

Attachment A

Grant Disbursement Agreement and Security Agreement

**NEW NY BROADBAND PROGRAM**

This **GRANT DISBURSEMENT AGREEMENT** (the "Agreement") includes all exhibits and attachments hereto and is made on the terms and by the parties listed below and relates to the Project described below:

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<b>NEW YORK STATE URBAN DEVELOPMENT CORPORATION d/b/a EMPIRE STATE DEVELOPMENT ("ESD" or "GRANTOR"):</b>	633 Third Avenue New York, NY 10017 Contact: «Project_Manager» Phone: «Project_Mgr_Phone» E-mail: «Project_Mgr_email»
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<b>THE GRANTEE:</b>	<<Original_Name_Client>> <<Street_Address_Client>> Contact: Phone: E-mail: Federal Taxpayer ID#:
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<b>PROJECT NAME:</b>	<<Project_Name>>
<b>PROJECT LOCATION:</b>	<<Project_Town>>, <<Project_Zip codes>>
<b>PROJECT NUMBER:</b>	<<Project_Number>>
<b>GRANT AMOUNT:</b>	<<Grant_Amt>>
<b>FUNDING SOURCE:</b>	New NY Broadband 15-16 Capital

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<b>ESD APPROVAL DATE:</b>	<<Approval_Date>>
<b>PACB APPROVAL DATE:</b>	<<PACB_Approval_Date>>
<b>EXPIRATION DATE:</b>	_____

## TERMS AND CONDITIONS

### 1. The Project

The Grantee shall:

- (a) Complete the project as set forth in the ESD General Project Plan attached hereto as Exhibit A (the “Project”).
- (b) Comply with the minimum Grantee service level requirements and reporting requirements.
- (c) Comply with Good Faith Marketing Efforts as set forth in paragraph 23.

### 2. Project Reporting

- (a) **Key Project Indicators.** Exhibit K lists the Key Project Indicators (“Indicators”) for your broadband project which will be achieved by the end of the term of this Agreement. The Grantee represents and warrants that it will complete all Indicators. If Grantee fails to deliver broadband services as indicated in Exhibit K, it shall repay to ESD a portion, or the entire Grant disbursed as set forth in Exhibit E. ESD reserves the right, but is under no obligation to waive this requirement.
- (b) **Reporting to ESD.** (i) Indicators are required to be reported quarterly from award inception to the end of this Agreement. The Grantee shall submit electronically to [nysbroadband@esd.ny.gov](mailto:nysbroadband@esd.ny.gov) a Key Project Indicator Reporting Form (“Report”), attached as Exhibit L, to ESD on a quarterly basis, within ninety (90) days of execution of this Agreement and every ninety (90) days thereafter until the end of this Agreement. (ii) Grantee also agrees to provide ESD with verbal or written status updates, (“Updates”) including but not limited to progress regarding the Grant Project and any known impediments or delays, upon ESD’s reasonable request, but not more frequently than on a monthly basis. ESD is entitled to rely on the Reports and Updates to determine performance of the Grant Project. Failure to submit Reports and Updates when due may result in deferred distribution of ESD grant funds (“Grant Funds”) as set forth in Exhibit E.
- (c) **Third Party Reporting and Compliance.** (i) Broadband Mapping (“Mapping”). Grantee is required to provide ESD or designated agent, broadband data as follows and as indicated in Exhibit M. Bolded terms below are defined in Exhibit L.
  - (i) **Addresses and Service Characteristics**, attached as Table 1, where new broadband service is deployed or upgraded within the project

footprint (“Footprint”) must be reported quarterly, when new or upgraded broadband service is delivered to customers, within 30 days of ESD’s request, but not more frequently than on a monthly basis, and at the completion of this Agreement.

(ii) **Census Blocks** for areas that receive broadband service within the recipient’s entire New York State service area, and as it may be expanded, must be reported semi-annually, and within 30 days of ESD’s request, but not more frequently than on a quarterly basis;

(iii) **Compliance with National Electrical Safety Code (“NESC”).** All pole attachments shall comply with the NESC requirements. Grantee shall ensure that the attachment of fiber and equipment is designed, constructed, operated, and maintained in accordance with all applicable provisions of the most current and accepted criteria of the NESC and all applicable and current electrical and safety requirements of any State or local governmental entity. Grantee shall certify such compliance with each semi-annual Census Block report noted above.

(d) ESD relies on the Reports, Updates, and Mapping to determine performance of the Project. Failure to submit Reports, Updates, and Mapping; and to be in compliance with NESC requirements may result in deferred distribution of the Grant Funds or a default.

### 3. Conditions Precedent to Disbursement of the Grant

(a) **Project Milestones.** Exhibit N, Project Milestones (“Milestones”), lists Grantee’s major network build-out phases per quarter and demonstrates the entire project will be substantially complete by the end of the term of this Agreement. Grant Funds will be disbursed as frequently as quarterly to Grantee provided Milestones are met.

(b) No Grant Funds shall be disbursed unless the Grantee is in compliance with the Terms and Conditions of this Agreement, including, but not limited to, Exhibit E (Disbursement Terms), and the following conditions have been satisfied:

(i) If the Grant Amount exceeds \$100,000, or if, as described in Exhibit A, it is expected that there will be additional grants that in the aggregate exceed \$100,000, ESD has received an opinion of Grantee’s counsel, in substantially the form appended to this Agreement as Exhibit D.

(ii) Any necessary approval has been issued by the Director of the Budget of the State of New York, and the Grant Funds have been received by ESD.

- (iii) ESD has received out-of-pocket expenses incurred by ESD in the making of the Grant, if any, as set forth in Exhibit E.
- (iv) There have been no materially adverse changes in the financial condition of the Grantee since the date of submission of its application to ESD.
- (v) ESD receives and approves Reports, Updates, and Mapping; and Grantee is in compliance with NESC requirements as set forth in Section 2.

#### 4. Disbursement and Recapture Terms

Subject to the terms and conditions contained in this Agreement, ESD shall disburse the Grant to the Grantee as follows:

- (a) ESD shall reimburse the Grantee for Project expenditures incurred by the Grantee as set forth in Exhibit E of this Agreement. Disbursements will be made upon submittal to ESD and approval by ESD of
  - (i) A Report
  - (ii) Updates
  - (iii) Mapping
  - (iv) A Milestone Report
  - (v) Grantee is in compliance with NESC requirements
  - (vi) A Payment Requisition Form and any supporting documentation as ESD may require, in the form attached to this Agreement as Exhibit F and its attachments, and Exhibit J.
- (b) In the event Grantee does not provide the Reports, Updates and Mapping, or is not in compliance with NESC requirements, ESD reserves the right to declare a default.
- (c) In no event will ESD make any payment which would cause ESD's aggregate disbursements to exceed the Grant Amount.
- (d) In no event shall ESD's receipt of any Report be construed as acceptance of the work of the Grant Project.
- (e) The Grant disbursement, or a portion thereof, may be delayed or subject to recapture by ESD as provided in Exhibit E.

5. Non Discrimination and Contractor & Supplier Diversity

The Grantee will comply with ESD's Non-Discrimination and Contractor & Supplier Diversity policies set forth in Exhibit G of this Agreement.

6. No Liability of ESD

ESD shall not in any event whatsoever be liable for any injury or damage, cost or expense of any nature whatsoever that occurs as a result of, or in any way in connection with the Project, and the Grantee hereby agrees to indemnify and hold harmless ESD, the State and their respective agents, officers, employees and directors (collectively, the "Indemnitees") from and against any and all such liability, other than that caused by the gross negligence or the willful misconduct of the Indemnitees.

7. Responsibility Provisions

- (a) The Grantee shall at all times during the Agreement term remain responsible. The Grantee agrees, if requested by the President and Chief Executive Officer of ESD or his or her designee, to present evidence of its continuing legal authority to do business in New York State, integrity, experience, ability, prior performance, and organizational and financial capacity.
- (b) The President and Chief Executive Officer of ESD or his or her designee, in his or her sole discretion, reserves the right to suspend any or all activities under this Agreement, at any time, when he or she discovers information that calls into question the responsibility of the Grantee. In the event of such suspension, the Grantee will be given written notice outlining the particulars of such suspension. Upon issuance of such notice, the Grantee must comply with the terms of the suspension order. Activities under this Agreement may resume at such time as the President and Chief Executive Officer of ESD or his or her designee issues a written notice authorizing a resumption of performance under this Agreement.
- (c) Upon written notice to the Grantee, and a reasonable opportunity to be heard with appropriate ESD officials or staff, this Agreement may be terminated by the President and Chief Executive Officer of ESD or his or her designee at the Grantee's expense where the Grantee is determined by the President and Chief Executive Officer of ESD or his or her designee to be non-responsible. In such event, the President and Chief Executive Officer of ESD or his or her designee may complete the requirements of this Agreement in any manner he or she deem advisable and pursue available legal or equitable remedies for breach.

## 8. Representations, Warranties and Covenants

The Grantee represents, warrants and covenants that:

- (a) It has full power and authority to execute and deliver this Agreement and to perform its obligations hereunder.
- (b) This Agreement was duly authorized, executed and delivered by the Grantee and is binding and enforceable against the Grantee in accordance with its terms.
- (c) It is a duly organized corporation, validly existing and in good standing under the laws of the State of its incorporation, has the corporate power and authority to own its assets and to transact the business in which it is now engaged or proposed to be engaged and is duly qualified as a foreign corporation and in good standing under the laws of each other jurisdiction in which such qualification is required and shall maintain its corporate existence in good standing in each such jurisdiction.
- (d) There are no actions, suits or proceedings or, to the knowledge of Grantee, threatened against, or affecting Grantee before any court, governmental entity or arbitrator, which may, in any one case or in the aggregate, materially adversely affect the financial condition, operations, properties or business of the Grantee, except as may have been disclosed in writing to ESD.
- (e) Grantee is in compliance and shall continue to comply in all material respects with all material applicable laws, rules, regulations and orders.
- (f) The information contained in the application submitted by the Grantee in connection with the project and the Grant, as such application may have been amended or supplemented (the "Application"), is incorporated herein by reference in its entirety. In the event of an inconsistency between the descriptions, conditions, and terms of this Agreement and those contained in the Application, the provisions of this Agreement shall govern. The Grantee hereby acknowledges that ESD has relied on the statements and representations made by the Grantee in the Application in making the Grant. The Grantee hereby represents and warrants that it has made no material misstatement or omission of fact in the Application or otherwise in connection with the Grant and, except as otherwise disclosed in writing to ESD, there has been no adverse material change in the financial condition of Grantee from the date of submission of the Application to the date hereof and that all other the information contained in the Application continues on the date hereof to be materially correct and complete.

- (g) The Grantee covenants that it will neither hold itself out as, nor claim to be an officer, employee, agent or representative of ESD or the State by reason hereof, and that it will not by reason thereof, make any claim, demand or application for any right or privilege applicable to an officer, employee, agent or representative of ESD or the State, including without limitation, worker's compensation coverage, unemployment insurance benefits, social security coverage or retirement membership or credit.
- (h) Neither the Grantee nor any of the members of its Board of Directors or other governing body or its employees have given anything of value to influence any official act or the judgment of any person in the award of the Grant or the performance of any of the terms of this Agreement.
- (i) It shall maintain business operations for the broadband network and all related equipment necessary to provide broadband services within the Footprint for the term of this Agreement.
- (j) The Grant shall be used solely for project expenses in accordance with the terms and conditions of this Agreement.
- (k) The Grantee is solely responsible and has sufficient funding for all Project costs in excess of the Grant.
- (l) Grantee will use Grant Funds, and submit payment requisitions, exclusively for eligible expenses related to capital works or purposes. Grantee acknowledges that Grant Funds must be used solely for authorized capital purposes and not for operating expenses or other working capital items or non-capital purposes, irrespective of whether the funds are still used for the benefit of the Project. Grantee acknowledges that the consequences of breaching this covenant could result in violations of State law. Grantee recognizes its financial obligations, risks and liabilities for breach of this covenant. ESD may, periodically request information from Grantee to confirm its compliance with this covenant and Grantee acknowledges its obligation under Section 9(a)(iii) of the GDA to provide information upon request to ESD.
- (m) Grantee is in compliance and shall continue to comply with Section 7 of this Agreement.
- (n) Grantee shall offer the New NY Broadband Program's Required Pricing Tier, as a service option to residential users for a period of five (5) years from following the first date that end-users of service provided through the Project may be connected. The Required Pricing Tier will provide for broadband Internet service at minimum speeds of 25/4 Mbps (download/upload), at a monthly rate not to exceed \$60. Such service

should not impose caps on the end-user's bandwidth usage (data caps). The \$60 monthly rate should include any connection fees, standard modem equipment fees (excluding fees for use of a wireless router), and/or surcharges.

The \$60 monthly rate described above need not include a one-time installation fee. Such a fee shall not exceed \$49 (regardless of whether the fee is paid in one or over several installments), except where providing service to an end-user would require Grantee to make a connection in excess of 300 feet, measured as the offset from the road to the typical termination point on the end-user's premises. In such cases, the Grantee is permitted to charge an installation fee in excess of \$49.

The rate is effective as of December 2015, and may be increased annually by the provider at a rate reflecting the rate of inflation as measured by the Consumer Price Index (CPI) or according to a rate published by ESD, whichever such increase would be greater. Additionally, to the extent ESD modifies the Program's pricing requirements for future rounds of the Program, and such changes are favorable to Grantees, ESD will make these revised terms available to existing Grantees.

#### 9. Default and Remedies

- (a) Each of the following shall constitute a default by the Grantee under this Agreement:
- (i) Failure to perform or observe any obligation or covenant of the Grantee contained herein, to the reasonable satisfaction of ESD and within the time frames established under this Agreement, including without limitation, failure to complete Indicators and Milestones by the end of the term of this Agreement.
  - (ii) Failure to submit Reports, Updates, Mapping, and Milestone Reports, and failure to be in compliance with NESC requirements for over 60 days. ESD reserves the right to waive this requirement.
  - (iii) Failure to comply with any request for information reasonably made by ESD to determine compliance by the Grantee with the terms of this Agreement, or otherwise reasonably requested by ESD in connection with the Grant.
  - (iv) The making by the Grantee of any false statement or the omission by the Grantee to state any material fact in, or in connection with this Agreement, the Security Agreement (as defined in Section 24 hereof), or the Grant.

