

ADDENDUM I

September 20, 2002

**Request for Proposals**

**For the Services of a Construction Manager**

**To Construct a New Convention Facility in Niagara Falls, New York**

**SECTION I. PROJECT OVERVIEW**

**A. INTRODUCTION**

USA Niagara Development Corporation (“USA Niagara”), a subsidiary of Empire State Development Corporation (“ESD”), is actively promoting redevelopment of downtown Niagara Falls. USA Niagara consultant team, Cannon Design, Hunter Interests, Inc. (“HII”), and Parsons Brinkerhoff, along with input from the Niagara Falls Convention and Visitors Bureau (“CVB”), has developed a coordinated program for conversion of the site known as The Falls Street Faire (the “Site”) into a new convention and conference center.

USA Niagara solicits proposals from qualified construction management firms to perform services as the construction manager (“CM”) for the redevelopment of the existing building at the Site as the Niagara Falls convention facility.

**B. BACKGROUND**

USA Niagara’s Board of Directors has approved a General Project Plan and acquisition of the Site, which is within a half-block of the current convention event headquarters hotel and numerous other hotels. The Site can be accessed from the adjacent Old Falls Street, an outdoor pedestrian mall, which can provide an attractive pre-function and social space thus enhancing the operation and appeal of the redeveloped Site as a convention center (the “Center”). The Center’s location provides access to hotels, restaurants, retail tourism attractions and entertainment all within a 10-minute walk. It is anticipated that the Site will be acquired by condemnation.

**C. THE SITE**

The existing building on the Site is a 119,000 gross square feet (“GSF”) pre-engineered steel structure and is well suited for use as a convention/conference center. It has a 545 ft long center hall with 130-foot wide column spans and ceiling heights in excess of 30 feet. This area can accommodate large exhibits. Attached to this center hall are areas with over 30-foot spans and 20-foot ceiling heights, suitable for support functions. The building fronts Rainbow Blvd. North to the west and Third Street on the east. There is a two-story space on the Third Street side. A shaft was constructed but there is no elevator servicing this space.

The existing building was planned to be an amusement "village", which was only 85% completed. It has functional electrical, plumbing, HVAC systems and lighting, which were designed to service the building in its original capacity. The interior improvements are constructed primarily of metal studs, gypsum board and decorative materials.

## **D. THE PROJECT**

The proposed Center is to be of first-class, quality finishes with all the amenities expected by a demanding clientele. The following programming elements are proposed for inclusion in the Project. These sizes are preliminary and the final configuration may be substantially different:

1. 10,600 GSF outward facing restaurant(s) with outdoor dining along the pedestrian mall. Spaces to be provided will be core and shell only.
2. A 31,000 GSF contiguous space suitable for large exhibitions.
3. A 17,000 GSF square-foot high-quality ballroom adjacent to the exhibition space and which can be converted to accommodate additional exhibits.
4. Provide public bathrooms as required by planned functions.
5. A 5,000 GSF pre-function space.
6. Receiving areas, support, administrative and storage spaces totaling 10,000 GSF.
7. 10,000 GSF of meeting space with moveable partitions to sub-divide space.
8. A 7,000 GSF full service kitchen with capacity to cater a 1,000 guest sit down dinner.
9. A 10,000 GSF mezzanine meeting/office space.
10. Modifications and additions to HVAC, electrical, plumbing, elevators and structural components as required to satisfy the program.
11. Most or all of the existing flooring pavers will have to be removed and replaced with appropriate flooring for intended use. Structural remediation of an existing second story area may be required.
12. The existing Dryvit façades will be redesigned and replaced.
13. The Center is located adjacent to an underutilized multi-level parking facility and a rubble surface parking area. The selected CM will be asked for input toward, or may be asked to provide construction management services, for the development of parking for this Convention Center project.
14. The building will be wired to accommodate state-of-the-art technology, including, communication and presentation services, as well as specialized lighting and other services.

## **E. THE DESIGN TEAM**

Cannon Design is the project architect firm, with Hunter Interest, Inc. and Parsons Brinckerhoff as subconsultants.

## **F. CONSTRUCTION SCHEDULE**

Dates below are subject to change.

