



NEW YORK CONVENTION CENTER DEVELOPMENT CORPORATION

MEETING OF THE DIRECTORS

633 Third Avenue - 37th Floor Conference Room
New York, New York 10017

Wednesday
April 19, 2017 – 3:00 p.m.

REVISED AGENDA

I. CORPORATE ACTION

- A. Officers of the Corporation – Appointment of Officers

II. FOR INFORMATION

- A. President’s Report – Oral Report

I. CORPORATE ACTION - Continued

- B. Annual Operating and Capital Budgets for Fiscal Year 2017-18 - Authorization to Adopt an Annual Operating and Capital Budget for Fiscal Year 2017-18; and to Take Related Actions
- C. Pre-Qualified Legal Counsel List - Adoption of the New York State Urban Development Corporation, d/b/a Empire State Development Pre-Qualified Counsel List
- D. Procurement Guidelines - Adoption of Revised Guidelines for the Use, Awarding, Monitoring and Reporting of Procurement Contracts

III. FOR CONSIDERATION

- A. New York Convention Center Development Corporation (New York County) – Jacob K. Javits Convention Center – Authorization to Enter into Stipend Agreement with Non-Selected Respondent; and Authorization to Take Related Actions
- B. New York Convention Center Development Corporation (New York County) – Jacob K. Javits Convention Center - Authorization to Amend Contract for Construction Manager as Agent to Construction Manager at Risk; and To Take Related Actions

Item I. A.



FOR CONSIDERATION

April 19, 2017

TO: The Directors

FROM: Robin Stout

SUBJECT: New York Convention Center Development Corporation (“CCDC”) - New York (New York County) — Jacob K Javits Convention Center (“Javits”) Expansion and Renovation Civic and Land Use Improvement Project (the “Project”)

REQUEST FOR: Appointment of CCDC Officers

I. BACKGROUND

CCDC is a subsidiary of New York State Urban Development Corporation dba Empire State Development (“ESD”) and is the corporate entity responsible for implementing and overseeing capital development and construction at Javits. Pursuant to CCDC By-Laws, CCDC officers “shall be a President, a Secretary, one or more Assistant Secretaries, a Treasurer, one or more Assistant Treasurers”. Additionally, the Directors may appoint other officers, including Vice President(s), with such authority as determined by the Directors.

With the recent departure of former CCDC President Sarah Saint Amand, the present officers of CCDC are as follows:

- President.....[Vacant]
- Senior Vice President – Business Affairs.....[Vacant]
- Senior Vice President – Finance.....[Vacant]
- General Counsel.....Elizabeth R. Fine*
- Secretary.....Eileen McEvoy
- Assistant Secretary.....[Vacant]
- Treasurer..... Robert Godley
- Assistant Treasurer.....[Vacant]

*Ex Officio with corresponding ESD position.

In order to efficiently direct CCDC affairs on a day-to-day basis, the following new slate of officers is proposed:

President.....	Robin Stout
Chief Financial Officer.....	Elaine A. Kloss*
General Counsel.....	Elizabeth R. Fine*
Deputy General Counsel.....	Maria Cassidy*
Secretary.....	Eileen McEvoy*
Assistant Secretary.....	Deborah Royce
Treasurer.....	ESD Treasurer*
Assistant Treasurer.....	Peter Heilbrunn

*Ex Officio with corresponding ESD position.

Robin Stout has assumed various roles in over 25 years at ESD. Robin served for five years as President of Moynihan Station Development Corporation, an ESD subsidiary tasked with building a new train hall in the Farley Post Office Building across from Penn Station. He has been Senior Counsel to the 42nd Street Development Project from pre-construction through post-construction, and has advised on Columbia University's Manhattanville expansion, the Atlantic Yards development in Brooklyn, and One Bryant Park in Manhattan, among other projects. Robin also assisted in the original Javits expansion and renovation plan in 2005 and 2006. Robin graduated from Columbia Law School and his legal fields of practice include real estate, condemnation, environmental, corporate, and litigation.

II. REQUESTED ACTION

The Directors are requested to appoint the above-referenced officers of CCDC.

III. RECOMMENDATION

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

IV. ATTACHMENT

Resolution

April 19, 2017

NEW YORK CONVENTION CENTER DEVELOPMENT CORPORATION ("CCDC") - New York (New York County) – Jacob K Javits Convention Center ("Javits") Expansion and Renovation Civic and Land Use Improvement Project (the "Project") -- Appointment of CCDC Officers

RESOLVED, that, in accordance with the materials presented to this meeting and ordered filed with CCDC records (the "Materials"), the Directors do hereby appoint the following slate of officers for CCDC, until their earlier resignation or removal:

President.....	Robin Stout
Chief Financial Officer.....	Elaine A. Kloss
General Counsel.....	Elizabeth R. Fine
Deputy General Counsel.....	Maria Cassidy
Secretary.....	Eileen McEvoy
Assistant Secretary.....	Deborah Royce
Treasurer.....	ESD Treasurer
Assistant Treasurer.....	Peter Heilbrunn

; and be it further

RESOLVED, that, as set forth in the Materials, Ms. Kloss, Ms. Fine, Ms. Cassidy, Ms. McEvoy, and the ESD Treasurer are appointed Ex Officio with the corresponding position at New York State Urban Development Corporation dba Empire State Development ("ESD"); meaning that the holder of such ESD position shall be deemed to be the corresponding officer of CCDC; and be it further

RESOLVED, that, in accordance with and for all purposes of CCDC By-Laws, Mr. Stout, Ms. Kloss, Ms. Fine, and the ESD Treasurer are "officers" of the Corporation with full signing authority on behalf of CCDC; and be it further

RESOLVED, that, the President of the Corporation or his designees be, and each of them hereby is, authorized to take any and all actions necessary to implement the foregoing resolutions.

* * *

Item I. B.



FOR CONSIDERATION

April 19, 2017

TO: The Directors

FROM: Robin Stout

SUBJECT: New York Convention Center Development Corporation (“CCDC”) - New York (New York County) – Jacob K. Javits Convention Center (“Javits”) Renovation and Expansion Civic Project – Annual Operating and Capital Budgets for FY 2017-18

REQUEST FOR: Authorization to Adopt Annual Operating and Capital Budgets for FY 2017-18 and To Take Related Actions

I. BACKGROUND

In furtherance of the Comptroller’s oversight responsibilities as set forth in Article X, Subsection 5 of the State Constitution and Subsection 8(14) of the State Finance Law, the Comptroller’s Office has promulgated regulations regarding the preparation, approval, submission and reporting of budgets and financial plans by public authorities (“Regulations”). The Regulations require, among other things, that prior to the commencement of the fiscal year the Directors of the New York Convention Center Development Corporation (“CCDC”) adopt an annual budget.

Proposed Operating and Capital Budgets are attached for your review. The Operating Budget will be funded with Unrestricted Funds of the Corporation. The Capital Budget will be funded with: (a) CCDC Unrestricted Funds; (b) proceeds from the Hotel Unit Fee Secured Bond Series 2015 and 2016; and (c) a FY 2016-17 NYS appropriation.

As the Directors know, CCDC is arriving at a new stage of development at Javits in FY 2017-18. Continuing work on the transformer building, and concluding design and commencing construction of the design-build expansion, will result in increased CCDC costs, as detailed herein.

II. THE FY 2017-18 OPERATING AND CAPITAL BUDGETS

The proposed Operating Budget for FY 2017-18 shows an increase in Personal Services expenses to reflect salary of the Corporation President and an assistant. The increase in Non-Personal Services largely reflects retention of consultants to efficiently assist the expansion.

The proposed Capital Budget will fund: (1) the expansion, to be carried out by LendLease Turner, the design-build contractor selected through a competitive procurement process in 2016 and authorized by the Directors in January 2017; (2) construction of the transformer building and other utility relocations; (3) Project Manager oversight; and (4) Capital Improvements to existing Javits, as allowed under the Reimbursement Agreement between CCDC and CCOC previously authorized by the Directors.

III. NON-DISCRIMINATION AND CONTRACTOR & SUPPLIER DIVERSITY

The non-discrimination and affirmative action policy of New York State Urban Development Corporation d/b/a Empire State Development (“ESD”) will apply to both the transformer and expansion projects. ESD, on behalf of the CCDC, has established project goals of 30% Minority/Women-owned Business Enterprise contractor and/or subcontractor participation, which includes the preconstruction and construction phases, and an overall goal of 30% minority and female workplace participation during construction.

ESD’S Service-Disabled Veteran-Owned Business (“SDVOB”) policies also will apply to both projects. Contractors will be required to solicit and utilize SDVOBs in the fulfillment of contracts and demonstrate the use of good faith efforts pursuant to 9 NYCRR Section 252.2 to achieve a goal of 3% SDVOB participation in the expansion and 6% SDVOB participation in the transformer work.

IV. ENVIRONMENTAL REVIEW

ESD staff, on behalf of CCDC, has determined that the requested authorization constitutes a Type II action as defined by the NYS Environmental Quality Review Act and the implementing regulations of the NYS Department of Environmental Conservation. No further environmental review is required in connection with the authorization.

V. REQUESTED ACTIONS

The Directors are requested to adopt the Annual Operating and Capital Budgets as set forth in the attachments and to delegate authority to the appropriate officers to take related actions.

VI. ATTACHMENTS

Resolutions
Proposed Annual Operating Budget for FY 2017-18
Proposed Annual Capital Budget for FY 2017-18

April 19, 2017

NEW YORK CONVENTION CENTER DEVELOPMENT CORPORATION ("CCDC") - (NEW YORK COUNTY) – Jacob K. Javits Convention Center ("Javits") Renovation and Expansion Civic Project – Annual Operating and Capital Budgets for FY 2017-18 – Authorization to Adopt Annual Operating and Capital Budgets for FY 2017-18 and to Take Related Actions

RESOLVED, that, in accordance with the materials presented at this meeting and ordered filed with the records of the Corporation (the "Materials"), the Corporation hereby adopts the Annual Operating and Capital Budgets for FY 2017-18 presented to this meeting and included in the Materials, subject to the availability of funds; and be it further

RESOLVED, that, the President or his designee(s) be, and each of them hereby is, authorized and directed, in the name of and on behalf of the Corporation, to execute and deliver any and all documents and to take all actions as may be necessary or proper to effectuate the foregoing.

* * *

Empire State Development
New York Convention Center Development Corporation
Operating Budget Plan FY 2017-18

	Budget Plan FY 2016-17	Budget Plan FY 2017-18
<u>PERSONAL SERVICES</u>		
Salaries	141,868	270,602
Fringe Benefits	53,909	102,829
TOTAL PERSONAL SERVICES	<u>195,777</u>	<u>373,431</u>
HEADCOUNT	1.0	2.0
<u>NON-PERSONAL SERVICES</u>		
Professional Fees		
Legal / Accounting Fees	22,000	24,000
Consultant Fees	7,000	214,000
Total Professional Fees	<u>29,000</u>	<u>238,000</u>
Other Non-Personal Services		
Employee Travel & Meals	10,000	15,000
On-line Services/ Due & Subscriptions	50	300
Office Occupancy Expenses	26,500	32,000
Insurance	26,103	30,351
Repairs/ Maint /Prop Mgmt/ Outside Serv.	10,000	15,000
Telephone/Fax/Internet	1,500	3,000
Office Supplies / Printing / Advertising	1,000	3,000
Computers/Software/Equipment	0	0
Total Other Non Personal Services	<u>75,153</u>	<u>98,651</u>
TOTAL NON-PERSONAL SERVICES	<u>104,153</u>	<u>336,651</u>
TOTAL OPERATING BUDGET	<u><u>299,930</u></u>	<u><u>710,082</u></u>

Empire State Development
New York Convention Center Development Corporation
FY 2017-18 Capital Budget

	Budget Plan FY 2016-17	Budget Plan FY 2017-18
Acquisition Costs	-	-
Construction Costs	\$ 7,700,000	\$ 429,000,000
Demolition and Site Clearance	5,000,000	1,000,000
Design and Other Soft Costs	25,000,000	6,000,000
Insurance	-	5,000,000
Legal Costs	330,000	3,000,000
Property Management/Maintenance Costs	-	12,000,000
Other Miscellaneous Costs	-	10,000,000
	<u>\$ 38,030,000</u>	<u>\$ 466,000,000</u>

Item I. C.



