

Contracting with CUNY

(July 2024)

Dear Potential Vendor:

As a New York State (“NYS”) entity, The City University of New York, including its constituent units (the Central Office, colleges, schools, centers, and institutes) (collectively, the “University” or “CUNY”), like many other public universities, are subject to restrictions on its contracting activities that are not applicable to private universities or companies. These restrictions pertain to contracts that are subject to the New York State Education Law and New York State Public Officers Law with guidance from the New York State Attorney General (“OAG”) and the New York State Comptroller.

1. GENERAL RESTRICTIONS

Governing Law and Venue. CUNY cannot agree to governing law or venue of any state (or jurisdiction) other than New York. Such a clause would implicate the state’s sovereign immunity and usurp the OAG’s authority as the state’s attorney for all purposes – including, management of litigation. The University cannot supplant this authority by agreeing in advance to control the manner in which litigation would be managed in the event of a conflict or dispute. As a result, the venue for any action or dispute arising in contract shall be in a court of competent jurisdiction in New York.

The state is liable only for contracts authorized by law. When it enters into a contract, it does so voluntarily and authorizes its liability. The University may not agree to submit to the laws or jurisdiction of another state, substantive law, or waiver of formal service of process.

1. **No Arbitration.** CUNY cannot agree to arbitration to resolve disputes under a contract and may not agree to submit to the rules of arbitration.
2. **Indemnification and/or hold harmless – provisions that require CUNY to pay losses incurred by another party.** Indemnification provisions have been determined to be unauthorized attempts to contractually waive the State’s sovereign immunity, and the only indemnity that the OAG has authorized the University to provide to vendors is:

“Subject to the availability of lawful appropriations and consistent with Section 8 of the State Court of Claims Act, the University shall hold the [supplier/vendor] harmless from and indemnify it for any final judgment of a court of competent jurisdiction to the extent attributable to the negligence of the University or of its officers or employees when acting within the course and scope of their employment.”

Contracts with the University may include only the exact language, as written above. The University cannot provide any other indemnity, including requirements to indemnify “to the extent permitted by law” or “unless prohibited by law” (or similar language). Nor can the University agree to any clause that may eliminate the words “indemnity” or “indemnify” but has the intent of obligating the University to defend the vendor in a third-party claim.

3. **Requirements that CUNY pay certain costs, such as taxes, interest, penalty fees, acceleration costs, cancellation charges, litigation costs, or attorneys’ fees.**
 1. **Interest and Late Payment Fees.** NYS Finance Law sets forth the interest and late payment fees that the State permits CUNY to pay and CUNY cannot agree to pay higher interest rates or greater late payment fees.
 2. **Penalty Fees/Cancellation Charges/Acceleration.** CUNY cannot make payments unless it has received goods and services (in exchange for those payments). Therefore, CUNY cannot pay fees such as penalties, cancellation charges, and costs associated with acceleration for which CUNY is not receiving additional goods or services.
 3. **Taxes.** As a State entity, CUNY is exempt from the payment of certain taxes. The NYS Department of Taxation and Finance has determined that CUNY is exempt from New York State sales and use taxes. CUNY also is exempt from taxes in states that do not charge tax to government entities. CUNY will not agree to reimburse a vendor for the payment of taxes. CUNY will agree to pay taxes lawfully imposed upon it, but CUNY cannot agree to allow a vendor to collect taxes that CUNY is not obligated to pay.
 4. **Attorneys’ Fees.** CUNY cannot agree to pay attorneys’ fees.
4. **Provisions Contrary to Law.** CUNY cannot agree to give up rights granted by law or common law, including, but not limited to: statutes of limitations, trial by jury, limitation of remedies, requirements to post bond for injunctions, to sue/or to limit liability for direct damages for personal injury, death, or damage to real property, tangible property, or intellectual property attributable to the negligence or other tort of the vendor, its officers, employees, or agents. CUNY also cannot agree to waive its right to sue or to limit the remedies available to CUNY against contracting parties.
5. **Disclaimer of Warranties.** CUNY cannot agree to terms that disclaim certain warranties of performance by the vendor. Vendors must represent and warrant that their products and services: (a) meet or exceed published standards, including any particular standards set forth in the contract; and (b) will be provided in a timely, professional manner with the level of care, skill, practice, and judgment consistent with industry standards and practices for similar services. Vendors are responsible for the goods or services they provide to CUNY under applicable law and/or contract.

