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OFFICE OF THE MAYOR
OFFICE OF CONTRACT SERVICES
PROCUREMENT POLICY BOARD MEETING
MARCH 4, 2009
10:00 A.M.

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P R E S E N T:
JOSE MALDONADO, Chairperson
ANTHONY CROWELL
LEW FINKELMAN
MARILYN GELBER
ROSS SANDLER
Also Present:
Howard Friedman, Corporation Counsel
Marla Simpson, Office of Contract Services
John Rand, Comptroller's Office

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P R O C E E D I N G S
(Time noted: 10:10 a.m.)
CHAIRPERSON MALDONADO: Good morning.

5 The meeting of the March 4, 2009 Procurement Policy
6 Board meeting will now come to order.

7 We have before us nine sets of
8 amendments which are pending in CAPA, ready for
9 final adoption today. The public hearing for all
10 of the amendments was held on February 13, 2009.
11 No testimony was received.

12 I would briefly describe each of the
13 pending amendments in the order it appears in your
14 packet. Staff of the Mayor's Office of Contract
15 Services and the Law Department are available to
16 answer any questions which members of the board may
17 have concerning these items.

18 The amendments pending for final
19 adoption include:

20 Rule 204: This change allows the City
21 to cancel the public hearing on the annual services
22 agency plans, if no requests to testify are
23 received.

24 Rule 207: The change will insure that
25 agency provides notice to vendors who will be

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1 nonresponsive, whether or not the contract award is
2 stayed, as part of the appeal process. During the
3 CAPA process, minor modifications were made to
4 clarify the draft rule in accordance with comments
5 by board members at the time the board voted into
6 CAPA.

7 Rule 3-02: This change conforms the
8 competitive sealed bid rule to the requirements of
9 the City's minority business program, as well as
10 the emerging business program. It also formally
11 repeals the now obsolete bypass process for awards
12 other than to the low bidder.

13 Rule 3-03: This change conforms the
14 RFP rule to the requirements of the City's minority
15 and emerging business programs. It also lengthens
16 the time frame that may be allowed with appropriate
17 approvals to hold RFPs open for the receipt of late
18 proposals when necessitated by emergency
19 circumstances.

20 Rule 3-08: There are two pending
21 changes to this rule. The first requires agencies
22 to use written solicitations for small purchases of
23 services, while continuing to allow oral processing
24 for purchases of goods valued up to \$25,000.

25 The second change requires agencies to

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2 obtain approval if they wish to add non-random
3 vendors to the bidder's list that are randomly
4 generated for small purchase opportunities.

5 Rule 3-09: This change requires
6 agencies to keep a record of the bases for the
7 determinations that prices of intergovernmental
8 purchases service or construction are fair and
9 reasonable.

10 Rule 4-02: This change increases the
11 threshold when agencies need MOCS approval of
12 contract amendments, so that the value of the
13 change must be at least total \$500,000.

14 Rule 4-09: This change makes a number
15 of clarifying amendments to the City resolution
16 process. During the CAPA process, minor
17 modifications were made to clarify this draft rule,
18 as requested by board members back when the rule
19 was voted into CAPA.

20 Right now, is there any member of the
21 board who has a question or wishes to make a
22 statement concerning any of the rule changes that
23 are ready for final adoption today?

24 There being no statements from any of
25 the board members, I would like a motion to adopt

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2 them all.

3 MR. CROWELL: Motion.

4 MR. GELLER: Second.

5 CHAIRPERSON MALDONADO: All in favor say
6 "Aye."

7 (A chorus of "Ayes.")

8 Adopted.

9 Thank you.

10 We also have before us seven sets of
11 amendments that are proposed to enter the CAPA
12 process as drafts for consideration in the future.
13 Again, I will briefly describe each of the proposed
14 new amendments in the order in which they appear in
15 your packet.

16 Staff from MOCS are available to answer
17 any questions members of the board may have
18 concerning these items.

19 The amendments proposed as drafts for
20 the CAPA process include:

21 Rule 1-01: This proposal conforms the
22 definition of construction in the PPB rules to
23 Local Law.

24 Rule 2-04: This proposal sets
25 standards for the length of contract terms for

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2 client services contracts; expanding the possible
3 use of six year, nine year or longer terms.

4 After the chair's briefing, we modified
5 this proposal to include the renewal terms within
6 the initial term lengths.

