (2014) and the words "Corporate Seal New York" was presented to the Sole Shareholder of the Corporation. The Sole Shareholder adopted the Corporate Seal.

A sample form of stock certificate representing shares of the Common Stock of the Corporation was presented to the Sole Shareholder and a specimen of such certificate was inserted in the minute book of the Corporation. The Sole Shareholder approved and adopted it as the form of certificate to represent the Common Stock of Corporation.

II. Appointment of Chairman

Pursuant to the By-Laws of the Corporation, the following person was designated as Chairman of the Board by the Governor of the State of New York and was ratified by the Sole Shareholder:

Chairman	Kenneth Adams
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III. Recommendation

It is recommended that the Board of Directors: (1) ratify the actions of the Incorporator and Sole Shareholder; (2) ratify the By-laws; and (3) adopt the Corporate Seal.

Attachments

Resolutions  
Exhibit A – By-Laws

February 6, 2015

ATLANTIC YARDS COMMUNITY DEVELOPMENT CORPORATION - Ratification of Actions of the Incorporator and Sole Shareholder; Ratification of By-Laws; and Adoption of Corporate Seal

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BE IT RESOLVED, that the actions taken by the Incorporator and Sole Shareholder of the Corporation in the organization of the Corporation and the nomination and appointment of the Chairman of the Board and the Board of Directors, and all matters related thereto, including, but not limited to, adoption and ratification of By-laws, adoption of Corporate Seal and adoption of a form of Stock Certificate be, and the same hereby are, in all respects ratified, confirmed and approved; and be it further

RESOLVED, that the By-laws, in the form attached as Exhibit A to the materials submitted to this meeting, be, and the same are hereby ratified, and be it further

RESOLVED, that the Corporate Seal described in the materials submitted to this meeting be, and it hereby is adopted.

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ATLANTIC YARDS COMMUNITY DEVELOPMENT CORPORATION

BY-LAWS

Article I

SHAREHOLDERS

Section 1.1 Sole Shareholder. The New York State Urban Development Corporation (“UDC”), as specified in the Certificate of Incorporation of the Atlantic Yards Community Development Corporation (“Corporation”), is the sole shareholder (“Shareholder”) of the Corporation. As specified in the Corporation’s Certificate of Incorporation, the aggregate number of capital shares which the Corporation shall have authority to issue is one hundred (100) shares of Common Stock, of one class only, with a par value of one cent (\$0.01) per share.

Section 1.2 Action Without a Meeting. The Shareholder may take any action which could be taken at a meeting without a meeting pursuant to provisions of the New York Business Corporation Law of the State of New York.

Article II

BOARD OF DIRECTORS

Section 2.1 Number of Directors. The business of the Corporation shall be managed by its Board of Directors (the “Board”), which shall consist of fourteen (14) directors:

- (a) nine (9) directors shall be appointed by the Governor of the State of New York, one of which shall be designated by the Governor as the Chair;
- (b) one (1) director shall be appointed by the Mayor of the City of New York;

- (c) one (1) director shall be appointed by the Brooklyn Borough President;
- (d) one (1) director shall be appointed by the Speaker of the New York Assembly;
- (e) one (1) director shall be appointed by the President Pro Tem of the New York State Senate; and
- (f) one (1) director shall be appointed by the Speaker of the New York City Council.

Section 2.2 Qualifications. Each director shall be at least twenty-one years of age and must reside in New York City.

Section 2.3 Term. Each director shall be appointed as set forth in Section 2.1 for a term of three (3) years. Each director shall continue in office until a successor has been appointed and has taken office, or until sooner death, resignation or removal.

Section 2.4 Vacancies. Any vacancy in the Board caused by the death, resignation or removal of a director shall be filled by a qualified director appointed as set forth in Section 2.1.

Section 2.5 Resignations. Resignations of directors must be in writing and shall be effective upon the date of receipt thereof by the Secretary or upon an effective date specified therein, whichever date is later.

Section 2.6 Removal of Directors. Any director may be removed at any time, for cause, by the Shareholder. With or without cause, at any time, any director appointed pursuant to Section 2.1 shall be removed upon the written direction of the individual providing such appointment pursuant to Section 2.1.

Section 2.7 Powers. The Board shall have the management and control of the business affairs and property of the Corporation and may exercise, by a majority vote for all actions, the following specific responsibilities:

- Reviewing proposed changes to Project plan and agreements, and advising ESD board accordingly in advance of votes;
- Monitoring developer compliance with all public commitments;
- Monitoring, reporting on and responding to construction impacts and quality of life issues;
- Evaluating the quality and effectiveness of monitoring, support and other services;
- Making recommendations to ESD on ways to improve and expedite developer responsiveness to public obligations and increase transparency of Project development;
- Assuring effective communication between the developer, government agencies and officials, elected officials and community and civic organizations;
- Developing recommendations related to the Project, including in relation to unanticipated issues; and
- Complying, as appropriate, with the Public Officers Law as it applies to members of the board and the conduct of business by AYCDC.

Section 2.8 Meetings of the Board.

(a) Regular meetings of the Board may be held, except as may otherwise be provided by law, without notice to the Board, at such time and place within New York City as shall from time to time be determined by the Sole Shareholder, Chair of the Board, or President, except that the Board shall meet not less than approximately quarterly.

(b) Special meetings of the Board may be called at any time by the Secretary at the request in writing of either the Chair of the Board, the President, or a quorum of members of the Board. Such request shall state the purpose or purposes of the proposed meeting. Such meetings shall be held within New York City. Notice of each such meeting, specifying the time and place thereof, shall be given by the Secretary by causing the same to be



delivered to each director at least five (5) days before the meeting or mailed to each director at least seven (7) days before the meeting. No such notice of any meeting need be given to any director who attends the meeting without protesting, prior thereto or at its commencement, the lack of notice or who files a written waiver of notice thereof with the Secretary, either before or after the meeting.

Section 2.9 Quorum of Directors. As provided in the Certificate of Incorporation of the Corporation, a quorum for the transaction of business at meetings of the Board shall consist of not less than a majority of the Board then in office. In the absence of a quorum at any duly scheduled or duly called meeting, a majority of the directors present may adjourn the meeting from time to time, without notice other than announcement at the meeting, until a quorum is present, at which time any business may be transacted which might have been transacted at the meeting as originally scheduled.

Section 2.10 Meeting by Video Conference. One or more members of the Board or of any committee thereof may participate in any meeting of the Board or of such committee by means of video conference by means of which all persons participating in the meeting can hear and see each other, and participation in a meeting by such means shall constitute presence in person at such meeting and can be counted towards the quorum as set forth in Section 2.9. In any such case the minutes of the meeting shall indicate which members of the Board or of such committee participated in the meeting by such means.

Section 2.11 Committees. The Board may appoint, by vote, such committees of Board members and may delegate such powers and duties to them as the Board may deem advisable.

Section 2.12 Compensation of Directors. No director of the Corporation shall receive, directly or indirectly, any salary, compensation or emolument from the Corporation, except as provided by the Board.

### Article III

#### OFFICERS

Section 3.1 Number, Election and Compensation. The principal officers of the Corporation shall be the President, one or more Vice Presidents, a Secretary, a Chief Financial Officer, a Treasurer and a General Counsel and such other officers as may be appointed by the Board from time to time. All officers of the Corporation shall be appointed by the Board. Any two or more offices may be held by the same person except the offices of President and Secretary. No officer of the Corporation shall receive, directly or indirectly, any salary, compensation or emolument from the Corporation, except as provided by the Board.

