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BY JEFFREY D. FRIEDLANDER

City Procurement: Change and Continuity

Recent changes to the City of New York's procurement process have increased the flexibility of city agencies in procuring goods and services and create a framework for increased speed and efficiency in the award of city-funded contracts for services to certain of the city's residents. At the same time, procurements by city agencies continue to be challenged, and must be defended, on grounds relating to procurement procedures. Activities relating to contracting and procurement are primarily the responsibility of two divisions of the Law Department: the Contracts and Real Estate Division, and the Commercial and Real Estate Litigation Division.

Innovations in Procurement

Attorneys of the Contracts and Real Estate Division, through their review of procurement rules and executive orders and the advice they give to city agencies on the laws governing procurement, play an indispensable role in implementing changes in this area. Two recent procurement innovations have received considerable attention from the division: "best value" procurements and the HHS Accelerator.

'Best Value' Procurements. General Municipal Law §103 is the basic instruction to municipalities as to how they may procure "public work" and "purchase" contracts. Public work contracts generally involve construction projects, but also include repair, alteration, or expansion of a public work. Purchase contracts involve the purchase of goods and also those services that do not involve specialized skills or the exercise of judgment. With certain exceptions, GML §103 has long required that these contracts be awarded through a competitive sealed bid process to the lowest responsible bidder. This requirement ensures that goods and services are obtained for the city at the lowest possible price and protects against favoritism, fraud and corruption in the award of public contracts. However, it has also created a degree of inflexibility in the city's procurement process.

Recently, this problem has been addressed by the state Legislature's enactment of a statute that amends GML §103 to permit "best value" procurement of purchase contracts. L. 2011, ch. 608; L. 2012, ch. 2. As described below, this opens the way for significant changes leading to greater flexibility in the way in which city agencies may procure goods and some services within the protective framework of the statute.

GML §103 now authorizes the award of purchase contracts to either the lowest bidder or to the bidder representing the "best value" to the city, as that phrase is defined in the State Finance Law. Under §163 of that law, best value is defined to be the best combination of quality, cost and efficiency. In addition, this definition specifically authorizes agencies to utilize a quantitative factor for certain small businesses and minority and women-owned businesses to be used in the evaluation of best value. Whether to award a purchase contract on the basis of low bid or best value is, in each instance, within the city's discretion.

In addition to state and local law, procurements by city agencies are governed by the rules of the city's Procurement Policy Board (PPB), set forth in Title 9 of the Rules of the City of New York (RCNY). These rules have recently been amended to implement the best value principles authorized by GML §103. See 9 RCNY §§3-02 (competitive sealed bidding) and 3-03 (competitive sealed proposals). Under the new rules, city agencies may procure goods or standardized services pursuant to the best value approach either by "best value bids" or by "best value proposals."

For best value bids, the agency must make clear in its invitation for bids that the award will be made on the basis of best value to the city and must set forth the criteria that the agency will consider in addition to price. Factors that the agency may take into account include features of the product or service set forth in the vendor's specifications, and warranties or maintenance to be provided with the product or service. Award must be made to the responsive and responsible bidder whose bid meets the requirements and criteria set forth in the invitation for bids, and whose bid represents the best value to the city by optimizing quality, cost and efficiency. In determining best value in the bid context, the agency may consider only the low responsive bid and other responsive bids that are within 10 percent of the low responsive bid, unless the city's chief procurement officer approves a higher percentage.

HHS Accelerator. HHS Accelerator is an initiative of Linda Gibbs, Deputy Mayor for Health and Human Services in the Bloomberg administration, to centralize certain administrative functions in the procurement of client services for youth,

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families, the elderly and other third-party targeted groups through a web-based document repository, universally applicable prequalification of contractors, and a master services agreement known as the Standard Human Services Contract. This initiative is intended to streamline the process of procuring these services by reducing the duplication created by the city current management of approximately 220 client service programs across 11 agencies. "HHS Accelerator" is both the name of an office—managed by the HHS Accelerator director, who is designated by the mayor—and the name of a procurement method set forth in the PPB Rules.

HHS Accelerator has established a web-based document repository that allows potential city contractors to share documents with the city on a common platform, thus significantly reducing duplicative requests for documentation. HHS Accelerator also allows the city to match specific procurements to specific vendor capabilities. Under HHS Accelerator, contractors apply to be prequalified to provide specific services in specific areas. A contractor is prequalified based on its ability to demonstrate the capability to perform. Specific procurements may then be targeted to eligible vendors.

The PPB recently adopted new rules to implement HHS Accelerator, and these rules will take effect by the end of this year. The major new rule is Section 3-16 of the PPB Rules, 9 RCNY §3-16. Under the new rule, the HHS Accelerator office establishes one centralized, citywide list of prequalified client services vendors that all city agencies will use for client service solicitations. The prequalification list is maintained by the HHS Accelerator office, and the HHS Accelerator director makes prequalification determinations for the 11 affected city agencies. Inclusion on the list establishes the vendor's ability to provide specific client services.

With a few exceptions, competitive solicitations for client services encompassed in the new program must be issued through HHS Accelerator, so that only those vendors who are prequalified will be eligible to compete to receive client services awards. Every solicitation under HHS Accelerator will be publicly advertised to allow vendors an opportunity to apply for prequalification, but only vendors who are prequalified will be eligible to submit a proposal in response to an RFP issued through HHS Accelerator.

In formulating and submitting their proposals, vendors will be able to reference and rely on documents already contained in the Accelerator document repository. In addition, agencies soliciting proposals can take advantage of the central availability of information on prequalified vendors to evaluate submitted proposals expeditiously and thoroughly. In these ways, it is expected that HHS Accelerator will substantially facilitate the procurement of client services for the targeted populations.

