



***THE RFP:
REFORM FOR PROCUREMENT***

PRELIMINARY RECOMMENDATIONS

STAFF REPORT TO
THE NEW YORK CITY
CHARTER REVISION COMMISSION

June 26, 2003

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EXECUTIVE SUMMARY

Chapter 13 of the Charter is the portion of the Charter that governs how the City purchases goods, services, and construction. The staff of the Charter Revision Commission has, on the direction of the Commission, studied whether the Charter's procurement provisions should be amended and, if so, how they should be amended. While many people now believe that Chapter 13 needs to be reformed, there is less agreement as to what steps should be taken. This report discusses the staff's proposals to revise Chapter 13, proposals that are summarized below. In arriving at its proposals, the staff consulted many people, and heard testimony both from elected officials and experts in the field of governmental purchasing. In analyzing the issue of procurement reform, one may wish to consider the following principles, which are principles that the Commission staff also considered:

- Prevention of fraud, favoritism, and corruption.
- Promotion of efficiency and effectiveness in the purchase of goods and services.
- Encouragement of accountability, understood in the context of the 1989 Charter provisions as to the primacy of mayoral responsibility for the procurement function.
- Promotion of fairness for vendors and enhanced access for them to the City's procurement system.

¹ This report was prepared by Alan Gartner, Executive Director, and Howard Friedman, Special Counsel, with assistance from Anthony Crowell, Chief Counsel. It reflects the contributions and perspectives of staff members of the Charter Revision Commission, including Elaine Reiss and Kevin Heath, and the many experts from the City procurement and vendor communities.

The Commission staff has proposed the following revisions to procurement-related sections of the Charter:

- Goals of Chapter 13—The staff proposes adding language to Chapter 13 setting forth certain principles and aspirations applicable to City procurements.
- Alternative procurement methods—The staff proposes repealing certain sections that are overly restrictive of how certain procurements are done, and granting the Procurement Policy Board (“PPB”) greater power to promulgate rules governing those procurement methods. This will give the City greater flexibility, through the PPB’s rulemaking power, to tailor its rules as appropriate.
- VENDEX—The staff proposes amending the Charter so that the Mayor and Comptroller are jointly responsible for all policy decisions related to VENDEX—the City’s computerized vendor integrity data system—and may implement those decisions through joint rulemaking.
- Employment reports—The staff proposes amending the Charter provision governing the submission of employment reports to the Department of Small Business Services (“DSBS”), so that DSBS will have greater flexibility to promulgate rules governing the content of those reports, the procedural rules related to them, and the consequences from the filing of inadequate reports.
- Registration—The staff proposes adding to the Comptroller’s registration powers the ability to make a one-time request for additional information from a procuring agency. The staff also proposes amending the Charter’s registration section so that if the Comptroller fails to act within the specified time frames, the Mayor may take the necessary payment steps.
- Purchase of specific goods—The staff proposes allowing the Department for Citywide Administrative Services (“DCAS”), which has the general responsibility for purchasing goods for City agencies, to delegate the purchase of a specific good to another agency, usually in the case where that agency would be the only one that would need the good.
- Security—The staff proposes amending the Charter’s procurement public notice and hearing requirements to allow for exceptions where

disclosure of information or strategy could be detrimental to the security of the City or its citizens.

- Financial audits—The staff proposes giving the PPB the ability to promulgate rules governing annual financial audits of contractors.

INTRODUCTION

The Commission Members

On March 26, 2003, Mayor Michael R. Bloomberg appointed Dr. Frank J. Macchiarola, President of St. Francis College, as Chair of the Charter Revision Commission, and on April 6 appointed ten other distinguished leaders from the civic, academic, and business communities. The Commission is the most diverse in the City's history, a majority of its members from boroughs other than Manhattan.

