

Revised Procurement Guidelines 2014

NEW YORK STATE URBAN DEVELOPMENT CORPORATION
D/B/A EMPIRE STATE DEVELOPMENT
Guidelines Regarding the Use, Awarding, Monitoring
and Reporting of Procurement Contracts

Effective March 28, 2014

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NEW YORK STATE URBAN DEVELOPMENT CORPORATION
D/B/A EMPIRE STATE DEVELOPMENT (“ESD”)

Guidelines Regarding the Use, Awarding, Monitoring and
Reporting of Procurement Contracts

Effective March 28, 2014

1. Overview and Requirements

The following guidelines (the “Guidelines”) are applicable to the use, awarding, monitoring and reporting of procurement contracts of the New York State Urban Development Corporation, d/b/a Empire State Development and its subsidiaries (collectively, “ESD”). ESD is required to adopt procurement guidelines by Article 9, Title 4 of the Public Authorities Law. The same law requires annual review and updating of the guidelines by the ESD Board of Directors (“Board”), including subsidiary Boards.

These Guidelines are modeled on the New York State Procurement Guidelines published by the State Procurement Council (the “SPC Guidelines”). The SPC Guidelines apply to all state agencies and thus provide useful guidance for procurement by ESD (which is not a state agency as that term is defined in the SPC Guidelines). The SPC Guidelines cover some issues and procedures rarely encountered by ESD, but should be consulted by staff if a situation arises that does not appear to be covered in these Guidelines, since useful guidance may thereby be obtained. View the [SPC Guidelines](#).

In these ESD Guidelines, a person, firm or corporation who wishes to provide goods and/or services to ESD may be called a “**vendor**” or “**offerer**” or, when responding to a public solicitation for qualified vendors or expressions of interest in becoming an ESD vendor, a “**respondent**.”

1.1. Contracts covered, and not covered, by the Guidelines

Pursuant to Public Authorities Law § 2879 (2), “**Procurement Contracts**” are any written agreements for the acquisition of goods or services of any kind in the actual or estimated amount of five thousand dollars (\$5,000) or more. For purposes of compliance with anti-lobbying laws contained in State Finance Law § 139-j and 139-k (see p. 11), Procurement Contracts also include the purchase, lease or grant of any other interest in real property which involves an estimated annualized expenditure in excess of fifteen thousand dollars (\$15,000).

Disposition of property (real or personal) by ESD is not a procurement covered by these Guidelines, but is instead subject to ESD's Property Disposition Guidelines. However, where a property disposition requires a competitive process, that process should be conducted in accordance with these Guidelines.

Note that **loans and grants** made by ESD in furtherance of its economic development mission are not Procurement Contracts, but may be subject to certain provisions of these Guidelines, including OSC review and approval for grants over \$1 million (see p. 23)

A Contract or Memorandum of Understanding ("MOU") with a sister State agency or authority are not considered a Procurement Contract covered by these Guidelines. Note, however, that appropriate approval(s) as set out in these Guidelines (including Board approval based on the amount and/or duration of the agreement) may apply to MOUs.

In connection with certain of its projects, ESD may need to obtain a license from a governmental agency, authority, or company or a public utility in order to enter the licensor's premises and perform work. As a precondition to receiving the license, ESD can be required to enter into agreements with the licensor that prescribe conditions for work to be performed on the site, including work and/or oversight of work which must be performed by the licensor's personnel or contractors, as well as payment of licensor costs by ESD. Examples include licenses for work on rail and utility facilities. Agreements of this kind, often referred to as "**forced contracts**," are not covered by the competitive solicitation requirements of these Guidelines because ESD has no discretion or authority with respect to the work to be performed by the licensor's personnel and contractors. However, appropriate approval(s) as set out in these Guidelines (including Board approval based on the amount and/or duration of the agreement) would apply.

Procurement Contracts **up to and including \$50,000** may be handled by Purchase Order approved by Department Head, Procurement Department, Controller's Office and Contracts Administration. A formal competitive solicitation is not required, but these purchases should be made after obtaining three quotes whenever practicable. For further information, see Section 2.1 below or consult the Procurements Manager.

1.2. Types of Procurement Contracts

Procurement Contracts for personal services include legal, accounting, management consulting, investment banking, planning, training, statistical analysis, research, public relations, architectural, engineering, construction, surveying, appraisal, or other services of a consulting, professional or technical nature for a fee, commission or other compensation by a person or persons who are not providing such services as officers or employees of ESD. The reasons for the use of personal services include:

- a. Requirements of special expertise or unusual qualifications;
- b. Nature, magnitude or complexity of services required;
- c. Lack of sufficient in-house resources, support staff, specialized facilities or equipment;

- d. Lower cost;
- e. Short-term or infrequent need for the services; and
- f. Distance of the location(s) where the services must be performed from ESD offices or facilities.

The types of goods and services requiring Procurement Contracts include goods and services needed to proceed with an ESD project, or to support the administrative needs of ESD.

Thus, the types of goods that may be procured cover the entire spectrum, ranging from paper and pens to motor vehicles.

1.3. General Procurement Principles

ESD's procurement process is designed to:

- Ensure fair and open competition;
- Guard against favoritism, improvidence, extravagance, fraud and corruption;
- Ensure that the results meet agency needs;
- Provide checks and balances to regulate agency procurement activities; and
- Protect the interests of ESD, the state and taxpayers.

Procurement Contracts are to be awarded on a **competitive basis** to the maximum extent practicable. Such awards are generally made after notice is published in the New York State Contract Reporter where the amount of the contract is **greater than \$50,000** and (regardless of the amount of the Procurement Contract) after the evaluation of proposals obtained, whenever practicable, from at least three qualified vendors or respondents. (See Section 7: Types of Solicitations).

Competition in the procurement process serves both ESD and potential vendors by ensuring that the procurement process produces an optimal solution at a reasonable price; and allowing qualified vendors an opportunity to obtain ESD business, while the process guards against inflated pricing, favoritism, fraud and collusion; and allows all qualified vendors an opportunity to obtain ESD business.

2. Procurement: Overview and Requirements

2.1. The Procurement Process Guide

I. Procurements up to \$50,000

If ESD's procurement needs can be met by a preferred source vendor, we must use this option.



If ESD's needs cannot be met by a preferred source, you may elect to use an OGS Centralized contract. Wherever practicable, you should still solicit two other quotes if this option is selected.



If ESD's needs cannot be met by the above mentioned options, you may elect to use a discretionary purchase through the use of a NYS certified MWBE or a NYS Small Business up to \$50,000.



