

**FLORIDA ATLANTIC UNIVERSITY
NOTICE OF PROPOSED REGULATION AMENDMENT**

Date: October 8, 2009

REGULATION TITLE AND NUMBER: Purchasing (6.008).

SUMMARY: The proposed revisions to FAU Regulation 6.008 are in compliance with Chapter 18 of the Board of Governor's (BOG) Regulations and include the raising of the competitive solicitation threshold from \$50,000 to \$75,000 and the addition of bid protest procedures in accordance with BOG Regulation 18.002.

FULL TEXT OF THE REGULATION AND AMENDMENT: The full text of the proposed regulation is attached below to this Notice. The full text of the existing regulation is posted on FAU's website at www.fau.edu/regulations. In addition, the full text of the proposed regulation and current regulation are available upon request to the Office of the General Counsel, which can be contacted at (561) 297-3007 or GeneralCounsel@fau.edu.

AUTHORITY TO AMEND THE REGULATION: Article IX of the Florida Constitution and the Board of Governors Regulation Development Procedure dated July 21, 2005.

UNIVERSITY OFFICIAL INITIATING THE REGULATION AMENDMENT: Dennis Crudele, Interim Senior Vice President for Financial Affairs

COMMENTS CONCERNING THE PROPOSED REGULATION AMENDMENT SHOULD BE SUBMITTED WITHIN 14 DAYS OF THE DATE OF THIS NOTICE TO THE CONTACT PERSON IDENTIFIED BELOW. In response, the University may solicit additional written comments, schedule a public hearing, withdraw or modify the proposed regulation amendment in whole or in part after notice, or proceed with adopting the regulation amendment. The comments must identify the regulation(s) on which you are commenting:

THE PERSON TO BE CONTACTED REGARDING THE PROPOSED REGULATION AMENDMENT IS: Myrlande Dessalines, Paralegal, Office of the General Counsel, 777 Glades Road, Boca Raton, Florida, 33431, (561) 297-3007 (phone), (561) 297-2787 (fax), GeneralCounsel@fau.edu.

PROPOSED

Florida Atlantic University

Regulation 6.008 Purchasing

(1) Definitions.

(a) Artistic Services – Services provided by an individual or group of individuals who profess and practice a skill in the area of music, dance, drama, folk art, creative writing, painting, sculpture, photography, graphic arts, web design, craft arts, industrial design, costume design, fashion design, motion pictures, television, radio or tape and sound recording or in any other related field.

(b) Commodity – Any of the various supplies, materials, goods, merchandise, food, equipment or other personal property, including a mobile home, trailer or other portable structure, which are purchased, leased, lease-purchased or otherwise contracted for by the University. Commodity also includes interest on deferred-payment contracts entered into by the University for the purchase of other commodities. Printing of publications, vehicles and software and license agreements shall be considered commodities.

(c) Competitive Bid/Proposal – The response submitted to an Invitation to Bid, Request for Proposal, or an Invitation to Negotiate by responsive and qualified bidders or offerors.

(d) Competitive Negotiation – The establishment of a contract through deliberation, discussion or conference on the specifications, terms and conditions of a proposed agreement.

(e) Competitive Solicitation – An Invitation to Bid, Request for Proposal or Invitation to Negotiate to competitively select a contractor.

(f) Construction Services – Contractual services, including labor or materials, for the design, construction, renovation, repair or demolition of University facilities.

(g) Contractor/Vendor – A person or firm who contracts to sell commodities or contractual services to the University.

(h) Contractual Service – The rendering by a contractor of its time and effort rather than the furnishing of specific commodities. The term applies only to those services rendered by individuals and firms who are independent contractors.

~~Contractual service does not include labor or materials for the construction, renovation, repair or demolition of facilities.~~

(i) Extension – An increase in the time allowed for the performance of the contract.

(j) Independent Contractor – A person or firm who provides a service to the University but does not have any employment or other relationship or connection with the University, except as provided in Section 112.313, F.S.

(k) Invitation to Bid – A written solicitation for competitive sealed bids, designating the title, date, and hour of the public bid opening and also defining the commodity, group of commodities or services.

(l) Invitation to Negotiate – An invitation extended to prospective contractors, whether by advertisement, written solicitation, electronic media or any other form of communication, to define the specifications, terms and conditions of a contract for commodities or contractual services. An invitation to negotiate may be used when negotiations are beneficial to achieve the best outcome for the University.

(m) Public Entity Crime – A violation of any state or federal law by a person in the transaction of business with any public entity of any state or with the United States government involving antitrust, fraud, theft, bribery, collusion, racketeering, conspiracy or material misrepresentation.

(n) Purchase - An acquisition of commodities, services or licenses obtained by purchase order, contract or other authorized purchasing method, whether by rent, lease, installment, lease-purchase or outright purchase.

