



New York State Office of the State Comptroller
Thomas P. DiNapoli

Division of State Government Accountability

Selected Personal Service Contracts

Empire State Development Corporation



Executive Summary

Purpose

To determine whether two selected Empire State Development Corporation (ESDC) personal service contracts were necessary, appropriately procured and monitored to ensure service delivery as required by ESDC guidelines. The audit covers the period April 1, 2007 through December 14, 2012.

Background

ESDC is a public benefit corporation whose mission is to promote a growing and vigorous economy and encourage job creation and economic opportunity. We audited two judgmentally selected personal service contracts. The first was a contract with BDO Consulting (BDO) for integrity monitoring of ESDC's expansion and renovation project at the Jacob K. Javits Convention Center. The second was an \$870,000 contract with a housing portfolio consultant, Adrienne Driben, with whom ESDC has been contracting since April 2004.

Key Findings

ESDC adopted procurement guidelines governing the need, award and monitoring of procurement contracts as required by the Public Authorities Law. We found that ESDC officials were not in compliance with many of these requirements for both the BDO and Adrienne Driben personal service contracts. We also found that ESDC officials did not enforce several contract terms with these vendors. As a result, there is diminished assurance that the contracts with these two personal service contractors for nearly \$3.9 million were necessary, appropriately procured and monitored to ensure service delivery.

Key Recommendations

- Change the control environment at ESDC to one that supports compliance with procurement guidelines and laws and enforces contract terms.
- Strengthen monitoring practices to ensure that criteria for contractor performance are in place, communicated to the relative parties and used in contract oversight.

Other Related Audits/Reports of Interest

[Empire State Development Corporation/Council on the Arts: Unnecessary and Potentially Illegal Consultant Contract With Former New York State Council on the Arts Executive Director \(2011-S-6\)](#)

[Empire State Development Corporation: Personal and Miscellaneous Services Contracts \(2009-S-62\)](#)

State of New York
Office of the State Comptroller

Division of State Government Accountability

April 16, 2014

Mr. Kenneth Adams
President and Chief Executive Officer
Empire State Development Corporation
633 3rd Avenue
New York, NY 10017

Dear Mr. Adams:

The Office of the State Comptroller is committed to helping State agencies, public authorities and local government agencies manage government resources efficiently and effectively and, by so doing, providing accountability for tax dollars spent to support government operations. The Comptroller oversees the fiscal affairs of State agencies, public authorities and local government agencies, as well as their compliance with relevant statutes and their observance of good business practices. This fiscal oversight is accomplished, in part, through our audits, which identify opportunities for improving operations. Audits can also identify strategies for reducing costs and strengthening controls that are intended to safeguard assets.

Following is a report of our audit of the Empire State Development Corporation entitled *Selected Personal Service Contracts*. This audit was performed pursuant to the State Comptroller's authority under Article X, Section 5 of the State Constitution, Section 2803 of the Public Authorities Law and Section 6278 (3) of McKinney's New York State Unconsolidated Laws as well as Article V, Section 1 of the State Constitution and Article II, Section 8 of the State Finance Law.

This audit's results and recommendations are resources for you to use in effectively managing your operations and in meeting the expectations of taxpayers. If you have any questions about this report, please feel free to contact us.

Respectfully submitted,

Office of the State Comptroller
Division of State Government Accountability

Table of Contents

| | |
|--|----|
| Background | 4 |
| Audit Findings and Recommendations | 5 |
| Lack of Compliance With Procurement Guidelines | 5 |
| Contract Performance Monitoring | 7 |
| Other Contract Requirements Not Enforced | 8 |
| Recommendations | 8 |
| Audit Scope and Methodology | 8 |
| Authority | 9 |
| Reporting Requirements | 9 |
| Contributors to This Report | 11 |
| Agency Comments | 12 |
| State Comptroller's Comments | 20 |

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Background

In 1995, the functions of the New York State Department of Economic Development (DED), a State agency, and the Urban Development Corporation (UDC), a public benefit corporation, were consolidated along with other economic development entities. UDC became the Empire State Development Corporation (ESDC), maintaining its status as a public benefit corporation. ESDC and DED are collectively referred to as Empire State Development (ESD), though they remain distinct entities. ESDC's mission is to promote a growing and vigorous economy, encourage the creation of new job and economic opportunities, increase revenues to the State and its municipalities, and achieve stable and diversified local economies. ESDC has an eight-member board of directors and about 350 employees. During the four years ended March 31, 2011, ESDC and its subsidiaries reported having 236 personal service contracts in effect that were fully or partially State-funded, with a total contract value exceeding \$1.1 billion.