7 Rules 2-08, 3-02, 4-06, 4-09: The next
8 proposal in your packet amends four rules,
9 beginning with 2-08, to provide copies of PPB
10 notices go to the Comptroller in addition to the
11 Mayor's Office of Contracts.

12 PPB 3-01, 3-10: The next proposal in
13 your packet amends two rules, beginning with 3-01,
14 to implement recent changes in state law concerning

15 prequalified lists.

16 It also lengthens the period for when
17 vendor certifications of their qualifications
18 remain current, from one year to two; with the
19 proviso that credentials must also be checked each
20 time a new contract award is made.

21 After the chair's briefing, we modified
22 this proposal to clarify the Oath and Article 78
23 process.

24 PPB 3-02, 4-02, 4-06, 4-13: The next
25 proposal in your packet amends two rules that were

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2 proposed as one new rule, all having to do with
3 subcontractors. The amendments implement state law
4 changes included in the reform package. The new
5 proposed rules would be 4-13, which confines the
6 process for agency's approval of subcontractors.

7 After the chair's briefing, we made
8 minor changes to the amended proposal, at the
9 request of the Law Department.

10 Rule 3-11, 4-02: The next proposal in
11 your packet deals with demonstration projects. It
12 lengthens the initial term for such contracts from
13 one year to three years, and provides for a
14 one year contract extension in appropriate
15 circumstances.

16 It also allows the agencies to utilize
17 this method for client service contracts in
18 situations where they don't necessarily have a
19 vendor preselected or a fully detailed approach
20 that they which to test. The proposal would allow
21 them to use demonstration project numbers to
22 identify potential vendors and new approaches.

23 On the latter point, MOCS has
24 distributed to each of you today a copy of the
25 report concerning the administration of children's

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2 services experience, with the use of the
3 demonstration project as a vehicle in identifying
4 new vendors and innovative approaches.

5 Rule 4-400: The last proposal
6 streamlines the recommendation process and requires
7 agencies to post notices of any intent to renew
8 contracts on their websites.

9 Is there any member of the board who
10 has a question on any of the proposals, or any
11 member who wants to make a statement or comment
12 concerning these proposals?

13 MR. FINKELMAN: Yes. On behalf of the
14 Comptroller's Office, we have concerns about the
15 changes to PPB Rules 301 and 310, that would take
16 prequalification out of the realm of special case.

17 And while we understand that the
18 backdrop of this is a recent change to the
19 municipal law, certainly the City has the

20 discretion to consider prequalification, since it
21 is a less competitive process than public sealed
22 bidding as a special case; and that is how the City
23 should continue to treat prequalification. So we
24 are opposed to that amendment.

25 CHAIRPERSON MALDONADO: Does Corporation
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2 Counsel have anything to add?

3 MR. FRIEDMAN: Actually, if I heard Mr.
4 Finkelman correctly, he is not arguing as matter of
5 law that we can't do the rule the way it is
6 drafted, to take construction PQL out of special
7 case. What I heard him say is that as a matter of
8 policy, the City should still have a special case
9 determination, even if state law would allow it to
10 be done.

11 Simply under state law, that's a policy
12 decision. It's not a legal decision. It is the
13 position of the Law Department that the rule is
14 legal as drafted.

15 MR. FINKELMAN: I will respond to that
16 by saying that the Comptroller's Office also has
17 concerns about the legality of the change, since
18 the New York City Charter continues to treat
19 prequalification as a special case; and PPB rules
20 do provide that they are supposed to conform with
21 the New York City Charter.

22 So I do question changing the PPB Rules
23 prior to the City Charter being amended in the
24 fashion that lets changes in the general municipal
25 law. So we do have concerns both on the legality

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2 of it, as well as the policy concerns.

3 MR. FRIEDMAN: On the legal part of it,
4 we had considered that issue when the state law was
5 first passed last year. And it is unquestionably
6 our position that the Charter can't impose
7 conditions on state law that the state do something
8 state law allows without those conditions.

9 I understand what the Comptroller's
10 Office is saying, but we are very definite that as
11 a matter of law the PPB Rules can be amended to
12 conform with state law.

13 MS. GELBER: Can you or Marla explain
14 the policy implications of either approach, since
15 it's really a policy issue?

