



**Empire State  
Development**

**Andrew Cuomo**  
*Governor*

**Eric Gertler**  
*Acting Commissioner and President & CEO designate*

**NEW YORK STATE DEPARTMENT OF ECONOMIC DEVELOPMENT**

**REQUEST FOR PROPOSALS**

**INTELLECTUAL PROPERTY/TRADEMARK OUTSIDE COUNSEL**

**RFP NUMBER 19-6139**

**PROPOSAL DUE DATE OCTOBER 16, 2019, 5:00 P.M. EST  
(LATE PROPOSALS CANNOT BE ACCEPTED)**

Release Date: September 4, 2019

**Request for Proposal (RFP) Response Form**

**RFP # 19-6139**

**Please review this RFP. Complete the following information and mail this form or if submitting a proposal, this form together with your entire proposal, to the address at the bottom of this page. Late proposals cannot be accepted.**

// **Attached is our proposal**

// **We DO NOT intend to submit a proposal for the following reason(s):**

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**Name of Organization:** \_\_\_\_\_

**Address:** \_\_\_\_\_

\_\_\_\_\_

• Is this address your company's principal place of business? Yes \_\_\_\_\_ No \_\_\_\_\_

The term "principal place of business" is defined as follows:

A company's principal place of business is generally considered to be the enterprise's main office, where the regular meetings of its board of directors occurs, and where a company's business is managed, conducted and directed, regardless of where the administrative departments or the physical property of the business are located. For purposes of determining the principal place of business, a foreign business enterprise's principal place of business is not necessarily the same as its state of incorporation. In sum, the determinate is where the actual "business" of the corporation takes place.

If the above address is not your principal place of business, please indicate the full address of your principal place of business on the following two lines:

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- Will this product or service be substantially produced in NYS: Yes \_\_\_\_\_ No \_\_\_\_\_
- Subject to the "Conditions Governing Proposals" article stated in this RFP, proposals must be in agreement with all terms and conditions of this RFP.

**Phone #:** \_\_\_\_\_ **Fax #:** \_\_\_\_\_

**Signature:** \_\_\_\_\_ **Date:** \_\_\_\_\_

**Type or Print Name and Title:** \_\_\_\_\_

**By checking this box, we request that you remove our name from your bidders' list**

Mail this as the first page of your proposal. If not submitting a proposal, please mail this form to: Lisa Sutton, NYS Department of Economic Development, Office of Fiscal Management, and Albany, NY 12245.

NEW YORK STATE DEPARTMENT OF ECONOMIC DEVELOPMENT  
REQUEST FOR PROPOSAL (#19-6139)

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## SECTION I - ADMINISTRATIVE INFORMATION

### 1.0 PURPOSE

The New York State Department of Economic Development (hereafter referred to as NYSDED or the Department) requires the services of an intellectual property/trademark outside counsel (also referred to herein as the successful Bidder or Contractor) to advise NYSDED on legal matters related to trademark registration and licensing of names, logos and symbols of the Department, including, but not limited to, the Department's famous trademark I♥NY, as well as other intellectual property matters. If and when necessary, the outside counsel will assert, enforce, and litigate in defense of the State of New York's registered I♥NY trademark and service marks, domestically and internationally. Outside counsel will be responsible to the Department and will report directly to the NYSDED's Counsel's Office. The activities of outside counsel will involve working closely with representatives of NYSDED's Counsel's Office, Contract Management Unit, Program Staff, and may involve interaction with NYSDED's executive staff.

### 1.1 OBJECTIVES

To hire a competent intellectual property/trademark outside counsel to advise NYSDED on all legal matters related to intellectual property of the State of NY surrounding the family of trademarks NYSDED already owns and others it may acquire in the future.

### 1.2 DESIGNATED CONTACTS

For the purpose of the Procurement Lobbying requirements of this RFP (see section 3.8 and Appendix G), the Department's designated contacts shall be Ms. Lisa Sutton, and employees designated by the Department as part of the Department's Contract Management Unit and all staff designated by the Department to have responsibilities and duties in the Department's Administration and Counsel's Office.

**Important Notice:** A restricted period under the Procurement Lobbying Law is currently in effect for this Procurement and it will remain in effect until approval of the Contract. Bidders are prohibited from contact related to this procurement with any New York State employee other than the designated contacts listed above (refer to: <http://ogs.ny.gov/aboutogs/regulations/advisoryCouncil/StatutoryReferences.html>).

All contacts/inquiries shall be made by email to: [rfpfaq@esd.ny.gov](mailto:rfpfaq@esd.ny.gov)

### 1.3 INQUIRES

All questions must be submitted in writing via email to [rfpfaq@esd.ny.gov](mailto:rfpfaq@esd.ny.gov) with **“Outside Counsel -IP” in the subject line. Please do not contact the Department by telephone. Questions must be received by the Department no later than September 24, 2019, 5:00 PM.** All inquiries must cite the particular RFP section in the questions.

\*\* Answers to all questions of a substantive nature will be provided to all known recipients of the RFP as soon as possible after the question deadline.

### 1.4 SCHEDULE OF PERTINENT DATES

Release of RFP	<b>September 4, 2019</b>
Deadline for Receipt of Questions	<b>September 24, 2019 by 5:00 PM EST</b>
Submission of Proposals	<b>October 16, 2019 by 5:00 PM EST</b> <b>Late proposals cannot be accepted.</b>
Oral Presentations/Interviews	By appointment at the discretion of NYSDED
Award of Contract	November/December (estimated)

### 1.5 PRE-BID CONFERENCE

There is no pre-bid conference for this project.

### 1.6 SUBMISSION OF PROPOSALS

Interested individuals or firms must submit their hard copy proposals no later than **5:00 P.M.** U.S. Eastern Standard Time, on October 16, 2019. Submit five (5) copies of the proposal to the following address:

**NYS Department of Economic Development  
Office of Fiscal Management  
625 Broadway – 8<sup>th</sup> floor  
Albany, NY 12245  
Attention: Lisa Sutton**

**Please note:** Your budget must be separately bound from the rest of your proposal to allow for the cost evaluation to be completed independent of the technical evaluation.

**In addition to the hard copies**, the Applicant must submit an identical electronic version of the entire proposal (including forms and budget) in MS Word/Excel or compatible format to [rfpinfo@esd.ny.gov](mailto:rfpinfo@esd.ny.gov) with **“Outside Counsel -IP – your company name” in the subject line**. Electronic copies are used for administrative purposes and DO NOT fulfill the requirement to submit the hard copies by the deadline.

It is the responsibility of each individual or firm to ensure timely submission of its hard copy proposal. Proposals received after the scheduled date and time cannot be accepted.

### 1.7 ORAL PRESENTATIONS/INTERVIEWS (if required)

Finalists may be required to give an oral presentation/interview to demonstrate their understanding of the objectives of the project. Finalists will be selected from bidders receiving the highest scores, based on the selection criteria identified in section 2.4 of this RFP. The Department will select the top three (3) highest scoring Finalists from proposals that receive a minimum score of 60 points. If fewer than three proposals are received or if fewer than three (3) proposals receive a score of 60 points, the number of Finalists selected shall be reduced accordingly. The purpose of the oral presentation/interview is to provide the Department’s Evaluation Committee with the opportunity to obtain a detailed understanding of:

- i. The extent of the Finalist’s knowledge of the RFP subject matter and understanding of the project requirements; and
- ii. Whether the methods and resources used by the Finalist are necessary, cost effective, and appropriate.

The oral presentation/interview will allow Finalists to elaborate on information included in their proposal. Finalists are advised to be mindful that the Evaluation Committee is interested in how well the Finalist communicates information described in section 2.1 (Scope of Services) of this RFP.

Based on information provided at the oral presentations/interviews, the Department’s Evaluation Committee will reevaluate and rescore Finalist proposals. The Finalist receiving the highest average score will be declared the successful bidder. If the optional oral presentation/interview is not required by the Department, the bidder receiving the highest average score will be declared the successful bidder.

The Department reserves the right to determine whether oral presentations/interviews will be necessary. If the Department decides to conduct oral presentations/interviews, such oral presentations/interviews will occur as follows:

1. Following the initial evaluation of proposals as provided for in section 2.5, the Evaluation Committee will determine the Finalists to be interviewed as those having the highest combined technical and cost scores. The Department anticipates that three (3) proposers will be selected as Finalists. Prior to the oral presentations/interviews, the Evaluation Committee may be provided with each Finalist's financial proposal (Appendix B) for the purpose of assessing the adequacy and reasonableness of the resources to be put forth by the bidders in performing the project.
2. Each finalist will be notified of the date and time of their oral presentation/interview to be held in person in either Albany or New York City, or via telephone/video conference. The oral presentation/interview should further document the proposer's ability to provide the required services. Key personnel directly responsible for the project should be present and participate in the oral presentation/interview. The purpose of the oral presentation/interview is to impart to the evaluation committee an understanding of how specific services will be furnished and clarify other information included in the proposal. Further information with regard to the format of this stage of the evaluation may be provided to the finalists prior to their interview.

## SECTION II – PROGRAM BACKGROUND AND SCOPE OF SERVICES

### 2.0 BACKGROUND

In the summer of 1977, the Department began a major new advertising program to promote tourism development in New York State. Promotional efforts have included all aspects of marketing and public relations including advertising, collateral materials and cooperative programs, and all have highlighted the logo, I♥NY (the “Mark”). The terms Mark, mark and marks are used interchangeably throughout this RFP. These terms primarily refer to the I♥NY trademark and service mark, however, other current and future trade and/or service marks are also included under the terms and conditions of this RFP.

The Department has owned trademark rights to the logo since the early formative stages of the I♥NY tourism marketing advertising campaign. The campaign currently enjoys high levels of consumer awareness. Over the years, the logo itself has received significant worldwide distribution and publicity. In 2000, the **I LOVE NEW YORK** logo was voted one of the best logos of all time by an international panel of judges commissioned by **R.O.B.** (Report on Business) Magazine in partnership with the London Financial Times. In its November issue that year, the magazine ranked the **I LOVE NEW YORK** logo 24<sup>th</sup> on its list of the world’s top 50 logos ever.

The Department selectively grants domestic and international licenses for commercial use of the Mark on a royalty/fee basis and for other uses without a fee or royalty. Since 1990, the Department has contracted with licensing agents for worldwide use of the Mark to:

- a. increase consumer awareness of the I♥NY marketing and advertising campaign;
- b. develop marketing partnerships with world class brands designed to expend the reach and message of the brand;
- c. communicate that I♥NY is a travel and tourism brand for New York State; and
- d. create revenue available to the Department and the State to further our marketing and advertising efforts.

To preserve the ability to license the Mark and to protect the brand, the Department must prevent unauthorized use of the Mark.

### 2.1 SCOPE OF SERVICES

The selected Contractor will be responsible for advising the Department in matters related to the defense of trademarks and/or service marks owned by NYSDED and the State of New York, and protection of such marks. The Contractor may be requested by the Department to represent, or assist in representing, the Department in related negotiations and administrative proceedings, including, but not limited to, matters before the Trademark Trial and Appeal Board (TTAB). In addition, the Contractor may be asked to represent the Department in judicial proceedings in various state or federal courts; subject, however, to the prior approval of the New York State Attorney General.

The Contractor will be expected to:

- i. Provide legal advice and assistance regarding all aspects of NYSDED and the State of New York’s trademark registration and management, domestic and international, including, but not limited to: the registration of trademarks; trademark searches; and the publication of trademarks in foreign countries;
- ii. Provide legal advice and assistance regarding all aspects of enforcement of NYSDED’s and the State of New York’s intellectual property rights, including, but not limited to, the identification of infringing activity; preparation, transmittal and follow-up of “cease-and-desist” letters, as

appropriate; the negotiation and settlement of unauthorized usage of any NYSDDED intellectual property; and any additional counseling related to NYSDDED's enforcement efforts;

- iii. Provide legal advice and assistance, including defense, regarding any litigation, including but not limited to administrative and adversarial proceedings, domestic and international. Tasks related to a litigation must be requested separately for each matter to be litigated and receive approval from NYSDDED and the NYS Attorney General prior to the commencement of services. Unless otherwise agreed by the Department, the Contractor shall not take legal action against parties infringing upon the Mark.
- iv. Provide legal advice and assistance on any Internet and social media issues related to ownership, licensing, and protection of NYSDDED's or the State' of New York's intellectual property and/or brand;
- v. Provide legal advice and assistance on other NYSDDED or State of New York intellectual property issues such as the protection and enforcement of copyright issues, including but not limited to advice on copyright infringement claims or defenses;
- vi. Provide legal advice and assistance, including, but not limited to, formal opinions and retention of additional legal services, consultants and experts both domestically and internationally as deemed necessary and agreed to in writing by NYSDDED.

