

No. 21-1170

IN THE
Supreme Court of the United States

LOUIS CIMINELLI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Writ of Certiorari to the United States
Court of Appeals for the Second Circuit**

JOINT APPENDIX

Michael R. Dreeben
(Counsel of Record)

Jenya Godina
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, DC 20006
(202) 383-5300
mdreeben@omm.com

Jason Zarrow
O'MELVENY & MYERS LLP
400 S. Hope St., 18th Floor
Los Angeles, CA 90071
(213) 430-6000

Elizabeth B. Prelogar
(Counsel of Record)

SOLICITOR GENERAL
U.S. DEPARTMENT OF
JUSTICE
950 Pennsylvania Ave., NW
Washington, DC 20530
(202) 514-2217
SupremeCtBriefs@usdoj.gov

Counsel for Respondent

*[Additional counsel listed
on inside cover]*

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Certiorari Granted June 30, 2022*

L. Nicole Allan
O'MELVENY & MYERS LLP
Two Embarcadero Center,
28th Floor
San Francisco, CA 94111
(415) 984-8700

Counsel for Petitioner

TABLE OF CONTENTS

Chronological List of Relevant Docket Entries, <i>United States v. Louis Ciminelli</i> , No. 16-cr-0776-VEC-6 (S.D.N.Y.)	1
Chronological List of Relevant Docket Entries, <i>United States v. Joseph Percoco, et al.</i> , No. 18-2990 (2d Cir.).....	22
Trial Indictment (S.D.N.Y. July 7, 2018) (Dkt. No. 780-1)	23
Letter Regarding Jury Instruction Document Filed by Louis Ciminelli (S.D.N.Y. June 15, 2018) (Dkt. No. 730)	36
Excerpt of Jury Instructions (S.D.N.Y. July 12, 2018) (Dkt. No. 784)	40
Excerpts of Pretrial Conference Transcript on June 6, 2018 (S.D.N.Y.).....	44
Excerpts of Trial Transcript from June 18, 2018 through July 12, 2018 (S.D.N.Y.)	48
Government Exhibit No. 1015: Resolution No. 102 of Fort Schuyler Management Corporation, dated Oct. 11, 2013.....	105
Government Exhibit No. 1017: Resolution No. 106 of Fort Schuyler Management Corporation, dated Jan. 28, 2014	109
Government Exhibit No. 1054: Memorandum of Understanding, effective Mar. 13, 2014.....	113
Government Exhibit No. 1060: Notice to Proceed, dated May 1, 2014	125
Government Exhibit No. 1063: Owner Design- Builder Agreement, effective Nov. 26, 2014.....	133

TABLE OF CONTENTS

The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following page in the appendix to the Petition for Certiorari:

Appendix A: Opinion of the United States
Court of Appeals for the Second Circuit
(Sept. 8, 2021)..... Pet. App. 1a

Appendix B: Judgment in a Criminal Case
(Dec. 3, 2018)..... Pet. App. 42a

Appendix C: Order of the United States
Court of Appeals for the Second Circuit
Denying Rehearing (Nov. 1, 2021) Pet. App. 57a

Appendix D: 18 U.S. Code § 1343..... Pet. App. 59a

**RELEVANT DOCKET ENTRIES FOR THE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK**

16-cr-776 (VEC)

Date	#	Docket Text
9/20/2016	1	SEALED COMPLAINT as to Joseph Percoco (1), Alain Kaloyeros (2), Peter Galbraith Kelly, Jr. (3), Steven Aiello (4), Joseph Gerardi (5), Louis Ciminelli (6), Michael Laipple (7), Kevin Schuler (8) in violation of 18 U.S.C. 666, 1001, 1349, 1951, and 2.
11/22/2016	49	INDICTMENT FILED as to Joseph Percoco (1) count(s) 6, 7-8, 9, 10-11, Alain Kaloyeros (2) count(s) 1, 2, 4, Peter Galbraith Kelly, Jr. (3) count(s) 9, 12, Steven Aiello (4) count(s) 1, 2, 3, 9, 13, 14, Joseph Gerardi (5) count(s) 1, 2, 3, 9, 13, 14, Louis Ciminelli (6) count(s) 1, 4, 5, Michael Laipple (7) count(s) 1, 4, 5, Kevin Schuler (8) count(s) 1, 4, 5.
5/11/2017	162	(S1) SUPERSEDING INDICTMENT FILED as to Joseph Percoco (1) count(s) 6s, 7s-8s, 9s-10s, 11s-12s, Alain Kaloyeros (2) count(s) 1s, 2s, 4s, Peter Galbraith Kelly, Jr. (3) count(s) 9s, 13s, Steven Aiello (4) count(s) 1s, 2s, 3s, 10s, 14s,

JA 2

		15s, Joseph Gerardi (5) count(s) 1s, 2s, 3s, 10s, 14s, 15s, Louis Ciminelli (6) count(s) 1s, 4s, 5s, Michael Laipple (7) count(s) 1s, 4s, 5s, Kevin Schuler (8) count(s) 1s, 4s, 5s.
9/19/2017	321	(S2) SUPERSEDING INDICTMENT FILED as to Joseph Percoco (1) count(s) 6ss, 7ss, 8ss, 9ss, 10ss, 11ss, 12ss, Alain Kaloyeros (2) count(s) 1ss, 2ss, 4ss, Peter Galbraith Kelly, Jr. (3) count(s) 9ss, 13ss, Steven Aiello (4) count(s) 1ss, 2ss, 3ss, 10ss, 14ss, 15ss, 17ss, Joseph Gerardi (5) count(s) 1ss, 2ss, 3ss, 10ss, 14ss, 16ss, 18ss, Louis Ciminelli (6) count(s) 1ss, 4ss, 5ss, Michael Laipple (7) count(s) 1ss, 4ss, 5ss, Kevin Schuler (8) count(s) 1ss, 4ss, 5ss.
6/11/2018		Minute Entry for proceedings held before Judge Valerie E. Caproni:Voir Dire held on 6/11/2018 as to Alain Kaloyeros, Steven Aiello, Joseph Gerardi, Louis Ciminelli. Jury Selection held on 6-11-18. Defendant Alain Kaloyeros appeared with his attorneys Michael C. Miller, Reid Weingarten and Michael G. Scavelli. Defendant Steven Aiello appeared with his

	<p>attorneys Stephen R. Coffey, Scott W. Iseman and Pamela A. Nichols. Defendant Joseph Gerardi appeared with his attorneys Milton Williams, Jr., Avni P. Patel and Jacob S. Gardner. Defendant Louis Ciminelli appeared with his attorneys Paul L. Shechtman, Jessica A. Masella and Tim Hoover. AUSAs Robert Boone, David Zhou and Matthew Podolsky appeared on behalf of the U.S. Government. Court Reporter Rebecca Forman, Kristen Carante and Elena Lynch present. Prospective jurors sworn, Voir Dire begun; thirty(30) jurors qualified. Jury selection adjourned until 6/12/18. Bail is continued as to all of the defendants.</p>
6/12/2018	<p>Minute Entry for proceedings held before Judge Valerie E. Caproni: Jury Trial as to Alain Kaloyeros, Steven Aiello, Joseph Gerardi, Louis Ciminelli held on 6/12/2018. Jury Selection held and concluded on 6-12-18. Defendant Alain Kaloyeros appeared with his attorneys Michael C. Miller, Reid Weingarten and Michael G. Scavelli. Defendant Steven Aiello appeared with his</p>

		attorneys Stephen R. Coffey, Scott W. Iseman and Pamela A. Nichols. Defendant Joseph Gerardi appeared with his attorneys Milton Williams, Jr., Avni P. Patel and Jacob S. Gardner. Defendant Louis Ciminelli appeared with his attorneys Paul L. Shechtman, Jessica A. Masella and Tim Hoover. AUSAs Robert Boone, David Zhou, Matthew Podolsky, Deleassa Penland, FBI and Paralegals Jonathan Concepcion and Sylvia Lee appeared on behalf of the U.S. Government. Court Reporters Rebecca Forman, Kristen Carante and Elena Lynch present. Twelve (12) jurors and four (4) alternates empaneled. Opening statements will commence on 6/18/18 at 9:30am in courtroom 26B. Bail is continued as to all of the defendants.
6/15/2018	730	LETTER by Louis Ciminelli as to Joseph Percoco, Alain Kaloyeros, Peter Galbraith Kelly, Jr., Steven Aiello, Joseph Gerardi, Louis Ciminelli, Michael Laipple, Kevin Schuler addressed to Judge Valerie E. Caproni from Paul Shechtman dated June 15, 2018 re: Jury

		Instruction Document filed by Louis Ciminelli. (Attachments: # 1 Supplement Proposed Instruction)
6/18/2018		Minute Entry for proceedings held before Judge Valerie E. Caproni: Jury Trial as to Alain Kaloyeros, Steven Aiello, Joseph Gerardi, Louis Ciminelli held on 6/18/2018. Defendant Alain Kaloyeros appeared with his attorneys Michael C. Miller, Reid Weingarten, Michael G. Scavelli, David B. Hirsh and Katherine M. Dubak. Defendant Steven Aiello appeared with his attorneys Stephen R. Coffey, Scott W. Iseman and Pamela A. Nichols. Defendant Joseph Gerardi appeared with his attorneys Milton Williams, Jr., Avni P. Patel and Jacob S. Gardner. Defendant Louis Ciminelli appeared with his attorneys Paul L. Shechtman, Jessica A. Masella and Tim Hoover. AUSAs Robert Boone, David Zhou, Matthew Podolsky, Deleassa Penland, FBI and Paralegals Jonathan Concepcion and Sylvia Lee appeared on behalf of the U.S. Government. Court Reporters Rebecca Foreman and Kristen

	<p>Carannante present. Jury sworn and empaneled. Government and defense counsel opening statements begun and concluded. Trial adjourned until 6/19/1. Bail is continued as to all of the defendants.</p>
6/19/2018	<p>Minute Entry for proceedings held before Judge Valerie E. Caproni: Jury Trial as to Alain Kaloyeros, Steven Aiello, Joseph Gerardi, Louis Ciminelli held on 6/19/2018. Jury trial continued and held. Defendant Alain Kaloyeros appeared with his attorneys Michael C. Miller, Reid Weingarten, Michael G. Scavelli, David B. Hirsh and Katherine M. Dubak. Defendant Steven Aiello appeared with his attorneys Stephen R. Coffey, Scott W. Iseman and Pamela A. Nichols. Defendant Joseph Gerardi appeared with his attorneys Milton Williams, Jr., Avni P. Patel and Jacob S. Gardner. Defendant Louis Ciminelli appeared with his attorneys Paul L. Shechtman, Jessica A. Masella and Tim Hoover. AUSAs Robert Boone, David Zhou, Matthew Podolsky, Deleassa Penland, Special</p>

	<p>Agent and Paralegals Jonathan Concepcion and Sylvia Lee appeared on behalf of the U.S. Government. Court Reporters Rebecca Foreman and Kristen Carannante present. Government's witnesses called for testimony. Trial adjourned until 6/20/18 @ 9:15am. Bail is continued as to all defendants.</p>
6/20/2018	<p>Minute Entry for proceedings held before Judge Valerie E. Caproni: Jury Trial as to Alain Kaloyeros, Steven Aiello, Joseph Gerardi, Louis Ciminelli held on 6/20/2018. Jury trial continued and held. Defendant Alain Kaloyeros appeared with his attorneys Michael C. Miller, Reid Weingarten, Michael G. Scavelli, David B. Hirsh and Katherine M. Dubak. Defendant Steven Aiello appeared with his attorneys Stephen R. Coffey, Scott W. Iseman and Pamela A. Nichols. Defendant Joseph Gerardi appeared with his attorneys Milton Williams, Jr., Avni P. Patel and Jacob S. Gardner. Defendant Louis Ciminelli appeared with his attorneys Paul L. Shechtman, Jessica A. Masella and Tim Hoover. AUSAs Robert Boone, David</p>

	<p>Zhou, Matthew Podolsky, Deleassa Penland, Special Agent and Paralegals Jonathan Concepcion and Sylvia Lee appeared on behalf of the U.S. Government. Court Reporters Kristen Carannante and Anita Trombetta present. Government's witnesses called for testimony. Trial adjourned until 6/21/18 at 9:15am. Bail is continued as to all defendants.</p>
6/21/2018	<p>Minute Entry for proceedings held before Judge Valerie E. Caproni: Jury Trial as to Alain Kaloyeros, Steven Aiello, Joseph Gerardi, Louis Ciminelli held on 6/21/2018. Jury trial continued and held. Defendant Alain Kaloyeros appeared with his attorneys Michael C. Miller, Reid Weingarten, Michael G. Scavelli, David B. Hirsh and Katherine M. Dubak. Defendant Steven Aiello appeared with his attorneys Stephen R. Coffey, Scott W. Iseman and Pamela A. Nichols. Defendant Joseph Gerardi appeared with his attorneys Milton Williams, Jr., Avni P. Patel and Jacob S. Gardner. Defendant Louis Ciminelli appeared with his attorneys Paul L. Shechtman, Jessica A.</p>

	<p>Masella and Tim Hoover. AUSAs Robert Boone, David Zhou, Matthew Podolsky, Deleassa Penland, Special Agent and Paralegals Jonathan Concepcion and Sylvia Lee appeared on behalf of the U.S. Government. Court Reporters Kristen Carannante and Anita Trombetta present. Government's witnesses called for testimony. Trial adjourned until 6/25/18 at 9:30am. Bail is continued as to all defendants.</p>
<p>6/26/2018</p>	<p>Minute Entry for proceedings held before Judge Valerie E. Caproni: Jury Trial as to Alain Kaloyeros, Steven Aiello, Joseph Gerardi, Louis Ciminelli held on 6/26/2018. Jury trial continued and held. Defendant Alain Kaloyeros appeared with his attorneys Michael C. Miller, Reid Weingarten, Michael G. Scavelli, David B. Hirsh and Katherine M. Dubak. Defendant Steven Aiello appeared with his attorneys Stephen R. Coffey, Scott W. Iseman and Pamela A. Nichols. Defendant Joseph Gerardi appeared with his attorneys Milton Williams, Jr., Avni P. Patel and Jacob S. Gardner. Defendant Louis Ciminelli</p>

	<p>appeared with his attorneys Paul L. Shechtman, Jessica A. Masella and Tim Hoover. AUSAs Robert Boone, David Zhou, Matthew Podolsky, Deleassa Penland, Special Agent and Paralegals Jonathan Concepcion and Sylvia Lee appeared on behalf of the U.S. Government. Court Reporters Kristen Carannante, Tom Murray and Rebecca Forman present. Government's witnesses called for testimony. Trial adjourned until 6/27/18 @ 9:30am. Bail is continued as to all defendants.</p>
<p>6/27/2018</p>	<p>Minute Entry for proceedings held before Judge Valerie E. Caproni: Jury Trial as to Alain Kaloyeros, Steven Aiello, Joseph Gerardi, Louis Ciminelli held on 6/27/2018. Jury trial continued and held. Defendant Alain Kaloyeros appeared with his attorneys Michael C. Miller, Reid Weingarten, Michael G. Scavelli, David B. Hirsh and Katherine M. Dubak. Defendant Steven Aiello appeared with his attorneys Stephen R. Coffey, Scott W. Iseman and Pamela A. Nichols. Defendant Joseph Gerardi appeared with his attorneys</p>

	<p>Milton Williams, Jr., Avni P. Patel and Jacob S. Gardner. Defendant Louis Ciminelli appeared with his attorneys Paul L. Shechtman, Jessica A. Masella and Tim Hoover. AUSAs Robert Boone, David Zhou, Matthew Podolsky, Deleassa Penland, Special Agent and Paralegals Jonathan Concepcion and Sylvia Lee appeared on behalf of the U.S. Government. Court Reporters Rebecca Forman and Thomas Murray present. Government's witnesses called for testimony. Trial adjourned until 6/28/18 @ 10:00am. Bail is continued as to all defendants.</p>
<p>6/28/2018</p>	<p>Minute Entry for proceedings held before Judge Valerie E. Caproni:Jury Trial as to Alain Kaloyeros, Steven Aiello, Joseph Gerardi, Louis Ciminelli held on 6/28/2018 (Jury Trial set for 7/2/2018 at 09:00 AM before Judge Valerie E. Caproni.) Defendant Alain Kaloyeros appeared with his attorneys Michael C. Miller, Reid Weingarten, Michael G. Scavelli, David B. Hirsh and Katherine M. Dubak. Defendant Steven Aiello appeared with his attorneys</p>

	<p>Stephen R. Coffey, Scott W. Iseman and Pamela A. Nichols. Defendant Joseph Gerardi appeared with his attorneys Milton Williams, Jr., Avni P. Patel and Jacob S. Gardner. Defendant Louis Ciminelli appeared with his attorneys Paul L. Shechtman, Jessica A. Masella and Tim Hoover. AUSAs Robert Boone, David Zhou, Matthew Podolsky, Deleassa Penland, Special Agent and Paralegals Jonathan Concepcion and Sylvia Lee appeared on behalf of the U.S. Government. Court Reporters Rebecca Forman and Thomas Murray present. The Government rested. Defense counsel made a motion pursuant to Rule 29, for a judgment of acquittal. The Court reserved its decision. Defense counsels witness called for testimony. Trial adjourned until 7/2/18 at 9:00am. Bail is continued as to all defendants.</p>
<p>7/02/2018</p>	<p>Minute Entry for proceedings held before Judge Valerie E. Caproni: Jury Trial as to Alain Kaloyeros, Steven Aiello, Joseph Gerardi, Louis Ciminelli held on 7/2/2018. Jury trial continued and held. Defendant</p>

	<p>Alain Kaloyeros appeared with his attorneys Michael C. Miller, Reid Weingarten, Michael G. Scavelli, David B. Hirsh and Katherine M. Dubak.</p> <p>Defendant Steven Aiello appeared with his attorneys Stephen R. Coffey, Scott W. Iseman and Pamela A. Nichols.</p> <p>Defendant Joseph Gerardi appeared with his attorneys Milton Williams, Jr., Avni P. Patel and Jacob S. Gardner.</p> <p>Defendant Louis Ciminelli appeared with his attorneys Paul L. Shechtman, Jessica A. Masella and Tim Hoover.</p> <p>AUSAs Robert Boone, David Zhou, Matthew Podolsky, Deleassa Penland, Special Agent and Paralegals Jonathan Concepcion and Sylvia Lee appeared on behalf of the U.S. Government. Court Reporters Rebecca Forman and Kristen Carannante present. The Government rested for a second time. Defense counsel renewed their motions pursuant to Rule 29, for a judgment of acquittal. The Court reserved its decision on counts 2 and 3 of the Indictment. Charge conference held. Trial adjourned until</p>
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		7/9/18 at 9:00am. Bail is continued as to all defendants.
07/07/2018	780	LETTER by USA as to Alain Kaloyeros, Steven Aiello, Joseph Gerardi, Louis Ciminelli addressed to Judge Valerie E. Caproni from the Government dated July 7, 2018 re: Trial Indictment and Responses to Dkt. Nos. 778 and 779 Document filed by USA. (Attachments: # 1 Trial Indictment)
7/09/2018		Minute Entry for proceedings held before Judge Valerie E. Caproni: Jury Trial as to Alain Kaloyeros, Steven Aiello, Joseph Gerardi, Louis Ciminelli held on 7/9/2018. Jury trial continued and held. Defendant Alain Kaloyeros appeared with his attorneys Michael C. Miller, Reid Weingarten, Michael G. Scavelli, David B. Hirsh and Katherine M. Dubak. Defendant Steven Aiello appeared with his attorneys Stephen R. Coffey, Scott W. Iseman and Pamela A. Nichols. Defendant Joseph Gerardi appeared with his attorneys Milton Williams, Jr., Avni P. Patel and Jacob S. Gardner. Defendant Louis Ciminelli appeared with his attorneys

	<p>Paul L. Shechtman, Jessica A. Masella and Tim Hoover. AUSAs Robert Boone, David Zhou, Matthew Podolsky, Deleassa Penland, Special Agent and Paralegals Jonathan Concepcion and Sylvia Lee appeared on behalf of the U.S. Government. Court Reporters Rebecca Forman and Kristen Carannante present. Defense counsel rested. Government and defense counsel closing arguments begun. Trial adjourned until 7/10/18 @ 9:00am. Bail is continued as to all defendants.</p>
<p>7/10/2018</p>	<p>Minute Entry for proceedings held before Judge Valerie E. Caproni: Jury Trial as to Alain Kaloyeros, Steven Aiello, Joseph Gerardi, Louis Ciminelli held on 7/10/2018. Jury trial continued and held. Defendant Alain Kaloyeros appeared with his attorneys Michael C. Miller, Reid Weingarten, Michael G. Scavelli, David B. Hirsh and Katherine M. Dubak. Defendant Steven Aiello appeared with his attorneys Stephen R. Coffey, Scott W. Iseman and Pamela A. Nichols. Defendant Joseph Gerardi appeared with his attorneys</p>

	<p>Milton Williams, Jr., Avni P. Patel and Jacob S. Gardner. Defendant Louis Ciminelli appeared with his attorneys Paul L. Shechtman, Jessica A. Masella and Tim Hoover. AUSAs Robert Boone, David Zhou, Matthew Podolsky, Deleassa Penland, Special Agent and Paralegals Jonathan Concepcion and Sylvia Lee appeared on behalf of the U.S. Government. Court Reporters Rebecca Forman and Kristen Carannante present. Defense counsel rested. Government and defense counsel closing arguments concluded. Court's charge to the jury concluded. Trial adjourned until 7/11/18 @ 9:00am. Bail is continued as to all defendants.</p>
<p>7/11/2018</p>	<p>Minute Entry for proceedings held before Judge Valerie E. Caproni: Jury Trial as to Alain Kaloyeros, Steven Aiello, Joseph Gerardi, Louis Ciminelli held on 7/11/2018. Jury trial continued and held. Defendant Alain Kaloyeros appeared with his attorneys Michael C. Miller, Reid Weingarten, Michael G. Scavelli, David B. Hirsh and Katherine M. Dubak. Defendant Steven Aiello</p>

		<p>appeared with his attorneys Stephen R. Coffey, Scott W. Iseman and Pamela A. Nichols. Defendant Joseph Gerardi appeared with his attorneys Milton Williams, Jr., Avni P. Patel and Jacob S. Gardner. Defendant Louis Ciminelli appeared with his attorneys Paul L. Shechtman, Jessica A. Masella and Tim Hoover. AUSAs Robert Boone, David Zhou, Matthew Podolsky, Deleassa Penland, Special Agent and Paralegals Jonathan Concepcion and Sylvia Lee appeared on behalf of the U.S. Government. Court Reporters Rebecca Forman present. Jury deliberations begun. Trial adjourned until 7/12/18 @ 9:30am. Bail is continued as to all defendants.</p>
7/12/2018	784	JURY INSTRUCTIONS as to Alain Kaloyeros, Steven Aiello, Joseph Gerardi, Louis Ciminelli.
7/12/2018	785	VERDICT FORM. as to Alain Kaloyeros, Steven Aiello, Joseph Gerardi, Louis Ciminelli.
7/12/2018		Minute Entry for proceedings held before Judge Valerie E. Caproni: Jury Trial as to Alain Kaloyeros, Steven Aiello,

