

**NOTICE**  
**OF ADOPTION OF FINAL RULE**

The Procurement Policy Board (PPB) has adopted an amendment to **§ 3-01, Policy, and § 3-10, Prequalification, of chapter 3 of Title 9 of the Rules of the City of New York**, pursuant to Sections 311 and 1043 of the New York City Charter. The amendment was published on May 13, 2009 in the City Record. A public hearing was held on June 18, 2009. The amendment was adopted by the Procurement Policy Board on June 24, 2009.

**Basis and Purpose of the Amendment**

The amendments makes a series of changes to conform sections 3-01 and 3-10 to changes that have occurred in State law. The amendment to section 3-01 removes the requirement that a special case determination be made prior to use of PQLs for construction contracts. The amendment to section 3-10 conforms the criteria for a vendor to be included on a PQL and conforms the circumstances when a PQL may be used to the changes in the law. The amendment also changes the period within which vendors on PQL lists must reestablish their qualifications from one year to two. Finally the amendment adds the requirement that, on a vendor's appeal from denial of inclusion on a PQL, the ACCO's determination shall be based on substantial evidence.

**The Amended Rule**

In the amendment, which immediately follows this notice, new material is underlined and deletions are bracketed.

Jose Maldonado, Chair

**Section 1. Subdivision (d) of section 3-01 of Title 9 of the Rules of the City of New York is amended as follows:**

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(d) “Special Case”. Agencies may elect to use one of the methods of source selection listed herein, after making the determination that it is not practicable or not advantageous to the City to use competitive sealed bidding as required by this section.

(1) Methods of Source Selection for which “Special Case” Determination is Required: A “Special Case” determination is required for each case in which one of the following methods of source selection is used:

- (i) Competitive sealed bidding from prequalified vendors, except as provided in Section 3-10 (a);
- (ii) Competitive sealed proposals (including multi-step process);
- (iii) Competitive sealed proposals from prequalified vendors;
- (iv) Negotiated acquisition;
- (v) Sole source procurement;
- (vi) Demonstration project for innovative products, approaches, or technologies;
- (vii) Innovative procurement method; or
- (viii) Government-to-government purchase.

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**Section 3-10 of Title 9 of the Rules of the City of New York is amended 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 [Procurement] using a PQL shall be considered a "special case" under these Rules.

(b) "Special Case" Determination. Prior to using a PQL [list of prequalified vendors] 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 [prequalified list], 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.

(c) Circumstances of Use. 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; [or]

(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.

(d) Criteria. 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;

(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;

(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

([7]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.

(e) Public Notice.

(1) Frequency.

(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.

(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.

(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 [prequalified lists] for various categories of goods, services, construction and construction-related services. Information and applications to be included on such PQLs [lists] 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.

(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) Content. The notice shall include the agency name, category of procurement, and information on how the vendor may obtain an application.

(3) Updated PQLs. When using a PQL [prequalified list] for a procurement, publication of notice soliciting vendors for such list shall have occurred within one year of the solicitation.

(f) Questionnaire. To apply for inclusion on a PQL, a vendor must complete and submit an agency-developed prequalification questionnaire. At least once every two years [annually], 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.

(g) Making the Prequalification Decision. 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.

(h) Solicitation from a PQL.

(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 [annually] to ensure that firms that no longer meet prequalification standards are not retained on the list.

(m) Appeal of Denial or Revocation of Prequalification.

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(3) Determination. 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.

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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.