Section 3.2 Terms and Removal. Unless he or she resigns, dies, or is removed prior thereto, each officer of the Corporation shall hold office until his or her successor has been appointed. Any officer appointed by the Board may be removed at any time, with or without cause, by the Board, and all vacancies (however arising) may be filled at any time, in each case by the affirmative vote of the Board. Any other employee of the Corporation may be removed at any time, with or without cause, by the President or by any superior of such employee to whom the power of removal has been delegated by the President.

Section 3.3 President. The President shall have general supervision and direction of the business of the Corporation, shall see that all orders and resolutions of the Board are carried into effect, and shall be a member of all committees appointed by the Board. The

President shall have such other powers and perform such other duties as may be prescribed from time to time by the Board. The President shall serve at the pleasure of the Governor.

Section 3.4 Vice Presidents. Each Vice President shall have such powers and perform such duties as may be prescribed from time to time by the Board or the President. In the absence or disability of the President, a Vice President appointed by the Board shall be vested with all the powers and authority to perform all the duties of the President.

Section 3.5 Secretary. The Secretary shall attend all meetings of the Board and record all votes and keep the minutes of all proceedings in a book to be kept for that purpose. The Secretary shall perform like duties for the standing committees when required. The Secretary shall give, or cause to be given, notice of all meetings of the Shareholder and of the Board when notice is required by these By-Laws. The Secretary shall have custody of the seal of the Corporation, and, when authorized by the Board or when any instrument requiring the corporate seal to be affixed shall first have been signed by the Chair of the Board, the President or a Vice President; shall affix the seal to the instrument and shall attest the same by his or her signature. The Secretary shall have such other powers and perform such other duties as may be prescribed from time to time by the Board or the President.

Section 3.6 Assistant Secretaries. Each Assistant Secretary, if one or more are appointed, shall be vested with all the powers and authorized, in the absence or disability of the Secretary to perform all the duties of the Secretary. Each Assistant Secretary shall perform such other duties as may be prescribed from time to time by the Board, the President or the Secretary.

Section 3.7 Chief Financial Officer. The Chief Financial Officer shall have primary oversight of all Corporation finances. The Chief Financial Officer shall have such other powers and perform such other duties as may be prescribed from time to time by the Board, or the President.

Section 3.8 Treasurer. The Treasurer shall have custody of the corporate funds and securities of the Corporation, shall cause full and accurate accounts of receipts and disbursements in books belonging to the Corporation to be kept, and shall deposit all moneys and other valuable effects in the name and to the credit of the Corporation in such depositories as may be designated by the Board. The Treasurer shall disburse the funds of the Corporation. The Treasurer shall have such other powers and perform such other duties as may be prescribed from time to time by the Board, or the President.

Section 3.9 General Counsel. The General Counsel shall be the chief legal advisor of the Corporation. The General Counsel shall have general supervision of all legal matters of the Corporation and shall see that all orders and resolutions of the Board are in compliance with all relevant laws carried into effect. The General Counsel shall have such other powers and perform such other duties as may be prescribed from time to time by the Board.

Section 3.10 Duties of Officers May be Delegated. In case of the absence of any officer of the Corporation, or for any other reason that the Board may deem sufficient, the Board may delegate, for the time being, the powers or duties, or any of them, of such officer to any other officer.

Article IV

INDEMNIFICATION OF DIRECTORS AND OFFICERS

Section 4.1 General Scope of Indemnification.

(a) The provisions of this Article for indemnification shall be in addition to and shall not supplant any indemnification by the State of New York heretofore or hereafter conferred upon any director, officer or employee by a statute, by Sections 17, 18 and 19 of the Public Officers Law, or otherwise. This Article is to be construed liberally in favor of each director, officer and employee of the Corporation to the fullest extent permitted by law, and any ambiguity, uncertainty or reasonable doubt as to facts, interpretation or legal conclusions shall be resolved in favor of such director, officer or employee. The provisions of this Article shall inure only to the directors, officers or employees of the Corporation, and to their estates, shall not enlarge or diminish the rights of any other party, and shall not impair, limit or modify the rights and obligations of any insurer under any policy of insurance.

(b) Directors, Officers and Employees. Other than as provided in Section 4.4 of these By-Laws, the Corporation shall, to the fullest extent permitted by law, save harmless and indemnify any person (or his or her estate) who shall have served as a director, officer or employee of the Corporation against financial loss or reasonable litigation expense incurred in connection with any claim, demand, suit, action or proceedings, whether civil or criminal, or the defense thereof, and arising out of: (i) any transaction of the Corporation, or (ii) any act or failure to act by any such director, officer or employee which engaged in the discharge of his or her duties on behalf of the Corporation.

Section 4.2 Conditions Precedent and Representation of Persons Indemnified.

Except in a criminal proceeding, the right to indemnification shall be conditioned on: (a) the prompt delivery to the Corporation of a copy of the summons, complaint, process, notice, demand or pleading commencing any such claim, demand, suit, action or proceeding; (b) a contemporaneous offer to name counsel to the Corporation as counsel to the director, officer or employee in the defense of such claim, demand, suit, action or proceeding; and (c) the full cooperation of the director, officer or employee, in the event the offer is accepted, in the making of such defense. The Corporation may, either by its own staff counsel or by outside counsel of its choice, accept the offer and assume the representation of any person who becomes a party to the claim, demand, suit, action or proceeding, except in situations in which: (y) choice of counsel is governed by statute; or (z) the Corporation's counsel determines that it is inappropriate or inadvisable for such person to be represented by counsel chosen by the Corporation. In the event the Corporation does not assume such representation, such person shall have the right to engage private counsel of his or her choice and the Corporation shall have the obligation of indemnification for the reasonable fees and expenses of such private counsel as provided in this Article and, to the extent applicable, Article Seven of the Business Corporation Law; provided, however, that the Corporation as a condition to such indemnification by the State of New York pursuant to the Statute shall require appropriate groups of person to be represented by the same counsel.

Section 4.3 Advances of Expenses.

(a) Directors and Officers. A director or officer who becomes a party to an action or proceeding may request that the Corporation advance expenses pending the final disposition of

such action or proceeding. Such advancement shall be made in the manner delineated by Section 723 of the Business Corporation Law.

(b) Employees. Reasonable litigation expenses incurred by an employee who becomes a party to an action or proceeding may be paid by the Corporation from time to time pending the final disposition of such action or proceeding without necessity for any authorization, findings, or other action by the directors prior to the making of such advances; provided, however, that such advancement shall be made in the manner delineated by Section 723 of the Business Corporation Law, and that the directors: (i) may make a preliminary finding at any time prior to the final disposition of such action or proceeding that it then appears that an employee has clearly not acted, in good faith, for a purpose reasonably believed to be in the best interests of the Corporation and, in criminal actions or proceedings, in addition, that the employee clearly had not had reasonable cause to believe that his or her conduct was lawful, or may seek an opinion in writing of outside legal counsel with respect to that issue, and if such a preliminary finding shall be made or a negative opinion on the issue shall be given, no further advances under this paragraph shall be made with respect to expenses of such employee; and (ii) may determine, or provide for the determination of, the reasonableness of expenses sought to be advanced.

