The Center for New York City Law at New York Law School and the New York City Law Department

Present

New York City Procurement Law: Doing Business with New York City

November 6, 2013

[3.5 Transitional and Nontransitional CLE Credits in Areas of Professional Practice]

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New York City Procurement Law: Doing Business with New York City
November 6, 2013

AGENDA

2:00-4:00 Session 1: Overview of the Law and Rules Governing NYC Procurements: What's New for Vendors in 2013?

1. Competitive sealed bids: New PPB rules and State law allowing the City to award contracts for the purchase of goods and standard services on a "Best Value" basis.
2. Minority and woman-owned business enterprises (MWBE): New local law and opportunities to participate in New York City contracts.
3. Contracts for client and community based services: The HHS Accelerator program to speed and simplify contracting.
4. Pay to Play and COIB rules.

Speakers: Steven Stein Cushman; Martha Mann Alfaro; Howard Friedman; Elaine Windholz

4:00-4:15 Break

4:15-5:45 Session 2: Core Vendor Issues

1. Bid protests: How and when may a bidder protest procurement decisions such as those regarding specifications in invitations for bids or requests for proposals, and decisions regarding contract awards?
2. Denial or revocation of pre-qualification status: How and when may a pre-qualification applicant challenge an adverse decision?
3. Non-responsiveness determinations: How and when may a vendor challenge a non-responsiveness determination?
4. Vendor responsibility determinations, non-responsibility appeals, and VENDEX cautions: How and when may a vendor manage business integrity and capacity issues that arise during the procurement process?
5. Dispute resolution: How can a vendor elevate a contract dispute to a higher level?

Speakers: Claude Millman; John Mascialino; Denise Richardson; Elaine Windholz

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Session 1: Overview of the Law and Rules Governing NYC Procurements: What's New for Vendors in 2013?

Steven Stein Cushman & Howard Friedman*

INTRODUCTION

These materials will provide an overview of New York City's procurement process and describe recent developments and current important topics. We will describe the legal framework that controls City procurement activity. The powers and responsibilities of City officials and specialized procurement officers will be described, and you will develop an understanding of the City's procurement mechanisms, which are intended to meet the goals of obtaining the best possible work at the lowest possible price through a fair process.

In Section I (pp. 2-4), we provide a brief description of the size and scope of the City's procurement activity, and discuss which agencies are governed by City procurements.

In Section II (pp. 5-8), we discuss the theory of how the procurement process is structured.

In Section III (pp. 8-19), we describe the particular procurement methods, including the elements of the competitive sealed bid, the basic method of procurement under State and local law.

In Section IV (pp. 19-27), we discuss recent developments and current topics in procurement—"best value" procurements, the HHS Accelerator program, certain ethics, conflicts and campaign finance issues, and contract registration.

The City's MWBE program, which will be addressed in Session 1, is described separately.

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* The authors are Chief and Deputy Chief, respectively, of the Contracts and Real Estate Division of the New York City Law Department. The views and opinions expressed in this article are those of the authors only and do not necessarily reflect the views and opinions of the City of New York or the New York City Law Department. Sharon Cantor and Rachael Kaminski assisted in the preparation of these materials.

I. OVERVIEW OF THE CITY'S PROCUREMENT ACTIVITY

A. Size and Scope of City Procurements. The sheer size and scope of the City's procurement system is daunting. In Fiscal Year 2013, for example, City agencies completed more than 40,500 procurements with a total value of more than $16.5 billion.[1] While representing only 2% of total contract value, 87 percent of procurements were worth $100,000 or less and were made using the small purchase method of procurement. Approximately 5,000 to 7,000 procurement actions are taken each year that are not such small purchases. Given the size of the City's procurement activity, what may be viewed as minor inconveniences when looked at in the context of an individual procurement or an individual law can quickly become significant hurdles to completing procurements in a timely manner when magnified across the entire system and when multiplied by several laws.

The primary and essential function of a public procurement system, of course, is to obtain supplies and services necessary for accomplishment of an agency's mission. The City spends approximately 25% of its budget each year purchasing goods, services and construction. In Fiscal Year 2013, for example, City agencies completed procurements with a total value of more than $16.5 billion. Of that total:

- 33 percent of the procurements were of human services
- 30 percent were of standardized services
- 17 percent were of construction services
- four percent were of architecture/engineering services
- 10 percent were of other professional services
- 6 percent were of goods

In looking at the procurement indicator reports keep in mind that the dollar figure given for many of the contracts underlying the category totals reflects the total cost of the contract over a period of years, not the amount that was actually expended in that year. The incautious reader of a series of such reports might assume that the City makes wild swings in the amount of contracted for human services, for instance, when in fact what is being reported is a periodic expiration and award of large blocks of multi-year program contracts.

Within these categories, the City supports a wide range of activities, everything from social services such as homeless shelters, senior centers, and job training, to basic infrastructure such as maintaining, repairing and replacing streets, bridges and water mains, to services such as a computer-aided dispatch system required for agencies to provide essential services such as responding to 911 calls.

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[1] The statistics cited in Part I are taken from "The City of New York Agency Procurement Indicators Report" for Fiscal Year 2013. This report is published annually by the Mayor's Office of Contract Services and may be found at http://www.nyc.gov/mocs.

B. Agencies Governed by City Procurement Laws. The initial section of Charter Chapter 13—the procurement chapter—is Section 310, entitled "Scope." It sets out the coverage of the City procurement law as governing purchase of all "goods, services and construction" to be paid for out of the City treasury or with monies under the control of the City. This could be read to apply Chapter 13 to procurements by public corporations that are legally distinct from the City but receive City funds through the budget process. For certain entities that are established by or pursuant to State law, however, State law preempts the application of requirements set forth in local law, whether set forth in the charter, the Administrative Code, or the Rules adopted by the PPB. *See Opinion of the Corporation Counsel, No. 11-90*, dated December 20, 1990, addressing the application of various local law requirements, including the City procurement process, to a number of entities such as the Department of Education and the Health and Hospitals Corporation.

The analysis for each of these entities varies with the particular legislative language applicable to the entity. For some agencies, State law preempts the application of local rules but nonetheless incorporates certain requirements that are similar to local rules. The New York City Department of Education, for example, is subject to the procurement requirements of Education Law §2590-g and is not subject to local procurement laws. The Education Law, however, incorporates a requirement that certain contracts be registered with the City Comptroller that largely tracks the registration requirements set forth in section 328 of the City Charter. The notable point is that just because "New York City" may appear in the formal title of a government agency, it does not necessarily follow that procurements by that agency are governed by New York City procurement rules.

Here is a short answer as to whether City procurement rules apply to certain governmental agencies. For a fuller discussion of the legal analysis underpinning these conclusions, *see* Corp. Counsel Opinion No. 11-90.

AGENCY	**CITY PROCUREMENT LAW**
New York City Health & Hospitals	No
New York City Housing Authority	No
Economic Development Corp.	No
Department of Education	No
School Construction Authority	No
Water Board/Water Finance Authority	No

C. City Roles. In this section, we highlight certain roles of different City offices. The list is not intended to be exhaustive either of the relevant players or of their powers.

1. PPB. The Procurement Policy Board has the responsibility to promulgate rules required by Chapter 13 and certain additional rules "necessary to implement the provisions of this chapter [13]." The extensive rule making powers of the PPB are summarized in Charter §311(a). The PPB is a five-member board, with three members appointed by the Mayor and two by the Comptroller. The PPB has no authority with respect to the award or administration of any particular contract. Charter §311(h).

2. Mayor. The Mayor has the responsibility to determine the organization, personnel structure and management of the City's procurement functions. Important Mayoral powers include the use of selective solicitation from a prequalified list pursuant to Charter §318, approval of the use of alternative procurement procedures pursuant to Charter §322, certification of compliance with procedural requisites for contracts awarded through a process other than competitive sealed bidding pursuant to Charter §327, and maintenance of a public information center regarding City contracts and contractors pursuant to Charter §334.

3. City Chief Procurement Officer (CCPO). The Director of the Mayor's Office of Contract Services (MOCS) is also designated by the Mayor as the City Chief Procurement Officer (CCPO). The CCPO exercises the powers of the Mayor in the procurement process, including those granted by the Charter, the Admin. Code, and the PPB Rules. Executive Order 121, dated August 11, 2008, delegates to the CCPO all the delegable powers and responsibilities of the Mayor with respect to procurements under Chapter 13 of the Charter and the PPB Rules or other law.

4. Agency Chief Contracting Officers (ACCOs). At the agency level, Agency Chief Contracting Officers (ACCOs) are responsible for the procurement functions of the agencies.

5. Corporation Counsel. The Corporation Counsel is required to certify as to the legal authority of all contracts under Chapter 13 pursuant to Charter §327(b). The Corporation Counsel also must approve "individually or by standard type of class, all contracts, leases and other legal papers" of the City pursuant to Charter §394(b). The Corporation Counsel, along with the Comptroller, provides prior approval for emergency procurements pursuant to Charter §315.

6. Comptroller. A procurement contract executed pursuant to Chapter 13, except for limited exceptions such as emergency contracts and small purchases, may not be "implemented" until it has been registered with the Comptroller pursuant to Section 328 of the Charter. *See also* Charter §93(p). Registration is discussed in detail in Section IV(D), page 24, below. The Comptroller, along with the Corporation Counsel, provides prior approval for emergency procurements pursuant to Charter §315.

II. THE STARTING POINT: THE THEORY OF HOW PROCUREMENT PROCESS IS STRUCTURED

A. General Municipal Law §103. The analysis of what law governs how a City contract must be awarded begins with Article 5-A of the General Municipal Law (Public Contracts).[2] GML §103 is the basic instruction to all municipalities to award all contracts for "public work" over specified minimum amounts through a competitive sealed bid process to the lowest responsible bidder. GML §103 also provides that public works contracts may be awarded either after public advertisement or through use of a prequalified list. GML §103(15).

For the construction, reconstruction or alteration of buildings where the project cost exceeds certain dollar thresholds and where no Project Labor Agreement (PLA) is in place, the City must separately bid and separate contracts awarded for plumbing and gas fitting; steam heating, hot water heating, ventilating and air conditioning (HVAC); and electric wiring. GML §101. Together with the general construction contract, therefore, the City often must award up to four separate contracts for a construction project. This law is referred to as the Wicks Law. The applicable dollar thresholds are $3 million in the City of New York; $1.5 million in Nassau, Suffolk, and Westchester Counties; and $500,000 in all other counties. The applicable threshold is determined by where the work is performed and not by the entity awarding the contract. When the New York City Department of Environmental Protection, for example, awards a contract to be performed in the West of Hudson watershed, the applicable threshold is $500,000.

The Wicks Law only applies in situations where competitive bidding is required pursuant to GML §103. *See* GML §101(2). Consequently, for example, emergency procurements are not subject to the Wicks Law. *See Active Fire Sprinkler Corp. v. City of New York*, Supreme Co., Kings Co., No. 9170/88 (6/14/88). The Wicks Law also does not apply to projects that are subject to a Project Labor Agreement (PLA). Labor Law §222(2)(b).

GML §103 also provides direction for how municipalities may award "purchase contracts (including contracts for service work, but excluding any purchase contracts necessary for the completion of a public works contract pursuant to article eight of the labor law)" over specified minimum amounts. GML §103 provides three alternatives for the award of a purchase contract.

1. Award to the lowest responsible bidder after public advertisement through competitive sealed bids;
2. Award to the bidder offering the "best value," as defined in State Finance Law §163, based on competitive sealed bids; or

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[2] As a background principle it should be remembered that there is nothing in constitutional or common law that mandates that public contracting must be carried out in a competitive manner, or through any particular procedure. In the absence of statutory guidance and constraint, public officials who have the power to enter into contracts may do so in any manner consistent with the public interest. *See Marino* v. *Town of Ramapo*, 68 Misc. 2d 44, 55 (Sup. Ct. Rockland Co., 1971) and cases cited therein.

3. Award to the proposer offering the "best value," as defined in State Finance Law §163, based on proposals received through a non-sealed bid process.

For best value determinations, SFL §163 defines best value as the bid or proposal "which optimizes quality, cost and efficiency." SFL §163(1)(j). In addition, the SFL best value definition also specifically authorizes agencies to utilize a quantitative factor for certain small businesses and minority and women-owned businesses. This issue is addressed in Section IV(A), page 19, below.

There are no statutory definitions of the terms "purchase" or "public work" that control the scope of GML §103. Public work contracts generally involve not only new construction projects, but also include the renovation, repair, alteration, rehabilitation 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. *See Exley v. Endicott*, 74 A.D.2d 96 (3rd Dept. 1980), *modified on other grounds*, 51 N.Y.2d 426 (1980).

There are a variety of exceptions to GML §103, some contained within the text of the GML and others created through judicial interpretation. For example, the courts have long recognized that, for purposes of GML §103, purchase contracts do not include contracts for the procurement of services which require specialized skills and the exercise of judgment. *See, e.g., Schulz v. Warren County Board of Supervisors*, 179 A.D.2d 118 (3rd Dept. 1992), *lv to app denied*, 80 N.Y.2d 754 (1992); *Doyle Alarm Co., Inc. v. Reville*, 65 A.D.2d 916 (4th Dept. 1978). In addition to judicially created exceptions, Article 5-A of the GML contains in itself many exceptions. *See, e.g.*, GML §103(1)(contracts or contracting methods authorized by other State laws); GML §103(4)(emergency contracts); and GML §104 (purchases through other government contracts). The exceptions to GML §103 are discussed in more detail below.

B. General Municipal Law §104-b.

When the municipality does not award a contract pursuant to GML §103 because of one of the various exceptions, GML §104-b governs the processes to be used by a municipality. GML §104-b does not require that any specific method be used and does not impose any specific processes to be followed. There is no State law requirement, for example, that if the City does not use a competitive sealed bid that the City must therefore use a competitive sealed proposal, or RFP, process.

Instead, GML §104-b directs municipalities to adopt policies and procedures for such procurements and identifies the PPB as the body responsible for adopting such policies and procedures. GML §104-b also sets forth a general standard that the City must comply with: such contracts "must be procured in a manner so as to assure the prudent and economical use of public moneys in the best interests of the taxpayers of the political subdivision or district, to facilitate the acquisition of goods and services of maximum quality at the lowest possible cost under the circumstances, and to guard against favoritism, improvidence, extravagance, fraud and corruption." These are the same goals that underlie GML §103. *See, e.g.*, GML §100-a; *Matter of New York State Chapter, Associated General Contractors of America v. New York State Thruway Authority*, 88 N.Y.2d 56, 67 (1996). Where State law does not require a competitive sealed bid, which is everything now except for public work contracts, City agencies may utilize any of the applicable alternative procurement methods set forth in the PPB Rules.

C. Specific Exceptions to GML §103/Circumstances where Competitive Sealed Bid Is Not Required. There are six primary exceptions to GML §103's public bidding requirements:

- small purchases;
- emergencies;
- special skills or judgment;
- sole sources;
- state laws that specifically allow municipalities to avoid competitive sealed bids; and
- change orders.

As small purchases, emergencies, sole source, and change orders are not only concepts that constitute exceptions to GML §103 but also themselves constitute methods of procurement, they will be addressed in Part III, below.

1. Special Skills or Judgment. Although GML §103 does not specifically exempt such contracts, New York courts have determined that GML §103 does not apply to the procurement of services which require specialized skills and the exercise of judgment. *See, e.g., Schulz v. Warren County Board of Supervisors*, 179 A.D.2d 118 (3rd Dept. 1992), *lv to app denied*, 80 N.Y.2d 754 (1992); *Doyle Alarm Co., Inc. v. Reville*, 65 A.D.2d 916 (4th Dept. 1978). The procurement of architectural, engineering, human, social, cultural or educational, legal, accounting, financial, computer, and other professional services are generally not obtained through a competitive sealed bid. *See* 9 RCNY §3-03(a).

Whether a services contract falls under the GML §103 definition of purchase contract or whether it is exempt as requiring special skills or judgment is of lesser significance now that GML §103 authorizes awards for all purchase contracts on the basis of best value. Still, in determining whether the procedural requirements of GML §103 apply, it is important to remember that the special skills exception does not apply to all service contracts. GML §103 applies where services do not require special skills or judgment. *See, e.g.*, Op. State Compt. 93-7 (service of legal process); Op. State Compt. 81-178 (printing services); 23 Op. State Compt. 654 (1967) (bus service). Nor are service contracts exempt simply because one contractor may be able to perform the services better than another contractor. After all, construction, which clearly may be done better by some firms than others, is the classic example of what must be done pursuant to a sealed bid.

2. Specific State laws. GML §103 provides that the State Legislature can expressly provide that competitive sealed bids are not required. The State Legislature has taken such action in a variety of instances. The most common exceptions relate to procurements involving other governments. *See* Section III(H), page 15, below, Purchases from, with, or through Other Governments.

III. PROCUREMENT METHODS

A. Competitive Sealed Bid. In conducting a competitive sealed bid, the City is subject to specific procedural requirements set forth in GML §103, the Charter, the Admin. Code, and the PPB Rules. We discuss four elements here: (1) advertisement/prequalification, (2) responsiveness, (3) responsibility, and (4) lowest bidder/best value. (These elements may also apply in non-sealed bid situations.)

1. Advertisement/Prequalification. Unless the City is soliciting from a prequalified list, GML §103(2) requires municipalities to advertise for bids and, for purchase contracts, offers in a newspaper, either the municipality's official newspaper or a newspaper designated for this purpose. The City's official newspaper is the City Record. Charter §1066. GML §103(15) authorizes the City to prequalify contractors for public works contracts and therefore, for applicable contracts, to limit the competition to contractors the City has determined to be qualified. Where a prequalified list is established, the City is required to advertise the opportunity to be on the list through the City Record.

GML §103 explicitly authorizes electronic bidding and, if an agency chooses to receive bids electronically, the advertisement must include the "designation of the receiving device." GML §103(2).

2. Responsiveness. A bid sets forth the terms of the contract that must be accepted by the bidder. In addition, the City may state experience and capacity requirements that a bidder must be able to satisfy in order to be awarded the contract. A responsive bidder is a "bidder whose bid meets the requirements and criteria set forth in the invitation for bids." Charter §313(a). A responsive bid "is one that complies with all material terms and conditions of the solicitation and all material requirements of the specifications." 9 RCNY §2-07(a). Factors affecting the responsiveness of bids are set forth in 9 RCNY §2-07(c). In short, bids must be filled out correctly; all required documents must be submitted; and the bidder may not attempt to modify the terms of the bid by substituting or adding additional terms.

The City may waive mistakes in responding to the precise requirements set forth in the bid solicitation only where the mistake is not substantial or material and does not provide the bidder with a substantial advantage or benefit not enjoyed by the other bidders. *See* 9 RCNY §2-07(d). *Compare Cataract Disposal, Inc. v. Town Board of the Town of Newfane*, 53 N.Y.2d 266 (1981) (Town may award contract to bidder who submits cash deposit in lieu of the required surety bond) *with Le Cesse Bros. Contracting, Inc. v. Town Board of the Town of Williamson*, 62 A.D.2d 28 (4th Dept. 1978) (Town may not award contract to bidder who fails to state the names of the manufacturers of equipment to be installed in the proposed contract, as required by the bid instructions).

In accordance with the principle that bidder mistakes that do not affect the competition do not render a bidder non-responsive, the PPB Rules also allow a bid mistake to be corrected where the mistake is a minor informality, such as a failure to return the required number of signed bids, or where the intended correct bid is evident on the face of the bid document, such as typographical errors or errors in extending unit prices. 9 RCNY §3-02(m).

- **Specifications**. Bid specifications may state terms to which the bidder must agree in order to be awarded the contract. The City must, of course, state in the specifications what it is procuring. In addition, the City may specify appropriate restrictions (e.g., experience requirements) on who is eligible to bid. Limitations on who may respond to a bid, however, are only permitted if they further the two goals underlying the State's competitive sealed bidding requirements: "(1) protection of the public fisc by obtaining the best work at the lowest possible price and (2) prevention of favoritism, improvidence, fraud and corruption in the awarding of public contracts." *Matter of New York State Chapter, Associated General Contractors of America v. New York State Thruway Authority,* 88 N.Y.2d 56, 67 (1996). In addition, when designing bids, "bidders [are to] be treated equally and fairly in their pursuit of public work." *Fischbach & Moore, Inc. v. New York City Transit Auth.*, 79 A.D.2d 14 (2nd Dept. 1981). The Courts, therefore, will strike down bid specifications that advance a social policy absent a demonstration that the bid specifications further the goals of public procurement by resulting in a cost savings or better product or services for that particular procurement. *See L & M Bus Corp. v. New York City Department of Education*, 17 N.Y.3d 149 (2011); *Council of the City of New York v. Bloomberg*, 6 N.Y.3d 380 (2006); *Associated General Contractors of America v. New York State Thruway Authority*, 88 N.Y.2d 56 (1996); *Associated Builders and Contractors v. City of Rochester*, 67 N.Y.2d 854 (1986).

The City is allowed, indeed even required, to state in the bid specifications what the City is procuring. Specifications do not violate GML §103 simply because they tend to favor one manufacturer over another. As the New York Court of Appeals explained in *Conduit & Foundation Corp. v. Metropolitan Transit Authority*, 66 N.Y.2d 144, 148 (1985): there is no "vested property interest in a public works contract." The laws requiring competitive bidding for public contracts "were not enacted to help enrich corporate bidders, but, rather, were intended for the benefit of taxpayers" and are to be construed therefore "with sole reference to the public interest." *Id.*; *Terminate Control Corp. v. Horowitz*, 28 F.3d 1335, 1343 (2nd Cir. 1994). The specifications, however, may not be drafted in such a way as to eliminate any real competition and steer the contract to a specific contractor. *See Gerzof v. Sweeney*, 16 N.Y.2d 206 (1965) (Court found no justification for a specification of a generator of a particular design and size that was manufactured by only one manufacturer). Specifications are improperly drawn if they limit competition in an attempt to insure the award of the contract to a particular manufacturer.

3. Responsibility. The City may award contracts only to responsible bidders. *See* GML §103; Charter §313(b)(2); 9 RCNY §2-08(a)(1). There are two components to responsibility. A responsible bidder must have both "the capability in all respects to perform in full the contract requirements, and the business integrity and reliability that will assure good faith performance." 9 RCNY §2-08(b)(1). In reviewing an agency's determination to find a contractor non-responsible, a Court's review is limited to determining whether there is a rational basis to support the determination. *Pell v. Board of Education*, 34 N.Y.2d 222 (1974); *Matter of Schiavone Constr. Co. v. Larocca*, 117 A.D.2d 440, 444 (3rd Dept. 1986), *lv den.*, 68 N.Y.2d 610 (1986). When an agency makes a responsibility determination, the issue is whether a contractor is or is not responsible; the agency may not perform a relative comparison with other vendors resulting in a determination whether the contractor is more or less responsible than another vendor. *See AAA Carting and Rubbish Removal, Inc. v. Town of Southeast*, 17 N.Y.3d 136 (2011).

- **Ability to Perform**. The City may impose experience requirements to ensure that the contractor is capable of performing the work.[3] A requirement that a bidder have successfully completed similar projects, for example, is permissible. *See P & C Giampilis Construction Corp. v. Diamond*, 210 A.D.2d 64 (1st Dept. 1994); *Construction Contractors Association of Hudson Valley, Inc. v. Board of Trustees, Orange County Community College*, 192 A.D.2d 265 (2nd Dept. 1993). The City may not, however, limit competition by imposing rigid experience requirements "unless it may fairly be said that successful completion of the project will be jeopardized by that bidder's inexperience. A municipality must err on the side of inclusion, and eschew unnecessarily narrow definitions of the statutory term 'responsible bidder.'" *Id.* at 268. Despite this admonition, the City is given significant leeway in setting appropriate experience qualifications. *See, e.g., P & C Giampilis Construction Corp.,* 210 A.D.2d 64 (upholding rejection of low bid because bidder had not completed two similar roofing projects that were within the last five years that were completed and in operation for a minimum of two years); *DCA Construction, Ltd. v. The City of New York*, Sup. Ct. N.Y. Co., Index No. 113340/99 (Oct. 26, 1999) (upholding rejection of low bid because bidder had not completed two bridge reconstruction contracts of at least $3 million in the past ten years).

- **Business Integrity**. In determining whether a bidder has sufficient integrity to justify the award of a public contract, the City may consider a bidder's honesty, integrity, good faith and fair dealing. A criminal conviction, pending indictment, or pending investigation may provide a rational basis for finding a bidder not responsible. *See, e.g., DeFoe Corp. v. New York City Dept of Transportation*, 87 N.Y.2d 754 (1996); *Matter of LaCorte Electrical Construction and Maintenance*, 80 N.Y.2d 232 (1992); *Abco Bus Co. v. Macchiarola*, 52 N.Y.2d 938 (1981), *rvsg on basis of dissenting opn*, 75 A.D.2d 831 (2nd Dept. 1980); *Tully Construction Co. v. Hevesi*, 214 A.D.2d 465 (1st Dept. 1995); *N.J.D. Electronics, Inc. v. New York City Health & Hospitals Corp.*, 205 A.D.2d 323 (1st Dept. 1994); *LaCorte Electrical Construction and Maintenance Inc. v. County of Rensselaer*, 195 A.D.2d 923 (3rd Dept. 1993). Moreover, the failure to disclose information requested by the City, or a failure to cooperate in an investigation, creates independent grounds on which the City may find a bidder not responsible. *Tully Construction*, 214 A.D.2d at 465. The City may not, however, find a contractor not responsible based on innuendo or "an impression of guilt by association rather

[3] A prospective contractor's compliance with stated experience requirements is often addressed in the context of a responsiveness determination. For example, a bid may require a bidder to have completed three contracts of a similar nature in the last three years. A bidder who has not done so is found non-responsive. The procedural requirements differ between non-responsive and non-responsibility determinations, but the substantive question whether the restriction is valid is the same whether the requirement is viewed as an issue of responsiveness or responsibility.

than demonstrating any relationship, other than the merely incidental, between petitioner and members of organized crime." *Leon DeMatteis Construction Corp. v. Dinkins*, 190 A.D.2d 621 (1st Dept. 1993), *lv to app. denied*, 81 N.Y.2d 711 (1993).

- **VENDEX**. The City maintains information regarding a potential contractor's responsibility in the VENDEX system. VENDEX—the Vendor Information Exchange System—is a computerized data base required to be maintained by local law for the purpose of facilitating responsibility determinations. Admin. Code §6-116.2. VENDEX is a repository of information about how a contractor has performed on past public contracts and issues that relate to the business integrity of a contractor and its principals. The system in essence allows agencies to share information about businesses seeking to do business with the City. Before a bidder may be awarded a contract, the agency checks VENDEX for relevant information. The bidder's previous history with the City, such as negative performance evaluations or significant breaches of prior contracts, and information obtained by the City from outside bodies regarding either performance or integrity issues, are all entered onto VENDEX. In addition, the bidder must complete a series of forms called VENDEX questionnaires requesting information about the bidder, its principals and affiliates, and its past practices. This information includes items such as the contractor's address, tax identification number, other names under which the contractor has conducted business in the past five years, the names of affiliates, contract sanction history, whether taxes have been paid in the previous five years, and the like. That information is used for making a responsibility determination on the specific contract but is also entered into VENDEX for consideration by agencies for future contract awards.

