

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

Division of State Government Accountability

Unnecessary and Potentially Illegal Consultant Contract With Former New York State Council on the Arts Executive Director

Empire State Development Corporation
New York State Council on the Arts



Report 2011-S-6

September 2013

Executive Summary

Purpose

To assess Empire State Development Corporation's personal services contract with former New York State Council on the Arts Executive Director Heather Hitchens for necessity, propriety and compliance with State law and ESDC's internal contracting guidelines. The contract covered the period August 1, 2007 through December 31, 2010.

Background

The Empire State Development Corporation (ESDC) is a public benefit corporation whose mission is to promote a growing and vigorous economy and encourage job creation and economic opportunity. The New York State Council on the Arts (Council) is a State agency dedicated to preserving and expanding New York's rich cultural resources. In 2007, former New York State Governor Eliot Spitzer appointed Heather Hitchens to the position of Executive Director of the Council. Ms. Hitchens' appointment took effect August 1, 2007 at an annual salary capped by law at \$109,800. In the same month Ms. Hitchens began work at the Council, ESDC began a consulting contract with her for cultural tourism services. Under this agreement, ESDC paid Ms. Hitchens \$2,100 per month for these services, totaling \$25,200 per year. As a result of this dual arrangement, her combined annual compensation by the State increased to \$135,000. The initial one-year contract between ESDC and Ms. Hitchens ran from August 2007 through August 1, 2008, with three subsequent amendments that extended the contract until December 31, 2010, when it ended. ESDC paid Ms. Hitchens a total of \$86,100 over the course of the contract term. Ms. Hitchens resigned from her Council position in May 2011.

Key Findings

- We found possible violations of law in the procurement of this contract with Heather Hitchens. We concluded the contract was initiated and continued primarily as a means to circumvent the salary for the position set by State law and increase Ms. Hitchens' compensation to a level she agreed to with former Governor Spitzer's office. As a result, she was paid \$135,000 annually, instead of the \$109,800 salary capped by law, for more than three years. The services Ms. Hitchens provided were already part of her existing job duties at the Council, and therefore unnecessary and wasteful as a separate ESDC contract.
- ESDC didn't comply with its own procurement guidelines in many steps of the contracting process, including assessing contractor performance and basic monitoring of deliverables.

Key Recommendations

- ESDC and the Council should work together to determine whether and to what extent funds were improperly paid and recover funds as appropriate and feasible.
- Change the control environment at ESDC to one that reinforces and demonstrates ethical decision-making, is transparent, and can withstand public scrutiny.
- The Council should ensure its employees and board members are aware of and comply with their responsibilities under the Public Officers Law.

**State of New York
Office of the State Comptroller**

Division of State Government Accountability

September 26, 2013

Mr. Kenneth Adams
President and CEO
Empire State Development Corporation
633 Third Avenue
New York, NY 10017

Mr. Aby Rosen
Chairman
New York State Council on the Arts
300 Park Avenue South, 10th floor
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Dear Mr. Adams and Mr. Rosen:

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

Following is a report of our audit of the Empire State Development Corporation and the New York State Council on the Arts entitled *Unnecessary and Potentially Illegal Consultant Contract With Former New York State Council on the Arts Executive Director*. This audit was performed pursuant to the State Comptroller's authority under Article X, Section 5 of the State Constitution, Section 2803 of the Public Authorities Law and Section 6278 (3) of McKinney's New York State Unconsolidated Laws as well as Article V, Section 1 of the State Constitution and Article II, Section 8, of the State Finance Law.

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

Respectfully submitted,

*Office of the State Comptroller
Division of State Government Accountability*

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Background

In 1995, the functions of the New York State Department of Economic Development (DED), a State agency, and the Urban Development Corporation (UDC), a public benefit corporation, were consolidated along with other economic development entities. UDC became the Empire State Development Corporation (ESDC), maintaining its status as a public benefit corporation. ESDC and DED are collectively referred to as Empire State Development (ESD), though they remain distinct entities. ESDC's mission is to promote a growing and vigorous economy, encourage the creation of new job and economic opportunities, increase revenues to the State and its municipalities, and achieve stable and diversified local economies. ESDC has an eight-member board of directors and about 350 employees. During Governor Eliot Spitzer's term there were two Chairs of the Board, both of whom were appointed by the Governor. During the four years ended March 31, 2011, ESDC reported having 236 personal services contracts in effect that were fully or partially State-funded, with a total contract value exceeding \$1.1 billion. The objectives of our audit were to assess ESDC's personal services contract with Heather Hitchens for necessity, propriety, and compliance with State law and ESDC's internal contracting guidelines.

The New York State Council on the Arts (Council) is a State agency dedicated to preserving and expanding New York's rich cultural resources. The Council has a staff of about 25 individuals, and is led by a group of up to 21 people who are appointed by the Governor and approved by the State Senate. The Council's powers and duties include promoting tourism by supporting projects that enhance New York's appeal to tourists.