(o) Purchases for Resale – The purchase of commodities or contractual services acquired for the purpose of selling them for the benefit of the University.

(p) Renewal – Contracting for an additional period of time after the initial contract term, provided the original terms of the agreement specify an option to renew.

(q) Request for Proposal – A written solicitation for competitive proposals for commodities or contractual services designating the title, date, and hour of the public opening. The request for proposal is used when the scope of work is not clearly defined.

(r) Responsive and Qualified Bidder or Offeror – A contractor/vendor who has submitted a bid or proposal that conforms in all material respects to a competitive solicitation.

(s) Term Contract – An indefinite quantity contract for the purchase of commodities or contractual services during a prescribed period of time.

(t) Vehicles – Includes any automobile, truck, motorcycle, bicycle, golf cart, watercraft or other vehicle designed primarily for transporting persons as well as construction vehicles or farm equipment. ~~Vehicles owned, leased or operated by the University shall be available for official University business only.~~

(2) Authority.

The President shall delegate to the Purchasing Department the powers and duties ~~prescribed in Section 1001.75(5), F.S. to approve, execute and administer University contracts for the purchase of commodities and contractual services and to establish policies and best practices to facilitate such duties, as appropriate.~~ In addition, the Purchasing Department has the responsibility to:

(a) Canvass sources of supply and enter into contracts for the purchase of goods or services including installment or lease-purchase contracts.

(b) Evaluate the ability of any vendor to remain on a competitive vendor list, based on the Vendor's responsiveness to competitive solicitations, the Vendor's ability to fulfill the duties specified in contracts, or any disruptive or unprofessional conduct or conduct which is not conducive to the University environment on the part of the Vendor or its agents.

(c) Negotiate with Vendors.

(d) Develop an Annual Certification List to serve as a waiver of the competitive solicitation requirement for commodities/ services that are frequently purchased and are available from a single source.

(e) Evaluate and approve contracts let by the Federal Government, the State, other states, political subdivisions or entities, colleges, universities, educational cooperatives or educational consortia 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.

(f) Elect as an alternative to the provisions of Section ~~120.57(3)(e), F.S.(8)(b)~~ herein, to proceed with a bid solicitation or contract award process when it is set forth, in writing, ~~that~~ the particular facts and circumstances which demonstrate that the delay due to staying the solicitation or contract award process would be detrimental to the interests of the University.

(g) Award contracts for commodities and contractual services. This includes the authority to make awards to multiple suppliers, awards in multiple year terms, or award contracts on behalf of multiple institutions or entities.

(h) Reject or cancel any or all competitive solicitations, in whole or in part, when determined to be in the best interest of the University.

(i) Purchase insurance as deemed necessary and appropriate for the operation and educational mission of the University.

(j) Coordinate with the University Division of Facilities on the administration of Construction Services, which services shall be administered pursuant to Chapter 14 of the Florida Board of Governors (BOG) Regulations.

(3) Competitive Solicitations.

(a) General.

1. The opportunity to bid on a University contract is a privilege, not a right.
2. All contracts for the purchase of commodities or contractual services exceeding ~~\$50,000~~ \$75,000 shall be awarded pursuant to a competitive solicitation, unless otherwise set forth in this ~~rule~~ regulation.

3. The purchase of commodities and contractual services shall not be divided to avoid the requirement of competitive solicitation.
4. In the event that no quotes, bids, proposals, or responses to Invitations to Negotiate are received in response to a competitive solicitation, the University shall negotiate the purchase at the best possible price.
5. When only one response is received to a competitive solicitation for commodities or contractual services exceeding ~~\$50,000-\$75,000~~, the Purchasing Department shall review the solicitation response to determine if a second call for a competitive solicitation is in the best interest of the University. If it is determined by the Purchasing Department that a second call would not serve a useful purpose, the University will proceed with the acquisition.
6. When multiple responses that are equal in all respects are received to a competitive solicitation, the Purchasing Department shall give a preference to responses that include ~~minority business enterprise participation,~~ commodities manufactured in the State, Florida businesses, businesses with a drug-free workplace program, or foreign manufacturers located in the state, in determining the contract award. If these conditions do not exist, or are the equivalent between two or more responses, a coin toss ~~will~~may be used.
7. The intended award shall be publicly posted by the Purchasing Department for 72 hours which is interpreted as three working days excluding Saturdays, Sundays, and State and University Holidays.
8. Advertisements. Invitations to Bid, Requests for Proposal, and Invitations to Negotiate expected to be in excess of \$150,000 shall be advertised in the Florida Administrative Weekly, ~~the Florida Communities~~ NetworkMyFloridaMarketPlace (MyFlorida.com), or on the Purchasing Department's web site.
9. The contents of Requests for Proposal, Invitations to Bid and Invitations to Negotiate shall be kept confidential by the University until the University provides notice of an intended decision or as otherwise provided in date of award, or for up to 10 calendar days after the opening date, the time allotted whichever is earlier, pursuant to Section 119.071(31)(mb), F.S.
10. In the case of extension errors, the extended price (unit price multiplied by the quantity) will be based on the unit price as stated in the Vendor's Response.