The New York Convention Center Development Corporation (NYCCDC) is a subsidiary of ESDC and was created to provide legal authority and funding for the development of a convention and exhibition facility in New York City. As a subsidiary of ESDC, the NYCCDC follows ESD's contract procurement guidelines.

The objective of our audit was to determine whether two selected ESDC-related personal service contracts were necessary, appropriately procured and monitored to ensure service delivery as required by ESDC guidelines. The audit covers the period April 1, 2007 through December 14, 2012. The first was an NYCCDC contract with BDO Consulting (BDO) originally approved for almost \$3 million, covering a 45-month period beginning March 2010, for integrity monitoring of ESDC's expansion and renovation project at the Jacob K. Javits Convention Center (Convention Center). The second was with a housing portfolio consultant, Adrienne Driben, with whom ESDC has been contracting since April 2004 and will have paid \$870,000 when the current contract and extension amendments end on December 31, 2014.

Audit Findings and Recommendations

ESDC adopted procurement guidelines governing the need, award and monitoring of procurement contracts as required by the Public Authorities Law. We found that ESDC officials were not in compliance with many of these requirements for both the BDO and Adrienne Driben personal service contracts selected for audit. We also found that ESDC officials did not enforce several contract terms with these vendors. As a result, there is diminished assurance that the contracts with these two personal service contractors for nearly \$3.9 million were necessary, appropriately procured and monitored to ensure service delivery as required by ESDC guidelines. We encourage ESDC officials to change the control environment at ESDC to one that supports compliance with procurement guidelines and laws and reinforces contract terms.

Lack of Compliance With Procurement Guidelines

Contract Justification

We reviewed ESDC's Guidelines Regarding the Use, Awarding, Monitoring and Reporting of Procurement Contracts (Guidelines) that were in effect over the course of the contract term. The Guidelines require the contract initiator to write a Contract Justification Memorandum (Memo) from the respective Department Head to another ESDC official, generally the Chief Financial Officer (CFO) or ESDC Chairman, justifying the need for the contract and providing expected maximum cost, description of services, selection process, demonstration that best value will be achieved, and funding source. We found that ESDC did not have a Contract Justification Memo for either of the two personal service contracts we audited.

ESDC officials told us that they did not use the Contract Justification Memo specified in their guidelines. Instead they used another document which they said contained the information required in the Contract Justification Memo. However, our review of this substituted document for each of the two contracts found that the document was dated after the contracts had already been approved. As a result, ESDC management did not have the information they needed to ensure the two contracts totaling \$3.87 million were justified and necessary before approving the contracts. In addition, not all the required information was included in the substitute documents for these contracts. For example, the vendor selection process and best value justification were not included for either of the contracts. Therefore, there is no assurance that open competition was going to take place for these procurements and that the best value would be received. The need for contracts must be clearly justified and documented prior to approval in order for the ESDC Board and management to make informed decisions on how to best use ESDC funds.

Contract Procurement

ESDC procurement guidelines require advertising and competitive bidding take place for contracts exceeding \$15,000 unless an exemption was demonstrated and approved. The guidelines also state that contract and bid specifications may include additional requirements such as evaluation of contractor experience and required reporting. Additional requirements were included in the

BDO contract procurement.

Our review of the contract procurement for the Adrienne Driben personal service contract found ESDC guidelines were followed. However, our review of the BDO contract procurement process found ESDC officials did not provide assurance to taxpayers that management is paying a reasonable price and exercising sound procurement practices in selecting BDO:

- ESDC officials were to numerically evaluate the bidders based on five factors. BDO received perfect scores in all five categories and became a finalist, despite an evaluator's notation that they had no business experience.
- The request for proposal (RFP) required bidders to submit examples of five projects with a cost of over \$400 million each. Although selected from a pool of 13 bidders, BDO, along with its subcontractors, only included one specific example of a project with a cost over \$400 million.
- The RFP stipulated that ESDC would negotiate a price with the highest ranking proposer and, if an agreement could not be reached on a fee, ESDC would negotiate with the next highest ranked proposer. ESDC officials determined that BDO was the highest ranking proposer. BDO's original bid was the sixth highest of the seven original bid finalists. After BDO was selected, they reduced their bid from over \$5 million (\$5,036,080) to just under \$3 million (\$2,999,275). However, BDO officials reduced their total bid price by decreasing the number of hours committed to the project, but at the same time they increased the average hourly rate from \$220 to \$230. Paying more for less service does not appear to be in ESDC's best interest.
- We also noted that the bids for this contract ranged from \$1.3 million to \$7.3 million for between 7,175 and 49,908 hours of service. This large disparity makes proposals harder to evaluate and suggests that the RFP may have been too broad.