4. Lowest Bidder/Best Value. In a competitive sealed bid for public work, the contract must be awarded to the responsible and responsive bidder with the lowest price. GML §103. The City cannot evaluate the quality of the bidders and award a contract based upon some combination of price and quality. If a bidder is responsible, the City cannot award to the second low bidder on the basis that the second low bidder is a better value because, although the price is higher, the performance will be better.

The lowest responsible and responsive bidder is determined solely by the price in the bid. The City may not provide selected contractors the opportunity to match the low bid or "engage in postbid negotiations through which a contractor other than the low bidder may become the low bidder." *Matter of Fischbach and Moore, Inc. v. New York City Transit Authority*, 79 A.D.2d 14, 20 (2nd Dept. 1981). The rationale for this principle is that if such negotiations were permitted, bidders may choose not to participate in the bidding process because of a lack of confidence that their sealed bids would actually determine the contract award. *Id.* The City may, however, negotiate with the low bidder in an effort to improve the bid with respect to price only. 9 RCNY §3-02(o)(2). *See also Matter of Fischbach and Moore*, 79 A.D.2d at 20.

Just as the City may not enter into post-bid negotiations, the City cannot engage in auction techniques. GML §103 requires sealed bids that are publicly opened and read at the same time. Reverse auctions would violate both of these provisions because the bids are not sealed (sealing would remove the value of the "auction"), and are not opened at a given time (they are opened during the bidding period).

If the City does not believe it is in its best interests to award to the lowest responsible and responsive bidder, the City may reject all bids and readvertise for new bids provided that there is a rational basis for doing so. *See Conduit and Foundation Corp. v. Metropolitan Transportation Authority*, 66 N.Y.2d 144 (1985) (upholding rejecting all bids because of belief that new round of bids, on a revised contract, would result in lower prices); *William A. Gross Construction Associates, Inc. v. Gotbaum*, 150 Misc.2d 478 (Sup. Ct. Queens Co. 1991) (upholding rejecting all bids after City impermissibly allowed low bidder to revise its bid in a way that gave low bidder substantial advantage). A rational basis could include, for example, conducting additional outreach in order to expand the bidder pool or revising the specifications in order to change the work being competed. The City may not, however, solicit new bids and therefore thwart the competitive process simply because an agency wishes that a different vendor had prevailed. *Burke's Auto Body, Inc. v. Ameruso*, 113 A.D.2d 198 (1st Dept. 1985).

Best Value. GML §103 authorizes the award of "purchase contracts (including contracts for service work, but excluding any purchase contracts necessary for the completion of a public works contract pursuant to article eight of the labor law)" pursuant to a competitive sealed bid where the award is made either to the lowest bidder or to the bidder representing the "best value" to the City, as defined in State Finance Law §163. The "best value" option is discussed in Section IV(A), page 19, below.

B. Competitive Sealed Proposals. The use of competitive sealed proposals is the preferred method of procurement for services requiring special skill and judgment such as architectural, engineering, human, social, cultural or educational, legal, accounting, financial, computer, and other professional services. 9 RCNY §3-01(c). *See also* Charter §317(a) (requiring an agency to select "the most competitive alternative method of procurement" when a competitive sealed bid is not practicable or not advantageous to the City). The PPB Rules set forth detailed requirements governing the content of Requests for Proposals, public notice or the use of prequalified lists, weighted evaluation criteria, the receipt and evaluation of the proposals, negotiations with the proposers and solicitation of best and final offers, and award. *See* 9 RCNY §3-03.

C. Negotiated Acquisition. The PPB Rules set forth various grounds for the use of negotiated acquisition. The three most common justifications are: (1) time sensitive situations such as responding to court orders, acting to preserve funds from an outside source, or where a compelling need exists that cannot be timely met through a competitive sealed bid or RFP; (2) a limited number of suppliers are available and able to perform the work; and (3) a compelling need to extend a contract beyond the otherwise permissible limit of one year. 9 RCNY §3-04(b)(1). *See Giuliani v. Hevesi*, 276 A.D.2d 398 (1st Dept. 2000) (upholding use of negotiated acquisition when agency wanted to implement a new social services model quickly in response to a change in federal law).

The negotiated acquisition process is tailored to the specific procurement; there is little required process and competition may be waived by the CCPO. Unless otherwise agreed to by the CCPO, a negotiated acquisition requires notice of the intent to enter into negotiations to be published in the City Record and for the agency to negotiate with all qualified suppliers who express an interest in performing the contract. *See* 9 RCNY §3-04. There are no specific requirements for how to conduct the negotiations.

D. Sole Source. New York courts have never required bids where there is only one source of a good or service, even though GML §103 does not specifically exempt such contracts. *See Harlem Gas Co. v. Mayor of New York*, 33 N.Y. 309 (1885); *Williams v. Bryant*, 53 A.D.2d 229 (4th Dept. 1976). The rationale for this exception is clear. If there is only one bidder, there is no competition and therefore no guarantee of a fair price. In those situations the City is allowed to negotiate directly with the sole source provider to reach an agreed upon contract.

Whether a supplier is a sole source is a determination that must be made each time the good or service is procured. 9 RCNY §3-05. After all, industries that have traditionally been subject to monopolies often are increasingly subject to competition. Utilities, for example, have historically been viewed as sole sources, but competition is increasingly being introduced in this area.

Difficult questions often arise over whether the sole source is truly a sole source or whether the agency has created an ostensible sole source in order to prevent competition for a contract. An agency may define its need for a good or service so narrowly that there is only one supplier that can satisfy the agency's specified need. The question is whether the agency has defined its procurement more narrowly than necessary in order to limit competition to one supplier, or whether the agency indeed does need exactly what is specified.

As for process, the ACCO must make a determination that there is only one source and, notice of the intent to enter into negotiations for the contract must be published in the City Record for five consecutive days. *See* 9 RCNY §3-05.

E. Emergencies. GML §103(4) provides that competitive sealed bids are not required "in the case of a public emergency arising out of an accident or other unforeseen occurrence or condition whereby circumstances affecting public buildings, public property or the life, health, safety or property require immediate action which cannot await competitive bidding." The Charter also provides that emergency contracts are not subject to competitive sealed bids and defines emergency as "an unforeseen danger to life, safety, property or a necessary service." Charter §315. An emergency does not exist if the only danger the City faces is financial loss.

The City may act to prevent injury rather than waiting for disaster to occur. For example, the City may declare a procurement emergency to procure goods and services in preparation for a forecasted severe weather event. If a hurricane, for example, is predicted, the City need not wait for the storm to arrive before executing emergency procurements. The City may not know for certain whether a disaster will actually occur, but waiting to act is obviously not necessary. It is enough that the City exercise its emergency powers to take the necessary steps to prepare for a known risk.

As to process, the prior approval of the Comptroller and the Corporation Counsel is required. Charter §315. The contractor is selected with as much competition as is possible and practicable given the facts of the emergency. *See* 9 RCNY §3-06. Emergency contracts do not have to be registered to be effective. Charter §328(d)(1).

F. Accelerated Procurements. The "accelerated procurement" method may be used to purchase commodities where speed is needed because the relevant market experiences "significant, short-term price fluctuations." Charter §326(b). The Charter requires that these markets be identified by the PPB. *Id.* The PPB has indentified the following markets: chemicals; energy; food; metals (ferrous and non-ferrous); paper; and plastics. 9 RCNY §3-07(b). Generally, accelerated procurements are done through a competitive sealed bid. The process differences, and the time savings, come from these procurements being exempted from other requirements. Specifically, accelerated procurements may be accomplished by a purchase order instead of by a formal contract; accelerated procurements are exempt from hearing requirements; and accelerated procurements do not have to be registered to be effective. Charter §§326(b)(ii) and 328(d)(1); 9 RCNY §§3-07(e) and 2-12(e)(2).

G. Small Purchases. The Charter specifies that the PPB and the City Council may, by concurrent action, establish small purchase limits for the City. Charter §314. The current small purchase limit for the City is $100,000. 9 RCNY §3-08(a). These limits are higher than those that apply generally to municipalities across the State. GML §103 specifies that competitive sealed bids are not required for public work contracts under $35,000 or for purchase contracts (generally for goods and certain services) under $20,000.

The Charter provision authorizing the City to set small purchase limits higher than those set forth in GML §103 was placed in the Charter in 1976, approved by the voters after being proposed by the 1975 Charter Revision Commission. The 1975 Commission, created by an act of the State Legislature, had the authority to supersede general laws such as GML §103. *See Finegan v. Cohen*, 275 N.Y. 432 (1937); *Calandra v. City of New York*, 90 Misc. 2d 487 (Sup. Ct. N.Y. Co. 1977).

Because a publicly advertised, competitive sealed bid is not required for a small purchase, an agency may not artificially divide a procurement into smaller contracts in order to use the small purchase procedure. 9 RCNY §3-08(b). In addition, an agency may not execute amendments or renewals to a small purchase contract that would bring the total value of the contract above the small purchase limit. *Id.*

Except for "micro purchases" (purchases worth $20,000 or less), small purchases still require competition. For micro purchases, the only substantive requirements are that the price be reasonable and that such purchases be "distributed appropriately" among responsible vendors. 9 RCNY §3-08(c)(1)(ii). For small purchases worth over $20,000, at least five vendors must be solicited at random from the appropriate Citywide small purchase bidders' list, 9 RCNY §3-08(c)(1)(iii), plus the same number from the applicable MWBE list. The agency may solicit additional vendors only with the approval of the CCPO. 9 RCNY §3-08(c)(1)(iii).

Different process requirements apply to small purchases and other procurement processes. Please note that a procurement is not a "small purchase" unless the contractor is selected pursuant to the procedures set forth in 9 RCNY §3-08. A $25,000 sole source procurement, for example, is not a small purchase simply because the value of the contract falls below the small purchase limit.

H. Purchases from, with, or through Other Governments.

1. Purchases from Other Governments. State law permits municipalities to contract directly with certain other governments, even in situations where GML §103 would otherwise require competitive sealed bids. *See* GML §103(1); *cf.* GML §104.

GML §99-r, which authorizes municipalities to acquire certain listed services "or any other services of government" directly from, among others, New York State agencies, public benefit corporations, and public authorities.

GML §119-o allows cities, counties, towns, villages, and school districts, among others to enter into agreements "for the performance among themselves or one for the other of their respective functions, powers and duties on a cooperative or contract basis or for the provision of a joint service or a joint water, sewage or drainage project."

GML §99-h authorizes municipal corporations to "appropriate and expend such sums as are required to administer, conduct or participate in" federal programs relating to the general welfare of the municipality's inhabitants, and "may perform any and all acts necessary to effectuate the purposes of any such programs."

GML §103(16) allows municipalities to purchase "apparatus, materials, equipment or supplies, or to contract for services related to the installation, maintenance or repair of apparatus, materials, equipment, and supplies . . . through the use of a contract let by the United States of America or any agency thereof, any state or any other county or political subdivision or district therein if such contract was let in a manner that constitutes competitive bidding consistent with state law and made available for use by other governmental entities."

Procurements done pursuant to the State laws listed above are not subject to the PPB Rules, *see* 9 RCNY §1-02(f)(1), although they are subject to the Charter's approval, public hearing, and registration requirements.

Under Section 3-13 of the PPB Rules, "government-to-government purchases" may be used by the City to procure goods, services, construction, or construction-related services from another government. 9 RCNY §3-13(a). Section 3-13 is applicable to contracts with another government only where there is no independent State law authority (e.g., GML §99-r) for the procurement. *See* 9 RCNY §§1-02(f)(1); 3-13(a). Unlike procurements with independent State law authorization, the PPB Rules (specifically 9 RCNY §3-13 procedural requirements) apply to government-to-government procurements that do not have independent State law authorization, although the procedural requirements are relatively minor.

2. Purchases with Other Governments. Under the authority of GML §119-o, discussed above, cities may agree with the other listed types of governments to do procurements on their common behalf. GML §119-o(2)(d). These types of purchases are also known as cooperative purchases. *See* 9 RCNY §3-09(b).

3. Purchases through Other Governments. The City purchases "through" another governmental entity when it uses a contract already entered into by that entity with its contractor by directly entering into a contract with that contractor. Whether a City agency has the authority to purchase through another government's contract depends on two questions: (1) Does the other government have the authority to allow the City to use its contracts? (2) Does the City have the authority to use the other government's contract? The two most common "other governments" that the City buys through are the New York State Office of General Services and the federal General Services Administration.

OGS's authority to allow the City to use its contracts comes from the State Finance Law. Pursuant to SFL §163(10)(e), "The [OGS] commissioner may authorize purchases required by state agencies or other authorized purchasers by letting a contract pursuant to a written agreement . . . . " Authorized users include an officer, body, or agency of a political subdivision. *See* SFL §163(1)(k).

Unlike for OGS, the GSA's authority to allow municipalities to use its contracts is limited to certain types of contracts and, for some contracts, certain purposes. Under 40 U.S.C. §502(c)(1), the GSA Administrator may "provide for the use by State or local governments of Federal supply schedules of the General Services Administration for the following: (A) Automated data processing equipment (including firmware), software, supplies, support equipment, and services (as contained in Federal supply classification code group 70)" and "(B) Alarm and signal systems, facility management systems, firefighting and rescue equipment, law enforcement and security equipment, marine craft and related equipment, special purpose clothing, and related services (as contained in Federal supply classification code group 84 or any amended or subsequent version of that Federal supply classification group)." Under subdivision (d)(1) of the same section, the GSA Administrator "may provide for the use by State or local governments of Federal supply schedules of the General Services Administration for goods or services that are to be used to facilitate recovery from a major disaster declared by the President under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 *et seq.*), to facilitate disaster preparedness or response, or to facilitate recovery from terrorism or nuclear, biological, chemical, or radiological attack." GSA has in fact made these—and certain other—contracts available for use by State and local governments. *See* http://www.gsa.gov/portal/category/100631.

What about the City's authority to use the contracts of other governments? GML Article 5-A provides the City with broad authority to use the contracts of other governments. Specific authority is found in GML §103(1-b), 104, and 104-b, and covers the use of both OGS and GSA contracts. *See also* Charter §316 and 9 RCNY §3-09(a).

When a City agency purchases through an OGS contract, it follows the OGS's direction for how to use the contract, rather than following process that would otherwise be required by State law or Chapter 13 of the Charter. Similarly, pursuant to GML §103(1-b), the City must comply with "comply with federal schedule ordering procedures as provided in federal acquisition regulation 8.405-1 or 8.405-2 or successor regulations, whichever is applicable" when using GSA Schedule 70 or successor schedule contracts.

Finally, in addition to permitting the OGS commissioner to allow the use of OGS's own contracts, SFL §163(10)(e) also allows the commissioner to "authorize purchases required by state agencies or other authorized purchasers . . . by approving the use of a contract let by any department, agency or instrumentality of the United States government and/or any department, agency, office, political subdivision or instrumentality of any state or states." Thus, if the City does not otherwise have authority to use a contract that another government is making available, it can get permission to use it from the OGS commissioner. Note, however, that permission from the OGS Commissioner is not required when the City otherwise has the authority, such as the authority granted by GML §103(16), which allows political subdivisions to purchase "apparatus, materials, equipment or supplies, or to contract for services related to the installation, maintenance or repair of apparatus, materials, equipment, and supplies . . . through the use of a contract let by the United States of America or any agency thereof, any state or any other county or political subdivision or district therein if such contract was let in a manner that constitutes competitive bidding consistent with state law and made available for use by other governmental entities."

I. Demonstration Projects. Demonstration projects may be undertaken to "test and evaluate the feasibility and application of an innovative product, approach, or technology not currently used by the City." 9 RCNY §3-11(a). Demonstration projects may be conducted for goods, services or construction, and may be initiated by an unsolicited proposal or by an agency on its own initiative. *Id.* The initial term of a contract for a demonstration project may not exceed three years, but should be long enough to both conduct the demonstration and determine its effectiveness. 9 RCNY §3-11(d). In addition, the agency may consider whether continuity of services after the demonstration project would be in the City's best interest, in the event that the demonstration is successful. *Id.* In the event that a longer period is needed to allow continuity of services or evaluate the demonstration, the agency may extend the contract for up to one year with CCPO approval. *Id.*

The general standard for when something is or is not a procurement still applies to demonstration projects. Consequently, a demonstration project is a procurement only if the agency is paying for it. If a vendor provides a good or service for testing by the City free of charge, such an agreement is not a procurement subject to 9 RCNY §3-11.

J. Innovative Procurement Methods. The PPB Rules provide for the possibility of using a procurement method "not currently used by the City or provided for under these Rules" as a means of testing and evaluating such a method. 9 RCNY §3-12(a). This approach allows the City to test a new procurement method while giving the PPB the opportunity to determine whether to make the new procurement method a permanent part of the PPB Rules. The CCPO must submit reports to the PPB regarding the results and value of the innovative method. 9 RCNY §3-12(f). The CCPO's final report must be made to the PPB within eight months following the registration of a contract let pursuant to the method in question. The City may utilize the same innovative procurement method multiple times to test it, but if the PPB does not codify the innovative procurement method within four months from the date of the final report, then the City may not use the innovative method for any future solicitations (until the PPB does, if it does, codify the method).

K. Preferred Sources. Section 162 of the State Finance Law requires that when adequate commodities or services are available and priced within a certain range, state agencies, public authorities, commissions, public benefit corporations and political subdivisions must offer to purchase certain commodities and services from the following:

- The Department of Correctional Services' correctional industries program and provided to the state pursuant to section 184(2) of the Correction Law
- Any qualified charitable non-profit-making agency for the blind approved by the Commissioner of the Office of Children and Family Services
- Any special employment program serving mentally ill persons operated by facilities within the Office of Mental Health approved for such purposes
- Any charitable non-profit–making agency for other severely disabled persons approved for such purposes
- Qualified veterans' workshop providing job and employment-skills training to veterans.
- Qualified charitable non-profit-making workshops for veterans approved for such purposes.

A list of preferred sources and their offerings can be found on the Office of General Services website (http://www.ogs.state.ny.us/procurecounc/pdfdoc/pslist.pdf)

L. Change Orders. Change orders are changes to existing contracts that authorize additional work to be performed that is either necessary to complete the work in the original contract or to add work that would not result in a material change to the scope of the contract. 9 RCNY §4-02. Change orders are not subject to competitive bidding requirements because they are not viewed as new procurements, unless the change order "so varies from the original plan or is of such importance as to constitute a new undertaking." *Albert Elia Building Company, Inc. v. New York State Urban Development Corporation*, 54 A.D.2d 337 (4th Dept. 1976). The City may modify contracts without competition "so long as such modification did not 'alter the essential identity or the main purpose of the contract.'" *Id.* (citations omitted). Whether a proposed change order is a material change is a fact specific analysis. Factors to consider include whether the contract was intended to cover all work necessary to accomplish a particular goal, whether the additional work was foreseen at the time of the solicitation, and whether the work was expressly excluded in the solicitation.

One limitation on the City's ability to execute change orders is General City Law §20(5), which provides that the City may not "grant extra compensation to any public officer, servant or contractor." GCL §20(5) prohibits the City from making additional payments to a contractor without receiving consideration either through additional services or changed legal terms. *See McGovern v. City of New York*, 234 N.Y. 377 (1923).

The application of GCL §20(5) can be considered in the case of changes to the applicable prevailing wage during the term of a contract. If the contract specifies that the contractor must comply with the payment of prevailing wages and does not make any provision for the contractor to receive additional payment or opt out of the contract if the prevailing wage increases or a job classification changes, then the City may not execute a change order to compensate the contractor. *See McGovern*, 234 N.Y. at 377. A contract provision that specifies that a contractor is to receive additional payments to account for changes in the prevailing wage is permissible, however, and would not run afoul of GCL §20(5) because it is part of the agreed upon compensation set forth in the original contract.

IV. RECENT DEVELOPMENTS AND CURRENT TOPICS

A. Best Value. GML §103 authorizes the award of "purchase contracts (including contracts for service work, but excluding any purchase contracts necessary for the completion of a public works contract pursuant to article eight of the labor law)" pursuant to a competitive sealed bid where the award is made either to the lowest bidder or to the bidder representing the "best value" to the City, as defined in State Finance Law §163. Best value is defined in Section 163 to be the vendor offering the best combination of quality, cost and efficiency. In addition, the SFL best value definition specifically authorizes agencies to utilize a quantitative factor for certain small businesses and minority and women-owned businesses. Where the bid for a purchase contract states that award is to be made to the low bidder, the same principles apply there as to the discussion of awarding bids for public work. Where the award is based on best value, the City has greater flexibility.

The City's rules implementing best value became effective July 1, 2013. The substantive changes to the PPB Rules are contained in 9 RCNY §§3-02 (competitive sealed bidding) and 3-03 (competitive sealed proposals). See Appendix A to these materials. 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," which could be done through either an RFP or a negotiated acquisition.

As to best value bids, the City must make clear in the invitation for bids that the award will be made on the basis of best value to the City and must include a statement of how best value will be determined. 9 RCNY §3-02(b)(2)(iv)(B). Specifically, the invitation for bids must set forth the criteria that the agency will consider when award is to be made on the basis of best value, in addition to price. Some of the factors that the agency may take into account include:

> (1) features of the offered product or service set forth in detailed specifications for the product offered;
>
> (2) warranties and or maintenance to be provided with the product or service;
>
> (3) references, past performance and reliability, including reliability or durability of the product being offered and current or past experience with the provision of similar goods or services;

(4) organization, staffing (both members of staff and particular abilities and experience), and ability to undertake the type and complexity of the work;

(5) financial capability; and

(6) record of compliance with all federal, State and local laws, rules, licensing requirements, where applicable, and executive orders, including but not limited to compliance with existing labor standards and prevailing wage laws.

9 RCNY §3-02(o)(1)(iii).

For best value bids, award is made to the responsive and responsible bidder whose bid meets the requirements and objectively measurable evaluation criteria set forth in the invitation for bids, and whose bid represents the best value to the City by optimizing quality, cost and efficiency. 9 RCNY §3-02(o)(1)(ii). In determining best value in the bid context, the agency must consider the low responsive bid and only the other responsive bids that are within 10 percent of the low responsive bid (or such higher percentage as is approved by the CCPO). 9 RCNY §3-02(o)(1)(iii). The best value determination may be made by the ACCO or by a committee, and the ACCO or committee may consider any information related to the listed best value factors, *id*, including additional information requested by the agency within 30 days of bid opening. 9 RCNY §§3-02(d)(1) and 3-02(o)(1)(iii). The agency must document the reasons that the winning bid represents the best value to the City and the factors considered by the agency. 9 RCNY §3-02(o)(3).

It is important to note that a competitive sealed bid based on best value is still a sealed bid. Consequently, the City may not engage in post-bid negotiations to allow bidders to match prices offered by other bidders or to supplement the services or goods offered. However, similar to how the City may negotiate with the low bidder as to price only in order to improve the bid when the bidder is selected on price, the City may negotiate with the bidder determined to provide the best value with respect to any of the factors considered in determining best value. 9 RCNY §3-02(o)(2).

The new best value bid rule also allows for multiple award task order contracts for standard services and multiple award purchase order contracts for goods, similar to how the existing rules allowed for multiple award task order contracts procured by RFP. *See* 9 RCNY §§3-02(t) and 3-03(j). For multiple awards based on competitive sealed bids, the contracts themselves may be based on price only or on best value. The vendor to receive an individual task or purchase order may be selected by best value for the particular order based on the original bid, or the agency may solicit offers for a given task or purchase award from all of the awarded vendors. 9 RCNY §3-02(t)(2)(i).

One consequence of the best value amendment to GML §103 is that goods and standard services may now be procured by proposals (i.e., either through an RFP or a negotiated acquisition) rather than low sealed bid, provided that the requirements of GML §103 are met. The most significant change in 9 RCNY §3-03, the RFP rule, to accommodate these requirements is that—unlike for RFPs for services for example—if an agency uses an RFP to procure goods or standard services, it must disclose the identity of all proposers on the due date and time of the proposals. 9 RCNY §3-03(f)(9); *see* GML §103(2). Otherwise, the process for procuring goods and services by RFP is very similar to the existing RFP process.

B. HHS Accelerator. HHS Accelerator is an initiative to centralize certain administrative functions in the procurement of human/client services through a web-based document repository, global prequalification of human/client services contractors, and a master services agreement (i.e., the City's Standard Human Services Contract). HHS Accelerator is intended to streamline the process by reducing the current degree of duplication fostered by the fact that the City currently manages approximately 220 client service programs across eleven mayoral agencies. HHS Accelerator is both the name of an office and the name of a procurement method set forth in the PPB Rules.

HHS Accelerator is managed by the HHS Accelerator Director, which is a position designated by the Mayor. The HHS Accelerator office has four functions: (1) creating maintaining a web-based document vault for client services vendors to share documents with City agencies and other funders; (2) creating and maintaining a centralized, electronic and web-accessible categorization system of services provided for all City agencies; (3) prequalifying client services providers through that categorization system; and (4) assisting in the managing of procurements for client services.

HHS Accelerator has established a web-based document repository that allows potential City contractors to share certain documents with the City on a common platform. Contractors are responsible for keeping their documents up to date. This shared space for document exchange will significantly reduce duplicative requests for documentation that currently must be submitted for each individual procurement. The document repository is the backbone of the Accelerator system and supports not only document sharing, but also collects specific documentation required for prequalification, such as regulatory filings.

HHS Accelerator also utilizes a taxonomy of client services that the City developed that 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 will then be targeted to eligible vendors.

PPB recently adopted new rules to implement HHS Accelerator. The new rules are attached as Appendix B to these materials and are expected to be effective later this year. The cites to PPB Rules in this section are cites to the new rules. The Accelerator PPB Rule is essentially a combination and adaptation of the current 9 RCNY §§3-03 (Request for Proposals) and 3-10 (Prequalification). The Accelerator Rule is modeled after, but is not identical to, the existing 9 RCNY §3-03 and §3-10.

HHS Accelerator establishes one centralized, citywide prequalification of client services vendors that all City agencies will use for client service solicitations. See 9 RCNY §3-16(a)-(i). The prequalification list is maintained through the office of HHS Accelerator, with the HHS Accelerator Director making the prequalification decisions for eleven City agencies. See 9 RCNY §3-16(e). The prequalification decision is a threshold determination of the entity's qualifications to provide services but it is not a responsibility determination. 9 RCNY §3-16(h). The ACCO for an agency must make a responsibility determination in connection with every contract award pursuant to the HHS Accelerator system. 9 RCNY §3-16(h). The ACCO may allow joint ventures of prequalified vendors to submit proposals. 9 RCNY §3-16(a)(2).