January 7, 2003	Bid award(s)
February 13, 2003	Start of construction
July 2, 2003	Construction completion date

The estimated construction cost for the Project is approximately \$8,750,000, including a 30% contingency. It is anticipated that a significant number of additive alternates will be bid as part of the construction documents.

## **G. PERMITTING**

The CM will secure all necessary permits prior to start of construction. Permitting agencies include, but are not limited to New York State and municipal agencies. Under the direction of USA Niagara, the Design Team will be responsible for preparing, reviewing, coordinating and approving all contract documents, drawings and other technical information needed to secure such permits.

## **H. ON-SITE UTILITIES AND IMPROVEMENTS**

Existing utilities may not be adequate for the new functions planned for the Center. Additional capacity will be provided as required. The CM will coordinate this, and all other aspects of the project.

## **SECTION II. SERVICES TO BE PROVIDED BY THE CONSTRUCTION MANAGER**

The CM's work will consist of the following tasks as generally outlined below and as more specifically defined by the CM in its proposal submission. The CM shall manage and coordinate the activities of all engineers and others (sub-consultants) engaged by the CM to perform any portion of the services outlined below:

### **A. PRE-CONSTRUCTION PHASE**

#### **1. Review of Existing Conditions and Information**

The CM shall inspect the Site and review all plans, studies, reports, and specifications, borings and permit applications, inclusive of the Projects' Health and Safety Plan, as required. The CM shall meet with USA Niagara, and the Design Team to discuss the project and its coordination.

#### **2. Project Planning and Coordination**

The CM shall assist, advise and make recommendations to USA Niagara and the Design Team on all aspects of planning for the Project construction. The CM is expected to demonstrate leadership in project coordination for the Project team.

The CM shall attend all scheduled Design Team meetings as required and/or any other meetings scheduled by USA Niagara during the Project design phase.

Assume weekly job meetings throughout the construction period in your calculations. The CM shall prepare and distribute minutes of meetings and monitor the progress of tasks assigned to team members.

3. Review Design Development Documents

The CM shall review the Design Team's Design Development Documents and make recommendations as to constructability, analysis of construction details, availability and utilization of materials and labor, time requirements for procurement, possible economies, scheduling, and number of contracts. The CM shall also assist the Design Team in the review of all sections of the drawings and specifications to minimize areas of conflict and overlap in the work to be performed by the various trade contractors.

4. 30% Estimate

The CM shall prepare an independent cost estimate at completion of the Design Team's 30% complete drawings for review and approval by USA Niagara. At the completion of this Task, the CM shall meet with USA Niagara and the Design Team to reconcile their estimates and present a comparative analysis of cost differences to USA Niagara for review.

5. Value Engineering

Based on the Cost Estimate prepared in Item #4 above, the CM shall Value Engineer the Project to ensure that it is within budget. The primary goal of Value Engineering shall be to achieve a completed Project at the lowest possible cost over the duration of the Project.

The CM shall also develop alternate approaches to sequencing the construction of the Project, innovative materials/systems to incorporate into the Project, and ways that make the Project easier and, therefore, cost effective.

6. Master Project Schedule

The CM shall develop, monitor and update a Master Project Schedule indicating all required activities and start/finish dates, including permits and agency approvals, required dates for information to be received from USA Niagara as well as the Design Team. Also required are the dates for completion of construction drawings and bid documents, inclusive of shop drawing review time, fabrication and construction time.

7. Construction Schedule

The CM shall prepare a Project Construction Schedule identifying long lead items highlighting milestones, as well as requirements for separate bid package completion. This schedule shall be incorporated into the construction contract of each General Contractor and sub-contractor to ensure support of, and conformance with the schedule, and that the Scope of Work for each trade contract includes meeting the schedule deadlines.

8. Construction Document Review

The CM shall review the Design Team's Construction Documents and make recommendations as to constructability, scheduling, division of work, Wick's Law components, optimum number of contracts, analysis of construction details, materials and methods to develop and administer maximum competition for all major elements of the work.

The CM shall also develop a bid packaging and pre-bid conference program to fully define the work to minimize contingencies for unknowns.

9. 60% and 90% Construction Document Cost Estimate

The CM shall prepare independent Construction Document estimates at 60% and 90% completion of the Design Team's Construction Document drawings for review by USA Niagara. The CM shall meet with the Design Team to reconcile their respective estimates and present a comparative analysis of cost differences to USA Niagara for review. The CM will make recommendations to USA Niagara if adjustments are required to reduce the budget or include "add alternates".

