

USA NIAGARA DEVELOPMENT CORPORATION

Meeting of the Directors

At the offices of the
USA Niagara Development Corporation
222 First Street, 7th Floor
Niagara Falls, N.Y. 14303

Friday

May 22, 2015 – 3:00 p.m.

AGENDA

I. CORPORATE ACTION

- A. Approval of Minutes of the March 26, 2015 Directors' Meeting

II. ADMINISTRATIVE ACTION

- A. USAN Procurements Guidelines - Adoption of Revised Guidelines for the Use, Awarding, Monitoring and Reporting of Procurement Contracts

III. FOR CONSIDERATION

- A. Niagara Falls (Niagara County) – 310 Rainbow Boulevard Industrial/Small and Medium-Sized Business Assistance Project – Adoption of Modified General Project Plan (“MGPP”); Authorization to Hold a Public Hearing; Authorization to Make a Grant and to Take Related Actions

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**USA NIAGARA DEVELOPMENT CORPORATION
d/b/a Empire State Development Corporation**

Meeting of the Directors
held at the USA Niagara Offices
222 First Street – 7th Floor
Niagara Falls, New York 14303

and

ESD New York City Regional Office
633 Third Avenue
New York, New York 10017

March 26, 2015

MINUTES

In Attendance Directors:

Francine DelMonte – Chair
Monica Pellegrino Faix
Paul Nanula (via telephone)
Gary Smith
Michael Williamson

Present for USA Niagara:

Chris Schoepflin, President
Eileen McEvoy, Secretary
Holly Ortman
Paul Tronolone, Senior Project Manager
John Risio, Project Manager
Jocelyn Viola, Office Manager

**Present for ESD
(Downstate):**

Julia Borukhov, Financial Project Manager
Thomas Conoscenti, Director - Real Estate Development
and Planning
Carey Gabay, First Deputy General Counsel
Agnes Klosek, Staff Accountant
Kathleen Mize, Controller
Maxwell Padden, Director – Subsidiary Finance

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**Present for ESD Western
New York Regional Office:**

Stephen Gawlik, Senior Counsel
Damon Lent

**Present for the City
of Niagara Falls:**

Mayor Paul Dyster

**Present for
Global Spectrum:**

Mathew Hollander
Jason Murgia

**Present for
Plati Niagara:**

Frank Strangio

Also Present:

The Press – Aaron Besecker – Buffalo News
Phillip Gambini – Niagara Gazette
The Public

The meeting of the USA Niagara Development Corporation, a wholly-owned subsidiary of the New York State Urban Development Corporation d/b/a the Empire State Development (“ESD”), was called to order at 3:00 p.m. by Chair DelMonte. It was noted for the record that notices to the public and news media of the time and place of the meeting had been given in compliance with the New York State Open Meetings Law.

The Chair went on to note for the record the guidelines by which the public is allowed to comment on items on the Agenda.

The Chair then asked the Directors if any of them had a potential conflict of interest with regard to any of the items on the Agenda and if so, to make that information known at this

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time. If any potential conflicts exist, the Chair continued, the Directors would be reminded at the appropriate time to recuse themselves from the vote on any such item. It was noted that Director Nanula would recuse himself with regard to the vote on Uniland.

The Chair then called for the approval of the Minutes of the November 24, 2014 Directors' meeting. Upon motion duly made and seconded, the following resolution was unanimously adopted:

APPROVAL OF MINUTES AND RATIFICATION OF ACTIONS TAKEN AT THE NOVEMBER 24, 2014 MEETING OF THE DIRECTORS OF THE USA NIAGARA DEVELOPMENT CORPORATION

RESOLVED, that the Minutes of the meeting of the Corporation held on November 24, 2014 as presented to this meeting, are hereby approved and all actions taken by the Directors present at such meeting as set forth in such Minutes, are hereby in all respect ratified and approved as actions of the Corporation.

* * *

Chair DelMonte then asked Christopher Schoepflin to present the remainder of the items on the Agenda.

First, Mr. Schoepflin asked the Directors to approve USA Niagara's Annual Operating Budget and Annual Capital Expense authorization for fiscal year 2015-2016.

Mr. Schoepflin explained that the total budget for all personal and non-personal services is \$709,728 which represents an increase of 7.2% over projected fiscal year 2014-2015 expenses.

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Mr. Schoepflin explained that of this 7.2% increase, approximately 4½% represent cost of living and merit increases for staff and approximately 2½% represents tuition reimbursement and internship costs.

Mr. Schoepflin further explained that consistent with previous years' operating budgets, the 2015-2016 operating budget will be advanced with ESD Corporate funds with the expectation of reimbursement at a later date.

Mr. Schoepflin went on to note that the Corporation's 2015-2016 annual capital expense authorization is \$15,630,000. This, he explained, includes construction costs of \$12,130,000; design and other soft costs of \$1.9 million; legal costs of \$100,000 and property management and maintenance costs of \$1.5 million.

Mr. Schoepflin further explained that it is anticipated that the proposed funding will cover capital costs associated with investments and projects such as the \$34.9 million Hyatt Place Hotel and the \$27 million Double Tree project.

Mr. Schoepflin then noted that funding for USA Niagara's annual capital expense authorization is from USA Niagara and City Memorandum of Understanding funds made available to the Corporation under the 2009 and 2014 agreements with the City of Niagara Falls in support of the Conference Center and Old Falls Street economic development projects

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located within the Corporation's Development District.

Mr. Schoepflin added that the individual capital project expenses for each capital project will be approved by the Directors under separate actions.

Following the full presentation, the Chair called for questions or comments. Director Williamson asked about the timeframe regarding USA Niagara's reimbursement to Empire State Development. Basically, Director Williamson asked if last year's advance would be due within the next two months.

Mr. Schoepflin stated that that would not be the case. He added that USA Niagara's balance is approximately \$19.8 million, covering the 12 years that the corporation has been in existence and that reimbursement is a broader issue.

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

USA Niagara Development Corporation -- Approval of the Corporation's Annual Operating Budget and Annual Capital Expense Authorization for Fiscal Year 2015-16 (April 1, 2015 – March 31, 2016)

RESOLVED, that based on the materials presented at this meeting and ordered filed with the Corporation (the "Materials"), the Corporation's proposed FY 2015-16 Annual Operating Budget and Annual Capital Expense Authorization are hereby approved and adopted in all respects, substantially in the form set forth in the materials and subject to the availability of funds; and be it further

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RESOLVED, that the Corporation is hereby authorized to undertake tasks and incur expenditures consistent with advancing the scope of work contemplated in the proposed operating budget, subject to the availability of funds; and be it further

RESOLVED, that the Directors shall make individual approvals and authorizations for items under the Annual Capital Expense Authorization; and be it further

RESOLVED, that the President or his designees be, and the same hereby are authorized to execute and deliver on behalf of the Corporation all documents, instruments and agreements that the President shall deem necessary and appropriate to carry out these resolutions; and be it further

RESOLVED, that the President or his designees be, and the same hereby are authorized to take any action necessary and appropriate to carry out the foregoing.

* * *

Mr. Schoepflin then presented the Niagara Falls Convention and Conference Facility Civic Project and Old Falls Street - CY 2015 Operating and Capital Budgets for approval.

Mr. Schoepflin explained that per the 2014 Memorandum of Understanding between USA Niagara and the City of Niagara Falls, the City has provided and will continue to provide up to \$1.5 million annually towards the combined annual operating budgets for both the Conference Center and Old Falls Street through 2018.

Mr. Schoepflin added that the proposed calendar year budget for the Conference Center is \$326,645 and the operating budget for Old Falls Street is \$686,424 for a combined total of \$1,013,078 with incentive fees factored in.

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Mr. Schoepflin further noted that the proposed calendar year 2015 capital budget is \$499,812 which includes a total of \$360,612 in proposed funding for the Conference Center and a total of \$139,200 in funding for Old Falls Street.

Mr. Schoepflin went on to note that Global Spectrum will make the proposed capital budget purchases on behalf of USA Niagara through State contracts where possible and then through competitive bids and comparable pricing where State contracts are not available.

Mr. Schoepflin then explained that the combined operating and capital budgets with incentive fees total \$1,512,890. He added that because the proposed budget may exceed the aforementioned \$1.5 million allocation, USA Niagara will fund the remaining \$12,890 from excess funds remaining from prior years MOU allocations if necessary.

Mr. Schoepflin then went on to explain that while the Directors have approved the Conference Center and Old Falls Street budget in March of each year to match the Corporation's fiscal year, the Conference Center's fiscal year is concurrent with the calendar year. This situation, Mr. Schoepflin noted, has led to delays in first quarter funding for both Old Falls Street and the Conference Center.

Mr. Schoepflin then explained that to address that gap, USA Niagara has advanced Global Spectrum \$178,448 to fund first quarter operations for 2015.

DRAFT – SUBJECT TO REVIEW AND REVISION

Mr. Schoepflin then explained that USA Niagara is also asking the Directors to approve funding for the Conference Center and Old Falls Street for the first quarter of 2016 in an amount not to exceed \$250,000 to avoid cash flow issues in the first quarter of 2016.

Mr. Schoepflin added that the Conference Center and the Old Falls Street budget from 2016 will still remain subject to USA Niagara's Director before the start of the Corporation's fiscal year:

Following Mr. Schoepflin's full presentation, the Chair called for questions or comments. Director Smith asked if the transfer of funds under the MOU requires City Council vote.

Mr. Schoepflin explained that the Council voted on the MOU in 2014 and that there is an executed agreement with the City that will remain in effect through 2018.

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

USA Niagara Development Corporation -- Approval of the CY 2015 Niagara Falls Convention and Conference Facility and Old Falls Street Operating Capital Budgets; Approval of First Quarter 2016 Funding; Authorization to Disburse Funds

RESOLVED, that based on the materials presented at this meeting and ordered filed with the Corporation (the "Materials"), the Corporation's proposed CY 2015 Niagara Falls Convention and Conference Facility and Old Falls Street Operating and Capital Budgets in the amount not to exceed \$1,512,890 is hereby approved, and adopted in all respects, substantially in the form set

DRAFT – SUBJECT TO REVIEW AND REVISION

forth in the materials and subject to the availability of funds; and be it further

RESOLVED, the Corporation's proposal for first quarter 2016 (calendar quarter) funding for the Niagara Falls Convention and Conference Facility and Old Falls Street in the amount not to exceed \$250,000 is hereby approved, and adopted in all respects, substantially in the form set forth in the materials and subject to the availability of funds; and be it further

RESOLVED, that the actions of the President or his designees relating to the CY 2015 Niagara Falls Convention and Conference Facility and Old Falls Street Operating Capital Budgets be approved and ratified, and the same hereby are, authorized to disburse funds substantially in accordance with the CY 2015 Niagara Falls Convention and Conference Facility and Old Falls Street Operating and Capital Budgets with such changes as the President or his designee deems necessary or appropriate; and be it further

RESOLVED, that the President or his designees be, and the same hereby are authorized to execute and deliver on behalf of the Corporation all documents, instruments and agreements that the President shall deem necessary and appropriate to carry out these resolutions; and be it further

RESOLVED, that the President or his designees be, and the same hereby are authorized to take any action necessary and appropriate to carry out the foregoing.

* * *

Chair DelMonte then asked Mr. Hollander, the Regional Vice President of Global Spectrum and Mr. Murgia, the General Manager of the Conference Center and Old Falls Street, to provide updates for the Directors' information.

Mr. Hollander opened his remarks by expressing his appreciation on behalf of Global Spectrum for the wonderful relationship that it has with USA Niagara and the City of Niagara Falls. He went on to note that his role is to make sure that Mr. Murgia and his team have all of the corporate resources and support that they need to be successful.

Mr. Murgia then addressed the meeting noting, in part, that in 2014, attendance at the

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Convention Center has grown by 40%.

Mr. Murgia further noted that the Convention Center has gained an exemplary regional reputation and that its wedding revenue has grown by 42% over the prior year.

Mr. Murgia then reported that Old Falls Street has begun to establish itself as a community gathering place that offers high level quality programming not only from a special event perspective but from a series perspective as well.

Mr. Murgia then provided a brief outline of the various special events and movie and concert series that are provided at Old Falls Street.

Mr. Murgia then explained that a number of upgrades are expected to be implemented over the coming year.

Following Mr. Murgia's full report, the Chair noted that in the Summer, she and her husband go to Old Falls Street on a regular basis.

The Chair then called on Mr. Schoepflin to provide a report on the Robert Moses Parkway South project.

Mr. Schoepflin, in turn, asked the project manager, Mr. Tronolone, to provide the

DRAFT – SUBJECT TO REVIEW AND REVISION

update.

Mr. Tronolone provided a detailed report on the most recent activities regarding this project.

Mr. Tronolone also outlined the steps that will be taken going forward on the project.

The Chair then asked for an update on the Wonder Falls and the Hamister projects.

Mr. Schoepflin noted that USA Niagara is currently working on amending its agreement with Hamister to substitute some more hotel rooms for what was initially some residential space. He added that the cost of the project has gone from \$25 million to approximately \$35 million.

Mr. Schoepflin stated that because of that increase, USA Niagara will invest more in that project. He stated that the request for increased funding will be presented to the Directors at the next Directors' meeting.

With regard to the Wonder Falls project, Mr. Schoepflin noted that this \$150 million project is in its very early stages.

Among other things, Mr. Schoepflin noted that the developer is doing due diligence at

DRAFT – SUBJECT TO REVIEW AND REVISION

the project site and that USA Niagara is in the process of negotiating a relatively brief but dense term sheet.

Following these brief presentations, the Chair asked if there were any questions. Director Pellegrino-Faix stated that she hopes that a part of the Wonder Falls project will be some sort of public engagement beyond the requirement of the environmental impact statement.