Generally, competitive solicitations for human/client services must be issued through HHS Accelerator, which means that only those vendors who are prequalified will be eligible to compete to receive client services awards. 9 RCNY §3-16(a).[4] Every solicitation under HHS Accelerator will be publicly advertised to allow vendors an opportunity to apply for prequalification in order to submit a proposal, but only those vendors who are prequalified will be eligible to submit a proposal in response to an RFP issued through HHS Accelerator. 9 RCNY §3-16(i). The solicitation itself will be available electronically and proposals will be submitted electronically through the Accelerator system, with vendors being able to reference and rely on documents already contained in the Accelerator document repository without resubmitting. Once proposals are submitted in response to a solicitation, the Accelerator system will be used by the applicable City agency to evaluate the proposals in a manner essentially like the process currently used to evaluate City RFPs. See 9 RCNY §3-16(j)-(r).

C. Ethics, Conflicts, and the Campaign Finance Law. As a general matter, City procurement officials "have a responsibility to ensure that their conduct will not violate the public trust placed in them. They must make certain that their conduct does not raise suspicion or give the appearance that they are in violation of their public trust." 9 RCNY §1-03(a)(1). Furthermore, "[v]endors and their representatives have a responsibility to deal ethically with the City and its employees, and to respect the ethical duties of City employees." 9 RCNY §1-03(a)(3). "Vendors must not request City employees to engage in conduct that would violate the law, these Rules, or the principles set forth in this section." *Id.*

The primary source of law governing the ethical behavior of City employees is Chapter 68 of the City Charter, which deals with conflicts of interests. In addition to, for example, creating the Conflicts of Interest Board ("COIB"), Chapter 68 details prohibited interests and conduct. Section 2604(a) governs "[p]rohibited interests in firms engaged in business dealings" with the City and Section 2604(b) defines prohibited conduct. The COIB rules are set forth at 53 RCNY 1-01 *et seq.*

Of particular note for firms doing business with the City are two provisions of Charter §2604. First, pursuant to Section 2604(b)(5), no public servant "shall accept any valuable gift, as defined by rule of the [COIB], from any person or firm which such public servant knows is or intends to become engaged in business dealings with the city, except that nothing contained herein shall prohibit a public servant from accepting a gift which is customary on family and social occasions." COIB's valuable gift rule is 53 RCNY §1-01, which defines a valuable gift as

[4] The exceptions to the use of Accelerator are set forth in PPB Rules §3-16(a)(1) and include discretionary funds awards, extensions of existing contracts, sole source contracts, and demonstration projects).

"any gift to a public servant which has a value of $50.00 or more, whether in the form of money, service, loan, travel, entertainment, hospitality, thing or promise, or in any other form." Section 1-01 then goes on to provide detailed guidance on subjects such as the acceptance of free meals, travel-related expenses, and gifts on social occasions.

Second, Charter §2604 sets forth certain post-employment restrictions. Among other restrictions, no public servant shall "solicit, negotiate for or accept any position . . . with any person or firm who or which is involved in a particular matter with the city, while such public servant is actively considering, or is directly concerned or personally participating in such particular matter on behalf of the city." Charter §2604(d)(1). Furthermore, no former public servant "shall, within a period of one year after termination of such person's service with the city, appear before the city agency served by such public servant." Charter §2604(d)(2).

Another ethics-related law that is relevant to firms doing business with the City is Local Law 34 of 2007, which amended the City's Campaign Finance Law. Among other changes, Local Law 34 amended the Campaign Finance Law to regulate campaign contributions from persons or entities that have business dealings with the City. In general, Local Law 34 contains provisions that set lower contribution limits for those who have business dealings with the City, mandate the creation of a "doing business database," and deem unmatchable contributions from those doing business with the City. By setting a maximum amount a candidate may accept from a person who does business with the City and imposing further restrictions on campaign financing, Local Law 34 seeks to alleviate concerns that a person will be able to buy his or her way into a City contract or business dealing by making generous campaign contributions. The law's goals were upheld by the Court of Appeals for the Second Circuit, which found that "the laws are closely drawn to address the significant governmental interest in reducing corruption or the appearance thereof." *Ognibene, et. al v. Parkes, et. al*, 671 F.3d 174 (2d Cir. 2011).

As to campaign contributions, a candidate or his or her principal committee may still accept contributions from a person who has business dealings with the City, provided that the aggregate contribution from such person for the election in question does not exceed $250 for a City Council candidate, $320 for a borough president candidate, or $400 for a candidate for Citywide office. N.Y.C. Admin. Code §3-703(1-a). These caps are significantly more restrictive than the generally applicable contribution limits. *See* N.Y.C. Admin. Code §3-703(1)(f). In addition to limiting the amount that a "doing business" contributor may donate, Local Law 34 prohibits such contributions from being matched with public funds. N.Y.C. Admin. Code §3-703(1-a).

The phrase "business dealings with the city"—central to understanding the scope of Local Law 34—is defined in N.Y.C. Admin. Code §3-702(18)(a). It is a complicated definition, and should be read carefully. Among other things, the phrase includes most procurement contracts (except for emergency contracts, contracts procured through competitive sealed bidding, and contracts below certain dollar thresholds), real estate transactions, applications under the Uniform Land Use and Review Procedure, concession, franchises, and economic development agreements (as defined by the law). Furthermore, a "business dealing with the City" does not include only a consummated transaction. To use procurement as one example, the law provides that "bids or proposals on contracts for the procurement of goods, services, or construction shall only constitute business dealings with the city of New York for the period from the later of the submission of the bid or proposal or the date of the public advertisement for the contract opportunity until twelve months after the date of such submission or advertisement" as well as "contracts for the procurement of goods, services or construction shall only constitute business dealings with the city of New York during the term of such contract (or in the case of purchase contracts for goods, from the date of such purchase) and for twelve months thereafter, provided, however that where such contract award is made from a line item appropriation and/or discretionary funds made by an elected official other than the mayor or the comptroller, such contract shall only constitute business dealings with the city from the date of adoption of the budget in which the appropriation of such contract is included until twelve months after the end of the term of such contract." N.Y.C. Admin. Code §3-702(18)(b).

With respect to implementation and enforcement, Local Law 34 places the burden on the candidates and their committees to inquire as to whether a contributor who makes a donation in excess of the contribution limits set forth above has business dealings with the City, and if so, with which agency or entity; the candidates and their committees must then submit reports on the contributions to the Campaign Finance Board. N.Y.C. Admin. Code §3-703(1-b). The Board verifies these reports against the "doing business database" maintained by the Mayor's Office, described below. *Id.*

Pursuant to N.Y.C. Admin. Code §3-702(20), the doing business database is a computerized database containing the names of persons who have business dealings with the City. This provision has an extensive definition of "person" that includes, among others, not only an entity but also "any chief executive officer, chief financial officer and/or chief operating officer of such entity or persons serving in an equivalent capacity, any person employed in a senior managerial capacity regarding such entity, or any person with an interest in such entity which exceeds ten percent of the entity." The definition of "person" also has exclusions, and "senior managerial capacity" is separately defined. Under the law, the database must be accessible to the Campaign Finance Board and the public, and must have a function to enable members of the public to determine if a person is in the database because such person has business dealings with the city; the doing business database can be found at: http://www.nyc.gov/portal/site/DBusinessSite.

In order for the Mayor's Office to maintain and update the database as required by law, any entity deemed to be engaged in business dealings with the City must complete a Doing Business Data Form developed by the Mayor's Office. A sample form and frequently asked questions are attached as Appendix C to these materials.

D. Registration. The Charter specifies that no contract executed pursuant to Chapter 13, except for limited situations such as emergency contracts and small purchases, may be "implemented" prior to registration. Charter §328(a). Consequently, the City does not have a legally binding contract prior to registration. *See, e.g., DeFoe v. NYC Dept of Transportation*, 87 N.Y.2d 754 (1996). Unless and until a contract is registered, the City may not pay for work performed for the City by a contractor, even where it is apparent that the City has benefitted by the contractor's efforts. *Seif v. City of Long Beach*, 286 N.Y. 382 (1941); *Garrison Protective Services v. Comptroller*, 92 N.Y.2d 732 (1999).

While the City may not make payment and a legal obligation to do so does not exist prior to registration, contractors may perform work for the City at risk and be paid through a retroactive contract. *See Institute for Puerto Rican/Hispanic Elderly*, 2012 N.Y. Misc. LEXIS 5738 (N.Y. Co. 2012) (upholding City agency determination to terminate contract with incumbent vendor and allow successor contractor to begin providing services prior to registration of contract). *See also Kuntz v. NYS Emergency Financial Control Board for the City of Yonkers*, 66 A.D.2d 795 (2d Dept. 1978) (Control Board may retroactively approve a contract that had required its prior approval before recovery may be made under the contract); *Deverho Construction Co. v. State of New York*, 94 Misc.2d 1053 (Ct. Cl. 1978) (requirement in State Finance Law §112 that contracts first receive the approval of the State Comptroller before becoming effective does not defeat a demand for payment for work performed prior to Comptroller approval, once given).

After an agency submits a contract to the Comptroller, the Charter specifies that the Comptroller must register the contract within thirty days unless one of two exceptions is present. For the first exception, the Comptroller may refuse to register a contract because he has information indicating that: (i) there are insufficient appropriated funds to pay the estimated cost of the contract[5]; (ii) the required certifications by either the Mayor (procedural requisites)[6] or by the Corporation Counsel (legal authority)[7] have not been made; or (iii) the proposed contractor has been disbarred from doing business with the City.[8] Charter §328(b). If one of these conditions exist, the Comptroller may reject the proposed contract and it shall not be registered.

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[5] Agencies may register contracts for less than the full value of the contract. See 9 RCNY §2-12(a) ("Contracts shall not be registered for less than their full value unless specific written authorization to do so is made by the Agency Head or the ACCO and such written authorization is provided to the Comptroller at the time of registration").

[6] Pursuant to Charter §327(a), for contracts that are not competitive sealed bids, the Mayor is required to certify "that the procedural requisites for the solicitation and award of the contract have been met." The City Chief Procurement Officer (CCPO), who is also the Director of the Mayor's Office of Contract Services, is delegated this authority by the Mayor. That authority is delegated to certain agencies for some categories of contracts.

[7] Pursuant to Charter §327(b), the Corporation Counsel "shall certify" for each contract submitted for registration "that each agency proposing to award a contract has legal authority to award each contract." This approval is in addition to the approval as to form by the Corporation Counsel required for all contracts pursuant to Charter §394(b). The Corporation Counsel's authority is delegated in writing to various Assistant Corporation Counsels and, for certain contracts, agency general counsels.

[8] The power to debar contractors was removed from the Charter by the voters in 2001 on a ballot question placed by a Charter Revision Commission. Consequently, the City no longer debars contractors pursuant to local law, though the Comptroller may still debar contractors for prevailing wage violations pursuant to the State Labor Law.

The second exception to the rule that contracts must be registered within thirty days arises when the Comptroller has reason to believe that there was possible corruption in the letting of the contract or that the proposed contractor is involved in corrupt activity. Charter §328(c). In that circumstance, the Comptroller may object to the registration of the contract in writing to the Mayor. After considering the objections, the Mayor may either withdraw the contract or require registration despite the Comptroller's objections. Charter §328(c).

The PPB Rules require that certain documents must be submitted with the contract when it is submitted for registration. 9 RCNY §2-12(c). The thirty day period for registration does not begin until such documents are submitted. 9 RCNY §2-12(d). The thirty day period is not tolled, however, if the Comptroller has any questions regarding any of the documents submitted or if the Comptroller believes that the documents should contain additional information. 9 RCNY §2-12(d) ("Following such date of filing, any questions by the Comptroller regarding any item shall be responded to by the agency forthwith.")

The Court of Appeals has strictly construed the Comptroller's registration authority. *Comptroller of the City of New York v. Mayor of the City of New York*, 7 N.Y.3d 256 (2006) ("*Snapple*"). In *Snapple*, the Comptroller refused to register a concession agreement on the grounds that the City had not properly followed the rules of the Franchise and Concession Review Committee (FCRC) in awarding the concession.[9] The concession agreement involved both the placement of vending machines on City property and the licensing of the City's intellectual property (i.e., the City's logos). The Mayor argued that only the vending part of the agreement was a concession because concessions only apply to real property, not intellectual property. The Mayor directed the Comptroller to register the contract pursuant to Charter §328(c) and the Comptroller refused. The Comptroller argued that the certifications provided by the Mayor and the Corporation Counsel pursuant to Charter §327 were invalid because the intellectual property part of the concession had not been presented to the FCRC.

The Court of Appeals first determined that a concession under Charter §362(a) is not restricted to the use of the City's real property and therefore that the intellectual property part of the Snapple agreement was indeed a concession. Consequently, the certifications by the Mayor and the Corporation Counsel were in fact improperly given. Nonetheless, the Court ordered the Comptroller to register the contract because the Comptroller does not have the right under the Charter to second guess the certifications provided by the Mayor and the Corporation Counsel. As the Court of Appeals explained:

> In this instance, the Comptroller argues rather circuitously that he need not comply with his statutory obligation to register the contract. He asserts that the City never submitted the marketing portion of the Snapple agreement to FCRC for review; that the mayoral certification under *section 327 (a)* that "the procedural

[9] Concessions are subject to the same registration requirements set forth in Section 328 that apply to City procurements. *See* Charter §375.

> requisites for the solicitation and award of the contract have been met" is untrue; and he therefore cannot be compelled to register the contract under *section 328 (b) (ii)*.
>
> The Comptroller may deny registration, however, only if "a certification required by [*section 327*] has not been made" (*§ 328 [b] [ii]*). The Comptroller's review as to *section 327* certifications is explicitly limited by the plain terms of the statute. *Section 328 (b) (ii)* does not give the Comptroller the power to second-guess facially sufficient certifications provided by the Mayor and the Corporation Counsel. The delegation of duties set forth in the relevant provisions of the Charter establishes in plain language that the Mayor and the Corporation Counsel--not the Comptroller--bear the burden of determining that procedural requirements have been met and legal authority exists to award a concession contract. Thus, there is no reason to annul the Snapple contract.

7 N.Y.3d at 267.

Once a contract is submitted to the Comptroller for registration, the contracting agency may withdraw the contract before registration (and before the 30-day clock has run) and the contract will not be deemed to be registered at the end of the 30-day period. *DeFoe v. NYC Dept of Transportation*, 87 NY2d 754 (1996); *Garrison Protective Services v. Comptroller*, 92 N.Y.2d 732 (1999). If the contracting agency does not withdraw the contract or accept the return of the contract, more than 30 days have elapsed and the Comptroller has not registered the contract, none of the grounds under Section 328(b) are present, and the Comptroller has not interposed an objection pursuant to Charter 328(c), then the contract may be deemed registered and is legally effective. *See, e.g., Friends of Dag Hammarskjold Plaza v. City of New York Parks & Recreation*, 831 N.Y.S.2d 347 (Sup. Ct. N.Y. Co. 2006).

Appendix A

Substantive PPB Best Value Rules

NOTICE OF ADOPTION OF FINAL RULE

The Procurement Policy Board has adopted amendments to **Chapter 3 Methods of Source Selection** of its Rules pursuant to Section 311 of the New York City Charter. The amendments were published in *The City Record* on April 27, 2012, and the required public hearing was held on June 4, 2012. The amendments were adopted by the Procurement Policy Board on April 8, 2013. These rules will take effect 30 days after publication.

Statement of Basis and Purpose

Prior to recent amendments to New York State General Municipal Law § 103, contracts for public work and contracts for purchase contracts (i.e., contracts for the purchase of goods and standard services) had to be procured, as a general matter, by publicly advertised, low sealed bid. The recent changes to GML § 103 (the "Best Value Law") give the City the option to procure purchase contracts based on best value to the City, as that phrase is defined in State Finance Law § 163. Under that section, best value is defined in terms of the optimization of quality, cost and efficiency.

In light of the Best Value Law, the amendments:

- set forth the rules governing competitive sealed bids to be awarded on the basis of best value to the City,
- require agencies to state in the bid for goods or standard services whether the award will be made on the basis of price only or will be made on the basis of best value to the City,
- requires that if award is made on the basis of best value, the bid include a statement of how best value will be determined,
- set forth the criteria that may be considered by the agency when award is to be made on the basis of best value,
- requires documentation by the agency of the reasons for determining that a bid represents best value, and,
- allows multiple award task order purchases among multiple contractors pursuant to competitive sealed bids for the purchase of goods and standard services where it is determined by the agency to be in the best interests of the City.

The Rule Amendments

New material is <u>underlined</u> and deletions are [bracketed].

Section 1. Subdivision (a) of section 3-02 of Chapter 3 of Title 9 of the Rules of the City of New York is amended to read as follows:

(a) Application. This section shall apply to all procurements made by competitive sealed bidding [including multi-step sealed bidding].

Section 2. Subparagraph (iv) of paragraph (2) of subdivision (b) of section 3-02 of Chapter 3 of Title 9 of the Rules of the City of New York is amended to read as follows:

(iv) a statement regarding how the award will be made:
(A) for construction, a statement that award shall be made to the lowest responsive and responsible bidder;
(B) for purchase of goods and standard services, a statement that award shall be made to the lowest responsive and responsible bidder or to the bidder whose bid represents the best value to the City by optimizing quality, cost and efficiency. If award will be made on the basis of best value to the City, such statement shall include how best value will be determined in accordance with 3-02(o);

Section 3. Subdivision (d) of section 3-02 of Chapter 3 of Title 9 of the Rules of the City of New York is amended to read as follows:

(d) Bidder Submissions.

(1) Bid Form and Content. The IFB shall provide a form on which the bidder shall insert the bid price, or other information requested, if any, pursuant to 3-02 (o)(1), and shall sign and submit along with all other necessary submissions. Bids shall be typewritten or written legibly in ink. Erasures or alterations shall be initialed by the signer in ink. All bids shall be signed in ink. The bid invitation also shall require that the bid be submitted in a sealed envelope, addressed as required in the bid documents, on or before the time and at the place designated in the bid documents. If so provided in the solicitation, sealed bids may be submitted electronically. Where award will be made to the bidder whose bid represents the best value to the City, the IFB may also provide that other information requested, if any, may be submitted up to thirty (30) days from the bid opening by all bidders whose bids are to be considered pursuant to 3-02(o)(1)(iii).

(2) Bid Samples and Descriptive Literature. The IFB shall state that the submission of bid samples and descriptive literature [should not be submitted unless expressly requested and that], regardless of any attempt by a bidder to condition the bid, [unsolicited bid samples or descriptive literature that are submitted at the bidder's risk] will not be [examined or tested and will not be] deemed to vary any of the provisions of the IFB.

Section 4. Paragraph (2) of subdivision (l) of section 3-02 of Chapter 3 of Title 9 of the Rules of the City of New York is amended to read as follows:

(2) Opening and Recording. Bids and modifications shall be opened publicly, at the time, date, and place designated in the IFB. The name of each bidder, the bid price, and such other information as is deemed appropriate shall be read aloud or otherwise made available. These requirements may be met through access to a

computer terminal at the location where bids are to be opened, provided that paper documents are available upon request at the time of bid opening. This information also shall be recorded at the time of bid opening. The bids shall be tabulated or a bid abstract prepared and made available for public inspection. The opened bids shall be available for public inspection at a reasonable time after bid opening but in any case before vendor selection except to the extent the bidder designates trade secrets or other proprietary data to be confidential. Material so designated shall accompany the bid and shall be readily separable from the bid in order to facilitate public inspection of the nonconfidential portion of the bid. Prices, makes, and model or catalog numbers of the items offered, deliveries, and terms of payment shall be publicly available at a reasonable time after bid opening but in any event before vendor selection regardless of any designation to the contrary at the time of bid opening. For bids on construction contracts submitted in accordance with Section 3-02 (b)[(2)]([xix]xx)[(K)](J) of these Rules, the sealed list of subcontractors submitted with the low bid shall be opened after such low bid has been announced and the names of the subcontractors shall be announced. The sealed lists of subcontractors submitted by all other bidders pursuant to Section 3-02 (b)([xix]xx)(2)([K]J) of these Rules shall be returned to such bidders unopened after the contract award.

Section 5. Subparagraph (iii) of paragraph (3) of subdivision (m) of section 3-02 of Chapter 3 of Title 9 of the Rules of the City of New York is amended to read as follows:

(iii) Mistakes Where Intended Correct Bid is Not Evident. Mistakes may not be corrected after bid opening. A bidder may be permitted to withdraw a [low] bid where a unilateral error or mistake has been discovered in the bid and the Contracting Officer makes the following determination, which shall be approved by the ACCO:

(A) the mistake was known or made known to the agency prior to vendor selection or within three days after the opening of the bid, whichever period is shorter;

(B) the price bid was based on an error of such magnitude that enforcement would be unconscionable;

(C) the bid was submitted in good faith and the bidder submits credible evidence that the mistake was a clerical error as opposed to a judgment error;

(D) the error in bid is actually due to an unintentional and substantial arithmetic error or unintentional omission of a substantial quantity of work, labor, material, goods, or services made directly in the compilation of the bid, which unintentional arithmetic error or unintentional omission can be clearly shown by objective evidence drawn from inspection of the original work paper, documents, or materials used in the preparation of the bid sought to be withdrawn; and

(E) it is possible to place the City in the same condition that had existed prior to the receipt of the bid.

Upon the approval of the ACCO, the bid may be withdrawn, and the bid bond or other security returned to the bidder. If the bid was the low bid or the bid that represents best value, then [T]the contract shall either be awarded to the next lowest bidder or bidder that represents the next best value to the City, as appropriate, or resolicited pursuant to these Rules. Under no circumstances shall a bid be amended or revised to rectify the error or mistake.

Section 6. Subdivision (o) of section 3-02 of Chapter 3 of Title 9 of the Rules of the City of New York is amended to read as follows:

(o) Bid Evaluation and Vendor Selection.

(1) [Bidder]Vendor Selection.

(i) Contracts for Construction. [General.] The responsible bidder whose bid meets the requirements and objectively measurable evaluation criteria set forth in the IFB, and whose bid price is the lowest responsive and responsible bid price or, if the IFB has so stated, the lowest responsive and responsible evaluated bid price, shall be selected for the contract. A bid shall not be evaluated for any requirement or criterion that is not disclosed in the IFB.

(ii) Contracts for Purchase of Goods and Standard Services. Prior to the bid, the ACCO shall determine whether the goods or standard services shall be awarded to the lowest responsive and responsible bidder or to the responsive and responsible bidder whose bid represents the best value to the City. The responsive and responsible bidder whose bid meets the requirements and objectively measurable evaluation criteria set forth in the IFB, and whose bid price is the lowest, or whose bid represents the best value to the City by optimizing quality, cost and efficiency, shall be selected for the contract.

(iii) If award will be made based on best value, best value may be determined by the ACCO, or the ACCO may convene a committee to make such determination. Any such committee shall consist of persons with knowledge, expertise and experience sufficient to make a fair and reasonable determination. As set forth below the ACCO, or the committee as the case may be, may determine best value by consideration of price together with other factors deemed relevant by the ACCO and set forth in the IFB. In making such determination the ACCO, or committee, shall consider the low responsive bid and the next low responsive bids that are within ten percent (10%) of the low responsive bid in price, or such higher percentage as approved by the CCPO either on an individual basis or by category or class. Such factors may include:

(1) features of the offered product or service set forth in detailed specifications for the product offered;

(2) warranties and or maintenance to be provided with the product or service;

(3) references, past performance and reliability, including reliability or durability of the product being offered and current or past experience with the provision of similar goods or services;

(4) organization, staffing (both members of staff and particular abilities and experience), and ability to undertake the type and complexity of the work;

(5) financial capability; and

(6) record of compliance with all federal, State and local laws, rules, licensing requirements, where applicable, and executive orders, including but not limited to compliance with existing labor standards and prevailing wage laws.

The ACCO, or committee, may consider any and all information related to such factors in determining best value and may require additional information to be submitted by the bidders with the bid, or alternatively, within up to thirty (30) days from the bid opening from all bidders whose bids are to be considered pursuant to in 3-02(o)(1)(iii). If a committee is used to evaluate the bids, then written evaluation forms shall be completed to record the evaluation of the bids and shall be signed and dated by all members of the committee.

(2) Negotiation with the apparent lowest responsive and responsible bidder or responsive and responsible bidder providing best value. Upon determination of the apparent lowest responsive and responsible bidder or responsive and responsible bidder providing best value, pursuant to 3-02(0)(1), and prior to award, the Contracting Officer may elect to open negotiations with the selected vendor in an effort to improve the bid to the City with respect to the price only if award will be made to the lowest responsive and responsible bidder, or if award will be made to the responsive and responsible bidder whose bid represents the best value to the City, with respect to any of the factors considered in determining best value. In the event the apparent [lowest responsive and responsible]winning bidder declines to negotiate, the Contracting Officer may elect to either award the contract to the apparent [lowest responsive and responsible] winning bidder or may, upon written approval by the ACCO, reject

all bids in accordance with this section. The result of negotiations, if any, shall be documented in the Recommendation for Award.

(3) Award. Upon the determination of the [lowest responsive and responsible] apparent winning bidder pursuant to 3-02(o)(1), a Recommendation for Award shall be approved by the ACCO and the contract shall be awarded to that bidder. Where the award is based on best value to the City, the ACCO shall set forth in the Recommendation for Award the reasons that the bid represents the best value to the City and the factors considered by the agency.

Section 7. Paragraph (1) of subdivision (p) of section 3-02 of Chapter 3 of Title 9 of the Rules of the City of New York is amended to read as follows:

(1) Definition. Low Tie Bids are low responsive bids from responsible bidders that are identical in price, meeting all the requirements and criteria set forth in the IFB when the selection of the winning bidder is based on price alone.

Section 8. Subdivisions (s) and (t) of section 3-02 of Chapter 3 of Title 9 of the Rules of the City of New York are amended to read as follows:

(s) [Multi-Step Sealed Bidding

(1) Conditions for Use. Multi-step sealed bidding may be used when it is determined by the ACCO that it is impracticable to prepare specifications to support vendor selection based solely on price.

(2) Evaluation.

(i) Once the technical proposals have been evaluated, price bids from only those vendors whose technical proposals have been found acceptable shall be considered and evaluated.

(ii) Price bids may be solicited at the same time as technical proposals, in separate sealed envelopes, or after evaluation of technical proposals, only from those whose technical proposals have been found acceptable.

(iii) Price bids shall not be opened until the technical evaluation is complete. Price bids from vendors whose technical proposals have been found unacceptable shall not be opened until after registration of the contract.

Selection of Other Than Lowest Bidder

(t)] Notification of Non-Responsiveness or Non-Responsibility. If the ACCO determines that [the lowest bidder] a bidder is either not responsible or not responsive, [the lowest] such bidder shall immediately be notified in writing of such determination and the reasons therefor, and the right to appeal the determination, if applicable. A copy of the notification shall be filed with the CCPO and Comptroller.

Section 9. Section 3-02 of Chapter 3 of Title 9 of the Rules of the City of New York is amended by adding a new subdivision (t) to read as follows:

(t) Multiple Award Task Order or Purchase Order Contracts.

(1) Determination. Multiple award task order contracts for standard services or multiple award purchase order contracts for goods may be awarded upon a determination by the ACCO that it is in the best interest of the City to award multiple contracts for goods or standard services to multiple contractors and to allocate work among such contractors through a task order or purchase order system. The criteria to be considered by the ACCO in making such determination may include the following: the nature of the goods or standard services to be procured; the expected frequency of task order or purchase order issuance; the capacity of vendors to provide all of the required services within the required timeframes; and the potential advantage of multiple contracts (e.g., more favorable terms; more competitive pricing, etc.).

