

FOR CONSIDERATION

December 14, 2011

TO: The Directors

FROM: Kenneth Adams

SUBJECT: (Statewide) – State Small Business Credit Initiative – Bonding Guarantee Assistance Program, New York State Urban Development Corporation Act Section 16-f

REQUEST FOR: Authorization to Promulgate and Adopt Rules and Regulations; Authorization to Enter into Agreements with (i) Sureties in order to Provide to Small Business and Minority-Owned Business Enterprise or Women Owned Business Enterprise Contractors Payment and Performance Bonds and (ii) Financial Institutions for the Issuance to Sureties of Standby Letters of Credit; Delegation of Authority; and Authorization to Take Related Actions

Background

The Directors are requested to authorize the promulgation of regulations for the Bonding Guaranty Assistance Program (the “Program”) and to authorize New York State Urban Development Corporation d/b/a Empire State Development (“ESD”) to enter into agreements with sureties and financial institutions in order to facilitate, in accordance with the Program, payment and performance bonds for small business and minority-owned business enterprise (“MBE”) or women-owned business enterprise (“WBE”, and MBE and WBE collectively “M/WBE”) contractors. The Program is one of the small businesses assistance programs established pursuant to the New York State Urban Development Corporation Act (“UDC Act”) to be operated by ESD and funded from \$55.4 million awarded pursuant to the State Small Business Credit Initiative (“SSBCI”), a United States Department of Treasury program authorized by the U.S. Small Business Jobs Act of 2010.

Governor Andrew Cuomo recently signed legislation directing \$ 10 million in SSBCI funding to this program.

Under the program, staff projects that over the next five years, 267 bonds will be issued to small business and M/WBE contractors for construction contracts, with an average contract size of \$750,000. ESD’s estimated average guaranty credit enhancement of \$187,500 per

contract will leverage an estimated \$200 million in new surety bonds over five years and creating approximately 2,150 jobs statewide.

The Program will enable financial institutions to provide to participating sureties irrevocable standby letters of credit issued for the account of ESD in order to induce the sureties to provide to small business and M/WBE contractors bonds for their contracts, provided that for each such contract the letter of credit is in an amount not to exceed fifty percent of the face value of bonds issued by the surety for such contract.

Eligible Sureties:

In order to be eligible to participate in the Program, a surety must, among other requirements:

- have a certificate of solvency (pursuant to section 111 of the Insurance Law) from, and have its rates approved by, the State Department of Financial Services and/or appear in the most current edition of the United States of America Department of Treasury Circular 570 as eligible to issue bonds in connection with procurement contracts for the United States of America;
- have a satisfactory performance record regarding contractor default, termination of contracts, application of satisfactory underwriting standards and principles and practices for evaluating contractor credit and capacity, and processing claims, including diligent and commercially reasonable recovery efforts; and
- be rated B+ or higher if rated by A.M Best's Key Rating Guide Property/Casualty.

Eligible Contractors:

In order to be eligible to participate in the Program, a contractor must, among other requirements:

- be a "Small Business" (as defined in Economic Development Law section 131) or a State certified (pursuant to Executive Law article 15-A) Minority-Owned Business Enterprise (as defined in Executive Law section 310) or Women-Owned Businesses Enterprise (as defined in Executive Law section 310);
- be unable to obtain a bond for the contact from a Program eligible surety without Program assistance; and
- have satisfactory experience for the contract work and a satisfactory contract performance history.

ESD may provide each surety that participates in the Program with additional requirements or guidelines on contractor eligibility, such as revenue limits or minimums or other factors. A participating surety may be required to verify information regarding Program eligible contractors or to secure such assurances from prospective Program eligible contractors as the Corporation may deem necessary. Preference for Program assistance is given to

certified Minority-Owned Business Enterprises and certified Women-Owned Business Enterprises.

Eligible Financial Institutions for Letters of Credit:

The financial institutions selected to issue the Program letters of credit will be either on ESD's approved list of depository financial institutions or subject to a competitive selection process and must have letter of credit rates that are reasonable and competitive.

Program Rule

UDC Act Section 16-f authorizes ESD to promulgate a rule for the program in accordance with the State Administrative Procedure Act ("SAPA"). Staff has prepared the proposed rule, a copy of which are annexed to these materials, that sets forth the regulations for implementation of the above described program. Staff recommends that Corporation adopt the regulations substantially in the form of annexed drafts. With the urgent need in the State for this assistance, staff will seek to proceed under the emergency rulemaking process under SAPA.

Program Agreements

In order to expeditiously implement the Program and allow participating sureties to issue more performance and payment bonds to small businesses and M/WBE contractors in this difficult construction contracting environment, ESD must enter into agreements with participating sureties and financial institutions for the issuance to participating sureties of irrevocable standby letters of credit for the account of ESD. Staff seeks to meet the United States Treasury goal for significant implementation of the Program by early next year. In order to do so, it will be necessary for staff to act, within the next thirty days, on applications of sureties for participation in the Program and to arrange the required letters of credit. The necessary agreements are currently being drafted, and it is likely that some of the major sureties that participate in a similar program funded by the Dormitory Authority of the State of New York ("DASNY") will be ready to enter into the agreements. With this short period, staff seeks authorization to enter into such agreements with sureties and financial institutions when an application is approved by staff. Staff will periodically report back to the Directors on the progress of the Program.