Mr. Schoepflin noted that the team put in a considerable amount of time putting together a very thorough RFP, and that RFP, represents a collection of the communities' thoughts. He added that he believes that the program that Uniland responded with reflects a lot of what the community is looking for in the project.

There being no further business, the meeting was adjourned at 3:35 p.m.

Respectfully submitted,

Eileen McEvoy
Corporate Secretary



FOR CONSIDERATION

May 22, 2015

TO: The Directors

FROM: Christopher Schoepflin

SUBJECT: USAN Procurements Guidelines

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

I. Background

At its March 2014 meeting, the USA Niagara Development Corporation ("USAN") Directors adopted updated and revised Guidelines for the Use, Awarding, Monitoring and Reporting of Procurement Contracts, as mandated by §2879 of the Public Authorities Law (the "Guidelines"). There have been a small number of changes to relevant laws, as well as Executive Orders and directions to authorities, in the past year. Accordingly, the ESD Procurements Manager and staff from the Legal Department, supported by representatives of the Contracts Administration and Finance Departments, have engaged in a revision of the Guidelines. As a result, on March 19, 2015, the ESD Board adopted the revised Guidelines (the "2015 Guidelines").

II. Procurement Contracts Guidelines Summary

The 2015 Guidelines attached to this memorandum set forth the policies and procedures to be followed by ESD and its subsidiaries including USAN, when seeking to contract for goods or services. It is required that each ESD subsidiary approve its own Procurement Guidelines in terms virtually identical to the proposed 2015 Guidelines, with any departure therefrom fully explained by the subsidiary Board. No deviation from the ESD approved guidelines is being recommended. It should be noted that these Guidelines do not have the force of law, and are intended as a statement of best practices and procedures. No contract is invalid merely because these guidelines have not been followed.

The proposed 2015 Guidelines define the universe of procurement transactions which are subject to the policies and procedures. Generally, all procurements by the Corporation must be competitive, except where State law provides for non-competitive sourcing (e.g.,

goods purchased from approved non-profit agencies for the blind, and procurements from the Office of General Services Centralized Contracts List). Based on the expected cost of procured goods and/or services, procurement contracts must be obtained after advertisement in the NYS Contract Reporter, except in limited instances where an exemption is obtained, generally for sole or single source procurements when only one vendor offers the desired goods or services or when a single vendor has unique qualities or experience that obviate a competitive process. The proposed 2015 Guidelines explain the various means of obtaining goods and services in an open, accountable and transparent manner, including incorporation of the Corporation's Bid Opening Guidelines and the compilation of a Procurements Record for every covered Procurement Contract.

The proposed 2015 Guidelines comply with the applicable provisions of the Public Authorities Law, the State Finance Law and the State Tax Law. They are consistent with the State Procurement Council's Guidelines and with the Governor's directive that all state agencies and public authorities make responsible spending decisions, and that they be accountable for sufficient monitoring of their spending to ensure the highest level of fairness, non-discrimination, openness and transparency.

The proposed 2015 Guidelines are intended to be user-friendly and are set forth in a logical and coherent fashion that will assist staff in understanding the procedures to be followed and the substantive rules that govern procurements. Many of the changes from the 2014 Guidelines are the result of efforts to make them more readable and to flow in a more coherent fashion.

Many sources of help to users and information are included as clickable links, and virtually all required forms and ESD policy and procedure documents can also be accessed from within the document by hyperlinks. For obvious reasons, the hard copy of the proposed 2015 Guidelines presented to the Directors for approval cannot contain these links, but they are shown in highlight form.

There are no substantive changes to the 2014 Guidelines incorporated into the proposed 2015 Guidelines, because there have been no substantive changes in applicable law. Procedural improvements and clarifications have been incorporated, including a requirement that all bid openings take place at the Procurement Department office, or such other place as directed by the Procurement Officer.

III. Recommendation and Requested Action

The Directors are requested to adopt the 2015 Guidelines for the Use, Awarding, Monitoring and Reporting of Procurement Contracts, effective as of the date of approval.

Attachments

Resolution

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

May 22, 2015

USA NIAGARA DEVELOPMENT CORPORATION – USAN Procurements Guidelines -
Adoption of Revised Guidelines for the Use, Awarding, Monitoring and Reporting of
Procurement Contracts

BE IT RESOLVED, that on the basis of the materials presented to this meeting, a copy of which is hereby ordered to be filed with the records of the Corporation, the proposed 2015 Guidelines for the Use, Awarding, Monitoring and Reporting of Procurement Contracts, a copy of which is attached to the materials, be and hereby is approved and adopted as of the date hereof, and the President or her designee is authorized to promulgate the said Guidelines in electronic form and other media for the use of the staff of the Corporation, and to take such other and further action as may be deemed necessary or appropriate to effectuate the foregoing Resolution.

* * *

Revised Procurement Guidelines 2015

NEW YORK STATE URBAN DEVELOPMENT CORPORATION
D/B/A EMPIRE STATE DEVELOPMENT
Guidelines Regarding the Use, Awarding, Monitoring
and Reporting of Procurement Contracts

Effective March 19, 2015

Table of Contents

1. Overview and Requirements	1
1.1. Contracts covered, and not covered, by the Guidelines	1
1.2. Types of Procurement Contracts	2
1.3. General Procurement Principles	3
2. Procurement: Overview and Requirements	4
2.1. The Procurement Process Guide	4
2.2. NYS Preferred Sources	5
2.3. OGS Centralized Contracts	5
2.4. Commodities Contracts	5
2.5. Service Contracts	5
2.6. Discretionary Purchases	5
3. Contract Reporter Exemptions	6
3.1. Reasons for Exemptions	6
3.2. Authorization for Exemptions	7
4. How to Conduct a Competitive Solicitation	8
5. Approval to Advertise	9
6. Contents of ANY Procurement Solicitation	9
7. Types of Solicitations	10
7.1. General	10
7.2. Requests for Proposals (“RFP”)	11
7.3. Requests for Statements of Qualification (“RFQ”)	11
7.4. Requests for Expressions of Interest (“RFEI”)	11
8. Compliance with Other Laws	11
8.1. Compliance with State Finance Law § 139-j and 139-k (Lobbying)	11
8.2. Compliance with State Tax Law § 5-a (Sales Tax Registration)	13
8.3. Use of the Vendrep Form and Vendor Responsibility	13
8.4. Compliance with Executive Law Article 15-A: Contractor and Supplier Diversity	14
8.5. Compliance with Iran Divestment Act of 2012	14
8.6. Encouragement of use of New York Businesses as sub-contractors and suppliers.	14
8.7. Project Sunlight	15
8.8. Publication on ESD Website	15
8.9. Standard-Form Attachments	15
9. Contract Reporter Advertising Process	15
9.1. Selection Criteria	16
9.2. Bid Opening Procedures	16
9.3. Bid Evaluation and Vendor Selection	17
9.4. Determination of Responsibility – “FLIP Review”	17
9.5. Procurement Record	18
10. Contract Approval	18
10.1. Board Materials	18
10.2. ESD Contract and Amendment Approval	19

11.	Steps After Contract Approval Is Obtained	21
11.1.	Commitment Request Package.....	21
11.2.	Contract Reporter Award Notification.....	22
11.3.	Extension/Amendment of Contracts	23
11.4.	Department of Budget (“DoB”) Approval	23
11.5.	OSC Post-Contract Approval of \$1,000,000+ Contracts	23
12.	Monitoring of Procurement Contracts	24
13.	Procurement Contracts Involving Former Officers of ESD	25
14.	Implementation of These Guidelines	25
15.	Reporting.....	25
15.1.	Quarterly Reports	25
15.2.	Annual Reports.....	25
16.	Effect on Awarded Contracts.....	26

NEW YORK STATE URBAN DEVELOPMENT CORPORATION
D/B/A EMPIRE STATE DEVELOPMENT (“ESD”)

Guidelines Regarding the Use, Awarding, Monitoring and
Reporting of Procurement Contracts

Effective March 19, 2015

1. Overview and Requirements

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

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

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

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

Pursuant to Public Authorities Law § 2879 (2), “**Procurement Contracts**” are any written agreements for the acquisition of goods or services of any kind in the actual or estimated amount of five thousand dollars (\$5,000) or more. For purposes of compliance with anti-lobbying laws contained in State Finance Law § 139-j and 139-k (see p. 11), Procurement Contracts also include the purchase, lease or grant of any other interest in real property which involves an estimated annualized expenditure in excess of fifteen thousand dollars (\$15,000).

Disposition of property (real or personal) by ESD is not a procurement covered by these Guidelines, but is instead subject to ESD's Property Disposition Guidelines. However, where a property disposition requires a competitive process, that process should be conducted in accordance with these Guidelines.

Note that **loans and grants** made by ESD in furtherance of its economic development mission are not Procurement Contracts, but may be subject to certain provisions of these Guidelines, including OSC review and approval for grants over \$1 million (see p. 23)

A Contract or Memorandum of Understanding ("MOU") with a sister State agency or authority are not considered a Procurement Contract covered by these Guidelines. Note, however, that appropriate approval(s) as set out in these Guidelines (including Board approval based on the amount and/or duration of the agreement) may apply to MOUs.

In connection with certain of its projects, ESD may need to obtain a license from a governmental agency, authority, or company or a public utility in order to enter the licensor's premises and perform work. As a precondition to receiving the license, ESD can be required to enter into agreements with the licensor that prescribe conditions for work to be performed on the site, including work and/or oversight of work which must be performed by the licensor's personnel or contractors, as well as payment of licensor costs by ESD. Examples include licenses for work on rail and utility facilities. Agreements of this kind, often referred to as "**forced contracts**," are not covered by the competitive solicitation requirements of these Guidelines because ESD has no discretion or authority with respect to the work to be performed by the licensor's personnel and contractors. However, appropriate approval(s) as set out in these Guidelines (including Board approval based on the amount and/or duration of the agreement) would apply.

Procurement Contracts **up to and including \$50,000** may be handled by Purchase Order approved by Department Head, Procurement Department, Controller's Office and Contracts Administration. A formal competitive solicitation is not required, but these purchases should be made after obtaining three quotes whenever practicable. For further information, see Section 2.1 below or consult the Procurements Manager.

1.2. Types of Procurement Contracts

Procurement Contracts for personal services include legal, accounting, management consulting, investment banking, planning, training, statistical analysis, research, public relations, architectural, engineering, construction, surveying, appraisal, or other services of a consulting, professional or technical nature for a fee, commission or other compensation by a person or persons who are not providing such services as officers or employees of ESD. The reasons for the use of personal services include:

- a. Requirements of special expertise or unusual qualifications;
- b. Nature, magnitude or complexity of services required;
- c. Lack of sufficient in-house resources, support staff, specialized facilities or equipment;

- d. Lower cost;
- e. Short-term or infrequent need for the services; and
- f. Distance of the location(s) where the services must be performed from ESD offices or facilities.

The types of goods and services requiring Procurement Contracts include goods and services needed to proceed with an ESD project, or to support the administrative needs of ESD.

Thus, the types of goods that may be procured cover the entire spectrum, ranging from paper and pens to motor vehicles.

1.3. General Procurement Principles

ESD's procurement process is designed to:

- Ensure fair and open competition;
- Guard against favoritism, improvidence, extravagance, fraud and corruption;
- Ensure that the results meet agency needs;
- Provide checks and balances to regulate agency procurement activities; and
- Protect the interests of ESD, the state and taxpayers.

Procurement Contracts are to be awarded on a **competitive basis** to the maximum extent practicable. Such awards are generally made after notice is published in the New York State Contract Reporter where the amount of the contract is **greater than \$50,000** and (regardless of the amount of the Procurement Contract) after the evaluation of proposals obtained, whenever practicable, from at least three qualified vendors or respondents. (See Section 7: Types of Solicitations).

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

2. Procurement: Overview and Requirements

2.1. The Procurement Process Guide

I. Procurements up to \$50,000

If ESD's procurement needs can be met by a preferred source vendor, we must use this option.



If ESD's needs cannot be met by a preferred source, you may elect to use an OGS Centralized contract. Wherever practicable, you should still solicit two other quotes if this option is selected.



If ESD's needs cannot be met by the above mentioned options, you may elect to use a discretionary purchase through the use of a NYS certified MWBE or a NYS Small Business up to \$50,000.



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



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

II. Procurements above \$50,000

If ESD's procurement needs can be met by a preferred source vendor, we must use this option.



If ESD's needs cannot be met by a preferred source, you may elect to use an OGS Centralized contract. Wherever practicable, you should still solicit two other quotes if this option is selected.



If ESD's needs cannot be met by the above mentioned options, you may elect to use a discretionary purchase through the use of a NYS certified MWBE or a NYS Small Business up to \$200,000.



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



If this is an emergency situation or only one vendor can meet the needs required for service, obtain a Contract Reporter Exemption from the Legal Department using Single Source or Sole Source exemption as appropriate.

2.2. NYS Preferred Sources

Goods and services needed by ESD may be available, without the need for competitive procurement from New York State Preferred Sources. If a Preferred Source has goods or services available in the form, function and utility required by ESD, at a price not more than 15% above the prevailing market rate, the goods or services should be obtained through the Preferred Source in the following prioritized order: NYS Department of Correctional Services Correctional Industries Program (CORCRAFT); approved charitable non-profit agencies for the blind; and approved charitable non-profit agencies for the severely disabled, qualified programs for the mentally ill, and qualified veterans workshops. For information on these Preferred Sources, see SFL § 162 and the Office of General Services' Preferred Sources Guide.

2.3. OGS Centralized Contracts

Goods and services needed by ESD may be available, without the need for competitive procurement, through centralized contracts held by the NYS Office of General Services ("OGS"). Information about centralized contract offerings can be obtained from the list of approved state contractors maintained by OGS.

Note that even if a OGS centralized contractor is available, it is recommended that staff obtain three price quotes from other OGS contractors or other vendors not on the OGS list, unless a compelling justification exists (e.g., experience with a particular project).