6. **Risk of Loss to CUNY prior to or during delivery.** CUNY does not accept risk of loss prior to or during delivery of commodities; all deliveries of products must be FOB Destination.
7. **Term, Price, Automatic Renewals, and Termination.**
 - Term: With limited exceptions, CUNY cannot enter into agreements for a period of longer than five (5) years, inclusive of renewals.
 - Price: Price and any annual price increases must be clearly stated in the Agreement.
 - Automatic Renewals: CUNY cannot agree to automatic renewals, and any renewal term(s) must be at the sole discretion of CUNY.
 - Termination: CUNY may terminate agreements at any time if funding is no longer available. CUNY also may terminate agreements for convenience upon reasonable notice to the vendor, with the notice provision subject to negotiation between CUNY and the vendor.
8. **Confidentiality of Contract Documents and Contract Prices.** All agreements that CUNY enters into are public documents, and all agreements that CUNY enters into also are subject to disclosure pursuant to the Freedom of Information Law (“FOIL”). CUNY cannot agree to keep confidential agreements to which it is a party; however, certain proprietary information in agreements, such as the vendors’ trade secrets, may be kept confidential, subject to New York State Public Officers Law.
9. **Requirements that CUNY provide endorsement of a vendor or a product.** CUNY is prohibited by New York State Public Officers Law from providing endorsements. Vendors may not use the CUNY name or logo or any College name or logo or mark to express or imply endorsement by CUNY.
10. **Exclusivity.** CUNY cannot grant exclusivity to any vendor unless there has been a competitive public solicitation that resulted in the selection of the vendor to provide the commodities and services on an exclusive basis.
11. **Contract Clauses that impose obligations by reference:** CUNY will not agree to contract provisions that incorporate additional obligations by reference, including, but not limited to, references to policies located at a specific web address. All terms and conditions must be included in the actual agreement. Any and all terms of the contract that are modified or amended shall be binding upon either party so long as such changes are agreed to in writing by the parties and executed by the designated individuals authorized to amend or modify the contract.
12. **Insurance.** CUNY does not maintain general liability insurance or commercial liability insurance. CUNY operates under New York State Education Law Article 125, and the University and its employees are held harmless and indemnified pursuant to New York State Education Laws Sections 6205 and 6224.
13. **Appendix A – Standard Clauses for NYS Contracts.** New York State requires these clauses of “Appendix A” to be incorporated into CUNY contracts. New York State does not permit negotiation of Appendix A clauses. In the event of any discrepancy, conflict, or ambiguity between or among contract documents, precedence must be given first to Appendix A – Standard Clauses for New York State Contracts.

2. Requirements for Specific Types of Contracts

1. Contracts that include services to store or process personal non-public information.
 0. **Indemnity.** Vendors must indemnify CUNY for any third-party claims for breach of confidentiality of non-public information, including attorney fees and all costs that CUNY incurs for statutorily required notifications.
 1. **FERPA language.** Contracts involving student non-public information must contain a clause requiring the vendor to comply with FERPA, similar to:

“The Services will require [Contractor] to have access to certain personally identifiable information regarding the University’s students. The University hereby appoints [Contractor] as its agent for the sole purpose of assuming duties in connection with the processing of student records that would otherwise be provided by the University. As the agent of the University, [Contractor] is subject to and shall comply with the Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g; 34 CFR Part 99) and its prohibitions against disclosure of personally identifiable information regarding students to third parties, except if permitted by the regulations of the United States Department of Education”.