Timing of Services

The Guidelines state that contract documents should be fully executed and delivered by both parties prior to the start of work, unless it is essential to start work earlier. In those situations, ESDC may issue a Letter to Proceed authorizing work to begin. The Letter to Proceed must be for an amount not to exceed \$50,000 and must be supported by a description of the need for immediate performance.

Auditors found that work began prior to contract execution for both the BDO and Adrienne Driben personal service contracts. BDO began work 97 days prior to contract execution. Adrienne Driben began work 124 days before the original contract execution and between 6 and 24 days prior to each of the four subsequent contract amendments being finalized. The required Letters to Proceed, that would have allowed work to begin prior to the contracts being fully executed, had not been completed for BDO or Adrienne Driben (the original contract and the four amendments). Although ESDC officials did not pay either of the personal service contractors until after the contracts were fully executed, they did not follow their own guidelines. As a result, ESDC officials put themselves at risk for possible contractor claims if the contracts were not approved after contractor resources had already been expended.

Contract Performance Monitoring

ESDC's guidelines state that performance monitoring must be maintained to ensure that ESDC receives the services as contracted and that payment is commensurate with the extent of performance. The guidelines also include the following provisions regarding contract monitoring:

- The contract must contain a scope of work or services, identify any deliverables, indicate whether ESDC resources will be used, and provide a timeframe,
- Contract terms should include the location of work and standards to measure performance (e.g., units of service, target dates),
- Invoices should be reviewed by the person monitoring the contract and approved by the respective Department Head. Payments shouldn't be made unless the work is satisfactory and in accordance with the terms of the contract,
- The frequency and manner of monitoring performance should be clearly stated and directly related to the terms of the contract,
- ESDC should maintain and review written documentation pertaining to contractor performance, and evaluation of performance should consider quantity and quality of work performed, and
- Employees assigned the responsibility of monitoring the work should be familiar with the type of work and with the specific terms of the contract.

ESDC officials didn't comply with several of these monitoring requirements for the two personal service contracts. For example, ESDC officials did not maintain written documentation pertaining to contractor performance for either of the two contracts reviewed.

ESDC officials informed us that the monthly invoices for Adrienne Driben are reviewed and that is how the work performed is monitored. However, a review of invoices is only one of the many requirements listed for contract performance monitoring. ESDC officials also claimed that several tangible work products had been produced to document the volume of work done under the contract. We did confirm that many reports and studies were provided by Adrienne Driben. However, ESDC officials were to evaluate contractor performance to determine if expectations were met in terms of quantity, quality, timeliness of work, as well as all other performance requirements that were to be determined and measured by ESDC officials monitoring the contract per ESDC guidelines. ESDC officials provided no support that this was done.

ESDC officials said they established protocols such as weekly meetings and board meeting updates, instead of written documentation, for BDO. However, the documentation for these meetings was sporadic or nonexistent, and did not include an evaluation of BDO's performance (i.e., monitoring of how well the work was done). Moreover, the original BDO six-month contract specifically required BDO officials to prepare quarterly written reports and to verbally report to the ESDC Board when requested. The subsequent amendment did not change these requirements. For the 11 quarters reviewed encompassing the period March 10, 2010 through December 31, 2012, only six reports were completed. Also, because of ESDC officials' lax monitoring, it's questionable how they could verify the activities and reported hours billed by BDO.

ESDC officials need to strengthen their monitoring practices to ensure that criteria for contractor performance are in place, communicated to the relative parties and used in contract oversight. In addition, ESDC officials need to enforce all contract requirements.

Other Contract Requirements Not Enforced

The BDO contract requires BDO to “obtain, organize and establish work space and required equipment and services at the Jacob K. Javits Convention Center.” BDO does not have work space at the Convention Center as required. Maintaining a consistent presence at the Convention Center is a constant reminder that the contractor and subcontractors doing the work are being monitored for potential fraud and corruption, which was one of the reasons ESDC hired an independent integrity monitor for \$3 million. The ESDC official responsible for monitoring the BDO contract explained that BDO does not need to have space at the Convention Center because the contractor responsible for the construction and the architects assess the quality of the construction work and approve it. This contradicts BDO’s responsibilities as the independent integrity monitor according to the contract, which states BDO will “Prepare and present independent Management Assessment Reports addressing, among other things, quality and completeness of work in place and compliance with contract documents, project safety and compliance with legal requirements, and completeness and accuracy of CM and contractor invoices and general conditions disbursements.”

