

GATEWAY DEVELOPMENT COMMISSION PROCUREMENT GUIDELINES

The Gateway Development Commission (the “**Commission**”) is a body corporate and politic created by the New York and New Jersey Gateway Development Commission Act (2019 N.Y. Sess. Laws ch. 108 (the “**New York Act**”) and 2019 N.J. Sess. Law Serv. ch. 195) (the “**New Jersey Act**,” and together with the New York Act, the “**Act**”) to facilitate the passenger rail transportation project between Penn Station, Newark, New Jersey, and Penn Station, New York, New York, as more fully described in the Act (the “**Project**”). These “**Guidelines**” are hereby adopted by the Commission to establish requirements applicable for the use, awarding, monitoring, and reporting of procurement contracts of the Commission as set forth below. These Guidelines are not intended and shall not be deemed to grant or confer any rights or remedies to or upon any third party.

I. OVERVIEW

A. Applicability. Except as otherwise provided herein, these Guidelines apply to all Procurement Contracts procured by the Commission. Consistent with the Act, the term “**Procurement Contract**” refers to any written agreement for the acquisition of goods or services of any kind, in the actual or estimated amount of \$5,000 or more. Procurement Contracts procured under these Guidelines may include, without limitation, contracts for goods, such as: office equipment, furniture, and supplies; computer and telecommunications equipment, systems, and software; construction materials and equipment; and security, safety, and maintenance equipment and supplies; and contracts for services, such as: legal, financial advisory, audit, accounting, risk management, architectural, engineering, design, surveying, construction management, construction and trade work, rehabilitation, repair, maintenance, hazardous materials mitigation, informational technology, communications, and printing.

B. Funding Compliant Procurements. Where federal or state law, rules, or regulations applicable to any funds received by the Commission prescribe procurement requirements that differ from these Guidelines, the requirements of such laws, rules, or regulations will govern with respect to contracts funded with such funds.

C. Selection of Procurement Method

1. In its Procurement Contracts, the Commission seeks to secure a high standard of quality at a reasonable cost and at the required time, on a competitive basis whenever practicable. The Commission’s Chief Executive Officer, or his or her delegate (hereinafter referred to as the “**Chief Executive Officer**”), chooses the appropriate procurement method and, when indicated, negotiates with vendors. Determinations required to be made by the Commission or Chief Executive Officer, including determinations related to source selection, vendor responsibility, and the basis for award, shall be documented in the contract file.

2. Except as otherwise provided in these Guidelines, or as specifically authorized by the Board of Commissioners of the Commission (the “**Board**”), Procurement Contracts should be awarded through a competitive process. In general, competitive selection may be made through competitive sealed bidding procedures described in Section II.B or the competitive sealed proposal

procedures described in Section II.C. Prequalification procedures may be used in the case of construction or specialized services or commodities. Personal and professional services may be procured in accordance with the competitive qualifications-based selection process described in Section II.A.2. In the case of projects delivered through alternative delivery methods (including, without limitation, design-build, design-build-finance-operate-maintain, or any combination of the foregoing) or other complex methods, procurements may be handled through the competitive sealed proposal process or through such other competitive process as the Chief Executive Officer determines is appropriate.

3. The Chief Executive Officer may elect to use a method of source selection authorized by Sections II.D (small purchases), II.E (sole-source procurement), II.F (emergency procurement) and II.G (purchases from government contracts or cooperatives agreements) of these Guidelines after making a determination that it is not practicable, not best practice, or otherwise not in the best interest of the Commission to use one of the procurement processes described in Sections II.A-C. By adopting this Policy, the Board has hereby determined that a full competitive process will not be required and is waived in such circumstances. The Board may also waive competition by resolution in such other circumstances as the Board determines to be in the best interest of the Commission.

II. METHODS OF SOURCE SELECTION

A. Personal and Professional Services

1. It shall be the policy of the Commission to announce publicly all requirements for personal and professional services and to enter into contracts for such services with vendors qualified for the type of services required, and at fair and reasonable prices. Personal and professional services shall be procured by the Commission in accordance with the qualifications-based selection procedure described in Subsection 2 below, through competitive sealed bids or proposals as described in Sections II.B and II.C, respectively, as authorized by Sections II.D-G, or as otherwise authorized by the Commission with respect to particular services or types of services.

