

## **Notice of Adoption of Rules**

Pursuant to the authority vested in the Procurement Policy Board (PPB) by Sections 311 and 324 of the New York City Charter and in accordance with the requirements of Section 1043 of said Charter, the PPB has adopted amendments to Chapter 3 of Title 9 of the Rules of the City of New York.

### **Statement of Basis and Purpose of Final Rules**

The following amendments to Title 9 of the Rules of the City of New York (“PPB Rules”) establish rules governing the procurements designated for small business mentoring programs and streamline the procedures surrounding prequalification.

#### *Mentoring Program*

Section 1206 of Chapter 55 of the New York City Charter (“Charter”) authorizes the New York City Department of Design and Construction (“DDC”) to implement, develop, and manage a mentoring program for small businesses and City-certified minority-and-women-owned business enterprises (“M/WBEs”). The mentoring program was established to provide participating mentees with the opportunity to bid on contracts designated for the program with tailored guidance, training and technical assistance from a mentor.

Further, Section 1309 of Chapter 56 of the Charter authorizes the City to establish a citywide small business and M/WBE mentoring program, greatly expanding the ability of the City to utilize this important and proven tool in increasing competition throughout the procurement process.

In furtherance of implementing the mentoring program, the PPB is codifying the procurement methods for contracts designated for both the DDC and Citywide mentoring program.

Section one of this rule amends the definition provision under Section 1-01(e) of the PPB Rules to include the term “mentoring program.”

Section two of this rule, among the other changes described further below, allows for the prequalification of vendors before the solicitation of bids or proposals for procurements designated for the mentoring program. The corresponding edits set forth the scope of prequalification for the mentoring program contracts, which includes the following:

- amending the circumstances of use to allow prequalification for procurements designated for a mentoring program,
- setting forth the criteria for developing a prequalified list (PQL) for mentoring program contracts,
- excluding procurements designated for a mentoring program from certain procedural requirements which are otherwise established under the Charter, including, but not limited to, the use of selective solicitation,
- amending the methods of selective solicitation to include selective solicitation under the mentoring program, and
- providing that M/WBE status may be considered in forming a PQL.

#### *Prequalified List*

The PPB is also proposing to streamline the processes surrounding PQLs. Section two of this proposed rule clarifies the use of citywide PQL, adds M/WBE status to the criteria that may be considered for inclusion on a PQL for certain types of procurements, and allows for City Chief Procurement Officer (CCPO) approved exceptions to the prequalification process. Duplicative obligations for publication and review are removed accordingly.

#### *Adverse Determination and Challenge of Adverse Determination*

The PPB is amending the provisions governing adverse agency determination on prequalification to align with the suspension of prequalification, as provided under the Charter, and remove the harsh consequences surrounding adverse determination.

Section two of this proposed rule includes suspension of prequalification as an adverse agency determination, clarifies the procedures related to challenging such adverse determination, and allows for CCPO's discretion on which determinations and modifications would be included in the VENDEX database (PASSPort portal and database).

The proposed amendment also eliminates the provision that deems a vendor's failure to respond to three consecutive solicitations a withdrawal from the PQL.

On March 19, 2024, the PPB voted to initiate the rulemaking process under the Citywide Administrative Procedure Act for this proposed rule amendment. A proposed version of these amendments was published in the *City Record* on April 26, 2024. A public hearing was held on May 28, 2024.

The PPB did not receive either written comments or oral testimony at the public hearing. In the absence of comments and in consideration of the PPB's discussions during the March public meeting, the PPB adopted the amendment on June 4, 2024.

The PPB's authority to promulgate these rules is found in sections 311, 324 and 1043 of the New York City Charter.

The new material added in the text of the rule is underlined and the deleted material is in [brackets]. "Shall" and "must" denote mandatory requirements and may be used interchangeably in the rules of this agency, unless otherwise specified or unless the context clearly indicates otherwise.

#### **Proposed Rule Change**

**SECTION 1. SUBDIVISION (e) OF SECTION 1-01 OF TITLE 9 OF THE RULES OF THE CITY OF NEW YORK IS AMENDED BY ADDING THE FOLLOWING NEW DEFINITIONS, IN THE APPROPRIATE ALPHABETICAL ORDER, TO READ AS FOLLOWS:**

Citywide PQL. A prequalified list (see PQL) established by an agency and designated by the CCPO to allow other agencies to solicit from the established list.

Mentoring Program. A program designed for agencies to provide prequalified mentee firms with (1) professional training and assistance from an established mentor firm and (2) exclusive opportunities to competitively bid for contracts designated for such program.