2. **General Data Protection Regulation (GDPR) – Contracts that include services to store or process European Union Citizen non-public information.** Vendors who provide services to store or process European Union Citizen non-public information are subject to the General Data Protection Regulation (GDPR), and such obligation must be stated in the contract.
3. **Contracts that include technology products or services for student, faculty and staff use.**
Contracts that involve vendors providing technology products or services for use by CUNY students, faculty, and staff must include the language below. CUNY cannot agree to alternate language<

“(a) The Vendor shall comply with all applicable federal and state laws and regulations regarding the accessibility of the Services for those who are disabled. In accordance with Section 170-F of the New York State Executive Law, the [Vendor] warrants and represents that the online content and functionality of all [products / services / etc.] under this Agreement conforms to the most current version of the Web Content Accessibility Guidelines adopted by the World Wide Web Consortium for accessibility and any successor standards that may be promulgated during the term of this Agreement (“WCAG Standards”), which are incorporated herein by reference. b. Vendor shall provide a completed Voluntary Product Accessibility Template (“VPAT”) that clearly indicates the Services’ compliance with the WCAG Standards. The VPAT must reflect

the Vendor's current software release to CUNY. Vendor warrants that the Services' online content and functionality shall meet or exceed the accessibility standards specified in vendor's VPAT throughout the Term of this Agreement, which must be aligned with the WCAG Standards. If CUNY determines that a user of the Services requires a special modification in order to access the Services, then CUNY shall promptly submit a written request to Vendor for a modification to the software in writing, and Vendor shall use commercially reasonable efforts to provide such modification promptly. In the event that the requested modification requires more than commercially reasonable efforts, then the Vendor must agree to engage in good faith negotiations with CUNY to amend the Agreement as necessary to provide for the requested modification of the Services.

2. Contracts for Software.

0. **Contracts are subject to the [Policies of CUNY's Computer and Information Systems Department](#)**
1. **Off-shoring is prohibited in contracts for services that store or host data.** Vendors must perform all services within the Continental United States, and vendor must ensure that all CUNY data ("Data") is stored within the Continental United States ("CONUS"). All Data in transit must be handled in accordance with FIPS-140-2 or TLS1 or TLS2 (or successor).

Support Services. All helpdesk, online and support services that access any Data must be performed within CONUS (the "Services"). At no time will any Follow-the-Sun support be allowed to access Data directly, or indirectly, from outside CONUS. Notwithstanding the foregoing, vendors who wish to access Data or perform Services outside of CONUS must notify CUNY at the very first opportunity and furnish to CUNY its security policies and protocols that address the manner in which the vendor will secure the Data and are consistent with CUNY's policies. During a public solicitation, vendors must present the question of whether it will be possible to access Data or perform Services outside of CONUS during the Question-and-Answer period, and vendors must provide its proposed security policies and protocols addressing the manner in which the vendor will secure the Data and are consistent with CUNY's policies as part of its proposal. In non-competitive procurements, the vendor must provide this information to Procurement at the very first opportunity. CUNY, with approval from New York State, may permit the vendor to access Data or perform Services outside of CONUS, if CUNY determines, in its sole discretion, that the vendor's security policies and protocols sufficiently protect the Data and the University.

Infrastructure Support Services. Infrastructure support services that do not directly or indirectly access Data may be provided in a Follow-the-Sun

format, if expressly set forth within an agreement that has been signed by the University.

2. Contracts for Intellectual Property

Vendors must indemnify and hold the University harmless from and against any and all damages, expenses (including reasonable attorneys' fees), claims, judgments, liabilities, and costs that may be incurred or assessed against the University in any action of infringement against the vendor of a patent, or of any copyright, trademark, trade secret, or other third-party proprietary right in connection with the Service.