2. Qualifications-Based Selection. For personal or professional services Procurement Contracts procured using qualifications-based selection procedures, the Commission shall solicit and evaluate statements of qualification and other proposal information submitted regarding the proposed contract (hereinafter collectively referred to as “SOQs”). The Chief Executive Officer shall seek SOQs from at least three persons or firms regarding the contract and shall make reasonable efforts to encourage firms or persons engaged in the lawful practice of their profession, to respond to the solicitation. SOQs shall be ranked, in order of preference, based upon criteria set forth in the solicitation regarding the respondents’ competence and qualifications, to identify one or more firms deemed by the Commission to be the most highly qualified to provide the services required and eligible for selection. The Chief Executive Officer shall negotiate a contract with the highest-qualified respondent at compensation that the Chief Executive Officer determines to be reasonable and fair to the Commission. Should the Chief Executive Officer be unable to negotiate a satisfactory contract with the highest-qualified respondent at a fair and reasonable price, the Chief Executive Officer may terminate negotiations with that respondent and undertake negotiations with the next most qualified respondent(s), in order of preference.

B. Competitive Sealed Bidding

1. In circumstances deemed by the Chief Executive Officer to be appropriate for the use of competitive sealed bidding, an “Invitation for Bids” (“**IFB**”) shall be issued, including a purchase description and all applicable contractual terms and conditions. Adequate public notice of the IFB shall be given by publication on the Commission’s website a reasonable time prior to the date for the opening of bids. In addition, the Commission may seek to increase awareness of the solicitation through such other means as appropriate. Bids shall be opened publicly in the presence of one or more witnesses at the time and place designated in the IFB. The amount of each bid, the name of each bidder, and the bid security, if any, shall be recorded. The record and each bid shall be open to public inspection.

2. The contract shall be awarded to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the IFB. Criteria that will affect the bid price and be considered in evaluation for award shall be objectively measurable (such as discounts, transportation costs, and total or lifecycle costs) and may include criteria to determine acceptability (such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose). After bid opening, no changes in bid prices or other provisions of bids prejudicial to the interest of the Commission or fair competition shall be permitted. Correction or withdrawal of inadvertently erroneous bids before or after award, or cancellation of awards or contracts based on such bid mistakes, shall be permitted in instances in which the Chief Executive Officer finds that it is in the Commission’s interest to do so. All decisions to permit the correction or withdrawal of bids, or to cancel awards or contracts based on bid mistakes, shall be supported by a written determination made by the Chief Executive Officer.

C. Competitive Sealed Proposals

1. In circumstances deemed by the Chief Executive Officer to be appropriate for the use of competitive sealed proposals, proposals shall be solicited through a “Request for Proposals” (“**RFP**”). Adequate public notice of the RFP shall be given in the same manner as provided in Section II.B.1. Proposals shall be opened so as to avoid disclosure of contents to competing proposers during the process of negotiation.

2. In employing a competitive sealed proposal process, the Chief Executive Officer may consider using a two-phase selection procedure, in which the Commission will, first, issue a “Request for Qualifications” (“**RFQ**”) describing the opportunity and soliciting SOQs from which the most highly qualified proposers may be identified and shortlisted, and second, issue an RFP to the shortlisted proposers, pursuant to which the shortlisted proposers will submit price and non-price/technical proposals. As provided in the RFP, the Commission may conduct one-on-one meetings with potential proposers regarding solicitation, proposal, and contract requirements, evaluation criteria, reference information, and any other industry feedback.

3. Award shall be made to the responsible and responsive proposer whose proposal is determined to be the most advantageous or to offer the best value to the Commission, taking into consideration the evaluation factors set forth in the RFP. Proposals shall be evaluated on the basis of price and the quality of the proposals, based on the relative importance of criteria identified in the RFP, such as (without limitation) capacity to execute the proposal (including financial

capacity), qualifications to provide specialized services or products, experience in the services, the community to be served or studied, or the site of the work, past performance, technical solutions, completion schedule, and potential risks to the Commission of the proposal.