2.4. Commodities Contracts

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

2.5. Service Contracts

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

2.6. Discretionary Purchases

ESD may purchase services or commodities from small business concerns or those certified pursuant to Article 15-A of the Executive Law (Minority and Women-Owned Businesses), or

commodities or technology products that are recycled or remanufactured, in an amount not exceeding two hundred thousand dollars (\$200,000) without a “formal competitive process.” In such a case, three quotes should be obtained wherever practicable, and Contract Reporter advertising is advisable when time permits. The award of a discretionary purchase contract should be notified in the Contract Reporter. For more information on discretionary purchases see www.ogs.ny.gov.

3. Contract Reporter Exemptions

3.1. Reasons for Exemptions

Advertising a procurement in the Contract Reporter is generally required unless specific grounds exist that constitute a reason for exemption. A Contract Reporter exemption may be granted by the Officer(s) specified in Attachment A to these Guidelines, only if any of the following circumstances can be demonstrated:

- (a) **Sole Source**. Only one source for the goods or services is available. Three examples of sole source procurements: (i) proprietary software compatible with ESD operating systems that no-one else offers; (ii) a printer’s warranty requiring that only a toner cartridge supplied by the manufacturer could be used without voiding the warranty; (iii) a vendor has developed a proprietary system for remediating contaminated land, unavailable from anyone else.
- (b) **Single Source**. The required goods or services are available from two or more vendors, but a particular vendor is preferable because of specific factors such as, without limitation, past experience with a particular issue; familiarity with ESD’s operations; experience with similar projects of ESD, other agencies or at other levels of government; demonstrated expertise; or capacity and willingness to respond to the situation. An example would be an environmental consultant who worked on an EIS for a project and now a Supplemental EIS is required for the same project; many consultants could do the work, but the original consultant’s familiarity with the project justifies selection as a single source.
- (c) **Emergency Circumstances**. Emergency circumstances exist when an urgent and unexpected situation arises which places public health or safety or the use or conservation of resources at risk and requires immediate action. Poor or late planning does not constitute an emergency. Contracts entered into as a result of an emergency situation should only cover the goods or services reasonably necessary to stabilize, ameliorate or remedy the situation. An example is a hazardous condition at a building owned by ESD: a contractor can be hired immediately to deal with the situation.

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

3.2. Authorization for Exemptions

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

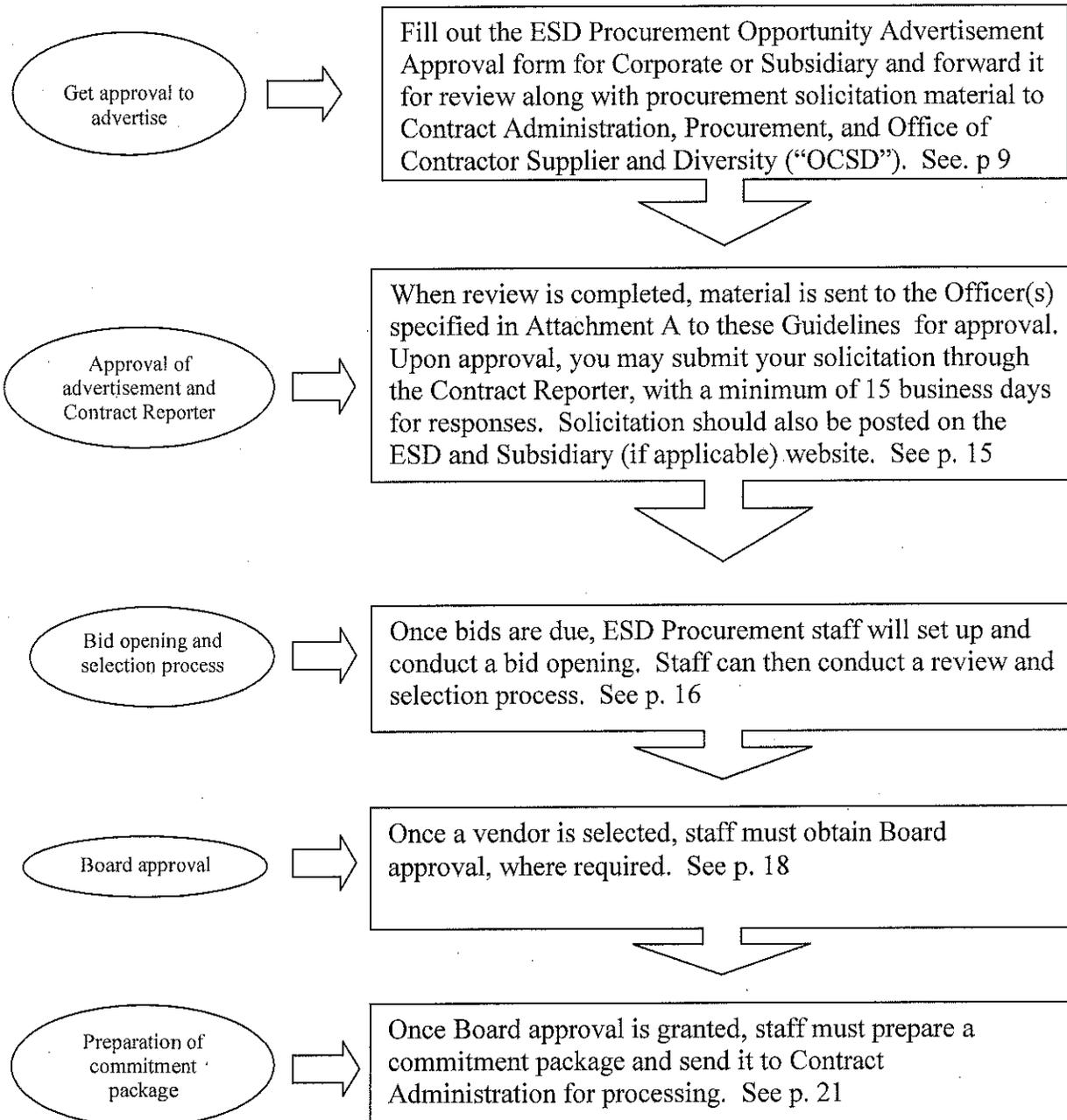
The memorandum requesting the exemption must document in reasonable detail: the circumstances establishing the exemption justification; a description of the goods or services to be acquired via the exemption; description of funding source; any alternatives considered; and the basis for determining that the cost of the proposed contract is reasonable under the circumstances.

If the proposed contract amount is greater than \$50,000, or will last more than one year, the exemption authorization should be obtained before ESD Board's approval. If Board approval is not required because the proposed amount is less than \$50,000 and the term of the contract is less than one year, the exemption authorization should be obtained from the Officer(s) specified in Attachment A to these Guidelines prior to contract execution and the commencement of any services or delivery of any goods.

Note that even if a Contract Reporter exemption is granted, compliance with SFL § 139-j and 139-k and State Tax Law § 5-a must still be satisfied (see p.11). Where appropriate, a statement from the staff initiator that the price obtained for the goods or service is compatible with market pricing must be presented with the exemption request.

At the time ESD enters into a contract with a single or sole source provider for an amount in excess of \$50,000, ESD shall submit an announcement of the contract for inclusion in the Contract Reporter, and shall specify the recipient of the contract.

4. How to Conduct a Competitive Solicitation



5. Approval to Advertise

Prior written approval of the Officer(s) specified in Attachment A to these Guidelines is required when you need to advertise a procurement opportunity, including Requests for Proposals (“RFPs”), Requests for Statements of Qualifications (“RFQs”) and Requests For Expression of Interest (“RFEIs”) (See Section 7: Types of Solicitation).

Note also that other approvals may be required to comply with State Division of Budget procedures (see Section 11.4). Submit the ESD Procurement Opportunity Advertisement Approval form (select Corporate or Subsidiary) to the appropriate officer at least 10 business days in advance of the relevant New York State Contract Reporter publication submission date. The Contract Reporter is now published daily.

6. Contents of ANY Procurement Solicitation

Whether the procurement is formal (such as an RFP, RFQ or RFEI) or informal (such as procurement for \$50,000 or less, or a Discretionary Purchase from an MWBE for less than \$200,000) the same basic information should be included in the solicitation:

- (i) What goods are being sought or what scope of services is desired;
- (ii) What the length (“term”) of the resultant contract will be;
- (iii) What criteria will be used in evaluating bids, and how those criteria are weighted? For example, price, bidders’ expertise, past history of government contracts, references/testimonials;
- (iv) Where known, the maximum price that ESD is prepared to pay for the goods or services;
- (v) A schedule of relevant dates (when bid is due, when questions may be asked or briefing meetings held, etc);
- (vi) ESD’s insurance requirements;
- (vii) ESD’s required diversity and minority participation (MWBE) goals;
- (viii) Disclosure to bidders that they must be able to demonstrate that they are responsible bidders, in good standing under the laws of New York and capable of fulfilling the requirements of the contract, and untainted by past non-performance or criminality;
- (ix) A copy of the contract that the successful vendor will be expected to agree to (generally, ESD’s Short Form Contract and Schedule A);
- (x) VENDREP Form where needed (See Sections 8.3 and 9.4);

- (xi) Encouragement of use of New York State businesses as sub-contractors or suppliers (See Section 8.6).

7. Types of Solicitations

7.1. General

There are a number of procurement techniques available, including Request for Proposals (RFP) and Request for Statements of Qualifications (RFQ) and, rarely, Requests for Expressions of Interest (RFEI). When selecting among these various approaches, the determining factors are:

- The importance of price or cost as a component in the review of incoming bids or proposals; and
- The ability to define specifications for goods or services being acquired, or to obtain those specifications from potential vendors (where the RFEI may be useful).

Generally, contracts for goods are to be awarded on the basis of “lowest price” and contracts for services are to be awarded on the basis of “best value” among responsive and responsible vendors. “Best value” is the basis for awarding service and technology contracts to the vendor that optimizes quality, cost and efficiency, among responsive and responsible vendors. The basis for a “best value” contract award must be, wherever possible, quantifiable. However, all procurement solicitations issued by ESD are to be guided by the same basic principles:

Clarity: Procurement documents should clearly convey to vendors what it is ESD wants to buy;

Fairness: No vendor should be advantaged over another. All information concerning the solicitation shall be conveyed in writing to all vendors participating in the process, including but not limited to process rules and evaluation criteria;

Openness: All relevant vendors should have an equal opportunity to respond to the offering.

Disclosure of Selection Criteria: The criteria for awards should be developed before bids/proposals are received. Vendors should know generally the basis upon which their offers are being judged. Note that if cost is weighted below 20%, a written justification for such weighting should be prepared and included in the Procurement record;

Efficiency: The process should be efficient, fair and able to withstand public scrutiny.

7.2. Requests for Proposals (“RFP”)

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

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

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

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

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

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

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

8. Compliance with Other Laws

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

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

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

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

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

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

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

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

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

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

Note that, once a recommended vendor has been selected after compliance with the competitive bidding process, it may be necessary for staff members to negotiate contract terms, etc., with the designated vendor. Those negotiations are not prohibited, and need not be conducted only by the designated contact person, although it is good practice to have the contact person present. However, any communication from a person other than the vendor that may reasonably be

considered to be an effort to influence the negotiation of a contract (either positively or negatively) is an impermissible contact and must be reported as such. For example: an ESD employee who is in the process of negotiating the terms of a land development deal which the Board has not approved, receives a call from an outside person saying that the vendor should get more development land because the vendor has a wonderful track record. Such a call constitutes lobbying and must be reported as such. The caller should be informed that the call will be reported, and asked to communicate directly with the designated contact person in the future.

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

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

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

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

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

8.3. Use of the Vendrep Form and Vendor Responsibility

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

8.4. Compliance with Executive Law Article 15-A: Contractor and Supplier Diversity

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

Where practical, feasible and appropriate, ESD shall promote and assist participation by minority and women-owned businesses in the selection and award of all contracts. Such minority and women-owned business participation shall be documented in a regular supplement, prepared by ESD’s Office of Contractor and Supplier Diversity (“OCSD”), for inclusion in the quarterly and annual reports made by Contracts Administration to the Board. To assist in the gathering of this information, the originator must provide OCSD with a completed Schedule of Minority/Women Business Participation, from the potential contract awardee, for OCSD's review and approval, prior to contract award. The required forms are accessible [here](#).

8.5. Compliance with Iran Divestment Act of 2012

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

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

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

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

The Secretary to the Governor has issued a directive that provides that all vendors who anticipate using sub-contractors or suppliers to fulfill procurement contracts must be encouraged (but not required) to use New York State businesses. All procurement solicitations of any kind must include specific language aimed at such encouragement. The model language can be accessed [here](#).

http://intranet.empire.internal/Resources/Data/Procurement/03042014_NYS_SubcontractorsandSuppliers.pdf

8.7. Project Sunlight

Project Sunlight is an important component of the Public Integrity Reform Act of 2011 that was passed by the Legislature and signed by the Governor. Under this law, the state governmental entities specified in the law are required to cooperate with the Office of General Services (OGS) and identify in a database developed by OGS all individuals, firms or other entities (other than State or local governmental agencies) that appear before such entity on behalf of themselves or in a representative capacity on behalf of a client or customer for any of various specified purposes. This includes appearances related to (a) procurement, (b) ratemaking, (c) regulatory matters, (d) judicial or quasi-judicial proceedings, (e) adoption or repeal of a rule or regulation.

Project Sunlight's reporting requirement for procurement appearances applies to those appearances that are for the purpose of procuring a State contract, irrespective of whether there is a governmental procurement planned. Thus, reporting is required for appearances relating to State contracts for which a Restricted Period under the Procurement Lobbying Law has not been established and without regard to whether a governmental procurement is anticipated. Appearances during the Restricted Period—whether they are bid clarification meetings or bid interviews or any other permissible contact under the State Finance Law do not need to be reported. As well as, appearances following the award of a State contract do not need to be reported.