(b) Purchasing actions that are not subject to the competitive solicitation process include:

1. Emergency Purchases. When the President or designee determines, in writing, that the delay due to the competitive solicitation process would cause an immediate danger to the public health, safety or the welfare of person(s), animal(s), the preservation or protection of property, or the continuance of a vital University function, the Purchasing Department is permitted to proceed with the procurement of commodities or contractual services without a competitive solicitation. The emergency purchase shall be limited to the purchase of the type of items and quantities needed, or for a time period sufficient to meet the immediate threat, and shall not be used to meet long-term requirements.
2. Sole Source Purchases. The Purchasing Department shall certify in writing that a particular commodity or service is available from a single source and shall

- publicly post the certification for three working days.
3. Purchases from contracts and negotiated annual price agreements established by the Federal Government, the State, other states, political subdivisions or entities, colleges, universities, educational cooperatives or educational consortia are not subject to further competitive solicitation.
 4. Construction Direct Purchase Program (Owner/Contractor Program). Commodities to be incorporated into any public work (as that term is defined in Rule 12A-1.094, F.A.C.), which are procured by the University in accordance with the requirements of the University's direct purchase program, are not subject to any further competitive solicitation.

(c) Commodities and contractual services that are not subject to the competitive solicitation process include:

1. Artistic services;
2. Academic reviews;
3. Lectures;
4. Auditing services;
5. Legal services, including attorney, paralegal, expert witness, appraisal, arbitrator or mediator services. Written approval from the Attorney General is not required for private attorney services acquired by the University, ~~pursuant to Section 287.059, F.S.~~;
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, and wheelchairs, provided the devices 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 the Federal Government, the State, other states, political subdivisions or entities, colleges, and universities;
13. Continuing education events or programs that are offered to the general public for which fees have been 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 the Annual Certification List developed by the University;
 20. Purchases for resale;
 21. Accountant Services;
 22. Contracts or services provided by not-for-profit, direct support, health support and University affiliated organizations and faculty practice plans;
 23. Implementation, programming, or training services available from the owner of copyrighted software or its agent; and
 24. Purchases of materials, supplies, equipment, or services for research purposes when the 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.

(4) Bonds.

(a) Bid Bonds. The University will require payment of a bid bond when the Purchasing Department determines that it is necessary based on the following factors: the size of the contract, the nature or scope of the project, the financial stability of the bidder or the ability of the bidder to fulfill the contract. The payment of the security shall be in the form of a certified, cashier's or treasurer's check, bank draft or bid bond.

(b) Payment and Performance Bonds. The University shall require a contractor to furnish a payment and performance bond, prior to the issuance of a contract, with good and sufficient securities, when the total contract amount is greater than \$200,000 and the Purchasing Department is uncertain about the contractor's ability to perform.

(c) Solicitation Protest Bond. Any contractor that files an action-petition pursuant to Section 120.57(3)(b), F.S.(8) below, protesting an intended award decision or intended decision pertaining to a solicitation, shall at the time of filing of the formal protest, post with the University, a bond payable to the University in an amount equal to: 10% of the estimated value of the protestor's bid or proposal; 10% of the estimated expenditure during the contract term or \$10,000, whichever is less. The bond shall be conditioned upon the payment of all costs that can potentially be adjudged against the contractor filing the protest action. In lieu of a bond, the University will accept a cashier's check or money order in the amount of the bond. Failure of the protesting contractor to file the required bond, cashier's check or money order at the time of filing the formal protest shall result in the denial of the protest.

(5) Contracts.

(a) Contracts for commodities or contractual services or licenses shall consist of a purchase order or bilateral agreement signed by the President or designee prior to goods or services being rendered by the contractor.

(b) Any contract for the purchase of services or tangible personal property for a period in excess of one fiscal year shall include the following statement: "The University's performance and obligation to pay under this contract is contingent upon an annual appropriation by the

Florida Legislature."

(c) Contract extensions, renewals, modifications to terms, conditions and scope, or amendments shall be permitted, shall be in writing, signed by all parties, and where applicable, are subject to annual appropriations by the Florida Legislature.

