

**NEW YORK TRANSPORTATION DEVELOPMENT CORPORATION**

**Meeting of the Directors**

Tuesday  
April 26, 2016 – 11:00 a.m.

**PROPOSED AGENDA**

**CORPORATE ACTION**

1. Approval of Minutes of the April 5, 2016 Directors' Meeting

**FOR CONSIDERATION**

2. New York Transportation Development Corporation Special Facilities Bonds, Series 2016 (LaGuardia Airport Terminal B Redevelopment Project) (comprised of the Series 2016A (Tax-Exempt) (AMT) Bonds, the Series 2016B (Taxable) Bonds and the Series 2016C (Taxable) Bonds) – Board Authorization to Perform Certain Acts in Connection with the Sale and Delivery of the New York Transportation Development Corporation Special Facilities Bonds, Series 2016 (LaGuardia Airport Terminal B Redevelopment Project) and to Take Related Actions
3. Procurements Guidelines – Adoption of Revised Guidelines for the Use, Awarding, Monitoring and Reporting of Procurement Contracts
4. Delegation of Authority to Enter into Contracts – Delegation of Authority to Sign Contracts Not to Exceed \$250,000

**ITEM 1.**

**DRAFT – SUBJECT TO REVIEW AND REVISION**

New York Transportation Development Corporation  
Meeting of the Directors  
Held at the NYC Offices of  
Empire State Development  
633 Third Avenue  
New York, New York 10017

April 5, 2016

MINUTES

In Attendance

Directors:

Howard A. Zemsky, Chairman  
George Haggerty  
Kathleen Mize  
Mehul Patel

NYTDC Staff:

Elizabeth R. Fine – Executive Vice President - Legal  
and General Counsel  
Robert M. Godley – Treasurer  
Rose-Marie Mahase – Assistant Secretary  
Debbie Royce – Secretary

ESD Staff:

Lauren Axelrod – Senior Counsel  
Jonathan Beyer – Senior Counsel  
Peter Heilbrunn – Senior Director, Debt Management  
Steve Johs – Senior Director, Treasury Operations

Also Present:

Kristi Ball – LaGuardia Gateway Partners  
Larry Belinsky – Frasca and Associates, LLC  
Michael McGuigan – Debevoise & Plimpton LLP  
Farhad Soltanieh – LaGuardia Gateway Partners  
Stewart Steeves – LaGuardia Gateway Partners

The meeting of the New York Transportation Development Corporation (the “Corporation”), a Local Development Corporation created under New York State law, was called to order at approximately 9:38 a.m. It was noted for the record that notices to the public and

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news media of the time and place of the meeting had been given in compliance with the New York State Open Meetings Law and that the meeting was being webcast. Further, Chairman Zemsky noted that the Directors had received relevant written materials in advance of the meeting and noted for the record the Corporation's policy which welcomes public comments on the items on the current Agenda.

Before beginning with the substantive portion of the meeting, Chairman Zemsky asked the Directors whether anyone had any potential conflict of interest with respect to any of the items on the proposed Agenda. Hearing none, he then called for the approval of the Minutes of the January 20, 2016 Directors' meeting. Upon motion duly made and seconded, the following resolution was unanimously adopted:

**APPROVAL OF MINUTES AND RATIFICATION OF ACTIONS TAKEN AT THE JANUARY 20, 2016 MEETING OF THE DIRECTORS OF NEW YORK TRANSPORTATION DEVELOPMENT CORPORATION**

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RESOLVED, that the Minutes of the meeting of the Corporation held on January 20, 2016 as presented to the Directors at this meeting, are hereby approved and all actions taken by the Directors present at such meeting as set forth in such Minutes, are hereby in all respect ratified and approved as actions of the Corporation.

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Chairman Zemsky then called on Lauren Axelrod to present the next Agenda item, a request for authorization to proceed with the preparation of documents in connection with issuing refunding bonds.

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Ms. Axelrod began by stating that the Directors are being asked to take two separate actions in connection with the refunding of the outstanding New York City IDA Special Facility Revenue Bonds, the proceeds of which were lent to American Airlines, to finance the construction of the new, fully completed Terminal 8 at JFK International Airport in Queens.

Ms. Axelrod stated that the proceeds of the prior bonds were used to provide funds for four things: the demolition of Terminal 8 and 9 at JFK; the acquisition and construction and equipping of a new Terminal A to be used and managed by American Airlines, together with related access ramps, parking facilities and a passenger tunnel connecting Concourse C to the main terminal; the funding of debt services reserve funds; and financing of certain related cost of issuance of the prior bonds.

After Ms. Axelrod’s overview of the refunding project, Mr. Robert Godley gave an overview as it relates to the Special Facility Revenue Bonds.

Hearing no further questions or comments and upon motion being duly made and seconded, the following resolution was unanimously adopted:

NEW YORK TRANSPORTATION DEVELOPMENT CORPORATION (the “TDC”) - Refunding of New York City Industrial Development Agency Bonds For the American Airlines Terminal at JFK International Airport (“IDA Bonds”) - Authorization to Proceed with the Preparation of Documents in Connection with Issuing Bonds to Refund all of the IDA Bonds, to Take Actions Related to the Tax Equity and Fiscal Responsibility Act (“TEFRA”), Select Underwriter(s) and to Take Related Actions

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RESOLVED, that in accordance with the materials presented to this meeting, a copy of which is hereby ordered to be filed with the records of the TDC (the “Materials”), the TDC hereby authorizes the preparation of documents necessary or desirable in connection with the

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issuance of bonds (the “Refunding Bonds”) in order to refund all of the IDA Bonds which were issued for the benefit of American Airlines, Inc., (the “Borrower”) and which financed the construction and equipping of the American Airlines Terminal at JFK International Airport; and be it further

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

RESOLVED, that the Corporation hereby consents to Citigroup Global Markets, Inc. (“Citi”) to be the senior managing underwriter for such Refunding Bonds, together with such co-managers, if any, as the TDC, in consultation with the Borrower, shall select in accordance with the Materials;

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

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Chairman Zemsky then called on Lauren Axelrod to present the final voting item on the Agenda.

Ms. Axelrod said that the Directors are being asked to authorize the Corporation staff to enter into a contract with Winston & Strawn to provide legal services to the Corporation in connection with the refunding; and in accordance with Federal Tax Law, an opinion from bond counsel is required to opine upon tax exempt bonds.

Additionally, bond counsel expertise is necessary to ensure compliance with applicable securities laws and market practices; and Counsel would advise the Corporation in securities, bonds, taxes and other related legal matters in connection with the refunding.

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Hearing no questions and/or comments and upon motion being duly made and seconded, the following resolutions were unanimously adopted:

**NEW YORK TRANSPORTATION DEVELOPMENT CORPORATION (“TDC”) –Authorization to Enter into a Contract to Provide Legal Services for the New York Transportation Development Corporation (“TDC”) in Connection with Refunding Bonds Related to John F. Kennedy Airport – Terminal 8 and to Take Related Actions**

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RESOLVED, that in accordance with the materials presented to this meeting, a copy of which is hereby ordered to be filed with the records of the TDC (the “Materials”), the Authority hereby finds the law firm of Winston & Strawn LLP (“Counsel”) to be responsible; and be it further

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

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

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Chairman Zemsky then introduced Stewart Steeves from LaGuardia Gateway Partners to make an oral presentation.