Section 4.4 Directors' Liability. No director of the Corporation shall be personally liable to the Corporation or its Shareholder for damages for any breach of duty as a director, unless a judgment or other final adjudication adverse to the director establishes that, in connection with any such breach of duty: (i) the acts or omissions of the director were in bad

faith or involved intentional misconduct or a knowing violation of law; (ii) the director personally gained in fact a financial profit or other advantage to which the director was not legally entitled; or (iii) the acts of the director violated Section 719 of the Business Corporation Law.

## Article V

### CONDUCT OF BUSINESS

#### Section 5.1 Powers of Execution.

(a) All checks and other demands for money and notes and other instruments for the payment of money shall be signed on behalf of the Corporation by such officer or officers or by such other person or persons as the Board may from time to time designate.

(b) All contracts, deeds and other instruments to which the seal of the Corporation is affixed shall be signed on behalf of the Corporation by the President, or such other person or persons as the Board may from time to time designate, and shall be attested by the Secretary or an Assistant Secretary.

(c) All other contracts, deeds and instruments shall be signed on behalf of the Corporation by the President or such other person or persons as the Board or the President may from time to time designate.

Section 5.2 Seal. The corporate seal shall have inscribed thereon the name of the Corporation, the year of its organization and the words, "Corporate Seal, New York".



Section 5.3 Fiscal Year. The fiscal year of the Corporation shall be from April 1<sup>st</sup> through March 31<sup>st</sup>.

## ARTICLE VI

### AMENDMENTS

Section 6.1 By-Laws. The By-Laws may be altered, amended or repealed and new By-Laws added by action of the Shareholder or by the Board.

# Item 2

FOR CONSIDERATION

February 6, 2015

TO: The Directors

FROM: Marion Phillips, III

SUBJECT: Officers of the Corporation

REQUEST FOR: Appointment of Officers

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I. Background

The Atlantic Yards Community Development Corporation (the "Corporation") has been established as wholly-owned subsidiary of the New York State Urban Development Corporation d/b/a Empire State Development ("ESD"). The Corporation was formed to oversee and monitor ESD's Atlantic Yards Land Use Improvement and Civic Project.

In accordance with the Corporation's By-Laws, as a matter of corporate housekeeping and to ensure the Corporation has a full complement of officers at any given time who can execute required documentation on the Corporation's behalf, it is recommended that the following officer positions of the Corporation be established and the name of the individual appearing beside each position be appointed.

In addition, at this time it is recommended that the positions of General Counsel; Chief Financial Officer; and Treasurer be appointed ex-officio with the corresponding positions at ESD. In this way, future staff changes will not result in the need for additional board actions simply to substitute individuals and ensuring that these officer positions will be filled expeditiously.

Accordingly it is recommended that the following offices be established and that for certain of these offices, marked with an asterisk, the individuals currently serving in the same capacity at ESD be appointed ex-officio to the office:

President – Marion Phillips, III;  
Vice President – Joseph Chan;  
\*General Counsel – Elizabeth R. Fine;  
\*Chief Financial Officer – Margaret Tobin;  
\*Treasurer – Robert Godley;  
Secretary – Debbie Royce; and  
Assistant Secretary – Regina Stephens.

## II. Requested Action

The Directors are requested to: 1) establish the office of President and approve the appointment of Marion Phillips, III to such office; 2) establish the office of Vice President and approve the appointment of Joseph Chan to such office; 3) establish the office of General Counsel and approve the appointment of Elizabeth R. Fine to such office; 4) establish the office of Chief Financial Officer and approve the appointment of Margaret Tobin to such office; 5) establish the office of Treasurer and approve the appointment of Robert Godley to such office; 6) establish the office of Secretary and approve the appointment of Debbie Royce to such office; 7) establish the office of Assistant Secretary and approve the appointment of Regina Stephens to such office; 8) confirm that the titles of General Counsel; Chief Financial Officer; and Treasurer are created and individuals are appointed to such offices ex-officio with the corresponding titles of the New York State Urban Development Corporation d/b/a/ Empire State Development; and 9) confirm that all positions listed above are officers of the Corporation within the meaning of the Business Corporation Law and the provisions of the Corporation's By-Laws, including the indemnification provisions thereof.

## III. Recommendation

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

Attachment  
Resolutions

February 6, 2015

ATLANTIC YARDS COMMUNITY DEVELOPMENT CORPORATION – Officers of the Corporation -  
Appointment of Officers

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RESOLVED, that the following offices are authorized and the following individuals be, and hereby are, appointed to the office which appears opposite their name, until earlier resignation or removal, their appointment being effective as of the date indicated in the attached materials, a copy of which is hereby ordered to be filed with the records of the Corporation:

President – Marion Phillips, III;  
Vice President – Joseph Chan;  
General Counsel – Elizabeth R. Fine;  
Chief Financial Officer – Margaret Tobin;  
Treasurer – Robert Godley;  
Secretary – Debbie Royce; and  
Assistant Secretary – Regina Stephens.

and be it further

RESOLVED, that within the meaning of the Business Corporation Law and in accordance with and for all purposes of the Corporations' By-Laws, including but not limited to the indemnification provisions thereof, the above-referenced individuals are "officers" of the Corporation;

and be it further

RESOLVED, that the titles of General Counsel; Chief Financial Officer; and Treasurer are and shall be appointed ex-officio with the corresponding titles of the New York State Urban Development Corporation d/b/a/ Empire State Development and confirms that these positions are "officers" of the Corporation within the meaning of the Business Corporation Law and within the meaning of the provisions of the Corporation's By-Laws, including the indemnification provisions thereof.

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# Item 3

FOR CONSIDERATION

February 6, 2015

TO: The Directors

FROM: Marion Phillips, III

SUBJECT: AYCDC Procurements Guidelines

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

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I. Background

At its March 28, 2014 meeting, the New York State Urban Development Corporation d/b/a Empire State Development (“ESD”) Directors adopted updated and revised Guidelines for the Use, Awarding, Monitoring and Reporting of Procurement Contracts, as mandated by §2879 of the Public Authorities Law (the “2014 Guidelines”). Annual review and approval of the ESD Procurement Guidelines is also required by Public Authorities Law § 2879. A copy of the 2014 Guidelines is attached.

All ESD subsidiaries, including the Atlantic Yards Community Development Corporation (“AYCDC” or the “Corporation”), are required to adopt the 2014 Guidelines, unless a compelling case is made that any provision thereof is inapplicable or should be amended for special reasons applicable to the subsidiary. AYCDC staff is unaware of any reason to depart from the 2014 Guidelines.

II. Procurement Contracts Guidelines Summary

The 2014 Guidelines attached to this memorandum set forth the policies and procedures to be followed by AYCDC 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 the Guidelines have not been followed.

The 2014 Guidelines define the universe of procurement transactions which are subject to the policies and procedures. Generally, all procurements by AYCDC must be competitive, except where State law provides for non-competitive sourcing (e.g., goods purchased from approved non-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 Guidelines explain the various means of obtaining goods and services in an open, accountable and transparent manner, including incorporation of the ESD Bid Opening Guidelines and the compilation of a Procurements Record for every covered Procurement Contract.

The 2014 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 2014 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. Many sources of help and information are included as clickable links, and virtually all required forms and ESD policy and procedure documents can also be accessed from within the document by hyperlinks. For obvious reasons, the hard copy of the proposed Guidelines presented to the Directors for approval cannot contain these links, but they are shown in highlight form.