(d) The University will enter into deferred payment agreements utilizing the State of Florida Comptroller's Consolidated Equipment Financing Program when the Purchasing Department determines that it is financially favorable to the University to do so. No agreement shall establish a debt of the State or shall be a pledge of the faith and credit of the State; nor shall any agreement be a liability or obligation of the State except from appropriated funds.

(e) Contracts entered into by the University that limit the liability of the Vendor shall be consistent with Section 672.719, F.S.

(f) The total value of a contract shall be defined as the initial cost or revenue to the University for the maximum term of the contract including all options, extensions, and renewals.

(6) Purchases from **Small and** Minority Business Enterprises.

~~(a) Purchasing from Minority Business Enterprises.~~ The University is an equal opportunity institution, and dedicated to improving small and minority business participation in its Purchasing program and to continuing support for all segments of Florida's business community. encourages procurement contracting with Minority Business Enterprises.

~~(b)(a)~~ The University will strive to solicit, advice, and make available opportunities for small and minority businesses.

~~(a)(b)~~ Certifications of minority business enterprises (**MBEs**) granted by state and local entities and business organizations are eligible for acceptance in the University's MBE Program. MBE certifications by the State of Florida will be accepted by the University.

(7) Standards of Conduct and Limitation on Participation.

(a) All individuals participating in the procurement process are bound by the State of Florida Code of Ethics for Public Employees, Chapter 112, Part 3, F.S., and Florida Atlantic University Regulation on University Ethics, Regulation 5.011.

(b) It shall be a breach of ethical standards for any employee of the University to accept, solicit, or agree to accept a gratuity of any kind for personal gain in connection with any contract for commodities or services. Current or potential contractors are prohibited from offering an employee of the University a gratuity of any kind for the employee's personal gain to influence the development of a contract or potential contract for commodities or services.

(c) All individuals taking part in the development or selection of criteria for evaluation, the evaluation process, and the contract award process in any purchase shall be independent of, and have no conflict of interest in the entities evaluated and selected.

(d) The 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 the person or affiliate was added to the convicted vendor list.

(e) A person or firm who receives a contract to perform a feasibility study for potential implementation of a subsequent contract, participates in the drafting of a competitive solicitation, or develops a program for future implementation shall be ineligible to contract with the University or compete for such procurements dealing with the specific subject matter.

(8) Protest Procedures. Protests shall be handled in accordance with BOG Regulation 18.002 and as otherwise provided herein.

(a) Any qualified offeror who is adversely affected by the University's decision may file a written notice of intent to protest with the Purchasing Department within 72 hours after University posting of an intended award. With respect to a protest of the terms, conditions, and specifications contained in a solicitation, including any provisions governing the methods for ranking bids, proposals, or replies, awarding contracts, reserving rights of further negotiation, or modifying or amending any contract, the notice of protest shall be filed in writing with the Purchasing Department within 72 hours of the posting of the solicitation. The petitioner must reduce its complaint to a written petition, specifying with particularity the facts and law upon which the protest is based and the proposed relief requested, and file it with the President within ten (10) calendar days from registration of the original complaint. If the competitive solicitation documents require the posting of a bond with the protest, the bond shall be included with the protest. Failure to file a notice of protest or the written petition, including posting of the required protest bond, shall constitute a waiver of the right to protest proceedings. No time service will be added to the above time limits for mail service.

(b) Upon receipt of the formal written petition filed in accordance with this regulation, the President or designee shall delay the execution of the contract until the protest is resolved by mutual agreement between the parties or by final presidential action, unless the President shall make a finding and declares that such delay would cause serious danger to the public health, safety or welfare or otherwise be detrimental to the interests of the University.

(c) Petitions involving disputed issues of material fact shall be referred for a quasi-judicial hearing. The President shall designate an administrative law judge to conduct the hearing in accordance with University procedures. At any time during the proceedings, the parties may seek a resolution of the protest by informal disposition or agreed settlement. At the conclusion of the hearing, the administrative law judge shall submit a written recommended order to the President. The President shall then issue a preliminary order for final action and notify the petitioner of such order. The preliminary order of the President shall be final, unless the petitioner takes exception to such order; in which event, it may file with the President such exceptions within twenty-one (21) days of receipt of notice of the preliminary order. At the end of the period for filing exceptions, the President will review the preliminary order and any exceptions that have been filed, and will render the final order. The decision of the President is final. Appellate review of the final order shall be in accordance with the requirements of Rule 9.190(b)(3), Florida Rules of Appellate Procedure.

Specific Authority—Florida Board of Governors Resolution dated January 7, 2003; Florida

Board of Governors Regulations 180.001, 18.002 and 18.003. History—New 3-26-80, Amended 11-10-82, Formerly 6C5-6.08, Amended 11-11-87, 2-13-03. Formerly 6C5-6.008, Amended - - 09.