

The Dormitory Authority of the State of New York held a Governance Committee Video Conference Meeting was held between DASNY's Albany Office, 515 Broadway, Albany, New York; New York City Office, One Penn Plaza 52nd Floor, New York, New York; and Buffalo Office, 539 Franklin Street, Buffalo, New York at 6:40 p.m. on Tuesday, November 12, 2019.

The Meeting was called to order by the Chair of the Committee. The Chair appointed Board Member Romski as a Member of the Corporate Governance Committee for purposes of the Meeting. Roll call was taken and a quorum was present. Those Governance Committee Members present and absent were as follows:

Governance Committee Members Present - NYCO

John B. Johnson, Jr., Committee Chair
Gerard Romski, Committee Member

Governance Committee Members Absent

Paul Ellis, Committee Member
Alfonso L. Carney, Jr., Board Chair

Other Board Members Present - NYCO

Joan Sullivan, Board Member

Other Board Members Present - Albany

Tracy Raleigh, Designated Representative of the Commissioner of Health, Member (ex officio)

Other Board Members Present - Buffalo

Jonathan H. Gardner, Board Member

DASNY Staff Present - NYCO

Paul G. Koopman, Vice President
Michael E. Cusack, Esq., General Counsel
Portia Lee, Managing Director, Public Finance and Portfolio Monitoring
Michael S. Clay, Senior Director, Opportunity Programs
J. Matthew Moore, Director, Procurement
Monica S. Norris, Esq., Assistant General Counsel

DASNY Staff Present - Albany

Kimberly J. Nadeau, Chief Financial Officer
Kimberly Ellis, Deputy Chief Financial Officer

Nicolla B. Zarrelli, Managing Senior Director, Construction Finance & Administration
Karen E. Ehlinger, Manager, Internal Control Analysis
Michael L. Johnson, Esq., Assistant General Counsel
Dena T. Amodio, Esq., Assistant General Counsel
Michael T. Corrigan

PUBLIC SESSION

Chairman Johnson called the meeting to order. He noted that Gerard Ronski had been appointed a Member of the Committee. The Minutes of the May 7, 2019 Governance Committee Meeting were reviewed and approved unanimously.

Performance Measurements

Governance Committee Chair Johnson asked Mr. Cusack to give a brief explanation of the proposed changes.

Mr. Cusack stated that before the Committee for their consideration and recommendation to the full DASNY Board, were the revised DASNY Performance metrics. He noted that there were several revisions being suggested.

First, staff is recommending that Goal 2: Employee Development and Training Metric be revised to delete the Board member training as a measurement of the goal to “Employ a professional, highly-trained, and expert workforce” as the Members are not employees of DASNY. Additionally, Mr. Cusack reported that statistical analysis showed that the Board Member training was only a fractional amount of the hours reported. He noted that in 2018-19 DASNY reported approximately 16,934 hours of training, of which approximately 14,000 hours were professional development, approximately 2,140 hours were NYS required training and close to 1,000 hours were ethics training. He further noted that of this only 21 hours were attributable to Board Members.

Next, Mr. Cusack noted that staff is recommending that the Sustainability metric of Goal 3 be expanded beyond LEED in order to more broadly track and report on all of DASNY’s sustainability efforts, not just those that are LEED-specific. He stated that this change would also support recent changes in State law which provide for a more proactive and comprehensive approach to sustainability that is consistent with the rapidly changing marketplace.

Mr. Cusack stated that the last proposed revision was to the New Program metric of Goal 3. He noted that DASNY, in supporting the public policy goals of New York State, continues to provide development support for new or additional State programs to our new and existing clients. He noted that the existing measure was an input metric that was designed to capture the level of unreimbursed DASNY effort subsidizing the development of State initiatives, regardless of whether the initiatives were ultimately adopted. Mr. Cusack stated that DASNY’s annual determination in this regard includes subjective judgments, and, therefore, staff recommends transitioning to an objective standard based upon the outcome of those support efforts, by reporting the number and nature of new or expanded programs that are actually enacted or authorized each year.

