

NEW YORK TRANSPORTATION DEVELOPMENT CORPORATION

MEETING OF THE DIRECTORS

MONDAY

APRIL 11, 2022

2:00 p.m.

NEW YORK TRANSPORTATION DEVELOPMENT CORPORATION

Meeting of the Directors

April 11, 2022 – 2:00 p.m.

AGENDA

I. CORPORATE ACTIONS

1. Procurement Guidelines – Authorization to Adopt Revised Guidelines for the Use, Awarding, Monitoring and Reporting of Procurement Contracts
2. Pre-Qualified List of Legal Counsel – Authorization to Adopt the Pre-Qualified List of New York State Urban Development Corporation d/b/a Empire State Development of Legal Counsel; and Authorization to Take Related Actions

II. FOR CONSIDERATION

3. New York Transportation Development Corporation – Appointment of Co-Senior Managing Underwriters; Appointment of Additional Underwriters; Appointment of Financial Advisor(s); Authorization to Take Actions Related to the Tax Equity and Fiscal Responsibility Act (“TEFRA”); Authorization to Induce the Project for Private Activity Financing and Declare the Official Intent of the Corporation to Provide Funds for the Reimbursement of Pre-Issuance Expenditures for the Project; Authorization to Proceed with the Preparation of Related Documents; and Authorization to Take Related Actions
4. New York Transportation Development Corporation – Procurement of Legal Services - Authorization to Enter into a Contract for Co-Bond Counsel Services in Connection with the JFK Airport Terminal 6-7 Redevelopment Project at John F. Kennedy International Airport; and Authorization to Take Related Actions
5. New York Transportation Development Corporation – Procurement of Legal Services - Authorization to Enter into a Contract for Co-Bond Counsel Services in Connection with the JFK Airport Terminal 6-7 Redevelopment Project at John F. Kennedy International Airport; and Authorization to Take Related Actions
6. New York Transportation Development Corporation – Procurement of Legal Services - Authorization to Enter into a Contract for Bond Disclosure Legal Services in Connection with the JFK Airport Terminal 6-7 Redevelopment Project at John F. Kennedy International Airport; and Authorization to Take Related Actions

Item 1



FOR CONSIDERATION

April 11, 2022

TO: The Directors

FROM: Matthew Bray

SUBJECT: New York Transportation Development Corporation Procurement Guidelines

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

I. BACKGROUND

The New York Transportation Development Corporation (the “Corporation”) is a corporation as defined in subparagraph (a)(5) of Section 102 of the New York Not-For-Profit Corporation Law (NYPNCL”) and is a charitable not-for-profit corporation as defined under Section 201(b) of the NYPNCL and Section 1411 of the NYPNCL. The Corporation was formed on October 30, 2015 and has issued bonds to fund New York City airport projects and to refinance Fuller Road Management Corporation debt. The Corporation is now addressing certain obligations and taking other necessary corporate actions.

The Corporation will enter into various contracts in the course of conducting its authorized purposes. In order to ensure the consistent, fair and competitive retention of goods and services, staff recommends the voluntary adoption of procurement guidelines (the “proposed 2022 Guidelines”) adopted by the New York Urban Development Corporation d/b/a/ Empire State Development (“ESD”) Board of Directors at its March 24, 2022 meeting. The proposed 2022 Guidelines will replace the procurement guidelines previously adopted by the Corporation.

II. PROPOSED 2022 GUIDELINES SUMMARY

The proposed 2022 Guidelines attached to this memorandum set forth the policies and procedures to be followed by the Corporation when seeking to contract for goods or services. It should be noted that these Guidelines do not have the force of law; are only required of public authorities and public benefit corporations, not local development corporations such as the Corporation; and are proposed as a statement of best practices and procedures. No contract is invalid merely because these guidelines have not been followed.

The proposed 2022 Guidelines define the universe of procurement transactions which are subject to the policies and procedures. Generally, all procurements by the Corporation must be competitively awarded, except where State law provides for non-competitive sourcing (e.g., goods purchased from approved not-for-profit agencies for the blind, or 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 only after advertisement in the NYS Contract Reporter, except in limited circumstances where an exemption is obtained, generally for emergencies or sole or single source procurements where only one vendor offers the desired goods or services or where a single vendor has unique qualities and experience that obviate a competitive process. The proposed 2022 Guidelines explain the various means of obtaining goods and services in an open, accountable and transparent manner, including incorporation of ESD's Bid Opening Guidelines and the compilation of a procurements record for every covered procurement contract.

The proposed 2022 Guidelines comply with the applicable provisions of the Public Authorities Law, State Finance Law and State Tax Law. They are consistent with the State Procurement Counsel's Guidelines and with the Governor's directive that all State agencies and public authorities make responsible spending decisions, and that they be accountable for sufficient monitoring of their spending to ensure the highest level of fairness, non-discrimination, openness and transparency.

The proposed 2022 Guidelines are intended to be user-friendly and set forth in a logical and coherent fashion that will assist staff in understanding the procedures to be followed and the substantive rules that govern procurements.

Sources of help to users and information are included as clickable links, and virtually all required forms and ESD policy and procedure documents can also be accessed from within the document by hyperlinks. These links appear in blue font in the hard copy of the proposed 2022 Guidelines presented herewith to the Directors for approval.

III. ENVIRONMENTAL REVIEW

Staff of the Corporation has determined that the requested authorization constitutes a Type II action as defined by the New York State Environmental Quality Review Act and the implementing regulations of the New York State Department of Environmental Conservation. No further environmental review is required in connection with the authorization.

IV. REQUESTED ACTION

The Directors of the Corporation are being requested to adopt the proposed 2022 Guidelines for the Use, Awarding, Monitoring and Reporting of Procurement Contracts, effective as of the date of approval.

V. ATTACHMENTS

Resolution

Exhibit A: Proposed 2022 Guidelines for the Use, Awarding, Monitoring and Reporting of
Procurement Contracts

April 11, 2022

NEW YORK TRANSPORTATION DEVELOPMENT CORPORATION — Procurement Guidelines
— Adoption of Revised Guidelines for the Use, Awarding, Monitoring and Reporting of
Procurement Contracts

BE IT RESOLVED, that on the basis of the materials presented to this meeting, a copy of which is hereby ordered to be filed with the records of the Corporation, the proposed 2022 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, as a statement of best practices and procedures, and the President or his/her 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.

* * *

EXHIBIT A

2022 Guidelines for the Use, Awarding, Monitoring and Reporting of Procurement Contracts

NEW YORK STATE URBAN DEVELOPMENT CORPORATION

D/B/A EMPIRE STATE DEVELOPMENT

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

Effective April 1, 2022

Table of Contents

1.	Overview and Requirements.....	1
1.1.	Contracts covered, and not covered, by the Guidelines.....	1
1.2.	Types of Procurement Contracts.....	2
1.3.	General Procurement Principles.....	3
2.	Procurement: Overview and Requirements.....	4
2.1.	The Procurement Process Guide.....	4
2.2.	NYS Preferred Sources.....	5
2.3.	OGS Centralized Contracts.....	5
2.4.	Commodities Contracts.....	5
2.5.	Service Contracts.....	5
2.6.	Discretionary Purchases.....	5
2.7.	Piggyback Contracts.....	6
2.8.	Pre-Qualified Lists.....	6
3.	Contract Reporter Exemptions.....	7
3.1.	Reasons for Exemptions.....	7
3.2.	Authorization for Exemptions.....	8
4.	How to Conduct a Competitive Solicitation.....	8
5.	Approval to Advertise.....	9
6.	Contents of ANY Procurement Solicitation.....	9
7.	Types of Solicitations.....	10
7.1.	General Information.....	10
7.2.	Requests for Proposals ("RFP").....	11
7.3.	Requests for Statements of Qualification ("RFQ").....	11
7.4.	Requests for Expressions of Interest ("RFEI").....	12
8.	Compliance with Other Laws.....	12
8.1.	Compliance with State Finance Law § 139-j and 139-k (Lobbying).....	12
8.2.	Compliance with State Tax 220 or Law § 5-a (Sales Tax Registration).....	13
8.3.	Compliance with Executive Order 177 (Prohibiting Contracts with Entities that Fail to Address Discrimination).....	14
8.4.	Compliance with Executive Law Articles 15-A & 17-B: Contractor and Supplier Diversity.....	14
8.5.	Compliance with Iran Divestment Act of 2012.....	17
8.6.	Encouragement of use of New York Businesses as sub-contractors and suppliers...17	17
8.7.	Project Sunlight.....	18
8.8.	Publication on ESD Website.....	18
8.9.	Contract Reporter Advertising Process.....	18
8.10.	Selection Criteria.....	19
8.11.	Bid Opening Procedures.....	19
8.12.	Bid Evaluation and Vendor Selection.....	20
8.13.	Determination of Responsibility — "DOR Review" and the VendRep form.....	20
8.13.1.	Cancellation of a Solicitation.....	22
8.14.	Procurement Record.....	22
8.14.1	Post Proposal Submission Activities.....	22
8.15.	Conflicts of Interest.....	22

9.	Contract Approval.....	23
9.1.	Board Materials.....	24
9.2.	ESD Contract and Amendment Approval.....	24
10.	Steps After Contract Approval Is Obtained.....	27
10.1.	Commitment Request Process (for contracts of \$50,000 or more).....	27
10.2.	Contract Reporter Award Notification.....	28
10.3.	[INTENTIONALLY OMITTED]	
10.4.	Division of Budget ("DoB") Approval.....	29
10.5.	OSC Jurisdiction Over Contracts in Excess of \$1 Million.....	29
11.	[INTENTIONALLY OMITTED]	
12.	Monitoring of Procurement Contracts.....	30
13.	Ethical Considerations.....	31
13.1.	Procurement Contracts Involving Former Employees of ESD.....	31
13.2.	Conflicts of Interest.....	31
13.3.	Unfair Advantage Prohibited.....	31
14.	Implementation of These Guidelines.....	31
15.	Reporting.....	32
15.1.	Annual Reports.....	32
16.	Effect on Awarded Contracts.....	32

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

Effective April 1, 2022

1. Overview and Requirements

The following guidelines (the "Guidelines") are applicable to the use, awarding, monitoring and reporting of procurement contracts of the New York State Urban Development Corporation, d/b/a Empire State Development and its subsidiaries (collectively, "ESD"), ESD is required to adopt procurement guidelines by Article 9, Title 4 of the Public Authorities Law ("PAL"). The same law requires annual review and updating of the guidelines by the ESD Board of Directors ("Board"), 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 "**offeror**" or, when responding to a public solicitation for qualified vendors or expressions of interest in becoming an ESD vendor, a "**respondent**."

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

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

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

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

thousand dollars (\$15,000).

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

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

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

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

Procurement Contracts **under \$50,000** may be handled by **Purchase Order** approved by Department Head, 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, consult the Procurement Coordinator.