Dr. Frank J. Macchiarola (Chair) is President of St. Francis College in Brooklyn. His service to New York City stretches back three decades and he was most recently called upon to be the mediator who helped settle the Broadway musicians strike. He served as chief of staff of the Emergency Financial Control Board (1975-1976), schools chancellor (1978-1983), and president of the New York City Partnership (1983-1987). He chaired the Districting Commission (1990-1992) and he has been a member of two Charter Revision Commissions (1986-1988 and 1983), the Campaign Finance Board (1988), the Water Board (1985-1988), and the Tax Study Commission (1986-1990), and chaired a New York City Partnership study of the Board of Elections (1985). His career has included service at the City's public and private universities: as Dean of the Benjamin N. Cardozo Law School, Yeshiva University; as Professor and Assistant Vice President, Columbia University; as Professor and Assistant Vice President, at Baruch College and The Graduate School and University Center, The City University of New York.

Cecilia Norat (Vice Chair) is Director of State Relations for the American International Group. She was a member of the 2002 Charter Revision Commission and is a resident of Manhattan.

Pat Gatling (Secretary) is the Commissioner and Chair of the New York City Commission on Human Rights. She was a member of the 2002 Charter Revision Commission and is a resident of Manhattan.

Jerry Garcia is Vice President and Global Business Manager at J.P. Morgan Investor Services. He was a member of 2002 Charter Revision Commission and is a resident of Brooklyn.

Mohammed Khalid is a Doctor of Dental Medicine and President both of the Iron Hill Civic Association, and the Pakistani Civic Association of Staten Island. He is a resident of Staten Island.

William Lynch, Jr. is Chief Executive Officer of Bill Lynch Associates, and a former New York City Deputy Mayor under Mayor David Dinkins. He is a resident of Manhattan.

Steve Newman is Chief Operating Officer of the Medical and Health Research Association, and a former New York City Deputy Comptroller. He is a resident of Queens.

Father Joseph O'Hare, S.J. is President of Fordham University, and the former Chair of the New York City Campaign Finance Board. He is a Bronx resident.

Katheryn Patterson is a former law partner at Coudert Brothers. She is a resident of Manhattan.

Fred Siegel is a Professor at the Cooper Union for Arts and Sciences, and a former Fellow at the Institute of Advance Studies. He is a resident of Brooklyn.

Veronica Tsang is Vice President of Chase Workplace Financial Services. She is a resident of Queens.

The Commission Staff

The Commission is staffed mainly by career public servants and pro bono attorneys and is led by its Executive Director, Alan Gartner, and Chief Counsel, Anthony Crowell.

Alan Gartner has served at The Graduate Center, CUNY, as Dean for Research and Co-Director, National Center on Educational Restructuring and Inclusion; as Executive Director, Division of Special Education, New York City Public Schools; and as Executive Director, New York City Districting Commission. He is the author or co-author of greater than two-dozen books on education, race, social policy, and disability. Dr. Gartner is on leave from his position as Research Director in the Office of Dennis Walcott, Deputy Mayor for Policy.

Anthony Crowell has extensive experience with the process of Charter revision. He served as Co-Executive Director to the 2002 Charter Revision Commission, General Counsel of the 2001 Commission and Counsel to the 1999 Commission. Prior to joining the City, he managed government affairs and policy at the International City/County Management Association (ICMA) in Washington, D.C. He is an adjunct professor both

at Brooklyn Law School and New York Law School, where he teaches municipal law. He has published numerous articles on public management and legal affairs. Mr. Crowell is on leave from his position as Special Counsel to the Mayor.

Other members of the staff include: Francis Barry, Research Director; Paul Elliott, Communications Director; Howard Friedman, Special Counsel; Mary Rose O'Connell, Deputy Chief Counsel; Elaine Reiss, Pro Bono Counsel; Jonathan Rosenbloom, Special Counsel; Owen Stone, Deputy Director for Communications and Research; Dana Shonk, Special Assistant; Mark Tyler, Chief of Staff and Deputy Chief Counsel; Sara Vidal, Director of Community Affairs; Richard Wager, Senior Advisor; and Jimmy Yan, Deputy Chief Counsel. The Commissions legal and research interns include: Rebecca Adams, Justin Bernstein, Krystal Castle, Shawn Clark, Ralph Constantino, Tom Donohoe, Ariel Dvorkin, Matt Elkin, Shakima Figuera, Brian Kaszuba, Kryzstof Lach, Allica Lam, Tiffany Leyseth, Tucker McKee, Jinja Murray, Jae Woo Park, Erick Payton, Ingrid Rodriguez, David Shyer, Harold Thompson and Chris Watson.