- (v) A default beyond any applicable grace period by the Grantee, or any entity which Grantee directly or indirectly controls, is controlled by, or is under common control with, under any other agreement with ESD.
  - (vi) Any manifestation, on the part of the Grantee, of an intention either:
    - (x) to terminate and/or (y) to restructure, under the terms of any bankruptcy or insolvency statute or law, its business. This includes, without limitation, the announced or actual cessation of business activities at the Project Location, the initiation of proceedings under any dissolution statute, or the execution of an assignment for the benefit of creditors, or the solicitation of any composition and/or arrangement with creditors, or the issuance of “closing” or “termination” notices to employees under any State or federal statute, or the filing of any voluntary petition under any chapter of the United States Bankruptcy Code, or the failure by the Grantee to obtain the dismissal, within sixty (60) days of filing, of any involuntary proceeding brought under any chapter of the United States Bankruptcy Code.
  - (vii) Failure by the Grantee, for any period of time, to comply with the terms and procedures of Section 7 of this Agreement.
  - (viii) The occurrence of an Event of Default, as defined in the Security Agreement.
- (b) Upon the serving of notice to the Grantee of the occurrence of a default (which notice shall specify the nature of the default), ESD shall have the right to terminate this Agreement, provided however, that if the default is pursuant to paragraph 9(a)(i), 9(a)(ii), 9(a)(iii), no default shall be deemed to have occurred if Grantee cures such default within ten (10) days of notice of default from ESD, or if the default is pursuant to paragraph 9(a)(i), 9(a)(ii) or 9(a)(iii), cannot be reasonably cured within such ten day period, Grantee commences to cure such default within the ten day cure period and cures the default within ninety (90) days thereafter, provided further that ESD shall not be obligated to make any disbursements during any such cure period. Defaults occurring under the terms and provisions of paragraphs 9(a)(iv), 9(a)(v), 9(a)(vi), 9(a)(vii), and 9(a)(viii) are not subject to the cure provisions provided herein.
- (c) Upon occurrence of a default pursuant to paragraph 9(a)(i), 9(a)(ii), 9(a)(iii), 9(a)(iv), 9(a)(v), 9(a)(vi), 9(a)(vii), or 9(a)(viii), ESD may (i) withhold any Grant proceeds not yet disbursed and (ii) require repayment of Grant proceeds disbursed to the Grantee in accordance with Exhibit E of this Agreement and (iii) proceed to protect and enforce its rights hereunder and under the Security

Agreement forthwith by such suits, actions or special proceedings in equity or at law, or by proceedings in the office of any board or officer having jurisdiction, whether for the specific performance of any covenant or agreement contained in this Agreement or in the Security Agreement or for the enforcement of any legal or equitable rights or remedies as ESD shall deem most effectual to protect and enforce such rights hereunder or under the Security Agreement. Notwithstanding the foregoing, if ESD determines that any Grant proceeds had previously been released based upon fraudulent representations or other willful misconduct, ESD may require repayment of all funds and may refer the matter to the appropriate authorities for prosecution. ESD shall be entitled to exercise any other rights and seek any other remedies provided by law.

#### 10. Term

The term of this Agreement shall commence on the date hereof and expire on the Expiration Date, as set forth on the first page of this Agreement (unless terminated prior to such date pursuant to paragraph 9 (b) hereof).

#### 11. Books and Records; Project Audit

- (a) The Grantee will maintain accurate books and records concerning the project for the term of this Agreement and for three (3) years from the expiration or earlier termination of this Agreement and will make those books and records available to ESD, its agents, officers and employees during Grantee's business hours upon reasonable request.
- (b) ESD shall have the right, upon reasonable notice, to conduct, or cause to be conducted, one or more audits, including field inspections, of the Grantee to assure that the Grantee is in compliance with this Agreement. This right to audit shall continue for three (3) years following the expiration or earlier termination of this Agreement.

#### 12. Maintenance of Insurance

Grantee shall maintain in full force and effect insurance, including, but not limited to, the insurance described hereafter, in such amounts and covering such risks as Grantor may require from time to time naming Grantor as an additional insured on a primary and non-contributory basis, with full waiver of subrogation.

- (a) The Grantee shall keep all broadband infrastructure ("Infrastructure") which includes assets such as building, fiber infrastructure, cable, towers, poles, outside plant equipment, network and access equipment, fixed and mobile wireless connections, customer premise equipment, and operating equipment at the Project Location and insured against: (i) loss by fire, (ii)

additional perils customarily covered under an all-risk policy and (iii) flood hazard, if the Project Location is located in an area identified by the Secretary of Housing and Urban Development as an area having special flood hazards and in which flood insurance has been made available under the National Flood Insurance Act of 1968, as amended. The insurance required in this paragraph (a) shall provide coverage for an amount not less than the full replacement value of the Infrastructure at the Project Location , or such other amount as the Grantor may reasonably require, provided that (i) the amount of insurance coverage shall be in an amount sufficient to satisfy, at all times, any co-insurance requirements, and (ii) the amount of any flood hazard insurance shall not exceed the maximum amount of coverage available under the National Flood Insurance Act.

- (b) When and to the extent required by the Grantor, the Grantee shall maintain in full force and effect insurance against risk as is customary in the industry of the Grantee. The insurance required in this paragraph (b) shall provide coverage in an amount satisfactory to Grantor.

**For Project Location in New York City, Long Island or Westchester**

- (c) The Grantee shall maintain Commercial General Liability Insurance providing both bodily injury (including death) and property damage insurance in a limit not less than Two Million Dollars (\$2,000,000) per occurrence, Three Million Dollars (\$3,000,000) aggregate and Five Million Dollars (\$5,000,000) umbrella. ESD and each of its directors, officers, employees, agents and representatives shall be additional insureds and certificate holders, on a primary and non-participatory basis, with full waive of subrogation (General Liability Additional Insured Endorsement shall be on Insurance Service Office's (ISO) form number CG 20 26 11 85) or equivalent acceptable to ESD. In addition, if the grant or loan contemplates the purchase, construction or renovation of any buildings or equipment, the Recipient shall keep the buildings at the Project Location and the building equipment insured against: (i) loss by fire, (ii) additional perils customarily covered under an all-risk policy and (iii) flood hazard, if the Project Location is located in an area identified by the Secretary of Housing and Urban Development as an area having special flood hazards and in which flood insurance has been made available under the National Flood Insurance Act of 1968, as amended.

**For Project Location OUTSIDE of New York City, Long Island or Westchester:**

- (c) The Grantee shall maintain Commercial General Liability Insurance providing both bodily injury (including death) and property damage insurance in a limit not less than One Million Dollars (\$1,000,000) per occurrence, Two Million Dollars (\$2,000,000) aggregate and Three Million Dollars (\$3,000,000) umbrella. ESD and each of its directors, officers, employees, agents and

representatives shall be additional insureds and certificate holders, on a primary and non-participatory basis, with full waive of subrogation (General Liability Additional Insured Endorsement shall be on Insurance Service Office's (ISO) form number CG 20 26 11 85) or equivalent acceptable to ESD. In addition, if the grant or loan contemplates the purchase, construction or renovation of any buildings or equipment, the Recipient shall keep the buildings at the Project Location and the building equipment insured against: (i) loss by fire, (ii) additional perils customarily covered under an all-risk policy and (iii) flood hazard, if the Project Location is located in an area identified by the Secretary of Housing and Urban Development as an area having special flood hazards and in which flood insurance has been made available under the National Flood Insurance Act of 1968, as amended.

- (d) All insurance required in this Section shall be issued by companies authorized to do business in the State of New York, satisfactory to Grantor pursuant to policies satisfactory to Grantor in form and substance. Without limiting the generality of the foregoing, the policies of insurance required hereby shall provide for ten (10) days' prior written notice of cancellation and shall be payable to the Grantor pursuant to a New York standard Grantor endorsement.
- (e) The Grantee shall give prompt written notice to the Grantor in the event of substantial damage to the Project Location by reason of fire or other hazard or casualty.
- (f) Notwithstanding the provisions of Subdivision 4 of Section 254 of the Real Property Law, the Grantor shall be entitled to retain and apply the proceeds of any insurance required hereby to the payment of any obligations or, in the sole discretion of the Grantor, apply any or all such proceeds to the cost of restoration of the Project Location, in which case the Grantee shall proceed with reasonable diligence to repair, replace or rebuild the Project Location to substantially their condition prior to such damage in full compliance with all legal requirements.
- (g) The Grantee shall provide the Grantor with copies of all policies of insurance (or certificates thereof) for the required insurance coverages in form and substance satisfactory to the Grantor. In addition, the Grantee shall provide the Grantor with copies of renewal policies (or certificates thereof) or temporary binders in the event renewal policies have not been issued, in a timely manner. The Grantee must, in any event, provide Grantor with satisfactory confirmation of renewal coverage by the renewal date.
- (h) In the event that the Grantee fails to maintain the insurance required hereby, the Grantor may obtain such insurance and pay the premiums therefor and the Grantee shall, on demand, reimburse the Grantor for any insurance

premiums paid, together with interest thereon computed at the highest rate per annum allowable under New York State law.

- (i) The Grantee will not take any action, or permit any condition to exist, with respect to the Project Location which may, in any manner, partially or wholly invalidate the insurance on the Project Location required hereby.

### 13. Survival of Provisions

It is agreed that: (a) the provisions of Sections 6, 8(g), (j) and (l) and 9, 11, 12, 13, 14, 15, 16, 17, 18, 21 and 22 (except insofar as any of the aforesaid Sections have been waived in accordance with the terms of Exhibit I to this Agreement) shall survive the expiration or early termination of this Agreement; and (b) such expiration or early termination shall not serve to limit, alter or modify any of the Grantee's obligations or responsibilities under the aforesaid Sections, and/or ESD's rights under such Sections, referenced in subsection (a) of this Section 13 of this Agreement. It is further agreed, moreover, that notwithstanding the expiration or early termination of this Agreement, ESD shall nevertheless retain the right to pursue, through and until the expiration of any applicable period of limitations established under the statutory or common law of the State of New York, any claim or claims arising from any Section of this Agreement, including but not limited to the above referenced Sections 6, 8(g), (j) and (l) and 9, 11, 12, 13, 14, 15, 16, 17, 18, 21 and 22 of this Agreement, and the expiration or early termination of this Agreement shall not constitute a defense to any such timely filed claim or cause of action that is asserted on ESD's behalf.

### 14. Notices

- (a) All notices, demands, requests or other communications permitted or required hereunder shall be in writing and shall be transmitted either:
  - (i) via certified or registered United States mail, return receipt requested;
  - (ii) by facsimile transmission;
  - (iii) by personal delivery;
  - (iv) by expedited delivery service; or
  - (v) by e-mail.

Such notices shall be addressed as follows or to such different addresses as the parties may from time-to-time designate:

#### Empire State Development

Name: «Project\_Manager»  
Title: Project Manager  
Address: 633 Third Avenue, New York, NY 10017  
Telephone Number: «Project\_Mgr\_Phone»

E-Mail Address: «Project\_Mgr\_email»

With a copy to:

Title: General Counsel  
Address: 633 Third Avenue, 37<sup>th</sup> Floor, New York, NY 10017  
Telephone Number: (212) 803-3750  
Facsimile Number: (212) 803-3975

<<Orgn Name Client>>

Name: <<Contact\_Name\_Client>>  
Title: <<Contact\_Title\_Client>>  
Address: <<Street\_Address\_Client>>, <<CitySTZip\_Client>>  
Telephone Number: <<Phone\_Client>>  
E-Mail Address: <<Email\_Client>>

- (b) Any such notice shall be deemed to have been given either at the time of personal delivery or, in the case of expedited delivery service or certified or registered United States mail, as of the date of mailing to the address provided herein, or in the case of facsimile transmission or email, upon receipt of a record, by the sender, that such a transmission has been completed.
- (c) The parties may, from time to time, specify any new or different address in the United States as their address for purpose of receiving notice under this Agreement by giving fifteen (15) days written notice to the other party sent in accordance herewith. The parties agree to mutually designate individuals as their respective representatives for the purposes of receiving notices under this Agreement. Additional individuals may be designated in writing by the parties for purposes of implementation and administration/billing, resolving issues and problems and/or for dispute resolution.

#### 15. No Assignment

The Grantee may not assign or transfer this Agreement or any of its rights hereunder.

#### 16. No Waiver

No waiver of any ESD's rights arising under this Agreement, or any other source, can occur unless such waiver shall be in writing and signed by ESD and such written document manifests a clear and unequivocal intent by ESD to waive its contractual or other legal rights. The term "waiver" as used herein is a term of art as used in the legal profession. ESD may not be estopped from asserting any of its legal rights, including but not limited to its rights under this Agreement, unless ESD has

signed a written document that clearly and unequivocally states that the other party may detrimentally rely upon the terms of such written document. Absent such written document, there shall be no estoppel against ESD and the other parties' alleged detrimental reliance shall be deemed to be unreasonable. The term "estoppel" is used herein is a term of art as used in the legal profession.

#### 17. Integration/Modification

This Agreement contains the entire agreement of the parties with respect to the subject matter hereof and supersedes all prior oral or written agreements or statements relating to such subject matter. In addition, this Agreement and the Security Agreement may be modified only by a written instrument executed by the party against whom enforcement of such modification is sought.

#### 18. Governing Law

This Agreement shall be governed by and construed in accordance with the laws of the State of New York. This Agreement shall be construed without the aid of any presumption or other rule of law regarding construction against the party drafting this Agreement or any part of it. In case any one or more of the provisions of this Agreement shall for any reason be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision hereof and this Agreement shall be construed as if such provision(s) had never been contained herein. In the event of a conflict between the Directors' materials attached hereto as Exhibit A and any other term or condition of this Agreement, then the term or condition of this Agreement shall govern.

#### 19. Confidentiality of Information

Information contained in reports made to ESD or otherwise obtained by ESD relating to trade secrets, operations and commercial or financial information, including but not limited to the nature, amount or source of income, profits, losses, financial condition, marketing plans, manufacturing processes, production costs, productivity rates, or customer lists, provided that such information is clearly marked "Confidential" by the Grantee, will be kept confidential by ESD, to the extent such information is determined by ESD to be exempt from public disclosure under the Freedom of Information Law and not otherwise required by law to be disclosed. Notwithstanding the foregoing, ESD will not be liable for any information disclosed, in ESD's sole discretion, pursuant to the Freedom of Information Law or other applicable law, or which ESD is required to disclose pursuant to legal process.

#### 20. Special Provisions

The Grantee shall comply with the special provisions, if any, set forth in Exhibit J.

## 21. Litigation Costs

The Grantee shall pay, in any action or proceeding that is commenced to enforce and/or involves the enforcement of the terms and conditions of this Agreement, all of ESD's costs including, without limitation, ESD's attorneys' fees. The Grantee shall also pay any and all of ESD's collection costs including, without limitation, its attorneys' fees.

## 22. Waiver

The Grantee knowingly and expressly waives the right to a trial by jury and the right to interpose any counterclaims in any action brought by ESD under the terms of this Agreement.