16 MS. SIMPSON: With respect to
17 prequalification for construction contractors, it
18 is not a generalized change or other type of
19 prequalification. State law provided a very
20 comprehensive list of considerations that address
21 issues such as safety and inclusiveness in MWBE
22 subcontracting, as well as the experience and other
23 issues that go into finding a vendor responsible
24 and capable for the project.

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It was the view of the City's

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2 construction agencies that using the
3 prequalification list in a way that state law
4 permitted would actually help both move the
5 procurement process for construction projects in a
6 swifter more sure fashion, and would contribute to
7 a broader competitive environment by bringing in
8 the companies that would actually bring
9 subcontractors to the table and would participate
10 effectively in the City's MWBE program; as well as,
11 obviously, addressing issues such as safety records
12 that are also critical to the report.

13 In general, I believe the thought was
14 that by using prequalified lists in a way state law
15 intended, we would be able, particularly in this
16 environment, to move construction projects more
17 effectively through the process and get a caliber
18 of vendors that would do high quality construction
19 and would meet schedules.

20 MR. FRIEDMAN: To add one more thing. I
21 didn't bring the law with me, but I managed to get
22 it on my BlackBerry. The state law that adds
23 prequalified lists, starts: "Notwithstanding any
24 general special or local law or rule or regulation
25 to the contrary --".

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2 So I would say that, as it stands, if
3 we didn't change it, the rule would be preempted by
4 state law.
5 I'll now backtrack on my policy point
6 and say that, arguably under this, even as a matter
7 of policy, if the PPB wanted to impose a special
8 case determination on this, it would be preempted
9 by state law, in light of the specific explicit
10 language in the state law.

11 It says, "Notwithstanding and covers
12 local rules." I think the PPB has to do this or
13 stay silent and, by staying silent, be preempted by
14 state law anyway.

15 MR. FINKELMAN: I completely disagree
16 with that assertion that the PPB doesn't have
17 discretion to keep prequalification in special case
18 conditions on its use, notwithstanding it being
19 included as an alternative to municipal law.

20 Are you telling this body it doesn't
21 have the discretion to keep the same parameters in
22 place?

23 MR. FRIEDMAN: Yes. I'm telling this
24 body that we're acting under a state law that
25 starts with, "Notwithstanding, among other things,

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2 any local rule." This is a local rule and, yes,
3 it's my position and the Law Department's position.

4 MR. FINKELMAN: There's nothing in the
5 general municipal law that mandates that a locality
6 can't put conditions on the use of
7 prequalification?

8 MR. FRIEDMAN: If it was silent, if PQL
9 law was silent, the we would get into whether the
10 general principles of statutory construction --
11 when you have explicit language in a brand new law
12 that says, "Notwithstanding any local rule," yes, I
13 think that has more weight; yes, I think.

14 MR. FINKELMAN: As a policy matter, the
15 Comptroller's Office has strong feelings that
16 public sealed bidding has been an acceptable means
17 of promoting competition under the general
18 municipal law for some 100 years, if not more than
19 that. And that should continue to be the norm and
20 prequalification should continue to be a special
21 case. That's our belief.

22 MR. SANDLER: Could you explain why?
23 What's the significance?

24 MR. FINKELMAN: The significance of it
25 is, if it is just an alternative to sealed bidding

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2 that can be used, an agency need not make any
3 determination as to why it should not use public
4 sealed bidding and just use the prequalified list
5 that has a limited number of vendors on it.

6 It's not as competitive as a sealed bid
7 process; and it should not be something that an
8 agency just has the unfettered discretion to use
9 at its whim.

10 MS. SIMPSON: To correct the record; I
11 don't believe the administration agencies that are
12 affected by this rule, that they could invoke its
13 use on whim.

14 It is a use of an eligible procurement
15 technique that they believe will help them achieve
16 their mission; and their mission is to complete
17 public works projects that the City requires on
18 time, on budget, and with high quality
19 construction. And that's the basis on which we
20 would choose any of the available procurement
21 techniques that are in the rules of PPB.

22 MR. FINKELMAN: Any they should continue
23 to do it based on the special case determination.

24 CHAIRPERSON MALDONADO: Ross?

25 MR. SANDLER: The significance of this

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2 change is that it extends this to construction?

3 MS. SIMPSON: The significance of this
4 is, instead of having to make a separate special
5 case finding prior to using a PQL for construction,
6 the agency would be able to simply elect the PQL
7 process in lieu of a competitive sealed bid and
8 publicly advertise the process.