After Mr. Steeves gave an overview of the LaGuardia Gateway Partners Project to Redevelop the Central Terminal Facility at LaGuardia Airport, otherwise known as Terminal B; Chairman Zemsky asked for a motion to adjourn the meeting.

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There being no further business, the meeting was adjourned at 10:06 a.m.

Respectfully submitted,

Rose-Marie Mahase  
Assistant Secretary

**ITEM 2.**



**FOR CONSIDERATION**

**DATE:** April 26, 2016

**TO:** The Directors

**FROM:** Howard A. Zemsky

**SUBJECT:** New York Transportation Development Corporation Special Facilities Bonds, Series 2016 (LaGuardia Airport Terminal B Redevelopment Project) (comprised of the Series 2016A (Tax-Exempt) (AMT) Bonds, the Series 2016B (Taxable) Bonds and the Series 2016C (Taxable) Bonds)

**REQUEST FOR:** Board Authorization to Perform Certain Acts in Connection with the Sale and Delivery of the New York Transportation Development Corporation Special Facilities Bonds, Series 2016 (LaGuardia Airport Terminal B Redevelopment Project) and to Take Related Actions

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**Introduction**

The Board is being asked to approve the operative provisions, sale terms, official statement, bond purchase agreements, related documents and related actions in connection with the sale and delivery of the New York Transportation Development Corporation (the "Corporation") Special Facilities Bonds (LaGuardia Airport Terminal B Redevelopment Project) Series 2016A (Tax-Exempt) (AMT) (the "Series 2016A Bonds"), Special Facilities Bonds (LaGuardia Airport Terminal B Redevelopment Project) Series 2016B (Taxable) (the "Series 2016B Bonds") and Special Facilities Bonds (LaGuardia Airport Terminal B Redevelopment Project) Series 2016C (Taxable) (the "Series 2016C Bonds" and together with the Series 2016A Bonds and the Series 2016B Bonds, the "Series 2016 Bonds") to be issued for the benefit of LaGuardia Gateway Partners, LLC, a Delaware limited liability company (the "Borrower"). The Borrower is a limited liability company. The members of the Borrower are Skanska ID LGP, LLC, MI LaGuardia CTB LLC and Vantage Airport Group (New York) Ltd. (each, a "Member").

**Background and Purpose**

The Borrower has requested that the Corporation issue the Series 2016 Bonds for the following purposes: (i) finance a portion of the costs of the Project (as defined below) relating to the demolition of the existing Terminal B and design and construction of a new Terminal B (the "New Terminal B") to be constructed by the Borrower at LaGuardia Airport in Queens, New York ("LGA Airport"); (ii) partially fund capitalized interest during construction (but subject to withdrawal to pay Project costs if necessary); and (iii) pay certain costs of issuance related to the Series 2016 Bonds. The proceeds of the Series 2016 Bonds will be loaned to the Borrower.

The Port Authority of New York and New Jersey (the "Port Authority"), as lessor, and the Borrower, as lessee, will enter into a Lease Agreement, dated as of the issuance date of the

Series 2016 Bonds (the "Lease Agreement,") pursuant to which the Port Authority will lease the premises upon which the Borrower will design, build, construct and operate the Project to the Borrower. The Project consists of (i) the operation, maintenance, and demolition of the existing Terminal B and related facilities; (ii) the design, construction, financing, operation, and maintenance of the New Terminal B and certain ancillary facilities and related infrastructure; (iii) the design and construction of certain airfield modifications and other infrastructure at LGA Airport on behalf of the Port Authority (which improvements, when completed, will not be operated or maintained by the Borrower and will not constitute part of the facilities leased to the Borrower under the Lease Agreement); and (iv) the design, construction, operation, and maintenance of a new central arrivals/departure hall (collectively the "Project"). In addition to the proceeds of the Series 2016 Bonds, the Project will be financed with (i) certain revenues received from the operation of the Project, (ii) funds provided by the Port Authority, and (iii) equity contributions to be made by the Members.

### **Security**

The Series 2016 Bonds will be issued and secured as Senior Bonds under the provisions of the Indenture of Trust to be dated as of May 1, 2016 (the "Indenture") by and between the Corporation and The Bank of New York Mellon, as trustee (the "Trustee"). The Series 2016 Bonds will be special limited obligations of the Corporation, payable from certain payments to be made by the Borrower to the Corporation under the Building Loan Agreement, dated as of May 1, 2016 (the "Building Loan Agreement") and a Project Loan Agreement, dated as of May 1, 2016 (the "Project Loan Agreement," and together with the Building Loan Agreement, the "Series 2016 Loan Agreements"), by and between the Corporation and the Borrower, such loans being further evidenced by two promissory notes (the "Building Loan Note" and the "Project Loan Note" and, together, the "Series 2016 Notes").

The Series 2016 Bonds will be secured by (i) moneys and obligations held by the Trustee under the Indenture (except moneys held in the Rebate Account), and (ii) certain collateral held by The Bank of New York Mellon, as collateral agent and securities intermediary (the "Collateral Agent"), pursuant to the Collateral Agency Agreement, dated as of May 1, 2016 among the Borrower, the Collateral Agent and the Trustee (the "Collateral Agency Agreement"). The Series 2016 Loan Agreements (other than the Corporation's Reserved Rights) and the Series 2016 Notes will be assigned to the Collateral Agent as security for the Series 2016 Bonds. The other collateral held by the Collateral Agent includes: (i) the Building Loan Leasehold Mortgage and the Project Loan Leasehold Mortgage (the "Leasehold Mortgages") to be executed by the Borrower in favor of the Issuer and the Collateral Agent, with respect to all of the rights of the Borrower under the Lease; (ii) certain revenues the Borrower receives from the operation of the Project and other funds required to be deposited in the accounts established under the Collateral Agency Agreement (the "Project Accounts") and pledged to the repayment of the Series 2016 Bonds; (iii) Borrower Security Agreement; (iv) Assignment of Leases and Rents, and (v) certain agreements which allow the Collateral Agent to exercise certain rights with respect to the design and construction contract and the management contract in the event of a default on the part of the Borrower under the Lease Agreement (the "Direct Agreements"). The revenues pledged by the Borrower and required to be deposited in the Project Accounts consist primarily of certain revenues it receives from the

operation of the Project through payments made by (i) airlines under various airline subleases or through rates and charges imposed on the airlines and (ii) providers of concession goods and services under various concession subleases.

The Indenture authorizes the Issuer, upon the request of the Borrower, to issue additional Senior Bonds or Subordinate Bonds under the Indenture for the benefit of the Borrower. Such additional Senior Bonds or Subordinate Bonds may be issued only upon compliance with the requirements set forth in the Indenture.