In 2007, then-New York State Governor Eliot Spitzer appointed Heather Hitchens to the position of Executive Director of the Council, effective August 1, 2007. The annual salary of the Executive Director position is set by statute at \$109,800. In the same month that Ms. Hitchens began work in her new position at the Council, she also entered into a consulting agreement with ESDC in which she agreed to provide cultural tourism expertise to ESDC at a cost of \$25,200 per year, payable at \$2,100 monthly. As a result of these arrangements, her combined annual compensation increased to \$135,000.

The initial contract between ESDC and Ms. Hitchens ran through August 1, 2008. There were three subsequent amendments: two one-year extensions and one extension for the five-month period ending December 31, 2010, at which time the contract ended. ESDC paid Ms. Hitchens \$86,100 over the course of the contract term. She later resigned from her Council position in May 2011. In total, Ms. Hitchens received compensation for both her employment by the Council and her consulting agreement for ESDC for nearly three and a half years.

Audit Findings and Recommendations

We reviewed the ESDC contract and related amendments for Heather Hitchens' services, and found possible violations of law in the contract procurement. We also concluded the contract was initiated and continued primarily as a means to circumvent the salary for the position set by State law and increase Ms. Hitchens' compensation to a level she agreed on with former Governor Spitzer's office. Though we verified that she performed most of the services ESDC paid for, we believe many of those services were already part of her existing job duties at the Council, were performed during her Council work hours, were done on behalf of the Council and its programs, and were therefore unnecessary and wasteful as a separate ESDC contract. Further, we found ESDC failed to comply with its policies in many aspects of the procurement process, including advertising the contract, assessing contractor performance, and monitoring the deliverables.

Possible Violations of Law

The salary for the position of Executive Director of the Council has been fixed by the State Legislature. Executive Law §169(d) sets the annual salaries for certain positions, including Council Executive Director, at \$109,800. In addition, Civil Service Law §135 prohibits employees who receive "definite salary" set under State law from receiving "extra salary or compensation."

In addition to this legal barrier to increasing compensation set by the legislature, Public Officers Law (POL) §73(4) prohibits State officers and employees from selling goods or services to a State agency in excess of \$25, absent public notice and competitive bidding. Another section, POL§73-a, requires State employees at certain pay levels, as well as those designated as policymakers by their State employers, to file annual Financial Disclosure Forms identifying outside employment, financial holdings, and other information. The Forms are due on or about May 15. Finally, 19 NYCRR Part 932 establishes a process for review of "outside activities" engaged in by State officers and employees. In this regard, 932.3(c) requires individuals in policymaking positions (such as Ms. Hitchens' Council position) who engage in outside activity other than their paid State position and who also receive more than \$4,000 in annual compensation for personal services to obtain prior approval from the State's ethics oversight agency, then the Commission on Public Integrity (now succeeded by the Joint Commission on Public Ethics). The request for approval must contain the consent of the approving authority, in this case the Council.

We believe the contract and compensation arrangement between ESDC and Ms. Hitchens resulted in Ms. Hitchens receiving \$25,200 annually to which she was not legally entitled and was done in contradiction to several of the above laws and requirements. There are strong indications that the Governor's Office, ESDC and Ms. Hitchens treated her services for both the Council and ESDC as part of the same job as Council Executive Director, and that the consulting agreement was used as a mechanism to circumvent the salary limit set by State law. In fact, when Governor Spitzer's Office issued a press release in June 2007 announcing Hitchens' selection as the Council's new Executive Director, it cited her annual salary in that position as \$135,000 – the amount of the combined Council salary and her consulting contract with ESDC.

When we met with Ms. Hitchens, she told us she negotiated her Council compensation with the Governor's Office, and the result was the two-party scenario described above, with ESDC making up the \$25,200 annually that exceeded the \$109,800 statutory limit. Ms. Hitchens explained that, though she was aware during negotiations that her compensation would come from two different entities, she viewed it as one job: that of Council Executive Director. Francine James, former Appointments Secretary for Governor Spitzer, confirmed that the Governor's Office approved this split and augmented salary. Ms. James stated that she could not recall the total amount to be paid to Ms. Hitchens but that Ms. Hitchens was to receive both the maximum allowed as the Executive Director for the Council on the Arts plus a supplement for work she was to complete for ESDC in cultural tourism. As discussed below, ESDC officials were not only aware of Ms. Hitchens' simultaneous position at the Council but even cited it as the rationale for its single source contract with her. Ms. Hitchens told us the Council was also aware of her compensation arrangement.

ESDC had a responsibility to ensure open competition and that a reasonable price was paid when contracting for consulting services. Ms. Hitchens appears to have violated POL§73(4) in negotiating this contract without competition. Ms. Hitchens was also required to file Financial Disclosure Forms after she began her Council position, though she told us she did not know about the requirement, and that no one at the Council informed her of this obligation. She filed the Forms for 2006-2009 nearly all at the same time in early 2011, not long after the Comptroller's auditors asked Commission on Public Integrity staff to provide Ms. Hitchens' forms. Though she did disclose her consulting relationship with ESDC, the after-the-fact disclosure diminished the transparency of her arrangement with ESDC. Finally, Ms. Hitchens did not obtain prior approval from the Commission on Public Integrity for her outside activity as an ESDC consultant, as required by the Commission's regulation Part 932.3(c).