1.2. Types of Procurement Contracts

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

Procurements of personal services include but are not limited to legal, accounting, auditing, management consulting, investment banking, underwriting, financial advice, temporary employees, planning, training, statistical analysis, research, public relations, architectural, engineering, construction, surveying, appraisal, or other services of a consulting, professional or technical nature

for a fee, commission or other compensation by a person or persons who are not providing such services as officers or employees of ESD.

Reasons for procuring personal services include:

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

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

1.3. General Procurement Principles

ESD's procurement process is designed to:

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

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

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

2. Procurement: Overview and Requirements

2.1. The Procurement Process Guide

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

- If ESD's procurement needs can be met by a preferred source vendor, you **must** use this option. See section 2.2.
- If ESD's needs cannot be met by a preferred source, you may elect to use an OGS Centralized contract. Please follow OGS guidelines of each specific contract as indicated in section 2.3.
- If ESD's needs cannot be met by the above options, you may elect to do an informal solicitation, in the following order: a discretionary purchase through the use of a NYS certified MWBE, SDVOB or a NYS Small Business (see section 2.6), a mini-bid off a pre-qualified list (see section 2.8) or a mini-bid to a minimum of three vendors equipped to provide services. One of the vendors should be an MWBE/SDVOB whenever practicable (see section 6) 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 must justify the need to Single or Sole Source this request in the justification memo and with the us

II. Purchases of \$50,000 or greater

- If ESD's procurement needs can be met by a preferred source vendor, you **must** use this option. See section 2.2.
- If ESD's needs cannot be met by a preferred source, you may elect to use an OGS Centralized contract. Please follow OGS guidelines of each specific contract as indicated in section 2.3.
- If ESD's needs cannot be met by the above options, you may elect to use a discretionary purchase through the use of a NYS certified MWBE, SDVOB or a NYS Small Business **up to \$500,000**. See Section 2.6.
- If ESD's needs cannot be met by the above options, you may elect to do a mini bid off of a prequalified list. You must solicit to a minimum of three vendors. One vendor should be an MWBE/SDVOB whenever practicable. See section 2.8.
- If ESD's needs cannot be met by the above options, use a Request for Proposals ("RFP"), Request for Qualifications ("RFQ") or Request for Expressions of Interest (RFEI), and **advertise in the Contract Reporter** if this is not an emergency situation and ESD's needs can be met by more than one vendor. See Section 4.

- In an emergency situation or if only one vendor can meet the needs required, obtain a Contract Reporter Exemption using a Single Source or Sole Source exemption as appropriate. See Section 3.

2.2. NYS Preferred Sources

Goods and services needed by ESD may be available, without the need for competitive procurement, from New York State Preferred Sources. If a Preferred Source has goods or services available in the form, function and utility required by ESD, at a price not more than 15% above the prevailing market rate, the goods or services should be obtained through the Preferred Source in the following prioritized order: NYS Department of Correctional Services Correctional Industries Program (CORCRAFT); approved charitable non-profit agencies for the blind; and approved charitable non-profit agencies for the severely disabled, qualified programs for the mentally ill, and qualified veterans workshops. For information on these Preferred Sources, see State Finance Law §162 and the Office of General Services ("OGS") Preferred [Sources Guide](#). The Guide is exhaustive, but the main points are easy to follow.

2.3. OGS Centralized Contracts

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

2.4. 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

Pursuant to PAL § 2879(3)(b)(i) and State Finance Law §163(6), ESD may purchase services or commodities from small business concerns, from those certified pursuant to Article 15-A of the Executive Law ([MWBES](#)), from those certified pursuant to Article 17-B of the Executive Law ([SDVOBs](#)), or commodities or technology products that are recycled or remanufactured, in an

amount up to \$500,000, without a "formal competitive process." In such a case, three quotes should be obtained wherever practicable, and Contract Reporter advertising is advisable when time permits.

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

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

- review the Preferred Source list and OGS Centralized Contracts to determine whether the desired goods or services are available to meet ESD's needs;
- ensure that the commodities, services or technology acquired meet ESD's form, function and utility needs;
- document and justify the selection of the vendor;
- document and justify the reasonableness of the price; and
- ensure that ESD buys from responsible vendors.
- Obtain board approval if the contract amount is over \$250,000

2.7. Piggyback Contracts

ESD may find it efficient to establish a contract based on another governmental entity's contract. This is known as "piggybacking" and may be used in accordance with the criteria established by OGS in the Contract Piggybacking Guidelines under State Finance Law § 163(10)(e), available at [https://ogs.ny.gov/procurement/piggybacking-using-other-existing-contracts-0#:text=Guide for Piggybacking in NYS New York State, of the State Comptroller and under appropriate circumstances](https://ogs.ny.gov/procurement/piggybacking-using-other-existing-contracts-0#:text=Guide%20for%20Piggybacking%20in%20NYS%20New%20York%20State,%20of%20the%20State%20Comptroller%20and%20under%20appropriate%20circumstances). Note that a piggyback procurement requires approval by the OGS Procurement Services Group — this can be difficult and time-consuming to accomplish, as the OGS staff are not very familiar with public authority procurement policies and practices. For example, if the agency you wish to piggyback on is a State agency, it will have different contractual terms than those used by ESD. This may lead to delay, if OGS decides to seek approval of the proposed ESD contract terms from the Attorney General. Piggybacking is better accomplished when you wish to use a contract established by another public authority (rather than a State Agency).

2.8. Pre-Qualified Lists

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

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

Also, ESD staff will have the option of adding additional vendors to Prequalified Lists for a variety of reasons including but not limited to increasing the number of prequalified vendors to better serve ESD's needs.

A list of all current ESD Pre-Qualified Lists will be made available to ESD Staff via ESD's Intranet. A link to exact location will be sent via Broadcast messages to all ESD staff.

3. Contract Reporter Exemptions

3.1. Reasons for Exemptions

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

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

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

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

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

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

3.2. Authorization for Exemptions

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

The memorandum requesting the exemption must document in reasonable detail: the circumstances establishing the exemption justification; a description of the goods or services to be acquired via the exemption; description of funding source; any alternatives considered; and the basis for determining that the cost of the proposed contract is reasonable under the circumstances. The Contract Reporter Exemption form can be found http://intranet.empire.internal/Finance/2018/ContractReporterExemptionRequestForm_Nov.2018.docx. If the proposed contract amount is over \$250,000 or is a personal services contract that will last more than one year, the exemption authorization should be obtained before ESD Board or President approval. If the proposed amount is \$250,000 or less, and the term of the contract is less than one year, the exemption authorization should be obtained from the Officer(s) specified in Attachment A to these Guidelines, prior to contract execution and the commencement of any services or delivery of any goods.

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

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

4. How to Conduct a Competitive Solicitation

- **Get Approval to Advertise:** Fill out the ESD Procurement Opportunity Advertisement Approval form for Corporate or Subsidiary and forward it for review along with procurement solicitation material to the Procurement Department for review. See section 5.
- **Approval of Advertisement and Contract Reporter:** When review is completed, material is sent to the Officer(s) specified in Attachment A to these Guidelines for approval. Upon approval, you may submit your solicitation through the Contract Reporter, with a minimum of 15 business days for responses. Solicitation should also be posted on the ESD and Subsidiary (if applicable) website. See section 8.9.
- **Bid Opening and Selection:** Once bids are due, ESD Procurement staff will set up and conduct a bid opening. Staff can then conduct a review and selection process. See section 8.11.
In order to avoid the risk of submitting a late proposal, ESD will include new language in the RFP suggesting that all proposals be submitted 24 hours prior to deadline.

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

5. Approval to Advertise

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

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

6. Contents of ANY Procurement Solicitation

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

- (i) What goods are being sought or what scope of services is desired;
- (ii) What the projected length ("term") of the resultant contract will be;
- (iii) What criteria will be used in evaluating bids, and how those criteria are weighted. For example, price, bidders' expertise, the qualifications of the proposed staff; past history of government contracts, references/testimonials, understanding of ESD's mission, and either diversity practices (commitment to sound diversity practices within the firm) or a firm's status as a certified MWBE and/or SDVOB¹;
- (iv) A schedule of relevant dates (when bid is due, when questions may be asked or briefing meetings/interviews held, etc.);
- (v) Contact information for a designated contact at ESD is the only person at ESD to whom communications about the solicitation may be directed. Failure to abide by this requirement may result in disqualification of the bidder.

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

- (vi) ESD's insurance requirements (obtained from Contract Administration for all solicitations);
- (vii) ESD's contractor and supplier diversity requirements: MWBE and SDVOB goals, if applicable (goals should be identified before seeking approval to advertise);
- (viii) Disclosure to bidders that they must be able to demonstrate that they are responsible bidders, in good standing under the laws of New York and capable of fulfilling the requirements of the contract, and untainted by past non-performance or criminality;
- (xi) A copy of the ESD standard terms and conditions to which the successful bidder will be expected to agree. This will generally be ESD's Schedule A - Standard Terms and Conditions (For [Materials and Services](#) or for [Law Firms](#)).
IMPORTANT: ESD's standard terms and conditions must be sent to potential vendors as early in the process as possible, to avoid later disputes about terms.
- (x) VENDREP Form where needed (See Section 8.13);
- (xi) Proof that the vendor is authorized to do business in New York State, if services are to be performed in New York State. Generally, this will require NYS Department of State Registration, which can be checked [here](#).
- (xii) Encouragement of use of New York State businesses as sub-contractors or suppliers (See Section 8.6).

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

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

7. Types of Solicitations

7.1. General Information

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

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

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

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

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

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

7.2. Requests for Proposals ("RFP")

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

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

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

http://intranet.empire.internal/Finance/2019/RFP_Template-June2019v2.docx

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

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

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

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

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 4 139-i and 139-k (Lobbying)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Background

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

All Procurement Contracts must also comply with the requirements of Executive Law Article 17B, which acknowledges that SDVOBs strongly contribute to the economies of the State and the nation. Staff should familiarize themselves with the [SDVOB Operations Guidance and the Guidelines for](#)

[the Use of Set Aside Contracts with SDVOBs](#) published by OGS to ensure compliance with SDVOB-related laws and requirements.

ESD staff are expected to encourage the use of MWBEs and SDVOBs in all procurements, including any amendments to existing contracts. Staff must reach out to the Office of Contractor and Supplier Diversity ("OCSD") as early as possible in the procurement process in order to facilitate goal setting for each contract. Additionally, upon advertising a solicitation for a new opportunity, staff should consider publicly posting a list of State-certified MWBEs or SDVOBs who have expressed interest in subcontracting opportunities in connection with the solicitation. Click here for an example of how to advertise interested MWBEs and SDVOBs:

<https://esd.ny.gov/sites/default/files/rfp/MWBEGA%202019%20Listing%20of%20Certified%20Firms%20Expressing%20Interest.pdf>

Executive Order 162

Pursuant to Executive Order Number 162 ("E0 162"), all New York State contracts, agreements and procurements issued and executed on or after June 1, 2017 require contractors to submit detailed workforce utilization reports that include the job title and gross wages of each employee of a contractor and subcontractor performing work on a State contract either or each employee in the contractor's and subcontractor's entire workforce, if the individuals working directly on a State contract cannot be identified. A State contract includes all agreements in excess of \$25,000 for services and commodities, and all agreements in excess of \$100,000 for construction. Contractors and subcontractors performing work on construction contracts with a total value in excess of \$100,000 are required to submit workforce utilization reports to on a monthly basis, within ten (10) days of the end of that month. Contractors and subcontractors performing work on commodities and service contracts with a total value in excess of \$25,000 are required to submit workforce utilization reports to on a quarterly basis within ten (10) days of the end of that quarter.