For the purposes of this section, providing legal advice and assistance to the State of New York shall include providing such advice and assistance to any state agencies or public authorities as needed.

## 2.2. DELIVERABLES

The deliverables for this project are consistent with the Scope of Services discussed above.

## 2.3 MINIMUM QUALIFICATION REQUIREMENTS

Your proposal must demonstrate your ability to comply with each of the items identified below.

Inability to demonstrate compliance with these qualifications will result in the disqualification of your proposal.

- 2.3.1 Prior to the proposed due date for this RFP, the Bidder must have at least one senior level attorney designated to perform services pursuant to this RFP who has at least ten years of relevant experience in:
  - a. intellectual property law and intellectual property litigation, with an emphasis on trademark law and brand management
  - b. providing legal advice on all aspects of intellectual property law, with an emphasis on trademark law and brand management
  - c. conducting legal and marketplace research to assist in the management and enforcement of the clients' intellectual property portfolio
  - d. representing clients in negotiations related to the management and enforcement of the clients' intellectual property portfolio, including domestic and international licensing opportunities
  - e. the registration and prosecution of intellectual property rights in the United States and in foreign jurisdictions
  - f. administrative proceedings (including matters before the United States Patent and Trademark Office and Trademark Trial and Appeal Board)
  - g. identifying and investigating infringing activity and issuing "cease-and-desist" letters
  - h. commencing and prosecuting legal action against infringing parties

- 2.3.2 The Bidder must provide the name, address, phone number, contact name, title and email address of three business references that can substantiate the Bidder's experience.
- 2.3.3 The Bidder must have the economic resources to pay expenses in advance of reimbursement from the State, for the services described in Section 2.1 of this RFP.

2.4 SELECTION CRITERIA

Proposals, which meet all the requirements of this RFP, will be evaluated by Department, based on the Selection Criteria stated in this section.

Proposals will be scored based on the following criteria:

2.4.1 Experience (30 points)

Evaluation of the firm's experience as described in Section 2.3 above. Particular attention will be given to prior experience with trademark brand protection and litigation. Limit your response to four pages.

2.4.2. Ability to perform the required services (40 points)

Evaluation of the approach, expertise, and adequacy/reasonableness of resources proposed by the firm to accomplish the Scope of Services (Section 2.1) and demonstrated ability to execute said proposal in a timely fashion. Your proposal must address each item listed in Section 2.1. The evaluation may include the number of intellectual property attorneys on staff and their history as a highly experienced workforce, and investigators who work for your firm or to whom you subcontract.

2.4.3. Cost (30 points)

Please complete Appendix B - Budget in full.

**Do not change the budget format. Failure to complete the financial proposal or bidder changes to the format may result in the disqualification of your proposal.**

**\*\* Your budget must be separately bound from the rest of your proposal to allow for the cost evaluation to be completed independent of the technical evaluation (see section 2.5 below).**

2.4.4. Quantitative Factors (10 points)

NYSDDED will award 10 points to respondents that are certified Minority or Women-owned Business Enterprises ("MWBEs") as defined in section three hundred ten of the New York State Executive Law or Service-Disabled Veteran-owned Business Enterprises ("SDVOBs") as defined in section three hundred sixty-nine-h of the New York State Executive Law.

In order to be awarded points pursuant to the Quantitative Factor, the respondent must (1) identify itself as an MWBE or SDVOB in the proposal and (2) be registered with the NYS Department of State as an entity authorized to conduct business in New York State. Respondents identifying themselves as MWBEs must be listed in the directory of New York State-certified MWBEs ("MWBE Directory") as of the closing of the period for responses to this RFP. The MWBE Directory is available at: <https://ny.newnycontracts.com/>. Respondents identifying themselves as SDVOBs must be listed in the directory of New York State-certified SDVOBs ("SDVOB Directory") as of the closing of the period for responses to this RFP. The SDVOB

## 2.5 EVALUATION PROCESS

Initial evaluation of proposals will be done in two parts – Technical Evaluation and Cost Evaluation. NYSDED’s Evaluation Committee will review the technical portion of each proposal based on the technical criteria listed above. NYSDED’s Evaluation Committee will not be advised of the costs proposed or cost scores (points awarded for cost) prior to the selection of the Finalists. However, the Evaluation Committee may be advised of information contained in each bidder’s budget (Appendix B) if such information is deemed by the Department to be pertinent in assessing the level of effort to be put forth by the bidders in performing the project. Then cost scores, computed by NYSDED’s Contract Management Unit based on a weighted average formula, will be added to the technical score resulting in the total score for the written proposal.

NYSDED reserves the right to determine whether oral presentations/interviews will be necessary. If NYSDED decides to conduct oral presentations/interviews, such oral presentations/interviews will occur as follows:

2.5.1 Following the evaluation of proposals as provided above, the Evaluation Committee will determine the Finalists to be interviewed as those having the highest combined technical and cost score averages. NYSDED anticipates that three (3) proposers will be selected as Finalists.

2.5.2 Each Finalist will be notified of the date, place and time of their oral presentation/interview to be held, either in Albany or in New York City or via telephone/video conference. The oral presentation/interview should further document the proposer’s ability to provide the required services. Key personnel directly responsible for the project including the Senior Project Consultant should be present and participate in the oral presentation/interview. The purpose of the oral presentation/interview is to impart to the Evaluation Committee an understanding of how specific services will be furnished and clarify other information included in the proposal. Further information with regard to the format of this stage of the evaluation may be provided to the finalists prior to their oral presentations/interview.

## 2.6 CONTRACT AWARD

Following the oral presentation/interviews, if any, the Evaluation Committee members will re-score each proposer interviewed on the technical criteria listed above. NYSDED anticipates that the Evaluation Committee will make an award recommendation of one proposer based upon its determination of the best value for NYSDED as the highest total average scores (technical and cost).

Upon selection, negotiations will be commenced with the successful proposer to enter into a contract setting forth the general terms that would govern any subsequent contract for services contemplated by this RFP. The Department will not enter into protracted negotiation with the successful bidder over contract terms and conditions or wait an unreasonable amount of time for the return of a signed contract. If the successful bidder does not sign and return to the Department the proposed contract including any draft of the proposed contract, within thirty (30) calendar days of receipt by the Contractor, the Department reserves the right to declare the award of the project to the Contractor null (null award). The Department will not be responsible for any cost incurred by the Contractor as a result of a null award. An award will then be made to the next highest scoring proposer.

## SECTION III - PROPOSAL CONTENT AND CONDITIONS

### 3.0 GENERAL INFORMATION

In preparing proposals, individuals and firms should follow the guidelines within this RFP.

### 3.1 COMPLETE PROPOSAL

Each participating bidder must submit a complete proposal with each element of the Selection Criteria, Section 2.4, addressed. In addition, all proposals must include the following information. Bidders supplying incomplete responses may be deemed non-compliant. Proprietary or confidential data shall be readily separable from the proposal in order to facilitate eventual public inspection of the non-confidential portion of the proposal. Please follow the format listed below:

#### 3.1.1 Title page, indicating:

Name, address (both mail and email) phone & fax number, contact person, and federal ID number. It must also include a statement that the offer shall be firm and not revocable for a period of 60 days unless withdrawn in writing.

#### 3.1.2. An overview of your company. Please provide a company overview that outlines your key competencies and approach to brand-building. Please include an overview on what sets you apart from other agencies. Please limit to two pages.

#### 3.1.3. A discussion of the relevant experience of your company and your staff proposed to provide the Scope of Services. This shall include a demonstration of how your company and staff meet the experience requirements in Section 2.3. Please limit to three pages.

#### 3.1.4 Resumes of the company's key personnel and other staff proposed to provide the Scope of Services.

#### 3.1.5 A discussion on how your company proposes to accomplish the Scope of Services. If any of the tasks associated with the project will be completed by non-company employees, qualifications and experience of those individuals must to be specified. Proposal narrative should be 12 – 15 pages.

#### 3.1.6 References as described in Section 2.3.2.

#### 3.1.7 Budget Requirements.

Appendix B of this RFP must be completed and submitted as part of your proposal. **DO NOT USE AN ALTERNATIVE BUDGET FORMAT.** Use of alternative budget format may lead to rejection of your proposal. The proposed budget cost over the 5-year term of the contract is **\$500,000** but this is not a guarantee to the volume of work.

#### 3.1.8. Other.

Please complete and include: Request for Proposal Response Form, Bidders Identifying Data form, Appendix B (Budget), Appendix C (Non-Collusive Bidding Certification), Appendix E (MacBride Fair Employment Principles) Appendix F (Vendor Responsibility Information) Appendix G (Procurement Lobbying Disclosure Pursuant to Sections 139-j and 139-k of State Finance Law respectively). Also include a completed form OCSD-1. Can be found at: [https://cdn.esd.ny.gov/CorporateInformation/Data/RFPs/OCSD\\_1MWBEEOPolicyStatement.pdf](https://cdn.esd.ny.gov/CorporateInformation/Data/RFPs/OCSD_1MWBEEOPolicyStatement.pdf)

The successful bidder must also complete the following but their inclusion is not required at the time of proposal:

- New York State tax forms ST-220-CA and ST-220-TD. The ST-220-CA may be found at: [ST-220-CA doc.](#). The ST-220-TD may be found at: [ST-220-TD doc.](#)
- A State Consultant Services *Contractor's Planned Employment From Contract Start Date Through the End of the Contract Term* (Form A) available at: [Form A doc.](#)
- The State Consultant Services *Contractor's Annual Employment Report* (Form B), **to be submitted annually**, available at: [Form B doc.](#) More information on the consultant

services reporting can be found at: [OSC-GFO](#).

- Businesses and other parties applying for a government permit, license or contract must prove compliance with New York State workers' compensation and disability benefits requirements. The vendor awarded the contract from this solicitation will be required to provide proof of NYS workers' compensation and disability insurance.

### 3.2 CONDITIONS GOVERNING PROPOSALS

- 3.2.1. Only those bidders that have supplied complete information will be considered.
- 3.2.2. FOIL: Any patented or proprietary information included in the proposal must be clearly identified in the proposal and in a cover letter submitted with the proposal (see section 3.4 below).
- 3.2.3. The Department reserves the following prerogatives:
- 3.2.3.1. to accept or reject any or all proposals received with respect to this RFP;
  - 3.2.3.2. to decline to award a contract resulting from this RFP;
  - 3.2.3.3. to require clarification from any bidder for the purposes of assuring a full understanding of responsiveness to the requirements of the RFP;
  - 3.2.3.4. to waive or modify minor irregularities in proposals received;
  - 3.2.3.5. to eliminate mandatory requirements unmet by all bidders;
  - 3.2.3.6. to negotiate with any or all bidders, within the proposal requirements, to best serve the interests of the State of New York;
  - 3.2.3.7. to amend the specifications contained in this RFP after its release, with due notice given to all potential bidders known to the Department to reflect the changed specifications;
  - 3.2.3.8. to utilize any or all ideas submitted in the proposals received unless those ideas are covered by legal patent or proprietary rights and the bidder has so advised the Department in statements contained in the bidders proposal and in a cover letter annexed thereto;
  - 3.2.3.9. to award contract(s) for any or all parts of a proposal; and
  - 3.2.3.10. to elect to award contract(s) to one or more responsive and responsible offerers, provided that the basis for the election among multiple contracts at the time of award shall be the most practical and economical alternative and shall be in the best interest of the State.
- 3.2.4. By submitting a proposal, the bidder agrees that it will not make any claim for or have any right to damages because of any lack of information or misinterpretation of the information provided in this RFP.

### 3.3 FREEDOM OF INFORMATION LAW

The Department is subject to the Freedom of Information Law (FOIL), which governs the process for the public disclosure of certain records maintained by the Department (See Public Officers Law, Sections 87 and 89).

