

**RESOLUTION ADOPTING GUIDELINES
FOR PROCUREMENT CONTRACTS**

WHEREAS, Section 2879 of the Public Authorities Law was enacted for the purpose of establishing guidelines governing each public authority and public benefit corporation: and

WHEREAS, the Governor Nelson A. Rockefeller Performing Arts Center Corporation, heretofore known as the Empire Center, is a public benefit corporation organized and operating pursuant to the provisions of Section 1350 and seq. of the Public Authorities Law of the State of New York; and

WHEREAS, said Section 2879 of the Public Authorities Law defines personal service contracts to mean written agreement to provide a service including but not limited to a legal, accounting, management, consulting, investment banking, planning, training, statistical, research, public relation, architectural, engineering, surveying or other personal services of a consulting, professional or technical nature for a fee, commission, or other compensation be a person or persons who are not providing such service as officers or employees of a state agency or public corporation;

NOW, BE IT RESOLVED, that the Empire State Performing Arts Corporation does hereby establish the following guidelines which detail the Center's operative policy and instructions regarding the use, awarding, monitoring and reporting of personal service contracts.

GUIDELINES FOR PROCUREMENT CONTRACTS

1. TITLE.

The following comprehensive guidelines detailing the operative policy and instructions of the Empire Center regarding the use, awarding, monitoring, and reporting of procurement contracts, shall be known as "Guidelines for Procurement Contracts". They shall be referred to herein as the "Guidelines".

2. DEFINITIONS.

A. Procurement Contract – any written agreement for the acquisition of goods or services of any kind, in the actual or estimated amount of \$5,000 or more.

B. Contract for Goods and Services – any written agreement to provide a good or service (other than those hereinafter defined as personal services), pertaining to building operation and maintenance, office equipment and supplies, printing, promotional materials, or any other similar item or items.

C. Contract for Personal Services – any written agreement to provide a service, including but not limited to legal, accounting, management consulting, investing, banking, planning, training, statistical, research, public relations, architectural, engineering, surveying, performance (of an artistic or entertainment nature), or personal services of a consulting, professional, or technical nature, for a fee, commission, or other compensation by a person or persons not providing such services as an officer or employee of a state agency or public benefit corporation.

D. Minority Business Enterprise –

1. Any business enterprise, including a sole proprietorship, partnership or corporation that is:

a. An enterprise in which at least 51% of the ownership of which is controlled by one or more minority group member, or in the case of a publicly – owned business at least 51% of the common stock or other voting interests of which is owned by one or more minority group member;

b. An enterprise in which the minority ownership is real, substantial, and continuing;

c. An enterprise in which the minority ownership has and exercises the authority independently to control the day-to-day business decisions of the enterprise; and

d. An enterprise authorized to do business in New York State, independently owned and operated, and not dominant in its field.

2. For the purpose of these Guidelines, a minority group member means a United States citizen or permanent resident alien who can demonstrate membership in one of the following groups:

a. Black persons having origins in any of the Black African racial groups not of Hispanic origin;

b. Hispanic persons of Mexican, Puerto Rican, Dominican, Cuban, Central or South American or either Indian or Hispanic origin, regardless of race;

c. Asian and Pacific Islander persons having origins in any of the Far East, Southeast Asia, the Indian sub-continent or the Pacific Islands, or

d. Native American persons having origins in any of the original peoples of North America.

3. For the purposes of these Guidelines, a women-owned business enterprise means a business enterprise, including a sole proprietorship, partnership or corporation which is:

a. At least 51% owned by one or more United States citizens or permanent resident aliens who are women or in the case of a publicly-owned business at least 51% of the common stock or other voting interests of which is owned by a United States citizen or citizens or a permanent resident alien or aliens who are women;

b. An enterprise in which the ownership interest of women is real, substantial, and continuing;

c. An enterprise in which the women ownership has and exercises the authority to control independently the day-to day business decisions of the enterprise; and

d. An enterprise authorized to do business in New York State, independently owned and operated, and not dominant in its field.