10. 100% Construction Document Reconciliation and Update

The CM shall reconcile and update the Design Team's cost estimate at 100% Construction Documents to confirm that the project is within budget.

11. Project Planning/Phasing

The CM shall also advise USA Niagara on and incorporate into planning for the Project issues related to insurance, construction safety, Equal Employment Opportunity policies, State Agency requirements, etc.

The CM shall also assist in the phasing and development of logistics plans that minimize construction impacts on the surrounding neighborhood.

12. Cash Flow Planning

The CM shall assist USA Niagara in the financial planning for the Project through the preparation of accounting procedures and systems, etc. including projected draw down schedules.

**B. BID PHASE**

The CM shall be responsible for the preparation and packaging of the bid packages for distribution by USA Niagara in conformance with all requirements from the project sponsors. The CM shall assist the Design Team in development of all add alternates to the bid documents, as required, and assist in the preparation of all addenda to the bid documents.

The CM shall review and assist USA Niagara in the evaluation of all bids received on the Project as well as review of qualifications of all contractors and their subcontractors. USA Niagara will hold all contracts.

## **C. CONSTRUCTION PHASE**

### **1. Project Management, Staffing and Overall CM Responsibilities**

The CM, as the Owner's "eyes and ears" shall assume responsibility for managing and coordinating construction of the Project. The CM shall establish on site organization and lines of authority in order to carry out the overall plans of the Project's construction team.

The CM shall maintain a competent, full-time supervisory staff at the job site to coordinate and provide general direction of the work and progress of contractors and the subcontractors on the Project including appropriate site safety and security measures.

The CM shall monitor the work as it is being performed until final completion and acceptance by USA Niagara, and shall advise USA Niagara and the Design Team when the materials furnished and work performed is not in accordance with the bid documents.

The CM, in cooperation with the Design Team, shall establish and implement procedures for expediting and processing all shop drawings, catalogs and other project documents.

The CM shall be responsible for establishing effective programs relating to job safety, job site records, and monthly progress reports.

The CM shall review and process all applications for Payment by the related trade contractors and/or material suppliers in accordance with the terms of the various contracts. The CM shall have overall responsibility for the processing of Change Orders including USA Niagara review and written acceptance.

The CM shall schedule and conduct job meetings to discuss the progress of the work.

All Requests for Information "RFI'S" will be returnable by the CM within 24 hours from receipt. USA Niagara will receive copies of same, including CM responses.

The CM shall provide a desk, phone and filing cabinets for USA Niagara's representative.

The CM shall verify that the Contractors shall maintain a frequently updated and accurate graphic record of all construction that deviates from the original plans. These records will be collected by the CM at completion of the construction phase. The CM shall provide to USA Niagara "As-Built Drawings" in digital format from CAD drawings supplied by the Design Team.

2. Partnering

Both USA Niagara and team members are committed to the spirit of a “partnering” this Project. The CM shall develop a comprehensive plan for the use of partnering on this Project.

3. Construction Phase Schedule and Milestone Dates

The CM shall prepare an updated Construction Phase Schedule, including all milestone dates reflecting final Scope of Work/alternates, contract awards, and buyouts for USA Niagara.

This schedule shall include all activities required to complete construction of the Project.

4. Project Cost Control Reporting

The CM shall be responsible for monitoring construction costs against the approved Project Estimate through a formalized Project Cost Control Report.

5. Safety Program

The CM shall develop a Project Safety Program that complies with the Occupational Safety and Health Administration and all other Federal, State and Local Codes for implementation on the Project.

**D. POST CONSTRUCTION PHASE/JOB CLOSEOUT**

The CM shall work closely with USA Niagara and the Design Team to provide for orderly project closeout and transition from construction to occupancy.

The CM shall conduct inspections of the completed project with USA Niagara prepare a punch list of completion items and expedite project completion, as well as monitor performance under Project guarantees.

The CM shall collect all operational manuals, record drawings, permits, affidavits and other required documents.

