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COUNTY OF ERIE

MARK C. POLONCARZ

COUNTY EXECUTIVE

June 12, 2018

Erie County Legislature
92 Franklin Street, 4th Floor
Buffalo, New York 14202

Re: NYS Municipal 104b Guidelines for the Purchase Process under the Formal Bid Dollar Threshold

Dear Honorable Members:

This submission of guidelines is for the processing of purchases under the Formal Bids' dollar threshold. The Division of Purchase dollar threshold for Formal Bidding is a mirror image of the NYS OGS at \$20,000. NYS Municipal Law 103 mandates the periodical view and approval of the public entity's governing board, also known as the Erie County Legislature. The approved guidelines will become NYS Municipal Law 104b.

Should your Honorable Body require further information, I encourage you to contact Vallie M. Ferraraccio, Director at the Division of Purchase at 858-2019. Thank you for your consideration on this matter.

Sincerely yours,

Mark C. Poloncarz, Esq.
Erie County Executive

MCP/lb
Enclosure

cc: Vallie Ferraraccio, Director of Purchasing

MEMORANDUM

To: Honorable Members of the Erie County Legislature
From: Division of Purchase
Re: NYS General Municipal Law 104b Review/Approval
Date: June 12, 2018

SUMMARY

The proposed resolution authorizes the acceptance of Erie County's Purchasing Procedures and establishes compliance with General Municipal Law requiring the governing board, aka County Legislature, to review and adopt those procedures for procurements under the Formal Bidding threshold of \$20K.

FISCAL IMPLICATIONS

By streamlining the acquisition process by reducing the amount of processing tasks for the buyers, it is possible to quicken turnaround time of purchase requests. This will result in potential work redistribution. No negative impact is anticipated. Potential future expense reductions as a result, in regards to the Advertising Budget are anticipated but not quantified at this time.

REASONS FOR RECOMMENDATION

General Municipal Law 104-b requires this submission. This Division is not asking for any changes to the current process, but the approval of the processes listed under 104b need to be periodically reviewed and approved by the County of Erie's governing board. The Legislative approval solidifies the processes to become NYS Municipal Law 104b.

BACKGROUND INFORMATION

It is necessary to submit the policy and procedures to accommodate the process to the Informal and Formal Bidding dollar thresholds under the rules and guidelines set forth by NYS General Municipal Law 103 and the Erie County Administrative Code, Section 3.07. These processes will assist in this division to accomplish its daily tasks more efficiently. .

CONSEQUENCES OF NEGATIVE ACTION

The County will be in non-compliance with the NYS Municipal Law which mandates that the processes created for under the Formal Bid dollar threshold of \$20K to be periodically reviewed and approved by the said public entity's governing board.

STEPS FOLLOWING APPROVAL

The approval will be filed and the Buyers will be to process bids in compliance of NYS Municipal Law 103. This measure will be implemented immediately.

**COUNTY OF ERIE
DIVISION OF PURCHASE**

**POLICIES AND PROCEDURES AS REQUIRED UNDER GENERAL
MUNICIPAL LAW SECTION 104-B. (Revised February 2013)**

STATEMENT OF PURPOSE

The purpose of the policies and procedures for the Division of Purchase is to protect Erie County taxpayers by assuring that competition is sought in a reasonable, cost-effective manner for all procurements where practicable and required by law. Goods and services that are not required by law to be procured pursuant to competitive bidding must be procured in a manner to assure the prudent and economical use of public moneys, to facilitate the acquisition of goods and services of maximum quality at the lowest possible cost and to “guard against favoritism, improvidence, extravagance, fraud and corruption” as required by New York General Municipal Law (GML) §104-b (1). It is the responsibility of the Division of Purchase to insure that internal efficiencies are achieved in order to minimize labor costs to procure goods and services. To that extent, the Director of Purchase shall develop policies and procedures and review the same, on an annual basis, that considers achievable efficiencies and at the same time, ensuring that the department is working within the confinement of the governing laws.