Consulting Contract Duplicated Ms. Hitchens' Existing Responsibilities in Paid State Position

Ms. Hitchens submitted invoices and Activity Reports to ESDC, usually monthly. The invoices were for the \$2,100 payments; the Activity Reports were accounts of Ms. Hitchens' activities that included dates she worked for ESDC and the nature of the activity. To assess the nature of her consulting activities and whether they were distinguishable from her Council duties, we reviewed the Council description for Executive Director; Ms. Hitchens' Council time records; the ESDC scope of consulting services, and the Activity Reports Ms. Hitchens submitted to ESDC. The description of Ms. Hitchens' duties as Council Executive Director included eight responsibilities, shown below:

- Works with the Chairman to communicate with the Office of the Governor and legislative committees and offices; serves as the primary liaison with the Division of the Budget and other state agencies;
- Participates with the Chairman in formal and informal legislative meetings;
- Supervises preparation of the agency's annual budget request to the Governor's office and to the Council;
- Communicates regularly with arts constituents throughout the state to enable the Council to be both innovative and responsive to the needs of the field;

- Works with the senior staff to develop and recommend programmatic and policy direction to the Chairman and the Council and coordinates long-range planning for the agency;
- Oversees and directs grant-making processes and procedures as guided by Council policies;
- Directs day to-day operations through a staff leadership team of three deputy directors;
- Directs communications with federal and other state agencies that are involved in arts funding; participates in regional and national service organizations that assist the Council in serving New York constituents.

We analyzed the Activity Reports Ms. Hitchens submitted to ESDC that described her consulting activities. The Reports typically included a “Key Accomplishments & Deliverables” section, followed by a “Meeting and Activities List,” which included the date and description of the reported activity, though not the hours or time of day. The Activity Reports described 274 consultant activities Ms. Hitchens reportedly undertook during the 41-month contract period.

We concluded that about half of the activities Ms. Hitchens reported as having done on behalf of ESDC were already part of her Council responsibilities as Executive Director or represented work in areas we concluded were Council programs. In many instances, Ms. Hitchens even described “NYSCA” (a common name for the Council) as the ‘doer’ of the activities she cited on the work record she submitted to ESDC. For example, Ms. Hitchens listed “NYSCA continued its work on the Cultural Data Project” as a Key Accomplishment on more than 20 Activity Reports she submitted to ESDC in support of her contract payments.

Among the activities Ms. Hitchens listed as fulfilling her ESDC contract were nine that involved Council staff and three Council retreats, one with a two-night stay that appeared on a Council travel voucher at Council expense. Still other activities were done or attended by someone other than Ms. Hitchens. This again highlights logical discrepancies between ESDC contracting with an individual while paying for services that describe the efforts of others. Following are examples of activities we concluded were primarily Council duties or primarily benefited the Council, despite Ms. Hitchens reporting them as having satisfied her separately paid ESDC consulting duties:

- 45 activities related to the Council’s Cultural Data Project initiative
- 3 Council retreats, including one with two overnight stays (April 27-29, 2008, at Council expense)
- 9 activities that cited “NYSCA” staff as participants
- 5 activities performed by the Council’s Director of Governmental Affairs, Sasha Soreff, either alone or with Ms. Hitchens
- 34 other activities conducted on behalf of or primarily benefiting the Council, including
 - Attendance at Arts Day in November 2008 and an arts roundtable in December 2008
 - Attendance at the January 2008 State of the State address, which she also reported as Council business on her Council travel voucher.

In addition to the activities we identified as having been done by or on behalf of the Council, Ms. Hitchens reported numerous activities that could be interpreted as Council duties but were not as readily identifiable as such given their descriptions. In total, the bulk of the activities Ms. Hitchens reported to ESDC represented ones that either directly or indirectly reflected the expected duties

of the Council Executive Director.

It is not unreasonable to expect State arts agency personnel to work with a public economic development entity on joint efforts to promote cultural tourism - efforts that benefit both entities and their respective missions. Nevertheless, these collaborations must be conducted by individuals representing each entity and combining these positions blurs the line between the duties and obligations the representative(s) owes to their respective employer. Ms. Hitchens did cite the collaborative efforts the Council was undertaking with ESDC, via statements such as "Met with Robert Wilmers to discuss current and future collaborative efforts between NYSCA and ESD" and "Meeting.....re: closer coordination between ESD and NYSCA." Robert Wilmers was one of the ESDC Board Chairs at that time. These statements serve to strengthen our conclusion that these activities fell within her duties at the Council, for which a salary is set by statute, and that a partnership and collaboration between the two entities, without contracting with and compensation to a particular individual, was a viable alternative, and one more in keeping with transparency and effective use of taxpayer funds.

Further demonstrating the true nature of this consulting agreement, management from both agencies did not adequately assess whether the services ESDC contracted for were already part of her Council position. Still, ESDC officials continued to renew the contract with Ms. Hitchens, despite much of her work being described as Council initiatives, sometimes even undertaken with Council staff. Perhaps more tellingly, Ms. Hitchens had to have performed many ESDC consulting activities on Council time and at Council's travel expense, further blurring the line between her duties for the two entities.