In response to an inquiry by Mr. Ronski, Mr. Koopman stated that DASNY does a lot of work to advance different goals of the State, such as conversations with various agencies in support of State infrastructure initiatives. He noted that it was difficult to measure whether or not those work efforts evolved into a program or aligned with DASNY's Mission. He explained that going forward if DASNY does do work on a particular initiative which is enacted into a program, DASNY would be able to report on the hours associated with that program, as the object is to be able to measure the support provided to programs that DASNY is responsible for.

Mr. Cusack noted that, if adopted, the proposed changes to the performance metrics would become effective April 1, 2020.

The Corporate Governance Committee decided unanimously to recommend the proposed revisions to the Performance Metrics to the full Board.

Procurement Contract Policy and Guidelines – Proposed Amendments

The Governance Committee Chair asked Mr. Cusack to describe the proposed amendments to the DASNY Procurement Policy and Contract Procurement Guidelines.

Mr. Cusack introduced to the Committee Monica S. Norris, Esq., Assistant General Counsel, Michael S. Clay, Senior Director, Opportunity Programs and J. Matthew Moore, Director, Procurement. He noted that they were all instrumental in putting together the presentation.

Ms. Norris noted that Article 15-A of the Executive Law requires DASNY to promote opportunities for minority- and women-owned business enterprises on DASNY contracts. She stated that although Article 15-A was scheduled to expire on December 31, 2019, it has been extended and will now expire on December 31, 2024. She noted that as a result, staff is recommending several changes to the Procurement Policy and Guidelines. Ms. Norris stated that the recommended changes are mainly administrative and conforming in nature, and are meant to streamline DASNY's guidelines to administer procurements in a more efficient manner. Ms. Norris directed the Members attention to the November 1, 2019 Memorandum, noting that the proposed changes generally fall within two categories: conforming changes resulting from the reauthorization of Article 15-A, and changes recommended for administrative reasons.

Ms. Norris stated that staff recommends the definition of "Minority-Owned Business Enterprise" appearing section 2(16) of the Procurement Guidelines be amended to eliminate the prior detailed definition, and incorporate by reference the definition of "Minority-Owned Business Enterprise" appearing in the reauthorized Article 15-A. She indicated that this approach would bring DASNY's Guidelines into compliance and also eliminate the need to future amendments to the Guidelines if the statewide definition should again change. She noted that this rationale also applies to staff's recommended changes to the definition of "Women-Owned Business Enterprise" appearing in section 2(33) of the Procurement Guidelines.

Ms. Norris indicated that staff is also recommending an additional proposed phrase “unless the context requires otherwise...” in each definition, in order to provide staff with flexibility when administering different programs which may contain a slightly different standard. In response to an inquiry from Mr. Ronski, Ms. Norris noted that examples of other contexts include DASNY’s discretionary purchases procedure, or section 2879 of the Public Authorities Law, which contains definitions slightly different from those in the reauthorized Article 15-A.

Ms. Norris directed the Members to the definition of “Diversity Practices” in section 2(12) of the Guidelines, and noted that staff is recommending adding the word “mentoring” to the definition to conform to changes in Article 15-A. In response to an inquiry from Mr. Ronski, Ms. Norris explained that the word “certified” is proposed to be deleted from the definition of “Diversity Practices” because certification is subsumed within the definitions of “Minority- and Women-Owned Business Enterprises.” She noted that language with regard to the mentor-protégé program, which is found in State Finance Law section 147, has been added to the definition of “Diversity Practices.”

In response to an inquiry from Mr. Ronski, Mr. Cusack confirmed that the criteria reflected in the Guidelines are applied in connection with the procurement of the professional services of outside legal counsel.

Ms. Norris noted that staff is recommending that the definition of “Disparity Study” in Guidelines section 2(32) also be amended to incorporate the Article 15-A definition of this term, so that the Guidelines don’t need to be updated whenever a new study is performed by the Empire State Development Corporation.

