

Erie County Medical Center Corporation

Procurement Guidelines

Effective March 1, 2018.

CONTENTS

I.	STATEMENT OF PURPOSE AND SCOPE	4
A.	Authority	4
B.	Purpose.....	4
C.	Interpretation.....	4
D.	Application of These Guidelines	4
E.	Referenced Policies.....	5
II.	DEFINITION OF TERMS	5
III.	SOURCE SELECTION	8
A.	Methods of Source Selection	8
B.	Preferred Source	8
C.	Invitation for Bid	9
D.	Request for Proposal.....	9
E.	Discretionary Procurements.....	11
F.	Medical Projects	12
G.	Exemptions from Formal Competition.	13
1.	Professional Services.....	13
2.	Additional Items under Existing Contract	13
3.	Standardization	13
4.	Sole Source	14
5.	Emergency Procurement.....	14
6.	Joint Hospital Purchases	14
7.	Group Purchasing Organizations	15
8.	Surplus and Second-Hand.....	15
9.	Recycled Products	15
10.	Government Sources.....	15
11.	Board Waiver of Competitive Requirements.....	15
12.	Professional Health Care Services.....	15
H.	Pre-qualification/Request for Qualifications	16
I.	New York State Business Enterprises.....	16
IV.	PROCEDURES and STANDARD PROVISIONS.....	16
A.	New York State Contract Reporter	16
B.	Cancellation of IFB or RFP	17
C.	Responsibility of Bidders and Respondents.....	17
D.	Compliance with Procurement Lobbying Law	18
E.	Vendor Preparation of Technology Specifications	18

F.	Contract Provisions.....	18
G.	Contract Review and Approval.....	19
H.	ECMCC Reserved Rights	19
V.	BOND REQUIREMENT.....	20
A.	Bid Security.....	20
B.	Other Forms of Security on Construction Contracts.....	21
VI.	ETHICS	21
A.	Definitions	21
B.	Conflict of Interest.....	21
C.	Kickbacks.....	21
D.	Procurement Disclosure Policy.....	21
VII.	MINORITY and WOMEN BUSINESS ENTERPRISE (“M/WBE”) REQUIREMENTS	22
A.	Scope.....	22
B.	M/WBE Goal Plan.....	22
C.	ECMCC’s Good Faith Efforts	23
D.	Documentation of Good Faith Efforts	23
E.	Contractor’s Good Faith Efforts	23
F.	Joint Ventures and Teaming Agreements	24
G.	M/WBE Utilization.....	24
H.	Self-Performance	25
I.	Commercially Useful Function.....	25
J.	Contractor Reporting	25
K.	Non-Compliance.....	25
L.	Waivers	25
M.	M/WBE Discretionary Purchases	26
N.	Consideration of Diversity Practices	27

I. STATEMENT OF PURPOSE AND SCOPE

A. Authority.

1. Public Authorities Law (“PAL”), Article 9, Title 4, New York Statutes, as amended.
2. Public Authorities Law, Article 10-C, New York Statutes, as amended (the “ECMCC Act”).
3. General Municipal Law (“GML”), Article 5-A, New York Statutes, as amended.
4. Public Health Law (“PHL”), Article 28, New York Statutes, as amended.
5. Executive Law (“EL”) Article 15A, New York Statutes, as amended.
6. State Finance Law (“SFL”), Article 9, New York Statutes, as amended.
7. Economic Development Law (“EDL”), Article 4-C, as amended.

B. Purpose.

The purpose of these Procurement Guidelines (“Guidelines”) is to set forth the procedures for purchasing supplies, equipment, materials, construction and services, including professional services, for Erie County Medical Center Corporation (“ECMCC”). These Guidelines are applicable to ECMCC and may be applied by ECMCC in other contexts, in its discretion.

C. Interpretation.

These Guidelines shall be construed and applied to promote compliance with all applicable laws. In the event of a conflict between these Guidelines and the requirements of any applicable law, the applicable law will prevail.

D. Application of These Guidelines.

1. Effective Date. These Guidelines are effective March 1, 2018.
2. Scope. These Guidelines shall apply to all contracts for construction and the purchase of all supplies, equipment, materials and services, including professional services, made by ECMCC irrespective of the source of funds, except as otherwise provided by law.
3. Severability. If any provision of these Guidelines or application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or application of these Guidelines which can be given effect without the invalid provision or application, and to this end the provisions of these Guidelines are declared to be severable.
4. Annual Review. These Guidelines, as adopted pursuant to Section 2879 of the Public Authorities Law and Section 104-b of the General Municipal

Law, shall be subject to annual review and may otherwise be changed without notice by the Board of Directors of ECMCC. The Guidelines are for the use of ECMCC and should not be relied upon as establishing any right by any person or entity other than ECMCC.

E. Referenced Policies.

1. Property Disposal Policy
2. Preferred Source Policy
3. Procurement Disclosure Policy

II. DEFINITION OF TERMS

The following terms shall, for purposes of these Guidelines, have the meanings set forth below unless the context clearly indicates a different meaning:

1. Best Value. The basis for awarding Contracts for services to a Contractor that optimizes quality, cost and efficiency, among responsive and responsible respondents. Such basis shall reflect, wherever possible, objective and quantifiable analysis. Such basis may also identify a quantitative factor for respondents that are Small Businesses or Minority- or Women-owned Business Enterprises (“M/WBE”) to be used in evaluation of Bids or Proposals for awarding of Contracts for services. In any case where a respondents’ gross price is reducible by an allowance for the value of used machinery, equipment, apparatus or tools to be traded in by a political subdivision, the gross price shall be reduced by the amount of such allowance, for the purpose of determining the Best Value. (SFL § 163(1)(j) and GML § 103).
2. Bid. An offer or proposal submitted in response to an Invitation for Bids.
3. Construction. The building, renovation, retrofitting, rehabilitation, restoration, painting, alteration or repair of any real property or improvements thereon, exclusive of the installation and assembly of any medical equipment, apparatus or device.
4. Consulting Services. Analysis, evaluation, research, training, data processing, computer programming, engineering, environmental, health, and mental health services, accounting, auditing, paralegal, legal, or similar services.
5. Contract. A written agreement, memorandum of understanding, letter agreement, letter of intent, or purchase order that formalizes the obligations of all parties involved.
6. Contractor. Any individual, business or other legal entity awarded a Contract to furnish goods or services to ECMCC.
7. Contract Value. The total value of a Contract, including all renewal options. If the value of the Contract is not known or cannot be determined at the time the Contract is awarded (i.e., a service Contract that states an hourly fee but does not state the total hours of service to be provided; a commodities Contract that states the price of the commodities but does not state the total volume of

commodities to be purchased), the Contract Value shall be the total amount that ECMCC reasonably anticipates spending under the Contract during the term and any renewal options. With respect to joint Procurements, the amount to be expended by entities other than ECMCC shall be excluded from the Contract Value.