(2) Method.

(i) Multiple awards may be made for contracts for goods or standard services, pursuant to competitive sealed bids where award is made based on price only, or based on best value pursuant to the criteria set forth in 3-02(o)(1), in conjunction with the procedures prescribed in this subdivision. The IFB shall also state the procedures and criteria to be used in selecting the vendor to perform on an individual task order or goods to be purchased pursuant to an individual purchase order. The agency may:

(a) select the vendor that represents the best value to the City for that particular task order or purchase order, as determined pursuant to 3-02(o), based on each vendor's bid, or

(b) the agency may solicit offers for each task order or purchase order from all awarded vendors. If the agency solicits offers for each task order or purchase order, each vendor shall receive each solicitation and have a reasonable opportunity to compete to provide the standard services or goods.

The agency may set forth an alternative method of assigning task orders or purchase orders if it is determined by the CCPO to be in the City's best interest and is set forth in the IFB. In the event that such alternative method is used for standard services, each vendor with a contract shall receive notice of assignment of each task order at the time each task order is issued, regardless of whether each vendor with a contract received the solicitation for the task order.

(ii) The following list constitutes acceptable alternative methods of assigning task orders:

(A) rotation, or other non-discretionary method of assignment, including where assignment pursuant to such method may be varied based on stated criteria (e.g., capacity or past performance);

(B) assignment to or competition among particular vendor(s) with technical expertise particularly suited to the task order;

(C) assignment to a particular vendor based on a vendor's particular geographic location, experience or knowledge;

(D) assignment to a particular vendor based on the agency's need to distribute task orders among vendors; and

(E) any other method approved by the CCPO as set forth in the IFB.

(iii) In the event that a vendor selected pursuant to one of the selection methods in paragraphs (i) or (ii) above is unable to perform the services on an individual task order or provide the goods to be purchased pursuant to an individual purchase order for reasons such as lack of capacity or conflict of interest, the agency may disqualify that vendor for purposes of that task order and select another vendor with approval of the CCPO.

(iv) Price shall be the primary factor considered in making individual vendor selection decisions, and no task order shall be issued unless the ACCO determines that the proposed price is fair and reasonable. Prices set forth in a multiple award contract shall represent maximum prices that may be set forth in individual task orders issued to that vendor.

(3) Duration. Unless otherwise approved by the CCPO, contracts awarded pursuant to this section shall have a total term including all renewals, of not more than three years. Task orders, or purchase orders may extend beyond the expiration of the contract term, in which event the terms and conditions of the contract shall continue to apply to the task order or purchase order until its termination or expiration. Task orders, or purchase orders, shall have a maximum term of three years or, if issued for a specific project, until the specific project is completed. Notwithstanding the above, a task order may be extended beyond or further extended beyond the expiration of the contract term, or beyond the expiration of the task order, with approval of the CCPO.

NOTICE OF ADOPTION OF FINAL RULE

The Procurement Policy Board has adopted amendments to **Chapter 3 Methods of Source Selection** of its Rules pursuant to Section 311 of the New York City Charter. The amendments were published in *The City Record* on April 27, 2012, and the required public hearing was held on June 4, 2012. The amendments were adopted by the Procurement Policy Board on April 8, 2013. These rules will take effect 30 days after publication.

Statement of Basis and Purpose

Prior to recent amendments to New York State General Municipal Law § 103, contracts for public work and contracts for purchase contracts (i.e., contracts for the purchase of goods and standard services) had to be procured, as a general matter, by publicly advertised, low sealed bid. The recent changes to GML § 103 (the "Best Value Law") give the City the option to procure purchase contracts based on best value to the City, as that phrase is defined in State Finance Law § 163. Under that section, best value is defined in terms of the optimization of quality, cost and efficiency.

In light of the Best Value Law, the amendments to this rule:

- set forth the rules governing the purchase of goods and standard services through competitive sealed proposals,
- require that all awards based on competitive sealed proposals will be made based on the best value to the City as defined in the State Finance Law,
- require the identity of all proposers for goods and standard services to be disclosed at the due date and time for the proposals as required by the amendments to GML §103, and
- allow the multiple award process to be used for the purchase of goods and standard services and set forth the process for how those awards will be made.

The Rule Amendments

New material is <u>underlined</u> and deletions are [bracketed].

Section 1. Paragraph (1) of subdivision (a) of section 3-03 of Chapter 3 of Title 9 of the Rules of the City of New York is amended to read as follows:

(1) statement that the contract award will be made to the responsible proposer whose proposal <u>represents the best value to the City by optimizing quality, cost and efficiency and therefore</u> is determined to be the most advantageous to the City, taking into consideration the price and such other factors or criteria that are set forth in the RFP;

Section 2. Clause (B) of subparagraph (ii) of paragraph (1) of subdivision (d) of section 3-03 of Chapter 3 of Title 9 of the Rules of the City of New York is amended to read as follows:

(B) Content. Such notice shall include:

((a)) agency name;

((b)) PIN;

((c)) title and/or brief description of the goods, services, or construction to be procured;

((d)) estimated quantity, if any;

((e)) how the solicitation documents may be obtained;

((f)) date and time by which, and the place where, proposals shall be submitted <u>and, for goods and standard services, where the identity of all proposers will be disclosed</u>;

((g)) required vendor qualifications or eligibility requirements, if any; and

((h)) identification of the citywide bidders list used.

Section 3. Paragraph (9) of subdivision (f) of section 3-03 of Chapter 3 of Title 9 of the Rules of the City of New York is amended to read as follows:

(9) Receipt and Registration of Proposals. The identify of an offeror shall not be disclosed prior to the established date and time for receipt of proposals. Proposals shall not be opened publicly but shall be opened in the presence of two or more City employees. Proposals and modifications shall be time and date-stamped upon receipt and held in a secure place until the established due date and time. <u>The agency shall disclose the identity of all proposers for goods and standard services on the due date and time of the proposals.</u> After the date and time established for the receipt of proposals, a Register of Proposals shall be prepared and shall be open to public inspection after award of a contract. It shall include for all proposals the name of each offeror and the number of modifications received, if any.

Section 4. The first unnumbered paragraph of subdivision (g) of section 3-03 of Chapter 3 of Title 9 of the Rules of the City of New York is amended to read as follows:

(g) Evaluation Process. Award, if any, must be made to the responsible proposer whose proposal represents the best value to the City by optimizing quality, cost and efficiency and therefore is determined to be the most advantageous to the City, taking into consideration the price and such other factors or criteria that are set forth in the RFP. In evaluating the proposals, the agency may consider only price and the criteria set forth in the RFP. In considering price, the agency may use methods such as ranking technically viable proposals by price, evaluating price per technical point, or evaluating proposals in accordance with another combination of price and technical merit. Such methods may result in the agency selecting the highest technically rated proposer over another technically qualified proposer who offered a lower fee as a result of factors including, but not limited to, the selected vendor's superior technical skill and expertise, increased likelihood of timely completion, and/or ability to manage several projects simultaneously with lower overall costs to the City, including costs in City personnel time and consultants. However, for construction-related consulting services, including those procured through multiple award task orders, the agency shall rank proposers by technical merit, and then consider price by negotiating a fair and reasonable price with the highest technically ranked proposer(s). Other methods for considering price, including using fee curves based on market-derived data with appropriate consideration of complexity, or evaluating proposals in accordance with another combination of price and technical merit, may be used for construction-related consulting services only with the written approval of the CCPO.

Section 5. Subdivision (j) of section 3-03 of Chapter 3 of Title 9 of the Rules of the City of New York is amended to read as follows:

(j) Multiple Award Task Order Contracts.

(1) Determination. Multiple award task order contracts for goods or services may be awarded upon a determination by the ACCO that it is in the best interest of the City to award multiple contracts for services to multiple contractors and to allocate work among such contractors through a task order system. If an agency intends such contracts to be available for use by other City agencies, the provisions of Section 3-14 (Contracts for Services) shall also apply. The criteria to be considered by the ACCO in making such determination may include the following: the nature of the services to be procured; the expected frequency of task order issuance; the capacity of vendors to provide all of the required services within the required timeframes; and the potential advantage of multiple contracts (e.g., more favorable terms; more competitive pricing, etc.).

(2) Method.

(i) Multiple awards may be made for contracts for goods or services, pursuant to requests for proposals, in conjunction with the procedures prescribed in this subdivision. Such request for proposals, and the subsequent contracts, shall state the procedures and criteria to be used in selecting the vendor to perform on an individual task order for services or purchase order for goods.

(A) For services other than standard services, [S]such procedures and criteria shall provide that each vendor shall receive each solicitation and have a reasonable opportunity to compete to provide the services, unless an alternative method of assigning task orders, as set forth below, is determined by the CCPO to be in the City's best interest and is set forth in the request for proposals and the contract. In the event that such alternative method is used, each selected vendor shall receive notice of assignment of each task order, regardless of whether each selected vendor received the solicitation for the task order.

(B) For goods and standard services, the agency may:

((a)) select the vendor that represents the best value to the City for that particular task order or purchase order, based on each vendor's contract, or,

((b)) solicit offers for each task order or purchase order from all awarded vendors. If the agency solicits offers for each task order or purchase order, each vendor shall receive each solicitation and have a reasonable opportunity to compete to provide the standard services or goods.

The agency may set forth an alternative method of assigning task orders or purchase orders if it is determined by the CCPO to be in the City's best interest and is set forth in the request for proposals and the contract. In the event that such alternative method is used for standard services, each vendor with a contract shall receive notice of assignment of each task order at the time each task order is issued, regardless of whether each vendor with a contract received the solicitation for the task order.

(ii) The following list constitutes acceptable alternative methods of assigning task orders:

(A) rotation, or other non-discretionary method of assignment, including where assignment pursuant to such method may be varied based on stated criteria (e.g., capacity or past performance);

(B) assignment to or competition among particular vendor(s) with technical expertise particularly suited to the task order;

(C) assignment to a particular vendor based on a vendor's particular geographic location, experience or knowledge; [and,]

(D) assignment to a particular vendor based on the agency's need to distribute task orders among vendors; and

(E) Any other method approved by the CCPO as set forth in the RFP.

(iii) In the event that a vendor selected pursuant to one of the selection methods in paragraphs (i) or (ii) above is unable to perform the services on an individual task order or provide the goods to be purchased pursuant to an individual purchase order for reasons such as lack of capacity or conflict of interest, the agency may disqualify that vendor for purposes of that task order and select another vendor with approval of the CCPO.

(iv[ii]) Each vendor shall be required to respond to every solicitation for an individual task order or purchase order for which it is solicited. The ACCO may determine that a vendor is in default if it fails to bid without an adequate explanation for such failure.

([i]v) Price shall be among the criteria considered in making individual vendor selection decisions, and no task order shall be issued unless the ACCO determines that the proposed price is fair and reasonable. Prices set forth in a multiple award contract shall represent maximum prices that may be set forth in individual task orders issued to that vendor.

(3) Duration. Unless otherwise approved by the CCPO, contracts awarded pursuant to this section shall have an initial term, or a total term including all renewals, of not more than three years. Task orders or purchase orders may extend beyond the expiration of the contract term, in which event the terms and conditions of the contract shall continue to apply to the task order until its termination or expiration. Task orders or purchase orders shall have a maximum term of three years or, if issued for a specific project, until the specific project is completed. Notwithstanding the above, a task order or purchase order may be extended beyond or further extended beyond the expiration of the contract term, or beyond the expiration of the task order or purchase order, with approval of the CCPO [shall be required prior to extension of a task order beyond the expiration of the contract term, and for any further extensions of that task order].

Section 6. The first unnumbered paragraph of subdivision (k) of section 3-03 of Chapter 3 of Title 9 of the Rules of the City of New York is amended to read as follows:

(k) Vendor Selection and Documentation. The ACCO shall make a determination showing the basis on which the contract award was made to the responsible proposer whose proposal was determined to represent the best value to the City and therefore to be the most advantageous to the City, taking into consideration the price and such other factors or criteria that are set forth in the RFP. This determination shall be included in a Recommendation of Award. Each Recommendation for Award shall include at a minimum the following information:

Appendix B

HHS Accelerator PPB Rules

The Proposed Rule Amendments

New material is underlined and deletions are [bracketed].

"Shall" and "must" denote mandatory requirements and may be used interchangeably in the rules of this department, unless otherwise specified or unless the context clearly indicates otherwise.

Section 1. Paragraph (1) subdivision(e) of section 1-01 of Chapter 3 of Title 9 of the Rules of the City of New York is amended to read as follows:

Section 1-01 Definitions

HHS (Health and Human Services) Accelerator. HHS Accelerator is an office that facilitates the central management of the procurement process for client services and contractual relationships with client services vendors by creating and maintaining a web-based document vault for client services vendors; by creating and maintaining a centralized, electronic and web-accessible categorization system of services provided for all City agencies; by prequalifying client services providers; and by managing procurements for client services.

HHS Accelerator Director. A position designated by the Mayor to head HHS Accelerator with regard to procurements conducted through HHS Accelerator.

§ 2. Paragraph 2 of subdivision (c) of section 2-04 of Chapter 2 of Title 9 of the Rules of the City of New York is amended to read as follows:

Section 2-04 MULTI-TERM CONTRACTS (CLIENT SERVICES)

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(2) The form of the draft and final Plans shall be prescribed by the CCPO, in consultation with the HHS Accelerator Director. The draft and final Plans shall include, but not be limited to: the type of services to be provided, the authorized maximum amount of funding associated with the program, the authorized number of contracts to be let for a particular program, and the month and year of the next planned competitive solicitation.

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§ 3. Paragraph 6 of subdivision (c) of Section 2-04 of Chapter 2 of Title 9 of the Rules of the City of New York is amended to read as follows:

(6) The agency shall submit to the CCPO and the HHS Accelerator Director by August 31 a copy of the Plan approved by the ACCO.

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§ 4. Subdivision (d) of Section 2-04 of Chapter 2 of Title 9 of the Rules of the City of New York is amended to read as follows:

(d) Determination and Approvals. Prior to issuing a solicitation for a multi-term contract, the ACCO, with the approval of the HHS Accelerator Director for those procurements procured pursuant to Section 3-16 of these Rules, shall make a determination that:

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§ 5. Paragraph (2)(i) of subdivision (e) of section 2-08 of Title 9 of the Rules of the City of New York is amended to read as follows:

(i) by applicants, at the time of an application for inclusion on a prequalified list, provided that this requirement shall not apply to applications under HHS Accelerator pursuant to Rule 3-16;

§6. Paragraph 6 of subdivision (b) of section 2-09 of Title 9 of the Rules of the City of New York is amended to read as follows:

Section 2-09 RECOMMENDATION FOR AWARD.

* * * * *

(6) date of City Record publication and date and publication name of any other advertised notice. If a prequalified vendor list other than HHS Accelerator is used, date(s) of advertisement(s) for prequalified list; if the procurement is from a sole source, the date of the notice of intent to enter sole source negotiations;

§ 7. Subdivision (c) of section 3-01 of Title 9 of the Rules of the City of New York is amended to read as follows:

(c) *Preference for Competitive Sealed Proposals in Certain Contracts.* Procurement by competitive sealed proposals, including, where applicable, through HHS Accelerator, is the preferred method for awarding contracts for non-commodity data processing equipment and for information technology, non-commodity data processing, architectural, engineering, client, legal, accounting, financial, training, educational, cultural, medical, managed care, employee health benefits, scientific management, research, performing arts, and systems consultation services, and/or other similar services. A "Special Case" determination is not required for such procurements.

§ 8. Subdivision (a) of section 3-10 of Title 9 of the Rules of the City of New York is amended to read as follows:

(a) **Policy.** Prequalification allows an agency to evaluate the qualifications of vendors for provision of particular categories of goods, services, construction, or construction-related services (including subcategories based on expertise, size, dollar size of project, or other factors as determined by the ACCO) before issuing a solicitation for a specific contract. Except for procurements for construction, a procurement using a PQL shall be considered a "special case" under these Rules. This Section does not apply to the prequalification of vendors through HHS Accelerator pursuant to Section 3-16.

§ 9. Chapter 3 of Title 9 of the Rules of the City of New York is amended by adding a new section 3-16 to read as follows:

Section 3-16 HHS Accelerator.

(a) Policy.

(1) Client services contracts must be procured through HHS Accelerator unless the HHS Accelerator Director authorizes, with the approval of the CCPO, the use of a different procurement method. Notwithstanding the above, the authorization of the HHS Accelerator Director is not required for procurements pursuant to Section 1-02(d); Section 1-02(e); Section 3-04(b)(2)(iii); Section 3-05; Section 3-06; Section 3-08; Section 3-09; and Section 3-13.

(2) The HHS Accelerator Director prequalifies vendors by evaluating their qualifications to provide client services (including subcategories of specific client services). When procuring client services pursuant to this Section, an agency must issue a solicitation for a specific contract to HHS Accelerator prequalified vendors in accordance with the provisions of this Section. The ACCO may permit joint ventures of two or more prequalified vendors. A procurement using HHS Accelerator is considered a "special case" under these Rules without the requirement for a further determination.

(b) Criteria. In developing the HHS Accelerator PQL, the HHS Accelerator Director may use any of the criteria listed in this subsection. Criteria that may be used to prequalify vendors for HHS Accelerator include, but are not limited to:

(1) current and past experience with similar projects;

(2) references, past performance, and reliability;

(3) organization, number of staff, staff abilities and experience, and the organization's ability to undertake the type and complexity of work;

(4) financial capability, responsibility and reliability for such type and complexity of work, and availability of appropriate resources;

(5) compliance with all federal, state, and local laws, rules, licensing requirements, where applicable, and executive orders, including but not limited to compliance with existing labor standards;

(6) compliance with equal employment opportunity requirements and anti-discrimination laws;

(7) business integrity of vendor.

(c) Public Notice of HHS Accelerator PQL.

(1) Frequency. At least once annually for five consecutive editions, the HHS Accelerator Director must publish in the City Record, a notice or notices specifically identifying client services categories covered by HHS Accelerator and inviting vendors to apply for inclusion on the HHS Accelerator PQL. The same documents published in the City record must be posted continuously and prominently on the City's web site. The City's website shall also include the criteria used to prequalify vendors. The application to be included on the HHS Accelerator PQL must always be available.

(2) Content. The notice must include contact information for the HHS Accelerator Office, the procurement category, and information on how the vendor may obtain an application.

(d) Prequalification Questionnaire. A vendor must complete and submit a prequalification questionnaire developed by the HHS Accelerator Director in consultation with the CCPO. After prequalification, a vendor may update information contained in HHS Accelerator as needed. At least once every three years, and when submitting any bid or proposal in response to a solicitation from the HHS Accelerator PQL, vendors must affirm that there has been no change in the information included in the prequalification questionnaire, or if there have been changes, provide the changed information.

(e) Making the Prequalification Decision. Prequalification questionnaires will be reviewed by the HHS Accelerator Director and other personnel with knowledge, expertise, and experience sufficient to make a fair and reasonable determination, as appropriate. The HHS Accelerator Director must approve or deny prequalification within ninety days from the date of submission of a properly completed prequalification questionnaire.

(f) Denial or Revocation of Prequalification.

(1) Any vendor whose qualifications fail to meet the criteria established by the HHS Accelerator Director will be denied prequalification. The prequalified status of a vendor may be revoked at any time based on changed circumstance, conditions, or status of the vendor or its staff, or additional information acquired by the HHS Accelerator Director, or further analysis of the information upon which the original prequalification determination was made where the new information or further analysis indicates that the vendor does not meet the established criteria for prequalification.

(2) The HHS Accelerator Director must notify the vendor in writing of a denial or revocation of prequalification, stating the reasons for the determination and informing the vendor of the right to appeal. The notification must also include the following statement:

> The vendor must also send a copy of its appeal to the New York City Comptroller, for informational purposes, at the Office of the New York City Comptroller, Office of Contract Administration, 1 Centre Street, Room 1005, New York, NY 10007, (212) 669-2323.

A copy of the HHS Accelerator Director's determination must also be sent to the CCPO for inclusion in the VENDEX database and to the Comptroller's Office.

(3) HHS Accelerator PQLs must be reviewed at least once every three years to ensure that firms that no longer meet prequalification criteria are not retained on the list.

(g) Appeal of Denial or Revocation of Prequalification.

(1) Time Limit. A vendor shall have fifteen days from receipt of the determination to file a written appeal of that determination with the HHS Accelerator Director. Receipt of notice by the vendor will be deemed to be no later than five days from the date of mailing, or upon delivery if delivered using a system that provides proof of the date of delivery. Filing of the appeal must be accomplished by actual delivery of the hard copy appeal document to the office of

the HHS Accelerator Director using a system that provides proof of the date of delivery.

(2) Form and Content. The appeal must be in writing and must briefly state all of the facts or other basis upon which the vendor contests the HHS Accelerator Director's determination. Supporting documentation, if any, must be included.

(3) Determination. The HHS Accelerator Director must consider the appeal, and must make a prompt written decision with respect to its merits. The HHS Accelerator Director may in his/her sole discretion convene an informal conference with the vendor to resolve the issue by mutual consent prior to making a determination.

(4) Notification. A copy of the decision of the HHS Accelerator Director must be sent to the vendor, stating the reasons for the decision and informing the vendor of the right to appeal. A copy of the determination must be sent to the Comptroller's Office and to the CCPO to modify the VENDEX database.

(5) Appeal to OATH. The decision of the HHS Accelerator Director shall be final unless appealed to OATH. If a vendor wishes to contest the HHS Accelerator Director's decision, it may appeal to OATH, which shall hear and take final action in the matter in accordance with its rules. The petition to OATH shall be filed by the vendor within fifteen days of the date of the decision. Supporting documentation, if any, shall be included. The vendor shall, at the same time, send a copy of its appeal to the HHS Accelerator Director, CCPO, and Comptroller's Office. The HHS Accelerator Director shall forward a copy of all appeal-related documents within fourteen days of its receipt of the copy of the vendor's appeal to OATH. During the pendency of the appeal, an Agency may proceed with the solicitation. OATH shall review the decision and determine whether that decision is arbitrary or capricious and whether it is based on substantial evidence. Copies of OATH's determination shall be sent to the vendor, HHS Accelerator Director, Comptroller's Office, and, where the decision results in the revocation of prequalification, to the CCPO for any modifications to the VENDEX database.

(h) Prequalification Not a Finding of Responsibility. That a vendor has been prequalified does not imply a finding of responsibility for a particular procurement. Between the time of receipt of proposals or bid opening and contract award, the ACCO may determine that a prequalified vendor is not responsible for a particular procurement pursuant to Section 2-08. If the ACCO makes such determination, in addition to the requirements of Section 2-08, he or she must also notify the HHS Accelerator Director, who will then determine whether a vendor should be removed from the PQL.

(i) Solicitation from HHS Accelerator PQL. The solicitation of bids or proposals through HHS Accelerator is limited to vendors on the HHS Accelerator

PQL who are prequalified in the specific category(ies) of client services being solicited. The solicitation of bids or proposals through HHS Accelerator must be publicly advertised to provide notice to vendors of the solicitation and an opportunity to apply for prequalification in order to submit a proposal.

(j) Requirement for a Concept Report for a New Client Services Program. At least 45 days prior to issuing a Client Services Requests for Proposals ("CS-RFP") for a new client services program, the agency must publicly release a concept report regarding such CS-RFP.

(1) For the purposes of this section, the term "new client services program" means any program that differs substantially in scope from an agency's current contractual client services programs, including, but not limited to, substantial differences in the number or types of clients, geographic areas, evaluation criteria, service design, or price maximums or ranges per participant, if applicable.

(2) For the purposes of this section, the term "concept report" means a document outlining the basic requirements of an RFP for client services contracts and includes, but is not limited to, the following information:

(i) purpose of the CS-RFP;

(ii) planned method of evaluating proposals;

(iii) proposed term of the contract(s);

(iv) procurement timeline, including, but not limited to, the expected start date for the new contract(s), expected CS-RFP issuance date, approximate proposal submission deadline and expected award announcement date;

(v) funding information, including but not limited to, total funding available for the CS-RFP and sources of funding, anticipated number of contracts to be awarded, average funding level of contracts, anticipated funding minimums, maximums or ranges per participant, if applicable, and funding match requirements, if any;

(vi) program information, including, but not limited to, as applicable, proposed model or program parameters, site, service hours, participant population(s) to be served and participant minimums and/or maximums; and

(vii) proposed vendor performance reporting requirements.

(3) Notwithstanding the issuance of a concept report, the agency may change the above-required information at any time after the issuance of such concept report.

(4) Prior to release of the concept report, the agency must publish a notification of its release in five consecutive editions of the City Record and electronically on the City's website in a location that is accessible to the public.

(5) Upon release, the concept report must be posted electronically on the City's website in a location that is accessible to the public.

(6) Non-compliance with this section shall not be grounds to invalidate a contract.

(k) CS-RFP Contents. CS-RFPs must include the following data:

(1) statement that the contract award will be made only to vendors that are prequalified through HHS Accelerator at the time that proposals are due;

(2) statement that the contract award will be made to the responsible proposer whose proposal is determined to be the most advantageous to the City, taking into consideration the price and such other criteria that are set forth in the RFP;

(3) statement of work or scope of services statement, performance requirements, and any special instructions;

(4) the specific criteria and the relative weight of each criterion or category of criteria that will be used to evaluate the proposals;

(5) statement of how price will be evaluated. In addition, the following statements regarding price must be included:

(i) a notice that prices shall be irrevocable until contract award, unless the proposal is withdrawn, and that offers may be withdrawn only after the expiration of ninety days (or such longer period as is specified in the solicitation) after opening of proposals, in writing received by the agency prior to award;

(ii) if applicable, request for cost breakdown of the proposed price;

(6) proposal submission requirements including requirements, if any, for the electronic submission of proposals, including through the use of documents contained in the HHS Accelerator document repository; if applicable, that technical and price proposals must be submitted in separate sealed envelopes (paper) or attachments (electronic); and the time and date after which proposals will not be accepted as well as the location of proposal submission;

(7) other information such as delivery dates or time frames within which the work must be completed. Where it is anticipated that a contract will extend

beyond one year, the following information must be included in any solicitation, in addition to any other requirements of these Rules:

(i) a statement of intent to award a multi-term contract, and an estimate of the quantity of services required for the proposed contract period;

(ii) a request for a proposal of a total price which shall be binding in the first year and may be negotiable from year to year thereafter;

(iii) that the multi-term contract is subject to modification or cancellation if adequate funds are not appropriated to the agency to support continuation of performance in any fiscal year succeeding the first;

(iv) that the multi-term contract is subject to modification or cancellation if the vendor's performance is not satisfactory;

(v) that the Contracting Officer must notify the vendor as soon as is practicable that the funds are, or are not, available for the continuation of the multi-term contract for each succeeding fiscal year;

(vi) whether proposers must submit prices for the first year, for the entire period of performance, or for some portion of the period; and

(vii) a statement setting forth those costs, if any, for which the vendor will be reimbursed in the event of cancellation;

(8) general as well as special terms and conditions, if applicable;

(9) a notice of the proposer's rights to appeal certain decisions;

(10) a notice of the City's prompt payment policy, including an explanation of the requirements for invoicing;

(11) a requirement for acknowledgment of amendments;

(12) if applicable, a request for a description of experience in the line of work being considered (including references);

(13) if applicable and necessary in the judgment of the Contracting Officer, a request for description of staff capability along with the resumes of key individuals who will work on the contract;

(14) a notice that although discussions may be conducted with offerors submitting acceptable proposals, award may be made without any discussions;

(15) if applicable, a provision on the submission and consideration of multiple or alternate proposals;

(16) a provision that proposers should clearly identify those portions of their proposals that they deem to be confidential, proprietary information or trade secrets and provide any justification why such materials, upon request, should not be disclosed by the City. Such information must be easily separable from the non-confidential sections of the proposals;

(17) a notice that contract award is subject to the provisions of the MacBride Principles Law;

(18) a notice that contract award is subject to applicable provisions of federal, state, and other local laws and executive orders requiring affirmative action and equal employment opportunity;

(19) if applicable, a notice that contract award is subject to completion of a VENDEX questionnaire and review of that information by the Department of Investigation;

(20) where applicable, all information required pursuant to Section 312(a) of the Charter;

(21) the following statement:

> The New York City Comptroller is charged with the audit of contracts in New York City. Any vendor who believes that there has been unfairness, favoritism, or impropriety in the proposal process should inform the Comptroller, Office of Contract Administration, 1 Centre Street, Room 1005, New York, NY 10007; telephone number (212) 669-2323; and

(22) name, address, and telephone number of contact person; and

(23) if applicable, information regarding multiple award task order contracts for services.

