

MOYNIHAN STATION DEVELOPMENT CORPORATION
a subsidiary of
NEW YORK STATE URBAN DEVELOPMENT CORPORATION
D/B/A EMPIRE STATE DEVELOPMENT CORPORATION

Guidelines Regarding the Use, Awarding, Monitoring
and Reporting of Procurement Contracts for
Moynihan Station Development Corporation

Effective as of January 2011

*****[PLEASE NOTE: THESE GUIDELINES ARE SUBJECT TO A FEDERAL
FUNDING PROVISIO SET FORTH AT THE END OF THESE GUIDELINES]*****

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Effective as of January 2011

Subject to the proviso, set forth at the end of the following Guidelines (the “Guidelines”), regarding projects funded in whole or in part by the government of the United States of America, including its agencies and instrumentalities, the Guidelines are applicable to the use, awarding, monitoring and reporting of procurement contracts of Moynihan Station Development Corporation (“MSDC”), a subsidiary of the New York State Urban Development Corporation d/b/a Empire State Development Corporation (“ESDC”) . ESDC and MSDC, and other ESDC subsidiaries are 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.

These Guidelines are modeled on the New York State Procurement Guidelines published by the State Procurement Council in July 2009 (the “SPC Guidelines”). The SPC Guidelines apply to all state agencies and thus provide useful guidance for procurement by ESDC, (which is not a state agency as that term is defined in the SPC Guidelines) and MSDC. The SPC Guidelines cover some issues and procedures rarely encountered by the ESDC or MSDC 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. The SPC Guidelines are available at www.ogs.state.ny.us/procurecounc/pdfdoc/guidelines.pdf .

A. Definitions

1. 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 State Finance Law § 139-j and 139-k (see p. 4, para. B.2), Procurement Contracts also include the

purchase, sale, lease or grant of any other interest in real property which involves an estimated annualized expenditure in excess of fifteen thousand dollars (\$15,000).

A person, firm or corporation who wishes to provide goods and/or services to MSDC, covered under these Guidelines is called a “vendor” or, when responding to a public solicitation for qualified vendors or expressions of interest in becoming a MSDC vendor, a “respondent.”

2. Procurement Contracts for Services

Procurement Contracts for personal services include, but are not limited to, architectural, engineering, construction, surveying, appraisal, legal, accounting, management consulting, investment banking, planning, training, statistical analysis, research, public relations, 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 ESDC or MSDC.

The reasons for use of a Procurement Contract for personal services include, but are not limited to:

- 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 MSDC offices or facilities.