When combined, the above circumstances cast serious doubt on the necessity or value of a separate consulting contract with Ms. Hitchens as an individual. We conclude that the consultant contract with ESDC was, for all practical purposes, a mechanism to circumvent the statutory compensation cap of \$109,800 for the Council's Executive Director position, and therefore was not in the best interest of either ESDC or the taxpayers.

Reported ESDC Activities Were Completed on Council Time and at Council's Travel Expense

We obtained Council time records and travel vouchers for Ms. Hitchens and compared them with the Activity Reports she submitted to ESDC to assess where and when she performed work for each entity as well as how her travel expenses were paid. According to ESDC officials, their agreement with Ms. Hitchens was that her \$2,100 monthly payments were to cover any travel expenses she incurred in performing work on behalf of ESDC. According to her bi-weekly Council time records, her work schedule was 9 a.m. to 5 p.m. Monday through Friday. We reviewed the 29 travel vouchers Ms. Hitchens submitted for expenses that were paid by the Council and incurred during the period she was under contract with ESDC. Because none covered travel after October 2008, we were able to review only 15 months of documented travel expenses during this period, totaling about \$5,300. (The current Council Executive Director said that budget cuts prevented travel at Council expense from late 2008 until recently.) The travel expenses included seven day

trips, eight trips with at least one overnight stay, and four that included airfare. Of the 29 vouchers, 19 included 32 days of travel on which Ms. Hitchens also reported consulting activity for ESDC.

Of these 32 days, there were:

- 25 instances in which the Activity Report description or destination was the same as or similar to information on the Council travel voucher (Activity Report/voucher match);
- three days on which the Activity Report description for six activities was the same as or similar to the Council time sheet (Activity Report/time sheet match);
- two days on which the Activity Report description was the same as or similar to both the Council travel voucher and the Council time sheet (Activity Report/travel voucher/time sheet match);
- two days on which the Council travel voucher destination and purpose section included a reference to either ESD or ESDC;
- four site visits and one meeting on Long Island, New York on the same day as two site visits near Potsdam, New York, more than a seven hour drive from Long Island. Ms. Hitchens reported these activities on her ESDC Activity Report, and she did not charge accrued Council leave on this day. We were unable to determine who paid for the travel to Potsdam.

Despite Ms. Hitchens' 240 reported days of consulting work for ESDC, she used accrued leave from the Council on only two of these days: one on which she charged three hours leave, and another on which she used a floating holiday. We note, too, that she did use accrued Council leave for 53 other absences during the period she was under contract with ESDC, but none of these coincided with days she also reported ESDC consulting activities. We concluded that Ms. Hitchens conducted the work she reported to ESDC during her scheduled Council work hours. Moreover, the Council paid for travel on days when Ms. Hitchens reported the same activity as fulfilling duties of both positions.

Clearly, officials of ESDC, the Council for the Arts, and former Governor Spitzer's Appointment Office had knowledge of the compensation set by law for Ms. Hitchens' position and sought to enhance her salary beyond this statutory limit. ESDC officials wasted taxpayer money on an unnecessary contract by paying a consultant for services she was already paid to provide as Executive Director of the Council on the Arts. Notwithstanding Ms. Hitchens' credentials or the adequacy of the salary set by the State Legislature to attract qualified candidates, entities must follow State Law and use appropriate channels to increase the salary set for public employees.

Recommendations

To ESDC and the Council on the Arts:

1. Work together to determine whether and to what extent funds were improperly paid and recover funds as appropriate and feasible.

To ESDC:

2. Change the control environment at ESDC to one that reinforces and demonstrates ethical

decision-making, is transparent, and can withstand public scrutiny.

To the Council on the Arts:

3. Ensure Council employees are aware of their responsibilities under the Public Officers Law, such as:

- Financial Disclosure Statement filing requirements
- appropriate approval and disclosure of outside activities in accordance with current JCOPE guidance.

Lack of Compliance With Procurement Guidelines

Contract Justification and Advertising

We reviewed ESDC's Guidelines Regarding the Use, Awarding, Monitoring and Reporting of Procurement Contracts (Guidelines) that were in effect over the course of the contract term. The Guidelines require the contract initiator to write a Contract Justification Memorandum (Memo) from the respective Department Head to another ESDC official, generally the Chief Financial Officer (CFO) or Chair, justifying the need for the contract and providing expected maximum cost, description of services, selection process, demonstration that best value will be achieved, and funding source.

ESDC also has an obligation to advertise its contracting opportunities. Generally, it is required to advertise in the New York State Contract Reporter (Contract Reporter) all contracts for goods and services of \$15,000 or more. To promote competition, contracts should be awarded on a competitive basis to the maximum extent practicable and after evaluation of proposals obtained, when practicable, from at least three qualified respondents.

The Guidelines allow exemption from advertising in certain situations, such as when there are emergency or critical circumstances or if it is infeasible to advertise. Infeasibility is defined as situations where advertising is impracticable or inappropriate or would serve no useful purpose, and includes sole source and single source contracts. Sole source is defined as a situation in which only one source for the services is available, whereas single source exists when two or more vendors are available, but a particular vendor is preferable due to factors such as past experience, familiarity with ESDC operations, or demonstrated expertise. We inquired whether the Heather Hitchens contract was a sole or single source contract, since none of the documents we reviewed contained this information. ESDC management explained they treated this as a single source contract.