The CM shall review and process all final payments and obtain all required lien releases and certifications, as well as providing for USA Niagara a summary of all final project expenditures. Final payments and/or payment of any retainage will only be made upon submission by each contractor/subcontractor of as-built drawings for work performed by them. CM will verify that drawings have been received prior to release of such payments.

**E. CADD CAPABILITY**

The CM must demonstrate excellence in scheduling techniques utilizing Primavera or equivalent software by providing examples of supporting documentation related to previous relevant work.

All drawings will be created on AutoCAD 2000. The CM should be familiar with AutoCAD applications.

**F. SCHEDULE**

Work shall commence upon receipt from USA Niagara of a written authorization to proceed and be completed as follows:

<u>Pre-construction Phase Services</u>	<u>Three (3) months</u>
<u>Construction Phase Service (inclusive of Project Closeout)</u>	<u>Five (5) months</u>

**G. PUBLIC AGENCY MEETINGS/JOB MEETINGS**

The CM shall hold weekly job meetings with contractors and furnish minutes to USA Niagara. In addition, the CM will be available at the job site to meet with USA Niagara and agencies as required by USA Niagara. Other public agencies may include, but not be limited to the City of Niagara Department of Public Works and other responsible agencies.

If additional meetings are needed, they will be approved by USA Niagara as extra services on an hourly rate basis.

**H. EXCLUSIONS**

USA Niagara will hold all construction contracts. The selected CM is excluded from General Contracting work of any kind. The CM will not be responsible for supplying any labor or materials to perform any construction. General Conditions shall be the responsibility of the individual contractors, including all costs associated with contractors' "staging areas" and temporary offices for both the CM and USA Niagara staff.

## **SECTION III. INSTRUCTIONS TO BIDDERS**

### **A. SUBMISSION REQUIREMENTS**

Proposals must include, at a minimum, the following items:

1. Provide a chart illustrating a detailed Project Management Structure, including internal staff structure, proposed method for coordinating multi-task projects, and interface with USA Niagara and contractors. Identification of members of the CM's team and their respective administrative, management and professional responsibilities for the Pre-Construction and Construction Phase including all individuals having on-site supervisory responsibilities.
2. Include a list of five (5) references for your firm with phone numbers for contact information, relevant projects, references role, dates of completion for projects and the project's total cost.
3. List at least five (5) projects completed by the CM's firm within the last five to eight years which specifically relate to similar developments.
4. List all current projects, their status, including percentage complete.
5. Describe relevant experience with convention/conference venue projects for hospitality related facilities.
6. List current insurance coverage, insurer, amounts and policy expiration dates. Required coverage is itemized under Section III, C.
7. Provide current status report of any and all litigation during the past three (3) years. This item may be submitted in a separate envelope.
8. Certification in the form of Exhibit A annexed to this request, without modifications or supplement, signed by the respondent's representation and sworn or acknowledged before a notary public.

### **B. CM'S SCHEDULE**

This project must be completed by July 2, 2003. As such, timely performance is critical.

Provide a Task-by-Task Schedule that specifies the time (in days or weeks) that will be required for each task, work part and all Scope of Services.

Include a linear timetable with significant milestones, which outlines the sequencing, overlapping, etc. of the individual tasks. The schedule should begin with contract execution or a Letter To Proceed, whichever is earlier. The schedule should also coincide with the Design Team design schedule, and indicate the time allocated for team reviews/meetings and approvals.

In addition, describe the process(es) CM would employ to maintain strict budgetary and schedule controls on the Project.

**C. INSURANCE**

At all times during the term of the contract the CM shall, at its sole expense, maintain comprehensive general liability insurance, including coverage for bodily injury and property damage, in an amount not less than one million (\$1,000,000) dollars, with an aggregate of two million (\$2,000,000); umbrella insurance policy, in amount not less than five million (\$5,000,000); and all risk property insurance covering all property, supplies and equipment owned or in the care, custody or control of the CM for the full value of such property; one million (\$1,000,000) dollars Workman's Compensation Insurance (Statutory Limits), General Public Liability Insurance, Automobile Public Liability Insurance and Automobile Property Damage Insurance.

All insurance shall name USA Niagara and ESDC as additional insured; provide that the interests of USA Niagara and ESDC shall be insured regardless of any breach or violation by the CM of any warranties, declarations or conditions contained in such policies. The CM shall promptly provide USA Niagara with original signed Certificates of Insurance.

