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## HPD'S Criteria for Awarding Affordable-Housing Construction Contracts<sup>1</sup> by John Edward Dallas

When the value of a procurement, or contract, for construction<sup>2</sup> and construction-related services is more than \$50,000, it ceases to qualify as a small purchase<sup>3</sup> and, consequently, the city Department of Housing Preservation and Development (HPD) is obligated under the City's Procurement Policy Board Rules (hereinafter "the PPBR") to resort to competitive sealed bidding.<sup>4</sup>

The competitive sealed bidding process has several defining aspects:

- sealed bids are publicly solicited by HPD's issuance of a solicitation called an Invitation for Bid (IFB)
- an award is to be made exclusively on the basis of the lowest price and price-related factors
- discussions with bidders are not mandatory and as a result not the norm, so that bids by and large stand and are evaluated as submitted
- late bids are disqualified under all circumstances<sup>5</sup>
- unless vendors will be solicited from a prequalified list, solicitations for competitive sealed bids must be publicly advertised<sup>6</sup>

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<sup>1</sup> This article was written in early August 2006. Its information sources are five in number and City-generated: (1) Vendor Information Manual, at <http://www.nyc.gov/html/selltonyc/html/tocvim.html>; (2) Procurement Policy Board Rules, at <http://www.nyc.gov/html/moc/ppb/html/rules/rules.shtml>; (3) "Contractor Responsibility—How the City Ensures That Its Contractors Are Responsible," Mayor's Office of Contract Services, at <http://home.nyc.gov/html/moc/html/contractor.html>; (4) "HPD and NYCEDC Request for Proposals for Coney Island Mixed-Use Development Opportunity," HPD – Developers–Request for Proposals/Qualifications/Offer, at [http://www.nyc.gov/html/hpd/html/developers/rfp\\_archive.shtml](http://www.nyc.gov/html/hpd/html/developers/rfp_archive.shtml); and (5) Coney Island Mixed-Use Opportunity Request for Proposal, at [http://www.nyc.gov/html/hpd/html/developers/rfp\\_archive.shtml](http://www.nyc.gov/html/hpd/html/developers/rfp_archive.shtml).

<sup>2</sup> The City's Procurement Policy Board Rules define "construction" as follows: "The process of building, reconstructing, rehabilitating, converting, altering, extending, improving, repairing, maintaining, or demolishing City real property or other public improvements. Their definition of "construction-related services" is: "Those services that may reasonably be required in the planning, design, or construction of real property or other public improvements. Such services shall include, but not be limited to, such services as architecture, engineering, construction supervision, construction management, planning surveys and reports, testing and investigation, and printing and blueprinting." PPBR § 1-01.

More specifically, the types of construction and construction-related services commonly purchased by City agencies, including HPD, fall in the following categories, as described by the City: architectural and engineering services, construction of new buildings and facilities, alteration of office space, paving and concrete work, elevator installation and repair, asbestos assessment and removal, air conditioning and heating repair and maintenance, roof installation and repair, landscaping, interior design and decorating, demolition, and road construction, repair, and maintenance. "How the City Buys," Chapter 1, Vendor Information Manual, at 2, at <http://www.nyc.gov/html/selltonyc/html/tocvim.html>.

<sup>3</sup> "Small Purchases," Chapter 3, Vendor Information Manual, at 19, at <http://www.nyc.gov/html/selltonyc/html/tocvim.html>.

<sup>4</sup> "Competitive Sealed Bidding," Chapter 3, Vendor Information Manual, at 19, at <http://www.nyc.gov/html/selltonyc/html/tocvim.html>.

<sup>5</sup> "Submitting Your Bid," Chapter 3, Vendor Information Manual, at 21, at <http://www.nyc.gov/html/selltonyc/html/tocvim.html>.

<sup>6</sup> "Unless vendors will be solicited from a prequalified list, solicitations for competitive sealed bids must be formally announced and advertised. Formal advertising is done by announcing the contract opportunity in the City Record and the

On the other hand, when factors in addition to price are important enough to require evaluation or when the City is unable to define all the requirements of a contract for construction and construction related services, the City will use a competitive sealed proposal, also called a Request for Proposals and best known by its acronym RFP.<sup>7</sup>

With competitive sealed proposals, in contrast to competitive sealed bidding, not only is price not the determining factor, so that the lowest-responsible-bidder standard is *not* controlling, there also typically is a negotiating process between HPD and respondents to an RFP. Depending on the size and complexity of an RFP, negotiations may include discussion; persuasion; changes in positions; and give-and-take on price, schedule, technical requirements, type of contract, or other contract terms. This process can ultimately result in the submission by a prospective contractor of a “best and final offer,” a revamped proposal tailored to address issues raised during negotiations.<sup>8</sup>