This is just another example of a contract requirement that was not enforced by ESDC officials.

Recommendations

1. Change the control environment at ESDC to one that supports compliance with procurement guidelines and laws and enforces contract terms.
2. Strengthen monitoring practices to ensure that criteria for contractor performance are in place, communicated to the relative parties and used in contract oversight.

Audit Scope and Methodology

The objective of our audit was to determine whether two selected Empire State Development Corporation (ESDC) personal service contracts were necessary, appropriately procured and monitored to ensure service delivery as required by ESDC guidelines. The audit covers the period April 1, 2007 through December 14, 2012. The first was a contract with BDO Consulting (BDO) originally approved for almost \$3 million, covering a 45-month period beginning March 2010, for integrity monitoring of ESDC’s expansion and renovation project at the Jacob K. Javits Convention Center (Convention Center). The second was with a housing portfolio consultant, Adrienne Driben, with whom ESDC has been contracting since April 2004 and will have paid \$870,000 when the current contract and extension amendments end on December 31, 2014. We selected the two contracts based on assessment of risks, including the nature of the services provided and the

amounts paid by ESDC/NYCCDC.

We reviewed ESDC's requests for proposal and subsequent bids received. We interviewed ESDC officials to gain an understanding of the contract award and monitoring processes. We examined contract documents to determine whether they adhered to the four sets of ESDC Procurement Guidelines that were in effect over the course of the contract. We visited and made observations at the Convention Center to gain an understanding of whether expectations set out in the contract were taking place. We interviewed the monitor from BDO to gain an understanding of how BDO carried out the monitoring of the contractor at the Convention Center. We analyzed contractor invoices to verify adherence to contract terms. We also reviewed minutes of ESDC Board of Directors meetings to determine whether the monitor was adequately reporting to the Board.

We conducted our performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective.

In addition to being the State Auditor, the Comptroller performs certain other constitutionally and statutorily mandated duties as the chief fiscal officer of New York State. These include operating the State's accounting system; preparing the State's financial statements; and approving State contracts, refunds, and other payments. In addition, the Comptroller appoints members to certain boards, commissions and public authorities, some of whom have minority voting rights. These duties may be considered management functions for purposes of evaluating organizational independence under generally accepted government auditing standards. In our opinion, these functions do not affect our ability to conduct independent audits of program performance.

Authority

This audit was performed pursuant to the State Comptroller's authority under Article X, Section 5 of the State Constitution, Section 2803 of the Public Authorities Law and Section 6278 (3) of McKinney's New York State Unconsolidated Laws as well as Article V, Section 1 of the State Constitution and Article II, Section 8 of the State Finance Law.

Reporting Requirements

We provided a draft copy of this report to ESDC officials for their review and formal comment. ESDC's response was considered in preparing this report and is attached to the end of it. ESDC's response included several lengthy attachments which we did not append to the report. Those attachments are maintained on file at the Office of the State Comptroller. In their response, ESDC officials indicated that they improved certain procurement protocols and practices as a result of our audit's preliminary findings and recommendations. However, ESDC officials also disagreed with some of our report's conclusions. Our rejoinders to certain ESDC comments are included in

our State Comptroller's Comments.

Within 90 days of the final release of this report, as required by Section 170 of the Executive Law, the President and Chief Executive Officer of the Empire State Development Corporation shall report to the Governor, the State Comptroller, and the leaders of the Legislature and fiscal committees, advising what steps were taken to implement the recommendations contained herein, and where recommendations were not implemented, the reasons why.

Contributors to This Report

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Vision

A team of accountability experts respected for providing information that decision makers value.

Mission

To improve government operations by conducting independent audits, reviews and evaluations of New York State and New York City taxpayer financed programs.

Agency Comments

Empire State Development

Melissa Little
Audit Manager
Office of the State Comptroller
Division of State Government Accountability
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Albany, NY 12236-0001

November 27, 2013

BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Re: Draft Report 2011-S-53

Dear Ms. Little:

On behalf of the New York State Urban Development Corporation d/b/a Empire State Development (“ESD”), I write in response to the Office of the State Comptroller’s (“OSC”) Draft Report 2011-S-53, Selected Personal Service Contracts (the “Draft Report”), transmitted to ESD on October 17, 2013.