**D. FEES**

1. Pre-construction Phase

Provide a fee for Pre-Construction Phase services as a monthly lump sum. Provide an estimate of reimbursable expenses, including detailed breakdown of staffing allocation, hours and billing rates, as well as, printing and distribution of bid materials. Principal time shall not be reimbursed.

2. Construction Phase

Provide a fee proposal for Construction Phase services as a percentage of hard construction costs.

- a) Provide a detailed schedule of estimated reimbursable expenses. Principals' time shall not be reimbursed. Travel expenses to and from the Project site are not considered to be a reimbursable cost.
- b) Specify and describe additional services and costs.
- c) No general conditions shall be accepted on this contract. (See also Section II, H)

**E. GENERAL RFP INFORMATION**

1. RFP Costs

This RFP does not in any way commit USA Niagara to reimburse the recipients of this RFP for any costs involved with the preparation and submission of their Proposal or any other additional presentation(s) of their proposal.

2. USA Niagara's Obligation to Contract

This RFP does not constitute a commitment by USA Niagara to accept any Proposals submitted pursuant hereto, or otherwise engage with any person or entity that submits any such Proposal, for the purchase of its services. USA Niagara reserves the right to engage any CM who submits a Proposal in response to this RFP for a portion of the services offered for such consideration as USA Niagara shall deem reasonable.

3. USA Niagara reserves the right to:

- a) Request any CM submitting a response to clarify its response or to supply additional material deemed necessary to further assess their qualifications.
- b) Reject any or all responses received.
- c) Negotiate final scope, cost and schedule with the selected CM.

**F. VERIFYING EXISTING CONDITIONS**

Each CM shall duly inform himself/herself as to all existing conditions and limitations under which the services are to be performed, and he/she shall include in the Proposal a sum to cover the costs of all items necessary to perform the work. USA Niagara will provide recent photos covering much of the interior and exterior of the existing building (Attachment "G"). No allowance shall be made to any CM because of lack of such examination or knowledge. The submission of a Proposal shall be construed as evidence that the CM has made such examination.

**G. PRE-BID CONFERENCE / ADDITIONAL INFORMATION REQUESTS**

A pre-bid conference will be held from 9:30am – 11:00am on Friday, September 27, 2002, at the offices of Cannon Design, located at 2170 Whitehaven Road, Grand Island, NY 14072.

Additional information may be made available from time to time on our website at: [www.usaniagara.com](http://www.usaniagara.com). Any questions or requests for additional information or document requests should be directed to USA Niagara. All substantive questions and document requests must be in writing, however telephone inquiries are acceptable at the discretion of USA Niagara on non-substantive matters. Answers to all substantive questions to and document requests will be posted on our website or answered at the pre-bid conference.

**H. USA NIAGARA RIGHT TO TERMINATE**

USA Niagara reserves the right to suspend or terminate, at any time and for any reason, an agreement resulting from this Proposal with compensation to the CM for all his/her reasonable costs incurred up to the time of termination.

**I. USA NIAGARA REPRESENTATION AND WARRANTIES**

USA Niagara makes no representations or warranties regarding the accuracy of any information provided for this RFP and will have no liability or obligation with respect to the Site, its condition, or its suitability for any specific use.

**J. AFFIRMATIVE ACTION AND EQUAL OPPORTUNITY**

It is the policy of the State of New York, and ESD, to comply with all federal, State and local laws, policies, orders, rules and regulations which prohibit unlawful discrimination because of race, creed, color, national origin, sex, sexual orientation, age, disability or marital status, and to take affirmative action in working with contracting parties to ensure that Minority and Women-owned Business Enterprises (M/WBEs), Minority Group Members and Women share in the economic opportunities generated by ESD's participation in projects or initiatives, and/or the use of ESD funds. ESD's non-discrimination and affirmative action policy will apply to the overall project. There is a 10% M/WBE contractor and/or subcontractor participation goal during the project, which can include the pre-construction, construction and operation-maintenance phases, and an overall goal of 10% minority and female workforce participation during construction. A copy of each respondent's equal employment opportunity policy statement and Staffing Plan (Schedule A-1, attached hereto) of the anticipated workforce to be utilized during the project shall be included as part of the response to any RFP. The ESD Affirmative Action Unit ("AAU") is available to assist you in identifying New York State certified M/WBEs that may provide goods and services in connection with the project.

