

May 16, 2006

Ms. Diane Taylor  
Project Director, Vendor Resp. Unit  
NYS Office of the State Comptroller  
110 State St  
Albany, NY 12236-0001

Dear Ms. Taylor :

**RE:** *Comments on 4/28/06 Draft VendRep Survey*

The Business Council appreciates the Comptroller's efforts to obtain public input on the development of the VendRep system, and the opportunity to submit comments on the April 28, 2006 draft of the VendRep questionnaire. These comments were developed with the input of numerous Business Council member companies that comprise our Contract Procurement Council, and that actively participate in the governmental contract arena in New York and other states.

The Business Council recognizes the fundamental purpose of the vendor responsibility assessment process -- to assure that potential contractors have the legal authorization to conduct business in New York State and the organizational and financial capacity to fulfill the obligations of a state contract, and to assure that the business is generally in compliance with applicable business laws.

We also recognize the state's objective to "know" their bidders and vendors, and to assure that it is not unwittingly awarding contracts with a entity that is "front" for otherwise non-responsible persons or business entities.

Our most significant concerns regarding previous versions of the VendRep questionnaire have been with their extraordinary breadth of inquiry – in many cases, the scope of inquiry seems directly related to the need to "know" the background and affiliations of certain bidders.

Further, the draft questionnaires have requested information that have little bearing on the vendor responsibility issues mentioned above. Likewise, previous versions of the questionnaire contained broad, vague questions that posed uncertain disclosure obligations on potential vendors.

We appreciate that incremental progress has been made in the various draft questionnaires that partially address our concerns, and these improvements have been a direct result of your staff's efforts to understand and respond to concerns raised by the vendor community.

Our detailed comments on the April 28, 2006 draft of the VendRep survey are attached.

While this draft contains improvements in a number of specific questions, it still fails to address our most basic concern about excessive breadth of inquiry.

We make three broad recommendations to address these concerns.

First – as we have discussed previously with OSC staff – we recommend that publicly traded corporations not be subject to questions regarding parent and affiliate businesses. These inquiries seem based on the state's "know the bidder" concerns, which does not seem to be a significant problem for publicly traded corporations.

Second, we suggest that the questionnaire be revised so that an organization's response can be limited to the division or subsidiary that is doing business with the State.

Third, we recommend that for non-publicly traded businesses, the obligation to respond to questions on affiliate businesses be imposed on a case-by-case basis. This approach has been successfully applied in other settings where the state has a significant interest in assessing a business entity's compliance history (i.e., the Department of Environmental Conservation's "record of compliance" program.)

These recommendations are based two factors:

– first, the belief that the OSC either has, or has access to, significant information on many vendors and potential vendors, either through publicly accessible information and/or through the state's experience dealing with these business via the contract procurement process. As such, we do not believe that subjecting every potential vendor to the full scope of VendRep questions will materially improve the OSC's ability to conduct an appropriate responsibility assessment.

– second, the questionnaire as currently drafted imposes significant obligations, and legal risks, on businesses, especially on large corporations with diverse operations and complex business structures. If the questionnaire were approved in its current form, organizations would have to spend inordinate time and resources searching for and disclosing information that does not reflect on their ability to perform their contractual obligations – and would likewise inundate state officials with such information. Ironically, a business entity that attempts to respond accurately is subject to costs and legal risk while organizations with lower ethical standards may have less concerns with completing and signing the questionnaire.

Moreover, we are concerned that by imposing excessive reporting requirements, the VendRep process could dissuade responsible vendors from participating in New

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York's contract procurement process. Any such impact would be contrary to the interests of the state, its taxpayers and its business community.

In brief, we recommend that the questionnaire focus on the specific business unit that would be bidding on a contract, and on material matters that reflect on that business unit's ability to perform the contract. Finally, the questionnaire should avoid using subjective terms that result in unclear reporting obligations.

Please feel free to contact me at any time to answer any questions regarding these comment. The Business Council and members of its Contract Procurement Council look forward to working with you and OSC staff in the finalization of a effective, efficient VendRep questionnaire.

Sincerely,

*kp*  
*Attachment*  
*Copy to Tom Sanzillo, Kim Fine, Joan Sullivan*

## BUSINESS TYPE

F 3.1 – We recommend that for-profit business entity category be sub-divided to publicly traded and non-publicly traded businesses. This distinction applies to several additional recommendations we make below to refine the scope of inquiry in the VendRep questionnaire, especially but not exclusively with regard to submission of data on affiliates.

F 3.2 – With regard to the definition of “business entity,” we make the following recommendations:

- in general, the definition should further define “business entity” as “...the legal entity for which this Responsibility Questionnaire is completed and submitted.”
- the term “business entity” should only apply to the division [or subsidiary] of that corporation that will supplying goods or services to the State under the state contract.