3. INTENT.

It is the intent of the Empire Center that to the fullest extent it is practical, and except as otherwise provided for herein, the selection of procurement contractors shall be from the widest available selection of responsible procurement contractors for a particular good or service.

4. RESPONSIBILITY FOR PROCUREMENT CONTRACTS.

The Executive Director of the Center, or his duly appointed designee has the overall day-to-day responsibility and oversight regarding the awarding and monitoring of procurement contracts. Personal services contractors shall be utilized in those areas where the Empire Center Board determines that such services may not be reasonably obtained by staff members of the Empire Center. In making such determination, facts such as timing, costs, qualifications or the nature of the services to be rendered shall be taken into consideration.

5. REQUIREMENTS REGARDING THE SELECTION OF PROCUREMENT CONTRACTORS.

A. Personal Services

1. The selection of personal services contractors shall be on a competitive basis except that the Executive Director may waive competition if it is in the best interest of the Empire Center to do so. The standard of "Best Interest of the Empire Center" may, but need not be based upon one or more of the following criteria for the selection of personal service contractors:

- a. Confidentiality,
- b. Specialized expertise or unusual qualifications; or services obtainable from one source only,
- c. Historical relationship with the Empire Center, the continuation of which is in its or their best interest,
- d. Specialized knowledge,
- e. Geographical proximity to the Empire Center.
- f. Lack of responsible competition, in the sole opinion of the Empire Center to perform the desired services,
- g. Nature, magnitude or complexity of services required,
- h. Lack of Empire Center resources, support staff, specialized facilities or equipment,
- i. Lower cost,
- j. Short-term or infrequent need for services, or

k. Selection which is necessary or convenient to the operations of the Empire Center.

2. Any contract involving services to be rendered over a period in excess of one year, shall require the approval of the Board by resolution, and an annual review of the contract by the Board.

3. A personal services contract shall require the approval of the Board by resolution, when the amount thereof exceeds \$25,000.

4. Legal services need not be awarded on a competitive basis.

B. Goods and Other Services.

1. Selection of contractors for goods and services other than personal services shall be made only on a competitive basis except as herein otherwise set forth. The level of competition and authorization shall depend upon the estimated or actual value of the good or service as follows:

<u>Level</u>	<u>Est. or Actual Value</u>	<u>Required level of Competition</u>	<u>Authorization Level Required</u>
I	Up to \$500	Not required*	Exec. Director
II	\$500 - \$5,000	3 Verbal Quotes**	Exec. Director
III	\$5,000 - \$15,000	3 Written Quotes***	Exec. Director
IV	\$15,000 - \$24,999	Sealed Bids	Exec. Director
V	\$25,000 and up	Sealed Bids	Board Resolution

* Formal documentation is not required. However, it is expected that all staff members will attempt to utilize WBEs and MBEs wherever possible and also to be cost conscious.

** Verbal quotes must be documented as to the vendor/supplier, service/item required, person spoken to and the date.

*** If there are not three vendors who provide the service, then this must be documented.

2. Competition may be waived:

a. On an emergency basis when the safety of life or property is involved. A written explanation of the nature of the emergency must accompany the purchase order/contract.

b. When only one source is available. A written statement must accompany the purchase order/contract, explaining the need for sole source acquisition.

The level of approval required for such waivers of competition as set forth in subsections 2(a) and (b) herein shall be either Managing Director or Executive Director within levels II – IV, and Board for Level V.

c. When state OGS contracts are used.

d. Under a warranty, when the Empire Center may be required to obtain service from a manufacturer designated entity.

e. When the best interest of the Empire Center is clearly saved, as determined by the Executive Director or the Board.

3. Any contract for goods or services other than personal services, awarded for a period in excess of one year, shall require the approval of the Board by resolution, and an annual review of the contract by the Board.

6. MINORITY AND WOMEN OWNED BUSINESS ENTERPRISED

A. Minority and women-owned business shall be given full opportunity to compete in all types of procurement contracts. Notification will be sent to the appropriate vendors/suppliers as noted in the WBE/MBE (Women and Minority Businesses) Directory.