Goal setting

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

OCSD is responsible for ensuring ESD's compliance with the MWBE and SDVOB Programs. OCSD works with ESD program staff (project managers, program directors, originators and procurement officers) to determine if a contract is eligible for MWBE and SDVOB goal setting, exempted² from goal setting, or excluded³ from goal setting.

It is important to note that whole projects cannot be assessed for goals; rather individual contracts must be assessed for goals.

OCSD may determine that an MWBE goal below the agency-specific goal of 30% is appropriate because there are limited or no subcontracting opportunities and/or limited or no availability of certified MWBEs to perform or provide specific good or services. All goals of less than 30% MWBE

participation, other than a zero-goal determination, must be forwarded to the Executive Chamber for review and must include documentation to reflect the reason for goal reduction.

Waiver Requests

A firm responding to a solicitation or already engaged on an ESD contract, after making good faith efforts to achieve the maximum feasible portion of an MWBE and/or SDVOB participation goal, may submit a [Waiver Request Form](#) to OCSD with appropriate information documenting its "good faith efforts"⁴ to meet its goals. The waiver process includes reviews by: OCSD and the OCSD Counsel. The Executive Chamber must approve MWBE waiver requests before a waiver before it can be issued.

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

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

³ "Exclusions" are contracts that either do not have subcontracting opportunities or no availability of certified MWBEs or SDVOBs to perform or provide specific goods or services. In cases where a contract is awarded by a means other than an RFP, including, but not limited to discretionary purchases and single source contracts, **DMWBD/OGS will only grant an exclusion if MWBEs or SDVOBs are solicited to participate as prime contractors or no MWBEs or SDVOBs are available to participate as prime contractors.**

⁴ "Good Faith Efforts" are the actions that all contractors must demonstrate to certify they have performed their due diligence to solicit MWBE and SDVOB participation in support of their State contract goals. Good Faith Efforts requirements are outlined in 5 NYCRR §142.8 (MWBEs) and 9 NYCRR § 252.2(n) (SDVOBs). A waiver of MWBE or SDVOB goals will not be granted unless the contractor has provided documentation of good faith efforts. In addition to completing a waiver request form, the contractor shall also provide OCSD with supporting information including, but not limited to:

- A statement setting forth the basis for the waiver request;
- The names of general circulation, and trade association publications in which certified MWBE/SDVOBs were solicited for the purposes of complying participation goals related to this contract;
- A list identifying the date(s) that all solicitations for certified MWBE/SDVOB participation were published in any of the above publications;
- A list of all certified MWBEs appearing in the [NYS Directory of Certified Firm](#); and all certified SDVOBs appearing in the [OGS Directory](#) that were solicited for purposes of complying with the participation goals;

- Copies of notices, dates of contact, letters, and other correspondence as proof that solicitations were made in writing and copies of such solicitations to all certified MWBEs/SDVOBs;
- Copies of responses to solicitations received from certified MWBEs/SDVOBs;
- Copies of bid prices from all respondents to a solicitation; and
- A description of any contract documents, plans, or specifications made available to certified MWBEs/SDVOBs for purposes of soliciting bids and the date and manner in which these documents were made available.

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

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

8.5. Compliance with Iran Divestment Act of 2012

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

"By submission of this bid, each bidder and each person signing on behalf of any bidder certifies, and in the case of a joint bid each party thereto certifies as to its own organization, under penalty of perjury, that to the best of its knowledge and belief that each bidder is 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 and is available here:

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

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

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

8.7. Project Sunlight

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

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

8.8. Publication on ESD Website

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

8.9. Contract Reporter Advertising Process

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

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

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

8.10. Selection Criteria

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

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

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

8.11. Bid Opening Procedures

In an effort to be more environmentally conscious, ESD has recently moved toward electric submissions of bids/proposals. Proposals must be submitted on time and compliant with RFP/RFQ requests. There is no bid opening for electronic submission. The entire process is controlled by the Procurement, Director. If it is a mini bid, it is controlled by the originator with the Procurement Director overseeing the process.

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

A Public Bid Opening is required for Public Works contract solicitations, pursuant to UDC Act § 11 (which incorporates by reference State Finance Law § 135). This section generally covers bids for construction work on public projects, and may include preparatory work such as demolition, asbestos abatement and the like. ESD or a subsidiary must be a party to the contract, which must involve the use of laborers, mechanics or workers (not, for example, architects and engineers). Construction contracts must be awarded to the lowest qualified and responsible bidder. See UDC Act § 11. The

definition of a "Public Work" is more a matter of art than law: if in doubt as to whether the contract is for Public Work, contact the Legal Department for guidance.

8.12. Bid Evaluation and Vendor Selection

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

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

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

8.13. Determination of Responsibility — "DOR" and the VendRep Form

Pursuant to State Finance Law § 139-j (7), ESD or the Subsidiary Board must determine that a vendor or respondent is a responsible contractor, prior to approving the award of a contract. In any event, whether or not a formal Determination of Responsibility is sought from the relevant Board, the initiator should ensure that all vendors are "responsible." **For all procurements, the initiator must submit a memo to the Procurements Director attesting that the initiator conducted both a DOR and a thorough review of the VendRep.** View [Determination of Responsibility form](#). In addition to consulting the resources listed on the Determination of Responsibility form, staff may find it useful

to consult OSC's list of suggested resources, at <http://www.osc.State.ny.us/vendrep/webresources.htm>, or review OGS's bulletin of best practices for determining vendor responsibility.

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

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

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

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

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

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

8.13.1. Cancellation of a Solicitation

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

8.14. Procurement Record

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

8.14.1 Post Proposal Submission Activities - Debriefing of Unsuccessful Respondents

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

8.15 Conflicts of Interest

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

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

a. Gifts and Offers of Employment: Respondent has not and shall not during this procurement and during the negotiation of any contract resulting from this procurement, offer to any employee,

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

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

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

9. Contract Approval

Procurement Contracts in amounts of **\$250,000 and under** that will be completed within one year (for services contracts) must be approved by the Officer(s) specified in Attachment A to these Guidelines. Board approval is not required for these contracts, but contracts **between \$50,000 and \$250,000** (or for subsidiaries, whatever the board approval threshold is) must be approved by the President of the ESD (or subsidiary) Board or his or her designee.

Procurement Contracts priced at **over \$250,000**, 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) Board.

Note that **insurance policies, warranty and product maintenance/support/lease contracts (including but not limited to auto and equipment leases and software support services)** are not considered personal service contracts and do not require approval by the Board unless the amount of the contract is over \$250,000 in aggregate through its term. All contracts with a technology component must be approved by ESD's Information Security Officer or designee prior to execution or Board approval.

9.1. Board Materials

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

The Board materials must set out:

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

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

- a. If staff anticipates that a contract may need to be extended beyond one year, ensure that Board approval is requested and that the materials and resolution specifically permit an extension of the contract. Once Board approval is obtained, the contract with the vendor must contain a clause that specifically permits extension. If the contract does not contain such a clause, and the contract needs to be extended, Contract Reporter advertising is required unless an exemption is granted. If a contract has already been presented to the board and it needs to be extended because the work took longer than expected; A No Cost Time Extension can be provided as long as sufficient funds remain to cover the work that needs to be done.
- b. **Contracts for personal services** to be rendered over a period of more than one year, regardless of the amount of the contract, which must have been approved by the Board, must in addition be reviewed annually by the ESD (or subsidiary) Directors, pursuant to Public Authorities Law § 2879.3(b)(ii). The initiating Department Head must provide an annual report setting forth the status of all continuing services contracts, together with justification for the continuance of such contracts for the next year. This annual status report can be made to Contracts Administration by filling out a contract summary/contract status report. The annual status reports will thus serve to clarify the need to continue existing multi-year service provider contracts. Note also that warranty and product maintenance/support/lease contracts (including but not limited to auto and equipment leases) are not considered personal service contracts.
- c. Contract documents should be fully executed and delivered by both parties prior to the commencement of any work. However, if in the discretion of the initiating Department Head it is essential that work on the contract be commenced before the formal contract documents have been approved, and before Board or President approval if required, the officer named in Attachment A to these Guidelines may

issue a letter authorizing a contractor to commence work pending completion and execution of formal contract documents ("**Notice to Proceed**"), provided that:

- i. the contract is not subject to OSC approval (See Section 10.5); and
- ii. the authorization contained in the Notice to Proceed is (a) \$250,000 or less and (b) does not exceed 20% of the total contract value; and
- iii. the initiating Department Head seeking the Notice to Proceed obtains in advance, via memorandum (with copies sent to Contract Administration and Procurement) an explanation in reasonable detail the need for the immediate commencement of contract performance, and the written authorization of the Officer(s) specified in Attachment A to these Guidelines.
- iv. Notice to Proceed can be used prior or after board approval and has a lifespan of just one year. No more than one Notice to Proceed can be used per contract.

d. Contract Amendments

- i. **Amendments to existing contracts** generally follow the same process as new contracts, i.e., any amendment over \$50,000 needs to be advertised in the Contract Reporter, exempted, or awarded to a firm on a pre-qualified list after soliciting bids from three other firms including at least one MWBE firm and one SDVOB firm. An Amendment Package must be sent to Contracts Administration for approval and processing (see Commitment Request Package on the next page for guidance). The same documents, such as justification memo/contract status report, commitment request form and/or standard amendment form must be generated. If the proposed amendment will involve a new Contract Reporter advertisement or other solicitation, the requirements of SFL §139-j and 139-k and State Tax Law § 5-a will apply, and in any case, new certifications may be required. Note that an amendment to an existing contract that causes the aggregate amount of the contract to exceed \$1 million may be subject to OSC approval, regardless of the amount of the amendment and source of funds. If the proposed amendment will be for a different scope of work, the process for a new contract should be followed
- ii. Amendments that increase the **contract amount** to more than \$250,000 must be approved by the ESD (or subsidiary) Directors. Amendments for less than 10% of the original contract amount (or the

contract amount as subsequently approved by the Board) may be executed by the ESD officer named in Attachment A to these Guidelines without further Board approval, unless the amendment increases the contract to an amount above \$250,000 and Directors' approval has not been previously obtained.