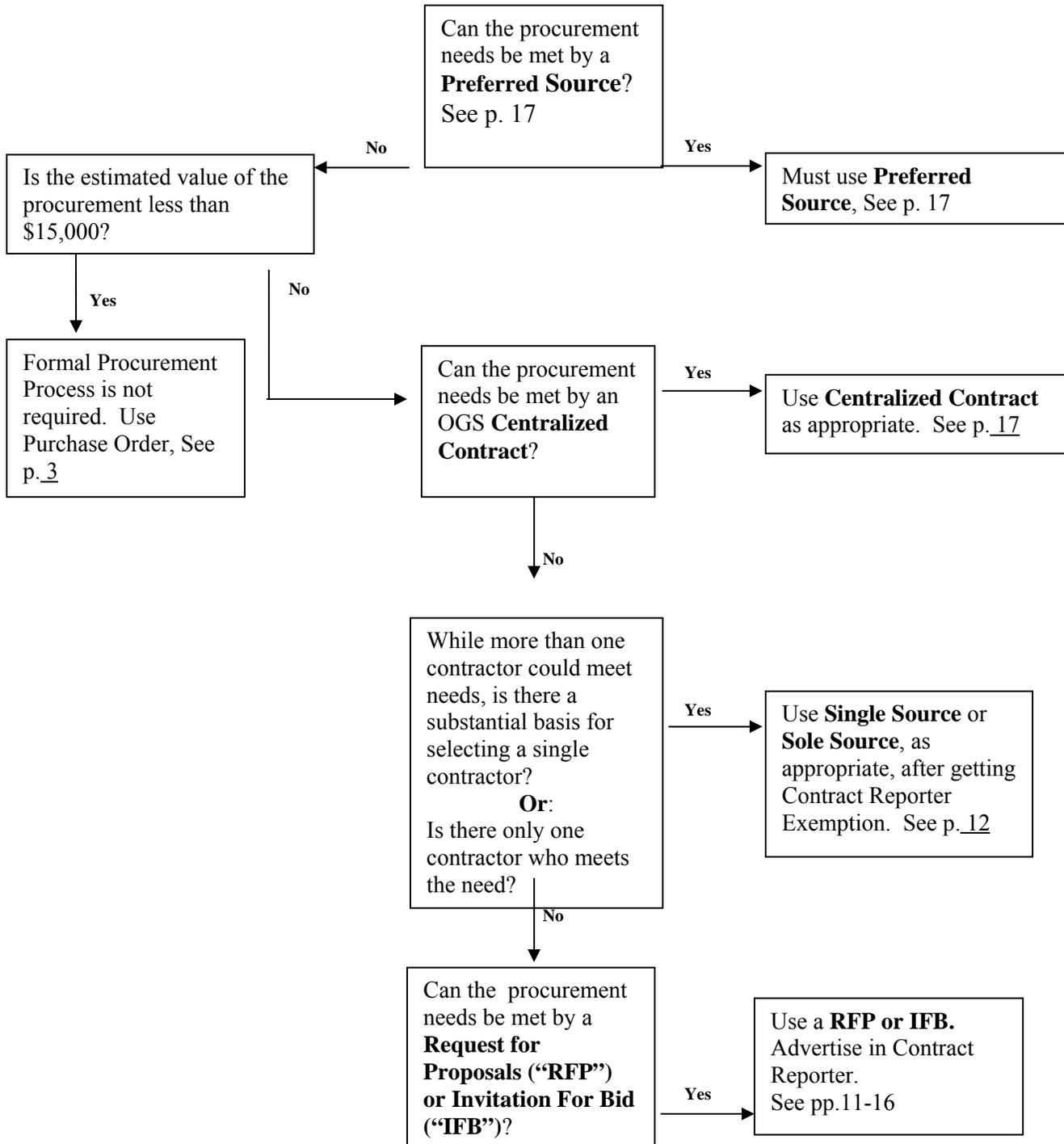
3. Procurement Contracts for Goods

The types of goods requiring Procurement Contracts include:

- a. Goods needed in order to proceed with a project of; and
- b. Goods needed in order to support the administrative needs of the procuring entity.

B. Procurement: Overview and Requirements

1. Selecting a Procurement Process



2. General

- a. 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, and after the evaluation of proposals obtained, whenever practicable, from at least three qualified vendors or respondents. Note that some procurements are exempted from competitive bidding pursuant to applicable provisions of the Economic Development Law (generally procurements exempted by the State Comptroller and rarely applicable to ESDC or MSDC).
- b. Whether or not a Procurement Contract is obtained through the New York State Contract Reporter, three quotes should be obtained whenever practicable.
- c. All Procurement Contracts shall be preceded, where practicable, by the preparation of reasonable cost estimates for the proposed contracts. Preparation of cost estimates shall be the responsibility of the staff members initiating the Procurement Contract.
- d. Procurement Contracts below \$15,000 that will not extend over one year may be handled by Purchase Order approved by, (i) in the case of MSDC, the MSDC President and ESDC Procurement Department, ESDC Controller's Office and ESDC Contracts Administration. Note that these purchases will generally require three quotes whenever practicable.
- e. Prior written approval of the ESDC Chief Executive Officer or ESDC Executive Director (or their respective designee) is required in order to advertise a procurement opportunity, including Requests for Proposals ("RFPs"), Requests for Statements of Qualifications ("RFQs"), Invitations for Bid ("IFBs") (see pp. 15-16). Note also that other approvals may be required to comply with State Division of Budget procedures (see p.18, para. D.2). Submit the Procurement Opportunity Advertisement Approval form (currently found on the ESDC website in the Resource Center under Procurement Resources)

to the appropriate officer at least 10 business days in advance of the relevant New York State Contract Reporter publication submission date. Note that the Contract Reporter is now published daily.