### III. Recommendation and Requested Action

The Directors are requested to adopt the 2014 Guidelines for the Use, Awarding, Monitoring and Reporting of Procurement Contracts, effective as of the date of approval.

#### Attachments

Resolution

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



February 6, 2015

ATLANTIC YARDS COMMUNITY DEVELOPMENT CORPORATION – AYCDC Procurements  
Guidelines - Adoption of Guidelines for the Use, Awarding, Monitoring and Reporting of  
Procurement Contracts

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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 2014 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 the date hereof, 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.

\* \* \*

Revised Procurement Guidelines 2014

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

Effective March 28, 2014

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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 March 28, 2014

**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. The same law requires annual review and updating of the guidelines by the ESD Board of Directors (“Board”), including subsidiary Boards.

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 “**offerer**” or, when responding to a public solicitation for qualified vendors or expressions of interest in becoming an ESD vendor, a “**respondent**.”

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

Pursuant to Public Authorities Law § 2879 (2), “**Procurement Contracts**” are any written agreements for the acquisition of goods or services of any kind in the actual or estimated amount of five thousand dollars (\$5,000) or more. For purposes of compliance with anti-lobbying laws contained in State Finance Law § 139-j and 139-k (see p. 11), Procurement Contracts also include the purchase, lease or grant of any other interest in real property which involves an estimated annualized expenditure 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.

Note that **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 OSC review and approval for grants over \$1 million (see p. 23)

A Contract or Memorandum of Understanding (“**MOU**”) with a sister State agency or authority are 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) 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 **up to and including \$50,000** may be handled by Purchase Order approved by Department Head, Procurement Department, 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, see Section 2.1 below or consult the Procurements Manager.

## 1.2. Types of Procurement Contracts

Procurement Contracts for personal services include legal, accounting, management consulting, investment banking, 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. The reasons for the use of 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. Lower cost;
- e. Short-term or infrequent need for the services; and
- f. Distance of the location(s) where the services must be performed from ESD offices or facilities.

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.

Thus, the types of goods that may be procured cover the entire spectrum, ranging from paper and pens to motor vehicles.

### **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 is published in the New York State Contract Reporter where the amount of the contract is **greater than \$50,000** and (regardless of the amount of the Procurement Contract) after the evaluation of proposals obtained, whenever practicable, from at least three qualified vendors or respondents. (See Section 7: Types of Solicitations).

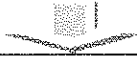
Competition in the procurement process serves both ESD and potential vendors by ensuring that the procurement process produces an optimal solution at a reasonable price; and allowing qualified vendors an opportunity to obtain ESD business, while the process guards against inflated pricing, favoritism, 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. Procurements up to \$50,000

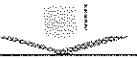
If ESD's procurement needs can be met by a preferred source vendor, we must use this option.



If ESD's needs cannot be met by a preferred source, you may elect to use an OGS Centralized contract. Wherever practicable, you should still solicit two other quotes if this option is selected.



If ESD's needs cannot be met by the above mentioned options, you may elect to use a discretionary purchase through the use of a NYS certified MWBE or a NYS Small Business up to \$50,000.



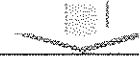
If ESD's needs cannot be met by the above mentioned options, you may elect use an informal solicitation. Contact the Procurement Unit for further assistance if needed.



If this is an emergency situation or only one vendor can meet the needs required for service, the initiating department head has to justify the need to Single Source or Sole Source this request on their justification memo.

#### II. Procurements above \$50,000

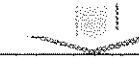
If ESD's procurement needs can be met by a preferred source vendor, we must use this option.



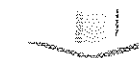
If ESD's needs cannot be met by a preferred source, you may elect to use an OGS Centralized contract. Wherever practicable, you should still solicit two other quotes if this option is selected.



If ESD's needs cannot be met by the above mentioned options, you may elect to use a discretionary purchase through the use of a NYS certified MWBE or a NYS Small Business up to \$200,000.



If ESD's needs cannot be met by the above mentioned, use a Request of Proposals ("RFP"), Request for Qualifications ("RFQ") or Request for Expressions of Interest (RFEI), and advertise in the Contract Reporter if this is not an emergency situation and ESD's needs can be met by more than one vendor.



If this is an emergency situation or only one vendor can meet the needs required for service, obtain a Contract Reporter Exemption from the Legal Department using Single Source or Sole Source exemption as appropriate.



## **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 SFL § 162 and the Office of General Services' Preferred Sources Guide.

## **2.3. OGS Centralized Contracts**

Goods and services needed by ESD may be available, without the need for competitive procurement, through centralized contracts held by the NYS Office of General Services ("OGS"). Information about centralized contract offerings can be obtained from the list of approved state contractors maintained by OGS.

Note that even if a OGS centralized contractor is available, it is recommended that staff obtain three price quotes from other OGS contractors or other vendors not on the OGS list, unless a compelling justification exists (e.g., experience with a particular project).

## **2.4. 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.

## **2.5. 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.

## **2.6. Discretionary Purchases**

ESD may purchase services or commodities from small business concerns or those certified pursuant to Article 15-A of the Executive Law (Minority and Women-Owned Businesses), or

commodities or technology products that are recycled or remanufactured, in an amount not exceeding two hundred thousand dollars (\$200,000) 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. The award of a discretionary purchase contract should be notified in the Contract Reporter. For more information on discretionary purchases see [www.ogs.ny.gov](http://www.ogs.ny.gov).

### 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 particular vendor is preferable because of specific factors such as, without limitation, past experience with a particular issue; familiarity with ESD’s operations; experience with similar projects of ESD, other agencies or at other levels of government; demonstrated expertise; or capacity and willingness to respond to the situation. An example would be an environmental consultant who worked on an EIS for a project and now a Supplemental EIS is required for the same project; many consultants could do the work, but the original consultant’s familiarity with the project justifies selection as a single source.
- (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 over \$50,000 should be notified in the Contract Reporter (Economic Development Law, ' 143 (4)).

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

The initiator of the proposed contract must obtain a written Contract Reporter exemption authorization. This is done by means of a memorandum to the Officer(s) specified in Attachment A to these Guidelines.

