

# Request for Proposals Buffalo Outer Harbor Events & Concessions Management



Issued by:

## **Erie Canal Harbor Development Corporation**

A subsidiary of the New York State Urban Development Corporation  
d/b/a Empire State Development  
95 Perry Street, Suite 500  
Buffalo, NY 14203

**Issued: April 16, 2020**

**Proposals Due: 12:00 PM on July 9, 2020**

The designated contact for this solicitation is:

Jill Clark, 716.572.6728

[jill.clark@esd.ny.gov](mailto:jill.clark@esd.ny.gov)

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## **I. INVITATION TO SUBMIT PROPOSALS**

The Erie Canal Harbor Development Corporation (“ECHDC”), a subsidiary of the New York State Urban Development Corporation d/b/a Empire State Development (“ESD”), seeks a partner to invest in the operation of events and concessions at designated land areas (the “Licensed Premises”) on the Outer Harbor in Buffalo, Erie County, New York. A proposal must demonstrate relevant experience, expertise, programmatic alignment and resources to operate the designated spaces and develop compatible, quality programs, events or concessions in collaboration with ECHDC management. ECHDC seeks proposals for a public/ private enterprise aligned with its mission and tailored to the Outer Harbor. Proposals submitted in response to this RFP must be compatible with existing partnerships and operations, and present limited impacts on the environmental setting and existing uses of the site. Proposals must reflect excellence, professionalism, quality and value in selection and execution of programming, concession offerings and visitor/ customer services. ECHDC’s intent is to exercise careful discretion to achieve a sensitive and balanced activation of the Licensed Premises in accordance with the requirements of this RFP and the License.

This RFP will result in the award of a license agreement (“License”) to the successful party (“Operator”). A sample license agreement (“Sample License”) is provided in this RFP. The designated premises that are subject to the License are defined herein and referred to as the “Licensed Premises.” The License will be in accordance with the terms and conditions set forth in this RFP, the Sample License, ECHDC’s operating requirements, and all applicable laws, rules, regulations and policies.

ECHDC will not consider proposals conditioned on a respondent’s use of additional Outer Harbor land, facilities or resources that are not contemplated in this RFP.

## **II. LICENSE TERM**

The term of the License will be for a period of three (3) years and three (3) months commencing January 1, 2021 and expiring on March 31, 2024.

## **III. RFP TIMELINE & SUBMISSION INSTRUCTIONS**

The following timeline is established for this RFP and is subject to change. ECHDC may extend the due date for proposals by issuance of published addenda to this RFP. Prior to submitting a proposal, respondents should check the NY State Contract Reporter website (<https://www.nyscr.ny.gov/>) to confirm the issuance of addenda relating to the RFP schedule.

RFP Released: April 16, 2020

Questions Due: 5:00 pm EST on May 29, 2020  
Answers to Questions Issued: By 5:00 pm EST on June 5, 2020  
**Proposals Due: 12:00 pm EST on July 9, 2020**  
Oral Presentations: July 23, 2020

Respondents are required to submit one (1) original, seven (7) copies, and one (1) electronic copy of their submittal prior to 12:00 PM EST on July 9, 2020. Responses shall be firmly sealed in an envelope or box and contain the Respondent's name and return address. Under no circumstances will ECHDC obligate itself to consider a response which is received after the deadline or does not include the basic items described above.

RFP responses shall be delivered to:

**Erie Canal Harbor Development Corporation**  
*Attn: Outer Harbor Events & Concessions Management RFP*  
**95 Perry Street, Suite 500**  
**Buffalo, New York 14203**

The ECHDC reserves the right to reject a submittal if any document or item listed in this RFP is incomplete, improperly executed, indefinite, ambiguous, and/or is missing. Additionally, factors such as, but not limited to, the following may also disqualify a respondent without further consideration:

- Evidence of collusion among Respondents;
- Any attempt to improperly influence any member of the evaluation panel or Committees;
- Discovery that a Respondent purposely misled or knowingly provided false or inaccurate information in a submittal;
- A Respondent's default under any type of agreement, which resulted in the termination of that agreement;
- Existence of any unresolved litigation or legal disputes between respondents and ECHDC or ESD

The ECHDC reserves the right to reject any and all submittals and to waive any informalities or irregularities in procedure.

## IV. CONTACT INFORMATION

### A. Designated Contact

The ONLY Designated Contact for this RFP process is:

Jill Clark, Manager of Waterfront Operations

E-mail: [jill.clark@esd.ny.gov](mailto:jill.clark@esd.ny.gov)

Phone: 716-572-6728

Mailing Address: Erie Canal Harbor Development Corporation  
95 Perry Street, 5<sup>th</sup> Floor  
Buffalo, NY 14203

NOTE: Interested parties may communicate with ECHDC staff to pose questions during a site visit, and confirm receipt by ECHDC of submitted inquiries, the issuance of addenda and to verify the timely submission of a proposal.

Prohibited contact or communication may result in disqualification from participation in the RFP.

### B. Site Tour

A site tour of the Licensed Premises is recommended. Outer Harbor grounds are open on a regular operating schedule, however not all interior spaces of the Licensed Premises are currently open to the public. Site tours may be scheduled **after** May 15, 2020 by contacting Jill Clark (contact information above) via email to schedule. No more than two (2) people may attend a site tour and current social distancing recommendations must be followed.

Parties should first carefully review the RFP and published addenda when scheduling a site visit. ECHDC tour staff can provide site orientation and information about the Licensed Premises as set forth in the RFP and published addenda. To ensure a timely response to inquiries, substantive questions arising during a site visit **must be submitted in writing** to ECHDC, preferably within three days of the visit.

### **C. Questions & Inquiries**

All questions, inquiries and requests for information regarding this RFP must be made in writing and emailed to ECHDC at the address listed in the “Designated Contacts” section. All questions are due on May 29, 2020 by 5:00 pm EST. Individual responses will not be provided. ECHDC will provide written responses to questions in the form of addenda to the RFP which shall be published on the NY State Contract Reporter website (<https://www.nyscr.ny.gov/>) by June 5, 2020 at 5:00 pm EST. Official addenda issued by ECHDC are the only authorized method used to communicate substantive information, including the clarification or modification of the timeline, terms, or other requirements of this RFP.

### **V. BACKGROUND**

#### Buffalo, New York

Buffalo is the second most populous city in the state of New York, second only to New York City. Located in Western New York State on the eastern shores of Lake Erie and at the head of the Niagara River, Buffalo is the principal city of the Buffalo-Niagara Falls metropolitan area and the seat of Erie County. The city itself has nearly 300,000 residents in 52.5 square miles, while the entire metropolitan area has over 1,250,000 residents.



**Buffalo's Waterfront: Canalside (foreground) and Outer Harbor (background)**

### Outer Harbor

In September 2013, New York Governor Andrew M. Cuomo presented his vision for a dramatic transformation of the City of Buffalo's largely vacant Outer Harbor waterfront. This has included the transfer of approximately 350 acres of waterfront land from the Niagara Frontier Transportation Authority (NFTA) to the ECHDC, whose mission and resources will better enable it to support and expedite the land's redevelopment.

Historically created through land filling along the Lake Erie shoreline, the NFTA (then the Niagara Frontier Port Authority) had used the northern portion of this property since the late 1950s for outdoor storage of sand, salt, gravel, and other bulk materials, as well as similar industrial port-related activities; these all ceased in the late 1990s. The southern portion of the lands has operated as the "NFTA Boat Harbor", a marina for small private boats. In addition, during the 2000s, an NFTA-owned inlet south of the marina was progressively improved by NFTA and became known as "Gallagher Beach", which largely facilitated wind surfing and personal watercraft use.

Approximately 182 acres of the transferred Outer Harbor lands, including the NFTA Boat Harbor and Gallagher Beach, is now being operated by the NYS Office of Parks, Recreation and Historic Preservation (“State Parks”) and designated as “Buffalo Harbor State Park”. State Parks has advanced a series of capital improvement efforts that have enhanced services and activities in this the first state park ever established within the City of Buffalo.

The remaining approximately 247 acres of land north of Buffalo Harbor State Park is now being operated by the ECHDC, which has completed several capital improvements to increase public access to and use of this property, as well as conducted several community-driven planning studies that have informed the current and future disposition of the Project Area.

In 2008 and 2011, the ECHDC acquired the former Ice Boom storage properties from the New York Power Authority (“NYPA”) and transformed them into Wilkeson Pointe. In 2013, the \$5 million investment opened the property to public use for the first time in the parcel’s history with a network of bicycle and pedestrian pathways, a kayak launch and fishing pier, playground, comfort station, event lawn, parking facilities, and regenerative landscaping using native plants and green infrastructure such as bioswales. The property’s edge was also reinforced with heavy stone to repair earlier seiche damage, while wind sculptures were placed on the “pointe” to celebrate the site’s year-round breezes.

In 2015, the ECHDC opened the Outer Harbor landing for the Queen City Bike Ferry civic project. This seasonal public transportation route drew over 55,000 passengers in its inaugural season and further enhanced the regional bicycle trail network, while directly connecting Canalside and the Outer Harbor with a short, five-minute ride.

In 2019, the ECHDC completed a \$5 million capital investment at the southern end of the Project Area, now known as the Lakeside Complex. This project includes a bicycle park with off-road and paved pathways, a multi-use trail network, nearly 4-acre event lawn for concerts and other large-scale events and festivals, and the establishment of habitat restoration areas on nearly 20 acres. The site was divided by an earthen berm that keeps the active recreation and parking access close to the street while the passive recreation and multi-use trails are closer to the water’s edge. The project also included the short-term relocation of Larry Griffis’ *Flatman* sculpture from Ashford Hollow to the site, overlooking Bell Slip and the lake.

The ECHDC’s next project will occur at Wilkeson Pointe. The beer garden area will be expanded with the addition of a 3,200 sqft food & beverage service building, restrooms, and deck overlooking Lake Erie. The parking lot will also be moved away from the kayak launch, closer to the beer garden. This work is expected to occur in 2021 and completed in time for summer 2022.

Improvements to the Bell Slip area, which includes improvements to the parking area and public restrooms, are expected to begin in 2022 and be completed prior to summer 2023.

In addition to these capital improvements, the ECHDC and ESD led a community-driven planning process to determine the future land uses for the 247 acres of ECHDC's Outer Harbor property. The Buffalo Outer Harbor Blueprint (the "Blueprint"), was accepted by the ECHDC Board of Directors in 2015 and its findings were incorporated into the City of Buffalo's Unified Development Ordinance (i.e., "Green Code") in 2016. The Blueprint also recommended short-term capital improvements, many of which were incorporated into the Lakeside Complex civic project.

Finally, beginning in 2018, the ECHDC led a second community-driven planning process to develop a long-term capital plan for the 208 acres of ECHDC's Outer Harbor property not including Terminal A. The result was a "preferred plan" that will become the basis for all upcoming Outer Harbor improvements. The plan can be viewed here: [www.buffalowaterfront.com/accessandactivation](http://www.buffalowaterfront.com/accessandactivation). ECHDC is now in a preliminary design phase for some of these projects at First Buffalo River Marina, Wilkeson Pointe to Bell Slip, and Terminal B. It is expected that an Outer Harbor Modified General Project Plan and related SEQR will occur in mid-2020 before final design is completed and construction on any project begins. ECHDC is anticipating that work will begin on the Terminal B project in 2022.

Currently programming, events, and concessions at the Outer Harbor are offered via a License agreement between ECHDC and Be Out Guest, Ltd. that expires on December 31, 2020.

## **VI. LICENSED PREMISES**

The Licensed Premises includes exclusive access to host events and concessions, in accordance to the guidelines set forth in Section VII – Scope of Concession, at the following ECHDC-owned properties:

(a) A water ferry landing, located at 10 Fuhrmann Blvd (for Google Maps search, use 2 Fuhrmann Blvd), that serves as the stop for the Queen City Ferry that travels to/from Canalside and the Outer Harbor;

(b) Wilkeson Pointe, located at 225 Fuhrmann Blvd, an approximately 20-acre site owned by ECHDC that has been improved to accommodate public activities, including a public kayak launch, walking trails, a small playground, a lawn and beach. Wilkeson Pointe is expected to be

undergoing improvements to the public space and beer garden area throughout the year 2021. The site will be unavailable for events and concessions during that time, however the public kayak launch and public trails are expected to remain open for the majority of the summer 2021. Work is expected to be completed prior to the summer of 2022;

(c) the former site of the Pier Restaurant, located at 461 Fuhrmann Blvd, an approximately 30 acre undeveloped site;

(d) the Bell Slip area, located at approximately 575 Fuhrmann Blvd, which is expected to undergo improvements in 2022 to expand parking, as well as add restrooms and a nature pavilion.

(e) the approximately 20-acre site known as the Lakeside Complex, located at 825 Fuhrmann Blvd, which includes a public plaza, bicycle park (including three mountain bike trails, a skills loop and pump track), and a 5 acre event lawn; and

(f) The property known as the Terminal Building Complex, located at 901 Fuhrmann Blvd, includes Terminals A & B, is currently available to the Operator for storage and large event parking (approximately 1,000 spaces). ECHDC is expected to start construction on Terminal B in 2022 at which point the Terminal B building will no longer be available for storage.

(g) The Greenbelt Pathway, currently named the “Independent Health Wellness Trail” via a sponsorship agreement that ends in 2020. The approximately 2.5-mile public trail stretches from Wilkeson Pointe to the Lakeside Complex.

See Exhibit A for a map of the Licensed Premises. If the Operator wishes to operate on ECHDC property located outside of the Licensed Premises, they must first obtain written permission from ECHDC.

## **VII. SCOPE OF CONCESSION**

This RFP seeks proposals for strong recreational, cultural, and/or educational programs to activate the Licensed Premises such as those relating to health and wellness, family-oriented, the environment/nature, music, and/or those that celebrate the diversity of Buffalo and the surrounding area.

### Events & Programming

Wilkeson Pointe is an ideal space for smaller-scale events (approximately 1,000 people or less), programming and festivals. Examples include fitness classes, craft & farmers markets, small

cultural festivals, private parties and receptions, maritime-themed events, small charity walks/races, and live music at the beer garden space.

The Lakeside Complex is ideal for hosting larger events, concerts, and festivals. The approximately 5-acre event lawn can hold approximately 12,000 people for a concert. Event examples include foot races (i.e. 5Ks, 10Ks etc.), charity walks/events, large festivals, concerts and boat races. The Lakeside Complex also includes a bike park with three mountain bike trails, a skills loop and a pump track. The front area of the Complex is a public plaza with a ticket kiosk, food truck parking, and public seating. See Exhibit B for a map of the Lakeside Complex.

The Western New York Mountain Bicycling Association (WNYMBA) holds a temporary revocable permit (TRP) with ECHDC for maintenance and programming at the Lakeside Bike Park. WNYMBA will be responsible for routine maintenance and repairs of the trails and will organize trail volunteer days. WNYMBA will provide programming including group rides, skills clinics, pump & strider track clinics, bike instructional and maintenance skills. A secure shipping container for storage of WNYMBA tools and trail material stockpile area are reserved on site. All trail work sessions and programming are to be coordinated with the Outer Harbor Operator. WNYMBA shall maintain their own liability insurance.

The former site of the “Pier Restaurant” is ideally utilized as large event space when the event exceeds the size of the Lakeside Complex or the Lakeside Complex otherwise cannot be used. This site is also ideal for event parking and/or spillover parking for the Lakeside Complex. The space can park between 1,000-2,000 cars.

### Signature Events

The summer waterfront concert series traditionally hosted at Canalside (“concert series”) is expected to make a permanent move to the Outer Harbor beginning in 2021. The Outer Harbor Operator will be required to host at least five (5) concerts at the Lakeside Complex in year 1 of the contract and seven (7) or more in years 2 and 3. Virtually all concert infrastructure will need to be provided by the Operator, including a stage, green room/back of house, restrooms, food & beverage, power, Wi-Fi, lighting, water, wayfinding and site signage, etc. The Operator will also be expected to re-brand the concert series including, but not limited to, development of a name and logo. The new brand will require ECHDC approval.

Respondents who do not envision hosting a concert series must submit written justification as part of their RFP response.

Respondents are strongly encouraged to envision a unique signature event or visitor experience for the Outer Harbor. Examples done in the past include the Architects of Air event and the public art installation of Robert Indiana's ONE through ZERO (The Ten Numbers).

The Buffalo Waterfront's July 4<sup>th</sup> Celebration is a collaborative effort between Outer Harbor Management and Canalside Management. While Canalside hosts the City of Buffalo's "official celebration", the fireworks display is traditionally launched from the Michigan Pier, located at 275 Fuhrmann Blvd. The Outer Harbor draws a large crowd to watch these fireworks, but traditionally there has not been a formal event held at the Outer Harbor.

### Public Space Activations

The selected Operator will be expected to offer certain public amenities and activate public gathering spaces within the Licensed Premises ("Activation Zones") including, but not limited to, the Lakeside Complex Plaza (see Exhibit B) and the Wilkeson Pointe beer garden (available in 2022). RFP responses should include a general activation plan, keeping the following requirements in mind:

- At least 1 staff member must be present in the Activation Zones during business hours
- Bicycle rentals must be offered at Lakeside on Fridays-Sundays at a minimum
- Kayak and bicycle rentals must be offered at Wilkeson Pointe on Fridays-Sundays at a minimum

### Food & Beverage

Operator is expected to develop a food & beverage program for the premises and RFP responses should include a preliminary plan, menu, and prices. Food and beverage can be operated anywhere within the licensed premises, except for Wilkeson Pointe in 2021. Beginning in 2022, Operator is expected to operate food & beverage out of the new Beer Garden and Concession Stand at Wilkeson Pointe (see Section V – Background for details) at a minimum on Fridays, Saturdays & Sundays as well as holidays throughout the Summer seasons (Memorial Day – Labor Day). ECHDC encourages the use of food trucks throughout the Premises on weekends and in support of events.