## 23. Good Faith Marketing Efforts

The Grantee has the responsibility to market and promote broadband networks to obtain new subscribers. Additionally, Grantee has the responsibility to develop a contingency plan to increase adoption rates if initial marketing efforts do not bring in sufficient subscribers. Grantee must document its good faith efforts toward obtaining new subscribers of broadband services offered by providing the following to ESD:

- (1) Copies of its marketing plans and marketing materials
- (2) Copies of any advertisements
- (3) Specific reasons for low adoption rates
- (4) Contingency plan to increase adoption rates

## 24. Security Agreement

Contemporaneously with the delivery of this Agreement, the Grantee and ESD shall enter into a Security Agreement substantially in the form attached hereto as Exhibit P (together with all amendments and supplements thereto hereafter made in conformity therewith and herewith, the "Security Agreement").

This Agreement is entered into as of the latest date written below:

NEW YORK STATE URBAN DEVELOPMENT CORPORATION  
d/b/a EMPIRE STATE DEVELOPMENT

---

(Signature) Edwin Lee, Vice President, Loans and Grants

---

(date)

<<Orgn\_Name\_Client>>

---

(Signature)

---

(Printed name and title)

---

(date)

## ESD CAPITAL GRANT DISBURSEMENT AGREEMENT

### EXHIBITS

EXHIBIT A	General Project Plan
EXHIBIT B	Reports & D&C Requirements
EXHIBIT C	Employment Goals
EXHIBIT D	Opinion of Counsel
EXHIBIT E	Disbursement & Recapture Terms
EXHIBIT F	Payment Requisition Form
EXHIBIT F-1	Financial Condition Documentation
EXHIBIT F-2	Documentation of Project Costs
EXHIBIT F-3	Equity Expenditure and Project Cost Affidavit
EXHIBIT G	Non-Discrimination and Contractor & Supplier Diversity – MWBE Requirements and Procedures
EXHIBIT G-1	M/WBE Participation / Equal Opportunity Policy Statement
EXHIBIT G-2	Staffing Plan
EXHIBIT G-3	Intentionally Deleted
EXHIBIT G-4	M/WBE Utilization Plan
EXHIBIT G-5	Waiver Request Form
EXHIBIT G-6	M/WBE Contractor Compliance and Payment Report
EXHIBIT H	Non-Discrimination and Contractor & Supplier Diversity – SDVOB Requirements and Procedures
EXHIBIT H-1	SDVOB Contract Performance Use Form
EXHIBIT H-2	SDVOB Contractor Compliance and Payment Report

## **EXHIBITS, Cont.**

EXHIBIT I	Employment Reporting Form (With Company's NYS Form 45 Attached)
EXHIBIT J	Special Provisions
EXHIBIT K	Key Project Indicators
EXHIBIT L	Key Project Indicator Report
EXHIBIT M	Broadband Mapping Data Specifications
EXHIBIT N	Project Milestones
EXHIBIT O	Project Milestones Report
EXHIBIT P	The Security Agreement

**EXHIBIT A: GENERAL PROJECT PLAN**

**See Materials Attached**

**EXHIBIT B: REPORTS – DESIGN & CONSTRUCTION REQUIREMENTS**

**Intentionally Deleted**

**EXHIBIT C: EMPLOYMENT GOALS**

**Intentionally Deleted**

## EXHIBIT D: OPINION OF COUNSEL

[Letterhead of Counsel to the Grantee]

[Date]

Empire State Development  
633 Third Avenue  
New York, NY 10017

Attn: «Project\_Manager»

Re: <<Project\_Name>>, Project <<Project\_Number>>

Ladies and Gentlemen:

We have acted as special counsel to <<Orgn\_Name\_Client>>, a business corporation [limited liability company; select one] (the “Grantee”), in connection with the execution and delivery of (a) the Grant Disbursement Agreement dated [Date of Agreement] (the “Agreement”) between New York State Urban Development Corporation d/b/a Empire State Development (“ESD”) and the Grantee, and (b) the Security Agreement, dated as of [DATE] (the “Security Agreement”) between the Grantee and ESD.

This opinion letter is being furnished to you at our client’s request pursuant to Section 3(a) of the Agreement. Capitalized terms used but not defined herein shall have the meanings assigned thereto in the Agreement.

In rendering the opinions set forth herein, we have examined originals, or copies certified or otherwise identified to our satisfaction, of such documents, corporate records and other instruments as we have deemed necessary or appropriate for the purposes of this opinion letter, including (a) the Agreement, (b) the Security Agreement, (c) the certificate of incorporation of the Grantee and (d) the by-laws of the Grantee. We have also examined and relied upon such other matters of law, documents, certificates of public officials and representations of officers and other representatives of the Grantee as we have deemed relevant, appropriate or necessary to the rendering of our opinions.

In rendering the opinions expressed below, we have assumed the legal capacity of all natural persons signing documents and that the signatures of persons signing all documents in connection with which this opinion letter is rendered are genuine, all documents submitted to us as originals or duplicate originals are authentic and all documents submitted to us as copies, whether certified or not, conform to authentic original documents. Additionally, we have assumed and relied upon the accuracy and completeness of all certificates and other statements, documents, records, financial statements and papers reviewed by us, and the accuracy and completeness of all representations, warranties, confirmations, schedules and exhibits contained in the Agreement, with respect to the factual matters set forth therein.

As to any facts material to the opinions expressed herein that we did not independently establish or verify, we have relied upon written statements and representations of officers and other representatives of the Grantee and of certain public officials. We have also assumed and relied upon the accuracy and completeness of all certificates and other statements, representations, documents, records, financial statements and papers reviewed by us, and the accuracy and completeness of all representations, warranties and exhibits contained in the Agreement with respect to the factual matters set forth therein.

Based upon the foregoing and subject to the assumptions, qualifications and other matters set forth herein, we are of the opinion that:

1. The Grantee is validly existing and in good standing under the laws of the State of New York and has full power and authority to execute and deliver the Agreement and to perform its obligations thereunder.

2. The Agreement and the Security Agreement have been duly authorized, executed and delivered by the Grantee and (assuming its due authorization, execution and delivery by ESD) is binding on and enforceable against the Grantee in accordance with their respective terms, subject to applicable bankruptcy, insolvency reorganization, arrangement, liquidation, moratorium, fraudulent conveyance or transfer and other similar laws relating to or affecting creditors' rights generally from time to time in effect and to general principles of equity (regardless of whether enforcement is sought in a proceeding in equity or at law), and except as rights under the Agreement to indemnity and contribution may be limited by federal or state laws.

3. Under the Uniform Commercial Code as in effect on the date hereof in the State of New York (the "NY UCC"), the provisions of the Security Agreement are effective to create a security interest in the Debtor's rights in that portion of the Collateral (as defined in the Security Agreement) in which a security interest may be created under the NY UCC, in favor of the Secured Party to secure the Obligations (as defined in the Security Agreement).

4. Under the Uniform Commercial Code as in effect on the date hereof in [identify name of jurisdiction where financing statement is filed] (the "Filing UCC"), the Financing Statement[s] [is][are] in sufficient form for filing in the [identify filing office[s] where the financing statement is filed] (the "Filing Office[s]"). Under the Filing UCC, the security interest of the Secured Party will be perfected in the Debtor's rights in that portion of the UCC Collateral in which a security interest can be perfected under the Filing UCC by the filing of a financing statement in the Filing Office[s] upon the later of the attachment of the security interest and the filing of the Financing Statement[s] in the Filing Office[s].

We are admitted to practice in the State of New York and we express no opinion as to any matters governed by any laws other than the laws of the State of New York and the Uniform Commercial Code, as in effect on the date hereof in [any jurisdiction other than New York where a financing statement is being filed]. The opinions expressed herein that are based on the laws of the State of New York are limited to the laws generally applicable in transactions of the type covered by the Agreement.

This opinion letter is for the benefit solely of ESD and not for the benefit of any other person. We are opining herein only as of the date hereof and we undertake no, and disclaim any, obligation to advise you of any changes in any matter set forth herein, regardless of whether changes in such matters come to our attention after the date hereof. No attorney-client relationship exists or has existed with ESD by reason of our preparation, execution and delivery of this opinion letter. By providing this opinion letter and permitting reliance hereon by you, we are not acting as your counsel and have not assumed any responsibility to advise you with respect to the adequacy of this opinion letter for your purposes. This opinion letter may not be relied upon by any other person or for any other purpose or used, quoted or otherwise referred to for any other purpose.

Very truly yours,

## EXHIBIT E: DISBURSEMENT AND RECAPTURE TERMS

### Disbursement

Subject to the terms and conditions of this Agreement and receipt of the fees as set forth below, ESD shall disburse the Grant in quarterly disbursements upon submission of the documentation set forth below:

#### Fees due:

Commitment Fee: \$ \_\_\_\_\_ (One percent (1%) of grant amount)

Reimbursement for out-of-pocket expenses \$ \_\_\_\_\_ (To be determined)

TOTAL due: \$ \_\_\_\_\_

#### I. Grant Disbursements

Funds will be disbursed for reimbursement of eligible expenses during the course of design and/or construction as frequently as quarterly, in proportion to ESD funding share of XX% of the total project costs, provided Milestones are achieved. Funds will only be disbursed if the Grantee is in compliance with the terms and conditions of this Agreement. Grantees must submit to ESD, the Report; Updates; Mapping; a Milestones Report; evidence supporting completion of Milestones and Indicators; invoices; and such other documentation as ESD may reasonably require, in the form attached to this Agreement as Exhibit F and its attachments; and Grantee is in compliance with NESC requirements. Failure to submit any of the referenced supporting documents when due may result in deferred distribution of the Grant Funds. Payment will be made upon acceptance by ESD of submitted expenses and documentation. Expenses must be incurred on or after AWARD DATE to be considered eligible project costs. ESD reserves the right to waive the requirement related to the completion of meeting Milestones or Indicators.

#### II. Final Disbursement

The final 10% of the grant will be disbursed as reimbursement for eligible expenses upon project completion, and completion of Indicators and Milestones. Grantees must submit to ESD, a final Report; a final Milestones Report; evidence supporting completion of Indicators and Milestones; invoices; Updates; Mapping; and such other documentation as ESD may reasonably require, in the form attached to this Agreement as Exhibit F and its attachments; and be in compliance with NESC requirements. Payment will be made upon acceptance by ESD of submitted expenses and documentation. Expenses must be incurred on or after AWARD DATE to be considered eligible project costs.

Grantee must submit all documentation for the final disbursement of the Grant for reimbursement of costs associated with design and construction of the Project by no later than \_\_\_\_\_, 20\_\_.

Grantee must submit all documentation for the final disbursement of the Grant for reimbursement of costs associated with installation of service on customer premises by no later than \_\_\_\_\_, 20\_\_.

All disbursements are subject to deferral and recapture as set forth below. ESD has the right to waive the recapture for good cause shown in its absolute discretion. ESD reserves the right to require additional documentation to support payment requisitions.

**Wire Transfer Information:**

Please provide:

-A letter from a financial officer of the company certifying to the accuracy of the following information:

Bank Name: \_\_\_\_\_

ABA #: \_\_\_\_\_

Acct. Name: \_\_\_\_\_

Acct. #: \_\_\_\_\_

**Deferral Terms**

In the event Reports, Updates, Mapping, and Milestone reports are not received in the form and time periods as indicated in Section 2, ESD shall not be obligated to make any further Grant disbursements.

In the event such Reports, Updates, Mapping, and Milestone reports as indicated in Section 2 are not received within 60 days in the form and time periods as indicated in Section 2, Grantee will be in default. However, no default shall be deemed to have occurred if Grantee cures such default within ten (10) days of notice of default from ESD.

**Recapture Terms**

ESD will be entitled to recoup all or part of ESD's grant if the Grantee fails to reach or complete Indicators and Milestones as required by the terms of this Agreement. Grantees who fail to complete Indicators and Milestones shall repay ESD amounts that have been disbursed to the Grantee as set forth below. Grant Funds will also be subject to pro rata recapture if the property at the Project Location is sold within five years of disbursement of funds.

**Recapture Amount**

The Recapture Amount, if the property is sold within 5 years of disbursement or if Grantee fails to complete Indicators or Milestones, is based on the time that has lapsed between when the Grant Funds were disbursed and when the transfer occurred; and/or failure to complete Indicators or Milestones.

- (a) The Recapture Amount, if the property is sold within 5 years of disbursement, shall be calculated by aggregating the Recapture Amount for each disbursement of the Grant, which in each instance shall be equal to:
- (i) 100% of the disbursed amount if the transfer occurred in the calendar year that the disbursement was made, or in the first full calendar year after the disbursement was made;
  - (ii) 80% of the disbursed amount if the transfer occurred in the second full calendar year after the disbursement was made;
  - (iii) 60% of the disbursed amount if the transfer occurred in the third full calendar year after the disbursement was made;
  - (iv) 40% of the disbursed amount if the transfer occurred in the fourth full calendar year after the disbursement was made;
  - (v) 20% of the disbursed amount if the transfer occurred in the fifth full calendar year after the disbursement was made.
- (b) The Recapture Amount, if the failure to complete Indicators or Milestones occurs, shall be calculated by aggregating the Recapture Amount for each disbursement of the Grant, which in each instance shall be equal to:
- (i) 100% of the disbursed amount if 0% of the Milestones and Indicators are completed by the time of submitting final reporting requirements;
  - (ii) 90% of the disbursed amount if 1% to 10% of the Milestones and Indicators are completed by the time of submitting final reporting requirements;
  - (iii) 80% of the disbursed amount if 11% to 20% of the Milestones and Indicators are completed by the time of submitting final reporting requirements;
  - (iv) 70% of the disbursed amount if 21% to 30% of the Milestones and Indicators are completed by the time of submitting final reporting requirements;
  - (v) 60% of the disbursed amount if 31% to 40% of the Milestones or Indicators are completed by the time of submitting final reporting requirements;
  - (vi) 50% of the disbursed amount if 41% to 50% of the Milestones or Indicators are completed by the time of submitting final reporting requirements;
  - (vii) 40% of the disbursed amount if 51% to 60% of the Milestones or Indicators are completed by the time of submitting final reporting requirements;
  - (viii) 30% of the disbursed amount if 61% to 70% of the Milestones or Indicators are completed by the time of submitting final reporting requirements;
  - (ix) 20% of the disbursed amount if 71% to 80% of the Milestones or Indicators are completed by the time of the submitting final reporting requirements;
  - (x) 10% of the disbursed amount if 81% to 90% of the Milestones or Indicators are completed by the time of submitting final reporting requirements;
  - (xi) 5% of the disbursed amount if 90% to 99% of the Milestones or Indicators are completed by the time of submitting final reporting requirements;

ESD has the right to waive the recapture for good cause shown in its absolute discretion.