In sum, the primary characteristics of competitive sealed proposals are:

- HPD issues a solicitation for proposals to potential vendors called a Request for Proposals (RFP)
- an award is not to be made strictly on the basis of the lowest price and price-related factors (respondents, then, cannot be in the strictest sense termed bidders, but, more appropriately, vendors, proposers or offerors)
- discussions with vendors are not only possible but routine, with the result that proposals<sup>9</sup> can be revised and resubmitted prior to being evaluated
- proposals are not automatically disqualified because of late submission<sup>10</sup>
- a public hearing may be required before final award of the contract, depending on its amount

The PPBR, in the interests of transparency, fairness, and the ethical and optimum employment of public dollars, dictate incorporation into RFPs of a number of requirements in the form of statements, notices, provisions, and certain types of information. For instance:

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City’s homepage, <http://www.ci.nyc.ny.us>. After clicking on ‘Selling to New York City Agencies’, click on Procurement Bulletin Board System.” “Competitive Sealed Bidding,” Chapter 3, Vendor Information Manual, at 19, at <http://www.nyc.gov/html/selltonyc/html/tocvim.html>.

The City Record, the city government’s official newspaper, published by the Department of Citywide Administrative Services “lists announcements of intended purchases valued at more than \$25,000 for goods and services, \$50,000 for construction and construction-related services and \$100,000 for Information Technology. Each announcement runs at least one day and provides information concerning the type of proposed procurement and instructions on how to obtain a copy of the bid documents.” “Methods of Locating Procurement Opportunities,” Chapter 2, Vendor Information Manual, at 4, at <http://www.nyc.gov/html/selltonyc/html/tocvim.html>.

<sup>7</sup> “Competitive Sealed Proposals,” Chapter 3, Vendor Information Manual, at 24, at <http://www.nyc.gov/html/selltonyc/html/tocvim.html>.

<sup>8</sup> “What Is Negotiation?,” Chapter 3, Vendor Information Manual, at 25, at <http://www.nyc.gov/html/selltonyc/html/tocvim.html>.

<sup>9</sup> By its very nature a counteroffer or an invitation to further negotiations, a proposal is thoroughly dissimilar to a bid, which figures in a process that admits of no discussion of a solicitation’s terms and conditions. Hence the PPBR’s definition of a proposal: “An offer made by one person to another as a basis for negotiations for entering into a contract.” PPBR § 1-01.

<sup>10</sup> “Submitting Your Bid,” Chapter 3, Vendor Information Manual, at 21, at <http://www.nyc.gov/html/selltonyc/html/tocvim.html>. See also PPBR § 3-03(f)(5), which says: “A late proposal may only be accepted when it is determined by the ACCO that it is in the best interest of the City to do so.” For further information on what comprises the conditions under which late proposals can be accepted, see PPBR § 3-03(f)(5)-(8).

- statement of work or scope of services statement, performance requirements, and any special instructions
- the specific criteria and the relative weight of each criterion or category of criteria that will be used to evaluate the proposals
- a statement of intent to award a multi-term contract, and an estimate of the quantity of services required for the proposed contract period
- general<sup>11</sup> as well as special terms and conditions, if applicable
- a notice of the proposer's rights to appeal certain decisions
- a notice of the City's prompt payment policy, including an explanation of the requirements for invoicing
- a notice that contract award is subject to the applicable provisions of federal, State, and local laws and executive orders requiring affirmative action and equal employment opportunity<sup>12</sup>
- a provision that proposers should give specific attention to the identification of 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<sup>13</sup>

The PPBR mandate that no other factors or criteria shall be used in the evaluation and award of the contract except those specified in the RFP.<sup>14</sup> One of the obvious objectives of this restriction is the creation of a level playing-field for all RFP respondents, most notably through their equal access to the same, unvarying information for the preparation of their proposals.

A statement of work or scope of services statement, performance requirements, and any special instructions would entail, using as an example the recent Coney Island Mixed-Use Opportunity RFP, a detailed description of the project (e.g., the development site, neighborhood context, and development program), project requirements and guidelines (e.g., design guidelines; zoning, land use and environmental issues and approvals), and information on the RFP process, the developer selection process, submission requirements, and the preference given to designs that incorporate high-performance and green technology.

At the core of the developer selection process – and hence of the competitive sealed proposal, or RFP, process – are the competitive selection criteria: the specific criteria, each carrying a certain number of points, that will be used to evaluate proposals. Since the latter will be evaluated, rated, and ranked according to the extent of their cumulative capability to satisfy the competitive selection criteria, a vendor

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<sup>11</sup> A prime example of a general term and condition is that an RFP must state 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 factors or criteria that are set forth in the RFP. PPBR § 3-03(k).