Individuals or firms which submit proposals to the Department may request that the Department except all or part of such proposal from public disclosure, pursuant to Section 87(a)(d) of the Public Officers Law, on the grounds that the proposal contains trade secrets, proprietary information, or that the information, if disclosed, would cause substantial injury to the competitive position of the firm submitting the information. Such exception may extend to information contained in the request itself, if public disclosure would defeat the purpose for which the exception is sought. The request for such an exception must be in writing and should state the reasons for the requested exception. It must also specify the proposal or portions thereof for which the exception is requested.

If the Department grants the firm's request for exception from disclosure, the Department shall keep such proposal in secure facilities and shall notify the firm of any request the Department receives for disclosure of the proposal.

### 3.4 NOTIFICATION OF AWARD

The Department will notify the successful proposer in writing. The Department will notify, in writing, each bidder (companies and individuals who submitted a proposal) whose proposal is not selected for the award

of this project.

### 3.5. COST OF PROPOSAL

The Department is not liable for any and all costs incurred by the bidder or any individual or firm associated with the bidder, for work performed to prepare, explain and submit the bidder's proposal. In addition, the Department is not liable for any and all costs incurred by the bidder or any individual or firm associated with the bidder to discuss, propose, negotiate or otherwise address in any way whatsoever, terms and conditions of any contract resulting from this RFP. Further, the Department is not liable for any costs incurred until the contract has been approved by the Attorney General and the State Comptroller's Office.

### 3.6 Debriefing

A debriefing shall be requested by the unsuccessful applicant within 15 calendar days of receipt of notification by the NYSDDED that the applicant's proposal is unsuccessful. Such notification shall be provided by NYSDDED to all unsuccessful applicants for this procurement.

NYSDDED, upon request made within 15 calendar days of such notice, shall schedule the debriefing to occur within a reasonable time of such request. Debriefings shall be conducted at the NYSDDED's Albany or New York City office, or via telephone, video conference or other types of electronic communication. NYSDDED personnel participating in the debriefing discussion shall have been involved with and knowledgeable about the procurement and the evaluation and selection of the successful applicant. Such debriefing shall include, but not be limited to: (A) the reasons the proposal submitted by the applicant was not selected for award; (B) the qualitative and quantitative analysis employed by NYSDDED in assessing the relative merits of the proposal; (C) the application of the selection criteria to the unsuccessful applicant's proposal; and (D) when the debriefing is held after the award has been fully finalized and approved, the reason for the selection of the winning proposal. The debriefing shall also provide, to the extent practicable, general advice and guidance to the unsuccessful applicant concerning potential ways that their future proposals could be more responsive.

To request a debriefing please contact the Department via e-mail at [rfpinfo@esd.ny.gov](mailto:rfpinfo@esd.ny.gov) within fifteen (15) calendar days of receipt of the notice that your proposal was not selected for an award.

### 3.7 Protests and Appeals

#### 1. Protests

Any interested party may file a protest, in writing, with the NYS Dept. of Economic Development NYSDDED, within ten (10) business days from the date of the notice of the contract award, except:

- where a protest concerns the terms and conditions of the solicitation (or other matters that would be apparent to an interested party prior to the date set in the solicitation for the receipt of bids), in which case that protest must be filed on or before the date set in the solicitation for the receipt of bids or proposals; or
  - where NYSDDED determines that sufficient circumstances exist and has set forth a different time period for filing protests.
- a) Once received by NYSDDED the protest shall be referred either to an individual employee or group of employees of NYSDDED. No such employee will have been actively involved in the procurement process being protested. NYSDDED will provide a copy of any protest filed to the successful bidder.
  - b) DED may summarily deny a protest that fails to contain specific factual or legal allegations, or where the protest raises only issues of law that have already been decided.
  - c) DED shall issue a determination within fifteen (15) business days of the filing of the protest. The answer to the protest should address all the factual and legal allegations contained in the protest. A copy of the answer shall be simultaneously delivered to the protester and the successful bidder.
  - d) During the time period in which a protest may be filed, or during the resolution of a pending protest,

NYSDDED may negotiate terms and conditions of the contract or grant award with the successful bidder. However, a contract or grant award will not be approved by the NYSDDED prior to the expiration of the time period for filing a protest, or, if a protest has been filed, before the NYSDDED issues a determination of the protest.

- e) The person or persons designated by NYSDDED to consider the protest shall prepare a written recommendation addressing all of the issues that have been raised by the protest.
- f) DED may accept, modify or reject such recommendation.
- g) In making his or her determination with regard to the protest, the NYSDDED designee may, in his or her sole discretion, consider any additional information from any source relating to the allegations set forth in the protest.
- h) All parties that have participated in the protest, as well as the original successful bidder, shall be provided with a copy of the final determination of NYSDDED. The determination shall be made part of the procurement or grant award record.

## 2. Appeals

All parties receiving a copy of the ESD final determination will also receive a copy of the current “[Contract Award Protest Procedure For Contract Awards Subject To The Comptroller’s Approval](#).” This document explains the time periods and procedure for filing a protest with the Office of the State Comptroller.

An interested party has ten (10) business days from the date it receives NYSDDED’s determination to file an appeal with the Bureau of Contracts in the Office of the State Comptroller.

[https://www.osc.state.ny.us/agencies/guide/MyWebHelp/Content/files/XI\\_17\\_att1.pdf](https://www.osc.state.ny.us/agencies/guide/MyWebHelp/Content/files/XI_17_att1.pdf)

## 3.8. PROCUREMENT LOBBYING

Please note the following and complete the forms provided in Appendix G. Please note that Form 4 of Appendix G must be submitted to the Department whenever you contact us. Pursuant to State Finance Law §§139-j and 139-k, this Request for Proposal includes and imposes certain restrictions on communications between the Department and an Offerer/bidder during the procurement process. An Offerer/bidder is restricted from making contacts from the earliest notice of intent to solicit offers through final award and approval of the Procurement Contract by the Department and Office of the State Comptroller (“restricted period”) to other than designated staff unless it is a contact that is included among certain statutory exceptions set forth in State Finance Law §139-j(3)(a). Designated staff, as of the date hereof, is identified in Section 1.2 of this solicitation. To avoid conflicts and other issues concerning statutory exceptions, the Department requires that Offerers contact only Department staff identified in the aforementioned section of this solicitation. Department employees are also required to obtain certain information when contacted during the restricted period and make a determination of the responsibility of the Offerer/bidder pursuant to these two statutes. Certain findings of non-responsibility can result in rejection for contract award and in the event of two findings within a 4 year period, the Offerer/bidder is debarred from obtaining governmental Procurement Contracts. Further information about these requirements can be found at <https://online.ogs.ny.gov/legal/lobbyinglawfaq/default.aspl> or by calling the New York State Office of General Services; Ms. Anne Phillips, OGS Legal Services, Empire State Plaza, 41<sup>st</sup> Floor Tower Building, Empire State Plaza, Albany NY 12242. Telephone: (518) 474-5607. E-mail: [Anne.Phillips@OGS.State.NY.US](mailto:Anne.Phillips@OGS.State.NY.US). State Finance Law Sections 139-j and 139-k may be viewed at:

<http://www.ogs.ny.gov/aboutogs/regulations/advisoryCouncil/sfl139-j.htm> and <http://www.ogs.ny.gov/aboutogs/regulations/advisoryCouncil/sfl139-k.htm>

## SECTION IV - CONTRACTUAL INFORMATION

### 4.0 CONTRACT PREPARATION

A contract defining all terms and conditions of the parties will be drafted by the Department. The contract may incorporate any or all of this RFP, Standard Clauses for All New York State Contracts (attached hereto as APPENDIX A), and as much of the successful bidder's final proposal as may be appropriate, and other documents as may be deemed suitable by the Department.

After the Department and the successful bidder execute the Contract, it must be submitted for approval to the Attorney General's Office (AG) and the Office of the State Comptroller (OSC) before it will become effective. The Contract will not be considered fully executed until approved by both the AG and OSC.

The Department will not enter into protracted negotiation with the successful bidder over contract terms and conditions or wait an unreasonable amount of time for the return of a signed contract. If the successful bidder does not sign and return to the Department the proposed contract including any draft of the proposed contract, within thirty (30) calendar days of receipt by the Contractor, the Department reserves the right to declare the award of the project to the Contractor null (null award). The Department will not be responsible for any cost incurred by the Contractor as a result of a null award. Moreover, the Department reserves the right to cancel for cause any proposed amendment to the original contract which is not signed and returned to the Department within thirty (30) calendar days of receipt by the Contractor.

### 4.1 CONTRACT TERM

The successful bidder shall perform the work and provide the services set forth in this RFP for a period of five (5) years. In addition to other termination rights as may be permitted by New York State Law, the Department has the absolute right to terminate any contract resulting from this RFP early for cause, convenience or unavailability of State funds, as more fully described in Section 4.2 of this RFP.

### 4.2 CANCELLATION/TERMINATION

#### 4.2.1. Department Termination.

Once a contract or other agreement resulting from this RFP is fully executed and approved, the Department has the right to cancel it early, in whole or in part, for cause or unavailability of State funds at any time or for convenience on thirty (30) calendar day written notice to the Contractor. If cancelled for cause, payment to the Contractor for approved charges incurred will be made at the Department's sole discretion. If cancelled for convenience, the Department agrees to pay the Contractor for charges incurred in the performance of the Contract up to the time of cancellation. If cancelled for unavailability of State funds, the Department will not be liable for payment but will use its best efforts to pay outstanding charges previously approved by the Department to the extent permitted by New York State Law.

Additionally, the Department also reserves the right to terminate this contract in the event it is found that the certification filed by the Contractor in accordance with New York State Finance Law §139-k (Appendix E) was intentionally false or intentionally incomplete. Upon such finding, the Department may exercise its termination right by providing written notification to the Contractor in accordance with the written notification terms of the contract.

#### 4.2.2. Contractor Termination.

The Contractor has the right to terminate this Agreement, in whole for cause. In the event of a cause termination, the Contractor shall first give the Department a written Notice of Termination for Cause, therein specifying the reason(s) for termination (the event of default). The Department will then have sixty (60) days to correct the event of default, in which case the Contractor shall issue without delay, a notice to the Department rescinding the Notice of Termination for Cause. Late payment of funds by the Department shall not be considered a reason

for a cause termination.

#### 4.3 PAYMENT PROCESS

Payment for services performed to the satisfaction of the Department shall be made in the ordinary course of State business upon receipt of duly authenticated invoices/vouchers and upon receipt of reports and/or other documentation, if required elsewhere in this RFP. Receipts (original copies preferred) for all non-personnel expenses must be attached as evidence of cost. The Department shall reimburse the Contractor for any required travel expenses incurred in the performance of contractual duties, in accordance with rates permitted by New York State (see Appendix D).

#### 4.4 ADMINISTRATIVE AND FISCAL REQUIREMENTS

##### 4.4.1. Subcontracts, advanced approval required.

The Contractor shall not incur any obligations or provide any services (hereafter, goods and services) for the Department's account which would exceed \$2,000, without first obtaining written approval from the Department's Project Manager or his/her designee. In order to obtain the Department's approval, as described in Section 4.7 herein, the Contractor shall submit written cost estimates for any subcontracted legal or other services to the Department. Each cost estimate will be specific to an individual project and provide a cost breakdown detailing required the personnel hours and administrative expenses. A unique job number shall be assigned to each project and shall be used on all estimates and invoices submitted to the Department.

##### 4.4.2. Administrative Expenses.

Administrative expenses charged up to the annual total proposed by the Contractor in response to Appendix B (Budget) of this RFP, shall be billed at actual cost with no mark-up due the Contractor. Said administrative expenses are deemed to be ordinary and necessary expenses associated with the maintenance of the Department's account by the Contractor

##### 4.4.3. Payments and Documentation.

All payments shall be made in the "ordinary course of State business" for services performed upon receipt of duly authenticated invoices/vouchers and agreed upon project statements of work, financial and activity reports. Payment for necessary travel shall be made in full compliance with the terms and conditions discussed in Appendix D (NYS Contractor Travel Reimbursement Guidelines) of this RFP.

Payment in the "ordinary course of State business" may be barred by extraordinary events beyond the control of the Department. The Department shall take all steps necessary for payment to be made as reflected on a duly authenticated invoice with the understanding that payment not made within thirty (30) days receipt of such invoice shall be subject to payment of interest charges in accord with section 179F of the New York State Finance Law.