## EXHIBIT F: CAPITAL GRANT PAYMENT REQUISITION FORM

Note to Grantee: **Do not re-type this form.** Fill in only the version included in the executed GDA.

«Project\_Manager»,  
 Empire State Development  
 633 Third Avenue  
 New York, NY 10017

RE: <<Project\_Name>>, Project <<Project Number>>

Dear «Project\_Manager»:

Enclosed please find our request for payment/reimbursement, in the amount of \$ \_\_\_\_\_.

ESD funds may be applied by Grantee in payment or reimbursement of the following costs:

Invoice #: \_\_\_\_\_

Eligible Expenses	A: Actual Costs Incurred (this request)	B: ESD Share (this request)	C: Cumulative Amount Previously Received from ESD	D: Grant Amount (Cumulative if multi-year grant)	E: (D-C-B) Grant Balance Remaining
Installation and upgrade of existing broadband networks					
Retainage (10% of grant amount)					
TOTAL					

### CERTIFICATION

I hereby warrant and represent to Empire State Development ("ESD") that:

- 1) To the best of my knowledge, information and belief, the expenditures for which <<Orgn\_Name\_Client>> is seeking payment and/or reimbursement comply with the requirements of the Agreement between ESD and <<Orgn\_Name\_Client>>, are eligible expenses, and that the payment and/or reimbursement of expenditures for which it is seeking payment and/or reimbursement from ESD does not duplicate reimbursement or disbursement of costs and/or expenses from any other source. These findings will be subject to audit by ESD's Internal Audit Department.
- 2) I have the authority to submit this invoice on behalf of <<Orgn\_Name\_Client>>. The project, or portion thereof for which this invoice relates, has been completed in the manner outlined in the Agreement.
- 3) I hereby attach the following documents for ESD approval, in support of this requisition:

- \_\_\_ Exhibit F-1: Financial Condition Documentation
- \_\_\_ Exhibit F-2: Documentation of Project Costs
- \_\_\_ Exhibit F-3: Equity Expenditure Documentation [note that this should generally be submitted each time there is a new expenditure level required for disbursement]
- \_\_\_ Exhibit G-2: Staffing Plan
- \_\_\_ Exhibit G-4: M/WBE Utilization Plan
- \_\_\_ Exhibit G-5: Waiver Request Form
- \_\_\_ Exhibit G-6: M/WBE Contractor Compliance and Payment Report
- \_\_\_ Exhibit H-1: SDVOB Contract Performance Use Form
- \_\_\_ Exhibit H-2: SDVOB Contractor Compliance and Payment Report
- \_\_\_ Exhibit K: Key Project Indicator Report
- \_\_\_ Exhibit N: Project Milestones Report

**EXHIBIT F: CAPITAL GRANT PAYMENT REQUISITION FORM, Cont.**

\_\_\_ A copy of all current policies of insurance (or certificates thereof) in full compliance with the terms and conditions of Section 12 of the Agreement

- 4) There have been no materially adverse changes in the financial condition of the Grantee, except as disclosed in writing to ESD, from the date of submission of the Application to the date hereof.
- 5) The Grantee has acted responsibly from the date of submission of the Application to the date hereof in full compliance with the terms and conditions of Section 7 of the Agreement.
- 6) Representations, Warranties and Covenants made in Section 8 of the Agreement are still true, complete and accurate, unless waived in Exhibit I of the Agreement.

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Print Name: \_\_\_\_\_

Title: \_\_\_\_\_

At any point in the course of your project, ESD would appreciate feedback regarding this ESD program. Please comment on the application, project approval, and/or payment reimbursement process or any other interactions with ESD related to the project. You may submit your feedback under separate cover to Edwin Lee, VP – Loans and Grants, 633 Third Avenue, NY, NY 10017. Please include your Project Number and Project Name which are listed at the top of this exhibit on your submission.

Thank you.

## EXHIBIT F-1: FINANCIAL CONDITION DOCUMENTATION

[Letterhead of CPA]

(Date)

«Project\_Manager»  
Broadband Project Manager  
NYS Department of Economic Development  
633 Third Avenue  
New York, NY 10017

Re: <<Project\_Name>>, Project <<Project Number>>  
**Bankruptcy Filing or Default on Debt Obligations**

Dear [Project Manager]:

In preparation for closing on the above-referenced project, [name of CPA firm] has performed the procedures enumerated below, which were agreed to by <<Orgn\_Name\_Client>> (the “Company”) and Empire State Development (“ESD”) (collectively the “specified parties”). The Company is responsible for its books and records and for notifying ESD of any materially adverse changes in its financial condition. These procedures are being performed solely to assist ESD in determining whether there has been a bankruptcy filing of the Company or whether the Company has experienced a default on any of its debt obligations subsequent to the date of the ESD Directors’ approval of the project on <<Approval\_Date>>.

This agreed-upon procedures engagement was conducted in accordance with attestation standards established by the American Institute of Certified Public Accountants. The sufficiency of these procedures is solely the responsibility of those parties specified in this report. Consequently, we make no representation regarding the sufficiency of the procedures described below either for the purpose for which this report has been requested or for any other purpose. Our procedures and findings are as follows:

1. Obtain from the Company, their most recent historical financial statements that have been prepared subsequent to the project’s approval date. Read the financial statements for the purpose of noting whether there is any indication that the company has filed bankruptcy or whether the entity has experienced a default on any of its debt obligations. Report as a finding any indication that the Company may have filed for bankruptcy or has experienced a default subsequent to the Project’s approval date.
2. Request all minutes of the board of directors and other committee meetings since the date of the project’s approval. If minutes are not available, obtain any abstracts or notes from such meetings. Read the minutes or abstracts and report as a finding any indication that the Company has filed for bankruptcy or whether the entity has

experienced a default on any of its debt obligations subsequent to the project's approval date.

3. Obtain a description and evaluation of any pending litigation, claims, or assessments and examine supporting documents, including legal correspondence. Report as a finding any indication that the Company may have filed for bankruptcy or whether the entity has experienced a default on any of its debt obligations subsequent to the project's approval date.
4. Obtain or prepare an analysis of notes payable, long-term debt, capitalized lease obligations, and other financing transactions or arrangements, such as lines of credit that existed as of the project's approval date. Compare balances in the company's liability accounts to debt amortization schedules and, if applicable, to the terms of new debt agreements. Report any findings of default.

[Findings should be listed here. If there were no findings, the CPA should state "We found no exceptions or matters to report as a result of our procedures"]

We were not engaged to and did not conduct an audit or an examination, the objective of which would be the expression of an opinion. Accordingly, we do not express such an opinion. Had we performed additional procedures, other matters might have come to our attention that would have been reported to you.

This report is intended solely for the information and use of the specified parties and is not intended to be and should not be used by anyone other than these specified parties.

Sincerely,

\_\_\_\_\_, CPA

NEW YORK STATE URBAN DEVELOPMENT CORPORATION  
d\b\ a EMPIRE STATE DEVELOPMENT  
<<Project\_Name>>, Project Number <<Project Number>>

**EXHIBIT F-2: DOCUMENTATION OF PROJECT COSTS**

[CPA Letterhead]

**Report of Independent Accountants**

Date

Contact: <<Contact\_Name\_Client>>,  
<<Contact\_Title\_Client>>  
<<Orgn\_Name\_Client>>  
<<Street\_Address\_Client>>  
<<CitySTZip\_Client>>

Re: <<Project\_Name>>, Project <<Project Number>>  
Verification of Project Costs

We have performed the procedures enumerated below, which were agreed to by <<Orgn\_Name\_Client>> (the “Company”) and Empire State Development (“ESD”) (collectively the “specified parties”), solely to assist ESD in determining whether cost expenditures were incurred in a manner established by the project documents as follows:

Management is responsible for <<Orgn\_Name\_Client>>’s compliance with those requirements. This agreed-upon procedures engagement was conducted in accordance with attestation standards established by the American Institute of Certified Public Accountants. The sufficiency of these procedures is solely the responsibility of those parties specified in this report. Consequently, we make no representation regarding the sufficiency of the procedures described below either for the purpose for which this report has been requested or for any other purpose. Our procedures and findings are as follows:

1. Obtained the attached “Statement of Actual Costs” for the Project (<<Project\_Name, <<Project\_Number>>) prepared by the Company.
2. Agreed the total per the Statement of Actual Costs to the Company’s financial accounting records – the fixed asset subledger (...or name appropriate financial record report)
3. For costs and expenses appearing on the Statement of Actual Costs, selected a sample for detailed testing of underlying transactions. [CPA will indicate method of selection, dollar value and percentage of items sampled.]

4. For each asset or expense item selected, obtained the supporting documentation, such as purchase orders, receiving reports, invoices and cancelled checks as deemed appropriate [CPA will indicate which documentation was used].
5. Examined the supporting documentation for sampled items, noting the invoice date, invoice number and invoice amount. Agreed the dollar amount on the invoice to the Company's financial accounting records (fixed asset subledger – or appropriate report name) and the statement of actual costs.
6. For each invoice examined, obtained the related wire transfer documentation noting the wire transfer date, number, and amount. Then, agreed the wire transfer amount to the vendor invoice amount.
7. For each asset or expense item selected, determined that such sampled item is a capital expense in accordance with applicable state and federal law.

[Summarize any exceptions, if applicable]

We were not engaged to and did not conduct an examination, the objective of which would be the expression of an opinion on compliance. Accordingly, we do not express such an opinion. Had we performed additional procedures, other matters might have come to our attention that would have been reported to you.

This report is intended solely for the information and use of the specified parties and is not intended to be and should not be used by anyone other than these specified parties.

(CPA)

Attachment: Statement of Actual Costs, (<<Project\_Name>>, <<Project\_Number>>)

Specified Party Contact Information:

Empire State Development  
633 Third Avenue  
New York, NY 10017  
(«Project\_Manager»)



**EXHIBIT G: PARTICIPATION BY MINORITY GROUP MEMBERS AND WOMEN WITH  
RESPECT TO STATE CONTRACTS: REQUIREMENTS AND PROCEDURES**

**I. General Provisions**

- A. Empire State Development (“ESD”) is required to implement the provisions of New York State Executive Law Article 15-A and 5 NYCRR Parts 140-145 (“MWBE Regulations”) for all State contracts as defined therein, with a value (1) in excess of \$25,000 for labor, services, equipment, materials, or any combination of the foregoing or (2) in excess of \$100,000 for real property renovations and construction.
- B. The Recipient to the subject Grant Disbursement Agreement ( the “Contractor” and the “Contract,” respectively) agrees, in addition to any other nondiscrimination provision of the Contract and at no additional cost to the ESD, to fully comply and cooperate with ESD in the implementation of New York State Executive Law Article 15-A. These requirements include equal employment opportunities for minority group members and women (“EEO”) and contracting opportunities for certified minority and women-owned business enterprises (“MWBEs”). The Contractor’s demonstration of “good faith efforts” pursuant to 5 NYCRR § 142.8 shall be a part of these requirements. These provisions shall be deemed supplementary to, and not in lieu of, the nondiscrimination provisions required by New York State Executive Law Article 15 (the “Human Rights Law”) or other applicable federal, state or local laws.
- C. Failure to comply with all of the requirements herein may result in a finding of non-responsiveness, non-responsibility and/or a breach of contract, leading to the withholding of funds or such other actions, liquidated damages pursuant to Section VII of this Appendix or enforcement proceedings as allowed by the Contract.

**II. Contract Goals**

- A. For purposes of this project, ESD hereby establishes an overall goal of \_\_\_% for MWBE participation, \_\_\_% for New York State certified minority-owned business enterprises (“MBE”) participation and \_\_\_% for New York State certified women-owned business enterprises (“WBE”) participation (collectively, “MWBE Contract Goals”) based on the current availability of qualified MBEs and WBEs.
- B. For purposes of providing meaningful participation by MWBEs on the project and achieving the MWBE Contract Goals established in Section II-A hereof, the Contractor should reference the directory of New York State Certified MBWEs found at the following internet address: <https://ny.newnycontracts.com>.

Additionally, the Contractor is encouraged to contact the Division of Minority and Women’s Business Development (518) 292-5250; (212) 803-2414; or (716) 846-8200) to discuss additional methods of maximizing participation by MWBEs on the project.

**EXHIBIT G: PARTICIPATION BY MINORITY GROUP MEMBERS AND WOMEN WITH  
RESPECT TO STATE CONTRACTS: REQUIREMENTS AND PROCEDURES**

- C. Where MWBE Contract Goals have been established herein, pursuant to 5 NYCRR § 142.8, the Contractor must document “good faith efforts” to provide meaningful participation by MWBEs as subcontractors or suppliers in the performance of the Contract. In accordance with Section 316-a of Article 15-A and 5 NYCRR § 142.13, the Contractor acknowledges that if it is found to have willfully and intentionally failed to comply with the MWBE participation goals set forth in the Contract, such a finding constitutes a breach of contract and the Contractor shall be liable to the ESD for liquidated or other appropriate damages, as set forth herein.

**III. Equal Employment Opportunity (EEO)**

- A. The Contractor agrees to be bound by the provisions of Article 15-A and the MWBE Regulations promulgated thereunder by the Division of Minority and Women’s Business Development of the New York State Department of Economic Development (the “Division”). If any of these terms or provisions conflict with applicable law or regulations, such laws and regulations shall supersede these requirements.
- B. The Contractor shall comply with the following provisions of Article 15-A:
1. Each Contractor and subcontractor performing work on the Contract shall undertake or continue existing EEO programs to ensure that minority group members and women are afforded equal employment opportunities without discrimination because of race, creed, color, national origin, sex, age, disability or marital status. For these purposes, EEO shall apply in the areas of recruitment, employment, job assignment, promotion, upgrading, demotion, transfer, layoff, or termination and rates of pay or other forms of compensation.
  2. The Contractor shall submit an EEO policy statement to ESD within seventy two (72) hours after the date of the notice by ESD to award the Contract to the Contractor.
  3. If the Contractor or Subcontractor does not have an existing EEO policy statement, the ESD may provide the Contractor or Subcontractor a model statement (see Form OCSD-1 – Minority and Women-Owned Business Enterprises Equal Employment Opportunity Policy Statement).
  4. The Contractor’s EEO policy statement shall include the following language:
    - a. The Contractor will not discriminate against any employee or applicant for employment because of race, creed, color, national origin, sex, age, disability or marital status, will undertake or continue existing EEO programs to ensure that minority group members and women are afforded equal employment opportunities without discrimination, and shall make and document its conscientious and active efforts to employ and utilize minority group members and women in its work force.
    - b. The Contractor shall state in all solicitations or advertisements for employees that, in the performance of the contract, all qualified applicants will be afforded equal employment opportunities without discrimination

**EXHIBIT G: PARTICIPATION BY MINORITY GROUP MEMBERS AND WOMEN WITH RESPECT TO STATE CONTRACTS: REQUIREMENTS AND PROCEDURES**

because of race, creed, color, national origin, sex, age, disability or marital status.