- f. Procurement Contracts under \$50,000 that will be completed within one year must be approved by the MSDC President or her/his designee.
- g. Procurement Contracts of \$50,000 and over as well as contracts for any amount involving goods or services to be rendered over a period in excess of one year must be approved by the MSDC Board. Standard form ESDC Directors/subsidiary Board materials (currently found on the ESDC website in the Resource Center under Procurement Resources) should be used whenever possible.

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

Although competitive solicitations are to be used to the maximum extent practicable, all Procurement Contracts over \$15,000.00, whether competitively bid or not, are subject to State Finance Law (“SFL”) § 139-j and 139-k, unless subject to an express exception set forth in these statutory provisions.

Among other things, SFL § 139-j and 139-k: (i) govern permissible communications between potential vendors, on one hand, and, on the other, ESDC, MSDC, other ESDC subsidiaries, or other involved governmental entities with respect to solicitation during the procurement process; and (ii) establish sanctions for knowing and willful violations of the provisions of the procurement requirements, including disqualification from eligibility for an award of any contract.

Compliance with SFL § 139-j and 139-k requires that all communications regarding any solicitation, from the issuance of the solicitation through the final award and approval of any resulting contract (the “Restricted Period”), be conducted only with permitted ESDC or MSCD contact person(s) identified in the solicitation materials. Compliance with these provisions further requires completion by vendors of the Offerer’s Affirmation of Understanding and Agreement pursuant to SFL § 139-j (3) and 139-j (5)(b)

and periodic updating of such forms during the term of any contract resulting from a solicitation.

All prospective vendors must submit two forms: The Offerer Disclosure of Prior Non-Responsibility Determinations pursuant to SFL § 139-k(2), and the Offer's Affirmation of Understanding and Agreement pursuant to § 139-j(3) and 139-j (5)(b), properly completed, as part of their proposals (each of these forms is currently found on the ESDC website in the Resource Center under Procurement Resources).

Please view the policy regarding permissible lobbying contacts (currently found on the ESDC website in the Resource Center under Procurement Resources under the heading Permissible Contacts under State Finance Law Sections 139j and 139k).

Also view the required language for solicitations by ESDC, MSDC and ESDC's other subsidiaries (currently found on the ESDC website in the Resource Center under Procurement Resources under the heading Required Language for Solicitations by ESDC and its Subsidiaries) to comply with these laws.

Staff must also obtain and report certain information when contacted by prospective vendors and/or third parties (not including state legislators and their staff, when acting in their official capacity) during the Restricted Period. Staff must also make a determination of the responsibility of vendors for improper contacts and make all such information publicly available in accordance with applicable law. Staff is required to 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 a procurement. In addition to obtaining the required identifying information, staff must inquire and record whether the person or organization that made the contact was the vendor, or was retained, employed or designated on behalf of the vendor to appear before or contact ESDC, MSDC or other ESDC subsidiary using the Government Entity Record of Contact under SLF § 139-k(4) contacts (currently found on the ESDC website in the Resource Center under Procurement Resources under the heading Model Form for Governmental Entity Report of Contact under State Finance Law § 139-k(4)). 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. In addition, two such findings of non-responsibility within a four-year period can result in debarment from obtaining any New York State government procurement contract.

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 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, if an MSDC employee is negotiating the terms of a land development, and receives a call from an outside person saying that the vendor should get more development land because the vendor has a wonderful track record, that would be a lobbying call and must be reported. The caller should be informed that the call will be reported, and asked to communicate directly with the designated contact person in the future.