PROCUREMENT PROCEDURES

(REF., GML §§ 103, 104,104-b; Erie County Charter §§ 306 & 2602; Erie County Administrative Code §§ 3.06, 3.07 & 19.08)

Bidding Procedures

When analyzing a request for acquisition of goods and services, an initial determination must be made as to whether a particular procurement is subject to competitive bidding. Some preliminary issues should be considered: Is the proposed procurement a purchase contract or a contract for public work? Is the amount requested above the applicable limit provided by law? Do any exceptions apply (e.g. state contract, sole source, public emergency)? If the amount requested is less than the bidding limits required, what procedures apply that promote competition and maintain a level of efficiency consistent with Erie County requirements?

Bidding Guidelines

NYS GML 103 requires advertised bidding for procurements over \$20,000 for general commodities/services (Purchase Contract), and \$35,000 for public work. Although not defined in GML 103 the Office of the State Comptroller has expressed the opinion that the term “purchase contract” applies to the procurement of commodities (e.g. equipment, materials, supplies, and some services), while the term “contract for public work” encompasses contracts for services, labor and construction (see 1987 Opns St Comp No. 87-46, p 70; 1979 Opns St Comp No. 79-762, p160). If it is determined that competitive bidding (GML 103) is not applicable for an acquisition, documentation must justify how the decision was reached. On procurements less than \$5,000; verbal, telephone, fax, written, or single source quotations may be used. Procurements of commodities/services between \$5,000 and \$20,000 and contracts for public work between \$5,000 and \$35,000 are subject to the informal bid process. The respective

department may make purchases less than \$1,000 by utilizing the Department Purchase Authorization (DPA) Procedure. Consideration must be given to acquisitions made of the same or similar items over the course of the fiscal year where the aggregate value may exceed the competitive bidding threshold. Departments are not permitted to split orders that may exceed \$5,000 over the course of the year unless those purchases are made off current available County, State, Federal or other Municipal contracts or for other reasons bidding is not practical. Multiple purchase orders to one vendor will be allowed if that vendor has an existing SAP Outline Agreement and/or Contract with the County of Erie.¹ All other requisitions need to comply with the applicable procedures herewith.

Formal Competitive Bid Process

On Purchases \$20,000 and greater for commodities/services, and contracts for public work greater than \$35,000, the formal sealed bid process must be used. Bid specifications are prepared by the requesting department and the Division of Purchase. Each formal bid is advertised in a newspaper with a circulation of 50,000 or greater. In addition, all formal bids are advertised on the Internet and can be downloaded by interested parties and prospective bidders accordingly.²

In determining the necessity for competitive bidding, the aggregate amount to be expended in a fiscal year for an item or commodity to be purchased, or for the same type or similar public work, must be considered. It is established that the purpose of the bidding statutes may not be frustrated or avoided by artificially splitting or breaking up contracts into lesser agreements, or entering into a series of agreements, for sums below the bidding limitations. As a general rule, items or work of the same or similar nature which are customarily provided by the same vendor or contractor should be treated as a single item for the purposes of determining whether the dollar threshold will be exceeded (see, e.g., 1992 Opns St Comp No. 92-46, p115).

Informal Bidding Process

On purchases of commodities/services between \$5,000 and \$20,000 and contracts for public work between \$5,000 and \$35,000, as far as practicable, will be procured by the Division of Purchase on bids first obtained from three sources where practical. Deviations from this policy must be approved by the Director of Purchase, documented on the "Bid Information Worksheet", and become part of the purchase documentation. Purchase requisitions and/or inquiry bid files or items within this threshold will include a notation indicating the names of at least three vendors who were contacted, the name of the individuals quoting for the firm, the date contacted, and the prices quoted by the vendors. A contract award will be to the lowest responsible bidder. Informal bids may be sealed, facsimile (fax), or telephone quotes at the Purchasing Director's discretion.