To obtain exemption from advertising, the contract initiator must submit a request to General Counsel describing the circumstances establishing the emergency or infeasibility and the basis for determining the proposed contract cost is reasonable. The Guidelines also require the exemption be authorized prior to the performance of services for contracts in amounts less than \$50,000, and before Directors' approval for contracts and amendments for \$50,000 or more.

We found the Memos for the contract and the three amendments were sent from then-General Counsel Anita Laremont, instead of from the Tourism and Marketing Department Head at the time, Thomas Ranese. Also, instead of Ms. Laremont receiving them, per ESDC policy, the President or Executive Vice President received them. In addition, though the initial Memo included justification of the need and expected maximum contract cost, as required, we found its statement that Ms. Hitchens' services would be a "valuable supplement to the activities of the Tourism and Marketing Department" did little to demonstrate this contract provided the best value.

Ms. Laremont was also the person who requested the advertising exemption for the initial Heather Hitchens contract in an August 13, 2007 memo to President and Chief Operating Officer Avi Schick. In it, Ms. Laremont claimed that in Ms. Hitchens' capacity as Council Executive Director, she (Hitchens) was uniquely qualified to provide cultural tourism expertise, employing the 'broad knowledge base gained in that role' to ESDC's tourism marketing, cultural tourism and I Love NY (ILNY) efforts. The request also stated that advertising in the Contract Reporter would serve no useful purpose. This statement and the circular logic employed in the single source request further reinforce the conclusion that the consulting agreement was a pretext to boost Ms. Hitchens' salary.

We also found none of the four exemption requests included the basis for determining the contract cost, and the exemption request for the first amendment was late, after Director approval. ESDC management explained it's not unusual for General Counsel's office to issue the Memos if a contract involves sole source or ethical considerations. They acknowledged not having provided the basis for determining the contract cost was reasonable, as well as the late timing of the exemption request, but offered no reason.

Demonstrating how single source contracts provide best value, why advertising isn't required, and how cost is considered are steps that provide assurance to taxpayers that management is paying a reasonable price and exercising sound procurement practices.

Timing of Services

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

Ms. Hitchens' Activity Reports showed she performed services for ESDC between one and six months prior to contract execution in each of the four contract periods without a Letter to Proceed. ESDC officials claimed this was a low-risk situation since they would not have paid Ms. Hitchens without an executed contract. We verified that ESDC didn't pay Ms. Hitchens until after contract execution in each of the four contract periods, but maintain that having a Letter to Proceed in place provides more protection against possible contractor claims.

Contract Monitoring

According to the scope of work for the initial contract and two of the three amendments, Ms. Hitchens was to provide the following six services to ESDC:

- Meet and confer regularly with ESD leadership on Cultural Tourism issues;
- Serve as ESD’s lead Cultural Tourism expert to participate in the development of tourism marketing strategies and execution for the I Love NY (ILNY) program;
- Develop and maintain relationships on behalf of ESD with the diversity of local and regional arts and cultural tourism organizations across the State;
- Manage the inventory of major cultural tourism assets across the state for use in ILNY marketing programs and initiatives;
- Identify areas to promote tourism for New York State using arts and cultural attractions as the anchor for overnight and extended-stay trips to target audiences; and
- Identify funding sources and revenue opportunities to further promote and support marketing for Cultural Tourism.

The third amendment called for a reduced scope of work, limited to providing cultural tourism expertise, assisting in the development of tourism marketing strategy, and execution of the ILNY program.

We analyzed Ms. Hitchens’ Activity Reports for the 41-month period from August 2007 through December 2010, and identified activities that appeared to satisfy one or more of the six services she was under contract to provide. We concluded that while Ms. Hitchens provided five of six services, she did not appear to have provided one of them: identifying funding sources and revenue opportunities to further promote and support marketing for Cultural Tourism.

We asked three people whether Ms. Hitchens provided the one service in question. DED Deputy Director of Tourism and current Department Head Edward Maitino responded that he didn’t recall receiving any deliverables that identified funding sources and revenue opportunities. Tourism Associate Christopher Achacoso, who signed Ms. Hitchens’ Payment Authorizations prior to their approval by the Department Head, told us he didn’t know anything about this, and Vice President of Contract Administration Carlos Otero responded that he didn’t know. We attribute the possible lack of receipt of a contracted service to ineffective monitoring, and the lack of knowledge about it to ineffective communication.

ESDC’s Guidelines also include the following provisions regarding contract monitoring:

- the contract must contain a scope of work or services, identify any deliverables, indicate whether ESDC resources will be used, and provide a timeframe
- contract terms should include the location of work and standards to measure performance (e.g., units of service, target dates, etc.);
- invoices should be reviewed by the person monitoring the contract and approved by the respective Department Head. Payments shouldn’t be made unless the work is satisfactory and in accordance with the terms of the contract;

- the frequency and manner of monitoring performance should be clearly stated and directly related to the terms of the contract;
- ESDC should maintain and review written documentation pertaining to contractor performance, and evaluation of performance should consider quantity and quality of work performed; and
- employees assigned the responsibility of monitoring the work should be familiar with the type of work and with the specific terms of the contract.