- c. The Contractor shall request each employment agency, labor union, or authorized representative of workers with which it has a collective bargaining or other agreement or understanding, to furnish a written statement that such employment agency, labor union, or representative will not discriminate on the basis of race, creed, color, national origin, sex age, disability or marital status and that such union or representative will affirmatively cooperate in the implementation of the Contractor's obligations herein.
- d. The Contractor will include the provisions of Subdivisions (a) through (c) of this Subsection 4 and Paragraph "E" of this Section III, which provides for relevant provisions of the Human Rights Law, in every subcontract in such a manner that the requirements of the subdivisions will be binding upon each Subcontractor as to work in connection with the Contract.

**C. Form OCSD-2 – Staffing Plan**

To ensure compliance with this Section, for contracts with a total expenditure in excess of \$250,000, the Contractor shall submit a staffing plan to document the composition of the proposed workforce to be utilized in the performance of the Contract by the specified categories listed, including ethnic background, gender, and Federal occupational categories. The Contractor shall complete the Staffing plan form and submit it as part of their bid or proposal or within a reasonable time, but no later than the time of award of the contract.

- D. The Contractor shall comply with the provisions of the Human Rights Law, all other State and Federal statutory and constitutional non-discrimination provisions. The Contractor and Subcontractors shall not discriminate against any employee or applicant for employment because of race, creed (religion), color, sex, national origin, sexual orientation, military status, age, disability, predisposing genetic characteristic, marital status or domestic violence victim status, and shall also follow the requirements of the Human Rights Law with regard to non-discrimination on the basis of prior criminal conviction and prior arrest.

**IV. MWBE Utilization Plan**

- A. The Contractor represents and warrants that Contractor has submitted an MWBE Utilization Plan, Form OCSD-4, by submitting evidence thereof through the New York State Contract System ("NYSCS"), which can be viewed at <https://ny.newnycontracts.com>, provided, however, that the Contractor may arrange to provide such evidence via a non-electronic method to ESD, either prior to, or at the time of, the execution of the contract.
- B. The Contractor agrees to use such MWBE Utilization Plan for the performance of MWBEs on the project pursuant to the prescribed MWBE goals set forth in Section III-A of this Exhibit.

## **EXHIBIT G: PARTICIPATION BY MINORITY GROUP MEMBERS AND WOMEN WITH RESPECT TO STATE CONTRACTS: REQUIREMENTS AND PROCEDURES**

- C. The Contractor further agrees that a failure to submit and/or use such MWBE Utilization Plan shall constitute a material breach of the terms of the Contract. Upon the occurrence of such a material breach, ESD shall be entitled to any remedy provided herein, including but not limited to, a finding of the Contractor's non-responsiveness.

### **V. Waivers**

- A. For Waiver Requests, the Contractor should use the NYSCS, provided, however, that Contractor may arrange to provide such evidence via a non-electronic method to ESD.
- B. If the Contractor, after making good faith efforts, is unable to comply with MWBE goals, the Contractor may submit a Request for Waiver documenting good faith efforts by the Contractor to meet such goals. If the documentation included with the waiver request is complete, the ESD shall evaluate the request and issue a written notice of acceptance or denial within twenty (20) days of receipt.
- C. If ESD, upon review of the MWBE Utilization Plan and updated Quarterly MWBE Contractor Compliance Reports determines that the Contractor is failing or refusing to comply with the MWBE Contract Goals and no waiver has been issued in regards to such non-compliance, the ESD may issue a notice of deficiency to the Contractor. The Contractor must respond to the notice of deficiency within seven (7) business days of receipt. Such response may include a request for partial or total waiver of MWBE Contract Goals.

### **VI. Quarterly MWBE Contractor Compliance Report**

The Contractor is required to submit a Quarterly MWBE Contractor Compliance Report through the NYSCS, provided, however, that Bidder may arrange to provide such evidence via a non-electronic method to ESD by the 10<sup>th</sup> day following each end of quarter over the term of the Contract documenting the progress made towards achievement of the MWBE goals of the Contract.

### **VII. Liquidated Damages - MWBE Participation**

- A. Where ESD determines that the Contractor is not in compliance with the requirements of the Contract and the Contractor refuses to comply with such requirements, or if the Contractor is found to have willfully and intentionally failed to comply with the MWBE participation goals, the Contractor shall be obligated to pay to ESD liquidated damages.
- B. Such liquidated damages shall be calculated as an amount equaling the difference between:
  - 1. All sums identified for payment to MWBEs had the Contractor achieved the contractual MWBE goals; and

**EXHIBIT G: PARTICIPATION BY MINORITY GROUP MEMBERS AND WOMEN WITH  
RESPECT TO STATE CONTRACTS: REQUIREMENTS AND PROCEDURES**

2. All sums actually paid to MWBEs for work performed or materials supplied under the Contract.
- C. In the event a determination has been made which requires the payment of liquidated damages and such identified sums have not been withheld by ESD, the Contractor shall pay such liquidated damages to ESD within sixty (60) days after they are assessed by the ESD unless prior to the expiration of such sixtieth day, the Contractor has filed a complaint with the Director of the Division pursuant to Subdivision 8 of Section 313 of the Executive Law in which event the liquidated damages shall be payable if the Director renders a decision in favor of ESD.



**EXHIBIT G-1: OFFICE OF CONTRACTOR AND SUPPLIER DIVERSITY  
M/WBE PARTICIPATION / EQUAL EMPLOYMENT OPPORTUNITY POLICY STATEMENT**

I, \_\_\_\_\_ (CONTRACTOR OR GRANT REPRESENTATIVE),

the \_\_\_\_\_ (GRANTEE/COMPANY NAME)

agree to adopt the following policies with respect to the project being developed or services rendered at

\_\_\_\_\_.

**NON-DISCRIMINATION AND EQUAL EMPLOYMENT OPPORTUNITY POLICY**

- (a) This organization will not discriminate against any employee or applicant for employment because of race, creed, color, national origin, sex, age, disability or marital status, will undertake or continue existing programs of affirmative action to ensure that minority group members are afforded equal employment opportunities without discrimination, and shall make and document its conscientious and active efforts to employ and utilize minority group members and women in its work force on state contracts.
- (b) This organization shall state in all solicitation or advertisements for employees that in the performance of the State contract all qualified applicants will be afforded equal employment opportunities without discrimination because of race, creed, color, national origin, sex, age, disability or marital status and that such union or representative will affirmatively cooperate in the implementation of this organization’s obligations herein.
- (c) At the request of the ESD, this organization shall request each employment agency, labor union, or authorized representative will not discriminate on the basis of race, creed, color, national origin, sex, age, disability or marital status and that such union or representative will affirmatively cooperate in the implementation of this organization’s obligations herein.
- (d) Organization shall comply with the provisions of the Human Rights Law, all other State and Federal statutory and constitutional non-discrimination provisions. The organization and its sub-vendors shall not discriminate against any employee or applicant for employment because of race, creed (religion), color, sex, national origin, sexual orientation, military status, age, disability, predisposing genetic characteristic, marital status or domestic violence victim status, and shall also follow the requirements of the Human Rights Law with regard to non-discrimination on the basis of prior criminal conviction and prior arrest.
- (e) The organization will include the provisions of sections (a) through (d) of this agreement in every subcontract in such a manner that the requirements of the subdivisions will be binding upon each subcontractor as to work in connection with this contract.

**MWBE PARTICIPATION (MWBE)**



**EXHIBIT G-1: OFFICE OF CONTRACTOR AND SUPPLIER DIVERSITY**  
**M/WBE PARTICIPATION / EQUAL EMPLOYMENT OPPORTUNITY POLICY STATEMENT**

This organization will and will cause its contractors and subcontractors to take good faith actions to achieve the M/WBE contract participation goals set by the State for that area in which the State-funded project is located, by taking the following steps:

- (1) Actively and affirmatively solicit bids for contracts and subcontracts from qualified State certified MBEs or WBEs, including solicitations to M/WBE contractor associations.
- (2) Request a list of State-certified M/WBEs from ESD’s Office of Contractor and Supplier Diversity (“OCSD”) and solicit bids from the listed vendors directly. OCSD may be reached via email at [OCSD@ESD.NY.GOV](mailto:OCSD@ESD.NY.GOV).
- (3) Ensure that plans, specifications, request for proposals and other documents used to secure bids will be made available in sufficient time for review by prospective M/WBEs.
- (4) Where feasible, divide the work into smaller portions to enhanced participations by M/WBEs and encourage the formation of joint venture and other partnerships among M/WBE contractors to enhance their participation.
- (5) Document and maintain records of bid solicitation, including those to M/WBEs and the results thereof. Contractor will also maintain records of actions that its subcontractors have taken toward meeting M/WBE contract participation goals.  
Ensure that progress payments to M/WBEs are made on a timely basis so that undue financial hardship is avoided, and that bonding and other credit requirements are waived or appropriate alternatives developed to encourage M/WBE participation.

Agreed on this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_\_.

By: \_\_\_\_\_  
(SIGNATURE)

**Print Name:** \_\_\_\_\_

**Title:** \_\_\_\_\_

**Minority & Women-owned Business Enterprise-Equal Employment Opportunity Liaison**

\_\_\_\_\_ (name of designated contractor/grantee liaison) is designated as the Minority and Women-owned Business Enterprise Liaison responsible for administering the Minority and Women-owned Business Enterprises-Equal Employment Opportunity (M/WBE-EEO) program.



# Empire State Development

## EXHIBIT G-1: OFFICE OF CONTRACTOR AND SUPPLIER DIVERSITY M/WBE PARTICIPATION / EQUAL EMPLOYMENT OPPORTUNITY POLICY STATEMENT

### M/WBE Contract Goals

### EEO Contract Goals

\_\_\_\_% Minority Business Enterprise Participation

NOT APPLICABLE % Minority Labor Force Participation

\_\_\_\_% Women's Business Enterprise Participation

NOT APPLICABLE % Female Labor Force Participation

\_\_\_\_% **TOTAL/OVERALL M/WBE Participation Goal**

\_\_\_\_\_  
(Signature of Contractor's Authorized Representative)

**\*Name:** \_\_\_\_\_

**\*Company:** \_\_\_\_\_

**\*Title:** \_\_\_\_\_

**\*Phone:** \_\_\_\_\_

**\*Fax:** \_\_\_\_\_

**\*Address:** \_\_\_\_\_

\_\_\_\_\_





EXHIBIT G-2: OFFICE OF CONTRACTOR AND SUPPLIER DIVERSITY STAFFING PLAN

<b>PREPARED BY (Signature):</b>	<b>NAME:</b>	<b>ALTERNATE TEL:</b>
<b>DATE:</b>	<b>TITLE:</b>	<b>EMAIL:</b>
	<b>TELEPHONE:</b>	<b>OTHER:</b>

General Instructions: All Contractors and each subcontractor identified in the bid or proposal must complete an EEO Staffing Plan (Form OCSD-2) and submit it as part of the bid or proposal package. Where the work force to be utilized in the performance of the State contract can be separated out from the contractor’s and/or Subcontractor’s total work force, the Contractor shall complete this form only for the anticipated work force to be utilized on the State contract. Where the work force to be utilized in the performance of the State contract cannot be separated out from the contractor’s and/or Subcontractor’s total work force, the Contractor shall complete this form for the contractor’s and/or Subcontractor’s total work force.

Instructions:

1. Enter the Contract or Solicitation number that this report applies to along with the name and address of your company or organization.
2. Check off the appropriate box to indicate if the Contractor completing the report is the contractor or a subcontractor.
3. Check off the appropriate box to indicate work force to be utilized on the contract or the Contractor’s total work force.
4. Enter the total work force by EEO job category.
5. Break down the anticipated total work force by gender and enter under the heading ‘Work force by Gender’
6. Break down the anticipated total work force by race/ethnic identification and enter under the heading ‘Work force by Race/Ethnic Identification’. Contact the M/WBE Permissible contact(s) for the solicitation if you have any questions.
7. Enter information on disabled or veterans included in the anticipated work force under the appropriate headings.
8. Enter the name and contact details of the person completing the form. Sign and date the form in the designated boxes.

RACE/ETHNIC IDENTIFICATION:

Race/ethnic designations as used by the Equal Employment Opportunity Commission do not denote scientific definitions of anthropological origins. For the purposes of this report, an employee may be included in the group to which he or she appears to belong, identifies with, or is regarded in the community as belonging. However, no person should be counted in more than one race/ethnic group. The race/ethnic categories for this survey are:

- o **WHITE** (Not of Hispanic origin) All persons having origins in any of the original peoples of Europe, North Africa, or the Middle East.
- o **BLACK** a person, not of Hispanic origin, who has origins in any of the black racial groups of the original peoples of Africa.
- o **HISPANIC** a person of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish culture or origin, regardless of race.
- o **ASIAN & PACIFIC ISLANDER** a person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent or the Pacific Islands.
- o **NATIVE INDIAN (NATIVE AMERICAN/ALASKAN NATIVE)** a person having origins in any of the original peoples of North America, and who maintains cultural identification through tribal affiliation or community recognition.





**Empire State  
Development**

**EXHIBIT G-3: OFFICE OF CONTRACTOR AND SUPPLIER DIVERSITY  
WORKFORCE UTILIZATION REPORT**

**Intentionally Deleted**



**Empire State  
Development**

**EXHIBIT G-3: OFFICE OF CONTRACTOR AND SUPPLIER DIVERSITY  
WORKFORCE UTILIZATION REPORT**

**Intentionally Deleted**



**EXHIBIT G-5: OFFICE OF CONTRACTOR AND SUPPLIER DIVERSITY  
WAIVER REQUEST FORM**

INSTRUCTIONS: This form must be submitted with any bid, proposal, or proposed negotiated contract or within a reasonable time thereafter, but prior to contract award. This MWBE Utilization Plan must contain a detailed description of the supplies and/or services to be provided by each certified Minority and Women-owned Business Enterprise (M/WBE) under the contract. Attach additional sheets if necessary.