F 3.2 – We support the modification included in this draft of the VendRep survey that restricts construction-related questions to business entities that intend to bid on state government construction contracts.

F 3.3 – The definition of “trade name” is very unclear (“Any name used by a person to identify a business or vocation of such person . . .”)

## BUSINESS CHARACTERISTICS

F 4.6 – The intent of this section is unclear. It seems to require that a business entity submit multiple VendRep questionnaires if it is classified as a “complex business entity” based on number of employees and/or value of sales. While we have a number of concerns regarding this provision, our basic concern is that the OSC is drawing the wrong distinction. As discussed above, we are suggesting that the OSC first distinguish between publicly traded and non-publicly traded business entities. We believe that sufficient public information is available regarding the identity of parent and affiliate businesses so that the OSC does not need to use the VendRep questionnaire in an attempt to identify their business relationships. Further, it is unclear whether an employment or sales threshold applied to a specific business entity will help discern instances where the OSC would need information on parent and/or affiliate businesses in order to make a responsibility determination.

F 4.6 – As the definition of “joint venture” refers to two or more entities joining together for a specific purposes or projects, this question should ask whether the business entity is a joint venture formed for the purpose of bidding on a state procurement contract.

F 4.9 – The definition of the term “registered to do business in New York State” should also indicate whether a foreign firm needs to be registered to be eligible to either submit a VendRep for or submit a bid on a state contract.

F 4.12.1 – As discussed above, disclosure of “affiliates” should not be required of publicly traded businesses. Further, for non-publicly traded businesses, disclosure of information on “affiliates” should either be limited to affiliated businesses that conduct business in New York State, or should be required based on a case-by-case determination of the OSC.

F 4.13 – This requirement to identify construction joint ventures in which the business entity has participated in within the past three years should only apply to business entities that answered yes to question 3.2 regarding their intent to bid on state construction contracts.

F 4.14.1 – As drafted, the VendRep survey suggests that the OSC database will display contracts awarded to the business entity as part of the on-site survey, rather than requiring the business entity to identify such contracts – as was the case in earlier versions of this questionnaire. This is a major improvement, and OSC is to be applauded for including this function in its on-line VendRep system. However, the intent of the question, “Should additional contracts be added,” is unclear. Is the OSC asking the business entity to determine the completeness of the OSC data base? Is the OSC allowing the business entity to provide additional contracts on which it would like the OSC responsibility determination to be made? Please provide more clear direction on how to comply with this provision. In any case, limiting the required submission of additional contract information is also a positive change to the survey.

## COMPLIANCE

F 5.3 – As discussed above, the questions in this section regarding “affiliates” should not apply to publicly traded corporations.

F 5.3.1 – We support the definition of “administrative proceeding” included in this question regarding legal actions by governmental entities with regard to contracts. It specifies that such “actions” applies to governmental actions required by law and based on a formal record. We suggest, however, that the term “government contract” [and “government contracting process”, see question 5.3.2] be defined to be consistent with the definition of “government entity,” i.e. federal, state and local governments.” We further recommend that the definition of “government entity” be defined to apply to those entities within the U.S.

F 5.3.3 – This question on whether the business entity as every been “disqualified on any government procurement,” should specify “disqualified for cause.” Previous versions of the VendRep survey included this “for cause” provision (see question 5.3.3 in 2/23/06 version). A similar change should be made in F 5.3.4. Our intent

here is to exclude listing of disqualifications based on procedural, ministerial or other non-substantive basis. Therefore, we also recommend the definition of "termination for cause" be expanded to apply to all "for cause" provisions of the questionnaire, and be modified to define "for cause" as applying to " . . . the business entity's failure to comply with substantive statutory and/or regulatory responsibilities.

F 5.3.4 – This question regarding "denial or revocation of a governmental prequalification" is fairly vague, and the questionnaire provides no details as to what constitutes such actions. At minimum, this should apply only to written determinations of denial or revocations.

F 5.3.8 – This question regarding instances where the business entity "initiated a request to withdraw its bid . . . or made any claim of an error on a bid" submitted to a government entity appears for the first time in the draft VendRep questionnaire. It is unclear how instances of a withdrawn bid would be considered in a vendor responsibility assessment. As such, we question the relevance of this information to the vendor responsibility assessment process.

F 5.3.9 – It is also unclear why the OSC would need to know if a business entity had been denied MBE or WBE certification, if the business entity is not claiming MBE and/or WBE status. Our experience in helping member companies navigate the M/WBE certification process indicates a certain level of inconsistency in determinations. We question whether the denial of M/WBE status has any relevance to the vendor responsibility assessment process.