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

State Tax Law § 5-a prohibits ESDC, MSDC, and ESDC's other 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 must include in their responses a properly completed Form ST-220-CA (currently found on the ESDC website in the Resource Center under Procurement Resources under the heading [ST-220-CA: Contractor Certification to Covered Agency](#)).

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 to the procuring entity in the form ESDC's standard form Affidavit of Non-Applicability of State Tax Law § 5-A (currently found on the ESDC website in the Resource Center under Procurement Resources

under the heading [STL5A: Affidavit of Non-Applicability of State Tax Law § 5-A](#)). Note also that § 5-a does not apply to contracts for architectural, engineering or surveying services. If in doubt, contact the ESDC legal department after having reviewed DFT Publication 223.

Failure to include a properly completed form ST-220-CA or affidavit is a basis for considering any such response incomplete and non-responsive and for exclusion from consideration for contract award. 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 the practice of ESDC, MSDC and ESDC's other subsidiaries is different. Only the prime 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.

5. Compliance with Executive Law Article 15-A: Affirmative Action

All Procurement Contracts must comply with the Affirmative Action 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 (M/WBE's) on State contracts so as to facilitate the award of a fair share of such contracts to M/WBE's.”

ESDC, MSDC, and ESDC's other subsidiaries shall promote and assist participation by minority and women-owned businesses in the selection and award of all Procurement Contracts. Such minority and women-owned business participation shall be documented in a regular supplement, prepared by the ESDC Affirmative Action Department, for inclusion in the quarterly and annual reports made by ESDC Contracts Administration to the ESDC Directors, and from time to time at the request of the MSDC Board, (see pP. 26 - 27, paras J.1 and J.2). To assist in the gathering of this information, the

contract originator must provide the ESDC Affirmation Action Department with a completed Schedule of Minority/Women Business Participation, from the potential contract awardee, for the ESDC Affirmative Action Department's review and approval, prior to contract award. The required forms are available from ESDC's Affirmative Action Department. See also p. 11, para. C.2 for new W/MBE reporting requirements in the case of Contract Reporter solicitations.

6. Standard-Form Attachments.

All Procurement Contracts of MSDC, which include amendments to existing contracts, should include ESDC's standard forms, including but not limited to ESDC's Standard Short Form Contract as well as further required contract terms (Schedule A), ESDC'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 ESDC Contract Administration for all solicitations and, if needed, must be included with the forms.

7. Publication on MSDC Website.

All competitive solicitations should be made available on the MSDC website after advertisement in the NYS Contract Reporter.

8. Selection Criteria.

Written selection criteria shall generally be established for each proposed Procurement Contract and shall be included in any written solicitation materials. The selection criteria shall generally include price as an important factor to be considered in the selection process.

9. Bid Opening Procedures.

All proposals should be received at one designated location within MSDC and immediately should be stamped with the date and time of receipt. Generally, ESDC staff members representing ESDC Contracts Administration/Subsidiary Finance, ESDC Legal, ESDC Procurements and MSDC should be present at bid openings in person or by teleconference. See the ESDC Bid Opening Guidelines (currently found on the ESDC

website in the Resource Center under Procurement Resources under the heading [Bid Opening Guidelines](#)).

10. Determination of Responsibility – “FLIP Review”.

Depending on the amount and complexity of the contract, the MSDC Board may decide that it is appropriate to make a determination that a vendor or respondent is responsible, prior to approving the award of a contract. The higher the dollar amount of the contract, the more likely a formal Determination of Responsibility will be. The initiator should discuss with the MSDC President and, if necessary, with the ESDC General Counsel , whether the MSDC Board should be asked to make a formal determination . In any event, whether or not a formal Determination of Responsibility is sought, the initiator should ensure that the vendor is 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. 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 ESDC Legal Department in such cases, after having reviewed the information at the following websites:

www.ogs.state.ny.us/procurecounc/pdfdoc/BestPractice.pdf and www.osc.state.ny.us/vendrep/webresources.htm.

11. Procurement Record.

The MSDC, staff initiator shall be responsible to create and maintain 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 determining to make an award. Note that final scoring sheets must be sent to the ESDC Procurements Manager before a contract is executed.

