

Empire State Development

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July 3, 2014

OFFICE OF THE STATE COMPTROLLER
THOMAS P. DINAPOLI
COMPTROLLER

Honorable Andrew M. Cuomo
Governor of the State of New York
Executive Chamber
State Capitol
Albany, NY 12224

Honorable Thomas P. DiNapoli
New York State Comptroller
110 State Street
Albany, NY 12236

Re: Report 2011-S-53
Selected Personal Service Contracts – Empire State Development

Gentlemen:

Pursuant to section 170 of the Executive Law, I write to advise you of the steps that the New York State Urban Development Corporation, doing business as Empire State Development ("ESD"), has taken to implement the recommendations contained in the Office of the State Comptroller's Audit Report 2011-S-53, Selected Personal Service Contracts, Empire State Development Corporation, dated April 2014 and transmitted to us on April 16, 2014 (the "Audit Report"). A copy of the Audit Report is attached for your convenience.

The Audit Report made two recommendations for corrective action as set forth below. As part of ESD's efforts to support and strengthen compliance with ESD's procurement guidelines and relevant law, ESD undertook comprehensive training of ESD staff in all of its offices Statewide on proper procurement practices and procedures. That training was completed in the Fall of 2013. At the conclusion of the training sessions, the materials were posted on the internal ESD website and made available to all staff on an ongoing basis.

Recommendation No. 1

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

a. Contract Justification

The Audit Report found that a document entitled "Contract Justification Memorandum" was not in place for either of the two contracts that are the subject of the audit, before these the contracts were approved by the Directors and management of ESD and its subsidiary, the New York Convention Center Development Corporation ("CCDC"), respectively, as is required by ESD's procurement guidelines. As more fully explained in

our response to the draft audit report, ESD staff prepared and presented to the Directors of each of these entities, respectively, a memorandum fully setting forth all of the information required to be included in a Contract Justification Memorandum prior to the meeting at which contract approval was sought and given. Those memoranda, however, were not entitled "Contract Justification Memorandum." Confusingly, a shorter memo, included in the contract execution packages of which the Directors memos and authorizations are a part, was entitled "Contract Justification Memorandum."

ESD has corrected its practices in this respect and has modified its forms to properly identify and distinguish the memorandum presented to the directors requesting contract authorization, from the post-authorization contract execution summary memorandum. It is important to note, however, that at the time these contracts were approved, the Directors of ESD and CCDC, respectively, had full disclosure of all information material to the selection of the contractors to whom these contracts were awarded.

b. Contract Procurement

With respect to one of the two contracts that was the subject of the Audit Report, the Audit Report concludes that CCDC's procurement process did not provide assurance to taxpayers that the contract price was reasonable and that the procurement practice was sound. As explained more fully in our response to the draft audit report, ESD maintains that the procurement of this contract was done in a fair, objective and consistent manner, which involved a multi-step process that included a formal Request for Proposals ("RFP"); review and evaluation of all written proposals received in response to the RFP; oral interviews that included each member of the professional team; and discussions among members of the selection committee. The 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 price. The selected contractor was the respondent ranked the highest by the selection committee and the negotiated fee was lower than 50% of the fee proposals received from all respondents.

The Audit Report's conclusion with respect to the procurement of this contractor is a subjective judgment with which ESD respectfully disagrees. ESD believes that the process by which this contractor was selected is a nationally recognized best-practice process commonly used in the selection of professional service contractors which resulted in a best value contract for CCDC and the taxpayers of the State.

c. Timing of Services

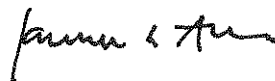
The Audit Report properly points out that work under the examined contracts commenced before the execution of a formal contract. It must be noted, however, that no work commenced until after the contracts were approved by the Board after full disclosure, as noted above, and that no payments were made until the formal contracts were executed. To minimize the possibility of permitting a contractor to commence work prior to issuing a letter to Proceed or executing a formal contract, ESD procurement staff emphasized the importance of this part of the procurement process in the comprehensive training sessions conducted during the Fall of 2013.

Recommendation No. 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 Audit Report concluded that ESD failed to maintain written documentation pertaining to contractor performance, in violation of ESD's procurement guidelines. ESD respectfully disagrees with this finding. Written reports, regular project meetings, extensive numerical 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. ESD's procurement guidelines explicitly provide that such documentation pertains to vendor performance and should be maintained and reviewed by the initiating Department. No payment is made on an invoice until satisfactory performance reflecting the full amount of the invoice is established. Nonetheless, the need to establish performance criteria and to perform ongoing performance monitoring was emphasized in the comprehensive procurement training that was conducted in the Fall of 2013.

Sincerely,



Kenneth Adams
President & CEO, Empire State
Development
Commissioner, NYS Department of
Economic Development

Audit Report 2011-S-53
Exec. Law § 170 letter
July 3, 2014

Cc: Honorable Robert Duffy, Lieutenant Governor and President, NYS Senate
Honorable Dean G. Skelos, NYS Senate Majority Leader
Honorable Jeffery Klein, NYS Senate Co-Leader
Honorable Andrea-Stewart-Cousins, NYS Senate Minority Leader
Honorable John A. DeFrancisco, NYS Senate Chair, Finance Committee
Honorable Liz Krueger, NYS Senate Ranking Minority Member, Finance
Committee
Honorable Sheldon Silver, NYS Assembly Speaker
Honorable Joseph Morelle, NYS Assembly Majority Leader
Honorable Brian M. Kolb, NYS Assembly Minority Leader
Honorable Herman Farrell, Jr., NYS Assembly Chair, Ways and Means Committee