<sup>12</sup> As a point of interest, at first consideration the City's equal employment opportunity policy with respect to contractors and subcontractors that it hires not only permits the employment of undocumented workers but also *forbids* their exclusion from apprenticeship programs. PPBR § 1-03(c) states: "It is the policy of the City of New York to promote equal employment opportunity for women and minority group members by City contractors and subcontractors and to ensure that all persons employed or seeking employment with such contractors and subcontractors are protected from unlawful discrimination as to race, creed, color, national origin, sex, age, disability, marital status, sexual orientation, or *citizenship status* (and from any other unlawful discrimination pursuant to federal, state, local laws and executive orders) with regard to all employment decisions, including recruitment, hiring, compensation, fringe benefits, *training and apprenticeship*, promotion, upgrading, demotion, downgrading, transfer, lay-off, termination, and all other terms and conditions of employment...." (Emphasis added.)

<sup>13</sup> PPBR § 3-03(a).

<sup>14</sup> PPBR § 3-03(g).

should pay close attention to the criteria and the relative importance of each factor, developing that part of the proposal which corresponds to a factor on which more emphasis is placed.<sup>15</sup>

Broadly expressed, the Coney Island RFP offers six competitive selection criteria:

- residential development experience (e.g., history of delivering projects on time and within budget; the absence of purchaser and/or tenant complaints); rental-housing management experience (e.g., track record of compliance with eligibility, record-keeping, and reporting requirements of subsidy programs for tenants), and capacity (e.g., whether current workload will impede the ability to meet the project's development timeframe)
- residential affordability and least subsidy (production of the most units with the least amount of public resources)
- community-facility operator experience, management, and capacity
- community-facility program quality and least subsidy
- quality of design proposal (HPD will evaluate each architectural proposal to determine the project's positive impact on community revitalization and responsiveness to the neighborhood context)
- sustainable design and development criteria (proposals should incorporate high-performance and green building techniques and features)<sup>16</sup>

The rating or point system is never specified in the Coney Island RFP; it is only referred to. For example, "Additional points will be awarded to proposals that incorporate such concepts," states the RFP with respect to the sustainable design and development criteria.<sup>17</sup> Similarly, it says preference will be given to proposals that produce the greatest number of units with the least amount of subsidy.<sup>18</sup> There is also preference for proposals that incorporate the community's desired program elements into the community facility.<sup>19</sup> In addition, proposals that exceed the required sustainable elements by including the most optional LEED qualifying points will achieve a high design ranking.<sup>20</sup>

Before they can be assessed for their aptness to fulfill the competitive selection criteria, proposals have to meet certain threshold requirements or else they will be disqualified.<sup>21</sup> In the case of the Coney Island RFP, these requirements are:

- all required forms must be completed
- at least one principal of the applicant must have had prior development experience, as principal, by successfully completing the new construction of at least one project of comparable size to the one proposed in the RFP – one mixed-used project of at least 100 residential units within the past seven years
- the community facility operator must have successfully operated similar facilities in the New York metropolitan area for at least five years within the past 15 years

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<sup>15</sup> "What Is an RFP?," Chapter 3, Vendor Information Manual, at 25, at <http://www.nyc.gov/html/selltonyc/html/tocvim.html>.

<sup>16</sup> Coney Island Mixed-Use Opportunity RFP, at 19 of 105, at [http://www.nyc.gov/html/hpd/html/developers/rfp\\_archive.shtml](http://www.nyc.gov/html/hpd/html/developers/rfp_archive.shtml).

<sup>17</sup> *Id.* at 20 of 105.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 20 of 105.

<sup>20</sup> *Id.* at 21 of 105.

<sup>21</sup> *Id.* at 17 of 105.

- applicants must be capable of beginning construction within 12 months from the date of the Negotiation Letter (the impact of other projects, in progress or pending, will be taken into account)
- proposed development projects must meet all minimum requirements outlined in the RFP's program description, requirements, and guidelines
- applicants must demonstrate adequate financial resources to develop a project of the scope proposed in their submission.
- a minimum of 20 percent of the residential units must be affordable to households whose earnings do not exceed 80 percent of AMI, as adjusted for household size<sup>22</sup>
- applicant's financing plan (e.g., estimated development costs and proposed rents and/or sales prices for the housing units) must be considered feasible.<sup>23</sup>

