

February 13, 2014

MEMORANDUM

To: Cabinet
College Presidents
Vice Presidents of Finance and Administration
Business Managers
Purchasing Directors and Accounts Payable Directors
Legal Affairs Designees

From: Frederick P. Schaffer, General Counsel & Senior Vice Chancellor for Legal Affairs *(Signature)*
Leonard Zinnanti, University Executive Controller *(Signature)*

Re: University Policy on Purchasing from Minority-Owned and Women-Owned Businesses

I. Introduction

The City University of New York (CUNY) is committed to procuring services, materials, supplies and equipment from minority-owned businesses or women-owned businesses (MWBs). CUNY recognizes the potential economic benefit, as well as the societal benefits of working with MWBs. In furtherance of this commitment, CUNY has established a University-wide participation goal for MWBE utilization under University procurements, to be calculated on an annual, fiscal year basis (Participation Goal). The Participation Goal applies to both senior and community colleges.

The policies and procedures detailed below are intended to clearly explain the processes the University asks all colleges to implement in an effort to meet its annual Participation Goal.

This policy does not apply to procurements by The City University Construction Fund, college associations, auxiliary enterprise corporations, or college foundations.

II. Policy Overview

A. Background

Article 15-A of the New York State (NYS) Executive Law requires certain State agencies and entities, and the vendors and contractors with whom they do business, to make a good faith effort to procure materials, supplies, equipment, and services (including printing) from NYS-certified MWBs.

As a matter of law and University policy these requirements apply to all senior and community college procurements exceeding \$25,000 for labor, services, supplies,

equipment, or materials and for procurements exceeding \$100,000 for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements (collectively, Covered Contracts).

It is imperative that the University continue to take steps to ensure its compliance with University policy and the Executive Law.

B. Participation Goal and University Utilization Percentage

All colleges must use good faith efforts to meet the University's annual Participation Goal. These good faith efforts may include, without limitation, seeking to contract directly with NYS-certified MWBEs and providing opportunities for NYS-certified MWBEs to participate in Covered Contracts as subcontractors or suppliers.

Though the University has set a Participation Goal that applies to all senior and community colleges, the University is currently required only to report senior college MWBE utilization to the Empire State Development Corporation (ESDC). ESDC is responsible for monitoring senior colleges' MWBE utilization and measuring it against the University's Participation Goal. The University receives credit from ESDC towards its Participation Goal for any direct expenditures made by the senior colleges to NYS-certified MWBEs under any University contract or purchase order. The University also obtains credit from ESDC for indirect expenditures made by the senior colleges to NYS-certified MWBEs serving as subcontractors or suppliers under senior college contracts.

The Office of the University Controller is required to file these reports with ESDC on a quarterly basis and in accordance with NYS's fiscal year. ESDC calculates senior college MWBE utilization by dividing (1) the value of payments made to NYS-certified MWBEs as prime contractors, subcontractors, or suppliers on senior college contracts by (2) the total value of covered senior college contracts.

III. MWBE Purchasing Procedures

Recordkeeping: As with all purchases, each college is subject to audit by NYS and must maintain records relating to its procurement efforts, including efforts to consider MWBE vendors on particular solicitations.

Colleges must use good faith efforts to seek NYS-certified MWBE participation through both direct purchasing and subcontracting. Those processes are described in this section.

A. MWBE Purchasing Procedures: Purchasing Directly From an MWBE

Direct purchases may be made from NYS-certified MWBEs using established University purchasing procedures and rules. Colleges may expedite MWBE purchases by (1) purchasing off contracts let by the NYS Office of General Services (OGS) and, where available, by The City of New York (City), the City's Department of Education (DOE), or the federal government; or (2) entering into purchase orders or contracts with MWBEs without a formal competitive process using the University's discretionary purchasing authority under the State Finance Law. All colleges are strongly encouraged to purchase directly from NYS-certified MWBEs through available governmental contracts and the University's discretionary purchasing authority to meet the dual goals of procurement efficiency and MWBE participation. These options are more fully described below.

1. Purchasing from MWBE Vendors under OGS and Other Available Contracts. Direct purchases from NYS-certified MWBE vendors may be made through existing OGS contracts where such vendors have been established as current contract holders. In purchasing off an OGS contract, colleges must familiarize themselves and follow any applicable contract requirements (e.g., term, geographic/service limitations, compensation requirements, etc.) and processes (e.g., mini-bids, etc.).