If ESD's needs cannot be met by the above mentioned options, you may elect use an informal solicitation. Contact the Procurement Unit for further assistance if needed.



If this is an emergency situation or only one vendor can meet the needs required for service, the initiating department head has to justify the need to Single Source or Sole Source this request on their justification memo.

II. Procurements above \$50,000

If ESD's procurement needs can be met by a preferred source vendor, we must use this option.



If ESD's needs cannot be met by a preferred source, you may elect to use an OGS Centralized contract. Wherever practicable, you should still solicit two other quotes if this option is selected.



If ESD's needs cannot be met by the above mentioned options, you may elect to use a discretionary purchase through the use of a NYS certified MWBE or a NYS Small Business up to \$200,000.



If ESD's needs cannot be met by the above mentioned, use a Request of Proposals ("RFP"), Request for Qualifications ("RFQ") or Request for Expressions of Interest (RFEI), and advertise in the Contract Reporter if this is not an emergency situation and ESD's needs can be met by more than one vendor.



If this is an emergency situation or only one vendor can meet the needs required for service, obtain a Contract Reporter Exemption from the Legal Department using Single Source or Sole Source exemption as appropriate.

2.2. NYS Preferred Sources

Goods and services needed by ESD may be available, without the need for competitive procurement from New York State Preferred Sources. If a Preferred Source has goods or services available in the form, function and utility required by ESD, at a price not more than 15% above the prevailing market rate, the goods or services should be obtained through the Preferred Source in the following prioritized order: NYS Department of Correctional Services Correctional Industries Program (CORCRAFT); approved charitable non-profit agencies for the blind; and approved charitable non-profit agencies for the severely disabled, qualified programs for the mentally ill, and qualified veterans workshops. For information on these Preferred Sources, see SFL § 162 and the Office of General Services' Preferred Sources Guide.

2.3. OGS Centralized Contracts

Goods and services needed by ESD may be available, without the need for competitive procurement, through centralized contracts held by the NYS Office of General Services ("OGS"). Information about centralized contract offerings can be obtained from the list of approved state contractors maintained by OGS.

Note that even if a OGS centralized contractor is available, it is recommended that staff obtain three price quotes from other OGS contractors or other vendors not on the OGS list, unless a compelling justification exists (e.g., experience with a particular project).

2.4. Commodities Contracts

The OGS Procurement Services Group (PSG) establishes centralized contracts for commodity contracts in the form, function and utility required by State agencies, for a wide range of items commonly acquired by agencies. If the commodity is available from a centralized contract in form, function and utility consistent with ESD's need, such item may be purchased from the centralized contract. However, ESD may competitively procure items otherwise available on a centralized contract when the resultant price is less.

2.5. Service Contracts

ESD has discretion to use the OGS centralized service contracts list. A wide and diverse range of services from routine maintenance to complex technology-based acquisitions are available through these OGS contracts. Again, ESD may competitively procure items otherwise available on the OGS centralized contract list when the resultant price is less.

2.6. Discretionary Purchases

ESD may purchase services or commodities from small business concerns or those certified pursuant to Article 15-A of the Executive Law (Minority and Women-Owned Businesses), or

commodities or technology products that are recycled or remanufactured, in an amount not exceeding two hundred thousand dollars (\$200,000) without a “formal competitive process.” In such a case, three quotes should be obtained wherever practicable, and Contract Reporter advertising is advisable when time permits. The award of a discretionary purchase contract should be notified in the Contract Reporter. For more information on discretionary purchases see www.ogs.ny.gov.

3. Contract Reporter Exemptions

3.1. Reasons for Exemptions

Advertising a procurement in the Contract Reporter is generally required unless specific grounds exist that constitute a reason for exemption. A Contract Reporter exemption may be granted by the Officer(s) specified in Attachment A to these Guidelines, only if any of the following circumstances can be demonstrated:

- (a) **Sole Source**. Only one source for the goods or services is available. Three examples of sole source procurements: (i) proprietary software compatible with ESD operating systems that no-one else offers; (ii) a printer’s warranty requiring that only a toner cartridge supplied by the manufacturer could be used without voiding the warranty; (iii) a vendor has developed a proprietary system for remediating contaminated land, unavailable from anyone else.
- (b) **Single Source**. The required goods or services are available from two or more vendors, but a particular vendor is preferable because of specific factors such as, without limitation, past experience with a particular issue; familiarity with ESD’s operations; experience with similar projects of ESD, other agencies or at other levels of government; demonstrated expertise; or capacity and willingness to respond to the situation. An example would be an environmental consultant who worked on an EIS for a project and now a Supplemental EIS is required for the same project; many consultants could do the work, but the original consultant’s familiarity with the project justifies selection as a single source.
- (c) **Emergency Circumstances**. Emergency circumstances exist when an urgent and unexpected situation arises which places public health or safety or the use or conservation of resources at risk and requires immediate action. Poor or late planning does not constitute an emergency. Contracts entered into as a result of an emergency situation should only cover the goods or services reasonably necessary to stabilize, ameliorate or remedy the situation. An example is a hazardous condition at a building owned by ESD: a contractor can be hired immediately to deal with the situation.

NOTE: Notwithstanding any Contract Reporter exemption that may be granted for any of the reasons set forth above, a reasonable attempt should be made wherever practicable to solicit at least three competitive bids, with written confirmation of the bids furnished within a reasonable time and maintained in the contract file. Also, any sole or single source contract awarded over \$50,000 should be notified in the Contract Reporter (Economic Development Law, §143 (4)).

3.2. Authorization for Exemptions

The initiator of the proposed contract must obtain a written Contract Reporter exemption authorization. This is done by means of a memorandum to the Officer(s) specified in Attachment A to these Guidelines.