FOR CONSIDERATION

April 19, 2017

TO: The Directors

FROM: Robin Stout

SUBJECT: Pre-Qualified Legal Counsel List

REQUEST FOR: Adoption of the New York State Urban Development Corporation, d/b/a Empire State Development Pre-Qualified Counsel List

I. Background

Among its many functions, the NYS Urban Development Corporation, d/b/a Empire State Development (“ESD”) and its subsidiaries, which include New York Convention Center Development Corporation (the “Corporation”), implement or facilitate a number of large and complex economic development projects and initiatives. The size, nature, complexity and timing of these projects typically require ESD and the Corporation to call on the assistance of outside counsel in various areas of expertise. To permit ESD and its subsidiaries to respond to the needs of these projects expeditiously, while having available the benefits of a broad solicitation of qualified outside law firms, ESD’s legal department staff maintains a list of pre-qualified counsel.

In 2012 ESD adopted a list of pre-qualified counsel that was scheduled to expire on March 31, 2017. Given the March 31, 2017 expiration date, in 2016 ESD staff conducted a broad solicitation of interested law firms. ESD staff reviewed the submissions and compiled a list of outside law firms, which they recommended to the ESD Directors for adoption. On February 16, 2017, the ESD Directors adopted the list of pre-qualified counsel, which is effective for three years, subject to extension by an additional year, in the discretion of the General Counsel of ESD. On January 13, 2013 the Corporation adopted ESD’s Pre-Qualified Counsel List. Given the expiration of the ESD pre-qualified counsel list, staff recommends adoption for a period of three years subject to extension by an additional year at the discretion of the General Counsel of ESD of the ESD pre-qualified counsel list, adopted by ESD on February 16, 2017.

II. The Solicitation

On June 27, 2016, ESD staff placed an advertisement in the New York State Contract Reporter requesting proposals from law firms in the following areas of law (including, in each instance, litigation capabilities): (1) real estate and land use; (2) construction; (3) environmental;(4) condemnation; (5) bankruptcy; (6) taxation; (7) bond financing; (8); (9) employment; (10) transactional direct and indirect investments; and (11) regulatory litigation.

In addition, ESD staff contacted the following organizations, individuals and law firms via email to advise them of the Contract Reporter opportunity:

- All law firms on ESD's list of prequalified counsel that was approved by the ESD Board in 2012 and all law firms on the list of prequalified investment counsel approved by the Board in 2014;
- 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")
- Amistad Long Island Black Bar Association
- Arab American Bar Association
- Asian American Bar Association of New York
- Association of Black Women Attorneys
- Capital District Black and Hispanic Bar Association
- Dominican Bar Association
- Neysa Alsina, NY Regional President of the Hispanic National Bar Association
- Korean American Lawyers Association of Greater New York
- Latino Lawyers Association of Queens County
- Long Island Hispanic Bar Association
- Metropolitan Black Bar Association
- Muslim Bar Association of New York
- Nigerian Lawyers Association, Inc.
- The Puerto Rican Bar Association
- South Asian Bar Association of New York
- Westchester Black Bar Association
- Women's Bar Association of the State of New York

Seventy-eight firms responded to the solicitation. Because a number of firms on the 2012 pre-qualified list failed to respond, ESD publicly re-opened the solicitation on August 2, 2016, with proposals due on August 17. Nine additional firms responded to the re-opened RFP, including some that were previously listed on the 2012 list and some new firms. The responses were evaluated by a Review Committee consisting of seven ESD attorneys, including the Senior Counsels responsible for environmental, litigation, contractor and supplier diversity, and employment matters and the Deputy General Counsel. The Review Committee's recommendations were discussed with the General Counsel. The responses were evaluated on the following criteria:

- (1) relevant firm experience and the qualifications and experience of the staff proposed to be assigned to the ESD engagement (50%);
- (2) anticipated cost of services and willingness to work with ESD to minimize costs (20%);
- (3) overall organization, completeness, and quality of the proposal, including cohesiveness, clarity of response and demonstrated understanding of ESD, its mission and activities (20%); and

(4) demonstrated commitment of time and resources to ESD or other State agencies or other public entities (10%).

In some cases, additional information was requested to clarify an initial submission. Thirteen firms were selected for interviews.

Based on the review, ESD staff recommended the approval as pre-qualified legal counsel to ESD, in the indicated areas of expertise, the firms listed on Attachment A to these materials.

III. Financial Commitment and Selection from the List

The Directors are not now being asked to authorize the retention of any firm in connection with any matter. Instead, the requested approval would serve to make available to the Corporation a selection of law firms that have been identified through a broad solicitation process. In the future, this would allow staff to select from among the pre-qualified firms, and after evaluation of those firms for a particular project, to make a recommendation to the Directors (or to the President and CEO or his or her designee, depending on the proposed dollar amount and length of the contract) for retention in connection with such project, without the need for conducting individual solicitations in each instance. This should save for each project the two or more months that is normally needed to conduct a solicitation, perform the necessary review and formulate a recommendation.

In the event that the principal partners and attorneys identified as being responsible for the Corporations matters or other key members of a pre-qualified firm's team in a particular area of expertise, leave the prequalified law firm, the pre-qualification will "follow" these key law firm member(s). Similarly, if a pre-qualified firm combines with another firm and such principal partners and other attorneys remain with the newly combined firm, the newly combined firm will be considered to be pre-qualified in that area of expertise.

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

Every firm on the proposed pre-qualified list has agreed to bill at or below ESD's maximum rate policy.

IV. Environmental Review

On behalf of the Corporation, ESD staff has determined that the requested authorization does not constitute an action as defined by the New York State Environmental Quality Review Act and the implementing regulations for the New York State Department of Environmental Conservation. No further environmental review is required in connection with the requested authorization.

V. Recommendation and Requested Action

Staff recommends and the Board is requested to adopt the ESD list of approved firms, included in Attachment A to these materials, as pre-qualified counsel in the area of expertise identified in such Attachment A (and in each case related litigation) and, in the discretion of the President, in consultation with ESD's legal department, such related areas of expertise as s/he may deem appropriate and advisable in connection with any project, for the term of three years until the first meeting of the ESD Directors in March 2020, with the option to extend the duration of the list for an additional year at the discretion of ESD's General Counsel.

Attachment
Resolution
Attachment A

April 19, 2017

NEW YORK CONVENTION CENTER DEVELOPMENT CORPORATION – Pre-Qualified Legal Counsel List - Adoption of the New York State Urban Development Corporation, d/b/a Empire State Development Pre-Qualified Counsel List

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 list of law firms set forth in Attachment A, approved at the February 16, 2017 meeting of the Board of Directors of the New York State Urban Development Corporation, d/b/a Empire State Development (“ESD”), as pre-qualified counsel in the various areas of expertise (and, in each case, related litigation), be adopted by the Corporation as the Corporation’s list of pre-qualified counsel in the various areas of expertise (and, in each case, related litigation) and in such other areas as the President, in consultation with the ESD legal department may in his or her sole discretion deem appropriate or advisable in connection with any particular project or matter, such list to remain in effect until the first meeting of the Directors of ESD occurring in March 2020 or, in the discretion of the ESD General Counsel, until the meeting of the ESD Directors first occurring in March 2021.

* * *

ATTACHMENT A
ESD Pre-Qualified Counsel List
Adopted February 16, 2017

PRACTICE AREA	FIRM NAME	* M/WBE CERTIFIED † M/WBE CERT PENDING ** SDVOB CERTIFIED	MAIN NY OFFICE	ADDITIONAL NY OFFICES	
BANKRUPTCY	Bond, Schoeneck & King, PLLC		Syracuse	Albany, Buffalo, Garden City, Ithaca, New York, Oswego, Rochester, Utica	
	Bryan Cave LLP		New York		
	Dentons US LLP		New York		
	Hodgson Russ LLP		Buffalo	Albany, New York, Saratoga Springs	
	Law Offices of Donald J. Tobias		New York		
	Menter, Rudin & Trivelpiece, PC		Syracuse	Watertown	
	Mintz Levin Cohen Ferris Glovsky and Popeo PC		New York		
	Nixon Peabody LLP		New York	Buffalo, Rochester	
	Phillips Lytle LLP		Buffalo	Albany, Garden City, Jamestown, New York, Rochester	
	Shearman & Sterling LLP		New York		
	Venable LLP		New York		
	Winston & Strawn LLP		New York		
BOND - SENIOR TIER	Dentons US LLP		New York		
	Harris Beach PLLC		Rochester	Albany, Buffalo, Ithaca, Melville, New York, Saratoga Springs, Syracuse, Uniondale, White Plains	
	Hawkins Delafield & Wood LLP		New York		
	Holland & Knight LLP		New York		
	Mintz Levin Cohen Ferris Glovsky and Popeo		New York		
	Nixon Peabody LLP		New York	Buffalo, Rochester	
	Squire Patton Boggs US LLP		New York		
	Winston & Strawn LLP		New York		

PRACTICE AREA	FIRM NAME	* M/WBE CERTIFIED	MAIN NY OFFICE	ADDITIONAL NY OFFICES
		† M/WBE CERT PENDING		
		** SDVOB CERTIFIED		
BOND - JUNIOR TIER	Barclay Damon LLP		Buffalo	
	Bond, Schoeneck & King, PLLC		Syracuse	Albany, Buffalo, Garden City, Ithaca, New York, Oswego, Rochester, Utica
	Bryant Rabbino LLP	*	New York	
	Buchanan, Ingersoll & Rooney PC		Buffalo	New York
	Burgher Gray Jaffe LLP	*	New York	
	D. Seaton & Associates, PA	*	New York	
	Day Pitney LLP		New York	
	Drohan Lee LLP	*	New York	
	Golden Holley James LLP	*	New York	
	Hardwick Law Firm, LLC	*	New York	
	Hodgson Russ LLP		Buffalo	Albany, New York, Saratoga Springs
	Law Offices of Barry D. Lites LLP	*	Huntington	New York
	Law Offices of Joseph C. Reid, PA	*	New York	
	Lewis & Munday PC	*	New York	
	Love & Long, LLP	*	New York	
	McGlashan Law Firm, PC	*	New York	
	Norton Rose Fulbright US LLP		New York	
	Pearlman & Miranda LLC	*	New York	
	Phillips Lytle LLP		Buffalo	Albany, Garden City, Jamestown, New York, Rochester
	Pugh, Jones & Johnson, PC	*	New York	
CONDEMNATION	Barclay Damon LLP		Buffalo	
	Berger & Webb, LLP		New York	
	Bond, Schoeneck & King, PLLC		Syracuse	Albany, Buffalo, Garden City, Ithaca, New York, Oswego, Rochester, Utica
	Carter Ledyard & Milburn LLP		New York	
	Harris Beach PLLC		Rochester	Albany, Buffalo, Ithaca, Melville, New York, Saratoga Springs, Syracuse, Uniondale, White Plains
	Love & Long, LLP	*	New York	
	Nixon Peabody LLP		New York	Buffalo, Rochester
	Phillips Lytle LLP		Buffalo	Albany, Garden City, Jamestown, New York, Rochester