	<p>Joseph Gerardi, Louis Ciminelli held on 7/12/2018. Jury trial continued and held. Defendant Alain Kaloyeros appeared with his attorneys Michael C. Miller, Reid Weingarten, Michael G. Scavelli, David B. Hirsh and Katherine M. Dubak.</p> <p>Defendant Steven Aiello appeared with his attorneys Stephen R. Coffey, Scott W. Iseman and Pamela A. Nichols.</p> <p>Defendant Joseph Gerardi appeared with his attorneys Milton Williams, Jr., Avni P. Patel and Jacob S. Gardner.</p> <p>Defendant Louis Ciminelli appeared with his attorneys Paul L. Shechtman, Jessica A. Masella and Tim Hoover.</p> <p>AUSAs Robert Boone, David Zhou, Matthew Podolsky, Deleassa Penland, Special Agent and Paralegals Jonathan Concepcion and Sylvia Lee appeared on behalf of the U.S. Government. Court Reporters Rebecca Forman present. Jury deliberations continued and concluded. A note from the jury marked as Court Exhibit # 8 “we have reached a verdict.” Verdict read by foreperson indicating that the jury has found the all of the defendants</p>
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		<p>guilty on all counts as charged in the Indictment (see Court Exhibit #9 Verdict Sheet). Jury polled; verdict is unanimous. The Court discharged the jury. Motion schedule set by court (see transcript). Pre-sentence investigation referrals are ordered as to all of the defendants. Date and time of sentencing(s) for the defendants are as follow: Alain Kaloyeros, 10/11/18 @ 2pm; Steven Aiello, 10/12/18 @ 2pm, Joseph Gerardi, 10/15/18 @ 2pm, Louis Ciminelli, 10/17/18 @ 2pm. Bail is continued as to all defendants.</p>
07/12/2018		<p>JURY VERDICT as to Alain Kaloyeros (2) Guilty on Count 1ss,2ss,4ss and Steven Aiello (4) Guilty on Count 1ss,2ss,3ss,10ss,15ss and Joseph Gerardi (5) Guilty on Count 1ss,2ss,3ss,16ss and Louis Ciminelli (6) Guilty on Count 1ss,4ss,5ss.</p>
12/03/2018		<p>Minute Entry for proceedings held before Judge Valerie E. Caproni: Sentencing held on 12/3/2018 for Louis Ciminelli (6) Count 1ss,4ss.</p>
12/04/2018	939	<p>JUDGMENT In A Criminal Case (S2-16-Cr-776-6). Date of Imposition of Judgment:</p>

	<p>12/3/2018. Defendant Louis Ciminelli (6) was found guilty to Count(s) 1ss, 4ss, after a plea of not guilty. Count(s) Open and Underlying are dismissed on the motion of the United States. IMPRISONMENT: Twenty-Eight (28) Months on Counts One and Four to run concurrently. -The court makes the following recommendations to the Bureau of Prisons: It is recommended that the defendant be housed in the camp at FMC Devens. -The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons: ***The defendant is granted permission to remain on bail pending appeal. The defendant shall surrender to his designated facility not later than noon, sixty (60) days after the mandate issues on his appeal. SUPERVISED RELEASE: Two (2) Years on each count to run concurrently. Standard Conditions of Supervision (see page 4 of Judgment). Additional Supervised Release Terms (see page 5 of Judgment). ASSESSMENT: \$200.00, due</p>
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		<p>immediately. FINE: \$500,000.00. Special instructions regarding the payment of criminal monetary penalties: A fine in the amount of \$500,000.00 is Ordered to be paid not later than 30 days from the entry of this judgment. -The defendant shall forfeit the defendant's interest in the following property to the United States: Forfeiture is Ordered. The parties shall confer regarding forfeiture. If an agreement cannot be reached, the Govt's brief in support of its position is due 1/11/2019. Defendant's response is due 1/25/2019. Govt's reply, if any, is due 2/1/2019.</p>
12/12/2018	952	<p>NOTICE OF APPEAL by Louis Ciminelli from 939 Judgment. Filing fee \$ 505.00, receipt number 465401224586.</p>

JA 22

**RELEVANT DOCKET ENTRIES FOR THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

No. 18-2990(L)

Date Filed	#	Docket Text
12/12/2018	30	NOTICE OF CRIMINAL APPEAL, with district court docket, on behalf of Appellant Louis Ciminelli, FILED. [18-3712]
03/12/2020	357	CASE, before RR, DC, RJS, HEARD. [18-2990, 18-3710, 18-3712, 18-3715, 18-3850, 19-1272]
09/08/2021	399	OPINION, the judgments of the district court are affirmed, by RR, DC, RJS, FILED. [18-3710, 18-3712, 18-3715, 18-3850]
09/08/2021	407	JUDGMENT, FILED. [18-3710, 18-3712, 18-3715, 18-3850]
11/01/2021	428	ORDER, petition for rehearing/rehearing en banc denied for Appellant Louis Ciminelli, FILED. [18-2990, 18-3710, 18-3712, 18-3715, 18-3850, 19-1272]
12/14/2021	450	JUDGMENT MANDATE, ISSUED. [18-3710, 18-3712, 18-3715, 18-3850]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF
AMERICA

- v. -

ALAIN KALOYEROS,
a/k/a “Dr. K,”
STEVEN AIELLO,
JOSEPH GERARDI, and
LOUIS CIMINELLI,
Defendants.

INDICTMENT[*]

16 Cr. 776 (VEC)

OVERVIEW

1. As described more fully below, the charges in this Indictment stem from a criminal scheme involving fraud in the award of hundreds of millions of dollars in New York State (the “State”) contracts. Specifically, ALAIN KALOYEROS, a/k/a “Dr. K,” the defendant, who was the head of SUNY Polytechnic Institute (“SUNY Poly”), a State-funded public university, worked with Todd Howe and STEVEN AIELLO, JOSEPH GERARDI, and LOUIS CIMINELLI, the defendants, to secretly rig the bidding process for State contracts worth hundreds of millions of dollars in favor of the companies owned and managed by AIELLO, GERARDI, and CIMINELLI.

RELEVANT INDIVIDUALS AND ENTITIES

* Note: The superseding indictment reproduced here was attached to a July 7, 2018 letter filed by the government (Dkt. No. 780) and reflects the version of the indictment submitted at trial, containing certain redactions from the September 19, 2017 superseding indictment (Dkt. No. 321).

CNSE, SUNY Poly, and Ford Schuyler

2. The College of Nanoscale Science and Engineering (“CNSE”) was a public institution of higher education that was funded in part by the State. In or around September 2014, CNSE merged with the State University of New York Institute of Technology to become a new public university known as SUNY Poly (referred to here collectively with CNSE as “SUNY Poly”). SUNY Poly is a public institution of higher education located principally in Albany, New York, that is part of the New York State University system (the “SUNY System”). The SUNY System is funded in part by the State.

3. In or around 2009, Fort Schuyler Management Corporation (“Fort Schuyler”), located in Albany, New York, was created as a non-profit real estate corporation affiliated with SUNY Poly that could enter into contracts with private companies on SUNY Poly’s behalf, for the purpose of carrying out development projects paid for with State funding. Fort Schuyler was governed by a Board of Directors, which, among other things, was charged with selecting private companies to partner with Fort Schuyler in SUNY Poly-related development projects. Certain public funding for SUNY Poly came through the Research Foundation for the State University of New York (the “Research Foundation”), which paid, at least in part, the salaries of many individuals affiliated with SUNY Poly and Fort Schuyler, including ALAIN KALOYEROS, a/k/a “Dr. K,” the defendant, and Todd Howe (as a retained consultant), during the times relevant to this Indictment.

ALAIN KALOYEROS

4. ALAIN KALOYEROS, a/k/a “Dr. K,” the defendant, served as the head of SUNY Poly at all times relevant to this Indictment. KALOYEROS also served as a member of the Board of Directors of Fort Schuyler. KALOYEROS selected and provided direction to Fort Schuyler’s officers and others working on behalf of Fort Schuyler.

Todd Howe

5. Todd Howe has held several public positions, including working for the Governor of New York when the Governor was United States Secretary of Housing and Urban Development, and for a former Governor of New York, who was the father of the current Governor.

6. During all times relevant to this Indictment, Howe was the president and primary employee of a government relations and lobbying firm (the “Government Relations Firm”) that had an office located in Washington, D.C.

7. Beginning in or about 2012, Howe was retained as a consultant to SUNY Poly. In his role as a consultant for SUNY Poly, Howe served as a close advisor to ALAIN KALOYEROS, a/k/a “Dr. K,” the defendant, and maintained an office at SUNY Poly in Albany, New York. Howe acted on behalf of SUNY Poly with respect to, among other things, SUNY Poly’s development projects, including large, State-funded development projects in Syracuse and Buffalo, New York. Howe also served as a primary liaison between SUNY Poly and the Governor’s senior staff.

8. At various times relevant to this Indictment, Howe also was retained by and received payments from (a) a large real estate development firm located

in Syracuse, New York (the “Syracuse Developer”) and (b) a large Buffalo-based construction and development company (the “Buffalo Developer”).

STEVEN AIELLO, JOSEPH GERARDI, and the Syracuse Developer

9. At all times relevant to this Indictment, the Syracuse Developer, through various corporate affiliates, built, owned, and managed real estate in and around New York State. In or around December 2013, the Syracuse Developer was awarded a contract with Fort Schuyler to serve as the preferred developer for projects of SUNY Poly to be created in Syracuse, New York. This contract permitted the Syracuse Developer to be chosen for SUNY Poly development projects of any size in or around Syracuse without further competitive bidding, and, indeed, shortly thereafter, the Syracuse Developer received a contract worth approximately \$15 million to build a film studio (the “Film Studio”), and in or around October 2015, the Syracuse Developer received a contract worth approximately \$90 million to build a manufacturing plant, both in the vicinity of Syracuse, New York.

10. STEVEN AIELLO, the defendant, was a founder of the Syracuse Developer and served as its President during all times relevant to this Indictment.

11. JOSEPH GERARDI, the defendant, was a founder of the Syracuse Developer and served as its General Counsel during all times relevant to this Indictment.

LOUIS CIMINELLI and the Buffalo Developer

12. At all times relevant to this Indictment, the Buffalo Developer provided construction management and general contracting services on various public and private projects in the State. In or around January 2014, the Buffalo Developer was named by Fort Schuyler as a preferred developer for projects of SUNY Poly to be built in Buffalo, New York. This award permitted the Buffalo Developer to be chosen for SUNY Poly development projects of any size in or around Buffalo without further competitive bidding, and, indeed, in or around March 2014, as a result of its position as a preferred developer, the Buffalo Developer received a contract worth approximately \$225 million to build a manufacturing plant in Buffalo, New York. That contract ultimately expanded to be worth approximately \$750 million.

13. LOUIS CIMINELLI, the defendant, was the Chairman and CEO of the Buffalo Developer, and served in that role at all times relevant to this Indictment.

THE BUFFALO BILLION FRAUD SCHEME

14. As part of the criminal scheme alleged in this Indictment, ALAIN KALOYEROS, a/k/a “Dr. K,” STEVEN AIELLO, JOSEPH GERARDI, and LOUIS CIMINELLI, the defendants, and Todd Howe devised a plan to secretly rig Fort Schuyler’s bidding process so that State contracts that were ultimately worth hundreds of millions of dollars would be awarded to the Syracuse Developer and the Buffalo Developer.

15. As part of their plan, Todd Howe and ALAIN KALOYEROS, a/k/a “Dr. K,” the defendant, had Fort Schuyler issue two requests for proposals (the “RFPs”), one for Syracuse (the “Syracuse RFP”) and

one for Buffalo (the “Buffalo RFP”), that would give the appearance of an open competition to choose “preferred developers” in Syracuse and Buffalo, respectively. However, the Syracuse Developer and the Buffalo Developer had been preselected by Howe and KALOYEROS to become the preferred developers, after the Syracuse Developer and the Buffalo Developer had begun paying Howe in exchange for Howe’s influence over the RFP processes. These preferred developer contracts were particularly lucrative for the Syracuse Developer and the Buffalo Developer, as the Syracuse Developer and the Buffalo Developer were then entitled to be awarded future development contracts of any size in Syracuse or Buffalo, respectively, without additional competitive bidding, and thus without competing on price or qualifications for particular projects.

16. To carry out their criminal scheme, Todd Howe and ALAIN KALOYEROS, a/k/a “Dr. K,” the defendant, agreed to and did provide secret information concerning the Syracuse RFP to STEVEN AIELLO and JOSEPH GERARDI, the defendants, including advance copies of the RFP that were provided to no other developers. Howe and KALOYEROS also worked with AIELLO and GERARDI to secretly tailor the Syracuse RFP to include qualifications that would favor the Syracuse Developer in Fort Schuyler’s selection process for the Syracuse RFP. Similarly, further to carry out their criminal scheme, Howe and KALOYEROS agreed to and did provide secret information regarding the Buffalo RFP to LOUIS CIMINELLI, the defendant, including advance copies of the RFP that were provided to no other developers, as well as information

regarding the location and purpose of the first preferred developer project – information that likewise was provided to no other developer. Howe and KALOYEROS also worked with CIMINELLI to secretly tailor the Buffalo RFP to include qualifications that would favor the Buffalo Developer in Fort Schuyler’s selection process for the Buffalo RFP. Furthermore, KALOYEROS, Howe, STEVEN AIELLO, JOSEPH GERARDI, and LOUIS CIMINELLI, the defendants, collaborated in secretly tailoring the Syracuse and Buffalo RFPs by, among other things, exchanging through Howe ideas for potential qualifications to be included in the Syracuse and Buffalo RFPs.

17. As part of their criminal scheme, Todd Howe and ALAIN KALOYEROS, a/k/a “Dr. K,” STEVEN AIELLO, JOSEPH GERARDI, and LOUIS CIMINELLI, the defendants, deceived and concealed material information regarding the drafting and selection process related to the RFPs from Fort Schuyler and its Board of Directors in the following ways, among others, and thereby exposed Fort Schuyler to risk of economic harm:

a. KALOYEROS falsely represented to Fort Schuyler and its Board of Directors that the bidding processes for the Syracuse RFP and the Buffalo RFP were fair, open, and competitive, when in truth and in fact, KALOYEROS and Howe had designed the RFPs so that the Syracuse Developer would be awarded the Syracuse RFP and the Buffalo Developer would be awarded the Buffalo RFP.

b. The Syracuse Developer falsely certified that no one was retained, employed, or designated by or on

behalf of the Syracuse Developer to attempt to influence the procurement process, when, in truth and in fact, the Syracuse Developer had retained Howe to influence the procurement process.

c. The Buffalo Developer falsely certified that no one was retained, employed, or designated by or on behalf of the Buffalo Developer to attempt to influence the procurement process, when, in truth and in fact, the Buffalo Developer had retained Howe to influence the procurement process.

18. In the course of, and in furtherance of, the criminal scheme, ALAIN KALOYEROS, a/k/a “Dr. K,” STEVEN AIELLO, JOSEPH GERARDI, and LOUIS CIMINELLI, the defendants, and Todd Howe, as well as others, including employees of SUNY Poly and Fort Schuyler, exchanged interstate emails and telephone calls with individuals located in Manhattan, New York, including (i) the then-assistant secretary for economic development for New York State (the “Assistant Secretary”), who worked part-time at the Governor’s offices in Manhattan, New York; and (ii) Manhattan-based employees of the Empire State Development Corporation, which is the State’s main economic development agency and was the administrator of funding for certain development projects awarded to the Syracuse Developer and to the Buffalo Developer.

19. As a result of the criminal conduct alleged herein, the Syracuse Developer was awarded two State contracts worth a total of approximately \$105 million, and the Buffalo Developer was awarded a State contract that was ultimately worth approximately \$750 million.

COUNT ONE

(Wire Fraud Conspiracy –
The Preferred Developer RFPs)

The Grand Jury charges:

20. The allegations contained in paragraphs 1 through 19 above are hereby repeated, realleged, and incorporated by reference as if fully set forth herein.

21. From at least in or about 2013, up to and including in or about 2015, in the Southern District of New York and elsewhere, ALAIN KALOYEROS, a/k/a “Dr. K,” STEVEN AIELLO, JOSEPH GERARDI, and LOUIS CIMINELLI, the defendants, and others known and unknown, willfully and knowingly did combine, conspire, confederate, and agree together and with each other to commit wire fraud in violation of Section 1343 of Title 18, United States Code.

22. It was a part and an object of the conspiracy that ALAIN KALOYEROS, a/k/a “Dr. K,” STEVEN AIELLO, JOSEPH GERARDI, and LOUIS CIMINELLI, the defendants, and others known and unknown, willfully, and knowingly, having devised and intending to devise a scheme and artifice to defraud, and for obtaining money and property by means of false and fraudulent pretenses, representations, and promises, would and did transmit and cause to be transmitted by means of wire and radio communication in interstate and foreign commerce, writings, signs, signals, pictures, and sounds for the purpose of executing such scheme and artifice, in violation of Title 18, United States Code, Section 1343, to wit, KALOYEROS, AIELLO, GERARDI, CIMINELLI, and their co-conspirators, devised a scheme to defraud Fort Schuyler of its right

to control its assets, and thereby exposed Fort Schuyler to risk of economic harm, by representing to Fort Schuyler that the bidding processes leading to the award of certain significant taxpayer-funded development contracts were fair, open, and competitive, when, in truth and in fact, KALOYEROS and Todd Howe, in collaboration and in concert with AIELLO, GERARDI, and CIMINELLI, used their official positions to secretly tailor the requests for proposals (“RFPs”) for those contracts so that companies that were owned, controlled, and managed by AIELLO, GERARDI, and CIMINELLI would be favored to win in the selection process for the contracts, and did transmit and cause to be transmitted interstate email and telephonic communications in furtherance of their scheme to defraud.

(Title 18, United States Code, Section 1349.)

COUNT TWO

(Wire Fraud – The Syracuse RFP)

The Grand Jury further charges:

23. The allegations contained in paragraphs 1 through 11 and 14 through 19 above are hereby repeated, realleged, and incorporated by reference as if fully set forth herein.

24. From in or about 2013, up to and including in or about 2015, in the Southern District of New York and elsewhere, ALAIN KALOYEROS, a/k/a “Dr. K,” STEVEN AIELLO, and JOSEPH GERARDI, the defendants, willfully and knowingly, having devised and intending to devise a scheme and artifice to defraud, and for obtaining money and property by

means of false and fraudulent pretenses, representations, and promises, did transmit and cause to be transmitted by means of wire and radio communication in interstate and foreign commerce, writings, signs, signals, pictures, and sounds for the purpose of executing such scheme and artifice, to wit, KALOYEROS, AIELLO, and GERARDI devised a scheme to defraud Fort Schuyler of its right to control its assets, and thereby exposed Fort Schuyler to risk of economic harm, by representing to Fort Schuyler that the bidding process for the Syracuse Preferred Developer contract was fair, open, and competitive, when, in truth and in fact, KALOYEROS and Todd Howe, in collaboration and in concert with AIELLO and GERARDI, used their official positions to secretly tailor the RFP for the contract so that the Syracuse Developer, which was owned, controlled, and managed by AIELLO and GERARDI, would be favored to win in the selection process for the contract, and did transmit and cause to be transmitted interstate email and telephonic communications in furtherance of their scheme to defraud.

(Title 18, United States Code, Sections 1343 and 2.)

COUNT THREE

(Wire Fraud – The Buffalo RFP)

The Grand Jury further charges:

25. The allegations contained in paragraphs 1 through 8 and 12 through 19 above are hereby repeated, realleged, and incorporated by reference as if fully set forth herein.

26. From in or about 2013, up to and including in or about 2015, in the Southern District of New York

and elsewhere, ALAIN KALOYEROS, a/k/a “Dr. K,” and LOUIS CIMINELLI, the defendants, willfully and knowingly, having devised and intending to devise a scheme and artifice to defraud, and for obtaining money and property by means of false and fraudulent pretenses, representations, and promises, did transmit and cause to be transmitted by means of wire and radio communication in interstate and foreign commerce, writings, signs, signals, pictures, and sounds for the purpose of executing such scheme and artifice, to wit, KALOYEROS and CIMINELLI devised a scheme to defraud Fort Schuyler of its right to control its assets, and thereby exposed Fort Schuyler to risk of economic harm, by representing to Fort Schuyler that the bidding process for the Buffalo Preferred Developer contract was fair, open, and competitive, when, in truth and in fact, KALOYEROS and Todd Howe, in collaboration and in concert with CIMINELLI, secretly used their official positions to tailor the RFP for the contract so that the Buffalo Developer, which was owned, controlled, and managed by CIMINELLI, would be favored to win in the selection process for the contract, and did transmit and cause to be transmitted interstate email and telephonic communications in furtherance of their scheme to defraud.

(Title 18, United States Code, Sections 1343 and 2.)

COUNT FOUR

(False Statements to Federal Officers)

The Grand Jury further charges:

27. The allegations contained in paragraphs 1 through 11 and 14 through 19 above are hereby

repeated, realleged, and incorporated by reference as if fully set forth herein.

28. On or about June 21, 2016, in the Southern District of New York and elsewhere, JOSEPH GERARDI, the defendant, willfully and knowingly did make materially false, fictitious, and fraudulent statements and representations in a matter within the jurisdiction of the executive branch of the Government of the United States, to wit, GERARDI, while meeting with federal agents and representatives of the United States Attorney's Office for the Southern District of New York, made statements denying involvement in tailoring the Syracuse RFP for the benefit of his company, the Syracuse Developer, when, in truth and in fact, GERARDI conspired to tailor and did tailor the Syracuse RFP for the benefit of his company.

(Title 18, United States Code, Section 1001(a)(2).)

FOREPERSON

JOON H. KIM
Acting United States
Attorney

JA 36

LETTER REGARDING JURY INSTRUCTION
DOCUMENT FILED BY LOUIS CIMINELLI

BRACEWELL
June 15, 2018

VIA ECF

Honorable Valerie E. Caproni
United States District Judge
Southern District of New York
40 Foley Square
New York, NY 10007

Re: United States v. Cimielli, S2 16 Cr. 776 (VEC)

Dear Judge Caproni:

This letter is respectfully submitted on behalf of Louis Ciminelli in response to the Court's request for jury instructions.

1. Attached hereto is a proposed instruction on multiple conspiracies. It is adapted from United States v. Berger, 224 F.3d 107, 113-15 (2d Cir. 2000).

2. We have decided not to submit an instruction on wire fraud or conspiracy to commit wire fraud because we believe that the "right-to-control theory," as articulated by the government and apparently adopted by the Court, misstates the law. At the June 6, 2018 conference, the Court said that "the property interest at issue [in this case] is the [potentially economically valuable] information that was misrepresented or withheld" from Fort Schuyler. (Tr.

120). The Supreme Court, however, has made clear that §1343 “requires the object of the [2] fraud to be ‘properly in the victim’s hands.’” Cleveland v. United States, 531 U.S. 12, 26 (2000).¹ We are hard-pressed to understand how information that was withheld from Fort Schuyler could be property “in its hands.”