4. As provided in the RFP, discussions may be conducted after proposal submission with responsible proposers reasonably susceptible of being selected for award to clarify proposals and assure full understanding of, and proposals' responsiveness to, the solicitation requirements. In conducting discussions, the Commission will not disclose any proprietary or confidential information derived from competing proposals. Proposal revisions may be permitted after initial submissions and prior to award for the purpose of obtaining best and final offers. Proposers shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals.

D. Small Purchases

1. Any Procurement Contract with an estimated total value not exceeding \$40,000 may be entered into pursuant to direct negotiation, without regard to any of the competitive source selection procedures set forth above.

2. Any procurement for a contract with an estimated total value exceeding \$40,000 but not exceeding \$250,000 may be entered into without regard to the competitive source selection procedures set forth above, *provided* that the Chief Executive Officer shall use reasonable efforts to obtain offers or quotations from at least three responsible persons or entities. Solicitations for small purchases may be made by telephone, email, mail, or advertisement on the Commission's website.

3. Award of small purchases may be made by purchase order or contract. The contract file shall include records of the vendors approached and their responses, and documentation of the award, including findings that the purchase price is fair and reasonable, and that adequate competition was solicited. Procurements shall not be artificially divided so as to constitute a small purchase under this Section II.D.

E. Sole-Source Procurements. A contract for goods or services may be awarded to a sole source without competition when the Chief Executive Officer determines either (1) that there is only one source for the required goods or services, or (2) even where required goods or services may be available from two or more sources, that an award without competition is in the best interest of the Commission and the public, which determination may be based on a particular vendor being preferable because of specific factors including, without limitation, past experience with a particular issue, familiarity with the Commission's operations, experience with similar projects of the Commission, demonstrated expertise or capacity and willingness to respond to the situation, and the continuation of ongoing work under an existing contract. If, in complying with the requirements of Sections II.A-D, II.F and II.G, the Commission only obtains an offer from one person or entity, or does not itself undertake a competitive procurement process, it will not be considered a sole source procurement under these Guidelines.

F. Emergency Procurement. Notwithstanding any other provision of these Guidelines, the Commission's Chief Executive Officer may make, or authorize others to make, an emergency

procurement when: (1) there exists a threat to public health, welfare, or safety, or to public property or property in which the Commission has an interest; (2) a critical need or unforeseen circumstance requires immediate action and cannot await competitive selection; or (3) under such other emergency conditions as identified specifically by the Chief Executive Officer; *provided* that such emergency procurement shall be made with such competition as is practicable under the circumstances and shall be limited to the procurement of the goods or services necessary to avoid or mitigate the emergency condition. A written determination of the basis for the emergency and for the selection of the particular vendor shall be included in the contract file.

G. Other Government Contracts and Cooperative Procurements. Notwithstanding any other provision of these Guidelines to the contrary, if the Chief Executive Officer determines it to be in the best interest of the Commission:

1. If there is a federal, state, city, or other governmental contract or pricing agreement for goods or services that permits the Commission to utilize the contract or pricing agreement, or to obtain goods and services from the vendor on substantially similar terms, and that it is in the best interest of the Commission (for reasons of efficiency, complexity, pricing, or otherwise), then the Commission may (a) utilize such contract or pricing agreement to obtain goods and services from such vendor under the terms of such contract or agreement or (b) enter into a contract with such vendor on terms that are substantially similar to those under such contract or agreement.

2. The Commission may (a) enter into a cooperative purchasing or procurement process for goods or services with one or more partner federal, state or local governments, governmental agencies, or government-owned corporation (each, a “**Partner Agency**”), including, without limitation, the State of New York, the State of New Jersey, the Port Authority of New York and New Jersey, the New Jersey Transit Corporation, and the National Railroad Passenger Corporation (“**Amtrak**”) or (b) authorize a Partner Agency to conduct a procurement on the Commission’s behalf, in accordance with such Partner Agency’s lawful procurement policies and procedures, and, upon any award by and pursuant to such procurement, enter into a contract with the successful vendor or authorize the Partner Agency to do so on behalf of the Commission. The roles of the applicable Partner Agencies and the Commission in any such procurement may be outlined in a memorandum of understanding or similar document. The Commission may at any time accept assignment of a contract entered into by a Partner Agency on behalf of the Commission pursuant to this Section II.G.2, subject to the terms and conditions of such contract and with the written consent of the Partner Agency.