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.

C. Competitive Process.

Competition in the procurement process serves the interest of both (i) ESDC and MSDC and (ii) prospective providers of goods or services. The process guards against inflated pricing, favoritism, fraud and collusion; and allows all qualified vendors an opportunity to obtain business.

1. Contract Reporter Advertising Required

Generally, the MSDC must advertise in the New York State Contract Reporter all contracts for the acquisition of goods and services of \$15,000 or more, annualized. In order to access the online system and place the advertisement, the initiator must obtain a user ID number from ESDC Contracts Administration. View the Contract Reporter's daily publication schedule (currently found at www.NYSCR.org)

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 (see p. 8), 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 ESDC Contracts Administration.

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

authorization by MSDC's Board the possibility of extension or amendment must be included in the authorizing materials and resolution.

4. Additional Solicitation.

Where practicable and appropriate, 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 ESDC's Affirmative Action Department.

5. Contract Reporter Exemption

- (a) Reasons for Exemptions. An advertisement in the Contract Reporter may be eligible for exemption if any of the following circumstances can reasonably be demonstrated:

Sole source. Only one source for the goods or services is available. Two examples of sole source procurements: (i) proprietary software compatible with ESDC 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.

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 ESDC's or MSDC's, operations; experience with similar projects of ESDC, MSDC or other ESDC subsidiaries, other agencies or at other levels of government; demonstrated expertise; or capacity and willingness to respond to the situation.

Emergency or Critical Circumstances. Emergency or critical circumstances exist when an urgent and unexpected situation

arises which places public or health safety or the use or conservation of resources at risk and requires immediate action. Poor planning does not constitute an emergency. Contracts entered into as a result of an emergency situation should be for only the goods or services reasonably necessary to stabilize, ameliorate or remedy the situation. Notwithstanding any Contract Reporter exemption that may be granted for emergency or critical circumstances, a reasonable attempt should be made where practicable to solicit at least three oral competitive bids, with written confirmation of the bid furnished within a reasonable time and maintained in the contract file.

Infeasibility. Infeasibility of advertising exists when a situation exists which would render advertising in the Contract Reporter inappropriate. For example, there may be situations where mission-critical procurements in support of economic development responsibilities require immediate action that cannot be accomplished within the Contract Reporter notice period. Such mission-critical procurements will be rare and will be granted only in extreme cases.

- (b) Authorization. The initiator of the proposed contract must obtain a written Contract Reporter exemption authorization. This is done by means of a memorandum to ESDC's General Counsel for subsequent approval by ESDC's Chairman, Chief Executive Officer or Executive Director (or their respective designee).

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; 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 \$50,000 or more, or will last more than one year, the exemption authorization must be obtained **before** approval by the MSDC Board . If the Board's approval is not required because the proposed amount is less than \$50,000 and the term of the contract is less than 1

year, the exemption authorization must be obtained prior to contract execution and the commencement of any services or delivery of any goods.

- (c) 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, unless an express statutory exception applies. Where appropriate, a formal 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.

6. Solicitation Techniques.

There are a number of procurement techniques available, including Request for Proposals (RFP), Request for Statements of Qualifications (RFQ) and Invitation for Bid (IFB). 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.

Generally, contracts for goods are to be awarded on the basis of “lowest price” and contracts for services are to 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 which 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 MSDC are to be guided by the same basic principles:

Clarity. Procurement documents should clearly convey to vendors the goods or services that are being procured .

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.

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

(a) Requests for Proposals (“RFP”)

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

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

- Description of program/project 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;

(b) Requests for Statements of Qualification (“RFQ”)

For retention of qualified pools of contractors to provide defined types or scopes of services (and, rarely, goods) required by the MSDC 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 outside legal counsel or property appraisers. If the ESDC (or an ESDC subsidiary, as the case may be) has established a list of pre-qualified contractors, and except where 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 the procuring entity outside the list. MSDC may make such procurements from of lists of vendors prequalified by ESDC.