PRACTICE AREA	FIRM NAME	* M/WBE CERTIFIED	MAIN NY OFFICE	ADDITIONAL NY OFFICES
		† M/WBE CERT PENDING		
		** SDVOB CERTIFIED		
CONSTRUCTION	Alisa Lukasiewicz PLLC	†	Buffalo	
	Barclay Damon LLP		Buffalo	New York
	Bond, Schoeneck & King, PLLC		Syracuse	Albany, Buffalo, Garden City, Ithaca, New York, Oswego, Rochester, Utica
	Buchanan Ingersoll & Rooney PC		Buffalo	New York
	Carter Ledyard & Milburn LLP		New York	
	Goldberg Segalla		Buffalo	Albany, Garden City, New York, Rochester, Syracuse, White Plains
	Goulston & Storrs		New York	
	Harris Beach PLLC		Rochester	Albany, Buffalo, Ithaca, Melville, New York, Saratoga Springs, Syracuse, Uniondale, White Plains
	Hawkins Delafield & Wood LLP		New York	
	Hodgson Russ LLP		Buffalo	Albany, New York, Saratoga Springs
	Hoguet Newman Regal & Kenney, LLP	*	New York	
	Holland & Knight LLP		New York	
	Ingram Yuzek Gainen Caroll & Bertolotti LLP		New York	
	Kilpatrick Townsend & Stockton LLP		New York	
	Love & Long, LLP	*	New York	
	McNamee, Lochner, Titus & Williams, PC		Albany	Saratoga County
	Mintz Levin Cohen Ferris Glovsky and Popeo PC		New York	
	Nixon Peabody LLP		New York	Buffalo, Rochester
	Pannone Lopes Devereaux & West LLC		Albany	Uniondale, White Plains
	Phillips Lytle LLP		Buffalo	Albany, Garden City, Jamestown, New York, Rochester
	Rozario & Associates, PC	†	New York	
	Rupp Baase Pfalzgraf Cunningham LLC		Buffalo	Jamestown, Lockport, Rochester
	Saunders Kahler, LLP	*	Utica	
	Schiff Hardin LLP		New York	
	Schoeman Updike & Kaufman LLP	*	New York	
	Sive, Paget & Riesel PC		New York	
	Towne, Ryan & Partners, PC	*	Albany	Burnt Hills, Cobleskill, Poughkeepsie, Saratoga Springs
	Venable LLP		New York	
	Wasserman Grubin & Rogers, LLP		New York	
	Whiteman Osterman & Hanna LLP		Albany	Hudson

PRACTICE AREA	FIRM NAME	* M/WBE CERTIFIED	MAIN NY OFFICE	ADDITIONAL NY OFFICES
		† M/WBE CERT PENDING		
		** SDVOB CERTIFIED		
ENVIRONMENTAL	Akerman LLP		New York	
	Barclay Damon LLP		Buffalo	
	Bond, Schoeneck & King, PLLC		Syracuse	Albany, Buffalo, Garden City, Ithaca, New York, Oswego, Rochester, Utica
	Bryan Cave LLP		New York	
	Buchanan Ingersoll & Rooney PC		Buffalo	New York
	Carter Ledyard & Milburn LLP		New York	
	Greenberg Traurig, LLP		New York	
	Harris Beach PLLC		Rochester	Albany, Buffalo, Ithaca, Melville, New York, Saratoga Springs, Syracuse, Uniondale, White Plains
	Hodgson Russ LLP		Buffalo	Albany, New York, Saratoga Springs
	Holland & Knight LLP		New York	
	Kavinoky Cook LLP		Buffalo	
	Knauf Shaw LLP		Rochester	
	Nixon Peabody LLP		New York	Buffalo, Rochester
	Phillips Lytle LLP		Buffalo	Albany, Garden City, Jamestown, New York, Rochester
	Rupp Baase Pfalzgraf Cunningham LLC		Buffalo	Jamestown, Lockport, Rochester
	Sive, Paget & Riesel PC		New York	
	Towne, Ryan & Partners, PC	*	Albany	Burnt Hills, Cobleskill, Poughkeepsie, Saratoga Springs
	Venable LLP		New York	
	Whiteman Osterman & Hanna LLP		Albany	Hudson
FORECLOSURE	Bryan Cave LLP		New York	
	Buchanan Ingersoll & Rooney PC		Buffalo	New York
	Forchelli, Curto, Deegan, Schwartz, Mineo & Terrana, LLP		Uniondale	
	Harris Beach PLLC		Rochester	Albany, Buffalo, Ithaca, Melville, New York, Saratoga Springs, Syracuse, Uniondale, White Plains
	Law Offices of Barry D. Lites LLP	*	Huntington	New York
	Law Offices of Donald J. Tobias		New York	
	McNamee, Lochner, Titus & Williams, PC		Albany	Saratoga County
	Menter, Rudin & Trivelpiece, PC		Syracuse	Watertown
	Nixon Peabody LLP		New York	Buffalo, Rochester
	Phillips Lytle LLP		New York	Albany, Garden City, Jamestown, New York, Rochester
	Towne, Ryan & Partners, PC	*	Albany	Burnt Hills, Cobleskill, Poughkeepsie, Saratoga Springs

PRACTICE AREA	FIRM NAME	* M/WBE CERTIFIED	MAIN NY OFFICE	ADDITIONAL NY OFFICES
		† M/WBE CERT PENDING		
		** SDVOB CERTIFIED		
INVESTMENTS	Bryant Rabbino LLP	*	New York	
	Buchanan Ingersoll & Rooney PC		Buffalo	New York
	Burgher Gray Jaffe LLP	*	New York	
	Carter Ledyard & Milburn LLP		New York	
	Colón & Peguero and Herrick Feinstein LLP	*	New York	
	Dentons US LLP		New York	
	Drohan Lee	*	New York	
	Harris Beach PLLC and McGlashan Law Firm, PC	*	Rochester	Albany, Buffalo, Ithaca, Melville, New York, Saratoga Springs, Syracuse, Uniondale, White Plains
	Hodgson Russ LLP		Buffalo	Albany, New York, Saratoga Springs
	Holland & Knight LLP		New York	
	Law Offices of Barry D. Lites LLP	*	Huntington	New York
	Lewis & Munday PC and Buckley King	*	New York	
	Lippes Mathias Wexler Friedman LLP		Buffalo	Albany, New York
	Love & Long, LLP	*	New York	
	McNamee, Lochner, Titus & Williams, PC		Albany	Saratoga County
	Miller Mayer, LLP		Ithaca	
	Mintz Levin Cohen Ferris Glovsky and Popeo PC		New York	
	Nixon Peabody LLP		New York	Buffalo, Rochester
	Peter Papagianakis Business Law Firm		New York	
	Schoeman Updike & Kaufman LLP	*	New York	
	Silverman Shin Byrne & Gilcrest PLLC	*	New York	
	The Nelson Law Firm, LLC		White Plains	
	Venable LLP		New York	

PRACTICE AREA	FIRM NAME	* M/WBE CERTIFIED	MAIN NY OFFICE	ADDITIONAL NY OFFICES
		† M/WBE CERT PENDING		
		** SDVOB CERTIFIED		
LABOR & EMPLOYMENT	Akerman LLP		New York	
	Alisa Lukaszewicz PLLC	†	Buffalo	
	Bond, Schoeneck & King, PLLC		Syracuse	Albany, Buffalo, Garden City, Ithaca, New York, Oswego, Rochester, Utica
	Brown Hutchinson LLP	*	Rochester	
	Buchanan Ingersoll & Rooney PC		Buffalo	New York
	Carter Ledyard & Milburn LLP		New York	
	Drohan Lee LLP	*	New York	
	Goldberg Segalla		Buffalo	Albany, Garden City, New York, Rochester, Syracuse, White Plains
	Gordon Rees Scully Mansukhani, LLP		New York	
	Harris Beach PLLC		Rochester	Albany, Buffalo, Ithaca, Melville, New York, Saratoga Springs, Syracuse, Uniondale, White Plains
	Hodgson Russ LLP and Law Offices of Sandra Rivera, PLLC*	*	Buffalo	Albany, New York, Saratoga Springs
	Hoguet Newman Regal & Kenney, LLP	*	New York	
	Kavinoky Cook LLP		Buffalo	
	Law Offices of Donald J. Tobias		New York	
	McNamee, Lochner, Titus & Williams, PC		Albany	Saratoga County
	Mintz Levin Cohen Ferris Glovsky and Popeo PC		New York	
	Paulose PLLC	*		
	Phillips Lytle LLP		Buffalo	Albany, Garden City, Jamestown, New York, Rochester
	Pugh, Jones & Johnson, PC	*	New York	
	Putney, Twombly, Hall & Hirson LLP		New York	
	Rozario & Associates, PC	†	New York	
	Saunders Kahler, LLP	*	Utica	
	Schoeman Updike & Kaufman LLP	*	New York	
	Schroeder, Joseph & Associates, LLP	*	Buffalo	
	Towne, Ryan & Partners, PC	*	Albany	Burnt Hills, Cobleskill, Poughkeepsie, Saratoga Springs
	Tully Rinckey PLLC	**	Albany	Binghamton, Buffalo, Rochester, Syracuse
	Venable LLP		New York	
	Whiteman Osterman & Hanna LLP		Albany	Hudson
	Wong Fleming, PC	*	New York	

PRACTICE AREA	FIRM NAME	* M/WBE CERTIFIED	MAIN NY OFFICE	ADDITIONAL NY OFFICES
		† M/WBE CERT PENDING		
		** SDVOB CERTIFIED		
REAL ESTATE & LAND USE	Alisa Lukasiewicz PLLC	†	Buffalo	
	Barclay Damon LLP		Buffalo	
	Bond, Schoeneck & King, PLLC		Syracuse	Albany, Buffalo, Garden City, Ithaca, New York, Oswego, Rochester, Utica
	Bryan Cave LLP		New York	
	Bryant Rabbino LLP	*	New York	
	Buchanan Ingersoll & Rooney PC		Buffalo	New York
	Carter Ledyard & Milburn LLP		New York	
	Divitta Alexander PLLC	*	Buffalo	
	Drohan Lee LLP	*	New York	
	Forchelli, Curto, Deegan, Schwartz, Mineo & Terrana, LLP		Uniondale	
	Goulston & Storrs		New York	
	Hardwick Law Firm, LLC	*	New York	
	Harris Beach PLLC		Rochester	Albany, Buffalo, Ithaca, Melville, New York, Saratoga Springs, Syracuse, Uniondale, White Plains
	Hawkins Delafield & Wood LLP		New York	
	Herrick Feinstein LLP		New York	
	Hodgson Russ LLP and Law Offices of Sandra Rivera, PLLC	*	Buffalo	Albany, New York, Saratoga Springs
	Holland & Knight LLP		New York	
	Ingram Yuzek Gainen Caroll & Bertolotti LLP		New York	
	Kavinoky Cook LLP		Buffalo	
	Knauf Shaw LLP		Rochester	
	Law Offices of Barry D. Lites LLP	*	Huntington	New York
	Law Offices of Donald J. Tobias		New York	
	Love & Long, LLP	*	New York	
	Menter, Rudin & Trivelpiece, PC		Syracuse	Watertown
	Mintz Levin Cohen Ferris Glovsky and Popeo PC		New York	
	Nixon Peabody LLP		New York	Buffalo, Rochester
	Pannone Lopes Devereaux & West LLC		Albany	Uniondale, White Plains
	Phillips Lytle LLP		Buffalo	Albany, Garden City, Jamestown, New York, Rochester
	Rozario & Associates, PC	†	New York	
	Rupp Baase Pfalzgraf Cunningham LLC		Buffalo	Jamestown, Lockport, Rochester
	Saunders Kahler, LLP	*	Utica	
	Schiff Hardin LLP		New York	
	Schoeman Updike & Kaufman LLP	*	New York	
	Shearman & Sterling LLP		New York	
	Sive, Paget & Riesel PC		New York	
	Skadden, Arps, Slate, Meagher & Flom LLP		New York	
	Towne, Ryan & Partners, PC	*	Albany	Burnt Hills, Cobleskill, Poughkeepsie, Saratoga Springs
	Venable LLP		New York	
	Whiteman Osterman & Hanna LLP		Albany	Hudson
	Windels Marx Lane & Mittendorf, LLP		New York	

PRACTICE AREA	FIRM NAME	* M/WBE CERTIFIED	MAIN NY OFFICE	ADDITIONAL NY OFFICES
		† M/WBE CERT PENDING		
		** SDVOB CERTIFIED		
REGULATORY LITIGATION	Alisa Lukaszewicz PLLC	†	Buffalo	
	Bond, Schoeneck & King, PLLC		Syracuse	Albany, Buffalo, Garden City, Ithaca, New York, Oswego, Rochester, Utica
	Bryan Cave LLP		New York	
	Carter Ledyard & Milburn LLP		New York	
	Goldberg Segalla		Buffalo	Albany, Garden City, New York, Rochester, Syracuse, White Plains
	Harris Beach PLLC		Rochester	Albany, Buffalo, Ithaca, Melville, New York, Saratoga Springs, Syracuse, Uniondale, White Plains
	Hodgson Russ LLP and Law Offices of Sandra Rivera, PLLC	*	Buffalo	Albany, New York, Saratoga Springs
	Hoguet Newman Regal & Kenney, LLP	*	New York	
	Kavinoky Cook LLP		Buffalo	
	Law Offices of Donald J. Tobias		New York	
	McNamee, Lochner, Titus & Williams, PC		Albany	Saratoga County
	Nixon Peabody LLP		New York	Buffalo, Rochester
	Pannone Lopes Devereaux & West LLC		Albany	Uniondale, White Plains
	Phillips Lytle LLP		Buffalo	Albany, Garden City, Jamestown, New York, Rochester
	Rupp Baase Pfalzgraf Cunningham LLC		Buffalo	Jamestown, Lockport, Rochester
	Sive, Paget & Riesel PC		New York	
	Towne, Ryan & Partners, PC	*	Albany	Burnt Hills, Cobleskill, Poughkeepsie, Saratoga Springs
	Venable LLP		New York	
	Whiteman Osterman & Hanna LLP		Albany	Hudson