3. The Chief Executive Officer is hereby authorized, on behalf of the Commission, to enter into an agreement with the Gateway Program Development Corporation (the “**Corporation**”) accepting assignment of contracts procured by the Corporation for the Project.

4. For the avoidance of doubt, with respect to procurements and contracts authorized by this Section II.G, the terms of the applicable governmental or Corporation contract and/or the procurement policies and procedures of the lead Partner Agency, as applicable, shall take precedence over these Guidelines to the extent allowed by applicable law.

III. ECONOMIC OPPORTUNITY

A. M/WBE Program

1. The Commission may maximize business opportunities available to minority and women entrepreneurs in the New York and New Jersey region to the fullest extent consistent with the legal requirements for such programs. To the extent permitted by applicable law, the Commission may identify opportunities for meaningful participation by minority business enterprises (“**MBEs**”) and women-owned business enterprises (“**WBEs**”), as such terms are defined in the Act. This may include the identification of those areas or types of contracts for which MBEs and WBEs may best bid or propose so as to promote and assist participation by such enterprises and facilitate a fair share of the awarding of contracts to such enterprises. The Commission may provide notice of contract opportunities to professional and other organizations that serve MBEs and WBEs providing the types of services or goods, as permitted by applicable law, being procured in the applicable solicitation.

2. The Commission may establish appropriate goals for participation by MBEs and WBEs in Procurement Contracts awarded by the Commission and for the utilization of MBEs and WBEs as subcontractors and suppliers by vendors that have been awarded contracts with the Commission, to the extent permitted by applicable law. In setting such goals, the Commission may accept the reported findings of the State of New York or the State of New Jersey, and any agencies, instrumentalities, departments, commissions or authorities thereof, or of a Partner Agency, regarding disparity between the availability and utilization of certain groups in contracting in the New York and New Jersey region, or may undertake its own disparity and utilization study, to the extent permitted by applicable law.

B. Geographic Preferences. Except to the extent that the inclusion of such provisions could jeopardize the receipt or use of federal, state, or local funds in support of the Project, the Commission shall develop and incorporate into every contract awarded by the Commission certain policies to promote the participation by business enterprises and residents of the State of New York and the State of New Jersey. For purposes of this Section III.B, the terms “New Jersey business enterprise,” “New Jersey resident,” “New York business enterprise,” and “New York resident” shall have the meanings ascribed to those terms in the Act.

IV. ETHICS AND NON-COLLUSION

A. Procurements Involving Former Commission Officers and Employees. Former Commission officers and employees shall comply with, and the Commission shall require that all procurements undertaken by the Commission comply with, applicable laws and rules, regulations, and policies adopted by the Board with respect to involvement of former Commission officers and employees in contracts procured by the Commission, including the Conflicts of Interest Policy and Code of Ethics for Commissioners and Officers adopted by the Board and the Code of Conduct to be developed and adopted by the Board.

B. Statement of Non-Collusion in Bids or Proposals

1. Each solicitation for a Procurement Contract issued by the Commission shall require that all bids or proposals contain the following statement subscribed by the bidder or

proposer and affirmed by such bidder or proposer as true under the penalties of perjury (*provided* that terminology may be adjusted as appropriate for RFPs):

- “1. 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 his knowledge and belief:
2. The prices in this bid have been arrived at independently without collusion, consultation, communication, or agreement, for the purpose of restricting competition, as to any matter relating to such prices with any other bidder or with any competitor;
3. Unless otherwise required by law, the prices which have been quoted in this bid have not been knowingly disclosed by the bidder and will not knowingly be disclosed by the bidder prior to opening, directly or indirectly, to any other bidder or to any competitor; and
4. No attempt has been made or will be made by the bidder to induce any other person, partnership or corporation to submit or not to submit a bid for the purpose of restricting competition.”