The Commission's Public Outreach and Proceedings

The Commission pursued its mission from the start by reaching out to the public. Prior to its first meeting, the Commission published, on a daily basis, the public notice announcing the meeting in the *City Record* and on its website at www.nyc.gov/charter. The notice was mailed to approximately 3,000 individuals on the mailing list of the 2002 Charter Revision Commission. Shortly thereafter, the Commission sent a second notice with the complete listing of all upcoming public meetings and hearings. This notice was

also published on a daily basis in the *City Record* and mailed to approximately 9,000 individuals on a mailing list that combined those of the 2002 Charter Revision Commission and the 2002-2003 Districting Commission. In response to the Chair's solicitation, the Commission's staff received many letters, telephone calls and e-mails either requesting information on or containing proposals for Charter revision.

Scope of Review

On April 14, 2003, the Commission held its initial public meeting. Chairman Macchiarola stressed that the Commission was committed to reviewing the entire Charter and encouraged the other Commissioners, the public and City agencies to continue to raise issues for possible Charter revision. Chairman Macchiarola emphasized that the Charter review proceedings would be fair and open to the public. The Commission staff provided an orientation to the Commission members on the Charter, the process of Charter revision and the range of issues addressed by the previous three Charter Revision Commissions: the 1998 Powers Commission, the 1999 and 2001 Mastro Commissions, and the 2002 McGuire Commission. Briefing binders containing the public reports of prior Commissions were given to the Commissioners.

Between May 14 and June 2, 2003, the Commission held nine meetings, including public hearings and expert forums, in all five boroughs which received extensive public participation.² These events were held on May 13 and May 27 in Manhattan; May 22 and

² The Queens hearing, held at LaGuardia Community College, was directly accessible by four major subway lines as well as bus lines. The Brooklyn hearing at DeKalb Branch of the Brooklyn Public Library, was accessible by subway lines as well as numerous bus lines. Manhattan's public hearing at the Adam Clayton Powell State Office Building was easily reached by subway as well as by bus. The hearing at Eugenio de Hostos

May 28 in Queens; May 20 in Staten Island, May 14 and May 29 in Brooklyn; and May 19 and June 2 in the Bronx. All members of the public were given three minutes to speak at the public hearings, but many spoke for more than the allotted time.

At the June 2 public meeting, the Chair, after extensive discussion with the Commission, directed the staff to prepare reports with preliminary options and recommendations in three areas: nonpartisan elections, procurement, and agency reorganization. He also asked the Commission and staff to continue in its review of the entire Charter.

Community College in the Bronx was accessible both by subway and bus. The Staten Island hearing, held at Curtis High School, was accessible by the Staten Island ferry and by car, a principal means of transportation for Staten Islanders. All of these facilities were fully handicap accessible and equipped to accommodate more than 200 persons. Additionally, sign-language or translation services in Chinese, Korean and Spanish were made available.

DISCUSSION

Chapter 13 of the Charter covers procurement. It has, through many influences discussed below, taken its current form. Although its goals when developed were salutary, there is now a consensus that Chapter 13 needs to be reformed, although there is less consensus in the procurement community³ as to what steps should be taken. The following sections discuss the staff's proposals to revise Chapter 13. In light of the procurement process's central role in the City's ability to function and to deliver services to its citizens, these revisions are vitally important.

A. History

Although the current version of Chapter 13 contains provisions traceable back to the period of the Tweed Ring scandal of the 1870s, Chapter 13 is in large part the product of revisions proposed by several commissions created in response to the Parking Violations Bureau scandal in 1986 and the abolition of the Board of Estimate following the U.S. Supreme Court's decision in Board of Estimate v. Morris, 489 U.S. 688 (1989), holding it unconstitutional. Two State-City Commissions on Government Integrity—the Sovern Commission and Feerick Commission—as well as a study, commissioned by the Koch Administration, of the City's procurement system by the Institute of Public Administration, significantly influenced members and staff of the 1989 Charter Revision Commission. In addition, the Model Procurement Code developed by the American Bar

³ The procurement community includes, within the City government, the Mayor's Office of Contracts, the Procurement Policy Board, the Law Department, the Office of Management and Budget, the Department of Small Business Services, the Department of Investigation, the Agency Chief Contracting Officers, the Comptroller's Office, and the Council. The community also includes private companies and not-for-profit organizations, within various industries, that do business with the City.

