

Attachment 5

- Contractor Disclosure Contacts Form and the Contractor Disclosure of Prior Non-Responsibility Determinations Form
- Model Language to Obtain Offerer's Affirmation of Understanding of and Agreement pursuant to State Finance Law Section 139-j (3) and 139-j (6) (b)
- Policy regarding Permissible Contacts under State Finance Law section 139-j and 139-k

[Attached]

COMPLIANCE WITH EXECUTIVE ORDER 127

New York State Executive Order Number 127 (EO 127) provides for increased disclosure in the public procurement process through identification of persons or organizations whose function is to influence procurement contracts, public works agreements and real property transactions.

A procurement is any contract, agreement or subsequent amendment involving an annualized expenditure in excess of \$15,000.00, but does not include those contracts that by law must be awarded to the lowest responsible bidder or based on the lowest price.

ESDC is obligated to obtain identifying information on every person or organization retained, employed or designated by or on behalf of the contractor to attempt to influence the procurement process. ESDC is obligated to collect information on whether such person or organization has a financial interest in the procurement. This obligation is on-going, and survives the awarding of the contract.

In addition, EO 127 mandates consideration of whether a contractor has intentionally provided false or incomplete information under such Order within the last five years, and whether a contractor has failed to timely disclose accurate and complete information or otherwise cooperate in the implementation of the Order. ESDC is precluded from awarding a procurement contract to a contractor with a finding of non-responsibility under the Order unless it makes a finding, on the record, that such contract is in the best interests of the State, notwithstanding the prior finding of non-responsibility.

Attachments

Contractor Disclosure of Contracts Form

Contractor Disclosure of Contacts Form

This form shall be completed and submitted with your bid/proposal or offer in accordance with Executive Order 127 (EO 127). Failure to complete and submit this form shall result in a determination of non-responsiveness and disqualification of the bid, proposal or offer. If at the time of submission of this form, the specific name of a person authorized to attempt to influence a decision on your behalf is unknown, you agree to provide the specific person's information when it is available. You also agree to update this information during the negotiation or evaluation process of this procurement, and throughout the term of any contract awarded to your company pursuant to this bid/proposal or offer.

Name of Contractor: _____

Address: _____

Name and Title of Person Submitting this Form: _____

Is this an initial filing in accordance with Section II, paragraph 1 of EO 127 or an updated filing in accordance with Section II, paragraph 2 of EO 127? (Please circle):

Initial filing

Updated filing

The following person or organization was retained, employed or designated by or on behalf of the Contractor to attempt to influence the procurement process:

Name: _____

Address: _____

Telephone Number: _____

Place of Principal Employment: _____

Occupation: _____

Does the above named person or organization have a financial interest in the procurement?

(Please circle)

yes

no

Model Language to Obtain Offerer's Affirmation of Understanding of and Agreement pursuant to State Finance Law § 139-j (3) and § 139-j (6) (b)

Background:

State Finance Law § 139-j(6)(b) provides that:

Every Governmental Entity shall seek written affirmations from all Offerers as to the Offerer's understanding of and agreement to comply with the Governmental Entity's procedures relating to permissible contacts during a Governmental Procurement pursuant to subdivision three of this section.

Instructions:

A Governmental Entity must obtain the required affirmation of understanding and agreement to comply with procedures on procurement lobbying restrictions regarding permissible Contacts in the restricted period for a procurement contract in accordance with State Finance Law § § 139-j and 139-k. It is recommended that this affirmation be obtained as early as possible in the procurement process, such as when the Offerer submits its proposal or bid. The following language can be used to obtain the affirmation.

Offerer affirms that it understands and agrees to comply with the procedures of the Government Entity relative to permissible Contacts as required by State Finance Law § 139-j (3) and § 139-j (6) (b).	
By: _____	Date: _____
Name: _____	
Title: _____	
Contractor Name: _____	
Contractor Address: _____	

Model Language to Obtain the Offerer Disclosure of Prior Non-Responsibility Determinations

Background:

Under New York State Finance Law § 139-k(2) and Executive Order 127, covered governmental entities are obligated to obtain specific information regarding prior non-responsibility determinations. This information must be collected in addition to the information that is separately obtained pursuant to State Finance Law § 163(9). In accordance with State Finance Law § 139-k, an Offerer must be asked to disclose whether there has been a finding of non-responsibility made within the previous four (4) years by an Governmental Entity due to: (a) a violation of State Finance Law § 139-j or (b) the intentional provision of false or incomplete information to a Governmental Entity. The terms "Offerer" and "Governmental Entity" are defined in State Finance Law § 139-k(1). State Finance Law § 139-j sets forth detailed requirements about the restrictions on Contacts during the procurement process. A violation of State Finance Law § 139-j includes, but is not limited to, an impermissible Contact during the restricted period (for example, contacting a person or entity other than the designated contact person, when such Contact does not fall within one of the exemptions). Under Executive Order 127, a proposed contractor must disclose findings of non-responsibility made within the previous five (5) years.