8. County. The County of Erie, New York.
9. Foreign Business Enterprise. shall mean a business enterprise, including a sole proprietorship, partnership, limited liability company or corporation, which offers for sale, lease or other form of exchange, goods sought by ECMCC and which are substantially produced outside New York State, or services sought by ECMCC and which are substantially performed outside New York State. (PAL § 2879(5)(b)(i)).
10. Group Purchasing Organization (GPO). An entity that aggregates the purchasing volume of members, such as hospitals and health-care providers, to leverage discounts with manufacturers, distributors and other vendors intending to realize administrative savings and efficiencies. (PHL § 2803-a).
11. Invitation for Bids (IFB). A formal competitive solicitation seeking sealed Bids for Construction work or specified goods or services, pursuant to which award is made to the responsive and responsible bidder(s) submitting the lowest price, provided that Contracts for goods and services (excluding Contracts for services necessary for the completion of a Construction project) may be awarded on the basis of Best Value to a responsive and responsible bidder. Generally, IFBs are used for the Procurement of Construction, equipment, materials and supplies.
12. Medical Building. The component of a Medical Project constituting appurtenant structures or facilities necessary to house or render the remaining components of the Medical Project operational. Medical Building does not include apparatus, equipment, devices, systems, supplies, or any combination thereof. (PAL § 3628(11)(g)(iii)).
13. Medical Project. Any substantial durable apparatus, equipment, device, or system, or any combination of the foregoing, including services necessary to install, erect, or assemble the foregoing, and any Medical Building, to be used for the purpose of care, treatment or diagnosis of disease or injury or the relief of pain and suffering of sick or injured persons. Medical Projects do not include ordinary supplies and equipment expended or used in the customary care and treatment of patients. (PAL § 3628(11)(g)(iv)).
14. Minority or Women-Owned Business Enterprise (“M/WBE”). A business certified under Article 15-A of the Executive Law that is independently owned, operated and authorized to do business in New York State; and is owned and controlled by at least 51% women or minority group members, respectively, who are citizens of the U.S. or permanent resident aliens. Such ownership must be real, substantial and continuing, and the minorities or women must have and exercise the authority to control independently the day-to-day business decisions of the enterprise.

15. New York State Business Enterprise. A business enterprise, including a sole proprietorship, partnership, limited liability company or business corporation, which offers for sale or lease or other form of exchange, goods which are sought by ECMCC and which are substantially manufactured, produced or assembled in New York State, or services which are sought by ECMCC and which are substantially performed within New York State. (PAL § 2879(5)(b)(ii)).
16. New York Resident. A natural person who maintains his or her permanent and principal home, within New York State and to which such person, whenever temporarily located away from such home, always intends to return.
17. New York State Contract Reporter (“NYSCR”). A publication of procurement opportunities printed for the New York State Economic Development Bureau pursuant to the New York State Economic Development Law. (EDL §§ 141 - 143).
18. Personal Services. Any services performed for a fee, commission or other compensation by persons or organizations that are not providing such services as employees of ECMCC. Personal Services include, but are not limited to, professional services or any other services of a consulting, technical or professional nature.
19. Preferred Source. Contractors selected in accordance with ECMCC’s Preferred Source Policy and State Finance Law Section 162, offering specific commodities or services that meet the form, function and utility requirements of ECMCC.
20. Project Developer. Any individual or entity that has submitted a Proposal in response to a Request for Proposals for a Medical Project. (PAL § 3628(11)(g)(i)).
21. Procurement. The acquisition of goods and/or services.
22. Procurement Contract. Any written agreement to which ECMCC is a party for the acquisition of goods or services of any kind in the actual or estimated amount of five thousand dollars (\$5,000) or more. (EDL § 141).
23. Procurement Record. Documentation of the decisions made and the approach taken with respect to a Procurement.
24. Professional Services. Services involving the provision of advice, instruction or specialized work from an individual, firm or corporation specifically qualified or licensed to provide such services including, but not limited to, accounting, legal, health care, consulting and management services.
25. Proposal. An offer or response submitted in response to a Request for Proposals.
26. Recycled Product. A product that is manufactured from secondary materials as defined in the EDL § 261(1)(d).
27. Request for Proposal (“RFP”). A competitive solicitation seeking Proposals for a specified service or technology, pursuant to which an award is made to the responsive and responsible respondent offering the best value. Generally, RFPs are used for the Procurement of services, information technology systems, and

consultants.

28. Responsible. The status afforded an individual or company based on factors such as: financial ability and organization capacity; legal authority to conduct business in New York state; integrity as it relates to business related conduct; and past performance.
29. Responsive. Meeting the minimum Specifications or Requirements as prescribed in a solicitation for goods or services.
30. Small Business. A business which is resident in New York State, independently owned and operated, not dominant in its field and employs one hundred or less persons. (SFL § 163(1)(e)).
31. Specifications (Requirements). Description of the physical or functional characteristics or the nature of a good, the work to be performed, the service or products to be provided, the necessary qualifications of the offeror, the capacity and capability of the offeror to successfully carry out the proposed Contract, the process for achieving specific results and/or anticipated outcomes, or any other requirement necessary to perform the work.

III. SOURCE SELECTION

A. Methods of Source Selection.

Unless otherwise authorized by law, all ECMCC Contracts will be awarded in accordance with one of the following Sections of these Guidelines:

- (a) Section III.B (Preferred Source)
- (b) Section III.C (Invitation for Bid);
- (b) Section III.D (Request for Proposal);
- (c) Section III.E (Discretionary Procurements);
- (d) Section III.F (Medical Projects);
- (e) Section III.G (Exemptions);
- (F) Section III.H. (Joint Purchase).

B. Preferred Source.

Prior to engaging in any other method of source selection for the purchase of goods or services, ECMCC shall assess, in accordance with the ECMCC Preferred Source Policy and Section 162 of the State Finance Law, whether the desired goods or services are available from an offeror that has been afforded Preferred Source status. If a Preferred Source has goods or services available in the form, function and utility consistent with the needs of ECMCC, such goods or services shall be procured in accordance with the requirements of State Finance Law section 162 and ECMCC's Preferred Source Policy. If a good or service is not available in form, function and utility consistent with the needs of ECMCC from a Preferred Source, ECMCC may then exercise its authority to utilize any of the other applicable procurement methods set forth in these Guidelines.

C. Invitation for Bid.

1. Conditions for Use. Contracts will be awarded competitively by evaluating Bids submitted in response to an Invitation for Bid, except as otherwise provided in these Guidelines.
2. Invitation for Bid. When the estimated amount of Procurement exceeds \$20,000 for supplies and services, or \$35,000 for public construction projects, and does not qualify for a Request for Proposals (see Section III.D), a Discretionary Procurement (see Section III.E) or for an Exemption from Formal Competition (see Section III.G), ECMCC will issue an Invitation for Bid which shall include Specifications and the contractual terms and conditions applicable to the Procurement. (GML § 103(1)).
3. Public Notice. ECMCC must publish notice of the IFB in a daily newspaper, having general circulation in the County, at least five (5) days prior to the date set forth therein for the opening of Bids. Such notice shall state the time and place for opening of the Bids. Where applicable, ECMCC must also publish notice of the IFB in the Contract Reporter in accordance with Section IV.A. (GML § 103(2), PAL § 3628(10)(b)).
4. Bid Acceptance and Evaluation. Timely bids will be unconditionally accepted and evaluated for responsiveness based on the requirements set forth in the IFB, which may include criteria to determine acceptability such as inspection, quality, workmanship, delivery and suitability for a particular purpose.
5. Correction or Withdrawal of Bids; Cancellation of Awards. ECMCC may permit, where appropriate, the withdrawal of inadvertently erroneous Bids before or after award, or cancellation of awards or Contracts based on such Bid mistakes. After Bid opening, no changes to Bid prices or other provisions of Bids prejudicial to the interest of ECMCC or fair competition shall be permitted.
6. Award. A Contract will be awarded after all necessary approvals have been obtained by written notice to the lowest responsible and responsive bidder (or bidders, in the case of multiple awards) whose Bid meets the requirements and criteria set forth in the IFB.
7. Bid Retention. All Bids received, including all related documentation and communications received from bidders during the bidding process, will be maintained in a Procurement Record by ECMCC for twelve (12) months.