\*Contractor Name: \_\_\_\_\_ Address: \_\_\_\_\_  
 \*Representative Name: \_\_\_\_\_ Town, State & Zip: \_\_\_\_\_  
 \*Phone: \_\_\_\_\_ \*ESD Contract/Project Number: \_\_\_\_\_  
 \*Fax: \_\_\_\_\_ RFP/RFQ/Solicitation Number: \_\_\_\_\_  
 \*Email: \_\_\_\_\_ \*MWBE Goals: MBE \_\_\_% + WBE \_\_\_% = MWBE GOAL \_\_\_%

1. *Certified M/WBE Firm Name, Contact Person's Name, Address, Phone and Email.	2. * MBE / WBE / or BOTH	3. Federal ID No.	4. Detailed Description of Work (Attach additional sheets, if necessary, Attach Contract if available)	5. Dollar Value of Contract (if unavailable or yet undetermined, indicate \$1)
A.	<u>NYS ESD CERTIFIED</u> <input type="checkbox"/> MBE <input type="checkbox"/> WBE			
B.	<u>NYS ESD CERTIFIED</u> <input type="checkbox"/> MBE <input type="checkbox"/> WBE			



**EXHIBIT G-5: OFFICE OF CONTRACTOR AND SUPPLIER DIVERSITY  
WAIVER REQUEST FORM**

6. If unable to fully meet the M/WBE goals set forth in the contract, the Contractor must submit a Waiver Request form, which may be obtained from the Office of Contractor and Supplier Diversity, at [OCSD@ESD.NY.GOV](mailto:OCSD@ESD.NY.GOV).

PREPARED BY (Signature): \_\_\_\_\_ DATE: \_\_\_\_\_

Preparer's Name (Print or Type): \_\_\_\_\_

Preparer's Title: \_\_\_\_\_

Date: \_\_\_\_\_

SUBMISSION OF THIS FORM CONSTITUTES THE CONTRACTOR'S ACKNOWLEDGEMENT AND AGREEMENT TO COMPLY WITH THE M/WBE REQUIREMENTS SET FORTH UNDER NYS EXECUTIVE LAW, ARTICLE 15-A, 5 NYCRR PART 143, AND THE ABOVE-REFERENCED SOLICITATION. FAILURE TO SUBMIT COMPLETE AND ACCURATE INFORMATION MAY RESULT IN A FINDING OF NONCOMPLIANCE AND POSSIBLE TERMINATION OF YOUR CONTRACT.

TELEPHONE NO.:

EMAIL ADDRESS:

**\*\* FOR OCSD-M/WBE USE ONLY**

**\*\***

REVIEWED BY:

DATE:

**UTILIZATION PLAN APPROVED?**

YES  NO Date:

**Contract No.:**

**Project No. (if applicable):**

**Contract Award Date:**

**Estimated Date of Completion:**

**Amount Obligated Under the Contract:**

**Description of Work:**

**NOTICE OF DEFICIENCY ISSUED?**

YES  NO Date of Issue:

**NOTICE OF ACCEPTANCE ISSUED?**

YES  NO Date of Issue:



# Empire State Development

## EXHIBIT G-5: OFFICE OF CONTRACTOR AND SUPPLIER DIVERSITY WAIVER REQUEST FORM

<b>Waiver Applicant</b>	
Contractor Name:	Fed ID No.:
Full Address:	Contract / RFP Number:
Project Details (Contract Name, Project Location):	Have you Previously submitted a Waiver Request? (YES/NO)
<p><b>By submitting this form and the required information, the Contractor certifies that every "Good Faith Effort" has been taken to promote MWBE participation pursuant to the MWBE requirements set forth under the contract. Review 5 NYCRR §142.8, Contractor's Good Faith Efforts, on pages three and four of this form for the precise definition of "Good Faith Effort". Failure to adequately demonstrate Good Faith Efforts will result in a denial of your Waiver Request. It is the Contractor's responsibility to ensure that adequate, clear and complete information is presented to the Office of Contractor and Supplier Diversity (OCS).</b></p>	



# Empire State Development

## EXHIBIT G-5: OFFICE OF CONTRACTOR AND SUPPLIER DIVERSITY WAIVER REQUEST FORM

**\*CURRENT CONTRACT VALUE: \$**

**\*CURRENT MBE & WBE GOALS:**

MBE: \_\_\_\_\_% + WBE: \_\_\_\_\_% = **OVERALL MWBE GOAL: \_\_\_\_\_%**

INDICATE ONLY THE OVERALL MWBE GOAL IF SPECIFIC MBE AND WBE GOALS WERE NOT ASSIGNED.

**\*CONTRACTOR IS REQUESTING :**

1.  **MBE Waiver** – A waiver of the MBE Goal for this procurement is requested.  
CURRENT MBE GOAL: \_\_\_\_\_%  
REQUESTED MBE GOAL: \_\_\_\_\_%
2.  **WBE Waiver** – A waiver of the WBE Goal for this procurement is requested.  
CURRENT WBE GOAL: \_\_\_\_\_%  
REQUESTED WBE GOAL: \_\_\_\_\_%
3.  **OVERALL MWBE Waiver** – A waiver of the MWBE Goal for this procurement is requested.  
CURRENT OVERALL MWBE GOAL: \_\_\_\_\_%  
REQUESTED MWBE GOAL: \_\_\_\_\_%

PREPARED BY (Signature): \_\_\_\_\_ Date: \_\_\_\_\_

SUBMISSION OF THIS FORM CONSTITUTES THE CONTRACTOR'S ACKNOWLEDGEMENT AND AGREEMENT THAT IT HAS MADE GOOD FAITH EFFORTS, PURSUANT TO 5 NYCRR §142.8, TO INCLUDE THE PARTICIPATION OF NEW YORK STATE CERTIFIED MINORITY AND WOMEN OWNED BUSINESSES IN THE ABOVE PROJECT OR CONTRACT. CONTRACTOR HEREBY AGREES TO PROVIDE ANY AND ALL RELEVANT DOCUMENTATION IN SUPPORT OF THE DEMONSTRATION OF ITS GOOD FAITH EFFORTS AND ACKNOWLEDGES THAT IT HAS PROVIDED WITH THIS WAIVER REQUEST ALL AVAILABLE DOCUMENTATION SUPPORTING ITS GOOD FAITH EFFORTS.

<b>*Name and Title of Preparer:</b>	<b>*Telephone Number:</b>	<b>*Email:</b>
Submit with the bid or proposal or if submitting after award submit to:  <b>Empire State Development Corporation</b>	<b>***** FOR M/WBE USE ONLY *****</b>	
	<b>REVIEWED BY:</b>	<b>DATE:</b>



# Empire State Development

## EXHIBIT G-5: OFFICE OF CONTRACTOR AND SUPPLIER DIVERSITY WAIVER REQUEST FORM

<p><b>Office of Contractor and Supplier Diversity</b> 633 Third Avenue, 35<sup>th</sup> 3Floor New York, New York 10017</p>	<p>Waiver Granted: <input type="checkbox"/> YES      MBE: <input type="checkbox"/>      WBE: <input type="checkbox"/></p> <p><input type="checkbox"/> Total Waiver      <input type="checkbox"/> Partial Waiver</p> <p><input type="checkbox"/> ESD Certification Waiver      <input type="checkbox"/> *Conditional</p> <p><input type="checkbox"/> Notice of Deficiency Issued _____</p> <p>* <u>Comments:</u></p> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
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**EXHIBIT G-5: OFFICE OF CONTRACTOR AND SUPPLIER DIVERSITY**

**WAIVER REQUEST FORM**

**5 NYCRR §142.8 - Contractor's Good Faith Efforts**

- (a) The contractor must document its good faith efforts toward meeting certified minority and women-owned business enterprise utilization plans by providing, at a minimum:
- (1) Copies of its solicitations of certified minority and women-owned business enterprises and any responses thereto;
  - (2) If responses to the contractor's solicitations were received, but a certified minority or woman-owned business enterprise was not selected, the specific reasons that such enterprise was not selected;
  - (3) Copies of any advertisements for participation by certified minority and women-owned business enterprises timely published in appropriate general circulation, trade and minority or women-oriented publications, together with the listing(s) and date(s) of the publication of such advertisements;
  - (4) Copies of any solicitations of certified minority and/or women-owned business enterprises listed in the directory of certified businesses;
  - (5) The dates of attendance at any pre-bid, pre-award, or other meetings, if any, scheduled by the State agency awarding the State contract, with certified minority and women-owned business enterprises which the State agency determined were capable of performing the State contract scope of work for the purpose of fulfilling the contract participation goals;
  - (6) Information describing the specific steps undertaken to reasonably structure the contract scope of work for the purpose of subcontracting with, or obtaining supplies from, certified minority and women-owned business enterprises.
- (b) In addition to the information provided by the contractor in paragraph (a) above, the State agency may also consider the following to determine whether the contractor has demonstrated good faith efforts:
- (1) Whether the contractor submitted an alternative utilization plan consistent with the subcontract or supplier opportunities in the contract;
  - (2) The number of certified minority and women-owned business enterprises in the region listed in the directory of certified businesses that could, in the judgment of the State agency, perform work required by the State contract scope of work;
  - (3) The actions taken by the contractor to contact and assess the ability of certified minority and women-owned business enterprises located outside of the region in which the State contract scope of work is to be performed to participate on the State contract;
  - (4) Whether the contractor provided relevant plans, specifications or terms and conditions to certified minority and women-owned business enterprises sufficiently in advance to enable them to prepare an informed response to a contractor request for participation as a subcontractor or supplier;
  - (5) The terms and conditions of any subcontract or provision of suppliers offered to certified minority or women-owned business enterprises and a comparison of such terms and conditions



**OCSD-6**

QUARTERLY MWBE COMPLIANCE AND PAYMENT REPORT

CONTRACTOR/GRANT AWARDEE

(or "REPORTING COMPANY"): \_\_\_\_\_

ESD/OCSD REPRESENTATIVE: \_\_\_\_\_

ADDRESS: \_\_\_\_\_

PROJECT NAME: \_\_\_\_\_

TOWN/COUNTY/ZIP: \_\_\_\_\_

CONTRACT/PROJECT #: \_\_\_\_\_

CONTACT PERSON: \_\_\_\_\_

PROJECT START DATE: \_\_\_\_\_

TELEPHONE: \_\_\_\_\_

PERCENT COMPLETE: \_\_\_\_\_

EMAIL: \_\_\_\_\_

ACTUAL COMPLETION DATE: \_\_\_\_\_

**Attach MWBE executed contracts, final lien waivers, cancelled checks, etc., or other documentation describing the "Good Faith Efforts" taken to achieve MWBE program. This report should be completed and signed by an officer of the Reporting Company.**

PRIME CONTRACTOR (Name, Address, Contact Person, Title and Phone # <u>with area code</u> )	PRIME CONTRACT AMOUNT	MWBE SUBCONTRACTOR (Name, Address, Contact Person, Title and Phone # with area code)	DESCRIPTION OF SERVICES	MWBE CONTRACT AMOUNT	MWBE PAYMENTS PREVIOUSLY REPORTED	MWBE PAYMENTS ON CURRENT REPORT	TOTAL MWBE PAYMENTS TO DATE
	\$			\$	\$	\$	\$
	\$			\$	\$	\$	\$
	\$			\$	\$	\$	\$
	\$			\$	\$	\$	\$

**CERTIFICATION:** I, \_\_\_\_\_ (Print Name), the \_\_\_\_\_ (Title) of the Reporting Company above, do certify that (i) I have read this Compliance Report and (ii) to the best of my knowledge, information and belief, the information contained herein is complete and accurate.

**SIGNATURE:** \_\_\_\_\_

**DATE:** \_\_\_\_\_



**OCSD-6**

QUARTERLY MWBE COMPLIANCE AND PAYMENT REPORT

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**SUBMIT REPORT TO:** OFFICE OF CONTRACTOR AND SUPPLIER DIVERSITY  
EMPIRE STATE DEVELOPMENT  
633 THIRD AVENUE, 35<sup>th</sup> FLOOR  
NEW YORK, NY 10017

Completed forms may be emailed directly to OCSD at [ocsd@esd.ny.gov](mailto:ocsd@esd.ny.gov). All email submissions must include the name and contact information of the individual or firm submitting the information.

**QUESTIONS?** Please contact the OCSD or email the office at [ocsd@esd.ny.gov](mailto:ocsd@esd.ny.gov).

Denise Ross  
Project Manager, OCSD  
(212) 803-3226  
[denise.ross@esd.ny.gov](mailto:denise.ross@esd.ny.gov)

Capital District  
Mid-Hudson  
Mohawk Valley  
North Country  
NYC

DED Procurement Contracts

Jazmin Thomas  
Project Associate, OCSD  
(212) 803-3571  
[Jazmin.Thomas@esd.ny.gov](mailto:Jazmin.Thomas@esd.ny.gov)

ESD Procurement Contracts  
ESD Subsidiaries – AYCDC, ESNMC,  
HCDC, MSDC, QWDC

Geraldine Ford  
Project Manager, OCSD  
(716) 846-8205  
[geraldine.ford@esd.ny.gov](mailto:geraldine.ford@esd.ny.gov)

Finger Lakes  
Long Island  
Southern Tier  
Central New York  
Western New York

ESD Subsidiaries– *ECHDC, USA NIAGARA,  
CCDC*



**Empire State  
Development**

**OFFICE OF CONTRACTOR AND SUPPLIER DIVERSITY**

**OCSD-6**

QUARTERLY MWBE COMPLIANCE AND PAYMENT REPORT

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## **EXHIBIT H: PARTICIPATION BY SERVICE-DISABLED VETERAN-OWNED BUSINESSES WITH RESPECT TO STATE CONTRACTS: REQUIREMENTS AND PROCEDURES**

Article 17-B of the Executive Law enacted in 2014 acknowledges that Service-Disabled Veteran-Owned Businesses (“SDVOBs”) strongly contribute to the economies of the State and the nation. As defenders of our nation and in recognition of their economic activity in doing business in New York State, the Recipient of the subject Grant Disbursement Agreement (the “Recipient” and the “Contract,” respectively) are strongly encouraged and expected to consider SDVOBs in the fulfillment of the requirements of the Contract. Such partnering may be as subcontractors, suppliers, protégés or other supporting roles. SDVOBs can be readily identified on the directory of certified businesses at:

[http://ogs.ny.gov/Core/docs/CertifiedNYS\\_SDVOB.pdf](http://ogs.ny.gov/Core/docs/CertifiedNYS_SDVOB.pdf)

The Recipient need to be aware that all authorized users of this Contract will be strongly encouraged to the maximum extent practical and consistent with legal requirements of the State Finance Law and the Executive Law to use responsible and responsive SDVOBs in purchasing and utilizing commodities, services and technology that are of equal quality and functionality to those that may be obtained from non-SDVOBs. Furthermore, Recipients are reminded that they must continue to utilize small, minority and women-owned businesses consistent with current State law.

For purposes of this procurement, ESD hereby establishes a goal of \_% for SDVOBs, based on the current availability of qualified SDVOBs. The Recipient must document good faith efforts to provide meaningful participation by SDVOBs in the performance of the Contract.

