

## **Guidelines for Executive Order No. 16**

### **Prohibiting State Agencies and Authorities from Contracting with Businesses Conducting Business in Russia**

On March 17, 2022, Governor Kathy Hochul issued Executive Order No. 16, which states: “All Affected State Entities are directed to refrain from entering into any new contract or renewing any existing contract with an entity conducting business operations in Russia.” In addition, Executive Order No. 16 directs the Office of General Services (“OGS”) to establish these guidelines for compliance with Executive Order No.16 by Affected State Entities.

On March 24, 2022, the United States, in coordination with the European Union and the Group of Seven (G-7), imposed sanctions on an additional 400 Russian individuals and entities. The federal sanctions include efforts to block moves by Russian entities and individuals to evade the sanctions imposed or to use international reserves.

While the federal sanctions seek to target specific entities and individuals within Russia, Executive Order No. 16 is intended to ensure that New York State is not entering into contracts with entities conducting business in Russia and thereby indirectly supporting Russia’s unjustified war against the Ukrainian people.

#### **I. *Guidance***

In order to comply with Executive Order No. 16, Affected State Entities must obtain a certification from bidders as part of a solicitation for a new contract or extension of an existing contract. Ideally, the certification will be among the documents that bidders must return with their bid. In the case of procurements that are currently in process, Affected State Entities should obtain the certification on or before the date the contract is signed by the awardee.

In addition, when an existing contract is being assigned to a new vendor, the Affected State Entity must obtain a certification from the new vendor as part of the process of consenting to the assignment of the contract. With respect to purchases (including mini-bids, RFQs, or task orders) from a centralized contract established by OGS, there is no need to request a certification from the vendor because OGS shall take responsibility for obtaining any necessary certifications from vendors on centralized contracts.

As used herein, the term “vendor” is intended to encompass bidders prior to contract award, contractors who have received a contract award, and contract assignees.

#### **II. *Certification***

Affected State Entities shall use the certification form attached to these guidelines. The certification form asks whether the vendor is an “entity conducting business operations in Russia” and provides four possible responses, which are certified under penalties of perjury. In keeping with the language in the Executive Order, the question should be answered by and on behalf of the specific entity that is the counterparty to the contract with the Affected State Entity; the question is not intended to encompass the operations of affiliates of the entity.

The Affected State Entity should first confirm that the vendor is not on the federal sanctions list at <https://sanctionssearch.ofac.treas.gov/>. If the vendor is on the federal sanctions list, the Affected State Entity may not award the contract to the vendor. There is no waiver process.

As long as the vendor is not on the federal sanctions list, the Affected State Entity should review the vendor's completed certification. The certification form has four possible answers. Answer No. 1 is "No." Answers 2.a. and 2.b. are each a qualified "Yes." Answer No. 3 is an unqualified "Yes."

**If the vendor checks Answer No. 1**, the Affected State Entity may proceed with the contract award in the usual manner and must include the vendor's certification in the procurement record.

**If the vendor checks Answer No. 3**, the vendor should be disqualified from contract award unless there are good grounds to exempt the vendor from disqualification, as set forth below. If the Affected State Entity disqualifies a vendor based on the response on the certification, the vendor should be advised that it will not be awarded the contract because it has failed to meet necessary qualifications required by Executive Order No. 16. The certification and the non-award letter must be included in the procurement record.

**If the vendor checks Answers No. 2.a. or 2.b.**, the Affected State Entity should carefully review the materials provided by the vendor that explain how the vendor's operations in Russia are limited. The Affected State Entity's review may prompt follow-up questions, and the vendor should be given a reasonable opportunity to respond to such questions or provide additional materials.

If after careful review, the Affected State Entity determines that the vendor has made good faith efforts to limit its business operations in Russia to the extent practicable, and determines that any remaining operations are not contributing in any significant way to the unjustified war in Ukraine by Russia, then the Affected State Entity may proceed with the contract award in the usual manner. The Affected State Entity's written determination, together with the vendor's certification and the related materials provided by the vendor, must be included in the procurement record.

On the other hand, if the Affected State Entity determines that the vendor's remaining operations in Russia are contributing to the unjustified war in Ukraine by Russia, the vendor should be disqualified from contract award unless there are good grounds to exempt the vendor from disqualification, as set forth below. If the vendor is disqualified, the vendor should be advised that it will not be awarded the contract because it has failed to meet necessary qualifications required by Executive Order No. 16. The Affected State Entity's written determination, together with the vendor's certification and the related materials provided by the vendor, must be included in the procurement record.

### **III. Exemptions**

Pursuant to Executive Order No. 16 "an Affected State Entity may contract with an entity conducting business operations in Russia provided that the head of the Affected State Entity makes a determination in writing that the investment or contract is necessary for the Affected State Entity to perform its functions and that no suitable investment or contractual alternative exists."

If an Affected State Entity believes an exemption is warranted, it must prepare a written determination that includes, at a minimum, the following: (1) a detailed explanation as to why the contract or investment with the particular entity is necessary for the Affected State Entity to perform its critical functions and (2) an explanation that there are no suitable alternatives to the contract or investment, which should describe what alternatives were considered and why the alternatives were not suitable. Other factors affecting the decision to grant an exemption may also be included.

In addition, if the vendor has checked Answers No. 2.a. or 2.b., the Affected State Entity may want to take account of the facts provided by the vendor to further support the exemption.

Finally, the written determination of an exemption must be signed by the head of the Affected State Entity or a person designated to act in the place of the head of the Affected State Entity. Both the vendor's certification and the written determination must be included in the procurement record.