Operator should collaborate in good faith with New York's Taste NY initiative. Taste NY was launched by Governor Andrew Cuomo in 2013 to promote New York's food and beverage heritage and related industries. The program is overseen by the Department of Agriculture and Markets and has created opportunities for local products to be showcased at appropriate state facilities. To the extent feasible, Operator shall promote and incorporate the core principles of the Taste NY initiative in any food or retail concessions.

## Marketing & Sponsorships

Operator is expected to develop a marketing & sponsorship plan for the premises and RFP responses should include a preliminary marketing plan as well as a sponsorship plan using Exhibit C – Sponsorships as a guide. Sponsorship activations should consider the natural surroundings of the Outer Harbor and partnerships are encouraged with companies and organizations that prioritize health, wellness, sustainability, and are family-friendly. Operator will be required to obtain ECHDC’s written approval for all sponsorship agreements and activations.

## Operations & Maintenance

The Operator is responsible for all cleaning/janitorial, waste management, repairs, and maintenance associated with an event or program brought to the Premises by the Operator. Daily cleaning, reset of furniture, fixtures and equipment within the Activation Zones is required. Operator is responsible for seasonal transitions of Activation Zones including, but not limited to, removal and storage of furniture, temporary signage, bike racks, season lighting, security fencing and equipment.

ECHDC holds a separate agreement with New York State Parks to perform various day-to-day maintenance tasks outside of the Operator’s scope of responsibilities.

## Miscellaneous and Coordination

Operator may partner or subcontract with program partners subject to ECHDC approval. The use of temporary, seasonal or portable service carts, stands and similar equipment may be allowed to serve the Licensed Premises, subject to ECHDC’s approval of an operating plan and service schedule. Proposals that afford new opportunities to facilitate marketing and promotional connections with other ECHDC and Outer Harbor programs, concessions and amenities are encouraged. Proposals that envision the development of a signature event for the Outer Harbor are also strongly encouraged.

Operator is expected to establish and operate under a sustainable business plan and philosophy that encourages, attracts, accommodates, and facilitates excellence in programs, concessions, visitor experience, and customer service executed in harmony with existing Outer Harbor uses and schedules.

The Outer Harbor Operator will also be required to provide the following access to the Canalside Management team (currently Be Our Guest, Ltd):

- Access to Michigan Pier for the annual July 4<sup>th</sup> fireworks display
- Access to Terminals A and B for seasonal storage

Operator will be required to attend monthly coordination meetings with ECHDC and the Canalside Management team.

## **VIII. BUSINESS CONSIDERATIONS**

1. **Due Diligence:** Respondents must rely on independent research and investigation for all matters relating to development of a proposal, including business case, market projections, revenue and cost assessments, construction plans, facility improvements, etc. The Licensed Premises will be made available to Operator in “as is, where is” condition at commencement of the term.
2. **Sample License:** The Sample License annexed to this RFP as Exhibit E represents the contract template with substantially all material terms and conditions of the License to be awarded hereunder. The License will be tailored to the successful proposal to the extent there is no substantial conflict with the goals and terms of the RFP and Sample License. The License is a state contract subject to the independent review and approval of the New York Office of the Attorney General and Office of the State Comptroller. Accordingly, a respondent should review the Sample License carefully when preparing a proposal as there are limited opportunities to negotiate language or change the material terms and conditions set forth therein.
3. **Menus & Pricing:** Proposals should include rates and fees for any services or products to be offered, including for food concessions sample menus demonstrating quality, variety and prices to accommodate a range of clientele. Operator shall restrict or prohibit the use of polystyrene (Styrofoam) and single use plastics for food service as set forth in the Sample License. Market-based prices and the usual and customary fees and charges should be incorporated into Operator’s business plan and pro-forma projections of revenues and expenses: pricing is subject to a reserved right of approval by ECHDC to ensure reasonableness and consistency with comparable markets. Exclusive memberships or similar “club” programs that restrict access by the public to the Licensed Premises and will not be approved.
4. **Ownership & Taxes:** There are no real estate property taxes for the Operator associated with the Licensed Premises. Capital repairs and improvements funded by Operator become the property of the State upon completion of the work and acceptance by ECHDC. Operator is responsible for payment/compliance with all applicable state and local tax requirements, including sales tax.

## **IX. RFP REQUIREMENTS**

### **A. Financial Requirements**

A proposal must demonstrate sufficient financial resources and professional capacity to program, promote, and operate the Licensed Premises in top-quality condition. Proposals must include the following:

1. Required Minimum License Fee: The required annual base fee (“License Fee”) is twenty five thousand (\$25,000) dollars per year;
2. Operator shall pay ECHDC \$2.00 of every event ticket sold and 5% of all site rental fees, parking fees, and sponsorships within thirty business days of month end.
3. Insurance Coverage: Licensee shall procure and maintain in full force and effect adequate commercial liability and other insurance coverage as specified in Section XVI – Contractual Requirements below.

## **X. GUIDANCE ON FORM & CONTENT OF PROPOSALS**

Proposals should clearly and concisely state the unique capabilities, experience, and strengths of the respondent, and demonstrate capacity to satisfy the requirements and objectives set forth in this RFP. A complete proposal must include and address the following elements:

1. Duly completed and executed Required Forms & Clauses; see Section XVI – Contractual Requirements
2. A detailed narrative setting forth the vision and philosophy for all proposed services, program offerings, concessions other amenities. The following are required components of a proposal:
  - a. Business plan: Identifying and accounting for all costs and expenses projected by Operator including without limitation for programming, maintenance, utilities, marketing and promotion; and all projected revenue from all sources, including from any contemplated partnerships, sub-licenses and sponsorships.
    - i. A pro forma projection must be itemized with financial projections for each year of the term with anticipated cash flows, and details of revenues and expenses, including proposed capital, operations and maintenance costs. Assumed or anticipated taxes, tariffs, grants, energy credits or other

governmental benefits must be disclosed and included in the pro forma. Financing contingencies, pricing and other assumptions or conditions that may impact capital, revenues or expenditures should be clearly disclosed in notes.

- ii. Pro forma projections must incorporate the proposed License Fee and other fees as outlined in Section IX; utility payments and all other financial obligations of the Operator.
  - iii. The pro forma shall be submitted with the proposal in Excel spreadsheet format in hard copy and saved on a portable flash drive.
- b. **A respondent must clearly disclose the intent to form a new legal entity to contract as Operator if selected for award.** Failure to make such disclosure in the proposal may result in delay or non-approval of the License by State control agencies.
- c. Proposals must include substantive information in the form of resumes and/or professional histories demonstrating the relevant background, education, expertise and/or experience of principal members of the respondent's organization, project team, management and operating partners and key participants. Materials including an organization chart or documents identifying the corporate composition and ownership of the respondent and any new entity to be formed, its current or intended business structure, chain of command, and relationships with any other underwriting investors, participants, partnerships or joint ventures.
- d. Evidence of experience presenting events and/or programs and/or operating experience in the relevant industry at a facility of comparable scope and scale to the Licensed Premises; including a detailed description of any similar venues owned or operated by respondent or its owners or principals. Respondent must provide evidence of capacity to develop and manage the project in accordance with the proposal and the requirements of the RFP and the License.
- e. A minimum of three (3) current references relevant to the scope and requirements of the RFP. Examples of preferred references include institutional partners and others that have underwritten or extended credit to the respondent, industry entities with which relevant business has been transacted, and/or a commercial landlord or government entity from which the respondent has leased or licensed property or provided relevant or analogous services.

- f. In the case of teams of more than one company, the Proposal should include projects where the team has worked together before, if applicable, and a detailed description of the partnership.

## **XI. PROPOSAL SUBMISSION INSTRUCTIONS**

A complete proposal is due before the deadline established for this RFP. A proposal must be submitted in writing to the address listed in Section III (“RFP Timetable & Submission Instructions”) in accordance with the requirements, terms, and conditions of this RFP. Proposals that are contingent or conditioned or that include a modification of any Required Forms may be disqualified.

**Submit one (1) original and seven (7) printed copies of the complete proposal, including all attachments, enclosures, and required forms and one (1) flash drive with the complete proposal in Adobe PDF format and all pro forma as an Excel spreadsheet document.** Original signatures are required on all copies of the proposal and required forms. The proposal must be bound or stapled originals, typewritten, two-sided, and on 8½” x 11” sized paper with numbered pages. The proposal shall be limited to no more than 100 single-sided or 50 double-sided pages. Required forms do not count against the page limit. Please do not submit a proposal in plastic sleeves or three ring binders.

## **XII. PROPOSAL REVIEW AND ORAL PRESENTATION**

ECHDC may utilize all submitted materials and all public information sources to evaluate the proposal and capabilities of a respondent. ECHDC will review proposals for completeness and compliance with the terms and conditions of this RFP, and may request from any respondent, at any time during the selection process, additional information, clarification, revisions or confirmation of the proposal.

A maximum of three (3) respondents will be afforded an opportunity to make an oral presentation to assist the Selection Committee in its evaluation and scoring of proposals against the selection criteria set forth herein. ECHDC will contact qualifying respondents to schedule presentations within two weeks of the deadline for submission of proposals.

## **XIII. EVALUATION OF PROPOSALS AND SELECTION CRITERIA**

Proposals are evaluated by a Selection Committee based on quality and content, not length. The License will be awarded to the respondent that by achieving the highest score, best demonstrates relevant experience and expertise; best responds to this RFP; offers the best value to New York State; and will best serve the public interest. The respondent

selected for award must be determined to be a responsible vendor by the Office of the State Comptroller as set forth in the Procurement Requirements of this RFP. ECHDC reserves the right to reject all proposals, and to waive technicalities, irregularities and omissions or solicit new proposals if in ECHDC's judgment the best interests of the State will be served.

Respondents should carefully review the objectives, expectations, and requirements of this RFP and its addenda, the Sample License, and all exhibits and attachments. ECHDC's Selection Committee evaluation is based on a 100-point scoring system; evaluation criteria for scoring are as follows:

**1. RFP Response – 50 Points**

- a. Strength of proposal, vision, philosophy, and commitment to develop and maintain excellence in service at the Outer Harbor and deliver quality and consistent customer experiences. 20 points
- b. Business development, public image, marketing and promotion. 15 Points
  - i. Compatibility of the proposal to the Licensed Premises
  - ii. Marketing and promotion strategies, including sponsorships and sales, outreach channels and social media
  - iii. Concepts and approach for development and expansion of visitor and customer base
  - iv. Capacity to monitor and respond positively to visitor demand and new trends
  - v. Customer service standards, programs and goals
- c. Business Plan. 15 Points
  - i. Quality, accuracy, specificity and presentation of business plan and proposed operating budget and pro-forma projections, including assumptions, contingencies, conditions and financial requirements of the RFP
  - ii. Financial feasibility and sustainability of the proposal over the term

**2. Background & Experience – 30 Points**

- a. Demonstrated ability to establish, maintain & promote a sustainable, high-quality project in a public setting. 10 Points
  - i. Experience establishing and operating a successful and financially sustainable project in a comparable public space, with examples

- ii. Successful and sustainable performance in current and previous projects providing high quality services and visitor experience relevant to the proposed project. Consistency in meeting high-quality customer service standards.
  - b. Personnel qualifications and experience. 10 Points
    - i. Managerial capacity and organizational structure, depth of management personnel and tenure and success in relevant projects
    - ii. Qualifications of key staff and team members, including managers, consultants, marketing and sales staff and event staff
    - iii. Recruitment and retention of experienced and qualified staff, demonstrated by current/past performance, references, and resumes
  - c. Financial and business capacity to execute the proposal. 10 Points

**3. Return to the ECHDC – 15 Points**

The value of the proposed License Fee plus the percentage/amount of other revenue streams as outlined in Section IX.A – Financial Requirements. Respondents may offer an additional License Fee above the required minimum.

**4. Diversity Practices – 5 Points**

Respondents will be awarded points based on the contents of the Diversity Practices Questionnaire and Diversity Scoring Matrix (see Exhibit D)

**XIV. MODIFICATION/WITHDRAWAL/REJECTION OF PROPOSALS**

Modification or withdrawal of a proposal must be in writing, dated and signed by the signatory to the original proposal submission. The modification or withdrawal must be submitted in a sealed envelope clearly marked “Modification [or Withdrawal] of Outer Harbor Events & Concessions Management Proposal Submitted by [respondent].”

ECHDC reserves the right to reject proposals, postpone, or cancel this RFP, to waive technicalities, irregularities and omissions, request additional information or clarification of a proposal, or solicit new proposals if, in its judgment, the best interests of New York State will be served.

## **XV. GENERAL PROVISIONS**

The issuance of this RFP and the submission of a response by a Bidder or the acceptance of such a response by ECHDC does not obligate ECHDC in any manner.

In addition, ECHDC reserves the right to:

- amend, modify or withdraw this RFP;
- revise any requirement of this RFP;
- require supplemental statements or information from any responsible party;
- accept or reject any or all responses hereto;
- extend the deadline for submission of responses hereto;
- negotiate potential contract terms with any Bidder;
- communicate with any Bidder to correct and/or clarify responses which do not conform to the instructions contained herein;
- cancel, or reissue in whole or in part, this RFP, if ECHDC determines in its sole discretion that it is its best interest to do so; and
- extend the term of any agreement on terms consistent with this RFP.
- seek a final and best offer from those firms short-listed.
- make an award under the RFP in whole or in part.
- require clarification at any time during the procurement process and/or require correction of arithmetic or other apparent errors for the purpose of assuring full and complete understanding of an offerer's proposal and/or to determine an offerer's compliance with the requirements for the solicitation.
- make revisions to the scope of work after contract award to ensure that the project goals are met.

ECHDC may exercise the foregoing rights at any time without notice and without liability to any responding firm or any other party for its expenses incurred in preparation of responses hereto or otherwise. All costs associated with responding to this RFP will be at the sole cost and expense of the Bidder.

All information submitted in response to this RFP is subject to the Freedom of Information Law ("FOIL"), which generally mandates the disclosure of documents in the possession of ECHDC upon the request of any person unless the content of the document falls under a specific exemption to disclosure. In addition, Proposals may be discussed at meetings of the ECHDC Directors, which meetings are subject to the Open Meetings Law.

ECHDC reserves the right, in its sole discretion, to retain and use all the materials and information, and the ideas and suggestions therein, submitted in response to this solicitation (collectively, the "Response Information") for any purpose. By submitting a Proposal, each Respondent waives any and all claims against ECHDC or ESD relating to ECHDC's retention or use of the Response Information.

### **Required Approvals**

The awarded contract, if any, may be subject to review and approval by the Office of the State Comptroller ("OSC") pursuant to Public Authorities Law §2879-a and the regulations issued thereunder. Such OSC review and approval may be required of contracts with a value in excess of one million dollars, or modifications to contracts that result in an aggregate value in excess of one million dollars, where such contracts are paid in whole or in part with monies appropriated by the State, or were awarded on a basis other than a competitive procurement (as that term is defined in the law and regulations). If the awarded contract is subject to OSC review and approval, the contract shall not be valid and enforceable, nor shall the Corporation have any liability of any kind arising from or in connection with the contract, unless and until OSC approval has been received.

### **Performance**

The Contractor's performance will be assessed by the Corporation according to the achievement of The Contractor's contractual obligations in a timely and professional manner, as set forth in the resulting Contract. The Corporation will utilize progress reports and periodic meetings to ensure that the project is carried out on a timely basis and results in effective recommendations and work products.

Contractor warrants that its services shall be performed in accordance with applicable professional standards and that the Contractor shall correct, at no charge to the Corporation, services which fail to meet applicable professional standards and which result in obvious or patent errors in the progression of its work.

### **Additional Services Requested**

The Corporation may, at any time, by written notice, make changes or additions to work or services within the general scope of the contract resulting from this RFP (not to include professional services requiring licenses or specialized expertise such as engineering, architectural, and environmental consulting, abatement, treatment, and testing work) for unanticipated needs. If any such change or addition causes an increase or decrease in the cost of, or in the time required for, performance of the contract, an equitable adjustment

may be made in the price using the billing rates set forth in the contract, and the Contractor shall be notified in writing accordingly. Any claim by the Contractor for adjustment under this clause must be asserted within 30 days from the date of receipt by the Contractor of the notification of change; provided however, that the Corporation, if it decides that the facts justify such action, may receive and act upon such claim as asserted at any time. Nothing in this clause shall excuse the Contractor from proceeding with this contract as modified.

### **Contractor Staff**

Contractor staff assigned to work on this project shall be subject to approval by the Corporation. It is highly desirable that staff assigned to work on this project continue to work on this project until completion. The Contractor should notify the Corporation of any proposed changes in staff immediately. The Corporation has an absolute right and discretion to approve or disapprove any proposed changes in staff. The Corporation, in each instance, will be provided with a summary of experience of the proposed substitute and an opportunity to interview that person, prior to giving its approval or disapproval; approval shall not be unreasonably withheld.

The Contractor specifically represents and agrees that its members, officers, employees, agents, servants, consultants, shareholders, and subcontractors have and shall possess the experience, knowledge, and character necessary to qualify them individually for the particular duties performed hereunder.

The Agreement resulting from this RFP is intended to secure the professional services of the Contractor because of its ability and shall not be assigned, conveyed, transferred, or disposed of by the Contractor.

