

## Joint Solicitation for the Development of the Empire Station Complex

### Addendum #2

Release Date: February 25, 2016

- 1) For prospective respondents to the Farley RFP, the following materials have been uploaded to the Dropbox for this solicitation ([www.bit.ly/empirestation](http://www.bit.ly/empirestation)):
  - a. **Farley Building Insurance Requirements:** Summarizes information with respect to the nature of insurance that Respondents should assume that they and other parties will be required to carry if selected.
  - b. **Form of Submission Security LC:** The form for the \$15,000,000 letter of credit to be included in the Respondent's submission.
  - c. **Form of Construction Commencement Security LC:** The form of the letter of credit for an amount to-be-determined associated with construction commencement to be provided by the Selected Developer.
  - d. **OCS D Diversity Practices Questionnaire:** Questionnaire of information Respondents are required to submit with their Proposal.
  - e. **Diversity Practices Scoring Matrix:** Methodology by which Diversity Practices Questionnaire will be scored.
  - f. **Moynihan Phase II Value Engineering Recommendations:** Includes a list of potential value-engineering opportunities for consideration based on a November 2015 workshop.

Each of the foregoing is added to and made part of the Farley RFP.

- 2) The Project Sponsors are amending the Farley RFP as follows:

On page 44, in the first sentence of the second paragraph in "Developer Payments & Deposits", the words "bond or" are deleted. Only letters of credit, issued by an Eligible Security Issuer (as defined below) will be accepted as Submission Security and as Construction Commencement Security (each as defined below).

On page 44, the third paragraph in "Developer Payments & Deposits" is deleted and replaced with the following:

"By submission of its proposal, each Respondent acknowledges and agrees to the following:

- (a) The Submission Security shall be provided in the form of a letter of credit issued by an Eligible Security Issuer<sup>1</sup> substantially in the form to be provided by ESD in an addendum to this RFP or such other form as shall be satisfactory to ESD. If a letter of credit submitted by a Respondent is determined by ESD to be nonconforming or otherwise unacceptable to ESD, ESD will so notify the Respondent, and ESD may either (x) reject the Respondent's proposal or (y) allow the Respondent 10 days to provide a letter of credit issued by an Eligible Security Issuer that is satisfactory to ESD, and if the Respondent then fails to deliver to ESD within such period a letter of credit that is satisfactory to ESD, ESD may reject the Respondent's proposal. The Respondent shall deliver to ESD with each such letter of credit evidence demonstrating that the issuer is an Eligible Security Issuer. If at any time following Respondent's delivery to ESD of a letter of credit, the issuer of such letter of credit shall fail to be an Eligible Security Issuer, the Respondent shall promptly notify ESD in writing and, within 10 days of such notice, or regardless of such notice within 10 days after ESD's demand, the Respondent shall deliver to ESD a satisfactory replacement letter of credit from an Eligible Security Issuer. After ESD's receipt of a replacement letter of credit satisfactory to ESD, ESD will promptly return to the Respondent the replaced letter of credit
- (b) Upon being conditionally designated by ESD as the Selected Developer, Respondent will negotiate with ESD and the other Project Sponsors in order to reach closing on all binding documents necessary for the Project within 90 days of such designation. If closing on such binding documents is not achieved within such 90-day period, (x) ESD may agree to extend the period for negotiations or (y) after conclusion of such 90-day period or any extension period, ESD may terminate the Respondent's conditional designation as the Selected Developer, may pursue negotiations with another Respondent, and may draw on the Submission Security as provided below.
- (c) ESD may draw on the Submission Security if ESD determines, in the exercise of its reasonable judgment, that the conditionally designated Selected Developer: (i) explicitly or implicitly withdrew, repudiated or otherwise indicated that it will not perform in accordance with its proposal or any material element thereof; (ii) cannot substantially perform all of the material elements of its proposal; (iii) failed to attend and actively participate in reasonably scheduled negotiation meetings, insists on terms or conditions of any documents that are inconsistent with this RFP or such Respondent's proposal or otherwise fails to negotiate in good faith; (v) fails to timely deliver to ESD the Construction Commencement Security (as defined below)

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<sup>1</sup> "Eligible Security Issuer" means a bank: (i) which either is (A) a member of the New York Clearing House Association; or (B) a non-member bank reasonably acceptable to ESD; (ii) (A) whose most recent issue of long term debt is rated A or better (as rated by Standard & Poor's) or A or better (as rated by Moody's Investors Service, Inc.) and (B) which has (1) assets in excess of seven billion five hundred million United States dollars (US\$7,500,000,000) and (2) a net worth in excess of three hundred million United States dollars (US\$300,000,000), in each case as adjusted for inflation, from the date hereof to the date of posting each requirement set forth in this clause; and (iii) which has an office in New York City at which a letter of credit issued by such bank may be presented for payment and/or provides a process, satisfactory to ESD, for electronic presentation for payment.

as required by this RFP; (vi) fails to timely deliver to ESD a replacement letter of credit issued by an Eligible Security Issuer as required by this RFP; or (vii) refuses to promptly and timely execute and deliver to ESD and the other Project Sponsors any material binding document that is consistent with this RFP, the Respondent's proposal or a comprehensive terms sheet that may be entered into between ESD and the conditionally designated Selected Developer.