8.8. Publication on ESD Website

Competitive solicitations must be made available on the ESD (and subsidiary, if applicable) website after advertisement in the NYS Contract Reporter. This website is also the appropriate place to post Questions and Answers regarding the procurement. (See Section 9: Contract Reporter Advertising Process).

8.9. Standard-Form Attachments

Procurement Contracts, which includes amendments to existing contracts, should include ESD's standard forms, including as appropriate ESD's Standard Short Form Contract as well as further required contract terms (Schedule A for consultants or law firms,; ESD's Non-Discrimination and Affirmative Action Provisions and Schedule of Minority/Women Business Participation; SFL § 139-j and 139-k and State Tax Law § 5-a (or affidavit of non-applicability). Insurance requirements must be obtained from Contract Administration for all solicitations and, if needed, must be included with the forms.

9. Contract Reporter Advertising Process

As stated above, ESD must advertise in the New York State Contract Reporter all contracts for the acquisition of goods and services of \$50,000 or more, unless an exemption is granted. In order to access the online system and place the advertisement, the initiator should contact Contracts Administration.

The minimum time for vendors to respond to a Contract Reporter solicitation is 15 business days (i.e., Saturdays, Sundays and legal holidays are excluded). View the Contract Reporter's daily publication schedule.

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

9.1. Selection Criteria

Written selection criteria shall generally be established for each proposed Procurement Contract and shall be included in any written solicitation materials. The relative weighting of the selection criteria should be set out in the RFP wherever practicable and, in the absence of written weighting, each criterion shall be deemed to have the same weight.

The selection criteria shall generally include price as an important factor to be considered in the selection process; however many ESD procurements are based on "Best Value," which allows for factors other than price to be taken into account. Such factors commonly include the quality of goods and services, the experience of the vendor and specific expertise with respect to the goods or services to be supplied. See also Section 7.1 above if price is weighted at less than 20%.

9.2. Bid Opening Procedures

All proposals should be received by the Procurement Department (unless the Procurements Manager directs otherwise), and immediately should be stamped with the date and time of receipt. **DO NOT OPEN ANY BID PACKAGES FOR ANY REASON BEFORE THE FORMAL BID OPENING.** ESD staff members representing Contracts Administration/Subsidiary Finance, Legal, Procurements, OCSD and the initiating Department/Subsidiary should be present at bid openings in person or by teleconference. Bids shall be opened by the Procurement Manager or his/her designee, and the time and date of receipt shall be entered into the Bid Log, which must be signed by all staff members present. Teleconference participants must confirm their presence by email to the Procurements Manager. The Bid Log shall also record the presence of SFL 139j-k and ST-220 forms in the bid.

A Public Bid Opening is required for Public Works contract solicitations, pursuant to State Finance Law § 144. This section generally covers bids for construction work on public projects, and may include preparatory work such as demolition, asbestos abatement and the like. ESD or a subsidiary must be a party to the contract, which must involve the use of laborers, mechanics or workers (not, for example, architects and engineers). The definition of a "Public Work" is more a matter of art than law: if in doubt as to whether the contract is for Public Work, contact the Legal Department for guidance.

9.3. Bid Evaluation and Vendor Selection

The initiating Department Head should establish, prior to bid opening, a team of at least three ESD staff members with relevant knowledge and experience of the goods and/or services being procured. One member should come from Contracts Administration or Finance. In some cases, one or more non-ESD team members may join the review team, where those persons have specific knowledge of the procurement subject, or a specific role to play in the administration of the contract with the successful bidder. If non-ESD staff is included in the review team, the team must be expanded in number such that a majority will always be ESD staff members.

Analysis of the proposals and/or bids submitted and the award of the contract shall be documented in reasonable detail. Award to anyone other than the low bidder must include in the documentation the reason the low bidder was not selected.

In reviewing bids, all members of the team must complete and sign scoring sheets that rate each bidder according to the selection criteria and weighting set out in the RFP. Scoring sheets must not include anything other than numerical ratings (i.e., no comments/opinions/notes, etc). Original scoring sheets must be signed and retained by the Procurements Manager as part of the Procurement Record.

9.4. Determination of Responsibility – “FLIP Review”

Pursuant to State Finance Law § 163, ESD or the Subsidiary Board must determine that a vendor or respondent is a responsible contractor, prior to approving the award of a contract. In any event, whether or not a formal Determination of Responsibility is sought from the relevant Board, the initiator should ensure that all vendors are “responsible.”

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

The Office of the State Controller has developed a useful resource, the VENDREP form, that should be used wherever possible. This form seeks information about the vendor, its affiliates and subsidiaries, officers and owners, past responsibility determinations by agencies and investigations/prosecutions. It must be notarized, and false statements may be actionable and in some cases may be criminal. The Vendrep forms can be accessed here: www.osc.state.ny.us/vendrep/webresources.htm.

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

If a vendor is considered to be non-responsible, steps must be taken to afford the vendor due process rights, including an opportunity to explain its position in writing and, in some cases, at a meeting. Consult the ESD Legal Department in such cases, after having reviewed the information at the following website:

www.ogs.state.ny.us/procurecounc/pdfdoc/BestPractice.pdf

9.5. Procurement Record

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

10. Contract Approval

Procurement Contracts in amounts **\$50,000** or less that will be completed within one year must be approved by the Officer(s) specified in Attachment A to these Guidelines .

Procurement Contracts over \$50,000, as well as contracts for any amount involving personal services to be rendered over a period in excess of one year, must be approved by the ESD (or Subsidiary) Directors. However, **warranty and product maintenance/support/lease contracts (including but not limited to auto leases)** are not considered personal services and do not require approval by the Board unless the amount of such contract is over \$100,000 in aggregate through the life of the contract.

10.1. Board Materials

The initiator writes a memorandum from the respective Department Head to the Officer(s) specified in Attachment A to these Guidelines, explaining the need for the contract. View Model Directors' Materials for Procurement Contracts.

The Board materials must set out:

- a. the need for goods and services;
- b. a brief description of the goods or services needed;
- c. the expected maximum cost of the proposed goods or services;
- d. the selection process used to determine an award based on best value, or where not quantifiable, the justification which demonstrates the best value will be achieved; and
- e. The funding source.

10.2. ESD Contract and Amendment Approval

- a. Contracts in amounts under \$50,000 must be approved by the Officer(s) specified in Attachment A to these Guidelines.
- b. Contracts (i) in amounts over \$50,000 or (ii) contracts for any amount involving services to be rendered over a period in excess of one year must be approved by the ESD (or Subsidiary) Directors.
- c. If staff anticipates that a contract may need to be extended beyond one year, ensure that Board approval is requested and that the materials and resolution specifically permit an extension of the contract. Once Board approval is obtained, the contract with the vendor must contain a clause that specifically permits extension. If the contract does not contain such a clause, and the contract needs to be extended, Contract Reporter advertising is required unless an exemption is granted.
- d. Contracts for goods to be provided or services to be rendered over a period in excess of one year, regardless of the amount of the contract, which therefore must have been approved by the Board, must in addition be reviewed annually by the ESD (or Subsidiary) Directors, pursuant to Public Authorities Law § 2879.3(b)(ii). The initiating Department Head must provide an annual report setting forth the status of all continuing goods and/or services contracts, together with justification for the continuance of such contracts for the next year. This annual status report can be made to Contracts Administration and Subsidiary Finance by filling out a contract summary/contract status report. The status reports will also be part of the annual budget and spending review process for all existing ESD and Subsidiary budgets, which must be annually approved by the respective Directors. The annual status reports will thus serve to clarify the need to continue existing multi-year goods and/or service provider contracts.
- e. Contract documents should be fully executed and delivered by both parties prior to the commencement of any work. However, if in the discretion of the initiating Department Head it is essential that work on the contract be commenced before the formal contract documents have been approved, the ESD Chief Executive Officer, Executive Vice President, General Counsel or Chief Financial Officer may issue a letter authorizing a contractor to commence work pending completion and execution of formal contract documents (“**Notice to Proceed**”), provided that:
 - i. The contract is not subject to Office of the State Comptroller (“OSC”) approval (See Section 11.5); and
 - ii. the authorization contained in the Notice to Proceed does not exceed \$50,000; and

iii. the initiating Department Head seeking the Notice to Proceed obtains in advance, via memorandum (with copies sent to Contract Administration and Procurement) an explanation in reasonable detail the need for the immediate commencement of contract performance, and the written authorization of two of the following: ESD Chief Executive Officer, Executive Vice President, General Counsel or Chief Financial Officer.

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

g. Contract amendments that increase the contract amount to \$50,000 or more must be approved by the ESD or Subsidiary Directors. Amendments for less than 10% of the original contract amount (or the contract amount as subsequently approved by the Board) may be executed by the ESD or subsidiary Chief Executive Officer or Chief Financial Officer without further Board approval, unless the amendment increases the contract to an amount above \$50,000 and Directors' approval has not been previously obtained. An Amendment Package must be sent to Contracts Administration for approval and processing (see Commitment Request Package on the next page for guidance). If a proposed amendment will increase the term of the contract to more than one year, Contract Reporter advertising is necessary unless, as discussed in paragraph (c) above, the original contract contained a clause specifically permitting extension.

In the case of contracts for more than \$1 million, where the initiator anticipates that unforeseen contingencies and changes of scope may arise and require changes in the contract amount, Board approval should be sought from the outset for amendment of the contract up to 10% of the amount approved, to be executed without further Board approval by the Chief Executive Officer and the Chief Financial Officer of the corporation. Note that such an amendment may require OSC review and approval (see section 11.5 below). If in doubt, consult the Legal Department.

11. Steps After Contract Approval Is Obtained

11.1. Commitment Request Package

- a. The contract initiator completes the required information on the Commitment Request Form.
- b. The contract initiator completes the Standard Form Contract -Short Form for Goods/Services, if applicable, with the relevant attachment (“Schedule A”) which may be Standard Form for Materials/Services, Architect Agreement, Attorney Agreement, or Standard Form Amendment or Modification of Contract.

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

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

- the scope and purpose of the contract;
 - the description of the services to be performed;
 - the location where the work is to be performed;
 - the standards to be used to measure performance (e.g. units of services, number and nature of clients served, target dates, etc.);
 - the level of expertise that is required to perform the tasks, the cost and the method payment of the contract;
 - the starting date and the contract period;
 - the finished product or the services to be delivered;
 - record-keeping and reporting requirements, including a statement that ESD and any relevant State agency has the right to audit the contractor’s records;
- c. Written explanation of the responsibility determination/FLIP Review and/or formal Determination of Responsibility, where required.
 - d. ESD/Subsidiary Board of Directors Approval, if applicable. View sample Board materials.
 - e. New York State Contract Reporter Form, approved exemption letter, or NYS OGS Centralized Contract.
 - f. All appropriate insurance certificates, as approved by the ESD Insurance Administrator, a copy of the appropriate officer’s approval and a copy of

the RFP, if applicable. Note that all contractors must have evidence of Workers' Compensation and Disability Insurance coverage.

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

11.2. Contract Reporter Award Notification

If a contract is awarded after a Contract Reporter Solicitation, the award, along with the Schedule of Minority/Women Business Participation, must be posted on the Contract Reporter system. A contract is considered awarded when it is executed (signed) by all parties. This posting will be done by Contracts Administration.

11.3. Extension/Amendment of Contracts

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

11.4. Department of Budget (“DoB”) Approval

Under DOB Bulletin B-1184, approval for certain procurements over \$500 is required. In general, if a state or legislative appropriation is the source of funds, approval is needed. A web-based application known as the “Agency Spending Controls Application” process is used to obtain prior approval. DOB approval is not required when the funding source for the procurement comes from a non-State source (e.g., a developer of an ESD project), where at least 75% of the procurement cost will be reimbursed by federal funds, or when the procurement is needed to address an immediate threat to public health and/or safety. DOB mandated forms are used in cases where approval is required. ESD has implemented the cost control measures described in Bulletin B-1184. All spending not involving Federal reimbursement of at least 75 percent, presenting an immediate threat to public health and/or safety or whose funding source is from a Third Party is subject to the preapproval process specified in the Budget Bulletin utilizing forms established by DOB known as Attachment A. An Attachment B form was also created for spending involving Federal reimbursement of at least 75% or presenting a public health and/or safety issue.

For instructions and forms, see the ESD Employee Intranet: Financial Resources. If in doubt, contact the ESD Controller’s Department for guidance.

11.5. OSC Post-Contract Approval of \$1,000,000+ Contracts

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



Comptroller review
of Contracts Memo_F

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

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

12. Monitoring of Procurement Contracts

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

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

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

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

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

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

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

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

13. Procurement Contracts Involving Former Officers of ESD

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

14. Implementation of These Guidelines

ESD's Legal Department, in conjunction with the VP/Administrative Services, shall be responsible for:

- a. Preparing for approval by the CEO such supplemental procedures as may be required to effectively implement these Guidelines.
- b. Preparing proposed amendments to the Guidelines for approval by the CEO and the ESD Directors when and as required.

15. Reporting

15.1. Quarterly Reports

ESD's VP/Contract Administration shall prepare for presentation by the Office of Contractor and Supplier Diversity to the ESD Directors, quarterly reports of new Procurement Contracts and required Schedules of MWBE Participation. For each Procurement Contract, the report shall include the contract amount, reason for award, initial scope of services and the selection process used. Such reports shall include information related to amendments approved on contracts during the reporting period.