A list of New York State Certified M/WBE's who may be utilized on this Project is available by contacting:

Mr. Jorge Vidro  
Director, Affirmative Action  
(212) 803-3228

**K. ADDITIONAL COVENANTS**

This request and all responses are subject to the General Terms and Conditions annexed to this Request as Exhibit B, the content of which is hereby incorporate by reference. In any conflict between the terms in other parts of this request and said Exhibit B, the terms and conditions set forth in Exhibit B shall control.

**SECTION IV. SELECTION PROCESS**

Please send eight (8) copies of your response by 12:00 PM EST, Friday, October 11, 2002 to:

Mr. Michael Wilton, President  
USA Niagara Development Corporation  
345 Third Street, Suite 505  
Niagara Falls, NY 14303

Please be advised that under no circumstances will USA Niagara obligate itself to consider a Proposal which is received after the deadline or does not include the basic items above.

Based on its review of the responses to this RFP, USA Niagara will select a short list of respondents on October 17, 2002. USA Niagara will notify each respondent in writing via fax as to whether its Proposal has been selected for short list interviews and a designated time for the interview which may be held on or about October 22, 2002.

Following final selection of a CM, USA Niagara will prepare a contract defining all Project terms and conditions and the selected CM's responsibilities.

## **ATTACHMENTS**

- A. Schedule 1 Proposed floor-plan and associated renderings
- B. Exhibit A Certification
- C. Exhibit B General Terms and Conditions
- D. Exhibit C Hold Harmless Agreement
- E. Schedule A-1 Staffing Plan
- F. Example of Draft ESD Contract Template
- G. Photos of Existing Interior and Exterior Conditions (color version available on website – [www.usaniagara.com](http://www.usaniagara.com))

**EXHIBIT A**  
**CERTIFICATION**

The undersigned: recognizes that all information and material provided all information and material submitted by the undersigned proposer in connection with its proposal and the Request for Proposals are submitted for the express purpose of inducing USA Niagara Development Corporation (“USA Niagara”), a subsidiary of New York State Urban Development Corporation d/b/a Empire State Development Corporation (“ESD”), a corporate governmental agency of the State of New York (the “State”), constituting a political subdivision and public benefit corporation, to award a contract to the undersigned; acknowledges that each of USA Niagara, the State and the State’s agencies and instrumentalities may, each in its sole and absolute discretion, by any means which it may choose, determine the truth and accuracy of all statements made therein; acknowledges that intentional submission of false or misleading information may constitute a felony under Penal Law §210.40 or a misdemeanor under Penal Law §210.35 or §210.45, and may also be punishable by a fine of up to \$10,000 or imprisonment of up to five years under 18 U.S.C. §1001; and states that the information submitted is true, accurate and complete.

By submission of this proposal, the proposer and each person signing on behalf of the proposer certifies, and in the case of a joint proposal each party thereto certifies as to his or her own organization under penalty of perjury, that to the best of his or her knowledge and belief:

- (1) The prices, amounts and material in this proposal have been arrived at independently, without collusion, consultation, communication or agreement, for the purpose of restricting competition, as to any matter relating to such prices, amounts and materials with any other proposer or with any competitor;
- (2) Unless otherwise required by law, the prices, amounts and material that have been quoted in this proposal have not been knowingly disclosed by the proposer and will not knowingly be disclosed by the proposer prior to award, directly or indirectly, to any other proposer or to any competitor, and
- (3) No attempt has been made or will be made by the proposer to induce any other person, partnership or corporation to submit or not to submit a proposal for the purpose of restricting competition.

The proposer hereby authorizes USA Niagara, ESD, the State and their agents and instrumentalities to contact the proposer’s bank(s) and credit references and any other persons identified in its submission, including without limiting the foregoing, all persons and entities identified in its Information Regarding Qualifications and Financial Capability form and any financial information, in connection with the proposal, and any and all other persons identified in any investigation conducted by or on behalf of USA Niagara, ESD or the State, and obtain release of pertinent financial and other information, as well as to obtain verification of information provided by or on behalf of the proposer.