The Contractor agrees not to subcontract any of its services, unless as indicated in its proposal, without the prior written approval of the State Project Manager. Approval shall not be unreasonably withheld upon receipt of written request to subcontract. All employees of the Contractor, or of its Subcontractors, who shall perform Services under this contract, shall possess the necessary qualifications, training, licenses, and permits as may be required within the jurisdiction where the Services specified are to be provided or performed, and shall be legally entitled to work in such jurisdiction. All persons, corporations, or other legal entities that perform Services on behalf of Contractor under the Agreement resulting from this RFP shall, in performing such Services, comply with all applicable Federal and State laws concerning employment in the United States.

## **XVI. CONTRACTUAL REQUIREMENTS**

This section contains additional information about the forms that are required to be included in each Bidder's submission pursuant to Section VI of this RFP, as well as information about ESD's procurement requirements.

### **i. Conflicts of Interest**

Respondent must attest it has read, understood and will comply with the following provisions <https://esd.ny.gov/sites/default/files/Conflict-of-Interest-Attestation-June-2019.pdf>. ESD shall have the right to disqualify any respondent to this RFP or terminate any contract entered into as a result of this RFP should ESD determine that the Respondent has violated any of these requirements.

- A. Gifts and Offers of Employment:** Respondent has not and shall not during this procurement and during the negotiation of any contract resulting from this procurement, offer to any employee, member or director of ESD, any gift, whether in the form of money, services, loan, travel, entertainment, hospitality, thing or promise, or in any other form, under circumstances in which it could reasonably be inferred that the offer was intended to influence said employee, member or director, or could reasonably be expected to influence said employee, member or director, in the performance of the official duty of said employee, member or director or was intended as a reward for any official action on the part of said employee, member or director. Respondent may not make any offers of employment or discuss the possibility of such offers with any employee, member or director of ESD who is involved in this procurement and/or resulting contract negotiation within at least 30 days from the time that the employee's involvement in this matter closed.
  
- B. Disclosure of Potential Conflicts:** Respondent shall disclose any existing or contemplated relationship with any other person or entity, including relationships with any member, shareholders of 5% or more, parent, subsidiary, or affiliated firm, which would constitute an actual or potential conflict of interest or appearance of impropriety, relating to other clients/customers/employers of the Respondent or former officers and employees of ESD, in connection with your rendering services enumerated in this RFP. If a conflict does or might exist, Respondent must describe how it would eliminate or prevent it.

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

ii. **State Finance Law Sections 139-j and 139-k forms**

State Finance Law Sections 139-j and 139-k (collectively, the “Procurement Requirements”) apply to this RFP. These Procurement Requirements: (1) govern permissible communications between potential Bidders and ESD or other involved governmental entities with respect to this RFP; (2) provide for increased disclosure in the public procurement process through identification of persons or organizations whose function is to influence procurement contracts, public works agreements and real property transactions; and (3) establish sanctions for knowing and willful violations of the provisions of the Procurement Requirements, including disqualification from eligibility for an award of any contract pursuant to this RFP. Compliance with the Procurement Requirements requires that all communications regarding this RFP, from the time of its issuance through final award and execution of any resulting contract (the “Restricted Period”), be conducted only with the designated contact persons listed above; the completion by Bidders of the Offerer Disclosure of Prior Non-Responsibility Determinations, and the Offerer’s Affirmation of Understanding and Agreement pursuant to State Finance Law (each form is accessible at the Required Forms for Vendors link at the ESDC web site under “RFPs/RFQs”); and periodic updating of such forms during the term of any contract resulting from this RFP.

Bidders must submit the Offerer Disclosure of Prior Non-Responsibility Determinations, and the Offerer’s Affirmation of Understanding and Agreement pursuant to State Finance Law as part of their submittal. Copies of these forms are available at:

[http://www.empire.state.ny.us/CorporateInformation/Data/RFPs/RequiredForms/SF\\_Law139JK.pdf](http://www.empire.state.ny.us/CorporateInformation/Data/RFPs/RequiredForms/SF_Law139JK.pdf).

The Procurement Requirements also require ESD staff to obtain and report certain information when contacted by Bidders during the Restricted Period, make a determination of the responsibility of Bidders and make all such information publicly available in accordance with applicable law. If a Bidder is found to have knowingly and willfully violated the State Finance Law provisions, that Bidder and its subsidiaries, related or successor entities will be determined to be a non-responsible Bidder and will not be awarded any contract issued pursuant to this solicitation. In addition, two such findings of non-responsibility within a four-year period can

result in debarment from obtaining any New York State governmental procurement contract. The designated contact account for this solicitation is referenced on the cover of this RFP.

This is not a complete presentation of the provisions of the Procurement Requirements. A copy of State Finance Law Sections 139-j and 139-k can be found at:

[http://esd.ny.gov/CorporateInformation/Data/RFPs/RequiredForms/PermissibleContactsPolicy\\_Jan2007.pdf](http://esd.ny.gov/CorporateInformation/Data/RFPs/RequiredForms/PermissibleContactsPolicy_Jan2007.pdf). All potential Bidders are solely responsible for full compliance with the Procurement Requirements. Both the prime consultant and any sub-consultants complete the forms required above.

### **iii. Vendor Responsibility Questionnaire**

All Bidders to this RFP must be “responsible,” which in this context means that they must have the requisite financial ability, organizational capacity and legal authority to carry out its obligations under this RFP, and in addition must demonstrate that both the Respondent and its principals have and will maintain the level of integrity needed to contract with New York State entities such as ESD. Further, the Respondent must show satisfactory performance of all prior government contracts. Accordingly, the contract to be entered into between ESD and the Respondent, if any, shall include clauses providing that the Respondent remain “responsible” throughout the term of the contract, that ESD may suspend the contract if information is discovered that calls into question the responsibility of the contracting party, and that ESD may terminate the contract based on a determination that the contracting party is non-responsible. On request, model language to this effect will be provided to any Respondent to this RFP.

To assist in the determination of responsibility, ESD requires that all Bidders register in the State's Vendor Responsibility System (“Vend-Rep System”). The Vend-Rep System allows business entities to enter and maintain their Vendor Responsibility Questionnaire information in a secure, centralized database. New York State Procurement Law requires that state agencies award contracts only to responsible vendors. Bidders are to file the required Vendor Responsibility Questionnaire online via the Vend-Rep System or may choose to complete and submit a paper questionnaire. Please include a copy of your Vend-Rep submission receipt or paper questionnaire with your proposal.

To enroll in and use the Vend-Rep System, see the System Instructions available at [www.osc.state.ny.us/vendrep](http://www.osc.state.ny.us/vendrep). For direct Vend-Rep System user assistance, the Office of the State Comptroller’s Help Desk may be reached at 866-370-4672 or 518-408-4672 or by email at [helpdesk@osc.state.ny.us](mailto:helpdesk@osc.state.ny.us).

Bidders opting to file a paper questionnaire can obtain the appropriate questionnaire from the Vend-Rep website ([http://www.osc.state.ny.us/vendrep/forms\\_vendor.htm](http://www.osc.state.ny.us/vendrep/forms_vendor.htm)) and execute accordingly pertaining to the company's trade industry. Per the website, Bidders are to "Select the questionnaire which best matches the business type (either For-Profit or Not-For-Profit) and business activity (Construction or Other)."

In addition, please see link to EO-192: <https://www.governor.ny.gov/news/no-192-executive-order-imposing-continuing-vendor-integrity-requirements-state-contracts>

**iv. Iran Divestment Act**

Every Proposal made to ESD pursuant to a competitive solicitation must contain the following statement, signed by the Respondent on company letterhead and affirmed as true under penalty of perjury:

"By submission of this bid, each bidder and each person signing on behalf of any bidder certifies, and in the case of a joint bid each party thereto certifies as to its own organization, under penalty of perjury, that to the best of its knowledge and belief that each bidder is not on the list created pursuant to paragraph (b) of subdivision 3 of section 165-a of the State Finance Law."

The list in question is maintained by the Office of General Services. For further information and to view this list please go to: <https://ogs.ny.gov/system/files/documents/2019/03/listofentities.pdf>

**v. Executive Order 177**

In accordance with New York State Executive Order 177, all bidders must certify that they are in compliance with the New York State Human Rights Law which prohibits discrimination and harassment based on a protected class, and which requires reasonable accommodation for persons with disability or pregnancy related conditions.

The required certification for can be found at:

<https://esd.ny.gov/sites/default/files/EO-177-Certification.pdf> and must be signed and included in all Proposals.

**vi. Non-Discrimination and Contractor & Supplier Diversity Requirements**

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

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 5% 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 month 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 monthly 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 subcontractors 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).

### **Diversity Practices**

ESD has determined, pursuant to New York State Executive Law Article 15-A, that the assessment of the diversity practices of Bidders is practical, feasible, and appropriate. Accordingly, Bidders shall be required to include as part of their response to this procurement the Diversity Practices Questionnaire (See Exhibit D).

### **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 (“SDVOBs”), 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/Contractors are strongly encouraged and 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.

For purposes of this procurement, ESD conducted a comprehensive search and determined that the Contract does not offer sufficient opportunities to set specific goals for participation by SDVOBs as subcontractors, service providers, and suppliers to Contractor. Nevertheless, Bidder/Contractor is encouraged to make good faith efforts to promote and assist in the participation of SDVOBs on the Contract for the provision of services and materials.

The directory of New York State Certified SDVOBs can be viewed at: <https://online.ogs.ny.gov/SDVOB/search>.

Bidder/Contractor is encouraged to contact the Office of General Services’ Division of Service-Disabled Veteran’s Business Development at 518-474-2015 or [VeteransDevelopment@ogs.ny.gov](mailto:VeteransDevelopment@ogs.ny.gov) to discuss methods of maximizing participation by SDVOBs on the Contract.

**vii. Encouraging the Use of NYS Businesses in Contract Performance Form**

New York State businesses have a substantial presence in State contracts and strongly contribute to the economies of the state and the nation. In recognition of their economic activity and leadership in doing business in New York State, Bidders for this ESD contract for commodities, services or technology are strongly encouraged and expected to consider New York State businesses in the fulfillment of the requirements of the contract. In order for ESD to assess the use of New York State businesses in each Proposal, ESD requests that each Respondent complete the Encouraging Use of New York State Businesses in Contract Performance form, accessible here:

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

**viii. Certification under State Tax Law Section 5-a**

Any contract resulting from this solicitation is also subject to the requirements of State Tax Law Section 5-a (“STL 5-a”). STL 5-a prohibits ESD from approving any such contract with any entity if that entity or any of its affiliates, subcontractors or affiliates of any subcontractor makes sales within New York State of tangible personal property or taxable services having a value over \$300,000 and is not registered for sales and compensating use tax purposes. To comply with STL 5-a, all Bidders to this solicitation must include in their Proposals a properly completed Form ST-220-CA ([http://www.tax.ny.gov/pdf/current\\_forms/st/st220ca\\_fill\\_in.pdf](http://www.tax.ny.gov/pdf/current_forms/st/st220ca_fill_in.pdf)), or an affidavit ([http://esd.ny.gov/CorporateInformation/Data/RFPs/RequiredForms/STL\\_5A\\_Affidavit.pdf](http://esd.ny.gov/CorporateInformation/Data/RFPs/RequiredForms/STL_5A_Affidavit.pdf)) that the Respondent is not required to be registered with the State Department of Taxation and Finance. Also in accordance with the requirements of STL 5-a, any contract resulting from this solicitation will require periodic updating of the certifications contained in Form ST-220-CA. Solicitation responses that do not include a properly completed ST-220-CA will be considered incomplete and non-responsive and will not be considered for contract award. Only the prime consultant completes Form ST 220-CA, but Schedule A to Form ST 220-CA requires detailed information from the sub-consultants, such as tax ID number, etc., if applicable. Moreover, if applicable, certificates of authority must be attached by the prime consultant and all the sub-consultants.

**ix. Schedule A**

Following final selection of a Respondent, ESD will prepare a contract defining all project terms and conditions and the Respondent’s responsibilities in conformance with Schedule A. A sample can be found at: [https://esd.ny.gov/sites/default/files/ScheduleA-Services\\_Materials-3818.pdf](https://esd.ny.gov/sites/default/files/ScheduleA-Services_Materials-3818.pdf)

Please note Bidders do not need to complete the entire Schedule A with the submission of their Proposal. However, Bidders should still review these terms, which are standard in all ESD contracts, and raise any concerns present prior to submission of their Proposal, as successful Bidders will need to accept these terms prior to contract execution.

**x. Project Sunlight**

This procurement is subject to the Public Integrity Reform Act of 2011. Under the Public Integrity Reform Act of 2011, “appearances” (broadly defined and including any substantive interaction that is meant to have an impact on the decision-making process of a state entity) before a public benefit corporation such as ESD by a person (also broadly defined) for the purposes of procuring a state contract (as contemplated in this RFP) must be reported by ESD to a database maintained

by the State Office of General Services that is available to members of the public. If in doubt as to the applicability of Project Sunlight, Bidders and their advisors should consult the Laws of 2011, Ch. 399 for guidance.

**xi. Insurance Requirements**

The selected Bidder will be required to provide the following insurance (at a minimum and to the extent applicable):

- Commercial General Liability of \$1 million per occurrence and \$2 million in the aggregate;
- In the event that you are using a vehicle in business, Commercial Automobile insurance with a limit of not less than \$1 million;
- Must show evidence of Worker's Compensation & Employer's Liability insurance at State statutory limits;
- Must show evidence of Disability insurance coverage at State statutory limits;

ECHDC, NYS Urban Development Corporation d/b/a Empire State Development (ESD), NYS Parks, and WNYMBA must be named as additional insured on a primary and non-contributory basis on all of the following policies: Commercial General Liability and Auto Liability. All policies above should include a waiver of subrogation in favor of ESD.

**xii. W-9 Form**

Provide a completed W-9 form (<https://www.irs.gov/pub/irs-pdf/fw9.pdf>), submit with proposal.

**Exhibit A – Map of Licensed Premises**

# OUTER HARBOR



## LEGEND

- Greenway Trail
- Locations
- Driveway Access
- 1 Bike Ferry Landing
- 2 Wilkeson Pointe
- 3 Former Pier Site
- 4 Bell Slip
- 5 Lakeside Complex
- 6 Terminal Complex

**Exhibit B – Map of Lakeside Complex**

# LAKESIDE BIKE PARK AND EVENT SPACE

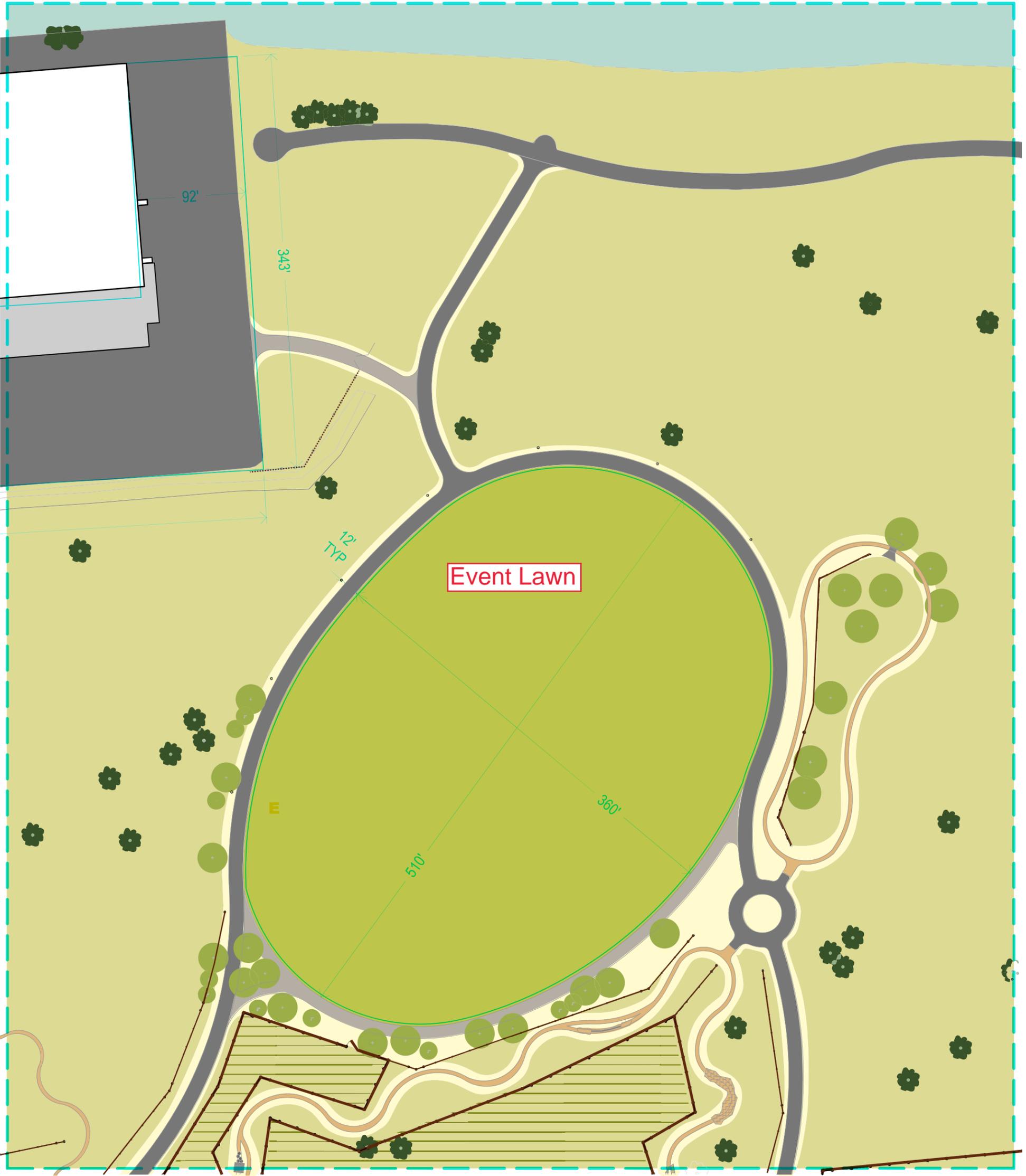
## LEGEND

-  MOWING EDGE
-  MEADOW
-  LAWN
-  ASPHALT
-  SINGLE TRACK TRAIL
-  POLLINATOR MEADOW
-  CHAIN LINK FENCE
-  COMMON FENCE, 4'
-  DEER EXCLUSION FENCE, 8'
-  WATER
-  HABITAT ZONE
-  GRAVEL SURFACING
-  INFILTRATION TRENCH
-  STONEDUST
-  CONCRETE
-  BUILDING
-  LAWN AREA ENLARGEMENT
-  ELECTRIC OUTLET (110)
-  WATER HYDRANT (MPT hose connection)
-  UNDERPASS GATEWAY TO LAWN  
12' wide paved,  
10' ht. at edge of pave