A copy of each Recipient’s SDVOB Contract Performance Use form proposing specific certified firms to be utilized or industries where SDVOB firms shall be sought is to be submitted with the executed GDA.

A copy of the aforementioned form is available at:

<http://esd.ny.gov/CorporateInformation/Data/RFPs/SDVOBContractPerformanceUse.pdf>

General inquiries or questions relating to aforementioned policies, SDVOB participation and the goals specified herein may be addressed to OCSD at [OCSD@ESD.NY.GOV](mailto:OCSD@ESD.NY.GOV).

**EXHIBIT H-1: SDVOB Contract Performance Use Form**

**To Be Provided**

**EXHIBIT H-2: SDVOB Contractor Compliance and Payment Report**

**To Be Provided**

**Exhibit I: Employment Reporting Form (With Company's NYS Form 45 Attached)**

**To Be Provided**

## EXHIBIT J: SPECIAL PROVISIONS

In the event of any conflict between Exhibit A of this Agreement and any other provisions of this Agreement, the terms of such other provisions shall govern.

- A. The following sections of the Terms and Conditions of this Agreement are waived: the reference to “Exhibit B”, Reports & D&C Requirements; reference to “Exhibit C”, Employment Goals; and reference to “Exhibit I”, Employment Reporting Form (With Company’s NYS Form 45 Attached).

**If the company is not a corporation but a limited liability company (LLC):**

In 8(c), reference to “corporation” shall mean limited liability company, reference to “incorporation” shall mean organization, and reference to “corporate” shall mean organizational.

**If there is more than one location, either where the project takes place OR where jobs will be reported:**

All references to “Project Location” shall mean “Project Locations.”

**If ESD’s grant is to a public agency (e.g., an urban renewal agency), and being passed through to a Beneficiary, so the Grantee is not the one operating the business, add:**

Paragraph 8(i) shall mean that Grantee and/or Beneficiary shall maintain or cause to be maintained business operations at the Project Location for the term of this Agreement.

**If more than one entity is implementing project,** the following language will be added:

Paragraph 25 is added to Terms and Conditions, as follows:

25. Joint and Several Liabilities

- (a) As used herein, the term Grantee shall include all signatories hereto, if more than one, other than ESD. In such event the obligations, representations and warranties of Grantee hereunder shall be joint and several.

As used herein, the term Beneficiary shall include all signatories hereto, if more than one, other than ESD. In such event the obligations, representations and warranties of Beneficiary hereunder shall be joint and several.

**EXHIBIT K: KEY PROJECT INDICATORS**  
<<Orgn\_Name\_Client>>, Project <<Project Number>>

**To Be Provided**

**EXHIBIT L: KEY PROJECT INDICATOR REPORT**  
<<Orgn\_Name\_Client>>, Project <<Project Number>>

**To Be Provided**

## EXHIBIT M: BROADBAND MAPPING DATA SPECIFICATIONS

<<Orgn\_Name\_Client>>, Project <<Project\_Number>>



### **New York State Broadband Mapping Data Specifications**

#### **Preparing Your Company's Data**

The following Record Format tables describe the minimum required fields to be included with each data submission. Providers may add fields as needed to describe availability and service characteristics, or to uniquely identify each record.

Submit data in a spreadsheet, delimited text document, database, or GIS compatible format. Use an identifiable file naming convention. Example -- NY\_*ProviderSpecificFRN*\_availability.xxx

For GIS files, all polygons must be closed and non-overlapping with a single, unique identifier. Any variation in the values in any of the required fields necessitates the creation of a separate closed, non-overlapping polygon. GIS files must be accompanied by metadata or a plain text "readme" file that contains the coordinate system information.

**Table 1: Address Availability and Service Characteristics**

Field	Description	Type	Example
Provider Name	Provider Name	Text	ABC Co.
DBA Name	“Doing-business-as” name	Text	Superfone, Inc.
FRN	Provider’s FCC Registration Number ( <a href="https://fjallfoss.fcc.gov/coresWeb/publicHome.do">https://fjallfoss.fcc.gov/coresWeb/publicHome.do</a> )	Text	0048402202
Provider Type	1 = Broadband Provider; 2 = Reseller; 3 = Other	Text	1
Address	<b>Complete</b> street address including Zip Code. <i>Addresses can be reported as one text string as the example to the right illustrates or in separate fields by address component (see example fields below).</i>	Text	2340 W Herrick Rd N Pine Bush NY 12566
Add Number	House or Building number	Text	2340
Street Name	Full street name including pre and post direction (street components may also be parsed into separate fields).	Text	W Herrick Rd N
City	Name of municipality used by the US Postal Service	Text	Pine Bush
State	2-letter state abbreviation used by the US Postal Service	Text	NY
Zip Code	five or nine digit code used by the US Postal Service	Text	12566
Technology of Transmission	Technology of Transmission available for the provision of service at the address <a href="https://transition.fcc.gov/form477/FBD/formatting_fbd.pdf">https://transition.fcc.gov/form477/FBD/formatting_fbd.pdf</a>	Integer	50
Maximum Advertised Downstream Speed	Maximum advertised downstream speed/bandwidth offered by the provider in Mbps	Float	100
Maximum Advertised Upstream Speed	Maximum advertised upstream speed/bandwidth offered by the provider in Mbps	Float	25

**Table 2: Census Block and Service Characteristics**

Field	Description	Type	Example
Provider Name	Provider Name	Text	ABC Co.
DBA Name	“Doing-business-as” name	Text	Superfone, Inc.
FRN	Provider’s FCC Registration Number <a href="https://fjallfoss.fcc.gov/coresWeb/publicHome.do">https://fjallfoss.fcc.gov/coresWeb/publicHome.do</a>	Text	0048402202
Provider Type	1 = Broadband Provider; 2 = Reseller; 3 = Other	Text	1
Census Block ID	<b>Census Blocks 2010</b> 15-digit numeric identifier for the US Census Block being reported.	Text	360010001001000
Technology of Transmission	Technology of Transmission available for the provision of service at the address <a href="https://transition.fcc.gov/form477/FBD/formatting_fbd.pdf">https://transition.fcc.gov/form477/FBD/formatting_fbd.pdf</a>	Integer	50
Maximum Advertised Downstream Speed	Maximum advertised downstream speed/bandwidth offered by the provider in Mbps	Float	100
Maximum Advertised Upstream Speed	Maximum advertised upstream speed/bandwidth offered by the provider in Mbps	Float	25

### Provider Footprint

NYS requests that wireline service providers supply a service footprint. Provider footprints will be highly beneficial for data verification and other relevant uses.

Submit a GIS compatible file that identifies your company or organization’s entire service area. Cable providers may alternatively supply a list of municipalities for which your company has franchise agreements to offer service.

**Table 3: Provider Footprint**

Field	Description	Type	Example
Provider Name	Provider Name	Text	ABC Co.
DBA Name	“Doing-business-as” name	Text	Superfone, Inc.
FRN	Provider’s FCC Registration Number <a href="https://fjallfoss.fcc.gov/coresWeb/publicHome.do">https://fjallfoss.fcc.gov/coresWeb/publicHome.do</a>	Text	0048402202
Provider Type	1 = Broadband Provider; 2 = Reseller; 3 = Other	Text	1

**EXHIBIT N: PROJECT MILESTONES**

<<Orgn\_Name\_Client>>, Project <<Project\_Number>>

In consideration for the making of the Grant, Grantee has agreed to achieve the Milestones set forth in below.

Time Period	Quarter	Milestones
Year 1	Qtr. 1	<ul style="list-style-type: none"> <li>• Order construction material.</li> <li>• Provide approvals to the Utility Companies to complete make-ready work.</li> <li>• Finalize network design and order construction material</li> <li>• Phase-3: Engage with Economic Development partners to survey residents in the proposed service areas to determine those with most interest in broadband services.</li> <li>• Hold discussions with Municipal Officials to determine priority builds dependent upon survey responses.</li> </ul>
	Qtr. 2	<ul style="list-style-type: none"> <li>• Phase-2: Commence construction and activation. Roll-out marketing campaign and educational programs in concert with our Economic Development partners. Connect subscribers #25-50.</li> <li>• Phase-3: Begin network design for final project routes as determined by survey and municipal guidance. Submit pole attachment applications to utility companies for attachment licenses along the pole routes. Submit initial construction material order.</li> <li>• Evaluate marketing and adoption efforts milestones</li> </ul>
	Qtr. 3	<ul style="list-style-type: none"> <li>• Phase-1: Segment completion. Connect subscribers # 50-55.</li> <li>• Phase-2: Complete construction and activation. Connect subscriber's # 55-150.</li> <li>• Phase-3: Continue Field Engineering and Commence Pole Attachment Application Process.</li> </ul>
	Qtr. 4	<ul style="list-style-type: none"> <li>• Phase-2: Marketing Completion: Connect subscribers #150-250.</li> <li>• Phase-3: Complete Field Engineering and Pole Attachment Applications. Complete Network Design.</li> </ul>

**EXHIBIT O: PROJECT MILESTONE REPORT**

<<Orgn\_Name\_Client>>, Project <<Project\_Number>>

Grantee shall submit, during the terms of this Agreement, the Milestone Report quarterly until the end of this agreement. Additionally, one final Milestone Report shall be submitted at the end of the term of this agreement that can demonstrate the milestones are substantially complete.

Time Period	Quarter	Milestones	Milestone Status Reporting Date: _____ to _____
Year 1	Qtr. 1	<ul style="list-style-type: none"> <li>• Order construction material.</li> <li>• Provide approvals to the Utility Companies to complete make-ready work.</li> <li>• Finalize network design and order construction material</li> <li>• Phase-3: Engage with Economic Development partners to survey residents in the proposed service areas to determine those with most interest in broadband services.</li> <li>• Hold discussions with Municipal Officials to determine priority builds dependent upon survey responses.</li> </ul>	
	Qtr. 2	<ul style="list-style-type: none"> <li>• Phase-2: Commence construction and activation. Roll-out marketing campaign and educational programs in concert with our Economic Development partners. Connect subscribers #25-50.</li> <li>• Evaluate marketing and adoption efforts milestones</li> </ul>	
	Qtr. 3	<ul style="list-style-type: none"> <li>• Phase-1: Segment completion. Connect subscribers # 50-55.</li> </ul>	
	Qtr. 4	<ul style="list-style-type: none"> <li>• Phase-2: Segment completion. Connect subscribers #150-250.</li> </ul>	

**EXHIBIT P: THE SECURITY AGREEMENT**

<<Orgn\_Name\_Client>>, Project <<Project\_Number>>

THIS SECURITY AGREEMENT, dated as of \_\_\_\_\_, 2016 (as the same may be amended, restated, supplemented or otherwise modified from time to time, this “Security Agreement”), is by and between \_\_\_\_\_, a \_\_\_\_\_ (the “Debtor”), and New York State Urban Development Corporation d/b/a/ Empire State Development, a [public-benefit corporation formed under the laws of the State of New York](the “Secured Party”).

**W I T N E S S E T H:**

WHEREAS, this Security Agreement is entered into in connection with that certain Grant Disbursement Agreement, dated as of \_\_\_\_\_, 2016, between the Debtor and the Secured Party (as the same may be amended, restated, supplemented or otherwise modified from time to time, the “GDA”);

NOW, THEREFORE, in consideration of the Secured Party entering into the GDA with the Debtor to enable the Debtor to receive ESD grant funds (“Grant Funds”) in accordance therewith, the Debtor hereby agrees as follows:

**ARTICLE I**

**DEFINITIONS**

1.1 Defined Terms. Unless otherwise defined herein, all terms defined in the UCC (as defined below) shall have the meanings assigned to them in the UCC. Capitalized terms not otherwise defined herein shall have the meanings assigned to such terms in the GDA. As used herein, the following terms have the following meanings:

“Bankruptcy Code” means Title 11 of the United States Code, as amended.

“Collateral” has the meaning assigned to it in Article II hereof.

“Debtor” has the meaning set forth in the preamble.

“Event of Default” shall mean any of the following:

(i) The making by the Debtor of any material false statement or the omission by the Debtor to state any material fact in or in connection with this Security Agreement or the GDA;

(ii) (a) The creation or existence of any other security interest in any of the Collateral other than Permitted Liens or (b) the transfer, sale or lease of any of the Collateral except in accordance with the terms hereof;

(iii) The announced or actual cessation or termination of business activities by the Debtor at the Project Location or of the Project itself, including all activities and provision of services required in connection with the Project; or

(iv) The Debtor becomes insolvent or consents to the appointment of a trustee, receiver, assignee, liquidator or similar official, making a general assignment for the benefit of its creditors or filing a voluntary proceeding under Chapter 7 or 11 of the Bankruptcy Code or any other federal, state or foreign bankruptcy or insolvency law (a “Bankruptcy Proceeding”) or (b) the filing against the Debtor of an involuntary Bankruptcy Proceeding that is not discharged or dismissed within sixty (60) days.

“Obligations” means the full, complete and timely performance and payment of all obligations of any type or nature of the Debtor to the Secured Party, including without limitation, all obligations under this Security Agreement, the GDA and arising from the disbursement of the Grant Funds or otherwise.

“Permitted Liens” means [*describe certain liens arising by operation of law or to which the Secured Party has agreed may exist considering the facts related to a Debtor on a case by case basis*].

“Secured Party” has the meaning set forth in the preamble.

“UCC” means the Uniform Commercial Code as in effect from time to time in the State of New York.

## ARTICLE II

### GRANT OF SECURITY INTERESTS

As security for the prompt and complete payment and performance in full of all the Obligations, the Debtor hereby grants to the Secured Party a security interest in all of the Debtor’s right, title and interest in, to and under the following, in each case, whether now owned or existing or hereafter acquired or arising (all of which being hereinafter collectively called the “Collateral”):

(a) [all Goods (including without limitation, all Equipment, Inventory and Fixtures), Documents or other personal property (i) acquired or improved with the Grant Funds, including, in any event, all Goods described on Schedule A hereto, or (ii) located within the Project Location and/or Footprint];

(b) [all Accounts, Chattel Paper, General Intangibles and other contract rights and agreements arising from the use of the Grant Funds or arising out of, related to or useful in connection with the completion and/or the performance of the Project];

(c) to the extent not otherwise included above, all Supporting Obligations of the foregoing; and

(d) to the extent not otherwise included above, all Proceeds, products, Accessions, additions, substitutions, replacements, rents and profits of or in respect of any or all of the foregoing.

### ARTICLE III

#### REPRESENTATIONS AND WARRANTIES

The Debtor hereby represents and warrants to the Secured Party as follows:

(a) It has full power and authority to execute and deliver this Security Agreement and perform its obligations hereunder, including without limitation, the power and authority to grant a security interest in the Collateral to the Secured Party.