The agreements with participating sureties will, among other things, provide for, (i) the requirements for eligibility of small business and M/WBE contractors; (ii) each such letter of credit to be in an amount equal to a percentage not to exceed a maximum of fifty percent (the estimate for such amount is approximately thirty-percent) of the face value of bonds issued by the surety for the related contract; (iii) return of letters of credit after completion of the contractor's contract; (iv) typical representations and warranties, events of default and remedies, and covenants; (v) compliance with State and Federal law, regulation, and policy.

ESD will also enter into agreements with financial institutions for the Program letters of credit which will provide among other things for collateral, fees, and the form of irrevocable standby letter of credit.

In order to further expedite the implementation of the program, staff also requests that, in addition to the ESD President, that the ESD Chief Financial Officer and Senior Vice President for Community and Economic Development be authorized to take all necessary actions, including, the execution and delivery of all agreements.

Statutory Basis

The program, the promulgation of the regulations, and the entering into the agreements described in these materials are authorized under Section 16-f of the UDC Act.

Affirmative Action

It is the policy of the State of New York, and the Corporation to comply with all federal, State, and local laws, policies, orders, rules and regulations which prohibit unlawful discrimination because of race, creed, color, national origin, sex, sexual orientation, age, disability or marital status, and to take affirmative action in working with contracting parties to ensure that New York State Business Enterprises, Minority Group Members and M/WBEs share in the economic opportunities generated by the Corporation's participation in projects or initiatives, and/or the use of Corporation funds. The Corporation's non-discrimination and affirmative action policy will apply to this initiative. Selected participants are encouraged to use good faith efforts to provide for the meaningful participation of M/WBEs, minority group members and women in connection with the Program.

Environmental Review

ESD staff has determined that the requested authorization constitutes a Type II ministerial action as defined by the New York State Environmental Quality Review Act ("SEQRA") and the implementing regulations of the New York State Department of Environmental Conservation. The beneficiaries of the Program assistance will be responsible for complying with SEQRA as applicable. No further environmental review is required in connection with this authorization.

Requested Actions

The Directors are requested to: (i) authorize the promulgation of the rule and regulations for the Program substantially in the form annexed to these materials with such

modifications and additions as the Corporation's General Counsel or Deputy General Counsel shall deem necessary or appropriate for the implementation of the Program and compliance with Executive Order 17 (2009) and SAPA and other applicable laws and regulations; (ii) authorize ESD to enter into agreements with participating sureties and financial institutions as described in the materials; and (iii) delegate authority to the ESD Chief Financial Officer and Senior Vice President for Community and Economic Development (in addition to the ESD President) so that the ESD President, Chief Financial Officer and the Senior Vice President for Community and Economic Development will be authorized to take all necessary actions, including the execution and delivery of all agreements, in order to effectuate the foregoing.

Recommendation

Based on the foregoing, I recommend that the requested actions be approved.

Attachments

Draft Rule
Resolutions

December 14, 2011

(Statewide) - State Small Business Credit Initiative - Bonding Guarantee Assistance Program, New York State Urban Development Corporation Act Section 16-f - Authorization to Promulgate and Adopt Rules and Regulations; Authorization to Enter into Agreements with (i) Sureties in order to Provide to Small Business and Minority-Owned Business Enterprise or Women Owned Business Enterprise Contractors Payment and Performance Bonds and (ii) Financial Institutions for the Issuance to Sureties of Standby Letters of Credit; Delegation of Authority; and Authorization to Take Related Actions

RESOLVED, that the Corporation hereby authorizes the promulgation and adoption of the rule and regulations (the "Rule") for the Bonding Guarantee Assistance Program (the "Program") created pursuant to Section 16-f of the New York State Urban Development Corporation Act (the "Act") substantially in the form described and included in the materials (the "Materials") presented in this meeting, a copy of which is ordered filed with the records of the Corporation, to provide for the implementation of the Program, in accordance with Section 16-f of the Act; and be it further

RESOLVED, that the General Counsel or Deputy General Counsel of the Corporation, or her designee, is authorized to proceed with and make modifications and additions to the Rule as necessary in order to implement the Program and comply with the State Administrative Procedure Act ("SAPA"), including Executive Order 17 (2009) and the emergency process under SAPA, and applicable laws and regulations; and be it further

RESOLVED, that the General Counsel or Deputy General Counsel of the Corporation, or her designee(s), be and each of them hereby is, authorized in the name and on behalf of the Corporation to execute and deliver any and all documents and to take all action as he or she may in his or her sole discretion consider to be necessary or appropriate to effectuate the foregoing resolutions; and be it further

RESOLVED, that the Corporation is hereby authorized to enter into agreements with (i) sureties that participate in the Program for the issuance of payment and performance bonds for the contracts of small business and Minority-Owned Business Enterprise and Woman-Owned Business Enterprise contractors and (ii) financial institutions for the issuance to participating sureties of letters of credit for the account of ESD as described in the Materials, provided that such letters of credit will be funded solely with \$10 million of federal funding through the State Small Business Credit Initiative ("SSBCI"), a United States Department of Treasury program authorized by the U.S. Small Business Jobs Act of 2010; and be it further

RESOLVED, that the President, or his designee, or the Chief Financial Officer, or the Senior Vice President Community Economic Development, be and each of them hereby is,

authorized in the name and on behalf of the Corporation to execute and deliver any and all documents and to take all action as he or she may in his or her sole discretion consider to be necessary or appropriate to effectuate the foregoing resolutions.

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