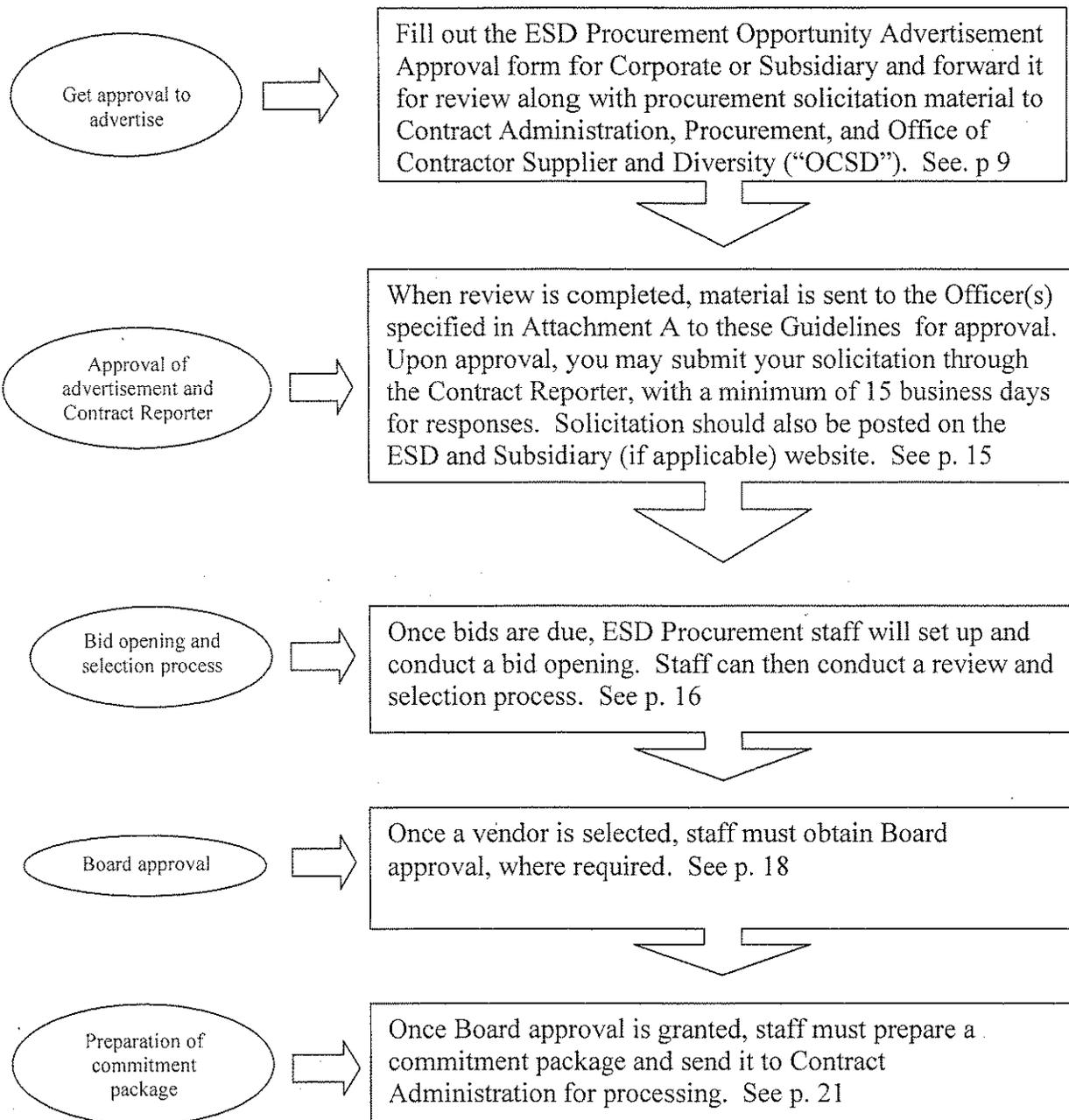
The memorandum requesting the exemption must document in reasonable detail: the circumstances establishing the exemption justification; a description of the goods or services to be acquired via the exemption; description of funding source; any alternatives considered; and the basis for determining that the cost of the proposed contract is reasonable under the circumstances.

If the proposed contract amount is greater than \$50,000, or will last more than one year, the exemption authorization should be obtained before ESD Board's approval. If Board approval is not required because the proposed amount is less than \$50,000 and the term of the contract is less than one year, the exemption authorization should be obtained from the Officer(s) specified in Attachment A to these Guidelines prior to contract execution and the commencement of any services or delivery of any goods.

Note that even if a Contract Reporter exemption is granted, compliance with SFL § 139-j and 139-k and State Tax Law § 5-a must still be satisfied (see p.11). Where appropriate, a statement from the staff initiator that the price obtained for the goods or service is compatible with market pricing must be presented with the exemption request.

At the time ESD enters into a contract with a single or sole source provider for an amount in excess of \$50,000, ESD shall submit an announcement of the contract for inclusion in the Contract Reporter, and shall specify the recipient of the contract.

4. How to Conduct a Competitive Solicitation



5. Approval to Advertise

Prior written approval of the Officer(s) specified in Attachment A to these Guidelines is required when you need to advertise a procurement opportunity, including Requests for Proposals (“RFPs”), Requests for Statements of Qualifications (“RFQs”) and Requests For Expression of Interest (“RFEIs”) (See Section 7: Types of Solicitation).

Note also that other approvals may be required to comply with State Division of Budget procedures (see Section 11.4). Submit the ESD Procurement Opportunity Advertisement Approval form (select Corporate or Subsidiary) to the appropriate officer at least 10 business days in advance of the relevant New York State Contract Reporter publication submission date. The Contract Reporter is now published daily.

6. Contents of ANY Procurement Solicitation

Whether the procurement is formal (such as an RFP, RFQ or RFEI) or informal (such as procurement for \$50,000 or less, or a Discretionary Purchase from an MWBE for less than \$200,000) the same basic information should be included in the solicitation:

- (i) What goods are being sought or what scope of services is desired;
- (ii) What the length (“term”) of the resultant contract will be;
- (iii) What criteria will be used in evaluating bids, and how those criteria are weighted? For example, price, bidders’ expertise, past history of government contracts, references/testimonials;
- (iv) Where known, the maximum price that ESD is prepared to pay for the goods or services;
- (v) A schedule of relevant dates (when bid is due, when questions may be asked or briefing meetings held, etc);
- (vi) ESD’s insurance requirements;
- (vii) ESD’s required diversity and minority participation (MWBE) goals;
- (viii) Disclosure to bidders that they must be able to demonstrate that they are responsible bidders, in good standing under the laws of New York and capable of fulfilling the requirements of the contract, and untainted by past non-performance or criminality;
- (ix) A copy of the contract that the successful vendor will be expected to agree to (generally, ESD’s Short Form Contract and Schedule A);
- (x) VENDREP Form where needed (See Sections 8.3 and 9.4);

(xi) Encouragement of use of New York State businesses as sub-contractors or suppliers (See Section 8.6).

7. Types of Solicitations

7.1. General

There are a number of procurement techniques available, including Request for Proposals (RFP) and Request for Statements of Qualifications (RFQ) and, rarely, Requests for Expressions of Interest (RFEI). When selecting among these various approaches, the determining factors are:

- The importance of price or cost as a component in the review of incoming bids or proposals; and
- The ability to define specifications for goods or services being acquired, or to obtain those specifications from potential vendors (where the RFEI may be useful).