Ms. Norris referred the Members to the provisions of the Guidelines concerning discretionary purchases. She noted that not only was Article 15-A amended, but provisions of PAL section 2879 had been amended as well, which increased the limit for discretionary purchases from \$200,000 to \$500,000. She advised that section 3(C)(5) of the Guidelines have been updated accordingly. Ms. Norris clarified for Mr. Ronski that the amendments were part of Chapter 96 of the Laws of 2019, and noted that the amendment at section 7(A) of the Guidelines also contains updated reporting requirements with respect to discretionary purchases.

Mr. Clay then spoke about the new Workforce Diversity Program which was implemented through Executive Law Article 28 and contained in the reauthorization of Article 15-A of the Executive Law. He noted the new program does not appear in the proposed Procurement Guidelines, as Empire State Development (ESD) and the Governor’s Office are responsible for the implementation of this new law and ESD will be establishing program guidelines which include a public comment period. Mr. Clay noted that DASNY and other agencies have had EEO (Equal Employment Opportunities) programs for approximately 20 years; he noted that the difference with the new program is workforce diversity will be part of the pre-award process on construction contracts where the apparent low bidder must commit to achieving 30% workforce participation or request a waiver in addition to meeting the MWBE (subcontractor/supplier) goals as part of the contract requirements.

In response to an inquiry from Mr. Ronski, Mr. Clay stated that DASNY currently establishes EEO workforce participation goals on construction contracts; however, the new law will require workforce diversity to become part of the contract award process, which is not currently required. He explained that currently, DASNY's prime contractors compile workforce data for themselves and their sub-contractors, and submit reports on a monthly basis as to how they are meeting the EEO goals. In response to Ms. Sullivan, Mr. Clay stated the new law would require agencies/authorities to evaluate compliance prior to the awarding of the contract. Mr. Cusack clarified that the information sought relates to minority workforce within the firm, not the hiring of an MWBE subcontractor.

Mr. Cusack noted that Article 28 does indicate that the program is subject to promulgation of new rules and regulations by the Director of ESD. He stated that the program is under development and will be subject to a public rulemaking process with a comment period. He noted that for present purposes, staff is simply bringing the new law to the Committee's attention, and any changes to the Guidelines would be brought back to the Committee for review.

Mr. Clay then noted that in an effort to build capacity of minority, women and small business owner participation, DASNY has been pursuing a Small Business, Minority and Women Owned Business Enterprise Pilot Program over the past several years. He noted that on July 15, 2019 Governor Cuomo signed into law programmatic legislation advanced by DASNY authorizing DASNY to establish a four-year MWBE/Small Business pilot program. He noted that it affords DASNY the opportunity to designate up to the greater of 5% (by dollar value), or \$20 million, of procurement contracts specifically for NYS certified minority and women-owned and small businesses. He noted that the program, which is under development, will also include a training component whereby MWBE firms will receive training from program consultants. Mr. Clay noted that DASNY's existing surety bond program would be integrated with the Pilot Program. Mr. Ronski observed that DASNY has always been at the forefront in this area. Mr. Koopman also noted that any MWBE would be eligible to bid on the procurement contracts available under the Pilot Program, not just those who receive training from DASNY.

Mr. Clay then discussed Service-Disabled Veteran-Owned Businesses ("SDVOBs"). He noted that for clarification purposes, staff is recommending updates to the Procurement Policy and Guidelines to recognize DASNY's ongoing efforts to recognize and assist in the participation of SDVOBs. He indicated that DASNY is now ranked #9 in the State out of 96 executive agencies/authorities for work awarded to SDVOB firms.

Mr. Moore stated that additional changes are being proposed to consolidate and enhance DASNY's existing vendor responsibility processes and also address EO 192 - Imposing Continuing Vendor Integrity Requirements in State Contracts that the Governor implemented in January of 2019. He noted that EO 192 does not alter the fact that DASNY must determine that a bidder is responsible prior to contract award, and DASNY continues to follow its current process which includes checking the OGS website to determine if the bidder is debarred under State law or is included on the non-responsible list. He noted that if a bidder is debarred, then DASNY may not award the contract to that bidder until the debarment period has expired. He further noted that if the bidder is on the non-responsible list, DASNY is precluded from awarding the contract to the bidder unless a waiver from the Governor's Office of General Counsel is obtained.