Proposals that meet the threshold requirements undergo an evaluation process based strictly on the competitive selection criteria detailed in the RFP. As required by the PPBR, proposals are reviewed and graded by a committee of not less than three persons "with knowledge, expertise, and experience sufficient to make a fair and reasonable evaluation."<sup>24</sup>

The committee must keep a record of the evaluation process through rating sheets or another type of evaluation form signed and dated by all committee members.<sup>25</sup> Evaluation materials can be amended; however, the initial and amended documents must be saved.<sup>26</sup>

The committee has the authority to contact qualified applicants – those who proposals are acceptable or are reasonably likely to be made acceptable – to discuss their proposals for the following purposes:

- promoting understanding of the City's requirements and the vendors' proposals and capabilities
- obtaining the best price for the City
- arriving at a contract that will be most advantageous to the City, taking into consideration price and other evaluation factors set forth in the RFP<sup>27</sup>

After the committee has made its selection, the Agency Chief Contracting Officer (hereinafter the "ACCO")<sup>28</sup> is required to issue a Recommendation for Award,<sup>29</sup> which must include at the very least the following information:

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<sup>22</sup> *Id.* at 19-21 of 105.

<sup>23</sup> *Id.* at 17 -19 of 105.

<sup>24</sup> PPBR § 3-03(g)(1).

<sup>25</sup> Can these evaluation records "FOILed" for? On July 13, 2006 I e-mailed Neil Coleman, HPD's Assistant Commissioner of Communications, in this regard. His reply in a July 14, 2006, e-mail: "...[W]e can't make a hypothetical judgment about what would be obtainable through FOIL. If you want to make a FOIL request, we can respond." Preliminarily, I believe that the rating sheets or forms that serve the same purpose are available under FOIL because they fall outside the 10 categories of information that may be legally withheld from disclosure to the public. However, it stands to reason the sheets and other evaluation records could be requested under FOIL only *after* a contract has been awarded. Otherwise, the request would most probably run afoul of one of the aforesaid 10 categories prohibiting disclosure of a record if it would interfere with present or imminent contract awards.

<sup>26</sup> PPBR § 3-03(g)(2).

<sup>27</sup> PPBR § 3-03(g)(3)(i)-(iii).

<sup>28</sup> HPD has two ACCOs: Jay Bernstein, Deputy ACCO, and Sharon Gardner, Deputy ACCO. Located at 100 Gold St., New York, 10013, Mr. Bernstein's room number is 8S4 and Ms Gardner's, 8S5. His phone is (212) 863-6657; hers is (212) 863-6145. Their fax number is (212) 863-5455.

- justification of the award
- if the award is for goods, services or construction for which there is no agency price history, a price comparison of the proposed price versus previous price, if applicable, with the rationale for any increases supported by cost/price analysis data
- reason for multiple award, and multiple award task order contracts
- any special terms and conditions included in the proposed contract via the use of cost/price analysis techniques
- affirmative finding of responsibility for the selected proposer(s)
- efforts to negotiate better value<sup>30</sup>

After the ACCO has made the determined that (1) the contract award was made to the responsible proposer, (2) whose proposal is most advantageous to the City, (3) taking into consideration the price and such other factors set forth in the RFP, all as described in the Recommendation for Award, followed by his or her obtainment of all required approvals, the ACCO awards the contract to the proposer.<sup>31</sup>

It should be mentioned that the PPBR require that, all other optional or mandatory criteria in or related to an RFP notwithstanding, the City award contracts only to responsible contractors.<sup>32</sup> This requirement is a constraint that supercedes even the City's paramount goal of maximizing to the fullest extent its purchasing power<sup>33</sup> and in the process making taxpayers' dollars go as far as possible.

It is precisely for this reason that the PPBR articulate the following policy: "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."<sup>34</sup>

The PPBR define a responsible contractor not only as one which has the capability in all respects to perform fully the contract requirements. As importantly, a responsible contractor also has the business integrity to justify the award of public dollars.<sup>35</sup> Therefore, a contractor may adjudged non-responsible and thus unfit to be the recipient of a contract, if, for example, it has been determined that the contractor committed violations of employment-related federal, state or local laws or an 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.<sup>36</sup>

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<sup>29</sup> The PPBR require the Contracting Officer to prepare a Recommendation for Award when procurements exceed the small purchase limits; in the case of construction and construction-related services, this amount is \$50,000. PPBR § 2-09(a)(2).

<sup>30</sup> PPBR § 3-03(k)(1)-(6).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* § 2-08(a)(1).

<sup>33</sup> PPBR - Procurement Policy Board, New York City Procurement Policy Board, at <http://www.nyc.gov/html/moc/ppb/html/rules.rules.shtml>.

