The City University of New York
Office of the General Counsel and Vice Chancellor for Legal Affairs
535 East 80th Street, New York, N.Y. 10021
Phone: (212) 794-5382
Fax: (212) 794-5426

Writer's direct phone: (212) 794-5506
Writer's e-mail: fschaffer@fiorello.cuny.edu

Frederick P. Schaffer
General Counsel

Jane Sovern
Deputy General Counsel

Jane E. Davis
Marina B. Ho
Abby L.ennis
Daphna H. Mitchell*
Linda Myles
Paul F. Ocziebross
Richard M. Piansky
Katherine Raymond
Susan Shanklin
Michael D. Solomon*

*Associate General Counsel

ADMINISTRATIVE ADVISORY NO. 01-1

November 27, 2001

MEMORANDUM

To: Campus Presidents

From: Frederick P. Schaffer

Re: College Purchasing

---

Many of you, especially those who have recently come to the University, have brought questions to me concerning college purchasing of goods and services. As you know, The City University of New York is a public entity, funded by taxpayer dollars. Purchasing using these funds is governed by law. My office is committed to assisting you and your purchasing staffs achieve as much speed and flexibility as possible within the applicable laws and regulations. To that end, I have attached an overview of the legal requirements governing purchasing. I hope this will be helpful to you and your staffs. If you have any questions, feel free to contact Daphna Mitchell (212) 794-5381, my Deputy Jane Sovern (212) 794-5589 or me.

encl.

c: (w.encl.)

Fiscal Review Committee
Vice Presidents/Deans of Administration
Business Managers
Purchasing Agents

R: DM O& ADMINISTRATIVE ADVISORY ON PURCHASING.WPD/52
Overview of University Purchasing

1. The City University of New York purchases goods and services, including construction, subject to law¹.

   - Central to the purchasing process is the notion that the competition be fair. New York courts have stated that the purposes of procurement law, which is consistent through the states and the federal government, are to prevent favoritism, fraud and corruption and to ensure that the taxpayer “get the best bang for the buck”.

   - Purchasing Offices have been supplied with copies of the University’s Procurement Policy Manual.

   - More recently, the NYS Office of General Services has placed Procurement Guidelines on the Internet at:

     http://www.ogs.state.ny.us/procurecounc/

2. The University Office of General Counsel ("OGC") strongly recommends that purchasing at all levels be conducted only through the College Purchasing Office.

¹ For goods, services and construction: Education Law Article 125, Section 6218 and State Finance Law Article 11, Sections 160 - 168.

For professional architect and engineer services over $25,000: State Finance Law Article 9, Section 136-a.
3. Under $5,000, competition is not required. OGC recommends, however, that the procurement record maintained by the College Purchasing Office reflect a rational basis (such as discount from retail price) for the purchase.

4. From $5,000 to $20,000, bidding is required. Solicitation from a minimum of five qualified vendors is recommended.

5. For contracts over $20,000:
   - a Board Resolution\(^2\) is required by law.
   - the solicitation must be advertised in the New York State Contract Reporter\(^3\). Although not so required by law, the University also places the same advertisement in The City Record. Colleges are encouraged to place notice of the letting in local papers and/or relevant market publications.
   - Colleges are required by law to investigate\(^4\) whether the goods or services are available from a “preferred source” such as the Department of Corrections and organizations representing the blind, physically or mentally disabled or veterans and award to these entities if they can meet the specifications in the “form, function and utility” required and within no more than fifteen percent above the prevailing market price.
   - If a preferred source is not available, Colleges are required by law to investigate whether the goods or services are available from a state centralized contract. If they are not, the College may then solicit bids.

6. OGC has prepared boilerplate documents for procurement.
   - Under $20,000, the Notice of Invitation to Bid contains all the relevant solicitation provisions as well as a copy of the agreement terms and conditions. While

---

\(^2\) New model procurement resolutions have been made available to all College Business Offices. For an electronic copy, please contact my secretary, Sharon Atkins [212-794-5595 or < smabh@cunyvm.cuny.edu >] and ask for < dm board resolutions 2001.wpd >.

\(^3\) Economic Development Law Article 4-C, Section 142.

\(^4\) A list of preferred source offerings is available at < http://www.ogc.state.ny.us/procurecoun/c/pdfdoc/ppliant.pdf >.

-2-
Colleges are not required to have the specifications for these procurements approved as to form by OGC, you are encouraged to request advice from OGC.

- Over $20,000, College Purchasing Offices may now request the most current “Goods and Services Boilerplate” by e-mail. They may also inquire whether OGC has any model specifications available for the type of goods or services required.

- For construction, the most current boilerplate documents are available from the Department of Design, Construction and Management ("DDCM").

- Architect and engineer consulting services are let through DDCM only.

7. Specifications for all levels always contain a section entitled "Bidder Requirements".

- New York courts have recognized that, while agencies spending taxpayer monies must be fiscally responsible, prudence does require vendors to meet appropriate standards for the complexity of the task and products to meet minimum standards of quality, durability, etc.

- Bidders must meet minimum requirements such as appropriate licensing, years in business, years performing this type of work, prior projects of similar size and scope to this type of work, financial viability and provision of samples of prior work.

- While we are permitted to name a particular model number, manufacturer or standard, the vendor can offer an equivalent. It is then the University’s decision as to whether that equivalent is “responsive” to the specifications and is an “Approved Equal.” As “Approved Equal” is a legal standard, Purchasing Offices should consult OGC if the otherwise qualified vendor proffers an equivalent.

8. Specifications for procurements over $20,000 require several approvals.

- In conjunction with the College using department, the College Purchasing Office prepares Specifications.