(c) Invitation for Bid (“IFB”)

The IFB methodology is appropriate for those situations where the needed goods or services can be translated into exact specifications and the award can be made on the basis of lowest price. That is often simple in case of goods. Where services are being procured, the IFB should be used only when “best value” – required under SFL § 163(3)(a)(ii) – is established by lowest price alone. For this reason, most services will be procured by RFP rather than IFB

- The IFB should provide prospective vendors with all the information necessary to develop a responsive bid. This will include clear and descriptive specifications or requirements that define the goods or services; and
- Specifications of the required qualifications of vendors and the mandatory contract terms and conditions.

7. NYS Preferred Sources

Goods and services needed 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 required form, function and utility, 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 (currently found at www.ogs.state.ny.us).

8. NYS Office of General Services (“OGS”) Centralized Contracts

Goods and services may be available, without the need for competitive procurement, through centralized contracts held by OGS. Information about centralized contract offerings can be obtained from the list of approved state contractors by OGS (currently found at www.ogs.state.ny.us).

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), and that written justification is approved by the ESDC Chairman, ESDC Chief Executive Officer, ESDC Executive Director, ESDC Chief Financial Officer or ESDC Controller (or their respective designees) and the MSDC President prior to contracting with an OGS vendor.

a. 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 the procurement need, such item may be purchased from the centralized contract. However, the procuring entity may competitively procure items otherwise available on a centralized contract when the resultant price is less.

b. Service Contracts

The procuring entity 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,

the procuring entity may competitively procure items otherwise available on the OGS centralized contract list when the resultant price is less.

D. Contract Approval Process

1. Contract Justification Memorandum

A memorandum to the ESDC Chief Financial Officer (for contracts under \$50,000) or ESDC President/Chief Executive Officer (for contracts of \$50,000 or over) or ESDC Executive Director , or their respective designees from the MDSC President justifying the need for the contract. The memorandum must set out:

- a. the need or justification 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.

2. 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 ESDC 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. For instructions and forms, see the ESD Employee Intranet: [Financial Resources](#). If in doubt, contact the ESDC

Controller's Department for guidance, having first reviewed [DoB Bulletin B-1184](#).

3. 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." At the time these Guidelines are approved, OSC has not issued final regulations implementing this law. When such regulations are final, OSC approval shall be deemed part of these Guidelines. [A memorandum explaining their application and procedures](#) has been circulated to all relevant staff and is available currently available on the ESDC website in the Resources Center under the heading Procurement Resources identified as NYS Comptroller Review of Contracts Memo. Note that loans and grant contracts may be covered by this OSC review process.

4. Contract and Amendment Approval

- a. Contracts in amounts under \$50,000 with a term of one year or less than one year may be approved by the MSDC President.
- b. Contracts (i) in amounts of \$50,000 and over and (ii) contracts for any amount involving services to be rendered over a period in excess of one year must be approved by the MSDC Board. Use the standard form Corporation Directors/subsidiary Board materials (currently found on the ESDC website in the Resource Center under Procurement Resources under the heading Model Directors Materials).
- c. If staff anticipates that a contract may need to be extended beyond one year, ensure that the MSDC Board approval is requested and that the materials and authorizing resolution specifically permit an extension of the contract. Once such 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 MSDC Board, must in addition be reviewed and approved annually by the MSDC Board. The MSDC President 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 ESDC Contracts Administration and ESDC Subsidiary Finance by filling out a justification form (available from ESDC Contracts Administration). The status reports will also be part of the annual budget and spending review process for all MSDC budgets, which must be annually approved by the MSDC Board. 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 MSDC President it is essential that work on the contract be commenced before the formal contract documents have been executed, the ESDC Chief Executive Officer, ESDC Executive Vice President, ESDC General Counsel or ESDC Chief Financial Officer may issue a letter authorizing the MSDC President to authorize the contractor to commence work pending completion and execution of formal contract documents (“Letter to Proceed”), provided that:
 - i. The contract is not subject to OSC approval (see p. 19, para. D.3); and
 - ii. the authorization contained in such Letter to Proceed does not exceed \$50,000; and
 - iii. the MSDC President obtains in advance, via memorandum (with copies sent to ESDC Contract Administration and ESDC Procurement) explaining in