Generally, contracts for goods are to be awarded on the basis of “lowest price” and contracts for services are to be awarded on the basis of “best value” among responsive and responsible vendors. “Best value” is the basis for awarding service and technology contracts to the vendor that optimizes quality, cost and efficiency, among responsive and responsible vendors. The basis for a “best value” contract award must be, wherever possible, quantifiable. However, all procurement solicitations issued by ESD are to be guided by the same basic principles:

Clarity: Procurement documents should clearly convey to vendors what it is ESD wants to buy;

Fairness: No vendor should be advantaged over another. All information concerning the solicitation shall be conveyed in writing to all vendors participating in the process, including but not limited to process rules and evaluation criteria;

Openness: All relevant vendors should have an equal opportunity to respond to the offering.

Disclosure of Selection Criteria: The criteria for awards should be developed before bids/proposals are received. Vendors should know generally the basis upon which their offers are being judged. Note that if cost is weighted below 20%, a written justification for such weighting should be prepared and included in the Procurement record;

Efficiency: The process should be efficient, fair and able to withstand public scrutiny.

7.2. Requests for Proposals (“RFP”)

RFP’s solicitations may range from relatively uncomplicated procurements to highly complex, long term efforts involving the significant commitment of both ESD and vendor resources.

RFPs follow a common format, focusing on a description of tasks including, but not limited to:

- Description of program objectives and background;
- Scope of services to be provided;
- Detailed requirements or specifications (required qualifications of vendors, “what” is needed and “how” services should be provided). Note that the terms of the RFP may not be knowingly tailored to favor a particular vendor.

7.3. Requests for Statements of Qualification (“RFQ”)

RFQ’s are appropriate for retention of qualified pools of contractors to provide defined types or scopes of services (and, rarely, goods) required by ESD on a regular or semi-regular basis as the need arises; or to select professional services to be rendered at pre-established rates. Competitive establishment of a pool or list of pre-qualified vendors is appropriate, for example, in the case of contractors or property appraisers. If ESD has established a list of pre-qualified contractors, unless services will be rendered by all qualified vendors at rates not to exceed a pre-set maximum, three quotes should be obtained from vendors on the list, and/or from vendors known to ESD outside the list.

7.4. Requests for Expressions of Interest (“RFEI”)

RFEIs are generally appropriate when ESD does not know the precise scope of services or goods required, and wishes to obtain this information from prospective vendors. An example would be a proposal for adaptive re-use of ESD or other state surplus property, where the re-use is likely to be dependent on the prospective respondents’ needs or ideas.

8. Compliance with Other Laws

8.1. Compliance with State Finance Law § 139-j and 139-k (Lobbying)

State Finance Law (“SFL”) § 139-j and 139-k apply to all Procurement Contracts over \$15,000, regardless of whether the contract was competitively bid.

Among other things, SFL § 139-j and 139-k: (i) govern permissible communications between potential vendors, and staff of ESD, its subsidiaries, or other involved governmental entities during the procurement process; (ii) require the disclosure of such communications, as well as prior determinations of vendor non-responsibility; and (iii) establish sanctions for knowing and willful violations of such provisions, including disqualification from eligibility for an award of any contract.

Specifically, SFL § 139-j and 139-k require that only permitted ESD and subsidiary contact person(s) identified in solicitation materials may communicate with potential bidders regarding the solicitation, from the issuance of the earliest written notice of a request for proposal through the final award and approval of any resulting contract. This period is defined by law as the "Restricted Period."

SFL § 139-j (6)(b) also requires potential vendors to complete the Offerer's Affirmation of Understanding and Agreement to comply with ESD's procedures relating to permissible contacts. This written affirmation is deemed to apply to any amendments to a procurement submitted by ESD after an initial affirmation is received with an initial bid.

SFL § 139-k governs the disclosure of prior non-responsibility determinations by potential vendors. SFL § 139-k(5) requires potential vendors to certify that the information they provide to ESD for consideration in its determination of vendor responsibility is true and accurate. Therefore, all prospective vendors must complete and submit two forms mandated by SFL §§ 139-j and 139-k as part of their proposals: 1) the Offerer's Affirmation of Understanding and Agreement; and 2) the Offerer's Disclosure of Prior Non-Responsibility Determinations.

When contacted during the Restricted Period, ESD staff, must obtain the following information: the name, address, telephone number, place of principal employment and occupation of the person or organization making the contact. Further, ESD staff must inquire whether the person or organization making the contact was the offerer or retained, employed or designated by the offerer. All such recorded contacts must be included in the procurement record for the procurement contract.

In addition, ESD staff must record any contacts that reasonably appear to be an attempt to influence the procurement process as well as contacts with staff members other than the designated contact person(s) during the Restricted Period of procurement. However, SFL § 139-j and 139-k do not prohibit an offerer from communicating with a member of the state legislature or legislative staff about a government procurement, provided such member of the state legislature or legislative staff is acting in his or her official capacity. If a vendor is found to have knowingly and willfully violated the State Finance Law provisions, that prospective vendor and its subsidiaries, related or successor entities will be determined to be a non-responsible vendor, and will not be awarded any contract issued pursuant to the solicitation. Two such findings of non-responsibility within a four-year period can result in debarment from obtaining any New York State government procurement contract.

For further guidance, ESD staff engaged in the procurement process should review ESD's policy regarding permissible lobbying contacts, and the required language for solicitations by ESD and its subsidiaries to ensure compliance with SFL § 139-j and 139-k.

Note that, once a recommended vendor has been selected after compliance with the competitive bidding process, it may be necessary for staff members to negotiate contract terms, etc., with the designated vendor. Those negotiations are not prohibited, and need not be conducted only by the designated contact person, although it is good practice to have the contact person present. However, any communication from a person other than the vendor that may reasonably be

considered to be an effort to influence the negotiation of a contract (either positively or negatively) is an impermissible contact and must be reported as such. For example: an ESD employee who is in the process of negotiating the terms of a land development deal which the Board has not approved, receives a call from an outside person saying that the vendor should get more development land because the vendor has a wonderful track record. Such a call constitutes lobbying and must be reported as such. The caller should be informed that the call will be reported, and asked to communicate directly with the designated contact person in the future.

8.2. Compliance with State Tax Law § 5-a (Sales Tax Registration)

State Tax Law § 5-a prohibits ESD and its subsidiaries from approving any contract valued at more than \$100,000 with any entity if that entity or any of its affiliates, subcontractors or affiliates of any subcontractor makes sales within New York State of tangible personal property or taxable services having a value over \$300,000 during the four quarters preceding the proposed contract date, and is not registered with the Department of Taxation and Finance (“DTF”) for sales and compensating use tax purposes.