9 It's the agency's choice based on its
10 own mission and the needs of the project, based on
11 the requirements of special case funds.

12 MR. SANDLER: There will be competitive
13 sealed bidding anyway, among the qualified?

14 MS. SIMPSON: That's correct.

15 CHAIRPERSON MALDONADO: Do any other
16 board members wish to comment on the proposal or
17 any others?

18 MR. RAND: To clarify. It's a special
19 case determination probably boiled down to two or
20 three sentences. It's not too much to ask an
21 agency to put pen to paper, to say "Why did you not
22 go out to the public domain and ask the public
23 bidders whether or not they want to put a bid on
24 this project?"

25 The prequalified list, there are

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2 circumstances where subcontractor MWBEs can be put
3 in there and can promote subcontracting.

4 It can also serve to diminish MWBEs for
5 the prime contractors, as an agency could put the
6 bar so high that many MWBEs which are trying in the
7 construction market may not be able to do that.

8 One other thing to raise is that my
9 title happens to be Deputy Comptroller for Audits,
10 Accountancy and Contracts. The Comptroller's
11 Office registers all contracts. We've seen on a
12 large number of occasions where agencies will take
13 a PQL and subjectively try to shorten that PQL by
14 saying that only a certain number of contractors
15 are qualified to do a contract of a certain size or
16 scope. An that is anti-competition and anti-PQL.

17 MR. SANDLER: What is the remedy for a
18 potential vendor who thinks they have been excluded
19 from prequalified list?

20 MS. SIMPSON: There is an appeals
21 process of the qualification rule, and that process
22 is not being amended and would continue to exist.

23 MR. SANDLER: Who do they appeal to?

24 THE SPEAKER: They appeal to the agency
25 for that denial; and they have their remedies an

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2 litigation. They can go to Oath.

3 MR. RAND: The entire administrative
4 process, the City's appeal process with an agency.
5 And if they elect to, they can go to Oath, which is
6 another very lengthy process.

7 MR. SANDLER: You mentioned examples of
8 things you thought were not appropriate. What then
9 does the Comptroller do or has done?

10 MR. RAND: The Comptroller has gone back
11 to agencies and said, "What are you doing here?
12 The PQL is supposed to be used as the entire
13 gamut." And we normally go back and forth with the

14 agency and contractor on it, to seek remedy for it.
15 In a few occasions that I know of, we
16 allowed a project to go forward for the
17 administration, to show that the scope of such
18 magnitude, that probably everybody on their list
19 would not be capable of doing it. They rounded up
20 a sufficient number of vendors for that
21 competition.

22 MS. SIMPSON: Nothing in the amendments
23 before you alters the existing standards in the
24 rules about the use of PQL or selected use of PQL;
25 so those same discussions were to continue to

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2 happen in a given case with a city agency and the
3 Comptroller's Office at the time of registration.

4 Secondly, the state law is prescriptive
5 in one fashion, that would protect bidders against
6 an arbitrary addition by an agency, and that is
7 this: Once the PQL has been established following
8 the new provisions that are in the state law and
9 are included in this rule, the agency must use the
10 PQL for the category that has been established for.

11 The agency cannot pick and choose once
12 it has a PQL for a particular type of work or a
13 particular type of project. The agency cannot then
14 cherry-pick which of its projects it uses the PQL
15 for, versus which project it uses a competitive bid
16 for.

17 So there is a level of predictability
18 that is built into the state law that would also
19 require a level of competitiveness in the state
20 law, a required minimum of five on every PQL.

21 MR. SANDLER: Can you give an idea of
22 some kinds of projects that are under the existing
23 rule that are going to be prequalified?

24 MR. FRIEDMAN: One of the standard ones
25 is for an emergency demolition program. Instead of

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2 declaring an emergency under 315 of the Charter,
3 instead of doing an ad hoc competition, there is
4 another agency might do if an emergency came up --
5 they have set up a PQL. And when there is an
6 emergency, they will go to the appropriate vendor,
7 depending on the size of the work that needs to be
8 done.

9 MR. SANDLER: What about major
10 construction?

11 MS. SIMPSON: I don't know that there
12 has been a widespread use. There is some. We can
13 certainly supply the board with some examples of
14 recent uses by some of the major construction
15 agencies.

16 But this is something that agencies
17 have been interested in obtaining, and this
18 provision in state law was discussed between the

19 City's agencies and the City's legislative affairs
20 office and the governor's office and the
21 legislature, prior to the enactment of this
22 provision.