Association was a significant influence on the Commission's work, leading to the creation of a procurement rule making board, the Procurement Policy Board (“PPB”).

In 1990, the PPB undertook its rulemaking mission with great zeal. The total number of pages of PPB rules increased steadily during the early years, especially after the PPB added special rules for human service contracts. The PPB considered special rules for human service contracts to be appropriate as the City was required, for the first time, to conform human services contract practice to the standards applicable to other sectors of the vendor community. Then, beginning in 1994, the PPB reversed the trend, streamlining its rules as an increasingly professionalized procurement staff was deemed less in need of minute direction and control from the rules.

Despite significant reforms over the past decade, there continues to be concern with the procurement process. Both the vendor community and the City’s own procurement community note the overly rigid procurement rules under which the City is required to operate, and the delay and cost that result. The Commission staff has focused many of its proposals to revise the Charter on ones that would give greater flexibility to the procurement community, particularly agency’s ACCOs (Agency Chief Contracting Officers), while at the same time ensuring that mayoral accountability is not diminished. The goal of the flexibility is to continue to achieve a number of the goals of the current Charter but do so, to a large extent, through rulemaking, so that the means to achieve those goals may be tailored to particular circumstances.

B. Legal Framework

1. State Law

Both state and local law govern the City's procurement practice. Of primary importance is Article 5-A of the General Municipal Law (GML), which contains the basic procurement instruction to all municipalities. Specifically, GML § 103 requires all municipalities to award all (1) contracts for public works and (2) all purchase (i.e., goods or commodities) contracts over a specified minimum amount through competitive sealed bid after public advertisement to the lowest responsible bidder.

GML § 103, expressly and through judicial interpretation, provides seven exceptions to the competitive sealed bid requirement: (1) small purchases, (2) emergencies, (3) judicially created exceptions for special skills or judgment, (4) sole sources, (5) state laws that specifically allow municipalities to avoid competitive sealed bids, (6) local laws enacted before September 1, 1953 (known as the "special case" exception) and (7) change orders. State laws that specifically permit competitive sealed bid avoidance include those that permit municipalities to contract directly with other municipalities and state and federal agencies as well as to purchase directly off State Office of General Services contracts.

GML § 104-b instructs municipalities to adopt policies and procedures for alternative methods of procurement—those procurement processes other than competitive sealed bidding—so that contracts are let in a manner to assure prudent and economical use of public funds in the best interest of taxpayers, to obtain maximum quality at lowest possible cost under the circumstances and to guard against favoritism, improvidence,

extravagance, fraud and corruption. As discussed below, the Charter also contains a number of provisions governing alternative methods of procurement.

2. Chapter 13 of the Charter

As a result of revisions resulting from the 1989 Charter Revision Commission, the Charter's general procurement process is administered primarily by the PPB, the Mayor, and the Comptroller. The PPB adopts rules governing the process generally, the Mayor is responsible for the implementation of the procurement system, and the Comptroller registers contracts and provides oversight through its audit responsibilities.

The PPB consists of five members, three of whom are appointed by the Mayor and two of whom are appointed by the Comptroller. Charter § 311(a). The PPB is given broad authority to promulgate rules governing the procurement process; it explicitly lacks the authority to address the award or administration of any particular contract. Charter §§ 311(b) and (f). The Charter also specifically requires the PPB to promulgate rules governing methods for soliciting bids or proposals and awarding contracts, the manner in which City agencies shall administer contracts, standards and procedures for determining whether a bidder is responsible, and procedures for the fair resolution of contract disputes. Charter § 311(b).