- All specifications for construction and facilities work must be reviewed by Vice Chancellor Macari’s staff before being sent to OGC.
• All specifications for information technology equipment and services must be reviewed by Vice Chancellor Brabham’s staff before being sent to OGC.

• The entire bid package, consisting of appropriate boilerplate and specifications, is then sent to OGC for approval as to form.

• Community Colleges must then send the approved bid package to the New York City Law Department before it is distributed to prospective bidders.

• For senior colleges, review by the Office of the Attorney General occurs after award.

9. Generally, government agencies award contracts by means of a sealed competitive bid, and award is made to the “lowest responsive and responsible bidder”.

• “Responsive” means that the Bidder meets the threshold Bidder Requirements.

• “Responsible” reflects her meeting the three criteria of demonstrated ability to perform, fiscal integrity and moral integrity.

10. A Request for Proposal (“RFP”) is a much more sensitive and sophisticated tool. The RFP process is complex and tends to be lengthy. Please do not hesitate to consult OGC for advice on which method of procurement is most suitable.

• An RFP is used when criteria other than price are important, or when the College wishes vendors in the market to provide it with ideas and designs for its project.

• The selection criteria, which are listed in the RFP, are weighted.

• Proposers must also meet the threshold responsiveness and responsibility tests.

11. The Bid Documents contain rules about communications between the University/College and prospective bidders.

• If appropriate for the particular procurement, the Bid Documents will specify a time for a pre-bid conference and/or site visit. The Purchasing Office hosts this conference.
• The Bid Documents also specify a final date for receipt of bidders’ questions.

• The College Purchasing Office issues answers to these questions by an addendum to the Bid Documents to all prospective bidders well before the bid due date.

• As stated in the Bid Documents, no other communications between University or College officers or employees on the one hand, and vendors or other parties on the other, are binding on the University.

12. During the bidding process, the University may deny Freedom of Information Law ("FOIL") requests on the basis that release of certain documents may "impair present or imminent contract awards."

• College Records Access officers may request assistance on these questions from Michael D. Solomon, Esq. (212-794-5322) of my staff.

13. Bids are due at a designated date, time and place. Late Bids are returned to the vendor unopened.

• The Bid Opening is public. The College Purchasing Officer opens each sealed envelope at the designated time and reads out the name the vendor has placed on the envelope and the total price she has listed on the sworn Bid Page. The Purchasing Officer should inform attendees that these are not final results and are subject to review according to law and the specific requirements of the Bid Documents.

• RFP’s are due at a designated date, time and place but a public opening is not appropriate because price is not the prime criterion and the entire proposal must be evaluated.

14. OGC has provided College Purchasing Offices with model forms to assist them in analyzing bids.

• It is assumed that the low bidder will receive the award unless she is deficient in one or more of the listed requirements. A rejected low bidder has the right to sue the agency, thus potentially holding up the award for many months. College Purchasing Officers have therefore been directed to call OGC if their bid analysis raises questions about the suitability of the low bidder.
15. The University also participates on a voluntary basis in VENDEX, an automated database of vendors maintained by New York City.

- VENDEX contains listings of all vendors used by mayoral agencies, as well as some other agencies.
- A "Caution" listing provides information about the difficulties other agencies have had with a vendor.
- A "Debar" listing means that mayoral agencies may not award a contract to that vendor for the stated period of time.
- All contracts sent to OGC for preparation for signature by the Secretary of the Board pursuant to Resolution, are checked on VENDEX.
- College Purchasing Offices are encouraged to fax information about a proposed awardee to Lisa Ortiz of my staff (fax: 212-794-5426) and request a VENDEX check.
- If the awardee is found to be a contractor who has a Caution or Debar listing, OGC will evaluate that listing and advise you how to proceed.

16. In summary, the College Purchasing Office follows the following procedure for every procurement over $20,000:

- prepares specifications and has them approved;
- places advertisements;
- prepares a Board Resolution, has it approved and then calendared;
- sends the Bid Documents to prospective bidders. This includes responders to the advertisement as well as any potential providers on lists maintained by the College or the University;
- convenes pre-bid conferences and site visits as appropriate;
- answers questions from prospective bidders;
- receives bids up to the due date;
- evaluates bids for responsiveness and responsibility;
• is required to consult OGC for advice on bid rejection;

• during RFP's, convenes a committee to evaluate the responsive proposals and then interview the top scorers if the committee wishes;

• checks the proposed awardee on VENDEX;

• recommends the proposed awardee to the using department;

• prepares documents for execution by the awardee;

• prepares documents for execution by the Secretary of the Board and

• prepares documents for registration by the Office of the City or State Comptroller.

Of course, OGC is available to provide legal advice as needed at any point during this process.

17. By law, a contract is not valid until it has been approved and filed by the relevant Comptroller:

• For senior colleges, the Office of the State Comptroller reviews the procurement record to ensure that no favoritism, fraud or corruption, nor any other material or substantial irregularity, has occurred. The State has ninety days for this review.

• For community colleges, the City Comptroller may object to the award if he believes that there is possible corruption in the letting of the contract or that the proposed contractor is involved in corrupt activity. The City has thirty days for this review.

Under both state and city law, even "contracts" signed by both the vendor and the University are not valid until registered by the Comptroller. New York courts have consistently ruled that a vendor performing without such a valid contract does so at his own risk. A recent bulletin from the Office of the State Comptroller emphasizes that state

---

5 State Finance Law Article 7, Section 112 and New York City Charter, Chapter 13, Section 328.

employees who direct a vendor to start providing goods or services without an approved contract may be personally liable for any indebtedness that is ultimately held to be owed to the vendor.

18. If you have questions, contact Daphna H. Mitchell, Esq. (212-794-5381) of my staff.