The Draft Report examines two personal service contracts in order to determine whether they were necessary, appropriately procured and monitored to ensure service delivery as required by ESD’s Guidelines Regarding the Use, Awarding, Monitoring and Reporting of Procurement Contracts (the “Guidelines”). The audit covered the period April 1, 2007 through December 14, 2012. The contracts that were selected for audit were: (1) a contract between BDO Consulting (“BDO”) and the New York Convention Center Development Corporation (“NYCCDC”), for integrity monitoring of the renovation and expansion of the Jacob K. Javits Convention Center (the “Javits Center”) in New York City (the “BDO Contract”)¹; and (2) a contract between Adrienne Driben and ESD, which involves services related to ESD’s housing portfolio (the “Driben Contract”).

We believe that the application of ESD’s careful procurement and contract monitoring processes to the referenced contracts demonstrate ESD’s commitment to and success in discharging its duty to protect the taxpayer funds with which it is entrusted. Further, since the December 14, 2012 end of the audit period, notable events have occurred. In January 2013, ESD revised the Guidelines, demonstrating ESD’s ongoing efforts to

¹ As ESD explained in its Response to the Preliminary Report, the contracting party to the BDO Contract is not ESD, but rather NYCCDC, an ESD subsidiary created by act of the Legislature in 1979 to provide authority and funding for the planning and development of a convention and exhibition facility in New York City. As such, NYCCDC follows ESD’s Guidelines in procuring its contracts.

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Comment
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* See State Comptroller’s Comments on page 20.

Melissa Little
Office of the State Comptroller
Response to Draft Report 2011-S-53

ensure that our procurement process is robust and, beginning October 2013, ESD's procurement staff has engaged in the process of training ESD and subsidiary staff on the implementation of the revised Guidelines. Further, in June 2013, the housing portfolio was transferred from ESD, and thus, work under the Driben Contract has ceased.

Procedural History

OSC issued a Preliminary Report, dated October 3, 2012, setting forth its concerns about the BDO Contract and the Driben Contract (the "Preliminary Report"). ESD submitted a response to the Preliminary Report by letter dated November 30, 2012 (the "Response to the Preliminary Report"). Both are attached hereto for your reference.

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Comment
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Response to Recommendations

The Draft Report contains two recommendations. ESD's responses are set forth below.

Recommendation No. 1:

1. *Change the control environment at ESD to one that supports compliance with procurement guidelines and laws and enforces contract terms.*

The Draft Report enumerates three areas in which it found flaws in the implementation of ESD's procurement process: a) contract justification; b) contract procurement; and c) timing of services.

a. Contract Justification

As part of the audit process, OSC reviewed the Guidelines and concluded that they require the contract initiator to write a Contract Justification Memorandum from the respective Department Head to another ESD official, generally the Chief Financial Officer or the ESD Chairperson, justifying the need for the contract and providing a description of the selection process, description of services, expected maximum cost, demonstration that best value will be achieved, and funding source. The Draft Report finds that ESD did not provide a Contract Justification Memo for either of the two personal service contracts audited.

As stated in the Response to the Preliminary Report, staff provided the information contemplated by a Contract Justification Memorandum, as set forth in the Guidelines, to the NYCCDC Board of Directors prior to the meeting at which authorization to enter into the BDO Contract was requested. Further, as reflected in the transcript of that meeting and as the Response to the Preliminary Report points out, the Directors were familiar with information such as need for the contract, funding source, maximum cost,

Melissa Little
Office of the State Comptroller
Response to Draft Report 2011-S-53

scope of services, and selection process. Indeed, based upon the robust discussion regarding the award of the contract, the Directors were satisfied that best value would be achieved. Thus, notwithstanding the absence of a document entitled "Contract Justification Memo," the objectives of a Contract Justification Memo were met prior to the Directors' authorization of the BDO Contract.

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Comment
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Similarly, with respect to the Driben Contract, information regarding contract need, cost, funding source, procurement process and best value was presented to the ESD Board of Directors at the time contract authorization was requested, despite the absence of a document specifically entitled "Contract Justification Memo."

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Comment
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As noted in the Response to the Preliminary Report, ESD agrees that its practice of labeling the internal contract summary memorandum included with contract execution package, after board approval, could be confusing, and that the headings "Contract Need" or "Contract Justification" should appear in the memorandum provided to the Directors prior to requesting authorization to enter into a contract. Indeed, since the time the Response to the Preliminary Report was submitted, ESD requires staff to use a form by which Directors' authorization for contracts is requested. This form elicits information such as scope of services, funding source, cost, term, and selection process, among other things. Moreover, "Contract Needs and Justification" appears at the top of the form in bold lettering so that the objective of the memorandum is clear. The contents of this form and instructions as to how staff should complete it are part of ongoing training offered by ESD procurement staff, the most recent sessions of which are being offered this month.