23 This provision was included in the
24 Wicks Law reform package. It doesn't technically
25 have anything to do with Wicks Law, but it is

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2 considered to be a construction reform that would
3 align the City's practice more in line with what
4 some of the state construction agencies do more
5 routinely.

6 And it was strongly supported by all of
7 the contractor organizations that the city and
8 state use in the procurement process.

9 MR. RAND: I would point out that the
10 particular agency that uses PQL for demolition is
11 the agency that was abusing the PQL process. Just
12 to throw that out there.

13 MS. SIMPSON: In the view of the
14 Comptroller. It's not before the board at this
15 time.

16 CHAIRPERSON MALDONADO: Further
17 discussion on this?

18 MR. SANDLER: I think it is a good idea.
19 I think that the notion that agencies take
20 responsibility for locating, identifying and
21 qualifying bidders is really helpful to projects;
22 and whatever the potential for abuse, I'm sure it
23 be vetted out. On the whole, it is a worthy
24 change.

25 CHAIRPERSON MALDONADO: Any discussion

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2 on those for which no objections have been
3 expressed?

4 My recommendation is -- if I can ask
5 for a motion to vote on those proposals for which
6 no objections have been expressed; and then we can
7 take PPB 3-01 and 3-10 separately.

8 Is there a motion?

9 MR. SANDLER: Motion.

10 MS. GELBER: Second.

11 CHAIRPERSON MALDONADO: All in favor say
12 "Aye."

13 (A chorus of "Ayes.")

14 It's carried unanimously.

15 We'll now take up PPB 3-01, 3-10.

16 Is there a motion to move that?

17 MR. SANDLER: Moved.

18 MR. CROWELL: Second.

19 CHAIRPERSON MALDONADO: All in favor say

20 "Aye."

21 (A chorus of "Ayes.")

22 The vote is three to two in favor.

23 MR. RAND: I would like to make one

24 request. On behalf of the Comptroller's Office, I
25 would like the administration to survey the

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2 agencies that do have PQLs and find out how many
3 minorities or emerging are on those PQLs. It would
4 be helpful information.

5 MS. SIMPSON: We will certainly try to
6 do that. But again, the point being that the
7 criteria that are established in state law have
8 only recently begun to be used by the agency.

9 So this is a process in transition, and
10 we don't intend the administration or use of PQLs
11 going forward to be limited by how PQLs were used
12 in the past, when they were used for a different
13 purpose and for a different office on a different
14 scale or complexity of construction.

15 MR. FRIEDMAN: If I could add one more
16 thing. The state law added a number of grounds
17 that an agency had to consider in determining who
18 would make it onto a prequalified list.

19 One of them, which is reproduced in the
20 draft rule, is compliance CCPO requirements and
21 anti-discrimination laws and demonstrated
22 commitments to working with minority and women
23 owned businesses, and joint ventures for
24 subcontractor relationships.

25 So the legislature, in any event, did

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2 have in mind this concern when it passed the law.

3 CHAIRPERSON MALDONADO: Is there a
4 motion to adjourn?

5 MR. FINKELMAN: I want to raise one
6 issue.

7 On the agenda, with respect to changes
8 in PPB Rules 311 and 402, which extend the standard
9 length of the initial project from 1 year to
10 3 years, I assume it's a typo where it says
11 "extensions up to 2 years with CCPO approval."

12 Hasn't that been changed to 1 year?

13 MS. SIMPSON: You're talking about the
14 agenda distributed prior to the briefing?

15 I didn't know that was not correct.
16 The chair's reading this morning was correct. That
17 has been modified to 1 year.

18 CHAIRPERSON MALDONADO: If there's no
19 further business, I'll entertain a motion to
20 adjourn.

21 MR. SANDLER: Motion.

22 MR. GELLER: Second.

23 CHAIRPERSON MALDONADO: We're adjourned.

24 (Time noted: 10:40 a.m.)

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I, Jeffrey Shapiro, a Shorthand Reporter and Notary Public, within and for the State of New York, do hereby certify that I reported the proceedings in the within-entitled matter, on Wednesday, March 4, 2009, at 156 William Street, 2nd Floor, New York, New York, and that this is an accurate transcription of these proceedings.

IN WITNESS WHEREOF, I have hereunto set my hand this _____ day of _____, 2009.

JEFFREY SHAPIRO