Defense of City Procurements

The amendments to state law and the PPB rules that permit a contract to be awarded on the basis of best value to the city and the centralized list of prequalified client services vendors established by the HHS Accelerator, discussed above, do not alter the long-standing requirements that the vendor selected for contract award must be responsive and responsible. See 9 RCNY §3-02(o)(1)(ii). A responsive vendor is one whose bid or proposal conforms in all material respects to the specifications of the solicitation. 9 RCNY §2-07. A responsible vendor is one who has "the capability in all respects to perform fully the contract requirements and the business integrity to justify the award of public tax dollars." 9 RCNY §2-08(b)(1). Disputes over whether a vendor is responsive or responsible are handled by attorneys of the Commercial and Real Estate Litigation Division.

In determining whether or not a bid or proposal is responsive, agencies must often decide whether failure in some way to comply with the solicitation's requirements is "material." A recent challenge to the exercise of agency discretion on this point was decided in the agency's favor in *R.S. Transportation Service v. Walcott*, Index No. 100735 (Sup. Ct., N.Y. Co. 2013) (Moulton, J.), a dispute over the award of a contract for school bus services by the city's Department of Education. There, one of the bids was received by the department with an unsigned signature page. When the department disqualified the bid on the ground that failure to submit a signed signature page was a material departure from the bid requirements, the bidder challenged this determination, arguing that the notarization page submitted with the bid indicated that a signed signature page had been submitted, but, even if this were not true, that the absence of a signed signature page was a de minimis deviation and should be excused.

The Supreme Court, New York County, applying the rational basis test, held that it is the agency's prerogative to determine whether a variance from a solicitation's requirements is material, and that here, the Education Department's determination was not arbitrary because the submission of a signed bid was listed as an explicit requirement in the bid documents and because allowing the petitioner to delay submitting a signed signature page until after bids had been opened would, in effect, have given it the option to withdraw its bid depending on the results of the bid tabulation, an opportunity denied to other bidders who had submitted their bids with signed signature pages.

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The same standard of review was applied to an agency's determination as to vendor responsibility in *En-Tech v. City*, Index No. 106743/2010 (Sup. Ct., N.Y. Co. 2011) (Scarpulla, J.). There, a losing bidder in a procurement for sewer rehabilitation work by the city's Department of Design and Construction (DDC) challenged the award of the contract to the low bidder, arguing that the vendor was not responsible because it had submitted false information with its bid. DDC responded that the low bidder had explained its submissions, and that any remaining questions as to the accuracy of the information did not rise to the level of non-responsibility. The Supreme Court, New York County, found that the petitioner failed to establish that DDC's determination lacked a rational basis or that the agency abused its discretion in awarding the contract to the low bidder.

Public Works

Attorneys of the Commercial and Real Estate Division are also called upon to defend an agency's determinations in preparing a solicitation's specifications. One such determination that has given rise to recent litigation was made by the New York City Water Board when it solicited proposals for work to be done in connection with its water and sewer service line protection program, which would be available to approximately 650,000 homeowners to protect them from the cost of repairing or replacing the pipes that connect their residences to the city's water and sewer mains. These pipes are property of the homeowners and must be maintained at their expense.

The voluntary program designed by the Water Board would, in return for a small monthly fee, pay the cost of such repairs for participating homeowners. Because this work would primarily benefit private homeowners, the Water Board determined that it was not "public work" for purposes of section 220 of the Labor Law and, therefore, that "prevailing wages" did not have to be paid to workers performing it.

In 2012, American Water Resources Inc. (AWR) was awarded a contract to perform the repair work required by the program. Subsequently, the Subsurface Plumbers Association asked the City Comptroller, who is responsible under Labor Law §220(3) for determining prevailing wage rates in New York City, whether the work provided for in AWR's contract was "public work" subject to the payment of prevailing wages. On Feb. 1, 2013, the comptroller issued an affirmative determination, concluding that Labor Law §220 applied, which he subsequently defended on the grounds that the prompt repairs provided by the program prevented damage to the city's infrastructure and thus benefitted the public, and the Water Board administered the contract, collecting the program fees of participating homeowners and passing them on to AWR, and could object to AWR's subcontractors. Both the Water Board and AWR challenged the comptroller's determination in a consolidated proceeding, in which division attorneys represented the Water Board. *American Water Resources and the New York City Water Board v. Liu*, Consolidated Index No. 100404/2013 (Sup. Ct., N.Y. Co. 2013).

At issue in this case is what constitutes "public work" for purposes of Labor Law §220. That provision does not define the term, but case law has developed a test that the Court of Appeals, in *De La Cruz v. Caddell Dry Dock*, 21 NY3d 530, 538 (2013), has recently modified, as follows: "First, a public agency must be a party to a contract involving the employment of laborers, workmen, or mechanics. Second, the contract must concern a project that primarily involves construction-like labor and is paid for by public funds. Third, the primary objective or function of the work product must be the use or other benefit of the general public."

Justice Alice Schlesinger concluded that "the primary objective of this contract is to offer private homeowners an affordable plan to cover large, unexpected repairs on the [water and/or] sewer service lines they own." Therefore, in her view, the work performed by AWR was not "public work" requiring the payment of prevailing wages under Labor Law §220. Accordingly, the court granted the petitions and vacated the comptroller's determination. The comptroller has filed a notice of appeal in the Appellate Division, First Department.

***Jeffrey D. Friedlander** is first assistant corporation counsel of the City of New York. **Howard Friedman**, deputy chief of the contracts and real estate division of the Law Department, and **Andrew Gelfand**, senior counsel in the commercial and real estate litigation division of the department, assisted in the preparation of this article.*