In addition to the Guidelines, ESDC uses Schedule A to identify other terms applicable to consultant contracts, such as the consultant's status as independent contractor; requirements regarding conflicts of interest; and maintenance and submission of time records. Schedule A requires consultants to maintain complete and correct records of the time spent performing the obligations agreed upon in the contract. It also states these time records "shall specify the dates and numbers of hours or portions thereof" the consultant spends on fulfilling the obligations. Further, it states that consultants shall submit duplicate copies of these time records at the time they submit invoices for payment, and they must maintain the records until three years after completing services or termination of the agreement.

ESDC didn't comply with several of these monitoring requirements. For example, the contract with Ms. Hitchens didn't include performance standards, nor did it identify the manner or frequency with which ESDC management would assess her performance. ESDC personnel didn't maintain any written documentation of Ms. Hitchens' performance, nor did they obtain the hours she spent fulfilling the terms of the contract, though the dates of her activity were on the Activity Reports.

We found weaknesses in other aspects of ESDC's oversight of this contract. According to the Guidelines, the person assigned the responsibility of monitoring the work should be familiar with the work and the contract terms. However, no one we interviewed at ESDC acknowledged having this responsibility. The individuals who may have been responsible for monitoring Ms. Hitchens' contract, primarily Department Head Edward Maitino and, to a lesser extent, Christopher Achacoso, claimed not to be familiar with the contract terms. They did say they were familiar with Ms. Hitchens' work through meetings.

Insufficient oversight contributed to the lack of performance standards and the information about how ESDC would use them. Similarly, it resulted in the lack of key individuals' familiarity with contract terms and the failure to record an assessment of Ms. Hitchens' performance. ESDC officials explained they didn't collect Ms. Hitchens' hours of work because that practice was only applicable to contractors who were paid by the hour; however, they acknowledged the Schedule A wording wasn't clear.

ESDC's failure to monitor this already-questionable contract on so many levels, from obtaining hours worked to familiarizing relevant personnel with their monitoring responsibilities, suggests this contract was poorly overseen.

Recommendations

To ESDC:

4. Train personnel at all levels on the legal and internal requirements that affect the procurement process and to assure that personnel responsible for contract oversight know and accept their responsibilities.

5. Monitor compliance with these requirements, including those related to:
 - Statutory limits on compensation,
 - Provisions of Public Officers Law,
 - Demonstrating contract necessity,
 - Providing a rationale for exemptions from advertising,
 - Justification of selection method and cost,
 - Ensuring criteria for contractor performance are in place, communicated to the relevant parties, and used in contract oversight.

Audit Scope and Methodology

We audited ESDC's personal services contract with former New York State Council on the Arts Executive Director Heather Hitchens for necessity, propriety and compliance with State law and ESDC's internal contracting guidelines. The contract covered the period August 1, 2007 through December 31, 2010.

To accomplish our objectives, we interviewed ESDC officials and reviewed laws, policies and procedures applicable to ESDC and the procurement process. We reviewed contract documents to get an understanding of their key provisions, including amounts, parties involved in the contract process, deliverables, and payment process. We performed tests of certain contract data to assess its reliability. We interviewed former ESDC General Counsel and the current Council Executive Director, and spoke with former Governor Spitzer's Appointments Secretary. We also interviewed Heather Hitchens. We obtained documentation about Ms. Hitchens' reported consulting activities on behalf of ESDC from ESDC. We also analyzed time and travel records we received from the Council.

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

In addition to being the State Auditor, the Comptroller performs certain other constitutionally and statutorily mandated duties as the chief fiscal officer of New York State. These include operating the State's accounting system; preparing the State's financial statements; and approving State contracts, refunds, and other payments. In addition, the Comptroller appoints members to

certain boards, commissions and public authorities, some of whom have minority voting rights. These duties may be considered management functions for purposes of evaluating organizational independence under generally accepted government auditing standards. In our opinion, these functions do not affect our ability to conduct independent audits of program performance.

Authority

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

Reporting Requirements

A draft copy of this report was provided to ESDC and Council officials for their review and comment. Their responses were considered in preparing this final report and are attached in their entirety to this report. ESDC and Council officials generally agreed with our recommendations and indicate steps they have taken or will take to implement them. Council officials plan to recover \$5,343 paid to Ms. Hitchens for travel she incurred for activities she performed for ESDC at Council's travel expense. However, ESDC officials have determined that ESDC does not have a right of action to recover funds paid under contract to Ms. Hitchens.

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

Contributors to This Report

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Vision

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

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

Agency Comments - New York State Council on the Arts



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Ms. Melissa Little
Office of the State Comptroller
Division of State Government Accountability
110 State Street, 11th Floor
Albany, NY 12236

July 29, 2013

Dear Ms. Little,

I write on behalf of the New York State Council on the Arts (NYSCA) in response to the Office of the State Comptroller's (OSC) Draft Report 2011-S-6, May 2013, which examined a contract between Heather Hitchens, former Executive Director of NYSCA (August 2007 to May 2011), and Empire State Development (ESD) for consulting services related to cultural tourism. We welcome your office's review and recommendations.