As part of its responsibility determination, a covered governmental entity must consider whether an Offerer fails to timely disclose accurate or complete information regarding the above non-responsibility determination. In accordance with law, no Procurement Contract shall be awarded to any Offerer that fails to timely disclose accurate or complete information under this section, unless a finding is made that the award of the Procurement Contract to the Offerer is necessary to protect public property or public health safety, and that the Offerer is the only source capable of supplying the required Article of Procurement within the necessary timeframe.

Instructions:

A Governmental Entity must include a disclosure request regarding prior non-responsibility determinations in its solicitation of proposals or bid documents or specifications or contract documents, as applicable, for procurement contracts. The attached form is to be completed and submitted by the individual or entity seeking to enter into a Procurement Contract.

5. If yes, please provide details below.

Governmental Entity: _____

Date of Termination or Withholding of Contract: _____

Basis of Termination or Withholding: _____

(Add additional pages as necessary)

Offerer certifies that all information provided to the Governmental Entity with respect to State Finance Law § 139-k and Executive Order 127 is complete, true and accurate.

By: _____ Date: _____
Signature

Name: _____

Title: _____

Policy Regarding Permissible Contacts
Under State Finance Law Section 139-j and 139-k

with respect to procurements by

New York State Urban Development Corporation d/b/a
Empire State Development Corporation
and its subsidiaries

The Lower Manhattan Development Corporation ("LMDC"), a subsidiary of the Empire State Development Corporation, amends and restates in its entirety Section 7 of the ESDC's Policy Regarding Permissible Contacts, as follows:

7. Miscellaneous

- a. Complaints or other notices to the General Counsel of LMDC regarding the implementation of this policy shall identify the solicitation with respect to which the complaint or notice is being submitted; the entity conducting the procurement at issue; and the nature of the complaint or notice, and should be submitted to the General Counsel of LMDC at the following address, for further forwarding, if necessary:

General Counsel
Lower Manhattan Development Corporation
One Liberty Plaza
20th Floor
New York, NY 10006

- b. This policy is adopted pursuant to Sections 139-j and 139-k of the State Finance Law. Nothing in this policy shall be construed as limiting the application of this law. In the event of a conflict between the provisions of this policy and the provisions of State Finance Law Sections 139-j and 139-k, the provisions of said Law shall govern.

**Policy Regarding Permissible Contacts
under State Finance Law Section 139-j and 139-k**

with respect to procurements by

**New York State Urban Development Corporation d/b/a
Empire State Development Corporation
and its subsidiaries**

1. Definitions

The following terms shall have the following meanings:

- a. "contact" or "contacts" shall mean any oral, written or electronic communication with the Corporation under circumstances from which a reasonable person would infer that the communication was intended to influence a procurement by the Corporation.
- b. "Corporation" shall mean ESDC or any of its subsidiaries, as the case may be.
- c. "ESDC" shall mean the New York State Urban Development Corporation d/b/a Empire State Development Corporation.
- d. "offerer" shall mean the individual or entity, or any employee, agent or consultant or person acting on behalf of such individual or entity, that makes a contact during the restricted period.
- e. "procurement" shall mean (i) the preparation of terms of the specifications, bid documents, request for proposals, or evaluation criteria for a procurement contract; (ii) solicitation for a procurement contract; (iii) evaluation of a procurement contract; (iv) award, approval, denial or disapproval of a procurement contract, or (v) approval or denial of an assignment, amendment (other than amendments that are authorized and payable under the terms of the procurement contract as it was finally awarded or approved), renewal or extension of a procurement contract, or any other material change in the procurement contract resulting in a financial benefit to the offerer.
- f. "procurement contract" shall mean any contract or other agreement for a commodity, service, technology, public work, construction, the grant of a franchise or concession, the purchase, sale or lease of real property or an acquisition or granting of other interest in real property which contract or other agreement involves an estimated annualized expenditure in excess of fifteen thousand dollars. Grants, eminent domain transactions and other transactions listed in subdivision (1)(g) of Section 139-j of the State Finance Law shall not be deemed procurement contracts.

- g. "restricted period" shall mean the period of time commencing with the earliest written notice or advertisement of the availability of the solicitation document for a procurement contract and concluding with the execution of a final procurement contract.