Moreover, at the June 6 conference, the Court said that the “government does not have to prove that the defendants intended [to cause Fort] Schuyler to lose money on [the RiverBend] project.” (Tr. 124-25); see also Tr. 132 (“the issue of whether [Fort Schuyler] got a good quality project at a fair price is not relevant”). As we have argued, that conclusion is difficult to square with the Second Circuit’s pronouncement that it has “repeatedly rejected application of the mail and wire fraud statutes where the purported victims received the full economic benefit of its bargain.” United States v. Binday, 804 F.3d 558, 570 (2d Cir. 2015); see also United States v. Starr, 816 F.2d 94, 96-99 (2d Cir. 1987)(setting aside mail fraud conviction where the purported victim “received exactly what they paid for” and “there was no discrepancy between benefits ‘reasonably anticipated’ and actual benefits received”). The government’s theory reads that language out of the law.

3. In its most recent submissions, the government places great weight on United States v. Viloski, 557 F. App’x. 28 (2d Cir. 2014). Notably, the Solicitor General does not seem to have the same confidence in the

¹ Cleveland was a mail fraud case, but its holding applies to wire fraud as well. See Pasquantino v. United States, 544 U.S. 349, 355 n.2 (2005).

right-to-control theory as the prosecutors in this District do. In opposing Viloski's petition for certiorari, the Solicitor General wrote this:

[3] The withholding by petitioner's co-conspirator of valuable information that he had a duty to disclose to Dick's was the means through which the conspirators schemed to deprive Dick's of its property interest in controlling its assets: entering leases and deciding how much to spend on those leases.

Brief for the United States in Opposition, 2017 WL 382956 at *15; id. at *18 ("the property at issue in [Viloski] was not information in the mind of petitioner and his co-schemer -- it was Dick's right to control the use of its assets, in particular, how much money it spent on store leases"); id. at *20 ("[c]ertainly Dick's own money was property in its hands"). Indeed, the Solicitor General urged the Supreme Court to deny certiorari because "even if [petitioner's property-based] contentions had merit, the verdict in [Viloski] would be valid, and any error in instructing the jury harmless, in light of the evidence that petitioner's scheme caused Dick's to lose money"). Id. at *23-24. The government's theory in this case -- that monetary loss is irrelevant -- would not give a reviewing court that same out.

Not engaging with the Court on a jury instruction is not how we typically practice law. But the government, we firmly believe, is leading the Court into error, and we are reluctant to follow its lead.

JA 39

Respectfully submitted,

/s/ Paul Shechtman

Paul Shechtman
Partner

Spencer Durland
Hodgson Russ LLP

PS/SD:wr

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF
AMERICA

- v. -

ALAIN KALOYEROS,
a/k/a “Dr. K,”
STEVEN AIELLO,
JOSEPH GERARDI, and
LOUIS CIMINELLI,
Defendants.

S2 16-CR-776
(VEC)

JURY
INSTRUCTIONS

VALERIE CAPRONI, UNITED STATES DISTRICT JUDGE:

* * * *

1. Element One: A Scheme to Defraud

The first element that the Government must prove, beyond a reasonable doubt, is that there was a scheme to defraud. A scheme to defraud is a scheme to obtain money or property in which false representations are made regarding material facts, if the falsity is reasonably calculated to deceive persons of average prudence. In this case, the Government alleges that the Defendants falsely represented to Fort Schuyler that the bidding processes for the Syracuse and Buffalo RFPs were fair, open, and competitive, when, in truth, the Syracuse and Buffalo RFPs were tailored so that Messrs. Aiello and Gerardi’s company, COR, and Mr. Ciminelli’s company, LPCiminelli, would be selected as preferred developers.

A representation is false if it was untrue when made and was known to be untrue by the person making the representation or causing it to be made, at the time it was made. A false representation is fraudulent if it was made with the intent to deceive. The false or fraudulent representation must relate to a material fact or matter. A fact is material if the fact is one that was capable of influencing the decision-maker to whom it was directed—here, Fort Schuyler—and was intended by the person making the representation to do so. It is not necessary that Fort Schuyler actually relied on the false or fraudulent representation. Deceitful statements of half truths of material facts may also constitute false representations under the statute.

In addition to proving that a statement was false or fraudulent and related to a material fact, in order to prove a scheme to defraud, the Government must prove that the alleged scheme contemplated depriving Fort Schuyler of money or property. Property includes intangible interests such as the right to control the use of one's assets. The victim's right to control the use of its assets is injured when it is deprived of potentially valuable economic information that it would consider valuable in deciding how to use its assets. In this context, "potentially valuable economic information" is information that affects the victim's assessment of the benefits or burdens of a transaction, or relates to the quality of goods or services received or the economic risks of the transaction. If all the Government proves is that the Defendant caused Fort Schuyler to enter into an agreement it otherwise would not have, or caused Fort Schuyler to transact with a counterparty

it otherwise would not have, without proving that Fort Schuyler was thereby exposed to tangible economic harm, then the Government will not have met its burden of proof. In this regard, economic harm is not limited to monetary loss. Instead, tangible economic harm has been proven if the Government has proven that the scheme, if successful, would have created an economic discrepancy between what Fort Schuyler reasonably anticipated it would receive and what it actually received.

In order to find that there was a scheme to defraud it is not necessary that the Defendant actually realized any gain from the scheme, that Fort Schuyler actually suffered any pecuniary loss, or that the scheme was completed.

Finally, it does not matter whether Fort Schuyler might have discovered the fraud had it probed further. If you find that a scheme to defraud existed, it is irrelevant whether you believe that Fort Schuyler was careless, gullible, or even negligent.

2. Element Two: Knowing and Willful Participation in the Scheme

The second element that the Government must prove, beyond a reasonable doubt, is that the Defendant you are considering participated in the scheme to defraud knowingly, willfully, and with a specific intent to defraud. This element involves the Defendant's state of mind, which is a question of fact for you to determine, like any other fact question. "Knowingly" means to act voluntarily and deliberately, rather than mistakenly or inadvertently. "Willfully" means to act knowingly and purposely, with an intent to do something the law forbids; that is

JA 43

to say, with a bad purpose either to disobey or to disregard the law. "Intent to defraud" means to act knowingly and with a specific intent to deceive, for the purpose of causing Fort Schuyler to enter into a transaction without potentially valuable economic information, as I previously defined that term.

* * * *

PRETRIAL CONFERENCE TRANSCRIPT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF
AMERICA

- v. -

ALAIN KALOYEROS,
a/k/a "Dr. K,"
STEVEN AIELLO,
JOSEPH GERARDI, and
LOUIS CIMINELLI,

Defendants.

16 Cr. 776 (VEC)

* * * *

[123]

MR. SCHECHTMAN: Judge, so I understand, they don't intend to prove -- and I take it their view is it's almost irrelevant -- whether this building was built on high quality and for a fair price.

THE COURT: Correct.

MR. SCHECHTMAN: They don't have to show that.

THE COURT: It's not relevant. To the extent that's part of your five-day case, the case is going to get shorter.

MR. WEINGARTEN: Can we talk about that before we part ways?

THE COURT: Of course.

MR. SCHECHTMAN: They don't have to show that Mr. Ciminelli intended to cause Fort Schuyler monetary loss.

MR. PODOLSKY: I noticed that argument in Mr. Schechtman's letter. I don't think we made that claim. Certainly as part of the schemes to defraud you have to show that the defendant had the intent to cause the risk of economic harm or contemplated some economic harm. We don't have to [124] prove that in fact economic harm materialized, but of course we will have to prove that it was a schemes to defraud, and that includes an intent to cause the risk of economic harm.

MR. SCHECHTMAN: Judge, look --

MR. WILLIAMS: I'm sorry, Paul, if I may. The government has to establish an intent on each defendant's part to cause economic harm.

MR. PODOLSKY: That is part of the scheme to defraud--

THE COURT: That was the fraud.

MR. SCHECHTMAN: We are all trying to prepare a defense here. Does that mean that they had to show that Mr. Ciminelli intended, to use the vernacular, to rip off Schuyler; that he intended for Schuyler to lose money on this project?

THE COURT: No.

MR. SCHECHTMAN: What does he have to intend? To deprive him of information, and that's it?

THE COURT: To deprive him of information that could have a -- that was potentially valuable economic information.

* * * *

[132]

MR. SCHECHTMAN: I don't mean to be difficult. There is a novel that begins with: "I contradict myself, so I contradict myself, I contain multitudes." But either we can prove this or we can't. If the notion is we can prove this was arduous negotiations and that at the end of the day the price was fair, the quality was good, and that proves that we weren't depriving them of material information, that's fine, because I'll call those witnesses. But what you told me before is I can't call them.

THE COURT: No. I've said that the issue of whether they got a good quality project at a fair price is not relevant.

* * * *

[143]

MR. MILLER: Your Honor, as a small footnote on I think an excellent argument my colleagues have made, but the indictment itself contains allegations about the total amount that was paid out in connection with projects in Buffalo and Syracuse and the numbers are not insignificant. I assume that evidence is part of what the government is going to try to get in front of the jury. I think the jury is entitled to know they got their dollar's worth; that the state got its dollar's worth.

THE COURT: They're not entitled to that. We've beaten this puppy entirely to death.

To the extent your evidence is, there is no way short of losing money, these developers gave the state the best deal they could ever get, I don't see how the evidence, which is "we built a really good building, they got really good value," that is not relevant.

JA 47

* * * *

[147]

MR. SCHECHTMAN: I think what they said to you today is they don't intend to call developers to say they could have done this at a better price.

MR. PODOLSKY: We do not anticipate that exact testimony.

* * * *

TRIAL TRANSCRIPT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF
AMERICA

- v. -

ALAIN KALOYEROS,
a/k/a "Dr. K,"
STEVEN AIELLO,
JOSEPH GERARDI, and
LOUIS CIMINELLI,

Defendants.

16 Cr. 776 (VEC)

* * * *

[175] Kennedy – Direct

Q. Where did you get the understanding that Fort Schuyler used the Research Foundation's procurement policies?

A. Through practice of what they have done with other affiliated groups, like Fuller Road Management Corp. and conversations with Dr. Kaloyeros.

Q. What -- now, you have mentioned generally procurement policies. What type of process was used to select a builder for Riverbend?

A. In this case it was the selection of a preferred developer.

Q. Are you familiar with the term request for proposals?

A. Yes. So that's a general term that all government procurements follow when a governmental entity is trying to solicit bids for goods or services that needed to be rendered.

Q. And generally how does it work?

A. The governmental entity puts out materials outlining what their specific needs are and allows a competitive and open process for a variety of interested parties that meet the criteria to apply for the work.

Q. And what's the purpose of using that type of process to select someone for a project?

A. To ensure public funds are spent -- one, the public funds are spent in a transparent and a competitive way.

Q. And was that process used in the case of selecting someone to build Riverbend?

A. Yes.

* * * *

[238] Fuleihan - Direct

Q. I'm sorry. Excuse me. Sorry. Just to be clear. Did Fort Schuyler manage projects that were located in the Albany area?

A. I cannot think of them. It doesn't mean they couldn't have had one, but none come to mind.

Q. But Fuller Road Management Corporation did manage projects in the Albany area?

A. Definitely.

Q. Mr. Fuleihan, are you familiar with the term requests for proposals or RFP?

A. Yes.

Q. What is an RFP?

A. It's just that. It is a request for proposals on a – in this case, in the case of Fort Schuyler, where these were real estate development opportunities or capital construction projects, for -- it would detail what the project was, and ask and put out specifications and circulate it and ask for bids to be returned.

Q. What's the purpose of issuing an RFP in order to seek out a developer?

A. The goal is to get varied different options that you can then weigh against each other and hopefully pick the best one.

Q. Is the RFP process competitive?

A. Yes.

Q. What are the benefits of having a competition?

[239] A. The benefits are more information that comes in, it allows for different and varied opinions that may not have been thought of by the people who designed the RFP. So it -- and it allows for comparing various aspects of an RFP, whether it's price or history or financial stability or innovation or technological expertise. There are many aspects that we would like to see in a response to an RFP.

Q. You mentioned that Fort Schuyler Management Corporation issued RFPs while you were the chairman there. Is that right?

A. Yes.

Q. At this point, Mr. Fuleihan, I'd like to show you what's been marked for identification as Government

Exhibit 5-R. It should come up on your screen. If it is easier, Mr. Fuleihan, there is also a binder of documents up there with you and you can take a look at those.

A. Thank you. What number is this?

Q. 5-R. Just look up when you're ready.

A. Okay.

Q. Okay? What is this document?

A. It is an e-mail chain.

Q. What's the date at the top of the e-mail chain?

A. August 20, 2013.

Q. Were you a recipient of that e-mail chain?

A. I'm cc'd on the top e-mail.

* * * *

[343] Fuleihan - Cross

Q. Fair to say as a member of the board, you voted in favor of the recommendations of the evaluation committee for both the Buffalo RFP and the Syracuse RFP?

A. That is correct, with the understanding that as these somewhat speculative RFPs moved in the process, that the board would have other opportunities to further determine if a project would move forward.

* * * *

[344] Fuleihan - Cross

Q. Section A(b) states, "Responses to this RFP will be evaluated by the selection committee, who will

recommend a preferred candidate as well as a first and second backup candidate.”

Do you see that?

A. Yes.

Q. Then Section (c) says, “Upon Fort Schuyler board approval, detailed discussions and negotiations will be conducted with the preferred candidate which may lead to designation of the preferred candidate as the preferred developer, subject however to execution of an acceptable agreement by the preferred candidate with Fort Schuyler.”

Do you see that?

A. I do.

Q. What did you understand that language meant?

A. Once again, that there were many steps in this process before there was a final project and a final -- and final completion of the project. This even implies that the preferred developer when, even before there was a designated project, there would be a process.

[345] Q. Section (d), “If an agreement cannot be reached with the preferred candidate, discussions and negotiations with the first backup candidate will ensue. If an acceptable agreement cannot be reached with the first backup candidate, the second backup candidate will be engaged in discussions and negotiations.”

Do you see that?

A. Yes.

Q. What did you understand that meant back in October of 2013?

A. I'm assuming that -- exactly what it says, that there would be discussion with the first selected selection and, if that didn't work, the second.

Q. Okay. Paragraph (f), "In the event that an ultimate selection cannot be made, Fort Schuyler reserves the right to terminate the process and this RFP," correct?

A. Correct.

Q. So even after appointing somebody to be a preferred developer, this whole thing could get shut down, correct?

A. Correct.

Q. Directing your attention to page 11 of 19, there is another section called "additional information." Do you see that?

A. Yes.

Q. And this additional information section makes clear that Fort Schuyler can cancel the bid at any time, correct?

A. Correct.

* * * *

[422] Barber - Direct

(Government's Exhibit 1039 received in evidence)

THE COURT: Okay, Mr. Podolsky.

MR. PODOLSKY: Your Honor, may we publish Government Exhibit 1039 at this time?

THE COURT: You may.

BY MR. PODOLSKY:

Q. All right. Mr. Barber, do you recall that before we broke we were discussing the SUNY Research Foundation procurement policies?

A. Yes.

Q. I would like you to take a look at what's on your screen, Government Exhibit 1039. Do you see that?

A. Yes.

Q. And what is the stamp up at the upper left-hand corner of that document? Do you see what that says?

A. Yes.

Q. What is it?

A. "RF procurement policy."

Q. And do you see where it says "RF procurement policy"?

A. Yes.

Q. What is RF?

A. Research Foundation.

Q. And do you see just below that header information there is a line that says "reason for policy"?

[423] A. Yes.

Q. Could you go ahead and read the first full sentence of that section.

A. "The purpose of the Research Foundation for the State University of New York ('Research Foundation' or 'RF') procurement policy is to promote open and free competition in procurement transactions to the maximum extent practical, so that

procurements are priced competitively and meet the technical, programmatic and/or performance requirements of the purchase.”

MR. PODOLSKY: And we can zoom back out.

BY MR. PODOLSKY:

Q. Do you see that the next section has a heading “Statement of Policy”?

A. Yes.

Q. And let’s just read the second paragraph of that section.

A. “Suppliers that develop or draft specifications, requirements, statements of work, or requests for bids or proposals for a procurement must be excluded from competing in any resulting procurement.”

MR. PODOLSKY: All right. Let’s zoom back out again, please and let’s go to the second page.

BY MR. PODOLSKY:

Q. Do you see there is a section in the middle with the title “When Bids and Proposals are Required”?

[424] A. Yes.

Q. Do you see there is a chart below that broken out into column for total purchase amount and requirement for solicitation of bids or proposals?

A. Yes.

Q. And do you see on the bottom row under total purchase amount it says over \$100,000?

A. Yes.

Q. What is the requirement for solicitation of bids or proposals there?

A. "Solicitation of written bids or proposals required, and procurement requires selection from a minimum of three written bids or proposals."

Q. From your time at Fort Schuyler do you recall whether there were always a minimum of three written bids or proposals for every RFP?

A. I don't recall that there always was.

Q. Now let's talk about how Fort Schuyler put these guidelines into practice. Did you have any involvement with the solicitation of written proposals when you were working with Fort Schuyler?

A. Yes.

Q. Is that process sometimes called a request for proposal or RFP?

A. Yes.

[425] Q. Now, if you recall, a few moments ago, and we can actually go back to the first page of Government Exhibit 1039, and you read a few moments ago that, under "reason for policy," "the purpose of the Research Foundation for the State University of New York procurement policy is to promote open and free competition in procurement transactions." Do you recall that?

A. Yes.

Q. Is an RFP supposed to be an open and free competition?

A. Yes.

Q. How does an RFP create competition?

A. I'm sorry. Could you repeat?

Q. Of course. How does an RFP promote competition?

MR. COFFEY: Object to foundation.

THE COURT: An RFP as issued by Fort Schuyler?

MR. COFFEY: Correct.

BY MR. PODOLSKY:

Q. Based on your involvement in -- can I ask you a question, Mr. Barber? Did you have familiarity with RFPs even prior to your time at Fort Schuyler?

A. Yes.

Q. And did you work on multiple RFP processes while you were at Fort Schuyler?

A. Yes.

Q. What about at Fuller Road? Did you have experiences with RFPs there as well?

[426] A. Yes.

Q. I want to ask generally, how does using an RFP create competition?

A. It creates competition by going out to the vendor community in a public notice to alert them that there is a potential for work, and it provides the detailed requirements about that work so that vendors are informed enough to understand it and provide a response.

Q. And from the perspective of the owner, the person putting out the RFP, what is the purpose of that competition?

A. To obtain the most qualified vendor to do the work at the most reasonable price.

Q. So I want to focus my questions on the 2013 to 2014 time period. Can you just walk me through at a high level what the RFP process was at Fort Schuyler?

A. The RFP process at Fort Schuyler was to obtain the program direction from Dr. Kaloyeros to begin an RFP process, and then the procurement team as well as myself and the legal team would go about drafting the RFP for review, and once that was prepared with Dr. Kaloyeros's approval, we would bring the RFP to the attention of the board of directors for their review and agreement to issue the RFP and inform them about what was the intended purpose.

* * * *

[443] Barber - Direct

Q. And generally why was LPCiminelli given the Riverbend project?

A. I'm sorry?

Q. Generally, why was LPCiminelli given the Riverbend project?

A. It was the larger project, the more involved project, and they had the -- demonstrated the stronger proposal in size, dollar value, and magnitude of operation to address that project.

Q. Did Dr. Kaloyeros agree with your recommendation?

A. Yes.

Q. Now, at this time, when deciding who would get these projects, was it your understanding that the

Buffalo preferred developer RFP was a competitive process?

A. Yes.

Q. Did you think at the time that the RFP process was fair?

A. Yes.

Q. Would it have mattered to you if in fact the RFP had been designed to give LPCiminelli an advantage?

A. Well, yes.

Q. Why?

A. Because they can't be designed on purpose to preconceive who is going to get it.

Q. Why not? What would that --

A. That would be contrary to free and open competition, which is the basis of the policy for procurement.

[444] Q. And, more generally, why would that matter to Fort Schuyler?

A. Well, it would undermine our credibility if it was ever perceived or made public that we were somehow preconceiving an award to someone, and it would make it very difficult for us to continue doing business in any capacity.

Q. Now, are you familiar with something called the Syracuse preferred developer RFP?

A. I'm familiar with it.

Q. What was it?

A. It was an RFP for developers in the Syracuse region to be qualified to do projects that were anticipated in that region by SUNY Poly.

Q. Who won that RFP?

A. COR Development.

Q. And what projects came out of that RFP?

A. The film hub and a manufacturing facility.

Q. What's a film hub?

A. It was a studio building for producers to produce films as well as administrative offices that were attached to it.

Q. And you mentioned a manufacturing facility. Do you recall who -- what that facility was for?

A. I believe it was for Soraa.

Q. Is that a company?

A. Yes.

* * * *

[809] Giattino - Recross

[MR. MILLER:] On the other hand, if you do amazing works, you do it on time, on budget, that's got to stand for something in terms of the intent of the original actors. I fully accept the proposition that you could engage in a bid-rigging scheme and still do great work, but you could also be not at all involved in a bid-rigging scheme, do great work, and the fact that you did great work is some indication of what your intent was when you were engaged in the negotiations.

THE COURT: Mr. Miller, that's my problem with your argument. I don't see any logical connection. I

can't get through, from a sort of a logic perspective, from they did a good job, ergo -- because they did a good job, you cannot conclude that they had a corrupt plan to deprive the board of Fort Schuyler of valuable information, information that Fort Schuyler would have wanted to know; namely, that this was not a fair and open competition and that that information had economic value, had potential economic value to Fort Schuyler.

So they could have done a bang-up job. Forget this case. Every contractor would love to be the only guy who did [810] it. Even if they want to do and do first class, no question about it, the best work in the world, that, I just can't get -- I don't understand how you are drawing a logical link between they did a good job, therefore, they could not have had an intent to defraud when they withheld information or failed to disclose -- or disclosed false information to the Fort Schuyler board. Because those two things, logically you can't get from one to the other. You can get logically from someone was bidding on a contract, they made all kinds of representations about what they were going to do, they did a sloppy job, a terrible job, they didn't live up to those representations, that tends to indicate a fraudulent intent, but it doesn't get other way.

MR. MILLER: I think I'll sit down. I've made my point.

THE COURT: I hear you. I entirely agree with the notion that this is a very difficult case for the government.

MR. WEINGARTEN: I just had a thought. Why don't we hedge on this? I mean it. The evidence comes

in and you give an instruction that it may or may not be relevant for the following reasons and you give alternative theories. You say just what you said.

THE COURT: No, but I can't -- I don't have a theory that makes it relevant.

* * * *

[1024] Schuler - Direct

A. The Buffalo Billion project had been announced I believe in 2012. That was going to be the major investment in trying to rejuvenate Buffalo's economy, and in that first year or so hadn't really done anything; and, as we got into the later part of 2013, it became apparent that the Buffalo Billion was really going to be led by Dr. Kaloyeros or pushed. The type of projects that he was doing were going to be kind of exported out of Albany across the state, particularly to Buffalo.

Q. How does -- again, focusing on the same time period, how did LPCiminelli get most of its work?

A. If it was the general contracting side, that is a hard bid, which would be a low number, competition; on the construction management, program management side, it would be through requests for proposals for the most part.