The Charter gives the Mayor ultimate responsibility for the procurement of goods, services, and construction through specific contracts. For example, under Charter § 317(b), the Mayor (or Deputy Mayor) has a non-delegable duty to review and approve proposed contracts worth more than two million dollars, where the proposed contractor was selected by a method other than competitive sealed bidding, competitive sealed bidding from prequalified vendors, or competitive sealed proposals. In addition, under Charter § 322,

written approval of the Mayor is required prior to solicitation of bids or proposals whenever an agency determines that it should use an alternative procurement procedure for a particular procurement or type of procurement. Similarly, prior to filing for registration of a contract that has been let by other than competitive sealed bidding, the Mayor must certify that the relevant procedural requisites have been met. Charter § 327(a). Should the Comptroller object to the registration of a particular contract, the Mayor has the obligation to address the objection. Charter § 328. The Mayor's Office of Contracts ("MOC"), created by Executive Order, assists in the performance of the Mayor's functions in much the same way the Mayor's Office of Management and Budget assists in the performance of the Mayor's budget functions.

As to the specific methods of procurement that may be used, the Charter contains a requirement, consistent with State law, in favor of competitive sealed bidding in most situations. Charter § 312(b)(1). Competitive sealed bidding is where sealed bids are publicly solicited and opened and a contract is awarded to the lowest responsive, responsible bidder; the only variable at issue is price. The presumption in favor of competitive sealed bidding is consistent with the mandate of GML § 103(1), which, with certain exceptions, requires that all contracts for "public work" be awarded "to the lowest responsible bidder . . . after advertisement for sealed bids." Under Charter § 312(b)(1), competitive sealed bidding must be accomplished pursuant to rules of the PPB.

The Charter permits the City to use a procurement method other than competitive sealed bidding in a "special case." Charter § 312(b)(1). A "special case" is defined as a situation "in which it is either not practicable or not advantageous to the city to use competitive sealed bidding" for any of certain enumerated reasons. Charter § 312(c)(1).

These reasons include, for example, that "judgment is required in evaluating competing proposals, and it is in the best interest of the city to require a balancing of price, quality, and other factors." Charter §§ 312(c)(1)(ii), 317, and 319. Section 312(c)(1) also authorizes the PPB to define other situations that constitute special cases.

Between the alternative methods of procurement contained in Chapter 13, and those created by the PPB pursuant to Charter § 322, plus the other methods of procurement provided for by law, the City's methods of procurement (other than competitive sealed bidding) consist of:

- small purchases
- sole source procurements
- emergency purchases
- competitive sealed proposals (also known as Requests for Proposals or RFPs)
- negotiated acquisitions
- accelerated procurements
- intergovernmental and government-to-government purchases
- procurements using prequalified lists
- demonstration projects, and
- innovative procurement methods.

C. Ongoing Efforts

1. Mayoral Initiatives

The Bloomberg Administration has taken a number of steps, both administrative and legislative, to achieve procurement reform. Administrative steps that have been undertaken include:

- Significant reduction by MOC of its oversight approvals where not mandated by Charter or PPB rules.
- Progressive delegation of procurement authority by MOC to ACCOs, in order to further speed contract processing; delegation is dependent upon agency performance.
- Creation of a "best practices" web site for ACCOs.

- Provision of technical assistance to vendors by MOC, as the general procurement entity.
- Simplification of VENDEX forms.

The Bloomberg Administration has submitted a series of legislative proposals to the Council to support its administrative reforms. These proposals include:

- Amendment of Charter § 316 to allow flexibility to order services or construction off existing federal and state government contracts if price is fair and reasonable.⁴
- Amendment of Section 317 to increase the threshold for mayor approval of certain contracts to \$10 million (from \$2 million), and to permit the mayor to exclude agencies from mayoral approval upon finding of agency capacity.
- Amendment of Sections 318 and 320 to permit mayor, upon finding of capacity, to exclude agencies from mayoral approval of determination to employ selective solicitation from prequalified vendor lists.

2. Commission Outreach

In its effort to study procurement reform, the Commission has reached out for input in a number of ways. On May 12, 2003, the Commission heard testimony from vendors, including representatives of social service agencies, and the City's top procurement administrators, including policymakers from the PPB, MOC and DCAS.⁵ Comptroller Thompson also testified before the Commission. Commission staff has

⁴ The Commission staff recognizes that this is a complex issue, and commends the efforts of MOC and the Comptroller to address it. The staff also commends the efforts that the Comptroller and Mayor have made, in general, jointly to address the procurement-related needs of the City.