### **Offering and Sale**

The Corporation will also enter into a bond purchase agreement for the initial underwriting of the Series 2016 A Bonds and the Series 2016 B Bonds (the "Bond Purchase Agreement"). The Series 2016C Bonds will be sold pursuant to a separate purchase agreement (the "2016C Purchase Agreement") pursuant to which the Series 2016C will be sold directly to certain large institutional investors (the "Direct Purchasers"). The Corporation is being asked to delegate authority to its officers to approve the maturities, prices, yields and other terms of the Series 2016 Bonds. In addition, although the Board has previously appointed a senior manager for this transaction, it now desires to appoint four additional underwriters. Also, the Borrower has stated that, if the Series 2016C Bonds are sold, it intends to enter into a placement agent agreement with Barclays Capital in connection with the sale of those Bonds.

The Series 2016A Bonds and the Series 2016B Bonds will be offered to investors pursuant to an official statement in substantially the form before you today. The Series 2016C Bonds, which will be issued as drawdown bonds, will not be offered pursuant to the official statement. The Direct Purchasers will conduct their own due diligence and will be required to execute and deliver to the Corporation, the Trustee and the Borrower an Investor Letter in which they acknowledge, among other things, that they are qualified investors and understand the risks of purchasing the Series 2016C Bonds. It is currently expected that either the Series 2016B Bonds or the Series 2016C Bonds will be issued but not both, but the final decision as to the issuance of the Series 2016B Bonds and/or the Series 2016C Bonds will depend upon market conditions and other factors. Pursuant to the Bond Purchase Agreement, the Borrower will provide warranties and indemnities for the benefit of the Corporation relating to information provided by the Borrower for inclusion in the official statement used in connection with the sale and issuance of the Series 2016 Bonds.

### **Environmental Review**

On August 22, 2014, the Office of the Deputy Mayor for Housing and Economic Development of the City of New York, acting as lead agency under the State Environmental Quality Review Act ("SEQRA"), issued a Negative Declaration for the Central Terminal Building Redevelopment Program at LaGuardia Airport, which for environmental review purposes includes the replacement of Terminal B, the airside apron, landside roadways, the removal of three historic hangar buildings and the replacement of the central terminal parking garage with a new West Garage. The lead agency's Negative Declaration was based on an Environmental Assessment Statement that included an environmental report prepared for the Federal Aviation

Administration ("FAA") under the federal environmental review laws. That detailed environmental report was prepared in consultation with a number of agencies, including the Port Authority, New York State Department of Transportation, New York State Historic Preservation Office, New York City Department of Parks and Recreation, New York City Department of Transportation, and New York City Landmarks Preservation Commission. The SEQRA lead agency published notice of its Negative Declaration on September 3, 2014. Thereafter, the FAA completed the detailed environmental report and issued a "Finding of No Significant Impact/Record of Decision." The environmental measures discussed in the FAA's findings are included as commitments of LaGuardia Gateway Partners LLC in its proposed lease with the Port Authority.

Subsequently, certain changes were proposed to the design of the Project, including a reconfiguration of the layout of the proposed New Terminal B (including a connecting hallway between the New Terminal B and Terminal C) and the West Garage. The potential impacts of these changes were assessed in a second environmental report prepared for the FAA, which concluded that the design changes would not affect the environmental impacts of the Project, and do not necessitate further environmental review.

The staff of the Corporation, in conjunction with its environmental counsel, has reviewed the comprehensive technical reports noted above, and agrees that the design changes proposed after issuance of the Negative Declaration would not result in any significant adverse environmental impacts. Accordingly, staff has concluded that no further review under SEQRA is required and therefore recommends that the Board abide by the determination resulting from the environmental review process conducted by the City's Office of the Deputy Mayor as lead agency under SEQRA.

### **Requested Action**

In accordance with the attached resolution, you are hereby requested to: (1) approve the terms and authorize the sale of the Series 2016A and Series 2016B Bonds on a negotiated basis; (2) approve the terms and authorize the sale of the Series 2016C Bonds at private sale to the Direct Purchasers; (3) approve the form and content of the official statement and various other documents connected with the sale and delivery of the Series 2016 Bonds; and (4) authorize certain officers and employees of the Corporation to take all actions deemed necessary to accomplish the final sale and delivery of the Series 2016 Bonds.

### **Attachments**

Resolution with the following Exhibits: (Exhibits to Directors only)

- A. Loan Agreements
- B. Indenture of Trust
- C. Collateral Agency Agreement
- D. Leasehold Mortgages
- E. Preliminary Official Statement
- F. Bond Purchase Agreement
- G. 2016C Purchase Agreement

**NEW YORK TRANSPORTATION DEVELOPMENT CORPORATION**

**RESOLUTION AUTHORIZING THE SALE AND ISSUANCE OF**

**SPECIAL FACILITIES BONDS, SERIES 2016**  
(LaGuardia Airport Terminal B Redevelopment Project)

**Adopted April 26, 2016**

WHEREAS, the New York Transportation Development Corporation (the "Corporation"), a local development corporation caused to be incorporated by the New York Job Development Authority pursuant to Section 1411 of the New York Not-For-Profit Corporation Law, being Chapter 35 of the Consolidated Laws of New York, and Section 1802, Subtitle I, Title 8, Article 8 of the New York Public Authorities Law (collectively, the "Act"), is authorized by the Act and its by-laws to issue special facility revenue bonds; and

WHEREAS, The Port Authority of New York and New Jersey, a municipal corporate instrumentality and political subdivision of the States of New York and New Jersey, created and existing by virtue of the Compact of April 30, 1921, made by and between the States of New York and New Jersey, and thereafter consented to by the Congress of the United States (the "Port Authority") proposes to enter into a Lease Agreement, dated as of the date hereof (the "Lease Agreement"), with the LaGuardia Gateway Partners, LLC, a Delaware limited liability company (the "Borrower"), pursuant to which, among other things, the Borrower is obliged to consummate the following (collectively, the "Project"): (i) the operation, maintenance, and demolition of the Existing Terminal B Facilities and certain ancillary facilities at LaGuardia Airport in Queens, New York ("LGA Airport"), (ii) the design, construction, financing, operation and maintenance of the New Facilities and certain ancillary facilities at LGA Airport; (iii) the design and construction of certain New Improvements at LGA Airport on behalf of the Port Authority; and (iv) the design, construction, operation and maintenance of a new Central Hall, provided that, in certain circumstances, the Port Authority shall have the right to remove the Central Hall from the facilities leased to the Borrower under the Lease Agreement prior to the expiration or termination of the Lease Agreement, all as more fully described in the Official Statement; and

WHEREAS, LaGuardia Gateway Partners, LLC. (the "Borrower") has requested that the Corporation issue its New York Transportation Development Corporation (the "Corporation") Special Facilities Bonds (LaGuardia Airport Terminal B Redevelopment Project) Series 2016A (Tax-Exempt) (AMT) (the "Series 2016A Bonds"), the Special Facilities Bonds (LaGuardia Airport Terminal B Redevelopment Project) Series 2016B (Taxable) (the "Series 2016B Bonds") and the Special Facilities Bonds (LaGuardia Airport Terminal B Redevelopment Project) Series 2016C (Taxable) Bonds (the "Series 2016C Bonds" and together with the Series 2016B Bonds and the