Q. Just to be clear, on the hard bid side, you said low number. Low number of what?

A. Price.

Q. Now, on the request for proposal side, what is that? What is a request for proposal?

A. The best way I can explain that is you could compare it to an ad for a job, but rather than trying to

hire a job applicant, you are trying to hire actually a company to provide a service, so you are looking for several qualified respondents to give you the reason why they are the best, so you can pick one to fulfill whatever service you are looking for.

[1025] Q. Is it meant to be a competition?

A. It is.

Q. Why is that?

A. Well, the competition will give you the best people on the job, the opportunity to kind of see what company can actually provide you in the manner that you want the best service and potentially the best price.

Q. What kinds -- have you been involved in responding to many RFPs in your work at LPCiminelli?

A. I have.

Q. Have you been involved in RFPs in other parts of your life?

A. I have.

Q. What kinds of entities use RFPs to secure work?

A. The public sector certainly uses them, the private sector will use them, not-for-profits. It is pretty universal.

Q. So I'm going to ask you some general questions about how RFPs work; but to the extent there is difference, I want to focus actually more on the not-for-profit world or private world, okay?

A. Okay.

Q. Why do those kinds of entities choose to use an RFP?

A. As a way of getting a pool of applicants.

Q. So let's walk through the basic process for an RFP as you understood it around the 2013 time period, okay?

A. Okay.

* * * *

[1058] Schuler - Direct

Q. What about demonstrated use of building information modeling?

A. That was something that we were investing in, in 2013.

THE COURT: What is it?

THE WITNESS: Has to do with using computer modeling. Before you put a shovel in the ground. You can detect clashes. I'm not an operations person, so I'm operating a little out of my comfort zone. That was the technology investment.

Q. Had you been asked in other circumstances to give input into an RFP before it's been drafted?

A. We have.

Q. Is that somewhat common in your world?

A. Yes.

Q. To your understanding, what's the purpose of an owner asking a potential builder for input?

A. Usually it's outside their comfort zone, they're looking for different ideas, things they may not have considered yet. So, it is the education, and the

opportunity to hopefully make the project run more smoothly.

Q. In your experience, is it common or have you been asked other than in this circumstance to provide qualifications for what's good for your company?

A. I think most times you provide qualifications or you're going to pick things that are good for your company. This was [1059] definitely more direct than that though.

Q. Let me ask the question slightly differently. Is it common or do you remember other times where the owner asked you to propose qualifications that are good for you?

A. No.

Q. Do you think that's consistent with your understanding of a competitive RFP process?

A. No, it would not be.

Q. Did you hear back from Mr. Howe about these bullet points?

A. Yes, it was a little couple weeks later. He had not had this conversation that he was particularly going to have about the input, and came back and said do you have any other thoughts? I am going to have this conversation about RFP input. Do you have any other thoughts before I have the conversation?

Q. You keep referring to "this conversation." What conversation is that?

A. Passing our potential input along to Dr. Kaloyeros.

Q. Did you provide any other input at that time?

JA 66

A. Just one more piece.

Q. What was that?

A. Promotion and compliance of MWBEs which stand for minority women owned businesses.

Q. Why did you suggest that at that time?

A. In 2013, an MWBE component was becoming, quite frankly, [1060] mandatory on a lot of this stuff, it was an important component I forgot, and we were good at it.

* * * *

[1096] Schuler - Direct

Q. Do you see the note just below that says "qualitative, not quantitative"?

A. Yes.

Q. What does that reflect?

A. That's kind of the base thought behind it, that we also preferred something more qualifications based; that the way we approached our business, it was always better for us to be battling on qualifications and solving problems for the owner rather than getting into just a quantitative battle that could come down to price.

Q. First of all, when you say "we" or "us," who are you referring to?

A. LPCiminelli.

Q. And why is it better for you to battle on qualifications rather than quantitative things like price?

A. Well, we are not always the low cost, and there is people who will dive at the work; but, generally, on qualifications, given our background and our people, we compete very, very well.

Q. Do you see right below that it says “unique to LPC”?

A. I do.

Q. What does that refer to?

A. That was Todd saying that in the course of this RFP you may want to put something in there that is unique to LPC, which I took to mean advantageous in the competition to you guys, us.

[1097] Q. To be clear, why would it be advantageous to LPCiminelli to have something unique to LPCiminelli in the RFP?

A. Well, if you are scoring based on the qualifications – if you are scoring or evaluating based on the requirements and RFP, if there is something in there that is somewhat unique to yourself, you are going to score better.

Q. Do you see under “unique to LPC” there is a note that says “biotech”?

A. Yes.

Q. What does that refer to?

A. I believe, my recollection of that is that that was Gail and mine’s just kind of misunderstanding of what Nano was. We were kind of like, this is bioresearch, that sort of thing, as opposed to the advanced manufacturing and solar stuff, and so that was just our misunderstanding.

Q. Now, if we zoom out for a moment, and now look at the bottom.

Do you see it appears there is now a series of notes with sort of bullet points?

A. Yes.

Q. We will go through them, but generally what are the bullets there?

A. Some ideas that could be qualifications for a draft RFP.

Q. So what's the first one?

A. "Delivery in Buffalo for over ten years."

[1098] Q. What does that mean?

A. That you had to have a presence in Buffalo for the previous ten years.

Q. And why would you want to see that in an RFP?

A. That is something that would kind of ensure the work stayed local; and, being that we were the biggest local contractor, it was good for us.

Q. Where did the idea to put a year -- a specific year requirement, where did that year come from?

A. From the Syracuse stuff we had dealt with earlier and in our own draft of -- I mentioned that we provided a draft to Syracuse earlier in the year. We had something similar in it based on their original from 2008.

Q. What's the next bullet?

A. "History of experience in Buffalo."

Q. Why would you want to see that in an RFP?

A. Well, again, to make sure anyone you are competing with has at least kind of come through town.

Q. And why is that good for LPCiminelli?

A. Because at different points in time you would have a national firm that might have expertise on a given project, but no history in the city do a one-off project, and so that would kind of prevent that.

Q. To be clear, prevent what?

A. Prevent them from competing.

[1099] Q. What's the next bullet in this list?

A. "Staff local experience."

Q. Why would you want to see that in an RFP?

A. Well, competing with some of the firms, some of the national firms that did have a presence in town very often, they had a great résumé of projects, but their local staff was very green and if we could always focus on staff, we tended on most projects to have more experienced staff.

Q. And the note underneath that, what does that reflect?

A. I think that's how you would ascertain what the local experience was. I'm not exactly sure on that one.

Q. Can you read it?

A. "Three projects in last five years in western New York. Understand this market."

Q. Is that something that you believe would favor LPCiminelli in an RFP?

A. Sure, of course.

Q. If we zoom out and just look at the bottom bullets or bottom notes, I should say.

Again, generally what do these reflect?

A. Again, just some more general qualifications that kind of tie back to the earlier August bullets.

Q. Are these also ideas that you would like to see in an RFP?

A. Yes.

Q. Now, I think you -- on Thursday I asked you some questions [1100] about whether you had ever given input on any other RFP. Do you recall that?

A. I do.

Q. And I think you have mentioned this morning the answer to this question, but have you provided a template for an RFP in any other circumstance?

A. Yes.

Q. And when was that?

A. We have done it multiple times.

Q. Have you ever been asked, other than in this situation, to include qualifications that were unique to LPCiminelli?

A. No, certainly not explicitly, no.

Q. Is it consistent with a fair and competitive RFP process to put in qualifications that are unique to LPCiminelli?

A. No.

Q. Now, you also mentioned that Mr. Howe raised with you a Syracuse RFP. Do you recall that?

A. I do.

Q. What was the Syracuse RFP?

A. This is, to my recollection, the first I have kind of heard of it or had been early on, but the basic message was that there is a similar RFP in Syracuse for a strategic development partner.

* * * *

[1293] Schuler - Cross

Q. It is true that LPC is one of the most significant construction companies in western New York, correct?

A. Correct.

* * * *

[1463] Schuler - Cross

Q. So your normal practice would be to affix your signature to this electronically?

A. Yes, because very often he wasn't around to sign it.

Q. Do you know whether he read this RFP response?

A. I don't know what he did and did not do.

Q. I think you testified to this, but COR and LPCiminelli are very different companies, am I right?

THE COURT: I think he testified to that several times.

Q. You testified several times that COR and LPCiminelli are very different companies, correct?

A. Yes.

Q. The RFPs here were essentially the same, am I right?

A. Correct.

Q. If you were tailoring RFPs for COR and LPCiminelli, you would expect the RFPs to be different, wouldn't you?

MR. PODOLSKY: Objection.

THE COURT: Sustained.

Q. I think you began your testimony last week by saying this was a \$750 million project. Am I right?

A. Ultimately.

Q. It started as a \$60 million project, correct?

A. To my recollection, in that ballpark.

Q. That \$60 million was not going to go in LPCiminelli's pocket, am I right?

[1464] A. Meaning that --

Q. Meaning --

THE COURT: Rephrase that question.

Q. When this was done, LPCiminelli was not walking away with \$60 million, am I right?

A. No. It's a percentage of the project.

Q. So the bulk of the money was going to the subs that were doing this work?

A. Right, to actually build this facility.

Q. You had a fee, a construction management fee, which was about 3½ percent of that 60 million, am I correct?

A. That's typical. I honestly don't know what our fee was on the project.

Q. But what you do know is that you got the award in February 2014 and didn't get the contract until the end of the year of 2014, correct?

A. Right. We had started work but the contract was not finalized until the end of the year.

Q. That's because negotiations here between Fort Schuyler and LPCiminelli were contentious, correct?

A. To the extent I was involved in them, yes, the parts that I knew.

Q. And protracted, lengthy, correct?

A. It seemed that way.

* * * *

[1485]

THE COURT: The Bills point is not what the development fee should be in this case. I have no idea how Mr. Balling has any idea what the development fee ought to have been in this case. The factoid that Mr. Bills is offering to testify to is what is the normal range of a development fee. That is a very different question.

* * * *

[1504] Balling - Direct

Q. Prior to working at Lend Lease, where did you work?

A. For about nine months I was with a company called Accent Builders, and before that with Balling Construction.

Q. Is Balling Construction related to a family member?

A. Yes, my father.

Q. So in total, how many years have you worked in the construction industry?

A. 32.

Q. I want to focus on your time working at Lend Lease. Did there come a time while working there that you learned of a request for proposal issued by an entity known as Fort Schuyler Management Corporation?

A. Yes.

Q. Approximately when was that?

A. I was watching the evening news in Buffalo and a story came out about an RFP that had been posted in the local paper. And they had a link to their -- to the website, the Fort Schuyler website where the RFP could be obtained.

Q. Do you remember when this was?

A. 2013.

Q. What did you do after hearing about it on the news?

A. I went to their website the next day. I had to execute a non-disclosure agreement and then the RFP was sent to us.

Q. "To us," who are you referring to?

A. To Lend Lease.

[1505] Q. Did you inform others at Lend Lease about the RFP?

A. Yes.

Q. Who, if anyone, did you talk to about it?

A. Gordon Soderlund, who was with our development group, and Jeff Reimer, who was my boss in Chicago.

Q. What were the nature of those discussions?

A. Just to talk about whether we would submit a response and what we thought of the RFP itself.

Q. Was Lend Lease interested in responding?

A. We opted to wait until after the pre-proposal meeting or conference call that was set up before making any decision.

Q. Did you discuss joining forces with another company?

A. Yes. We met with LeChase Construction and Uniland Development.

Q. So what type of company is LeChase Construction?

A. Construction company.

Q. What type of company is Uniland Development?

A. Commercial developer.

Q. Why did you reach out to those two companies?

A. Uniland had a headquarters in Buffalo for a number of years and LeChase had some relevant experience in upstate New York with high-tech type projects.

Q. Why was Uniland's location in Buffalo relevant?

A. The RFP requested that a firm be headquartered in Buffalo for at least 50 years.

[1506] Q. So what steps did the three of you take to pursue the RFP?

A. We had the pre-proposal conference call, and then we had a meeting as a group to talk about a response.

Q. What was the purpose of the conference call?

A. To go through the content of the request for proposal.

Q. Who participated on that call?

A. I believe it was myself, Michael Montante from Uniland, and Gordon Soderlund from our company.

Q. Did any other companies participate on the call?

A. I don't believe so.

THE COURT: This was a call with Fort Schuyler?

THE WITNESS: Yes.

Q. Do you remember who at Fort Schuyler in particular?

A. I do not.

Q. Generally speaking, what was discussed?

A. The content of the RFP, and I believe we asked about some of the criteria within the RFP.

Q. What answers, if any, did you receive?

A. They indicated they were looking for a local firm and that the criteria was vague intentionally, so they could find a partner.

Q. What was your impression of the RFP after this phone call?

A. Well, at the time I felt the, the advertisement in the paper was odd, the 50-year requirement was odd, and the vagueness of the RFP was unusual.

[1507] Q. Why do you say that?

A. I just never recall seeing an RFP that didn't explain the type of project or the size of project so that a firm could be better suited to respond with their qualifications.

Q. Did you discuss what happened on the call with Fort Schuyler with anyone else or with anyone at Lend Lease, rather?

A. Yes, we had a call with our development group and my boss Jeff Reimer afterwards.

Q. What happened next?

A. Lend Lease decided not to pursue the project.

Q. Why?

A. The vagueness of the RFP raised a lot of concern. There was a feeling that the -- if the company were to be selected, and the project ended up being something that the company could not perform on, that it could result in an embarrassing situation of parting ways. And there was also discomfort with the 50-year requirement.

Q. What do you mean by there is discomfort with the 50-year requirement?

A. It just felt like it was being steered towards a local competitor.

Q. Who?

A. LPCiminelli.

Q. Why did you feel that way?

A. They were the only company that met that criteria.

[1508] Q. Which criteria are you talking about?

A. The 50-year headquarter in Buffalo.

Q. Do you know if Uniland and LeChase ultimately responded to the RFP?

A. I believe they did.

Q. Now, focusing on the RFP itself some more, what, if anything, seemed unusual to you about it?

A. Just the way it was, it was written to be as vague as it was, and then the procurement method of using the newspaper advertised for it was unusual.

Q. Why – I'm sorry. I didn't mean to cut you off.

A. And then the 50-year requirement.

Q. You mentioned the way it was advertised. What was unusual about that?

A. I don't recall the last time a project was advertised in the classified ads. Typically, the internet is used more than that. And then if there is any state procurement, there is a state website for all the procurement that occurs at the state.

Q. Did you later learn what the project was for that was referenced in the RFP?

A. Yes.

Q. What did you learn?

A. It was the Riverbend solar factory project.

Q. Knowing that, was the RFP typical of one you would expect for such a project?

[1509] A. No.

Q. Why do you say that?

A. Generally speaking, RFPs are a good way for a client to sort out a firm's experience and qualifications associated with a project that they're going to build. Particularly one of that scale, that it would seem a client would want to know the experience of those that are submitting on a similar project.

Q. You mentioned something of that scale. Was the size of that project typical of projects you had seen in your experience in upstate New York?

MR. MILLER: Objection.

A. No.

THE COURT: Sustained.

MR. MILLER: Move to strike.

THE COURT: Disregard the answer.

Q. Are you familiar with the term construction management fee?

A. Yes.

Q. What is that?

A. It is a fee for overhead and profit.

THE COURT: That who charges?

THE WITNESS: That the construction management firm charges.

Q. How are such fees calculated at Lend Lease in 2013?

MR. SHECHTMAN: Judge, may we --

MR. MILLER: Objection.

[1510] MR. SHECHTMAN: Object.

THE COURT: Overruled.

MR. SHECHTMAN: May we approach?

THE COURT: No.

MR. SHECHTMAN: Judge, if I didn't think it was important, I wouldn't say it.

THE COURT: No. We discussed this.

MR. SHECHTMAN: That's what this is about. If I could be heard at sidebar, please.

THE COURT: All right.

MR. SHECHTMAN: I apologize.

(Continued on next page)

[1511] (At the sidebar)

MR. SHECHTMAN: I will be very brief. As to this witness, this is question number six, and there was agreement that they would not offer evidence about the construction management fee through this witness.

MR. BOONE: No. If I could see it. What it says is the construction management fee should have been 2 percent.

MR. SHECHTMAN: What's he going to say?

THE COURT: Step back. We discussed this ad nauseam. He is going to talk about generally construction management fees.

MR. BOONE: Correct.

MR. SHECHTMAN: Is he going to put in size?

MR. BOONE: He is going to put in size and say what percentages go with what size projects.

(Continued on next page)

[1512] (In open court)

BY MR. BOONE:

Q. Okay. Just to go back one question. What is a construction management fee?

A. It is a fee for overhead and profit that the construction manager calculates.

Q. How were such fees calculated at Lend Lease in 2013?

A. It's really a function of what the market will bear at that time.

Q. Based on your experience in the market at that time, how were fees sort of typically determined?

MR. MILLER: Objection.

THE COURT: Overruled.

A. For a construction management at risk, I would say the two to two and a half percent range.

Q. Is that dependent on the size of the project?

A. Yes. The larger the size, it would theoretically go down.

THE COURT: So the larger the project, the lower the fee?

THE WITNESS: Yes.

THE COURT: And vice versa?

THE WITNESS: Correct.

Q. So for the two to two and a half percent fee, what size project would that be applicable to?

A. Under 100 million.

* * * *

[1588] Destito - Direct

Q. Okay. Do you recognize this document?

A. Yes, I do.

Q. What is it?

A. It is an authorization by the board to issue a request for proposal for a economic development project.

Q. Does it say where that project will be located?

A. In Syracuse, greater Syracuse area.

Q. You said this is an authorization. Is it sometimes referred to as a resolution?

A. Yes, it is a resolution.

Q. What is a resolution?

A. A resolution is a document that is given to the board for approval to proceed.

Q. How are resolutions approved by the board?

A. By a vote. Reviewed, and a vote is taken.

Q. Now, you mentioned that this is an authorization to issue a request for proposal. What did you understand the term "request for proposal" to mean?

A. A request for a proposal outlines a scope of work and goes out to the vendor community for -- it is a bidding process, so identifies what you're looking for. Excuse me.

Q. No, excuse me. At the time you reviewed this, first of all, did you vote on this resolution?

[1589] A. Yes, I did.

Q. Did you vote in favor --

A. Yes, I did.

Q. So at the time you reviewed this resolution, did you have any familiarities with RFPs or requests for proposals?

A. Yes, I did.

Q. What was your familiarity with RFPs?

A. It harkens back to my legislative days as well as the work that I do today at OGS. I'm familiar with the request for proposal.

Q. So, at a high level, if you can explain what was your experience with them in your legislative days and your work at OGS.

A. So in my legislative days, I chaired a committee that oversaw procurement process as well as today we do procurement at OGS. So, I'm familiar with RFPs and how they work.

Q. Okay. Based on that understanding, why do companies or entities issue RFPs?

A. To access a good quality and efficient process and work product for something that they're looking for to get. Whether it's commodities or construction or whatever.

Q. Based on your experience, is price a component?

A. Price, quality, competition.

Q. Prior to voting on this resolution, what, if anything, did you know about the Syracuse RFP?

[1590] A. I didn't know anything about the RFP. I was familiar with this resolution.

Q. Okay. If we could look now, if we could highlight the bottom portion where it says section 1.

A. Yes.

Q. So what's being discussed in section 1?

A. An issuance of a request for proposal for a economic development project in the greater Syracuse area in conjunction with SUNY CNSE.

Q. So was this just authorizing that issuance?

A. Yes.

Q. If we can now take a look at section 2, please. And Commissioner Destito, if you can read this section into the record?

A. "Recommendation. Upon completion of a competitive RFP process and evaluation of response, but prior to the president of the corporation entering into a binding contract on behalf of the corporation, the president of the corporation shall submit the president's recommendations regarding the RFP to the board of directors for its consideration and approval."

Q. Okay. Sort of layman's terms, what's being discussed here?

A. They're asking for our approval for a competitive RFP process to be out and to be evaluated by the president of the corporation and its entities and to be brought back to the board of directors for approval or disapproval.

[1591] Q. So you mentioned this term "competitive RFP process" in the first few -- it is in the first part of the sentence. What did you understand that phrase, competitive RFP process and evaluation to mean?

A. A competitive RFP process is one that goes out to the public and is out there, and you look for the entity that will provide the best value, which is price, but the best quality, you're looking for the best product that you can get.

Q. Did it matter to you if the process being discussed here was competitive?

A. Yes. Competitive is important. And you wouldn't want -- you would want it to be competitive, yes.

THE COURT: Again.

MR. COFFEY: I'm sorry. I object as non-responsive.

THE COURT: Overruled.

Q. Just to follow up on what you said, why did it matter to you?

A. Well, you wouldn't want anyone to be unfairly advantaged in any way. So, competitive is competitive. Competition brings quality and value to a RFP.

Q. Would you have approved the use of a process that wasn't competitive?

MR. COFFEY: Objection.

THE COURT: Overruled.

Q. You may answer.

[1592] A. I, as I stated, I wouldn't want a process that was in any way unfair or advantaged to any one person.

Q. Did the board review the Syracuse RFP before it was issued?

A. I do not believe so.

Q. Did you personally review it?

A. No.

Q. What involvement, if any, did the board have in managing the RFP process?

A. I don't believe any. I don't have any involvement.

Q. What involvement did you have, if any, in reviewing the responses to the RFP?

A. I did not.

Q. If we could just take a look at the next page of this same Exhibit, 1018. Just let me know when you've had a chance to look at it.

A. Yes.

Q. What's being discussed here on this page?

A. The certification for the -- the Fort Schuyler Management Corporation, that the resolution had been adopted.

Q. Okay. If we can now take a look at Government Exhibit 1016. Let me know when you have it.

A. I've got it, thank you.

Q. Do you recognize this document?

A. Yes.

Q. What do you recognize it to be?

[1593] A. A resolution that is again regarding a greater Syracuse economic development project and it's in search of a developer.

Q. Okay. Why don't we take a look at the next page. And if you could just read the paragraph at the top that begins with "selection."

A. "Selection of a local developer in the greater Syracuse area for strategic research, technology outreach, business development, manufacturing, and education and training partnership in conjunction with the SUNY College of Nanoscale Science and Engineering."

Q. Is this resolution regarding the selection of a winner for the RFP we just discussed?

A. I believe so, yes.

Q. Do you see where does it indicate on here who was selected?

A. Yes.

Q. Who was selected?

A. COR Development Company LLC.

Q. Did you vote on this resolution?

A. I did.

Q. Did you vote in favor of it?

A. Yes.

Q. Prior to voting on the resolution, did you have any familiarity with COR?

A. No.

Q. If you could now read the second-to-last whereas clause.

[1594] A. "Whereas, as part of a competitive procurement process that included the RFP, the evaluation committee completed its evaluation and identified COR Development Company LLC as the successful bidder; and."

Q. So again, we see here the phrase "competitive procurement process." Was your understanding that COR was selected as a result of that process?

A. Yes.

Q. I've asked you already what you understood competitive procurement to mean. Does that definition apply to this as well?

A. Yes. But -- yes.

Q. If we could take a look, just briefly, at section 1. Same document.

A. Yes.

Q. What's being discussed in this section?

A. A selection of a developer for the greater Syracuse economic development project.

Q. It mentions COR Development?

A. Yes.

Q. If we could take a look at section 2.

A. Yes.

Q. Same question. What's being discussed here?

A. We authorized the -- authorized, empowers and directs the president of the corporation to proceed with negotiations with [1595] COR Development Company.