⁵ Martha Hirst, Commissioner, Department of Citywide Administrative Services (DCAS); Marla Simpson, Director, Mayor's Office of Contracts (MOC); Larry Picker, representing Rose Gill Hearn, Commissioner, Department of Investigation; Brendan Sexton, Chair, Procurement Policy Board (PPB); Pat Thomas, ACCO, Department of Health and Mental Hygiene; Nancy Wackstein, Executive Director, United Neighborhood Houses; Fran Barrett, Executive Director, Community Resources Exchange; Cynthia Searcy, Research Associate, Citizens Budget Commission; Michael Stoller, Executive Director, Human Services Council; Frank McArdle, Managing Director, General Contractors Association; and Richard Anderson, New York Building Congress.

reviewed the work of previous Charter Revision Commissions on procurement (from 1999 and 2001) and has reviewed many national and local reports concerning procurement policies and practices. The staff met with representatives of the construction industry, and has had intensive discussions with members of the PPB and MOC. Staff also consulted with the staff of the 1989 Charter Revision Commission, which drafted much of the current Charter procurement provisions.

D. Strategies for Charter Revision

1. Introduction

The City's procurement process reflects reactions to the 1986 PVB scandal, the need to devolve the Board of Estimate's contracting powers after it was held unconstitutional, and efforts to effect social policy through the procurement process. Implementation of these goals has added considerable time to the City's procurement process. Indeed, the impact of retroactive contracts on the vendor community, particularly on not-for-profit vendors, has generated concern.

The Bloomberg Administration has identified important goals and made progress toward completing administrative reform initiatives that will speed the procurement process and reduce contract retroactivity. The staff recommends, however, that more can be done, through Charter amendment and other efforts, to achieve important goals for the procurement system. These goals, and the means to achieve them, are discussed below.

2. Principles and Goals

The Commission staff's approach is to emphasize the Charter's role in providing policy direction. The following principles have shaped the policy recommendations proposed:

- Prevention of fraud, favoritism, and corruption.
- Promotion of efficiency and effectiveness in the purchase of goods and services.
- Encouragement of accountability, understood in the context of the 1989 Charter provisions as to the primacy of mayoral responsibility for the procurement function.
- Promotion of fairness for vendors and enhanced access for them to the City's procurement system.

These principles are important individually. The goal of the staff was to strike an appropriate balance among these principles.

In analyzing revisions that might be proposed, the staff considered these principles and the goals stated below.

Ensuring integrity in the procurement process. The staff recognizes that the need to ensure probity, or integrity, in the procurement process to prevent fraud, favoritism, and corruption continues. To ensure this, the staff recommends Charter revisions related to sharpening the effectiveness of the VENDEX system and employment reports. It is also mindful of the role the Comptroller can play in identifying potential corruption through the registration process, but the staff encourages the Comptroller to exercise authority within the limits delineated in the Charter. Finally, the Commission staff recognizes the potential advantage of vendor prequalification, but it is aware that the State law limitations may preclude this as a general practice, while permitting it in particular circumstances, as provided by Charter and PPB rules.

Encouraging the exercise of flexibility. As a matter of overall practice, the city's interests are best served when the procurement method or tool used is tailored to the particular circumstances, as to the items to be purchased, the vendor market(s), the circumstances warranting the purchase. While constrained by the mandates of GML § 103, and its requirement of competitive sealed bids in many circumstances, flexibility in the procurement process would be in the best interests of the City. Toward this end, the Commission staff recommends revisions to Chapter 13 that will give the PPB increased authority in promulgating rules concerning alternative methods of procurement and repeal mandates the limit such flexibility. The staff also proposes Charter revisions that will give increased flexibility to the Mayor and Comptroller regarding VENDEX, and to the Department of Small Business Services regarding employment reports. The staff also believes that the Commission should encourage both the PPB to promulgate rules that increase flexibility and the ACCOs to use flexibility to the extent allowable. The staff further believes the Commission should encourage the City to seek passage of State legislation to loosen the constraints imposed by GML § 103. In addition, the staff proposes that the Commission support the Administration's current legislative proposal to allow mayoral oversight approvals to be waived in certain circumstances.