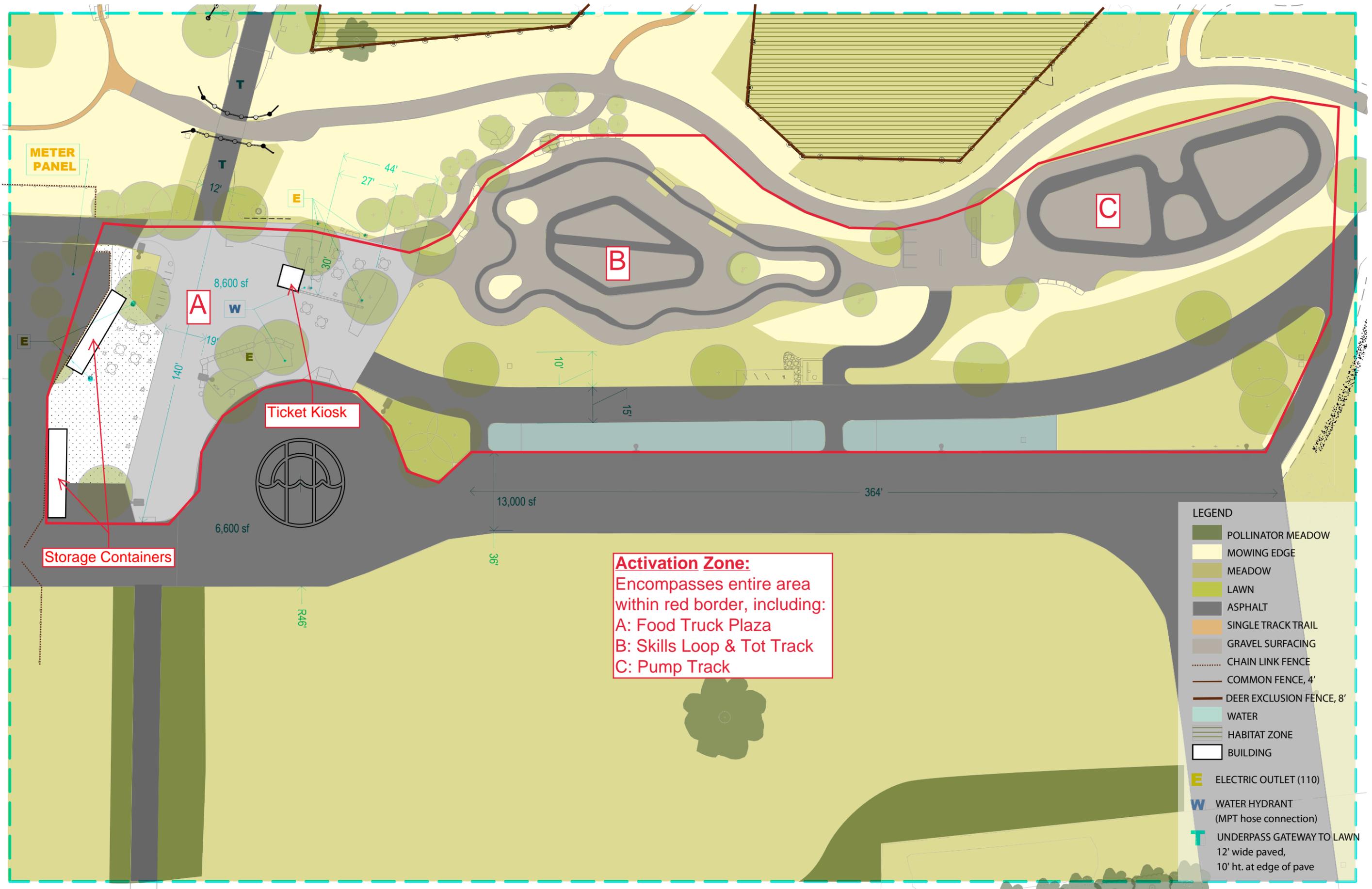
LEGEND

- CONCRETE
- MOWING EDGE
- MEADOW
- LAWN
- ASPHALT
- SINGLE TRACK TRAIL
- GRAVEL SURFACING
- CHAIN LINK FENCE
- COMMON FENCE, 4'
- DEER EXCLUSION FENCE, 8'
- WATER
- HABITAT ZONE



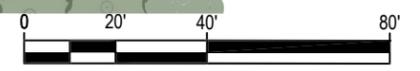
**2** LAKESIDE AREA PLAN - GREAT LAWN (2 OF 3)  
1" = 80'





**Activation Zone:**  
 Encompasses entire area within red border, including:  
 A: Food Truck Plaza  
 B: Skills Loop & Tot Track  
 C: Pump Track

- LEGEND**
- POLLINATOR MEADOW
  - MOWING EDGE
  - MEADOW
  - LAWN
  - ASPHALT
  - SINGLE TRACK TRAIL
  - GRAVEL SURFACING
  - CHAIN LINK FENCE
  - COMMON FENCE, 4'
  - DEER EXCLUSION FENCE, 8'
  - WATER
  - HABITAT ZONE
  - BUILDING
  - E ELECTRIC OUTLET (110)
  - W WATER HYDRANT (MPT hose connection)
  - T UNDERPASS GATEWAY TO LAWN  
12' wide paved,  
10' ht. at edge of pave



**Exhibit C – Sponsorship Guidelines**



## **Sponsorship Guidelines**

Sponsorship of the Premises or the Use is subject to the approval of ECHDC as to form, content, and manner of presentation, and Operator shall not enter into any sponsorship agreement without the prior written approval of ECHDC.

Below is an outline of potential sponsorship packages for the Outer Harbor. Operator shall work with ECHDC staff on developing sponsorable assets and dollar amounts. Sponsorships should be mindful of the Outer Harbor's vast natural green space and the primary look and feel of any sponsorship activation should maintain Outer Harbor and/or Buffalo Waterfront brand standards.

Sponsorships at the Outer Harbor can be split into distinct categories, examples:

### **Signature Events**

- Potential Sponsorship levels:
  - Presenting: \$25,000-\$50,000
  - Premier: \$15,000-\$25,000
  - Event: \$5,000-\$10,000
  - Supporting: \$2,500-\$5,000
  
- Potential Signature Event Sponsorship Benefits:
  - Recognition on BuffaloWaterfront.com website
  - Recognition and quote in press release
  - Speaking opportunity during event
  - Recognition on Outer Harbor signage dedicated to the event
  - Recognition on e-blasts
  - Opportunity to have tent at event
  - Social media recognition
  - Logo displayed on event signage
  - Access to VIP area

### **Program Sponsorships**

- Potential Sponsorship levels:
  - Health & Wellness: \$25,000-\$150,000
  - Family: \$10,000-\$25,000
  - Arts & Culture: \$10,000 - \$25,000
  - Music: \$5,000-\$10,000



- Potential Program Sponsorship Benefits:
  - Signage displayed in area during program
  - Recognition in press release
  - Recognition on Buffalo Waterfront online calendar
  - Recognition on Buffalo Waterfront website
  - Recognition on Buffalo Waterfront e-blasts
  - Opportunity to display or activate product on site
  - Social media recognition

### **Available Naming and Sponsorship Opportunities**

- Lakeside Complex
  - Bike Park
  - Event Lawn
  - Plaza
- Wilkeson Pointe
  - Event lawn
  - Beer Garden
  - Playground
  - Beach
- Greenway Trail
- Terminal B
  
- Potential Naming Sponsorship Benefits:
  - Permanent signage in area for duration of sponsorship
  - Recognition and quote in press release
  - Recognition on Buffalo Waterfront map (online)
  - Recognition on Buffalo Waterfront website
  - Recognition in e-blasts
  - Opportunity to display or activate product in sponsored area or during signature events
  - Social media recognition

**Exhibit D – Diversity Practices Questionnaire**



I, \_\_\_\_\_, as \_\_\_\_\_ (title) of \_\_\_\_\_ firm or company (hereafter referred to as the company), swear and/or affirm under penalty of perjury that the answers submitted to the following questions are complete and accurate to the best of my knowledge:

1. Does your company have a Chief Diversity Officer or other individual who is tasked with supplier diversity initiatives? Yes or No

If Yes, provide the name, title, description of duties, and evidence of initiatives performed by this individual or individuals.

2. What percentage of your company's gross revenues (from your prior fiscal year) was paid to New York State certified minority and/or women-owned business enterprises as subcontractors, suppliers, joint-venturers, partners or other similar arrangement for the provision of goods or services to your company's clients or customers?

3. What percentage of your company's overhead (i.e. those expenditures that are not directly related to the provision of goods or services to your company's clients or customers) or non-contract-related expenses (from your prior fiscal year) was paid to New York State certified minority- and women-owned business enterprises as suppliers/contractors?<sup>1</sup>

---

<sup>1</sup> Do not include onsite project overhead.



4. Does your company provide technical training<sup>2</sup> to minority- and women-owned business enterprises? Yes or No

If Yes, provide a description of such training which should include, but not be limited to, the date the program was initiated, the names and the number of minority- and women-owned business enterprises participating in such training, the number of years such training has been offered and the number of hours per year for which such training occurs.

5. Is your company participating in a government approved minority- and women-owned business enterprise mentor-protégé program?

If Yes, identify the governmental mentoring program in which your company participates and provide evidence demonstrating the extent of your company's commitment to the governmental mentoring program.

6. Does your company include specific quantitative goals for the utilization of minority- and women-owned business enterprises in its non-government procurements? Yes or No

---

<sup>2</sup> Technical training is the process of teaching employees how to more accurately and thoroughly perform the technical components of their jobs. Training can include technology applications, products, sales and service tactics, and more. Technical skills are job-specific as opposed to soft skills, which are transferable.



If Yes, provide a description of such non-government procurements (including time period, goal, scope and dollar amount) and indicate the percentage of the goals that were attained.

7. Does your company have a formal minority- and women-owned business enterprise supplier diversity program? Yes or No

If Yes, provide documentation of program activities and a copy of policy or program materials.

8. Does your company plan to enter into partnering or subcontracting agreements with New York State certified minority- and women-owned business enterprises if selected as the successful respondent? Yes or No

If Yes, complete the attached Utilization Plan



All information provided in connection with the questionnaire is subject to audit and any fraudulent statements are subject to criminal prosecution and debarment.

Signature of  
Owner/Official

---

Printed Name of  
Signatory

---

Title

---

Name of Business

---

Address

---

City, State, Zip

---



STATE OF \_\_\_\_\_

COUNTY OF \_\_\_\_\_ ) ss:

On the \_\_\_\_ day of \_\_\_\_\_, 201\_, before me, the undersigned, a Notary Public in and for the State of \_\_\_\_\_, personally appeared \_\_\_\_\_, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to this certification and said person executed this instrument.

\_\_\_\_\_

Notary Public

**Exhibit E – Sample License Agreement**

**SAMPLE LICENSE AGREEMENT BETWEEN  
ERIE CANAL HARBOR DEVELOPMENT CORPORATION (“ECHDC”)  
AND TBD**

This LICENSE AGREEMENT (the “Agreement” or the “License”) made as of \_\_\_\_\_, between the  
**ERIE CANAL HARBOR DEVELOPMENT CORPORATION**  
 (“ECHDC”), a subsidiary of New York State Urban Development Corporation d/b/a Empire State Development  
 (“ESD”), having an office at 95 Perry St, Buffalo, New York 14203, and **TBD** (“Operator”).

W I T N E S S E T H:

WHEREAS, on \_\_\_\_\_, ECHDC issued a request for proposals (“RFP”) seeking qualified firms to operate concessions and events on certain property owned by ECHDC on the Outer Harbor in the City of Buffalo; and WHEREAS, the Operator submitted a proposal in response to the RFP that was selected by the ECHDC Board of Directors at its meeting in \_\_\_\_\_; and

WHEREAS, the Operator is granted exclusive access to host events and concessions at the following ECHDC-owned property:

- (a) A water ferry landing, located at 10 Fuhrmann Blvd, that serves as the stop for the Queen City Ferry that travels to/from Canalside and the Outer Harbor;
  - (b) Wilkeson Pointe, located at 225 Fuhrmann Blvd, an approximately 20-acre site owned by ECHDC that has been improved to accommodate public activities, including a public kayak launch, walking trails, a small playground, a lawn and beach. Wilkeson Pointe is expected to be undergoing improvements to the public space and beer garden area throughout the year 2021. The site will be unavailable for events and concessions during that time, however the public kayak launch and public trails are expected to remain open for the majority of the summer 2021. Work is expected to be completed prior to the summer of 2022;
  - (c) the former site of the Pier Restaurant, located at 461 Fuhrmann Blvd, an approximately 30 acre undeveloped site;
  - (d) the Bell Slip area, located at approximately 575 Fuhrmann Blvd, which is expected to undergo improvements in 2022 to expand parking, as well as add restrooms and a nature pavilion.
  - (e) the approximately 20-acre site known as the Lakeside Complex, located at 825 Fuhrmann Blvd, which includes a public plaza, bicycle park (including three mountain bike trails, a skills loop and pump track), and a 5 acre event lawn; and
  - (f) The property known as the Terminal Building Complex, located at 901 Fuhrmann Blvd, includes Terminals A & B, is currently available to the Operator for storage and large event parking (approximately 1,000 spaces). ECHDC is expected to start construction on Terminal B in 2022 at which point the Terminal B building will no longer be available for storage.
  - (g) The Greenbelt Pathway, currently named the “Independent Health Wellness Trail” via a sponsorship agreement that ends in 2020. The approximately 2.5-mile public trail stretches from Wilkeson Pointe to the Lakeside Complex.
- and

WHEREAS, the Parties expect that additional property may be available to the Operator to operate concessions and events, provided such use is consistent with the operations of the Outer Harbor and consistent with the condition of the property; and now

It is hereby mutually covenanted and agreed by and between the parties hereto that this License (hereinafter defined) is made upon the agreements, terms, covenants and conditions hereinafter set forth.

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SAMPLE

## Section 1. Contract Documents

- (a) This agreement is comprised of the following documents, all of which are hereby incorporated by reference:
  - (i) Concession License Agreement
  - (ii) RFP dated \_\_\_\_ and any addenda thereto (the “RFP”)
  - (iii) Operator’s Proposal and Proposal Form (collectively the “**RFP Response**”)
  - (iv) Attachments
  - (v) Schedule A
- (b) In the event of any inconsistency in or conflict among the document elements of the agreement identified herein, such inconsistency or conflict shall be resolved by giving precedence to the documents in the following order:
  - (i) Concession License Agreement, including all attachments
  - (ii) Schedule A
  - (iii) RFP and any addenda thereto
  - (iv) RFP Response.

## Section 2. Term

The term of this License shall commence on January 1, 2021 (“Commencement Date”) and terminate on March 31, 2024 (the “Term”), unless terminated sooner pursuant to the provisions of this License.

## Section 3. Grant of License

- (a) ECHDC hereby grants the Operator the Exclusive Right to use and occupy the area depicted as “ECHDC Property – Available for Programming” on the attached Exhibit (“Premises”), for the exclusive purpose as described in the RFP and proposed in the RFP Response (the “Use”). ECHDC represents to the Operator that it is the owner of the Premises. ECHDC warrants that this Exclusive Right will be included in all future instruments and conveyances related to the Premises, including any sale, lease, or license of the Premises, during the Term of this License.
- (b) Operator acknowledges that the Premises are public, non-residential spaces and that for all purposes hereunder ECHDC licenses the Premises “as is/where is” and without warranty. Operator states that it has thoroughly examined and inspected the Premises that, unless and except as expressly set forth in this agreement, it has not relied upon any representation or statement of ECHDC or its officers or employees as to the suitability of the Premises for the Use.
- (c) The Premises and Additional Premises shall remain open to the general public in accordance with its past use except that the Operator may restrict access for specific events conducted by the Operator provided such events and such restricted access are approved by ECHDC.
- (d) ECHDC is not required to undertake any finishing work or preparation of the Premises for Operator’s use. If any finishing work is required to fit up the Premises in a manner suitable for the Use, Operator shall perform such work at its own expense. If such finishing work constitutes a Capital Project, the scope of the project and costs must be reviewed and approved by ECHDC. Operator shall not use any portion of the Premises that is in a condition unsafe or improper for the conduct of the Use.
- (e) Operator shall not use any other portion of the Premises or place any display tables, equipment, merchandise, or other items or property outside the Premises without the express written permission of ECHDC.
- (f) Operator states that its RFP Response identified and accounted for all anticipated revenue sources and business opportunities sought to be captured by Operator. Operator shall not commercially exploit the Premises except through the Use. Notwithstanding the foregoing, ECHDC may authorize new or additional revenue sources identified by Operator; Operator shall pay ECHDC an equitable portion of such additional revenue, as determined by good faith negotiations between the parties.
- (g) Notwithstanding anything contained in this License to the contrary, ECHDC shall have the right to license and or lease space in the property identified in the Exhibit as Terminal A & B (the “Terminal Property”) for activities that do not directly compete with the activities of the Operator, including but not limited to, boat storage or storage of other materials, boat repair and other mixed uses. In addition, should ECHDC dispose of the Terminal Property by sale or long term lease for development, the Operator shall have no further rights with respect to the Terminal Property.
- (h) The Parties expressly agree that this License does not create or convey any right, title or property interest, including any leasehold interest, in the Premises on behalf of the Operator.
- (i) Operator shall secure and maintain throughout the Term all licenses and permits necessary for the operation of the Concessions, including those required for the sale of liquor, beer and wine at the Premises. ECHDC shall approve of and cooperate with Operator in connection with filing applications for, and securing and maintaining in good standing, any and all licenses and permits and renewals

thereof needed by Operator to fulfill its obligations hereunder.