D. Request for Proposal.

1. Conditions for Use. A Contract may be solicited through an RFP rather than an IFB if the estimated amount of Procurement exceeds \$20,000 for supplies and services or \$35,000 for public construction projects and factors other than price are critical to the Procurement (such as specialized skills or equipment) and none of the exemptions described in Section III.G (Exemptions from Formal Competition) are applicable. For example, an RFP might be used for the Procurement of Personal Services or the Procurement of biotechnology, electronic, software and system applications. (GML § 103(1)).
2. Request for Proposal. ECMCC will issue an RFP, which shall include a

statement of work and/or Specifications, and the contractual terms and conditions applicable to the Procurement.

3. Public Notice. ECMCC shall, if applicable, publish notice of the IFB in the Contract Reporter in accordance with Section IV.A. ECMCC may also publish notice of the RFP in a newspaper or other publication for purposes of soliciting participation as determined by the Director of Purchasing.
4. Evaluation. Where the basis for award is the Best Value offer, the Procurement Record shall include a determination of the evaluation criteria in advance of the initial receipt of proposals, which whenever possible, shall be quantifiable, and shall describe the process to be used in the determination of Best Value and the manner in which the evaluation process and selection shall be conducted. The RFP shall set forth criteria stating the relative importance of each evaluation factor to the Procurement, including price, to be used by ECMCC during the evaluation period. Each Procurement based on Best Value shall be evaluated by a selection committee of no fewer than two (2) impartial employees or contractors of ECMCC with subject matter expertise. The Procurement Record shall include a full record of all evaluations performed by selection committee, including scorecards of the criteria.
5. Negotiations with Responsible Offeror and Revisions to Proposals. As provided in the RFP, a selection committee may conduct negotiations with responsible offerors who timely submit Proposals determined to be reasonably qualified to be selected for award. The purpose of negotiations will be to seek the Best Value for ECMCC and to clarify for and advise offerors of the deficiencies in both the technical and price aspects of their Proposals so as to assure the full understanding of and conformance to the solicitation requirements. No offeror will be provided information about any other offeror's Proposal, and no offeror will be assisted in bringing its Proposal up to the level of any other Proposal. Offerors will not be directed to reduce their Proposal prices to a specified amount in order to be considered for award. A common deadline will be established for receipt of Proposal revisions and communicated to responsible offerors.
6. Award. After evaluation of Proposal revisions, if any, award will be made to the responsible offeror (or offerors, in the case of multiple awards) whose Proposal is determined to be the most advantageous to ECMCC taking into consideration price and the evaluation factors set forth in the RFP.
7. Documentation of Award. If an award is made to an offeror who is not the lowest bidder, ECMCC shall document the factors taken into consideration, and findings indicating the requirements of ECMCC are met by the award. Such documentation shall be maintained in the Procurement Record.
8. Proposal Retention. All Proposals received, including all related documentation and communications received from offerors during the selection process, will be maintained by ECMCC for twelve (12) months.

E. Discretionary Procurements.

For purchases up to the discretionary Procurement thresholds set forth below, ECMCC

shall not be required to conduct formal competitive bidding processes. With respect to any discretionary Procurement, ECMCC must (i) ensure that the goods, services or technology acquired meet ECMCC's form, function and utility needs; (ii) document and justify the selection of the vendor; (iii) document and justify the reasonableness of the price; and (iv) ensure that the vendor is a responsible vendor. Reasonableness of price may be determined by obtaining three (3) alternate quotes or comparing the proposed price to prices paid for similar goods or services within the previous twelve (12) months.

1. Supplies and Services under \$20,000. Any Procurement of goods and services, including Professional Services, with a Contract Value that does not exceed \$20,000 including all renewal options may be made without a competitive bidding process; provided, however, that reasonable efforts shall be made to ensure that the price to be paid is reasonable. A Procurement shall not be artificially divided so as to constitute a discretionary Procurement under this Section. (GML § 103(1)).
2. Public Works under \$35,000. Any construction project with a total Contract Value that does not exceed \$35,000 may be awarded without a competitive bidding process; provided, however, that reasonable efforts shall be made to ensure that the price paid is reasonable. A construction project may not be divided into more than one project so as to constitute a discretionary Procurement under this Section. (GML § 103(1)).
3. M/WBE Goods and Services under \$200,000. Any Procurement Contract for goods or services, with a Contract Value that does not exceed \$200,000 including all renewal options, may be awarded to an M/WBE without a competitive bidding process, provided that the price for the goods or services is determined to be reasonable in accordance with the M/WBE Policy. The reasonably expected aggregate amount of all purchases of the same commodities or services from the same provider within the twelve-month period commencing on the date of the first purchase cannot exceed the \$200,000 limit. Therefore, even though the value of an individual Procurement Contract may be below the Discretionary M/WBE Procurement threshold, expected purchases during the following twelve (12) month period should be evaluated to determine whether the discretionary procurement exception is available. Where the Contract Value exceeds \$50,000, the Contract award, and if applicable, the mini-bid directed to M/WBE firms, must be advertised in the New York State Contract Reporter in accordance with Section IV.A. (PAL § 2879)
4. Small Business Goods and Services under \$200,000. Any Procurement Contract for goods or services with a Contract Value that does not exceed \$200,000, including all renewal options, may be awarded to a Small Business without competitive bidding process, provided that the price for the goods or services is determined to be reasonable. For purposes of determining reasonableness of price, the same process set forth in the M/WBE Policy shall apply to Small Business discretionary awards. The Procurement requirements shall not be artificially divided so as to constitute a discretionary Procurement under this Section III.G. Where the Contract Value exceeds \$50,000, the Contract award and, if applicable, the solicitation directed to Small Businesses, must be advertised in the New York State Contract Reporter in

accordance with Section IV.A. (PAL § 2879).