In addition, if NYS-certified MWBEs are listed on DOE, City, or federal contracts through which CUNY is authorized to make purchases (e.g., NYC Department of Citywide Administrative Services (DCAS) contracts or US General Services Administration (GSA) Schedules 70 and 84), then colleges are encouraged to make direct purchases from such MWBE vendors under these contracts.

2. Purchasing Directly from an MWBE Using Discretionary Purchasing Authority up to \$200,000 under the State Finance Law. State Finance Law Section 163 permits the University flexibility to contract directly with MWBEs for commodities and/or services (but not for construction or construction-related services). Section 163 authorizes the University to make discretionary purchases of commodities and/or services directly from an MWBE in an amount up to \$200,000¹ without a formal competitive process (i.e., without sealed bids and without the requirement to award to the responsive and responsible bidder offering the lowest price). Colleges must, however, otherwise satisfy all applicable purchasing processes and requirements prior to making such purchases including, without limitation, those relating to:
 - giving first priority to Preferred Sources (e.g., NYS Industries for the Disabled or NYS Industries for the Blind), OGS commodity contracts, and CUNY-wide contracts;
 - considering other available NYS, City, DOE, and federal contracts, such as OGS services contracts, DCAS contracts, and GSA Schedules 70 and 84;
 - advertising in the NYS Contract Reporter and NYC Record for procurements with a value of \$50,000 or more;
 - obtaining all applicable forms and certifications as may be required by the dollar value and nature of the procurement (e.g., Procurement Lobbying Act forms, Consultant Disclosure Law forms, Tax Law certifications, vendor responsibility documentation, etc.);
 - making vendor responsibility determinations;
 - coordinating all purchasing through the college Purchasing Department;
 - using only those documents issued or approved as to form by the Office of General Counsel (OGC);

¹ In determining whether a particular solicitation meets one of the discretionary purchasing dollar thresholds described in this policy, colleges shall consider the reasonably expected aggregate amount of all purchases of the same commodities or services to be made within the twelve-month period commencing on the date of purchase. Purchases of services or commodities shall not be artificially divided for the purpose of satisfying the thresholds.

- complying with all CUNY signature authority policies; and
- senior colleges only: submitting applicable contracts and purchase orders with a value of \$100,000 or more to the NYS Office of the Attorney General (AG) and Office of State Comptroller (OSC) for pre-audit approval.

If a college has determined that a particular commodity or service is not available from a Preferred Source, OGS commodity, or CUNY-wide contract, then it may seek to make such purchase from an MWBE vendor using the following steps.

a. **Purchases from an MWBE for an Amount Up To \$50,000:**

- i. Identify and confirm the availability and status of NYS-certified MWBE vendors by searching the Division of Minority and Women's Business Development MWBE database, available at:
<https://ny.newnycontracts.com/FrontEnd/VendorSearchPublic.asp>.
- ii. Confirm that the commodities or services provided by the NYS-certified MWBE meet the form, function, and utility needs of the college requirement.
- iii. Document in the procurement record the justification for selecting the vendor and the fairness and reasonableness of the MWBE vendor's price. "Reasonable" means a "fair market price" based on normal competitive conditions and not necessarily the lowest possible price (*New York State Procurement Bulletin, Discretionary Purchasing Guidelines, October 13, 2010*). Methods for determining fairness and reasonableness of price include, but are not limited to, one or more of the following price analysis techniques:
 - quotes (e.g., telephone or written);
 - comparison with competitive, published catalog, price lists, market prices of commodities, indexes, etc., for the same or similar items;
 - comparison of historical, prior prices paid by CUNY and/or other governmental entities with current proposed prices for the same or similar items;
 - comparison of proposed prices with independent, internal cost estimates; and
 - OGS or Less, if applicable.

If the MWBE's price is deemed to be high, then colleges may negotiate with the MWBE to reach a price that is fair and reasonable. The MWBE's price will be deemed to be fair and reasonable if it is within 15% of the lowest quote or other pricing indicator utilized by the college.

Note: The New York State Procurement Council has advised that OSC expects, at a minimum, to see informal competition in the form of multiple quotes for these purchases. If fewer than three (3) quotes are received, the college will have to document how it

determined that the price is reasonable. (*New York State Procurement Bulletin, Discretionary Purchasing Guidelines, dated October 13, 2010*).

As such, colleges are encouraged as a best practice to seek at least three (3) quotes from vendors to determine fairness and reasonableness of price. In addition, OGC has issued a Request for Quotes document for use by the colleges. Though oral quotes are permitted, colleges are also encouraged as a best practice to prepare written specifications and receive written quotes using such specifications and Request for Quotes document.

