

FLORIDA BOARD OF GOVERNORS
NOTICE OF PROPOSED REGULATION AMENDMENT

DATE: January 17, 2013

REGULATION NUMBER AND TITLE: 18.001, Purchasing Regulations

SUMMARY: The 2012 Legislative Session passed HB 7087 and HB 5201, which require changes to Regulation 18.001. The bills provide for a price preference for Florida-Based Vendors, including Florida printers, and also establish cost-saving goals of five percent.

The proposed revision renumbers and consolidates existing critical sections and incorporates the recent changes in law by adding a section guiding the price preference for Florida-Based Vendors, eliminating existing printing reference and strengthening the existing donation language. The proposed language was developed in conjunction with university attorneys, purchasing officials, and a small sub-group of volunteers, headed by Shirley Liu, Assistant General Counsel, FIU and Kathy Ritter, Purchasing Director, UNF. No adverse impact has been identified by adoption of these regulations.

FULL TEXT OF THE REGULATION IS INCLUDED WITH THIS NOTICE.

AUTHORITY TO PROPOSE REGULATION(S): Section 7(d), Art. IX, Fla. Const.; BOG Regulation Development Procedure dated March 23, 2006.

THE BOARD OF GOVERNORS' OFFICIAL INITIATING THE PROPOSED REGULATION: Chris Kinsley, Director, Finance & Facilities

COMMENTS REGARDING THE PROPOSED REGULATION SHOULD BE SUBMITTED WITHIN 14 DAYS OF THE DATE OF THIS NOTICE TO THE CONTACT PERSON IDENTIFIED BELOW. The comments must identify the regulation on which you are commenting:

General Counsel, Board of Governors, State University System, 325 W. Gaines Street, Suite 1614, Tallahassee, Florida 32399, (850) 245-0466 (phone), (850) 245-9685 (fax), or generalcounsel@flbog.edu.

18.001 Purchasing Regulations

(1) **Authority of the Institutions.** Each university Board of Trustees shall adopt regulations establishing basic criteria related to procurement, including procedures and practices to be used in acquiring commodities and contractual services, as follows:

- (a) Removing any contractor from the University's competitive vendor list that fails to fulfill any of its duties specified in a contract with the University(s) and to reinstate any such contractor when satisfied that further instances of default will not occur.
- (b) Planning and coordinating purchases in volume and negotiating and executing agreements and contracts for commodities and contractual services under which the University may make purchases.
- (c) ~~Evaluating~~Utilizing, -and approving, and utilizing contracts let by any State of Florida agency or department, the Federal Government, other states, political subdivisions, not-for-profit cooperatives or ~~consortiums~~consortia, or any independent college or university for the procurement of commodities and contractual services, when it is determined to be cost-effective and in the best interest of the University, to make purchases under contracts let by such other entities. For the 2012-2013 fiscal year, Universities shall review existing consortia and cooperative contracts to identify potential savings and, if there is the potential for savings, enter into new consortia and cooperative contracts to achieve the savings, with the goal of achieving a five-percent savings on existing contract prices.
- (d) Awarding contracts for commodities and contractual services to multiple suppliers, if it is determined to be in the best interest of the University. Such awards may be on a university, regional or State University System-wide basis and the contracts may be for multiple years.
- (e) Rejecting or canceling any or all competitive solicitations when determined to be in the best interest of the University.
- (f) Barring any vendor from doing business with the University for demonstrated cause, including previous unsatisfactory performance.
- ~~(g) Vendors shall be required~~Requiring vendors to identify their principal place of business as defined in subparagraph (3)(d) in response to all forms of competitive solicitations.
- ~~(h) Requiring the use of purchasing agreements or state term contracts pursuant to section 287.056, Florida Statutes, or consortia and cooperative agreements to the extent such use would result in net savings of 5% or greater to the university over otherwise available or offered pricing to the university for the exact same good or service. In no instance shall university regulations require the use of state purchasing agreements or state term contracts pursuant to section 287.056 if the university can achieve a lower cost or if a specific commodity or contractual service is not available.~~
- ~~(i) Prohibiting all university personnel, including university support organization personnel, from soliciting information from vendors during the procurement process relating to fundraising or prospective donations to the university or its direct support organization.~~
- (g) Prohibiting University employees and University direct support organization employees participating involved in on a procurement selection committee process for commodities or services from soliciting donations from responding potential vendors

during the selection process, except for donations or other benefits expressly stated in or contemplated by the procurement document that reduce the cost of the commodities or services to the University.

(2) **Competitive Solicitation Threshold.** Each university Board of Trustees shall establish a competitive solicitation threshold not greater than \$75,000 (the “Competitive Solicitation Threshold”) for the purchase of commodities or contractual services.