)(l) "Open ended" CS-RFPs. For a client services program in which there is available funding for more than the available responsible vendor, and for which the requirements and qualifications are unusually complex and difficult to predict (such as Uniform Land Use Review Procedures approvals of appropriate sites, licenses, etc.) and for which interested potential vendors may become qualified during the course of a year, the ACCO may designate the applicable RFP as an "open-ended RFP." If an RFP is so designated, the agency must publish quarterly in the City Record a notice of solicitation, clearly stating that the RFP may be obtained at any time and that proposals may be submitted in response to the RFP on an on-going basis. When an agency decides to terminate the open-ended RFP, it must publish the termination in the City Record.

(m) Proposal Preparation Time and Form.

(1) Vendors must be given a reasonable time to prepare their proposals, and this time must never be less than ten days. How proposals are to be submitted, including any required forms, must be included in the RFP.

(2) The ACCO is responsible for ensuring that an extract or copy of the scope of work is available for public inspection upon request at the agency issuing the solicitation and that the notice of the solicitation includes a description of the proposed service area and the name and telephone number of an agency individual who can be contacted to provide a copy of the extract or the scope of work.

(n) Public notice.

(1) Notice of solicitation. When RFPs, notices of their availability or notices of solicitation are published, they must also be simultaneously posted on the City's website in a location that is accessible to the public. An agency may, upon a vendor's request, provide RFPs or notices electronically. Notices of solicitation and copies of the CS-RFP must be delivered electronically at least twenty days prior to the due date to all vendors prequalified through HHS Accelerator for the applicable category(ies), unless a selective solicitation is being utilized pursuant section 3-16(j). Vendors must respond to the solicitation electronically via the HHS Accelerator System.

(2) Notice of Vendor Selection.

(i) Frequency. Notice of vendor selection exceeding the small purchase limits must be published once in the City Record within fifteen days after registration of the contract.

(ii) Content. Such notice must include:

(A) agency name;

(B) PIN;

(C) title and/or brief description of the goods, services, or construction to be procured;

(D) name and address of the vendor;

(E) dollar value of the contract; and

(F) procurement method by which the contract was let.

(o) CS-RFP Handling Procedures.

(1) Pre-Proposal or Pre-Solicitation Conferences. Pre-proposal or pre-solicitation conferences may be conducted as set forth in Section 3-02 of these Rules.

(2) Amendments to CS-RFPs. Amendments to CS-RFPs may be made as set forth in Section 3-02 of these Rules and will be issued by the Agency through HHS Accelerator.

(3) Modification or Withdrawal of Proposals. Proposals may be modified or withdrawn prior to the established due date as set forth in Section 3-02 of these Rules. The established due date is either the time and date announced for receipt of proposals or receipt of modifications to proposals, if any, or if discussions have begun, the time and date by which best and final offers must be submitted.

(4) Late Proposals and Modifications. Any proposal or modification received after the established due date and time at the place designated for receipt is late and may be accepted only as set forth in paragraphs (5) through (8) below.

(5) Handling and Acceptance of Late Proposals. A late proposal may only be accepted if the ACCO determines that it is in the best interest of the City to do so. In such event, the ACCO may hold open the receipt of proposals by no more than three hours, during which time no other competing proposal may be opened. The ACCO may, upon written approval by the CCPO, hold open the receipt of proposals by longer than three hours, but until no later than the original submission time on the next business day; such approval may be given by the CCPO only where the need for holding the receipt of proposals open for a longer time arises from generally applicable emergency circumstances, such as weather or transit emergencies. No late proposals can be accepted if any proposals have been opened. Where an ACCO has determined that it is in the best interest of the City to accept a late proposal, any other late proposal received during the period of extension must also be accepted.

(6) Documentation of Late Proposals. The ACCO must, within one business day of accepting late proposals, document the reasons that it is in the best interest of the City to approve the extension, indicate the length of time extended, list the name of any vendor(s) submitting a proposal received during the extension period established pursuant to paragraph (5) above, and include an affirmative statement

that no proposals were opened before the late proposal was accepted and that any other late proposal received during the period of extension was also accepted.

(7) Late Modifications. A late modification of an accepted proposal that makes its terms more favorable to the City must be considered at any time it is received and, if accepted by the ACCO, must be so documented in the Recommendation for Award.

(8) Record. A record must be made of each request for acceptance of a late proposal or modification. A late proposal or modification that is not accepted by the ACCO must not be opened until after registration of the contract.

(9) Receipt and Registration of Proposals. The identity of an offeror shall not be disclosed prior to the established date and time for receipt of proposals. Proposals shall not be opened publicly. Proposals and modifications shall be time and date-stamped upon receipt and held in a secure place until the established due date and time. After the date and time established for the receipt of proposals, a Register of Proposals including shall be prepared and available for public inspection after award of a contract. .

(p) Evaluation Process. Award, if any, must be made to the responsible proposer whose proposal is determined to be the most advantageous to the City, taking into consideration the price and such other factors or criteria that are set forth in the RFP. In evaluating the proposals, the agency may consider only price and the criteria set forth in the RFP. In considering price, the agency may use methods such as ranking technically viable proposals by price, evaluating price per technical point, or evaluating proposals in accordance with another combination of price and technical merit. Such methods may result in the agency selecting the highest technically rated proposer over another technically qualified proposer who offered a lower fee as a result of factors including, but not limited to, the selected vendor's superior technical skill and expertise, increased likelihood of timely completion, and/or ability to manage several projects simultaneously with lower overall costs to the City, including costs in City personnel time and consultants.

(1) Evaluation Committee. Proposals must be reviewed by an evaluation committee of no fewer than three persons with knowledge, expertise, and experience sufficient to make a fair and reasonable evaluation. If an RFP incorporates multiple competitions, each competition may be evaluated by a separate committee. Each member of the evaluation committee(s) must submit a signed statement to the ACCO, in a format approved by the CCPO, agreeing to prohibitions on any conflicts of interest.

(a) Randomized evaluation process. If the HHS Accelerator Director determines that the expected number of proposals will be large enough to make it infeasible for each member of the evaluation committee to read each proposal, the ACCO may, subject to the approval of the HHS Accelerator Director, establish a pool of appropriate evaluators and then randomly assign each proposal to at least three such evaluators for review.

(b) Outside Evaluators. The evaluation committee may include persons not employed by the agency. In addition, the ACCO may determine, subject to the approval of the HHS Accelerator Director, that it is in the best interests of the City for the evaluation committee to include persons who are not employees of the City of New York, provided that such non-City employees may not constitute a majority of the evaluation committee. Such persons must serve without compensation, but may be entitled to travel and other related expenses as may be reasonably incurred in their role as an evaluator.

(2) Rating Sheets. Ratings sheets or other written evaluation forms must be used by the evaluators to evaluate proposals . Each evaluator must sign and date his or her rating sheet. Initial ratings may be amended and the amended ratings recorded on amended ratings sheets. Copies of all initial and amended rating sheets or evaluation forms must be maintained.

(3) Proposal Discussions with Individual Offerors. The evaluation committee must evaluate all proposals and may elect to enter into discussions with those offerors whose proposals are acceptable or are reasonably likely to be made acceptable. Discussions with offerors may be for any or all of the following purposes:

(i) to promote understanding of the City's requirements and the vendors' proposals and capabilities;

(ii) to obtain the best price for the City; or

(iii) to award a contract that will be most advantageous to the City taking into consideration price and the other evaluation criteria in the RFP.

(4) Conduct of Discussions.

(i) Proposers shall be accorded fair treatment with respect to any opportunity for discussions and revisions of proposals.

(ii) The ACCO must set an agenda and schedule for conducting discussions.

(iii) If there is a need for any substantial clarification of, or change in, the RFP, the RFP must be amended to incorporate such clarification or change and the amended RFP must be provided to all proposers.

(iv) Auction techniques (revealing one proposer's price to another) and disclosure of any information derived from competing proposals are prohibited.

(v) Any oral clarification of a proposal must be confirmed in writing by the proposer.

(5) Best and Final Offers. Best and final offers are the revised and corrected final proposals submitted by proposers after discussions, if any, have been held by the agency.

(i) The ACCO must establish a common date and time for the submission of best and final offers.

(ii) Best and final offers may be submitted only once unless the ACCO makes a determination that it is in the City's best interest to conduct additional discussions and/or require another submission of best and final offers.

(iii) Proposers must be informed that if they do not submit a notice of withdrawal or another best and final offer, their immediate previous offer will be construed as their best and final offer.

(iv) All best and final offers must be recorded on the Register of Proposals and handled in accordance with the control procedures contained in this Section.

(v) The ACCO may request best and final offers on the whole proposal or on any one or combination of its component parts (e.g., price, technical qualifications, approach, and/or capability). The request must be the same for all proposers.

(vi) Best and final offers must be evaluated in accordance with subdivision 3-16(q).

(q) Mistakes in Proposals.

(1) Confirmation of Proposal. When the ACCO knows or has reason to conclude before award that a mistake has been made by the proposer, he or she must request the proposer to confirm the proposal. If the proposer alleges there is a mistake in the proposal, the proposal may be corrected or withdrawn during any discussions that are held or if the conditions set forth in this subdivision are met.

(2) Mistakes Discovered After Receipt of Proposals but Before Vendor Selection.

(i) During Discussions Prior to Best and Final Offers. Once discussions are commenced with any proposer or after best and final offers are requested, any offeror may correct any mistake by modifying or withdrawing the proposal until the time and date set for receipt of best and final offers.

(ii) Minor Informalities. Minor informalities, unless otherwise corrected by an offeror, must be treated in accordance with Section 3-02(m)(3)(i) of these Rules.

(iii) Correction of Mistakes. If discussions are not held or if the best and final offers upon which award will be made have been received, mistakes may be corrected and the intended correct offer considered only in accordance with Section 3-02(m)(3)(ii) of these Rules.

(3) Mistakes Discovered After Vendor Selection. Mistakes may not be corrected after vendor selection except in accordance with Section 3-02(m)(4) of these Rules.

(4) Determinations Required. When a proposal is corrected or withdrawn, or correction or withdrawal is denied, a determination must be prepared in accordance with Section 3-02(m)(5) of these Rules.

(r) Vendor Selection and Documentation. The ACCO must make a determination showing the basis on which the contract award was made to the responsible proposer whose proposal was determined to be the most advantageous to the City, taking into consideration the price and other criteria in the RFP. This determination must be included in a Recommendation for Award. Each Recommendation for Award must include at a minimum the following information:

(1) justification of the award;

(2) if the award is for client services for which there is agency price history, a price comparison of the proposed price versus previous price, with reasons for any increases as supported by a cost/price analysis;

(3) reasons for multiple award contracts;

(4) any special terms and conditions included in the proposed contract that were derived from a cost/price analysis;

(5) affirmative finding of responsibility for the selected proposer(s); and

(6) efforts to negotiate better value.

Upon determination of the most favorable proposal and after obtaining all required approvals, the Contracting Officer shall award the contract to that proposer.

§ 10. Paragraph (2) of subdivision (a) of section 4-12 of Chapter 4 of Title 9 of the Rules of the City of New York is amended to read as follows:

(2) In the circumstance wherein an expiring contract for client services is to be replaced by a new contract awarded from an RFP pursuant to Section 3-03 or via HHS Accelerator pursuant to Section 3-16, renewed pursuant to Section 4-04 or extended pursuant to Sections 3-04(b)(2)(iii) or 4-02(b)(1)(iii), the agency should notify the selected vendor of its selection by no later than ninety (90) days prior to the expiration date of the contract that is to be replaced, renewed or extended. Earlier notification is preferable, particularly where the agency anticipates that the vendor will be required to file a new VENDEX questionnaire pursuant to Section 2-08(e)(2). In addition, where an agency proposes to continue services by means of a new RFP award, the Notice of Solicitation for such RFP should be published by the agency pursuant to Section 3-03(d), or by the HHS Accelerator Director pursuant to Section 3-16(b)(1), by no later than two hundred fifty (250) days prior to the expiration of the contracts to be replaced.

Appendix C

Doing Business Data Form and Frequently Asked Questions

The City of New York
Mayor's Office of Contract Services
Doing Business Accountability Project

Doing Business Data Form

To be completed by the City agency prior to distribution

Agency: ____________ **Transaction ID:** ____________

Check One:	Transaction Type (check one):		
☐ Proposal	☐ Concession	☐ Contract	☐ Economic Development Agreement
☐ Award	☐ Franchise	☐ Grant	☐ Pension Investment Contract

Any entity receiving, applying for or proposing on an award or agreement must complete a Doing Business Data Form (see Q&A sheet for more information). Please either type responses directly into this fillable form or print answers by hand in black ink, and be sure to fill out the certification box on the last page. **Submission of a complete and accurate form is required for a proposal to be considered responsive or for any entity to receive an award or enter into an agreement.**

This Data Form requires information to be provided on principal officers, owners and senior managers. The name, employer and title of each person identified on the Data Form will be included in a public database of people who do business with the City of New York; no other information reported on this form will be disclosed to the public. **This Data Form is not related to the City's VENDEX requirements.**

Please return the completed Data Form to the City office that supplied it. Please contact the Doing Business Accountability Project at DoingBusiness@cityhall.nyc.gov or 212-788-8104 with any questions regarding this Data Form. Thank you for your cooperation.

Section 1: Entity Information

Entity Name: ____________

Entity EIN/TIN: ____________

Entity Filing Status (select one):

☐ Entity has never completed a Doing Business Data Form. *Fill out the entire form.*

☐ Change from previous Data Form dated ____________. *Fill out only those sections that have changed, and indicate the name of the persons who no longer hold positions with the entity.*

☐ No Change from previous Data Form dated ____________. *Skip to the bottom of the last page.*

Entity is a Non-Profit: ☐ Yes ☐ No

Entity Type: ☐ Corporation (any type) ☐ Joint Venture ☐ LLC ☐ Partnership (any type) ☐ Sole Proprietor ☐ Other (specify): ____________

Address: ____________

City: ____________ State: ____________ Zip: ____________

Phone : ____________ Fax : ____________

E-mail: ____________

Provide your e-mail address and/or fax number in order to receive notices regarding this form by e-mail or fax.

Section 2: Principal Officers

Please fill in the required identification information for each officer listed below. If the entity has no such officer or its equivalent, please check "This position does not exist." If the entity is filing a Change Form and the person listed is replacing someone who was previously disclosed, please check "This person replaced..." and fill in the name of the person being replaced so his/her name can be removed from the *Doing Business Database*, and indicate the date that the change became effective.

Chief Executive Officer (CEO) or equivalent officer

☐ This position does not exist

The highest ranking officer or manager, such as the President, Executive Director, Sole Proprietor or Chairperson of the Board.

First Name: ____________________ MI: _____ Last: ____________________

Office Title: ____________________

Employer (if not employed by entity): ____________________

Birth Date (mm/dd/yy): ____________________ Home Phone #: ____________________

Home Address: ____________________

☐ This person replaced former CEO: ____________________ on date: __________

Chief Financial Officer (CFO) or equivalent officer

☐ This position does not exist

The highest ranking financial officer, such as the Treasurer, Comptroller, Financial Director or VP for Finance.

First Name: ____________________ MI: _____ Last: ____________________

Office Title: ____________________

Employer (if not employed by entity): ____________________

Birth Date (mm/dd/yy): ____________________ Home Phone #: ____________________

Home Address: ____________________

☐ This person replaced former CFO: ____________________ on date: __________

Chief Operating Officer (COO) or equivalent officer

☐ This position does not exist

The highest ranking operational officer, such as the Chief Planning Officer, Director of Operations or VP for Operations.

First Name: ____________________ MI: _____ Last: ____________________

Office Title: ____________________

Employer (if not employed by entity): ____________________

Birth Date (mm/dd/yy): ____________________ Home Phone #: ____________________

Home Address: ____________________

☐ This person replaced former COO: ____________________ on date: __________

Section 3: Principal Owners

Please fill in the required identification information for all individuals who, through stock shares, partnership agreements or other means, **own or control 10% or more of the entity**. If no individual owners exist, please check the appropriate box to indicate why and skip to the next page. If the entity is owned by other companies, those companies do **not** need to be listed. If an owner was identified on the previous page, fill in his/her name and write "See above." If the entity is filing a Change Form, list any individuals who are no longer owners at the bottom of this page. If more space is needed, attach additional pages labeled "Additional Owners."

There are no owners listed because (select one):

☐ The entity is not-for-profit ☐ There are no individual owners ☐ No individual owner holds 10% or more shares in the entity

☐ Other (explain): ______________________________

Principal Owners (who own or control 10% or more of the entity):

First Name: ____________ MI: ____ Last: ____________

Office Title: ____________

Employer (if not employed by entity): ____________

Birth Date (mm/dd/yy): ____________ Home Phone #: ____________

Home Address: ____________

First Name: ____________ MI: ____ Last: ____________

Office Title: ____________

Employer (if not employed by entity): ____________

Birth Date (mm/dd/yy): ____________ Home Phone #: ____________

Home Address: ____________

First Name: ____________ MI: ____ Last: ____________

Office Title: ____________

Employer (if not employed by entity): ____________

Birth Date (mm/dd/yy): ____________ Home Phone #: ____________

Home Address: ____________

Remove the following previously-reported Principal Owners:

Name: ____________ Removal Date: ____________

Name: ____________ Removal Date: ____________

Name: ____________ Removal Date: ____________

Section 4: Senior Managers

Please fill in the required identification information for all senior managers who oversee any of the entity's relevant transactions with the City (e.g., contract managers if this form is for a contract award/proposal, grant managers if for a grant, etc.). Senior managers include anyone who, either by title or duties, has substantial discretion and high-level oversight regarding the solicitation, letting or administration of any transaction with the City. **At least one senior manager must be listed, or the Data Form will be considered incomplete.** If a senior manager has been identified on a previous page, fill in his/her name and write "See above." If the entity is filing a Change Form, list individuals who are no longer senior managers at the bottom of this section. If more space is needed, attach additional pages labeled "Additional Senior Managers."

Senior Managers:

First Name: ______________________ MI: _____ Last: ______________________

Office Title: ______________________

Employer (if not employed by entity): ______________________

Birth Date (mm/dd/yy): ______________ Home Phone #: ______________________

Home Address: ______________________

First Name: ______________________ MI: _____ Last: ______________________

Office Title: ______________________

Employer (if not employed by entity): ______________________

Birth Date (mm/dd/yy): ______________ Home Phone #: ______________________

Home Address: ______________________

First Name: ______________________ MI: _____ Last: ______________________

Office Title: ______________________

Employer (if not employed by entity): ______________________

Birth Date (mm/dd/yy): ______________ Home Phone #: ______________________

Home Address: ______________________

Remove the following previously-reported Senior Managers:

Name: ______________________ Removal Date: ______________

Name: ______________________ Removal Date: ______________

Certification

I certify that the information submitted on these four pages and _____ additional pages is accurate and complete. I understand that willful or fraudulent submission of a materially false statement may result in the entity being found non-responsible and therefore denied future City awards.

Name: ______________________

Signature: ______________________ Date: ______________________

Entity Name: ______________________

Title: ______________________ Work Phone #: ______________________

Please return this form to the City agency that supplied it to you, not to the Doing Business Accountability Project.

DOING BUSINESS ACCOUNTABILITY PROJECT

QUESTIONS AND ANSWERS ABOUT THE DOING BUSINESS DATA FORM

What is the purpose of this *Data Form*?

To collect accurate, up-to-date identification information about organizations that have business dealings with the City of New York in order to comply with Local Law 34 of 2007 (LL 34), a campaign finance reform law. LL 34 limits municipal campaign contributions from principal officers, owners and senior managers of entities doing business with the City and mandates the creation of a *Doing Business Database* to allow the City to enforce the law. The information requested in this *Data Form* must be provided, regardless of whether the organization or the people associated with it make or intend to make campaign contributions. No sensitive personal information collected will be disclosed to the public.

Why have I received this *Data Form*?

The contract, franchise, concession, grant or economic development agreement you are proposing on, applying for or have already been awarded is considered a business dealing with the City under LL 34. No proposal or application will be considered and no award will be made unless this *Data Form* is completed. Most transactions valued at more than $5,000 are considered business dealings and require completion of the *Data Form*. Exceptions include transactions awarded on an emergency basis or by "conventional" competitive sealed bid (i.e. bids that do not use a prequalified list or "Best Value" selection criteria.) Other types of transactions that are considered business dealings include real property and land use actions with the City.

What individuals will be included in the *Doing Business Database*?

The principal officers, owners and certain senior managers of organizations listed in the *Doing Business Database* are themselves considered to be doing business with the City and will also be included in the *Database*.

- **Principal Officers** are the Chief Executive Officer (CEO), Chief Financial Officer (CFO) and Chief Operating Officer (COO), or their functional equivalents. See the *Data Form* for examples of titles that apply.
- **Principal Owners** are individuals who own or control 10% of more of the organization. This includes stockholders, partners and anyone else with an ownership or controlling interest in the entity.
- **Senior Managers** include anyone who, either by job title or actual duties, has substantial discretion and high-level oversight regarding the solicitation, letting or administration of any contract, concession, franchise, grant or economic development agreement with the City. At least one Senior Manager must be listed or the Data Form will be considered incomplete.

I have already completed a *Doing Business Data Form*; do I have to submit another one?

Yes. An organization is required to submit a *Doing Business Data Form* each time it enters into a transaction considered a business dealing with the City, including contract, concession and franchise proposals. However, the *Data Form* has both a Change option, which requires only information that has changed since the last *Data Form* was filed, and a No Change option. No organization should have to fill out the entire *Data Form* more than once.

If you have already submitted a *Data Form* for one transaction type (such as a contract), and this is the first time you are completing a *Data Form* for a different transaction type (such as a grant), please select the Change option and complete Section 4 (Senior Managers) for the new transaction type.

Will the personal information on this *Data Form* be available to the public?

No. The names and titles of the officers, owners and senior managers reported on the *Data Form* will be made available to the public, as will information about the organization itself. However, personal identifying information, such as home address, home phone and date of birth, will not be disclosed to the public, and home address and phone number information will not be used for communication purposes.

I provided some of this information on the VENDEX Questionnaire; do I have to provide it again?

Yes. Although the *Doing Business Data Form* and the VENDEX Questionnaire request some of the same information, they serve entirely different purposes. In addition, the *Data Form* requests information concerning senior managers, which is not part of the VENDEX Questionnaire.

What organizations will be included in the *Doing Business Database*?

Organizations that hold $100,000 or more in grants, contracts for goods or services, franchises or concessions ($500,000 for construction contracts), or that hold any economic development agreement or pension fund investment contract, are considered to be doing business with the City for the purposes of LL 34. Because all of the business that an organization does or proposes to do with the City will be added together, the *Data Form* must be completed for all transactions valued at more than $5,000 even if the organization doesn't currently do enough business with the City to be listed in the *Database*.

No one in my organization plans to contribute to a candidate; do I have to fill out this *Data Form*?

Yes. All organizations are required to return this *Data Form* with complete and accurate information, regardless of the history or intention of the entity or its officers, owners or senior managers to make campaign contributions. The *Doing Business Database* must be complete so that the Campaign Finance Board can verify whether future contributions are in compliance with the law.

My organization is proposing on a contract with another firm as a Joint Venture that does not exist yet; how should the Data Form be completed?

A joint venture that does not yet exist must submit a Data Form for each of its component firms. If the joint venture receives the award, it must then complete a form in the name of the joint venture.

How long will an organization and its officers, owners and senior managers remain listed on the *Doing Business Database*?

- **Contract, Concession and Economic Development Agreement holders**: generally for the term of the transaction, plus one year.
- **Franchise and Grant holders**: from the commencement or renewal of the transaction, plus one year.
- **Pension investment contracts**: from the time of presentation on an investment opportunity or the submission of a proposal, whichever is earlier, until the end of the contract, plus one year.
- **Line item and discretionary appropriations**: from the date of budget adoption until the end of the contract, plus one year.
- **Contract proposers**: for one year from the proposal date or date of public advertisement of the solicitation, whichever is later.
- **Franchise and Concession proposers**: for one year from the proposal submission date.

For information on other transaction types, contact the Doing Business Accountability Project.

How does a person remove him/herself from the *Doing Business Database*?

When an organization stops doing business with the City, the people associated with it are removed from the *Database* automatically. However, any person who believes that s/he should not be listed may apply for removal. Reasons that a person would be removed include his/her no longer being the principal officer, owner or senior manger of the organization. Organizations may also update their database information by submitting an update form. Removal Request and Update forms are available online at www.nyc.gov/mocs (once there, click MOCS Programs) or by calling 212-788-8104.

What are the new campaign contribution limits for people doing business with the City?

Contributions to City Council candidates are limited to $250 per election cycle; $320 to Borough President candidates; and $400 to candidates for citywide office. Please contact the NYC Campaign Finance Board for more information at www.nyccfb.info, or 212-306-7100.

The *Data Form* is to be returned to the City office that issued it.

If you have any questions about the *Data Form* please contact the Doing Business Accountability Project at 212-788-8104 or DoingBusiness@cityhall.nyc.gov.