In addition to the provisions stated therein, said sections shall require the Contractor to submit estimates to be pre-approved by the Department's Project Manager or his/her designee, for any and all work regardless of type. The Department in its discretion reserves the right to issue written administrative guidelines and controls to supplement or make technical corrections to, the payment process described in this RFP. The Department will consult with the Contractor regarding administrative guidelines and controls, however, the Department reserves the right to implement administrative guidelines and controls at its sole discretion.

The release of this RFP by the NYSDED does not guarantee that a Contract will be entered into. Moreover, if a Contract is entered into (fully ratified) the right to assign work or all services described in this RFP is at the sole discretion of the NYSDED.

#### 4.4.4. Other Payment and Documentation Provisions

- i. Discounts allowed by suppliers of goods and services purchased by the Contractor on behalf of the Department must be fully disclosed and credited to the Department.
- ii. Where Contractor on behalf of the Department makes purchases, all bills and invoices rendered to the Department shall omit any tax (particularly sales tax) from which the State of New York is exempt. Reimbursement of first party subcontractor tax payments will be reimbursed when unavoidable.
- iii. Shipping Charges. The Contractor shall document such charges by submitting each individual shipping/messenger receipt, along with details determining reasonableness of charges.
- iv. Travel expenses will be billed based upon the prevailing New York State per diem rates. All travel authorized by the Department will be billed as incurred. Contractor shall incur no expenditures for travel outside of New York State without the prior written approval of the Project Manager or his/her designee.
- v. In the event invoices include overtime charged by a subcontractor, the following information must be included: the operation requiring overtime; written justification of the necessity for incurring overtime charges; the regular rate charged per hour; the overtime rate charged per hour; the number of hours worked at both the regular and overtime rates; and the dates overtime was incurred.

#### 4.4.6. Budget Reports.

The Contractor shall provide bi-monthly (every two months) budget reports in a format prescribed by the Department. Budget reports for legal services shall include all approved and pending estimates. The Department may request that this report be prepared more frequently than bi-monthly.

#### 4.5. INTELLECTUAL PROPERTY/PERSONAL PROPERTY

The Department reserves the right to include intellectual/personal property provisions in the Contract, with regard to the ownership (exclusive and/or nonexclusive) of any property or work product created or purchased as a result of any agreement resulting from this RFP. The presumption is that, unless otherwise stated and agreed, all intellectual property is owned by the Department, including works made or performed for hire. Specifically exempt from the provisions of this paragraph are property, plant, equipment and preexisting software provided by the Contractor to the Department, for the purpose of carrying out the provisions of this RFP. Property, plant, equipment and preexisting software may become subject to intellectual/personal property regulation when agreed to in writing by the parties.

#### 4.6. REPORTS

In addition to reports discussed elsewhere in this RFP, the Department reserves the right to request other reasonable programmatic and/or financial reports. When requested to do so, the successful bidder will provide the Department with reports in a reasonable period of time and in an acceptable format.

#### 4.7. SUBCONTRACTS

4.7.1. Subcontracting is permitted when required by the Contractor to fulfill the terms and conditions of this RFP. Your proposal must identify the name and address of the subcontracting firm or firms and explain which element(s) of the Scope of Service (section 2.1) and Budget (see Appendix B) the subcontractor(s) is responsible for. The Department is an equal opportunity Contractor and reserves the right to review and approve all subcontracting firms (see section 4.10 for details on Minority and Women-Owned Business Enterprise subcontracting).

4.7.2. After the contract resulting from this RFP, if any, is awarded, any subcontracts or purchases in excess of \$50,000 must adhere to the following:

- 4.7.2.1. For subcontracts or purchases which are competitively bid, Contractor must request proposals from a minimum of three (3) qualified firms, and the lowest responsible bidder shall be accepted unless otherwise approved in writing by the Department.
- 4.7.2.2. Subcontracts or purchases that are sole or single source (entered into without submission to competitive bid) must be approved in writing by the Department prior to entering into the agreement.
- 4.7.2.3. All subcontracts awarded pursuant to this section 4.7. shall adhere to all the terms and conditions set forth in this RFP and the resulting contract.

#### 4.7.3. Sole/Single Source Contracts.

For purposes of this agreement, sole source contracts are defined as where only one vendor is capable of supplying the required services or properties because such service or property offered is so unique that it cannot be duplicated or obtained elsewhere, or involves creative artistry of a similar nature.

Single source contracts are defined as where, although more than one vendor can supply the required services or properties, circumstances of a material and substantial nature make the awarding of the contract to one vendor over the others appropriate.

The requirement for competitive bidding may be waived upon prior written approval of the Department's Project Manager provided that prior to the acceptance of such services or properties, the Contractor provides a detailed written statement to the Department which describes the sole or single source determination, the alternatives considered and the terms of the proposed contract. In addition, the Contractor must establish to the satisfaction of the Department, the reasonableness of the proposed expenditure. In general, the price charged to the Department should be no greater than the price charged in the private sector. Sole/single source contracts are to be avoided whenever possible.

#### 4.8 REPRESENTATIONS AND WARRANTIES BY THE DEPARTMENT

The Department represents and warrants that it has the legal competence to grant the rights herein to the Contractor if and when a contract is entered into.

#### 4.9 REPRESENTATIONS, WARRANTIES, AND COVENANTS BY THE CONTRACTOR

The Contractor represents warrants and covenants that:

4.12.1 It is a legal entity duly organized, validly existing and in good standing under the laws of the jurisdiction in which its home office is located and is, duly authorized to conduct business in the State of New York;

4.12.2 It has the legal power and authority to execute and deliver any contract resulting from this RFP and to consummate the obligations and activities contemplated on its part hereby. The execution and delivery of any contract resulting from this RFP has been duly authorized by the Contractor, and no other proceedings by the Contractor are necessary to authorize the execution and delivery of a contract or the performance of the Contractor's obligations hereunder;

4.12.3 All statements of fact contained in the Contractor's proposal, are true, complete, and accurate and shall be true, complete, and accurate during the term of the Contract and any extension thereof; and neither it, nor any of its directors, officers, employees, consultants or subcontractors has or will give anything of value to anyone to procure a Contract between the parties or to influence any official act or the judgment of any person in the negotiation of any of the terms of any Contract resulting from this RFP.

#### 4.10 CONTRACTOR REQUIREMENTS AND PROCEDURES FOR BUSINESS PARTICIPATION OPPORTUNITIES FOR NEW YORK STATE CERTIFIED MINORITY- AND WOMEN-OWNED BUSINESS ENTERPRISES AND EQUAL EMPLOYMENT OPPORTUNITIES FOR MINORITY GROUP MEMBERS AND WOMEN

## **New York State Law**

Pursuant to New York State Executive Law Article 15-A and Parts 140-145 of Title 5 of the New York Codes, Rules and Regulations ESD is required to promote opportunities for the maximum feasible participation of New York State-certified Minority and Women-owned Business Enterprises (“MWBEs”) and the employment of minority group members and women in the performance of ESD contracts.

## **Business Participation Opportunities for MWBEs**

For purposes of this solicitation, ESD hereby establishes an overall goal of 30 percent for MWBE participation (based on the current availability of MBEs and WBEs). A contractor (“Contractor”) on any contract resulting from this procurement (“Contract”) must document its good faith efforts to provide meaningful participation by MWBEs as subcontractors and suppliers in the performance of the Contract. To that end, by submitting a response to this RFP, the respondent agrees that ESD may withhold payment pursuant to any Contract awarded as a result of this RFP pending receipt of the required MWBE documentation. The directory of MWBEs can be viewed at: <https://ny.newnycontracts.com>. For guidance on how ESD will evaluate a Contractor’s “good faith efforts,” refer to 5 NYCRR § 142.8.

The respondent understands that only sums paid to MWBEs for the performance of a commercially useful function, as that term is defined in 5 NYCRR § 140.1, may be applied towards the achievement of the applicable MWBE participation goal. The portion of a contract with an MWBE serving as a broker that shall be deemed to represent the commercially useful function performed by the MWBE shall be 25 percent of the total value of the contract.

In accordance with 5 NYCRR § 142.13, the respondent further acknowledges that if it is found to have willfully and intentionally failed to comply with the MWBE participation goals set forth in a Contract resulting from this RFP, such finding constitutes a breach of contract and ESD may withhold payment as liquidated damages.

Such liquidated damages shall be calculated as an amount equaling the difference between: (1) all sums identified for payment to MWBEs had the Contractor achieved the contractual MWBE goals; and (2) all sums actually paid to MWBEs for work performed or materials supplied under the Contract.

By submitting a bid or proposal, a respondent agrees to demonstrate its good faith efforts to achieve the applicable MWBE participation goals by submitting evidence thereof through the New York State Contract System (“NYSCS”), which can be viewed at <https://ny.newnycontracts.com>, provided, however, that a respondent may arrange to provide such evidence via a non-electronic method by contacting the Office of Contractor and Supplier Diversity (“OCSD”) at [OCSD@esd.ny.gov](mailto:OCSD@esd.ny.gov).

Additionally, a respondent will be required to submit the following documents and information as evidence of compliance with the foregoing:

- A. An MWBE Utilization Plan with their bid or proposal. Any modifications or changes to an accepted MWBE Utilization Plan after the Contract award and during the term of the Contract must be reported on a revised MWBE Utilization Plan and submitted to ESD for review and approval.

ESD will review the submitted MWBE Utilization Plan and advise the respondent of ESD acceptance or issue a notice of deficiency within 30 days of receipt.

- B. If a notice of deficiency is issued, the respondent will be required to respond to the notice of deficiency within seven (7) business days of receipt by submitting to OCSD at [OCSD@esd.ny.gov](mailto:OCSD@esd.ny.gov), a written remedy in response to the notice of deficiency. If the written remedy that is submitted is not timely or is found by

ESD to be inadequate, ESD shall notify the respondent and direct the respondent to submit, within five (5) business days, a request for a partial or total waiver of MWBE participation goals. Failure to file the waiver form in a timely manner may be grounds for disqualification of the bid or proposal.

ESD may disqualify a respondent as being non-responsive under the following circumstances:

- a) If a respondent fails to submit an MWBE Utilization Plan;
- b) If a respondent fails to submit a written remedy to a notice of deficiency;
- c) If a respondent fails to submit a request for waiver; or
- d) If ESD determines that the respondent has failed to document good faith efforts.

The successful respondent will be required to attempt to utilize, in good faith, any MBE or WBE identified within its MWBE Utilization Plan, during the performance of the Contract. Requests for a partial or total waiver of established goal requirements made subsequent to Contract Award may be made at any time during the term of the Contract to ESD, but must be made no later than prior to the submission of a request for final payment on the Contract.

The successful respondent will be required to submit a quarterly MWBE Contractor Compliance & Payment Report to ESD, by the 10<sup>th</sup> day following each end of quarter over the term of the Contract documenting the progress made toward achievement of the MWBE goals of the Contract.

### **Equal Employment Opportunity Requirements**

By submission of a bid or proposal in response to this solicitation, the respondent agrees with all of the terms and conditions [\*\*SCHEDULE B - PARTICIPATION BY MINORITY AND WOMEN-OWNED BUSINESS ENTERPRISES: REQUIREMENTS AND PROCEDURES\*\*](#). The respondent is required to ensure that it and any subcontractors awarded a subcontract for the construction, demolition, replacement, major repair, renovation, planning or design of real property and improvements thereon (the "Work"), except where the Work is for the beneficial use of the respondent, undertake or continue programs to ensure that minority group members and women are afforded equal employment opportunities without discrimination because of race, creed, color, national origin, sex, age, disability or marital status. For these purposes, equal opportunity shall apply in the areas of recruitment, employment, job assignment, promotion, upgrading, demotion, transfer, layoff, termination, and rates of pay or other forms of compensation. This requirement does not apply to: (i) work, goods, or services unrelated to the Contract; or (ii) employment outside New York State.

The respondent will be required to submit a Minority and Women-owned Business Enterprise and Equal Employment Opportunity Policy Statement, OCSD-1, to ESD with its bid or proposal.

If awarded a Contract, respondent shall submit a Workforce Utilization Report and shall require each of its Subcontractors to submit a Workforce Utilization Report, in such format as shall be required by ESD on a quarterly basis during the term of the Contract.

Pursuant to Executive Order #162, contractors and subcontractors will also be required to report the gross wages paid to each of their employees for the work performed by such employees on the contract utilizing the Workforce Utilization Report on a quarterly basis.