7. PROCEDURES FOR COMPETITIVE SELECTION - PERSONAL SERVICES

The procedures for competitive selection of personal services contractors when such method of selection is considered to be in the best interest of the Empire Center, is as follows:

A. The Empire Center shall prepare a written statement containing a description of the services, the reasons why they are required, and the required estimated schedule or duration of the services.

B. A request for proposals (“RFP”), shall whenever practicable and desirable be sent to three or as many more firms as are in the best interest of the Empire Center to assure competition, including any WBE/MBE firms, unless there are less than three qualified firms or unless competition is waived as provided in the Guidelines.

C. The RFP shall describe the services to be performed, any completion dates or time requirement, MBE requirements, if applicable, and the criteria to be utilized by the Empire Center in evaluating proposals and shall contain a requirement for a cost proposal and the date, time, and place when proposals must be received. In

cases of sealed bids, the bids should be opened at a designated time and place by at least three persons. Preferably, these should include two staff members and a Board member or representative.

D. The Empire Center may select one or more proposers with which to negotiate after evaluation of the proposals received. The award shall be made to the proposer or proposers whose proposal(s) will be the most advantageous to Empire Center, price, qualifications, and other factors considered, using such evaluation criteria as the basis for the decision.

E. Architectural, Engineering, and Technical Contracts.

1. In the procurement of such architectural, engineering, and technical services, the Empire Center shall evaluate current statements of qualifications and performance data. If desired, the Empire Center may conduct discussions with three or more professional firms regarding anticipated design concepts and proposed methods of approach to the assignment.

2. The Empire Center shall then comply with the provisions of Subparagraphs "A", "B", and "C" of Section 7 of these Guidelines.

3. The Empire Center shall negotiate a contract with the highest qualified professional firm for architectural, engineering, and/or technical services at compensation which the Empire Center determines in writing to be fair and reasonable. In making this decision, the Empire Center shall take into account the estimated value of the services to be rendered, the scope, complexity and professional nature thereof. Should the Empire Center be unable to negotiate a satisfactory contract with the professional firm considered to be the most qualified, at a fee it determines to be fair and reasonable, negotiations with the professional firm shall formally be terminated. The Empire Center shall then undertake negotiations with the second most qualified professional firm. Failing accord with the second most qualified firm, the Empire Center shall undertake negotiations with the third most qualified professional firm. Should the Empire Center be unable to negotiate a satisfactory contract with any of the selected professional firms in order of their competence and qualification, it shall continue negotiations in accordance with this subparagraph until an agreement is reached.

4. The provisions of this subparagraph "3" shall apply only to engineering and/or technical services and/or architectural service contracts in excess of \$25,000.

5. Contracts for engineering, technical, or architectural services involving lesser amounts may be entered into pursuant to the provisions of this section or any applicable provisions of the Guidelines.

8. PROVISIONS TO BE CONTAINED IN ALL PROCUREMENT CONTRACTS

a. Procurement contracts shall set forth the nature, quantity, if applicable, and monitoring of work performed, the use of Empire Center supplies and facilities, the use of Empire Center personnel, and other provisions considered to be in the best interest of the Empire Center. All requirements of law shall be incorporated by reference in the Empire Center's procurement contracts. Procurement contracts shall be awarded only to persons or firms deemed responsive to the Empire Center's procurement documents as well as capable and responsive.

The following types of provisions shall be contained in all procurement contracts, except that any provision listed which are inapplicable or unnecessary because of the nature of duration of the services or goods to be delivered, the location or locations where they are to be performed or the type of compensation being paid therefore need not be included. Any other terms deemed applicable may be added.