PRACTICE AREA	FIRM NAME	* M/WBE CERTIFIED	MAIN NY OFFICE	ADDITIONAL NY OFFICES
		† M/WBE CERT PENDING		
		** SDVOB CERTIFIED		
TAXATION	Bond, Schoeneck & King, PLLC		Syracuse	Albany, Buffalo, Garden City, Ithaca, New York, Oswego, Rochester, Utica
	Carter Ledyard & Milburn LLP		New York	
	Harris Beach, PLLC		Rochester	Albany, Buffalo, Ithaca, Melville, New York, Saratoga Springs, Syracuse, Uniondale, White Plains
	Hodgson Russ LLP and Law Offices of Sandra Rivera, PLLC	*	Buffalo	Albany, New York, Saratoga Springs
	Mintz Levin Cohen Ferris Glovsky and Popeo PC		New York	
	Nixon Peabody LLP		New York	Buffalo, Rochester
	Norton Rose Fulbright US LLP		New York	
	Pearlman & Miranda LLC	*	New York	
	Phillips Lytle LLP		Buffalo	Albany, Garden City, Jamestown, New York, Rochester
	Whiteman Osterman & Hanna LLP		Albany	Hudson
	Winston & Strawn LLP		New York	

Item I. D.



FOR CONSIDERATION

April 19, 2017

TO: The Directors

FROM: Robin Stout

SUBJECT: New York Convention Center Development Corporation ("NYCCDC" or the "Corporation") Procurement Guidelines

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

I. BACKGROUND

At its May 18, 2016 meeting, the NYCCDC Directors adopted revised Guidelines for the Use, Awarding, Monitoring and Reporting of Procurement Contracts, as mandated by §2879 of the Public Authorities Law (the "Guidelines"). There have been no substantive changes to relevant laws, Executive Orders and directions to authorities, in the past year, however there have been some important internal procedural initiatives that impact the 2016 Guidelines. Accordingly, the New York State Urban Development Corporation d/b/a Empire State Development ("ESD") Procurements Manager and staff from the Legal Department, supported by representatives of the Contracts Administration and Finance Departments, engaged in a revision of the Guidelines. A copy of the revised Guidelines is attached.

On March 23, 2017, the ESD Board adopted the revised Guidelines (the "2017 Guidelines"), which are designed to govern procurements by ESD and its subsidiaries, such as NYCCDC. Approval is sought for the adoption by the Board of the 2017 Guidelines.

II. PROCUREMENT CONTRACTS GUIDELINES SUMMARY

The 2017 Guidelines attached to this memorandum set forth the policies and procedures to be followed by NYCCDC when seeking to contract for goods or services. It should be noted that these guidelines do not have the force of law, and are intended as a statement of best practices and procedures. No contract is invalid merely because the guidelines have not been followed.

The 2017 Guidelines define the universe of procurement transactions that are subject to the policies and procedures. Generally, all procurements by the Corporation must be competitive,

except where State law provides for non-competitive sourcing (e.g., goods purchased from approved non-profit agencies for the blind, and procurements from the Office of General Services Centralized Contracts List). Based on the expected cost of procured goods and/or services, procurement contracts must be obtained after advertisement in the NYS Contract Reporter, except in limited instances where an exemption is obtained, generally for sole or single source procurements when only one vendor offers the desired goods or services or when a single vendor has unique qualities or experience that obviate a competitive process. The 2017 Guidelines explain the various means of obtaining goods and services in an open, accountable and transparent manner, including incorporation of the ESD Bid Opening Guidelines and the compilation of a Procurements Record for every covered Procurement Contract.

The 2017 Guidelines comply with the applicable provisions of the Public Authorities Law, the State Finance Law and the State Tax Law. They are consistent with the State Procurement Council's Guidelines and with the Governor's directive that all state agencies and public authorities make responsible spending decisions, and that they be accountable for sufficient monitoring of their spending to ensure the highest level of fairness, non-discrimination, openness and transparency.

Notable changes from the 2016 Guidelines include:

- Emphasis on soliciting proposals from MWBEs and SDVOBs and coordination with ESD's Office of Contractor and Supplier Diversity early in the procurement process; guidance about how to evaluate diversity practices and certification status in a solicitation;
- Clarification about appropriate circumstances for single source procurements;
- Option to enter into open retainer agreements with one or more firms on a pre-qualified list approved by the Board;
- Additional guidance about conducting vendor responsibility determinations, including a revised template for documenting such determinations;
- Model language for informal solicitations;
- Guidance about how to cancel an unsuccessful solicitation;
- Illustrative examples of various permissible contract amendment scenarios;
- Additional guidance about submission of certain contracts valued in excess of \$1 million to the Office of the State Comptroller;
- Additional guidance regarding restrictions on appearances by former ESD employees
- New integrity provisions regarding conflicts of interest and prohibiting consideration of proposals from firms that participate in drafting solicitation materials.

The 2017 Guidelines are intended to be user-friendly and are set forth in a logical and coherent fashion that will assist staff in understanding the procedures to be followed and the substantive

rules that govern procurements. Many changes from the 2016 Guidelines are the result of efforts to make them more readable and coherent.

Sources of help and information are included as clickable links, and virtually all required forms and ESD policy and procedure documents can also be accessed from within the document by hyperlinks. The hard copy of the proposed 2017 Guidelines presented to the Directors for approval cannot contain these links, but they are shown in highlight form.

III. ENVIRONMENTAL REVIEW

ESD staff has determined that approval of the proposed 2017 Guidelines does not constitute an action as defined by the New York State Environmental Quality Review Act and its implementing regulations. No further environmental review is required in connection with the requested approval.

IV. RECOMMENDATION AND REQUESTED ACTION

The Directors are requested to adopt the 2017 Guidelines for the Use, Awarding, Monitoring and Reporting of Procurement Contracts, effective as of the date of approval.

ATTACHMENTS

Resolution

Proposed 2017 Guidelines for the Use, Awarding, Monitoring and Reporting of Procurement Contracts

April 19, 2017

NEW YORK CONVENTION CENTER 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 “Materials”), the proposed 2017 Guidelines, for the Use, Awarding, Monitoring and Reporting of Procurement Contracts, a copy of which is attached to the materials, be and hereby is approved and adopted as of the date hereof, and the President or 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.

* * *

Revised Procurement Guidelines 2017

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

Effective March 23, 2017

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NEW YORK STATE URBAN DEVELOPMENT CORPORATION
D/B/A EMPIRE STATE DEVELOPMENT (“ESD”)

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

Effective March 23, 2017

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

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

Pursuant to 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. For purposes of compliance with anti-lobbying laws contained in State Finance Law § 139-j and 139-k (see p. 12), Procurement Contracts also include the purchase, lease or grant of any other 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 Procurements Director.

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.

1.3. General Procurement Principles

ESD's procurement process is designed to:

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

Procurement Contracts are to be awarded on a **competitive basis** to the maximum extent practicable. Such awards are generally made after notice is published in the **New York State Contract Reporter** where the amount of the contract is **\$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.

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

2. Procurement: Overview and Requirements

2.1. The Procurement Process Guide

I. Procurements \$5,000 to \$50,000

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



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



If ESD's needs cannot be met by the above mentioned options, you may elect to use a discretionary purchase through the use of a NYS certified MWBE, SDVOB or a NYS Small Business. See Section 2.6.



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



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

II. Procurements \$50,000 +

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



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



If ESD's needs cannot be met by the above mentioned options, you may elect to use a discretionary purchase through the use of a NYS certified MWBE, SDVOB or a NYS Small Business up to \$200,000. See Section 2.6.



If ESD's needs cannot be met by the above mentioned, 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.



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

2.2. NYS Preferred Sources

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

Note that even if an OGS centralized contractor is available, it is recommended that staff obtain three price quotes from other OGS contractors or other vendors not on the OGS list, including at least one MWBE or SDVOB certified firm, unless a compelling justification exists (e.g., experience with a particular project). Staff should confirm that a firm is certified on either the MWBE directory (<https://ny.newnycontracts.com>) or SDVOB directory (http://ogs.ny.gov/Core/Docs/CertifiedNYS_SDVOB.pdf).

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), ESD may purchase services or commodities from small business concerns or those certified pursuant to Article 15-A of the Executive Law (MWBEs), or commodities or technology products that are recycled or remanufactured, in an amount up to two hundred thousand dollars (\$200,000) without a “formal competitive process.” In such a case, three quotes should be obtained wherever practicable, and Contract Reporter advertising is advisable when time permits. Recommended language for such advertisements can be found at <http://www.ogs.ny.gov/procurecounc/pdfdoc/DiscretionaryPurchasingGuidelines.pdf>. 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.

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://nyspro.ogs.ny.gov/sites/default/files/uploaded/PSPiggybackGuide_2.2015.pdf. Note that a piggyback procurement requires approval by the OGS Procurement Services Group – this can be difficult and time-consuming to accomplish, as the OGS staff are not very familiar with public authority procurement policies and practices. For example, if the agency you wish to piggyback on is a State agency, it will have different contractual terms than those used by ESD. This may lead to delay, if OGS decides to seek approval of the proposed ESD contract terms from the Attorney General. Piggybacking is better accomplished when you wish to use a contract established by another public authority.

3. Contract Reporter Exemptions

3.1. Reasons for Exemptions

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

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

- (b) **Single Source.** The required goods or services are available from two or more vendors, but a particular vendor is preferable because of specific factors such as, without limitation, past experience with a particular issue; familiarity with ESD's operations; experience with similar projects of ESD, other agencies or at other levels of government; demonstrated expertise; or capacity and willingness to respond to the situation. An example would be a competitively-procured environmental consultant who worked on an EIS for a project and now a Supplemental EIS is required for the same project; many consultants could do the work, but the original consultant's familiarity with the project justifies selection as a single source. Where a vendor's past experience or familiarity with ESD was gained through a non-competitively awarded contract, staff are strongly encouraged to conduct a competitive solicitation rather than pursue a single source exemption for that vendor to perform additional work. *In general, the Corporation's policy is to minimize the use of single source contracts and to maximize the use of competitive procurement methods.*

- (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.