In addition, ESD's procurement staff has revised the internal contract execution package to include a form that replaces the prior internal contract summary memo, which OSC found confusing. This Contract Summary/Justification Memorandum form ensures that information regarding the need for a contract, its scope of services, funding source, cost, term and selection process, is provided to the appropriate ESD officers prior to their execution of a contract. The current procurement training sessions make clear that this form is distinct from the form to be used to seek Directors' authorization to enter into a contract and comes after Directors' approval procedurally.

b. Contract Procurement

Contrary to the conclusion in the Preliminary Report, the Draft Report finds that ESD properly followed the Guidelines with respect to the procurement of the Driben Contract.

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Comment
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However, with respect to the BDO Contract, the Draft Report finds ESD did not follow the procedures set forth in the Guidelines. Specifically, OSC takes issue with:

Melissa Little
Office of the State Comptroller
Response to Draft Report 2011-S-53

- BDO's receipt of perfect scores in all five evaluation categories, despite an evaluator's notation that they had no business experience;
- BDO's submission of one example of a project with a cost exceeding \$400 million, despite that the request for proposal required bidders to submit examples of five such projects;
- BDO's original proposal was sixth highest of the seven proposals received, and upon negotiation, BDO reduced its total bid price but also decreased the number of hours committed to the project and increased the average hourly rate; and
- the large disparity of proposal amounts and hours of service among the seven proposers, rendering the proposals more difficult to evaluate and suggesting that the RFP was too broad.

ESD continues to maintain that the procurement of the BDO Contract was done in a fair, objective and consistent manner. It involved a multi-step process, including review and evaluation of all written proposals, oral interviews, engagement in face-to-face dialogue with each member of the professional team, and discussions among members of the selection team. This process followed the prescribed procedures established in the RFP, and allowed for the selection of the most qualified proposer based on a variety of established criteria that included, but was not limited to, price. Further, it is a nationally recognized best-practice process commonly used in the selection of professional service contractors to negotiate the lowest fee with the selected proposer. This permits the procurement of the highest quality service at the lowest competitive price.

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Comment
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As ESD pointed out in its Response to the Preliminary Report, BDO did not increase its hourly rate upon fee negotiation. NYCCDC never contracted for a maximum number of hours; instead BDO was initially required to complete the scope of work within a six-month period, billing at hourly rates up to a not to exceed amount of \$659,050. These rates ranged from \$350/hour for the lead project executive to \$90/hour for paraprofessionals. The rates billed remained the same as the rates submitted in response to the RFP. At the conclusion of the six-month period of the initial contract, BDO delivered the scope of services for \$596,000, or approximately 10% less than the contracted maximum amount. Further, while OSC continues to characterize the BDO Contract amount as "almost \$3 million," the amended authorized maximum contract amount is \$2,169,675, as noted in the Response to the Preliminary Report. Moreover, as ESD also noted in its Response to the Preliminary Report, only one of the seven final proposals was lower than this amended maximum contract amount, and only by \$15,000.

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Comment
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Finally, while ESD agrees that we received a broad range of responses to the RFP, both in terms of price and number of hours of service, ESD respectfully disagrees that this result suggests that the RFP was too broad. Instead, the receipt of a wide range of

Melissa Little
Office of the State Comptroller
Response to Draft Report 2011-S-53

responses enables the organization to gain valuable insight on the industry standard and to more accurately balance cost with value of services proposed by a vendor.

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Comment
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c. Timing of Services

The Draft Report finds that work began prior to contract and/or amendment execution for both the BDO Contract and the Driben Contract. While the Draft Report recognizes that ESD did not pay either service provider prior to contract execution, the Draft Report concludes that the commencement of work violated the Guidelines.

As stated in the Response to the Preliminary Report, ESD acknowledges that work began on both engagements prior to contract execution and without a formal Letter to Proceed. This was an oversight on the part of NYCCDC and ESD management. However, work commenced only after the respective Boards authorized the contracts, and neither organization paid the vendors until after contract execution.

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Comment
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In order to minimize the possibility of permitting a contractor to commence work prior to issuing a Letter to Proceed or executing a contract, ESD procurement staff is emphasizing the importance of this part of the procurement process in current training sessions.