- iii. If a proposed amendment to a contract for personal services will increase the **term** of the contract to more than one year, Board approval is necessary, and Contract Reporter advertising is necessary unless (i) as discussed in paragraph (a) above, the original contract contained a clause specifically permitting extension; or (ii) the amendment is awarded to a vendor on a pre-qualified list following wherever practicable the receipt of three quotes from other vendors on the list including at least one from a certified MWBE or SDVOB firm; or (iii) the amendment increases the term of the contract by not more than three months, and approval for the extension is given by the person named in Attachment A to these Guidelines. If the amendment will increase the amount of time or other terms of the contract but **will not increase the contract amount**, the initiator need not submit a new Commitment Request Package.
- iv. In the case of contracts for more than \$1 million, where the initiator anticipates that unforeseen contingencies and changes of scope may arise and require changes in the contract amount, Board approval should be sought from the outset for amendment of the contract up to 10% of the amount approved, to be executed without further Board approval by the Chief Executive Officer and/or the Chief Financial Officer of the corporation. Note that such an amendment may require OSC review and approval (see section 10.5). If in doubt, consult the Legal Department.

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

*Some subsidiaries have lower monetary thresholds for board approval.

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

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

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

10. Steps After Contract Approval Is Obtained

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

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

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

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

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

10.2. Contract Reporter Award Notification

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

10.3. [INTENTIONALLY OMITTED]

10.4. Division of Budget ("DoB") Approval

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

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

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

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

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

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

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

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

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

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

11. [INTENTIONALLY OMMITTED]

12. Monitoring of Procurement Contracts

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

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

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

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

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

The evaluation of the vendor's performance should take into consideration the quantity and quality of the work performed; the timeliness of submission of contract deliverables; the adequacy of cost and performance records and other supporting documentation; the ability of the vendor to meet MWBE and SDVOB participation goals; and whether the extent of performance, to date, is commensurate with the amount the contractor has been paid.

All MWBE and SDVOB performance should be reported to OCSD.

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

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

13. Ethical Considerations

13.1 Procurement Contracts Involving Former Employees of ESD

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

13.2 Conflicts of Interest

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

13.3 Unfair Advantage Prohibited

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

14. Implementation of These Guidelines

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

15. Reporting

15.1. Annual Reports

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

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

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

16. Effect on Awarded Contracts

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

Item 2



FOR CONSIDERATION

April 11, 2022

TO: The Directors

FROM: Matthew Bray

SUBJECT: Pre-Qualified List of Legal Counsel

REQUEST FOR: Authorization to Adopt the Pre-Qualified List of the New York State Urban Development Corporation d/b/a Empire State development of Legal Counsel; and Authorization to Take Related Actions

I. INTRODUCTION

This action seeks adoption by the New York Transportation Development Corporation (the "Corporation") of the New York State Urban Development Corporation d/b/a Empire State Development ("ESD") pre-qualified list of legal counsel which would make these firms available for further recommendation to the Corporations' Board of Directors (the "Directors") for retention as the need may arise, without need to conduct a further solicitation.

ESD adopted a new pre-qualified list of legal counsel, as detailed below, on March 24, 2022 and the Directors is being requested to adopt that new list for the Corporation.

The Directors are not now being asked to authorize the retention of any particular firm in connection with any matter. Instead, the requested approval and adoption of the ESD list would serve to make available to the Corporation a selection of candidate firms that have been through a board solicitation process. This would allow staff to select from among the candidate firms to recommend to the Corporation in the future for retention in connection with particular projects, without the need to conduct 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.

II. ADOPTION OF PRE-QUALIFIED LIST OF COUNSEL

On October 8, 2021, ESD staff placed an advertisement in the New York State Contract Reporter requesting proposals from law firms in the following twelve (12) areas of law (including, in each instance, litigation capabilities): real estate and land use; construction; environmental; condemnation; taxation; bond financing; labor & employment; venture capital investments and

other investments; bankruptcy/foreclosure/workout; governance and regulatory litigation; intellectual property; and landlord-tenant. Proposals were due on or before November 12, 2021.

In addition, staff contacted the following individuals and law firms via email to advise them of the Contract Reporter opportunity: all of the law firms on ESD's current list of pre-qualified legal counsel previously approved by the Board; all law firms that are State-certified Minority or Women-Owned Business Enterprises ("MWBEs"); all law firms that are State-certified Service-Disabled Veteran-Owned Businesses ("SDVOBs"); the Bar Associations of all of the Counties in New York State; and various other local, regional and minority bar associations.

Seventy-four (74) firms responded to the solicitation. The responses were evaluated by a Review Committee consisting of nine ESD staff attorneys. The Review Committee's recommendations then were discussed with the acting General Counsel. The responses were evaluated on the following criteria, with the percentage of the overall score in parentheses:

- (1) Relevant firm experience for each applicable area of law for which pre-qualification is sought and the qualifications and experience of staff proposed to be assigned to an ESD engagement (30%);
- (2) General qualifications and experience of the firm, including client reference checks (20%);
- (3) Status as a certified Minority or Women-Owned Business Enterprise (MWBE) or a certified Service-Disabled Veteran-Owned Business (SDVOB) as defined in the New York State Executive Law (15%);
- (4) Overall organization, completeness and quality of the response and the Firm's demonstration of a clear understanding of ESD's mission and activities (15%);
- (5) Demonstrated experience and success working with ESD or other New York State agencies or other public entities (10%); and
- (6) Anticipated cost of services and willingness to work with ESD to minimize costs (10%).

Based upon review of all relevant criteria, ESD staff selected a list of legal counsel to remain in effect for three years, with an option to renew for one additional year. On March 24, 2022, a team of legal counsel set forth in Exhibit A (attached) were selected by the ESD board of directors.

On the basis of overall ESD staff analysis and ranking of the proposals, and the approval of the ESD board, it is recommended that the Corporation select the law firms set forth in Exhibit A (attached) to be eligible to serve as legal counsel, as needed, for a term of three years; it is also recommended that authority be granted to the Corporation's General Counsel to extend the term for one year.

In the event that the principal partners or attorneys responsible for ESD's legal matters or other key members of a pre-qualified firm's team in a particular area of expertise, leave the pre-qualified law firm, the pre-qualification shall "follow" the(se) key law firm member(s).

Similarly, if a pre-qualified firm combines with another firm and such principal partners or other attorneys remain in the newly formed firm, the newly formed firm will be considered pre-qualified in that area of expertise.

III. ENVIRONMENTAL REVIEW

Staff has determined that the requested authorization constitutes a Type II action as defined by the New York State Environmental Quality Review Act and the implementing regulations for the New York Department of Environmental Conservation. No further environmental review is required in connection with this authorization.

IV. REQUESTED ACTION

At this time the Board of Directors is requested to approve the law firms listed on Exhibit A attached to these materials as pre-qualified legal counsel to the Corporation.

V. ATTACHMENTS

Resolution

EXHIBIT A: Pre-Qualified List of Legal Counsel

April 11, 2022

NEW YORK TRANSPORTATION DEVELOPMENT CORPORATION — Pre-Qualified List of Legal Counsel – Authorization to Adopt the Pre-Qualified List of the New York State Urban Development Corporation d/b/a Empire State Development of Legal Counsel; and Authorization to Take Related Actions

WHEREAS, the New York Transportation Development Corporation (the “Corporation”) proposes to select a team of law firms (the “Law Firms”) for all matters related to the Corporation; and

WHEREAS, ESD issued a Request for Proposals to select a group of law firms to serve ESD and, on the basis of the overall ranking of the proposals by the responding law firms, selected qualified Law Firms; and

WHEREAS, based on ESD’s evaluation of such Law Firms, the Corporation wishes to adopt the same list of Law Firms that was adopted by ESD on March 24, 2022;

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 Exhibit A be and each hereby is, approved as pre-qualified legal 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 absence of the General Counsel, 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 termination or expiration of the pre-qualified ESD list of Law Firms; and may it be further

RESOLVED, that the President and his or her designee(s) be, and each of them hereby is, authorized and directed, in the name and on behalf of the Corporation to execute and deliver any and all documents and to take all such actions as may be necessary or appropriate to effectuate the foregoing. Any actions previously taken by the Corporation consistent with this authorization are hereby ratified and affirmed.

* * *

EXHIBIT A

ESD Pre-qualified Legal Counsel

Adopted – March 24, 2022

Adopted by New York Transportation Development Corporation – April 11, 2022

ESD PRE-QUALIFIED LEGAL COUNSEL LIST

Established March 24, 2022 - Page 1

REAL ESTATE

Amato Law Group PLLC	Knauf Shaw LLP
Ashurst LLP	Law Firm of Dayrel Sewell, PLLC
Ballard Spahr LLP	Law Offices of Barry D. Lites LLP
Bee Ready Fishbein Hatter & Donovan, LLP	Law Offices of Joseph C. Reid, P.A.
Bryan Cave Leighton Paisner LLP	Marous Law
Bryant Rabbino LLP	Mintz, Levin, Cohn, Ferris, Glovsky and Popeo
BurgherGray LLP	Mintzer Mauch PLLC
Carter Ledyard & Milburn LLP	Nixon Peabody
Cullen and Dykman LLP	Oquendo Deraco PLLC
Drohan Lee LLP	Orrick, Herrington & Sutcliffe LLP
Goldberg Segalla	Phillips Lytle LLP
Goldstein Hall PLLC	Pullano & Farrow
Harris Beach PLLC	Reitler Kailas & Rosenblatt LLP
Hawkins Delafield & Wood LLP	Rozario Touma P.C.
Hedgeman Law Firm	Saunders Kahler, L.L.P.
Herrick, Feinstein LLP	Schoeman Updike Kaufman & Gerber LLP
Hodgson Russ LLP	Skadden, Arps, Slate, Meagher & Flom LLP
Hunton Andres Kurth LLP	Sullivan Cove Consultants, LLC
Ingram Yuzek Gainen Carroll & Bertolotti	Venable LLP
Jaspan Schlesinger LLP	West Group Law PLLC
JR Kasman PLLC	Windels Marx
Kaplan Kirsch and Rockwell	Wong Fleming
Katten Muchin Rosenman LLP	Zarin & Steinmetz
Kavinoky Cook LLP	

CONSTRUCTION

Ashurst LLP	Kaplan Kirsch and Rockwell
Bee Ready Fishbein Hatter & Donovan, LLP	Mintz, Levin, Cohn, Ferris, Glovsky and Popeo
Billig Law, P.C.	Nixon Peabody
Brooks & Berne PLLC	Phillips Lytle LLP
Goldberg Segalla	Pullano & Farrow
Goldstein Hall PLLC	Rozario Touma P.C.
Greenberg Traurig	Saunders Kahler, L.L.P.
Harris Beach PLLC	Sullivan Cove Consultants, LLC
Hawkins Delafield & Wood LLP	Tiber Hudson LLC
Hedgeman Law Firm	Venable LLP
Herrick, Feinstein LLP	Wasserman Grubin & Rogers LLP
Hoguet Newman Regal & Kenney, LLP	West Group Law PLLC
Holland & Knight LLP	Wilson & Chan LLP
Ingram Yuzek Gainen Carroll & Bertolotti	Windels Marx