F 5.3.12 – It remains unclear to us how a business entity would know if it had been subject to a "criminal investigation" regarding false or fraudulent M/W/DBE designations. The term "investigation" should be removed because it is a subjective standard. [Note: it is unclear whether the proposed definition of "investigation" applies here to the term "criminal investigation." Regardless, the proposed definition of "investigation" – "an inquiry has been made or is being made . . ." – does not address our concerns.] The remaining thresholds in this question (i.e. felony indictment or conviction) are objective and sufficient to obtain relevant information. Finally, this question is redundant, as question F 5.3.15 asks about criminal indictments, etc. under all categories of business-related conduct.

F 5.3.13 – This question asks whether the business entity has been subject to any "sanction" related to a business or professional permit or licence. The definition of the term "sanction" applies, in part, "violations" and to a fine of any amount. As such, this question would require disclosure of relatively minor, non-criminal "violations" and/or minor financial penalties under a wide range of federal, state and local permit programs. We recommend that the term "sanction" be modified to apply to fines and penalties of \$10,000 or more, and to injunctions, disbarments, suspensions and/or revocation of permits and licences. This revised standard will focus the OSC inquiry on significant violations of law.

F 5.3.14 – This question regarding “investigations” should be dropped in its entirety. As mentioned above, it is still unclear what constitutes an “investigation” under the proposed definition, and it is also unclear the extent to which a business entity would be aware of such “investigations.” We do not believe that a responsibility determination should be based, even in part, on such uncertain criteria.

F 5.3.15 – Contrary to our concerns regarding draft questions regarding “investigations,” this question contains objective thresholds (indictments, judgements, convictions) that apply to business-related activity. Our only suggestion is that instead of referring to conduct “constituting a crime,” it should refer to conduct “constituting a misdemeanor or felony.”

F 5.3.20 – We have concerns regarding provisions of this question that apply to instances where the business entity was subject to a fine in excess of \$1,000 (subparts (i) and (ii), or had entered into a settlement for “violations” of a wide range of federal, state or local laws and regulations (subpart (iv.)) We believe the \$1,000 threshold for disclosures of fines to be exceedingly low, and again recommend a threshold of \$10,000 [see comments regarding F 5.3.13 above.] Likewise, we recommend that a \$10,000 threshold be applied to the inquiry in subpart (iv) regarding settlements related to violations of listed “laws and regulations.”

Further, while our concerns will be reduced by applicability of a \$10,000 threshold, we also recommend that the reporting obligations be limited to specifically listed federal and/or state statutes and regulations. As proposed, this definition of “laws and regulations” is both broad and vague. For example, it is unclear what constitutes a “safety law” or a “health law” under various jurisdictions. New York has neither, although New York’s consolidated statutes have numerous provisions regarding “safety” (including safety in the workplace, traffic and other settings) and “health.” Again, a responsibility determination should be based on such vague criteria.

F 5.4 – We have several recommendations regarding this section on enforcement and compliance issues related to business entity leaders. First, this inquiry should only apply to a business entity leaders’ actions that occur in their capacity as a representative of the business entity. Second, the reference to persons identified in section 4.11.3 is redundant. Third, applicability to “joint venture entity” should be consistent with our proposal to revise the definition of “joint venture” [see comment above on question F 4.6].

F 5.4.1 – See comments above [question F 5.3.13] regarding definition of the term “sanction.”

F 5.4.2 – We recommend deletion of this question regarding “investigations.” [see discussion of this issue above regarding question F 5.3.12.]

F 5.4.4 – Our comments above regarding question 5.3.20 apply as well to this question regarding fines and settlements involving “business entity leaders.”

#### FINANCIAL AND ORGANIZATIONAL CAPACITY

F 6.1 – Consistent with our recommendation regarding question F 3.2, we recommend that this section exempt affiliates of a publicly traded corporation. Likewise, we again recommend that the term “business entity” should only apply to the division [or subsidiary] of that corporation that will supplying goods or services to the State under the state contract.

F 6.1.2 – Rather than referring simply to “unsatisfied judgement, injunctions or lien” obtained by a government entity, this question should reflect provisions of question F 6.1.4, which refers to judgements, claims and liens “which remain uncharged or were unsatisfied for more than 90 days.”

F 6.3.1 – This question, which asks whether a business entity has “filed and paid all tax returns required by Federal, State or local tax laws,” is excessively broad. It is extremely difficult for organizations with extensive operations throughout the U.S. to identify tax claims asserted by various state and local authorities. Likewise, as written, this question could be interpreted as applying to ongoing tax disputes; actions that may be immaterial to a venter responsibility assessment. As a result, the tax portion of this question should be limited to New York State and states in which New York has reciprocity, and should exclude disputed tax liability that is the subject of a formal challenge. In addition, there should also be a materiality threshold (e.g. \$100,000).