2. A bid or proposal shall not be considered for award nor shall any award be made where the provisions of Subsection 1 above have not been complied with; *provided, however*, that if in any case the bidder or proposer cannot make the foregoing certification, the bidder or proposer shall so state and shall furnish with the bid or proposal a signed statement which sets forth in detail the reasons therefor. Where the provisions of Subsection 1 have not been complied with, the bid or proposal shall not be considered for award, nor shall any award be made unless the Commission or official thereof determines that such disclosure was not made for the purpose of restricting competition. The fact that a bidder or proposer (a) has published price lists, rates, or tariffs covering items being procured, (b) has informed prospective customers of proposed or pending publication of new or revised price lists for such items, or (c) has sold the same items to other customers at the same prices being bid, does not constitute, without more, a disclosure.

3. Any bid or proposal submitted to the Commission by a corporate bidder or proposer for work or services performed or to be performed or goods sold or to be sold, where competitive bidding is utilized, and where such bid or proposal contains the certification referred to in Subsection 1 hereof shall be deemed to have been authorized by the board of directors of the bidder, and such authorization shall be deemed to include the signing and submission of the bid or proposal and the inclusion therein of the certificate as to non-collusion as the act and deed of the corporation.

V. PROCUREMENT AND CONTRACT MANAGEMENT

A. Vendor Responsibility. Procurements shall be made from, and contracts shall be awarded to, responsible vendors only. Each solicitation issued by the Commission shall set forth requirements for responsible bidders/proposers and contractors, including requirements with respect to authorization to do business in the State of New York and/or the State of New Jersey, as applicable, licensing, and other qualifications such as, without limitation, contractor integrity,

compliance with laws and ethics policies, experience and record of past performance, financial resources and/or adequate financial security, and capability to perform.

B. Specifications or Scope of Work/Services. Each solicitation issued by and/or contract for goods or services entered into by the Commission shall include a description of the types of any goods to be purchased, and with respect to procurement of services, a description of those areas of responsibility and oversight requiring the use of personal services and the reasons for the use of personal services in such area. Reasons for soliciting contracts for services may include, without limitation, the lack of, or unavailability of, sufficient staff or other resources, the need for specialized expertise, or the need for only short-term or limited services. The Commission shall ensure that any product specifications incorporated in any procurement requirements or contract terms for contracts procured by the Commission shall comply with the requirements of Subsection 15(b) of Section 2 of the New York Act and Section 16(b) of the New Jersey Act.

C. Cancellation or Termination of Procurements. The Commission reserves the right, at any time, in its discretion, with or without cause, to cancel or withdraw any solicitation issued by the Commission, and/or to terminate any procurement initiated or conducted by the Commission (including rejecting all submitted bids or proposals or terminating any negotiations with a vendor in connection therewith) and may also commence a new procurement for the proposed contract or project. The Commission reserves all rights with respect to procurements that are available to the Commission under applicable laws.

D. Protest Procedure. Procedures to protest the solicitation terms or procurement outcome will be identified in the solicitation. Such protest procedure will be the sole administrative remedy for protesting procurement decisions.

E. Standard Contract Terms. The Commission shall develop a listing of the types of provisions to be contained in contracts procured by the Commission, including provisions concerning the nature and monitoring of the work to be performed, the use of Commission supplies and facilities, the use of Commission personnel, and any other appropriate provisions. Except for small purchases under Section II.D, it is generally anticipated that each Procurement Contract will include terms and conditions with respect to the following, as appropriate: (1) the contract term and any renewal options; (2) the respective powers, duties, responsibilities, obligations, and functions of the Commission and the vendor; (3) compensation or payments to the vendor or Commission; (4) the rights of the Commission with respect to oversight, monitoring, inspections, auditing, and access to records and information; (5) vendor reporting obligations; (6) rights and remedies of the Commission for vendor default, including termination; (7) insurance requirements; (8) requirements to comply with applicable laws; and (9) provisions for amendment of the contract.