15.2. Annual Reports

Annually, ESD's VP/Contract Administration shall prepare for the Directors' review a report on Procurement Contracts as of the end of each fiscal year, summarizing procurement activity by ESD for the period of the report, including a listing of all contracts entered into, the selection process used to select vendors, the status of existing Procurement Contracts and required Schedules of MWBE Participation. ESD's VP/Contract Administration shall also prepare, on an annual basis, a report for submission to:

- a. The Division of Budget;
- b. The Department of Audit and Control;
- c. The Senate Finance Committee;
- d. The Assembly Ways and Means Committee;
- e. Members of the public (upon receipt of reasonable requests therefor); and
- f. The Commissioner of Economic Development.

The reports shall include these Guidelines, any amendments thereto, and an explanation of the amendments.

16. Effect on Awarded Contracts

Nothing contained in these Guidelines shall be deemed to alter, affect the validity of, modify the terms of, or impair any contract or agreement made or entered into in violation of, or without compliance with, these Guidelines. These Guidelines reflect best and customary practice, but are not intended to be rules of law. Note, however, that certain contracts may not be “valid or enforceable” without OSC approval. (See Section 11.5)



FOR CONSIDERATION

May 22, 2015

TO: The Directors

FROM: Christopher Schoepflin

SUBJECT: Niagara Falls (Niagara County) – 310 Rainbow Boulevard Industrial/Small and Medium-Sized Business Assistance Project

REQUEST FOR: Adoption of Modified General Project Plan (“MGPP”); Authorization to Hold a Public Hearing, Authorization to Make a Grant and to Take Related Actions

I. Project Description:

The 310 Rainbow Boulevard Industrial/Small and Medium Sized Business Assistance Project (the “Project”) involves providing State assistance to Hamister Group (“Hamister” or the “developer”) to facilitate a \$35 million mixed-use development on a highly-visible, 0.88-acre land parcel along Old Falls Street. It would result in the development of a ±111,629-square-foot (“SF”) building containing a hotel, ballroom and ground-level food-and-beverage and or retail operations open to the general public.

II. Project Location:

The Project site is located on an approximately 0.88-acre parcel at 310 Rainbow Boulevard in Niagara Falls, New York. The Project site is bounded by: Michael J. O’Laughlin Way on the north; Rainbow Boulevard on the east; Old Falls Street on the south; and a private parking lot for the Hard Rock Café on the west.

The Project site is a major parcel in the heart of the city’s downtown tourist district and is located in proximity to Niagara Falls State Park, the Conference & Event Center Niagara Falls, the Seneca Niagara Casino complex, and a number of other downtown hospitality establishments.

III. Project Background:

On July 8, 2013, the USA Niagara Development Corporation (“USAN”) Board of Directors, among other things: i) adopted a General Project Plan (“GPP”) for the Project and (ii) authorized

the commitment of funds in the total amount of \$2,750,000 for the Project. A copy of the July 8, 2013 Board materials and GPP are attached hereto as Attachment A. The GPP and all findings and determinations made by the Board shall remain in full force and effect except as modified below to reflect changes to the proposed Project.

IV. The Proposed 2015 MGPP:

Since the GPP was approved by the Board, the cost estimates and program of the Project have been refined by the developer requiring a modification of the Project. As such, USAN staff recommends certain amendments to the GPP. The proposed amendments are attached hereto as Attachment B and are described as follows:

- (a) The developer has eliminated the previously-proposed 24 rental apartments from the development program (in exchange for additional hotel rooms and meeting space) given that the updated construction estimates and associated Pro Forma indicated that the relatively small residential component of the program would have significantly impaired the Project's financial performance.

- (b) In addition to the previously committed \$2.75 million in USAN assistance toward the Project, an additional \$1.1 million in State Funds have been proposed to be provided to the developer. This public investment, now proposed to total \$3.85 million, would advance a total investment now estimated at roughly \$35 million (up from \$25 million). This public investment would result in Hamister achieving an acceptable Internal Rate of Return ("IRR") necessary to undertake the Project and ensure its continued success. The source of the additional funding is Buffalo Regional Innovation Cluster appropriation authorized pursuant to the 2014-15 State budget. No USAN corporate funds would be used to fund the Project.

V. Environmental Review:

The Directors made a Determination of No Significant Effect on the Environment for the proposed Project at their meeting of July 8, 2013. This determination addressed all aspects of the 310 Rainbow Boulevard Industrial/Small and Medium-Sized Business Assistance Project, inclusive of anticipated refinements under this MGPP. Therefore, no further environmental review is required in connection with this action.

VI. Non-Discrimination and Contractor & Supplier Diversity:

Empire State Development/USAN's Non-Discrimination and Contractor & Supplier Diversity policies will apply to this Project. Hamister shall be required to: (i) include minorities and women in any job opportunities created, (ii) solicit and utilize Minority and Women Business Enterprises ("MWBEs") for any contractual opportunities generated in connection with the Project and (iii) use Good Faith Efforts (pursuant to 5 NYCRR §142.8) to achieve an overall MWBE Participation Goal of 30% related to the total value of the State's funding. The aforementioned goal includes a Minority Business Enterprise ("MBE") Participation Goal of 18% and a Women Business Enterprise ("WBE") Participation Goal of 12%, related to the total value of USAN's funding.

VII. Requested Actions:

The Directors are requested to: a) adopt the May 2015 MGPP; b) authorize a public hearing on the May 2015 amendment; c) authorize the commitment of funds in the total amount of \$3,850,000 for the Project; and d) authorize the taking of all actions related to the foregoing.

VIII. Attachments:

Resolution

Attachment A – Board Materials dated July 8, 2013 and General Project Plan

Attachment B – May 2015 Modified General Project Plan

May 22, 2015

USA Niagara Development Corporation -- 310 Rainbow Boulevard Proposed Industrial/Small and Medium-Sized Business Assistance Project – Adoption of Amendment to the General Project Plan; Authorization to Hold a Public Hearing, Authorization to Make a Grant and to Take Related Actions

BE IT RESOLVED, that on the basis of the materials presented to this meeting (the "Materials"), a copy of which is hereby ordered filed with the records of the USA Niagara Development Corporation (the "Corporation"), relating to the 310 Rainbow Boulevard Proposed Industrial/Small and Medium-Sized Business Assistance Project (the "Project"), the Corporation hereby adopts the proposed Modified General Project Plan (the "Plan") for the Project submitted to this meeting, together with such changes therein as the President or other proper officers of the Corporation may deem appropriate, a copy of which Plan, together with such changes, is hereby ordered filed with the records of the Corporation; and be it further

RESOLVED, that upon written finding of the President or other proper officers of the Corporation that no substantive negative testimony or comment has been received at the public hearing held on the Plan, such Plan shall be effective at the conclusion of such hearing, and that upon such written finding being made, the President or other proper officers of the Corporation be, and each of them hereby is, authorized to enter into an agreement, for the purposes, and substantially on the terms and conditions, set forth in the materials presented to this meeting, including the commitment of Corporation funding in the total amount of \$3,850,000 for the Project, with such changes as the President or other proper officers of the Corporation may deem appropriate, and be it further

RESOLVED, that the provision of USAN financial assistance is expressly contingent upon: (1) the approval of the Public Authorities Control Board, if applicable, and (2) receipt of all other necessary approvals; and be it further

RESOLVED, that the President of the Corporation or other proper officers 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 related actions as he may in his sole discretion consider to be necessary or proper to effectuate the foregoing resolutions.

* * *



222 First Street, 7th Floor
Niagara Falls, NY 14303
phone: 716.284.2556
fax: 716.284.2917
www.usaniagara.com

FOR CONSIDERATION

July 8, 2013

TO: The Directors

FROM: Christopher Schoepflin

SUBJECT: Proposed Industrial/Small and Medium-Sized Business Assistance Project - 310 Rainbow Boulevard, Niagara Falls, NY

REQUEST FOR: Proposed Industrial/Small and Medium-Sized Business Assistance Project Findings Pursuant to Sections 10 (b), 10 (f) and 10 (g) of the UDC Act; Adoption of General Project Plan; Authorization to hold a Public Hearing Under Section 16 of the UDC Act; Authorization to make a Determination of No Significant Effect on the Environment; Authorization to waive the requirement of a Labor Peace Agreement; Authorization to Enter into an Agreement with the Hamister Group ("Hamister") and Authorization to Take Related Actions.

I. Project Summary:

(Please see the attached General Project Plan ("GPP") for a more detailed description of the Project.)

A. Project Site:

The Project site is located on an approximately 0.88-acre parcel at 310 Rainbow Boulevard in Niagara Falls, New York. The Project site is bounded by: Michael J. O'Laughlin Way on the north; Rainbow Boulevard on the east; Old Falls Street on the south; and a private parking lot for the Hard Rock Café on the west.

The Project site is a major parcel in the heart of the city's downtown tourist district and is located in proximity to Niagara Falls State Park, the Conference & Event Center Niagara Falls, the Seneca Niagara Casino complex, and a number of other downtown hospitality establishments.

B. Project Description:

The Project involves providing \$2.75 million in assistance toward a \$25 million mixed-use development project. It would result in the development of a ±119,000-square-foot ("SF"), mixed-use infill building. The building would contain a 114-room, "upscale"-grade hotel (preliminarily anticipated to be a Hilton Garden Inn®) with a 10,000 SF ballroom facility; 24 market-rate apartments; and 5,000 SF street-level retail/food-and-beverage uses fronting on Old Falls Street, with opportunities for additional retail along the Rainbow Boulevard frontage in the future.

The Hamister Group, Inc. ("Hamister" or "the developer"), is a New York State-based hotel and health care management company. The developer is currently undertaking a mixed-use hotel / office / apartment project (i.e., a major rehab of an existing downtown office tower) in Buffalo, NY and has other hotel holdings in Pittsburgh, Louisville, Knoxville, and Nashville. The GPP envisions that Hamister will be directly responsible for the development activities under the Project. The State funds allocated to the Project, which would reimburse portions of capital cost items under the Project upon completion, will supplement private funds in the Project

A financial return analysis of the developer's Pro Forma indicates that the Project would not be financially feasible without assistance from USAN. Based on this analysis, the \$2.75 million in USAN assistance toward the \$25 million investment would result in Hamister achieving an operating performance producing an acceptable Internal Rate of Return ("IRR") necessary for Hamister to undertake the Project and ensure its continued success.

A benefit to the community, the Project would create new jobs and increase bed tax revenues. The Project would also serve the public as a recreational support amenity by expanding the City of Niagara Falls' (the "City") inventory of quality hotel rooms; the breadth of choices for food-and-beverage and banquet facilities; and new residential units to continue to grow the number of year-round downtown residents. In addition, these goals would be accomplished by contributing to a dense cluster of activities along Old Falls Street, which would complement the existing tourism setting in the City by concentrating a mix of uses and facilities within a definable, pedestrian-oriented "place." Like other USAN initiatives to expand the lodging, restaurant, and meeting facilities downtown, the Project would directly compliment the State's investment in the Conference Center Niagara Falls.

C. Funding Uses and Sources

The table below outlines the proposed uses of funds programmed for the project and the sources of these funds. The budget for the uses of funds was derived from cost/pro-forma estimates submitted by Hamister as part of the Project negotiations. The sources of funds include \$2.75 million in USAN/City MOU funds pursuant to the 2009 Memorandum of Understanding ("MOU") between USAN and the City to support economic development projects in the USAN Development District. No USAN corporate funds would be used to fund the Project.

Table 1 – Uses & Sources of Funds

Funding Uses	
Land Costs	\$100,000
Legal Fees	\$60,000
Architectural/Engineering Services (including Contingencies)	\$863,777
Other Soft Costs	\$3,165,428
Hard Construction Costs (including Contingencies)	\$20,292,089
Financing Costs	\$837,083
GRAND TOTAL	\$25,318,377
Anticipated Funding Sources	
Owner's Private Financing and Equity (Hamister)	\$22,568,377
USAN Funds	\$2,750,000
GRAND TOTAL	\$25,318,377

D. Tentative Project Timeline:

- Public Hearing on GPP July 2013
- Review by Public Authorities Control Board August 2013
- Execute Development Agreement August 2013
- Final Design/Approvals for Project April-October 2013
- Start of Construction November 2013
- Completion of Construction September 2015
- Certificate of Occupancy October 2015
- Final Transfer of Land to Hamister Group Oct./Nov. 2015

E. Development Agreement:

Hamister, together with USAN and the City, would enter into a development agreement which would govern all aspects of the proposed Project's implementation. The primary terms of the development agreement would require the developer to finance, design, construct and operate a mixed use facility in accordance with Section V(A) of the GPP. The developer would be required to pay the City \$100,000 to purchase the land. As part of the agreement, USAN would provide funding for the project in an amount not to exceed \$2.75 million. In the event that the City's existing license on this site cannot be effectively terminated by the City, such that the City cannot deliver title to the developer sufficient to allow the project to be constructed in accordance with the terms of the development agreement, USAN will be required to reimburse the developer's actual, documented design costs up to an amount not to exceed \$780,000.

F. Developer Selection Process:

Selection of the developer for the Project was conducted through a competitive procurement process. USAN and the City launched a request for proposals ("RFP") on October 5, 2011 for redevelopment of the site. Seven proposals were received on December 9, 2011. A Selection Committee was formed consisting of USAN, ESD and City staff. Upon review of the proposals, the Selection Committee selected or "shortlisted" five developer teams and conducted interviews on January 18, 2012. Teams that were determined to best achieve the objectives as stated in the RFP were ranked order as follows:

Rank	Developer Team	Max Score 600
1.	Hamister Group	529
2.	Uniland Development	470
3.	DHD Ventures	448
4.	Eastern Hospitality Advisors	410
5.	LMK Realty Associates	233

Hamister was recommended by the Selection Committee and approved as the preferred developer by the Niagara Falls City Council on February 22, 2012.

Pursuant to State Finance Law Section 139-j and 139-k and ESD's policy related thereto, staff has (a) considered the ability of Hamister to perform the services as set forth in these materials, and (b) consulted the list of offerers determined to be non-responsible bidders and debarred offerers maintained by the New York State Office of General Services. Based on the foregoing, staff finds Hamister to be responsible.

