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Pre-Qualification Belatedly Comes To New York City Projects

by: Henry L. Goldberg

In the early hours of July 1, 2008, a comprehensive, multi-faceted piece of legislation was agreed upon in Albany between legislative leaders and our "accidental governor," David Paterson (i.e. elevated to the position as a result of the resignation of Eliot Spitzer). Among the highly significant changes in New York construction law included in this legislative package was the Wick's Law/PLA "tradeoff," virtually eliminating the Wick's Law in New York State.

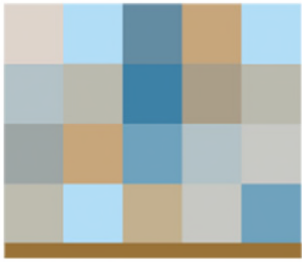
However, unnoticed was the fact that pre-qualification rights for New York City public agencies were also expanded beyond just emergency contracts. Mayor Michael Bloomberg's administration had long sought this increased authority. The ramifications of this aspect of the aforementioned political deal are just now beginning to be felt.

NYC DDC Launches "Pre-Qualification List" Process

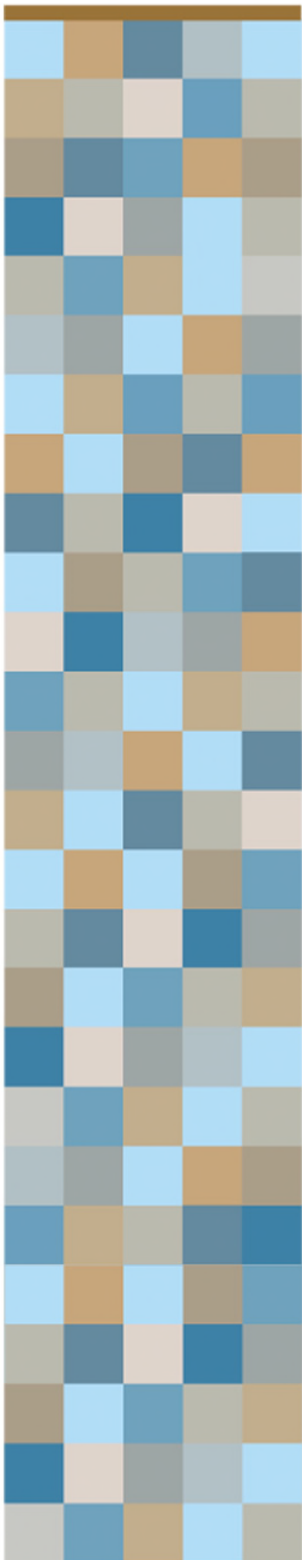
New York City Department of Design and Construction ("DDC") is spearheading the City's belated implementation of these expanded pre-qualification rights. DDC recommends that contractors apply to be put on pre-qualified list (PQLs) as soon as possible. Only those contractors who are prequalified for a particular PQL and are included on that PQL as of the bid solicitation date will be permitted to bid on projects selected for bidding by that particular PQL. The benefits of establishing PQLs, in the City's estimation, are that it will shorten contract procurement and award times and that bids will be received only from contractors who possess the requisite experience and qualifications. The potential problem, however, will be the elimination of basic contractor rights to "protest" procurement decisions in the face of subjective determinations by the City. Historically, such determinations relating to contractor "responsibility" were made post-bid and pre-award. At the outset, any participant with a bid bond was allowed to participate in the bid; personal or subjective "beliefs" of agency personnel were, at least in theory, irrelevant.

The City of New York asserts that it is committed to achieving excellence in the design and construction of its capital program, and that, consistent with this commitment, DDC will use pre-qualification lists when soliciting bids for selected projects. Pre-qualification, the City asserts, will allow an agency to evaluate the qualifications of vendors for the provision of particular categories of construction and related services, based on the respective vendors' work experience, size, the estimated cost of project, and other factors as determined by the agency chief contracting officer (ACCO), before issuing a solicitation for a specific contract.

The current PPB Rules regarding pre-qualification start out somewhat reasonably as follows:



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(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;

However, they end granting almost complete discretion via a "best interest of the City" standard for construction projects, as follows:

- (4) with respect to procurement of construction, any basis that is in the best interests of the City. (NYC Procurement Policy Board Rule 3-10, emphasis added)

It is hard to imagine a broader granting of discretionary authority to a public owner. Pursuant to General Municipal Law Section 103(15) and the NYC Procurement Policy Board Rule 3-10, prospective vendors must first prequalify for open PQLs. Only those contractors successfully prequalified as a result of a Request for Qualifications (RFQ) will be invited to bid on listed projects.