NEW YORK CITY MINORITY & WOMEN OWNED BUSINESS ENTERPRISE PROGRAM

Charter § 1304

Administrative Code § 6-129

66 RCNY §11-21 et seq; §11-60 et seq

Sources

- Local Law 129 of 2005
  – Minority & Women Owned Business Enterprises
- Local Law 12 of 2006
  – Emerging Business Enterprises
  (Socially & Economically Disadvantaged)
- Local Law 1 of 2013

Eligibility for MBE/WBE certification

51% ownership held by women or minorities who are citizens or permanent residents

Ownership must be real, substantial & continuing

Owners must have & exercise authority to control independently day to day business decisions

Firms owned by women who are minorities

- May be certified as both MBEs and WBEs
- May be counted by an agency and a contractor toward either a goal for MBEs or a goal for WBEs (but not both)

Emerging business enterprises

- 51% ownership by citizens or permanent residents
- Ownership is real, substantial & continuing
- Owners must have & exercise authority to control independently day to day business decisions
- Owners are “socially & economically disadvantaged”

Economic disadvantage

Net worth must be less than $1M, excluding ownership interest in the business enterprise and equity in primary personal residence.

Social disadvantage

Objective distinguishing feature that has contributed to social disadvantage, such as physical or mental disability, long-term residence in environment isolated from the mainstream U.S. society, or other similar causes not common to individuals who are not socially disadvantaged; and

Personal experiences of substantial and chronic social disadvantage in U.S. society; and

Negative impact on entry into or advancement in the business world because of the social disadvantage.

Certified firms must have nexus to City's geographic market

(1) Principal office or place of business or headquarters is located within the City; <u>or</u>

(2) Full-time employees in offices within the City to conduct or solicit business in the City the majority of their working time; <u>or</u>

(3) Principal office or place of business or headquarters is located within the geographic market of the City, and (i) has transacted business more than once in the City within the last 3 years, or (ii) has sought to transact business more than once in the City within the last 3 years; <u>or</u>

(4) 25% of annual gross receipts for the last 3 years were derived from transacting business in the City; <u>or</u>

(5) 2 or more of the following: (i) the business has maintained a bank account or engaged in other banking transactions in the City; (ii) the business, or one of its owners, possesses a license issued by a City agency to do business in the City; (iii) the business has transacted/sought to transact business in/with the City more than once in the past 3 years.

Qualified joint venture

- Joint venture between one or more MBEs, WBEs and/or EBEs and another person
- MBE/WBE/EBE must be entitled to at least 25% of profits, exposed to at least 25% of losses

Graduate MBE/WBE/EBE

- Has been awarded contracts within past 3 years where total City funding was $50M or more, <u>and</u>
- Size has exceeded standard for relevant industry by U.S. Small Business Administration for 3 years

Contracts and subcontracts performed by "graduates" don't count toward goals

Firms can apply to have "graduate" designation lifted after 2 years by demonstrating that they have been below the relevant SBA size standards for 2 years.

ANNUAL CITYWIDE GOALS			
CONSTRUCTION		**STANDARD SERVICES**	
Black American	18%	Black American	12%
Asian American	8%	Asian American	3%
Hispanic American	4%	Hispanic American	6%
Women	18%	Women	10%
Emerging	6%	Emerging	6%
PROFESSIONAL SERVICES		**GOODS UNDER $100K**	
Black American	12%	Black American	7%
Asian American	--	Asian American	8%
Hispanic American	8%	Hispanic American	5%
Women	17%	Women	25%
Emerging	6%	Emerging	6%

Disparity study & updates

- Citywide goals are based on a study comparing availability & utilization of MBEs & WBEs in City procurements.
- Goals are set for categories where significant underutilization is found.
- Law requires Commissioner of SBS, in consultation with City Chief Procurement Officer, to review availability and utilization every 2 years, and adjust goals by rule as appropriate.

Agency annual utilization plans

- Agency goals are set annually
- Considerations:
  - Citywide goals
  - Size & nature of agency’s procurements
  - Availability of MBEs, WBEs & EBEs with capacity to perform specific types & scale of work the agency anticipates

Goals for individual procurements

- Factors:
  - Scope of work
  - Availability of MBEs, WBEs and EBEs
  - Prime contracting and subcontracting opportunities within their capacity
  - Agency's progress in meeting its annual goals through race- and gender- neutral means
  - Other relevant factors

Options for goals

- Agency may establish specific goals for particular services

- Agency may establish goals for particular types of certified firms (e.g. owned by Black Americans or Asian Americans or Hispanic Americans or Women or Economically/Socially Disadvantaged)

- Agency may specify that goals can be achieved by
  - Combination of prime contract & subcontract dollars
  - Combination of construction and services
  - Combination of MBEs, WBEs and/or EBEs

Credit

- Contractor that is a certified MBE/WBE/EBE may count own participation, after subtracting amounts awarded to subcontractors
- Contractor may count participation of subcontractors that are certified MBEs/WBEs/EBEs
- Qualified joint venture may count own participation, after
  - subtracting amounts awarded to subcontractors
  - multiplying the remainder by percentage of profit to which the MBE/WBE/EBE partner is entitled under the JV agreement

Credit for subcontractors' subcontractors

- The City Chief Procurement Officer may identify types of contracts where payments made to "indirect subcontractors" are credited toward the relevant goals.

Waivers (full or partial)

- A bidder/proposer may ask agency to reduce goal
  - on grounds it is unreasonable in light of availability of certified firms, or
  - by demonstrating it has legitimate business reasons for proposing lower level of subcontracting

Agency decisions on waivers

- Based on whether bidder/proposer has capacity and bona fide intention to perform contract without subcontracting, or without as much subcontracting as contemplated by the goals
- Considering
    - past practice of bidder/proposer
    - whether it made efforts to form a qualified joint venture
    - whether it made good faith efforts to identify portions of contract it intends to subcontract

Modifications

- May be granted at contractor’s request or agency’s initiative when agency determines contractor has made all reasonable good faith efforts to meet the goals.

Factors demonstrating good faith

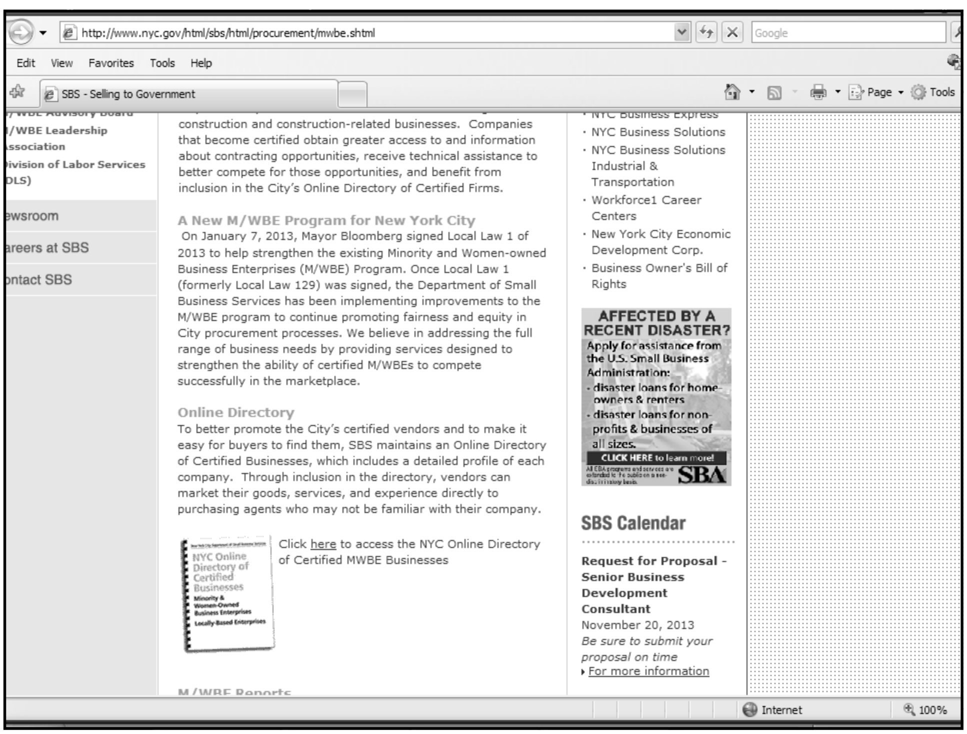
- Advertising in general media, professional publications, and publications of minority and women’s organizations
- Timely notice to minority and women’s organizations
- Written notice to solicit M/W/EBEs
- Efforts to identify work that could be substituted for portions originally designated for M/W/EBEs
- Meetings with M/W/EBEs prior to due date of bid/proposal
- Efforts to negotiate with M/W/EBEs
- Timely requests for assistance to agency MWBE officer and SBS
- Description of how their recommendations were acted upon and why they did not lead to desired level of participation

Changes in scale/scope

- Agency may modify participation goals when it has changed scope of work in manner affecting scale & type of work that contractor’s utilization plan indicated would be awarded to subcontractors.

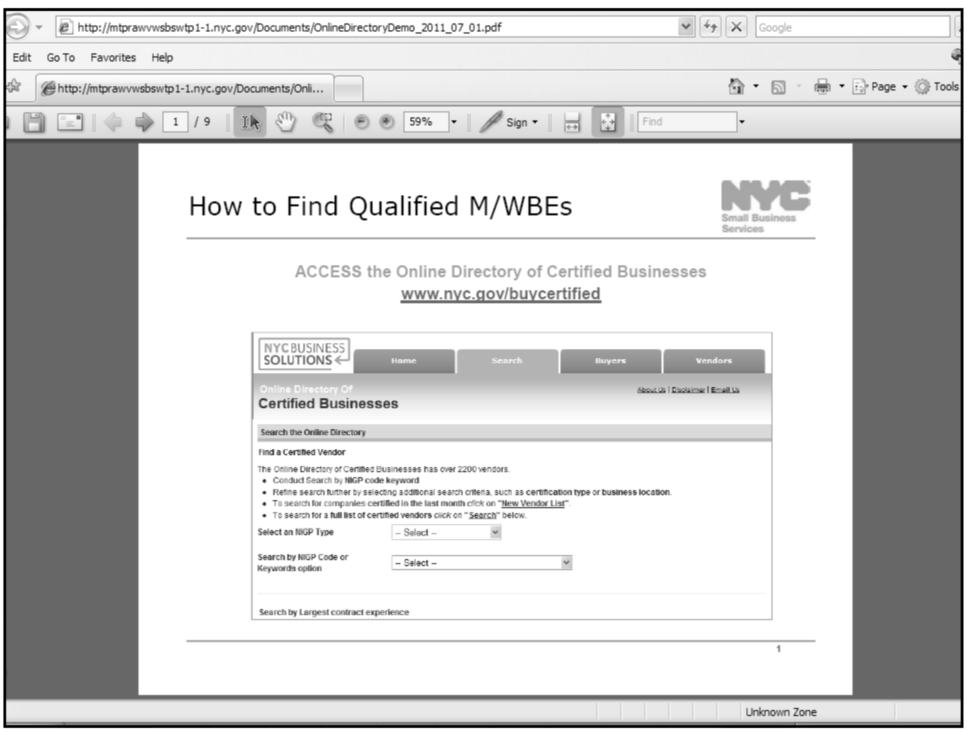
HELPFUL TOOLS

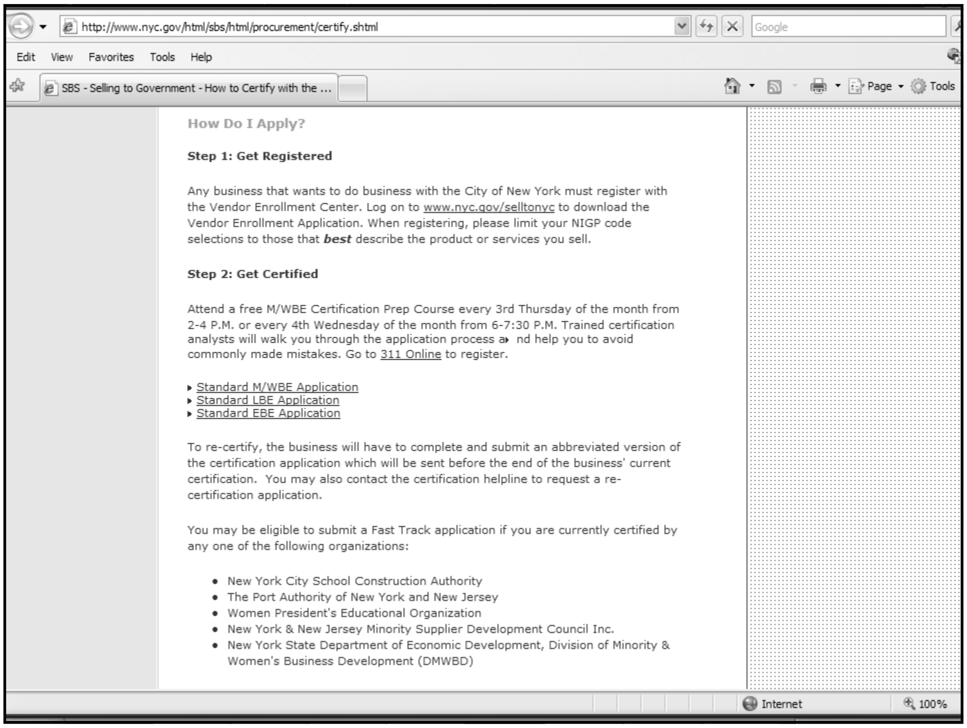

http://www.nyc.gov/html/sbs/html/home/home.shtml
Edit View Favorites Tools Help
New York City Department of Small Business Services
NYC Resources
311
Office of the Mayor
Small Business Services
PRINTER FRIENDLY
EMAIL A FRIEND
TRANSLATE THIS PAGE
NEWSLETTER SIGN-UP
TEXT SIZE:
GO
HURRICANE SANDY SMALL BUSINESS STOREFRONT IMPROVEMENT PROGRAM
SBS Announces New Program for Businesses Impacted by Hurricane Sandy
Deputy Mayor Robert K. Steel, SBS Commissioner Rob Walsh, and the Mayor's Fund to Advance New York City President Megan Sheekey announced the Small Business Storefront Improvement Program to help repair storefronts along commercial corridors impacted by Hurricane Sandy. The new citywide program, funded by the Mayor's Fund to Advance New York City, will help local businesses in neighborhoods impacted by Hurricane Sandy repair their storefronts, create a cohesive image for commercial corridors, and help draw customers and attract new investment to neighborhoods impacted by Sandy.
Please note that the Storefront Improvement Program has reached enrollment capacity but applications are still being accepted in the event that more funding shall become available.
www.nyc.gov/html/sbs/html/neighborhood_development/NDD_Neighborhood_Challenge_Project_Application.shtml
Internet
100%


http://www.nyc.gov/html/sbs/html/procurement/mwbe.shtml
Edit View Favorites Tools Help
SBS - Selling to Government
construction and construction-related businesses. Companies that become certified obtain greater access to and information about contracting opportunities, receive technical assistance to better compete for those opportunities, and benefit from inclusion in the City's Online Directory of Certified Firms.
A New M/WBE Program for New York City
On January 7, 2013, Mayor Bloomberg signed Local Law 1 of 2013 to help strengthen the existing Minority and Women-owned Business Enterprises (M/WBE) Program. Once Local Law 1 (formerly Local Law 129) was signed, the Department of Small Business Services has been implementing improvements to the M/WBE program to continue promoting fairness and equity in City procurement processes. We believe in addressing the full range of business needs by providing services designed to strengthen the ability of certified M/WBEs to compete successfully in the marketplace.
Online Directory
To better promote the City's certified vendors and to make it easy for buyers to find them, SBS maintains an Online Directory of Certified Businesses, which includes a detailed profile of each company. Through inclusion in the directory, vendors can market their goods, services, and experience directly to purchasing agents who may not be familiar with their company.
Click here to access the NYC Online Directory of Certified MWBE Businesses
NYC Online Directory of Certified Businesses
NYC Business Solutions
NYC Business Solutions Industrial & Transportation
Workforce1 Career Centers
New York City Economic Development Corp.
Business Owner's Bill of Rights
AFFECTED BY A RECENT DISASTER?
Apply for assistance from the U.S. Small Business Administration:
disaster loans for home-owners & renters
disaster loans for non-profits & businesses of all sizes.
CLICK HERE to learn more!
SBA
SBS Calendar
Request for Proposal - Senior Business Development Consultant
November 20, 2013
Be sure to submit your proposal on time
For more information
Internet
100%

Search terms in the MWBE Directory

- Industry type
- Largest contract experience
- Aggregate bonding limit
- Union firm?
- Location





How Do I Apply?

Step 1: Get Registered

Any business that wants to do business with the City of New York must register with the Vendor Enrollment Center. Log on to www.nyc.gov/selltonyc to download the Vendor Enrollment Application. When registering, please limit your NIGP code selections to those that ***best*** describe the product or services you sell.

Step 2: Get Certified

Attend a free M/WBE Certification Prep Course every 3rd Thursday of the month from 2-4 P.M. or every 4th Wednesday of the month from 6-7:30 P.M. Trained certification analysts will walk you through the application process and help you to avoid commonly made mistakes. Go to 311 Online to register.

- Standard M/WBE Application
- Standard LBE Application
- Standard EBE Application

To re-certify, the business will have to complete and submit an abbreviated version of the certification application which will be sent before the end of the business' current certification. You may also contact the certification helpline to request a re-certification application.

You may be eligible to submit a Fast Track application if you are currently certified by any one of the following organizations:

- New York City School Construction Authority
- The Port Authority of New York and New Jersey
- Women President's Educational Organization
- New York & New Jersey Minority Supplier Development Council Inc.
- New York State Department of Economic Development, Division of Minority & Women's Business Development (DMWBD)

NEW YORK LAW SCHOOL
CENTER FOR NEW YORK CITY LAW

NEW YORK CITY LAW DEPARTMENT

New York City Procurement Law: Doing Business with New York City

Session 2: Core Vendor Issues

New York City Procurement Law: Doing Business with New York City

CORE VENDOR ISSUES

INTRODUCTION

The City of New York can be an excellent source of business.

- In its 2012 fiscal year, the City of New York procured more than $10.5 billion in supplies, services, and construction.
- It processed more than 46,000 transactions.

But issues and disputes can arise.

These matters usually play out within the following categories, all addressed in the New York City Procurement Policy Board (PPB) Rules:

- Responsiveness
- Responsibility (Rehabilitation)
- Pre-Qualification
- Protests
- Disputes

The Players:

- Contracting Agency (Agency Chief Contracting Officer)
- Mayor's Office of Contracts Services (City Chief Procurement Officer)
- Law Department (Corporation Counsel)
- Department of Investigations
- Comptroller
- Procurement Policy Board
- Contract Dispute Resolution Board ("OATH" – Office of Administrative Trials and Hearings)

RESPONSIVENESS OF BIDS/PROPOSALS

PPB RULES SECTION 2-07

Section 2-07

RESPONSIVENESS OF BIDS/PROPOSALS

- Bid/proposal is responsive if it “complies with all material terms and conditions” of the solicitation.
- If ACCO determines bid/proposal is non-responsive, decision must be mailed to vendor “no later than two business days after the determination is made.”
- Vendor has five days from receipt to appeal to Agency Head (with copy to Comptroller).
- Award of the contract is stayed pending determination of the Agency Head, unless ACCO determines to proceed “to protect substantial City interests.”
- Agency Head must make a “prompt determination” of appeal.
- Article 78 petition may be filed within four months to challenge adverse Agency Head decision.

Relevant Rules

Section 2-07

RESPONSIVENESS OF BIDS/PROPOSALS

- **(a) <u>Policy</u>**
  - A responsive bid or proposal is one that complies with all material terms and conditions of the solicitation and all material requirements of the specifications. The ACCO shall make a determination of responsiveness prior to award.

Section 2-07

RESPONSIVENESS OF BIDS/PROPOSALS

- **(b) <u>Determination of Non-Responsiveness</u>**
  - If the lowest price bid or any proposal is found non-responsive, a determination, setting forth in detail and with specificity the reasons for such finding, shall be made by the ACCO.
  - A copy of such determination shall be mailed to the non-responsive vendor no later than two business days after the determination is made, and the agency shall inform the vendor of the right to appeal as set forth herein.

Section 2-07

RESPONSIVENESS OF BIDS/PROPOSALS

- **(b) <u>Determination of Non-Responsiveness</u>** (cont.)
  - Such notice shall also inform the vendor that, if an appeal is taken, award of the contract shall be stayed pending the determination of the Agency Head, unless the ACCO makes a determination and informs the vendor, pursuant to subdivision (e) of this Rule, that the award will not be stayed because proceeding with the award without delay is necessary to protect substantial City interests.

Section 2-07

RESPONSIVENESS OF BIDS/PROPOSALS

- **(c) <u>Standards</u>.** Factors affecting the responsiveness of bids or proposals include:
  - (1) compliance with all material requirements of the specification;
  - (2) compliance with all material terms and conditions of the solicitation;
  - (3) submission of bids or proposals in the form specified in the solicitation including all required signatures, in ink, and including all required pricing information;
  - (4) if bid or proposal price has been materially altered, alterations must be initialed in ink by the bidder or proposer. If the alteration has not been initialed in ink, and can be severed from the other items in the bid or proposal, then that particular item only may be considered non-responsive;

Section 2-07

RESPONSIVENESS OF BIDS/PROPOSALS

- **(c) <u>Standards</u>** (cont.)
  - (5) submission of bids or proposals by the time and date and at the place specified in the solicitation except that a late proposal may be accepted pursuant to these Rules;
  - (6) submission of bid, performance, or payment security, if required by the solicitation. Acceptable security for bids, performance, and payment shall be limited to:
    - (i) a one-time bond in a form satisfactory to the City,
    - (ii) a bank certified check or money order,
    - (iii) City bonds, or
    - (iv) other financial instruments as determined by the Office of Construction in consultation with the Comptroller;

Section 2-07

RESPONSIVENESS OF BIDS/PROPOSALS

- **(c) <u>Standards</u>** (cont.)
  - (7) submission of samples, literature, or other information, if required by the solicitation;
  - (8) submission of all required disclosure statements; and
  - (9) attendance at a mandatory pre-bid or pre-proposal conference or site inspection.

Section 2-07

RESPONSIVENESS OF BIDS/PROPOSALS

- **(d) Rejection of Bids or Proposals**
  - Bids or proposals that fail to conform with the standards set forth above shall be rejected unless the ACCO determines in writing that waiving the nonconformance would not deprive the agency of the assurance that the contract will be performed according to its specified requirements and would not adversely affect the competition by placing a bidder in a position of advantage over other bidders or by otherwise undermining the competition.

Section 2-07

RESPONSIVENESS OF BIDS/PROPOSALS

- **(e) Appeal.** All non-responsive determinations may be appealed as set forth herein.
  - (1) Time Limit. A vendor shall have five days from receipt of the determination of non-responsiveness to file an appeal with the Agency Head. Receipt of notice by the vendor shall be deemed to be no later than five days from the date of mailing or upon delivery, if delivered. Filing of the appeal shall be accomplished by actual delivery of the appeal document to the office of the Agency Head. The vendors shall also send a copy of its appeal, for informational purposes, to Office of the New York City Comptroller, Office of Contract Administration, 1 Centre Street, Room 1005, New York, NY 10007.

Section 2-07

RESPONSIVENESS OF BIDS/PROPOSALS

- **(e) <u>Appeal</u> (cont.)**
  - (2) <u>Form and Content</u>. The appeal shall be in writing and shall briefly state all the facts or other basis upon which the vendor contests the finding of non- responsiveness. Supporting documentation, if any, shall be included.

Section 2-07

RESPONSIVENESS OF BIDS/PROPOSALS

- **(e) <u>Appeal</u> (cont.)**
  - (3) <u>Stay of Award of Contract Pending Agency Head Determination</u>
    - Award of the contract shall be stayed pending the determination of the Agency Head, unless the ACCO makes a determination that proceeding with the award without delay is necessary to protect substantial City interests. Where such a determination is made, the vendor shall be advised of this action in the determination of non-responsiveness or, if the stay is removed at any time after the vendor has been notified of determination of non-responsiveness, notification shall be provided to the vendor no later than two business days after such determination is made.

Section 2-07

RESPONSIVENESS OF BIDS/PROPOSALS

- **(e) <u>Appeal</u> (cont.)**
  - (3) <u>Stay of Award of Contract Pending Agency Head Determination</u> (cont.)
    - The Agency Head shall consider the appeal, and may, in his or her sole discretion, meet with the vendor to discuss the merits of the appeal. The Agency Head shall make a prompt determination with respect to the merits of the appeal, a copy of which shall be sent to the vendor. The Agency Head's determination shall be final. The Agency Head shall not delegate the authority to make a determination on the appeal to the ACCO.

VENDOR RESPONSIBILITY AND APPEAL OF DETERMINATION OF NON-RESPONSIBILITY

PPB RULES SECTION 2-08

Section 2-08

VENDOR RESPONSIBILITY AND APPEAL

- "A responsible contractor is one which has the capability in all respects to perform fully the contract requirements and the business integrity to justify the award of public tax dollars."
- Comparison and Overlap: Non-Responsiveness and Responsibility
- ACCO must notify vendor of non-responsibility determination within two days of the determination.
- Vendor has ten days from receipt to appeal to Agency Head (with copy to Comptroller).
- Agency Head must make a "prompt written decision no later than sixty days after receipt."
- Contract award is stayed pending appeal to the Agency Head unless the ACCO decides award is "necessary to protect substantial City interests."

(continues to next slide)

Section 2-08

VENDOR RESPONSIBILITY AND APPEAL

- Vendor has ten calendar days from receipt of the Agency Head's decision to appeal to the CCPO.
- CCPO must "make a prompt written decision."
- Contract award is stayed pending appeal to the CCPO unless the ACCO or CCOP decides award is "necessary to protect substantial City interests."
- Decisions about non-responsibility are included in VENDEX database.
- Article 78 petition may be filed within four months to challenge adverse CCPO decision.

(continues to next slide)

Section 2-08

VENDOR RESPONSIBILITY AND APPEAL

- **Rehabilitation**
  - Based on a finding of non-responsibility or other caution.
  - Historical background: *Housing Works*.
  - Very few decisions.
  - Role of DOI.

(continues to next slide)

Section 2-08

VENDOR RESPONSIBILITY AND APPEAL

- **Vendor Integrity Tips**
  - Code of Conduct.
  - Hotline.
  - Training.
  - Personnel Changes.
  - Internal Controls.
  - Investigation/Compliance System.
  - Monitor.
  - Self-Reporting.
  - Acceptance of Responsibility.

Relevant Rules

Section 2-08

VENDOR RESPONSIBILITY AND APPEAL

- **(a) Policy**
  - (1) Purchases shall be made from, and contracts shall be awarded to, responsible prospective contractors only.
  - (2) The award of a contract to a contractor based on lowest evaluated price alone can be false economy if there is subsequent default, improper or exaggerated claims, late deliveries, or other unsatisfactory performance resulting in additional contractual and administrative costs. While it is important that City purchases be made at the lowest price, this does not require an award to a contractor solely because that contractor submits the lowest offer. A prospective contractor must affirmatively demonstrate its responsibility, including, when necessary, the responsibility of its proposed subcontractors.

Section 2-08
VENDOR RESPONSIBILITY AND APPEAL

- (b) **General Standards**
  - (1) A responsible contractor is one which has the capability in all respects to perform fully the contract requirements and the business integrity to justify the award of public tax dollars.