Further, pursuant to Article 15 of the Executive Law (the "Human Rights Law"), all other State and Federal statutory and constitutional non-discrimination provisions, the Contractor and sub-contractors will not discriminate against any employee or applicant for employment because of race, creed (religion), color, sex, national origin, sexual orientation, military status, age, disability, predisposing genetic characteristic, marital status or domestic violence victim status, and shall also follow the requirements of

the Human Rights Law with regard to non-discrimination on the basis of prior criminal conviction and prior arrest.

**Please Note: Failure to comply with the foregoing requirements may result in a finding of non-responsiveness, non-responsibility and/or a breach of the Contract, leading to the withholding of funds, suspension or termination of the Contract or such other actions or enforcement proceedings as allowed by the Contract.**

The required forms can be found at the following web addresses:

Form OCSD-1: <https://esd.ny.gov/sites/default/files/OCSD-1-Policy-Statement.pdf>

Form OCSD-2: <https://esd.ny.gov/sites/default/files/OCSD-2-Staffing-Plan.pdf>

Form OCSD-3:

<https://esd.ny.gov/sites/default/files/OCSD-3-Workforce-Utilization-Report.xlsx>

Form OCSD-4: <https://esd.ny.gov/sites/default/files/OCSD-4-Utilization-Plan.pdf>

Form OCSD-5: <https://esd.ny.gov/sites/default/files/OCSD-5-Waiver-Request-Form.pdf>

Form OCSD-6: <https://esd.ny.gov/sites/default/files/OCSD-6-Compliance-Report.pdf>

In the event that the above links are unavailable or inactive, the forms may also be requested from OCSD at [OCSD@esd.ny.gov](mailto:OCSD@esd.ny.gov).

#### PARTICIPATION OPPORTUNITIES FOR NEW YORK STATE CERTIFIED SERVICE-DISABLED VETERAN OWNED BUSINESSES

Article 17-B of the New York State Executive Law provides for more meaningful participation in public procurement by certified Service-Disabled Veteran-Owned Businesses (“SDVOB”), thereby further integrating such businesses into New York State’s economy. ESD recognizes the need to promote the employment of service-disabled veterans and to ensure that certified service-disabled veteran-owned businesses have opportunities for maximum feasible participation in the performance of ESD contracts.

In recognition of the service and sacrifices made by service-disabled veterans and in recognition of their economic activity in doing business in New York State, Bidders are expected to consider SDVOBs in the fulfillment of the requirements of the Contract. Such participation may be as subcontractors or suppliers, as protégés, or in other partnering or supporting roles.

#### **Contract Goals**

- A. ESD hereby establishes an overall goal of 6% for SDVOB participation, based on the current availability of qualified SDVOBs. For purposes of providing meaningful participation by SDVOBs, the Bidder/Contractor should reference the directory of New York State Certified SDVOBs found at: <https://online.ogs.ny.gov/SDVOB/search>. Questions regarding compliance with SDVOB participation goals should be directed to the Designated Contacts. Additionally, following Contract execution, Contractor is encouraged to contact the Office of General Services’ Division of Service-Disabled Veterans’ Business Development at 518-474-2015 or [VeteransDevelopment@ogs.ny.gov](mailto:VeteransDevelopment@ogs.ny.gov) to discuss additional methods of maximizing participation by SDVOBs on the Contract.
- B. Contractor must document “good faith efforts” to provide meaningful participation by SDVOBs as subcontractors or suppliers in the performance of the Contract.

### **SDVOB Utilization Plan**

- A. In accordance with 9 NYCRR § 252.2(i), Bidders are required to submit a completed SDVOB Utilization Plan on Form OCSD-4.
- B. The Utilization Plan shall list the SDVOBs that the Bidder intends to use to perform the Contract, a description of the work that the Bidder intends the SDVOB to perform to meet the goals on the Contract, the estimated dollar amounts to be paid to an SDVOB, or, if not known, an estimate of the percentage of Contract work the SDVOB will perform. By signing the Utilization Plan, the Bidder acknowledges that making false representations or providing information that shows a lack of good faith as part of, or in conjunction with, the submission of a Utilization Plan is prohibited by law and may result in penalties including, but not limited to, termination of a contract for cause, loss of eligibility to submit future bids, and/or withholding of payments. Any modifications or changes to the agreed participation by SDVOBs after the Contract award and during the term of the Contract must be reported on a revised SDVOB Utilization Plan and submitted to ESD.
- C. ESD will review the submitted SDVOB Utilization Plan and advise the Bidder/Contractor of ESD acceptance or issue a notice of deficiency within 20 days of receipt.
- D. If a notice of deficiency is issued, Bidder/Contractor agrees that it shall respond to the notice of deficiency, within seven business days of receipt, by submitting to ESD a written remedy in response to the notice of deficiency. If the written remedy that is submitted is not timely or is found by ESD to be inadequate, ESD shall notify the Bidder/Contractor and direct the Bidder/Contractor to submit, within five business days of notification by ESD, a request for a partial or total waiver of SDVOB participation goals on OCSD-5. Failure to file the waiver form in a timely manner may be grounds for disqualification of the bid or proposal.
- E. ESD may disqualify a Bidder's bid or proposal as being non-responsive under the following circumstances:
  - (a) If a Bidder fails to submit an SDVOB Utilization Plan;
  - (b) If a Bidder fails to submit a written remedy to a notice of deficiency;
  - (c) If a Bidder fails to submit a request for waiver; or
  - (d) If ESD determines that the Bidder has failed to document good faith efforts.
- F. If awarded a Contract, Contractor certifies that it will follow the submitted SDVOB Utilization Plan for the performance of SDVOBs on the Contract pursuant to the prescribed SDVOB contract goals set forth above.
- G. Contractor further agrees that a failure to use SDVOBs as agreed in the Utilization Plan shall constitute a material breach of the terms of the Contract. Upon the occurrence of such a material breach, ESD shall be entitled to any remedy provided herein, including but not limited to, a finding of Contractor non-responsibility.

### **Request for Waiver**

- A. Prior to submission of a request for a partial or total waiver, Bidder/Contractor shall speak to the Designated Contacts at ESD for guidance.
- B. In accordance with 9 NYCRR § 252.2(m), a Bidder/Contractor that is able to document good faith efforts to meet the goal requirements, as set forth in clause IV below, may submit a request for a partial or total waiver on Form OCSD-5, accompanied by supporting documentation. A Bidder may submit the request for waiver at the same time it submits its SDVOB Utilization Plan. If a request for waiver is

submitted with the SDVOB Utilization Plan and is not accepted by ESD at that time, the provisions of clauses II (C), (D) & (E) will apply. If the documentation included with the Bidder's/Contractor's waiver request is complete, ESD shall evaluate the request and issue a written notice of acceptance or denial within 20 days of receipt.

C. Contractor shall attempt to utilize, in good faith, the SDVOBs identified within its SDVOB Utilization Plan, during the performance of the Contract. Requests for a partial or total waiver of established goal requirements made subsequent to Contract award may be made at any time during the term of the Contract to ESD, but must be made no later than prior to the submission of a request for final payment on the Contract.

D. If ESD, upon review of the SDVOB Utilization Plan and Monthly SDVOB Compliance Report (OCSD-6) determines that Contractor is failing or refusing to comply with the contract goals and no waiver has been issued in regards to such non-compliance, ESD may issue a notice of deficiency to the Contractor. The Contractor must respond to the notice of deficiency within seven business days of receipt. Such response may include a request for partial or total waiver of SDVOB contract goals.

Waiver requests should be sent to OCSD.

### **Required Good Faith Efforts**

In accordance with 9 NYCRR § 252.2(n), Contractors must document their good faith efforts toward utilizing SDVOBs on the Contract. Evidence of required good faith efforts shall include, but not be limited to, the following:

- (1) Copies of solicitations to SDVOBs and any responses thereto.
- (2) Explanation of the specific reasons each SDVOB that responded to Bidders/Contractors' solicitation was not selected.
- (3) Dates of any pre-bid, pre-award or other meetings attended by Contractor, if any, scheduled by ESD with certified SDVOBs whom ESD determined were capable of fulfilling the SDVOB goals set in the Contract.
- (4) Information describing the specific steps undertaken to reasonably structure the Contract scope of work for the purpose of subcontracting with, or obtaining supplies from, certified SDVOBs.
- (5) Other information deemed relevant to the waiver request.

### **Monthly SDVOB Contractor Compliance Report**

In accordance with 9 NYCRR § 252.2(q), Contractor is required to report Monthly SDVOB Contractor Compliance to ESD during the term of the Contract for the preceding month's activity, documenting progress made towards achieving the Contract SDVOB goals. This information must be submitted using form OCSD-6 available on the ESD website and should be completed by the Contractor and submitted to ESD, by the 10th day of each month during the term of the Contract, for the preceding month's activity to: [OCSD@esd.ny.gov](mailto:OCSD@esd.ny.gov).

### **Breach of Contract and Damages**

In accordance with 9 NYCRR § 252.2(s), any Contractor found to have willfully and intentionally failed to comply with the SDVOB participation goals set forth in the Contract, shall be found to have breached the contract and Contractor shall pay damages as set forth therein.

## APPENDIX A

### STANDARD CLAUSES FOR ALL NEW YORK STATE CONTRACTS

The parties to the attached contract, license, lease, amendment or other agreement of any kind (hereinafter, "the contract" or "this contract") agree to be bound by the following clauses which are hereby made a part of the contract (the word "Contractor" herein refers to any party other than the State, whether a contractor, licensor, licensee, lessor, lessee or any other party):

**1. EXECUTORY CLAUSE.** In accordance with Section 41 of the State Finance Law, the State shall have no liability under this contract to the Contractor or to anyone else beyond funds appropriated and available for this contract.

**2. NON-ASSIGNMENT CLAUSE.** In accordance with Section 138 of the State Finance Law, this contract may not be assigned by the Contractor or its right, title or interest therein assigned, transferred, conveyed, sublet or otherwise disposed of without the State's previous written consent, and attempts to do so are null and void. Notwithstanding the foregoing, such prior written consent of an assignment of a contract let pursuant to Article XI of the State Finance Law may be waived at the discretion of the contracting agency and with the concurrence of the State Comptroller where the original contract was subject to the State Comptroller's approval, where the assignment is due to a reorganization, merger or consolidation of the Contractor's business entity or enterprise. The State retains its right to approve an assignment and to require that any Contractor demonstrate its responsibility to do business with the State. The Contractor may, however, assign its right to receive payments without the State's prior written consent unless this contract concerns Certificates of Participation pursuant to Article 5-A of the State Finance Law.

**3. COMPTROLLER'S APPROVAL.** In accordance with Section 112 of the State Finance Law (or, if this contract is with the State University or City University of New York, Section 355 or Section 6218 of the Education Law), if this contract exceeds \$50,000 (or the minimum thresholds agreed to by the Office of the State Comptroller for certain S.U.N.Y. and C.U.N.Y. contracts), or if this is an amendment for any amount to a contract which, as so amended, exceeds said statutory amount, or if, by this contract, the State agrees to give something other than money when the value or reasonably estimated value of such consideration exceeds \$10,000, it shall not be valid, effective or binding upon the State until it has been approved by the State Comptroller and filed in his office. Comptroller's approval of contracts let by the Office of General Services is required when such contracts exceed \$85,000 (State Finance Law Section 163.6-a). However, such pre-approval shall not be required for any contract established as a centralized contract through the Office of General Services or for a purchase order or other transaction issued under such centralized contract.

**4. WORKERS' COMPENSATION BENEFITS.** In accordance with Section 142 of the State Finance Law, this contract shall be void and of no force and effect unless the Contractor shall provide and maintain coverage during the life of this contract for the benefit of such employees as are required to be covered by the provisions of the Workers' Compensation Law.