F. Medical Projects.

1. Source Selection. ECMCC may award Contracts for Medical Projects to Project Developers on the basis of factors other than cost alone, including but not limited to, facility design, system reliability, efficiency, safety and compatibility with other elements of patient care. Notwithstanding any contrary provisions of law, a Contract for a Medical Project with a Project Developer may be awarded pursuant to the competitive bidding process outlined in Section III.C (Invitation for Bid) or pursuant to the Proposal evaluation process outlined in Section III.D (Request for Proposal). (PAL § 3628(10)).
2. Public Notice. When an RFP is issued for a Medical Project, ECMCC shall publish notice of such issuance in at least one (1) newspaper of general circulation in the County. Concurrent with the publication of such notice, a draft RFP shall be filed with the County Commissioner of Health. (PAL § 3628(10)(b)).
3. Board Resolution. If after issuance of an RFP for a Medical Project, a Contract is awarded to a Project Developer who is not the lowest bidder, ECMCC shall adopt a resolution containing particularized findings indicating that the requirements of ECMCC are met by the award and that such award is in the public's best interest. (PAL § 3628(10)(b)).
4. Project Cost over \$500,000. Where a Medical Project expected to cost more than \$500,000 involves the construction of a Medical Building, ECMCC's Contract with the Project Developer shall provide that the Medical Building shall be constructed through Contracts awarded through the competitive bidding process outlined in Section III.C (Invitation for Bid) and shall require separate and independent competitive bidding in each of the following subdivisions:
 - (a) plumbing and gas fitting;
 - (b) steam heating, hot water heating, ventilating and air conditioning apparatus; and
 - (c) electric wiring and standard illuminating fixtures.(PAL §§ 3628(11)(b)(i)-(iii)).
5. Bid Security. Where a Medical Project expected to cost more than \$500,000 involves the construction of a Medical Building, the Project Developer or the Project Developer's construction subcontractors shall furnish bid security as provided in Section V.A(1). (PAL § 3628(11)).

G. Exemptions from Formal Competition.

The following types of Procurements are exempt from the competitive bidding process

and may be awarded by ECMCC without issuance of a formal IFB, provided however that unless otherwise noted herein or within the M/WBE Policy, exemption from competitive bidding shall not exempt the Procurement from applicable M/WBE participation requirements set forth in the M/WBE Policy or Contract Reporter publication requirements set forth in Section IV.A:

1. Professional Services. Where the issuance of an RFP is impractical due to the professional nature or scope of the services to be provided, such Professional Services may be procured through the solicitation of price quotations from no less than three (3) offerors. Such quotations must be obtained in writing. Award will be made to the offeror providing the Best Value to ECMCC based on an evaluation of the price and other specified factors. If factors other than price are utilized in the evaluation of the quotes, such factors shall be disclosed to all offerors at the time the price quotation is solicited. The names, addresses and/or telephone numbers of the offerors and persons contacted, along with the date and amount of each quotation shall be recorded and maintained in the Procurement Record. Any award of a Contract under this Section III.G(1) shall comply with ECMCC's M/WBE policies and procedures and the Contractor Reporter publication requirements set forth in Section IV.A.
2. Additional Items under Existing Contract. Where the need for additional items or services arises under an existing Contract awarded pursuant to an IFB or RFP, such Procurement may be made without issuing a new IFB or RFP, provided that the additional items or services were contemplated under the original IFB or RFP, are provided within eighteen (18) months of the original RFP or IFB and the quantity of additional items or services does not exceed thirty (30%) percent of the quantity of items or services procured under the original Contract. All communications and documentation related to the Procurement of additional items or services will be maintained in the Procurement Record. For avoidance of doubt, this Section shall not apply to any discretionary Procurements to the extent that the additional items or services would cause the Contract Value to exceed the discretionary Procurement threshold. To the extent that the additional items or services impact the Contract Value, and the Contract is subject to M/WBE goals, ECMCC shall require the Contractor to submit an updated M/WBE Utilization Plan in accordance with the M/WBE Policy.
3. Standardization. For reasons of efficiency or economy, purchase Contracts for equipment, material, supplies or services may be standardized to a particular make, model or brand upon the approval by at least three-fifths of the members of the Board of Directors of ECMCC. The resolution adopted by the Board shall specify the reasons that standardization is appropriate. A common reason for standardization is to ensure that equipment purchased is compatible with existing equipment or spare parts. For such purchases to be justified, the original equipment should be suitable for the required purpose, the price should be reasonable when compared to the overall cost, and the advantages of another make or source of equipment shall have been considered and rejected on grounds acceptable to ECMCC. After a resolution is adopted, ECMCC may specify the standardized make, model or brand in specification document, however all competitive processes set forth in these Guidelines must still be followed. (GML § 103(5)).

4. Sole Source. When ECMCC determines that there is only one source for required goods or services, and no other vendor offers functionally equivalent goods or services in the marketplace, a Procurement Contract for such goods or services may be awarded without competitive procedures, provided that a Sole Source Justification Form is completed by the Department initiating the Procurement and approved by the Director of Purchasing, Counsel, and ECMCC's CEO or CFO. Sole source Procurements with Contract Values exceeding \$50,000 shall be advertised in the Contract Reporter in accordance with Section IV.A. The definition of "Sole Source" under these Guidelines shall include those instances where goods or services are available from two or more vendors, but a particular vendor is preferable because of specific factors described in this section. Factors supporting an award in such a "single source" situation include: (i) legislation or appropriation mandates use of particular vendor; (ii) warranty voided if service or parts are provided by a different vendor; (iii) software license renewals, additions, or upgrades available from only one source, or (iv) other proprietary circumstances as may be identified in the Sole Source Justification Form, as may be amended. (1983 Op. St. Compt. No. 83-67)
5. Emergency Procurement. Notwithstanding any other provision of these Guidelines, ECMCC may make or authorize others to make an emergency Procurement in the event of an immediate threat to public health, welfare or safety, or to prevent or minimize serious disruption of ECMCC services jeopardizing patient health, welfare or safety; subject to the following provisions:
 - (a) The emergency Procurement shall be limited to those supplies, services or construction items necessary to meet the immediate emergency;
 - (b) Whenever practicable, approval of the CEO shall be obtained prior to the Procurement;
 - (c) Emergency Procurements shall be made with such competition as is practicable under the circumstances;
 - (d) The official responsible for the Procurement shall submit to the Board of Directors a written determination of the basis for the emergency and for the selection of the particular Contractor prior to the next meeting of the Board and the Board shall ratify the Emergency Procurement at such Board meeting. (GML § 103(4)).
6. Joint Hospital Purchases. ECMCC may participate in a joint purchasing agreement for the Procurement of goods, supplies and services with one or more other municipal, state, federal or privately-owned hospital or other health related facility or medical school that receives public funding without competitive bidding. Such cooperative or joint purchasing may include, but is not limited to, multi-party contracts between public Procurement units and open-ended public Procurement unit contracts that are made available to other entities. Such joint purchases are exempt from traditional M/WBE goals but must comply with other applicable M/WBE policies ECMCC has in place governing joint purchases. (PHL § 2803-a).

