

# COUNTY OF ULSTER

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## OPINION 2009-001 FOR PUBLIC RELEASE

### PRE-PAYMENT FOR BUS ENGINES

**This opinion represents the views of the Office of the Ulster County Comptroller at the time they were rendered, based upon facts and records as presented to this office by the persons or departments making the inquiry or contacted in order to render this opinion. This opinion may no longer represent those views if, among other things, facts provided are determined to be inaccurate, or there have been subsequent court cases or statutory amendments that bear on the issues discussed in this opinion.**

We are asked whether the County could “pre-buy” five (5) engines that meet U.S. Environmental Protection Agency (EPA) 2007 regulations and would be out of production by December 31, 2009. We are advised that these engines will be used in five (5) cutaway buses scheduled to be completed and delivered by contract delivery date of September 30, 2010.

We are further advised that these five (5) cutaway buses, which each cost \$524,159.00, will be paid with 100% Federal funding from the American Recovery and Investment Act of 2009 Funds (Federal Stimulus) and that the cost of the engine “pre-buy” of \$19,000.00 each will be deducted from the total cost of the buses as a credit on subsequent invoices when the buses are delivered. We have been provided a copy of the award letter from Ulster County to the successful bidder and a copy of two purchase orders #160788 for two (2) buses at \$1,062,216.00 and #161870 for three (3) buses for \$1,593,324.00 including applicable warranties.

We have been provided documentation supporting the “pre-buy” from the funding source, The Federal Transportation Administration, and a letter of explanation from the manufacturer, Orion, a division of Daimler Buses North America Ltd.

It is indicated that the engines will be received and stored in a secured facility owned and operated by Orion, a division of Daimler Buses North America Ltd until they are ready to be installed; that a bill of sale for each engine listing Ulster County as the purchaser has been provided; that each engine has a unique and clearly identifiable serial number; that an insurance certificate has been provided confirming insurance coverage and naming Ulster County as an additional insured.

*The mission of the Ulster County Comptroller's Office is to serve as an independent agency of the people, to protect the public interest by monitoring County government and to assess and report on the degree to which its operation is economical, efficient and its financial condition sound.*

The Office of the Comptroller of New York State has often expressed the view that payment by a municipality in advance of receipt of goods or services should be avoided wherever possible. A municipality should not be put into the position of advancing public moneys whenever there exists the possibility that, in the event of a default by the vendor or contractor, the municipality would find it difficult or impossible to obtain a refund. In addition, County Law, § 369(2) requires claims to be certified to the effect that goods were actually delivered or services actually rendered. These statutes clearly envision the making of payments subsequent to the rendition of services or delivery of goods.

Notwithstanding this general rule, this Office has recognized that certain types of contracts involve special circumstances where custom and usage, or fundamental concepts of policy, make payment in advance of receipt of goods or services an exception to the normal course of doing business. We realize that in this case advance payments will result in a savings of public moneys.

In this instance, although not physically possessing the asset, upon payment Ulster County will have ownership of the engines. This ownership is evidenced by the contract with the vendor and by the bills of sale which identify the engines by physical description, including serial numbers and pictures. Further, the engines are insured by the vendor with Ulster County named as an additional insured.

Accordingly, we find the special circumstances of this pre-buy of bus engines and the provisions made to protect the public's interest in this special circumstance to be acceptable and allowable.

Elliott Auerbach, Comptroller

December 10, 2009