**5. NON-DISCRIMINATION REQUIREMENTS.** To the extent required by Article 15 of the Executive Law (also known as the Human Rights Law) and all other State and Federal statutory and constitutional non-discrimination provisions, the Contractor will not discriminate against any employee or applicant for employment because of race, creed, color, sex (including gender identity or expression), national origin, sexual orientation, military status, age, disability, predisposing genetic characteristics, marital status or domestic violence victim status. Furthermore, in accordance with Section 220-e of the Labor Law, if this is a contract for the construction, alteration or repair of any public building or public work or for the manufacture, sale or distribution of materials, equipment or supplies, and to the extent that this contract shall be performed within the State of New York, Contractor agrees that neither it nor its subcontractors shall, by reason of race, creed, color, disability, sex, or national origin: (a) discriminate in hiring against any New York State citizen who is qualified and available to perform the work; or (b) discriminate against or intimidate any employee hired for the performance of work under this contract. If this is a building service contract as defined in Section 230 of the Labor Law, then, in accordance with Section 239 thereof, Contractor agrees that neither it nor its subcontractors shall by reason of race, creed,

color, national origin, age, sex or disability: (a) discriminate in hiring against any New York State citizen who is qualified and available to perform the work; or (b) discriminate against or intimidate any employee hired for the performance of work under this contract. Contractor is subject to fines of \$50.00 per person per day for any violation of Section 220-e or Section 239 as well as possible termination of this contract and forfeiture of all moneys due hereunder for a second or subsequent violation.

**6. WAGE AND HOURS PROVISIONS.** If this is a public work contract covered by Article 8 of the Labor Law or a building service contract covered by Article 9 thereof, neither Contractor's employees nor the employees of its subcontractors may be required or permitted to work more than the number of hours or days stated in said statutes, except as otherwise provided in the Labor Law and as set forth in prevailing wage and supplement schedules issued by the State Labor Department. Furthermore, Contractor and its subcontractors must pay at least the prevailing wage rate and pay or provide the prevailing supplements, including the premium rates for overtime pay, as determined by the State Labor Department in accordance with the Labor Law. Additionally, effective April 28, 2008, if this is a public work contract covered by Article 8 of the Labor Law, the Contractor understands and agrees that the filing of payrolls in a manner consistent with Subdivision 3-a of Section 220 of the Labor Law shall be a condition precedent to payment by the State of any State approved sums due and owing for work done upon the project.

**7. NON-COLLUSIVE BIDDING CERTIFICATION.** In accordance with Section 139-d of the State Finance Law, if this contract was awarded based upon the submission of bids, Contractor affirms, under penalty of perjury, that its bid was arrived at independently and without collusion aimed at restricting competition. Contractor further affirms that, at the time Contractor submitted its bid, an authorized and responsible person executed and delivered to the State a non-collusive bidding certification on Contractor's behalf.

**8. INTERNATIONAL BOYCOTT PROHIBITION.** In accordance with Section 220-f of the Labor Law and Section 139-h of the State Finance Law, if this contract exceeds \$5,000, the Contractor agrees, as a material condition of the contract, that neither the Contractor nor any substantially owned or affiliated person, firm, partnership or corporation has participated, is participating, or shall participate in an international boycott in violation of the federal Export Administration Act of 1979 (50 USC App. Sections 2401 et seq.) or regulations thereunder. If such Contractor, or any of the aforesaid affiliates of Contractor, is convicted or is otherwise found to have violated said laws or regulations upon the final determination of the United States Commerce Department or any other appropriate agency of the United States subsequent to the contract's execution, such contract, amendment or modification thereto shall be rendered forfeit and void. The Contractor shall so notify the State Comptroller within five (5) business days of such conviction, determination or disposition of appeal (2NYCRR 105.4).

**9. SET-OFF RIGHTS.** The State shall have all of its common law, equitable and statutory rights of set-off. These rights shall include, but not be limited to, the State's option to withhold for the purposes of set-off any moneys due to the Contractor under this contract up to any amounts due and owing to the State with regard to this contract, any other contract with any State department or agency, including any contract for a term commencing prior to the term of this contract, plus any amounts due and owing to the State for any other reason including, without limitation, tax delinquencies, fee delinquencies or monetary penalties relative thereto. The State shall exercise its set-off rights in accordance with normal State practices including, in cases of set-off pursuant to an audit, the finalization of such audit by the State agency, its representatives, or the State Comptroller.

**10. RECORDS.** The Contractor shall establish and maintain complete and accurate books, records, documents, accounts and other evidence directly pertinent to performance under this contract (hereinafter, collectively, "the Records"). The Records must be kept for the balance of the calendar year in which they were made and for six (6) additional years thereafter. The State Comptroller, the Attorney General and any other person or entity authorized to conduct an examination, as well as the agency or agencies involved in this contract, shall have access to the Records during normal business hours at an office of the Contractor within the State of New York or, if no such office is available, at a mutually agreeable and reasonable venue within the State, for the term specified above for the purposes of inspection, auditing and copying. The State shall take reasonable steps to protect from public disclosure any of the Records which are exempt from disclosure under Section 87 of the Public Officers Law (the "Statute") provided that: (i) the Contractor shall timely inform an appropriate State official, in writing, that said records should not be disclosed; and (ii) said records shall be sufficiently identified; and (iii) designation of said records as exempt under the Statute is reasonable. Nothing contained herein shall

diminish, or in any way adversely affect, the State's right to discovery in any pending or future litigation.

**11. IDENTIFYING INFORMATION AND PRIVACY NOTIFICATION.** (a) Identification Number(s). Every invoice or New York State Claim for Payment submitted to a New York State agency by a payee, for payment for the sale of goods or services or for transactions (e.g., leases, easements, licenses, etc.) related to real or personal property must include the payee's identification number. The number is any or all of the following: (i) the payee's Federal employer identification number, (ii) the payee's Federal social security number, and/or (iii) the payee's Vendor Identification Number assigned by the Statewide Financial System. Failure to include such number or numbers may delay payment. Where the payee does not have such number or numbers, the payee, on its invoice or Claim for Payment, must give the reason or reasons why the payee does not have such number or numbers.

(b) Privacy Notification. (1) The authority to request the above personal information from a seller of goods or services or a lessor of real or personal property, and the authority to maintain such information, is found in Section 5 of the State Tax Law. Disclosure of this information by the seller or lessor to the State is mandatory. The principal purpose for which the information is collected is to enable the State to identify individuals, businesses and others who have been delinquent in filing tax returns or may have understated their tax liabilities and to generally identify persons affected by the taxes administered by the Commissioner of Taxation and Finance. The information will be used for tax administration purposes and for any other purpose authorized by law. (2) The personal information is requested by the purchasing unit of the agency contracting to purchase the goods or services or lease the real or personal property covered by this contract or lease. The information is maintained in the Statewide Financial System by the Vendor Management Unit within the Bureau of State Expenditures, Office of the State Comptroller, 110 State Street, Albany, New York 12236.

**12. EQUAL EMPLOYMENT OPPORTUNITIES FOR MINORITIES AND WOMEN.** In accordance with Section 312 of the Executive Law and 5 NYCRR 143, if this contract is: (i) a written agreement or purchase order instrument, providing for a total expenditure in excess of \$25,000.00, whereby a contracting agency is committed to expend or does expend funds in return for labor, services, supplies, equipment, materials or any combination of the foregoing, to be performed for, or rendered or furnished to the contracting agency; or (ii) a written agreement in excess of \$100,000.00 whereby a contracting agency is committed to expend or does expend funds for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements thereon; or (iii) a written agreement in excess of \$100,000.00 whereby the owner of a State assisted housing project is committed to expend or does expend funds for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements thereon for such project, then the following shall apply and by signing this agreement the Contractor certifies and affirms that it is Contractor's equal employment opportunity policy that:

(a) The Contractor will not discriminate against employees or applicants for employment because of race, creed, color, national origin, sex, age, disability or marital status, shall make and document its conscientious and active efforts to employ and utilize minority group members and women in its work force on State contracts and will undertake or continue existing programs of affirmative action to ensure that minority group members and women are afforded equal employment opportunities without discrimination. Affirmative action shall mean recruitment, employment, job assignment, promotion, upgradings, demotion, transfer, layoff, or termination and rates of pay or other forms of compensation;

(b) at the request of the contracting agency, the Contractor shall request each employment agency, labor union, or authorized representative of workers with which it has a collective bargaining or other agreement or understanding, to furnish a written statement that such employment agency, labor union or representative will not discriminate on the basis of race, creed, color, national origin, sex, age, disability or marital status and that such union or representative will affirmatively cooperate in the implementation of the Contractor's obligations herein; and

(c) the Contractor shall state, in all solicitations or advertisements for employees, that, in the performance of the State contract, all qualified applicants will be afforded equal employment opportunities without discrimination because of race, creed, color, national origin, sex, age, disability or marital status.

Contractor will include the provisions of "a", "b", and "c" above, in every subcontract over \$25,000.00 for the construction, demolition, replacement, major repair, renovation, planning or design of real property and improvements thereon (the "Work") except where the Work is for the beneficial use of the Contractor. Section 312 does not apply to: (i) work, goods or services unrelated to this contract; or (ii) employment outside New York State. The State shall consider compliance by a contractor or subcontractor with the requirements of any federal law concerning equal employment opportunity which effectuates the purpose of this section. The contracting agency shall determine whether the imposition of the requirements of the provisions hereof duplicate or conflict with any such federal law and if such duplication or conflict exists, the contracting agency shall waive the applicability of Section 312 to the extent of such duplication or conflict. Contractor will comply with all duly promulgated and lawful rules and regulations of the Department of Economic Development's Division of Minority and Women's Business Development pertaining hereto.

**13. CONFLICTING TERMS.** In the event of a conflict between the terms of the contract (including any and all attachments thereto and amendments thereof) and the terms of this Appendix A, the terms of this Appendix A shall control.

**14. GOVERNING LAW.** This contract shall be governed by the laws of the State of New York except where the Federal supremacy clause requires otherwise.

**15. LATE PAYMENT.** Timeliness of payment and any interest to be paid to Contractor for late payment shall be governed by Article 11-A of the State Finance Law to the extent required by law.

**16. NO ARBITRATION.** Disputes involving this contract, including the breach or alleged breach thereof, may not be submitted to binding arbitration (except where statutorily authorized), but must, instead, be heard in a court of competent jurisdiction of the State of New York.

**17. SERVICE OF PROCESS.** In addition to the methods of service allowed by the State Civil Practice Law & Rules ("CPLR"), Contractor hereby consents to service of process upon it by registered or certified mail, return receipt requested. Service hereunder shall be complete upon Contractor's actual receipt of process or upon the State's receipt of the return thereof by the United States Postal Service as refused or undeliverable. Contractor must promptly notify the State, in writing, of each and every change of address to which service of process can be made. Service by the State to the last known address shall be sufficient. Contractor will have thirty (30) calendar days after service hereunder is complete in which to respond.

**18. PROHIBITION ON PURCHASE OF TROPICAL HARDWOODS.** The Contractor certifies and warrants that all wood products to be used under this contract award will be in accordance with, but not limited to, the specifications and provisions of Section 165 of the State Finance Law, (Use of Tropical Hardwoods) which prohibits purchase and use of tropical hardwoods, unless specifically exempted, by the State or any governmental agency or political subdivision or public benefit corporation. Qualification for an exemption under this law will be the responsibility of the contractor to establish to meet with the approval of the State.

In addition, when any portion of this contract involving the use of woods, whether supply or installation, is to be performed by any subcontractor, the prime Contractor will indicate and certify in the submitted bid proposal that the subcontractor has been informed and is in compliance with specifications and provisions regarding use of tropical hardwoods as detailed in §165 State Finance Law. Any such use must meet with the approval of the State; otherwise, the bid may not be considered responsive. Under bidder certifications, proof of qualification for exemption will be the responsibility of the Contractor to meet with the approval of the State.

**19. MACBRIDE FAIR EMPLOYMENT PRINCIPLES.** In accordance with the MacBride Fair Employment Principles (Chapter 807 of the Laws of 1992), the Contractor hereby stipulates that the Contractor either (a) has no business operations in Northern Ireland, or (b) shall take lawful steps in good faith to conduct any business operations in Northern Ireland in accordance with the MacBride Fair Employment Principles (as described in Section 165 of the New York State Finance Law), and shall permit independent monitoring of compliance with such principles.

**20. OMNIBUS PROCUREMENT ACT OF 1992.** It is the policy of New York State to maximize opportunities for

the participation of New York State business enterprises, including minority and women-owned business enterprises as bidders, subcontractors and suppliers on its procurement contracts.