\_\_\_\_\_  
Name of Proposer

\_\_\_\_\_  
Signature of Officer

\_\_\_\_\_  
Title

Sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 2002.

\_\_\_\_\_  
Notary Public

**EXHIBIT B**  
**GENERAL TERMS AND CONDITIONS**

In addition to those terms and conditions stated elsewhere, this Request for Proposals (“RFP or Request”) is subject to the following:

Neither the State, ESD nor USA Niagara make any representations or warranties whatsoever with respect to this Request or the real property and improvements known as the The Falls Street Faire (the “Facility”) including, without limiting the foregoing, representations or warranties as to: the accuracy or completeness of any information or assumptions contained in or provided in connection with this Request or otherwise furnished to respondents; the use or development, or potential use or development, of the Facility or any portion thereof; the physical condition, environmental condition, layout, configuration, size, boundaries, access, location, systems and utilities for all land and improvements constituting the Facility and for the adjacent properties; and the suitability of the Facility for any specific uses or development.

Respondents shall not rely upon any statement or information given to respondents by the State, ESD or USA Niagara including, without limiting the foregoing, any information contained in this Request or made available pursuant to this Request or otherwise. Each respondent shall make its own analysis and evaluation of the Facility. Each respondent shall obtain its own independent legal, accounting, engineering and technical advice on all matters relating to the Facility, including, without limiting the foregoing: examination, review and verification of any information provided by or on behalf of the State, ESD or USA Niagara and its advisors.

In the event that the selected respondent does not enter into any agreement for the Facility, USA Niagara may, in its sole discretion, invite any of the other respondents and others to participate in a further competitive process to determine a new selected respondent.

USA Niagara will not pay for or refund any costs and expenses incurred by any respondent in responding to this Request or by any preferred respondent following selection or designation.

All determinations as to the completeness or compliance of any response or as to the eligibility, qualification or capability of any respondent will be within the sole and absolute discretion of USA Niagara.

Selection or designation of any respondent or a response pursuant to this Request will not create any rights for the respondent including, without limitation, rights of enforcement, equity or reimbursement. USA Niagara shall have no obligation or liability whatsoever to any person or entity whose response is selected or designated as a result of this Request unless and until a Operating Agreement shall have been fully executed and delivered by all parties thereto and all consents and approvals necessary for USA Niagara’s entry into such agreement have been obtained, and then all such obligations and liabilities shall be solely in accordance with the terms and conditions of such Operating Agreement.

A respondent may be rejected if USA Niagara determines, in the exercise of its sole and absolute discretion, that such respondent, any respondent partner, or member of a respondent team or any principal, partner, officer, director, affiliated person, or principal shareholder or member of the respondent, of any respondent partner, or of any member of a respondent team, has been convicted of, or pled guilty or nolo contendere to, a felony or crime of moral turpitude, is an “organized crime figure,” under indictment or criminal investigation, or is in arrears or in default

on any debt, contract, or obligation to or with USA Niagara, ESD, the State, or any of their respective affiliates, subsidiaries, agencies, departments or instrumentalities. Each respondent, respondent partner, and member of a respondent team and any principal, partner officer director, affiliated person, or principal shareholder of the selected respondent, respondent partner, or member of the respondent team may be required to complete a background questionnaire with respect to the foregoing, or other matters, and may be subject to investigation by USA Niagara, ESD and the State.

USA Niagara is under no legal obligation to obtain or enter into any agreement for the Facility through a competitive bid process. This Request does not constitute an offer of any nature and does not obligate USA Niagara to undertake any action or to proceed with the project.

USA Niagara will review all responses for completeness and compliance with the terms and conditions of this Request, and may request from any and all of the respondents, at any time during the selection process, additional information, material, clarification, confirmation or modification of any submitted response. USA Niagara may also, but is not obligated to, make requests for additional material or for clarification or modification of any submitted response which is incomplete or non-conforming as submitted. Submission of a response shall constitute the respondent's permission to USA Niagara to make such inquiries concerning the respondent and members of the development team as USA Niagara, in its sole discretion, deems useful or appropriate including, without limitation, authorization to contact the respondent's bank(s) and credit references, and any other persons identified in the response and to obtain release of pertinent financial and other information. Except at the request or by the consent of USA Niagara in its sole discretion, no respondent will be entitled to change its response once submitted.