#### Section 4. Fees

- (a) Operator shall pay to ECHDC an annual base fee of \$25,000 due on or before February 1 of each year (the “**Base Fee**”).
- (b) Operator shall pay ECHDC \$2.00 of every event ticket sold and 5% of all site rental fees, parking fees, and sponsorships within thirty business days of month end. Note: parking fees that are included as part of an event ticket price are not exempt from the 5% fee.
- (c) Monthly, within fifteen business days of Operator’s financial month end closing, Operator shall cause to be made and delivered to ECHDC a statement detailing the Gross Revenue. Such report will use standard profit/loss inventory associated with events occurring on the Premises, including but not limited to, statistics associated with parking volume, concessions, retail and sponsorship.
- (d) On or before March 15th of each year, Operator shall cause to be made and delivered to the ECHDC an annual statement of Gross Revenues for the immediately preceding year of the License Term. If such report reveals that Operator has either underpaid or overpaid the Percentage Fee due the ECHDC hereunder, then any amounts due the ECHDC shall be paid with said report, and any overpayment shall be deducted from the Percentage Fee payments next due the ECHDC upon issuance of a credit memorandum by the ECHDC provided that there are such Percentage Fee payments due ECHDC, else any overpayment amounts due the Operator shall be paid by ECHDC within thirty business days of a request received from Operator.
- (e) On or before the end of each fiscal year, ECHDC reserves the right to conduct an independent audit to determine the correctness of the computation of the Percentage Fees paid to ECHDC for the preceding year(s). The fees associated with the audit shall be paid by ECHDC. If as a result of such inspection and audit, it is established that additional payments are due, Operator shall pay such additional fees to the ECHDC upon written demand made by ECHDC.
- (f) All payments to be made to ECHDC under this License shall be made payable to the Erie Canal Harbor Development Corporation, 95 Perry Street, Buffalo, New York 14203, Attention: Financial Project Manager, or as ECHDC may from time to time direct.
- (g) Operator shall pay all fees promptly when due without notice or demand therefore, and without any abatement, deduction or set off for any reason whatsoever. Fees shall be paid to ECHDC in lawful money of the United States by, at Operator’s election, either (i) good and sufficient check (subject to collection) drawn on a bank which is a member of the New York Clearing House Association, or a successor thereto, or (ii) wire transfer to an account designated by ECHDC.
- (h) No payment by Operator or receipt by ECHDC of a lesser amount than that provided herein shall be deemed to be other than on account of the earliest stipulated Fee; nor shall any endorsement or statement on any check or any letter accompanying any check or payment as a Fee be deemed an accord and satisfaction, and ECHDC may accept such check or payment without prejudice to ECHDC’s right to recover the balance of such Fee or pursue any other remedy provided herein.
- (i) The obligation of Operator to make payments of all Fees arising during the Term shall survive the expiration or earlier termination of this License.
- (j) Without in any way limiting the rights of Operator in the event of casualty damage to the Premises, in the event of a significant weather event, act of war or other natural or manmade disaster impacts the Premises, and Operator’s operations at the Premises are suspended due to (i) mandatory governmental evacuation orders in excess of seven (7) days; (ii) power outages caused by such event in excess of seven (7) days; (iii) “boil orders”, lack of potable water or lack of sanitary sewer

services caused by such event with respect to the Premises in excess of seven (7) days; or (iv) any other cause outside of Operator's control relating to such event which results in suspension of operations in excess of seven (7) days, regardless of the extent of physical damage to the Premises, then the Base Fee and Percentage Fees shall be abated commencing with the eighth (8th) day of such suspension until such time as Operator is able to reestablish operations on the Premises, provided that Operator makes commercially reasonable efforts to resume operations as soon as possible. The aggregate Base Fee and Percentage Fees so abated shall be paid to ECHDC by Operator in twelve (12) equal monthly installments together with the then current installment of Base Fee and Percentage Fees due commencing on the first Base Fee payment date following Operator's reestablishment of operations on the Premises.

## **Section 5. Capital Projects**

- (a) Operator shall undertake no excavations or construction, nor make any alterations, additions or improvements to or installations upon the Premises without the prior written permission of ECHDC. All such work shall be done subject to and in accordance with the terms and conditions of this License and in accordance with the Legal Requirements.
- (b) Operator shall be responsible, at its own expense, for any design, planning, technical analyses, and/or other work necessary for ECHDC to comply with any required local, state, or federal law, regulation, review, consultation and/or permit requirement associated with an Operator-proposed excavation/construction, alteration, addition or improvement to or installation upon the Premises.
- (c) Operator shall cause all work to be performed in a good and workmanlike manner and in accordance with the Legal Requirements. Upon ECHDC's written request, Operator shall promptly commence to reconstruct or replace and diligently pursue to completion, at its sole cost and expense, prior to or after completion of such work, any work which is not done substantially in accordance with what was approved by ECHDC.
- (d) Capital Projects undertaken by Operator, whether with or without the consent of ECHDC, will become the property of ECHDC upon completion unless the consent of the ECHDC expressly provides otherwise. Operator shall not remove or modify any Capital Project during the term of this agreement or at its expiration or termination without the prior written consent of ECHDC.
- (e) All of Operator's consulting, construction, or other contracts for a Capital Project must be in accordance with the terms of this agreement and must not impair the rights of the State or of ECHDC under this agreement or create or be deemed to create a contractual or third-party beneficiary relationship between ECHDC and any contractor of Operator.
- (f) In addition to requiring insurance coverage under Section 19 - Insurance, Operator shall require all its Capital Project consultants and contractors to indemnify the Indemnitees as set forth in Section 14 - Indemnity and Claims.

## **Section 6. General Operating Requirements**

- (a) *Obligation to Operate.* Operator shall undertake the Use.
- (b) *General Operating Standards.* Operator shall conduct a first-class operation and shall furnish and maintain all necessary and proper equipment, fixtures, personnel, supplies, and materials required to do so. Operator shall conduct all its operations in an orderly manner and so as not to annoy, disturb, or be offensive to other Operators or patrons of the Premises. Operator warrants that any

- food, food products, merchandise, and other goods and services; sold or kept for sale under this agreement will be of high quality and standards and will conform in all respects to applicable federal, State and local laws, regulations, ordinances, and codes. All goods and services offered for sale must be in good taste and considered appropriate, proper, and consistent with the State of New York and ECHDC's values. If in ECHDC's judgement any good or service offered by Operator is inconsistent with image, policies, or reputation of the State of New York or ECHDC or otherwise unsuitable, at ECHDC request, Operator shall cease offering such good or service immediately.
- (c) The Parties agree to work together to develop a diverse and broad range of activities to be conducted on the Premises with the goal of activating the Premises for use by the general public. Any and all proposed Concessions conducted by the Operator on the Premises shall be subject to review and approval by ECHDC in accordance with the following:
- (i) Annually and at least twelve (12) weeks in advance of the first scheduled event at the Premises, the Operator shall provide a proposed plan for the season (the "Annual Plan") which shall include a calendar of events and activities, marketing plan, food and beverage plan and a safety and security plan.
  - (ii) The Annual Plan must be approved by ECHDC and such approval may be reasonably withheld at the ECHDC's sole discretion.
  - (iii) The Operator shall update the Annual Plan as needed to reflect any changes during the year. Any material change to the Annual Plan shall be subject to ECHDC's approval. The Operator shall make reasonable efforts to provide a minimum four weeks' notice, or as soon as is practicable, for any proposed revisions to the Annual Plan.
- (d) *Fire Safety Standards.* Operator shall comply with all current and future regulations, requirements, orders, and directions of the National Fire Protection Association and the New York Fire Insurance Rating Organization, and of any other board or organization exercising similar functions, that apply to the Operator's Use in the Premises.
- (e) *Operating Licenses.* Operator shall obtain and maintain all necessary licenses, certificates, permits, or other governmental authorization for the Use, and shall provide for the inspection and review of such governmental authorizations by ECHDC and other persons authorized by law. Operator shall comply with all current and future governmental laws, regulations, codes, or orders applicable to the Operator's conduct of the Use at or its occupancy of the Premises. If any current or future licensing requirement requires a Capital Project, such work is subject to the requirements of Section 5 - Capital Projects of this agreement. This provision does not constitute consent by ECHDC to the application of any Licensing Requirements to ECHDC or the State of New York.
- (f) *Method of Sales Transactions.* Operator shall accept, at minimum, the following methods of payment:  
(i) cash and (ii) at least two major credit cards.
- (g) *Payment of Taxes.* Operator is solely responsible for and shall pay in a timely manner all applicable taxes.
- (h) *Identifying Signage.* Operator shall post signage within the Premises, in a place and manner that is easily visible to the public, signage approved by ECHDC that identifies the Premises as operated by Operator under a license from ECHDC and lists Operator's corporate name and contact information.
- (i) *Hours of Operation.* Operator shall conduct the Use only between [XXam] and [XXpm] ("**Normal Business Hours**"). If Operator desires to operate outside Normal Business Hours, it may do so only with the express written permission of ECHDC, such permission to be subject to the Park's

- operating hours and security staffing but not to be unreasonably withheld.
- (j) *Fireworks.* With the exception of July 4, Operator shall not undertake or permit any firework displays or performances involving pyrotechnics of any kind without the specific prior written approval of ECHDC. All applicable state and local permits are required for any firework displays.
  - (k) *Closures.* Although ECHDC shall make commercially reasonable efforts to avoid interference with Operator's use of the Premises, ECHDC may, with two weeks' notice to Operator, require Operator to temporarily close in order for ECHDC to make repairs, alternations, changes, or improvements to the Premises. Operator acknowledges that ECHDC might close the Premises, or a portion of the Premises, with little or no advance notice for the protection of public health and safety, and that in such event Operator shall close until the affected portion of the Premises is re-opened and ECHDC will have no liability to Operator for such closures.
  - (l) *Information Security.* Operator shall comply with the provisions of the New York State Information Security Breach and Notification Act, General Business Law Section 899-aa. Operator shall be liable for the costs associated with such breach if caused by Operator's negligent or willful acts or omissions, or the negligent or willful acts or omissions of Operator's agents, officers, employees or subcontractors.
  - (m) *Facility Regulations.* Operator shall comply with all existing ECHDC regulations and Facility rules, except that if with respect to Operator's use of the Premises such regulations and rules conflict with the provisions of this agreement, the provisions of this License will prevail.
  - (n) *Exterior Signage.* ECHDC has adopted a uniform style of signage for its properties and may erect, display, or change signage at the Premises in its sole discretion. Operator shall not erect, display or change any advertising, identifiers or other signs at or on the exterior of the Premises or elsewhere in the Premises without the prior written consent of ECHDC.
  - (o) *Website, Social Media and Email Addresses* Operator shall be responsible for including all Outer Harbor events and activities on ECHDC's 'Buffalo Waterfront' website. Operator shall be responsible for social media promotion of Outer Harbor events and activities using ECHDC's 'Buffalo Waterfront' accounts (including, but not limited to, Facebook, Instagram, and Twitter) and will coordinate with the operator at Canalside for scheduling posts, ads, etc. ECHDC reserves the right to require Operator to use @buffalowaterfront.com email addresses when conducting all business.

## **Section 7. Operator Responsibilities**

- (a) Operator shall comply with all federal and state laws, codes, regulations, and policy or guidance documents applicable to the conduct of the activities authorized by this agreement, including all applicable governmental regulations regarding the sale, use, and storage of foodstuffs, beverages, alcohol, and fuel.
- (b) Operator shall implement policies to address the environmental impacts of its operations, including, without limitation, those on the use of non-biodegradable material, the purchase of "green" products, and the conservation of energy. Consistent with such policies, at a minimum Operator:
  - (i) shall use recyclable materials whenever practicable;
  - (ii) shall provide appropriate receptacles to allow for separation of recycling material and biodegradable waste from other trash and debris; and
  - (iii) shall not provide or distribute Styrofoam products or single-use plastic bags, condiment packets, drinking straws or drink stirrers, except that Operator shall

provide plastic drinking straws upon request to customers with a physical or medical need therefore.

- (c) Operator shall make reasonable efforts to purchase goods and services from New York State businesses and suppliers sourcing products from New York State businesses, including minority- and women-owned businesses certified by Empire State Development, and service-disabled veteran owned businesses certified by the Office of General Services.
- (d) Operator shall not commit any nuisance on the Premises or do or permit to be done anything which may result in the creation or commission of a nuisance on the Premises. Operator shall not cause or produce, nor allow to be caused or produced, any unusual, noxious, or objectionable smoke, gas, vapor, odor, or noise on the Premises, nor allow the same to permeate the Premises or emanate therefrom.
- (e) Operator shall not use or connect any equipment or engage in any activity or operation that will cause or tend to cause an overloading of the capacity of any existing or future utility, mechanical, electrical, communication, or other system or portion thereof serving the Premises; nor shall Operator do or permit to be done anything that might interfere with the effectiveness or accessibility of existing and future utility, mechanical, electrical, communication, or other systems or portions thereof on the Premises or elsewhere. Operator shall connect all electrical appliances directly to an electrical outlet or fused power strip.
- (f) Operator shall not overload any floor, roadway, passageway, pavement or other surface, or any wall, partition, column or other supporting member, within the Premises.
- (g) Operator shall not discharge any acids, vapors, or other harmful materials into the water lines, vents, or flues of the Premises. Operator shall not use the water and wash closets and other plumbing fixtures for any purpose other than those for which the same were designed and constructed, and shall not throw or deposit any sweepings, rubbish, rags, acids, or other foreign substances therein. Operator shall not store, sweep, or throw anything into the shared common or public areas of the Premises, or into or upon any heat or ventilating vents or registers in the Premises, or into any plumbing apparatus in the Premises, or onto any buildings or land adjoining the Premises.
- (h) Operator shall not use or store, or permit the use or storage, at the Premises of any explosives of any kind, illuminating oils, oil lamps, turpentine, benzene, naphtha, or other similar hazardous materials or substances. Operator shall properly handle, store, and use all fuel, including propane tanks, Sterno or other portable warming fuel and apparatus.
- (i) Operator shall not place objects against glass partitions, doors or windows, ceilings or floors, or walls in a manner that is unsightly from any exterior within the Premises, and shall promptly remove the same upon notice from ECHDC. Operator shall provide shelving for stored items and keep floor areas and walkways clear. Operator shall not install or place, or permit to be installed or placed, any lights, fixtures, or decorations of any sort or any flashing, blinking, neon, or animated signs or lights in windows or areas visible to public view.

### **Section 8. Property Operations and Maintenance**

ECHDC holds a separate agreement with the New York State Office of Parks, Recreation, and Historic Preservation (“NYS Parks”) to perform various day-to-day operations and maintenance tasks. Operator shall contact ECHDC with any maintenance or service requests for NYS Parks. Operator will be required to meet with ECHDC and NYS Parks on at least a monthly basis for coordination purposes.

- (a) Parking, Roadways and Emergency Access

- (i) Parking and roadways are to be kept clear and unobstructed on a daily basis. Event set up for parking and vehicle circulation is to be restored to typical traffic pattern by the following day.
  - (ii) Emergency access routes are to be maintained at all times and modified as needed for events.
  - (iii) There is no snow removal service provided on the property. Operator is responsible for snow removal to accommodate programmed events.
- (b) Landscape Environments and Trails
  - (i) ECHDC/NYS Parks are responsible for lawn care, landscape beds and habitat restoration areas, edging, mulch, tree care, invasive species management, trail maintenance, permanent fences and gates, seasonal maintenance and irrigation.
  - (ii) The Western New York Mountain Bicycling Association (WNYMBA) holds a temporary revocable permit (TRP) with ECHDC for routine maintenance and repairs of the trails at the Lakeside Bike Park. A secure shipping container for storage of WNYMBA tools and trail material stockpile area are reserved for trail maintenance. All trail work sessions are to be coordinated with the Operator.
  - (iii) There is no snow removal provided on trails.
- (c) Housekeeping and Sanitation
  - (i) Operator shall at all times keep the Activation Zones in a clean and sanitary condition. Activation Zones are to be in broom clean condition, with furniture wiped clean and reset at the end of each operating day.
  - (ii) Operator shall be responsible, at its own expense, for pest control in all interior spaces within the Activation Zones. This shall include but not be limited to ants, flies, roaches, bees/wasps, and rodents. Bee and wasp nests on the exterior of structures in the Activation Zones shall be included in the Operator's pest control service.
  - (iii) Operator shall adhere to all applicable State and local health and sanitary codes, standards, regulations and inspections. If, at any time, the Operator receives a citation issued by any State or local health agency, Operator shall notify ECHDC and correct the deficiency, in the required timeframe, at its own expense.
  - (iv) Public restrooms existing at the entrance to Wilkeson Pointe, and future public restrooms at Bell Slip and Lakeside, will be opened and closed daily by NYS Parks, April 1 - November 1. NYS Parks is responsible for daily janitorial services, such as cleaning, supplies and minor repairs. Restrooms that are within Activation Zones managed by the Operator are to be cleaned and maintained by the Operator.
- (d) Waste Removal
  - (i) Operator shall be responsible for the collection, handling and removal of all waste, recycling and other refuse generated from their Use of the Premises. Litter in landscapes and along trails left as a result of Operator's Use is to be collected and disposed of by the Operator. Operator is to implement a recycling program to be approved by ECHDC. Waste collection holding areas and dumpsters are to be in screened enclosures when visible to the general public.
  - (ii) NYS Parks is responsible for daily waste removal from receptacles along the Greenway Trail system and public restrooms.
- (e) Utilities
  - (i) Operator acknowledges that there are limited utility services to the Premises. The

following utilities shall be paid for and maintained by ECHDC: electricity, water, gas, and sewer.