The Draft Report was addressed to both ESD and NYSCA; its findings and recommendations were addressed to either one or both of the agencies. This response will cover the recommendations addressed to NYSCA.

The Report's recommendation to NYSCA on page 10 is as follows:

"3. Ensure Council employees are aware of their responsibilities under Public Officers Law, such as:

- Financial Disclosure Statement filing requirements
- Appropriate approval and disclosure of outside activities in accordance with current JCOPE guidance"

It is currently NYSCA's policy, and has been since January 1, 2011, that NYSCA's employees and Council members be informed of the requirements of the New York State Public Officers Law. Under Public Officers Law § 73, staff that are policy makers or whose salary meets or exceeds the filing rate specified therein must complete required financial disclosures annually, by a specified filing deadline. NYSCA notifies all staff and Council members who are required to file annual financial disclosure statements, and confirms with the Joint Commission on Public Ethics (JCOPE), which receives these filings, that all NYSCA filings have been completed. If any person required to file has not submitted a financial disclosure statement to JCOPE, I, as Executive Director of the agency, follow up with that

person to ensure that his or her statement is filed. As required by the Executive Law, staff who are policy makers under the law complete training upon the start of employment at the agency, and regular training is required thereafter (either every two or three years under the law, depending on the type of employee). Compliance with these training requirements is verified by the Executive Director. In order to ensure consistent compliance with the law, NYSCA has also sought out guidance from and adhered to all guidance provided by JCOPE when questions about ethics and requirements of the Public Officers Law arise.

The audit's recommendation to NYSCA and ESD on page 9 is as follows:

"1. Work together to determine whether and to what extent funds were improperly paid and recover funds and appropriate and feasible."

NYSCA agrees with the Draft Report's finding beginning on page 8 "Reported ESDC Activities Were Completed on Council Time and at Council's Travel Expense." NYSCA has reviewed the worksheet prepared by OSC. It presents research and reconciliation of travel vouchers submitted to NYSCA for expenses related to 19 day or overnight trips and for which NYSCA reimbursed Ms. Hitchens \$5,342.86. The Council has reviewed the vouchers and concurs with the accounting on the worksheet. Because such expenses should have been covered by payments under Ms. Hitchens' contract with ESD, NYSCA will seek to recover this amount from the former Executive Director.

I am confident that the compliance and training policies now in practice at NYSCA related to Public Officers Law and the agency's efforts to seek to recover funds related to travel reimbursements adequately address the recommendations made in the draft Report.

Please contact me if you have any further questions regarding our response or require additional information or documentation.

Sincerely,



Lisa Robb
Executive Director

Cc: Aby Rosen, Chair, NYS Council on the Arts
Kenneth Adams, President & CEO, NYS Empire State Development Corporation

Agency Comments - Empire State Development Corporation

Empire State Development

Melissa Little
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July 29, 2013

Re: Draft Report 2011-S-6

Dear Ms. Little:

On behalf of Empire State Development (“ESD”), I write in response to the Office of the State Comptroller’s (“OSC”) Draft Report 2011-S-6, Unnecessary and Potentially Illegal Consultant Contract with Former New York State Council on the Arts Executive Director (the “Draft Audit Report”), transmitted to ESD on May 29, 2013.

ESD accepts the facts as set forth in the Draft Audit Report regarding events that occurred several years ago, under a prior administration. However, it should be noted that some of the ESD personnel mentioned in the Draft Audit Report are no longer employed by ESD. Since that time, ESD has revisited its procurement process on several occasions. ESD has: revised its procurement guidelines, and developed standard forms to make the process more readily understandable and user-friendly for ESD staff; restructured its procurement unit; and developed staff training directed at all ESD staff involved in procurements.

Response to Recommendations

The Draft Audit Report contains five recommendations. Of these five: three (nos. 2, 4 and 5) are addressed only to ESD; one (no. 3) is addressed only to the New York State Council on the Arts (“NYSCA”, co-addressee of the Draft Audit Report); and one (no. 1) is addressed to both ESD and NYSCA. ESD’s responses to the four recommendations applicable to ESD are set forth below. (Recommendations 2, 4 and 5 are closely related; thus, ESD’s response to all three is presented together.)

Recommendation No. 1:

1. *Work together to determine whether and to what extent funds were improperly paid and recover funds as appropriate and feasible.*

After careful review of the ESD contract with Heather Hitchens (“Hitchens”), ESD staff conclude that ESD does not have a right of action under the contract to recover funds.

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Melissa Little
 Office of the State Comptroller
 Response to Draft Report 2011-S-6

As the Draft Audit Report points out, Hitchens provided regular invoices detailing tasks that she performed under the contract. These tasks were within the scope of the contract between ESD and Hitchens. Thus, Hitchens provided services under a valid contract, upon which ESD paid the contractual fee. We understand, however, that NYSCA, in its response by letter dated July 29, 2013, has indicated that it "will seek to recover" the amount NYSCA reimbursed Hitchens for overnight trips that should have been covered by payments under Hitchens' contract with ESD.