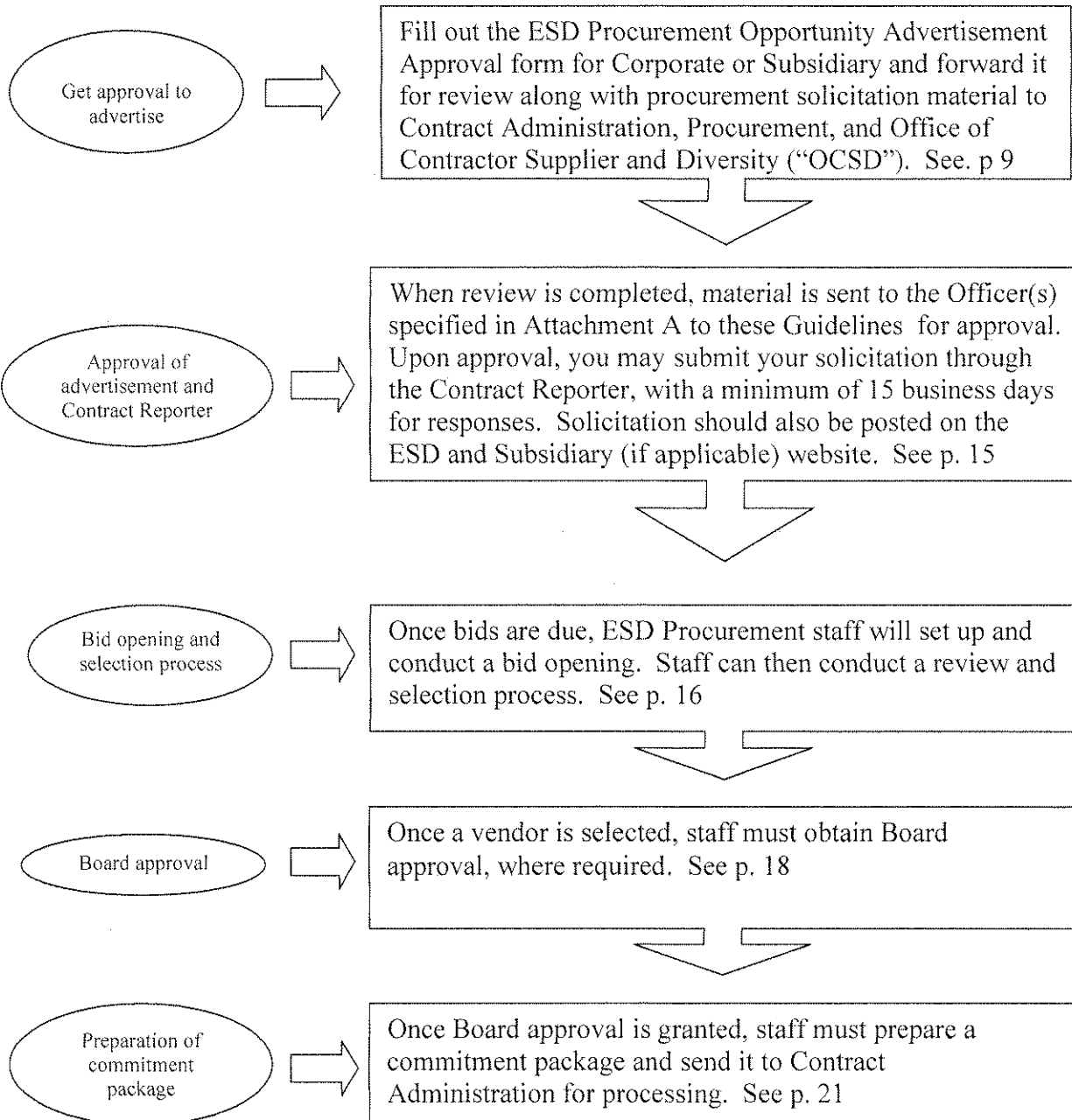
The memorandum requesting the exemption must document in reasonable detail: the circumstances establishing the exemption justification; a description of the goods or services to be acquired via the exemption; description of funding source; any alternatives considered; and the basis for determining that the cost of the proposed contract is reasonable under the circumstances.

If the proposed contract amount is greater than \$50,000, or will last more than one year, the exemption authorization should be obtained before ESD Board's approval. If Board approval is not required because the proposed amount is less than \$50,000 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 139-k and State Tax Law § 5-a must still be satisfied (see p.11). 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 excess of \$50,000, ESD shall submit an announcement of the contract for inclusion in the Contract Reporter, and shall specify the recipient of the contract.

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



## **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 now published daily.

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

Whether the procurement is formal (such as an RFP, RFQ or RFEI) or informal (such as procurement for \$50,000 or less, or a Discretionary Purchase from an MWBE for less than \$200,000) 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 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, past history of government contracts, references/testimonials;
- (iv) Where known, the maximum price that ESD is prepared to pay for the goods or services;
- (v) A schedule of relevant dates (when bid is due, when questions may be asked or briefing meetings held, etc);
- (vi) ESD’s insurance requirements;
- (vii) ESD’s required diversity and minority participation (MWBE) goals;
- (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;
- (ix) A copy of the contract that the successful vendor will be expected to agree to (generally, ESD’s Short Form Contract and Schedule A);
- (x) VENDREP Form where needed (See Sections 8.3 and 9.4);

- (xi) Encouragement of use of New York State businesses as sub-contractors or suppliers (See Section 8.6).

## 7. Types of Solicitations

### 7.1. General

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:

- 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 it is 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;

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’s 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.

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

RFQ’s 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; or to select professional services to be rendered at pre-established rates. 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.

## **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.

# **8. Compliance with Other Laws**

## **8.1. Compliance with State Finance Law § 139-j 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 Offerer’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 ‘ § 139-j and 139-k as part of their proposals: 1) the Offerer’s Affirmation of Understanding and Agreement; and 2) the Offerer’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 offerer or retained, employed or designated by the offerer. 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 offerer 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.

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 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 § 5-a 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. Use of the Vendrep Form and Vendor Responsibility**

As required by Executive Order, all vendors must be found to be “responsible”, and remain so through the term of the contract. The Office of the State Controller has developed a useful resource, the VENDREP form, which should be requested from all bidders for contracts where a Vendor Responsibility determination will be needed (most contracts, and all which will require Board approval). See Section 9.4 below for further guidance on vendor responsibility. The Vendrep forms can be accessed here: [www.osc.state.ny.us/vendrep/webresources.htm](http://www.osc.state.ny.us/vendrep/webresources.htm).

#### **8.4. Compliance with Executive Law Article 15-A: Contractor and Supplier Diversity**

All Procurement Contracts must comply with the requirements of Executive Law Article 15-A, which promotes employment and business opportunities for minorities and women on State contracts “to encourage and assist State agencies in their efforts to increase participation by minority and women-owned business enterprises (“MWBEs”) on State contracts so as to facilitate the award of a fair share of such contracts to MWBEs.”

Where practical, feasible and appropriate, ESD shall promote and assist participation by minority and women-owned businesses in the selection and award of all contracts. Such minority and women-owned business participation shall be documented in a regular supplement, prepared by ESD’s Office of Contractor and Supplier Diversity (“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 Schedule of Minority/Women Business Participation, from the potential contract awardee, for OCSD's review and approval, prior to contract award. The required forms are accessible [here](#).

#### **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 not 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. 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 accessed [here](#).

[http://intranet.empire.internal/Resources/Data/Procurement/03042014\\_NYS\\_SubcontractorsandSuppliers.pdf](http://intranet.empire.internal/Resources/Data/Procurement/03042014_NYS_SubcontractorsandSuppliers.pdf)

### **8.7. Project Sunlight**

Project Sunlight is an important component of the Public Integrity Reform Act of 2011 that was passed by the Legislature and signed by the Governor. Under this law, the 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. (See Section 9: Contract Reporter Advertising Process).

### **8.9. Standard-Form Attachments**

Procurement Contracts, which includes amendments to existing contracts, should include ESD's standard forms, including as appropriate ESD's Standard Short Form Contract as well as further required contract terms (Schedule A for consultants or law firms,; ESD's Non-Discrimination and Affirmative Action Provisions and Schedule of Minority/Women Business Participation; SFL § 139-j and 139-k and State Tax Law § 5-a (or affidavit of non-applicability). Insurance requirements must be obtained from Contract Administration for all solicitations and, if needed, must be included with the forms.