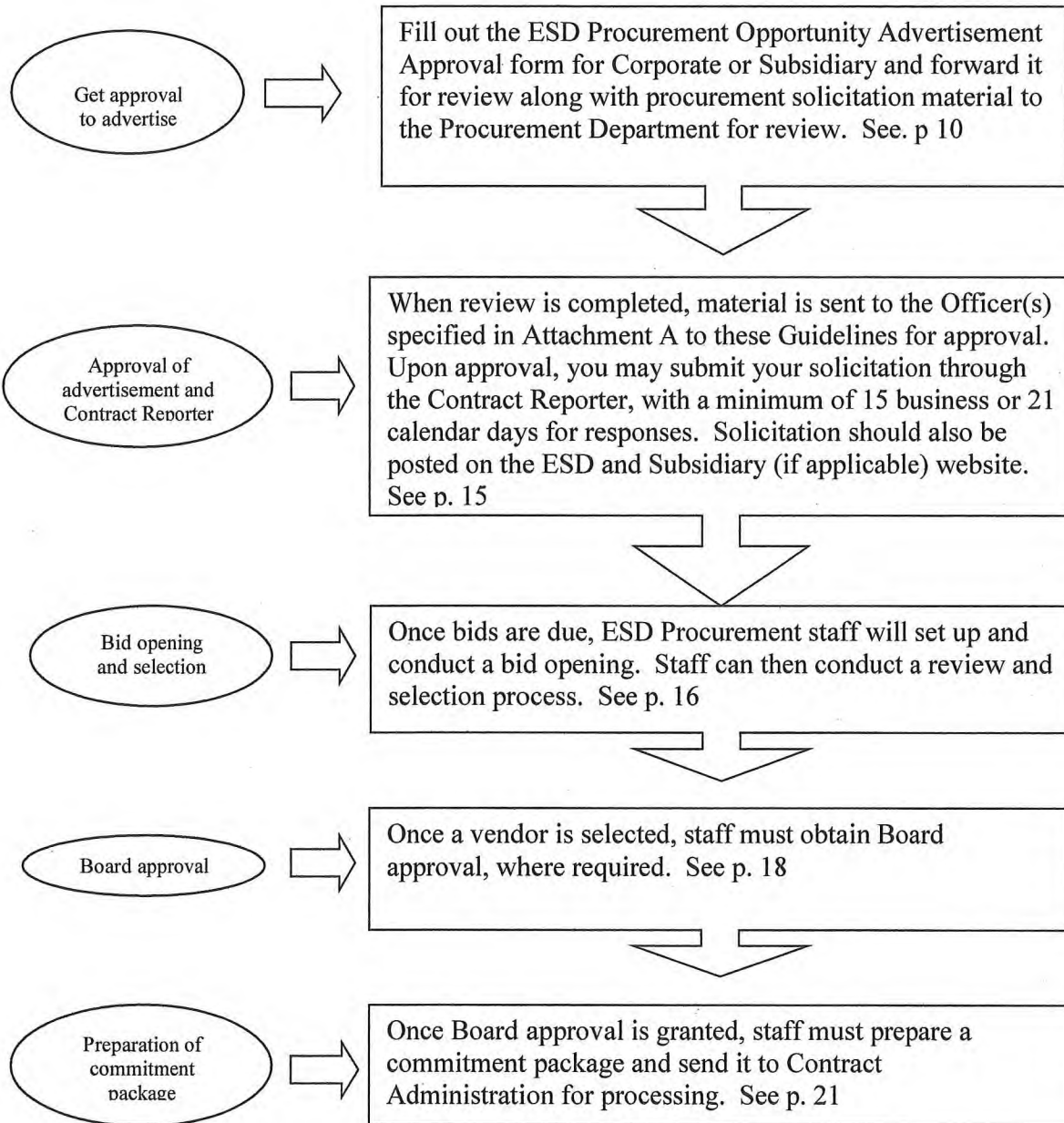
The memorandum requesting the exemption must document in reasonable detail: the circumstances establishing the exemption justification; a description of the goods or services to be acquired via the exemption; description of funding source; any alternatives considered; and the basis for determining that the cost of the proposed contract is reasonable under the circumstances. The Contract Reporter Exemption form can be found [here](#).

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 139-k (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



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 for up to \$200,000, 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 who 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.

¹ 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: MWBEMWBE 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;

(ix) 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 [here](#).

7. Types of Solicitations

7.1. General

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

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

Generally, contracts for goods are to be awarded on the basis of "lowest price" and contracts for services are to be awarded on the basis of "best value" among responsive and responsible

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

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

Fairness: No vendor should be advantaged over another. All information concerning the solicitation shall be conveyed in writing to all vendors participating in the process, including but not limited to process rules and evaluation criteria;

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

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

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

7.2. Requests for Proposals (“RFP”)

RFP 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.

Click [here](#) to view ESD’s standard RFP template.

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 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 one year. 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. 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 § 139-j and 139-k (Lobbying)

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

Among other things, SFL § 139-j and 139-k: (i) govern permissible communications between potential vendors, and staff of ESD, its subsidiaries, or other involved governmental entities during the procurement process; (ii) require the disclosure of such communications, as well as prior determinations of vendor non-responsibility; and (iii) establish sanctions for knowing and willful violations of such provisions, including disqualification from eligibility for an award of any contract.

Specifically, SFL § 139-j and 139-k require that only permitted ESD and subsidiary contact person(s) identified in solicitation materials may communicate with potential bidders regarding the solicitation, from the issuance of the earliest written notice of a Request for Proposal through the final award and approval of any resulting contract. This period is defined by law as the “Restricted Period.”

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

SFL § 139-k governs the disclosure of prior non-responsibility determinations by potential vendors. SFL § 139-k(5) requires potential vendors to certify that the information they provide to ESD for consideration in its determination of vendor responsibility is true and accurate.

Therefore, all prospective vendors must complete and submit two forms mandated by SFL § 139-j and § 139-k as part of their proposals: 1) [the Offerer’s Affirmation of Understanding and Agreement](#); and 2) the Offerer’s Disclosure of Prior Non-Responsibility Determinations.

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

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

For further guidance, ESD staff engaged in the procurement process should review [ESD’s policy regarding permissible lobbying contacts](#), and the [required language for solicitations by ESD and its subsidiaries](#) to ensure compliance with SFL § 139-j and 139-k.

Note that, once a recommended vendor has been selected after compliance with the competitive bidding process, it may be necessary for staff members to negotiate contract terms, etc., with the designated vendor. Those negotiations are not prohibited, and need not be conducted only by the designated contact person, although it is good practice to have the contact person present.

However, any communication from a person other than the vendor that may reasonably be considered to be an effort to influence the negotiation of a contract (either positively or negatively) is an impermissible contact and must be reported as such. For example: an ESD employee who is in the process of negotiating the terms of a land development deal which the Board has not approved, receives a call from an outside person saying that the vendor should get more development land because the vendor has a wonderful track record. Such a call constitutes lobbying and must be reported as such. The caller should be informed that the call will be reported, and asked to communicate directly with the designated contact person in the future.

8.2. Compliance with State Tax Law § 5-a (Sales Tax Registration)

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

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

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

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

8.3. [INTENTIONALLY OMITTED]

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 17-B, which acknowledges that SDVOBs strongly contribute to the economies of the State and the nation. Staff should familiarize themselves with the [SDVOB Operations Guidance](#) 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 potential opportunities for MWBEs: <http://www.panynj.gov/business-opportunities/pdf/OBDCR-LGA-MWBE-Flyer-16-F4%20.pdf>.

Goal-setting

All State contracts 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.

² "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,

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 an [MWBE Waiver Request Form](#) or [SDVOB 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 a waiver before it can be issued.

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.

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 Firms](#) 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

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 §142.7 (MWBEs) and 9 NYCRR § 252.2(n) (SDVOBs).

- 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.internal/Resources/Data/Finance/2017/MWBE_SDVOB_DBE/OCSD-4_MWBEUtilizationPlan.docx and http://intranet.empire.internal/Resources/Data/Finance/2017/MWBE_SDVOB_DBE/SDVOBUtizationPlan100.pdf.

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.internal/Resources/Data/Procurement/03042014_NYS_SubcontractorsandSuppliers.pdf

8.7. Project Sunlight

Project Sunlight is an important component of the Public Integrity Reform Act of 2011. 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 maintained by OCSD, as well as any appropriate SDVOBs, listed at http://ogs.ny.gov/Core/Docs/CertifiedNYS_SDVOB.pdf.

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 taken into account. Such factors commonly include the quality of goods and services, the experience of the vendor and specific expertise with respect to the goods or services to be supplied. See also Section 7.1 above if price is weighted at less than 20%.

8.11. Bid Opening Procedures

All 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. In some cases, one or more non-ESD team members may join the review team, where those persons have specific knowledge of the procurement subject, or a specific role to play in the administration of the contract with the successful bidder. 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.

In reviewing bids, all members of the team must complete and sign scoring sheets that rate each bidder according to the selection criteria and weighting set out in the RFP. Scoring sheets must not include anything other than numerical ratings (i.e., no comments/opinions/notes, etc). Original scoring sheets must be signed and retained by the Procurements Director as part of the Procurement Record.

8.13. Determination of Responsibility – “CLIP Review” and the VendRep form

Pursuant to State Finance Law § 163, ESD or the Subsidiary Board must determine that a vendor or respondent is a responsible contractor, prior to approving the award of a contract. In any event, whether or not a formal Determination of Responsibility is sought from the relevant Board, the initiator should ensure that all vendors are “responsible.”

There are two methods of ascertaining vendor responsibility:

- “CLIP” review. This review involves an assessment of responsibility in four categories:

Category	Factors to be considered include, but not are limited to:
Financial and Organizational <u>C</u> apacity	Assets, liabilities, recent bankruptcies, equipment, facilities, personnel resources and expertise, and proper auditing and accounting controls.
<u>L</u> egal Authority	Authority to do business in New York State, licenses, and registrations.
<u>I</u> ntegrity	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.
Previous Contract <u>P</u> erformance	Reports of less than satisfactory performances, early contract termination for cause, contract abandonment, court determinations of breach of contract.

For all procurements, the initiator must submit a memo to the Procurements Director attesting that the initiator conducted a CLIP review and finds the vendor to be responsible and indicating what steps were taken to make that determination. 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.

CLIP review is not needed for procurements from the OGS Centralized Contracts list.

- 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://nyspro.ogs.ny.gov/sites/default/files/uploaded/OSCBestPracticeforVendorResponsibility.pdf>.

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.

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** 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 **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 source.

9.2. ESD Contract and Amendment Approval

- 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.

- b. Contracts for services to be rendered over a period in excess of 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 \$250,000 or less; 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.
- d. **Contract Amendments**
 - i. **Amendments to existing contracts** 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.

- 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 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 (c) 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. 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 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/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.

Example B: Original contract for \$40,000 was awarded via purchase order. The initiator wishes to amend the contract for additional \$20,000. Because the amendment is less than \$50,000, it too can be procured via purchase order. However, staff should carefully examine future needs to avoid repeated awards of small noncompetitive amendments.

Example C: Original contract for \$5 million was awarded competitively and approved by the Board. 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 (or exemption) is still necessary.

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 more)

- a. The contract initiator should assemble a Commitment Request Package containing the following documents:
 1. A completed [Commitment Request Form](#).
 2. A [Contract Summary/Justification Memorandum](#) explaining the need for the procurement and the method of procurement used.
 3. 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 Offerer's Affirmation of Understanding and Agreement pursuant to SFL §139-j; and (vii) Appendix C (Offerer 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 more clear and specific the contract, the easier it will be to monitor.

The terms of the contract should include, but not be limited to:

- the scope and purpose of the contract;
 - the description of the services to be performed;
 - the location where the work is to be performed;
 - the standards to be used to measure performance (e.g. units of services, number and nature of clients served, target dates, etc.);
 - the level of expertise that is required to perform the tasks, the cost and the method payment of the contract;
 - the 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;
4. Written explanation of the responsibility determination/CLIP 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.
 5. ESD/Subsidiary Board of Directors or CEO/designee approval, if applicable. View [sample Board materials](#) and [CEO/Designee Approval Cover Memo](#).
 6. 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.

7. 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.
8. A completed **Commitment Package Checklist**.
 - b. The initiator signs and obtains the Department Head approval on the Commitment Request form and forwards the commitment package (all documents listed above) to Procurement for compliance review and approval. When approved, Procurement will route the commitment package to Contract Administration.
 - c. Contract Administration routes and tracks the commitment package and obtains necessary approvals from various ESD departments.
 - d. Upon obtaining in-house approvals, Contract Administration sends all three (3) sets of the contract or amendment package to the vendor for signature(s).
 - e. After receiving three (3) signed sets from the vendor, Contract Administration sends all three sets to the Officer(s) specified in Attachment A to these Guidelines for signature.
 - f. One 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. Department of Budget ("DoB") Approval

Under DOB Bulletin B-1184, approval for certain procurements over \$500 is required. In general, if a State or legislative appropriation is the source of funds, approval is needed. A web-based application known as the "Agency Spending Controls Application" process is used to obtain prior approval. DOB approval is not required when the funding source for the procurement comes from a non-State source (e.g., a developer of an ESD project), where at least

75% of the procurement cost will be reimbursed by federal funds, or when the procurement is needed to address an immediate threat to public health and/or safety. DOB mandated forms are used in cases where approval is required. ESD has implemented the cost control measures described in Bulletin B-1184. All spending not involving Federal reimbursement of at least 75 percent, presenting an immediate threat to public health and/or safety or whose funding source is from a Third Party is subject to the preapproval process specified in the Budget Bulletin utilizing forms established by DOB known as Attachment A. An Attachment B form was also created for spending involving Federal reimbursement of at least 75% or presenting a public health and/or safety issue.