¹. An exception to the Department Purchase Authorization is made to the Division of Sewerage Management (DSM). The DSM may utilize the automated Department Purchase Order document type to process the \$1000 and under auto generated requisitions from the implemented Plant Maintenance Module. Outline Agreements are created by following the bidding processes and are uploaded into SAP to provide automation to the requisitioning process within the Sewer Management's Plant Maintenance Module.

² Formal bids are advertised every other Friday in the Buffalo News; thus, bid specifications must be received by the Purchasing Department the Tuesday before the advertisement will be published to provide adequate preparation time. Formal bids are also advertised on www.erie.gov and www.Bidnet.com.

Special Purchase Situations

In other instances where it is determined competitive bidding is not required, such as emergencies, sole source procurements, or professional services, written justification must be attached to the file. The following is a description of procedures for making these types of procurements.

Sole Source (No-Bid) Contracts- When circumstances are presented to the Director of Purchase, which serve the public interest indicating valid reasons that a request can be met by only one qualified vendor, the Director of Purchase may waive the bidding requirement. Goods and services, which may be procured from only one source, are defined as “sole source” items. It is important to note that there must be a single supplier of the item or service and there are no substantial equivalents. Sole source situations generally exist when an item is manufactured by only one firm, and a vendor has the exclusive franchise or distributorship for an item.

To initiate a sole source purchase, the buyer must be confident that conditions exist in the marketplace such that the requested goods or services are available from only one supplier and no substantial equivalents exist. In making these determinations, the Division of Purchase will document the unique benefits to the County of Erie of the item or service as compared to other projects available in the marketplace. (See, gen., 1988 Opns St Comp No. 88-35, p 65)

Even though there is only one source of supply, the buyer must still obtain a quotation for the vendor. Upon receipt of the properly executed quotation (written, fax, e-mail), the buyer will then proceed to write the purchase order.

Since market conditions change over the years, a previously substantiated sole source may find new entrants to a formerly monopolized market. All sole sources should be verified. It can be a situation where the buyer knows the marketplace has changed or it simply may be the need to verify the marketplace has not changed. It is understood that the mere likelihood that only one firm will bid is insufficient to justify sole source procurement. (1983 Opns St. Comp. No 83-124, p156)

Emergencies- Erie County Administrative Code, Section 3.07 (b) and GML 103(4), provide that purchases may be made without competitive bidding in the event that a public emergency arises due to an accident or other unforeseen occurrence.

Emergencies do not include situations, caused by a lack of planning on the part of the department. While it will be the department that requests an emergency purchase, the County Executive with approval if the Department of Law will determine if it qualifies as an actual emergency. The Department of Law will determine if the statutory criteria are met on a case-by-case basis. If approved, the County Executive may issue an emergency declaration.

When circumstances support an emergency procurement, the requesting department must submit the required written emergency declaration for the County Executive to the Director of Purchase or his/her designee. The requesting department and/or buyer must then locate a source for the required goods or service. The goal must always be to obtain the lowest price from the vendor who can best meet the delivery requirements. If the item is included in an Erie County contract listing, the contract vendor should be contacted first. Once the sources and price have been established, an emergency purchase order will be processed. It should be noted that in the event of a contract for services, the emergency contract will not exist for a term beyond the reasonable limits of the existence of the emergency situation. Similarly, in the case of an emergency involving the acquisition of commodities, the quantity acquired will be no more than needed to address the emergency situation at the time.

The Division of Purchase procedure will be the same as a routine informal or formal bid except that advertising and bidding is not required. The purchase order must state "Emergency purchase approved by (Name), County Executive as per Section 3.07 (b) of the Erie County Administrative Code." A copy of the County Executive's written emergency declaration must be attached to the purchase order.