## **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). View the Contract Reporter's daily publication schedule.

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 minority and women-owned business maintained by ESD's Non-Discrimination and Contractor & Supplier Diversity Department.

### **9.1. 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 taken into account. 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%.

### **9.2. Bid Opening Procedures**

All proposals should be received at one designated location within the initiating Department, 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/Subsidiary Finance, Legal, Procurements, OCSD and the initiating Department/Subsidiary should be present at bid openings in person or by teleconference. Bids shall be opened by the Procurement Manager 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 Manager. 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 State Finance Law ' 144. 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). 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.

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

The initiating Department Head should establish, 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. In some cases, one or more non-ESD team members may 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. 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.

In reviewing bids, all members of the team 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 retained by the Procurements Manager as part of the Procurement Record.

### **9.4. Determination of Responsibility – “FLIP Review”**

Pursuant to State Finance Law ' 163, 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 is sought from the relevant Board, the initiator should ensure that all vendors are “responsible.”

Vendor responsibility is generally accomplished by “FLIP” review. FLIP review involves assessment of four factors: (i) Financial and organizational capacity; (ii) Legal authority to do business in the state; (iii) Integrity of the owners/officers/principals; and (iv) Past performance on prior government contracts.

The Office of the State Controller has developed a useful resource, the VENDREP form, that should be used wherever possible. 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 can be accessed here: [www.osc.state.ny.us/vendrep/webresources.htm](http://www.osc.state.ny.us/vendrep/webresources.htm).

For more information, including links to forms used in a determination of responsibility, see Best Practices on the OGS website. Note that FLIP review is not needed for procurements from the OGS Centralized Contracts list.

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 the following website:

[www.ogs.state.ny.us/procurecounc/pdfdoc/BestPractice.pdf](http://www.ogs.state.ny.us/procurecounc/pdfdoc/BestPractice.pdf)

### **9.5. Procurement Record**

The ESD department head or his or her designee 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 Manager before a contract is executed.

## **10. Contract Approval**

Procurement Contracts in amounts **\$50,000** or less that will be completed within one year must be approved by the Officer(s) specified in Attachment A to these Guidelines .

Procurement Contracts over \$50,000, as well as contracts for any amount involving personal services to be rendered over a period in excess of one year, must be approved by the ESD (or Subsidiary) Directors. However, **warranty and product maintenance/support/lease contracts (including but not limited to auto leases)** are not considered personal services and do not require approval by the Board unless the amount of such contract is over \$100,000 in aggregate through the life of the contract.

### **10.1. 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.

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 source.

**10.2. ESD Contract and Amendment Approval**

- a. Contracts in amounts under \$50,000 must be approved by the Officer(s) specified in Attachment A to these Guidelines.
- b. Contracts (i) in amounts over \$50,000 or (ii) contracts for any amount involving services to be rendered over a period in excess of one year must be approved by the ESD (or Subsidiary) Directors.
- c. 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.
- d. Contracts for goods to be provided or services to be rendered over a period in excess of one year, regardless of the amount of the contract, which therefore must have been approved by the Board, must in addition be reviewed annually by the ESD (or Subsidiary) Directors. The initiating Department Head must provide an annual report setting forth the status of all continuing goods and/or 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 and Subsidiary Finance by filling out a contract summary/contract status report. The status reports will also be part of the annual budget and spending review process for all existing ESD and Subsidiary budgets, which must be annually approved by the respective Directors. The annual status reports will thus serve to clarify the need to continue existing multi-year goods and/or service provider contracts.
- e. 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, the ESD Chief Executive Officer, Executive Vice President, General Counsel or Chief Financial Officer 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 Office of the State Comptroller (“OSC”) approval (See Section 11.5); and
  - ii. the authorization contained in the Notice to Proceed does not exceed \$50,000; 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 two of the following: ESD Chief Executive Officer, Executive Vice President, General Counsel or Chief Financial Officer.

f. **Amendments to existing contracts** follow the same process as new contracts, i.e., the amendment needs to be advertised in the New York State Contract Reporter or exempted. 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.

g. Contract amendments that increase the contract amount to \$50,000 or more 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 Chief Executive Officer or Chief Financial Officer without further Board approval, unless the amendment increases the contract to an amount above \$50,000 and Directors' approval has not been previously obtained. If any such proposed amendment will increase the term of the contract to more than one year, Contract Reporter advertising is necessary unless, as discussed in paragraph (c) above, the original contract contained a clause specifically permitting extension.

g. 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 the Chief Financial Officer of the corporation. Note that such an amendment may require OSC review and approval (see section 11.5 below). If in doubt, consult the Legal Department.



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

### **11.1. Commitment Request Package**

- a. The contract initiator completes the required information on the Commitment Request Form.
- b. The contract initiator completes the Standard Form Contract -Short Form for Goods/Services, if applicable, with the relevant attachment (“Schedule A”) which may be Standard Form for Materials/Services, Architect Agreement, Attorney Agreement, or Standard Form Amendment or Modification of Contract.

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 more clear and 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 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;
- c. Written explanation of the responsibility determination/FLIP Review and/or formal Determination of Responsibility, where required.
  - d. ESD/Subsidiary Board of Directors Approval, if applicable. View sample Board materials.
  - e. New York State Contract Reporter Form, approved exemption letter, or NYS OGS Centralized Contract.
  - f. 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.

- g. Three (3) original sets of the contract package or amendment with: (i) Schedule A (conditions applicable to consultant or legal agreements); (ii) Schedule B (scope of work and compensation terms); (iii) Schedule C (Non-Discrimination and Affirmative Action Provisions and Schedule of Minority/Women Business Participation and Compliance with Executive Law Article 15-A); (iv) Schedule D (ST-220 Contractor Certification Form pursuant to Tax Law § 5-a); (v) Schedules E-1 (Compliance with SFL § 139-j and 139-k, the Offerer's Affirmation of Understanding and Agreement pursuant to SFL §' 139-j (3) and 60 (b), the Offerer Disclosure of Prior Non-Responsibility Determinations under SFL § 139-k(2); and (vi) the Encouragement of NY sub-contractors and suppliers form.
- h. The initiator signs and obtains the Department head approval on the Commitment Request form and forwards the commitment package (all documents listed above) to Procurement for compliance review and approval. When approved, Procurement will route the commitment package to Contract Administration. The commitment package must be accompanied by a completed Commitment Package Checklist.
- i. Contract Administration routes and tracks the commitment package and obtains necessary approvals from various ESD Departments.
- j. Upon obtaining in-house approvals, Contract Administration sends all three (3) sets of the contract or amendment package to the vendor for signature(s).
- k. After receiving three (3) signed sets from the vendor, Contract Administration sends all three sets to the Officer(s) specified in Attachment A to these Guidelines for signature.
- l. One original copy of the fully-executed contract is sent by Contract Administration to the vendor.

## **11.2. Contract Reporter Award Notification**

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

## **11.3. Extension/Amendment of Contracts**

If a Procurement Contract is entered into after a Contract Reporter solicitation, the contract and solicitation can provide that there may be an extension of the contract or amendment to the scope of work. If so, then extensions and/or amendments do not need to be advertised in the Contract Reporter again. However, if the contract requires approval by the ESD Board, the possibility of extension or amendment must be included in the original Board materials and Resolution. When in doubt, provide for extension or amendment to minimize future problems.