7. Group Purchasing Organizations. ECMCC recognizes purchases made through Group Purchasing Organizations as a best practice in hospital purchasing nationwide with associated efficiencies, savings and speed. ECMCC may participate in one or more group purchasing organizations (GPO). Procurements made pursuant to a GPO arrangement shall not be subject to competitive bidding processes or traditional M/WBE goals. (PHL § 2803-a).
8. Surplus and Second-Hand. Surplus and second-hand supplies, equipment and materials purchased from the federal government, New York State, or any other political subdivision, district or public benefit corporation are not subject to the competitive bidding process. (GML § 103(6)).
9. Recycled Products. Recycled products may be purchased without regard to the competitive Bid process so long as they meet the specified requirements and are reasonably competitive. Reasonably competitive shall mean that the cost of the recycled product does not exceed a cost premium of ten (10%) percent above a comparable non- recycled product. (GML § 104-a).
10. Government Sources. ECMCC may purchase from the New York State Office of General Services when the purchase exceeds \$500, or it may make purchases from the federal government, without regard to the competitive Bid process or M/WBE goals. However, when ECMCC elects to use a federal source for the purchase of goods or services, no purchase may be made where a Bid for such good or service has been received, unless the purchase may be entered into upon the same terms, conditions, and Specifications and represent a cost savings to ECMCC. (SFL § 163(3)(iv), PAL § 3628(9)).
11. Board Waiver of Requirements for Competitive Selection of Contractors. The ECMCC Board may, by resolution, waive requirements for the competitive selection of contractors for a specific procurement that otherwise would be awarded on a competitive basis when such waiver is in the best interest of ECMCC. Accordingly, the Board of Directors may, upon careful deliberation and a vote of 2/3 of the Directors present at a meeting of the Board at which such Contract is presented, waive the selection of contractors on a competitive basis when doing so is in the best interest of ECMCC. (PAL § 2879(3)(b)(i)).
12. Professional Health Care Services. Contracts for professional health care services including but not limited to services performed by health care agencies or entities, physicians, dentists, physician's assistants, home health and personal care aides, occupational, speech, respiratory and physical therapists, nurses, nurses' assistants, medical and laboratory technicians, diagnosticians, social workers, psychiatric workers, veterinarians, and persons who provide care, treatment, counseling, case management, rehabilitative or preventative services to the mentally ill, developmentally disabled and those suffering from the disease of alcoholism or substance abuse are exempt from competitive bidding.

H. Pre-qualification/Request for Qualifications.

Prospective suppliers may be pre-qualified for particular types of supplies, services or construction. Such pre-qualification, however, is subject to subsequent

review and does not necessarily constitute a finding of responsibility for any particular contract award nor does it guarantee an amount to be awarded. Notice of the Request for Qualifications shall be published at least annually in a newspaper of general circulation, and shall be published in the New York State Contract Reporter, similar to an IFB/RFP. The pre-qualified vendor list generated by the Request for Qualifications shall not contain less than five (5) bidders and must remain open for additional qualified bidders. Prequalification of bidders does not constitute competitive bidding. An IFB or RFP must still be used to determine how a particular Procurement will be awarded. (GML § 103(15)(b)).

I. New York State Business Enterprises.

It is the goal of ECMCC to promote the participation of New York State Business Enterprises and New York State Residents in Procurement Contracts. (PAL §§ 2879(3)(n)-(p)).

IV. PROCEDURES and STANDARD PROVISIONS

A. New York State Contract Reporter. All Procurements (other than joint purchases and contracts for health care services) of goods, services or public works having a Contract Value of Fifty Thousand Dollars (\$50,000) or more shall be published in the New York State Contract Reporter (except as provided below).

1. Notice of Procurement. For all Procurement Contracts with a Contract value equal to or greater than \$50,000 ECMCC will, prior to issuing an IFB or RFP, submit the following information to the New York State Contract Reporter website: (a) ECMCC's name and address; (b) the IFB or RFP number; (c) a brief description of the goods and/or services sought, the location where goods are to be delivered and/or services provided and the contract term; (d) the address where bids or proposals are to be submitted; (e) the due date for Bids or Proposals; (6) a description of any eligibility or qualification requirements or preferences; (7) a statement as to whether the contract requirements may be fulfilled by a subcontracting, joint venture or coproduction arrangement; (8) any other information deemed useful to potential contractors; (9) the name, address, and phone number of the person to be contacted for additional information and (10) a statement as to whether the goods and/or services sought have, in the immediately preceding three-year period, been supplied by a Foreign Business Enterprise (as defined in EDL § 141(2)). The notice of Procurement opportunity shall appear in the NYSCR at least fifteen (15) business days prior to the Bid or Proposal due date. (EDL § 142(2)(c)).
2. Notice of Contract Award. At the time a determination of intent to award a Procurement Contract is made, the following information shall be submitted for publication in NYSCR:
 - (a) For Procurement Contracts obtained through IFB, the result of the Bid opening including the names of bidding firms and the amounts bid by each;
 - (b) For Procurement Contracts obtained through RFP or quote solicitation, the names of vendors submitting

Proposals or quotes and the vendor submitting the selected Best Value Proposal or quote.

- (c) For all other Procurement Contracts (including Procurement Contracts with a value of \$50,000 or more awarded on a sole source or single source basis, including such Contracts not exceeding \$200,000 awarded to Small Businesses or M/WBE firms, or for the purchase of goods and/or technology that are recycled or remanufactured, and certain other Procurement Contracts exempt from the general advertising requirement for procurement contract bidding opportunities), the name of the proposed awardee. (EDL §§ 143(2)-(3)).

- 3. Exemptions. This Section IV.A shall not apply (a) in the event of an Emergency Procurement, (b) if the Procurement is being resolicited within forty-five (45) business days after the date Bids or Proposals were originally due, or (c) to Procurement Contracts awarded to not-for-profit human services providers. (EDL § 144).

B. Cancellation of Invitation for Bid or Request for Proposal.

An IFB, RFP or other solicitation may be canceled, or any or all Bids or Proposals may be rejected in whole or in part as may be specified in the solicitation or otherwise, when it is in the best interest of ECMCC. The reasons for the cancellation or rejection shall be made part of the Procurement Record. (GML § 103(1)).

C. Responsibility of Bidders and Respondents.

- 1. Standards. Factors to be considered in determining whether the standard of “responsibility” has been met include whether a prospective contractor has:
 - (a) Available the appropriate financial, material, equipment, facility and/or personnel resources and expertise, or the ability to obtain them, necessary to indicate its ability to meet all contractual requirements;
 - (b) A satisfactory record of performance with projects of a similar size and nature;
 - (c) A satisfactory record of integrity;
 - (d) Qualified legally to contract with ECMCC; and
 - (e) Promptly supplied all necessary information in connection with the inquiry concerning responsibility.
- 2. Written Determination of Non-Responsibility or Nonresponsiveness Required. If a bidder or offeror who otherwise would have been awarded a contract is found non-responsible or nonresponsive, ECMCC shall issue a written determination of non-responsibility or nonresponsiveness setting forth the basis of the finding.

D. Compliance with Procurement Lobbying Law. In accordance with ECMCC’s Procurement Disclosure Policy, bidders and offerors are required to disclose prior violations of the Procurement Lobbying Law and certify compliance with ECMCC’s

Procurement Disclosure Policy. ECMCC shall investigate any report of violation of the Procurement Disclosure Policy. Failure to comply with the Procurement Disclosure Policy may result in the disqualification of a Contractor from future Procurement opportunities.

E. Vendor Preparation of Technology Specifications. If a vendor prepares and furnishes specifications for a technology Procurement proposal, to be used in a competitive Procurement, such vendor shall not be permitted to bid or propose on such Procurement, either as a prime vendor or as a subcontractor. Contracts for evaluation of offers for products or services shall not be awarded to a vendor that would then evaluate its own offers for products or services. Such restrictions shall not apply where:

1. The vendor is the sole source or single source of the product or service;
2. More than one vendor has been involved in preparing the specifications for a Procurement proposal; or
3. A vendor has furnished at ECMCC's request specifications or information regarding a product or service they provide, but such vendor has not been directly requested to write specifications for such product or service or an ECMCC technology procurement proposal.