reasonable detail the need for the immediate commencement of contract performance, the written authorization of two of the following: ESDC Chief Executive Officer, ESDC Executive Vice President, ESDC General Counsel or ESDC 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, 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 (unless an express statutory exception applies), 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. See p. 19, para. D.3.
- g. Contract amendments that increase the contract amount to \$50,000 or more must be approved by the MSDC Board. Amendments for less than 10% of the original contract amount may be executed by the MSDC President without further MSDC Board approval, unless the amendment increases the contract to an amount above \$50,000 and approval of the MSDC Board 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 on p.19, para. D.4.c the original contract contained a clause specifically permitting extension.

5. Commitment Request Package

- a. The contract initiator completes the required information on the [Commitment Request Form](#) (currently available on the ESDC website in the Resource Center under Procurement Resources).

- 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](#). All of these forms are currently available on the ESDC website in the Resource Center under Procurement Resources.

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 the procuring entity, 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.
- Note that any contingency amount anticipated should not be disclosed to the vendor or third parties during contract negotiation and must not be included in the contract price.
- the starting date and the contract period,
- the finished product or the services to be delivered, and
- the record-keeping and reporting requirements, including a statement that in addition to MSDC, ESDC, and any relevant State agency has the right to audit the contractor’s records.

- c. Justification memorandum (as described above).

- d. Written explanation of the responsibility determination/FLIP Review (see p.10, para. B.10), and/or formal Determination of Responsibility, where required.
- e. MSDC Board Approval, if applicable. Use the standard form Corporation Directors/subsidiary Board materials (currently found on the ESDC website in the Resource Center under Procurement Resources under the heading Model Directors Materials).
- f. New York State Contract Reporter Form, approved exemption letter, or NYS OGS Centralized Contract.
- g. All appropriate insurance certificates, as approved by the ESDC Insurance Administrator, a copy of the MSDC President's approval and a copy of the RFP, if applicable. Note that all contractors must have evidence of Workers' Compensation and Disability Insurance coverage.
- h. Five (5) original sets of the contract package or amendment with Schedule A (conditions applicable to consultant or legal agreements), Schedule B (scope of work and compensation terms), Schedule C (Non-Discrimination and Affirmative Action Provisions and Schedule of Minority/Women Business Participation and Compliance with Executive Law Article 15-A), Schedule D (ST-220 Contractor Certification Form pursuant to Tax Law § 5-a) unless a statutory exception applies, and, unless a statutory exception applies, 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 139-j (60) (b), the Offerer Disclosure of Prior Non-Responsibility Determinations under SFL § 139-k(2)).
- i. The staff initiator signs and obtains the MSDC President approval on the Commitment Request form and forwards the commitment package (all documents listed above) to ESDC Procurement for compliance review and approval. When approved, ESDC Procurement will route the commitment package to ESDC Contract Administration. The commitment

package must be accompanied by a completed Commitment Package Checklist (currently available on the ESDC website in the Resource Center under Procurement Resources).

- j. ESDC Contract Administration routes and tracks the commitment package and obtains necessary approvals from various ESDC Departments.
- k. Upon obtaining in-house approvals, ESDC Contract Administration sends five (5) sets of the contract or amendment package to the vendor for signature(s).
- l. After receiving five (5) signed sets from the vendor, ESDC Contract Administration sends all five sets to the ESDC Chief Financial Officer or ESDC Chief Executive Officer for signature.
- m. One original copy of the fully-executed contract is sent by ESDC Contract Administration to the vendor.

E. Responsibilities of Vendors

Having been awarded a contract, vendors shall have the following responsibilities:

1. To perform the contract in accordance with its terms;
2. To cooperate with ESDC and MSDC personnel who are directing, supervising or monitoring the performance of the contract or who are assisting in its performance.