Professional Services- Professional, technical or consulting services are not the type of services which may properly be the subject of competition based solely on the compliance with the objective, uniform standards of the bid specification, pursuant to a bid being awarded to the lowest responsible bidder. The determination of whether the professional service exemption is applicable must be made on a case-by-case basis, examining the particular services needed. Generally professional services include, but are not limited to, the specialized expertise of interpreters, consultants, attorneys, engineers or architects.

Contracts for professional, technical or other consultant services having a value of \$10,000 or more are procured by the use of Requests of Proposals (RFP). The requesting department shall advertise the Request for Proposals (RFP), and designate a committee of three to review the proposals and choose a vendor as required by Erie County Administrative Code 19.08. RFPs are distributed to interested parties and are advertised on the Internet and can be downloaded by interested parties and prospective proposers accordingly. Though not required, the department may advertise in trade publications. The department will select a vendor from the responses received and create a proposal to submit to the County Legislature and County Executive for approval to contract. Alternatively, the department may send final specifications to the Division of Purchase for bid submission if it is determined that a bid is more appropriate for the procurement. Except as provided in the Erie County Charter and Erie County Administrative Code, contracts for professional, technical and consulting services, including those contracts below the \$10,000 RFP threshold, shall be submitted to the County Legislature for its approval pursuant to section 2602 of the Erie County Charter.³

³ Exceptions apply to the Board of Elections, Department of Public Works, and County Attorney. See, e.g. Code 3.07(a); 6.02(c); 10.02(c); 1601(d).

True Lease- Leases for real property shall not be considered a purchase or contract made by the Division of Purchase. True lease agreements are neither purchases nor contracts for public works and, thus, are not subject to competitive bidding under GML 103 (*Exley v Village of Endicott*, 21 NY2d 426, 434 NYS2d992). Lease agreements require County Attorney approval before any procurement activity can begin. Documentation for the leasing versus purchasing decision should be made and should include a cost benefit analysis. The competitive bidding statutes cannot be circumvented by casting an agreement which is truly a purchase or a contract for public work in terms of a lease.

Insurance- Insurance requirements for vendors are to be reviewed and approved by the County Attorney's Office on a periodic basis. The purchase of insurance is to be conducted through the County Attorney's Office.

Second Hand Equipment acquired from other government agencies- The requesting department must have approval from the appropriate outside government official as well as budgetary approval before the purchase of surplus and second hand supplies, material or equipment is initiated. The Division of Purchase will verify that the purchase price is fair through market price comparisons via industry publications and other procurement sources. Competitive bidding is not required according to GML 103 (6). (21 Opns St comp, 1965, p615)

Single Source Purchases (\$1000 to \$5000)

For purchases between \$1000 and \$5000, the respective buyer has the option to award a purchase order to a single source vendor, usually recommended by the requesting department. It is the buyer's responsibility to ensure that the purchase price is fair through price comparisons from available sources. If the buyer has reason to believe that the price quote is not within an acceptable range for the product or products in question, he/she may request an informal quote or bid.

Exempted from GML 103, 104-b

Procurements from Industries for the for the Blind or Industries for the Disabled (NYSID)⁴, New York State Correctional Industries(CORCRAFT)⁵, and Federal, State, Local Contracts or Approved Purchasing Cooperative Agreements are exempted from GML 103 competitive bidding and GML 104-b purchasing policies. Although General Municipal Law exempts these types of purchases from the requirements of written or verbal quotations, use of the exemption must be documented with relevant information and/or copies of Federal, State or Local contracts.

Responsibilities/Exceptions

The Director of Purchase is the responsible Purchasing Agent for the County. The Director and buyers within the Division of Purchase are responsible for following the policies and procedures described herein and all relevant laws as they pertain to competitive bidding, using his/her experience and judgment in the application of County policies and procedures. (GML 104-b (2)(f)). If an award is made to a vendor other than the lowest price offered, written documentation stating the basis for such award and a justification that the award is in the best interest of the County, must be provided to and retained by the Division of Purchase.

