

## **Guidelines for Implementation of State Finance Law § 136-d Industrial Painting and Industrial Coatings in State Contracts**

### **I. Background**

In 2021, Chapter 613 of the Laws of 2021, relating to contracts involving industrial painting and industrial coatings, was signed into law by Governor Hochul. The law created a new § 136-d of the State Finance Law (“SFL § 136-d”) that requires the Office of General Services (“OGS”) to establish guidelines concerning the required certifications for contractors applying industrial painting or industrial coating, often referred to as protective coatings. The law is intended to increase safety and efficiency when industrial paint and coatings are applied pursuant to a State agency contract.

These guidelines are intended to provide information regarding the responsibilities of New York State agencies on the implementation of SFL § 136-d. These guidelines establish the minimum requirements for State agencies when developing and executing contracts involving the application of protective coatings. The objective is to ensure that contractors are qualified to perform the work in a safe and efficient manner as well as to ensure the work performed lasts for the project’s intended useful life. These guidelines also remind State agencies to include in their contracts: (i) the right to suspend work under the contract if information is discovered that calls into question contractor certifications/competence and, (ii) the right to terminate the contract if the State agency makes a determination that the contractor is not certified or has not maintained certifications as required.

### **II. Legal Authority**

As stated above, SFL § 136-d was signed into law on November 15, 2021, became effective on May 14, 2022, and applies to any State contracting opportunities advertised on or after May 14, 2022, with the exception of contracts for which an invitation for bid, request for proposal, or similar solicitation was issued prior to May 14, 2022.

### **III. Scope**

State Finance Law § 136-d applies to any State agency contract that includes the application of industrial painting or industrial coating in an amount over \$50,000.

As used in this guidance:

The term “bidder” means an entity that responds to an invitation for bid, request for proposal, request for application, application for a grant, or other similar solicitation for a contract or grant with a State agency.

The term “contract” means any contract, lease, grant, or equivalent legal instrument.

The term “contractor” means an entity and/or the entity’s subcontractor that has been awarded a contract or grant by a State agency.

The term “industrial coating” means a coating system applied to the surface of a substrate or piece of equipment the primary intent of which is for the protection of the asset and corrosion control. An industrial coating provides protection beyond that of a typical decorative paint or finish.

The term “industrial painting” means the field of applying an industrial coating.

The term “miscellaneous metals” means metal products that are not part of the primary structural systems in a project. These include, but are not limited to railings, stairs, utility specialties, mechanical and electrical supports, relieving angles, sill angles, small supporting structures, etc.

The term “surface preparation” means the preparation or cleaning of the surface of an asset to a specified standard prior to applying a coating.

The term “State agency” has the same meaning as such term is defined in State Finance Law § 160.

The term “vendor” may mean either a bidder or a contractor awarded or being considered for award of a State contract.

#### **IV. Industrial Coating Certification Requirements**

This section is intended to provide guidelines for State agencies to develop contract documents for industrial coating system projects.

##### **A. *During Contract Development***

If a project will require industrial coating or industrial painting, the contract documents should include detailed specifications for industrial coating system materials and application processes. The detailed specifications should outline minimum certification requirements for surface preparation, coating system application, and quality control. Contract documents should establish the qualifications required for the application of the coating system to be used and include specifications for the collection and disposal of waste generated during the application of industrial paints and coatings, as well as measures to minimize waste and control pollution during cleaning and painting or coating operations.

Contract documents and specifications should include the following:

1. Technical requirements of the coating system.
2. Application procedures for the coating system, including surface preparation requirements and disposal requirements. Surface preparation and coating system application requirements should be in accordance with industry standards as set forth by the Association for Materials Protection and Performance (AMPP).
3. Contractor’s quality control inspection procedures for surface preparation and coating system application.
4. Construction submittal requirements for contractors. Contractors should be required to submit, for review and approval:
  - a. Documentation indicating a minimum number of successfully completed coating system installations with a scope similar to that of the project (e.g., at least five similar installations).

