ADMINISTRATIVE ADVISORY MEMORANDUM

To: Purchasing Directors

From: Frederick P. Schaffer, Esq.

Re: Vendor Responsibility - OSC Bulletin No. G-221

1. **Purpose of this Advisory**

   On November 1, 2004, The Office of the State Comptroller issued Bulletin No. G-221, "Vendor Responsibility: Standards, Procedures, and Documents." The purpose of this memorandum is to summarize key provisions of this Bulletin for your convenience. Please note that The Office of General Counsel ("OGC"), in conjunction with University Contracting Office, has revised purchasing documents to reflect the requirements of this Bulletin. Please do not hesitate to call OGC at 212-794-5382 if you need any assistance with vendor responsibility issues.

2. **Summary**

   Procurement laws and guidelines require that all awards of taxpayer-funded contracts be to responsible vendors. Vendor responsibility generally means that a vendor has the integrity to justify the award of public dollars and the capacity to fully perform the requirements of the contract. It is a campus’s obligation to evaluate the responsibility of a prospective contractor. Such a responsibility determination is an important part of the procurement process, promoting fairness in contracting and protecting the campus and the taxpayer against failed contracts.

   A campus must consider the following factors in making the determination of a vendor’s responsibility:

   - Legal Authority to do business in New York State
   - Integrity
   - Capacity - both organizational and financial
   - Previous performance
3. **Does G-221 apply to the University?**

3.1 Yes, pursuant to Education Law Section 6218(c) and State Finance Law Article 11.¹

4. **What is a “responsible” contractor?**

Bulletin No. G-221 describes the four “Responsibility Factors”:

“The courts, in examining contractor ‘responsibility,’ have indicated that ‘responsibility’ is ‘an elastic word,’ encompassing factors including financial ability to complete the contract, accountability, reliability, skill, sufficiency of capital resources, judgment, integrity, and ‘moral worth.’

Whether a contractor is ‘responsible’ is a question of fact to be determined on a case-by-case basis. Based upon existing legal precedents, responsibility determinations can and should involve a review of the following major categories:

1. Does the contractor possess the integrity to perform the contract? Factors to be considered include criminal indictments, criminal convictions, civil fines and injunctions imposed by governmental agencies, anti-trust investigations, ethical violations, tax delinquencies, debarment by the federal government, prior determinations of responsibility-related non-responsibility, etc.

2. Has the contractor performed at acceptable levels on other governmental contracts? Factors to be considered include reports of less than satisfactory performance, early contract termination for cause, contract abandonment, court determinations of breach of contract, etc.

3. Is the contractor legally capable of performing the contract? Factors to be considered include authority to do business in New York State (under the Business Corporation Law or Not-For-Profit Corporation

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¹ For purchases under $20,000, Education Law Section 6218 (c) requires that the University purchases be “awarded to the lowest responsible bidder.”

For purchases over $20,000, the University is governed by State Finance Law Article 11. State Finance Law Section 163 (9) (f) requires that: “[p]rior to making an award of contract, [the University] shall make a determination of responsibility of proposed contractor.”

Senior Colleges: Bulletin No. G-221 states: “[T]he [State] Comptroller will not approve a contract unless he or she concurs that the proposed contractor is responsible.”

Community Colleges: Community Colleges purchase under the same laws mentioned above.
Law), licensing (e.g., with the Education Department or Department of State), debarment by the State Labor Department due to a prevailing wage violation, etc.

4. Is the contractor financially and organizationally capable of performing the contract? Factors to be considered include assets, liabilities, recent bankruptcies, equipment, facilities, personnel resources and expertise, availability in consideration of other business commitments, existence of appropriate accounting and auditing procedures for control of property and funds, etc.

5. **Who must meet the Four Responsibility Factors?**

5.1 The contractor AND its affiliates, owners and officers must meet the Four Responsibility Factors.

5.2 Subcontractors, who are “known at the time of contract award, [whose] qualifications are a material factor in the award, and [whose] subcontract will equal or exceed $100,000 over the life of the contract” must meet the Four Responsibility Factors.

5.3 Contract renewals are subject to Vendor Responsibility requirements. Please call OGC (212-794-5382) to request the Senior College or Community College Model Renewal Letter, which contains appropriate language.

5.4 Contract amendments, extensions and assignments are subject to Vendor Responsibility requirements. Call OGC (212-794-5382) for advice.

5.5 Construction contract change orders are subject to Vendor Responsibility requirements. Call OGC (212-794-5382) for advice.

6. **How do I determine a vendor’s responsibility?**

6.1 For purchases under $20,000, ensure that the vendor has signed the Invitation To Bid (“ITB”).

6.2 For contracts over $20,000, review the Vendor Responsibility Profile in the Goods and Services Boilerplate Part IV and Construction Boilerplate Part III.

6.3 Use the Resources:

   <http://www.osc.state.ny.us/vendrep/resources.htm>

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7. **What shall I do if I have questions about the vendor’s Four Responsibility Factors?**

Call OGC (212-794-5382) for advice immediately. The vendor has certain legal rights. As Bulletin No. G-221 states:

“The courts have also recognized a protected constitutional due process liberty interest in connection with a determination of non-responsibility. Therefore, prior to finding a contractor non-responsible, the contracting agency must offer the ‘safeguards of reasonable notice and timely opportunity to be heard.’”

8. **Do I need to do a responsibility review for purchases from a preferred source?**

No. OSC has waived this requirement at this time.

9. **Do I need to do a responsibility review for purchases from an OGS contract?**

Call the OGS contact person listed on the particular OGS contract for advice.

10. **Do I need to do a responsibility review for a “piggy-back” on the contract of another government agency?**

Yes. Call OGC (212-794-5382) for advice.

11. **What documentation do I have to add to the procurement record?**

Two copies of a completed Vendor Responsibility Profile and attachments

<http://www.osc.state.ny.us/vendrep/templates.htm#profile>

12. **Who signs the Vendor Responsibility Profile?**

Use form AC1782 to designate authorized persons. These are usually the persons authorized to sign Purchase Orders.

<http://www.osc.state.ny.us/agencies/ac1782.pdf>

13. **What shall I do if I find negative information about the Contractor when it is already performing the contract?**

Call OGC (212-794-5382) for advice immediately.
14. **Important Sites**

* Bulletin No. G-221

<http://www.osc.state.ny.us/agency/GBull/g221.htm>

* Frequently Asked Questions (“FAQ”)

<http://www.osc.state.ny.us/vendrep/FAQs.htm>

* Chart: Vendor Responsibility Documentation Requirements

<http://www.osc.state.ny.us/vendrep/documents/vrdcrules.pdf>

* Vendor Responsibility Profile and Questionnaire

Download necessary forms in .doc or .pdf format:

<http://www.osc.state.ny.us/vendrep/templates.htm#profile>

* Additional Resources

<http://www.osc.state.ny.us/vendrep/resources.htm>

c: Vice Chancellor Emma E. Macari
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Controller Barry Kaufman
Associate Controller Patrick Dalzell
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