ESD PRE-QUALIFIED LEGAL COUNSEL LIST

Established March 24, 2022 - Page 2

ENVIRONMENTAL

Amato Law Group PLLC	Jaspan Schlesinger LLP
Bryan Cave Leighton Paisner LLP	Kaplan Kirsch and Rockwell
BurgherGray LLP	Kavinoky Cook LLP
Carter Ledyard & Milburn LLP	Knauf Shaw LLP
Goldberg Segalla	Mintzer Mauch PLLC
Greenberg Traurig	Nixon Peabody
Harris Beach PLLC	Phillips Lytle LLP
Herrick, Feinstein LLP	Sullivan Cove Consultants, LLC
Hodgson Russ LLP	Venable LLP
Holland & Knight LLP	West Group Law PLLC
Hunton Andres Kurth LLP	Zarin & Steinmetz

CONDEMNATION

Applebaum Katz Brodsky, PLLC	Jaspan Schleisinger LLP
Carter Ledyard & Milburn LLP	Phillips Lytle LLP
Harris Beach PLLC	Zarin & Steinmetz

TAXATION

BurgherGray LLP	Kavinoky Cook LLP
Cullen and Dykman LLP	Mintz, Levin, Cohn, Ferris, Glovsky and Popeo
Harris Beach PLLC	Nixon Peabody
Hodgson Russ LLP	Pearlman & Miranda LLC
Holland & Knight LLP	Phillips Lytle LLP
Jaspan Schlesinger LLP	Skadden, Arps, Slate, Meagher & Flom LLP
Katten Muchin Rosenman LLP	Windels Marx

BANKRUPTCY - FORECLOSURE & WORKOUT

BurgherGray LLP	Orrick, Herrington & Sutcliffe LLP
Cullen and Dykman LLP	Phillips Lytle LLP
Harris Beach PLLC	Reitler Kailas & Rosenblatt LLP
Hodgson Russ LLP	Saunders Kahler, L.L.P.
Holland & Knight LLP	Windels Marx
Katten Muchin Rosenman LLP	Wong Fleming
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo	Yang-Patyi Law Firm, PLLC
Nixon Peabody	

ESD PRE-QUALIFIED LEGAL COUNSEL LIST

Established March 24, 2022 - Page 3

BOND FINANCING

Ashurst LLP	Law Offices of Barry D. Lites LLP
Ballard Spahr LLP	Law Offices of Joseph C. Reid, P.A.
Barclay Damon LLP	Lewis And Munday
Bryant Rabbino LLP	Marous Law
BurgherGray LLP	McGlashan Law Firm, P.C.
Cozen O'Connor	Mintz, Levin, Cohn, Ferris, Glovsky and Popeo
D. Seaton and Associates, P.A., P.C.	MWH Law Group LLP
Drohan Lee LLP	Nixon Peabody
Goldstein Hall PLLC	Norton Rose Fulbright US LLP
Greenberg Traurig	Orrick, Herrington & Sutcliffe LLP
Hardwick Law Firm, LLC	Pearlman & Miranda LLC
Harris Beach PLLC	Phillips Lytle LLP
Hawkins Delafield & Wood LLP	Saunders Kahler, L.L.P.
Hodgson Russ LLP	Squire Patton Boggs (US) LLP
Holland & Knight LLP	Tiber Hudson LLC
Kaplan Kirsch and Rockwell	Windels Marx
Katten Muchin Rosenman LLP	

LABOR & EMPLOYMENT

Bee Ready Fishbein Hatter & Donovan, LLP	Mintz, Levin, Cohn, Ferris, Glovsky and Popeo
Brooks & Berne PLLC	Oquendo Deraco PLLC
Brown Hutchinson LLP	Phillips Lytle LLP
BurgherGray LLP	Pullano & Farrow
Drohan Lee LLP	Reitler Kailas & Rosenblatt LLP
Gleason, Dunn, Walsh & O'Shea	Rozario Touma P.C.
Goldberg Segalla	Saunders Kahler, L.L.P.
Greenberg Traurig	Schoeman Updike Kaufman & Gerber LLP
Harris Beach PLLC	Schroder, Joseph & Associates, LLP
Hodgson Russ LLP	The Chandler Law Firm, PLLC
Hoguet Newman Regal & Kenney, LLP	Tully Rinckey PLLC
Hunton Andres Kurth LLP	Venable LLP
J. Graves Associates LLP	West Group Law PLLC
Jaspan Schlesinger LLP	Windels Marx
Kavinoky Cook LLP	Wong Fleming

ESD PRE-QUALIFIED LEGAL COUNSEL LIST

Established March 24, 2022 - Page 4

VENTURE CAPITAL & OTHER INVESTMENTS

BurgherGray LLP	Law Offices of Joseph C. Reid, P.A.
Drohan Lee LLP	Mintz, Levin, Cohn, Ferris, Glovsky and Popeo
Harris Beach PLLC	Nixon Peabody
Herrick, Feinstein LLP	Phillips Lytle LLP
Holland & Knight LLP	Reitler Kailas & Rosenblatt LLP
Law Offices of Barry D. Lites LLP	

GOVERNANCE & REGULATORY LITIGATION

Amato Law Group PLLC	Herrick, Feinstein LLP
Ballard Spahr LLP	Holland & Knight LLP
Bee Ready Fishbein Hatter & Donovan, LLP	Jaspan Schlesinger LLP
Billig Law, P.C.	Kavinoky Cook LLP
Brooks & Berne PLLC	Nixon Peabody
Brown Hutchinson LLP	Oquendo Deraco Pllc
Bryan Cave Leighton Paisner LLP	Phillips Lytle LLP
Calcaterra Pollack LLP	Pullano & Farrow
Carter Ledyard & Milburn LLP	Reitler Kailas & Rosenblatt LLP
Drohan Lee LLP	Saunders Kahler, L.L.P.
Goldberg Segalla	Schoeman Updike Kaufman & Gerber LLP
Goldstein Hall PLLC	Venable LLP
Greenberg Traurig	West Group Law PLLC
Harris Beach PLLC	Windels Marx
Hedgeman Law Firm	

INTELLECTUAL PROPERTY

BurgherGray LLP	Reitler Kailas & Rosenblatt LLP
Harris Beach PLLC	Schoeman Updike Kaufman & Gerber LLP
Hodgson Russ LLP	Skadden, Arps, Slate, Meagher & Flom LLP
Law Firm of Dayrel Sewell, PLLC	Venable LLP
Phillips Lytle LLP	

LANDLORD & TENANT

Goldstein Hall PLLC	Phillips Lytle LLP
Herrick, Feinstein LLP	Pullano & Farrow
Ingram Yuzek Gainen Carroll & Bertolotti	Rozario Touma P.C.
Kavinoky Cook LLP	Saunders Kahler, L.L.P.
Nixon Peabody	The Chandler Law Firm, PLLC
Oquendo Deraco Pllc	Yang-Patyi Law Firm, PLLC

Item 3



FOR CONSIDERATION

April 11, 2022

TO: The Directors

FROM: Matthew Bray

SUBJECT: JFK Airport Terminal 6-7 Redevelopment Project at John F. Kennedy International Airport – Series 2022 Bonds

REQUEST FOR: Appointment of Co-Senior Managing Underwriters; Appointment of Additional Underwriters; Appointment of Financial Advisor(s); Authorization to Take Actions Related to the Tax Equity and Fiscal Responsibility Act (“TEFRA”); Authorization to Induce the Project for Private Activity Financing and Declare the Official Intent of the Corporation to Provide Funds for the Reimbursement of Pre-Issuance Expenditures for the Project; Authorization to Proceed with the Preparation of Related Documents; and Authorization to Take Related Actions

I. BACKGROUND

JFK Millennium Partners, LLC (the “Borrower”) has requested the New York Transportation Development Corporation (the “Corporation” or “TDC”) to issue Special Facility Revenue Bonds, in one or more series or subseries including, but not limited to, Series 2022A (Tax-Exempt/AMT) (JFK Airport Terminal 6-7 Redevelopment Project) and Series 2022B (Taxable) (JFK Airport Terminal 6-7 Redevelopment Project), which may be fully or partially supported by one or more bond insurance policy(ies) or a reserve fund surety(ies) (the “Bonds”), the proceeds of which Bonds will be used by the Borrower to (i) pay costs, and reimburse Borrower for costs already paid, relating to (a) the demolition of the existing terminal 7 at the John F. Kennedy International Airport, located in Jamaica, New York 11430 (the “Airport”), (b) the design, construction, and equipping of a new terminal 6 headhouse and departure and arrivals area, and (c) the design and construction of other related facilities at the Airport ((a) - (c), inclusive, collectively, the “Project”); (ii) pay a portion of the interest on the Bonds accruing during construction of the Project; (iii) fund one or more debt service reserve funds for the Bonds; and (iv) pay costs of issuance related to the Bonds.

II. SELECTION OF CO-SENIOR MANAGING UNDERWRITERS

The Borrower has selected Goldman Sachs & Co. LLC (“Goldman”) and Wells Fargo as the co-senior managing underwriters. Goldman and Wells Fargo are on the pre-qualified list of

underwriters of the Corporation (the “Pre-Qualified List of Underwriters”). The Pre-Qualified List of Underwriters was created after an RFP process by Empire State Development (“ESD”) and was adopted by the Corporation’s Board of Directors (the “Board of Directors”) on February 24, 2020. The Borrower selected Goldman and Wells Fargo for their extensive experience in all aspects of municipal finance, extensive experience as underwriters on other TDC and ESD bond issuances, and responses and ratings in the pre-qualification process. The Corporation, in consultation with the Borrower, will have the option to select other underwriters from the Pre-Qualified List of Underwriters, including co-managers from the Pre-Qualified List of Underwriters to the extent necessary to satisfy the requirements in section IV below.

The Corporation staff now seeks the consent of the Board of Directors to adopt the selection of co-senior managing underwriters for the Bond issuance and to delegate to the Corporation, in consultation with the Borrower, the ability to appoint additional underwriters as the deal progresses.

III. SELECTION OF FINANCIAL ADVISOR

The Corporation also may select a financial advisor from TDC’s Pre-Qualified List of Financial Advisors (“FAs”) (the “Pre-Qualified List of FAs”). The Pre-Qualified List of FAs was created after an RFP process by ESD and adopted by the Corporation on February 24, 2020.

A financial advisor may be selected based on its: (i) extensive experience in all aspects of municipal finance, particularly airport financing, (ii) hourly rate proposal subject to a cap of \$250,000, (iii) extensive experience as a financial advisor on other bond issuances and (iv) responses and ratings in the pre-qualification process. Relative to section IV below, the financial advisor will sub-contract to a Minority and Women-Owned Business Enterprise (“MWBE”) to address applicable participation goals.

The Corporation staff now seeks the consent of the Board of Directors to adopt the selection of a financial advisor, if one is utilized, for the Bond issuance for the reasons and on the terms noted above. The firm will be paid by the Borrower pursuant to a Pre-Financing Agreement.

IV. NON-DISCRIMINATION AND CONTRACTOR & SUPPLIER DIVERSITY

The Corporation’s Non-Discrimination and Contractor & Supplier Diversity policies will apply to these contracts. The Underwriter shall be required to include minorities and women in any job opportunities created, to solicit and utilize MWBEs for any contractual opportunities generated in connection with the Project and shall be required to use Good Faith Efforts (pursuant to 5 NYCRR §142.8) to achieve MWBE participation.