Series 2016C Bonds, the "Series 2016 Bonds") to (i) demolish the existing Terminal B and finance a portion of the costs of the Project relating to the design and construction of a new Terminal B (the "New Terminal B") to be constructed by the Borrower at LGA Airport, (ii) partially fund capitalized interest during construction (but subject to withdrawal to pay Project costs if necessary), and (iii) pay certain costs of issuance related to the Series 2016 Bonds; and

WHEREAS, the proceeds of the Series 2016 Bonds will be loaned to the Borrower;

WHEREAS, the City of New York, after conducting a review as lead agency, issued a negative declaration, dated August 22, 2014, determining that the Project would not have a significant adverse impact on the environment;

WHEREAS, the Project was revised after issuance of the negative declaration as aforesaid but after careful review of the changes together with environmental counsel, staff of the Corporation has concluded that the changes are not substantive from an environmental perspective and that the Corporation may rely on the negative declaration issued by the City of New York;

WHEREAS, the duly authorized officers of the Corporation have caused to be prepared a Building Loan Agreement and a Project Loan Agreement (the "Loan Agreements") by and between the Corporation and the Borrower, copies of which are annexed to this Resolution as Exhibit A, pursuant to which the Corporation will loan the proceeds of the Series 2016 Bonds to the Borrower; and

WHEREAS, the Borrower will execute a Building Loan Note and the Project Loan Note in connection with the Loan Agreements (the "Notes"); and

WHEREAS, the Series 2016 Bonds will be issued and secured as Senior Bonds under an Indenture of Trust (the "Indenture") by and between the Corporation and The Bank of New York Mellon, as trustee (the "Trustee"), a copy of which is annexed to this Resolution as Exhibit B; and

WHEREAS, the Corporation will assign certain of its rights under the Loan Agreements and the Notes to the Collateral Agent pursuant to the Collateral Agency Agreement to be executed by the Trustee, the Collateral Agent and the Borrower as security for the Series 2016 Bonds, a copy of which is attached to this Resolution as Exhibit C; and

WHEREAS, pursuant to the Collateral Agency Agreement, other collateral held by the Collateral Agent as security for the Series 2016 Bonds includes: (i) the Building Loan Leasehold Mortgage and the Project Loan Leasehold Mortgage (the "Leasehold Mortgages") to be executed by the Borrower in favor of the Issuer and the Collateral Agent, with respect to all of the rights of the Borrower under the Lease (copies of which are attached to this Resolution as Exhibit D) (ii) certain revenues the Borrower receives from the operation of the Project and other funds required to be deposited in the Accounts established under the Collateral Agency Agreement (the "Project Accounts") and pledged to the repayment of the Series 2016 Bonds, (iii) Borrower

Security Agreement, (iv) Assignment of Leases and Rents, and (v) Direct Agreements that allow the Collateral Agent to exercise certain rights with respect to the design and construction contract and the management contract in the event of a default on the part of the Borrower under the Lease Agreement; and

WHEREAS, the revenues pledged by the Borrower and required to be deposited in the Project Accounts largely consist of certain revenues it receives from the operation of the Project through payments made by (i) airlines under various airline subleases or through rates and charges imposed on the airlines and (ii) providers of concession goods and services under various concession subleases; and

WHEREAS, although the Board has previously appointed a senior manager for this transaction, it now desires to appoint four additional underwriters; and

WHEREAS, the duly authorized officers of the Corporation have caused to be prepared a Preliminary Official Statement, a form of which is annexed to this Resolution as Exhibit E, and will cause to be prepared an Official Statement to be used in connection with the issuance and sale of the Series 2016A Bonds and the Series 2016B Bonds (collectively, the "Official Statement") and have negotiated a purchase contract for sale of the Series 2016A Bonds and the Series 2016B Bonds (the "Bond Purchase Agreement") by and between the Corporation and the underwriters named therein, as representative of the underwriters (collectively, the "Underwriters"), a copy of which is annexed to this Resolution as Exhibit F; and

WHEREAS, the duly authorized officers of the Corporation have negotiated a purchase agreement with the purchasers of the Series 2016C Bonds (the "2016C Purchase Agreement"), copy of which is annexed to this Resolution as Exhibit G;

NOW, therefore, the Board of Directors of the Corporation, in accordance with the materials presented at this meeting, including the Board Memorandum and the Exhibits annexed to this Resolution (collectively, the "Materials"), upon motion duly made and seconded, duly adopts the following Resolution:

RESOLVED, that copies of the Materials are hereby ordered to be filed with the records of the Corporation and are deemed to be incorporated herein by reference; and further

RESOLVED, the Board accepts the recommendations of staff relating to compliance of SEQRA as described in the recitals above; and further

RESOLVED, that the Loan Agreements, the Indenture, the Bond Purchase Agreement and the 2016C Purchase Agreement, in substantially the forms presented to this meeting, are hereby approved, and any Authorized Officer (as hereinafter defined) is hereby authorized and directed to execute and deliver the same on behalf of the Corporation, in such forms as are approved with such changes, supplements and amendments thereto as any Authorized Officer executing the same may approve, such approval to be conclusively evidenced by such Authorized Officer's execution thereof; and further

RESOLVED, that the Preliminary Official Statement, in substantially the form presented to this meeting, is hereby approved, and the distribution of the Official Statement in connection with the sale of the Series 2016A Bonds and Series 2016B Bonds, with such changes, supplements and amendments thereto as may be necessary or appropriate to reflect the documents and the matters described therein or as may be approved by an Authorized Officer, such approval to be conclusively evidenced by the execution of the final Official Statement, is hereby authorized, and any Authorized Officer is hereby authorized and directed to execute the same on behalf of the Corporation; and further

RESOLVED, that the amount, maturity or maturities, prices and yields, if any, and other terms of or relating to the Series 2016 Bonds (the "Terms") insofar as set forth in the Indenture, are hereby approved, with the understanding that such Terms will be finalized in connection with the sale of the Series 2016 Bonds, which is expected to occur in May, 2016, subject to the final approval of any Authorized Officer, such approval to be evidenced by such Authorized Officer's execution of each of the Indenture, the Bond Purchase Agreement and the 2016C Purchase Agreement and that all other documents relating to the Series 2016 Bonds shall similarly, as appropriate, be conformed thereto; provided that the aggregate principal amount of the Series 2016 Bonds shall not exceed \$3,000,000,000, the final maturity shall not extend past July 1, 2050 and the interest rates to be borne by the Series 2015 Bonds shall not exceed a net interest cost of 12%; and further

RESOLVED, that in connection with the issuance of the Series 2016 Bonds, the Corporation hereby appoints The Bank of New York Mellon as Trustee under the Indenture; and further

RESOLVED, that the Corporation, in addition to the appointment of Citigroup Global Markets, Inc. as lead underwriter on November 3, 2015, now appoints Wells Fargo Securities, Barclays Capital, Ramirez & Co., Inc. and Siebert Brandford Shank & Co. LLC (the last two firms being certified minority business enterprises) as the underwriters for the Series 2016A and Series 2016B Bonds and authorizes the appointment of such other underwriters as determined by an Authorized Officer of the Corporation.