F. Contract Provisions.

1. All Contracts for Personal Services shall detail the scope of services to be performed and the time frame for performance, the monitoring or reviewing of that performance by ECMCC personnel and, where appropriate, any permitted use of supplies, facilities or personnel. Such contracts also shall state the compensation for the services, the timing of payment, the preconditions for receiving payment from ECMCC, procedures for termination of the contract and any other provisions counsel deems necessary or appropriate for each particular contract. If the performance of any contract permits or requires the use of subcontractors, the Contract shall require the Contractor to act affirmatively to secure such participation by M/WBEs and to report the nature and extent of such efforts to ECMCC in accordance with predetermined ECMCC participation goals.
2. All Contracts awarded through one of the competitive Bid processes also must include the following non-collusive bidding certification language:
 - (a) 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 knowledge and belief:
 - The prices in this bid have been arrived at independently without collusion, consultation, communication, or agreement, for the purpose of restricting competition, as to any matter relating to such prices with any other bidder or with any competitor;
 - Unless otherwise required by law, the prices which have been quoted in this bid have not been knowingly disclosed by the

bidder and will not knowingly be disclosed by the bidder prior to opening, directly or indirectly, to any other bidder or to any competitor; and

- Unless otherwise required by law, the prices which have been quoted in this bid have not been knowingly disclosed by the bidder and will not knowingly be disclosed by the bidder prior to opening, directly or indirectly, to any other bidder or to any competitor; and
- No attempt has been made or will be made by the bidder to induce any other person, partnership or corporation to submit or not to submit a bid for the purpose of restricting competition.

G. Contract Review and Approval.

1. General Counsel. All contracts and amendments to contracts must be reviewed and approved by ECMCC's General Counsel, with the exception of renewals or extensions to existing contracts upon the same terms and conditions previously reviewed and approved by the General Counsel. General Counsel may designate an attorney member of the Office of General Counsel to perform review in any particular instance.
2. Board Approval of Non-Budgeted Contracts. Any Contract with a Contract Value in excess of \$500,000 that does not appear in the budget must be approved by the Board of Directors.
3. Board Approval and Annual Review of Certain Contracts for Services. Any Procurement Contract for services with an actual or anticipated term of more than one (1) year must be approved by and annually reviewed by the Board of Directors. (PAL § 2879).
4. Signing Authority. The CEO, CFO and President are the only persons authorized to sign Contracts on behalf of ECMCC.

H. ECMCC Reserved Rights. The following statement of reserved rights may be incorporated in all RFPs and IFBs.

ECMCC reserves the right to:

1. Reject any and all proposals submitted in response to this Request for Proposals or Invitation for Bids;
2. Disqualify any respondent whose conduct or proposal fails to conform to the requirements of this RFP/IFB;
3. Withdraw this RFP/IFB at any time at its sole discretion;
4. Prior to submission of proposals to amend the RFP/IFB specifications to correct errors or oversights, or to supply additional information as it becomes available;
5. Change any of the scheduled dates;

6. Waive any requirements that are not material;
7. Waive any non-conformity with the requirements of this RFP/IFB;
8. Terminate this RFP/IFB process at any time;
9. Seek clarification from a respondent at any time throughout the RFP/IFB process for the purpose of resolving ambiguities or questioning information presented in proposals;
10. Award the contract in whole or in part and/or apportion the award among one or more respondents;
11. Negotiate final terms with the successful respondent(s);
12. Conduct contract negotiations with the next responsible bidder, should ECMCC be unsuccessful in negotiating with the selected bidder; and
13. Prepare a list of finalists based on initial proposal evaluations and request that finalists present in-person or telecommunicated presentations to ECMCC.

V. BOND REQUIREMENT

A. Bid Security.

1. Requirement for Bid Security on Construction Contracts. Bid security shall be required for Contracts involving the construction of a Medical Building when the cost is estimated to exceed \$500,000. Bid security shall be in the form of a bond from the Project Developer or the Project Developer's construction subcontractor guaranteeing prompt payment when due to all persons furnishing labor and materials. Such bond shall be provided by a surety company authorized to do business in New York, or the equivalent in cash or otherwise supplied in a form satisfactory to ECMCC. Nothing herein prevents the requirement of such bonds on other construction Contracts or Contracts valued under \$500,000 when the circumstances warrant. (PAL § 3628(11))
2. Bid Security on Supply or Services Contracts. Bid security may be required for supply or service contracts, as ECMCC deems necessary to protect ECMCC's interests. Any security requirements shall be set forth in the solicitation. Bid security shall be a bond provided by a surety company authorized to do business in New York or the equivalent in cash or otherwise supplied in a form satisfactory to ECMCC. Bid security shall not be used as a substitute for a determination of a bidder or offeror's responsibility.
3. Rejection of Solicitations for Noncompliance with Bid Security Requirements. When the solicitation requires security, noncompliance requires that the Bid or Proposal be rejected unless otherwise waived by ECMCC pursuant to these Guidelines. (PAL § 3628(11)).

B. Other Forms of Security on Construction Contracts.

ECMCC may require other forms of security to assure timely, faithful and uninterrupted performance, including, but not limited to, operations period surety bonds, letters of credit, and appropriate written guarantees from the Contractor.

VI. ETHICS

A. Definitions.

1. Direct and Indirect Participation. Involvement through decision, approval, disapproval, recommendation, preparation of any part of a purchase request, influencing the content of any specification or Procurement standard, rendering of advice, investigation, auditing, or in any other advisory capacity.
2. Employee. Any individual drawing a salary from ECMCC or any non-compensated individual performing services for ECMCC.
3. Relative. An individual residing in the same household as the ECMCC employee and any individual who is a direct descendent of the employee's grandparents or the spouse of such descendent.

B. Conflict of Interest.

1. Conflict of Interest. It shall be a breach of ethical standards for any employee to participate directly or indirectly in a Procurement when the employee knows that:
 - (a) The employee or a relative of the employee has a financial interest pertaining to the Procurement;
 - (b) A business or organization in which the employee or relative is involved has a financial interest pertaining to the Procurement;
 - (c) Any other person, business, or organization with whom the employee or relative is negotiating or has an arrangement concerning prospective employment is involved in the Procurement.

C. Kickbacks.

It shall be a breach of ethical standards for any payment, gratuity, or offer of employment to be made by or on behalf of a subcontractor under a contract to the prime contractor, higher tier subcontractor or any person associated therewith, or a relative of such contractors or subcontractors, as an inducement for the award of a subcontract or order.

D. Procurement Disclosure Policy.

ECMCC, its officers, agents and representatives shall comply with State Finance Law Sections 139-j and 139-k and ECMCC's Procurement Disclosure Policy with respect to all Procurements with an estimated annualized expenditure of \$15,000.