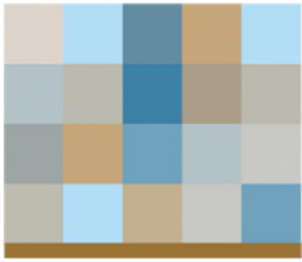
The City has organized this initiative by contractor size categories, as follows:

Small General Contractor

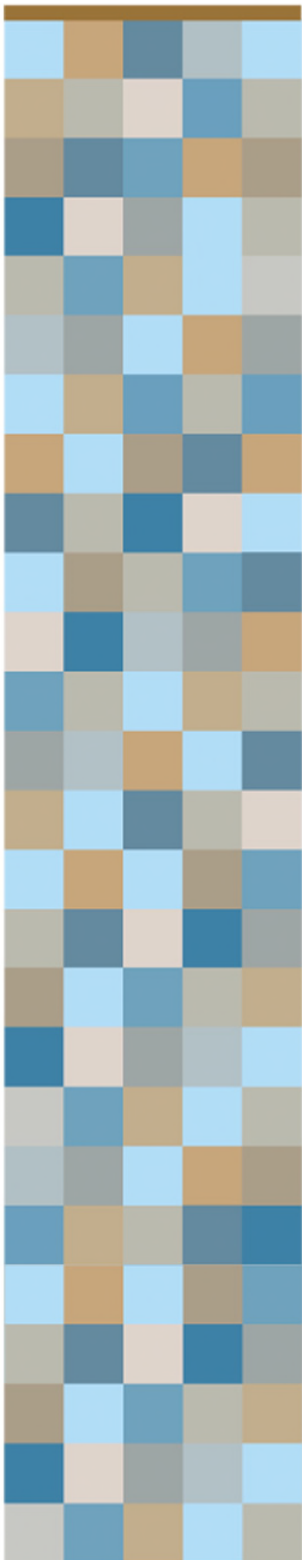
To apply for this standing "PQL" an applicant must have, during the previous consecutive five-years, successfully completed at least three general construction projects with a construction cost range of \$500,000 to less than \$3,000,000 for each project. In addition, the applicant must submit at least one project that they have performed or managed which included interior renovation and mechanical, electrical and/or plumbing system upgrades. This work may have been performed as a prime or subcontractor. M/WBE goal will be 50% in this category.

Medium General Contractor

An applicant for this PQL category must, during the same five-year time period, have performed work with a construction cost range of \$3M to \$10M for each project. In addition, the applicant must submit at least one project that they have performed or managed work which included interior renovation and mechanical, electrical and/or plumbing system upgrades. This work may have been performed as a prime or subcontractor. M/WBE goal will be 50%.



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Large General Contractor

An applicant for this PQL category must, during the previous five-year period, have successfully completed three GC projects with a construction cost range of greater than \$10M for each project. The applicant must also submit at least one project that they had performed or managed work which included interior renovation and building-wide system upgrades. This work may have been performed by the applicant as a prime or subcontractor. M/WBE goals will be established on a per project basis.

Special Experience Requirements

Applicants with experience and capabilities in general construction work must provide a summary list of at least three, and no more than six, projects that best represent the applicant's experience. A detailed "Exhibit B - Qualification Form" will be required for each project on the summary of projects list submitted by the contractor. M/WBE utilization plans will be required. In this regard, keep in mind that expenditures for supplies do not count. Separate M/WBE participation goals will be established for each project.

With regard to bonding, the normal 5% bid bond will be required as well as 100% performance and payment bonds. This will apply to all City projects of applicable size.

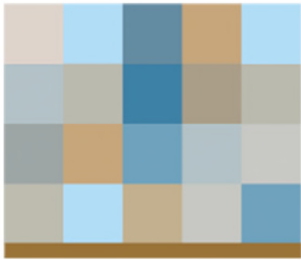
Significant DDC work is going to be procured through this initiative which will provide significant potential opportunity. From mid-2019 to mid-2020, DDC's portfolio consists of thirty-five library projects ranging from \$500,000 to \$30M. During that same approximately twelve-month period, contracting opportunities will include twenty-one Department of Homeless projects ranging from \$500,000 - \$15M. Similarly, additional upcoming PQL contracting opportunities will include eleven Department of Cultural Affairs projects ranging from \$1M - \$40M, as well as six NYPD projects ranging from \$1M to \$80M, including a new 116th Precinct facility. Information on most of these projects can be found on the DDC website.

MHH Commentary

Pre-qualification has long been controversial in the construction industry. The large, more experienced contractors will more readily and easily enjoy its benefits (and exclusivity). Smaller, less experienced firms will have a more challenging time. Clearly, entry into the public sector of the construction industry will be more difficult.

Bid Protests

It's also hard to imagine what a bid protest would look like under these rules. A contractor would need to challenge subjective and arbitrary (or worse) decisions that could seep into the discretionary selection process. While each generation of government engineers think they have a "better idea," history has shown that cronyism and fraud inevitably rear their ugly heads in public procurement systems, particularly with regard to one as large as New York City's. Government procurement agencies should not have unfettered control and discretion over who is allowed to enter the bid room for public bidding purposes. Competitive bidding laws often seem burdensome



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and unnecessary and a new generation of municipal engineers can often (and inevitably) forget past notorious procurement scandals. This pre-qualification "experiment" will need to be monitored carefully over time.

It remains to be seen how this new NYC PQL process plays out. However, if the difficulties the bureaucrats have had administrating the City and NYS M/WBE certification processes are any indication, this could get ugly. It also might be interesting to see what the interplay will be between the City having both the ability to certify prospective M/WBEs, as well as the broad added authority to pre-qualify the capabilities of public contractors generally.

The NYC DDC website (<https://www1.nyc.gov/site/ddc/about/about-ddc.page>) provides more information about DDC's RFQ's and the PQL procedures, as well as upcoming opportunities. You will also be able to locate a PQL application on the website.

Any issues raised in this Alert may be addressed to Mr. Goldberg who can be reached at: (516) 873-2000 or by email at hgoldberg@moritthock.com.



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