- b. Documentation that its project employees have minimum coating system training, such as AMPP Coating Application Specialist 1 (CAS1) certification or its equivalent, and have completed the OSHA 10-hour course.
- c. Documentation that its project employees have completed fall protection training, scaffold erector training, suspended scaffold user training, respiratory protection training, and fit training, as applicable to the project.
- d. Documentation that its project employees have completed minimum certification requirements for coating system application, such as AMPP Quality Procedure 1 (QP1) certification for field coating application or its equivalent, and AMPP Quality Procedure 2 (QP2) certification for field coating removals or its equivalent, as applicable to the project.
- e. Documentation of its quality control requirements and processes, such as AMPP Quality System 1 (QS1) certification for implementing and documenting quality control and record-keeping or its equivalent.
- f. Credentials for the qualified quality control representative for the project (the quality control representative should not be the project foreman).
- g. For work involving disturbance or abatement of lead-based paint, documentation that its project employees have received safety training for hazardous materials, such as AMPP Lead Paint Removal and AMPP Lead Paint Worker Safety training or their equivalent. The training specific to industrial coating application is a higher standard than would be typically required by contract and by OSHA. Hazardous material handling and/or disposal should be in accordance with federal, State, and local requirements.

The contract should also include language giving the State agency (i) the right to suspend work under the contract if information is discovered that calls into question contractor certifications/competence and, (ii) the right to terminate the contract if the State agency makes a determination that the contractor is not certified or has not maintained certifications as required.

**B. *Prior to Contract Award***

State agencies should confirm during the bid review that the bidder will provide the minimum certification requirements as identified in the contract. A bidder's inability to satisfy the minimum certification requirements would serve as cause to reject the bid as non-responsive.

SFL § 136-d has no effect on an entity's status as a responsible vendor.

**C. *During Contract Performance***

State agencies should review and approve certification documentation submitted by the contractor to confirm that the minimum certification requirements have been met. Certification requirements should be maintained for the duration of the contract.

If the State agency discovers adverse information indicating that the contractor may no longer meet its contractual obligations for certifications and/or quality control requirements, the State agency should conduct an investigation. The State agency should notify the contractor and provide the contractor with an opportunity to be heard, and potentially take corrective action, prior to making a final determination that the contractor has not met its contractual

obligations. If the State agency makes a final determination that the contractor has not met its contractual obligations, the State agency may issue a stop work order based on the contractor's deficiency and pursue any other available contractual or legal remedies.

At the completion of the project, contractors should provide final documentation and certification that the industrial coating system application was completed in compliance with the contract. Contractors should also submit documentation of all quality control reports as a project closeout document.

## **V. Procurement of Industrial Paints and Coatings**

If a State agency is going to purchase industrial paints or coatings, the State agency should consider the use of eco-friendly industrial paint or coating to limit the amount of volatile organic compounds ("VOCs") emitted into the air.

## **VI. Exceptions**

The following items are exempt from the guidelines described herein.

### **A. *Emergency Projects***

These guidelines are not applicable to projects executed in response to a "construction emergency," which Public Buildings Law defines as damage to or a malfunction in buildings or property of the State of New York caused by an unanticipated, sudden, and unexpected occurrence which involves a pressing necessity for immediate repair, reconstruction, or maintenance in order to permit the safe continuation of a necessary public use or function, or to protect the property of the State of New York, or the life, health and safety of any person.

### **B. *Miscellaneous Metals***

These guidelines are not applicable to components of a contract defined as miscellaneous metals unless the contract specifications specifically require a miscellaneous metal to be coated with industrial paint or coating.

## **VII. Waiver**

If a State agency desires to award a contract to a bidder that has not met the minimum certification requirements, the head of the State agency may determine that a waiver is appropriate and issue a waiver in those instances.

If a State agency head believes a waiver is warranted, it must prepare a written determination that includes, at a minimum, the following: (1) a detailed explanation as to why the contract with the particular entity is necessary for the State agency to perform its critical functions and (2) an explanation that there are no suitable alternatives to the contract, which should describe what alternatives were considered and why the alternatives were not suitable. Other factors affecting the decision to grant a waiver may also be included. Finally, the written determination of a waiver must be signed by the head of the State agency, or a person designated to act in the place of the head of the State agency. The written determination must be included in the procurement record.