<sup>34</sup> PPBR § 2-08(a)(2).

<sup>35</sup> *Id.* at § 2-08(b)(1).

<sup>36</sup> *Id.* at § 2-08(g)(1)(iii). Interestingly, The PPBR obligates the Contracting Officer in making or substantiating the determination of non-responsibility or responsibility to use, among others, "such other sources as publications, suppliers, subcontractors and *customers* of the prospective contractor, financial institutions, other government agencies, and business and trade agencies." (Emphasis added.) *Id.* at § 2-08(g)(1)(vi). This raises an interesting question: Does "customers" encompass end-users—homeowners and renters?

To assist the ACCO – or, in the event of an appeal, the Commissioner of HPD or the City Chief Procurement Officer (hereinafter the “CCPO”) at the Mayor’s Office of Contractor Services – in reaching a responsibility determination, all vendors or contractors that are under consideration for any single contract for construction or construction-related services valued at \$100,000 or more must complete and submit a VENDEX Questionnaire.<sup>37</sup> Moreover, the principals of the business must submit a Principal Questionnaire.<sup>38</sup> Furthermore, any contract that requires completion of the VENDEX Questionnaire cannot be awarded without a previous review of the contents of the form by the City’s Department of Investigation.<sup>39</sup>

VENDEX Questionnaires are valid for three years. Upon signing a contract with HPD, contractors must certify that their VENDEX filings are current, accurate, and complete.<sup>40</sup> The information put on the questionnaire is subsequently stored on the VENDEX Computer System, a citywide database containing information on contractors that do business with the City, and is supplemented with information from City agencies (e.g., contract performance evaluations; liens and warrants compiled by the City’s Department of Finance) and local, state, and federal law-enforcement agencies (e.g., violations of labor-standards laws and regulations).<sup>41</sup>

This information along with VENDEX’s compilation of debarred, suspended, ineligible, and non-responsible contactors boosts city agencies’ competence and effectiveness in rooting out those contractors who do not meet the PPBR’s standard of responsibility.<sup>42</sup>

Lastly, before HPD awards (or exercises a renewal option in) a contract for construction or construction-related services that was solicited by a method other than competitive sealed bidding and that is valued in excess of \$100,000 – which is the case with the Coney Island RFP – HPD is required to hold a public hearing.<sup>43</sup>

Notice of the hearing must be published in the City Record at least once not less than the 10 days prior to the event date or a shorter period approved by the CCPO.<sup>44</sup> Testimony can be given in person or in writing at the hearing, or it may be submitted by mail, in which case, to be part of the official record, it

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<sup>37</sup> *Id.* at § 2-08(e)(1)(i). This provision of the PPBR echoes a City ordinance, Section 6-116.2(b) of the New York City Administration Code.

<sup>38</sup> *See* Contractor Responsibility – Mayor’s Office of Contract Services, Web site of Mayor’s Office of Contract Services, at <http://home.nyc.gov/html/moc/html/hearings.html>.

<sup>39</sup> *Id.* at § 3-03(e)(18). More explicitly, before HPD can make a determination of vendor responsibility, it is mandated by the PPBR to “request the Department of Investigation to review 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.” *Id.* at § 2-08(f).

<sup>40</sup> *Id.* at § 2-08(e)(2).

<sup>41</sup> *See* Contractor Responsibility – Mayor’s Office of Contract Services, Web site of Mayor’s Office of Contract Services, at <http://home.nyc.gov/html/moc/html/hearings.html>.

<sup>42</sup> *See* PPBR § 2-08(g)(1)(i)-(iii). In addition, as a resource accessible also to the taxpayers, VENDEX’s data apparently fulfills in part the public-disclosure requirement regarding City contracts and vendors imposed by PPBR § 1-04(a) on the Mayor and, thus, mayoral agencies: “The Mayor shall ensure that copies of City contracts and other standard information regarding City contracts and vendors (including information relating to vendor’s qualification and performance evaluations, contract audits, and decisions regarding suspension and debarment) are reasonably available for public inspection as provided by law, with adequate protection for confidential information....”

<sup>43</sup> *Id.* at § 2-11(a).

<sup>44</sup> *Id.* at § 2-11(c)(1).

must be received by the date of the hearing at the Mayor's Office of Contract Services.<sup>45</sup> The hearing must be recorded by audiotape or transcript and this record of the proceedings is public information.<sup>46</sup>

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<sup>45</sup> Contract Public Hearings Calendar – Mayor's Office of Contract Services, Web site of Mayor's Office of Contract Services, at <http://home.nyc.gov/html/moc/html/hearings.html>.

<sup>46</sup> PPBR at § 2-11(d).