II. Statutory Basis:

In accordance with the UDC Act, the Corporation is making Industrial/Small and Medium-Sized Business Assistance Project Findings. Corporation staff has reviewed the required findings and determined that there is an adequate basis for the making of the findings. The specific findings, and the basis for such findings, are set forth in the General Project Plan.

III. Environmental Review:

Empire State Development ("ESD")/USAN, as lead agency, has completed an environmental review of the proposed Project, pursuant to the requirements of the State Environmental Quality Review Act ("SEQRA") and the implementing regulations of the New York State Department of Environmental Conservation.

This review, which was coordinated with the involved agencies due to the Project's Type I classification, found that the proposed project would not result in significant adverse impacts on the environment. Therefore, the Directors are recommended to make a Determination of No Significant Effect on the Environment.

IV. Labor Peace Agreement

Public Authorities Law Section 2879-b prohibits public authorities from providing financing for any project that includes, as a principal function, a hotel with more than fifteen employees unless a labor peace agreement ("LPA") is entered into with a labor organization representing hotel employees in the state, for a period of at least five years. An LPA is an agreement between the project developer (or its contractors) and a labor organization prohibiting the labor organization and its members from engaging in labor activities that disrupt the hotel's operations. The statute also provides that LPA requirement can be waived if the authority determines that the project would not be able to go forward with an LPA or the costs of the project to the authority would be substantially increased by such a requirement.

Hamister has requested a waiver from the LPA requirement because the increased costs associated with an LPA would make the project infeasible. Review of the developer's operations and financial statements indicates that the effect of an LPA on the project would be an increase in wage labor and benefits by more than 40%. Hamister has advised USAN that absent a waiver, the project will not proceed. Staff has reviewed the developer's financial analyses and operating pro forma and agrees that the project would be rendered infeasible if an LPA were to be required due to the increased costs associated with its implementation. Staff therefore recommends that USAN waive the LPA requirement for this project.

V. Non-Discrimination and Contractor & Supplier Diversity:

ESD/USAN's Non-Discrimination and Contractor & Supplier Diversity policies will apply to this Project. Hamister shall be required to: (i) include minorities and women in any job opportunities created, (ii) solicit and utilize Minority and Women Business Enterprises ("MWBEs") for any contractual opportunities generated in connection with the Project and (iii) use Good Faith Efforts (pursuant to 5 NYCRR §142.8) to achieve an overall MWBE Participation Goal of 30% related to the total value of USAN's funding. The aforementioned goal includes a Minority Business Enterprise ("MBE") Participation Goal of 18% and a Women Business Enterprise ("WBE") Participation Goal of 12%, related to the total value of USA Niagara's funding.

VI. Requested Actions:

The Directors are requested to: a) adopt Industrial/Small and Medium-Sized Business Assistance Project findings pursuant to Sections 10 (b), 10 (f) and 10 (g) of the UDC Act; b) adopt the General Project Plan; c) authorize a public hearing as required under Section 16 of the UDC Act; d) authorize USAN to make a Determination of No Significant Effect on the Environment; e) waive the requirement of a Labor Peace Agreement; f) authorize USAN to enter into an agreement with Hamister for the development of the Project; g) authorize the commitment of funds in the total amount of \$2,750,000 for the Project; and h) authorize the taking of all actions related to the foregoing.

Attachments:

Resolution

General Project Plan

July 8, 2013

310 Rainbow Boulevard Proposed Industrial/Small and Medium-Sized Business Assistance Project – Land Use Improvement Project Findings Pursuant to Sections 10 (b), 10(f) and 10 (g) of the UDC Act; Adoption of General Project Plan; Authorization to hold a Public Hearing Under Section 16 of the UDC Act; Authorization to make a Determination of No Significant Effect on the Environment; Authorization to waive the requirement of a Labor Peace Agreement; Authorization to Enter into an Agreement with the Hamister Group; and Authorization to Take Related Actions.

BE IT RESOLVED, that on the basis of the materials presented to this meeting (the "Materials"), a copy of which is hereby ordered filed with the records of the USA Niagara Development Corporation (the "Corporation"), relating to the 310 Rainbow Boulevard Proposed Industrial/Small and Medium-Sized Business Assistance Project (the "Project"), the Corporation hereby makes the requisite findings pursuant to Sections 10 (b) and 10 (f) of the New York State Urban Development Corporation Act, as amended (the "Act"); and be it further

RESOLVED, that on the basis of the Materials which indicate that no families or individuals reside in nor are to be displaced from the Project area, the Corporation hereby finds that the requirements of Section 10 (g) of the Act are satisfied; and be it further

RESOLVED, that the Corporation does hereby adopt, subject to the requirements of Section 16(2) of the Act, the proposed General Project Plan (the "Plan") for the Project submitted to this meeting, together with such changes therein as the President or other proper officers of the Corporation may deem appropriate, a copy of which Plan, together with such changes, is hereby ordered filed with the records of the Corporation; and be it further

RESOLVED, that upon written finding of the President or other proper officers of the Corporation that no substantive negative testimony or comment has been received at the public hearing held on the Plan, such Plan shall be effective at the conclusion of such hearing, and that upon such written finding being made, the President or other proper officers of the Corporation be, and each of them hereby is, authorized to enter into an agreement, for the purposes, and substantially on the terms and conditions, set forth in the materials presented to this meeting, including the commitment of Corporation funding in the total amount of \$2,750,000 for the Project, with such changes as the President or other proper officers of the Corporation may deem appropriate, and be it further

RESOLVED, that the Directors make a Determination of No Significant Effect on the Environment, in accordance with the terms and conditions set forth in the materials presented to the Directors at this meeting; and be it further

RESOLVED, that based on the materials presented at this meeting, the Corporation hereby finds, pursuant to New York State Public Authorities Law Section 2879-b, that the project would not be able to go forward if a labor peace agreement were required and hereby waives such requirement in connection with the project; and be it further

RESOLVED, that the provision of USAN financial assistance is expressly contingent upon: (1) the approval of the Public Authorities Control Board, if applicable, and (2) receipt of all other necessary approvals; and be it further

RESOLVED, that the President of the Corporation or other proper officers 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 related actions as he may in his sole discretion consider to be necessary or proper to effectuate the foregoing resolutions.

* * *

General Project Plan

310 Rainbow Boulevard
Niagara Falls, New York

Industrial/Small and Medium-Sized Business Assistance Project

Adopted: July 8, 2013

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I. Introduction

The USA Niagara Development Corporation ("USAN"), a subsidiary of the New York State Urban Development Corporation d/b/a the Empire State Development ("ESD"), proposes the undertaking of the **310 Rainbow Boulevard Industrial/Small and Medium-Sized Business Assistance Project** (the "Project") in the City of Niagara Falls, Niagara County, New York.

The Project involves providing \$2.75 million in assistance to a private company to facilitate a \$25 million mixed-use development on a highly-visible, 0.88-acre land parcel along Old Falls Street. It would result in the development of a ±119,000-square-foot ("SF"), building containing hotel, ballroom, residential, and ground-level food-and-beverage and or retail operations open to the general public.

The parcel comprising the Project site is currently largely vacant except for accessory features from the former "Flight of Angels" balloon ride, which ceased operations in 2009. In the summer of 2010-2011, a temporary use consisting of rides/amusements, tour operations, and surface parking occupied the parcel. The lot continued to be used for commercial parking absent the amusement rides in the summer of 2012.

The applicant for the Project is the Hamister Group ("Hamister" or "the developer"), a New York State-based hotel and health care management company. The company is currently undertaking a mixed-use hotel/office/apartment project (i.e., a major rehab of an existing downtown office tower) in Buffalo, NY and has other hotel holdings in Pittsburgh, Louisville, Knoxville, and Nashville.

As the ESD subsidiary with a mission to facilitate revitalization of the tourism industry in downtown Niagara Falls, NY, USAN is adopting this General Project Plan ("GPP") in accordance with the New York State Urban Development Corporation ("UDC") Act, which permits ESD and its subsidiaries to undertake activities in furtherance of "Industrial" and "Small-/Medium-Sized Business Assistance" projects in areas in need of redevelopment, particularly those in danger of becoming substandard or blighted.

The Project, which is consistent with the 2009 City of Niagara Falls Comprehensive Plan, City Zoning requirements, and USAN policies for new development to support its tourism base, would include actions in furtherance of tourist industry and small-/medium-sized business goals. Support for these findings is discussed herein.

II. Project Location

The Project site is located on an approximately 0.88-acre parcel at 310 Rainbow Boulevard (Section, Block and Lot No. 158.12-1-4.11) in Niagara Falls, New York (see **Figure 1**). The Project site is bounded by:

- Michael J. O’Laughlin Way on the north;
- Rainbow Boulevard on the east;
- Old Falls Street on the south; and
- A private parking lot for the Hard Rock Café on the west.

The Project site is a major parcel in the heart of the city’s downtown tourist district and is located in proximity to Niagara Falls State Park, the Conference & Event Center Niagara Falls, the Seneca Niagara Casino complex, and a number of other downtown hospitality establishments.

III. Background

In November 2011, under the terms of agreements to fund/develop Niagara County Community College’s (“NCCC’s”) Niagara Falls Culinary Institute, the property at 310 Rainbow Boulevard was turned over to the City of Niagara Falls for new development and USAN was given the exclusive rights to solicit developers/projects at that property on behalf of the City.

In December 2011, USAN and the City issued a competitive Request for Proposals (“RFP”) for the property at 310 Rainbow Boulevard. After reviewing seven responses to the RFP, Hamister was selected as the preferred Project developer. It was determined that the Hamister proposal would best meet the RFP objectives by creating a high-density mix of quality hotel, residential, and retail uses with a focus on active ground-level development that would contribute to visitor and resident offerings along Old Falls Street.

Since its inception, USAN has been advancing a policy direction to facilitate investment in improving the hotel inventory in downtown Niagara Falls, with notable projects including the Giacomo Hotel and Residences, Crowne Plaza, and Red Coach Inn, as well as ongoing efforts at upgrading six (6) other downtown properties. A USAN-commissioned assessment by HVS Consulting and Valuation Services (“HVS”) found that Niagara Falls still has an inordinate proportion of its hotel inventory in the economy and independent¹ categories, which tended to impose intense price competition to the market. In turn, the lack of a large

¹ The city’s independent hotels are also largely in the economy category, with properties like the *Giacomo* and *Red Coach Inn* as key exceptions.

block of quality hotel rooms has served as an impediment for the USAN-owned Conference Center Niagara Falls from attracting larger meetings and conventions. HVS's analysis recognizes a series of obstacles here, similar to other like-sized cities, in realizing an upgrading of its lodging inventory, the most significant being access to financing.

To bridge these risks, HVS recommend a series of development incentives that allow for increased leverage in financing new hotel developments—particularly those as part of mixed-use developments that would contribute to a dense cluster of activity on Old Falls Street. HVS stated that this is a particularly feasible public investment method in Niagara Falls, NY, since unlike many other American cities, converting a greater percentage of city's eight million annual visitors to overnight stays would progressively contribute to a number of positive economic impacts.

IV. Project Objective

The Project aims to realize a new mixed-use infill development on the property at 310 Rainbow Boulevard, which would significantly reverse the current substandard condition of this important land parcel along one of the City's most visible streets. In achieving this objective, the Project would serve a strong public need and result in economic benefits to the local community, by:

- Expanding the downtown Niagara Falls inventory of quality lodging products;
- Adding new street-level food-and-beverage offerings along Old Falls Street;
- Realizing new ballroom facilities that would complement/supplement the operations and capture potential of the Conference Center Niagara Falls;
- Contribute to the City capturing a greater percentage of overnight patrons with relatively-higher disposable income, thus increasing the potential for expanded economic activity downtown; and
- Generate important new market-rate residential units, which will continue to advance a permanent resident base downtown to progressively help stem seasonality of its activity levels.

V. Project Description

A. Overview

This GPP envisions that Hamister will be directly responsible for the development activities under the Project. The State funds allocated to the Project, which would reimburse portions of capital cost items under the Project upon completion, will supplement private funds in the Project.

Specifically, the Project would involve the construction and operation of a ±119,000- SF, mixed-use infill building at the property (See **Figures 2 and 3**). The building would contain a

114-room, “upscale”-grade² hotel (preliminarily anticipated to be a Hilton Garden Inn®) with a 10,000-SF ballroom facility; 24 market-rate apartments; and 5,000 SF street-level retail/food-and-beverage uses fronting on Old Falls Street, with opportunities for additional retail along the Rainbow Boulevard frontage in the future.

Parking for the development would be secured by Hamister in the City Parking Ramp. In addition, Hamister proposes the option of constructing—as part of the Project and at its own cost—a pedestrian bridge over Rainbow Boulevard connecting to the third level of the City Parking Ramp. This would be subject to approval by the Niagara Falls City Council.

The Project would be developed in accordance with USAN’s Urban Design Standards, which involve a series of guidelines involving incorporation of active, publicly-accessible ground level uses (e.g., retail, food-and-beverage facilities, etc.), and architectural components that facilitate visual interest (e.g., quality materials, articulation of façade elements, signage, etc.), while still permitting a wide range of architectural expressions/styles.

B. Incentive Amount

A financial return analysis of the developer’s Pro Forma indicates that the Project would not be financially feasible without assistance from USAN. Based on this analysis, the \$2.75 million in USAN assistance toward the \$25 million investment would result in Hamister achieving an operating performance producing an acceptable Internal Rate of Return (“IRR”) necessary for Hamister to undertake the Project and ensure its continued success.