2. Permissible Contacts during the Restricted Period

- a. With respect to each procurement that it conducts, the Corporation shall designate a person or persons who may be contacted by offerers relative to the procurement. All comments and questions from offerers regarding a procurement should generally be in writing and must be addressed only to the contact person(s) identified in the solicitation document or otherwise identified to offerers.
- b. During the restricted period, offerers shall only communicate, with respect to any procurement, in the manner and with the individuals set forth in Section 2 (a) of this Policy.
- c. Notwithstanding Section 2(b) of this Policy, offerers may:
 - i. submit proposals in response to a solicitation document;
 - ii. submit written questions as may be provided for in the solicitation document;
 - iii. participate in any pre-bid conference or site visit as may be provided for in the solicitation document;
 - iv. make a complaint in writing to the general counsel of the Corporation if a communication by an offerer made in accordance with Section 2(a) of this policy has not been responded to in a timely manner;
 - v. after being notified of a tentative award of a procurement contract, engage in communications solely for the purpose of negotiating the terms of the final contract or contracts and any interim agreements in advance of the final contract or contract, including any conditional designation document;
 - vi. request the review of an award of a procurement contract;
 - vii. participate in protests, appeals or other review proceedings (including the apparent successful respondent and its representatives) seeking a final administrative or judicial determination;
 - viii. make a complaint to the attorney general, inspector general, district attorney or court of competent jurisdiction regarding alleged improper conduct with respect to the procurement; and
 - ix. communicate with a member of the New York State legislature or legislative staff about the procurement.
- d. Offerers shall not attempt to influence the conduct of, and award of a contract under, the procurement in a manner that would result in a violation or an attempted violation of Section 73(5) (regarding certain gifts) and Section 74 (code of ethics) of the Public Officers Law. Each respondent to the solicitation must submit a properly completed

Contractor's Disclosure of Contacts form, in accordance with Executive Order 127 (Providing for Additional State Procurement Disclosure) with its proposal.

- c. As early as practicable during the restricted period, the Corporation shall seek a written affirmation from each offerer as to its understanding of and agreement to comply with State Finance Law Section 139-j and this Policy regarding permissible contacts during the restricted period. Each respondent to a solicitation who has not submitted such an affirmation prior to submitting a proposal, must submit such a written affirmation with its proposal.

3. Recording of Contacts

Upon receiving any contact during the restricted period, Corporation staff shall make a record of such contact, including the name, address, telephone number, place of principal employment and occupation of the person or organization making the contact and whether the person or organization making the contact was the potential respondent itself or was retained, employed or designated by or on behalf of the potential respondent.

4. Violations of Requirements Regarding Permissible Contacts

- a. Any member, officer or employee of the Corporation who becomes aware that an offerer has violated the provisions of State Finance Law 139-j(3) or Section 2 of this Policy regarding permissible contacts during the restricted period shall immediately notify the General Counsel of the Corporation of the impermissible contact and shall provide the Corporation's General Counsel with a copy of the record of contact.
- b. If any member, officer or employee of a governmental entity other than the Corporation becomes aware that violation regarding permissible contacts with respect to a procurement has occurred involving such other governmental entity, then such member, officer or employee shall make a record of such impermissible contact and shall immediately notify the ethics officer, inspector general, if any, or other official of the other governmental entity responsible for investigating such matters, who shall in turn notify the Corporation's General Counsel and provide the General Counsel with a copy of the record of contact.
- c. Upon receiving notice of an impermissible contact with respect to a procurement, the Corporation's General Counsel will conduct an investigation to determine whether an impermissible contact occurred and, if so, whether such impermissible contact was knowing and willful. The investigation shall include review of the record of contact and may include an interview of the individual making the report and other involved staff. The investigation may include review of such other documents or the interview of such other individuals as the General Counsel in his or her discretion may consider appropriate.

- d. The Corporation's General Counsel shall endeavor to make a determination, within ten business days of receiving any notice of impermissible contact, whether sufficient cause exists to believe that the impermissible contact occurred and that such contact was knowing and willful, but in any event shall make such determination before the award of a final procurement contract or contracts. In the event it is determined that sufficient cause exists to believe that the impermissible contact occurred and was knowing and willful, then the General Counsel shall notify the involved offerer of the date and nature of the alleged impermissible contact and of the preliminary determination that such contact was knowing and willful.
- e. The offerer shall be provided with an opportunity to submit a written response to the alleged impermissible contact within ten business days of receiving such notice. In the General Counsel's discretion, an interview with the offerer may be granted or required. In making a final determination regarding an allegation of impermissible contact, the General Counsel shall take into consideration any information provided by the offerer during the course of the investigation.
- f. In the event the General Counsel makes a final determination that an offerer has knowingly and willfully violated this policy or Section 139-j of the State Finance Law and such violation involved misconduct by a GIPEC employee in the implementation of this policy, then the General Counsel shall report such instance of employee misconduct to the Corporation's President.
- g. The notice provided for in Section 4(d) above may be sent by facsimile transmission or electronic mail provided that hard copy of such notice is also sent by overnight, personal or other method of delivery providing a delivery receipt, to the offerer at the address listed on the report of contact, in the offerer's proposal or such other address as the General Counsel may deem most appropriate.
- h. Prior to awarding any procurement contract, the Corporation shall make a determination of responsibility with respect to the proposed awardee. In making a determination of responsibility with respect to any offerer, the Corporation shall consider the proposed awardee's ability to perform the services provided for in the proposed contract including but not limited to such factors as the offerer's financial capability; level of relevant expertise; depth and qualifications of staff; if applicable, the offerer's prior performance under contracts with ESDC or any subsidiary of ESDC or other instrumentality of the State of New York; and any prior findings of non-responsibility with respect to such offerer (by any governmental entity, as defined in section (1)(a) of State Finance Law Section 139-j) made within the preceding four years.
- i. Notwithstanding any of the criteria set forth in section 4(g) above, either of the following shall result in a determination of non-responsibility with respect to any offerer: (I) a final determination, pursuant to the procedure set forth in this section 4,