Recommendation Nos. 2, 4 and 5:

2. *Change the control environment at ESD to one that reinforces and demonstrates ethical decision-making, is transparent, and can withstand public scrutiny.*
4. *Train personnel at all levels on the legal and internal requirements that affect the procurement process and to assure that personnel responsible for contract oversight know and accept their responsibilities.*
5. *Monitor compliance with these requirements, including those related to:*
 - *Statutory limits on compensation,*
 - *Provisions of Public Officers Law,*
 - *Demonstrating contract necessity,*
 - *Providing a rationale for exemptions from advertising,*
 - *Justification of selection method and cost,*
 - *Ensuring criteria for contractor performance are in place, communicated to the relevant parties, and used in contract oversight.*

Since 2007, ESD has revised and regularly reviews its procurement process, dedicated staff to the procurement process and developed procurement training for staff.

Procurement Guidelines and Related Standard Forms

ESD has Procurement Guidelines designed to assist staff in executing procurements efficiently and effectively. In recent years, ESD has updated its Procurement Guidelines several times to reflect amendments to state law and to increase user-friendliness. In May 2009, ESD revised the Procurement Guidelines to ensure conformity with the Public Authorities Law, State Finance Law, and Tax Law. In particular, the revisions articulated various solicitation techniques to ensure a competitive process. Additionally, the revised guidelines contained guidance as to the information necessary to obtain director approval of procurement contracts, the appropriate documentation to be included in the approval package, and the process for monitoring and reporting on procurement contracts once directors have approved.

Melissa Little
Office of the State Comptroller
Response to Draft Report 2011-S-6

In May 2010, ESD again modified the Procurement Guidelines, including changes to make them easier for staff to work with and to reflect current laws, including amended statewide procurement guidelines issued in July 2009. Most recently, in January 2013, ESD revised its Procurement Guidelines to increase user-friendliness, to require compliance with Project Sunlight (a Governor's initiative that requires, among other things, public authorities to report communications from representatives of parties seeking procurement contracts which are intended to influence the award of such contracts), and to incorporate the use of OSC's VendRep Vendor Responsibility System, among other things. As required by the Public Authorities Law, the directors reviewed and approved these revisions. Further, the Public Authorities Law requires the directors to review the Procurement Guidelines annually to ensure their continued consistency with the corporation's obligations, and compliance with applicable laws and regulations. The current Procurement Guidelines are posted in various places on ESD's internal network, making them a readily available reference for all staff.

Furthermore, ESD has created standard forms and language to ensure consistency in the procurement process. ESD has developed standard language to be included in solicitations. Moreover, ESD staff use a standardized form to seek directors' authorization for the corporation to enter into a contract. This form elicits information to ensure and to document that ESD staff followed the proper procurement process prior to seeking the directors' approval. Such standardization ensures consistency across the organization and conformity with Procurement Guideline requirements. Moreover, the Procurement Guidelines contain links to the related standardized forms and required language, and various Office of General Services lists and guides. This makes the procurement process more understandable and user friendly, and increases accuracy in implementation by staff.

Additionally, ESD has recently created a standard intake form upon which staff can make contract reporter exemption requests. This form clearly sets forth the criteria needed to seek an exemption so that information required as a justification is properly elicited, considered, and documented. To complement this standardization of requests, ESD has also created a tracking system to facilitate consistency.

Finally, in order to ensure compliance with the requirements of the Procurement Guidelines and the consistent handling of procurement-related decisions, ESD has assigned dedicated staff attorneys to address any issues that may arise regarding the interpretation and application of the Procurement Guidelines.

Melissa Little
Office of the State Comptroller
Response to Draft Report 2011-S-6

Procurement Unit

In further effort to create a more robust procurement process, ESD has restructured its Procurement Unit to report to the Vice President of Contract Administration and Subsidiary Finance. This integrated the procurement process into the overall contract administration process. The unit includes staff dedicated to review completed procurement-related forms, maintain appropriate tracking systems, and keep informed of changes in laws and regulations as they affect procurement.

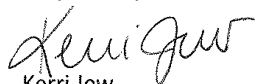
Staff Training

Lastly, ESD has developed training for all staff on the procurement process. This training focuses on the recent updates to the Procurement Guidelines, as well as reacquaints staff with relevant forms and how to access them. Training topics include: justification for exemptions; contract thresholds and how they affect requirements; when a request for proposal is required; and when a request for statement of qualifications may be appropriate. ESD is in the process of finalizing training materials and will begin a new round of training sessions in the next several months. The Vice President of Contract Administration will provide the training and an attorney will participate in each session to ensure that information presented is consistent with the Procurement Guidelines.

Conclusion

ESD believes that it has substantially improved its procurement guidelines and processes since the time of the actions addressed in the Draft Audit Report and that these improvements address the recommendations made in the Draft Audit Report.

Respectfully,



Kerri Jew
Compliance Officer

c: Lisa Robb
Executive Director
New York State Council on the Arts

Lawrence A. Jacobs
Executive Vice President, Legal & General Counsel
Empire State Development