G. Monitoring of Procurement Contracts

1. Performance of Procurement Contracts must be monitored by MSDC and/or ESDC staff to ensure that the scope of work or services to be provided has been performed, that use of ESDC, MSDC or other ESDC subsidiary personnel, supplies and facilities is documented, and

that the established starting and completion dates for major components of the contract have been met.

2. ESDC, MSDC or other ESDC subsidiary 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.
3. 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.
4. 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 MSDC.
5. Periodic visits to the work sites should be made 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.
6. 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.
7. Performance that is below expectations or established standards should be reported to ESDC and MSDC management (as the case may be) 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.
8. All invoices presented for payment should be reviewed by the person who is monitoring the contract and approved by the MSDC President. 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.

H. Procurement Contracts Involving Former Officers of ESDC, MSDC or other ESDC Subsidiaries

Neither ESDC, MSDC, nor any other ESDC subsidiary shall enter into Procurement Contracts with any of their former officers or employees, or with firms employing such officers or employees, except as permitted by applicable provisions of law and by ESDC's [Guidelines Regarding Conflicts of Interest and Ethical Standards](#) (currently available on ESDC's website in the Resource Center under Procurement Resources).

I. Implementation of these Guidelines

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

1. Preparing for approval by the ESDC CEO such supplemental procedures as may be required effectively to implement these Guidelines.
2. Preparing proposed amendments to the Guidelines for approval by the MSDC Board when and as required.

J. Reporting

1. Quarterly Reports

ESDC's VP/Contract Administration shall prepare, and present to the ESDC Directors, quarterly reports of new Procurement Contracts and required Schedule of W/MBE 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.

2. Annual Reports

Annually, ESDC's VP/Contract Administration shall prepare for approval by the ESDC Directors and public availability a report on Procurement Contracts as of the end of each fiscal year summarizing procurement activity by ESDC 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 (see p. 20, para. 4.d) and required Schedule of W/MBE Participation. ESDC'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; and
- e. Members of the public (upon receipt of reasonable requests therefor).

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

K. 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. Note, however, that certain contracts may not be "valid or enforceable" without OSC approval. See p.19, para. D. 3.

FEDERAL FUNDING PROVISIO

NOTWITHSTANDING ANY PROVISION OF THESE GUIDELINES, WITH RESPECT TO PROCURMENTS FOR PROJECTS FUNDED IN WHOLE OR IN PART BY THE FEDERAL GOVERNMENT OF THE UNITED STATES OF AMERICA, INCLUDING ITS AGENCIES AND INSTRUMENTALITIES, THE REQUIREMENTS OF FEDERAL LAW AND REGULATIONS AND THE TERMS AND CONDITIONS SET OUT IN THE AGREEMENTS AND DOCUMENTATION WITH THE FEDERAL

ENTIY THROUGH WHICH SUCH FUNDING IS PROVIDED MUST BE COMPIED WITH AND SATISFIED IN ADDITION TO COMPLIANCE WITH THESE GUIDELINES. WHEN A FEDERAL REQUIREMT EXPRESSLY LOOKS TO THE LAW, REGULATION, POLICY, OR PRACTICE GOVERNING PROCUREMENT BYMSDC, THESE GUIDELINES SHALL BE USED. IN THE EVENT OF A CONFLICT BETWEEN SUCH FEDERAL REQUIREMENTS AND THESE GUIDELINES, THE FEDERAL REQUIREMENTS SHALL CONTROL TO THE EXTENT THAT COMPLIANCE WITH THESE GUIDELINES WOULD VIOLATE OR FAIL TO FULLY COMPLY WITH THE FEDERAL REQUIREMENT. ANY QUESTION REGARDING APPLICATON OF THESE GUIDELINES AND THE APPLICABLE FEDERAL REQUIREMENTS MUST BE REFERRED TO THE ESDC PROJECT ATTORNY OR THE ESDC GENERAL COUNSEL FOR GUIDANCE.