- (ii) Operator is responsible for any internet, television, and telephone services to the Premises.
  - (iii) ECHDC/NYS Parks is responsible for utility system maintenance, seasonal shutoff and activation of utilities and maintenance of light fixtures and lamping throughout the Premises.
- (f) Maintenance and Repairs
- (i) ECHDC shall maintain the Premises in in safe, operable, and inviting condition at all times and maintain and keep the Premises in good and acceptable repair as determined by ECHDC. Except as otherwise specifically set forth in this agreement, ECHDC shall perform all capital, structural, and routine repairs, replacements, and maintenance as needed on a turnkey basis at its own cost, including such work that is required as a result of vandalism or other destructive acts.
  - (ii) Limited solely to the Operator Concessions and other Operator events anticipated by this Agreement, Operator is responsible for maintenance and repair of the Premises and Operator shall, at its own expense, maintain or cause to be maintained, and shall keep or cause to be kept, the Premises in a good, safe, clean and orderly condition and repair. The Premises shall be maintained, repaired and operated in accordance with all Legal Requirements.
  - (iii) Operator shall at its sole cost repair, replace, rebuild, or repaint, as necessary, any part of the Premises that is damaged or destroyed by the acts or omissions of Operator, Operator's business invitees, or other persons who are at the Premises at Operator's invitation, including Operator's events and programming. In the event of such damage or destruction, Operator shall notify ECHDC within three business days. If such work constitutes a Capital Project, the scope of the project and costs must be reviewed and approved by ECHDC.
  - (iv) All product data information, manuals, service requirements and warranty information is to be provided to ECHDC for any new installation or modification to built environment, equipment, furnishings and fixtures.

## **Section 9. Qualified Staff**

- (a) Operator shall employ all necessary staff in sufficient force to conduct the Use properly, efficiently, and to the high standards for operation required by this agreement. Operator shall employ only duly qualified and competent staff, including professional and experienced managers to oversee and administer the operation of the Premises.
- (b) Operator's employees and contractors must be able to communicate effectively with ECHDC, the public, vendors, public safety personnel, and all others with whom they must interact in the course of their employment.
- (c) Operator is solely responsible for the recruitment and screening of personnel and verification of credentials.
  - (i) Operator shall check each prospective personnel against the Statewide Sexual Offenders Registry.
  - (ii) Operator shall not hire or retain any person who:
    - a. Refuses to provide the names of references, documentation of credentials,

- information on criminal conviction records, or any other requested information that bears on the applicant's fitness to work with or in close proximity to the public, including children; or
- b. Has not completely and truthfully reported information concerning their criminal convictions; or
  - c. Subject to and consistent with Article 23-A of the New York State Correction Law, whose criminal convictions record directly bears on their fitness to work with or in close proximity to the public, including children, or whose employment would involve an unreasonable risk to the safety or welfare of the public, including children; or
  - d. Who has been the subject of, or who is the subject of an ongoing investigation pursuant to, an indicated child abuse and maltreatment report on file with the State Central Registry.
- (d) Operator shall train its employees in appropriate operational procedures and standards, including, as applicable and without limitation, pricing definitions; item specifications; housekeeping and maintenance standards; courtesy, guest relations, and speed and manner of customer service; personal appearance; safety; and individual job performance. Operator shall additionally train its managerial employees in quality and cost controls; marketing and advertising; supervision; and accounting and cash control procedures.
  - (e) (If applicable) Operator shall arrange for all employees involved in the preparation and serving of food to be certified through the ServSafe® program offered by the National Restaurant Association or an equivalent industry standard approved by ECHDC.
  - (f) Operator shall provide its employees with proper identification credentials and distinctive attire or uniforms that foster a neat and appropriate public image. The style of uniforms is subject to approval by ECHDC.
  - (g) Operator shall take prompt and appropriate action in response to complaints about the conduct, demeanor, or appearance of its employees, contractors, customers, and other business invitees. Upon the request of ECHDC, Operator shall immediately take all reasonable steps necessary to remove or otherwise resolve the cause of such complaints, including to discipline, retrain, or replace any employee whose conduct or appearance is unprofessional and/or inconsistent with the standards of ECHDC. To the extent commercially reasonable, any collective bargaining agreement between Operator and any labor union or organization must recognize the foregoing right of ECHDC, and no such collective bargaining agreement shall in any way affect or diminish the rights of ECHDC hereunder.

#### **Section 10. Sale of Alcoholic Beverages and Tobacco Products**

- (a) Operator may sell alcoholic beverages at the Premises so long as it obtains and holds the applicable New York State Liquor Authority license. Operator must comply with the terms of its liquor license in all serving or sale of alcoholic beverages and shall provide industry-standard alcohol service training to all employees serving alcohol.
- (b) Operator shall obtain the prior approval of ECHDC for all alcohol-related signs, media messaging, advertisements, and sales promotions.
- (c) Operator shall not sell any tobacco products, including electronic nicotine delivery systems or vapes; or faux-tobacco products (e.g., candy cigarettes, bubble gum cigars) at the Premises.

## **Section 11. Financial Records**

- (a) Operator shall keep books and records of account for its Use at the Premises (“**Financial Records**”) in an electronic format in accordance with generally accepted accounting principles. Operator shall keep its Financial Records for the balance of the calendar year in which they were made and for six additional years thereafter.
  - (i) During the term of this agreement and for six years thereafter, ECHDC, the Office of the State Comptroller, the Office of the Attorney General, and their authorized representatives and contractors (collectively, “**State Auditors**”) may inspect and audit Operator’s Financial Records during at any time during Normal Business Hours upon at least 24 hours’ notice. As part of such an inspection or audit, the inspector or auditor may make copies of Operator’s Financial Records.
- (b) Operator shall immediately and properly record all sales of any nature within the Premises using a point of sale system that has industry standard features or controls to prevent or limit theft and fraud to the fullest extent practicable. Operator shall record sales from remote, portable, or mobile operations transacted outside the Premises at soon as commercially reasonable.
  - (ii) State Auditors may audit point of sale transactions at any time and Operator shall provide State Auditors access to all such systems for audit purposes.

## **Section 12. Condition of Premises**

Except as otherwise expressly set forth in this License, (i) no representations, statements or warranties, express or implied, have been made by or on behalf of ECHDC in respect of the Premises, the status of title thereof, the physical condition thereof, the zoning or other laws, regulations, rules and orders applicable thereto, taxes, or the use that may be made of the Premises and (ii) Operator acknowledges that Operator has relied on no such representations, statements or warranties, and ECHDC shall in no event whatsoever be liable for any latent or patent defects in the Premises.

## **Section 13. ECHDC not Liable for Injury, Damage, etc.**

- (a) Limited to the Operator Concessions and other Operator events anticipated by this Agreement, and except as expressly set forth in this Agreement, ECHDC shall not in any event whatsoever be liable for any injury or damage to Operator or to any other person happening on, in or about the Premises and its appurtenances during the term of this License, nor for any injury or damage to the Premises or to any property belonging to Operator or to any other Person which may be caused by a fire or breakage or which may arise from any other cause during the term of this Agreement, except to the extent caused by the negligence or intentional conduct of ECHDC or ECHDC’s agents or employees.
- (b) Limited to the Operator Concessions and other Operator events anticipated by this Agreement, and except as expressly set forth in this Agreement, and except as expressly set forth in this Agreement, and except to the extent caused by the negligence or intentional conduct of ECHDC or ECHDC’s agents or employees, ECHDC shall not be liable to Operator or to any other Person for any failure of water supply, gas or electric current, nor for any injury or damage to any property of Operator or of any other Person or to the Premises caused by or resulting from gasoline, oil, steam, electricity, or hurricane, tornado, blizzard, flood, wind or similar storms or

disturbances, or water, rain or snow which may leak or flow from the street, sewer, gas mains or subsurface area or from any part of the Premises, or leakage of gasoline or oil from pipes, appliances, sewer or plumbing works therein, or from any other place, nor for interference with light or other incorporeal hereditament by anybody, or caused by any public or quasi-public work.

- (c) Limited to the Operator Concessions and other Operator events anticipated by this Agreement, and except as expressly set forth in this Agreement, and except to the extent caused by the negligence or intentional conduct of ECHDC or ECHDC's agents or employees, ECHDC shall not be liable to Operator or to any other Person for any injury or damage to any property of Operator or of any other Person or to the Premises, arising out of any sinking, shifting, movement, subsidence, failure in load-bearing capacity of, or other matter or difficulty related to, the soil, or other surface or subsurface materials, on the Premises; and Operator shall assume and bear all risk of loss with respect thereto.

#### **Section 14. Indemnity and Claims**

- (a) Operator assumes all risks in its performance under this agreement and agrees to defend, indemnify and hold harmless the State of New York, ECHDC, NYS Parks, Western New York Mountain Bike Association and their officers, employees, agents, and assigns ("the Indemnitees") from and against all claims, suits, losses, damage, or injury to persons or property of whatsoever kind and nature, whether direct or indirect, that are caused or contributed to by Operator or Operator's contractors, vendors, employees, agents, and invitees and that arise out of Operator's conduct or Operator's performance of this agreement.; provided, however, that Operator's indemnity will not extend to any claims, suits, losses, damage, or injury to persons or property attributable to the negligence of any Indemnitee.
- (b) For all purposes hereunder, ECHDC will not be liable for any injury, loss, or damage to Operator or to Operator's contractors, vendors, employees, agents, and invitees or to any person happening on, in, or about the Licensed Premises or its appurtenances, nor for any injury or damage to the Premises or to any property belonging to Operator or to any other person, that may be caused by fire, theft, breakage, vandalism, or any other use or misuse or abuse of any portion of the Premises, including but not limited to any common areas, sidewalks, roads, or water in or adjacent to the Premises, or that might arise from any other cause whatsoever, unless and only to the extent of the proportion of which any such injury, loss or damage is determined to be caused by the negligence of ECHDC.
- (c) For all purposes hereunder, ECHDC will not be liable to Operator or to Operator's contractors, vendors, employees, agents, and invitees or to any other person for any failure of water supply, gas supply, or electric current, nor for any injury or damage to any property of Operator or any other person or to the Premises caused by or resulting from spill or release of gasoline, oil, steam, gas, or electricity; leakage of any substance from pipes, appliances, sewers, or plumbing works; hurricane, flood, tornado, wind, or similar storm or disturbance; water, rain, or snow that might leak or flow from the street, sewers, or subsurface areas, or from any part of the Premises or any body of water within or adjacent to the Premises; or any public or quasi-public work, unless and only to the extent of the proportion by which any such injury, loss, or damage is determined to be caused by the negligence of ECHDC.
- (d) The obligations of the Operator under this Section shall not be affected in any way by the

absence in any case of covering insurance or by the failure or refusal of any insurance carrier to perform any obligation on its part under insurance policies affecting the Premises. All amounts owed to ECHDC under this Section shall be paid no later than ten days after demand therefore, with interest at the Default Rate from the date any indemnified amount was paid by such party until the date repaid with such interest, and shall constitute an Additional Fee under this License.

- (e) If any claim, action, or proceeding is made or brought against any of the Indemnitees by reason of any event for which Operator has agreed to indemnify the Indemnitees then, upon demand by ECHDC, Operator shall, and in the absence of such demand, Operator may, at its option, resist or defend such claim, action or proceeding (in such Indemnitee's name, if necessary) by the attorneys for Operator's insurance carrier (if such claim, action or proceeding is covered by insurance maintained by Operator) or (in all other instances) by such attorneys as Operator shall select and ECHDC shall approve, which approval shall not be unreasonably withheld. Operator shall not enter into any settlement of any such claim without the prior consent of ECHDC, and all of such affected Indemnitees, which shall not be unreasonably withheld, and only if such parties are released from all liability in connection with such claim and none of their interests are prejudiced by such settlement. Notwithstanding the foregoing, each of the Indemnitees may engage its own attorneys to defend it or to assist in its defense, but Operator shall be liable only for the fees and disbursements of ECHDC's attorneys and only for ECHDC's attorneys if Operator has not retained attorneys. ECHDC may enter into any settlement of such claim provided that Operator is not materially adversely affected by any such settlement.
- (f) This Section and all other indemnity provisions elsewhere in this License shall survive the expiration or earlier termination of this License.

## **Section 15. Intellectual Property**

- (a) ECHDC is the owner of several marks associated with the Premises, including the marks identified in Attachment X (the "Marks"). ECHDC hereby grants Operator a nonexclusive, nontransferable, royalty-free right to use the Marks during the term of this agreement for promotional and merchandising purposes related to the Use.
- (b) ECHDC may at all reasonable times to inspect Operator goods, services, and promotional activities and materials employing the Marks to ensure that Operator's use of the Marks is of proper quality and otherwise consistent with this agreement. If ECHDC determines that Operator's use of the Marks is inconsistent with ECHDC's standards or adversely impacts the reputation, image, mission, or integrity of ECHDC, ECHDC may impose additional conditions on Operator's use of the Marks including, without limitation, a right of ECHDC to pre-approve Operator's use of the Marks.
- (c) At the termination of this agreement all right of Operator to use the Marks will immediately terminate and Operator shall immediately cease its use of the Marks.

- (d) Although the rights granted by this section are not assignable and may not be sublicensed, Operator may contract with a third-party for production of merchandise and promotional materials using the Marks.
- (e) Operator acknowledges that ECHDC is the owner of the Marks and any related word and/or design marks now used by ECHDC or that may be developed and used by ECHDC in the future (“Related Marks”). Operator shall not oppose or undertake any other actions or proceedings adverse to ECHDC’s use, registration, or application for registration of any of the Marks or any Related Mark. Operator shall not register or apply to register the Marks or any Related Mark or any other terms of designs confusingly similar thereto with the United States Patent and Trademark Office, the State of New York, or any other jurisdiction administering a register of trade and/or service marks. Any rights asserted by Operator in the Marks will vest in ECHDC and any goodwill from the use of the Marks by Operator will inure solely to the benefit of ECHDC.
- (f) Except for the descriptive use of the facility name in its advertising and the rights specifically granted in this section, Operator shall not use any ECHDC, Empire State Development or State of New York logo, trademark, or other intellectual property.

#### **Section 16. Sponsorships**

- (a) *Sponsorships.* Sponsorship of the Premises or the Use is subject to the approval of ECHDC as to form, content, and manner of presentation, and Operator shall not enter into any sponsorship agreement without the prior written approval of ECHDC. Sponsorship by companies, interests, or organizations that are directly identified with the sale or use of tobacco products is strictly prohibited. Sponsorship opportunities include, without limitation, program inserts, product sampling, and advertising displays at the Premises.
- (b) *Naming Rights.* Operator shall not sell, lease, license, market, or otherwise offer so-called “naming rights” to the Premises without the express written permission of ECHDC. Naming rights includes, without limitation, recognition of contributors and donors of money, property, services, or anything of value to Operator.
- (c) Sponsorship activations should consider the natural surroundings of the Outer Harbor and partnerships are encouraged with companies and organizations that prioritize health, wellness, sustainability, and are family-friendly. Operator will be required to obtain ECHDC’s written approval for all sponsorship agreements and activations.

#### **Section 17. Advertising**

- (a) Operator shall use commercially reasonable efforts to promote its Use. On an annual basis, Operator shall develop, and submit to ECHDC for review and approval, a marketing plan describing media and promotional tools to be used

in promoting the Use and the Premises. Operator shall implement such plan as approved by ECHDC.

- (b) ECHDC reserves the right to require Operator to use a standard design, style, template, or format in all advertisements and other promotional materials, including website design and social media. ECHDC may prohibit any advertising sign by Operator that, in the sole judgement of ECHDC, impairs the aesthetics of the Premises or that restricts the movement of patrons in the area.
- (c) Operator shall not advertise or offer for sale, hire, or use any amenities, areas, or activities outside of the Premises without the prior approval of ECHDC.

#### **Section 18. Coordination with ECHDC**

Operator shall cooperate with ECHDC and NYS Parks and comply with all reasonable requests made with respect to the operation and maintenance of the Premises. Operator shall meet with ECHDC at least monthly to review, plan, and improve the development, construction, maintenance, and operation of the Premises. Operator shall also attend regular coordination meetings with the Canalside Management Team.