- (a) When only one response is received to the competitive solicitation ~~threshold~~ for commodities or contractual services ~~that exceeding \$75,000 the Competitive Solicitation Threshold~~, the University may review the solicitation responses to determine if a second call for a competitive solicitation is in the best interest of the University. If it is determined that a second call would not serve a useful purpose, the University may proceed with the acquisition.
- (b) The purchase of commodities and contractual services shall not be divided to avoid the requirement of competitive solicitation.

(3) **Preferences for Florida-Based Vendors.**

(a) Preferences for Personal Property~~Commodities~~. When a University awards a contract to purchase personal property~~commodities~~, other than printing, by competitive solicitation pursuant to paragraph (2) of this regulation, a preference shall be provided to vendors with a principal place of business in Florida (such vendors hereinafter referred to as “Resident Vendors”) as follows:

1. ~~If the lowest responsible and responsive bid, or the highest ranked responsible and responsive proposal or reply~~ If the responsible and responsive vendor that submits the lowest bid, the most advantageous proposal, or the best value reply is one from a vendor whose principal place of business is outside of Florida and is in a state or political subdivision thereof that which grants a preference for the same purchase to a vendor in such state or political subdivision, as applicable, then the University shall grant the same preference, as the case may be, to either the responsible and responsive Resident Vendor with the lowest responsible and responsive bid received pursuant to an Invitation to Bid, or the Resident Vendor with the highest ranked responsible and responsive proposal or reply the most advantageous proposal received pursuant to a Request for Proposals, or the best value reply received pursuant to an Invitation to Negotiate.
2. With respect to Invitations to Bid, if the lowest responsible and responsive bid is from a vendor whose principal place of business is in a state that does not grant a preference for the purchase to a vendor in such state, then the University shall grant a preference in the amount of five percent to percent (5%) to the lowest responsible and responsive Resident Vendor.
3. For vendors whose principal place of business is outside of~~not in~~ Florida, such vendors must, at the time of submitting its bid, proposal or reply, provide a written opinion from a licensed attorney in its state specifying:
 - a(a)(i) the preferences(s) granted by the state or political subdivision, as applicable, under the laws of that state to vendors whose principal place of business is in that state or political subdivision; and
 - b(b)(ii) how the preference is calculated.

- The failure to submit the written opinion may be waived as non-material if all vendors responding to the solicitation have principal places of business outside of Florida.
4. The vendor's principal place of business, as represented by the vendor in its bid or reply, may be relied upon by the University without further inquiry. If the University determines that a vendor has misrepresented its principal place of business, the vendor's bid, proposal or reply shall be rejected.
 5. For the purpose of paragraph (3)(a), "personal property" shall be defined as goods and commodities, but not real estate, intellectual property or services.
- (b) Preferences for Printing. When a University purchases printed materials by competitive solicitation pursuant to paragraph (2) of this regulation, a preference shall be provided Resident Vendors as follows:
1. If the lowest responsible and responsive bid received pursuant to an Invitation to Bid is from a vendor whose principal place of business is outside of Florida, then the University shall grant a preference to the lowest responsible and responsive Resident Vendor in the amount of five percent (5%) if the University has determined that the printing can be performed by the Resident Vendors at a level of quality comparable to that obtainable from the vendor submitting the lowest bid whose principal place of business is outside of Florida.
 2. ~~{For purposes of subparagraph 3(b)(1), the level of quality shall be determined by the number of points whether a vendor receives on}~~ satisfies the minimum specification requirements as set forth in the Invitation to Bid "Quality" section of its evaluation points.}
- (c) Method of Calculating Five Percent Preference.
1. ~~{If the competitive solicitation is an Invitation to Bid, then an amount equal to five percent of percent (5%) of the total base bid and any alternates shall be added to deducted from the base bid and alternates, as applicable, of the lowest responsible and responsive Resident Vendor's bid}~~ bidder.}
- (d) Determining a Vendor's Principal Place of Business. A vendor's "principal place of business" is determined as follows:
1. If the vendor is an individual or a sole proprietorship, then its "principal place of business" is in the state where the vendor's primary residence is located.
 2. If the vendor is a business organization, then its "principal place of business" is in the state where the majority of the vendor's executive officers direct the management of the vendor's business affairs.
- (e) Federally Funded Projects. Purchases made to perform specific obligations under federally funded projects shall not be subject to this ~~the preference requirement to requirement to~~ the extent the application of a preference is not allowed under applicable federal law or regulation.

(4) **Exceptional Purchases.** Each university is authorized to make exceptional purchases of commodities or contractual services as follows:

- (a) Purchase of Products with Recycled Content. Each University may establish a program to encourage the purchase and use of products and materials with recycled content and postconsumer recovered material.