Mr. Moore stated that if DASNY discovers adverse information indicating that a contractor may no longer be responsible and a determination of non-responsibility is made, the contractor would also be placed on the OGS non-responsible list and other State entities would be precluded from contracting with that entity. In response to an inquiry from Mr. Ronski, Mr. Moore stated that DASNY uses an OSC system called VenRep.

Mr. Moore directed the Members to the proposed changes to the Guidelines. He indicated that the new Vendor Responsibility paragraph reaffirms the obligation for all primes to be responsive and responsible at the bidding phase as well as throughout the term of the contract, and extends these requirements to subcontracts of \$2 million or more. Mr. Moore stated that DASNY is also imposing a contractual obligation on the part of every contractor to confirm that its subcontractors are responsible, and the contractor must notify DASNY if a subcontractor is non-responsible. Mr. Cusack clarified that as DASNY checks the OGS list prior to using a contractor to confirm if it is debarred or non-responsible, the contractor would do the same for a subcontractor.

Mr. Moore then reported on the proposed administrative and conforming changes, which include substituting "DASNY" for "the Authority," adding definitions of "Emergency Contract" and "Non-Competitive Basis," and other matters described in the November 1, 2019 Memorandum.

In response to an inquiry by Mr. Ronski regarding DASNY's outside counsel procurement process, Mr. Cusack noted that both the Guidelines and the By-Laws (requiring Board approval under certain circumstances) apply to the procurement of counsel representing DASNY. He noted that DASNY has implemented contractual language regarding reporting responsibility, and reiterated that the intent of the proposed changes is to bring DASNY's Procurement Guidelines into compliance with EO 192 and other laws enacted over the past 1-2 years. He stated that under Public Authorities Law section 2879, DASNY follows the procurement framework approved by the Board in the Guidelines. He did note, however, that the selection of Underwriter's Counsel is different, as that counsel does not represent DASNY but rather the Underwriter, and that DASNY's review is limited to the traditional criteria of cost, quality and competence, such that the counsel involved in DASNY transactions in other roles are firms that would withstand a certain level of scrutiny.

Mr. Cusack mentioned that the November 1, 2019 memorandum included in the Board Book supersedes the memo that was included in the October Board Book, as there were additional administrative changes that Mr. Moore noted, which came out of input from Ms. Sullivan and others regarding uniformity.

Committee Chair Johnson expressed that he recognized the enormous amount of work that went into preparation of the materials that were presented to the Committee. He noted that the Guidelines were first amended in 2001, and have been evolving for almost 20 years. He suggested that from a governance standpoint, next year DASNY seek outside guidance to revamp the Guidelines to be more streamlined for today's market. Ms. Sullivan agreed, noting that while some provisions may be obsolete, overall there have been numerous additional

requirements enacted over the years. Committee Chair Johnson expressed that the guidance should be provided by an independent outside entity.

Ms. Sullivan noted that a number of revisions over the years have been made to address new requirements, and the Committee Chair concurred that the intention of such a review would not be to relax standards. Mr. Ronski expressed his concern about the feasibility of implementing some of the recently-enacted requirements. Committee Chair Johnson agreed, noting the lack of workforce diversity in rural areas of northern New York.

After further discussion, the Corporate Governance Committee decided to inform the full Board of the proposed revisions to the Procurement Policy and Procurement Contract Guidelines at the November Board meeting, but to defer any recommendation for action until the December Board meeting.

Mr. Ronski moved to adjourn the Meeting, Mr. Johnson seconded the motion and the Corporate Governance Committee Meeting adjourned at approximately 7:25 p.m.

Respectfully submitted,

Michael E. Cusack
Assistant Secretary