Q. Did you have any involvement in contract negotiations with COR?

A. No.

Q. Do you know if anyone on the board did?

A. No, I do not believe so.

Q. Other than approving this resolution, did the board play any role in selecting COR as the winner?

A. I supported the resolution. But we were also told that there was only one bidder.

Q. So outside of sort of -- supporting the resolution, did you play any other role --

A. No.

Q. If we can now take a look at a different exhibit. Government Exhibit 1020. Let me know when you've had a chance to look at it.

A. Yes.

Q. Do you recognize this document?

A. Yes, I do.

Q. What is it?

A. It's a resolution discussing the specific economic development project for the greater Syracuse area of a film nano school.

Q. Okay. Did you vote on this resolution?

A. I did.

[1596] Q. Did you vote in favor?

A. I did.

Q. If we could take a look at the third whereas clause.

A. Yes.

Q. If you can read that into the record, please.

A. "Whereas, the corporation conducted a competitive bidding process that included the issuance of a request for proposals for a developer in the Syracuse area, and as a result of such process, by resolution number 105 dated December 19, 2013, the board of directors of the corporation authorized the awarding to COR Development Company LLC (COR) of the project set forth in the RFP consisting of a strategic research, technology outreach, business development, manufacturing, and education and training partnership in the greater Syracuse area."

Q. Okay. At the very beginning of that statement we again see a reference to the competitive process. Again, was your understanding that COR was selected as a result of such a process?

A. Yes.

Q. If we can now, I want to switch gears. You mentioned earlier that another city where Fort Schuyler had development project was Buffalo?

A. Yes.

Q. So, I'd like for you to, I want to focus on that. I'd like for you to look at Government Exhibit 1015.

[1597] A. The resolution?

Q. Yes.

THE COURT: Mr. Boone, these are all in evidence. Why can't we skip to the question that you want to ask.

MR. BOONE: Certainly, your Honor.

THE COURT: Do you know these are true copies of the resolutions.

MR. BOONE: Will do, your Honor.

Q. Just to sort of orient where we are, Commissioner Destito, what are we looking at in 1015?

A. It is a resolution for an RFP for a economic development project in the greater Buffalo area.

Q. Okay. I'll try to go through this more quickly. If you look at section 2.

A. Yes.

Q. You will again see a reference to this being a competitive RFP process. Only this time it's obviously in regards to Buffalo.

A. Yes, yes.

Q. Was it your understanding that the Buffalo RFP process was to be competitive?

A. Yes.

Q. Was your understanding of what that phrase means the same definition you gave earlier?

A. Yes.

[1598] Q. If we could go to Government Exhibit 1017. Just to orient the jury, what is Government Exhibit 1017?

A. It's the selection of a local developer in the greater Buffalo area for the economic development project that was set forth in that RFP.

Q. Okay. Does it indicate who was selected?

A. Yes.

Q. Who does it say was selected?

A. Management recommended LPCiminelli Incorporated and McGuire Development Company LLC.

Q. Did you vote on this resolution as well?

A. I did.

Q. You voted in favor?

A. Yes.

Q. Did you have any familiarity with LPCiminelli or McGuire?

A. No, no.

Q. Just so the record is clear. Did you have any familiarity with LPCiminelli or McGuire before voting on this resolution?

A. No. No.

Q. Again, you will notice in the second-to-last whereas clause a reference to there being a

competitive procurement process. And that the winners being selected as a result of that. Do you see that?

A. Yes.

Q. Was that your understanding?

[1599] A. Yes.

Q. Again, was your understanding of what that meant sort of the definition you gave earlier?

A. Yes.

Q. And did it matter to you that the Buffalo process was competitive?

A. Yes.

Q. Was it for the same reasons you gave earlier in regards to the Syracuse RFP?

A. Yes.

* * * *

[1601] Bills - Direct

Q. In upstate New York, who does LeChase consider to be its competitors?

A. Sort of regional. There's some national companies that operate in New York such as Turner Construction, Gilbane Construction, and then each region sort of has some more regional competition within each region.

[1602] Q. What are some of the regional competitors?

A. In Rochester there is the Pike Company, DiMarco, Christa; Syracuse is Hueber-Breuer,

Hayner Hoyt. Albany has BBL, UW Marx. The list goes on.

Q. What about Buffalo?

A. Buffalo RP Oak Hill, Concept Construction, we see Pike in that market from Rochester. And now Arc Construction.

Q. Was that list the same in 2013?

A. No.

Q. So, who were your competitors in 2013 in Buffalo?

A. 2013, well, the largest competitor was LPCiminelli.

* * * *

[1612] Bills - Direct

Q. What did you learn?

A. There was a solar project, Solar City or Riverbend type project, and eventually an IBM data center relocation in the greater Buffalo region.

Q. Are you familiar with the term “construction management fee”?

A. Yes.

Q. What does that term mean?

A. As a construction manager, a construction manager fee would be overhead and profit associated with our services of managing the construction.

Q. How did Le Chase calculate that fee in 2013 and 2014?

A. We look at those fees on a project-by-project basis. Given the size, scope, and scale of any particular project in dollar value and/or complexity, we look at it in our world geographically: what is the reach, is it a long stretch for us. Then we look at it in a time duration: is it a one-year or four-year phased, drawn-out effort?

Q. Can you give us an example?

A. Of a project?

Q. Sorry. Let me try to ask a better question. Given what you said, can you give a range of what is a typical fee for a particular size project.

[1613] A. CMPs range from 2 percent for extremely large projects to 4 to 5 percent for smaller projects.

Q. What would you consider a large project?

A. A large project would be in excess of 200 million.

Q. What would be a small project?

A. 1 to 5 million.

Q. Did there come a point in time when you made arrangements to meet with Alain Kaloyeros?

A. I never made arrangements to meet Alain Kaloyeros.

THE COURT: Your voice trailed off at the end. You never made arrangements to meet Kaloyeros?

THE WITNESS: No, I never did.

Q. After losing the Buffalo RFP, what efforts, if any, did you make to talk to those at Fort Schuyler about the process?

JA 96

A. I hadn't made any efforts.

* * * *

[1728] Ellard - Direct

MR. ZHOU: Let's look to page 2 of this document, Ms. Lee.

Q. Let's focus in number I.8. If you could read that paragraph, Special Agent Ellard.

A. "I.8. FSMC in conjunction with CNSE, issued a request for proposals RFP to establish a strategic research, technology outreach, business development, manufacturing, and education and training workforce collaboration with a qualified developer in the greater Syracuse area."

Q. Let's zoom out and focus in on I.10. If you could read that, Special Agent Ellard.

A. Yes. "I.10. COR responded to the RFP with a proposal, and after a competitive process, including the RFP, FSMC has conditionally selected COR for award of a project. And FSMC now wishes for COR to develop and construct a facility in the greater Syracuse area to house a location for the headquarters and production, postproduction, and distribution operations of an established film/television company in support of CNSE's collaboration with CNSE's industry collaborator.

MR. ZHOU: Now let's turn to page 3, please. Towards the bottom, Ms. Lee, there is a second-to-last bullet, a little higher up. If you could highlight that.

Q. Special Agent Ellard, if you could read that, please.

A. "The building shall be constructed on an open book basis at cost plus 8 percent and a mutually agreeable development fee, [1729] but in no event will the cost to FSMC for the building exceed \$9 million, which will include one million for site work on the property."

MR. ZHOU: Ms. Lee, if we could go to page 7. Let's zoom in the on the signatures.

Q. Do you see that one side of the signature is "COR Development Company LLC, Steven F. Aiello, president"?

A. Yes.

Q. Do you see the other side is "Fort Schuyler Management Corporation" with a signature titled "President FSMC"?

A. Yes.

MR. ZHOU: Ms. Lee, let's take this document down, and if you could pull up what is in evidence as Government Exhibit 1051, please.

Q. Do you see, Special Agent Ellard, this is a document that says "Notice to proceed" at the top?

A. Yes.

MR. ZHOU: Let's zoom in on the first whereas clause, Ms. Lee.

Q. If you could read that, Special Agent Ellard.

A. "Whereas, on October 1, 2013, Fort Schuler Management Company ("FSMC") in conjunction with the State University of New York College of Nanoscale Science and Engineering ("CNSE") issued a request for proposals ("RFP") for a strategic

research, technology outreach, business development, [1730] manufacturing, and education and training partnership with a qualified local developer in the greater Syracuse area; and.”

Q. Let’s go to the fourth whereas clause. If you could read that, Special Agent Ellard, please.

A. “Whereas, FSMC conducted a competitive bidding process under the RFP, and as a result of such process FSMC entered into a memorandum of understanding (“MOU”) effective March 25, 2014, with COR for COR to develop, design, and construct a building consisting of 52,000 square feet in the Collamer Crossings business park at 24 Aspen Park Boulevard, DeWitt, New York, 13057, the building to house the location for the headquarters and production, postproduction, and distribution operations of an established film/television company in support of CNSE’s collaboration with the film house, with the building and related infrastructure/site work on the property being referred to in this NCP as ‘the project’; and.”

Q. Let’s go to page 4 now, Ms. Lee. Let’s zoom in the on signatures. Do you see that the top has Fort Schuyler Management Corporation signature and the name Alicia Dicks, title president?

A. Yes.

Q. Do you see the next signature block is “COR Development Company LLC, Steve F. Aiello president”?

A. Yes.

MR. ZHOU: Ms. Lee, let’s take this document down and [1731] let’s go to Government Exhibit 1049,

please. If we could zoom in on the top line in the paragraph.

Q. Do you see here this is a construction management and construction agreement?

A. Yes.

Q. Do you see that it is dated January 7, 2015, and it says, "It is hereby entered into between COR Aspen Park Boulevard Company Number 2 LLC," and then later it mentions in the paragraph Fort Schuyler Management Corporation?

A. Yes.

MR. ZHOU: Now let's go to page 3, Ms. Lee. Let's focus in on the compensation paragraph.

Q. Do you see that number 6 says "Compensation?"

A. Yes.

Q. "FSMC shall pay COR the actual cost of constructing the project on an open book basis cost of work plus 8 percent of the cost of work, fixed construction services fee, and a development fee of 6 percent of the cost of work development fee"? Do you see that?

A. Yes.

Q. Do you see it further continues, "The cost of the project and the maximum cost to FSMC for the project shall not exceed \$10,660,000 GMP" and then it continues further?

A. Yes.

MR. ZHOU: Ms. Lee, if you could take this down and [1732] pull up what is in evidence as Government Exhibit 1054. Zoom in on the top paragraph.

Q. Do you see, Special Agent Ellard, this is a memorandum of understanding that indicates that it takes effect on March 13, 2014, and is between LPCiminelli, Inc., a New York corporation with its principal office located at 2421 Main Street, Buffalo, New York, 14214, and Fort Schuyler Management Corporation? Do you see that?

A. Yes.

MR. ZHOU: Let's go to page 2 now. Ms. Lee, if you could pull up I8, please.

Q. If you could read that, Special Agent Ellard.

A. "FSMC, in conjunction with CNSE, issued a request for proposals ('RFP') to establish a strategic research, technology outreach, business development, manufacturing, and education and training workforce training collaboration with a qualified developer in the greater Buffalo area."

Q. If we could go to I.10 now. If you could read that please.

A. "LPCiminelli responded to the RFP with a proposal, the RFP submission, and after a competitive process, including the RFP, FSMC is authorized to award to LPCiminelli one or more projects under the RFP. And FSMC now wishes for LPCiminelli to develop and construct the first two facilities of the hub, one facility to house CNSE's collaboration with Soraa and one facility to house CNSE's collaboration with Silevo, as set forth in the [1733] MOU.

MR. ZHOU: Now if we could go to page 7, Ms. Lee. Let's focus on the signature blocks.

Q. Do you see that the LPCiminelli, Inc. side is signed with a signature and it says “Sr Executive Vice President”?

A. Yes.

Q. Do you see the right-hand side says “Fort Schuyler Management Corporation, signature,” and then “President FSMC”?

A. Yes.

Q. Let’s look at our final document here, Special Agent Ellard. Let’s look at Government Exhibit 1060.

MR. ZHOU: Pull up the top paragraph, Ms. Lee.

Q. Do you see, Special Agent Ellard, this one is a notice to proceed?

A. Yes.

Q. It says, “Whereas, on October 15, 2013, Fort Schuyler Management Corporation, in conjunction with the State University of New York College of Nanoscale Science and Engineering, issued a request for proposals (‘RFP’) for a strategic research, technology outreach, business development, manufacturing, and education and training partnership with a qualified local developer in the greater Buffalo area”?

A. Yes.

Q. Now let’s go to the fifth whereas clause. It begins with “Whereas, FSMC conducted.” We will read just the first portion [1734] here. Do you see that it says, “Whereas, FSMC conducted a competitive bidding process under the RFP, and as a result of such process FSMC entered into a memorandum of

understanding ('MOU') effective March 13, 2014, with LPCiminelli"? Do you see that?

A. Yes.

MR. ZHOU: Let's focus in on the second-to-last whereas clause, Ms. Lee, on this first page.

Q. If you could read that paragraph, Special Agent Ellard.

A. "Whereas, FSMC and LPCiminelli anticipate that the guaranteed maximum price under the contract for the core and shell of the project will be \$60 million consisting of (a) estimated maximum total cost to work for the core and shell of the project, which is anticipated not to exceed \$57,300,000, and (b) estimated maximum LPCiminelli design and construction management fees of 4.5 percent of the cost of the work, and to be as outlined in the proposal received by FSMC on December 10, 2013, in response to the RFP ('proposal'), which such proposal is incorporated herein by reference; and."

Q. Let's go to page 4 now. Let's take a quick look at the signatures. Do you see there is a signature from Fort Schuyler Management Corporation, name Alicia Dicks, title president?

A. Yes.

Q. Do you see for LPCiminelli, Inc. there is the name John Ciminelli with a signature, title S vice president?

[1735] A. Yes.

* * * *

[2078]

MR. SHECHTMAN: Judge, I promise to be very short. I just want to say, I think I speak for all of the defendants, none of us are of the view that the theory in this case, right to control theory, is anything other than I think the legal term is cockamamie. None of us have waived that argument by not really pushing it today.

THE COURT: That's fine.

* * * *

[2356]

MR. ISEMAN: Just to make our record on a couple of points, on line 12, your Honor, at the end of that middle sentence, where it says "contemplated depriving another of money or property," we request you also charge "and would not receive what it bargained for," and then we would object – we object to the definition that "this interest is injured when a victim is deprived of potentially valuable economic information." We object to that definition. We don't believe that that's money or property and would ask that you discharge that it is money or property.

THE COURT: That is directly from a Second Circuit case.

MR. ISEMAN: Understood.

* * * *

[2357]

THE COURT: And I understand you think the whole theory is cockamamie, but even I, who may not think it is quite as cockamamie as you think it is, think we need to explain to the jury if this theory is going to the jury, what potential -- what it means to deprive the Fort Schuyler board of their right to

control their assets, and the Second Circuit has said that means they were deprived of potentially valuable economic information, and that phrase standing alone is kind of meaningless without giving it some –

[2358]

MR. SHECHTMAN: Well, I join with Mr. Coffey. I don't know that "affected the benefits and burdens of the relevant project" sharpens that.

THE COURT: That came from your colleagues.

* * * *

GOVERNMENT EXHIBIT 1015

CERTIFICATION

**FORT SCHUYLER MANAGEMENT
CORPORATION
RESOLUTION NO. 102**

The undersigned, being the duly elected and qualifying Secretary of Fort Schuyler Management Corporation (“Corporation”), certifies that the following constitutes a true and correct copy of a resolution adopted by the Board of Directors of the Corporation on October 11, 2013, authorization to issue a request for proposals for a strategic research, technology outreach, business development, manufacturing, and education and training partnership with a qualified local developer in the Greater Buffalo area in conjunction with the SUNY College of Nanoscale Science and Engineering, as it appears in the records of the Corporation in my possession as of the date I have signed this Certification.

I further certify that, as of the date I have signed this Certification, the attached resolution is in full force and effect and has not been amended, repealed or rescinded.

Signed on this 11th day of October 2013.

/s/ Laurie M. Hartman
Secretary

JA 106

RESOLUTION OF THE BOARD OF DIRECTORS
OF FORT SCHUYLER MANAGEMENT
CORPORATION

October 11, 2013

AUTHORIZATION TO ISSUE A REQUEST FOR
PROPOSALS FOR A STRATEGIC RESEARCH,
TECHNOLOGY OUTREACH, BUSINESS
DEVELOPMENT, MANUFACTURING, AND
EDUCATION AND TRAINING PARTNERSHIP
WITH A QUALIFIED LOCAL DEVELOPER IN
THE GREATER BUFFALO AREA IN
CONJUNCTION WITH THE SUNY COLLEGE OF
NANOSCALE SCIENCE AND ENGINEERING

WHEREAS, Fort Schuyler Management Corporation (the "Corporation") is a 501(c)(3) corporation formed to help facilitate research and economic development activities related to the research and educational mission of the State University of New York ("SUNY") in and around the Cities of Utica and Rome, New York by purchasing, constructing, and developing and managing facilities and promoting the research therein which support the economic development, research activities, and the mission of SUNY and its SUNY Institute of Technology campus; and

WHEREAS, the Corporation, in conjunction with the SUNY College of Nanoscale Science and Engineering ("SUNY CNSE"), anticipates developing comprehensive initiatives throughout New York State for research, technology outreach, business development, manufacturing, and education and training hubs, which will serve to strengthen and grow existing initiatives; and

WHEREAS, as part of these outreach efforts, the Corporation and SUNY CNSE seek to develop strategic partnerships with a qualified local developer in the Greater Buffalo Area for potential research, technology outreach, business development, manufacturing, and education and training hubs; and

WHEREAS, in furtherance of the Corporation's purposes and the common objectives of the Corporation and SUNY CNSE, the Corporation desires, in conjunction with SUNY CNSE, to issue a request for proposals ("RFP") to establish a strategic research, technology outreach, business development, manufacturing, and education and workforce training partnership with a qualified developer in the Greater Buffalo Area.

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF DIRECTORS OF THE CORPORATION, AS FOLLOWS:

SECTION I: ISSUANCE OF A REQUEST FOR PROPOSALS. The Board of Directors of the Corporation hereby authorizes the issuance of an RFP for a strategic research, technology outreach, business development, manufacturing, and education and training partnership with a qualified local developer in the Greater Buffalo Area in conjunction with SUNY CNSE.

SECTION 2: RECOMMENDATION. Upon completion of a competitive RFP process and evaluation of responses, but prior to the President of the Corporation entering into a binding contract on behalf of the Corporation, the President of the Corporation shall submit the President's

JA 108

recommendations regarding the RFP to the Board of Directors for its consideration and approval.

SECTION 3: EFFECTIVE DATE. This resolution shall take effect immediately.

GOVERNMENT EXHIBIT 1017

CERTIFICATION

**FORT SCHUYLER MANAGEMENT
CORPORATION
RESOLUTION NO. 106**

The undersigned, being the duly elected and qualifying Secretary of Fort Schuyler Management Corporation (“Corporation”), certifies that the following constitutes a true and correct copy of a resolution adopted by the Board of Directors of the Corporation on January 28, 2014, selection of a local developer in the Greater Buffalo area for a strategic research, technology outreach, business development, manufacturing, and education and training partnership in conjunction with the SUNY College of Nanoscale Science and Engineering, as it appears in the records of the Corporation in my possession as of the date I have signed this Certification.

I further certify that, as of the date I have signed this Certification, the attached resolution is in full force and effect and has not been amended, repealed or rescinded.

Signed on this 28th day of January 2014.

/s/ Laurie M. Hartman
Secretary

JA 110

RESOLUTION ADOPTED BY THE UNANIMOUS
WRITTEN CONSENT OF THE BOARD OF
DIRECTORS OF FORT SCHUYLER
MANAGEMENT CORPORATION

January 28, 2014

SELECTION OF A LOCAL DEVELOPER IN THE
GREATER BUFFALO AREA FOR A STRATEGIC
RESEARCH, TECHNOLOGY OUTREACH,
BUSINESS DEVELOPMENT, MANUFACTURING,
AND EDUCATION AND TRAINING
PARTNERSHIP WITH THE SUNY COLLEGE OF
NANOSCALE SCIENCE AND ENGINEERING

WHEREAS, Fort Schuyler Management Corporation (the "Corporation") is a 501(c)(3) corporation formed to help facilitate research and economic development activities related to the research and educational mission of the State University of New York ("SUNY") by purchasing, constructing, and developing and managing facilities and promoting the research therein which support the economic development, research activities, and the mission of SUNY and its SUNY Institute of Technology campus; and

WHEREAS, the Corporation, in conjunction with the SUNY College of Nanoscale Science and Engineering ("SUNY CNSE"), anticipates developing comprehensive initiatives throughout New York State for research, technology outreach, business development, manufacturing, and education and training hubs; and

WHEREAS, as part of these outreach efforts, the Corporation and SUNY CNSE seek to develop strategic partnerships with a qualified local developer

in the Greater Buffalo Area for potential research, technology outreach, business development, manufacturing, and education and training hubs; and

WHEREAS, pursuant to authorization by the Board of Directors of the Corporation and in furtherance of the Corporation's purposes and the common objectives of the Corporation and SUNY CNSE, the Corporation, in conjunction with SUNY CNSE, issued a request for proposals ("RFP") to establish a strategic research, technology outreach, business development, manufacturing, and education and workforce training partnership with a qualified developer in the Greater Buffalo Area; and

WHEREAS, as part of a competitive procurement process that included the RFP, the evaluation committee completed its evaluation and identified the need for two Buffalo Area developers and based on the evaluations, propose awarding both LPCiminelli, Inc. and McGuire Development Company, LLC the successful bidders for one or more projects as identified in the RFP; and

WHEREAS, management recommends LPCiminelli, Inc. and McGuire Development Company, LLC for awarding of one or more projects set forth in the RFP; and

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF DIRECTORS OF THE CORPORATION, AS FOLLOWS:

SECTION 1: SELECTION OF DEVELOPER. The Board of Directors of the Corporation hereby authorizes the awarding to LPCiminelli, Inc. and McGuire Development Company, LLC for one or more projects set forth in the RFP consisting of a strategic

research, technology outreach, business development, manufacturing, and education and training partnership in the Greater Buffalo Area.

SECTION 2: CONTRACT FOR DEVELOPER. The Board of Directors of the Corporation hereby authorizes, empowers, and directs the President of the Corporation to proceed with negotiations with LPCiminelli, Inc. and/or; McGuire Development Company, LLC for a contract for one or more projects set forth in the RFP consisting of a strategic research, technology outreach, business development, manufacturing, and education and training partnership in the Greater Buffalo Area.

SECTION 3: DOCUMENTS AND CONTRACTS. The Board of Directors of the Corporation hereby authorizes, empowers and directs the President of the Corporation to approve, sign, acknowledge and deliver all documents or contracts in such form, substance, and content, and upon such terms, as may be necessary or appropriate, to implement and carry out the purposes and intents of this Resolution.

SECTION 4: EFFECTIVE DATE. This Resolution shall take effect immediately.