Accordingly, all respondents to a solicitation where the amount of the contract is expected to exceed \$100,000 must include in their responses a properly completed Form ST-220-CA. However, if a vendor is not registered with DTF because of a lack of sales of over \$300,000 within the relevant period, the vendor must submit an affidavit so certifying. Note also that § 5-a does not apply to contracts for architectural, engineering or surveying services. If in doubt, contact the ESD legal department after having reviewed DTF Publication 223.

Failure to include a properly completed form ST-220-CA or affidavit may be a basis for considering any such response incomplete. However, the vendor or respondent should be given an opportunity to cure such failure, because some agencies do not require the form until contract signing, and vendors may not realize that ESD practice is different. Only the primary respondent vendor completes Form ST-220-CA, but Schedule A to Form ST 220-CA requires detailed information from the vendor’s sub-contractors, such as tax ID number, etc. If applicable, certificates of authority evidencing registration with DTF for sales tax purposes must be attached by the prime vendor and all the sub-contractors.

Further in accordance with the requirements of § 5-a, any contract resulting from a solicitation will require periodic updating of the certifications contained in Form ST-220-CA.

8.3. Use of the Vendrep Form and Vendor Responsibility

As required by Executive Order, all vendors must be found to be “responsible”, and remain so through the term of the contract. The Office of the State Controller has developed a useful resource, the VENDREP form, which should be requested from all bidders for contracts where a Vendor Responsibility determination will be needed (most contracts, and all which will require Board approval). See Section 9.4 below for further guidance on vendor responsibility. The Vendrep forms can be accessed here: www.osc.state.ny.us/vendrep/webresources.htm.

8.4. Compliance with Executive Law Article 15-A: Contractor and Supplier Diversity

All Procurement Contracts must comply with the requirements of Executive Law Article 15-A, which promotes employment and business opportunities for minorities and women on State contracts “to encourage and assist State agencies in their efforts to increase participation by minority and women-owned business enterprises (“MWBEs”) on State contracts so as to facilitate the award of a fair share of such contracts to MWBEs.”

Where practical, feasible and appropriate, ESD shall promote and assist participation by minority and women-owned businesses in the selection and award of all contracts. Such minority and women-owned business participation shall be documented in a regular supplement, prepared by ESD’s Office of Contractor and Supplier Diversity (“OCSD”), for inclusion in the quarterly and annual reports made by Contracts Administration to the Board. To assist in the gathering of this information, the originator must provide OCSD with a completed Schedule of Minority/Women Business Participation, from the potential contract awardee, for OCSD’s review and approval, prior to contract award. The required forms are accessible [here](#).

8.5. Compliance with Iran Divestment Act of 2012

Every bid or proposal made to ESD pursuant to a competitive solicitation as provided in these Guidelines must contain the following statement, signed by the bidder or respondent and affirmed as true under penalty of perjury:

"By submission of this bid, each bidder and each person signing on behalf of any bidder certifies, and in the case of a joint bid each party thereto certifies as to its own organization, under penalty of perjury, that to the best of its knowledge and belief that each bidder is not on the list created pursuant to paragraph (b) of subdivision 3 of section 165-a of the state finance law."

The list in question is maintained by OGS. No bid that fails to certify compliance with this requirement may be accepted as responsive, unless the bidder includes a statement in compliance with the Iran Divestiture Act (contact the Legal Department for guidance in such a case).

8.6. Encouragement of use of New York Businesses as sub-contractors and suppliers.

The Secretary to the Governor has issued a directive that provides that all vendors who anticipate using sub-contractors or suppliers to fulfill procurement contracts must be encouraged (but not required) to use New York State businesses. All procurement solicitations of any kind must include specific language aimed at such encouragement. The model language can be accessed [here](#).

http://intranet.empire.internal/Resources/Data/Procurement/03042014_NYS_SubcontractorsandSuppliers.pdf

8.7. Project Sunlight

Project Sunlight is an important component of the Public Integrity Reform Act of 2011 that was passed by the Legislature and signed by the Governor. Under this law, the state governmental entities specified in the law are required to cooperate with the Office of General Services (OGS) and identify in a database developed by OGS all individuals, firms or other entities (other than State or local governmental agencies) that appear before such entity on behalf of themselves or in a representative capacity on behalf of a client or customer for any of various specified purposes. This includes appearances related to (a) procurement, (b) ratemaking, (c) regulatory matters, (d) judicial or quasi-judicial proceedings, (e) adoption or repeal of a rule or regulation.

Project Sunlight's reporting requirement for procurement appearances applies to those appearances that are for the purpose of procuring a State contract, irrespective of whether there is a governmental procurement planned. Thus, reporting is required for appearances relating to State contracts for which a Restricted Period under the Procurement Lobbying Law has not been established and without regard to whether a governmental procurement is anticipated. Appearances during the Restricted Period—whether they are bid clarification meetings or bid interviews or any other permissible contact under the State Finance Law do not need to be reported. As well as, appearances following the award of a State contract do not need to be reported.

8.8. Publication on ESD Website

Competitive solicitations must be made available on the ESD (and subsidiary, if applicable) website after advertisement in the NYS Contract Reporter. This website is also the appropriate place to post Questions and Answers regarding the procurement. (See Section 9: Contract Reporter Advertising Process).

8.9. Standard-Form Attachments

Procurement Contracts, which includes amendments to existing contracts, should include ESD's standard forms, including as appropriate ESD's Standard Short Form Contract as well as further required contract terms (Schedule A for consultants or law firms,; ESD's Non-Discrimination and Affirmative Action Provisions and Schedule of Minority/Women Business Participation; SFL § 139-j and 139-k and State Tax Law § 5-a (or affidavit of non-applicability). Insurance requirements must be obtained from Contract Administration for all solicitations and, if needed, must be included with the forms.

9. Contract Reporter Advertising Process

As stated above, ESD must advertise in the New York State Contract Reporter all contracts for the acquisition of goods and services of \$50,000 or more, unless an exemption is granted. In order to access the online system and place the advertisement, the initiator should contact Contracts Administration.

The minimum time for vendors to respond to a Contract Reporter solicitation is 15 business days (i.e., Saturdays, Sundays and legal holidays are excluded). View the Contract Reporter's daily publication schedule.

Where practicable, staff members responsible for a proposed Procurement Contract should make reasonable efforts to identify potential vendors in addition to those identified through the Contract Reporter. This may be done by obtaining referrals from other governmental entities that may have similar requirements, reviewing reference directories, mailing solicitation materials to industry associations and/or known vendors and mailing to lists of appropriate minority and women-owned business maintained by ESD's Non-Discrimination and Contractor & Supplier Diversity Department.