USA Niagara may at any time exclude those responses which, in the sole discretion of USA Niagara, fail to demonstrate the necessary qualifications or which fail to comply with the terms and conditions of this Request

USA Niagara reserves the right, in its sole discretion, to reject at any time any or all responses; to withdraw the request without notice; to negotiate with one or more respondents submitting responses and/or enter into agreements with respect to the Facility (including to parties other than those responding to this request) on terms other than those set forth herein. USA Niagara reserves the right to waive compliance with and/or change any of the terms of this request and to waive any informalities or irregularities in the request process. Under no circumstances will USA Niagara pay or be liable for any costs incurred by a respondent in responding to this request or in connection with the negotiation of any agreement.

No brokerage fees, finders' fees, commissions or other compensation will be payable by USA Niagara in connection with the selection of any respondent or the negotiation and closing of any agreement. Submission of a response by a respondent in response to this request will constitute an undertaking by the respondent to hold harmless and indemnify USA Niagara from and against any and all expenses, damage or liability (including, without limitation, attorney's fees and disbursements) arising out of any claim for such fees, commissions or other compensation made in connection with such respondent's response to this request, selection or non-selection hereunder or negotiation and execution (or non-execution) of any agreement.

Public access to material submitted by respondents in response to this request shall be governed by the relevant provisions of the Freedom of Information Law, which constitutes Article 6 of the New York State Public Officers Law ("FOIL"), and regulations adopted pursuant thereto. If any

respondent submits information which it believes to be a trade secret or otherwise exempt from disclosure under FOIL, it must specifically identify such information and state in writing the reasons why the information should be exempt from disclosure. Notwithstanding the foregoing, neither the State, ESD nor USA Niagara shall be liable if the State, ESD or USA Niagara releases information pursuant to FOIL which the respondent believes to be a trade secret or detrimental to its business.

In the event that USA Niagara becomes aware of any material misrepresentation in the information supplied by a respondent, USA Niagara shall have the right to reject at any time the response of the respondent, to refuse to negotiate or continue negotiations with the respondent and to take any other action, including retaining any deposit made by the respondent, as shall be deemed appropriate by USA Niagara, in its sole discretion.

It is the policy of the State, ESD and USA Niagara to comply with all federal, State and local laws, policies, orders, rules and regulations that prohibit unlawful discrimination because of race, creed, color, national origin, sex, sexual orientation, age, disability or marital status, and to take affirmative action in working with contracting parties to ensure that Minority and Women-owned Business Enterprises (M/WBEs), Minority Group Members and women share in the economic opportunities generated by ESD's and/or its subsidiaries participation in projects or initiatives, and/or the use of their funds. ESD's non-discrimination and affirmative action policies will apply to this initiative. M/WBEs are encouraged to respond.

The selection of a respondent will create no legal or equitable rights in favor of the selected respondent, including rights of enforcement or reimbursement. A respondent's response for a site is not assignable and only the party identified as the operator in the selected respondent's submission will be permitted to execute the Operating Agreement.

By submitting a response for this Request, the respondent agrees to be bound by all the terms and conditions of this Request.

**EXHIBIT C**  
**HOLD HARMLESS AGREEMENT**

IN CONSIDERATION OF USA Niagara Development Corporation (“USA Niagara”), granting or obtaining permission for the undersigned (hereinafter called “Grantee”) to visit the site described in the Request for Proposals (hereinafter referred to as the “Premises”) for the purpose of inspecting the Premises, Grantee hereby agrees to defend, indemnify and hold harmless USA Niagara, New York State Urban Development Corporation d/b/a Empire State Development Corporation (“ESD”), the State of New York (the “State”) and all agencies, departments and public authorities of the State and their respective officers, members, directors, employees and agents, from and against any and all claims, actions, suits, judgments, causes of action, demand, losses, damages, liabilities, costs, charges and expenses (including, without limitation, bodily harm, personal injury, death and damage), whenever asserted and by whomever, resulting from, arising out of, or in any way connected with any site visits, inspections, use of occupancy of the Premises by Grantee or its employees, officers, contractors, subcontractors, invitees and agents howsoever the same may be caused or occasioned.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2002.

**GRANTEE:** \_\_\_\_\_

**BY:** \_\_\_\_\_

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