In accordance with Article 17-B of the Executive Law, vendors will be strongly encouraged to the maximum extent practical and consistent with legal requirements to use responsible and responsive Service-Disabled Veteran-Owned Businesses in the fulfillment of the requirements of this contract.

V. FEDERAL TAX LAW REQUIREMENTS

Federal tax law, specifically the Tax Equity and Fiscal Responsibility Act (“TEFRA”), requires a hearing prior to the issuance of qualified private activity bonds in certain circumstances. The Corporation has been requested to act as issuer of qualified private activity bonds for the Project. Consequently, a TEFRA hearing is required and the applicable notice period for the TEFRA hearing is seven days.

TEFRA also requires an approval from an applicable elected representative of the issuer of qualified private activity bonds (in this case the Governor) to approve the transaction. The Governor’s approval is intended to be obtained immediately following the TEFRA hearing.

Accordingly, the Board of Directors is requested to authorize the holding of a public TEFRA hearing for the Bonds, the publication of the prior notice of the TEFRA hearing and the subsequent request to the Governor for approval of the Bonds.

VI. PROJECT INDUCEMENT

Inducement of the Project and the declaration of the Corporation’s official intent to provide funds for the reimbursement of pre-issuance expenditures will enable proceeds of the Bonds in an expected maximum principal amount of \$4 billion to be used, among other things, to reimburse Project expenditures made by the Borrower prior to the date or dates of the issuance of the Bonds, thereby expediting the Project. Prior to the issuance of the Bonds, the form of financing documents and the issuance of the Bonds must be reviewed and approved by the Corporation. Prior to such review and approval, the Project’s compliance with all applicable procedures, guidelines and requirements must be fully and formally confirmed including, without limitation, the New York State Environmental Quality Review Act (“SEQRA”). The Corporation is not obligated to approve the Project, to issue the Bonds or to take any other actions related to the Project.

The attached Resolution does not authorize or require the Corporation to issue the Bonds. Without the inducement, only limited types of Project expenditures paid by the Borrower more than 60 days prior to the issuance of the Bonds may be reimbursed with the tax-exempt bond proceeds.

VII. DOCUMENTS

It is intended that the Bonds will be issued to finance a portion of the Project. Accordingly, the related Bond documents must be drafted and approved for the issuance of the Bonds expeditiously. The Board of Directors is requested to consent to the commencement of drafting documents. An additional Board of Directors meeting will occur to approve the form of final documents.

VIII. ENVIRONMENTAL REVIEW

Staff of the Corporation has determined that the requested actions constitute a Type II action as defined by the New York State Environmental Quality Review Act (“SEQRA”) and the implementing regulations of the New York State Department of Environmental Conservation. No further environmental review is required in connection with the authorization. Prior to the authorization of the issuance of bonds, any applicable environmental review pursuant to SEQRA will be completed.

IX. REQUESTED ACTION

Staff recommends that the Board of Directors take actions related to authorizing the selection of co-senior managing underwriters, authorizing the appointment of additional underwriters, authorizing the appointment of financial advisor(s), authorizing the TEFRA hearing for the Bonds, authorizing the inducement of the Project and declaration of the official intent of the Corporation to provide funds for the reimbursement of pre-issuance expenditures for the Project, and authorizing the preparation of the required Bond documents and take any related actions.

X. RECOMMENDATION

Based on the foregoing, staff recommends approval of the requested actions.

XI. ATTACHMENT

Resolution

April 11, 2022

NEW YORK TRANSPORTATION DEVELOPMENT CORPORATION — JFK Airport Terminal 6-7 Redevelopment Project at John F. Kennedy International Airport - Appointment of Co-Senior Managing Underwriters; Appointment of Additional Underwriters; Appointment of Financial Advisor(s); Authorization to Take Actions Related to the Tax Equity and Fiscal Responsibility Act (“TEFRA”); Authorization to Induce the Project for Private Activity Financing and Declare the Official Intent of the Corporation to Provide Funds for the Reimbursement of Pre-Issuance Expenditures for the Project; Authorization to Proceed with the Preparation of Related Documents; and Authorization to Take Related Actions

WHEREAS, JFK Millennium Partners, LLC (the “Borrower”) has requested the New York Transportation Development Corporation (the “Corporation” or “TDC”) to issue its Special Facility Revenue Bonds, in one or more series or subseries including, but not limited to, Series 2022A (Tax-Exempt/AMT) (JFK Airport Terminal 6-7 Redevelopment Project) and Series 2022B (Taxable) (JFK Airport Terminal 6-7 Redevelopment Project), which may be fully or partially supported by one or more bond insurance policy(ies) or a reserve fund surety(ies) (the “Bonds”), the proceeds of which Bonds will be used by the Borrower to (i) pay costs relating to (a) the demolition of the existing terminal 7 at the John F. Kennedy International Airport, located in Jamaica, New York 11430 (the “Airport”), (b) the design, construction, and equipping of a new terminal 6 headhouse and departure and arrivals area, and (c) the design and construction of other related facilities at the Airport ((a) - (c), inclusive, collectively, the “Project”); (ii) pay a portion of the interest on the Bonds accruing during construction of the Project; (iii) fund one or more debt service reserve funds for the Bonds; and (iv) pay costs of issuance related to the Bonds.

WHEREAS, in order to facilitate the issuance of the Bonds as requested, the officers of the Corporation propose to authorize selection of co-senior managing underwriters and appointment of additional underwriters, authorize selection of financial advisor(s), take actions related to the TEFRA hearing, induce the Project and declare the Corporation’s official intent to provide funds for the reimbursement of pre-issuance expenditures for the Project, authorize the preparation of required Bond documents in connection with the issuance of the Bonds and to take any related actions.

RESOLVED, in accordance with the materials presented to this meeting a copy of which is hereby ordered to be filed with the records of the Corporation, the Corporation takes the following actions:

Selection of Underwriters

RESOLVED, that the Corporation hereby consents to Goldman Sachs & Co. LLC and Wells Fargo to be the co-senior managing underwriters for the Bonds, together with the right to appoint other underwriters, including co-managers, if any, as the Corporation, in consultation with the Borrower, shall select.

Selection of Financial Advisors

RESOLVED, that the Corporation hereby consents to the right to appoint financial advisor(s) for the Project.

Actions Related to the Tax Equity and Fiscal Responsibility Act ("TEFRA")

RESOLVED, that the Corporation hereby authorizes the holding of a public hearing ("TEFRA Hearing"), the publication of prior notice of the TEFRA Hearing and the submission to the Governor of request for approval following such TEFRA Hearing, all in accordance with and as may be required by the Internal Revenue Code of 1986, as amended.

Inducement Resolution and Declaration of Official Intent

RESOLVED, that the Corporation hereby declares its official intent, solely for purposes of United States Treasury Regulations §1.150-2, to issue the Bonds and use the proceeds thereof to pay or reimburse the Borrower for eligible Project costs. This declaration of official intent is subject to subsequent approval of the Project by the Corporation. The Corporation understands that the Borrower has paid and will pay certain capital expenditures in connection with the Project prior to the issuance of the Bonds for the Project. The Borrower may use temporary funds that are or will be available on a short-term basis to pay for preliminary expenditures, construction costs and certain equipping costs for the Project. Said declaration is based upon the representations of the Borrower that the Borrower reasonably expects to be reimbursed for the use of such funds with the proceeds of the Bonds to be issued by the Corporation or another authorized governmental issuer to finance the Project costs. The maximum principal amount of Bonds currently expected to be issued for the Project is \$4 billion.

Preparation of Bond Documents

RESOLVED, that the Corporation hereby authorizes the preparation of Bond documents necessary or desirable in connection of the issuance of the Bonds.

Miscellaneous

RESOLVED, that the President and his or her designee(s) be, and each of them hereby is, authorized and directed, in the name and on behalf of the Corporation to execute and deliver any and all Bond documents and to take all such actions as may be necessary or appropriate to effectuate the foregoing. Any actions previously taken by the Corporation consistent with this authorization are hereby ratified and affirmed.

* * *

Item 4



FOR CONSIDERATION

April 11, 2022

TO: The Directors

FROM: Matthew Bray

SUBJECT: Procurement of Legal Services – Squire Patton Boggs (US) LLP

REQUEST FOR: Authorization to Enter into a Contract for Legal Services in Connection with the JFK Airport Terminal 6-7 Redevelopment Project at John F. Kennedy International Airport; and Authorization to Take Related Actions

CONTRACT NEED AND JUSTIFICATION

I. CONTRACT SUMMARY

Counsel: Squire Patton Boggs (US) LLP (“Squire” or “Counsel”)

Scope of Services: Counsel would serve as co-bond counsel together with Hardwick Law Firm, LLC (“Hardwick”) which the board of directors (the “Board of Directors”) of the New York Transportation Development Corporation (the “Corporation” or “TDC”) will be requested to authorize under a separate resolution to provide legal services to the Corporation in connection with the issuance of Special Facility Revenue Bonds, in one or more series or subseries including, but not limited to, Series 2022A (Tax-Exempt/AMT) (JFK Airport Terminal 6-7 Redevelopment Project) and Series 2022B (Taxable) (JFK Airport Terminal 6-7 Redevelopment Project), which may be fully or partially supported by one or more bond insurance policy(ies) or a reserve fund surety(ies) (the “Bonds”), the proceeds of which Bonds will be used by the Borrower to (i) pay costs relating to (a) the demolition of the existing terminal 7 at the John F. Kennedy International Airport, located in Jamaica, New York 11430 (the “Airport”), (b) the design, construction, and equipping of a new terminal 6 headhouse and departure and arrivals area, and (c) the design and construction of other related facilities at the Airport ((a) - (c), inclusive, collectively, the “Project”); (ii) pay a portion of the interest on the Bonds accruing during construction of the

Project; (iii) fund one or more debt service reserve funds for the Bonds; and (iv) pay costs of issuance related to the Bonds.

Contract Amount: All counsel fees for the Bonds, including Counsel’s fee and all affiliated eligible costs of the Bond transaction, shall be payable only up to an aggregate amount equal to 2% of the par amount of the Bonds. Counsel will be required to use good faith efforts to allocate at least 30% participation on this matter to Hardwick.

Funding Source: JFK Millennium Partners, LLC (“JMP” or the “Borrower”) will fund the contract in its entirety on or about the closing date of the Bonds. Counsel will agree that the Corporation will not be obligated to pay any amounts for services described herein except to the extent, if any, that the Corporation receives funds from the Borrower for that purpose.

II. BACKGROUND

JMP has requested the Corporation serve as the issuer for the Bonds, the proceeds of which will be used by the Borrower to (i) pay costs relating to the Project; (ii) pay a portion of the interest on the Bonds accruing during construction of the Project; (iii) fund one or more debt service reserve funds for the Bonds; and (iv) pay the Bond issuance costs.