9.1. Selection Criteria

Written selection criteria shall generally be established for each proposed Procurement Contract and shall be included in any written solicitation materials. The relative weighting of the selection criteria should be set out in the RFP wherever practicable and, in the absence of written weighting, each criterion shall be deemed to have the same weight.

The selection criteria shall generally include price as an important factor to be considered in the selection process; however many ESD procurements are based on "Best Value," which allows for factors other than price to be taken into account. Such factors commonly include the quality of goods and services, the experience of the vendor and specific expertise with respect to the goods or services to be supplied. See also Section 7.1 above if price is weighted at less than 20%.

9.2. Bid Opening Procedures

All proposals should be received at one designated location within the initiating Department, and immediately should be stamped with the date and time of receipt. **DO NOT OPEN ANY BID PACKAGES FOR ANY REASON BEFORE THE FORMAL BID OPENING.** ESD staff members representing Contracts Administration/Subsidiary Finance, Legal, Procurements, OCSD and the initiating Department/Subsidiary should be present at bid openings in person or by teleconference. Bids shall be opened by the Procurement Manager or his/her designee, and the time and date of receipt shall be entered into the Bid Log, which must be signed by all staff members present. Teleconference participants must confirm their presence by email to the Procurements Manager. The Bid Log shall also record the presence of SFL 139j-k and ST-220 forms in the bid.

A Public Bid Opening is required for Public Works contract solicitations, pursuant to State Finance Law § 144. This section generally covers bids for construction work on public projects, and may include preparatory work such as demolition, asbestos abatement and the like. ESD or a subsidiary must be a party to the contract, which must involve the use of laborers, mechanics or workers (not, for example, architects and engineers). The definition of a "Public Work" is more a matter of art than law: if in doubt as to whether the contract is for Public Work, contact the Legal Department for guidance.

9.3. Bid Evaluation and Vendor Selection

The initiating Department Head should establish, prior to bid opening, a team of at least three ESD staff members with relevant knowledge and experience of the goods and/or services being procured. One member should come from Contracts Administration or Finance. In some cases, one or more non-ESD team members may join the review team, where those persons have specific knowledge of the procurement subject, or a specific role to play in the administration of the contract with the successful bidder. If non-ESD staff is included in the review team, the team must be expanded in number such that a majority will always be ESD staff members.

Analysis of the proposals and/or bids submitted and the award of the contract shall be documented in reasonable detail. Award to anyone other than the low bidder must include in the documentation the reason the low bidder was not selected.

In reviewing bids, all members of the team must complete and sign scoring sheets that rate each bidder according to the selection criteria and weighting set out in the RFP. Scoring sheets must not include anything other than numerical ratings (i.e., no comments/opinions/notes, etc). Original scoring sheets must be signed and retained by the Procurements Manager as part of the Procurement Record.

9.4. Determination of Responsibility – “FLIP Review”

Pursuant to State Finance Law § 163, ESD or the Subsidiary Board must determine that a vendor or respondent is a responsible contractor, prior to approving the award of a contract. In any event, whether or not a formal Determination of Responsibility is sought from the relevant Board, the initiator should ensure that all vendors are “responsible.”

Vendor responsibility is generally accomplished by “FLIP” review. FLIP review involves assessment of four factors: (i) Financial and organizational capacity; (ii) Legal authority to do business in the state; (iii) Integrity of the owners/officers/principals; and (iv) Past performance on prior government contracts.

The Office of the State Controller has developed a useful resource, the VENDREP form, that should be used wherever possible. This form seeks information about the vendor, its affiliates and subsidiaries, officers and owners, past responsibility determinations by agencies and investigations/prosecutions. It must be notarized, and false statements may be actionable and in some cases may be criminal. The Vendrep forms can be accessed here: www.osc.state.ny.us/vendrep/webresources.htm.

For more information, including links to forms used in a determination of responsibility, see Best Practices on the OGS website. Note that FLIP review is not needed for procurements from the OGS Centralized Contracts list.

If a vendor is considered to be non-responsible, steps must be taken to afford the vendor due process rights, including an opportunity to explain its position in writing and, in some cases, at a meeting. Consult the ESD Legal Department in such cases, after having reviewed the information at the following website:

www.ogs.state.ny.us/procurecounc/pdfdoc/BestPractice.pdf

9.5. Procurement Record

The ESD department head or his or her designee shall be responsible for creating and maintaining a record of the procurement process. Such record shall contain documentation related to the procurement process, any competitive solicitation exemption, proposals and/or bids received, scoring sheets, vendor responsibility documentation and other documents prepared or used by the bid reviewers in their vendor selection process. Note that final scoring sheets must be sent to the Procurements Manager before a contract is executed.

10. Contract Approval

Procurement Contracts in amounts **\$50,000** or less that will be completed within one year must be approved by the Officer(s) specified in Attachment A to these Guidelines .

Procurement Contracts over \$50,000, as well as contracts for any amount involving personal services to be rendered over a period in excess of one year, must be approved by the ESD (or Subsidiary) Directors. However, **warranty and product maintenance/support/lease contracts (including but not limited to auto leases)** are not considered personal services and do not require approval by the Board unless the amount of such contract is over \$100,000 in aggregate through the life of the contract.

10.1. Board Materials

The initiator writes a memorandum from the respective Department Head to the Officer(s) specified in Attachment A to these Guidelines, explaining the need for the contract. View Model Directors' Materials for Procurement Contracts.

The Board materials must set out:

- a. the need for goods and services;
- b. a brief description of the goods or services needed;
- c. the expected maximum cost of the proposed goods or services;
- d. the selection process used to determine an award based on best value, or where not quantifiable, the justification which demonstrates the best value will be achieved; and
- e. The funding source.