- iv. Obtain and review all forms, documents, and certifications from the MWBE that may be required based on the dollar value and nature of the procurement, prior to entering into a contract or issuing a purchase order. Colleges may only use contracts and purchase orders that have been issued or approved as to form by OGC.
- v. Obtain approvals of, and only execute, contracts and/or purchase orders in accordance with CUNY's signature policies.

b. Purchases from an MWBE of \$50,000 and up to \$200,000:

- i. Follow the process outlined above for purchases under \$50,000.
- ii. In addition, colleges must advertise in the NYS Contract Reporter and NYC Record at least fifteen (15) days prior to entering into any contract with, or issuing any purchase order to, the MWBE. Colleges must use one of the following sample advertisements:

[College] intends to purchase [1,000 widgets] pursuant to its discretionary authority under State Finance Law Section 163 (6). Interested parties should contact [College contact] to discuss this opportunity.

[College] intends to purchase [1,000 widgets] pursuant to its discretionary authority under State Finance Law Section 163 (6), which authorizes purchases without a formal competitive process in certain circumstances, including purchases from New York State small businesses, from businesses certified pursuant to Article 15-A of the New York State Executive Law and, if applicable, from businesses selling commodities or technology that are recycled or remanufactured. Interested parties should contact [College contact] to discuss this opportunity.

[College] intends to purchase [1,000 widgets] pursuant to its discretionary purchasing authority under State Finance Law Section 163. This procurement opportunity is limited to NYS Small Businesses, businesses certified pursuant to Article 15-A of the NYS Executive Law and, if applicable, businesses selling commodities or technology that are recycled or remanufactured.

- iii. Senior colleges only: submit applicable contracts and purchase orders with a value of \$100,000 or more to the AG and to OSC for pre-audit approval.
- c. Purchases from an MWBE for \$200,000 or more: State Finance Law Section 163 discretionary purchasing authority does not apply to commodity or service purchases for \$200,000 or more. Colleges must use formal competitive (sealed) solicitations (e.g., Requests for Proposals or Invitations to Bid) in these instances unless another exemption applies. The use of MWBEs as subcontractors or suppliers on Covered Contracts, including those that are procured with a formal competitive process, is discussed below.

B. MWBE Purchasing Procedures: MWBE Subcontracting

This Section III(B) applies all senior college and community college Covered Contracts that are not a direct contract with an MWBE.

1. ***Setting Participation Goals.*** MWBEs may also serve as subcontractors or suppliers on University contracts. Colleges must determine a MWBE participation goal tailored to each procurement solicitation for a Covered Contract, expressed as a percentage of project value payable to MWBEs as subcontractors or suppliers (a Contract Participation Goal). Contract Participation Goals apply whether the solicitation is a Request for Proposals or an Invitation to Bid, and whether the solicitation is for a Covered Contract for goods, services, or construction.

In order to set an appropriate Contract Participation Goal for a particular solicitation, colleges should refer to the New York State 2010 Disparity Study, available at

http://www.esd.ny.gov/MWBE/Data/NERA_NYS_Disparity_Study_Final_NEW.pdf.

2. ***Waivers.*** If, after a Covered Contract is executed, the prime vendor cannot meet the applicable Contract Participation Goal, that vendor may apply for a waiver from the University. Waiver applications must demonstrate that the vendor has used its good faith efforts to meet the Contract Participation Goal. Waivers are to be made using a form supplied by OGC. College Business Managers will be responsible for reviewing the waivers and approving or denying them based on applicable regulations.
3. ***Exemptions.*** ESDC has advised that certain expenditures are not included in the calculation of CUNY's Participation Goal. Examples of certain exempt categories of expenditures are set forth below, and colleges are not required to set Contract Participation Goals for contracts relating to these expenditures:
 - personal services;
 - leases of real property;
 - utilities (electricity, natural gas, water, sewage); and
 - travel reimbursements.

[continued]

IV. Methods for Encouraging MWBE Participation

Colleges are also encouraged to take the following steps to further MWBE participation in Covered Contracts:

- A. send notice of particular solicitations to appropriate NYS-certified MWBE vendors from the ESDC directory and to appropriately located (regional) MWBE business associations;
- B. attempt to unbundle college contracts and solicit from NYS-certified MWBE vendors;
- C. consider encouraging in its procurements joint ventures, teaming agreements, partnerships, or other similar arrangements between prime contractors and NYS-certified MWBE vendors; and
- D. develop selective bidder lists that include NYS-certified MWBE vendors.

[end]