(b) This Security Agreement has been duly authorized, executed and delivered by the Debtor and is binding and enforceable against the Debtor in accordance with its terms. The security interests in the Collateral granted to the Secured Party hereunder constitute valid and continuing security interests in the Collateral.

(c) Upon the filing of financing statements naming the Debtor as “debtor” and the Secured Party as “secured party” and describing the Collateral in the filing offices set forth on Schedule B hereto, the security interests in the Collateral granted to the Secured Party hereunder will constitute perfected security interests therein to the extent that such security interests can be perfected by the filing of a financing statement.

(d) The Debtor is the legal and beneficial owner of the Collateral free and clear of any lien, claim, encumbrance, option or right of others, except for (i) the security interest created under this Security Agreement and (ii) Permitted Liens.

(e) The Debtor’s chief executive office is located in the State of \_\_\_\_\_, its jurisdiction of organization is the State of \_\_\_\_\_, and its exact legal name is as set forth in the recitals.

(f) There are no actions pending or threatened by or against the Debtor in which an adverse decision could reasonably be expected to have a material adverse effect upon the financial condition, operating results, assets, operations or business prospects of the Debtor.

(g) The fair salable value of the Debtor’s assets exceeds the fair market value of its liabilities, and Debtor is able to timely pay its debts as they mature.

(h) The Debtor has timely filed all required tax returns and has paid, or has made adequate provisions to pay, all material taxes, except those being contested in good faith and with respect to which adequate reserves are set aside.

(i) No written representation, warranty or other statement of the Debtor in any certificate or written statement given to Secured Party contains any untrue

statement of a material fact or omits to state a material fact necessary to make the statements contained in the certificates or statements not misleading.

## ARTICLE IV

### COVENANTS

The Debtor covenants and agrees with the Secured Party that, from and after the date of this Security Agreement until all Obligations shall have been fully performed and indefeasibly paid in full:

4.1 Change of Name; Identity or Corporate Structure. The Debtor shall not change its name, identity, corporate structure, or jurisdiction of organization (in each case within the meaning of Article 9 of the UCC) until (i) it shall have given to the Secured Party thirty (30) days prior written notice thereof and (ii) with respect to such new name, identity, corporate structure, or jurisdiction of organization, it shall take all action to maintain the full force and effect and perfected status of the security interest of the Secured Party in the Collateral intended to be granted hereby with first priority (except for Permitted Lien that are permitted to have greater priority), including without limitation, the taking of all actions as the Secured Party may reasonably request .

4.2 Further Assurances. At any time and from time to time, upon the request of the Secured Party, the Debtor will promptly and duly execute and deliver any and all such further instruments, endorsements, and other documents, make such filings, give such notices and take such further action as the Secured Party may reasonably deem necessary in order to obtain the full benefits of this Security Agreement and to exercise all of the rights, remedies and powers herein granted, including, without limitation, the filing of any financing statements, in form acceptable to the Secured Party under the Uniform Commercial Code in effect in any jurisdiction with respect to the security interests granted hereby. The Debtor also hereby authorizes the Secured Party and its counsel to file any financing or continuation statements and amendments thereto, in all jurisdictions and with all filing offices as the Secured Party may reasonably determine are necessary to perfect the security interest granted by this Security Agreement. Such financing statements shall describe the Collateral in the same manner as described in this Security Agreements or in such other manner as the Secured Party determines, in its sole discretion, is necessary or advisable to ensure the perfection of its security interest.

4.3 Rights Concerning the Collateral.

(a) The Secured Party may inspect any Collateral, all books and records related thereto and the premises upon which the Collateral is located, at any time upon reasonable notice.

(b) After an Event of Default has occurred and is continuing, the Secured Party shall have the right to enforce the Debtor's rights against account debtors and other obligors, to notify such account debtors to make payments directly to the Secured Party and to take all actions in connection therewith.

(c) The Debtor shall comply with the insurance requirements set forth in Section 12 of the GDA.

(d) The Debtor will cause all Equipment which constitutes Collateral to be maintained and preserved in the same condition, repair and working order as when new, ordinary wear and tear excepted, and will as soon as practicable make or cause to be made all repairs, replacements and other improvements in connection therewith that are necessary or desirable to such end. The Debtor will promptly furnish to the Secured Party a statement respecting any loss or damage exceeding \$[\*] to any of the Equipment or Inventory constituting Collateral of such Debtor.

(e) The Debtor has the risk of loss of the Collateral. The Secured Party has no duty to collect any income accruing on the Collateral or to preserve any rights relating to the Collateral.

(f) The Debtor may not:

(i) make any transfers, sales or leases of any of the Collateral, except for sales of Equipment and Inventory in the ordinary course of business;

(ii) license any of the Collateral;

(iii) create or permit to exist any other security interest, lien, claim or encumbrances in any of the Collateral other than Permitted Liens; or

(iv) otherwise transfer or dispose of any of the Collateral.

(g) The Debtor hereby irrevocably constitutes and appoints the Secured Party and any officer or agent thereof, with full power of substitution, as its true and lawful attorney-in-fact with full irrevocable power and authority in the place and stead of the Debtor and in the name of the Debtor or in its own name, from time to time in the Secured Party's discretion, for the purpose of carrying out the terms of this Security Agreement, to take any and all appropriate action and to execute any and all documents and instruments that may be necessary or desirable to accomplish the purposes of this Security Agreement. The Debtor hereby ratifies all that said attorneys shall lawfully do or cause to be done by virtue hereof. This power of attorney is a power coupled with an interest and shall be irrevocable.

## ARTICLE V

### REMEDIES

5.1 Acceleration; Rights and Remedies Generally. Upon the filing of any proceeding with respect to the Debtor under the terms of any bankruptcy or insolvency statute or law, including without limitation, the filing of any petition under

any chapter of the United States Bankruptcy Code with respect to the Debtor, all performance and payment of all Obligations shall immediately be due. If any Event of Default shall have occurred and be continuing, the Secured Party may exercise in respect of the Collateral, in addition to all other rights and remedies provided for herein or otherwise available to it at law or in equity, all the rights and remedies of a secured party on default under the Uniform Commercial Code of any applicable jurisdiction.

5.2 Proceeds. The proceeds received by the Secured Party in respect of any sale of, collection from or other realization upon all or any part of the Collateral shall be applied, together with any other sums held by the Secured Party pursuant to this Security Agreement, by the Secured Party to the fulfillment and satisfaction of all Obligations in such order as the Secured Party may determine. The Secured Party's sole duty with respect to the custody, safekeeping and physical preservation of the Collateral in its possession, under Article 9 of the UCC or otherwise, shall be to deal with it in the same manner as the Secured Party deals with similar property for its own account.

## ARTICLE VI

### MISCELLANEOUS

6.1 Advances by Secured Party. On failure of the Debtor to perform any of the covenants or agreements contained herein, the Secured Party may, at its sole option and in its sole discretion, perform the same or cause the performance of the same and in so doing may expend such sums as the Secured Party may reasonably deem advisable in the performance thereof, including, without limitation, the payment of any insurance premiums, the payment of any taxes, a payment to obtain a release of a lien, expenditures made in defending against any adverse claim and all other expenditures which the Secured Party may reasonably make for the protection of the security hereof or which the Secured Party may be compelled to make by operation of law. All such sums and amounts so expended shall be repayable by the Debtor promptly upon notice thereof and written demand therefor, shall constitute additional Obligations and shall bear interest from the date that is five business days after the date said amounts are demanded in writing at the Default Rate. No such performance of any covenant or agreement by the Secured Party on behalf of the Debtor and no such advance or expenditure therefor shall relieve the Debtor of any default under the terms of this Security Agreement or the GDA.

6.2 Notices. All notices and other communications hereunder shall be in writing and shall be addressed as follows (or at such other address for a party as shall be specified by like notice):

If to the Secured Party:

Empire State Development

Name: «Project\_Manager»

Title: Project Manager

Address: 633 Third Avenue, New York, NY 10017

Telephone Number: «Project\_Mgr\_Phone»

E-Mail Address:       «Project\_Mgr\_email»

With a copy to:

Title:                General Counsel

Address:           633 Third Avenue, 37<sup>th</sup> Floor, New York, NY 10017

Telephone Number: (212) 803-3750

Facsimile Number: (212) 803-3975

If to the Debtor:

With copies to:

All such notices or communications shall be deemed to have been delivered and received: (a) if delivered in person, on the day of such delivery, (b) if by facsimile, on the day on which such facsimile was sent, provided that receipt is personally confirmed by telephone, (c) if by certified or registered mail (return receipt requested), on the fifth Business Day after the mailing thereof or (d) if by reputable overnight delivery service, on the second Business Day after the sending thereof.

6.3    Amendments and Waivers. The provisions of this Security Agreement may not be amended, nor may the Debtor take any action herein prohibited or omit to perform any action required hereunder to be performed by it, except with the written consent of the Secured Party.

6.4    Costs and Expenses. The Debtor shall reimburse the Secured Party for all of its reasonable costs and expenses incurred in connection with the exercise of its rights hereunder, which shall include all reasonable attorneys' fees and legal expenses of the Secured Party. For the avoidance of doubt, all such expenses shall constitute Obligations hereunder.

6.5    Successors and Assigns. This Security Agreement shall be binding upon and inure to the benefit of the Debtor, the Secured Party, all future holders of the Obligations and each of their respective successors and assigns, except that the Debtor may not assign or transfer any of its rights or Obligations under this Security Agreement without the prior written consent of the Secured Party. The Secured Party may assign or transfer any of its rights hereunder in its sole discretion. If an assignment is made, the Debtor shall render performance under this Security Agreement to the assignee. The Debtor waives and will not assert against any assignee any claims, defenses, or setoffs which the Debtor could assert against the Secured Party except defenses which cannot be waived.

6.6    Severability. In case any provision in or obligation under this Security Agreement or the Obligations shall be invalid, illegal or unenforceable in any jurisdiction, the validity, legality and enforceability of the remaining provisions or

Obligations, or of such provision or obligation in any other jurisdiction, shall not in any way be affected or impaired thereby.

6.7 Effectiveness. This Security Agreement shall become effective on the date on which the Debtor and the Secured Party shall have signed a counterpart hereof.

6.8 GOVERNING LAW. THIS SECURITY AGREEMENT SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAW OF THE STATE OF NEW YORK.

6.9 SUBMISSION TO JURISDICTION; WAIVER OF JURY TRIAL.

(a) ANY LEGAL ACTION OR PROCEEDING AGAINST ANY PARTY HERETO WITH RESPECT TO THIS AGREEMENT AND ANY ACTION FOR ENFORCEMENT OF ANY JUDGMENT IN RESPECT THEREOF MAY BE BROUGHT IN THE COURTS OF THE STATE OF NEW YORK OR OF THE UNITED STATES OF AMERICA FOR THE SOUTHERN DISTRICT OF NEW YORK, AND, BY EXECUTION AND DELIVERY OF THIS AGREEMENT, DEBTOR AND THE SECURED PARTY HEREBY ACCEPTS FOR ITSELF AND IN RESPECT OF ITS PROPERTY, GENERALLY AND UNCONDITIONALLY, THE NONEXCLUSIVE JURISDICTION OF THE AFORESAID COURTS AND APPELLATE COURTS FROM ANY APPEAL THEREOF. DEBTOR IRREVOCABLY CONSENTS TO THE SERVICE OF PROCESS OUT OF ANY OF THE AFOREMENTIONED COURTS IN ANY SUCH ACTION OR PROCEEDING BY THE MAILING OF COPIES THEREOF BY REGISTERED OR CERTIFIED MAIL, POSTAGE PREPAID, TO SUCH PARTY AT ITS NOTICE ADDRESS PROVIDED PURSUANT TO SECTION 6.2 HEREOF. EACH OF DEBTOR AND THE SECURED PARTY HEREBY IRREVOCABLY WAIVES ANY OBJECTION WHICH IT MAY NOW OR HEREAFTER HAVE TO THE LAYING OF VENUE OF ANY OF THE AFORESAID ACTIONS OR PROCEEDINGS ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT BROUGHT IN THE COURTS REFERRED TO ABOVE AND HEREBY FURTHER IRREVOCABLY WAIVES AND AGREES, TO THE EXTENT PERMITTED BY APPLICABLE LAW, NOT TO PLEAD OR CLAIM IN ANY SUCH COURT THAT ANY SUCH ACTION OR PROCEEDING BROUGHT IN ANY SUCH COURT HAS BEEN BROUGHT IN AN INCONVENIENT FORUM. NOTHING HEREIN SHALL AFFECT THE RIGHT OF ANY PARTY HERETO TO SERVE PROCESS IN ANY OTHER MANNER PERMITTED BY LAW OR TO COMMENCE LEGAL PROCEEDINGS OR OTHERWISE PROCEED IN ANY OTHER JURISDICTION.

(b) EACH OF DEBTOR AND SECURED PARTY HEREBY IRREVOCABLY WAIVES ALL RIGHT OF TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT OR ANY MATTER ARISING HEREUNDER.

6.10 Counterparts. This Security Agreement may be executed in any number of counterparts and by the different parties hereto on separate counterparts, each of which when so executed and delivered shall be an original, but all of which shall together constitute one and the same instrument.

6.11 Termination. At such time as all Obligations shall have been fully performed and paid in full, as the case may be, the Collateral shall be released from the security interest created hereby, and this Security Agreement and all obligations (other than those expressly stated to survive such termination) of the Secured Party and the Debtor hereunder shall terminate, all without delivery of any instrument or performance of any act by any party, and all rights to the Collateral shall revert to the Debtor. At the request and sole expense of the Debtor following any such termination, the Secured Party shall deliver to the Debtor any Collateral held by the Secured Party hereunder, and execute and deliver to the Debtor such documents as the Debtor shall reasonably request to evidence such termination.

*(Remainder of page intentionally left blank)*

IN WITNESS WHEREOF, the Debtor and the Secured Party have caused this Security Agreement to be duly executed and delivered as of the date first above written.

\_\_\_\_\_,  
as Debtor

By: \_\_\_\_\_  
Name:  
Title:

NEW YORK STATE URBAN DEVELOPMENT  
CORPORATION D/B/A EMPIRE STATE  
DEVELOPMENT

\_\_\_\_\_,  
as Secured Party

By: \_\_\_\_\_  
Name:  
Title:

Schedule A to Security Agreement

**Goods<sup>1</sup>**

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<sup>1</sup> To be completed with specific descriptions of collateral, e.g. type of equipment, manufacturer, model and serial number.

Schedule B to Security Agreement

**Locations of Filing Office**