#### **11.4. Department 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 B-1184. 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.

#### **11.5. OSC Post-Contract Approval of \$1,000,000+ Contracts**

Under Public Authorities Law § 2879-a (effective March 1, 2010), proposed contracts in excess of one million dollars that either: (i) are to be paid for in whole or in part by state appropriations; or (ii) are not to be awarded after a competitive process (regardless of the funding source), must be approved by the Office of the State Comptroller (“OSC”) after the contract is signed. If § 2879-a applies and approval by OSC has not been obtained, the signed contract “shall not be a valid enforceable contract.” 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.



Comptroller review  
of Contracts Memo\_F

Note that loan and grant contracts may be covered by the OSC review process.

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.

## **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, 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.

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, 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, and whether the extent of performance, to date, is commensurate with the amount the contractor has been paid.

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.**

### **13. Procurement Contracts Involving Former Officers of ESD**

ESD shall not enter into Procurement Contracts with its former officers or employees, or with firms employing such officers or employees, except as permitted by applicable provisions of law and by ESD's "Guidelines Regarding Conflicts of Interest and Ethical Standards."

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

ESD's Legal Department, in conjunction with the VP/Administrative Services, shall be responsible for:

- a. Preparing for approval by the CEO such supplemental procedures as may be required to effectively implement these Guidelines.
- b. Preparing proposed amendments to the Guidelines for approval by the CEO and the ESD Directors when and as required.

### **15. Reporting**

#### **15.1. Quarterly Reports**

ESD's VP/Contract Administration shall prepare for presentation by the Office of Contractor and Supplier Diversity to the ESD Directors, quarterly reports of new Procurement Contracts and required Schedules of MWBE Participation. For each Procurement Contract, the report shall include the contract amount, reason for award, initial scope of services and the selection process used. Such reports shall include information related to amendments approved on contracts during the reporting period.

#### **15.2. 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 11.5)

# Item 4

FOR CONSIDERATION

February 6, 2015

TO: The Directors

FROM: Marion Phillips, III

SUBJECT: Establishment of Pre-Qualified Counsel List

RE: Approval of Pre-Qualified Counsel

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Background

The New York State Urban Development Corporation d/b/a Empire State Development (“ESD”) and its subsidiaries, including the Atlantic Yards Community Development Corporation (“AYCDC”), are involved in large and complex economic development projects. The size, nature, complexity and timing of these projects typically require ESD and its subsidiaries to call on the assistance of outside counsel in various areas of expertise. To permit the Corporation to respond to the needs of these projects expeditiously, while having available the benefits of a broad solicitation of qualified outside law firms, the legal department staff recommended the creation of a list of pre-qualified counsel. At its meeting in September of 2012, ESD approved such a list, to remain in effect for three years, with an option for the General Counsel or Deputy General Counsel to extend the list for a fourth year.

This action seeks adoption of the ESD approved pre-qualified list which would make these firms available for future recommendation to the AYCDC Directors for retention as the need may arise, without the need to conduct a further solicitation. No individual law firm is being recommended at this time for retention in connection with any particular matter and no funding is being authorized. Rather, only a pre-qualified list is being approved.

The Solicitation

On April 23, 2012, ESD staff placed an advertisement in the New York State Contract Reporter requesting proposals from law firms in the following areas of law: real estate and land use; environmental; construction; condemnation; bankruptcy; labor; taxation; bond financing; foreclosure and, in each case, related litigation. Proposals were due by May 17, 2012 and all submissions were opened on May 23, 2012.

In addition, ESD staff contacted by letter and/or email all firms that had responded to the 2008 and 2010 solicitations, all New York State certified minority and women-owned business enterprise firms (“M/WBE”), as well as other firms referred to us by ESD staff and others. All such communications advised the firms of the Contract Reporter procurement opportunity.



Sixty-six firms responded to the solicitation. The responses were evaluated by a Review Committee consisting of the Deputy General Counsel and five Senior Counsels, including the Senior Counsel primarily responsible for bond financings and the Senior Counsel for environmental and litigation matters. The submissions were evaluated on the basis of, among other things: number and experience of attorneys practicing in each area of expertise; demonstrated experience in development projects similar to those in which the Corporation engages; experience in government and public/private initiatives generally; presence and size of office(s) in New York State; the firm's current arrangements and/or willingness to engage in future M/WBE partnering or mentoring arrangements; and willingness to work within the Corporation's limitation on hourly fees. In some cases, additional information was requested in clarification of an initial submission and nine firms were selected for interviews.

Based on the review, ESD staff recommended approval, as pre-qualified counsel to the Corporation, in the indicated areas of expertise, the 50 firms listed on Attachment A to these materials. The ESD Board approved the pre-qualified list at its September 2012 meeting. This will permit staff to respond to project needs efficiently.

#### Financial Commitment and Selection from the List

The Directors are not now being asked to authorize the retention of any firm in connection with any matter. Instead, the requested approval would serve to make available to AYCDC a selection of candidate firms that have been through a broad solicitation process. This would allow staff to select from among the candidate firms to recommend to the AYCDC Directors in the future for retention in connection with particular projects without the need for conducting individual solicitations in each instance. This will save for each project the two or more months that is normally needed to conduct a solicitation, perform the necessary review and formulate a recommendation.

In addition, staff recommends that the General Counsel of ESD or, in the General Counsel's absence, the Deputy General Counsel, be given the authority to refer to any such counsel matters in related areas of expertise as s/he may deem appropriate and advisable in connection with any project. For example, in the event that a tax issue arises in connection with a real estate transaction, the General Counsel or, in the General Counsel's absence, the Deputy General Counsel, in his/her discretion could call on the expertise of tax attorneys with the pre-qualified firm that was selected to handle the real estate aspects of the transaction.

#### Duration of List

Staff recommends that the pre-qualified list remain in effect until revised simultaneously with revision of the ESD list, with the option to extend the duration of the list for an additional year at the discretion of the General Counsel or, in the General Counsel's absence, the Deputy General Counsel.

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### Environmental Review

ESD staff has determined that this determination does not constitute an action as defined by the New York State Environmental Quality Review Act and its implementing regulations. No further environmental review is required in connection with the requested approval.

### Recommendation and Requested Action

Staff recommends and the Directors are requested to approve the firms on Attachment A to these materials as pre-qualified counsel in the areas of expertise identified in such Attachment (and in each case related litigation) and, in the discretion of ESD's General Counsel or, in the General Counsel's absence, the Deputy General Counsel, such related areas of expertise as the s/he may deem appropriate and advisable in connection with any project, for a term of three years plus an additional year at the option of the General Counsel or, in the General Counsel's absence, the Deputy General Counsel.

### Attachments

Resolution  
Attachment A

February 6, 2015

ATLANTIC YARDS COMMUNITY DEVELOPMENT CORPORATION – Establishment of Pre-Qualified Counsel List - Approval of Pre-Qualified Counsel

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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 law firms, listed in Attachment A be and each hereby is, approved as pre-qualified counsel in the various areas of expertise (and, in each case, related litigation), and in such other areas as the General Counsel or, in the General Counsel's absence, the Deputy General Counsel, may in his or her sole discretion may deem appropriate or advisable in connection with any particular project or matter, such approval to remain in effect until the meeting of the Directors first occurring after September 20, 2015 or, in the discretion of the General Counsel or, in the General Counsel's absence, the Deputy General Counsel, until the meeting of the Directors first occurring after September 20, 2016.