⁴ See State Finance Law, section 162.

⁵ See Correction Law, sections 184, 186.

Updating Policies and Procedures

The Erie County Legislature shall review the policies and procedures at least annually and shall solicit comments from the Division of Purchase (GML 104-b (3), (4)).

Unintentional Failure to Comply

The unintentional failure to comply with the provisions of GML 104-b shall not be grounds to void action taken or give rise to a cause of action against the County of Erie or any officer or employee thereof. (GML 104-b (5))

DOCUMENTATION PROCEDURES

VERBAL/TELEPHONE QUOTES- At a minimum, the quotation should include the date, the item, the name of the vendor and vendor's representative, and the price quoted. The information is recorded on the purchase order and becomes part of the purchasing document.

SINGLE SOURCE QUOTES- The buyer will solicit for one written, faxed, or verbal quotation. Written or faxed quotations are attached to the Division of Purchase copy of purchase order. All verbal quotations will be document on the purchase order in accordance with purchasing office procedure.

WRITTEN QUOTES- A minimum of three quotations should be solicited and documented. "Request For Quotation" or "Informal Bid Request" forms are used and attached to the file.

FAX QUOTES- Fax quotes may be accepted for any quotation under \$20,000 for commodities/services and under contracts for public work greater than \$35,000 in accordance with the Division of Purchase Fax Bid Policy.

PRICE VERIFICATION- Buyers are required to verify New York State Contract pricing when applicable and practical. If price lists are not available through NYS OGS, buyers must receive pricing form the vendors and shall include some written affidavit of price validity.

BUILDING MODIFICATIONS- When delivery of purchases for equipment is dependent on non-bonded construction project completion, buyers must have the "Building Modification Form" filled out and approved by Public Works prior to ordering.

BID LANGUAGE (Extensions/Alternate submissions)- When bids are to be used in multiple time periods and/or for multiple orders requiring the vendor to hold pricing, it is mandatory that language in the bid document states the intention to do the same. The language must be clear and concise and should leave no doubt with respect to its intended use. The same holds true for the alternative bid submissions. The language must be clear and if the alternates are to be accepted, the Division of Purchasing should make every effort to notify all potential vendors of our acceptance of the same.

POST BID NEGOTIATIONS- Post bid negotiations are the responsibility of the Purchasing Director or his/her designee. Departments are not permitted to assume this responsibility.

REQUEST FOR PROPOSALS- RFPs are used for obtaining professional, technical and consulting services. The requesting department is responsible for submitting specifications to the Division of Purchase for review. If it is determined that the service is not biddable, the department originating the RFP may proceed in accordance with State and Local laws. Evaluations are conducted in accordance with Erie County Administrative Code 19.08.

A RESOLUTION SUBMITTED BY:
DIVISION OF PURCHASE

RE: Review of Purchasing Policies and Procedures

WHEREAS, General Municipal Law Section 104-b, subdivision 4 requires the governing board of the County to annually review County policies and procedures with respect to procurement of goods and services where such goods and services are not required by law to be procured pursuant to competitive bidding; and

WHEREAS, it has been determined that the implementation of these procedures are within the scope of and furtherance of specific purchase and procurement laws and rules set forth by New York State statute, the Erie County Charter, and the Erie County Administrative Code; and

WHEREAS, the Erie County procurement policies have been previously reviewed and found to be in compliance with the requirements of General Municipal Law Section 104-b (Comm. 2E-26) and were adopted by this Legislature on July of 2013; and

NOW, THEREFORE, BE IT

RESOLVED, that the Erie County Legislature does hereby adopt the Erie County Purchase Policies and Procedures under General Municipal Law 104-b as the policy of the County of Erie pursuant to General Municipal Law Section 104-b, and be it further; and be it further

RESOLVED, that certified copies of this resolution shall be forwarded to the Director of Budget and Director of Purchase.