- (b) Purchase of Private Attorney Services. Written approval from the Attorney General is not required for private attorney services acquired by the University.
- (c) Purchase of Insurance. Each University shall have the authority to purchase insurance as deemed necessary and appropriate for the operation and educational mission of the University.
- (e)(d) Purchase of Printing. However, if a University determines that it is in the best interests of the University to purchase printed materials through a competitive solicitation process, the preference provision in paragraph (3)(b) shall apply.

(5) **Purchases from Contractors Convicted of Public Entity Crimes.** A University shall not accept a competitive solicitation from or purchase commodities or contractual services from a person or affiliate who has been convicted of a public entity crime and has been placed on the State of Florida's convicted vendor list for a period of 36 months from the date of being added to the convicted vendor list.

(6) **Competitive Solicitation Exceptions.** The following types of purchasing actions, and commodities and contractual services purchases are not subject to the competitive solicitation process:

- (a) Emergency Purchases. When a university president or his/her designee determines, in writing, that the delay due to the competitive solicitation process is an immediate danger to the public health or safety or the welfare of the University, including University tangible and/or intangible assets; or would otherwise cause significant injury or harm not in the best interest of the University, the University may proceed with the procurement of commodities or contractual services without a competitive solicitation.
- (b) Sole Source Purchases. Commodities or contractual services available from a single source may be exempted from the competitive solicitation process.
- (c) Purchases from Contracts and Negotiated Annual Price Agreements established by the State of Florida, other governmental entities, other Universities in the State University System, or other independent colleges and universities are not subject to further competitive solicitation.
- (d) The following listed commodities and services are not subject to competitive solicitation:
 - 1. Artistic services;
 - 2. Academic reviews;
 - 3. Lectures;
 - 4. Auditing services;
 - 5. Legal services, including attorney, paralegal, expert witness, appraisal, arbitrator or mediator services;
 - 6. Health services involving examination, diagnosis, treatment, prevention, medical consultation or administration. Prescriptive assistive devices for medical, developmental or vocational rehabilitation including, but not limited to prosthetics, orthotics, wheelchairs and other related equipment and supplies, provided they are purchased on the basis of an established fee schedule or by a method that ensures the best price, taking into consideration the needs of the client;

7. Services provided to persons with mental or physical disabilities by not-for-profit corporations organized under the provisions of s. 501(c)(3) of the Internal Revenue Code or services governed by the provisions of the Office of Management and Budget Circular A-122;
8. Medicaid services delivered to an eligible Medicaid recipient by a health care provider who has not previously applied for and received a Medicaid provider number from the Department of Children and Family Services. This exception will be valid for a period not to exceed 90 days after the date of delivery to the Medicaid recipient and shall not be renewed;
9. Family placement services;
10. Training and education services;
11. Advertising;
12. Services or commodities provided by governmental agencies, another University in the State University System, direct support organizations of the university, political subdivisions or other independent colleges and universities;
13. Programs, conferences, workshops, continuing education events or other university programs that are offered to the general public for which fees are collected to pay all expenses associated with the event or program;
14. Purchases from firms or individuals that are prescribed by state or federal law, or specified by a granting agency;
15. Regulated utilities and government franchised services;
16. Regulated public communications, except long distance telecommunication services or facilities;
17. Extension of an existing contract;
18. Renewal of an existing contract if the terms of the contract specify renewal option(s);
19. Purchases from an Annual Certification List developed by each University;
20. Purchases for resale;
21. Accounting Services;
22. Contracts or services provided by not-for-profit support and affiliate organizations of the University, direct support organizations, health support organizations and faculty practice plans;
23. Implementation/programming/training services available from owner of copyrighted software or its contracted vendor; or
24. Purchases of materials, supplies, equipment, or services for instructional or sponsored research purposes when a director of sponsored research or designee certifies that, in a particular instance, it is necessary for the efficient or expeditious prosecution of a research project in accordance with sponsored research procedures or to attain the instructional objective.

(7) Vendors Excluded from Competition. In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, Invitations to Bid and/or, Request for Proposals and/or Invitations to Negotiate shall be excluded from competing for such procurements.

(8) **Standard of Conduct.** It shall be a breach of ethical standards for any employee of a University to accept, solicit, or agree to accept a gratuity of any kind, form or type in connection with any contract for commodities or services. It shall also be a breach of ethical standards for any potential contractor to offer an employee of a University a gratuity of any kind, form or type to influence the development of a contract or potential contract for commodities or services.

Authority: Section 7(d) Art. IX, Fla. Const.; History—New 3-27-08; amended .(insert new effective date).