#### **Section 19. Insurance**

- (a) At all times throughout the term of this License, Operator shall maintain, and comply with the terms of, insurance, with insurers licensed to do business in the State of New York and reasonably acceptable to ECHDC and generally recognized as being responsible, against such risks, loss, damage and liability and for such amounts as are customarily insured against by other enterprises of like size and type as that of Operator, including, without limitation:
  - (i) Property damage insurance, which shall include fire insurance (including "extended coverage") and coverage for personal property and vandalism/malicious mischief and other casualties, in an amount not less than the actual replacement cost of any improvements to the Premises.
  - (ii) Commercial general liability insurance protecting Operator and ECHDC against losses from liabilities imposed by law or assumed in any written contract (including the contractual liability assumed by Operator under this Agreement) and arising from injury or death of a person or persons or damage to the property of others. Such insurance shall be in a minimum amount of One Million Dollars (\$1,000,000.00) combined single limit per occurrence with a \$2,000,000.00 aggregate for bodily injury or death and property damage, and may be effected under overall blanket or excess coverage policies of Operator.
  - (iii) Automobile liability insurance in the amount of \$1,000,000.00.
  - (iv) Excess Umbrella Liability insurance - \$5 million per occurrence / \$ 5 million aggregate

- (v) Liquor liability in the amount of \$1,000,000.00.
  - (vi) Workers' compensation insurance and other employee benefits insurance which Operator is required by law to provide.
  - (vii) Must show evidence of Disability insurance coverage at State statutory limits.
  - (viii) The Erie Canal Harbor Development Corporation, the NYS Urban Development Corporation d/b/a Empire State Development, New York State Office of Parks, Recreation, and Historic Preservation (NYS Parks), and Western New York Mountain Bike Association (WNYMBA) must be named as additional insureds on a primary and non-contributory basis on all of the following policies: Commercial General Liability, Auto Liability and Excess Liability policies
  - (ix) All policies listed above should include a waiver of subrogation in favor of ECHDC, NYS UDC d/b/a ESD, and NYS Parks.
  - (x) Professional Liability Insurance of \$1 million will be required of any engineer/architect retained by Operator, if any, with respect to improvements on the Premises.
  - (xi) An individual certificate (including hold harmless) must be provided to each of the following organizations: City of Buffalo, Erie Canal Harbor Development Corporation, Empire State Development, New York State Department of Transportation, New York State Office of Parks, Recreation, and Historic Preservation and Western New York Mountain Bike Association. All certificates of insurance are due one month (30 days) prior to the scheduled event
  - (xii) Such other insurance in such amounts and against such other insurable hazards as ECHDC from time to time may reasonably require or to the extent required by Requirements.
- (b) All policies evidencing the insurance required by this Agreement shall provide that:
- (i) Operator, ECHDC, and ESD (i.e., New York State Urban Development Corporation d/b/a Empire State Development) be designated as insureds or additional insureds as their respective interests may appear, except with respect to workers' compensation insurance, to the extent of the indemnity provisions of this License Agreement;
  - (ii) At least thirty (30) days written notice be given to ECHDC of the proposed nonrenewal, cancellation, lapse, reduction of benefits or material change in coverage relating to the Premises thereof;
  - (iii) The insurance shall be primary insurance without any right of contribution from any other insurance carried by ECHDC;
  - (iv) The amounts of insurance required pursuant to this License shall not be construed to limit the extent of Operator's liability under this License;
  - (v) Operator shall not violate or permit to be violated any of the conditions or provisions of any policy of insurance required by this License, and Operator shall perform and satisfy or cause to be performed and

- satisfied the requirements of the companies writing such policies;
- (vi) Operator shall be solely responsible for the payment of premiums notwithstanding that ECHDC or any other party is or may be named as an insured.
  - (vii) The insurance companies affording coverage must be reasonably deemed acceptable to ECHDC throughout the Term. If any insurance company is deemed unacceptable to the ECHDC Operator agrees to procure and maintain at its expense coverage with an acceptable insurer upon notification by ECHDC.
- (c) Operator hereby waives any and every claim for recovery from ECHDC for any and all loss of or damage to the Premises or to the contents thereof, which loss or damage is covered by valid and collectible physical damage insurance policies, to the extent that such loss or damage is recoverable under said insurance policies. Inasmuch as this waiver will preclude the assignment of any such claim by subrogation or otherwise, Operator agrees to give to each insurance company which has issued, or in the future may issue, to it policies of physical damage insurance, written notice of the terms of this waiver, and to have said insurance policies properly endorsed, if necessary, to prevent the invalidation of said insurance coverage by reason of said waiver. If Operator shall fail to maintain insurance in effect as required by this Agreement, the waiver of subrogation and release of liability by Operator set forth in this Article shall be in full force and effect to the same extent as if such required insurance (containing a waiver of subrogation) were in effect.
- (d) At the time of execution and delivery of this Agreement, Operator shall deliver to ECHDC duplicate originals of insurance certificates containing evidence of compliance with the requirements of this Article. At least thirty (30) calendar days prior to the expiration of any policy of insurance required by this License, Operator shall furnish to ECHDC evidence that the policy has been renewed or replaced or is no longer required by this License, and shall deliver to ECHDC certificates of such renewal or replacement policies as ECHDC may request.
- (e) The net proceeds of any casualty insurance required by this License shall be payable jointly to Operator and ECHDC and applied toward extinguishments or satisfaction of the liability with respect to which such insurance is written, in accordance with the provisions of this License.

## **Section 20. Environmental**

- (a) In 1999, the NYS Department of Environmental Conservation (“NYSDEC”) issued a Record of Decision (“ROD”) for the “Buffalo Outer Harbor Radio Tower Site” (i.e., NYSDEC Site No. 915026, located in a 0.9 acre-area of land south of the Bell Slip immediately north of the paved portions of 901 Fuhrmann Boulevard), which had stipulations to protect future users from exposure that involved in-situ chemical oxidation treatment of soils; excavation and transport of excess treated/stabilized soils to a landfill site; covering treated soils remaining at the site with two feet of

clean fill and topsoil over a demarcation layer of geotextile fabric; and institution of deed restrictions limiting the Site to future industrial/commercial usage, all of which was fully completed while the property was owned by the Niagara Frontier Transportation Authority (“NFTA”); and

- (b) In 2002, NYSDEC issued a ROD for the “Buffalo Outer Harbor Brownfield Site” (i.e. NYSDEC Site No. B00149) comprising all vacant former NFTA Port of Buffalo lands other than the “Radio Tower Site” and contained soils classified as contaminated but not hazardous, which involved a remedy (which was completed by NFTA in 2010) that consisted of installing a one-foot soil/geotextile cap and riprap stabilization along the Outer Harbor shoreline (i.e., the area currently known as the Outer Harbor “Greenbelt”) to prevent migration of soils into Lake Erie and to prevent/block possible exposure pathways to site contaminants (i.e., inhalation, dermal contact, and ingestion) in this area, which is now annually inspected by ECHDC, and a future, use-based remedial strategy for the balance of the site which involved future soil/geotextile capping depending on future land uses implemented on the balance of the site; and
- (c) In 2008 and 2011, ECHDC commissioned Phase I/II environmental site investigations by LiRo Engineers of 175 and 225 Fuhrmann Boulevard (now comprising Wilkeson Point) that documented environmental conditions at the property and in 2012 ECHDC commissioned LiRo Engineers to design and help implement a remedy to prevent/block possible exposure pathways to such contaminated soils involving capping the site to NYSDEC standards using a one-foot soil/geotextile cap, and also extending the cap to the shoreline, where stone was used to protect the site from erosion and provide a barrier to contact by users of the shoreline; and
- (d) In September/October 2011, ECHDC commissioned surface water and sediment sampling by LiRo Engineers at Wilkeson Pointe that determined it was fully suitable for boating and fishing, however, would not be suitable for swimming or wading, pending further investigations of the source/extent of sediment contamination and surface-water bacteria levels; and
- (e) In 2012, NFTA and ECHDC commissioned URS Corporation (URS) to conduct a Limited Human Health Exposure Assessment to determine what level of risk recreational visitors and users of Buffalo Outer Harbor lands, and this assessment stated that aforementioned areas already remediated (provided the integrity of the implemented remedies remained intact [i.e., no excavation]) and selected areas where soil contamination levels did not exceed NYSDEC “Restricted Residential” or “Commercial” soil cleanup objectives levels would be fully suitable/safe for various recreational activities, including the Outer Harbor Greenbelt, Wilkeson Pointe, paved areas such as the Bell Slip parking lot, and areas formerly comprising the “Pier” nightclub area.
  - (i) If the Operator wishes to undertake the Use on an area outside of the Premises, ECHDC hereby grants to Operator and Operator’s agents, consultants and contractors (collectively the “Consultants”) the right to enter the Premises during an inspection period mutually agreed upon by both parties in order to inspect and evaluate the Property.

Operator shall have access to the Premises in order to perform inspections and tests on the Premises. Access may include the collection of soil samples, soil borings, or groundwater samples, or the performance of structural, engineering, geotechnical, or environmental inspections or tests from or at the Premises properties. The access provided shall be subject to the following:

- (ii) Prior to the Operator or any Consultant entering the Premises, said entity shall deliver to ECHDC a certificate of insurance naming ECHDC as an additional insured on its commercial general liability policy. Such insurance shall be in a minimum amount of One Million Dollars (\$1,000,000.00) combined single limit per occurrence with a \$2,000,000.00 aggregate for bodily injury or death and property damage related to access to the Premises.
  - (iii) Prior approval of the ECHDC shall be required prior to Operator or the Consultants engaging in any invasive testing on the Property (including but not limited to soil borings and collection of soil samples). ECHDC's approval of such testing shall not be unreasonably withheld conditioned or delayed.
  - (iv) Operator shall provide ECHDC copies of any reports or other documents generated, at no cost to ECHDC, unless said reports are confidential as the result of an attorney/client privilege.
- (f) At Operator's request, ECHDC will make available to the Operator, as of the Commencement Date, for Operator's review copies of any and all environmental and engineering studies performed at the Premises of which ECHDC is aware, including, but not limited to, a 2012 Limited Human Health Exposure Assessment by URS Corporation, and Phase I/II environmental site investigations by LiRo Engineers. ECHDC will further make available copies of any and all prior environmental site assessments, change in use documents, compliance audits and any subsurface investigations (however named) or other reports on environmental conditions or compliance at the Premises, including any report, notice, correspondence, or other document relating to hazardous substances or wastes found on or disposed of or released from the Premises.
- (g) An "Adverse Environmental Condition" includes the presence of any Hazardous Substances on the Premises in violation of any Environmental Requirements or in a condition which has caused or is reasonably likely to cause Environmental Claims. "Hazardous Substances" include any waste, pollutant, hazardous material, hazardous toxic substance, hazardous waste, special waste, industrial substance or waste, petroleum or petroleum-derived substance or waste, or any constituent of any such substance or waste, including any such substance regulated under any safety or environmental law. "Environmental Requirements" include all present and future requirements of common law, and all present and future requirements of any Governmental Authority regulating the discharge, disposal, remediation, etc. of any Hazardous Substances or any other pollutant, contaminant, etc., or regulating the protection of the health and safety of employees or the public. "Environmental

claim” includes any and all administrative, regulatory, or judicial actions, suits, orders, demands, claims, notices of violation, investigations or proceedings, or requests for information involving any person alleging liability arising out of or resulting from (1) alleged noncompliance with any environmental laws or environmental permits; or (2) the alleged presence, migration, or release of, or exposure to, any Hazardous Substances at any location.

## **Section 21. Mechanics’ Liens**

- (a) Operator shall pay or cause to be paid all costs and charges for work done by Operator or caused to be done by Operator in or to the Premises, and for all materials furnished for or in connection with such work. Operator shall, indemnify ECHDC against, and hold ECHDC and the Premises free, clear and harmless of and from, all mechanic’s liens and claims of liens, and all other liabilities, liens, claims and demands on account of such work by or on behalf of Operator. If any such lien, at any time, is filed against the Premises as a result of work performed or caused to be performed by the Operator, Operator shall cause such lien to be discharged of record within twenty (20) days after Operator is in receipt of notice of the filing of such lien. In the event that the Operator fails or refuses to remove such lien of record within such time period by payment, bonding off or payment into court, the ECHDC shall be entitled, but shall not be obligated, to discharge the same of record and all amounts paid by the ECHDC with respect to the same (including reasonable attorneys’ fees and disbursements) shall be paid by the Operator to the ECHDC as Additional Rent within twenty (20) days after the ECHDC renders a statement to the Operator with respect thereto. If a final judgment establishing the validity or existence of a lien for any amount is entered, Operator shall immediately pay and satisfy the same. If the Operator fails to pay any charge for which such a mechanics’ lien has been filed, ECHDC may, at its option, pay such charge and related costs and interest, and the amount so paid, together with reasonable attorneys’ fees and disbursements incurred in connection with such lien, shall be immediately due from Operator to ECHDC. Nothing contained in this License shall be deemed the consent or agreement of ECHDC to subject the interest of ECHDC to liability under any mechanic’s or other lien law. If Operator receives notice that a lien has been or is about to be filed against the Premises or any action affecting title to the Premises has been commenced on account of work done by or for or materials furnished to or for Operator, Operator shall immediately notify ECHDC in writing of such notice.
- (b) At least fifteen (15) days prior to the commencement of any work (including, but not limited to any alterations, additions, improvements or installations) in or to the Premises, by others at the request of the Operator, Operator shall give ECHDC written notice of the proposed work and the names and addresses of the persons supplying labor and materials for the proposed work. ECHDC shall have the right to post notices of non-responsibility or similar notices on the Premises in order to protect ECHDC’s fee interest in the Premises against any such liens.
- (c) Except as expressly provided in this Agreement, Operator shall have no power to do

any act or make any contract which may create or be the foundation of any lien or other encumbrance upon the estate or assets of, or funds appropriated to, ECHDC or of any interest of ECHDC in the Premises.

## **Section 22. Sublicensing**

- (a) Operator may, with the prior written approval of ECHDC, and if required by law the New York State Office of the State Comptroller, and subject to the terms and conditions of this agreement, sublicense its rights and obligations under this agreement to an independent third-party. Such third-party must meet ECHDC's vendor responsibility requirements and have demonstrable qualifications and experience for the sublicensed obligations.
- (b) Operator shall require its sub-Operators to comply with the provisions of this agreement and shall name the ECHDC as the sole intended third-party beneficiary of the sublicense. ECHDC reserves the right to review and approve or reject the sublicense, as well as any amendments thereto; this right does not make ECHDC or the State of New York a party to any sublicense or create for the sub-Operator any right, claim, or interest in the sublicense against ECHDC.
- (c) Operator shall give ECHDC immediate written notice of the initiation of any legal action or claim arising out of a sublicense that may affect Operator's performance under this Agreement.
- (d) No sublicense will relieve Operator of any duty, obligation, or responsibility owed to ECHDC under this agreement.

## **Section 23. Surrender**

- (a) Operator shall yield and deliver peaceably to ECHDC possession of the Premises on the date of expiration or termination of this agreement. Operator shall return the Premises to ECHDC in good order, repair and condition, reasonable wear excepted, as would not adversely affect or interfere with the efficient and proper utilization of the Premises or any part thereof, or in compliance with an alternative agreement reached by the parties at the time of surrender.
- (b) On or before the expiration or termination of this agreement, Operator shall:
  - (i) remove its equipment, removeable fixtures, and other personal property and all property of third parties for which it is responsible from the Premises;
  - (ii) remove any advertising, identifiers, or other of its signs from the interior and exterior of the Premises and from any other location within the Premises; and
  - (iii) repair all damage caused by such removals.ECHDC may lawfully remove or dispose of any personal property remaining at the Premises after the expiration or termination of this agreement.
- (c) No agreement of, or to accept a, surrender will be valid unless and until the same is reduced to writing and signed by the duly authorized representatives of the

parties. Except as expressly provided in this section, neither the doing of nor any omission to do any act or thing by any of the officers, agents, or employees of ECHDC will be deemed an acceptable surrender of the Premises or this agreement. Without limiting the foregoing, no officer or employee of ECHDC is authorized to accept the keys of the Premises as an act of surrender prior to the expiration or termination of this agreement and no delivery of the keys to ECHDC by Operator will constitute a termination of this agreement or acceptance of surrender.

#### **Section 24. Rights of Entry and Re-Entry**

- (a) In addition to any other rights of entry in this agreement, ECHDC may enter the Premises for the purposes of observing the performance by Operator of its obligations under this agreement or for the doing of any official act or things which ECHDC may be obligated or have the right to do under this agreement or in accordance with law. In case of emergency or exigent circumstances threatening the health, safety, or welfare of the public or the physical integrity of the Premises, ECHDC reserves an unrestricted right of entry to the Premises at all times.
- (b) ECHDC may, as an additional remedy upon the giving of a notice of termination as provided this agreement, re-enter the Premises and every part thereof upon the effective date of termination without further notice of any kind, and may regain and resume possession either with or without the institution of summary or any other legal proceedings or otherwise. Such re-entry, or regaining or resumption of possession, however, shall not in any manner affect, alter, or diminish any of the obligations of Operator under this agreement, and shall in no event constitute an acceptance of surrender.

#### **Section 25. Rights Upon Loss from Casualty**

- (a) If the Premises suffers a loss or damage from casualty, Operator shall notify ECHDC as soon as practicable.
- (b) If the loss or damage from casualty does not substantially interrupt or impede Operator's Use, Operator shall proceed with performance of this agreement.
- (c) If the loss or damage from casualty is to the extent that Operator's Use is substantially interrupted or impeded, ECHDC shall consult with Operator prior to making a determination of whether or in what manner the loss or damage can or should be restored to substantially the same condition as existed prior to such loss from casualty. ECHDC shall make a preliminary determination within 2 business days of the Premises being sufficiently safe to access and make a final determination within 45 days.
  - (i) If ECHDC determines that the loss or damage cannot or should not be restored, ECHDC shall inform Operator of such determination and set a date on which the agreement will terminate. In such event,

Operator shall pay ECHDC the remaining amount of Operator's Fees owed to ECHDC out of its share of any insurance proceeds.