RESOLVED, that, subject to the conditions set forth in the Bond Purchase Agreement, the Corporation shall sell and award the aggregate principal amount of the Series 2016A Bonds and the Series 2016B Bonds to the Underwriters; and further

RESOLVED, that, subject to the conditions set forth in the 2016C Purchase Agreement, the Corporation shall sell and award the aggregate principal amount of the Series 2016C Bonds to the 2016C Purchasers; and further

RESOLVED, that the Corporation shall offer for sale, sell, issue and deliver the Series 2016 Bonds pursuant to the Bond Purchase Agreement, the 2016C Purchase Agreement and the Indenture and shall apply the proceeds thereof in accordance with the Indenture, the Collateral Agency Agreement and certain documents and certificates to be delivered upon the issuance of the Series 2016 Bonds; and further

RESOLVED, that each of the Chairperson, President, Vice President and Treasurer of the Corporation, and any other person duly authorized to act in such capacity, is designated an "Authorized Officer;" and further

RESOLVED, that each of the Authorized Officers is hereby authorized and directed to approve and execute such documents, instruments and certificates, make any changes to the forms of the Loan Agreements (including any exhibits thereto), the Indenture, the Bond Purchase Agreement, the 2016C Purchase Agreement, the Official Statement and all other related documents as he or she may reasonably deem necessary, desirable or appropriate to consummate the transactions authorized hereby (including the execution of a declaration of official intent within the meaning of Treasury Regulations Section 1.150-2 to provide for the reimbursement of Project expenditures paid prior to the issuance date of the Series 2016A Bonds and the taking of any actions necessary to procure bond insurance for some or all of the Series 2016 Bonds) and thereby, make such payments and take such other actions in the name of the Corporation and on its behalf, as he or she may reasonably deem necessary, desirable or appropriate to carry out the foregoing resolutions, including without limitation the execution, sale and delivery of the Series 2016 Bonds, the execution and delivery of the tax certificate relating to the Series 2016A Bonds, the execution and delivery of any and all papers, instruments, opinions, certificates, affidavits, agreements and other documents necessary, desirable or appropriate to carry out the foregoing resolutions and that all actions heretofore taken in connection with the offering, sale and issuance of the Series 2016 Bonds by any Authorized Officer or his or her designee are hereby ratified and approved.

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**ITEM 3.**



**FOR CONSIDERATION**

April 26, 2016

**TO:** The Directors

**FROM:** Howard A. Zemsky

**SUBJECT:** Procurements Guidelines

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

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**Background**

The New York Transportation Development Corporation (the "Corporation") will enter into various contracts in the course of conducting its authorized purposes. In order to ensure the consistent, fair and competitive retention of goods and services staff recommends the voluntary adoption of procurement guidelines ("2016 Guidelines") adopted by the New York State Urban Development Corporation d/b/a Empire State Development Board of Directors at their March 24, 2016 meeting.

The proposed 2016 Guidelines attached to this memorandum set forth the policies and procedures to be followed by the Corporation when seeking to contract for goods or services. It should be noted that these Guidelines do not have the force of law, are required only of public authorities and public benefit corporations, not local development corporations such as the Transportation Development Corporation, and are proposed as a statement of best practices and procedures. No contract is invalid merely because these guidelines have not been followed.

The proposed 2016 Guidelines define the universe of procurement transactions which 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 proposed 2016 Guidelines explain the various means of obtaining goods and services in an open, accountable and transparent manner, including incorporation of the Corporation's Bid Opening Guidelines and the compilation of a Procurements Record for every covered Procurement Contract.

For informational purposes, please note that the proposed 2016 Guidelines comply with the applicable provisions of the Public Authorities Law, the State Finance Law and the State Tax Law. They are consistent with the State Procurement Council's Guidelines and with the Governor's directive that all state agencies and public authorities make responsible spending decisions, and that they be accountable for sufficient monitoring of their spending to ensure the highest level of fairness, non-discrimination, openness and transparency.

The Guidelines reflect the Board's determination, pursuant to a separate item at this meeting, that procurement contracts in an amount up to and including \$250,000 may be approved by the President of the Corporation or his duly appointed designee, and do not require formal Board approval. An exception to this procedure is that contracts for personal services that will have a term of one year or more continue to require Board approval (as well as annual review).

The proposed 2016 Guidelines are intended to be user-friendly and are set forth in a logical and coherent fashion that will assist staff in understanding the procedures to be followed and the substantive rules that govern procurements.

Sources of help to users and information are included as clickable links, and virtually all required forms and ESD policy and procedure documents can also be accessed from within the document by hyperlinks. The hard copy of the proposed 2016 Guidelines presented to the Directors for approval cannot contain these links, but they are shown in highlight form.

#### **Recommendation and Requested Action**

The Directors are requested to adopt the proposed 2016 Guidelines for the Use, Awarding, Monitoring and Reporting of Procurement Contracts, effective as of the date of approval.

#### **Attachments**

Resolution

Proposed 2016 Guidelines for the Use, Awarding, Monitoring and Reporting of Procurement Contracts

April 26, 2016

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

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BE IT RESOLVED, that on the basis of the materials presented to this meeting, a copy of which is hereby ordered to be filed with the records of the Corporation, the proposed 2016 Guidelines for the Use, Awarding, Monitoring and Reporting of Procurement Contracts, a copy of which is attached to the materials, be and hereby is approved and adopted as of the date hereof, as a statement of best practices and procedures, and the Chief Executive Officer or his/her designee is authorized to promulgate the said Guidelines in electronic form and other media for the use of the staff of the Corporation and to take such other and further action as may be deemed necessary or appropriate to effectuate the foregoing Resolution.

\* \* \*

Revised Procurement Guidelines 2016

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 24, 2016

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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 24, 2016

**1. Overview and Requirements**

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

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

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

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

Pursuant to Public Authorities Law § 2879 (2), “**Procurement Contracts**” are any written agreements for the acquisition of goods or services of any kind in the actual or estimated amount of five thousand dollars (\$5,000) or more. For purposes of compliance with anti-lobbying laws contained in State Finance Law § 139-j and 139-k (see p. 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 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) 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, see Section 2.1 below or consult the Procurements Manager.

## **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 legal, accounting, management consulting, investment banking, 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. (See Section 7: Types of Solicitations).