C. Development Agreement

Hamister, together with USAN and the City of Niagara Falls, would enter into a development agreement which would govern all aspects of the proposed Project’s implementation. The primary terms of the development agreement would require the developer to finance, design, construct and operate a mixed use facility in accordance with Section V(A) referenced above. The developer would be required to pay the City \$100,000 to purchase the land. As part of the agreement, USAN would provide funding for the project in an amount not to exceed \$2.75 million. In the event that the City cannot deliver title to the developer sufficient to allow the project to be constructed in accordance with the terms of the development agreement, USAN will be required to reimburse the developer’s actual, documented design costs up to an amount not to exceed \$780,000.

² The hotel industry classifies various lodging brands (or “flags”) in grades ranging from the highest level of “luxury” (e.g., iconic brands such as Ritz Carlton®), then progressively lower to “upper-upscale” (e.g., full-service Sheraton®, Hyatt Regency®, or Hilton®); “upscale” (e.g., Crowne Plaza®, Courtyard by Marriott®, Doubletree®, Hilton Garden Inn®, etc.); “upper-midscale” (Fairfield Inn®, Hampton Inn®, Holiday Inn®, etc.); “midscale” (Howard Johnson®, Quality Inn®, etc.); and finally, “economy” (e.g., Days Inn®, EconoLodge®, Rodeway Inn®). Independent hotels may be of any grade.

D. Tentative Project Timeline

- Public Hearing on GPP July 2013
- Review by Public Authorities Control Board August 2013
- Execute Development Agreement August 2013
- Final Design/Approvals for Project April-October 2013
- Start of Construction November 2013
- Completion of Construction September 2015
- Certificate of Occupancy October 2015
- Final Transfer of Land to Hamister Group Oct./Nov. 2015

VI. Project Funding

Table 1 outlines the proposed uses of funds programmed for the project and the sources of these funds. The budget for the uses of funds was derived from cost/pro-forma estimates submitted by Hamister as part of the Project negotiations.

The source of funds is USAN/City MOU funds pursuant to the 2009 Memorandum of Understanding (“MOU”) between USAN and the City of Niagara Falls to support economic development projects in the USAN Development District. No USAN corporate funds would be used to fund the Project.

Table 1 – Uses & Sources of Funds

Funding Uses	
Land Costs	\$ 100,000
Legal Fees	\$ 60,000
Architectural/Engineering Services (including Contingencies)	\$ 863,777
Other Soft Costs	\$3,165,428
Hard Construction Costs (including Contingencies)	\$ 20,292,089
Financing Costs	\$ 837,083
GRAND TOTAL	\$25,318,377

Anticipated Funding Sources	
Owner’s Private Financing and Equity (Hamister)	\$ 22,568,377
USAN Funds	\$ 2,750,000
GRAND TOTAL	\$25,318,377

VII. Economic Impact

The Project would serve the public as a recreational support amenity by expanding the City's inventory of quality hotel rooms; the breadth of choices for food-and-beverage and banquet facilities; and new residential units to continue to grow the number of year-round downtown residents. In addition, these goals would be accomplished by contributing to a dense cluster of activities along Old Falls Street, which would complement the existing tourism setting in the City by concentrating a mix of uses and facilities within a definable, pedestrian-oriented "place." Like other USAN initiatives to expand the lodging, restaurant, and meeting facilities downtown, the Project would also directly compliment the State's investment in the Conference Center Niagara Falls.

In terms of visitor perceptions, together with the State's investment in the first phase of work to transform the former Rainbow Centre Mall/City Parking Ramp, involving the recent opening of the Niagara Falls Culinary Institute, the Project will significantly improve the visual quality along a major downtown corridor and would result in a prominent new feature in the City's skyline view. While not quantifiable, such improvements often shape initial impressions of an urban area and decisions on whether it is viewed as a safe and desirable place to visit.

ESD performed an economic analysis of the Project and has projected that it is estimated that it would have the following beneficial economic impacts over a ten-year period:

- Construction activity will generate an estimated total of 324 person years of employment (direct, indirect, and induced).
- Permanent operations will generate 71 net new on-site jobs with an average salary of \$24,500.
- Based upon ESD's regional economic impact model, economic activity by the 71 employees will also generate an additional 21 jobs in the region over the ten-year evaluation period.
- Direct and indirect fiscal benefits during the ten-year evaluation period (i.e., taxes on personal incomes from project direct/indirect employment, corporate and business incomes, excise and user taxes, property taxes, and other taxes) is estimated to total \$11.7 million.
- Total impact on economic activity related to the Project in the region is estimated to be \$39.528 million (direct, indirect and induced) over the ten-year evaluation period.

VIII. Statutory Basis

A. Industrial Project Findings – UDC Act Section 10(b):

Based on the information set forth in this GPP and other due investigation conducted by USAN, USAN hereby affirms the UDC Act Industrial Project findings as follows:

1. *That the area in which the project is to be located is a substandard or insanitary area, or is in danger of becoming a substandard or insanitary area, wherein there exists a condition of substantial and persistent unemployment or underemployment.*

The Project site is an underutilized parcel that detracts value from surrounding uses on Old Falls Street, and has the potential of becoming further substandard if actions are not taken to facilitate new investment there. In turn, the City as a whole has experienced chronically high jobless rates. Significant new infill development on the Project site has the potential—together with other recent projects—to begin to establish a cluster of uses that would re-establish Old Falls Street's economic importance as a "place" of tourism-related activities, which would also directly and indirectly create new employment opportunities.

2. *That the acquisition or construction and operation of such project will prevent, eliminate or reduce unemployment or underemployment in such area.*

The Project would represent a major infill development to continue efforts to grow tourism-related economic activity downtown. It is projected to create 324 direct, indirect, and induced jobs as a result of its construction and 92 direct, indirect, and induced jobs as part of its operations over a ten-year period.

3. *That such project shall consist of a building or buildings, which are suitable for manufacturing, warehousing or research or other industrial, business or commercial purposes.*

The Project will consist of a major, mixed-use development consisting of a combination of commercial uses that would further expand the tourism industry in downtown Niagara Falls.

4. *That adequate provision has been, or will be made for the payment of the cost of the acquisition, construction, operation, maintenance and upkeep of such project.*

The Project developer has submitted a pro-forma and budget for the Project that has been confirmed by ESD/USAN to be sufficient in providing funds to acquire the site from the City, to construct the new development, and to operate/maintain it in a reasonable manner.

5. *That the acquisition and construction, proposed leasing, operation and use of such project will aid in the development, growth and prosperity of the state and the area in which such project is located.*

The Project will provide a significant contribution to establishing a dense cluster of tourism-related uses along the Old Falls Street corridor, which is a primary public policy goal of USAN to aid in the revitalization of the tourism industry in the City of Niagara Falls.

B. Small and Medium-Sized Business Assistance Project Findings – UDC Act Section 10(f):

Based on the information set forth in this GPP and other due investigation conducted by USAN, USAN hereby affirms the UDC Act Small and Medium-Sized Business Assistance Project findings as follows:

1. *That the area in which the project will be located is a substandard or insanitary area, or is in danger of becoming a substandard or insanitary area, wherein there exists a condition of substantial and persistent unemployment or underemployment.*

See Item A. 1 above.

2. *That the project demonstrates market, management and financial feasibility and has a clear likelihood of success;*

USAN's market research confirms sufficient demand in the local market to support the Project and the Hamister Group has submitted information demonstrating its financial capability to undertake the effort. Hamister's pro-forma uses reasonable assumptions confirmed by USAN/ESD to demonstrate a clear likelihood for the Project's success.

3. *That the firm provides at least a ten percent equity contribution and such contribution is not derived from other governmental sources.*

The Project budget includes a minimum of ten percent equity participation by the Hamister Group that is not derived from other governmental sources.

4. *That the requested financial assistance is not available from other public or private financing sources on terms compatible with the successful completion of the project.*

The requested amount of financial assistance is reasonable and necessary to support the completion of the Project and as documented in market analyses conducted by USAN, would not be readily available from other public or private financial sources.

5. *That the project will not result in the relocation of any industrial firm from one municipality within the state to another municipality, except under one of the following conditions: (i) when an industrial firm is relocating within a municipality with a population of at least one million where the governing body of such municipality approves such relocation; or (ii) the corporation notifies each municipality from which such industrial firm will be relocated and each municipality agrees to such relocation.*

Insofar as the project is a new—rather than relocated—development, it would not involve the relocation of any firm from another municipality in the state.

6. *That the project is not for the purpose of refinancing any portion of the total project cost or other existing loans or debts of the project sponsor or owner.*

The Project, and particularly USAN assistance for it, does not involve refinancing of any existing loans or debts for this or any other property or holding of the developer.

C. Displacement Findings – UDC Act Section 10(g)

No residential or business relocation is required because no families, individuals, or businesses would be displaced at the Project site.

IX. Labor Peace Agreements

Public Authorities Law Section 2879-b prohibits public authorities from providing financing for any project that includes, as a principal function, a hotel with more than fifteen employees unless a labor peace agreement (“LPA”) is entered into with a labor organization representing hotel employees in the state, for a period of at least five years. An LPA is an agreement between the project developer (or its contractors) and a labor organization prohibiting the labor organization and its members from engaging in labor activities that disrupt the hotel’s operations. The statute also provides that LPA requirement can be waived if the authority determines that the project would not be able to go forward with an LPA or the costs of the project to the authority would be substantially increased by such a requirement. Hamister will be required to comply with the LPA requirement as a condition to receiving financial assistance from USAN.

X. Environmental Review

ESD/USAN, as lead agency, has completed an environmental review of the proposed Project, pursuant to the requirements of the State Environmental Quality Review Act (“SEQRA”) and the implementing regulations of the New York State Department of Environmental Conservation. This review, which was coordinated with the involved agencies due to the Project’s Type I classification, found that the proposed project would not result in significant adverse impacts on the environment. Therefore, the Directors are recommended to make a Determination of No Significant Effect on the Environment.

XI. Non-Discrimination and Contractor & Supplier Diversity

USAN’s Non-Discrimination and Contractor & Supplier Diversity policies will apply to this Project. Hamister shall be required to: (i) include minorities and women in any job opportunities created, (ii) solicit and utilize Minority and Women Business Enterprises (“MWBEs”) for any contractual opportunities generated in connection with the Project and (iii) use Good Faith Efforts (pursuant to 5 NYCRR §142.8) to achieve an overall MWBE Participation Goal of 30% related to the total value of USAN’s funding. The aforementioned goal includes a Minority Business Enterprise (“MBE”) Participation Goal of 18% and a Women Business Enterprise (“WBE”) Participation Goal of 12%, related to the total value of USA Niagara’s funding.

XII. Conclusion

This proposed Industrial/Small and Medium Sized Business Assistance Project will result in major new infill development along Old Falls Street in downtown Niagara Falls. In doing so, it would contribute to creating a dense cluster of activity in the core of the downtown district and realize a significant expansion of the City’s inventory of quality lodging facilities, food and beverage and retail offerings, and downtown housing. This will contribute to

municipal needs by further supporting revitalization of the downtown district and expanding economic activity in the City's tourism industry.

Figures

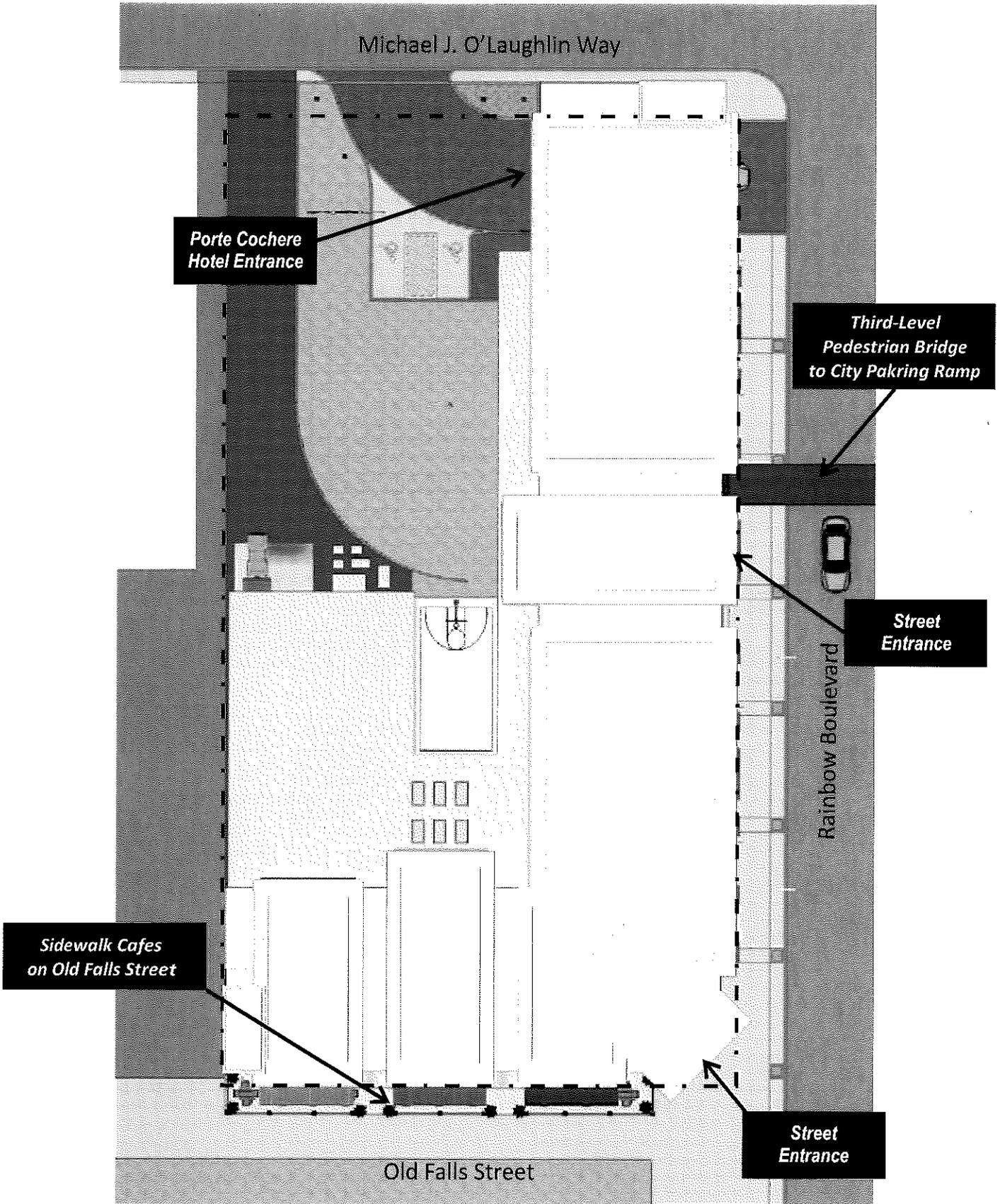
Figure 1: Site Location Map

Figure 2: Preliminary Site Plan

Figure 3: Selected Renderings of Proposed Project



Figure 1: Site Location
 Development of 310 Rainbow Boulevard



Source: Carmina, Wood, Morris, PC

Figure 2: Preliminary Site Plan
 Development of 310 Rainbow Boulevard





Looking Northwest at Old Falls Street and Rainbow Blvd.