The Corporation staff will seek the consent of the Board of Directors to the form of the Bond documents, as well as the approval by the Board of Directors of the terms of the transaction, at a subsequent Board meeting.

III. COUNSEL SELECTION PROCESS

On October 8, 2021, New York State Urban Development Corporation d/b/a Empire State Development (“ESD”) staff placed an advertisement in the New York State Contract Reporter requesting proposals from law firms in the following twelve (12) areas of law (including, in each instance, litigation capabilities): real estate and land use; construction; environmental; condemnation; taxation; bond financing; labor & employment; venture capital investments and other investments; bankruptcy/foreclosure/workout; governance and regulatory litigation; intellectual property; and landlord-tenant.

74 firms responded to the solicitation. The responses were evaluated by a Review Committee consisting of nine ESD staff attorneys. The Review Committee’s recommendations then were discussed with the acting General Counsel. The Review Committee recommended a new Pre-Qualified Counsel List, which ESD approved on March 24, 2022. Based on ESD’s review process and board approval, the Corporation’s Directors have been asked today to adopt the new ESD Pre-Qualified Counsel List. Counsel is on this new Pre-Qualified Counsel List for bond counsel services.

Corporation staff recommends that Squire serve as co-bond counsel for this transaction. Selection of Counsel for this transaction was predicated on the experience of the attorneys from Squire who previously served as co-bond counsel for the Corporation's Special Facility Revenue Bonds, Series 2020A (Tax-Exempt/AMT) (Terminal 4 John F. Kennedy International Airport Project) (the "Series 2020A Bonds"), Special Facility Revenue Bonds, Series 2020B (Taxable) (Terminal 4 John F. Kennedy International Airport Project) (the "Series 2020B Bonds") and Special Facility Revenue Bonds, Series 2020C (Tax-Exempt/Non-AMT) (Terminal 4 John F. Kennedy International Airport Project) (the "Series 2020C Bonds," and together with the Series 2020A Bonds and Series 2020B Bonds, the "Series 2020 Bonds"). Accordingly, staff recommends the retention of Counsel for the Bonds based on: (a) Counsel's specific and necessary expertise as bond counsel, (b) Counsel's performance with distinction on other airport transactions, including for the Series 2020 Bonds, (c) Counsel's rate proposal, and (d) the ESD pre-qualification process.

IV. SCOPE OF WORK

Counsel will advise the Corporation in securities, bonds, taxes and other related legal matters in connection with the issuance and sale of the Bonds. Such work may include, but not be limited to, drafting, negotiating, and finalizing the Bond sale contracts, resolution amendments, disclosure documents and tax opinions. Counsel also would coordinate documentation with other involved agencies.

V. CONTRACT - NEED, PRICE AND FUNDING

A. NEED FOR CONTRACT

In accordance with federal tax law, an opinion from bond counsel is required to opine upon tax-exempt bonds. In addition, bond counsel expertise is necessary to ensure compliance with applicable securities laws and market practices. The Corporation has used experienced bond counsel on every issuance of its bonds.

B. CONTRACT PRICE AND FUNDING

This is a conduit financing with no Corporation funds at risk. Accordingly, the Borrower will fully fund all Counsel costs and expenses. Counsel would work at their typical hourly rate less a small discount. The Borrower will pay all Counsel costs and expenses from Bond proceeds on or about the Bond closing. All Counsel fees on the Bonds, including Hardwick and other affiliated eligible costs of the Bond transaction, shall be payable only up to an aggregate amount equal to 2% of the par amount of the Bonds. In addition, Counsel will acknowledge that the Corporation will have no obligation to pay any legal fees except to the extent funds are received from the Borrower for that purpose.

VI. RESPONSIBLE PARTY

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

VII. ENVIRONMENTAL REVIEW

Staff has determined that the requested authorization constitutes a Type II action as defined by the New York State Environmental Quality Review Act and the implementing regulations for the New York Department of Environmental Conservation. No further environmental review is required in connection with this authorization.

VIII. NON-DISCRIMINATION AND CONTRACTOR & SUPPLIER DIVERSITY

ESD's Non-Discrimination and Contractor & Supplier Diversity policies will apply to this contract. Counsel shall be required to include minorities and women in any job opportunities created, to solicit and utilize Minority and Women-Owned Business Enterprises ("MWBEs") for any contractual opportunities generated in connection with this procurement, and shall be required to use Good Faith Efforts (pursuant to 5 NYCRR § 142.8) to achieve an overall MWBE participation goal of at least 30% related to the total amount of the Corporation's bond counsel fees. Squire has agreed to use good faith efforts to allocate work to Hardwick. The Board of Directors is simultaneously being asked to separately retain Hardwick as MWBE counsel for this bond transaction to meet these requirements.

IX. REQUESTED ACTION

The Board of Directors is asked to authorize the retention of Squire as counsel to the Corporation for such legal services as are described in these materials.

X. RECOMMENDATION

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

XI. ATTACHMENT

Resolution

April 11, 2022

NEW YORK TRANSPORTATION DEVELOPMENT CORPORATION – Procurement of Legal Services Squire Patton Boggs (US) LLP - Authorization to Enter into a Contract for Legal Services in Connection with JFK Airport Terminal 6-7 Redevelopment Project at John F. Kennedy International Airport; and Authorization to Take Related Actions

RESOLVED, that in accordance with the materials presented to this meeting, a copy of which is hereby ordered to be filed with the records of the Corporation (the “Materials”), the Corporation hereby finds Squire Patton Boggs (US) LLP (“Counsel”) to be responsible; and be it further RESOLVED, that the Corporation is hereby authorized to enter into a contract with Counsel for the purposes and services, and substantially on the terms and conditions, as set forth in the Materials; and be it further

RESOLVED, that the President and his designee(s) be, and each of them hereby is, authorized and directed, in the name and on behalf of the Corporation to execute and deliver any and all Bond documents and to take all such actions as may be necessary or appropriate to effectuate the foregoing. Any actions previously taken by the Corporation or Counsel consistent with this authorization are hereby ratified and affirmed.

* * *

Item 5



FOR CONSIDERATION

April 11, 2022

TO: The Directors

FROM: Matthew Bray

SUBJECT: Procurement of Legal Services – Hardwick Law Firm, LLC

REQUEST FOR: Authorization to Enter into a Contract for Legal Services in Connection with the JFK Airport Terminal 6-7 Redevelopment Project at John F. Kennedy International Airport; and Authorization to Take Related Actions

CONTRACT NEED AND JUSTIFICATION

I. CONTRACT SUMMARY

Counsel: Hardwick Law Firm, LLC (“Hardwick” or “Counsel”)

Scope of Services: Counsel would serve as co-bond counsel together with Squire Patton Boggs (US) LLP (“Squire”) which the board of directors (the “Board of Directors”) of the New York Transportation Development Corporation (the “Corporation” or “TDC”) will be requested to authorize under a separate resolution to provide legal services to the Corporation in connection with the issuance of Special Facility Revenue Bonds, in one or more series or subseries including, but not limited to, Series 2022A (Tax-Exempt/AMT) (JFK Airport Terminal 6-7 Redevelopment Project) and Series 2022B (Taxable) (JFK Airport Terminal 6-7 Redevelopment Project), which may be fully or partially supported by one or more bond insurance policy(ies) or a reserve fund surety(ies) (the “Bonds”), the proceeds of which Bonds will be used by the Borrower to (i) pay costs relating to (a) the demolition of the existing terminal 7 at the John F. Kennedy International Airport, located in Jamaica, New York 11430 (the “Airport”), (b) the design, construction, and equipping of a new terminal 6 headhouse and departure and arrivals area, and (c) the design and construction of other related facilities at the Airport ((a) - (c), inclusive, collectively, the “Project”); (ii) pay a portion of the interest on the Bonds accruing during construction of the

Project; (iii) fund one or more debt service reserve funds for the Bonds; and (iv) pay costs of issuance related to the Bonds.

Contract Amount: All counsel fees for the Bonds, including Counsel’s fee and all affiliated eligible costs of the Bond transaction, shall be payable only up to an aggregate amount equal to 2% of the par amount of the Bonds. Squire will be required to use good faith efforts to allocate at least 30% participation on this matter to Counsel.

Funding Source: The contract will be funded in its entirety by JFK Millennium Partners, LLC (“JMP” or the “Borrower”) on or about the closing date of the Bonds. Counsel will agree that the Corporation will not be obligated to pay any amounts for services described herein except to the extent, if any, that the Corporation receives funds from the Borrower for that purpose.

II. BACKGROUND

JMP has requested the Corporation serve as the issuer of the Bonds, the proceeds of which will be used by the Borrower to (i) pay costs relating to the Project; (ii) pay a portion of the interest on the Bonds accruing during construction of the Project; (iii) fund one or more debt service reserve funds for the Bonds; and (iv) pay costs of issuance related to the Bonds.

The Corporation staff will seek the consent of the Board of Directors to the form of the Bond documents, as well as the approval by the Board of Directors of the terms of the transaction, at a subsequent Board meeting.

III. COUNSEL SELECTION PROCESS

On October 8, 2021, New York State Urban Development Corporation d/b/a Empire State Development (“ESD”) staff placed an advertisement in the New York State Contract Reporter requesting proposals from law firms in the following twelve (12) areas of law (including, in each instance, litigation capabilities): real estate and land use; construction; environmental; condemnation; taxation; bond financing; labor & employment; venture capital investments and other investments; bankruptcy/foreclosure/workout; governance and regulatory litigation; intellectual property; and landlord-tenant.

74 firms responded to the solicitation. The responses were evaluated by a Review Committee consisting of nine ESD staff attorneys. The Review Committee’s recommendations then were discussed with the acting General Counsel. The Review Committee recommended a new Pre-Qualified Counsel List, which ESD approved on March 24, 2022. Based on ESD’s review process and board approval, the Corporation’s Directors have been asked today to adopt the new ESD Pre-Qualified Counsel List. Counsel is on this new Pre-Qualified Counsel List for bond counsel services.

Corporation staff recommends the retention of Counsel as co-bond counsel for the Financings based on: (a) knowledge and expertise of the firm; (b) prior satisfactory work which the firm has performed for ESD and the Corporation including serving as co-bond counsel on several other Corporation airport financings; (c) rate proposal; and (d) the ESD pre-qualification process. For all the reasons stated above, staff is requesting that Counsel be retained for this transaction.

IV. SCOPE OF WORK

Counsel will advise the Corporation in securities, bonds, taxes and other related legal matters in connection with the issuance and sale of the Bonds. Such work may include, but not be limited to, drafting, negotiating, and finalizing the Bond sale contracts, resolution amendments, disclosure documents and tax opinions. Counsel also would coordinate documentation with other involved agencies.

V. CONTRACT - NEED, PRICE AND FUNDING

A. NEED FOR CONTRACT

In accordance with federal tax law, an opinion from bond counsel is required to opine upon tax-exempt bonds. In addition, bond counsel expertise is necessary to ensure compliance with applicable securities laws and market practices. The Corporation has used experienced bond counsel on every issuance of its bonds.