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

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 reported to OSC in a revision to the annual report or (ii) executing a noncompetitive Eligible Contract/Amendment that was reported to OSC in a revision to the annual report.
- 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.

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.

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 Procurement/Contract Administration Department, shall be responsible for:

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

15. Reporting

15.1. Quarterly Reports

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

15.2. Annual Reports

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

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

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

16. Effect on Awarded Contracts

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

Item III. A.



FOR CONSIDERATION

April 19, 2017

TO: The Directors

FROM: Robin Stout

SUBJECT: New York Convention Center Development Corporation (New York County) – Jacob K. Javits Convention Center

REQUEST FOR: Authorization to Enter into Stipend Agreement with Non-Selected Respondent; and Authorization to Take Related Actions

CONTRACT NEED AND JUSTIFICATION

I. CONTRACT SUMMARY

Non-Selected Respondent: Skanska Javits Design-Build Joint Venture (“Skanska”)

Scope of Services: Production, and timely delivery, of a proposal responsive to the Corporation’s Request for Proposals issued June 2016 for Design-Build Work in connection with the Javits Expansion Project

Term of Contract: Not applicable; payment is for work performed to complete Skanska’s October 2016 proposal

Contract Amount: Not to exceed \$1,500,000

Funding Source: Bond Proceeds (Series 2016)

II. BACKGROUND

In conformity with the procurement process ratified by the Directors on January 13, 2017, for many months New York Convention Center Development Corporation (the “Corporation” or “CCDC”) was engaged in a process to procure a design-builder for the Javits Expansion Project, including, as required by statute, a two-step process involving issuance of a request for qualifications (the “RFQ”) followed by the issuance of a request for proposals (the “RFP”). The RFQ resulted in three respondents being shortlisted. The RFP was issued to those three respondents in June 2016. Two responses to the RFP were received by the October 31, 2016 deadline, one from Lendlease Turner and one from Skanska.

III. REVIEW OF THE PROPOSALS RECEIVED

To review both submitted proposals, CCDC assembled: (a) teams of technical experts to review both responses; and (b) as contemplated by the RFP, a selection committee to evaluate the responses and recommend to CCDC a Selected Proposer representing “best value” based on the RFP evaluation criteria, which included design, schedule, experience, and price. After review of both responses and the technical reports, and evaluation of both responses, the selection committee determined that Lendlease Turner represented the best value and recommended Lendlease Turner to CCDC as design-builder for the Project. In response to that recommendation, on January 31, 2017, the Directors designated respondent Lendlease Turner as the design-builder for the Project, and authorized the Corporation to enter into a design-build contract with Lendlease Turner. Nonetheless, also based on such review, which included thorough analysis of the non-selected Skanska response, CCDC staff and technical experts found the Skanska proposal to be responsive under the criteria of the RFP.

IV. STIPEND AGREEMENT

As set forth at RFP Section 3.11 (copy attached as Attachment A), RFP respondents who submitted a responsive proposal but were not awarded the design-build contract are eligible for a stipend of up to \$1,500,000 for work performed to submit a responsive proposal. As required by RFP Section 3.11, Skanska submitted, with its proposal on the required submittal date, an executed form of the Stipend Agreement attached as Attachment B to these materials.

V. RESPONSIBLE PARTY

CCDC has examined Skanska’s “responsibility” as defined in State Finance Law §163, and as provided in ESD’s Procurement Guidelines, Article 8.13. Based on this analysis of financial and organizational capacity, legal authority to do business in New York, integrity of principals, and past performance on contracts, CCDC concludes that Skanska is a responsible vendor.

VI. RESPONSIVE BID

Based on review of the Skanska submission as described above and as detailed in the Directors’ January 31, 2017 materials, CCDC staff recommends that the Directors find that the Skanska proposal was responsive under the criteria of the RFP.

VII. ESSENTIAL TERMS OF THE STIPEND AGREEMENT

The form of the Stipend Agreement is attached in its entirety as Attachment B to these materials. The terms of the Stipend Agreement relevant to the Skanska submission are as follows:

Subject to requisite approvals, CCDC would pay a Stipend Amount not to exceed \$1,500,000 to the non-selected respondent who submitted a proposal responsive under the criteria of the RFP. Upon Director authorization of the contract, CCDC would notify Skanska of its eligibility for the stipend, and Skanska would have 30 days to submit an invoice to CCDC with substantiation of “Qualified Costs” up to \$1,500,000. “Qualified Costs” are defined as “all

reasonable costs and expenses incurred ... in the production of the Work Product". "Work Product" is defined as work necessary to "plan, design, and develop the [Expansion] Project; furnish data, information, innovation, technology, techniques, methods, processes, unique uses of commercial items, solutions, construction means and methods, Project execution approaches, reports, concepts and other ideas relating to the Project; prepare drawings, plans and specifications for the Project; and submit a Proposal for the Project based on such work". After review and approval of such invoice and back-up documentation, CCDC would pay to Skanska a stipend in the amount of demonstrated Qualified Costs, up to a maximum of \$1,500,000. Upon receipt of such payment by Skanska: (a) CCDC would own all Skanska Work Product; and (b) Skanska would waive all rights to any claim in connection with the contract procurement.

VIII. NON-DISCRIMINATION & CONTRACTOR AND SUPPLIER DIVERSITY

Pursuant to New York State Executive Law Articles 15-A and 17-B, ESD recognizes its obligation under the law to promote opportunities for maximum feasible participation of certified Minority and Women-owned Business Enterprises ("MWBE") and Service Disabled Veteran-Owned Businesses ("SDVOB") in the performance of ESD projects and procurements. The ESD Office of Contract and Supplier Diversity has reviewed the proposed contract and have determined that there exists no potential for MWBE and SDVOB participation. As such, participation goals will not be established or required.

IX. ENVIRONMENTAL REVIEW

On behalf of CCDC, ESD staff has determined that the requested authorization constitutes a Type II action as defined by the New York State Environmental Quality Review Act ("SEQRA") and the implementing regulations for the New York State Department of Environmental Conservation. No further environmental review is required in connection with the requested authorization.

X. REQUESTED ACTIONS

Based on the foregoing, CCDC Directors are being asked to: (1) determine that Skanska is responsible; (2) determine that the Skanska submission constituted a responsive proposal under the criteria of the RFP; (3) authorize CCDC to enter into the Stipend Agreement with Skanska on the terms presented in these materials; and (4) authorize CCDC take related actions as necessary or appropriate.

XI. RECOMMENDATION

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

ATTACHMENTS

Resolutions

Attachment A: RFP Section 3.11

Attachment B: Form of Stipend Agreement

April 19, 2017

NEW YORK CONVENTION CENTER DEVELOPMENT CORPORATION – NEW YORK CITY (NEW YORK COUNTY) – Jacob K. Javits Convention Center – Authorization to Enter into Stipend Agreement with Non-Selected Respondent; and Authorization to Take Related Actions

BE IT RESOLVED, that, based on the materials presented at this meeting, a copy of which is hereby ordered filed with the records of the Corporation (the “Materials”), the Corporation hereby finds Skanska Javits Design-Build Joint Venture (“Skanska”) to be responsible; and be it further

BE IT RESOLVED, that based on the Materials, the Corporation hereby finds that Skanska’s October 2016 proposal, timely received in response to the Corporation’s June 2016 RFP, was responsive under the criteria of the RFP; and be it further

RESOLVED, that based on the Materials, the Corporation is hereby authorized to enter into a Stipend Agreement with Skanska in connection with the Javits Expansion Project, for a maximum fee not to exceed \$1,500,000, substantially on the terms and conditions as set forth in the Materials; and be it further

RESOLVED, that the President, or his designee(s) be, and each of them hereby is, authorized to take such action and execute such documents as may be necessary or appropriate to carry out the foregoing Resolutions. Any actions previously taken by the Corporation consistent with this authorization are hereby ratified and affirmed.

* * *

3.11 Stipend Agreement

For those Proposers that submit a responsive Proposal in the judgment of the Owner and are not awarded the Design-Build Contract, the Owner intends to offer, subject to requisite public approvals, a stipend of up to \$1.5 million (Stipend) subject to and pursuant to the terms and conditions of an agreement substantially in the form attached as Schedule C.

If a Proposer wishes to be eligible to receive a Stipend, it shall execute and deliver to the Owner one originally executed copy of the Stipend Agreement no later than the Proposal Submittal Date. If Proposer is a joint venture, the Stipend Agreement shall be signed by the joint venture. After the required approvals have been obtained, including those from the New York State Office of the Attorney General and the Office of the State Comptroller, the Owner will return to the Proposer a copy of the fully executed original. Payment of the Stipend will be made as specified in the Stipend Agreement, subject to the terms and conditions set forth therein. If a Proposer accepts and the Owner pays the Stipend, the Owner will be entitled to use (or permit the use of), at the Owner's risk, any work product contained in the Proposal, including the techniques, methods, processes, concepts and information contained in the Proposal, for all purposes associated with the continued development, implementation, operation or expansion of the Project.

Each Proposer shall bear the cost of preparing the Proposal and any costs incurred at any time before or during the Proposal process, including costs incurred for any interviews, except as may be offset by any amounts paid in accordance with this Section. If the Owner cancels this RFP prior to the Proposal Submittal Date the Owner shall not make any Stipend payment.

SCHEDULE C

STIPEND AGREEMENT

This Stipend Agreement (the "**Agreement**") is made and entered into as of _____, 2016, between the New York Convention Center Development Corporation (the "**Owner**"), a public benefit corporation organized and existing under and by virtue of the laws of the State of New York (the "**State**"), and _____, a _____ organized and existing under the laws of the State of _____ and authorized to do business in the State (the "**Consultant**").

RECITALS

The Jacob K. Javits Convention Center ("**Javits**") is owned by Owner and operated and managed by the New York Convention Center Operating Corporation.

Owner is currently procuring a design-build contract for the design and construction of a truck marshalling facility, a ballroom, additional meeting rooms and exposition space, and other new facilities to expand and improve Javits (the "**Project**").

Pursuant to the New York Transformational Economic Development Infrastructure and Revitalization Projects Act, Owner issued a request for qualifications ("**RFQ**") on April 12, 2016, in order to prequalify or short-list the design-build entities eligible to submit proposals to permit, design, construct, commission and achieve occupancy readiness for the Project.

Following evaluation of the statements of qualifications submitted in response to the RFQ, and based upon the criteria set forth in the RFQ, three firms (including Consultant; each of the three a "**Proposer**") were selected to receive the request for proposals ("**RFP**"), issued on June __, 2016, for the Project.

Consultant intends to prepare and submit a proposal for the Project in response to the RFP (the "**Proposal**").

Owner intends to select one of the Proposers (the "**Design-Builder**") to enter into an agreement for the implementation of the Project (the "**Design-Build Contract**") based on the selection criteria stated in the RFP.

Owner, as part of its procurement of the Project, and subject to and pursuant to the terms and conditions of this Agreement, is offering a stipend to Proposers that submit a responsive Proposal and are not awarded the Design-Build Contract.

In order to be eligible to receive a stipend in connection with the procurement of the Project, a Proposer is required to enter into a stipend agreement with Owner for compensation for the provision of certain work product, as further set forth in this Agreement.

In consideration of the mutual covenants herein contained and other good and valuable consideration, the receipt and sufficiency of which are hereby expressly acknowledged by each of the parties hereto, the parties hereto, intending to be legally bound, agree as follows:

SECTION 1. DEFINITIONS. All capitalized terms used in this Agreement and not otherwise defined have the meanings ascribed to such terms in the RFP.

SECTION 2. PERFORMANCE OF WORK. Consultant, as a Proposer, may plan, design, and develop the Project; furnish data, information, innovation, technology, techniques, methods, processes, unique uses of commercial items, solutions, construction means and methods, Project execution approaches, reports, concepts and other ideas relating to the Project; prepare drawings, plans and specifications for the Project; and submit a Proposal for the Project based on such work (the "Work Product"), pursuant to and in accordance with the terms of the RFP.

SECTION 3. STIPEND AMOUNT.