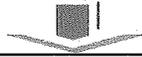
Competition in the procurement process serves both ESD and potential vendors by ensuring that the procurement process produces an optimal solution at a reasonable price; and allowing qualified vendors an opportunity to obtain ESD business, while the process guards against inflated pricing, favoritism,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

## 2. Procurement: Overview and Requirements

### 2.1. The Procurement Process Guide

#### I. Procurements under \$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.



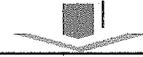
If ESD's needs cannot be met by the above mentioned options, you may elect use an informal solicitation. Contact the Procurement Unit for further assistance if needed.



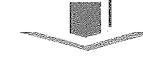
If this is an emergency situation or only one vendor can meet the needs required for service, the initiating department head has to justify the need to Single Source or Sole Source this request in the justification memo.

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



If this is an emergency situation or only one vendor can meet the needs required, 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 a OGS centralized contractor is available, it is recommended that staff obtain three price quotes from other OGS contractors or other vendors not on the OGS list, unless a compelling justification exists (e.g., experience with a particular project).

## **2.4. Commodities Contracts**

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

## **2.5. Service Contracts**

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

## 2.6. Discretionary Purchases

ESD may purchase services or commodities from small business concerns or those certified pursuant to Article 15-A and 17-B of the Executive Law (Minority and Women-Owned Business Enterprises and Service-Disabled Veteran Owned Businesses), 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. The award of a discretionary purchase contract should be notified in the Contract Reporter. For more information on discretionary purchases see <http://www.ogs.ny.gov/Bu/PC/docs/PnpDiscretionaryThresholds.pdf>.

## 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 [www.ogs.ny.gov/BU/PC/SFL.asp](http://www.ogs.ny.gov/BU/PC/SFL.asp). 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 an environmental consultant who worked on an EIS for a project and now a Supplemental EIS is required for the same project; many consultants could do the work, but the original consultant's familiarity with the project justifies selection as a single source.
  
- (c) **Emergency Circumstances.** Emergency circumstances exist when an urgent and unexpected situation arises which places public health or safety or the use or conservation of resources at risk and requires immediate action. Poor or late planning does not constitute an emergency. Contracts entered into as a result of an emergency situation should only cover the goods or services reasonably necessary to stabilize, ameliorate or remedy the situation. An example is a hazardous condition at a building owned by ESD: a contractor can be hired immediately to deal with the situation.

**NOTE:** Notwithstanding any Contract Reporter exemption that may be granted for any of the reasons set forth above, a reasonable attempt should be made wherever practicable to solicit at least three competitive bids, with written confirmation of the bids furnished within a reasonable time and maintained in the contract file. Also, any sole or single source contract awarded in the amount of \$50,000 or more should be notified in the Contract Reporter (Economic Development Law, §143 (4)).

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

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

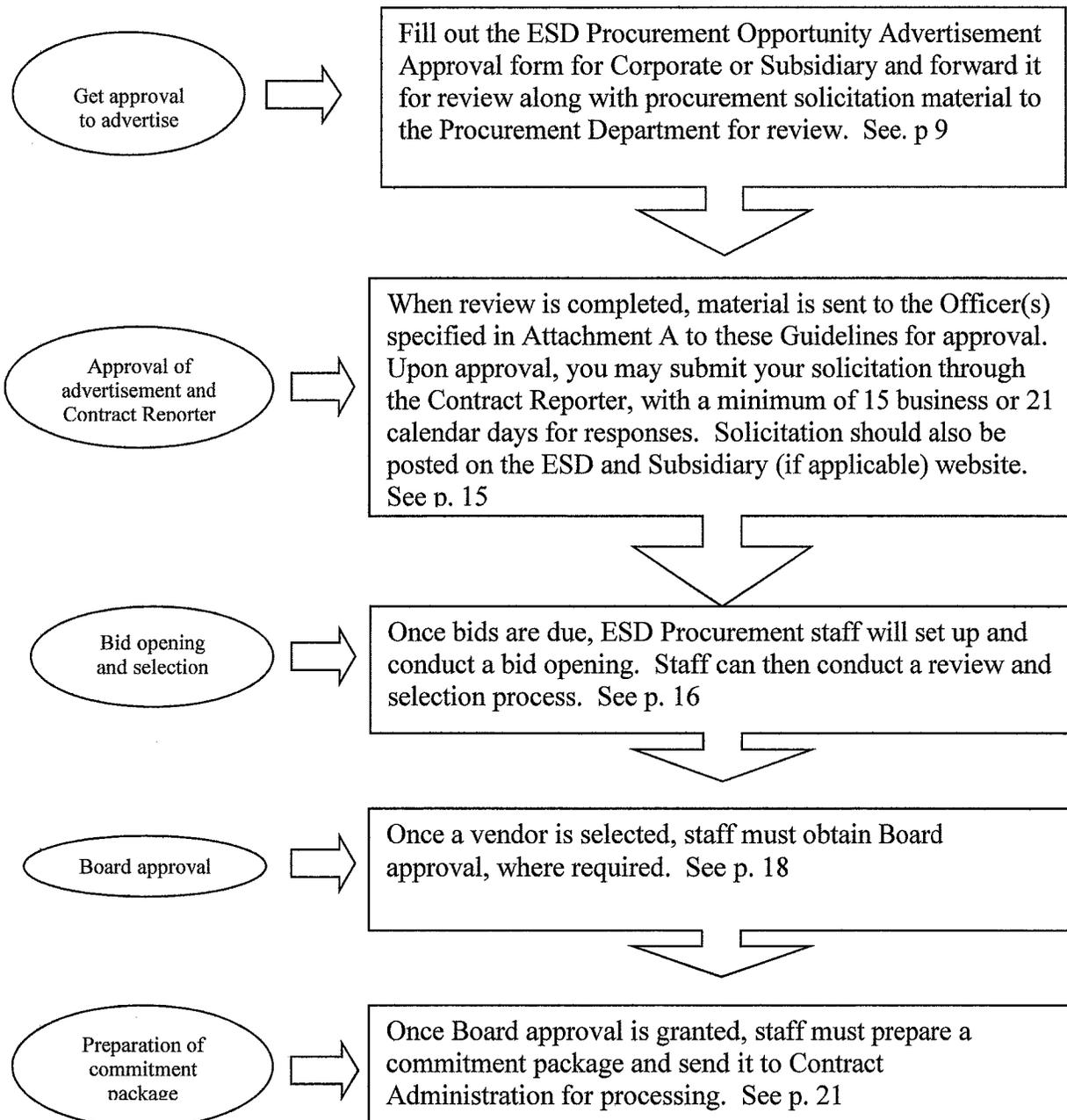
The memorandum requesting the exemption must document in reasonable detail: the circumstances establishing the exemption justification; a description of the goods or services to be acquired via the exemption; description of funding source; any alternatives considered; and the basis for determining that the cost of the proposed contract is reasonable under the circumstances. A template Exemption Memo is 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's 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 or SDVOB for up to \$200,000) the same basic information should be included in the solicitation:

- (i) What goods are being sought or what scope of services is desired;
- (ii) What the 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, past history of government contracts, references/testimonials;
- (iv) Where known, the maximum price that ESD is prepared to pay for the goods or services;
- (v) A schedule of relevant dates (when bid is due, when questions may be asked or briefing meetings held, etc);
- (vi) ESD’s insurance requirements (obtained from Contract Administration for all solicitations);
- (vii) ESD’s contractor and supplier diversity requirements: Minority and Women-owned Business Enterprise and Service-Disabled Veteran-Owned Business participation goals (M/WBE and SDVOB);
- (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 that the successful vendor will be expected to agree to. This will generally be ESD's Schedule A (For Consultants or for Law Firms and Special Consultants) - Standard Terms and Conditions. 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 Sections 8.3);

(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).