B. CONTRACT PRICE AND FUNDING

This is a conduit financing with no Corporation funds at risk. Accordingly, the Borrower will fully fund all Counsel costs and expenses. Counsel would work at their typical hourly rate less a small discount. All Counsel costs and expenses are expected to be paid by the Borrower from Bond proceeds on or about the closing of the Bonds. All Counsel fees on the Bonds, including Squire and other affiliated eligible costs of the Bond transaction, shall be payable only up to an aggregate amount equal to 2% of the par amount of the Bonds. In addition, Counsel will acknowledge that the Corporation will have no obligation to pay any legal fees except to the extent funds are received from the Borrower for that purpose.

VI. RESPONSIBLE PARTY

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

VII. ENVIRONMENTAL REVIEW

Staff has determined that the requested authorization constitutes a Type II action as defined by the New York State Environmental Quality Review Act and the implementing regulations for the New York Department of Environmental Conservation. No further environmental review is required in connection with this authorization.

VIII. NON-DISCRIMINATION AND CONTRACTOR & SUPPLIER DIVERSITY

ESD's Non-Discrimination and Contractor & Supplier Diversity policies will apply to this contract. Counsel shall be required to include minorities and women in any job opportunities created, to solicit and utilize Minority and Women-Owned Business Enterprises ("MWBEs") for any contractual opportunities generated in connection with this procurement, and shall be required to use Good Faith Efforts (pursuant to 5 NYCRR § 142.8) to achieve an overall MWBE participation goal of 30% related to the total amount of the Corporation's bond counsel fees. However, by virtue of Counsel's status as an MWBE, Counsel satisfies the MWBE requirement without the need for additional MWBE participation. Squire has agreed in a separate retainer to use good faith efforts to achieve this participation goal.

IX. REQUESTED ACTION

The Board of Directors is asked to authorize the retention of Hardwick as Counsel to the Corporation for such legal services as are described in these materials.

X. RECOMMENDATION

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

XI. ATTACHMENT

Resolution

April 11, 2022

NEW YORK TRANSPORTATION DEVELOPMENT CORPORATION – Procurement of Legal Services
Hardwick Law Firm, LLC - Authorization to Enter into a Contract for Legal Services in Connection
with JFK Airport Terminal 6-7 Redevelopment Project at John F. Kennedy International Airport;
and Authorization to Take Related Actions

RESOLVED, that in accordance with the materials presented to this meeting, a copy of which is hereby ordered to be filed with the records of the Corporation (the “Materials”), the Corporation hereby finds Hardwick Law Firm, LLC (“Counsel”) to be responsible; and be it further

RESOLVED, that the Corporation is hereby authorized to enter into a contract with Counsel for the purposes and services, and substantially on the terms and conditions, as set forth in the Materials; and be it further

RESOLVED, that the President and his designee(s) be, and each of them hereby is, authorized and directed, in the name and on behalf of the Corporation to execute and deliver any and all Bond documents and to take all such actions as may be necessary or appropriate to effectuate the foregoing. Any actions previously taken by the Corporation or Counsel consistent with this authorization are hereby ratified and affirmed.

* * *

Item 6



FOR CONSIDERATION

April 11, 2022

TO: The Directors

FROM: Matthew Bray

SUBJECT: Procurement of Legal Services –BurgherGray LLP

REQUEST FOR: Authorization to Enter into a Contract for Legal Services in Connection with the JFK Airport Terminal 6-7 Redevelopment Project at John F. Kennedy International Airport; and Authorization to Take Related Actions

I. CONTRACT SUMMARY

Counsel: BurgherGray LLP (“BurgherGray” or “Counsel”)

Scope of Services: Counsel would serve as bond disclosure counsel for which the board of directors (the “Board of Directors”) of the New York Transportation Development Corporation (the “Corporation” or “TDC”) will be requested to authorize under a separate resolution to provide legal services to the Corporation in connection with the issuance of Special Facility Revenue Bonds, in one or more series or subseries including, but not limited to, Series 2022A (Tax-Exempt/AMT) (JFK Airport Terminal 6-7 Redevelopment Project) and Series 2022B (Taxable) (JFK Airport Terminal 6-7 Redevelopment Project), which may be fully or partially supported by one or more bond insurance policy(ies) or a reserve fund surety(ies) (the “Bonds”), the proceeds of which Bonds will be used by the Borrower to (i) pay costs relating to (a) the demolition of the existing terminal 7 at the John F. Kennedy International Airport, located in Jamaica, New York 11430 (the “Airport”), (b) the design, construction, and equipping of a new terminal 6 headhouse and departure and arrivals area, and (c) the design and construction of other related facilities at the Airport ((a) - (c), inclusive, collectively, the “Project”); (ii) pay a portion of the interest on the Bonds accruing during construction of the Project; (iii) fund one or more debt service reserve funds for the Bonds; and (iv) pay costs of issuance related to the Bonds.

Contract Amount: All counsel fees for the Bonds, including Counsel’s fee and all affiliated eligible costs of the Bond transaction, shall be payable only up to an aggregate amount equal to 2% of the par amount of the Bonds.

Funding Source: The contract will be funded in its entirety by JFK Millennium Partners, LLC (“JMP” or the “Borrower”) on or about the Bond closing date. Counsel will agree that the Corporation will not be obligated to pay any amounts for services described herein except to the extent, if any, that the Corporation receives funds from the Borrower for that purpose.

II. BACKGROUND

JMP has requested the Corporation serve as the issuer of the Bonds, the proceeds of which will be used by the Borrower to (i) pay costs relating to the Project; (ii) pay a portion of the interest on the Bonds accruing during construction of the Project; (iii) fund one or more debt service reserve funds for the Bonds; and (iv) pay costs of issuance related to the Bonds.

The Corporation staff will seek the consent of the Board of Directors to the form of the Bond documents, as well as the approval by the Board of Directors of the terms of the transaction, at a subsequent Board meeting.

III. COUNSEL SELECTION PROCESS

On October 8, 2021, New York State Urban Development Corporation d/b/a Empire State Development (“ESD”) staff placed an advertisement in the New York State Contract Reporter requesting proposals from law firms in the following twelve (12) areas of law (including, in each instance, litigation capabilities): real estate and land use; construction; environmental; condemnation; taxation; bond financing; labor & employment; venture capital investments and other investments; bankruptcy/foreclosure/workout; governance and regulatory litigation; intellectual property; and landlord-tenant.

74 firms responded to the solicitation. The responses were evaluated by a Review Committee consisting of nine ESD staff attorneys. The Review Committee’s recommendations then were discussed with the acting General Counsel. The Review Committee recommended a new Pre-Qualified Counsel List, which ESD approved on March 24, 2022. Based on ESD’s review process and board approval, the Corporation’s Directors have been asked today to adopt the new ESD Pre-Qualified Counsel List. Counsel is on this new Pre-Qualified Counsel List for bond counsel services.

It is recommended that BurgherGray serve as disclosure counsel for this transaction. Selection of Counsel for this transaction was predicated on the fact that BurgherGray is a certified Minority and Women-Owned Business Enterprise (“MWBE”) and previously served as co-bond

counsel and disclosure counsel for several recent airport financings by the Corporation. Accordingly, staff recommends the retention of Counsel for the Bonds based on: (a) Counsel's specific and necessary expertise as disclosure counsel, (b) Counsel's performance with distinction on other airport transactions, (c) Counsel's rate proposal, and (d) the ESD pre-qualification process.

IV. SCOPE OF WORK

Counsel will advise the Corporation in securities, bonds, taxes and other related disclosure matters in connection with the issuance and sale of the Bonds. Such work may include, but not be limited to, drafting, negotiating, and finalizing the Bond sale contracts, resolution amendments, and disclosure documents.

V. CONTRACT - NEED, PRICE AND FUNDING

A. NEED FOR CONTRACT

As a result of recent changes to federal securities laws, in particular the Dodd-Frank Act, there are an increasing number of rules and an increasing amount of oversight with respect to disclosure and continuing disclosure for issuers of tax-exempt bonds. In order to fully address these requirements many issuers are retaining separate disclosure counsel. This additional expertise will help ensure compliance with applicable securities laws and market practices.

B. CONTRACT PRICE AND FUNDING

This is a conduit financing with no Corporation funds at risk. Accordingly, the Borrower will fully fund all Counsel costs and expenses. Counsel would work at their typical hourly rate less a small discount. All Counsel costs and expenses are expected to be paid by the Borrower from Bond proceeds on or about the closing of the Bonds. All counsel fees on the Bonds, including BurgherGray and other affiliated eligible costs of the Bond transaction, shall be payable only up to an aggregate amount equal to 2% of the par amount of the Bonds. In addition, Counsel will acknowledge that the Corporation will have no obligation to pay any legal fees except to the extent funds are received from the Borrower for that purpose.

VI. RESPONSIBLE PARTY

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

VII. ENVIRONMENTAL REVIEW

Staff has determined that the requested authorization constitutes a Type II action as defined by the New York State Environmental Quality Review Act and the implementing regulations for the New York Department of Environmental Conservation. No further environmental review is required in connection with this authorization.

VIII. NON-DISCRIMINATION AND CONTRACTOR & SUPPLIER DIVERSITY

ESD's Non-Discrimination and Contractor & Supplier Diversity policies will apply to this contract. Counsel shall be required to include minorities and women in any job opportunities created, to solicit and utilize Minority and Women-Owned Business Enterprises ("MWBEs") for any contractual opportunities generated in connection with this procurement, and shall be required to use Good Faith Efforts (pursuant to 5 NYCRR § 142.8) to achieve MWBE participation. Counsel is a Minority-owned Business Enterprise certified by the State of New York and may utilize its certification to satisfy the above requirement.

IX. REQUESTED ACTION

The Board of Directors is requested to authorize the retention of BurgherGray as Counsel to the Corporation for such legal services as are described in these materials.

X. RECOMMENDATION

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

XI. ATTACHMENT

Resolution

April 11, 2022

NEW YORK TRANSPORTATION DEVELOPMENT CORPORATION – Procurement of Legal Services BurgherGray LLP - Authorization to Enter into a Contract for Legal Services in Connection with JFK Airport Terminal 6-7 Redevelopment Project at John F. Kennedy International Airport; and Authorization to Take Related Actions

RESOLVED, that in accordance with the materials presented to this meeting, a copy of which is hereby ordered to be filed with the records of the Corporation (the “Materials”), the Corporation hereby finds BurgherGray LLP (“Counsel”) to be responsible; and be it further

RESOLVED, that the Corporation is hereby authorized to enter into a contract with Counsel for the purposes and services, and substantially on the terms and conditions, as set forth in the Materials; and be it further

RESOLVED, that the President and his designee(s) be, and each of them hereby is, authorized and directed, in the name and on behalf of the Corporation to execute and deliver any and all Bond documents and to take all such actions as may be necessary or appropriate to effectuate the foregoing. Any actions previously taken by the Corporation or Counsel consistent with this authorization are hereby ratified and affirmed.

* * *