GOVERNMENT EXHIBIT 1054

**FSMC – LP CIMINELLI Confidential
EXECUTION COPY**

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding (“MOU”) takes effect on March 13, 2014 (“Effective Date”) and is between LP CIMINELLI, INC. (“LP CIMINELLI”), a New York corporation with its principal office located at 2421 Main Street, Buffalo, New York 14214, and Fort Schuyler Management Corporation (“FSMC”), a New York not-for-profit corporation having an office located at SUNYIT, 100 Seymour Road, Utica, New York 13502. LP CIMINELLI and FSMC are sometimes referred to in this MOU individually as a “Party” and together as the “Parties”.

I. OVERVIEW

- 1.1. New York State (“NYS”) under the leadership of Governor Andrew Cuomo has led the U.S. in multi-million dollar strategic investments in high technology programs that cover the entire spectrum of clean energy, medical, smart grid and nanotechnology industry needs, from long-term innovative research and development, to workforce development and education, to product prototyping and supporting the transition to scale-up manufacturing and commercialization.
- 1.2. NYS’ comprehensive job creation and economic growth agenda for NYS provides strategic investments for job creation in emerging high-tech industries across NYS and fosters critical

collaborations between NYS government, the private sector and NYS's top-flight universities and research institutions. This agenda is embodied by the commitment of NYS to and the growth of CNSE and the public-private collaborations that CNSE operates throughout NYS with CNSE's public and private university and industry partners.

- 1.3. Governor Andrew Cuomo has identified economic growth in NYS as a leading focus for NYS government, seeking to invest significant levels of financial support for public-private collaborations throughout the Erie-Mohawk Corridor of NYS by constructing state-of-the-art facilities that leverage CNSE's capabilities and partners.
- 1.4. LP CIMINELLI is a full service construction firm specializing in construction management and general contracting.
- 1.5. FSMC helps facilitate research and economic development activities related to the research and education mission of the State University of New York ("SUNY") by purchasing, constructing, developing and managing facilities and promoting the research therein which support economic development, research activities, and the mission of SUNY.
- 1.6. FSMC and the SUNY College of Nanoscale Science and Engineering ("CNSE") are developing comprehensive initiatives through NYS for research, technology outreach, business development, manufacturing, and education and training hubs.

- 1.7. CNSE is a critical enabling component in maintaining and bolstering NYS' position as a leader in nanotechnology. CNSE has leveraged the experience it has obtained from its success in nano-electronics and has expanded its program and collaborations throughout NYS into other high technology areas.
- 1.8. FSMC, in conjunction with CNSE, issued a request for proposals ("RFP") to establish a strategic research, technology outreach, business development, manufacturing, and education and training workforce training collaboration with a qualified developer in the Greater Buffalo Area.
- 1.9. CNSE, with its industry collaborators, including SORAA, Inc. ("SORAA") and Silevo, Inc. ("SILEVO"), is establishing the Buffalo High-Tech Manufacturing Innovation Hub in the City of Buffalo in order establish a state-of-the-art campus to house high-tech and advanced manufacturing companies.
- 1.10. LP CIMINELLI responded to the RFP with a proposal (the "RFP Submission") and, after a competitive process including the RFP, FSMC is authorized to award to LP CIMINELLI one or more projects under the RFP, and FSMC now wishes for LP CIMINELLI to develop and construct the first two facilities of the Hub, one facility to house CNSE's collaboration with SORAA and one facility to house CNSE's collaboration with SILEVO, as set forth in the MOU.

In view of the foregoing, the Parties set forth in this MOU an expression of interest to engage in good faith negotiations in contemplation of a closer collaboration to establish the objectives set forth below. As the Parties embark upon negotiations, they wish to express their preliminary understanding of the key issues set forth this MOU. The Parties are bound by the terms of this MOU until the earlier of the expiration of this MOU or such time as the critical issues set forth in this MOU are fully negotiated and documented in final definitive contracts (collectively, "Final Contracts") signed by FSMC and LP CIMINELLI.

II. PURPOSE

The purpose of this MOU is to provide a framework for collaboration between FSMC and LP CIMINELLI to establish certain key terms and conditions under which LP CIMINELLI will develop and construct on the Property (as defined below) the SILEVO Manufacturing Facility (as defined below), the SORAA Manufacturing Facility (as defined below), and related facilities, all as set forth in the MOU.

III. PROPERTY DEVELOPMENT AND CONSTRUCTION

- 3.1. LP CIMINELLI will develop and build, as set forth in this Section III, the SILEVO Manufacturing Facility, the SORRA Manufacturing Facility, and related facilities on the real property identified as Area 1 on Schedule B and located at 1339-1341 South Park Avenue in Buffalo, New York ("Property"), which will be purchased and owned by FSMC.

3.2 The manufacturing facility (“SILEVO Manufacturing Facility”) for CNSE’s collaboration with SILEVO will be located on the Property as depicted on Schedule B and will consist of the following:

- 212,000 gsf manufacturing plants;
- 20,000 gsf office and amenity space; and

Parking to accommodate up to four hundred (400) employees and sufficient clearances to allow for logistical flow of incoming and outbound material.

Subject to the signing of Final Contracts between LP CIMINELLI and FSMC, LP CIMINELLI will use commercially reasonable best efforts to develop and construct the SILEVO Manufacturing Facility on or before February 23, 2015, but in no event later than August 23, 2015. Notwithstanding anything to the contrary contained herein, during the Term of this MOU, and subject to the terms of a Final Contract between LP CIMINELLI and FSMC, LP CIMINELLI’s obligations pursuant to this paragraph 3.2 will be fulfilled by its provision of general site development services for the SILEVO Manufacturing Facility.

3.3. The manufacturing facility (“SORAA Manufacturing Facility”) for CNSE’s collaboration with SORAA will be located on the Property as depicted on Schedule B and will consist of the following:

- 40,000 gsf manufacturing plant; and
- 10,000 gsf office and amenity space.

Subject to the signing of Final Contracts between FSMC and LP CIMINELLI, LP CIMINELLI will use commercially reasonable best efforts to develop and construct the SORAA Manufacturing Facility on or before May 23, 2015, but in no event later than November 23, 2015. Notwithstanding anything to the contrary contained herein, during the Term of this MOU, and subject to the terms of a Final Contract between LP CIMINELLI and FSMC, LP CIMINELLI's obligations pursuant to this paragraph 3.3 will be fulfilled by its provision of general site development services for the SORAA Manufacturing Facility

- 3.4. The SILEVO Manufacturing Facility and the SORAA Manufacturing Facility will each include the following building and site components:

Base Building Shell components shall include, but are not limited to:

- Standard foundation system
- Building structural frame
- Standard roofing system
- Building exterior enclosure, windows and doors
- Code related egress and exit stairways
- Code required elevators and vertical transport

Site Infrastructure and Improvement components include, but are not limited to:

- Primary electrical power distribution
- Natural gas distribution
- Domestic and Fire Water Distribution-Loop
- Telecommunicatinos and Data feed facilities

JA 119

- Sanitary Sewer lines and site lift station
- Main access roads and service drives
- Parking and internal connector driveways
- Landscape and Hardscape paving areas
- Storm water improvements
- Exterior pavement at manufacturing yard space

Tenant Interior Fitout and Improvement Components including, but are not limited to:

- Interior Partitioning of spaces
- Core area toilets, shafts and amenities elements
- All interior finishes
- Interior lighting and convenience electrical outlets
- Primary heating, ventilation and air-conditions (HVAC)
- Basic exhaust systems for primary functions
- Basic plumbing and sanitary sewer
- Basic tele-data cabling and punch-down only

- 3.5. Under no circumstances will the cost to FSMC for all amounts payable for the development and construction, including, without limitation, site development, of the SILEVO Manufacturing Facility, the SORAA Manufacturing Facility, and related facilities exceed in the aggregate \$60 million.
- 3.6. LP CIMINELLI will develop and construct the SORAA Manufacturing Facility and the SILEVO Manufacturing Facility, and related facilities, with input from FSMC, SILVEO and SORAA and their respective third-party consultants as reasonably appropriate, and with such design and other firm(s) as identified

by FSMC. FSMC shall have the right to review and approve all team members and subcontractors used by LP CIMINELLI for the development and construction of the SILEVO Manufacturing Facility, the SORAA Manufacturing Facility, and related facilities.

IV. FUNDS

Each Party shall be responsible for funding its own activities under this MOU. The scope of the activities under this MOU shall be determined by the funds available to each Party for the collaboration under this MOU and by financial assistance as may be obtained by either Party from external sources. No funds of either Party are in any way committed or obligated for any purpose whatsoever by virtue of entering into this MOU. This MOU does not identify or require the transfer of funds between the Parties. This MOU shall not be construed to authorize or guarantee funding for any proposals or applications submitted for funding, nor shall it be construed as a guarantee of future funding nor shall this MOU be construed as an endorsement of any proposal or application submitted by any Party or non-Party.

V. FINAL CONTRACTS

The Parties agree and acknowledge that the precise terms and conditions associated with the each project undertaken by the Parties pursuant to this MOU will be governed by one or more Final Contracts that will be separately signed written agreements entered into by LP CIMINELLI and FSMC. The Parties acknowledge that entry into a Final Contracts may be subject to a multitude of material conditions precedent, including, but not limited to, each Party's

review and approval of the Final Contracts and successful negotiation of related agreements, if any.

VI. TERM AND TERMINATION

The MOU shall be effective for a term (“Term”) of 120 days following the Effective Date, unless earlier terminated in accordance with this MOU. The Parties may extend the Term of this MOU by an amendment to this MOU signed by both Parties.

VII. PUBLICATION AND PUBLICITY

Press releases and any publicity or other communication or disclosure by any Party to a non-Party regarding this MOU, the relationship among the Parties, or the negotiation of any proposed Final Contracts must be approved by all Parties in writing prior to any such press release, public announcement or other disclosure, excluding any communication to another Party to this MOU, internally within any Party (including with such Party’s financial, legal and other advisors).

VIII. CONFIDENTIAL INFORMATION

The Parties agree that the terms and conditions set forth in Schedule A shall govern Confidential Information (as defined in Schedule A) during the Term of this MOU.

IX. USE OF NAME

Nothing contained in this Agreement shall be construed as conferring any right to use in advertising, publicity or other promotional activities any name, trade name, trademark or other designation of either Party (including any

contraction, abbreviation or simulation of any of the foregoing).

X. NOTICE

All communications, notices and disclosures required or permitted by this Agreement shall be in writing, shall be provided to the other Party and shall be deemed to have been given at the earlier of the date when actually delivered to the other Party or when deposited in the United States mail, certified or registered mail, postage prepaid, return receipt requested, by hand delivery, by overnight courier service with signed receipt or by facsimile transmission (with written confirmation of receipt thereof), and addressed as follows, unless and until either Party notifies the other Party of a change of address:

To FSMC:
Alicia Dicks, President
SUNYIT
100 Seymour Road
Utica, New York 13502

To LP CIMINELLI:
Frank L. Ciminelli, II
Senior Vice President
LP Ciminelli, Inc.
2421 Main Street
Buffalo, New York 14214

XI. NO LIABILITY

No Party shall make a claim against, or be liable to, the other Party or its affiliates or agents for any damages, including (without limitation) incidental, consequential, special, direct or indirect, punitive,

damages or lost profits or injury to business reputation, resulting from the continuation or abandonment of negotiations. A Party's undertaking to develop information or technology and/or acquire personnel or capital assets or other detrimental reliance in expectation of Final Contracts shall be at its own risk and such Party shall not make a claim against any other Party for any such reliance damages.

XII. GOVERNING LAW AND JURISDICTION

This MOU will be governed by and interpreted exclusively under the laws of the State of New York, without regard to its choice of law rules. The Parties will comply with all applicable federal, state and local laws and regulations with respect to this MOU. In case of any dispute concerning or arising out of this MOU that cannot be resolved by the Parties in good faith, such dispute shall be finally settled and venue shall be exclusively held in any appropriate state or federal court in the County of Albany, State of New York. Each Party consents to exclusive jurisdiction and venue of such courts.

XIII. MISCELLANEOUS

- 13.1. No amendment or modification of this MOU shall be valid or binding upon the Parties unless in a writing signed by both of the Parties.
- 13.2. This MOU may be signed in one or more counterparts, each of which shall be deemed to be an original and all of which when taken together shall constitute the same MOU. Any signed copy of this MOU made by photocopy,

facsimile or Adobe PDF format shall be considered an original.

- 13.3. All agreements drafts, term sheets, memoranda, if any, and other communications respecting the agreements or activities related thereto prepared or exchanged in the course of negotiations, even if signed by one or both of the Parties, shall be considered only preliminary and shall not be legally binding unless subsequently incorporated into this MOU by an amendment or into a Final Contract.
- 13.4. This MOU, together with the RFP Submission, represents the complete understanding between the Parties as it relates to the subject matter in this MOU and supersedes any prior and contemporaneous communications, understandings or agreements, oral or written, between the Parties as it relates to the subject matter.

IN WITNESS WHEREOF, each Party has caused this MOU to be signed by its duly authorized representative as follows:

LP CIMINELLI, INC.

By: /s/ Frank L. Ciminelli, II

Title: Sr. Executive Vice President

Date: 3/24/2014

**FORT SCHUYLER
MANAGEMENT
CORPORATION**

By: /s/ Alicia Dicks

Title: President,
FSMC

Date: 3/25/2014

GOVERNMENT EXHIBIT 1060

FSMC/LP Ciminelli CONFIDENTIAL

NOTICE TO PROCEED

WHEREAS, on October 15, 2013 Fort Schuyler Management Corporation (“FSMC”), in conjunction with the State University of New York College of Nanoscale Science and Engineering (“CNSE”), issued a Request for Proposals (“RFP”) for a Strategic Research, Technology Outreach, Business Development, Manufacturing, and Education and Training Partnership with a Qualified Local Developer In the Greater Buffalo Area; and

WHEREAS, LP Ciminelli, Inc, (“LP Ciminelli”), a New York corporation having an office located at 2421 Main Street, Buffalo, New York, submitted a proposal (“Proposal”) in response to the RFP; and

WHEREAS, CNSE, with its industry collaborators, including SORAA, Inc. (“SORAA”) and Silevo, Inc. (“SILEVO”), is establishing the Buffalo High-Tech Manufacturing Innovation Hub in order to establish a state-of-the-art campus to house high-tech and advanced manufacturing companies; and

WHEREAS, FSMC intends to contract to purchase approximately 88 acres located in the City of Buffalo for the development of the Buffalo High-Tech Manufacturing Innovation Hub; and

WHEREAS, FSMC conducted a competitive bidding process under the RFP, and, as a result of such process, FSMC entered into a Memorandum of Understanding (“MOU”), effective March 13, 2014, with LP Ciminelli for LP Ciminelli to develop, design

and construct the first two facilities of the Buffalo High-Tech Manufacturing Innovation Hub, with one facility (“SORAA Facility”), consisting of about 212,000 gross square feet of manufacturing space and 20,000 square feet of office and amenity space, to house CNSE’s collaboration with SORAA and with the second facility (“SILEVO Facility”), consisting of about 40,000 gross square feet of manufacturing space and 10,000 gross square feet of office and amenity space, to house CNSE’s collaboration with SILEVO (with the development, design and construction of the SORAA Facility, the SILEVO Facility, and related infrastructure being referred to in this NTP as the “Project”); and

WHEREAS, in accordance with the MOU, FSMC intends to negotiate and enter into an Owner Design-Builder Agreement - Guaranteed Maximum Price (“Contract”) with LP Ciminelli using such form and otherwise on terms and conditions mutually acceptable to FSMC and LP Ciminelli, pertaining to the design and construction of the Project; and

WHEREAS, FSMC and LP Ciminelli anticipate that the guaranteed maximum price under the Contract for the core and shell of the Project will be \$60,000,000, consisting of (a) estimated maximum total cost of work for the core and shell of the Project, which is anticipated not to exceed \$57,300,000 and (b) estimated maximum LP Ciminelli design and construction management fees of 4.5% of the cost of the work and to be as outlined in the proposal received by FSMC on December 10, 2013 in response to the RFP (“Proposal”), which such Proposal is incorporated herein by reference; and

WHEREAS, in advance of negotiating and entering into the Contract, FSMC desires for LP Ciminelli to begin various activities, documentation, design, site preparation, and planning for the Project, with a not to exceed expenditure of \$3,000,000.

NOW THEREFORE, in consideration of the mutual promises contained in this Notice to Proceed (“NTP”), and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by FSMC and LP Ciminelli (with FSMC and LP Ciminelli sometimes referred to in this NTP individually as a “Party and collectively as the “Parties”), the Parties agree as follows:

1. LP Ciminelli is hereby directed to and will proceed with efforts to satisfactorily address the scoping, planning and design necessary to advance the initial pre-construction stage of the Project, as set forth in the scope of work attached to this NTP as Exhibit A (“Work”) and in accordance with the schedule of completion attached to this NTP as Exhibit B. As part of the Work, LP Ciminelli shall advance designs to the 30% design complete milestone set forth in Exhibit A and shall provide FSMC with an anticipated guaranteed maximum price for the Project. FSMC and LP Ciminelli shall work together during the design phase of the Work to ensure that the anticipated guaranteed maximum price is achieved.
2. For completion of the Work and for reimbursement of all expenses incurred in connection with the scope of work attached as Exhibit A, LP Ciminelli shall be entitled to

payments in accordance with the project scoping budget attached to this NTP as Exhibit C ("Budget"), with such payments totaling an amount not to exceed \$3,000,000. Expenses not set forth in the Budget shall be reimbursed by FSMC only if such expenses are approved in writing by FSMC prior to such expenditures being incurred.

3. LP Ciminelli shall perform the Work in accordance the terms of this NTP.
4. In connection with any portion of the Work to be subcontracted, LP Ciminelli shall: (a) cause any sub-contract Work in excess of \$10,000 to be awarded by competitive process in accordance with Exhibit D; (b) subject to FSMC's approval, issue bid proposal documents to subcontractors for such sub-contract Work; and (c) not enter into any subcontracts for such sub-contract Work unless such subcontracts are assignable to FSMC. FSMC agrees to pay LP Ciminelli its invoices net 30 days during the time period covered by this NTP, and, in turn, LP Ciminelli agrees to pay its subcontractor invoices net 30 days during the period covered by this NTP.
5. LP Ciminelli may make application for progress payments monthly for Work performed under this NTP in accordance with the cash flow schedule attached to this NTP as Exhibit E by submitting to FSMC, after the end of any month in which such Work is performed, a notarized application in such form and in accordance with such payment procedures as

established by FSMC, provided, however, that the total of all amounts expended and committed in performance of the Work under this NTP shall not exceed \$3,000,000 including the amounts of signed subcontracts.

6. This NTP may be terminated by FSMC, upon ten (10) days' written notice to LP Ciminelli, in the event (a) the Parties are not able to reach agreement on a mutually acceptable Contract, (b) a breach of the terms of this NTP and ten (10) days' written notice reasonably describing the breach and failure to cure, or (c) insolvency, receivership of assets, or any bankruptcy filing of LP Ciminelli. This NTP shall also automatically terminate upon the Parties' signing of, a Contract, with such Contract governing all rights and responsibilities of the Parties. In the event of termination by FSMC as a result of a breach by LP Ciminelli (following applicable notice and cure periods), LP Ciminelli acknowledges and agrees that it shall not have any claim against FSMC except for reimbursement of any expenses incurred and amounts payable under this NTP prior to termination and that it shall execute such documents as may be required to assign to FSMC each and every subcontract entered into by LP Ciminelli pursuant to this NTP. In the event of termination by FSMC as a result of a breach by LP Ciminelli (following applicable notice and cure periods), FSMC shall be entitled to set-off any amounts owed to LP Ciminelli by the amount of damages resulting from such breach.

7. A dispute between the Parties relating to this NTP that is not resolved within three (3) business days of the dispute shall be subject to the following additional terms:
 - (a) Issuance of Stop Work Order (“SWO”)
 - (I) FSMC may Issue a stop work order (“SWO”) after such dispute goes unresolved for three (3) business days. FSMC will use best efforts to provide (or cause to provide) immediate notice to LP Ciminelli in person, by fax or by email and followed with certified, return receipt requested or overnight mail . The SWO must be sent by certified mail, return receipt requested or overnight mail to be effective and will have an effective date of one (1) day after the date overnight mail is sent or three (3) days after the date certified mail is sent. As of the effective date of the SWO, all Work under this NTP will stop.
 - (II) LP Ciminelli will provide immediate notice of a SWO to subcontractors to stop Work accordingly and, as of the effective date of the SWO, no further subcontractor expenses shall be invoiced until recommencement is agreed upon as set forth below.
 - (b) Within ten (10) business days of effective date of a SWO, LP Ciminelli will provide FSMC with a statement of all expenses incurred from the last invoice date through the date of the SWO. This amount plus all

invoiced amounts will be submitted for payment approval. No further payments will be due until the SWO is lifted.

- (c) LP Ciminelli may not recommence Work after issuance of a SWO unless and until FSMC agrees to lift the SWO.
 - (d) If a SWO is issued and LP Ciminelli is in violation of terms of this NTP, then any additional charges incurred as a result of the SWO and recommencement of Work will be borne by LP Ciminelli.
8. Provided FSMC shall have paid all amounts due and owing to LP Ciminelli pursuant to this NTP, FSMC shall own all designs, plans and other information generated by LP Ciminelli and/or in conjunction with any of its subcontractors, as a result of the Work performed under this NTP. In the event of a termination of this NTP, all designs, plans and other information produced prior to the time of such termination shall be solely owned by FSMC and such designs, plans and other information will be delivered to FSMC by LP Ciminelli within a reasonable time after termination.
9. This NTP shall be subject to terms and conditions set forth in the exhibits attached to this NTP. Without limiting the generality of the foregoing, LP Ciminelli shall take out and maintain, without interruption throughout the term of this NTP, and shall cause its subcontractors to take out and maintain, such general liability and property damage

insurance as will protect LP Ciminelli and FSMC from claims for personal injury and/or property damage which may arise from operations under this NTP, whether such operations be by LP Ciminelli, any subcontractor or by anyone directly or indirectly employed by either of them. Such insurance shall be written for not less than the limits of liability specified in Exhibit F attached hereto, or required by law, whichever coverage is greater. LP Ciminelli and its subcontractors shall obtain such payment and performance bonds as set forth in Exhibit F.

10. The signing of this NTP by the Parties authorizes LP Ciminelli to commence performance of the Work in accordance with the terms of this NTP.
11. The MOU, as modified by this NTP, constitutes the entire agreement between FSMC and LP Ciminelli with respect to the matters set forth therein and herein.

Fort Schuyler Management Corporation

By: /s/ Alicia Dicks
Name: Alicia Dicks
Title: President

Date: May 1, 2014

LP Ciminelli, Inc.