VII. MINORITY AND WOMEN BUSINESS ENTERPRISE (“M/WBE”) REQUIREMENTS.

A. Scope. All Procurement Contracts entered into by ECMCC exceeding \$25,000 for labor, services, supplies, equipment, or materials or exceeding \$100,000 for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements, must comply with the M/WBE requirements set forth in New York State Executive Law Article 15-A, as well as 5 NYCRR Parts 142-144 (“M/WBE Regulations”) (“State Contracts”). With respect to procurement of services and commodities, ECMCC shall consider the reasonably expected aggregate amount of all purchases of the same commodities or services to be made within a twelve (12) month period commencing on the date of purchase when determining whether these requirements apply. Aggregate purchases of the same commodities or services within a twelve (12) month period are deemed a single transaction.

B. M/WBE Goal Plan.

1. Annually, ECMCC shall submit to the director of the NYS Department of Economic Development, Division of Minority and Women’s Business Development (the “Division”), an M/WBE Goal Plan setting forth the percentage of ECMCC expenditures targeted for the participation of M/WBEs in the following State Contract categories:

- Construction;
- Commodities;
- Construction related professional services; and
- Non-construction related professional and non-professional services.

2. Establishment of Goals. ECMCC shall review all State Contracts and establish overall goals for each contract as well as goals for specific MBE and WBE participation, as required by 5 NYCRR 142.2. Generally, ECMCC is committed to achieving an overall M/WBE utilization percentage of thirty percent (30%) of ECMCC’s Agency Budget, which percentage goal may be amended from time to time as set forth in the M/WBE Goal Plan (the “M/WBE Goal”). This goal is generally subdivided into twenty percent (20%) MBE and ten percent (10%) WBE participation, but may be reduced or increased on an individual basis at ECMCC’s discretion.

3. Exempt and Excluded Expenditures. The M/WBE Goal Plan includes a list of “Exempt” and “Excluded” expenditures, which expenditures are not included in ECMCC’s agency budget. Such exemptions and exclusions shall include those otherwise described within these Guidelines, but may also include other areas that ECMCC determines insufficient M/WBE utilization is available.

4. State Contract Goals. Each IFB, RFP, and proposed contract that is expected to result in a State Contract (other than an exempt or excluded State Contract) shall set forth the M/WBE Goal for the State Contract.

Individual goals may be set for each State Contract, taking into consideration the factors set forth in 5 NYCRR 141.2(e). Each IFB and RFP shall include detailed instructions on M/WBE compliance and requirements to be met in responding the IFB or RFP.

C. ECMCC's Good Faith Efforts. For all procurements anticipated to result in a State Contract (other than an exempt or excluded State Contract), ECMCC shall employ good faith efforts to achieve M/WBE participation in accordance with 5 NYCRR 141.6, including, but not limited to, the following notice of solicitation strategies:

1. NYS Contract Reporter. With respect to all procurements expected to result in a State Contract exceeding \$50,000, such procurements shall be advertised in the New York State Contract Reporter.
2. Direct Solicitation of M/WBEs. Notice of the solicitation (by email or letter) shall be sent by ECMCC's Department of Purchasing directly to certified M/WBEs that have been identified by ECMCC as M/WBE vendors qualified to provide the service or commodity.
3. Other Media. Advertisements for RFPs, IFBs and other solicitations anticipated to result in a State Contract will also be placed in minority and women-focused media as appropriate.

D. Documentation of Good Faith Efforts. ECMCC shall document its Good Faith Efforts by including in the procurement record: (1) documentation showing M/WBE vendors, organizations and associations that were solicited and/or copies of advertisements placed in general circulation media, trade association, publications and/or minority-focused media, and (2) all bids, quotes, proposals or other responses received from M/WBE vendors.

E. Contractor's Good Faith Efforts. When an opportunity for subcontracting or indirect expenditure with an M/WBE firm exists on a State Contract, ECMCC shall ensure that prime vendors employ a good faith effort to utilize M/WBE subcontractors as required under 5 NYCRR 142.8. In determining whether a Contractor has made good faith efforts to utilize M/WBE subcontractors, ECMCC shall consider, at a minimum, whether the Contractor has undertaken the following efforts:

1. Solicit certified M/WBEs and provide copies of solicitations and responses thereto upon ECMCC's request;
2. Advertise for participation of M/WBEs in in appropriate general circulation, trade and minority- or women-oriented publications, and provide copies of the listing(s) and date(s) of the publication to ECMCC upon request; and
3. Undertake steps to reasonably structure the contract scope of work for the purpose of subcontracting with, or obtaining supplies from, certified M/WBEs.

F. Joint Ventures and Teaming Agreements.

Where a State Contract does not afford opportunities for subcontracting or subconsulting, potential contractors shall be encouraged to enter into joint ventures and teaming agreements with M/WBEs.

1. Joint Venture. A contractual agreement joining together two or more business enterprises, one of which is a certified M/WBE, for the purpose of performing on a State Contract. The M/WBE must provide a percentage of value added services representing an equitable interest in the joint venture. All parties to the joint venture must agree to share in the profits and losses of the business endeavor according to their percentage of equitable interest.
2. Teaming Agreement. A utilization plan arrangement between two or more business enterprises, one of which is a certified M/WBE, to perform on a specific State Contract if awarded to the team. The team itself may be a joint venture, or one of the team members may be designated to act as the prime contractor, and the other member(s) designated to act as subcontractors.
3. Information Required. In the event that a contractor responding to a solicitation is a joint venture, teaming agreement, or other similar arrangement that includes a certified M/WBE, such a contractor must submit the M/WBEs identifying information, including federal identification number and copy of certification, as well as a copy of the joint venture or teaming agreement.

G. M/WBE Utilization.

1. M/WBE Utilization Plan. With respect to procurements that are anticipated to result in the execution of a State Contract, ECMCC shall include a blank M/WBE Utilization Plan with any IFB, RFP, or proposed contract (where the contract is exempt from competition requirements set forth in GML § 103).
2. Review of Utilization Plan. ECMCC shall review and approve all M/WBE documentation (Utilization Plan, Staffing Plan, etc.), or otherwise notify the potential contractor of disapproval or deficiency of the documentation within twenty (20) business days of submission, as required by 5 NYCRR §142.4. If the Utilization Plan is not approved, the M/WBE Program Coordinator will provide the contractor with a written notice of deficiency of the Utilization Plan within twenty (20) business days of its receipt, as required under 5 NYCRR Part 142.6(c). The potential contractor must respond to the notice of deficiency by submitting to the M/WBE Compliance Coordinator a written remedy within the period of time set forth in the bid or RFP documents, as permitted by 5 NYCRR Part 142.6(e). If the written remedy submitted is found to be inadequate, the M/WBE Compliance Coordinator will notify the contractor and may request the contractor to submit a request for a waiver. If a contractor is deemed non-responsive or non-responsible by ECMCC in accordance with Section any request for waiver shall be deemed to be moot (5 NYCRR Part 142.7(a) (1) (b)).

3. Determination of Non-Responsiveness. ECMCC may disqualify a potential contractor as non-responsive (5 NYCRR §142.6(f)) to the requirements of NYS Executive Law Article 15-A upon the occurrence of any of the following:

- (i) Contractor fails to submit a M/WBE Utilization Plan in accordance with the requirements of this Policy or apply for a waiver;
- (ii) Contractor fails to submit a written remedy in response to a notice of Utilization Plan deficiency in accordance with this Policy;
- (iii) Contractor fails to submit a request for waiver upon request by ECMCC;
- (iv) Denial of a request for waiver by the M/WBE Compliance Coordinator or the Division; or
- (v) M/WBE Compliance Coordinator determines that the contractor has failed to perform good faith efforts.