Information on the availability of New York State subcontractors and suppliers is available from:

NYS Department of Economic Development  
Division for Small Business  
Albany, New York 12245  
Telephone: 518-292-5100  
Fax: 518-292-5884  
email: [opa@esd.ny.gov](mailto:opa@esd.ny.gov)

A directory of certified minority and women-owned business enterprises is available from:

NYS Department of Economic Development  
Division of Minority and Women's Business Development  
633 Third Avenue  
New York, NY 10017  
212-803-2414  
email: [mwbecertification@esd.ny.gov](mailto:mwbecertification@esd.ny.gov)  
<https://ny.newnycontracts.com/FrontEnd/VendorSearchPublic.asp>

The Omnibus Procurement Act of 1992 requires that by signing this bid proposal or contract, as applicable, Contractors certify that whenever the total bid amount is greater than \$1 million:

- (a) The Contractor has made reasonable efforts to encourage the participation of New York State Business Enterprises as suppliers and subcontractors, including certified minority and women-owned business enterprises, on this project, and has retained the documentation of these efforts to be provided upon request to the State;
- (b) The Contractor has complied with the Federal Equal Opportunity Act of 1972 (P.L. 92-261), as amended;
- (c) The Contractor agrees to make reasonable efforts to provide notification to New York State residents of employment opportunities on this project through listing any such positions with the Job Service Division of the New York State Department of Labor, or providing such notification in such manner as is consistent with existing collective bargaining contracts or agreements. The Contractor agrees to document these efforts and to provide said documentation to the State upon request; and
- (d) The Contractor acknowledges notice that the State may seek to obtain offset credits from foreign countries as a result of this contract and agrees to cooperate with the State in these efforts.

**21. RECIPROCITY AND SANCTIONS PROVISIONS.** Bidders are hereby notified that if their principal place of business is located in a country, nation, province, state or political subdivision that penalizes New York State vendors, and if the goods or services they offer will be substantially produced or performed outside New York State, the Omnibus Procurement Act 1994 and 2000 amendments (Chapter 684 and Chapter 383, respectively) require that they be denied contracts which they would otherwise obtain. NOTE: As of May 15, 2002, the list of discriminatory jurisdictions subject to this provision includes the states of South Carolina, Alaska, West Virginia, Wyoming, Louisiana and Hawaii. Contact NYS Department of Economic Development for a current list of jurisdictions subject to this provision.

**22. COMPLIANCE WITH NEW YORK STATE INFORMATION SECURITY BREACH AND NOTIFICATION ACT.** Contractor shall comply with the provisions of the New York State Information Security Breach and Notification Act (General Business Law Section 899-aa; State Technology Law Section 208).

**23. COMPLIANCE WITH CONSULTANT DISCLOSURE LAW.** If this is a contract for consulting services, defined for purposes of this requirement to include analysis, evaluation, research, training, data processing, computer programming, engineering, environmental, health, and mental health services, accounting, auditing,

paralegal, legal or similar services, then, in accordance with Section 163 (4-g) of the State Finance Law (as amended by Chapter 10 of the Laws of 2006), the Contractor shall timely, accurately and properly comply with the requirement to submit an annual employment report for the contract to the agency that awarded the contract, the Department of Civil Service and the State Comptroller.

**24. PROCUREMENT LOBBYING.** To the extent this agreement is a "procurement contract" as defined by State Finance Law Sections 139-j and 139-k, by signing this agreement the contractor certifies and affirms that all disclosures made in accordance with State Finance Law Sections 139-j and 139-k are complete, true and accurate. In the event such certification is found to be intentionally false or intentionally incomplete, the State may terminate the agreement by providing written notification to the Contractor in accordance with the terms of the agreement.

**25. CERTIFICATION OF REGISTRATION TO COLLECT SALES AND COMPENSATING USE TAX BY CERTAIN STATE CONTRACTORS, AFFILIATES AND SUBCONTRACTORS.**

To the extent this agreement is a contract as defined by Tax Law Section 5-a, if the contractor fails to make the certification required by Tax Law Section 5-a or if during the term of the contract, the Department of Taxation and Finance or the covered agency, as defined by Tax Law 5-a, discovers that the certification, made under penalty of perjury, is false, then such failure to file or false certification shall be a material breach of this contract and this contract may be terminated, by providing written notification to the Contractor in accordance with the terms of the agreement, if the covered agency determines that such action is in the best interest of the State.

**26. IRAN DIVESTMENT ACT.** By entering into this Agreement, Contractor certifies in accordance with State Finance Law §165-a that it is not on the "Entities Determined to be Non-Responsive Bidders/Offerers pursuant to the New York State Iran Divestment Act of 2012" ("Prohibited Entities List") posted at: <http://www.ogs.ny.gov/about/regs/docs/ListofEntities.pdf>

Contractor further certifies that it will not utilize on this Contract any subcontractor that is identified on the Prohibited Entities List. Contractor agrees that should it seek to renew or extend this Contract, it must provide the same certification at the time the Contract is renewed or extended. Contractor also agrees that any proposed Assignee of this Contract will be required to certify that it is not on the Prohibited Entities List before the contract assignment will be approved by the State.

During the term of the Contract, should the state agency receive information that a person (as defined in State Finance Law §165-a) is in violation of the above-referenced certifications, the state agency will review such information and offer the person an opportunity to respond. If the person fails to demonstrate that it has ceased its engagement in the investment activity which is in violation of the Act within 90 days after the determination of such violation, then the state agency shall take such action as may be appropriate and provided for by law, rule, or contract, including, but not limited to, imposing sanctions, seeking compliance, recovering damages, or declaring the Contractor in default.

The state agency reserves the right to reject any bid, request for assignment, renewal or extension for an entity that appears on the Prohibited Entities List prior to the award, assignment, renewal or extension of a contract, and to pursue a responsibility review with respect to any entity that is awarded a contract and appears on the Prohibited Entities list after contract award.

January 2014

Applicant Company Name: \_\_\_\_\_

**APPENDIX B**

**Budget Proposal**

Refer to Section 3.1.7 item for additional guidance on completing the following budget.

PERSONNEL (Please list specific titles)	
<b><u>Title</u></b>	<b><u>Hourly Rate</u></b>
Senior Partner	\$ _____
Junior Partner	\$ _____
Senior Associate	\$ _____
Junior Associate	\$ _____
Associate Attorney	
Paralegal	\$ _____
Support Staff	\$ _____

Provide only a single rate for each title. Do not provide a range of billing rates for any individual title.

Each rate shall be INCLUSIVE of ancillary costs such as, but not limited to, salary, fringe, taxes, overhead and profit.

Direct expenses including but not limited to photocopies, postage, telecommunication, court fees, travel, and filing fees shall be billed at cost in addition to personnel.

**APPENDIX C**

NON-COLLUSIVE BIDDING CERTIFICATION REQUIRED BY SECTION 139-D OF THE STATE FINANCE LAW

SECTION 139-D, Statement of Non-Collusion in bids to the State

**BY SUBMISSION OF THIS BID, BIDDERS AND EACH PERSON SIGNING ON BEHALF OF BIDDER CERTIFIES, AND IN THE CASE OF JOINT BID, EACH PARTY THERETO CERTIFIES AS TO ITS OWN ORGANIZATION, UNDER PENALTY OF PERJURY, THAT TO THE BEST OF HIS/HER KNOWLEDGE AND BELIEF:**

1. The prices of this bid have been arrived at independently, without collusion, consultation, communication, or agreement, for the purpose of restricting competition, as to any matter relating to such prices with any other Bidder or with any competitor;
2. Unless otherwise required by law, the prices which have been quoted in this bid have not been knowingly disclosed by the Bidder and will not knowingly be disclosed by the Bidder prior to opening, directly or indirectly, to any other Bidder or to any competitor; and
3. No attempt has been made or will be made by the bidder to induce any other person, partnership or corporation to submit or not to submit a bid for the purpose of restricting competition.

**A BID SHALL NOT BE CONSIDERED FOR AWARD NOR SHALL ANY AWARD BE MADE WHERE 1, 2, 3 ABOVE HAVE NOT BEEN COMPLIED WITH; PROVIDED HOWEVER, THAT IF IN ANY CASE THE BIDDER(S) CANNOT MAKE THE FORGOING CERTIFICATION, THE BIDDER SHALL SO STATE AND SHALL FURNISH BELOW A SIGNED STATEMENT WHICH SETS FORTH IN DETAIL THE REASONS THEREFORE:**

**[BIDDERS AFFIX ADDENDUM TO THIS PAGE IF SPACE IS REQUIRED FOR STATEMENT]**

Subscribed to under penalty of perjury under the laws of the State of New York, this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_ as the act and deed of said individual, corporation or partnership.

**Person Legally Responsible for Binding Bidder**

Name \_\_\_\_\_ Title \_\_\_\_\_

Signature \_\_\_\_\_

**Joint or combined bids must be certified on behalf of each participant**

\_\_\_\_\_  
Legal name of person, firm or corporation

\_\_\_\_\_  
Legal name of person, firm or corporation

**Person(s) Legally Responsible for Binding Participant**

Name \_\_\_\_\_

Name \_\_\_\_\_

Title \_\_\_\_\_

Title \_\_\_\_\_

Business Address \_\_\_\_\_

Business Address \_\_\_\_\_

## Appendix D

### **Contractor travel reimbursement guidelines**

Any travel related to the project must be approved by NYSDED prior to incurring any travel related costs.

The maximum per diem rates permitted by the travel guidelines of the New York State Office of State Comptroller can be found at the following web site:

<http://www.osc.state.ny.us/agencies/travel/travel.htm>

## APPENDIX E

### NONDISCRIMINATION IN EMPLOYMENT IN NORTHERN IRELAND: MACBRIDE FAIR EMPLOYMENT PRINCIPLES

In accordance with section 165 of the State Finance Law, the bidder, by submission of this bid certifies that it or any individual or legal entity in which the bidder holds a 10% or greater ownership interest, or any individual or legal entity that holds a 10% or greater ownership in the bidder, either: (answer yes or no to one or both of the following, as applicable),

- (1) has business operations in Northern Ireland;

Yes \_\_\_\_ or No \_\_\_\_

if yes:

- (2) shall take lawful steps in good faith to conduct any business operations that it has in Northern Ireland in accordance with the MacBride Fair Employment Principles relating to nondiscrimination in employment and freedom of workplace opportunity regarding such operations in Northern Ireland, and shall permit independent monitoring of their compliance with such Principles.

Yes \_\_\_\_ or No \_\_\_\_

---

Signature

Date

## APPENDIX F

Vendor Name: \_\_\_\_\_

NYS Vendor ID # (if one has been assigned) \_\_\_\_\_

### Vendor Responsibility Information

Effective January 1, 2005, the Office of the State Comptroller has conveyed that all requests for NYS contract approval must include information regarding Vendor Responsibility for the Contractor. **In addition any subcontractor on a state contract receiving \$100,000 or more must also complete the Vendor Responsibility Questionnaire.** The NYS Department of Economic Development recommends that vendors file the required questionnaire online via the NYS VendRep System. To enroll in and use the system and complete the questionnaire, see the instructions available at:

[http://www.osc.state.ny.us/vendrep/info\\_vrsystem\\_vendor.htm](http://www.osc.state.ny.us/vendrep/info_vrsystem_vendor.htm) or go directly to the VendRep System online at <http://portal.osc.state.ny.us>.

Failure to submit a completed questionnaire may result in either a grant or designation being rescinded or delayed. In addition, the NYS Department of Economic Development reserves the right to rescind upon a finding that the recipient is deemed not responsible to receive funds.

Please check one of the following:

- A Vendor Responsibility Questionnaire has been filed online and has been certified/updated within the last six months. Date certified online: \_\_\_\_\_
- A Vendor Responsibility Questionnaire is attached hereto. (paper version can be found and printed at: <http://www.osc.state.ny.us/vendrep/documents/questionnaire/ac3290s.pdf>)

## APPENDIX G

### PROCUREMENT LOBBYING DISCLOSURE PURSUANT TO SECTIONS 139-J AND 139-K OF STATE FINANCE LAW

(For Agreements of \$15,000 or more please complete this form.)