By: /s/ John Ciminelli
Name: John Ciminelli
Title: S. Vice President

Date: May 1, 2014

JA 133

GOVERNMENT EXHIBIT NO. 1063

OWNER DESIGN-BUILDER AGREEMENT

**PROJECT: DESIGN AND CONSTRUCTION
SERVICES FOR A 1 GIGAWATT SOLAR PANEL
FACILITY AT THE BUFFALO HIGH-TECH
INNOVATION & COMMERCIALIZATION HUB IN
BUFFALO, NEW YORK**

Owner: Fort Schuyler Management
Corporation
100 Seymour Road
Utica, New York 13502
Attention: Alicia Dicks,
President

Design-Builder: LP Ciminelli, Inc.
2421 Main Street
Buffalo, New York
Attention: Frank L. Ciminelli II

Architect: EYP Architecture &
Engineering, P.C.
257 Fuller Road
Albany, NY 12203
Attention:

OWNER DESIGN-BUILDER AGREEMENT

This Owner Design-Builder Agreement (“Agreement”) is effective as of November 26, 2014 (“Effective Date”) and is between Fort Schuyler Management Corporation (“Owner”), having an office at 100 Seymour Road, Utica, New York 13502, and LP Ciminelli, Inc. (“Design-Builder”), a corporation organized and existing under the laws of the state of New York with offices located at 2421 Main Street, Buffalo, New York.

WHEREAS, Owner desires to engage Design-Builder to provide the design and construction of a 1 gigawatt solar panel facility and related infrastructure (“Facility”) on that certain real property consisting of approximately 88 acres and located at 1339-1341 South Park Avenue in the City of Buffalo, New York; and

WHEREAS, Owner Issued to Design-Builder a Notice To Proceed (“Notice to Proceed”) effective as of May 1, 2014, authorizing Design-Builder to perform certain Design-Builder duties and services in connection with the Project, with a not to exceed expenditure of \$3,000,000; and

WHEREAS, Owner amended the Notice to Proceed by that certain First Amendment to Notice to Proceed effective as of May 29, 2014, authorizing Design-Builder to perform certain additional Design-Builder duties and services in connection with the Project and increasing the not to exceed expenditure to \$21,006,100.

WHEREAS, Owner further amended the Notice to Proceed by that certain Second Amendment to Notice to Proceed effective as of September 1, 2014,

authorizing Design-Builder to perform certain additional Design-Builder duties and services in connection with the Project and increasing the not to exceed expenditure to \$69,921,303.

NOW, THEREFORE, Owner and Design-Builder agree as follows:

1. DESIGN-BUILDER'S DUTIES

1.1 Design-Builder agrees to furnish or cause to be furnished project design and construction services, and project management, administration and superintendence and to furnish at all times an adequate supply of workmen and materials and to perform the Work as set forth in this Agreement.

2. THE ARCHITECT

2.1 Design-Builder has engaged EYP Architecture & Engineering, P.C. ("Architect") to act as the architect of record to perform the design work required under the Contract Documents. Engineering included within the Work may be performed by M&W U.S., Inc. or the Design-Builder, at the discretion of the Design-Builder, following Design-Builder's consultation with the Owner. All design work shall be performed by licensed design professionals. The Design-Builder may hire other consulting architects and/or engineers upon consultation with the owner. Design-Builder shall and shall cause the Architect and such other consulting architects or engineers to be bound by the duties, obligations, representations and warranties as they relate to their respective scope of work and as set forth in

this Agreement. The Design-Builder will cause the Architect to perform services relating to the Work, and will cause all other architects and engineers to perform their respective services relating to the Work, in a manner consistent with that degree of skill and care ordinarily exercised by practicing professionals performing similar services in a world-class solar panel facility.

3. WORK, GUARANTEED MAXIMUM PRICE (GMP), TIME OF COMPLETION

3.1 Unless otherwise expressly set forth in the Contract Documents, the Design-Builder shall perform all Work and provide and pay for all materials (including transportation thereof), labor, tools, equipment, and utilities, including, but not limited to, temporary utilities not provided by Owner and necessary for the proper performance and completion of all the Work required under the Contract Documents and designated in the scope of work. The scope of work ("SOW") or "Scope of Work" is attached as Exhibit A to this Agreement and identifies the Work to be performed by the Design-Builder. As part of the Work, Design-Builder shall develop final contract drawings and specifications ("Drawings and Specifications") for Owner's acceptance. Upon acceptance, the Drawings and Specifications shall become part of the Contract Documents, and Design-Builder shall perform all Work and provide and pay for all materials (including transportation thereof), labor, tools, equipment, and utilities, including, but not limited to, temporary utilities not provided by

owner and necessary for the proper execution and completion of all the work shown in the Drawings and Specifications, and all work, materials and equipment inferable therefrom, necessary to produce the intended result.

3.2 DESIGN-BUILDER'S TASKS AND DUTIES

3.2.1 Project Cost Estimate

The Project cost estimate ("Project Cost Estimate") is attached to this Agreement in Exhibit B and such Project Cost Estimate is hereby accepted by Owner. The Project Cost Estimate is the Construction Budget, and the Construction Budget may only be amended by writing, signed by the Owner, expressly amending the Construction Budget.

3.2.2 Basic Services

Unless otherwise expressly stipulated, in addition to the requirements in Paragraph 3.1 of this Agreement, Design-Builder shall provide or cause to be provided all architectural, engineering, and construction management services and all contract administrative duties required hereunder and perform all construction work necessary for the proper execution and completion of all the Work called for and attached hereto as Exhibit A ("Basic Services").

3.2.3 Schematic Design Phase

3.2.3.1. The Design-Builder shall review the SOW.

3.2.3.2 The Design-Builder shall provide a preliminary evaluation of the SOW. The preliminary evaluation shall also therefore include a careful analysis of the constructability of the Facility as set forth in the SOW and the GMP.

3.2.3.3 The Design-Builder shall review with the Owner, site use and improvements, selections of materials, building systems and equipment, construction methods and methods of Project delivery. The Design-Builder shall consider and advise the Owner as to alternative systems, components, materials, finishes and equipment so as to provide quality construction at the least cost (hereafter referred to as value engineering). The Design-Builder shall suggest for approval by Owner, modifications to the SOW, including the use of add or deduct alternates to assure that the cumulative cost of all bids received will be within the GMP.

3.2.3.4 Based on the SOW and the GMP, the Design-Builder shall review and comment on schematic design documents consisting of drawings, outline specifications and other documents illustrating the scale and relationship of Project components (“Schematic Design”).

3.2.4 Design Development Phase

3.2.4.1 Based on the accepted Schematic Design documents including modifications in the SOW or the Project Cost Estimate or the GMP agreed to by the Owner, the Design-Builder shall prepare or cause the Architect to prepare, for acceptance by owner, the design development documents consisting of drawings, outline specifications and other documents which fix and describe the size and character of the entire Project as to Design-Builder, the architectural, structural, mechanical and electrical systems, equipment, materials, finishes and such other elements as may be appropriate (“Design Development Services”).

3.2.4.2 Design-Builder, as part of Basic Services, shall cooperate with Owner in identifying modifications necessary, including redesign, or value engineering, to attempt to bring costs within the Project Cost Estimate. The Design-Builder shall use commercially reasonable efforts to effect cost reductions by redesign and value engineering. Agreed upon modifications shall be made as part of Design Development Services.

3.2.4.3 At completion of Design Development Phase, Design-Builder shall provide a further updated Project Cost Estimate.

3.2.4.4 The Design Development Phase shall be complete when Owner, in writing

accepts the design development drawings and draft contract specifications (“Design Development Documents”). Upon completion of the Design Development Phase, the Design-Builder shall provide Owner with drawings, outline specifications and other documents for acceptance by Owner.

3.2.5 Construction Documents Phase

3.2.5.1 Following Owner approval of the Design Development Documents, the Design-Builder shall cause the Architect to prepare, for acceptance by the Owner, construction documents (“Construction Documents”) consisting of Drawings and Specifications setting forth in detail the requirements for the construction of the Project. When Construction Documents are ninety percent (90%) complete and have been approved by Owner, owner and Design-Builder shall use good faith commercially reasonable efforts to establish a guaranteed maximum price for the Project, exclusive of the site work, (the “Overall Project GMP”) and a guaranteed maximum price for the site work for the Project (the “Site Work GMP”), and to promptly thereafter execute an amendment to this Agreement confirming such GMPs. Owner and Design-Builder shall use good faith commercially reasonable efforts to work toward establishing a Site Work GMP in the amount of \$119,764,283 and an Overall

Project GMP in the amount of \$409,513,072. The GMPs may be modified as set forth in this Agreement and the General Conditions (Paragraph 3.1.6) upon Owner prior written consent and the GMP as modified shall be the final GMPs.

3.2.5.2 The Design-Builder shall prepare the necessary bidding information, bidding forms, the conditions of the contracts, and the forms of the construction agreement between the Design-Builder and the contractors, consistent with the requirements of this Agreement.

3.2.5.3 The Design-Builder shall prepare all necessary submittals to assist the Owner in connection with the Owner's responsibility for filing documents required for the approvals and permitting of governmental authorities having jurisdiction over the Project.

3.2.5.4 The Construction Documents Phase shall be complete when Owner, in writing accepts the Construction Documents, bid documents and bid packages (for issuance), but nothing in this Agreement imposes responsibility on Owner to review and/or determine whether the documents are complete, whether there is adequate coordination amongst the various documents, or whether bid packages fully apprise the Design-Builder, Architect and contractors

of the scope of work required. Such responsibility shall remain with the Design-Builder as elsewhere set forth herein.

3.2.6 Bidding or Negotiation Phase

3.2.6.1 The Design-Builder, promptly following the Owner's acceptance of the Construction Documents, or at such earlier time as Owner and Design-Builder agree as to any particular trade subdivision, shall obtain bids as hereafter provided for. Where required, the Design-Builder shall render interpretations and clarifications of the Drawings and Specifications in appropriate written form to aid bidders. The Design-Builder shall conduct pre-award conferences with apparent successful Bidders.

3.2.7 Construction Phase-Administration of the Construction Contract

3.2.7.1 The Construction Phase will commence with the award of the initial contract for construction or upon the issuance of a notice to proceed and together with the Design-Builder's and Architect's obligation to provide Basic Services under this Agreement will end when Architect issues a Certificate for Final Payment.

3.2.7.2 Unless otherwise provided in this Agreement and/or in the Contract Documents, the Design-Builder shall provide administration of the contracts for

construction as required by this Agreement.

3.2.7.3 The Design-Builder shall advise and consult with the Owner on all matters during the Construction Phase. All instructions to the contractors shall be forwarded through the Design-Builder. The Design-Builder shall have authority to act on behalf of the Owner only to the extent provided in this Agreement or in the General Conditions.

3.2.7.4 In addition to the Basic Services required above and elsewhere in this Agreement, the Design-Builder shall provide as-builts in accordance with the following. Pursuant to the General Conditions, the Design-Builder shall maintain at the site one record copy of all Drawings, Specifications, addenda, Change Orders and other modifications marked to record changes and selections made during construction and depleting the Work as installed. Information to be shown shall include, without limitation, structural, mechanical, electrical and other basic building and site work systems, with particular attention paid to Items of Work which will be buried or otherwise covered in the completed Work, such as underground utilities, piping and conduit in walls and chases, structural elements encased in concrete or masonry, etc. Such recording of information shall include final and actual sizes as well as

location and elevation by offset distances in feet and inches to permanent visible and accessible structures. During the Design-Builder's and Architect's periodic inspections, Design-Builder shall review such marked contract drawings for correctness and completeness. At completion of the Work, the Design-Builder will be required to submit prints of the record drawings to the Architect for review. Design-Builder shall review such record drawings and make necessary changes to correctly reflect, based upon Design-Builder's and Architect's periodic visits to the project, the as-built status of the project. The Architect shall prepare a complete set of all contract drawings on electronic media, (autocad and pdf formats) and compatible with Owner's computer system, showing significant changes in the Work made during construction based on marked-up prints, drawings and other data. Such record drawings shall be signed and dated by the Design-Builder and Architect and delivered to and accepted by Owner prior to and as a condition precedent to final payment to the Design-Builder.

3.2.8 Additional Basic Services. In addition to Design-Builder's duties set forth in the General Conditions and above:

3.2.8.1 The Design-Builder shall make a detailed survey of the Project to determine existing conditions which could adversely

affect the preparation of an accurate estimate of construction costs.

3.2.8.2 The Design-Builder shall prepare or cause to be prepared, performance specifications and requests for proposals for: i) the procurement and installation of systems components of the construction; and ii) for procurement of long lead time equipment and materials.

3.2.8.3 The Design-Builder shall consider and advise the Owner as to alternative systems, components, materials and equipment to achieve the most efficient use of labor, materials, equipment and methods so as to provide quality construction at the least cost.

3.2.8.4 With each request for a Change Order affecting the GMP, Design-Builder shall submit a proposed revised GMP. The Design-Builder shall provide documentation of all changes, accepted by Owner, made in the GMP (which may only be changed by a Change Order signed by Owner), so that complete traceability is maintained between the original breakdown and the latest accepted breakdown.

3.2.8.5 Attached hereto as Exhibit C is the preliminary Bar Chart Schedule (“Bar Chart Schedule”), which is hereby accepted by Owner. The Design-Builder may from time to time submit proposed changes to the accepted Bar Chart

Schedule, which may or may not be accepted, at Owner's sole election, unless Design-Builder is entitled to a Change Order extending the time of performance as provided for in the General Conditions. With each Change Order extending Design-Builder's contract time the Design-Builder shall submit a proposed revised schedule. The Design-Builder shall provide documentation of all changes made in the accepted Bar Chart Schedule (see Paragraph 5.5) so that complete traceability is maintained between the original schedule and the latest accepted schedule.

3.2.8.6 The Design-Builder shall prepare all procurement and construction cost estimates. The Design-Builder shall prepare preliminary estimates as requested in support of the design process and shall prepare final cost estimates for an early procurement of equipment and materials; for all systems components contracts; and for all out of system construction work. The Design-Builder shall notify the Owner whenever the estimated construction cost for any major-trade subdivision is tending to exceed the corresponding line item of the latest approved GMP or whenever the Project status is such as to preclude meeting the completion schedule.

3.2.8.7 The Design-Builder shall identify, recommend for purchase, and expedite the

procurement of equipment, materials and supplies which require long lead time for procurement or manufacture.

3.2.8.8 The Design-Builder shall notify the Owner as appropriate of all filings required to be made with, and all permits to be obtained from, all governmental and quasi-governmental authorities having jurisdiction over the Work sufficiently in advance to permit such filings to be timely and fully made and such permits to be obtained. The Design-Builder shall make all filings and obtain all permits which are customarily obtained by a builder or general contractor.

4. GUARANTEED MAXIMUM PRICE

4.1 COST TO THE OWNER

4.1.1 The maximum cost to the Owner, including the Cost of the Work, together with the Design-Builder's Fee, the Design-Builder's General Conditions and the Design-Builder's reimbursable expenses, shall not exceed the respective GMP therefor. Owner shall pay to Design-Builder, for Design-Builder's performance of all work labor and services required to be provided, the Cost of the Work, together with the Design-Builder's Fee, the Design-Builder's General Conditions and the Design-Builder's reimbursable expenses, which shall not in the aggregate exceed the respective GMP therefor. The GMPs shall include a Design-Builder's Contingency, which shall be established as a

separate line item within the GMP and shall be increased by the amount of any buy-out savings realized by Design-Builder. Expenditures from a Design-Builder's Contingency shall be in the sole discretion of the Owner and any balance in a Design-Builder's Contingency remaining at the end of the Project shall be returned to Owner as savings.

4.1.2 The maximum cost to the Owner for the Design-Builder's Fee shall not in any event exceed the percentage set forth on Exhibit B.

4.2 COMPETITIVE BIDDING AND CONTRACT AWARDS

4.2.1 Design-Builder shall competitively bid any Work where Design-Builder's budgeted cost therefor is \$25,000.00 or more to contractors who have been pre-qualified by Design-Builder in accordance with the prequalification process described on Exhibit G. To the extent that the approved Project schedule does not provide sufficient time for such prequalification and bidding for any portion of the Work, Design-Builder shall procure such Work in accordance with the best value sourcing guidelines for procurement set forth in Exhibit F. Notwithstanding anything contained in this Agreement or elsewhere to the contrary, Design-Builder shall not be required to utilize competitive bidding (either through prequalification or otherwise) or best value

sourcing for: i) architect; engineering services and other similar soft, cost items; ii) materials testing; iii) building permit; and iv) general conditions, general requirements and reimbursable expense items upon completion of the prequalification process, Design-Builder shall notify Owner in writing of all prequalified bidders. Within ten (10) days of the receipt of such prequalified bidders list, Owner shall notify Design-Builder of any prospective prequalified bidders to which Owner has an objection, which bidder shall thereafter be deemed disqualified from bidding. Any contract entered into by Design-Builder for subcontract work must be assignable to owner.

4.2.2 If Design-Builder desires to self-perform any of the Work, it must nevertheless competitively bid such work as provided for in this Agreement, and further, must submit its bid to Owner not less than twenty-four (24) hours before bids are required to be received from others.

4.2.3 The Design-Builder shall whenever possible issue requests for proposals to at least three (3) prequalified contractors, and shall receive proposals and assist in their evaluation. In selecting sources from which to solicit bids, and in evaluating bids, Design-Builder shall comply with Owner's policies as set forth in Articles 3.5 and 14 of the General Conditions.

4.2.4 The bidding on construction subcontracts for divisions of the Work to be performed by contractors must be conducted so as to achieve maximum competition among prequalified bidders in order to obtain the most reasonable price for acceptable work. Design-Builder may bid on any item, provided Design-Builder's bid is received twenty-four (24) hours before the time to receive bids from others, and full and clear information is available to other bidders regarding the scope of Work, so that they are not at a disadvantage.

4.2.5 It shall be the responsibility of the Design-Builder to coordinate bids so as to assure that all Work called for under the Contract Documents, including all work not expressly shown or called for, but includable as required to obtain the intended result, is provided. In the event the Design-Builder shall fail to include in the various bid packages any work necessary for the proper execution of the Work so as to provide to the Owner a complete working Project with complete working systems, subsystems and components, the Design-Builder shall be required to provide such additional work, labor and services necessary to complete the Work, which shall be an allowable Cost of the Work, provided however, Design-Builder shall not be entitled to an increase of the GMP.

4.2.6 Invitation for bids shall describe the required work clearly, accurately, and

completely. Bidding documents shall include general conditions in form supplied by the Owner.

4.2.7 Design-Builder shall award the subcontracts within stated time limits, after sealed bids are opened, to that prequalified bidder whose bid, conforming to the invitation for bids, contains the lowest price offered. Design-Builder with the consent of Owner, may i) reject any non-conforming bid, or ii) waive any non-substantive irregularity, provided nothing shall entitle Design-Builder to waive, alter or modify the requirements of Articles 3.5 or 14 of the General Conditions, or iii) reject all bids of and rebid any trade subdivision, subject to section 4.2.1; provided, however, Design-Builder shall not be entitled to any extension to the Contract Time by reason of such rebid, provided a substantially responsive bid or bids were received, notwithstanding the fact that such bid amount(s) exceed(s) the corresponding amounts set forth in the Project Cost Estimate.

4.2.8 Each bid package shall be described in sufficient detail to inform prequalified bidders of the nature and scope of the work and shall contain instructions to interested bidders for submitting responses.

4.2.9 In performing its responsibilities hereunder the Design-Builder shall avoid any conflict of interest. In particular, neither the Design-Builder nor any firm in which a

principal (i.e., over 10%) stockholder or member of the Design-Builder's firm has a financial interest, shall during the term of the contract, make or cause to be made any bid for, or be awarded any subcontract for construction work of the Project except for self-performed work as expressly permitted by this Agreement or where after full disclosure the Owner agrees to an award to such subcontractor.

4.2.10 Notwithstanding the foregoing, however, if the low bid for any bid package exceeds the Design-Builder's line item price for such package as shown on the Project Cost Estimate or if less than three bids are received in response to the submission of any bid package to prequalified bidders, the Owner may authorize one of the following procedures:

4.2.10.1 The Design-Builder shall negotiate with the low bidder to reduce the price of the bid package to a cost which will not exceed the line item price: or

4.2.10.2 The Design-Builder shall reject all bids and issue a revised invitation to bid to the prequalified bidders; or

4.2.10.3 The Design-Builder may elect to perform such work with its own forces, provided, however, that the price for such Work shall not exceed the price received from the lowest bidder; or

4.2.10.4 The Design-Builder shall award to the low bidder for a price above the line

item, provided, however, that in such circumstance the GMP related to such Work shall not be adjusted.

4.2.10.4 Whichever of these procedures is followed, there shall be no reduction of the scope or quality of the Project for any trade subdivision in order to accomplish the Project within the Guaranteed Maximum Prices therefor.

4.2.11 Notwithstanding anything contained herein to the contrary, neither the Project Cost Estimate or the GMPs shall serve as a guaranteed maximum price for each line item separately, and the Design-Builder shall have the right to adjust each line item to reflect actual bids accepted, adjusting the Design-Builder's Contingency, or if necessary lowering the Design-Builder's Fee accordingly; provided however, nothing shall entitle the Design-Builder to increase the Design-Builder's Fee or the GMPs, except to the extent Owner requests improvements or changes in scope of work and such improvements or changes are priced in accordance with the terms of this Agreement and Owner agrees to the price for such improvements or changes.

4.3 CONTRACT AWARDS

4.3.1 The Design-Builder shall make the award and enter into agreements with the contractors who are required to subscribe to a prevailing wage program of employment in accordance with the General Conditions,

after first providing the Owner notice of the bid results, and not less than a period of one week to make objections to the proposed contract award.

4.3.2 The relationship of the Design-Builder to each trade contractor is the same as that of a general contractor to a subcontractor.

4.3.3 The Design-Builder's Fee shall be calculated as a percent of Cost of the Work and not exceed the percentage set forth as the "Design-Builder's Fee" on Exhibit B. Design-Builder's Fee shall not constitute a Cost of the Work, but shall be compensable with each monthly application for payment.

4.3.4 The Design-Builder's direct labor costs related to the Project shall be calculated as a percent Cost of the Work. Design-Builder's direct labor costs shall not constitute a Cost of the Work, but shall be compensable with each monthly application for payment at 1.3 times Design-Builder's direct personnel expense.

4.3.5 The Design-Builder's general conditions costs shall be reimbursed at reasonable and actual incurred costs. The Design-Builder's labor travel costs shall be reimbursed at reasonable and actual incurred costs. Design-Builder's general conditions costs, and labor travel costs shall not constitute a Cost of the Work, but shall be compensable with each monthly application for payment.

4.3.6 Intentionally omitted.

4.3.7 To the extent that Design-Builder is able to identify savings during the performance of the Work, it shall do so and advise the Owner.

4.4 COST OF THE WORK

4.4.1 The term “Cost of the Work” as used herein shall mean the Design-Builder’s actual costs of the Work performed and materials purchased by separate contract (or by Design-Builder when self-performing any Work) for the items set forth below:

4.4.1.1 Cost of all labor, materials, supplies, rental of equipment not customarily provided by contractors, and equipment incorporated in the Work, including costs of transportation thereof.

4.4.1.2 Payments properly made by Design-Builder to contractors for Work performed pursuant to subcontracts under this Agreement, including payments to any architects, engineers, design professionals and consultants.