## **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’s solicitations may range from relatively uncomplicated procurements to highly complex, long term efforts involving the significant commitment of both ESD and vendor resources.

RFPs follow a common format, focusing on a description of tasks including, but not limited to:

- Description of program objectives and background;
- Scope of services to be provided;
- Detailed requirements or specifications (required qualifications of vendors, “what” is needed and “how” services should be provided). Note that the terms of the RFP may not be knowingly tailored to favor a particular vendor.

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

RFQ’s are appropriate for retention of qualified pools of contractors to provide defined types or scopes of services (and, rarely, goods) required by ESD on a regular or semi-regular basis as the need arises; or to select professional services to be rendered at pre-established rates. Competitive establishment of a pool or list of pre-qualified vendors is appropriate, for example, in the case of contractors or property appraisers. If ESD has established a list of pre-qualified contractors, unless services will be rendered by all qualified vendors at rates not to exceed a pre-set maximum, three quotes should be obtained from vendors on the list, and/or from vendors known to ESD outside the list.

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

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

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

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

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

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

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

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

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

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

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

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

non-responsibility within a four-year period can result in debarment from obtaining any New York State government procurement contract.

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

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

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

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

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

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

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

### **8.3. Use of the Vendrep Form and Determination of Vendor Responsibility**

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

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

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

All Procurement Contracts must also comply with the requirements of Executive Law Article 17-B, which acknowledges that Service-Disabled Veteran-Owned Businesses (SDVOBs) strongly contribute to the economies of the State and the nation. As defenders of our nation and in recognition of their economic activity in doing business in New York State, respondents for this contract for commodities, services or technology are strongly encouraged and expected to consider SDVOBs in the fulfillment of the requirements of the contract. Such partnering may be as subcontractors, suppliers, protégés or other supporting roles.

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 ESD’s Office of Contractor and Supplier Diversity (“OCSD”), for inclusion in the quarterly and annual reports made by Contracts Administration to the Board. To assist in the gathering of this information, the originator must provide OCSD with a completed 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 [here](#) and can be found at the bottom of the RFP page.

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

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

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

each bidder is not on the list created pursuant to paragraph (b) of subdivision 3 of section 165-a of the state finance law."

The list in question is maintained by OGS. No bid that fails to certify compliance with this requirement may be accepted as responsive, unless the bidder includes a statement in compliance with the Iran Divestiture Act (contact the Legal Department for guidance in such a case).

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

The Secretary to the Governor has issued a directive that provides that all vendors who anticipate using sub-contractors or suppliers to fulfill procurement contracts must be encouraged (but not required) to use New York State businesses. All procurement solicitations of any kind must include specific language aimed at such encouragement. The model language can be found at [http://intranet.empire.internal/Resources/Data/Procurement/03042014\\_NYS\\_SubcontractorsandSuppliers.pdf](http://intranet.empire.internal/Resources/Data/Procurement/03042014_NYS_SubcontractorsandSuppliers.pdf)

**8.7. Project Sunlight**

Project Sunlight is an important component of the Public Integrity Reform Act of 2011. 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). View the Contract Reporter's daily publication schedule.

Where practicable, staff members responsible for a proposed Procurement Contract should make reasonable efforts to identify potential vendors in addition to those identified through the Contract Reporter. This may be done by obtaining referrals from other governmental entities that may have similar requirements, reviewing reference directories, mailing solicitation materials to industry associations and/or known vendors and mailing to lists of appropriate minority and women-owned business maintained by ESD's Office of Contractor & Supplier Diversity.

### **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 Manager 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 Manager or his/her designee, and the time and date of receipt shall be entered into the Bid Log, which must be signed by all staff members present. Teleconference participants must confirm their presence by email to the Procurements Manager. The Bid Log shall also record the presence of SFL 139j-k and ST-220 forms in the bid.

**A Public Bid Opening is required** for Public Works contract solicitations, pursuant to State Finance Law § 144. This section generally covers bids for construction work on public projects,

and may include preparatory work such as demolition, asbestos abatement and the like. ESD or a subsidiary must be a party to the contract, which must involve the use of laborers, mechanics or workers (not, for example, architects and engineers). The definition of a "Public Work" is more a matter of art than law: if in doubt as to whether the contract is for Public Work, contact the Legal Department for guidance.

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

The initiating Department Head should establish, prior to bid opening, a team of at least three ESD staff members with relevant knowledge and experience of the goods and/or services being procured. One member should come from Contracts Administration or Finance. In some cases, one or more non-ESD team members may join the review team, where those persons have specific knowledge of the procurement subject, or a specific role to play in the administration of the contract with the successful bidder. 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 Manager as part of the Procurement Record.

#### **8.13. Determination of Responsibility – "FLIP 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."

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

The Office of the State Controller has developed a useful resource, the VENDREP form, that should be used wherever possible. This form seeks information about the vendor, its affiliates and subsidiaries, officers and owners, past responsibility determinations by agencies and investigations/prosecutions. It must be notarized, and false statements may be actionable and in

some cases may be criminal. The Vendrep forms can be accessed here: [www.osc.state.ny.us/vendrep/webresources.htm](http://www.osc.state.ny.us/vendrep/webresources.htm). See also Section 8.3 above.

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

If a vendor is considered to be non-responsible, steps must be taken to afford the vendor due process rights, including an opportunity to explain its position in writing and, in some cases, at a meeting. Consult the ESD Legal Department in such cases, after having reviewed the information at [www.ogs.state.ny.us/procurecounc/pdfdoc/BestPractice.pdf](http://www.ogs.state.ny.us/procurecounc/pdfdoc/BestPractice.pdf).

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

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

### **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.

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)** 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.