Recommendation No. 2:

2. *Strengthen the monitoring practices to assure that criteria for contractor performance are in place, communicated to the relative parties and used in contract oversight.*

The Draft Report points out that ESD's "guidelines state that performance monitoring must be maintained to ensure that [ESD] receives the services as contracted and that payment is commensurate with the extent of performance." The Draft Report finds that ESD officials did not comply with several of the monitoring requirements for both the BDO Contract and the Driben Contract. Specifically, the Draft Report finds that ESD failed to maintain written documentation pertaining to contractor performance.

With respect to the Driben Contract, the Draft Report notes that ESD officials reviewed monthly invoices, and that Driben provided many reports and studies. However, the Draft Report concludes that these were insufficient to demonstrate that ESD evaluated contract performance to determine if expectations were met in terms of quantity, quality, timeliness of work, as well as other performance requirements.

ESD respectfully disagrees that no documentation exists to ensure that the services rendered were acceptable in quantity and quality. Written reports, extensive numerical

Melissa Little
Office of the State Comptroller
Response to Draft Report 2011-S-53

analyses, other tangible work produced and Board approvals for each contract amendment enabled ESD senior staff to verify the activities reported and hours billed in the detailed monthly invoices submitted to ESD for payment. Indeed, the Guidelines provide that such documentation pertains to vendor performance, and should be maintained and reviewed by the initiating Department. ESD clearly followed these protocols in monitoring the Driben Contract.

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Comment
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With respect to the BDO Contract, the Draft Report states that while ESD officials established protocols such as weekly meetings and Board meeting updates, the documentation of such protocols was sporadic or nonexistent, and did not include an evaluation of how well BDO's work was done. Moreover, the Draft Report finds that only six quarterly reports were completed in the 11 quarters reviewed, despite that original contract requirement that BDO prepare quarterly written reports and report orally to the Board when requested.

As previously stated in the Response to the Preliminary Report, NYCCDC heavily monitors the BDO contract, and the record reflects very close oversight of this contract. At the onset of the contract engagement with BDO, NYCCDC established extensive and robust reporting protocols that provided a detailed basis for monitoring the progress of the engagement. Copies of these written quarterly reports were provided to the audit team.

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Comment
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In addition to quarterly written reports, NYCCDC established the following reporting protocols during the audit period:

- Mark Feldman, Esq., a BDO Managing Director, reported to the Board at each scheduled Board Meeting (approximately every 3 months), updating the Board on the progress of his work and any findings to date and answering any questions the Board may have had;
- The NYCCDC President met with Mr. Feldman and members of the project team weekly to review findings of his investigations and audits, and to review details of the proposed work plan for the coming week. The former Chairman of the Board (who is now a Board member) attended these sessions on a periodic basis. The audit team was provided access to the President's file of notes from these meetings;
- Several times a month, Mr. Feldman attended weekly meetings of the Project Team to monitor progress of work; and
- A member of the project audit team attended the monthly review of contractor payment requests prior to their submission for payment.

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Comment
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Written reports, Board briefings, weekly meeting with the NYCCDC President to review the coming week's work plan and BDO's attendance at project meetings are all

Melissa Little
Office of the State Comptroller
Response to Draft Report 2011-S-53

procedures and protocols put in place to enable the President to verify the activities reported and hours billed in the detailed monthly invoices submitted to the NYCCDC for payment. By signing the Payment Request Form, the President certified that invoices accurately represented that services had been rendered and that the hours billed were adequately accounted for.

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Comments
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Indeed, such monitoring practices are consistent with the Guidelines, which specify that "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." Further, the current procurement training sessions instruct "NO payment should be made unless the work is satisfactory and in accordance with the terms under the contract. Approval on the Payment Authorization Form attests to this." Finally, the Guidelines require only that "deficiency reports be specific and in writing." The Guidelines do not require that all reports regarding contractor performance be written.

The Draft Report also finds that NYCCDC's failure to provide BDO with work space on the Convention Center's job site as another example of lax monitoring practices. Specifically, the Draft Report states that not providing an onsite office prohibited BDO from monitoring the quality of work in place. OSC's conclusion is misplaced. The BDO professionals engaged by NYCCDC have law enforcement, prosecutorial, compliance, and accounting backgrounds. They are neither architects nor engineers with the professional credentials to judge the quality of construction. Instead, they are charged with determining whether work in place is accurately billed upon completion and whether the construction professionals on the project are abiding by established rules, regulations, and protocols in determining quality and completeness. Such monitoring is adequately performed at BDO's offices, which are a short walk from the job site. Further, the BDO personnel assigned to this contract continue to have full access to the construction site. They have badges that permit them to enter the site unannounced and without needing prior authorization. Such unencumbered access permits the BDO professionals to complete the tasks of integrity monitoring objectively.