4.4.1.3 Sales, use or similar taxes related to the Work and for which Design-Builder is liable, imposed by any governmental authority. The Owner is exempt from payment of sales and compensating use taxes of the State of New York and of cities, counties and other subdivisions of the State. Provided that the Owner furnishes appropriate documentation evidencing such exemptions, these taxes shall not be

JA 156

included in bids or proposals for Work to be performed under the Contract, and are not part of the Cost of the Work. This exemption applies to:

4.4.1.3.1 Materials permanently incorporated in the Project, such as equipment, pipe, catch basins, stone, gravel, concrete, paving, brick, masonry, insulation and other construction materials, etc.; and

4.4.1.3.2 Supplies which are permanently incorporated into the Project; and

4.4.1.3.3 Material and furnishings for the Project which are incorporated therein, such as chairs, desks, draperies, and moveable personal property.

4.4.1.3.4 This exemption does not apply, however, to tools, machinery, equipment or other property purchased by, leased by or to the Design-Builder or its contractors, or to supplies or materials not incorporated into the completed Project. The Design-Builder and contractors shall be responsible for and shall pay any and all applicable taxes, including sales and compensating use taxes, for which no exemption is available, which taxes as paid shall be a Cost of the Work.

4.4.1.4 Permit fees, royalties, damages for infringement of patents and costs of defending suits therefor, and deposits.

4.4.1.5 Expenses of reconstruction and/or costs to replace and/or repair damaged materials and supplies provided that Design-Builder is not compensated for such expenses and/or costs by insurance or otherwise and that such expenses and/or costs have resulted from causes other than the fault or neglect of Design-Builder. Such expenses and/or costs shall include costs incurred as a result of any act or neglect of Owner or of any employee, agent or tenant of Owner, any act or neglect of any separate contractor employed directly by Owner, and/or any casualty or so-called "war risk".

4.4.1.6 Cost of premiums for all bonds, guarantees, warranties and insurance which a Contractor is required by the Contract Documents to purchase and/or maintain. The cost of any bonds obtained by Design-Builder, contractors, or materialmen, not required, shall not be, directly or indirectly, part of the Cost of the Work. Bonds must be approved by the Owner prior to purchase.

4.4.1.7 Costs for electronic equipment and computer software directly related to the Work.

JA 158

4.4.1.8 Legal, mediation and arbitration costs, including attorney's fees, other than those arising from disputes between the Owner and Design-Builder, reasonably incurred by the Design-Builder after the execution of this Agreement in the performance of the Work.

4.4.1.9 Costs of document reproductions, facsimile transmissions and long distance telephone calls, postage and personal delivery charges, messenger services, office supplies and telephone service in connection with and for the benefit of the Project.

4.4.1.10 Costs of removal of debris from the site of the Work and its proper and legal disposal.

4.4.1.11 Design-Builder's direct labor costs.

4.4.1.12 Design-Builder's reimbursable costs or expenses.

4.4.1.13 Other direct costs incurred in the performance of the Work if and to the extent such costs are approved in advance in writing by Owner.

4.5 "COST OF THE WORK" SHALL NOT INCLUDE

4.5.1 Notwithstanding anything to the contrary set forth herein, the term "Cost of the Work" shall not include any of the items set forth herein below:

4.5.1.1 Design-Builder's costs of defending patent and copyright suits if Design-Builder had reason to know any of the Work violated a patent or copyright; costs to defend patent suits should not be included in the Cost of the Work for purposes of calculating the Design-Builder's fee.

4.5.1.2 Intentionally omitted.

4.5.1.3 Intentionally omitted.

4.5.5 Minor expenses for such items as telegrams, long distance telephone calls, telephone service at the site, expressage, and similar petty cash items in connection with the Work.

4.5.6 Any part of Design-Builder's capital expenses, including interest on Design-Builder's capital employed for the Work.

4.5.7 Overhead or general expenses of any kind, except as may be expressly included hereinabove.

4.5.8 The Owner's contingency fund, unless and until the Owner's contingency fund is incorporated in the Project pursuant to Section 4.1 above.

4.5.9 All Owner's costs, such as cost of legal services, insurance, site survey and investigations to the extent not included in Exhibit A (Scope of Work), Owner's design fees, construction testing and inspection, costs of defective or non-conforming work,

owner's project inspector, moveable equipment, finance costs and furnishings.

4.5.10 Any Design-Builder's costs that would cause the GMP to be exceeded.

4.5.11 Any Design-Builder's costs due to negligence, willful misconduct or violation of the contract or law by Design-Builder or any of its contractors or their respective agents, employees or contractors.

4.5.10 In computing costs:

4.5.10.1 All cash discounts for Work performed by Design-Builder shall accrue to Owner. Cash discounts with respect to Work performed by contractors shall accrue to such contractors.

4.5.10.2 All trade discounts, rebates and refunds and all returns from the sale of surplus materials and equipment for Work performed by Design-Builder shall accrue to Owner. All trade discounts, rebates and refunds, and all returns in the sale of surplus materials and equipment for Work performed by contractors shall accrue to such contractors.

5. TIME OF COMPLETION

5.1 SUBSTANTIAL COMPLETION AND PROJECT MILESTONE SCHEDULE

5.1.1 Design-Builder shall diligently proceed with the design and engineering work included within the Work commencing on the Effective Date and shall proceed with the

construction work included within the Work with due diligence in accordance with the Project Milestone Schedule in Exhibit E so as to substantially complete all of the Work to be performed by Design-Builder on or before _____, which dates may be extended for the reasons identified in Paragraph 7.3 of the General Conditions and for such period of time as Design-Builder is prevented from proceeding as established from by written Change Order in accordance with the provisions of Paragraph 6.4 of the General Conditions. TIME IS OF THE ESSENCE IN THIS CONTRACT.

5.1.2 In the event Design-Builder fails to achieve a milestone in Exhibit E by the dates set forth in Exhibit E for such milestone (as the same may be extended in accordance with Paragraph 5.1.1), then Owner shall have the right to deduct from any sums due to Design-Builder under this Agreement the sum of one hundred seventy five thousand dollars (\$175,000) for each day that the milestone remains uncompleted, up to the sum of twenty one million dollars (\$21,000,000). Owner may set-off any amounts owed Design-Builder or, at Owner's request, Design-Builder will immediately pay to Owner in cash any amounts which Owner is entitled to set-off in the event the remaining amounts of funds due under this Agreement is less than the amounts owner has the right to setoff. Owner and Design-Builder agree and acknowledge that (i) Owner's actual damages

for the failure of substantial completion of one or more of the milestones identified in Exhibit E would be substantial but extremely difficult to ascertain and (ii) such sum set forth in this Paragraph 5.1 represents a fair and reasonable estimate of costs Owner will incur as a result of such late achievement of completions of one or more such milestones.

5.1.3 In the event the Design-Builder completes a milestone in advance of the date set forth in Exhibit E for such milestone (as the same may be extended in accordance with Paragraph 5.1.1), Design-Builder shall receive from Silevo, Inc. ("Tenant"), in addition to the Design-Builder's Fee, compensation in the amount of one hundred seventy five thousand dollars (\$175,000) per day for each day in advance of the milestone date Design-Builder achieves the milestone, up to the sum of twenty one million dollars (\$21,000,000). Any amount(s) due to Design-Builder under this Paragraph 5.1.3 shall be payable by Tenant in accordance with a separate written agreement entered into by Design-Builder, Owner, and Tenant effective as of the Effective Date ("Tenant Agreement"). Owner has no responsibility or obligation for any amount(s) due to Design-Builder under this Paragraph 5.1.3, other than to enter into the Tenant Agreement with Design-Builder and Tenant.

5.2 Together with the submission of the GMPs, Design-Builder shall submit for Owner's acceptance a proposed revised Bar Chart

Schedule for the progress of the Work. Said Schedule shall designate the estimated commencement and completion dates for each major trade subdivision of the Work.

5.3 The Design-Builder shall cause the Architect to submit drawings and specifications and required bid documents to Owner for Owner's acceptance in accordance with the most current Owner accepted Bar Chart Schedule. The Owner shall use its best efforts to review and accept such submissions within ten (10) business days of receipt upon Owner's acceptance, Design-Builder shall commence work under the accepted drawings and specifications to the extent feasible. It is understood that the final contract drawings and final contract specifications may not be complete at the time the Design-Builder commences the construction. The Design-Builder shall diligently proceed with the Work on the basis of accepted drawings and specifications.

5.4 Concurrently with the portion of the Work set forth above in Paragraph 5.3, Design-Builder shall cause the Architect to complete the proposed final contract drawings and final contract specifications for Owner's review and acceptance.

5.5 It is specifically understood that Owner will utilize the most current Owner accepted Bar Chart Schedule from time to time to determine final dates upon which to make decisions it must make with respect to the Work. Notwithstanding that Owner is required to review and comment,

accept or approve any submissions of the Design-Builder pursuant to this Agreement or any other Contract Documents, such review and comment, acceptance or approval shall not relieve the Design-Builder of its guarantees, warranties or responsibilities to properly construct the Project.

5.6 Subject to the terms of Paragraph 7.3 of the General Conditions, in the event that Design-Builder's Work is delayed at any time by changes or alterations in the Work not materially caused by fault or omission of Design-Builder, by strikes, by lockouts, by fire, by embargoes, by windstorm, by flood, by earthquake, by acts of war, by changes in public laws, regulations or ordinances enacted after the Effective Date of this Agreement, by acts of public officials not caused by any fault or omission of Design-Builder, the Design-Builder may make written request for a Change Order granting an extension of time in accordance with the provisions of the General Conditions, which request shall not be unreasonably denied. Design-Builder assumes the risk for delays if any caused by any other reason (other than reasons identified in Section 7.3 of the General Conditions and certain other cases as more fully set forth in the provisions of the General Conditions entitling the Design-Builder to an extension in the Contract Time).

5.7 The term "substantially complete" as used herein shall mean receipt of a certification of occupancy or completion from the applicable governmental jurisdiction evidencing completion of the Work in accordance with applicable codes

and excepting only so called punch list items of a minor nature which do prohibit the beneficial use and occupancy of the Premises by Owner.

6. PAYMENT

6.1 Owner shall, based upon monthly applications for payment submitted by the Design-Builder, as provided for in Paragraph 4.1 of the General Conditions, make progress payments for the completed Work, as provided for in Paragraph 4.2 of the General Conditions, and shall make final payment to the Design-Builder, in accordance with the provisions of Paragraph 4.2 of the General Conditions. Monthly payments to Design-Builder are forecast to be as shown in Exhibit Q under "Construction Spends". Owner agrees to pay Design-Builder in accordance with Paragraph 4.2 of the General Conditions, and Design-Builder agrees to pay its contractor in accordance with Paragraph 4.7 of the General Conditions.

6.2 Design-Builder hereby acknowledges that payments by Owner for Work performed in connection with the Project may be made in part from disbursements to Owner by a lender or by entities making governmental or other grants ("Funding Entities").

6.3 The Design-Builder shall permit any Funding Entities and their representatives to inspect the Premises, provided any such Funding Entities and their representatives shall comply with all Project safety rules, regulations, and guidelines imposed by the Design-Builder.

6.4 The Design-Builder shall consider the possible use of a project labor agreement and shall not enter into a project labor agreement without the prior written consent of Owner. No laborer, workman or mechanic in the employ of a contractor or subcontractor engaged in the performance of any of the Work shall be paid less than the prevailing rate of wage. The “prevailing rate of wage,” for the intents and purposes of this agreement shall be the rate of wage paid in the locality, as, by virtue of New York State Department of Labor – Prevailing Wages.

6.5 Design-Builder, its contractors and subcontractors shall execute and provide all documents, including but not limited to all certificates, acknowledgments of payment, releases for payments received, and such other documents and reports reasonably required by any such Funding Entity as a condition of Its grant, loan or mortgage to Owner:

6.6 By an appropriate written agreement, the Design-Builder shall require each contractor, to the extent of the Work to be performed by the contractor, to be bound to the Design-Builder by the terms of Paragraphs 6.2 through and including 6.5 and to assume toward the Design-Builder and Owner all the obligations and responsibilities which the Design-Builder, by these paragraphs, assumes toward the Owner.

7. OWNER FURNISHED INFORMATION

7.1 The Owner assumes no responsibility for any conclusions or interpretations made by the Design-Builder based on the information made

available by the Owner; nor does the Owner assume any responsibility for any understanding reached or representations made concerning conditions which can affect the Work by any of its officers or agents before the signing of this Agreement unless that understanding or representation is expressly stated in the Contract Documents. Notwithstanding the foregoing, under no circumstances shall Design-Builder bear any responsibility for any pre-existing subsurface or environmental conditions at the Project site.

8. INDEPENDENT CONTRACTOR STATUS

8.1 The Design-Builder shall not be considered an employee of the Owner. The Design-Builder shall at all times be deemed and act as an independent contractor and perform its tasks and duties consistently with such status, and will make no claim or demand for any right or privilege applicable to an officer or employee of the Owner, including but not limited to Workmen's Compensation, disability benefits, accident or health insurance, unemployment insurance, social security or retirement membership.

9. WAIVER OF BREACH

9.1 The failure of Owner or Design-Builder at any time to require performance of any provision hereof with respect to a particular matter shall in no way affect the right of Owner or Design-Builder to enforce such provision at a later date with respect to another matter; nor shall the waiver by Owner or Design-Builder of any

breach of any provision hereof be taken or held to be a waiver with respect to any succeeding breach of such provision or as a waiver of the provision itself. The acceptance of final payment shall constitute a waiver of all claims by Design-Builder except those previously made in writing and still unsettled.

10. ACCOUNTING RECORDS

10.1 Design-Builder shall check all materials, equipment and labor entering into the Work and shall keep such full and detailed accounts as may be necessary for proper financial management under this Contract. Owner shall be afforded access at all reasonable times to all of Design-Builder's records, books, correspondence, instructions, drawings, receipts, vouchers, memoranda and similar data relating to this Contract, and Design-Builder shall preserve all such records for a period of at least seven (7) years after Owner has made the final payment hereunder.

11. CONTRACT DOCUMENTS

11.1 The contract ("Contract") between Owner and Design-Builder for the Work consists of the Contract Documents. The Contract Documents, other than the Agreement, are incorporated into the Agreement by reference and the Contract Documents, including without limitation the Agreement, together form the entire Contract by and between Owner and Design-Builder. The Contract Documents consist of:

- This Agreement;

JA 169

- The General Conditions attached to this Agreement;
- Exhibit A (Scope of Work) of this Agreement;
- Exhibit B (Project Cost Estimate) of this Agreement;
- Exhibit C (Bar Chart Schedule) of this Agreement;
- Exhibit D (Cash Flow Forecast) of this Agreement;
- Exhibit E (Project Milestones) of this Agreement;
- Exhibit F (Procurement Guidelines) of this Agreement;
- Exhibit G (Prequalification Procedure) of this Agreement;
- Change Orders and Change Directives issued or a minor change authorized under the Agreement or the General Conditions and approved by Owner;
- Final Drawings and Final Specifications developed by Architect and approved by the Owner (such approval to be evidenced by reference to such Final Drawings and specifications in the GMP amendment); and

11.2 The Contract Documents shall be signed, and/or initialed as appropriate, by Owner and Design-Builder. The Contract Documents are complementary, and what is required by any one

shall be as binding as if required by all. The intention of the documents is to include all labor and materials reasonably necessary for the proper execution of the Work. Words which have well known technical or trade meanings are used herein in accordance with such recognized meanings. All references to this Agreement shall include all exhibits, schedules and other attachments hereto. Capitalized terms used but not defined herein shall have the meanings ascribed to them in the General Conditions attached hereto and made a part hereof.

11.3 In the case of discrepancies between drawings or specification prepared hereunder those accepted drawings or specifications bearing the latest date shall govern. All drawings and specification changes shall be dated and sequentially recorded. All modifications to drawings and specifications shall be interpreted in conformity with the Contract Documents, which shall govern, unless otherwise specified.

11.4 Wherever in the Contract Documents the term "major trade subdivisions" appears it shall mean the trades performing the subdivisions of the work as set forth in the specifications.

12. CONTRACT MODIFICATIONS

12.1 No waiver, alteration or modification of any of the provisions of this Agreement or the Contract shall be binding upon either Owner or Design-Builder unless the same shall be in writing and signed by both Owner and Design-Builder. Change Orders, Change directives,

waivers, alterations or modifications of any of the provisions of the Contract Documents shall be of no effect unless signed by Owner's Representative on behalf of Owner.

13. NOTICES

All communications in writing between the parties, including without limitations, applications for payment, shall be deemed to have been received by the addressee if hand delivered to an officer of the corporation for whom they are intended or if sent by registered or certified mail, return receipt requested, or by telegram addressed as follows:

If to Design-Builder:

LP Ciminelli, Inc.
2421 Main Street
Buffalo, New York
Attention: Frank L. Ciminelli, II

with a copy to (which copy shall not constitute notice):

Hodgson Russ LP
The Guaranty Building
140 Pearl St., Suite 100
Buffalo, New York 14202
Attention: Terrence M. Gilbride, Esq.

If to Owner:

Fort Schuyler Management Corporation
100 Seymour Road
Utica, New York 13502
Attention: Alicia Dicks, President

JA 172

with a copy to (which copy shall not constitute notice):

State University of New York Polytechnic
Institute
257 Fuller Road
Albany, New York 12203
Attention: Carl J. Kempf III, Esq.

For the purpose of directions, Design-Builder's representative shall be Frank L. Ciminelli II and Owner's representative shall be Thomas O'Brien unless otherwise specified in writing.

14. ASSIGNMENT

14.1 Design-Builder may not assign this Agreement, nor any rights afforded hereunder, without the prior written consent of Owner, which such consent may be withheld in its sole discretion. Design-Builder acknowledges and consents to the assignment of the following and/or will cause the assignment of the following, to the extent applicable to Design-Builder, to financial institution(s) of Owner's choosing selected by Owner for the financing of the Project ("Lender(s)"), or to The Research Foundation for the State University of New York, and any lending institution holding a leasehold mortgage granted by Owner (as determined by Owner): (a) the Contract (including without limitation this Agreement), together with any and all extensions, modifications, amendments, replacements and renewals thereof, (b) all major subcontracts, together with any and all extensions, modifications, amendments and renewals

thereof which are entered into by Design-Builder in connection with the performance of the Work or the supply of the materials required for the Project; (c) all architectural, engineering and other design contracts for the Project, (d) all plans, specifications and other design and construction documents for the Project, including but not limited to, the Plans and Specifications, (e) all guarantees, warranties and other undertakings covering the quality or performance of the work or the quality of the materials required by the Contract, contracts and major subcontracts, and (f) to the extent assignable, all building permits, governmental permits, licenses, and authorizations now or hereafter issued.

15. HEADINGS

15.1 The headings herein contained are inserted only as a matter of convenience and reference and are not meant to define, limit or describe the scope or intent of the Contract Documents or in any way to affect the terms and provisions set forth herein.

16. APPLICABLE LAW

16.1 Unless otherwise specified, this Agreement shall be governed by the laws of the State of New York, without regard to the conflict of laws principles thereof, and the parties hereto agree and consent that the courts of the State of New York have subject matter jurisdiction for any action brought pursuant to this Agreement and that such action shall be brought in any state court of the State of New York as the proper

venue for state actions, or in any United States Federal District Court located in the State of New York as the proper venue for federal actions. The Design-Builder hereby consents to and agrees to submit to personal jurisdiction in New York State and agrees that the service of process may be made upon it by personal service at its principal place of business or by the mailing of process to its principal place of business by certified mail, return receipt requested, or in any other manner provided for in the Civil Practice Law and Rules of the State of New York, to obtain personal jurisdiction over it. The Parties expressly waive any right to a jury trial for any legal action or proceeding brought under this Agreement and the Parties agree that any legal action or Proceeding under this Agreement shall be tried by a judge without a jury.

17. PUBLIC ANNOUNCEMENTS OR USE OF THIS PROJECT IN MEDIA, SALES, OR INFORMATION SHARING; CONFIDENTIALITY

17.1 Any and all public announcement, information sharing, marketing reference of this Project to the media or any entity for any purpose whatsoever is prohibited, unless granted by the express written authorization of Owner and CNSE.

17.2 Either Owner or Design-Builder (with respect to information disclosed by it, the "Disclosing Party") may disclose Confidential Information (as defined below) to the other (with

respect to such information, the “Receiving Party”) orally or in writing or by other media or by transfer of materials. When disclosed in writing or by such other media or materials, Confidential Information shall be expressly identified in writing as Disclosing Party’s Confidential Information. When disclosed orally, Disclosing Party shall identify the information as confidential at the time of such disclosure, with subsequent written confirmation to Receiving Party within thirty (30) days of such disclosure indicating the date and type of information disclosed. In addition, by example and not in any way limiting, all information pertaining to the design and construction of the Project and the property on which the Project will be constructed shall be deemed to constitute Confidential Information of Owner. Receiving Party shall clearly label any of Disclosing Party’s Confidential Information reduced to writing by Receiving Party as “XYZ CONFIDENTIAL INFORMATION” where XYZ is replaced with the name of Disclosing Party. For purposes hereof, the term “Confidential Information” shall mean all information that is maintained in confidence by a Party (“Owning Party”) and is disclosed to or obtained by another Party in connection with and during the term of this Agreement, including, but not limited to, information that relates to such Owning Party’s announcement of this relationship shall be mutually coordinated and agreed upon by the Parties, and (b) a summary of pertinent Sections of this Agreement that are reasonably necessary for disclosing and/or licensing under this

Agreement; provided, that such disclosure is under a written agreement containing restrictions of confidentiality at least as stringent as those contained in this Agreement.

18. MINORITY AND WOMEN OWNED BUSINESS ENTERPRISES

18.1 Design-Builder shall develop and submit to Owner a plan for mentoring minority and women owned business enterprises ("MWBE") in the community surrounding the Project, for recruiting minority and women employees, and for satisfying at least 30% MWBE participation in the Project including the current New York State regional goals for minority owned business enterprise of 20% and women owned business enterprise of 10%.

19. SUCCESSION OF RIGHTS AND OBLIGATIONS

19.1 All rights and obligations under the Contract (including without limitation this Agreement) shall inure to and be binding upon the successors and assigns of the parties hereto.

20. TERM

20.1 The Term of this Agreement shall be from the Effective Date through the completion of the Work.

21. COUNTERPART SIGNATURES

21.1 This Agreement may be signed via facsimile or PDF and in one or more counterparts, each of which shall be deemed to

be an original and all of which when taken together shall constitute the same Agreement.

22. WAIVERS

22.1 No waiver of any term, provision, or condition of this Agreement, whether by conduct or otherwise, in any one or more instances, shall be deemed to be or construed as a further or continuing waiver of any such term, provision, or condition of any other term, provision, or condition of this Agreement.

23. INTEGRATION CLAUSE

23.1 The contract (including without limitation this Agreement) represents and embodies all the agreements and negotiations between the Parties hereto on the subject matter hereof and no oral agreements or correspondence prior to the date of signing of this Agreement shall be held to vary the provisions hereof.

IN WITNESS WHEREOF, the parties have, by their duly authorized representatives, signed this Agreement, as of the day and year first above written.

DESIGN-BUILDER: LP OWNER: Fort Schuyler
Ciminelli, Inc. Management
 Corporation

By: /s/ Frank L.
Ciminelli II
Name: Frank L.
Ciminelli II
Title: Sr. Executive V.P.
Date: 12/5/2014

By: /s/ Alicia Dicks
Name: Alicia Dicks
Title: President
Date: FSMC