1. Description of services
2. Compensation
3. Time for performance or date of completion
4. Liability of contractor or consultant; indemnification of Empire Center
5. Reports of contractor or consultant
6. Ownership of plans, drawings, or other products of the performance of the services (professional services)
7. No assignments or subcontracts without the express written consent of the Empire Center
8. Maintenance of records, accounts
9. Right of Empire Center to inspect and/or audit books and records of contractor or consultant (professional services)
10. Insurance requirements
11. Termination
12. Monitoring of the performance of service
13. Use of the Empire Center supplies, facilities or property

14. Use of the Empire Center personnel
15. All provisions required to be included in Empire Center contracts by Federal, State or Local laws, ordinances, codes, rules, or regulations, and
16. Involvement of former officers or employees

B. Contractors shall have the following responsibilities:

1. To perform the contract in accordance with its terms;
2. To perform services required under a contract competently, efficiently, in a timely and first class manner, at a reasonable cost and in a manner acceptable to the Empire Center or to deliver goods or supplies in a first class condition, to the proper location, on a timely basis, and in a manner which is acceptable to the Empire Center; and
3. To cooperate with Empire Center personnel who are directing, monitoring, or supervising the delivery of services or goods, or who are assisting in the delivery thereof.

9. INVOLVEMENT OF FORMER OFFICERS OR EMPLOYEES

No procurement contracts shall be entered into with current and/or former officers or employees of the Empire Center except by a resolution adopted by the Board upon showing that such contract is in the best interest of the Empire Center, and then only to the extent permitted by section 73 of the Public Officers Law and other applicable provisions of law.

10. PUBLICLY AVAILABLE REPORTS

A publicly available report shall be prepared on not less than an annual basis, summarizing procurement activity by the Empire Center, including a listing of all contracts entered into, the process used to select such contractors, and the status of existing procurement contracts. For the purposes of such report, only contracts in the actual or estimated amount of \$5,000 or more and for at least one year in duration need be included.

11. ANNUAL REPORT ON PROCUREMENT CONTRACTS

A. The Empire Center shall annually prepare and approve a report on procurement contracts which shall include the Guidelines, an explanation of the Guidelines and any amendments thereto since the last annual report. Such report on procurement contracts may be a part of any other annual report that the Empire Center

is required to make. For the purposes of this report, only procurement contracts in the actual or estimated amount of \$5,000 need be included.

B. Such a report shall be available to be submitted annually as per current requirements.

C. Copies of the Annual Report are to be made available to the public upon reasonable request therefore.

12. THIRD PARTY RIGHTS; VALIDITY OF CONTRACTS.

A. These Guidelines are intended for the guidance of the officers and employees of the Empire Center only, and nothing contained herein is intended or shall be construed to confer upon any person, firm, or corporation any right, remedy, claim or benefit under, or by reason, of any requirement or provision hereof.

B. Nothing contained in the Guidelines shall be deemed to alter, affect the validity of, modify the terms of or impair any contract or agreement made or entered into in violation of, or without compliance with, the provisions of the Guidelines.

13. MISCELLANEOUS

A. Where applicable Federal, State, or Local laws, ordinances, codes, rules or regulations containing requirements which are in conflict with or impose greater obligations upon the Empire Center than these Guidelines, then such requirements shall take precedence over those contained herein.

B. Any specific provision of the Guidelines may be waived by the Chairman or Executive Director of the Empire Center, but only under extraordinary circumstances. Any waivers of the Guidelines herein due to extraordinary circumstances shall be reported to the Empire Center Board no later than the first monthly meeting following the waiver to allow the Board to certify the extraordinary circumstances are present and necessary.

C. The Empire Center shall not be precluded from adopting additional requirements relating to the matters covered by these Guidelines.

14. ARTISTIC CONTRACTS

These Guidelines do not include provisions or requirements for contracts made between the Empire Center and “performers”, “entertainers”, or any person or persons in the entertainment, art, film, theatre, lecture, or television fields. Each contract is negotiated on an individual basis, the criteria used includes but is not limited to availability, name recognition, artistic merit, and interest to the public at large. The

Executive Director of the Empire Center has the discretion to negotiate contracts in order to program and schedule the facility as he/she sees fit, as long as it is in the best interest of the Empire Center and the State of New York. Signed contracts will be obtained for all such artistic contracts and will be kept on file available for review/audit at any time.

15. EFFECTIVE DATE

The Guidelines shall be effective as of the first day of April, 1991 and reviewed on an annual basis.