- (ii) If ECHDC determines that the loss or damage can and should be restored, Operator may, within thirty days of ECHDC's determination and by written notice to ECHDC, elect to restore the Premises at ECHDC's sole cost and expense, in which case this agreement shall continue in force. Operator may apply the proceeds of its required policy of property insurance to the restoration of the Premises. Any restoration work will be deemed a Capital Project. If Operator does not wish to undertake its own restoration of the Premises, Operator shall, within thirty days of ECHDC's determination, provide ECHDC with written notice of its decision and pay to ECHDC the full proceeds it received under its required policy of property insurance and this agreement will terminate upon written confirmation of receipt of such funds by ECHDC.
- (d) If this agreement is terminated because of loss or damage from casualty Operator shall pay to ECHDC all fees and other amounts due for the period through and including the date of casualty and the parties shall otherwise finalize all open matters and obligations between them.
- (e) Nothing in this section releases Operator from its obligation to carry the property insurance required by Section 19 – Insurance.

**Section 26. Notices; Consents by ECHDC**

- (a) All notices permitted or required under this agreement shall be in writing and shall be transmitted:
  - (i) via certified or registered United States mail, return receipt requested;
  - (ii) by personal delivery;
  - (iii) by expedited delivery service; or
  - (iv) by e-mail.
- (b) Such notices must be addressed as follows or to such different address as the parties may from time- to-time designate:

If to ECHDC:  
Jill Clark  
Erie Canal Harbor Development  
Corporation  
95 Perry Street, 5<sup>th</sup> Floor  
Buffalo, NY 14203  
Telephone: 716-846-8200  
Email: jill.clark@esd.ny.gov

If to Operator:

TBD  
Telephone:  
Fax:  
Email:

and

Stephen Gawlik  
General Counsel  
Empire State Development  
95 Perry Street, 5<sup>th</sup> Floor  
Buffalo, NY 14203  
Telephone: 716-846-8200  
Email: stephen.gawlik@esd.ny.gov

- (c) Any such notice shall be deemed to have been given either at the time of personal delivery or, in the case of expedited delivery service or certified or registered United States mail, as of the date of first attempted delivery at the address, or in the case of email, upon receipt.
- (d) Any consent by ECHDC permitted or required under this agreement shall be given by ECHDC unless the provision permitting or requiring such consent expressly provides otherwise. ECHDC shall not unreasonably withhold or delay any consent or approval requested by Operator.
- (e) Additional individuals may be designated in writing by the parties for purposes of implementation and administration/billing, resolving issues, and problems and/or for dispute resolution.

## **Section 27. ECHDC's Rights to Perform Operator's Covenants**

- (a) If an Event of Default is occurring, or if Operator is in Default and such Default creates an emergency situation, ECHDC, without waiving or releasing Operator from any obligation of Operator contained in this License, may (but shall be under no obligation to) perform such obligation on Operator's behalf. ECHDC shall give Operator such prior notice (except in the case of emergency) of ECHDC's performance of such obligations as is reasonable under the circumstances. Any reservation of a right by ECHDC to enter upon the Premises and to make or perform any repairs, alteration, or other work in, to, or about the Premises which is Operator's obligation pursuant to this License, shall not be deemed to (i) impose any obligation on ECHDC to do so; (ii) render ECHDC

liable to Operator or any third party for the failure to do so; or (iii) relieve Operator from any obligation to indemnify the ECHDC as otherwise provided in this License. Nothing in this License shall impose any duty upon the part of ECHDC to do any work required to be performed by Operator under this License, and performance of any such work by ECHDC shall not constitute a waiver of Operator's default in failing to perform the same.

- (b) All sums paid by ECHDC and all third party costs and expenses reasonably incurred by ECHDC in connection with its performance of any obligation pursuant to this License, together with interest thereon at the Default Rate, from the respective dates which are thirty (30) days after the date each such sum, cost, expense, charge, payment or deposit was demanded by ECHDC to be repaid by Operator until the date of actual repayment to ECHDC with such interest, shall be paid by Operator to ECHDC and shall constitute Additional Rent under this License. Any payment or performance by ECHDC shall not be nor be deemed to be a waiver or release of breach or Default of Operator with respect thereto or of the right of ECHDC to terminate this License, institute summary proceedings or take such other action as may be permissible hereunder if an Event of Default by Operator shall have occurred. Damages incurred by reason of Operator's failure to provide and keep insurance in force in accordance with this License shall not be limited to the amount of the insurance premium or premiums not paid, and ECHDC also may recover, as damages for such breach, the uninsured amount of any loss and damage and the costs and expenses of suit, including reasonable attorneys' fees and disbursements, suffered or incurred by reason of damage to or destruction of the Premises.

## **Section 28. Default**

- (a) Any one or more of the following events shall constitute an "Event of Default" hereunder and ECHDC may, upon the occurrence of such event or at any time thereafter, terminate this agreement by giving Operator at least 10 (ten) days' notice in writing. Upon the date fixed in such notice, this agreement will come to an end as if said date were the Expiration Date.
  - (i) Operator becomes insolvent; or takes the benefit of any present or future insolvency statute; or makes a general assignment for the benefit of creditors; or files a voluntary petition in bankruptcy or a petition or answer seeking an arrangement or its reorganization or the readjustment of its indebtedness under the federal bankruptcy laws or under any other law or statute of the United States or of any State thereof; or consents to the appointment of a receiver, trustee, or liquidator of all or substantially all its property.
  - (ii) By order or decree of a court, Operator is adjudged bankrupt or an order is made approving a petition filed by any of the creditors seeking its reorganization or the readjustment of its indebtedness under the

federal bankruptcy laws or under any law or statute of the United States or of any State thereof.

- (iii) A petition under any part of the federal bankruptcy laws or an action under any present or future insolvency law or statute is filed against Operator and not be dismissed within 45 days after the filing thereof.
- (iv) The actual or purported letting hereunder of the interest or estate of Operator under this agreement is transferred to, passed to or devolved upon, by operation of law or otherwise, any other person, firm, or corporation except upon the express written approval of ECHDC.
- (v) By or pursuant to, or under authority of, any legislative act, resolution, or rule, or any order or decree of any court or governmental board, agency, or officer, a receiver, trustee, or liquidator takes possession or control of all or substantially all the property of Operator; or any execution or attachment is issued against Operator or any of its property, whereupon possession of the Premises shall be taken by someone other than Operator, and any such possession or control continues in effect for a period of 20 days.
- (vi) Any lien is filed against the Premises because of any act or omission of Operator and is not removed or bonded as provided for in this agreement.
- (vii) Operator fails to duly and punctually pay any fee or other amounts due to ECHDC within ten (10) days after notice is received by Operator that it is past due; or
- (viii) Operator fails to keep, perform, and observe each and every material obligation set forth in this agreement on its part to be kept, performed, or observed, within 30 days after receipt of notice of default thereunder from ECHDC (except where fulfillment of its obligation requires activity over a period of time, and Operator shall have commenced to perform whatever may be required for fulfillment within 30 days after receipt of notice and continues diligently such performance without interruption except for causes beyond its control).
- (ix) Operator ceases to be duly authorized to conduct business in the State of New York and does not become authorized to conduct business in the State of New York within 30 days of written notice by ECHDC.
- (x) Operator is found by ECHDC to have intentionally falsified any information provided to ECHDC, and corrected information is not provided within 20 days of written demand by ECHDC therefor, or Operator is found by ECHDC to have provided intentionally false or incomplete certifications or other representations in its RFP Response.

- (b) ECHDC may also terminate this agreement without advance notice to Operator

if any member, partner, director, or officer of the Operator is convicted of any of the following offenses: Bribery Involving Public Servants and Related Offenses, as defined in Article 200 of the New York State Penal Law; Corrupting the Government, as defined in Article 496 of the New York State Penal Law; or Defrauding the Government as defined in Section 195.20 of the New York State Penal Law.

- (c) No waiver by ECHDC of any default on the part of Operator in performance of any of the terms, covenants, or conditions hereof to be performed, kept, or observed by Operator is or will be construed to be a waiver by ECHDC of any other or subsequent default in performance of any of the said terms, covenants, and conditions. No acceptance by ECHDC of Rent or other amounts due under this agreement will be construed to be a waiver by ECHDC of any right of the State to terminate this agreement.
- (d) Operator hereby waives its right to trial by jury in any summary proceeding, ejectment, or other action that may hereafter be instituted by ECHDC against Operator in respect of the Premises or in any action that may be brought by ECHDC to recover fees, damages, or other amounts payable under this agreement. Operator shall not interpose any claims as counterclaims in any summary proceeding or action for non-payment that may be brought by ECHDC unless such claims would be deemed waived if not so interposed.
- (e) The rights of termination described in this section are in addition to any other rights of termination provided in this agreement and any rights and remedies that ECHDC would have at law consequent upon any breach of this agreement by Operator. The exercise by ECHDC of any right of termination will be without prejudice to any other such rights and remedies.
- (f) Operator hereby waives all rights of redemption arising if it is evicted or dispossessed for any cause set forth in this agreement or if ECHDC obtains or retains possession of the Premises in any lawful manner.

## **Section 29. Miscellaneous**

- (a) The standard contract provisions identified as Schedule A relating to ESD and ECHDC contracts is hereby attached hereto as **Exhibit** and incorporated herein. Should the terms of this License conflict with any terms contained in Schedule A, the terms contained in this License shall prevail. There are no representations, covenants, warranties, promises, agreements, conditions or undertakings, oral or written, between ECHDC and Operator other than set forth in this Agreement and in the Request for Proposals for Buffalo Outer Harbor Event & Concessions Management in Buffalo, New York (RFP), which is attached as **Exhibit**, and Operator's Response to the RFP (the "Response") which is attached as **Exhibit**. If there is an ambiguity or inconsistency between either the RFP, the Response and this Agreement, the documents shall be interpreted to be consistent, if possible. If such an interpretation is not possible, the Agreement shall prevail.
- (b) This License may not be changed, modified, amended or terminated orally, but only by a written instrument of change, modification, amendment or termination

executed by the party against whom enforcement of any change, modification, amendment or termination is sought.

- (c) This License shall be governed by and construed in accordance with the laws of New York State without regard to conflicts of law principles.
- (d) The agreements, terms, covenants and conditions herein shall be binding upon, and shall inure to the benefit of, ECHDC, Operator and their respective successors and permitted assigns. Except as set forth in the immediately preceding sentence, nothing in this License shall be deemed to confer upon any Person any right or benefit, including any right to insist upon, or to enforce against ECHDC or Operator, the performance of such party's obligations hereunder.
- (e) Nothing herein is intended nor shall be deemed to create a joint venture or partnership between ECHDC and Operator, nor to make ECHDC in any way responsible for the debts or losses of Operator.
- (f) The parties acknowledge and agree (a) that each has substantial business experience and is fully acquainted with the provisions of this License, (b) that the provisions and language of this License have been fully negotiated, and (c) that no provision of this License shall be construed in favor of any party or against any party by reason of such provision of this License having been drafted on behalf of one party rather than the other.
- (g) This License shall completely and fully supersede all other prior understandings or agreements, both written and oral, between ECHDC and Operator relating to use and rental of the Premises.
- (h) If any clause, provision or section of this License shall be ruled invalid by any court of competent jurisdiction, the invalidity of such clause, provision or section shall not affect any of the remaining provisions hereof.
- (i) This License may be simultaneously executed in several counterparts, each of which shall be an original and all of which shall constitute but one and the same instrument.
- (j) Operator does hereby expressly waive all rights to trial by jury on any cause of action directly or indirectly involving the terms, covenants or conditions of this License or the Premises or any matters whatsoever arising out of or in any way connected with this License.
- (k) The provisions of this License relating to waiver of a jury trial and the right of redemption shall survive the termination or expiration of this License.
- (l) Operator and the party executing this License on behalf of Operator each represents to ECHDC that such party is authorized to execute this License for and on behalf of Operator and thereby to bind Operator to all of the terms and conditions of this License. ECHDC and the party executing this License on behalf of ECHDC each represents to Operator that such party is authorized to execute this License for and on behalf of ECHDC and thereby to bind ECHDC to all of the terms and conditions of this License.

### **Section 30. Claims**

- (a) Any and all claims against ECHDC arising out of this agreement are limited to money damages and will be commenced exclusively in, and subject to the jurisdiction of, the New York State Court of Claims.
- (b) Any and all claims against Operator for damages brought by ECHDC and/or any actions to enforce the terms and conditions of this agreement shall be enforceable in any appropriate court in Erie County, New York, which shall be the sole venue.

### **Section 31. Force Majeure; Waiver of Damages**

- (a) If either ECHDC or Operator is delayed or prevented from performing any act required by this agreement by reason of acts of God, weather, earth movement, lockout or labor trouble, acts of war or terrorism, civil commotion, public emergency, or other similar causes without fault and beyond the reasonable control of the party obligated, performance of such act will be excused for the period of the delay and the period for the performance of such act will be extended for a period equivalent to the period of such delay. Nothing in this section however, excuses Operator from the prompt payment of any and all fees and amounts due to ECHDC.
- (b) Operator waives any and all claims for compensation from the State of New York and ECHDC for any and all loss or damage sustained by Operator resulting from acts of God, weather, earth movement, lockout or labor trouble, acts of war or terrorism, civil commotion, public emergency, or other similar causes without fault and beyond the reasonable control of ECHDC.

### **Section 32. Freedom of Information Law**

Operator acknowledges that ECHDC is subject to the requirements of the Freedom of Information Law and that any information or records submitted by Operator to ECHDC are presumptively subject to disclosure unless specifically exempted by statute. In accordance with Public Officers Law Section 89(5)(a)(3), ECHDC will maintain any information or records that Operator requests be exempted from disclosure pursuant to Public Officers Law 87(2)(d) apart from all over information or records and, in the event of a request under the Freedom of Information Law for such information or records, shall contact Operator to determine the extent to which such information or records might properly be exempted from disclosure.

### **Section 33. Non-Discrimination and Contractor & Supplier Diversity**

- (a) Operator agrees that the operation of the Premises shall be subject to Article 15A of the NYS Executive Law regarding the use of Minority and Women Owned Businesses (“MWBE”) and shall comply with the MWBE requirements contained in **Exhibit** which is attached hereto and incorporated herein.

- (b) Operator shall make a good faith effort to hire local firms and contractors for work performed on the Premises and City of Buffalo residents for any job opportunities generated from operation of the Premises.

**Section 34. Failure to Insist Upon Strict Performance**

The failure of ECHDC to insist, in any one or more instances, upon a strict performance of any covenant, term, provision or agreement of this License shall not be construed as a waiver or relinquishment thereof, but the same shall continue and remain in full force and effect, notwithstanding any law, usage or custom to the contrary. The receipt by ECHDC of rent with knowledge of the breach of any covenant or agreement hereunder shall not be deemed a waiver of the rights of ECHDC with respect to such breach, and no waiver by ECHDC of any provision hereof shall be deemed to have been made unless expressed in writing and signed by ECHDC.

**Section 35. Rights of Third Parties**

Nothing contained in this agreement creates or gives to third parties any claim or right of action against the Indemnitees, or any interest in real or personal property of the State of New York, beyond that as may legally exist without regard to this agreement.

**Section 36. Agency**

Nothing contained in this agreement constitutes or will be construed to create or constitute a legal or *de facto* partnership or joint venture or an agency relationship between the parties.

**Section 37. Integration Clause**

This agreement shall not be materially amended or otherwise modified except in writing signed by both parties and approved by the Office of the State Comptroller. Except to the extent that documents are incorporated herein by reference, this agreement constitutes the entire agreement between the parties concerning the subject matter hereof and supersedes all prior agreements and understandings of the parties in connection therewith. No covenant, representation, or condition not expressed herein shall be effective to interpret, change, or restrict the express provisions of this agreement. This agreement shall be interpreted without construing any provision in favor of or against either party by reason of the drafting of the provision.

**\*Signature Page to Follow\***

**In witness whereof**, the parties are signing this agreement on the date stated in the introductory clause.

**[TBD]**

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

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

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

Acknowledgement

STATE OF \_\_\_\_\_ )

) SS:

COUNTY OF \_\_\_\_\_ )

On this \_\_\_ day of \_\_\_\_\_ in the year 20\_\_\_, before me, the undersigned a notary public in and for said state, personally appeared \_\_\_\_\_, personally known, to me, or proved to me on the basis of satisfactory evidence to be the individual whose name is described within the instrument and acknowledged to me that he/she executed the same in his/her capacity as the \_\_\_\_\_ of \_\_\_\_\_, and that by his/her signature on the instrument, the individual, or the person upon behalf of whom the individual acted, executed the instrument.

\_\_\_\_\_  
Notary Public

**Erie Canal Harbor Development Corporation**

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

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

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

Acknowledgement

STATE OF \_\_\_\_\_ )

) SS:

COUNTY OF \_\_\_\_\_ )

On this \_\_\_ day of \_\_\_\_\_ in the year 20\_\_\_, before me, the undersigned a notary public in and for said state, personally appeared \_\_\_\_\_, personally known, to me, or proved to me on the basis of satisfactory evidence to be the individual whose name is described within the instrument and acknowledged to me that he/she executed the same in his/her capacity as the \_\_\_\_\_ of \_\_\_\_\_, and that by his/her signature on the instrument, the individual, or the person upon behalf of whom the individual acted, executed the instrument.

\_\_\_\_\_  
Notary Public

**\*Attachments Follow\***

**EXHIBITS:**

SAMPLE