10.2. ESD Contract and Amendment Approval

- a. Contracts in amounts under \$50,000 must be approved by the Officer(s) specified in Attachment A to these Guidelines.
- b. Contracts (i) in amounts over \$50,000 or (ii) contracts for any amount involving services to be rendered over a period in excess of one year must be approved by the ESD (or Subsidiary) Directors.
- c. If staff anticipates that a contract may need to be extended beyond one year, ensure that Board approval is requested and that the materials and resolution specifically permit an extension of the contract. Once Board approval is obtained, the contract with the vendor must contain a clause that specifically permits extension. If the contract does not contain such a clause, and the contract needs to be extended, Contract Reporter advertising is required unless an exemption is granted.
- d. Contracts for goods to be provided or services to be rendered over a period in excess of one year, regardless of the amount of the contract, which therefore must have been approved by the Board, must in addition be reviewed annually by the ESD (or Subsidiary) Directors. The initiating Department Head must provide an annual report setting forth the status of all continuing goods and/or services contracts, together with justification for the continuance of such contracts for the next year. This annual status report can be made to Contracts Administration and Subsidiary Finance by filling out a contract summary/contract status report. The status reports will also be part of the annual budget and spending review process for all existing ESD and Subsidiary budgets, which must be annually approved by the respective Directors. The annual status reports will thus serve to clarify the need to continue existing multi-year goods and/or service provider contracts.
- e. Contract documents should be fully executed and delivered by both parties prior to the commencement of any work. However, if in the discretion of the initiating Department Head it is essential that work on the contract be commenced before the formal contract documents have been approved, the ESD Chief Executive Officer, Executive Vice President, General Counsel or Chief Financial Officer may issue a letter authorizing a contractor to commence work pending completion and execution of formal contract documents ("**Notice to Proceed**"), provided that:
 - i. The contract is not subject to Office of the State Comptroller ("OSC") approval (See Section 11.5); and
 - ii. the authorization contained in the Notice to Proceed does not exceed \$50,000; and

- iii. the initiating Department Head seeking the Notice to Proceed obtains in advance, via memorandum (with copies sent to Contract Administration and Procurement) an explanation in reasonable detail the need for the immediate commencement of contract performance, and the written authorization of two of the following: ESD Chief Executive Officer, Executive Vice President, General Counsel or Chief Financial Officer.

f. **Amendments to existing contracts** follow the same process as new contracts, i.e., the amendment needs to be advertised in the New York State Contract Reporter or exempted. The same documents, such as justification memo/contract status report, commitment request form and/or standard amendment form must be generated. If the proposed amendment will involve a new Contract Reporter advertisement or other solicitation, the requirements of SFL §139-j and 139-k and State Tax Law § 5-a will apply, and in any case, new certifications may be required. Note that an amendment to an existing contract that causes the aggregate amount of the contract to exceed \$1 million may be subject to OSC approval, regardless of the amount of the amendment and source of funds.

- g. Contract amendments that increase the contract amount to \$50,000 or more must be approved by the ESD or Subsidiary Directors. Amendments for less than 10% of the original contract amount (or the contract amount as subsequently approved by the Board) may be executed by the ESD Chief Executive Officer or Chief Financial Officer without further Board approval, unless the amendment increases the contract to an amount above \$50,000 and Directors' approval has not been previously obtained. If any such proposed amendment will increase the term of the contract to more than one year, Contract Reporter advertising is necessary unless, as discussed in paragraph (c) above, the original contract contained a clause specifically permitting extension.

- g. In the case of contracts for more than \$1 million, where the initiator anticipates that unforeseen contingencies and changes of scope may arise and require changes in the contract amount, Board approval should be sought from the outset for amendment of the contract up to 10% of the amount approved, to be executed without further Board approval by the Chief Executive Officer and the Chief Financial Officer of the corporation. Note that such an amendment may require OSC review and approval (see section 11.5 below). If in doubt, consult the Legal Department.

11. Steps After Contract Approval Is Obtained

11.1. Commitment Request Package

- a. The contract initiator completes the required information on the Commitment Request Form.
- b. The contract initiator completes the Standard Form Contract -Short Form for Goods/Services, if applicable, with the relevant attachment ("Schedule A") which may be Standard Form for Materials/Services, Architect Agreement, Attorney Agreement, or Standard Form Amendment or Modification of Contract.

Remember that the provisions and the requirements of the proposed contract must be specific and stated in clear and unambiguous terms so they are fully understood by the contracting parties. It is important that the contract clearly specify what is expected of both the contractor and ESD, and the method of payment to the contractor. The more clear and specific the contract, the easier it will be to monitor.

The terms of the contract should include, but not be limited to:

- the scope and purpose of the contract;
 - the description of the services to be performed;
 - the location where the work is to be performed;
 - the standards to be used to measure performance (e.g. units of services, number and nature of clients served, target dates, etc.);
 - the level of expertise that is required to perform the tasks, the cost and the method payment of the contract;
 - the starting date and the contract period;
 - the finished product or the services to be delivered;
 - record-keeping and reporting requirements, including a statement that ESD and any relevant State agency has the right to audit the contractor's records;
- c. Written explanation of the responsibility determination/FLIP Review and/or formal Determination of Responsibility, where required.
 - d. ESD/Subsidiary Board of Directors Approval, if applicable. View sample Board materials.
 - e. New York State Contract Reporter Form, approved exemption letter, or NYS OGS Centralized Contract.
 - f. All appropriate insurance certificates, as approved by the ESD Insurance Administrator, a copy of the appropriate officer's approval and a copy of

the RFP, if applicable. Note that all contractors must have evidence of Workers' Compensation and Disability Insurance coverage.

- g. Three (3) original sets of the contract package or amendment with: (i) Schedule A (conditions applicable to consultant or legal agreements); (ii) Schedule B (scope of work and compensation terms); (iii) Schedule C (Non-Discrimination and Affirmative Action Provisions and Schedule of Minority/Women Business Participation and Compliance with Executive Law Article 15-A); (iv) Schedule D (ST-220 Contractor Certification Form pursuant to Tax Law § 5-a); (v) Schedules E-1 (Compliance with SFL § 139-j and 139-k, the Offerer's Affirmation of Understanding and Agreement pursuant to SFL §§ 139-j (3) and 60 (b), the Offerer Disclosure of Prior Non-Responsibility Determinations under SFL § 139-k(2); and (vi) the Encouragement of NY sub-contractors and suppliers form.
- h. The initiator signs and obtains the Department head approval on the Commitment Request form and forwards the commitment package (all documents listed above) to Procurement for compliance review and approval. When approved, Procurement will route the commitment package to Contract Administration. The commitment package must be accompanied by a completed Commitment Package Checklist.
- i. Contract Administration routes and tracks the commitment package and obtains necessary approvals from various ESD Departments.
- j. Upon obtaining in-house approvals, Contract Administration sends all three (3) sets of the contract or amendment package to the vendor for signature(s).
- k. After receiving three (3) signed sets from the vendor, Contract Administration sends all three sets to the Officer(s) specified in Attachment A to these Guidelines for signature.
- l. One original copy of the fully-executed contract is sent by Contract Administration to the vendor.