#### **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.

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. Contracts in amounts \$250,000 and under must be approved by the Officer(s) specified in Attachment A to these Guidelines.
- b. Contracts (i) in amounts over \$250,000 or (ii) contracts for any amount involving services to be rendered over a period in excess of one year must be approved by the ESD (or Subsidiary) Directors.
- c. If staff anticipates that a contract may need to be extended beyond one year, ensure that Board approval is requested and that the materials and resolution specifically permit an extension of the contract. Once Board approval is obtained, the contract with the vendor must contain a clause that specifically permits extension. If the contract does not contain such a clause, and the contract needs to be extended, Contract Reporter advertising is required unless an exemption is granted.
- d. Contracts for 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.
- e. Contract documents should be fully executed and delivered by both parties prior to the commencement of any work. However, if in the discretion of the initiating Department Head it is essential that work on the contract be commenced before the formal contract documents have been approved, the 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 Office of the State Comptroller (“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.

f. **Amendments to existing contracts** follow the same process as new contracts, i.e., the amendment needs to be advertised in the New York State Contract Reporter or exempted. The same documents, such as justification memo/contract status report, commitment request form and/or standard amendment form must be generated. If the proposed amendment will involve a new Contract Reporter advertisement or other solicitation, the requirements of SFL §139-j and 139-k and State Tax Law § 5-a will apply, and in any case, new certifications may be required. Note that an amendment to an existing contract that causes the aggregate amount of the contract to exceed \$1 million may be subject to OSC approval, regardless of the amount of the amendment and source of funds.

g. Contract amendments that increase the contract amount to 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. An Amendment Package must be sent to Contracts Administration for approval and processing (see Commitment Request Package on the next page for guidance). If a proposed amendment will increase the term of the contract to more than one year, Contract Reporter advertising is necessary unless, as discussed in paragraph (c) above, the original contract contained a clause specifically permitting extension.

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.

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

### **10.1. Commitment Request Package**

- a. For contracts of \$50,000 or more, the contract initiator completes the required information on the Commitment Request Form.
- b. The contract initiator completes the Standard Form Contract - Short Form for Goods/Services or Standard Form Amendment or Modification of Contract.

Remember that the provisions and the requirements of the proposed contract must be specific and stated in clear and unambiguous terms so they are fully understood by the contracting parties. It is important that the contract clearly specify what is expected of both the contractor and ESD, and the method of payment to the contractor. The more clear and specific the contract, the easier it will be to monitor.

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

- the scope and purpose of the contract;
  - the description of the services to be performed;
  - the location where the work is to be performed;
  - the standards to be used to measure performance (e.g. units of services, number and nature of clients served, target dates, etc.);
  - the level of expertise that is required to perform the tasks, the cost and the method payment of the contract;
  - the 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;
- c. Written explanation of the responsibility determination/FLIP Review and/or formal Determination of Responsibility, where required.
  - d. ESD/Subsidiary Board of Directors Approval, if applicable. View sample Board materials.
  - e. New York State Contract Reporter Form, approved exemption letter, or NYS OGS Centralized Contract.

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

## **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 Minority/Women Business Participation, must be posted on the Contract Reporter system. This posting will be done by Contracts Administration.

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

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

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

Under Public Authorities Law § 2879-a (effective March 1, 2010), proposed contracts in excess of one million dollars that either: (i) are to be paid for in whole or in part by state appropriations; or (ii) are not to be awarded after a competitive process (regardless of the funding source), must be approved by the Office of the State Comptroller (“OSC”) after the contract is signed. If § 2879-a applies and approval by OSC has not been obtained, the signed contract “shall not be a valid enforceable contract.” OSC has issued final regulations implementing this law, and OSC approval shall be deemed part of these Guidelines. A memorandum explaining the application and procedures involved in OSC approval has been circulated to all relevant staff and may be viewed [here](#).

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

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

## 11. Monitoring of Procurement Contracts

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

ESD employees assigned the responsibility of monitoring the work should be familiar with the type of work being performed and with the specific terms of the contract.

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

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

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

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

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

**All invoices presented for payment should be reviewed by the person who is monitoring the contract and approved by the respective Department Head. No payment should be made unless the work is satisfactory and in accordance with the terms of the contract. Approval on the Payment Authorization form attests to this.**

## 12. Procurement Contracts Involving Former Officers of ESD

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

### **13. 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.

### **14. Reporting**

#### **14.1. 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.

#### **14.2. 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.

### **15. 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 4.**



**FOR CONSIDERATION**

April 26, 2016

**TO:** The Directors

**FROM:** Howard A. Zemsky

**SUBJECT:** Delegation of Authority to Enter into Contracts

**REQUEST FOR:** Delegation of Authority to Sign Contracts Not to Exceed \$250,000

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**Background**

Currently only the New York Transportation Development (“TDC”) Board of Directors has the power to enter into any contract. The contract procurement process for goods and services involves compliance with multiple procedures, including confirming Board approval of each contract. The scheduling and formality of a full board meeting is necessary. Delegating authority to an officer of the corporation to approve certain types of projects could help expedite the contracting process. The New York State Urban Development Corporation d/b/a Empire State Development (“ESD”) has adapted a delegation of authority to the President of ESD and the TDC Directors are being asked to adopt substantially the same delegation.

**Proposal**

It is proposed that the Directors delegate authority so that only contracts (including procurement of services and loan documents) over \$250,000 would require approval by the Directors. The authority to enter into contracts not to exceed \$250,000 would be delegated to the President and Chief Executive Officer or his or her designee(s), who shall be one or more officers of the Corporation designated by the President and Chief Executive Officer.

With regard to contractual arrangements (including, without limitation, procurement of services and loan documents) resulting in the disbursement of funds or the incurrence of future liabilities, the following guidelines would be used:

1. Single contracts where total expenditures are to exceed \$250,000 should be approved by the Directors even though annual payments may be less than \$250,000.
2. Where a single project is expected to result in a disbursement of funds in excess of \$250,000, the transaction should be approved by the Directors even if individual contractual agreements comprising the total project are under \$250,000.

3. Contract amendments or change orders which increase an original contract from an amount below \$250,000 to an amount in excess of \$250,000 should be approved by the Directors. Furthermore, all amendments to contracts originally over \$250,000 should be approved by the Directors unless their original authorization allowed for price adjustments.
4. Contracts involving services to be rendered over a period in excess of one year should be approved by the Directors, regardless of the amount of the contract.

**Recommendation and Requested Action**

The Directors are requested to delegate authority to the President and Chief Executive Officer or his or her designee(s), who shall be officers of the Corporation, to enter into contracts up to \$250,000, to make all findings required by applicable laws and to take all such other actions as may be necessary or appropriate in connection with the approval, execution and implementation of such contracts.

**Attachments**

Resolution

April 26, 2016

NEW YORK TRANSPORTATION DEVELOPMENT CORPORATION - Delegation of Authority to Enter into Contracts - Change in Delegation of Authority to Sign Contracts Not to Exceed \$250,000

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BE IT RESOLVED, that in accordance with the materials presented to this meeting, a copy of which is hereby ordered filed with the records of the Corporation, the President and Chief Executive Officer or his or her designee(s), who shall be one or more officers of the Corporation, and each of them hereby is, authorized to enter into contracts, including, without limitation, procurement of services and loan documents, in amounts not to exceed Two Hundred and Fifty Thousand Dollars (\$250,000), on behalf of the Corporation with such persons, firms and corporations as he or she may deem necessary to exercise the powers, duties and functions of the Corporation as prescribed by law, and to make all findings required by applicable laws, and to take all such other actions as may be necessary or appropriate in connection with the approval, execution and implementation of such contracts; and be it further

RESOLVED, that the President and Chief Executive Officer shall, from time to time, advise the Directors of contracts which have been entered into pursuant to this authority.

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