H. Self-Performance. Contractors that are NYS certified M/WBEs and will self-perform all or a portion of a State Contract may count the value of the self-performed work as either MBE or WBE involvement up to the dollar value of such involvement. Contractor must also engage participation from another MBE or WBE firm of the opposite designation in order to meet the requirements of ECMCC's M/WBE Program. Example: On a contract for supplies with a 30% M/WBE goal (15% MBE and 15% WBE), ABC Company is a WBE and intends to self-perform 20% of the contract work. Company ABC may count 20% of the contract value as WBE utilization performed by Company ABC. Company ABC must still engage at least one NYS certified MBE as a subcontractor or supplier to perform at least 15% of the contract work in order to meet the M/WBE requirements of the contract.

I. Commercially Useful Function. In accordance with 5 NYCRR 140.1(f), only sums paid to M/WBEs for the performance of a commercially useful function may be applied towards the achievement of the applicable M/WBE participation goal. An M/WBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. An M/WBE does not perform a commercially useful function if its role adds no substantive value and is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of participation.

J. Contractor Reporting. The State Contract shall require contractor to submit monthly M/WBE utilization reports throughout the term of the Contract.

K. Non-Compliance. Contractors who fail to comply with the utilization percentages set forth in their approved Utilization Plan shall be subject disqualification, liquidated damages, termination of the State Contract, or other enforcement as set forth in the Contract.

L. Waivers. If a contractor or potential contractor, after engaging in good faith efforts as described within the M/WBE Regulations, is unable to achieve the M/WBE goals applicable to the RFP, IFB, or State Contract, ECMCC may permit the contractor to request a total or partial waiver of the M/WBE goals by submitting a request for waiver accompanied by documentation of good faith efforts. Within seven (7)

business days of submission, ECMCC will determine in its discretion whether the request should be approved, denied, or whether additional action should be taken by the contractor to reach the applicable goal. Contractors are responsible for preparation of all Requests for Waiver and supporting documentation, and waiver requests that do not contain sufficient documentation of Good Faith Efforts should not be approved.

M. M/WBE Discretionary Purchases. Consistent with New York Public Authorities Law Section 2879, where goods or services are available from certified M/WBEs, procurements may be made by ECMCC in amounts not exceeding \$200,000 without competitive bidding, in accordance with the March 31, 2015 resolution of the ECMCC Board of Directors (each a “Discretionary M/WBE Procurement”). ECMCC must document in the procurement record support for both the reasonableness of the price and the selection of the M/WBE vendor. Any contracts entered into as Discretionary M/WBE Procurements must include language providing for the termination of the agreement should the M/WBE lose its state certification.

1. Solicitation of discretionary quotes. When making a Discretionary Procurement, ECMCC may solicit quotes from multiple M/WBE vendors (“M/WBE Mini-Bid”). Generally, the Discretionary M/WBE Procurement should be awarded to the responsible M/WBE vendor submitting the lowest price.

2. Advertisement of Discretionary M/WBE Procurements.

Advertising requirements under NYS Economic Development Law still apply to Discretionary M/WBE Procurements. The language that should be used for advertisement of a Discretionary M/WBE Procurement is as follows for M/WBE Mini-Bids (as described below):

“ECMCC intends to procure [insert project description, i.e. 1,000 widgets] pursuant to its discretionary purchasing authority under New York Public Authorities Law section 2879. This procurement opportunity is limited to New York State businesses certified pursuant to Article 15-A of the New York State Executive Law.”

If this is not intended as an M/WBE Mini-Bid, the following language shall be used:

“ECMCC intends to procure [insert project description, e.g. 1,000 widgets] as a discretionary spend pursuant to its purchasing authority under New York Public Authorities Law section 2879. ECMCC will procure these services or goods from a New York State businesses certified pursuant to Article 15-A of the New York State Executive Law. This is not a bid opportunity. Please do not contact ECMCC requesting bid information.”

3. Negotiation of Procurement Price. When an M/WBE submits a quote for a commodity or service in a Discretionary M/WBE Procurement (not exceeding \$200,000) and the quote is deemed high, ECMCC should engage in direct negotiation with the M/WBE vendor in an attempt to reach

reasonableness of price. This step is not permitted for a competitive procurement.

4. Reasonableness of Price. ECMCC must document in the procurement record the “reasonableness of price” for any Discretionary M/WBE Procurement. Generally, reasonableness of price can be determined by: (1) Comparing the quoted price with the price for the same or similar services purchased within the last six months; (2) Comparing the price with other quoted prices; (3) Comparing the quoted price with prices in various procurement publications; (4) Reviewing the type of work that was previously accepted by ECMCC at a similar price; or (5) Comparing the price of the product or service with the current market value of the same product or service.
5. Justification for the Selection of M/WBE Vendor. ECMCC must document justification for the selection of the M/WBE vendor in the procurement record. Selection may be supported by: (1) demonstrating reasonableness of cost; (2) showing enhanced or best value provided by the vendor; (3) (if applicable) noting the vendor is a NYS small business; and (4) identifying the vendor as an M/WBE (this cannot be the sole justification).

N. Consideration of Diversity Practices.

1. Generally. ECMCC may consider potential contractors’ “Diversity Practices” in awarding contracts in excess of \$250,000 that are not subject to formal competitive bidding, and are awarded on the basis of best value. With respect to such contracts awarded through the RFP process and anticipated to be in excess of \$250,000, prior to issuing the RFP, ECMCC shall determine whether it is practical, feasible and appropriate to include Diversity Practices in the evaluation. If ECMCC makes a determination that the evaluation of Diversity Practices is not practicable, feasible, or appropriate for service contracts, such determination shall be supported in writing in the procurement record.
2. Diversity Practices. A contractor's “diversity practices” are its past, present, and prospective practices and policies with respect to: (a) utilizing certified M/WBEs in contracts awarded by New York State agencies, other public entities or private sector companies, as subcontractors and suppliers; and (b) entering into partnerships, joint ventures or other similar arrangements with certified M/WBEs as defined in this part or other applicable federal, state, or local statutes or regulations, or certified by the certifying entities recognized by the Division governing an entity's utilization of minority or women-owned business enterprises, and (c) any other information requested by that demonstrates the contractor's commitment to a policy of diversity practices related to M/WBEs.
3. Determination of Practicality or Feasibility. A determination by ECMCC as to whether it is practical, feasible and appropriate to assess the diversity practices of all prime contractors making such submissions shall include consideration of the: (1) nature of the labor, services, supplies, equipment and materials being procured; (2) method of procurement undertaken to make the award; (3) certified M/WBE utilization plans required by ECMCC;

and (4) availability of certified M/WBEs in the region in which the contract is to be performed.

4. Diversity Practice Submissions. Where ECMCC determines with respect to a particular contract that Diversity Practices will be considered in awarding the Contract, ECMCC shall require all potential contractors to complete and submit a Diversity Questionnaire and shall consider the potential contractors' Diversity Practices as a factor in making a determination regarding contract award.