11.2. Contract Reporter Award Notification

If a contract is awarded after a Contract Reporter Solicitation, the award, along with the Schedule of Minority/Women Business Participation, must be posted on the Contract Reporter system. A contract is considered awarded when it is executed (signed) by all parties. This posting will be done by Contracts Administration.

11.3. Extension/Amendment of Contracts

If a Procurement Contract is entered into after a Contract Reporter solicitation, the contract and solicitation can provide that there may be an extension of the contract or amendment to the scope

of work. If so, then extensions and/or amendments do not need to be advertised in the Contract Reporter again. However, if the contract requires approval by the ESD Board, the possibility of extension or amendment must be included in the original Board materials and Resolution. When in doubt, provide for extension or amendment to minimize future problems.

11.4. Department of Budget (“DoB”) Approval

Under DOB Bulletin B-1184, approval for certain procurements over \$500 is required. In general, if a state or legislative appropriation is the source of funds, approval is needed. A web-based application known as the “Agency Spending Controls Application” process is used to obtain prior approval. DOB approval is not required when the funding source for the procurement comes from a non-State source (e.g., a developer of an ESD project), where at least 75% of the procurement cost will be reimbursed by federal funds, or when the procurement is needed to address an immediate threat to public health and/or safety. DOB mandated forms are used in cases where approval is required. ESD has implemented the cost control measures described in Bulletin B-1184. All spending not involving Federal reimbursement of at least 75 percent, presenting an immediate threat to public health and/or safety or whose funding source is from a Third Party is subject to the preapproval process specified in the Budget Bulletin utilizing forms established by DOB known as Attachment A. An Attachment B form was also created for spending involving Federal reimbursement of at least 75% or presenting a public health and/or safety issue.

For instructions and forms, see the ESD Employee Intranet: Financial Resources. If in doubt, contact the ESD Controller’s Department for guidance.

11.5. OSC Post-Contract Approval of \$1,000,000+ Contracts

Under Public Authorities Law § 2879-a (effective March 1, 2010), proposed contracts in excess of one million dollars that either: (i) are to be paid for in whole or in part by state appropriations; or (ii) are not to be awarded after a competitive process (regardless of the funding source), must be approved by the Office of the State Comptroller (“OSC”) after the contract is signed. If § 2879-a applies and approval by OSC has not been obtained, the signed contract “shall not be a valid enforceable contract.” OSC has issued final regulations implementing this law, and OSC approval shall be deemed part of these Guidelines. A memorandum explaining the application and procedures involved in OSC approval has been circulated to all relevant staff and may be viewed here.



Comptroller review
of Contracts Memo_F

Note that loan and grant contracts may be covered by the OSC review process.

OSC has confirmed that contracts for the sale of real property for an amount over \$1 million are covered by the Property Disposition Guidelines and are not subject to OSC review and approval under PAL § 2879-a.

12. Monitoring of Procurement Contracts

Performance of Procurement Contracts must be monitored by the initiating Department to ensure that the scope of work or services to be provided are being/have been performed, that use of ESD personnel, supplies and facilities is documented, and that the established starting and completion dates for major components of the contract are being/have been met.

ESD employees assigned the responsibility of monitoring the work should be familiar with the type of work being performed and with the specific terms of the contract.

The frequency and manner in which the vendor's performance will be monitored should be clearly stated to the vendor and directly related to the terms of the contract.

Written documentation pertaining to vendor performance, such as progress reports, site visit reports, payment and expenditure data, memoranda of verbal discussions, and written correspondence, should be maintained and reviewed by the initiating Department.

Periodic visits to the work sites should be made where appropriate to review work in progress and work completed. Site visit reports should be completed and include the observations of pertinent matters, such as the number and type of persons employed by the vendor, adequacy of the facilities and equipment, and quality of performance, including any deficiencies in the performance of the work, which may have an impact on satisfactory completion of the project.

The evaluation of the vendor's performance should take into consideration the quantity and quality of the work performed, the timeliness of submission of contract deliverables, the adequacy of cost and performance records and other supporting documentation, and whether the extent of performance, to date, is commensurate with the amount the contractor has been paid.

Performance that is below expectations or established standards should be reported to ESD management immediately. All deficiency reports should be specific and in writing. Management should review deficiency reports and take appropriate action, which may include termination of a contract.

All invoices presented for payment should be reviewed by the person who is monitoring the contract and approved by the respective Department Head. No payment should be made unless the work is satisfactory and in accordance with the terms of the contract. Approval on the Payment Authorization form attests to this.

13. Procurement Contracts Involving Former Officers of ESD

ESD shall not enter into Procurement Contracts with its former officers or employees, or with firms employing such officers or employees, except as permitted by applicable provisions of law and by ESD's "Guidelines Regarding Conflicts of Interest and Ethical Standards."

14. Implementation of These Guidelines

ESD's Legal Department, in conjunction with the VP/Administrative Services, shall be responsible for:

- a. Preparing for approval by the CEO such supplemental procedures as may be required to effectively implement these Guidelines.
- b. Preparing proposed amendments to the Guidelines for approval by the CEO and the ESD Directors when and as required.

15. Reporting

15.1. Quarterly Reports

ESD's VP/Contract Administration shall prepare for presentation by the Office of Contractor and Supplier Diversity to the ESD Directors, quarterly reports of new Procurement Contracts and required Schedules of MWBE Participation. For each Procurement Contract, the report shall include the contract amount, reason for award, initial scope of services and the selection process used. Such reports shall include information related to amendments approved on contracts during the reporting period.

15.2. Annual Reports

Annually, ESD's VP/Contract Administration shall prepare for the Directors' review a report on Procurement Contracts as of the end of each fiscal year, summarizing procurement activity by ESD for the period of the report, including a listing of all contracts entered into, the selection process used to select vendors, the status of existing Procurement Contracts and required Schedules of MWBE Participation. ESD's VP/Contract Administration shall also prepare, on an annual basis, a report for submission to:

- a. The Division of Budget;
- b. The Department of Audit and Control;
- c. The Senate Finance Committee;
- d. The Assembly Ways and Means Committee;
- e. Members of the public (upon receipt of reasonable requests therefor); and
- f. The Commissioner of Economic Development.

The reports shall include these Guidelines, any amendments thereto, and an explanation of the amendments.

16. Effect on Awarded Contracts

Nothing contained in these Guidelines shall be deemed to alter, affect the validity of, modify the terms of, or impair any contract or agreement made or entered into in violation of, or without compliance with, these Guidelines. These Guidelines reflect best and customary practice, but are

not intended to be rules of law. Note, however, that certain contracts may not be “valid or enforceable” without OSC approval. (See Section 11.5)