F. Compliance with Law. As a matter of policy, each Procurement Contract shall require compliance with the enactments, ordinances, resolutions, and regulations of the respective states and local governments where the relevant work is located in regard to, as applicable and as amended, the construction and maintenance of the work and in regard to health and fire protection that would be applicable if the Commission were a private corporation, to the extent that the Commission finds it practicable to do so, without interfering with, impairing, or affecting the efficiency of its purposes, or its ability to effectuate its work upon a self-supporting basis, or its obligations, duties, and responsibilities to New York and New Jersey, its bondholders, if any, and the general public.

G. Performance Monitoring. All Procurement Contracts with terms longer than one year shall include vendor obligations with respect to annual reporting and disclosures and shall be subject to evaluation by the Commission for such vendor's performance as set forth in the Procurement Contract.

H. Cancellation or Disqualification for Failure to Cooperate with Investigation.

1. Each Procurement Contract shall include a clause providing that upon the refusal by a person, when called before a grand jury, head of a state department, temporary state Commission or other agency of the State of New York or the State of New Jersey, the organized crime task force in the department of law of the State of New York, head of a city department, or other city agency, which is empowered to compel the attendance of witnesses and examine them under oath, to testify in an investigation concerning any transaction or contract had with the applicable state, any political subdivision thereof, a public authority or with any public department, agency or official of the State of New York or the State of New Jersey or of any political subdivision thereof or of a public authority, to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract, such person, and any firm, partnership or corporation of which he or she is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with the Commission or official thereof, for goods, work or services, for a period of five years after such refusal.

2. Any person who, when called before a grand jury, head of a state department, temporary state commission or other state agency of the State of New York or the State of New Jersey, the organized crime task force in the department of law of the State of New York, head of a city department, or other city agency, which is empowered to compel the attendance of witnesses and examine them under oath, to testify in an investigation concerning any transaction or contract had with the applicable state, any political subdivision thereof, a public authority or with a public department, agency or official of the state or of any political subdivision thereof or of a public authority, refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant questions concerning such transaction or contract, and any firm, partnership or corporation, of which he or she is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids or proposals to or receiving awards from or entering into any contracts with the Commission or any official of the Commission, for goods, work or services, for a period of five years after such refusal. Such disqualification shall be effective starting on the date the Commission receives notice of such refusal in accordance with Section 2(15)(d) of the New York Act and Section 16(d) of the New Jersey Act.

3. Any firm, partnership or corporation which has become subject to the cancellation or termination of a contract or disqualification to contract on account of the refusal of a member, partner, director or officer thereof to waive immunity when called to testify shall be entitled to exercise its rights of appeal set forth in Section 2(15)(e) of the New York Act and Section 16(e) of the New Jersey Act, as applicable.

VI. COMMISSION REPORTING

A. Statutory Reporting Requirements. The Commission shall annually prepare, approve, and submit a report on Procurement Contracts entered into by the Commission for such year in accordance with the requirements of the Act, which shall include these Guidelines and any other procurement guidelines adopted by the Commission pursuant to requirements of the Act, an explanation of such guidelines, and any amendments thereto since the last annual report. Such report on Procurement Contracts may be a part of any other annual report that the Commission or Corporation is required to make. The Commission shall make available to the public copies of its annual report on Procurement Contracts upon reasonable request therefor.

B. Reports to the Board. The Chief Executive Officer shall report to the Board no less often than annually on all Procurement Contracts procured by the Commission pursuant to these Guidelines and any material amendments thereto, including the vendor name, the procurement method, the award date and the total contract amount.

VII. MISCELLANEOUS

A. Reservation of Rights; No Beneficiaries. The Commission's failure to comply with the provisions of these Guidelines shall not alter, modify the terms of, affect the validity of, or impair any of the Commission's rights or privileges under any Procurement Contract to which the Commission is a party. Nothing contained in these Guidelines is intended or shall be construed to confer upon any person, firm, or corporation any right, remedy, claim, or benefit under, or by reason of, any requirement or provision hereof.

B. Waiver. Any provision of these Guidelines may be waived by the Board, or such individuals as they may designate, except to the extent prohibited by law. A waiver may also be in the form of a ratification. If a contract is federally assisted, prior to issuing a waiver, consideration should be given to the steps that may be taken to assure that federal assistance is not jeopardized.