

Policy Regarding Permissible Contacts
under State Finance Law Section 139-j and 139-k
with respect to the
Request for Statements of Qualification for
Public Open Space Professional Design Services: Governors Island, New York City

Issued: October 23, 2006
Submission Date: November 15, 2006

1. Definitions

The following terms shall have the following meanings:

- a. "Contact" or "contacts" shall mean any oral, written or electronic communication, under circumstances from which a reasonable person would infer that the communication was intended to influence the RFQ, with any of the following: GIPEC; the State of New York or any of its agencies or instrumentalities including the New York State Urban Development Corporation d/b/a Empire State Development Corporation and the Department of State; the City of New York and any of its agencies or instrumentalities, including the New York City Economic Development Corporation; and any of their officers, directors, commissioners or other officials, employees, agents, consultants or other contractors or subcontractors or other representatives.
- b. "GIPEC" shall mean Governors Island Preservation and Education Corporation, a subsidiary of the New York State Urban Development Corporation d/b/a Empire State Development Corporation, which is under the common management and direction of the City of New York and State of New York.
- c. "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.
- d. "RFQ" shall mean the Request for Statements of Qualification for Public Open Space Professional Design Services issued October 23, 2006, as the same may be amended or supplemented from time to time.
- e. "Restricted period" shall mean the period of time commencing with the earliest written notice or advertisement of the availability of the RFQ and concluding, with respect to each offerer, with the execution of a final contract or contracts.

2. Permissible Contacts during the Restricted Period

- a. All comments and questions from offerers regarding the RFQ must be in writing and electronically submitted to GIPEC at: ParkRFQ-GIPEC@empire.state.ny.us. However, for the purpose of compliance with State Finance Law Section 139-j, contacts with Betty Chen, Ellen Cavanagh, or Jennel Hewan as additional permissible contacts may be amended from time to time, will be considered permissible.
- b. Offerers shall only communicate 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 the RFQ as provided for in the RFQ;
 - ii. submit written questions as provided for in the RFQ;
 - iii. participate in any pre-bid conference or site visit as provided for in the RFQ;
 - iv. make a complaint in writing to the general counsel of GIPEC 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 contract pursuant to the RFQ, 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 contract pursuant to the RFQ;
 - vii. participate in protests, appeals or other review proceedings (including the apparent successful RFQ respondent and its representatives) seeking a final administrative 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 RFQ; and
 - ix. communicate with a member of the New York State legislature or legislative staff about the RFQ.
- d. Offerers shall not attempt to influence the conduct of, and award of a contract or contracts under, the RFQ 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.
- e. GIPEC 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 for the RFQ. In any event, each respondent to the RFQ must submit such a written affirmation with its proposal, as set forth in the RFQ. A Form of Affirmation of Understanding of and Agreement pursuant to State Finance Law Section 139-j(3) and 139-j(6)(b) is attached to this policy as Attachment 3.

3. Recording of Contacts

Upon receiving any contact during the restricted period, GIPEC staff or staff of any other governmental entity 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. A form of Governmental Entity Report of Contact Under State Finance Law Section 139-k(4) is attached to this Policy as Attachment 4.

4. Violations of Requirements Regarding Permissible Contacts

- a. Any member, officer or employee of GIPEC 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 for the RFQ shall immediately notify the General Counsel of GIPEC of the impermissible contact and shall provide the GIPEC General Counsel with a copy of the record of contact.
- b. If any member, officer or employee of a governmental entity other than GIPEC becomes aware that violation regarding permissible contacts with respect to this RFQ 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 GIPEC General Counsel and provide the GIPEC General Counsel with a copy of the record of contact.
- c. Upon receiving notice of an impermissible contact with respect to the RFQ, the GIPEC 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 GIPEC 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 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 President of GIPEC.
- 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 registration pursuant to the requirements of the RFQ, in the offerer's proposal, or such other address as the General Counsel may deem most appropriate.
- h. Prior to awarding any contract pursuant to the RFQ, GIPEC shall make a determination of responsibility with respect to the proposed awardee. In making a determination of responsibility with respect to any offerer, GIPEC 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 GIPEC or other instrumentality of the State of New York, the City of New York or instrumentalities of the City of New York; and any prior findings of non-responsibility with respect to such offerer 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 knowingly 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 GIPEC 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 RFQ unless, by action of the Board of Directors, GIPEC 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 GIPEC 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 for the RFQ.

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

6. Procurement Record

- a. GIPEC shall maintain a procurement record with respect to the RFQ 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 RFQ 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 RFQ;
 - iv. all Contractor Disclosure of Contracts 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 GIPEC of responses to the RFQ;
 - viii. a statement describing the basis for any action taken to terminate a contract awarded pursuant to the RFQ 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.

7. Miscellaneous

- a. Complaints or other notices to the General Counsel of GIPEC regarding the implementation of this policy shall be addressed to:

General Counsel
Governors Island Preservation and Education Corporation
c/o 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.