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Comment
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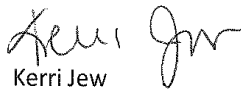
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Office of the State Comptroller
Response to Draft Report 2011-S-53

Conclusion

ESD believes that NYCCDC engaged in robust monitoring of its contract with BDO and will continue to do so. The Draft Report identifies several areas of ESD's procurement practices that should be clarified or strengthened. ESD has carefully considered these recommendations and has substantially improved the procurement guidelines and processes since the time of the actions addressed in the Draft Report. We believe these improvements address the recommendations made in the Draft Report.

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Comment
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Respectfully,



Kerri Jew
Compliance Officer

c: Maria Cassidy
Deputy General Counsel
Empire State Development

State Comptroller's Comments

1. We acknowledge and understand that the New York Convention Center Development Corporation is a subsidiary of ESDC and follows ESD's contract procurement guidelines. Further, we added language to this affect to our report.
2. We considered ESD's responses to our preliminary audit findings in preparing our draft audit report. Also, we did not append these attachments to our report. However, the attachments will be kept on file at the Office of the State Comptroller.
3. Instead of the prescribed Contract Justification Memorandum, ESDC officials provided the CFO and/or ESDC Chairman with an alternate document. As detailed in the report, the alternate document did not include all the required information, and the document was dated after the Board approved it. Further, the related Board Minutes did not indicate that all information required for the Contract Justification Memorandum was provided to the Board and discussed during Board meetings prior to the Board's contract decisions.
4. In response to our Preliminary Findings, ESDC officials provided us with additional information that caused us to conclude that ESDC properly procured the Driben contract.
5. We continue to question whether the process allowed for the selection of the most qualified proposer. As detailed in our report, the Request for Proposal required each bidder to provide examples of five projects they worked on costing over \$400 million. BDO, however, provided only one example of a project costing over \$400 million.
6. BDO's original proposal was the sixth highest of the seven proposals initially received. Subsequently, the NYCCDC allowed BDO to revise its proposal, wherein BDO became the second lowest bidder. However, BDO was the only bidder allowed to revise its proposal. If the other bidders were allowed to revise their proposals, the NYCCDC might have received significantly lower-cost proposals from the other qualified contractors as well. Furthermore, BDO's rates from the initial proposal to the revised proposal did not remain the same. In fact, they increased, on average, from \$220 to \$230 per hour.
7. As detailed in our report, the proposals ranged from \$1.3 million to \$7.3 million for between 7,175 to 49,908 hours of service. Given such a wide range of responses, comparisons of competing proposals could be rather difficult.
8. The "oversight" (or error) in question occurred on multiple occasions. For the original Driben and BDO contracts, as well as the four Driben contract amendments, work commenced prior to contract (or amendment) execution. ESDC officials also state that work did not start until the Board authorized the contracts. However, as detailed in our report, the Board did not have all of the necessary information, as normally provided by the Contract Justification Memorandum, to properly assess the contract's justification.
9. We acknowledge that the contractor provided ESDC/NYCCDC with certain reports and studies. However, ESDC/NYCCDC officials did not provide us with any written reports, numerical analysis or any other documentation of monitoring of the contractor's performance, specifically in relation to the quantity, quality and timeliness of work.
10. As detailed in our report, the available documentation did not provide evidence of "very close oversight" of the BDO contract. Specifically, the contract required BDO officials to prepare written quarterly reports. However, from March 10, 2010 through December 31, 2012, BDO provided the NYCCDC with only six of 11 quarterly reports that were due.

11. As noted in our report, documentation for these meetings was sporadic or nonexistent. Consequently, it is unclear that such meetings/discussions actually took place, what the content of the discussions included, and what was actually accomplished during the discussions.
12. The President's signature on the Payment Request Form does not constitute sufficient supporting documentation of the services rendered and/or the hours claimed for payment.
13. ESDC/NYCCDC officials considered the provision that BDO "obtain, organize and establish work space and required equipment and services at the Jacob K. Javits Convention Center" to be important enough for inclusion in the contract. If ESDC/NYCCDC officials believed that BDO could monitor without an on-site presence, we then question why the aforementioned requirement was included in the contract in the first place.
14. We are pleased that ESD officials have taken steps to substantially improve procurement guidelines and practices that address our report's recommendations. We encourage ESD to take the steps to ensure compliance with such guidelines and practices.