that such offerer has knowing and willfully violated the provisions of this policy or State Finance Law Section 139-j, and (II) the failure by such offerer to timely disclose accurate and complete information or otherwise cooperate with the Corporation in administering this policy and the provisions of State Finance Law Section 139-j.

- j. In the event an offerer is determined to be non-responsible, such offerer and its subsidiaries and any related or successor entity with substantially similar function, management, board of directors, officers and shareholders shall not be awarded any contract pursuant to the procurement unless, by action of the Board of Directors, the Corporation finds that the award is necessary to protect public property or public health or safety and that the offerer is the only source capable of performing the contract. Any such action by the Corporation's Board of Directors shall state the basis for the finding of necessity and a record of the action and the basis shall be included in the procurement record.
- k. Any subsequent determination of non-responsibility due to a violation of State Finance Law Section 139-j within four years of a determination of non-responsibility due to such a violation shall result in the offerer's being rendered ineligible to submit a proposal on or be awarded any procurement contract for any governmental entity subject to the provisions of State Finance Law Section 139-j for a period of four years from the date of the second determination of non-responsibility.
- l. Upon making any determination of non-responsibility or ineligibility under this Section 4, the Corporation shall notify the New York State Office of General Services so that the offerer that is the subject of such determination will be included in the list of all offerers who have been determined to be non-responsible or ineligible, which list is published on the Office of General Services' website and is publicly available.

5. Required Contractual Provisions

Each procurement contract awarded by the Corporation shall contain (a) a certification by the offerer that all information provided to the Corporation with respect to Executive Order 127 and State Finance Law Section 139-j is true, complete and accurate; and (b) a provision authorizing the Corporation to terminate the contract in the event such certification is found to be intentionally false or intentionally incomplete.

6. Procurement Record

- a. The Corporation shall maintain a procurement record with respect to the procurement and the ultimate award of contracts thereunder. The procurement record shall contain such documents as evidence the material decisions made and approach taken in the procurement process, including, without limitation, the following:

- i. a full copy of the solicitation document(s) and all addenda thereto;
 - ii. a copy of all questions and answers made available to offerers;
 - iii. copies of all proposals submitted in response to the solicitation;
 - iv. all Contractor Disclosure of Contacts forms submitted in accordance with Executive Order 127;
 - v. all records of contacts, Offerer Disclosure of Prior Non-Responsibility Determinations and Offerer Affirmation of Understanding of and Agreement pursuant to State Finance Law Section 139-j made or submitted in accordance with said Section of the State Finance Law;
 - vi. all complaints to the General Counsel made pursuant to this policy; all records of the General Counsel with respect to any investigation into any allegation of a knowing and willful violation of the provisions of this policy and the State Finance Law Section 139-j regarding permissible contacts and all determinations made pursuant to such investigation;
 - vii. all determinations of responsibility or non-responsibility and other documentation of evaluations by or on behalf of the Corporation of responses to the solicitation;
 - viii. a statement describing the basis for any action taken to terminate the procurement contract because of a false, incomplete or inaccurate certification of compliance with or other violation of Executive Order 127 or State Finance Law Section 139-j.
- b. All documents comprising the procurement record shall be subject to disclosure in accordance with the provisions of the Freedom of Information Law and any other applicable law.

7. Miscellaneous

- a. Complaints or other notices to the General Counsel of the Corporation regarding the implementation of this policy shall identify the solicitation with respect to which the complaint or notice is being submitted; the entity conducting the procurement at issue; and the nature of the complaint or notice, and should be submitted to the General Counsel of ESDC at the following address, for further forwarding, if necessary:

General Counsel
 Empire State Development Corporation
 633 Third Avenue
 New York, NY 10017

- b. This policy is adopted pursuant Sections 139-j and 139-k of the State Finance Law. Nothing in this policy shall be construed as limiting the application of this law. In the event of a conflict between the provisions of this policy and the provisions of State Finance Law Sections 139-j and 139-k, the provisions of said Law shall govern.