Looking Northeast along Old Falls Street



Looking Southwest at Rainbow Blvd and Michael J. O'Laughlin Way

Figure 3: Selected Renderings of Proposed Project
Development of 310 Rainbow Boulevard

Source: Carmina, Wood, Morris, PC



Attachment B

USA Niagara Development Corporation

**310 Rainbow Boulevard
Industrial/Small and Medium-Sized Business Assistance Project
Niagara Falls, New York**

May 2015 Modified General Project Plan

(Original General Project Plan adopted July 8, 2013)

The USA Niagara Development Corporation (“USAN”), a subsidiary of the New York State Urban Development Corporation d/b/a Empire State Development (“ESD”), adopted a General Project Plan (“GPP”) on July 8, 2013 to undertake the 310 Rainbow Boulevard Industrial/Small and Medium-Sized Business Assistance Project (the “Project”) in the City of Niagara Falls, Niagara County, New York.

Except as noted below, the GPP remains unmodified and in full force and effect. The amendment is as follows:

1. In Section I Introduction, delete the second paragraph beginning with “The Project involves...” and replace with:

The Project involves providing \$3.85 million in assistance to a private company to facilitate a \$35 million mixed-use development on a highly-visible, 0.88-acre land parcel along Old Falls Street. It would result in the development of a ±111,629-square-foot (“SF”), building containing hotel, ballroom and ground-level food-and-beverage and or retail operations open to the general public.

2. In Section IV Project Objection, delete the fifth bullet beginning with “Generate important...”

3. In Section V Project Description, delete the entire section and replace with the following:

A. Project Overview

This **Modified General Project Plan** (“MGPP”) envisions the Hamister Group (“Hamister” or “the developer”) will be directly responsible for the development activities under the Project. The State funds allocated to the Project will supplement private funds in the Project.

Specifically, the Project would involve the construction and operation of a ±111,629-square foot (“SF”) building at the property (See **Figures 2 and 3**). The building would contain:

- An “upscale”-grade, 128-room Hyatt Place® Hotel (up from 114-room assumed-Hilton Garden® in July 2013);
- A 16,797 SF ballroom/meeting facility on the upper floors of the building (up from 10,000 SF in July 2013); and
- Street-level retail/food-and-beverage establishments totaling 6,810 SF of space (up from 5,000 SF in July 2013).

Parking for the development will be secured by Hamister in the City Parking Ramp and the proposed building will include a porte-cochere along O’Laughlin Drive to allow for drop off, check-in and valet services.

The Project would be developed in accordance with USAN’s Urban Design Standards, which involve a series of guidelines involving incorporation of active, publicly-accessible ground level uses (e.g., retail, food-and-beverage facilities, etc.), and architectural components that facilitate visual interest (e.g., quality materials, articulation of façade elements, signage, etc.), while still permitting a wide range of architectural expressions/styles.

B. Incentive Amount

A financial return analysis of the developer’s Pro Forma indicates that the Project would not be financially feasible without assistance from USAN. Based on this analysis, the \$3.85 million in State assistance toward the \$35 million investment would result in Hamister achieving an operating performance producing an acceptable Internal Rate of Return (“IRR”) necessary for Hamister to undertake the Project and ensure its continued success.

C. Development Agreement

Hamister, together with USAN and the City of Niagara Falls, would enter into an amendment to the development agreement which would govern all aspects of the proposed Project’s implementation. The primary terms of the development agreement would require the developer to finance, design, construct and operate a mixed use facility in accordance with Section V(A) referenced above. The developer would be required to pay the City \$100,000 to purchase the land. As part of the agreement, USAN would provide funding for the project in an amount not to exceed \$3.85 million. In the event that the City cannot deliver title to the developer sufficient to allow the project to be constructed in accordance with the terms of the development agreement, USAN will be required to reimburse the developer’s actual, documented design costs up to an amount not to exceed \$780,000.

D. Project Timeline

- | | |
|---|-----------------------------------|
| <ul style="list-style-type: none"> ▪ Public Hearing on MGPP ▪ MGPP Review by Public Authorities Control Board | <p>June 2015</p> <p>June 2015</p> |
|---|-----------------------------------|

- Building permits issued for Project June 2015
- Property Closing on Project Site July 2015
- Start of Construction July 2015
- Completion of Construction September 2016
- Certificate of Occupancy October 2016

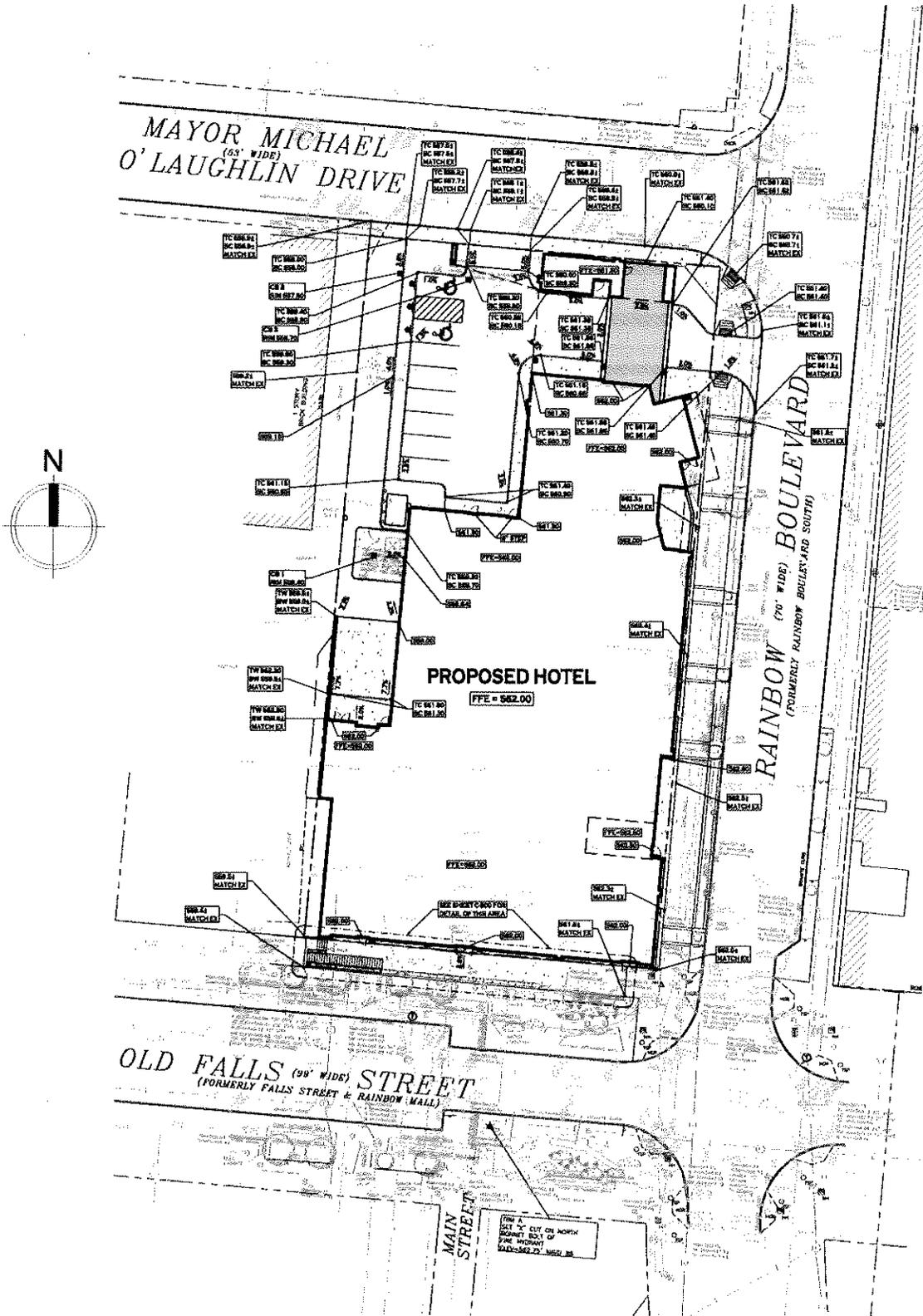
4. Project Funding

Table 1 outlines the proposed uses of funds programmed for the project and the sources of these funds. The source of funds is USAN/City of Niagara Falls MOU funds pursuant to the 2009 Memorandum of Understanding (“MOU”) between USAN and the City of Niagara Falls to support economic development projects in the USAN Development District, and Buffalo Regional Innovation Cluster appropriation authorized pursuant to the 2014-15 State budget. No USAN corporate funds would be used to fund the Project.

**Table 1
Uses & Sources of Funds**

Funding Uses	
Land Costs	\$100,000
Other land costs (legal, insurance, etc.)	\$75,000
Soft Costs	\$2,856,449
Financing Costs	\$1,458,418
Construction / FF&E Costs	\$31,535,648
Owners Contingencies	\$2,296,984
GRAND TOTAL	38,322,499
Anticipated Funding Sources	
Owner’s Private Financing and Equity (Hamister)	34,472,499
USAN Initial Grant (Approved July 8, 2013)	2,750,000
Supplemental Grant	1,100,000
GRAND TOTAL	38,332,499

5. In Section V Project Description, in the fourth line, delete “, and downtown housing”.

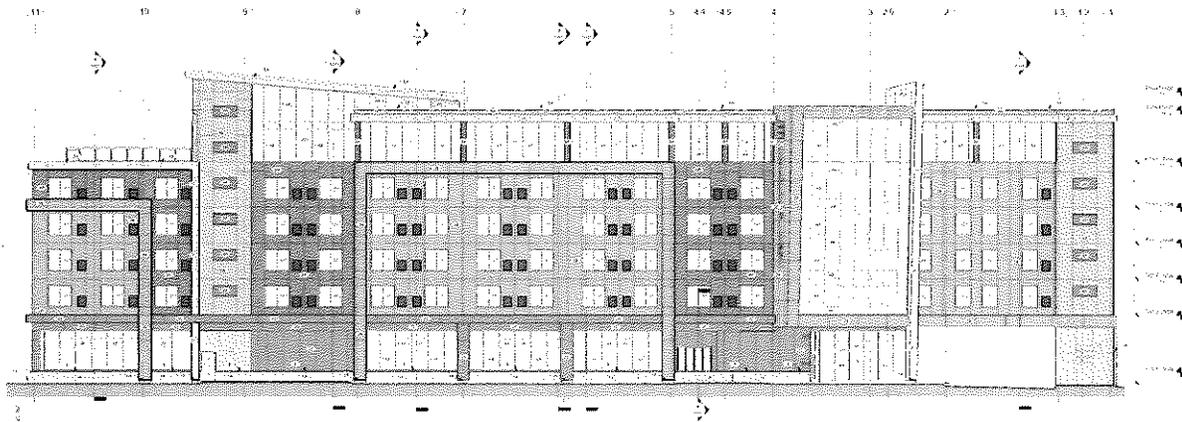


Source: Carmina Woods Morris, April 2015

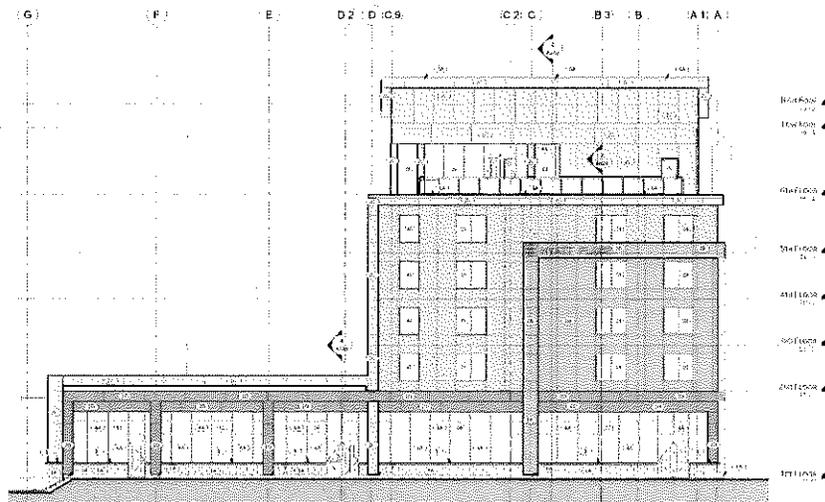
Modified General Project Plan – 310 Rainbow Blvd.
 Figure 2: Final Site Plan – April 2015



Project Rendering: View South Along Rainbow Boulevard



Final East-Facing (Rainbow Boulevard) Elevation



Final South-Facing (Old Falls Street) Elevation

Source: Carmina Woods Morris, April 2015