(A) Design-Build Contract Awarded to Consultant. If Owner awards the Design-Build Contract to Consultant and issues a notice to proceed to commence Design-Build Work (as defined in the Design-Build Contract) to Consultant in accordance with the terms of the Design-Build Contract, Consultant shall not be entitled to any stipend payment hereunder or any other payment for the Work Product; provided, however, that if a notice to proceed to commence Design-Build Work (as defined in the Design-Build Contract) is not issued within the period of time specified in, and in accordance with the terms of, the Design-Build Contract, and such nonissuance is not due to the fault of Consultant, then Consultant shall be entitled to an amount equal to Consultant's total Qualified Costs (as defined in subsection 5(E)), as substantiated in accordance with subsection 5(E), not to exceed \$1,500,000, subject to the terms of this Agreement, including, without limitation, Sections 4 and 5, in full and final payment for the Work Product (the "**Stipend Amount**"), as if it were not awarded the Design-Build Contract.

(B) Design-Build Contract Awarded to Another Proposer. Subject to Section 4 of this Agreement, if Owner awards the Design-Build Contract to a Proposer, other than Consultant, that enters into the Design-Build Contract, Owner shall pay Consultant an amount equal to (but not in addition to) the Stipend Amount.

(C) Procurement Cancelled by Owner Prior to Proposal Submittal Deadline. If Owner cancels the procurement of the Project for any reason prior to the Proposal due date and time specified in the RFP, as such due date and time may be amended by addenda to the RFP (such due date and time being the "**Proposal Submittal Deadline**"), then Consultant shall not be entitled to any Stipend Amount or any other payment for the Work Product.

(D) Design-Build Contract Not Awarded by Owner Following Proposal Submittal Deadline. If Owner cancels the procurement of the Project for any reason following the Proposal Submittal Deadline, or Owner does not execute a Design-Build Contract within 180 days following the Proposal Submittal Deadline or any longer period agreed to by Owner and Design-Builder, then Owner shall pay Consultant an amount equal to (but not in addition to) the Stipend Amount.

(E) Discretionary Stipend Amount Payment Upon Procurement Cancellation. Notwithstanding anything to the contrary set forth in this Section, if Owner cancels the procurement of the Project for any reason prior to the Proposal Submittal Deadline, Owner may, in its sole and absolute discretion, elect to make a payment to Consultant for its Work Product completed as of the date of cancellation if, at Owner's request, Consultant: (1) submits to Owner all Work Product completed prior to procurement cancellation; (2) submits to Owner an invoice and satisfactory evidence substantiating its Qualified Costs in accordance with Section 5; and (3) attends a meeting with Owner to discuss the Work Product completed prior to procurement cancellation. In no event would any such payment be greater than a Stipend Amount.

SECTION 4. RESPONSIVE PROPOSAL. Consultant shall not be entitled to any Stipend Amount or other payment under this Agreement unless Consultant has provided the

Work Product through and including submittal of a Proposal that, in the sole and absolute judgment of Owner, is a responsive Proposal determined under the criteria of the RFP. Without limiting any of the foregoing, the parties further acknowledge that any of the following will result in a Proposal being deemed unresponsive: (1) failure of the Proposal to be received at the required submittal location at or prior to the Proposal Submittal Deadline; (2) failure of the Proposal to comply with the minimum requirements mandated in the RFP; (3) failure to include a competitive and responsible price proposal for the Project; or (4) withdrawal of Consultant from the Project procurement process or disqualification of Consultant by Owner in accordance with the terms of the RFP.

SECTION 5. PAYMENT OF STIPEND AMOUNT.

(A) Consultant Invoice. Within 30 days of being notified by Owner of Consultant's eligibility for a Stipend Amount hereunder, Consultant must submit to Owner's designated representative, a single invoice, together with all documentation required under subsection (E) of this Section, for the lesser of: (1) the amount of Consultant's Qualified Costs; or (2) \$1,500,000.

(B) Owner Determination of Stipend Amount. Owner will review Consultant's invoice and documentation submitted pursuant to subsection (A) of this Section and, based upon such review, make a determination as to the appropriate Stipend Amount. If Owner disagrees with the proposed Stipend Amount set forth in Consultant's invoice, Owner will notify Consultant in writing within 15 days of receipt of Consultant's invoice of its determination of the appropriate Stipend Amount based on its aforementioned review, and Consultant shall submit a revised invoice to Owner within three business days following delivery of any such notice from Owner. By delivery of its revised invoice to Owner, Consultant agrees to accept the Stipend Amount, as determined by Owner hereunder. Prior to submitting a revised invoice to Owner in accordance with this subsection, Consultant may request non-binding mediation of any dispute as to Owner's determination of the Stipend Amount payable hereunder. The mediator shall be a professional mutually acceptable to the parties who has no current or on-going relationship to either party. The costs of the mediator shall be divided equally between Owner and Consultant.

(C) Payment of Stipend Amount by Owner. Payment of the Stipend Amount due under Sections 3(A), 3(D) or 3(E) shall be made by Owner within [60] days of the date Owner determines the Stipend Amount due pursuant to subsection (B) of this Section. Any payment of a Stipend Amount due under Section 3(B) shall be made by Owner within [60] days after: (a) any complaint against the award is administratively and judicially resolved; or (b) the Statute of Limitations against the filing of any such complaint has run. Consultant acknowledges and agrees that it shall be deemed to have accepted the Stipend Amount hereunder, and that all of its rights in the Work Product are transferred to Owner, effective as of the date Owner sends payment of the applicable Stipend Amount to Consultant in accordance with this Agreement.

(D) Limitations to Payment of Stipend Amount. Consultant shall not be entitled to payment of any Stipend Amount under this Agreement if Consultant: (1) except as provided in subsection 3(E), fails to submit a Proposal on or before the Proposal Submittal Deadline; (2) files or has filed a protest of the Project procurement process, award or cancellation of the Project procurement; (3) fails to submit an invoice (or a revised invoice, if required) in accordance with this Section, or fails to provide satisfactory evidence substantiating its Qualified Costs in accordance with subsection (E) of this Section; (4) is selected by Owner to be the Design-Builder and fails to engage in good faith negotiations of the Design-Build Contract with Owner; or (5) fails to comply with all other terms and conditions of this Agreement.

(E) Qualified Costs. Consultant shall maintain written records substantiating all Qualified Costs incurred by Consultant and its subcontractors in producing the Work Product in sufficient detail to permit a proper audit thereof. To the extent not attached to Consultant's invoice, such records shall be made available upon request of Owner at all times during the term of this Agreement and for six years after final payment of a Stipend Amount is made. For purposes of this Agreement, "**Qualified Costs**" shall comprise all reasonable costs and expenses incurred by Consultant in the production of the Work Product, provided that travel expenses, and costs of production of the Proposal and other marketing-type costs and expenses, and costs of secretarial or word processing time, shall be excluded. Consultant shall submit to Owner copies of all substantiating documentation of Qualified Costs concurrently with the submission of its invoice pursuant to subsection (A) of this Section, and at any other time upon Owner's request.

(F) Tax Clearance Certificate. Consultant is required, if it is not an entity organized under the laws of the State, to obtain and submit the required tax clearance certificate to Owner to enable the processing of a Stipend Amount. Any time taken to satisfy or furnish such tax clearance certificate shall extend any required payment date set forth in this Section by an equal period of time.

SECTION 6. OWNER PROPERTY. In consideration for payment of a Stipend Amount hereunder, Owner may use any of the ideas or information contained in Consultant's Proposal and any other related Work Product in connection with any contract awarded for the Project, or in connection with any subsequent procurement, without any obligation to pay any additional compensation to Consultant. Upon Consultant's receipt of payment of any Stipend Amount, the Proposal and any other Work Product (including, without limitation, any intellectual property of Consultant) shall become property of Owner, without restriction or limitation on its use other than as expressly set forth herein, and Owner shall have the right to use such Proposal and related Work Product for the governmental purposes of Owner in any manner or combination it so elects, without notice to or consent of Consultant. Owner agrees that any use of such Proposal and related Work Product by Owner without Consultant's verification or adaptation for the specific purpose intended shall be at Owner's sole risk.

SECTION 7. THIRD PARTY INTELLECTUAL PROPERTY RIGHTS. With respect to any Work Product that incorporates intellectual property owned by third parties, Consultant represents and warrants that it has the right to grant Owner an irrevocable, non-exclusive, perpetual, royalty-free license to use such intellectual property for the purposes specified herein. Consultant hereby assigns such license to Owner effective upon Consultant's acceptance of payment of the applicable Stipend Amount.

SECTION 8. WAIVER OF CLAIMS. Acceptance by Consultant of payment of a Stipend Amount from Owner shall constitute a waiver by Consultant of any and all rights, equitable or otherwise, to bring any claim (including, without limitation, any protest of the Project procurement process, award or cancellation of the Project procurement) against Owner or any of its Board members, officers, directors, agents, employees, representatives or advisors and their successors and assigns, in connection with the procurement of the Project.

SECTION 9. TAXES. Consultant shall be responsible for payment of all taxes including federal, state and local taxes arising out of Consultant's activities in accordance with this Agreement, including by way of illustration but not limitation, federal and state income tax, social security tax, unemployment insurance tax and any other taxes or business license fees as required by applicable law.

SECTION 10. NON-DISCRIMINATION REQUIREMENTS. To the extent required by Article 15 of the State Executive Law (also known as the Human Rights Law) and all other State and Federal statutory and constitutional non-discrimination provisions, Consultant shall

not discriminate against any employee or applicant for employment because of race, creed, color, sex, national origin, sexual orientation, military status, age, disability, genetic predisposition or carrier status, or marital status.

SECTION 11. CONSULTANT LIABILITY. Consultant shall be responsible for all damage to life and property due to acts, errors or omissions of Consultant or its subcontractors, agents or employees in the performance of work hereunder. Further, it is expressly understood that Consultant shall indemnify and hold harmless Owner from claims, suits, actions, damages and costs of every name and description resulting from the performance of work hereunder, and such indemnity shall not be limited by reasons of enumeration of any insurance coverage herein required. Consultant's obligations under this Section shall apply to and include, without limitation, claims founded upon tort; claims based upon Consultant's failure to meet professional standards; or claims based upon breach of copyright, trade secrets or other protected materials. Nothing in this Agreement shall create or give to third parties any claim or right of action against Consultant or Owner beyond such as may legally exist irrespective of this Agreement.

SECTION 12. TERMINATION. At any time prior to the stated original or any revised Proposal Submittal Deadline, Owner shall have the right, in its sole and absolute discretion, to terminate this Agreement, with no liability to Owner, by delivery to Consultant of written notice that Owner has determined to withdraw the RFP and cancel the procurement for the Project undertaken through the issuance of the RFP. Any such withdrawal and termination shall be without prejudice to the right of Owner to conduct a procurement for the Project under another procurement process commenced following the withdrawal of the RFP.

SECTION 13. CONSULTANT'S REPRESENTATIONS AND WARRANTIES. Consultant represents and warrants that the following statements are true:

(A) Due Authorization and Binding Obligation. This Agreement has been duly authorized, executed and delivered by all necessary corporate action of Consultant and constitutes a legal, valid and binding obligation of Consultant, enforceable against Consultant in accordance with its terms, except to the extent that its enforceability may be limited by the Bankruptcy Code or by equitable principles of general application.

(B) No Conflict. To the best of its knowledge after due inquiry, neither the execution nor delivery by Consultant of this Agreement nor the performance by Consultant of its obligations in connection with the transactions contemplated hereby nor the fulfillment by Consultant of the terms or conditions hereof (1) conflicts with, violates or results in a breach of any constitution, law, governmental regulation, by-laws or certificates of incorporation applicable to Consultant or (2) conflicts with, violates or results in a breach of any order, judgment or decree, or any contract, agreement or instrument to which Consultant is a party or by which Consultant or any of its properties or assets are bound, or constitutes a default under any of the foregoing.

(C) No Approvals Required. No approval, authorization, order or consent of, or declaration, registration or filing with, any governmental body is required for the valid execution and delivery of this Agreement by Consultant except as such have been duly obtained or made.

(D) No Litigation. Except as disclosed in writing to Owner, there is no legal proceeding, at law or in equity, before or by any court, arbitral tribunal or other governmental body pending or, to the best of Consultant's knowledge after due inquiry, overtly threatened or publicly announced against Consultant, in which an unfavorable decision, ruling or finding could reasonably be expected to have a material and adverse effect on the execution and delivery of this Agreement by Consultant or the validity, legality or enforceability of this

Agreement against Consultant, or any other agreement or instrument entered into by Consultant in connection with the transactions contemplated hereby, or on the ability of Consultant to perform its obligations hereunder or under any such other agreement or instrument.