**§ 2. 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 or procurements designated for a mentoring program, 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 of these Rules.

(b) *“Special Case” Determination.* 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 or a procurement designated for a mentoring program, or as otherwise approved by the CCPO, upon the CCPO’s determination that use of the PQL is in the best interest of the City, 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;
- (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; or
- (5) the procurement is designated for a mentoring program as authorized by law.

(d) *Criteria.* [Criteria] In developing a PQL for a procurement of goods, services, construction-related services, or a procurement designated for a mentoring program, the 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]
- (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.]; and
- (11) status as an M/WBE.

In developing a PQL for a procurement of construction, except for a procurement designated for a mentoring program, the agency shall use, at minimum, the criteria listed in paragraphs (1) through (10) of this subdivision but may use other criteria as applicable.

(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 at least once 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)] (iii) 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, including M/WBE-only PQLs. 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.

[(v)] (iv) For any PQL for construction, in addition to the notices required by this [subsection] subdivision, the ACCO shall publish, [not less than] at least once 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 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. Except for a PQL for a procurement designated for a mentoring program, [At] 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.

(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. Except for a PQL for a procurement designated

for a mentoring program or a PQL for which the CCPO has approved an alternate review schedule, [The] the ACCO shall [have] review:

(i) [ninety days from the date of submission of] a properly completed prequalification questionnaire within ninety days from the date of submission to approve or deny prequalification; and thereafter,

(ii) each affirmation submitted by vendors pursuant to subdivision (f) of this section to ensure that firms that no longer meet the criteria established shall be suspended from prequalification for a period no longer than three months or their certification shall be revoked, as set forth in subdivision (l) below.

(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, except for a procurement designated for a mentoring programs, must have no [less] fewer 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, or a procurement designated for a mentoring program, 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.]

(2) Any agency may solicit bids or proposals for a category of procurement or a particular procurement from a Citywide PQL.

(i) *Selective solicitation from a PQL.*

(1) *Definition and policy.* 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] where the benefits of additional competition are outweighed by the administrative cost of soliciting more than a minimum number of bids, or where a procurement is designated for a mentoring program. A determination to utilize selective solicitation for a particular procurement or for a particular category of shall be made by the ACCO and approved by the CCPO, unless otherwise provided by law or 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.

(2) *Minimum requirement.* When selective solicitation is used, it is essential that a minimum level of competition be sought.

(3) Methods of selective solicitation.

(i) *[Minimum requirement.* When selective solicitation is used, it is essential that a minimum level of competition be sought.

(ii) *Random selective solicitation.* Except as otherwise permitted by Sections 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)] (ii) *Rotational selective solicitation.* Rotational selective solicitation is permitted for construction and construction-related services pursuant to Section 3-03(h) of these Rules.

[(iv)] (iii) *Selective solicitation based on a determination that a vendor(s) is the best qualified.* 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 Sections 3-03(h) and 3-04(b) of these Rules will be utilized, the evaluation committee established pursuant to Section 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.

[(v)] (iv) *Selective solicitation and multiple awards.* 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 Section 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 Section 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).

[(vi)] (v) *Selective solicitation for procurements designated for a mentoring program.* Where the solicitation will result in the award of a contract designated for a mentoring program, the agency may select any method of solicitation under this paragraph, either alone or in combination with another method, or may restrict the solicitation to vendors who have been qualified in accordance with the criteria determined prior to the receipt of bids or proposals.

(j) *Prequalification not a finding of responsibility.* 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] shall be removed from the PQL.

(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, suspension, 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 suspended for no more than three months or 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.

(2) The ACCO shall notify the vendor in writing of a denial, suspension, 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, Bureau of Contract Administration, 1 Centre Street, Room 727, New York, NY 10007, (212) 669-2323.

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

[(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.]

(m) *Appeal of denial, suspension, 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, except that, if the determination indicates that delivery of an appeal by electronic means will be accepted, filing of the appeal may be accomplished by electronic delivery to the email address(es) specified in the determination.

(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.

(3) *Determination.* The Agency [head] Head shall consider the appeal and[,] shall make



a prompt written decision with respect to its merits and, for an appeal of a suspension, such prompt written decision shall be made prior to the expiration of the suspension period, 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.

(4) *Notification.* 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 both the CCPO for consideration of [any] modification to [the VENDEX database] PASSPort and to the Comptroller's Office.

(5) *Appeal of denial or revocation of prequalification to OATH.* The decision of the Agency Head or the head of DLS shall be final unless the denial or revocation is 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. 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 consideration of [any] modifications to [the VENDEX database] PASSPort.