#### Statutory Summary

Changes to the New York State Finance Law (referred to as the “new State Finance Law”) effective January 1, 2006, significantly alter the administrative process for the development of State procurement contracts<sup>1</sup>. The procedures discussed herein are put in place to address the new State Finance Law. The New York State Department of Economic Development recognizes the considerable additional responsibility that the new State Finance Law places on potential bidders (“Offerers”) as well as on the Department and we regret any inconvenience. The Department assures you that we are interested in receiving a proposal from your company. Among other things, the new law:

- Makes the States lobbying law applicable to attempts to influence procurement contracts once the procurement process has been commenced by the Department.
- Requires the Department to record **all** contacts made by lobbyists and contractors (you) about a governmental procurement so that the public knows who is contacting the Department about procurements.
- Requires the Department to designate persons who generally may be the **only** staff contacted relative to the Department’s procurement in a restricted period.
- Authorizes the imposition of fines and penalties against persons/organizations engaging in impermissible contacts about a Department procurement and provides for the debarment of repeat violators.
- Directs the Office of General Services to disclose and maintain a list of non-responsible bidders pursuant to this new law and those who have been debarred and publish such list on its website.
- Expands the definition of lobbying to include procurement contracts.

Generally speaking, two related aspects of procurements were affected: (i) activities by the business and lobbying community seeking procurement contracts and (ii) activities involving governmental agencies establishing procurement contracts. The obligations imposed by State Finance Law Sections 139-j and 139-k are collectively referred to as the “new State Finance Law”. State Finance Law Sections 139-j and 139-k may be viewed at <http://www.ogs.state.ny.us/aboutogs/regulations/advisoryCouncil/sfl139-j.htm> and at <http://www.ogs.state.ny.us/aboutogs/regulations/advisoryCouncil/sfl139-k.htm>

The following contains language and forms (these forms must be completed and returned as part of your proposal, and when indicated at other times during this procurement process) to be reviewed and completed by you the bidder (“Offerer”), in compliance with sections 139-J and 139-k of the State Finance Law.

#### NYS Department of Economic Development Policy Language

Pursuant to State Finance Law §§139-j and 139-k, this Invitation for Bid includes and imposes certain restrictions on communications between the Department and an Offerer/bidder during the procurement process. An Offerer/bidder is restricted from making contacts from the earliest notice of intent to solicit offers through final award and approval of the Procurement Contract by the Department and Office of the State Comptroller (“restricted period”) to other than designated staff unless it is a contact that is included among certain statutory exceptions set forth in State Finance Law §139-j(3)(a). Designated staff, as of the date hereof, are any member of the Department’s Contract Management or Publications Unit. To avoid conflicts and other issues concerning statutory exceptions, the Department requires that Offerers contact only Department staff identified in the aforementioned section of this solicitation. Department employees are also required to obtain certain information when contacted during the restricted period and make a determination of the responsibility of the Offerer/bidder pursuant to these two statutes. Certain findings of non-responsibility can result in rejection for contract award and in the event of two findings within a 4 year period, the Offerer/bidder is debarred from obtaining governmental Procurement Contracts. Further information about these requirements can be found at <http://www.ogs.state.ny.us/aboutOgs/regulations/defaultAdvisoryCouncil.html> or by calling the New York State Office of General Services; Ms. Anne Phillips, OGS Legal Services, Empire State Plaza, 41<sup>st</sup> Floor Tower Building, Empire State Plaza, Albany NY 12242. Telephone: (518) 474-5607. E-mail: [Anne.Phillips@OGS.State.NY.US](mailto:Anne.Phillips@OGS.State.NY.US).

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<sup>1</sup> “Procurement contract” shall mean any contract or other agreement for an article of procurement involving an estimated annualized expenditure in excess of fifteen thousand dollars. Grants, article eleven-B state finance law contracts, program contracts between not-for-profit organizations, as defined in article X1-B of the state finance law, and the unified court system, intergovernmental agreements, railroad and utility force accounts, utility relocation project agreements or orders and eminent domain transactions shall not be deemed procurement contracts.

**Termination Provisions**

The Department also reserves the right to terminate any PO resulting from this IFB in the event it is found that the certification filed by the Contractor in accordance with New York State Finance Law §139-k was intentionally false or intentionally incomplete. Upon such finding, the Department may exercise its termination right by providing written notification to the Contractor in accordance with the written notification terms of this contract.

**Form 1 - Offerer’s Affirmation of Understanding of and Agreement pursuant to State Finance Law §139-j (3) and §139-j (6) (b)**

State Finance Law §139-j(6)(b) provides that: Every Governmental Entity shall seek written affirmations from all Offerers as to the Offerer’s understanding of and agreement to comply with the Governmental Entity’s procedures relating to permissible contacts during a Governmental Procurement pursuant to subdivision three of this section.

The Department must obtain the required affirmation of understanding and agreement to comply with procedures on procurement lobbying restrictions regarding permissible Contacts in the restricted period for a procurement contract in accordance with State Finance Law §§139-j and 139-k.

Offerer affirms that it understands and agrees to comply with the procedures of the Department relative to permissible contacts as required by State Finance Law §139-j (3) and §139-j (6) (b).

By: \_\_\_\_\_ Date: \_\_\_\_\_

Name: \_\_\_\_\_ Title: \_\_\_\_\_

Contractor Name: \_\_\_\_\_

Contractor Address: \_\_\_\_\_

**Form 2 - Offerer’s Certification of Compliance with State Finance Law §139-k(5)**

New York State Finance Law §139-k(5) requires that every Procurement Contract award subject to the provisions of State Finance Law §§139-k or 139-j shall contain a certification by the Offerer that all information provided to the procuring Governmental Entity with respect to State Finance Law §139-k is complete, true and accurate.

The Department must obtain the required certification that the information is complete, true and accurate regarding any prior findings of non-responsibility, such as non-responsibility pursuant to State Finance Law §139-j. The Offerer must agree to the certification and provide it to the procuring Governmental Entity.

Offerer Certification:

I certify that all information provided to the Department with respect to State Finance Law §139-k is complete, true and accurate.

By: \_\_\_\_\_ Date: \_\_\_\_\_

Name: \_\_\_\_\_ Title: \_\_\_\_\_

Contractor Name: \_\_\_\_\_

Contractor Address: \_\_\_\_\_

**Form 3 - Offerer Disclosure of Prior Non-Responsibility Determinations**

New York State Finance Law §139-k(2) obligates a Governmental Entity to obtain specific information regarding prior non-responsibility determinations with respect to State Finance Law §139-j. This information must be collected in addition to the information that is separately obtained pursuant to State Finance Law §163(9). In accordance with State Finance Law §139-k, an Offerer must be asked to disclose whether there has been a finding of non-responsibility made within the previous four (4) years by any Governmental Entity due to: (a) a violation of State Finance Law §139-j or (b) the intentional provision of false or incomplete information to a Governmental Entity. The terms "Offerer" and "Governmental Entity" are defined in State Finance Law § 139-k(1). State Finance Law §139-j sets forth detailed requirements about the restrictions on Contacts during the procurement process. A violation of State Finance Law §139-j includes, but is not limited to, an impermissible Contact during the restricted period (for example, contacting a person or entity other than the designated contact person, when such contact does not fall within one of the exemptions).

As part of its responsibility determination, State Finance Law §139-k(3) mandates consideration of whether an Offerer fails to timely disclose accurate or complete information regarding the above non-responsibility determination. In accordance with law, no Procurement Contract shall be awarded to any Offerer that fails to timely disclose accurate or complete information under this section, unless a finding is made that the award of the Procurement Contract to the Offerer is necessary to protect public property or public health safety, and that the Offerer is the only source capable of supplying the required Article of Procurement within the necessary timeframe. See State Finance Law §§139-j (10)(b) and 139-k(3).

The Department must include a disclosure request regarding prior non-responsibility determinations in accordance with State Finance Law §139-k in its solicitation of proposals or bid documents or specifications or contract documents, as applicable, for procurement contracts. The attached form is to be completed and submitted by the individual or entity seeking to enter into a Procurement Contract. It shall be submitted to the Governmental Entity conducting the Governmental Procurement.

**Offerer Disclosure of Prior Non-Responsibility Determinations**

Name of Individual or Entity Seeking to Enter into the Procurement Contract: \_\_\_\_\_

Address: \_\_\_\_\_

Name and Title of Person Submitting this Form: \_\_\_\_\_ Date: \_\_\_\_\_

1. Has any Governmental Entity made a finding of non-responsibility regarding the individual or entity seeking to enter into the Procurement Contract in the previous four years? (Please circle):  
No Yes

If yes, please answer the next questions:

2. Was the basis for the finding of non-responsibility due to a violation of State Finance Law §139-j (Please circle):  
No Yes

3. Was the basis for the finding of non-responsibility due to the intentional provision of false or incomplete information to a Governmental Entity? (Please circle):  
No Yes

4. If you answered yes to any of the above questions, please provide details regarding the finding of non-responsibility below.  
Governmental Entity: \_\_\_\_\_

Date of Finding of Non-responsibility: \_\_\_\_\_

Basis of Finding of Non-Responsibility: \_\_\_\_\_

(Add additional pages as necessary)

5. Has any Governmental Entity or other governmental agency terminated or withheld a Procurement Contract with the above-named individual or entity due to the intentional provision of false or incomplete information? (Please circle):  
No Yes

6. If yes, please provide details below.

Governmental Entity: \_\_\_\_\_

Date of Termination or Withholding of Contract: \_\_\_\_\_

Basis of Termination or Withholding: \_\_\_\_\_

(Add additional pages as necessary)

OFFERER CERTIFIES THAT ALL INFORMATION PROVIDED TO THE GOVERNMENTAL ENTITY WITH RESPECT TO  
STATE FINANCE LAW §139-K IS COMPLETE, TRUE AND ACCURATE.

By: \_\_\_\_\_ Date: \_\_\_\_\_

Signature: \_\_\_\_\_

**Form 4 - Report of Contact under State Finance Law §139-k(4)**

**THIS FORM TO BE COMPLETED AND RETURNED TO THE DEPARTMENT WHENEVER YOU CONTACT US DURING THE DESIGNATED PERIOD. ATTEMPTS TO CONTACT THE DEPARTMENT WILL NOT BE ACKNOWLEDGED UNLESS YOU PROVIDE THIS FORM. THIS INCLUDES THE SUBMISSION OF QUESTIONS REGARDING THIS IFB.**

New York State Finance Law §139-k(4) obligates every Governmental Entity during the Restricted Period of a Procurement Contract to make a written record of any Contacts made. The term "Contact" is defined by statute and refers to those oral, written or electronic communications that a reasonable person would infer are attempts to influence the Governmental Procurement. In addition to obtaining the required identifying information, the Governmental Entity must inquire and record whether the person or organization that made the Contact was the Offerer or was retained, employed or designated on behalf of the Offerer to appear before or Contact the Governmental Entity.

It should be noted that State Finance Law §139-k(6) provides: [a]ny communications received by a governmental entity from members of the state legislature, or legislative staffs, when acting in their official capacity, shall not be considered to be a "contact" within the meaning of this section and shall not be recorded by a governmental entity pursuant to this section.

Offerers and those designated, employed or retained by Offerers are hereby advised of the Department's intention to record all Contacts.

**Record of Contact Under State Finance Law §139-k(4)**

To: The New York state Department of Economic Development

Regarding Procurement Project No.: \_\_\_\_\_ (See first page of this document) Date: \_\_\_\_\_

From: \_\_\_\_\_  
(Name and title of Offerer)

Subject: Record of Contact under State Finance Law §139-k(4). In accordance with State Finance Law §139-k(4), the following information is provided).

Address of Offerer: \_\_\_\_\_

\_\_\_\_\_ Telephone Number: \_\_\_\_\_

Offerer's Place of Principal Employment (Name and Address of your Employer, may be different from the Offerer's name and address, if not state same as above).

\_\_\_\_\_

Your Occupation: \_\_\_\_\_

1. Is the above named person or organization the "Offerer" in this governmental procurement? Please circle Yes or No

2. If no, was the above named person or organization retained, employed or designated by the "Offerer" to:

- Appear before the governmental entity about the governmental procurement? Please circle – Yes or No
- Contact the governmental entity about the governmental procurement? Please circle – Yes or No

**Bidder's Identifying Data**

**Bidder's Name** \_\_\_\_\_

**Business Address** \_\_\_\_\_  
Street

\_\_\_\_\_

City

State

Zip

Telephone \_\_\_\_\_ Fax \_\_\_\_\_ E-mail \_\_\_\_\_

**Federal id. Number** \_\_\_\_\_

**If Bidder is a Partnership complete the following:**

Name of Partners or Principals

Business Address

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**If Bidder is a Corporation complete the following:**

Name

Business Address

\_\_\_\_\_  
President

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
Secretary

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
Treasurer

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_