- (d) Prior to closing on the binding documents, the Respondent must provide additional security in the form of a letter of credit in an amount equal to 5% of the amount of the Train Hall Work Fixed Price (the "Construction Commencement Security"). After ESD's receipt of a Construction Commencement Security letter of credit satisfactory to ESD and execution and delivery by all parties of all binding documents, ESD will promptly return to the Respondent the Submission Security letter of credit. The Construction Commencement Security is in addition to the performance and payment bonds and any other security required to be provided by the Selected Developer.
- (e) The Construction Commencement Security shall be provided in the form of a letter of credit issued by an Eligible Security Issuer substantially in the form to be provided by ESD in an addendum to this RFP or such other form as shall be satisfactory to ESD. If the letter of credit submitted to ESD by the Respondent is determined by ESD to be nonconforming or otherwise unacceptable to ESD, ESD will so notify the Respondent and allow the Respondent 10 days to provide a letter of credit from an Eligible Security Issuer that is satisfactory to ESD, and if the Respondent fails to deliver to ESD within such period a letter of credit that is satisfactory to ESD, ESD may revoke the Respondent's designation as the Selected Developer, reject the Respondent's proposal, and draw the full amount of the Submission Security.
- (f) The Respondent shall deliver to ESD with the Construction Commencement Security evidence demonstrating that the issuer of such letter of credit is an Eligible Security Issuer. If at any time following Respondent's delivery to ESD of the Construction Commencement Security, the issuer shall fail to be an Eligible Security Issuer, the Respondent shall promptly notify ESD in writing and, within 10 days of such notice, or regardless of such notice within 10 days after ESD's demand therefor, the Respondent shall deliver to ESD a satisfactory replacement letter of credit from an Eligible Security Issuer. If Respondent fails to deliver to ESD within such period a replacement letter of credit, ESD, at its discretion, may extend the period or may immediately draw the full amount of the letter of credit in ESD's possession and pursue any other remedies ESD may have with respect to the Respondent, including without limiting the foregoing revoking the Respondent's designation as the Selected Developer, terminating the binding documents, and rejecting the Respondent's proposal. If the Respondent timely provides to ESD a replacement letter of credit satisfactory to ESD, ESD will promptly return to the Respondent the replaced letter of credit.

- (g) The Development Agreement will include a deadline for the commencement of construction, after which date, if construction has not commenced, (x) ESD may agree to extend the period for commencement of construction or (y) ESD, after the end of such period or any extension thereof, may terminate the binding agreements, may revoke the Respondent's designation as the Selected Developer, and may draw upon the Construction Commencement Security. After the commencement of construction of the Train Hall Work (including the delivery to ESD of the executed construction contract, payment and performance bonds, each with a multiple obligee rider, evidence of all required construction insurance, and other security for completion of the Train Hall Work and the Selected Developer's other obligations to ESD with respect to the Project (*e.g.*, a completion guarantee backed by a letter of credit issued by an Eligible Security Issuer), each in form satisfactory to ESD) and Selected Developer's diligent prosecution of such work for 30 days in accordance with the ESD approved construction contract schedule, ESD will promptly surrender to the Selected Developer the Construction Commencement Security.
- (h) Forfeiture of the Submission Security and the Construction Commencement Security will constitute liquidated damages. Such liquidated damages are reasonable in order to compensate ESD and the other Project Sponsors for damages any of them will incur as a result of the Respondent's failure to satisfy its obligations pursuant to this RFP which the Respondent acknowledged and agreed to by submitting its proposal or the binding documents. Such damages include potential harm to the credibility and reputation of the Project Sponsors, Project delays and incidental and consequential damages resulting therefrom, additional costs of administering this or a new procurement, including, without limiting the foregoing, engineering, legal, accounting, consultant, advisor, overhead and other administrative costs, and other direct, incidental and consequential damages. These damages would be difficult and impractical to measure and prove and are incapable of accurate measurement because of, among other things, the unique nature of the Project and the efforts required to receive and evaluate proposals for the Project and the unavailability of a substitute for those efforts. The amounts of liquidated damages stated in this RFP represent good faith estimates and evaluations as to the actual potential damages that ESD and the other Project Sponsors would incur as a result of the Respondent's failure to satisfy the obligations under the RFP or the binding documents that the Respondent agreed to when it submitted its proposal or delivered the binding documents and do not constitute a penalty. By submitting its proposal the Respondent agrees to such liquidated damages in light of the foregoing and in order to fix and limit the Respondent's costs and to avoid disputes over what amounts of damages are properly chargeable to the Respondent."

On page 49, the criteria item titled “MWBE/SDVOB” is deleted and replaced with the following:

Diversity Practices	Respondents to the RFP will be evaluated for Diversity Practices using the attached Diversity Practices Scoring Matrix (to be provided in Addendum #2 to this RFP). Up to 5 percent will be awarded based upon the contents of the Diversity Practices Questionnaire (to be provided in addendum #2 to this RFP) submitted by each Respondent to the RFP.	5%
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Any questions regarding this addendum may be submitted to the designated contact account for this solicitation at [empirestation@esd.ny.gov](mailto:empirestation@esd.ny.gov). To receive updates when new addendum are posted to the ESD website, please email [empirestation@esd.ny.gov](mailto:empirestation@esd.ny.gov). If you have already emailed this account, you will be notified of future updates.