\* \* \*

**Attachment A:**  
**Pre-Qualified Legal Counsel**  
**Adopted by ESD Board on September 20, 2012**  
**Adopted by AYCDC Board February 6, 2015**

Real Estate and Land Use

Bond Schoeneck & King PLLC  
\* Brown & Hutchinson  
Bryan Cave LLP  
\* Bryant Rabbino LLP  
Carter Ledyard & Milburn LLP  
Damon & Morey LLP  
Day Pitney LLP  
Law Offices of Donald J. Tobias  
\* Gonzalez Saggio & Harlan LLP  
Harris Beach PLLC  
Hawkins Delafield & Wood LLP  
Herrick Feinstein LLP  
Hiscock & Barclay LLP  
Hodgson Russ LLP  
Holland & Knight  
Ingram Yuzek Carroll & Bertolotti LLP  
Jaekle Fleischmann & Mugel LLP  
Knauf & Shaw LLP  
Kramer Levin Naftalis & Frankel LLP  
Mentor Rudin & Trivelpiece PC  
McNamee Lochner Titus & Williams, P.C.  
Nixon Peabody LLP  
Phillips Lytle & \* The Gibson Law Firm  
Saunders Kahler LLP  
Schiff Hardin LLP  
\* Schoeman Updike & Kaufman LLP  
Shearman & Sterling LLP  
Sidley Austin LLP  
Skadden Arps Slate Meagher & Flom LLP  
Venable LLP  
Whiteman Osterman & Hanna LLP

\* M/WBE Firm

Condemnation

Berger & Webb  
Bond Schoeneck & King PLLC  
Carter Ledyard & Milburn LLP  
Damon & Morey LLP  
Day Pitney LLP  
Harris Beach PLLC  
Hiscock & Barclay LLP  
Kramer Levin Naftalis & Frankel LLP  
McNamee Lochner Titus & Williams, P.C.  
Nixon Peabody LLP  
Sidley Austin LLP

Construction

Bond Schoeneck & King PLLC  
Carter Ledyard & Milburn LLP  
Damon & Morey LLP  
Day Pitney LLP  
\* Gonzalez Saggio & Harlan LLP  
Greenberg Traug LLP  
Harris Beach PLLC  
Herrick Feinstein LLP  
Hodgson Russ LLP  
\* Hoguet Newman Regal & Kenney LLP  
Holland & Knight  
Ingram Yuzek Carroll & Bertolotti LLP  
Kilpatrick Townsend & Stockton LLP  
Kramer Levin Naftalis & Frankel LLP  
Mentor Rudin & Trivelpiece PC  
McNamee Lochner Titus & Williams, P.C.  
Nixon Peabody LLP  
Saunders Kahler LLP  
Schiff Hardin LLP  
Shearman & Sterling LLP  
Sidley Austin LLP  
Venable LLP  
Wasserman Grubin & Rogers LLP  
Whiteman Osterman & Hanna LLP  
\* Wilson & Chan LLP

## Bankruptcy

Bond Schoeneck & King PLLC  
Bryan Cave LLP  
Damon & Morey LLP  
Day Pitney LLP  
Law Offices of Donald J. Tobias  
Harris Beach PLLC  
Herrick Feinstein LLP  
Hodgson Russ LLP  
Jaeckle Fleischmann & Mugal LLP  
Mentor Rudin & Trivelpiece PC  
McNamee Lochner Titus & Williams, P.C.  
Nixon Peabody LLP  
Saunders Kahler LLP  
Schiff Hardin LLP  
Shearman & Sterling LLP  
Sidley Austin LLP  
Venable LLP  
Whiteman Osterman & Hanna LLP

## Labor

Bond Schoeneck & King PLLC  
\* Brown & Hutchinson  
Clifton Budd & DiMaria LLP  
Damon & Morey LLP  
Day Pitney LLP  
\* Gonzalez Saggio & Harlan LLP  
Harris Beach PLLC  
Hiscock & Barclay LLP  
Hodgson Russ LLP  
\* Hogue Newman Regal & Kenney LLP  
Jaeckle Fleischmann & Mugal LLP  
Schroder Joseph & Associates LLP  
McNamee Lochner Titus & Williams, P.C.  
Putney Twombly Hall & Hirson LLP  
\* Rao Tiliakos LLP  
Saunders Kahler LLP  
\* Schoeman Updike & Kaufman LLP  
Shearman & Sterling LLP  
Sidley Austin LLP  
Venable LLP  
Whiteman Osterman & Hanna LLP

\* M/WBE Firm

## Environmental

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Bryan Cave LLP  
Carter Ledyard & Milburn LLP  
Damon & Morey LLP  
Day Pitney LLP  
\* Gonzalez Saggio & Harlan LLP  
Harris Beach PLLC  
Herrick Feinstein LLP  
Hodgson Russ LLP  
Jaeckle Fleischmann & Mugal LLP  
Knauf & Shaw LLP  
Kramer Levin Naftalis & Frankel LLP  
Mentor Rudin & Trivelpiece PC  
McNamee Lochner Titus & Williams, P.C.  
Nixon Peabody LLP  
Phillips Lytle & \* The Gibson Law Firm  
Shearman & Sterling LLP  
Sidley Austin LLP  
Sive Paget & Riesel PC  
Venable LLP  
Whiteman Osterman & Hanna LLP

## Taxation

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Carter Ledyard & Milburn LLP  
Damon & Morey LLP  
Day Pitney LLP  
Harris Beach PLLC  
Herrick Feinstein LLP  
Hodgson Russ LLP  
Holland & Knight  
Ingram Yuzek Carroll & Bertolotti LLP  
Jaeckle Fleischmann & Mugal LLP  
McNamee Lochner Titus & Williams, P.C.  
Nixon Peabody LLP  
Schiff Hardin LLP  
Shearman & Sterling LLP  
Sidley Austin LLP  
Whiteman Osterman & Hanna LLP

Foreclosure

Bond Schoeneck & King PLLC  
Carter Ledyard & Milburn LLP  
Damon & Morey LLP  
Law Offices of Donald J. Tobias  
\* Gonzalez Saggio & Harlan LLP  
Harris Beach PLLC  
Herrick Feinstein LLP  
Mentor Rudin & Trivelpiece PC  
McNamee Lochner Titus & Williams, P.C.  
Nixon Peabody LLP  
Sidley Austin LLP

Bond

Senior Tier:

Harris Beach PLLC  
Hawkins Delafield & Wood LLP  
Holland & Knight  
Mintz Levin Cohn Ferris Glovsky and Popeo  
Nixon Peabody LLP  
Orrick Herrington & Sutcliffe LLP  
Squire Sanders LLP & \* KnoxSeaton  
Winston & Strawn LLP

Junior Tier:

Bond Schoeneck & King PLLC  
\* Brown & Hutchinson  
Chapman & Cutler LLP  
Day Pitney LLP  
Edwards Wildman Palmer LLP and \* The  
Hardwick Law Firm LLC  
\* Gonzalez Saggio & Harlan LLP  
Hiscock & Barclay LLP  
\* Law Office of Joseph C. Reid, P.A.  
\* Lewis & Munday PC  
Sidley Austin LLP

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