Section 2-08
VENDOR RESPONSIBILITY AND APPEAL

- (b) **General Standards** (cont.)
  - (2) Factors affecting a contractor's responsibility may include:
    - (i) financial resources;
    - (ii) technical qualifications;
    - (iii) experience;
    - (iv) organization, material, equipment, facilities, and personnel resources and expertise (or the ability to obtain them) necessary to carry out the work and to comply with required delivery or performance schedules, taking into consideration other business commitments;
    - (v) a satisfactory record of performance;
    - (vi) a satisfactory record of business integrity;

Section 2-08

VENDOR RESPONSIBILITY AND APPEAL

- **(b) General Standards (cont.)**
  - (2) Factors affecting a contractor's responsibility (cont.)
    - (vii) where the contract includes provisions for reimbursement of contractor costs, the existence of accounting and auditing procedures adequate to control property, funds, or other assets, accurately delineate costs, and attribute them to their causes; and
    - (viii) compliance with requirements for the utilization of small, minority-owned, and women-owned businesses as subcontractors.

Section 2-08

VENDOR RESPONSIBILITY AND APPEAL

- **(c) Special Standards**
  - (1) When it is necessary for a particular contract or class of contracts, the Contracting Officer shall develop, with the assistance of appropriate specialists, special standards of responsibility. Special standards may be particularly desirable when experience has demonstrated that certain minimum experience or specialized facilities are needed for adequate contract performance.
  - (2) The special standards shall be set forth in the solicitation (and so identified) and shall apply to all bidders/proposers.
  - (3) Special standards must be based on demonstrated need and must not be used to artificially limit competition.

Section 2-08

VENDOR RESPONSIBILITY AND APPEAL

- **(d) <u>Ability To Meet Standards</u>**
  - (1) The prospective contractor may demonstrate the availability of necessary financing, equipment, facilities, expertise, and personnel by submitting upon request:
    - (i) evidence that such contractor possesses such necessary items;
    - (ii) acceptable plans to subcontract for such necessary items; and
    - (iii) a documented commitment from, or explicit arrangement with, a satisfactory source to provide the necessary items.

Section 2-08

VENDOR RESPONSIBILITY AND APPEAL

- **(d) <u>Ability To Meet Standards</u>** (cont.)
  - (2) A prospective contractor that has performed unsatisfactorily shall be presumed to be non-responsible, unless the Contracting Officer determines that the circumstances were beyond the contractor's control or that the contractor has taken appropriate corrective action. Past failure to apply sufficient tenacity and perseverance to perform acceptably is strong evidence of non-responsibility.

Section 2-08

VENDOR RESPONSIBILITY AND APPEAL

- **(e) <u>VENDEX Questionnaire</u>**
  - (2) <u>Obligation to File Questionnaires</u>. VENDEX questionnaires shall be completed and filed by the contractor at least once within each three year period within which such contractor does business with the City. Each contractor shall certify at the time of award of each contract that all the information submitted within such three year period is current, accurate and complete. In the event that changes have occurred within the three year period, the contractor shall update, prior to contract award, any previously-submitted VENDEX questionnaire to supply any changed information, and shall certify that both the updated and unchanged information is current, accurate and complete.

Section 2-08

VENDOR RESPONSIBILITY AND APPEAL

- **(e) <u>VENDEX Questionnaire</u>** (cont.)
  - (2) <u>Obligation to File Questionnaires</u> (cont.) If VENDEX questionnaires have not been submitted within three years, then such questionnaires shall be completed and filed:
    - (i) by applicants, at the time of an application for inclusion on a prequalified list;

Section 2-08

VENDOR RESPONSIBILITY AND APPEAL

- **(f) <u>Department of Investigation and Administrative Fee.</u>**
  - (1) Prior to making its determination of vendor responsibility, the agency shall request the Department of Investigation to conduct a Vendor Name Check on the proposed vendor, which shall consist of a review of the names on the Questionnaire and other information to ascertain whether the business or its affiliated individuals are or have, during a relevant period of time, been the subject of an investigation by the Department. The Department of Investigation shall undertake the review expeditiously and provide an explanation to an agency if its review is not completed within thirty calendar days of the request. If the Department of Investigation ascertains that there has been such an investigation, it shall provide a copy of any final report or statement of findings to the Agency Head for use in making the determination of responsibility. If the results of the review are not made available to the agency within thirty calendar days of the request, the agency may make its responsibility determination on the basis of the information then available to it.

Section 2-08

VENDOR RESPONSIBILITY AND APPEAL

- **(g) <u>Making the Responsibility Determination</u>**
  - (1) The Contracting Officer shall use the following sources of information to support determinations of responsibility or non-responsibility:
    - (i) the VENDEX database of debarred, suspended, and ineligible contractors;
    - (ii) VENDEX and other records of evaluations of performance, as well as verifiable knowledge of contracting and audit personnel;
    - (iii) determinations of violations of employment-related federal, state, or local law or executive order, including but not limited to those relating to equal employment opportunity, prevailing wage, workplace health and safety, employee benefits, and employee wages and hours;

Section 2-08

VENDOR RESPONSIBILITY AND APPEAL

- **(g) <u>Making the Responsibility Determination</u>** (cont.)
  - (1) The Contracting Officer shall use the following sources of information to support determinations of responsibility or non-responsibility: (cont.)
    - (iv) information supplied by the prospective contractor, including bid or proposal information, VENDEX and prequalification questionnaire replies, financial data, information on production equipment, and personnel information;
    - (v) pre-award survey reports; and
    - (vi) other sources such as publications, suppliers, subcontractors and customers of the prospective contractor, financial institutions, other government agencies, and business and trade associations.

Section 2-08

VENDOR RESPONSIBILITY AND APPEAL

- **(g) <u>Making the Responsibility Determination</u>** (cont.)
  - (2) A Contracting Officer may notify the bidder or offeror of unfavorable responsibility information and provide the bidder or offeror an opportunity to submit additional information or explain its actions before adverse action is taken by the City.

Section 2-08

VENDOR RESPONSIBILITY AND APPEAL

- **(h) <u>Determination of Non-Responsibility Required</u>**
  - (1) If a bidder or offeror who otherwise would have been awarded a contract is found non-responsible, a determination of non-responsibility setting forth in detail and with specificity the reasons for the finding of non-responsibility shall be prepared by the Contracting Officer.
  - (2) A copy of the determination of non-responsibility shall be immediately sent to the non-responsible bidder or offeror. Notice to the non-responsible bidder must be mailed no later than two business days after the determination of non-responsibility is made and must inform the contractor of the right to appeal the determination to the Agency Head or designee within ten calendar days of receipt. A copy of the determination of non-responsibility shall also be sent to the CCPO and Comptroller.
  - (3) The determination of non-responsibility shall be included in the VENDEX database.

Section 2-08

VENDOR RESPONSIBILITY AND APPEAL

- **(i) <u>Determination of Non-Responsibility</u>.**

An agency letting a contract by competitive sealed bid or competitive sealed bid from prequalified vendors may find the lowest responsive bidder(s) to be non-responsible in accordance with Section 2-08 of these Rules.

Section 2-08

VENDOR RESPONSIBILITY AND APPEAL

- **(j) Notice.** After making a determination of non-responsibility, the ACCO shall notify the lowest bidder in writing of that determination. The notification shall state the reasons upon which the determination is based and shall inform the bidder of the right to appeal the determination of non-responsibility to the Agency Head and subsequently to the Mayor, and of the procedure for taking such appeals. The notification shall also contain the following statement:

  The vendor shall also send a copy of its appeal to the New York City Comptroller, for informational purposes, at Office of the New York City Comptroller, Office of Contract Administration, 1 Centre Street, Room 1005, New York, NY 10007, (212) 669-2323.

Section 2-08

VENDOR RESPONSIBILITY AND APPEAL

- **(k) Appeal to Agency Head.** Appeals to the Agency Head of the determination of non-responsibility shall be made pursuant to the following procedure:
  - (1) Time for Appeal. Any vendor who is determined to be non-responsible in connection with the award of a particular contract shall be allowed ten days from receipt of the agency's notification to file a written appeal of that determination with the Agency Head. Receipt of notice by the vendor shall be deemed to be no later than five days from the date of mailing or upon delivery, if delivered. Filing of the appeal shall be accomplished by actual delivery of the appeal document to the office of the Agency Head.

Section 2-08

VENDOR RESPONSIBILITY AND APPEAL

- **(k) <u>Appeal to Agency Head</u> (cont.)**
  - (2) <u>Form and Content of Appeal by Vendor</u>. The appeal by the vendor shall be in writing and shall briefly state all the facts or other basis upon which the bidder contests the agency finding of non-responsibility. Supporting documentation shall be included.

Section 2-08

VENDOR RESPONSIBILITY AND APPEAL

- **(k) <u>Appeal to Agency Head</u>** (cont.)
  - (3) <u>Agency Head Determination</u>. The Agency Head shall consider the vendor's appeal, and shall make a prompt written decision no later than sixty days after receipt with respect to the merits of the bidder's appeal, except when such appeal relates to an Office of Labor Services determination of non-compliance with applicable equal employment opportunity requirements. Under such exception, the Office of Labor Services shall review all appeals and shall inform the Agency Head of its recommendation as to the merits of the vendor's appeal within forty-five days. The Agency Head or head of the Office of Labor Services may, in his or her sole discretion, meet with the vendor to discuss his/her appeal. If the Agency Head's determination is not made within the prescribed sixty days after receipt of the appeal, then the vendor may present the appeal to the Mayor.

Section 2-08

VENDOR RESPONSIBILITY AND APPEAL

- **(k) Appeal to Agency Head (cont.)**
  - (4) Notification to Vendor of Agency Head Decision. A copy of the decision of the Agency Head shall be sent to the vendor. If the Agency Head upholds the ACCO's finding of non-responsibility, the Agency Head shall inform the vendor of the right to appeal the decision to the Mayor, and of the procedure for taking such an appeal.
  - (5) Delegation. The Agency Head may designate a senior agency official, other than the ACCO or his or her subordinates, to consider this appeal.
  - (6) Finality. The Agency Head's decision of a vendor's appeal shall be final unless further appealed to the Mayor.

Section 2-08

VENDOR RESPONSIBILITY AND APPEAL

- **(l) Stay of Award of Contract Pending Agency Head Decision**

  Award of the contract shall be stayed pending the rendering of a decision by the Agency Head unless the ACCO makes a determination that execution of the contract without delay is necessary to protect substantial City interests. Where the award is not stayed, the vendor shall be advised of this action in the determination of non-responsibility or if the stay is removed at a later date, notification shall be provided to the vendor no later than two business days after such determination is made.

Section 2-08

VENDOR RESPONSIBILITY AND APPEAL

- **(m) Appeal to Mayor.** Appeals to the Mayor of the Agency Head decision upholding a determination of non-responsibility shall be made pursuant to the following procedure:
  - (1) Delegation. The Mayor may delegate responsibility for deciding this appeal to the CCPO.
  - (2) Time for Appeal. Any vendor who wishes to appeal the decision of the Agency Head shall be allowed ten calendar days from receipt of the Agency Head's notification to file a written appeal of that determination with the Mayor or CCPO. Receipt of notification by the vendor shall be deemed to be no later than five days from the date of mailing or upon delivery, if delivered. Filing of the appeal shall be accomplished by actual delivery of the appeal document to the Office of the Mayor.

Section 2-08

VENDOR RESPONSIBILITY AND APPEAL

- **(m) Appeal to Mayor** (cont.)
  - (3) Form and Content of Appeal by Vendor. The appeal by the bidder shall be in writing and shall briefly state all the facts or other basis upon which the bidder contests the agency finding of non responsibility. Supporting documentation shall be included.
  - (4) Mayoral Determination. The Mayor or CCPO shall consider the vendor's appeal, and shall make a prompt written decision with respect to the merits of the vendor's appeal. The Mayor, in the Mayor's sole discretion, may meet with the bidder to discuss the appeal.
  - (5) Notification to Bidder of Mayoral Decision. A copy of the decision of the Mayor or CCPO shall be sent to the vendor.
  - (6) Finality. The decision by the Mayor or CCPO of a vendor's appeal from an Agency Head decision concerning non-responsibility shall be final.

Section 2-08

VENDOR RESPONSIBILITY AND APPEAL

- **(n) <u>Stay of Award of Contract Pending Decision By Mayor or His Designee</u>**

Award of the contract shall be stayed pending the rendering of a decision by the Mayor or CCPO, unless the ACCO has made a determination pursuant to these Rules that the execution of the contract without delay is necessary, or the Mayor or CCPO, in their discretion, determine that it is in the best interests of the City to go forward with the award of the contract.

Section 2-08

VENDOR RESPONSIBILITY AND APPEAL

- **(o) <u>Documentation</u>**

Documents reflecting the agency determination of non- responsibility and any appeal and decision with respect to appeal, and evidence of having supplied written notifications as required by these Rules, shall be sent to the CCPO for inclusion in the VENDEX database.

Section 2-08

VENDOR RESPONSIBILITY AND APPEAL

- **(p) <u>Rehabilitation of Vendors</u>**

An application for a declaration of rehabilitation may be made by any vendor who has been found non-responsible by one or more City agencies, if such vendor has either declined to appeal or exhausted the process for appealing such non- responsibility determination(s) as set forth in this section, or by any vendor that is the subject of any unfavorable responsibility information recorded in the VENDEX database as a caution(s). A declaration of rehabilitation will not result in deletion of the underlying non-responsibility determination or caution from the VENDEX database, but a summary of such declaration or of any decision denying such an application shall be entered into the VENDEX database for consideration by agency Contracting Officers in making future responsibility determinations.

Section 2-08

VENDOR RESPONSIBILITY AND APPEAL

- **(p) <u>Rehabilitation of Vendors</u>** (cont.)

In making responsibility determinations, Contracting Officers may rely upon the declaration of rehabilitation in lieu of requiring a vendor to explain negative responsibility information in accordance with subdivision (g)(2) of this section.

□(1) <u>Time for Filing</u>. No application for a declaration of rehabilitation may be filed prior to the latest date for filing of an appeal of a non-responsibility determination in accordance with subdivision (k)(1) of this section. If a vendor pursues an appeal in accordance with subdivision (k)(1) of this section, no application for a declaration of rehabilitation may be filed prior to the latest date for filing of an appeal to the Mayor in accordance with subdivision (m)(2) of this section. The submission of an application for a declaration of rehabilitation shall not toll the time limits set forth in this section for filing an appeal.

Section 2-08

VENDOR RESPONSIBILITY AND APPEAL

- **(p) <u>Rehabilitation of Vendors</u>** (cont.)
  - (2) <u>Form and Content of Filing</u>. To apply for a declaration of rehabilitation, a vendor must submit a written application to the CCPO. The rehabilitation application shall be certified by the applicant to the effect that all of the information supplied is true to the best of the applicant's knowledge, information and belief. The application shall state how the applicant has demonstrated its responsibility for future procurement awards, and shall:
    - (i) demonstrate that the issues leading to the relevant non- responsibility determination(s) or to the relevant caution(s) have been remedied by the applicant, and
    - (ii) set forth any additional remedies or corrective actions the applicant is willing to undertake as a condition of a final declaration of rehabilitation by the CCPO.

Section 2-08

VENDOR RESPONSIBILITY AND APPEAL

- **(p) <u>Rehabilitation of Vendors</u>** (cont.)
  - (3) <u>Remedies</u>. Remedies or corrective actions may include, but are not limited to:
    - (i) retaining an auditor, monitor, technical consultant or independent private sector inspector general with the consent of the Department of Investigation to review the applicant's business practices, oversee its performance and/or develop specific remedies with respect to the subject matter of the non-responsibility determination(s) or caution(s);
    - (ii) ownership changes and/or reorganizations of the legal structure of the applicant in a manner that appropriately remedies the issues raised in the non-responsibility determination(s) or caution(s);
    - (iii) dismissing employees whose actions were the subject matter of the non-responsibility determination(s) or caution(s);

Section 2-08

VENDOR RESPONSIBILITY AND APPEAL

- **(p) Rehabilitation of Vendors** (cont.)
  - (3) Remedies (cont.)
    - (iv) entering into certification agreements with the Department of Investigation prescribing corrective actions and/or otherwise appropriately remedying the subject matter of the non-responsibility determination(s) or caution(s);
    - (v) resolving judicial or administrative proceedings that were the subject matter of the non-responsibility determination(s) or caution(s) under terms demonstrating that such concerns have been appropriately remedied; or
    - (vi) engaging in any other lawful action leading to resolution of the issues that were the subject matter of the non-responsibility determination(s) or caution(s), or demonstrating that any negative responsibility information recorded as a caution has been appropriately remedied.

Section 2-08

VENDOR RESPONSIBILITY AND APPEAL

- **(p) Rehabilitation of Vendors** (cont.)
  - (4) Notice to Agencies. The applicant shall concurrently provide a copy of its application for rehabilitation to the Department of Investigation, the Comptroller and to the Contracting Officer of any agency that found such applicant non-responsible or requested that negative responsibility information be entered as a caution in the VENDEX database.

Section 2-08

VENDOR RESPONSIBILITY AND APPEAL

- **(p) Rehabilitation of Vendors** (cont.)
  - (5) CCPO Decision. The CCPO shall review the filing, shall consult with the Department of Investigation and may consult with any other relevant government agency, prior to making a final decision concerning the application for a declaration of rehabilitation. The CCPO may seek additional information from the applicant. Upon review of the filing and any subsequent submission by the applicant, the CCPO shall issue a decision granting or denying the application for declaration of rehabilitation. In making such decision, the CCPO may consider a broad range of factors, which may include, but is not limited to, the following:

Section 2-08

VENDOR RESPONSIBILITY AND APPEAL

- **(p) Rehabilitation of Vendors** (cont.)
  - (5) CCPO Decision. (cont.)
    - (i) The public policy expressed in these Rules that the vendors have the capability in all respects to perform fully the requirements of public contracting and the business integrity to justify the award of public tax dollars;
    - (ii) The bearing of any criminal, false, fraudulent or other activities of the vendor, its affiliates and current and past owners, principals, employees, or their associates or other persons or entities on the skill, judgment and integrity of the vendor or on its fitness or ability to perform as a public contractor, and the time elapsed since and seriousness of such activities;

Section 2-08

VENDOR RESPONSIBILITY AND APPEAL

- **(p) Rehabilitation of Vendors** (cont.)
  - (5) CCPO Decision (cont.)
    - (iii) Any information produced by the vendor or available from other sources relevant to its rehabilitation, including the adequacy of the remedies or corrective actions identified by the applicant, or to any other factor bearing on the vendor's skill, judgment and integrity or its fitness or ability to perform as a public contractor.
    - The CCPO may condition any declaration of rehabilitation upon the applicant's completion of the specific additional corrective actions, if any, set forth in such declaration. The CCPO decision granting or denying the application for declaration of rehabilitation shall be final and a record of the determination shall be included in the VENDEX database.

Section 2-08

VENDOR RESPONSIBILITY AND APPEAL

- **(p) Rehabilitation of Vendors** (cont.)
  - (6) Notification of Decision. A copy of the CCPO decision granting or denying the application for declaration of rehabilitation shall be mailed to the vendor, with copies to the Department of Investigation, the Comptroller and the Contracting Officer of any agency that found such applicant non-responsible or requested that negative responsibility information be entered as a caution in the VENDEX database.

Section 2-08

VENDOR RESPONSIBILITY AND APPEAL

- **(p) Rehabilitation of Vendors** (cont.)
  - (7) Effect. Nothing in this subdivision shall preclude an agency Contracting Officer from finding a vendor to be responsible where such vendor has not applied for a declaration of rehabilitation or where an application for such declaration has been denied. Furthermore, nothing in this subdivision shall preclude an agency Contracting Officer from finding a vendor to be non- responsible, notwithstanding a declaration of rehabilitation.

VENDOR PROTESTS

PPB RULES SECTION 2-10

Section 2-10

VENDOR PROTESTS

- Vendor must protest "within ten days after the protesting vendor knows or should have known of the facts that prompted the protest but no later than ten days after publication of the notice of award."
- Issue: Protest the solicitation itself?
- Issue: Multiple protests?
- Protest is filed with Agency Head (copied to Comptroller and ACCO).
- Agency Head has 30 days to decide.
- No automatic stay of award.
- Article 78 petition may be filed within four months to challenge adverse Agency Head decision.

Relevant Rules

Section 2-10
VENDOR PROTESTS

- **(a) <u>Protests</u>.** Any vendor may protest a determination of any procurement action pursuant to this section, unless another appeal or protest provision is provided in these Rules. Accelerated procurements, emergency procurements, and small purchases are not subject to vendor protests.
  - (1) <u>Time for Protest</u>. A protest shall be made within ten days after the protesting vendor knows or should have known of the facts that prompted the protest but no later than ten days after publication of the notice of award.

Section 2-10
VENDOR PROTESTS

- **(a) <u>Protests</u> (cont.)**
  - (2) <u>Form and Content of Protest</u>. The protest shall be filed with the Agency Head and shall briefly state all the facts or other basis upon which the vendor contests the agency decision. Supporting documentation, if any, shall be included. If a vendor has already been selected for the procurement, the Agency Head shall, upon receipt of the protest, mail a copy of the protest to the selected vendor. Filing of the protest shall be accomplished by actual delivery of the protest documents to the office of the Agency Head. The vendor shall also send a copy of its protest to the ACCO and the New York City Comptroller, Office of Contract Administration.

Section 2-10

VENDOR PROTESTS

- **(a) Protests (cont.)**
  - (3) Agency Head Determination. The Agency Head may, in his or her sole discretion, invite written comment from the selected vendor (if any) or other interested party, and/or convene an informal conference with the protesting vendor, the selected vendor, and/or any other interested party to resolve the protest by mutual consent. The Agency Head's determination with respect to the merits of the protest shall be mailed to the protesting vendor and the selected vendor (if any) within thirty days of receipt of the protest documents. The determination shall state the reasons upon which it is based. Copies of all documents required by this paragraph shall be forwarded to the CCPO and the Comptroller as such documents become available to the agency.

PREQUALIFICATION

PPB RULES SECTION 3-10

Section 3-10
PREQUALIFICATION

- ACCO must approve or deny prequalification within 90 days "of submission of a properly completed prequalification questionnaire."
- Vendor's appeal from denial or revocation of prequalification is to OATH.
- OATH must consider whether ACCO decision is "arbitrary or capricious" and "based on substantial evidence.
- No automatic stay of award.
- Decisions are entered in VENDEX.
- Article 78 petition may be filed within four months to challenge OATH decision.

Relevant Rules

Section 3-10

PREQUALIFICATION

- **(a) <u>Policy</u>.** Prequalification allows an agency to evaluate the qualifications of vendors for provision of particular categories of goods, services, construction, or construction-related services (including subcategories based on expertise, size, dollar size of project, or other factors as determined by the ACCO) before issuing a solicitation for a specific contract. Except for procurements for construction, a procurement using a PQL shall be considered a "special case" under these Rules.

Section 3-10

PREQUALIFICATION

- **(b) "<u>Special Case" Determination</u>.** Prior to using a PQL for a procurement of goods, services or construction-related services, the ACCO shall make a determination that such procurement is a "special case" that requires the use of a PQL, that the list is composed of vendors that have been prequalified to provide the specified item(s) to be procured, and that the particular PQL is accurate, complete, and current. The ACCO may permit joint ventures of two or more prequalified vendors from one or more PQLs, or may combine PQLs for a solicitation. Use of a PQL for a procurement of construction does not require a special case determination.

Section 3-10

PREQUALIFICATION

- **(c) <u>Circumstances of Use</u>. Prequalification shall be used only where the need for advance screening of vendors' qualifications outweighs the benefits of broader competition, as determined by the ACCO. Such circumstances include, but are not limited to, categories of procurement where:**
  - (1) it is essential that only highly competent and experienced vendors be invited to bid;
  - (2) high volume and/or repetitive procurements necessitate reduction of paperwork and delays in the award of contracts;
  - (3) the time between the occurrence of the need and the award of the contract must often be reduced to avert or respond to an emergency; or
  - (4) with respect to procurement of construction, any basis that is in the best interests of the City.

Section 3-10

PREQUALIFICATION

- **(d) <u>Criteria</u>.** Criteria that may be used to prequalify vendors include, but are not limited to:
  - (1) current and past experience with similar projects;
  - (2) references, past performance, and reliability;
  - (3) organization, staffing (both members of staff and particular abilities and experience), and ability to undertake the type and complexity of work;
  - (4) financial capability, responsibility and reliability for such type and complexity of work, and availability of appropriate resources;

Section 3-10

PREQUALIFICATION

- **(d) <u>Criteria</u>** (cont.)
  - (5) record of compliance with all federal, State, and local laws, rules, licensing requirements, where applicable, and executive orders, including but not limited to compliance with existing labor standards;
  - (6) record of maintaining harmonious labor relations;
  - (7) use of subcontractors;
  - (8) compliance with equal employment opportunity requirements and anti- discrimination laws, and demonstrated commitment to working with minority and women-owned businesses through joint ventures or subcontractor relationships;

Section 3-10

PREQUALIFICATION

- **(d) <u>Criteria</u>** (cont.)
  - (9) record of protecting the health and safety of workers on public works projects and job sites as demonstrated by the vendor's experience modification rate for each of the last three years; and
  - (10) record of business integrity of vendor.
  - In developing a PQL for a procurement of goods, services or construction-related services, the agency may use any of the criteria listed in this subsection. In developing a PQL for a procurement of construction, the agency must use all of the criteria listed in this subsection.

Section 3-10
PREQUALIFICATION

- **(e) <u>Public Notice</u>.**
  - (1) <u>Frequency</u>.
    - (i) For each category of procurement for which an agency maintains a PQL or intends to establish a new PQL, the ACCO shall publish in the City Record at least once annually for five consecutive editions and shall post on the City's website in a location that is accessible by the public simultaneously with its publication a notice or notices specifically identifying each such category and inviting vendors to apply for inclusion on such PQL. Application for inclusion on such PQL shall be continuously available.

Section 3-10
PREQUALIFICATION

- **(e) <u>Public Notice</u>** (cont.)
  - (1) <u>Frequency</u> (cont.)
    - (ii) For each procurement not falling within a category for which a PQL has been established, but for which the agency intends to prequalify vendors prior to issuing a solicitation for such procurement, the ACCO shall publish in the City Record for five consecutive editions and shall post on the City's website in a location that is accessible by the public simultaneously with its publication a notice of its intention to establish such a PQL and invite vendors to apply for inclusion. There shall be a cutoff date for receipt of prequalification questionnaires for such PQL.

Section 3-10

PREQUALIFICATION

- **(e) <u>Public Notice</u>** (cont.)
  - (1) <u>Frequency</u> (cont.)
    - (iii) When using a PQL for a procurement, publication of notice inviting vendors to apply for such PQL shall have occurred within one year prior to the issuance of the solicitation.
    - (iv) The CCPO shall cause to be published in the City Record and shall post on the City's website in a location that is accessible by the public simultaneously with its publication a prominently placed continuous notice stating that New York City procurement policy encourages agencies to develop a PQL for various categories of goods, services, construction and construction-related services. Information and applications to be included on such PQLs may be obtained from the ACCO at each agency, may be submitted to ACCOs at any time, and shall be approved or denied within ninety days from the date of submission.