(E) Representations and Warranties to Remain True. During the term of this Agreement, Consultant will not take any action, or omit to perform any act, that results in a representation and warranty becoming untrue. Consultant will promptly notify Owner if any representation and warranty becomes untrue. From time to time, Consultant will provide Owner, upon Owner's request, with proof of the continuing accuracy of these representations and warranties.

SECTION 14. COMPTROLLER APPROVAL. This Agreement shall not be valid, effective or binding upon Owner until duly authorized by Owner and approved by the State Comptroller.

SECTION 15. VENUE. Any legal proceedings related to this Agreement or to any rights or any relationship between the parties arising therefrom shall be solely and exclusively initiated and maintained in State or federal courts located in the County of New York, New York.

SECTION 16. STANDARD CLAUSES. The parties to this Agreement agree to be bound by the standard "Schedule A" clauses that are included in all Owner contracts set forth in Appendix 1. References to "Contractor" and "Corporation" in Appendix 1 shall be deemed to mean and refer to Consultant and Owner, respectively.

SECTION 17. SEVERABILITY. Each provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law. If any provision of this Agreement is held to be invalid, unenforceable or illegal to any extent, such provision shall be severed and such invalidity, unenforceability or illegality shall not prejudice or affect the validity, enforceability and legality of the remaining provisions of this Agreement, unless such continued effectiveness as modified would be contrary to the basic understandings and intentions of the parties as expressed herein. If any provision of this Agreement is held to be invalid, unenforceable or illegal, the parties will promptly endeavor in good faith to negotiate new provisions to eliminate such invalidity, unenforceability or illegality and to restore this Agreement as nearly as possible to its original intent and effect.

SECTION 18. FURTHER ASSURANCES. Owner and Consultant each agree to execute and deliver such further instruments and to perform any acts that may be necessary or reasonably requested in order to give full effect to this Agreement.

SECTION 19. COUNTERPARTS. This Agreement may be executed in any number of original counterparts. All such counterparts shall constitute but one and the same Agreement.

[SIGNATURE PAGE FOLLOWS]

[Final RFP, Addendum No. 9, September 30, 2016]

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their duly authorized representatives as of the day and year first above written.

NEW YORK CONVENTION CENTER
DEVELOPMENT CORPORATION

[NAME OF CONSULTANT]

By: _____

By: _____

Printed Name: _____

Printed Name: _____

Title: _____

Title: _____

APPROVED AS TO FORM:

APPROVED:

State Attorney General

State Comptroller

Date: _____

Date: _____

APPENDIX 1 TO STIPEND AGREEMENT

SCHEDULE A

**CONDITIONS APPLICABLE TO THE CORPORATION'S AGREEMENTS
FOR MATERIALS/SERVICES**

Note: The latest version of "Schedule A", which are standard contract terms in all Owner contracts that will be included as Appendix 1 to the Stipend Agreement, can be found at:

<http://esd.ny.gov/CorporateInformation/Data/ScheduleA.pdf>

Item III. B.



FOR CONSIDERATION

April 19, 2017

TO: The Directors

FROM: Robin Stout

SUBJECT: New York Convention Center Development Corporation ("CCDC")
(New York County) - Jacob K. Javits Convention Center ("Javits")

REQUEST FOR: Authorization to Amend Contract for Construction Manager as Agent to
Construction Manager at Risk; and To Take Related Actions

CONTRACT NEED AND JUSTIFICATION

I. Contract Summary

Vendor: Tishman Construction Company of New York, an AECOM
Company ("Tishman" or "TCC")

Scope of Services: Construction Manager at Risk ("CMAR") for the Early Construction
work, including the transformer building, new 12th Avenue
entrance, and various utility relocations (collectively, the
"Project").

The contract will provide for a Guaranteed Maximum Price
("GMP") and a fixed completion date.

**Anticipated Term
Of Amended Contract:** April 24, 2017 through approximately January 2020

Contract Amount: Not to exceed \$95 million. The value of the contract includes
existing Project trade contracts, all of which will be assigned to
Tishman, as well as any future contracts that comprise this scope
of work.

Funding Source: CCDC 2015 and 2016 Bond Series Revenue (Hotel Unit Fee
secured)

II. Project Background

In May 2016, CCDC Directors authorized a contract for \$8 million with Tishman for Construction Management Services as Agent, to provide construction management services in connection with the Project. Specifically, this work includes:

- Construction of the a three-story transformer building to be built out of the flood plain, and upgrading the transformers to meet the needs of existing and expanded Javits;
- Relocating a sewer pipe and a water main that currently run under decommissioned West 39th Street, over which the expansion will be built;
- Rerouting electrical feeders belonging to the Port Authority of New York & New Jersey; and
- Rerouting ConEd service off West 39th Street.

Work on the Project is well underway. The transformer building's steel structure has been topped out and design and construction coordination are continuing.

Under the existing Construction Manager as Agent contract, TCC has been assisting CCDC to procure necessary trade contractors and equipment for the Project. TCC has entered into certain trade contracts, as CCDC's agent, each pursuant to CCDC Director authorization, and TCC has provided vital guidance and oversight of the Project. However, because TCC has been acting "as agent" and not "at risk," CCDC, to date, has borne all cost and schedule risk. The following contracts for construction work and/or equipment have been authorized under the "as agent" contract:

- Provision and installation of structural steel (\$6,220,000);
- Caissons and foundations (\$4,869,900);
- Utility relocation (\$1,721,673);
- Electric generator sets (\$6,194,929); and
- Switchgear equipment (\$3,936,850).

Approximately 22 contracts are yet to be awarded.

During the course of TCC's engagement as Construction Manager as Agent, CCDC staff determined that the Project would progress more efficiently and more affordably if the Construction Manager was "at risk"; in other words, if responsibility for Project completion on a certain schedule and for a set budget rested with the Construction Manager, instead of with CCDC. At CCDC's request, TCC agreed to re-negotiate the terms of the existing construction management contract to reflect this change.

III. Procurement Methodology

Following CCDC's procurement guidelines, and as detailed in May 2016 Director materials, the original procurement for construction management services was advertised in the New York State Contract Reporter and competitively procured via a publicly released Request for Proposals.

With respect to the current proposed contract amendment, an exemption from Contract Reporter Advertisement requirements has been approved on a single source basis for the following reasons:

- TCC was competitively procured less than a year ago to provide construction management services for the Project. TCC was awarded the construction manager "as agent" contract because it was found to be the most experienced and technically qualified respondent. We do not believe that the outcome of the procurement or the pool of likely respondents would have materially differed based on an "as agent" or "at risk" arrangement.
- TCC has already commenced work as construction manager "as agent", and the Project, under TCC's management, is well underway. It would be costly and inefficient to bring in a new construction manager at this point in the Project.
- Staff has engaged in aggressive negotiations with TCC and believes that the terms of the proposed "at risk" amendment, detailed below, are commercially reasonable based on industry standards. Moreover, modifying the contract to an "at risk" basis is in CCDC's financial interest, compared to continuing the "as agent" contract, because schedule and budget risk will be transferred to TCC, with the added advantage that risk of interference with the larger expansion project will be minimized.

IV. Essential Terms of the "At Risk" Contract

Guaranteed Maximum Price ("GMP"): The GMP would be determined when approximately 80% of specified trades have been procured by TCC, based on the following formula. GMP would include:

- (a) The value of the contracts procured through date of GMP determination (80%);
- (b) Previously agreed estimates of the remaining approximate 20% of the contracts;
- (c) Agreed lump sum general conditions of \$10.5M;
- (d) A 5% construction management fee;

(e) A 7% contingency (subject to shared savings, discussed below);

(f) Bond fee of 0.6%; and

(g) Insurance fee of 1.675%.

The GMP would be adjusted based only on changes to design specifications, relief events, and certain owner approved trade subcontract allowances. However, other increases to the cost of the work shall be borne by TCC.

Final Completion Date:	120 days following July 1, 2019 Scheduled Substantial Completion Date
Construction Management Fee:	5% of Cost of Work (included in GMP)
Contingency Amount:	7% of Cost of Work (included in GMP)
Shared Savings:	At Final Completion, CCDC would pay TCC 50% of any savings achieved during procurement (as compared to GMP), plus 50% of any unused contingency. Shared savings would be capped at 6.5% of the Cost of the Work, less any Construction Management fees and incentive payments earned by TCC.
GMP Incentive Amount	If TCC is eligible for Shared Savings as outlined above, and if final GMP (excluding owner directed change orders) is less than \$91 million, CCDC would pay TCC 50% of the difference between \$91 million and the lesser GMP.
Delay Liquidated Damages:	\$25,000 per day of delay after interim milestone (April 1, 2018) and substantial completion milestone (July 1, 2019), with no grace period at interim milestone and with a 15-day grace period at substantial completion.
Incentive Bonus:	\$100,000 at interim milestone if timely achieved and \$50,000 at substantial completion if timely achieved.

Commissioning and Testing	TCC will be required to commission and test the systems and subsystems of the Project as a condition of substantial completion.
Warranty	TCC will provide a one-year construction work warranty following Substantial Completion.
Limitation of Liability	TCC's liability to CCDC is limited to \$15,000,000 plus proceeds of all available insurance for suits brought by CCDC against TCC. This limitation does not apply if TCC abandons the Project, and also does not apply to any loss, cost or expense sustained by TCC: (a) in performing Project work; (b) resulting from TCC CMAR Agreement breach; (c) in any CCDC tort claim against TCC based on gross negligence, willful misconduct, fraud, misrepresentation or false claims; (d) in any third party legal proceedings; (e) resulting from required indemnity payments (including attorneys' fees) resulting from third party claims. Governmental fines and penalties also are excluded. CCDC will appropriately insure resulting risk.

V. Non-Discrimination and Contractor & Supplier Diversity

ESD's Non-Discrimination and Contractor & Supplier Diversity policies will apply to the Project. TCC 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, 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 value of ESD's funding. The overall goal shall include a Minority-owned Business Enterprise Participation Goal of 15% and a Women-owned Business Enterprise Participation Goal of 15% related to the total value of ESD's funding.

ESD's Service-Disabled Veteran-Owned Business ("SDVOB") policies also will apply to the Project. TCC shall be required to solicit and utilize SDVOBs in the fulfillment of the requirements of this contract. TCC must demonstrate good faith efforts pursuant to 9 NYCRR §252.2 to achieve a goal of 6% for SDVOB participation.

VI. Environmental Review

On behalf of CCDC, ESD staff has determined that the requested authorization constitutes a Type II action as defined by the New York State Environmental Quality Review Act ("SEQRA") and the implementing regulations for the New York State Department of Environmental Conservation. No further environmental review is required in connection with the requested authorization.

VII. Responsible Parties

CCDC has examined TCC's "responsibility" as defined in State Finance Law §163, and as provided in ESD's Procurement Guidelines, Article 8.13. Based on this analysis of financial and organizational capacity, legal authority to do business in New York, integrity of principals, and past performance on contracts, staff concludes that Tishman is a responsible vendor.

VIII. Requested Actions

The Directors are requested to authorize CCDC to: (a) amend its Project Construction Manager contract with TCC substantially upon the terms and conditions set forth in these materials; and (b) to take all related actions.

IX. Recommendation

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

Attachments
Resolutions

April 19, 2017

NEW YORK CONVENTION CENTER DEVELOPMENT CORPORATION - (NEW YORK COUNTY) -
Jacob K. Javits Convention Center - Authorization to Amend Contract for Construction
Management as Agent to Construction Management at Risk; and To Take Related Actions

BE IT RESOLVED, that based on the materials presented at this meeting (the "Materials"), a copy of which is hereby ordered filed with the records of the Corporation, the Corporation is hereby authorized to amend its Construction Management as Agent contract with TCC to be a Construction Management at Risk contract, for a price not to exceed \$95 million, substantially on the terms and conditions as set forth in the Materials; and be it further

RESOLVED, that the President, or his designee(s) be, and each of them hereby is, authorized to take such action and execute such documents as may be necessary or appropriate to carry out the foregoing Resolutions. Any actions previously taken by the Corporation consistent with this authorization are hereby ratified and affirmed.

* * *