Section 3-10

PREQUALIFICATION

- **(e) <u>Public Notice</u>** (cont.)
  - (1) <u>Frequency</u> (cont.)
    - (v) For any PQL for construction, in addition to the notices required by this subsection, the ACCO shall publish, not less than annually, an advertisement in a New York City newspaper of general circulation inviting vendors to apply for inclusion on such PQL.
  - (2) <u>Content</u>. The notice shall include the agency name, category of procurement, and information on how the vendor may obtain an application.
  - (3) <u>Updated PQLs</u>. When using a PQL for a procurement, publication of notice soliciting vendors for such list shall have occurred within one year of the solicitation.

Section 3-10

PREQUALIFICATION

- **(f) <u>Questionnaire</u>.** To apply for inclusion on a PQL, a vendor must complete and submit an agency-developed prequalification questionnaire. At least once every two years, and at the time of submitting any bid or proposal in response to a solicitation from a PQL, vendors shall affirm that there has been no change in the information included in the prequalification questionnaire, or shall supply such changed information. With respect to any PQL used in connection with contract awards pursuant to Section 1-02(e) of these Rules, such affirmation by vendors that there has been no change in the information included in the prequalification questionnaire (or the supplying of such changed information) shall occur at the time of contract award.

Section 3-10

PREQUALIFICATION

- **(g) <u>Making the Prequalification Decision</u>.** Prequalification questionnaires shall be reviewed by the ACCO and other agency personnel with knowledge, expertise, and experience sufficient to make a fair and reasonable determination, as appropriate. The ACCO shall have ninety days from the date of submission of a properly completed prequalification questionnaire to approve or deny prequalification.

Section 3-10

PREQUALIFICATION

- **(h) <u>Solicitation from a PQL</u>.**
  - (1) Where a PQL has been established for a category of procurement or a particular procurement, the solicitation of bids or proposals for such procurement or category is not required to be publicly advertised, but may be limited to vendors on the PQL. PQLs for construction must have no less than five vendors and shall remain open for all additional qualified vendors. Where a PQL has been established for a category of construction procurement or a particular construction procurement, the solicitation of bids for such procurement or within such category must be limited to vendors on the PQL.
  - (2) Prequalified lists shall be reviewed at least once every two years to ensure that firms that no longer meet prequalification standards are not retained on the list.

Section 3-10

PREQUALIFICATION

- **(i) <u>Selective Solicitation from a PQL</u>.**
  - (1) <u>Definition and Policy</u>. Selective solicitation is the solicitation of bids or proposals from fewer than all the vendors on a PQL. This method may be used where time is of the essence or the benefits of additional competition are outweighed by the administrative cost of soliciting more than a minimum number of bids. A determination to utilize selective solicitation for a particular procurement or for a particular category of procurement shall be made in writing by the ACCO and approved by the CCPO, unless the CCPO, upon adequate assurances of an agency's capacity to comply with the applicable procedural requirements, has determined that such approval is not required for an agency's contracts or particular categories of contracts.

Section 3-10
PREQUALIFICATION

- **(i) <u>Selective Solicitation from a PQL</u>** (cont.)
  - (2) <u>Methods of Selective Solicitation</u>.
    - (i) <u>Minimum Requirement</u>. When selective solicitation is used, it is essential that a minimum level of competition be sought.
    - (ii) <u>Random Selective Solicitation</u>. Except as otherwise permitted by §§3-03(h) and 3-04(b) of these Rules, bids or proposals shall be solicited from a minimum of eight vendors, selected at random from the PQL.
    - (iii) <u>Rotational Selective Solicitation</u>. Rotational selective solicitation is permitted for construction and construction-related services pursuant to §3-03(h)of these Rules.

Section 3-10
PREQUALIFICATION

- **(i) <u>Selective Solicitation from a PQL</u>** (cont.)
  - (2) <u>Methods of Selective Solicitation</u> (cont.)
    - (iv) <u>Selective Solicitation Based on a Determination that a Vendor(s) is</u> <u>the Best Qualified</u>. In the case of construction or construction-related services where selective solicitation based on a determination that a vendor(s) is the best qualified pursuant to §3-03(h) and §3-04(b) of these Rules will be utilized, the evaluation committee established pursuant to §3-03(g) of these Rules or a separate committee, composed of no fewer than three persons with knowledge, expertise, and experience to make a fair and reasonable evaluation of the vendors, shall select a minimum of five vendors evaluated as being the best qualified for the construction or construction-related service. The committee shall make a determination of the basis for selecting each vendor.

Section 3-10

PREQUALIFICATION

- **(i) <u>Selective Solicitation from a PQL</u>** (cont.)
  - (2) <u>Methods of Selective Solicitation</u> (cont.)
    - (v) <u>Selective Solicitation and Multiple Awards</u>. Where the solicitation will result in the award of multiple contracts, the minimum number of vendors solicited shall be proportional to the number of anticipated awards (e.g., where two contracts are to be awarded, the agency must select a minimum of sixteen vendors, except that in the case of construction- related services to be procured pursuant to §3-03(h)(2)(i)(B) of these Rules, the agency must only select a minimum of six vendors; in the case of construction-related services to be procured pursuant to §3-03(h)(2)(ii) of these Rules where selection based on a "best qualified" determination is utilized, either alone or in combination with random and/or rotational selective solicitation, the agency must only select a minimum of ten vendors).

Section 3-10

PREQUALIFICATION

- **(j) <u>Prequalification Not a Finding of Responsibility</u>.** The fact that a vendor has been prequalified does not in and of itself represent a finding of responsibility for a particular procurement. Between the time of bid opening or receipt of proposals and contract award, the ACCO may determine that a prequalified vendor is not responsible and, as such, should be removed from the PQL.

Section 3-10
PREQUALIFICATION

- **(k) PQL of Auditors.** A PQL of auditors shall be maintained by the Comptroller in accordance with this section. An agency seeking to award an audit contract shall solicit only those vendors that have been prequalified by the Comptroller.
- **(l) Denial or Revocation of Prequalification.**
  - (1) Any vendor whose qualifications fail to meet the criteria established by the ACCO shall be denied prequalification. The prequalified status of a vendor may be revoked on the basis of changed circumstance, conditions, or status of the vendor or its staff, or additional information acquired by the agency, or further analysis of the information upon which the original prequalification determination was made where the new information or further analysis indicates that the vendor does not meet the established criteria for prequalification.

Section 3-10
PREQUALIFICATION

- **(l) Denial or Revocation of Prequalification** (cont.)
  - (2) The ACCO shall notify the vendor in writing of a denial or revocation of prequalification, stating the reasons upon which the determination is based and informing the vendor of the right to appeal. The notification shall also include the following statement:

    The vendor shall send a copy of its appeal to the New York City Comptroller, for informational purposes, at the Office of the New York City Comptroller, Office of Contract Administration, 1 Centre Street, Room 1005, New York, NY 10007, (212) 669-2323.

  A copy of the ACCO's determination shall also be sent to the CCPO for inclusion in the VENDEX database and to the Comptroller's Office.

Section 3-10

PREQUALIFICATION

- **(l) Denial or Revocation of Prequalification** (cont.)
  - (3) A prequalified vendor that fails to respond to three consecutive solicitations shall be deemed to have withdrawn from the PQL. For purposes of this subdivision, a response of “no bid” or “no proposal” shall be considered a response to a solicitation. No appeal shall be considered from a deemed withdrawal from a PQL, but a vendor who has been so removed may apply for reinstatement by submitting a new prequalification questionnaire.

Section 3-10

PREQUALIFICATION

- **(m) Appeal of Denial or Revocation of Prequalification.**
  - (1) Time Limit. A vendor shall have fifteen days from receipt of the determination to file a written appeal of that determination with the Agency Head. Receipt of notice by the vendor shall be deemed to be no later than five days from the date of mailing or upon delivery, if delivered. Filing of the appeal shall be accomplished by actual delivery of the appeal document to the office of the Agency Head.
  - (2) Form and Content. The appeal shall be in writing and shall briefly state all the facts or other basis upon which the vendor contests the agency determination. Supporting documentation, if any, shall be included.

Section 3-10
PREQUALIFICATION

- **(m) <u>Appeal of Denial or Revocation of Prequalification</u>** (cont.)
  - (3) <u>Determination.</u> The Agency Head shall consider the appeal, and shall make a prompt written decision with respect to its merits, except when such appeal relates to a DLS determination of non-compliance with equal employment opportunity requirements. Under such exception, the head of DLS shall consider the appeal and shall promptly inform the Agency Head in writing of his/her determination on the merits. The Agency Head or head of DLS (as applicable) may in his/her sole discretion convene an informal conference with the vendor and the ACCO to resolve the issue by mutual consent prior to making a determination. The Agency Head shall determine whether the ACCO's decision is arbitrary and capricious and whether it is based on substantial evidence.

Section 3-10
PREQUALIFICATION

- **(m) <u>Appeal of Denial or Revocation of Prequalification</u>** (cont.)
  - (4) <u>Notification</u>. A copy of the decision of the Agency Head or the head of DLS shall be sent to the vendor, stating the reasons upon which the decision is based and informing the vendor of the right to appeal. A copy of such determination shall be sent to the CCPO for any modification to the VENDEX database and to the Comptroller's Office.

Section 3-10

PREQUALIFICATION

- **(m) <u>Appeal of Denial or Revocation of Prequalification</u>** (cont.)
  - (5) <u>Appeal to OATH</u>. The decision of the Agency Head or the head of DLS shall be final unless appealed to OATH. If a vendor wishes to contest the Agency Head/head of DLS decision, it may appeal to OATH, which shall hear and take final action in the matter in accordance with its rules. The petition to OATH shall be filed by the vendor within fifteen days of the date of the decision. Supporting documentation, if any, shall be included. The vendor shall, at the same time, send a copy of its appeal to the Agency Head, CCPO, and Comptroller's Office.

Section 3-10

PREQUALIFICATION

- **(m) <u>Appeal of Denial or Revocation of Prequalification</u>** (cont.)
  - The agency shall forward a copy of all appeal-related documents within fourteen days of its receipt of the copy of the vendor's appeal to OATH. OATH shall review the decision and determine whether that decision is arbitrary or capricious and whether it is based on substantial evidence. Copies of OATH's determination shall be sent to the vendor, Agency Head, Comptroller's Office, and, where the decision results in the revocation of prequalification, to the CCPO for any modifications to the VENDEX database.

RESOLUTION OF DISPUTES ARISING OUT OF CONTRACT ADMINISTRATION

PPB RULES SECTION 4-09

Section 4-09

RESOLUTION OF DISPUTES

- Review contract and statutory provisions regarding notices of claim and similar exhaustion procedures.
- Contracts often contain administrative "notice of claim" time restrictions and "opportunity to cure" provisions.
- NYC Administrative Code requires submission of claim to Comptroller.
  - §7–201(a): "In every action or special proceeding prosecuted or maintained against the city, the complaint or necessary moving papers shall contain an allegation that at least thirty days have elapsed since the demand, claim or claims, upon which such action or special proceeding is founded, were presented to the comptroller for adjustment, and that the comptroller has neglected or refused to make an adjustment or payment thereof for thirty days after such presentment . . . "
- Contracts often require that action be commenced within specific time period from "accrual," e.g., six months.
- PPB Rules Dispute Resolution clause contains additional time limitations.

Section 4-09

RESOLUTION OF DISPUTES

- PPB Dispute Resolution provision applies to "all disputes between the City and a vendor that arise under, or by virtue of, a contract between them."
  - For construction and construction related services, clause only applies to following disputes: scope of work, contract interpretation, payment for extra or disputed work, conformity of work to contract, and acceptability and quality of work. Disputes arising from adverse determinations of Engineer, Resident Engineer, Engineering Audit Officer, or Agency designee.
- Other Exceptions – where can pursue plenary action for breach of contract:
  - Disputes concerning matters dealt with in other PPB Rules sections.
  - Disputes involving patents, copyrights, trademarks, or trade secrets relating to proprietary rights in computer software.
  - Disputes involving termination other than for cause (for construction, all terminations are excluded).

Section 4-09

RESOLUTION OF DISPUTES

- Vendor must submit Notice of Dispute to Agency Head within thirty days of receiving written notice of the determination or action that is the subject of the dispute (or within the contractual deadline).
- Agency Head decides within thirty days of receipt of all materials and information from agency staff.
- Vendor may submit Notice of Claim to the Comptroller within 30 days of Agency Head decision.
- Comptroller may adjust claim within 45 days of receiving agency's materials.
- Vendor may petition the CDRB within thirty days of the end of the Comptroller's time to adjust the claim.

Section 4-09
RESOLUTION OF DISPUTES

- CDRB: OATH ALJ, MOCS, and Private Representative.
- Process follows OATH Rules.
- If a decision is note made within the required period, it is deemed a "non-determination without prejudice that will allow application to the next level."
- During dispute process, contract terms remain in force and work continues otherwise directed by the City.
- Vendor <u>or</u> City can bring Article 78 within four months to challenge CDRB decision.

Relevant Rules

Section 4-09
RESOLUTION OF DISPUTES

- **(a) <u>Applicability</u>.** Except as provided in (1) and (2) below, this section shall apply to all disputes between the City and a vendor that arise under, or by virtue of, a contract between them. All contracts shall include a clause providing that all such disputes shall be finally resolved in accordance with the provisions of this section. Parties to contracts that do not contain this clause may by written agreement consent to the resolution of any disputes pursuant to this section.
  - (1) This section shall not apply to disputes concerning matters dealt with in other sections of these Rules or to disputes involving patents, copyrights, trademarks, or trade secrets (as interpreted by the courts of New York State) relating to proprietary rights in computer software, or to termination other than for cause.

Section 4-09
RESOLUTION OF DISPUTES

- **(a) <u>Applicability</u>** (cont.)
  - (2) For construction and construction related services, this section shall apply only to disputes about the scope of work delineated by the contract, the interpretation of contract documents, the amount to be paid for extra work or disputed work performed in connection with the contract, the conformity of the vendor's work to the contract, and the acceptability and quality of the vendor's work; such disputes arise when the Engineer, Resident Engineer, Engineering Audit Officer, or other designee of the Agency Head under the contract (as defined in the contract) makes a determination with which the vendor disagrees. For construction, this section shall not apply to termination of the contract for cause or other than for cause.

Section 4-09

RESOLUTION OF DISPUTES

- **(b) <u>General Provisions</u>**. All determinations required by this section shall be clearly stated, with a reasoned explanation for the determination based on the information and evidence presented to the party making the determination. Failure to make such determination within the time required by this section shall be deemed a non-determination without prejudice that will allow application to the next level.
- **(c) <u>Work to Continue.</u>** During such time as any dispute is being presented, heard, and considered pursuant to this section, the contract terms shall remain in force and, unless otherwise directed by the ACCO or Engineer, work shall continue as directed. Failure of the vendor to continue the work as directed shall constitute a waiver by the vendor of its claim.

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- **(d) <u>Presentation of Dispute to Agency Head</u>.**
  - (1) <u>Notice of Dispute and Agency Response</u>. The vendor shall present its dispute in writing ("Notice of Dispute") to the Agency Head within the time specified by the contract or, if no time is specified, within thirty days of receiving written notice of the determination or action that is the subject of the dispute. This notice requirement shall not be read to replace any other notice requirements contained in the contract. The Notice of Dispute shall include all the facts, evidence, documents, or other basis upon which the vendor relies in support of its position, as well as a detailed computation demonstrating how any amount of money claimed by the vendor in the dispute was arrived at. Within thirty days after receipt of the complete Notice of Dispute, the ACCO or, in the case of construction or construction related services, the Engineer, Resident Engineer, Engineering Audit Officer, or designee of the Agency Head under the contract, as applicable, shall submit to the Agency Head all materials he or she deems pertinent to the dispute.

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- **(d) <u>Presentation of Dispute to Agency Head</u>** (cont.)
  - (1) <u>Notice of Dispute and Agency Response</u> (cont.)

Following initial submissions to the Agency Head, either party may demand of the other the production of any document or other material the demanding party believes may be relevant to the dispute. The requested party shall produce all relevant materials that are not otherwise protected by a legal privilege recognized by the courts of New York State. Any question of relevancy shall be determined by the Agency Head whose decision shall be final. Willful failure of the vendor to produce any requested material whose relevancy the vendor has not disputed, or whose relevancy has been affirmatively determined, shall constitute a waiver by the vendor of its claim.

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- **(d) <u>Presentation of Dispute to Agency Head</u>** (cont.)
  - (2) <u>Agency Head Inquiry</u>. The Agency Head shall examine the material and may, in his or her discretion, convene an informal conference with the vendor and the ACCO and, in the case of construction or construction related services, the Engineer, Resident Engineer, Engineering Audit Officer, or designee of the Agency Head under the contract, as applicable, to resolve the issue by mutual consent prior to reaching a determination. The Agency Head may seek such technical or other expertise as he or she shall deem appropriate, including the use of neutral mediators, and require any such additional material from either or both parties as he or she deems fit.

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- **(d) <u>Presentation of Dispute to Agency Head</u>** (cont.)
  - (2) <u>Agency Head Inquiry</u> (cont.)

The Agency Head's ability to render, and the effect of, a decision hereunder shall not be impaired by any negotiations in connection with the dispute presented, whether or not the Agency Head participated therein. The Agency Head may or, at the request of any party to the dispute, shall compel the participation of any other vendor with a contract related to that of the party presenting the dispute, and that vendor shall be bound by the decision of the Agency Head. Any vendor thus brought into the dispute resolution proceeding shall have the same rights and obligations under this section as the vendor initiating the dispute.

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- **(d) <u>Presentation of Dispute to Agency Head</u>** (cont.)
  - (3) <u>Agency Head Determination</u>. Within thirty days after the receipt of all materials and information, or such longer time as may be agreed to by the parties, the Agency Head shall make his or her determination and shall deliver or send a copy of such determination to the vendor and ACCO and, in the case of construction or construction related services, the Engineer, Resident Engineer, Engineering Audit Officer, or designee of the Agency Head under the contract, as applicable, together with a statement concerning how the decision may be appealed.

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- **(d) <u>Presentation of Dispute to Agency Head</u>** (cont.)
  - (4) <u>Finality of Agency Head Decision</u>. The Agency Head's decision shall be final and binding on all parties, unless presented to the CDRB pursuant to this section. The City may not take a petition to the CDRB. However, should the vendor take such a petition, the City may seek, and the CDRB may render, a determination less favorable to the vendor and more favorable to the City than the decision of the Agency Head.

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- **(e) <u>Presentation of Dispute to the Comptroller</u>.** Before any dispute may be brought by the vendor to the CDRB, the vendor must first present its claim to the Comptroller for his or her review, investigation, and possible adjustment.
  - (1) <u>Time, Form, and Content of Notice</u>. Within thirty days of receipt of a decision by the Agency Head, the vendor shall submit to the Comptroller and to the Agency Head a Notice of Claim regarding its dispute with the agency. The Notice of Claim shall consist of (i) a brief statement of the substance of the dispute; the amount of money, if any, claimed; and the reason(s) the vendor contends the dispute was wrongly decided by the Agency Head; (ii) a copy of the decision of the Agency Head; and (iii) a copy of all materials submitted by the vendor to the agency, including the Notice of Dispute. The vendor may not present to the Comptroller any material not presented to the Agency Head, except at the request of the Comptroller.

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- **(e) <u>Presentation of Dispute to the Comptroller</u>** (cont.)
  - (2) <u>Agency Response</u>. Within thirty days of receipt of the Notice of Claim, the agency shall make available to the Comptroller a copy of all material submitted by the agency to the Agency Head in connection with the dispute. The agency may not present to the Comptroller any material not presented to the Agency Head except at the request of the Comptroller.

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- **(e) <u>Presentation of Dispute to the Comptroller</u>** (cont.)
  - (3) <u>Comptroller Investigation</u>. The Comptroller may investigate the claim in dispute and, in the course of such investigation, may exercise all powers provided in Sections 7-201 and 7-203 of the New York City Administrative Code. In addition, the Comptroller may demand of either party, and such party shall provide, whatever additional material the Comptroller deems pertinent to the claim, including original business records of the vendor. Willful failure of the vendor to produce within fifteen days any material requested by the Comptroller shall constitute a waiver by the vendor of its claim. The Comptroller may also schedule an informal conference to be attended by the vendor, agency representatives, and any other personnel desired by the Comptroller.

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- **(e) <u>Presentation of Dispute to the Comptroller</u>** (cont.)
  - (4) <u>Opportunity of Comptroller to Compromise or Adjust Claim</u>. The Comptroller shall have forty-five days from his or her receipt of all materials referred to in (e)(3) to investigate the disputed claim. The period for investigation and compromise may be further extended by agreement between the vendor and the Comptroller, to a maximum of ninety days from the Comptroller's receipt of all materials. The vendor may not present its petition to the CDRB until the period for investigation and compromise delineated in this section has expired. In compromising or adjusting any claim hereunder, the Comptroller may not revise or disregard the terms of the contract between the parties.

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- **(f) <u>Contract Dispute Resolution Board</u>.** There shall be a Contract Dispute Resolution Board composed of:
  - (1) the chief administrative law judge of OATH or his/her designated OATH administrative law judge, who shall act as chairperson, and may adopt operational procedures and issue such orders consistent with this section as may be necessary in the execution of the CDRB's functions, including, but not limited to, granting extensions of time to present or respond to submissions;

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- **(f) <u>Contract Dispute Resolution Board</u>** (cont.)
  - (2) the CCPO or his/her designee; any designee shall have the requisite background to consider and resolve the merits of the dispute and shall not have participated personally and substantially in the particular matter that is the subject of the dispute or report to anyone who so participated; and
  - (3) a person with appropriate expertise who is not an employee of the City. This person shall be selected by the presiding administrative law judge from a prequalified panel of individuals, established and administered by OATH, with appropriate background to act as decision-makers in a dispute. Such individuals may not have a contract or dispute with the City or be an officer or employee of any company or organization that does, or regularly represent persons, companies, or organizations having disputes with the City.

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- **(g) <u>Petition to CDRB</u>.** In the event the claim has not been settled or adjusted by the Comptroller within the period provided in this section, the vendor, within thirty days thereafter, may petition the CDRB to review the Agency Head determination.

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- **(g) <u>Petition to CDRB</u>** (cont.)
  - (1) <u>Form and Content of Petition by Vendor</u>. The vendor shall present its dispute to the CDRB in the form of a Petition, which shall include (i) a brief statement of the substance of the dispute; the amount of money, if any, claimed; and the reason(s) the vendor contends that the dispute was wrongly decided by the Agency Head; (ii) a copy of the decision of the Agency Head; (iii) copies of all materials submitted by the vendor to the agency; (iv) a copy of the decision of the Comptroller, if any; and (v) copies of all correspondence with, and material submitted by the vendor to, the Comptroller's Office. The vendor shall concurrently submit four complete sets of the Petition: one to the Corporation Counsel (Attn: Commercial and Real Estate Litigation Division), and three to the CDRB at OATH's offices, with proof of service on the Corporation Counsel. In addition, the vendor shall submit a copy of the statement of the substance of the dispute, cited in (i) above, to both the Agency Head and the Comptroller.

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- **(g) <u>Petition to CDRB</u>** (cont.)
  - (2) <u>Agency Response</u>. Within thirty days of receipt the Petition by the Corporation Counsel, the agency shall respond to the statement of the vendor and make available to the CDRB all material it submitted to the Agency Head and Comptroller. Three complete copies of the agency response shall be submitted to the CDRB at OATH's offices and one to the vendor. Extensions of time for submittal of the agency response shall be given as necessary upon a showing of good cause or, upon the consent of the parties, for an initial period of up to thirty days.

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- **(g) <u>Petition to CDRB</u>** (cont.)
  - (3) <u>Further Proceedings</u>. The Board shall permit the vendor to present its case by submission of memoranda, briefs, and oral argument. The Board shall also permit the agency to present its case in response to the vendor by submission of memoranda, briefs, and oral argument. If requested by the Corporation Counsel, the Comptroller shall provide reasonable assistance in the preparation of the agency's case. Neither the vendor nor the agency may support its case with any documentation or other material that was not considered by the Comptroller, unless requested by the CDRB. The CDRB, in its discretion, may seek such technical or other expert advice as it shall deem appropriate and may seek, on it own or upon application of a party, any such additional material from any party as it deems fit. The CDRB, in its discretion, may combine more than one dispute between the parties for concurrent resolution.

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RESOLUTION OF DISPUTES

- **(g) <u>Petition to CDRB</u>** (cont.)
  - (3) <u>Further Proceedings</u>. The Board shall permit the vendor to present its case by submission of memoranda, briefs, and oral argument. The Board shall also permit the agency to present its case in response to the vendor by submission of memoranda, briefs, and oral argument. If requested by the Corporation Counsel, the Comptroller shall provide reasonable assistance in the preparation of the agency's case. Neither the vendor nor the agency may support its case with any documentation or other material that was not considered by the Comptroller, unless requested by the CDRB. The CDRB, in its discretion, may seek such technical or other expert advice as it shall deem appropriate and may seek, on it own or upon application of a party, any such additional material from any party as it deems fit. The CDRB, in its discretion, may combine more than one dispute between the parties for concurrent resolution.

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- **(g) <u>Petition to CDRB</u>** (cont.)
  - (4) <u>CDRB Determination</u>. Within forty-five days of the conclusion of all submissions and oral arguments, the CDRB shall render a decision resolving the dispute. In an unusually complex case, the CDRB may render its decision in a longer period of time, not to exceed ninety days, and shall so advise the parties at the commencement of this period. The CDRB's decision must be consistent with the terms of the contract. Decisions of the CDRB shall only resolve matters before the CDRB and shall not have precedential effect with respect to matters not before the CDRB.

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- **(g) <u>Petition to CDRB</u>** (cont.)
  - (5) <u>Notification of CDRB Decision</u>. The CDRB shall send a copy of its decision to the vendor, the ACCO, the Corporation Counsel, the Comptroller, the CCPO, and, in the case of construction or construction related services, the Engineer. A decision in favor of the vendor shall be subject to the prompt payment provisions of these Rules. The Required Payment Date shall be thirty days after the date the parties are formally notified of the CDRB's decision.

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- **(g) <u>Petition to CDRB</u>** (cont.)
  - (6) <u>Finality of CDRB Decision</u>. The CDRB's decision shall be final and binding on all parties. Any party may seek review of the CDRB's decision solely in the form of a challenge, filed within four months of the date of the CDRB's decision, in a court of competent jurisdiction of the State of New York, County of New York pursuant to Article 78 of the Civil Practice Law and Rules. Such review by the court shall be limited to the question of whether or not the CDRB's decision was made in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion. No evidence or information shall be introduced or relied upon in such proceeding that was not presented to the CDRB in accordance with this section.

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- **(h) <u>Final Decision Not Impaired by Contract Termination</u>.** Any termination, cancellation, or alleged breach of the contract prior to or during the pendency of any proceedings pursuant to this section shall not affect or impair the ability of the Agency Head or CDRB to make a binding and final decision pursuant to this section.

Questions