Two other flexibility related staff proposals involve amending the "by whom procured" provision to allow DCAS to delegate specific goods purchases to individual user agencies, and allowing for public notice and hearing requirements not to apply to procurements involving the City's security.

A further area where flexibility should be encouraged is to remove from the Charter the prescriptions as to which official the Mayor may delegate his authority concerning contract approval. In the context of his overall responsibility for procurement, we propose this to be a matter of mayoral discretion, requiring only that he certify that the designee was an official qualified and competent to exercise this authority.⁶

Also, the Commission staff believes that the dollar amounts for various tiers of procurement review listed in the Charter should be eliminated. In their place, the staff recommends that these limits be set every other year by the Procurement Policy Board, subject to approval by the City Council.

Not-for-profit organizations. Not-for-profit and community-based organizations play an essential role in the provision of human services to the people of New York City, especially in low-income and “minority” communities. The importance of these organizations is reflected both in the extent of services provided by these organizations and in Charter Section 311(b)(4), where the development, maintenance, and strengthening of ties of these organizations to the communities where services are to be provided is listed as the first among five circumstances as the basis of outside procurement of technical, consultant, or personal services. To support and enhance the role of these organizations, the staff recommends that the Commission acknowledge the following proposals of these organizations:

- In recognition of the essential role these organizations play, treat them as “partners” in the provision of pertinent services. Steps that would

⁶ Related legislation is pending before the Council.

express this relationship include the regular consultation with these organizations and their respective advocacy groups⁷, the periodic provision of information to them as to developments in the field and agency plans, and, as feasible, the establishment and sharing of timeframes for agency actions.

- Recognition of the harmful consequences for these agencies (and those whom they serve) of delays in the procurement process, especially the effect of untimely contract renewals.

The realization of these proposals cannot be facilitated through the Charter. However, the staff nonetheless believes that they merit consideration by MOC and the agencies.

In addition, the staff recommends that the Charter be amended to allow the PPB to promulgate rules pertaining to the use of single financial audit for organizations involved with multiple city agencies, similar to the federal A-133 process.

Expanding the universe of vendors. It is in the City's interest to expand the universe of responsible vendors. Such an expansion would increase the range of those from whom the City can purchase goods and services, increase competition among vendors, and lead to better quality and/or reduced cost goods and services. In addition, this expansion would encourage small businesses (including those that are women and/or minority owned) to participate as vendors to the City, increasing their economic viability and engagement with the City.

Consistent with expanding the universe of vendors, it is important to note that on June 12, 2003, Mayor Bloomberg signed Executive Order No. 36, which deals with procurement opportunities for minority- and women-owned business enterprises

⁷ Our meeting with representatives from the engineering, planning, and construction communities commends this process in other areas as well.

("M/WBEs"). As stated by the Mayor, New York City has a diverse business community with thousands of M/WBEs. The Mayor further stated that the City's economic welfare will be promoted by the growth of these businesses, which cumulatively generate substantial economic activity and employment opportunities. In an effort to ensure that M/WBEs have equal opportunity to compete for City business, the Mayor ordered that DSBS take a number of steps, including expanding efforts to certify eligible businesses as M/WBEs, increasing the awareness of M/WBEs of business opportunities with the City, and working with other City agencies to achieve these goals. Along with DSBS, MOC has taken steps to increase opportunities for M/WBEs, including modifying the database from which small purchase solicitation lists are generated, so that every small purchase solicitation will go to five randomly selected M/WBEs, in addition to five other randomly selected businesses from the City's bidders list. The Commission staff commends these efforts, and recommends that the Commission recognize them as well.

VENDEX. Codified in the Administrative Code (Section 6-116.2(b)), the VENDEX system, necessary as it is to determinations of vendor responsibility, is overly burdensome to vendors without necessarily providing City agencies with all needed information. For the system to perform its needed functions, it must be focused on essential questions, up-to-date, available on an electronic basis, and with relevant information coordinated through the MOC and made available to ACCOs. In order to achieve the needed flexibility, the Commission staff recommends a Charter change that would deem the Administrative Code VENDEX provisions to have no force and effect, and would have the Mayor and the Comptroller addresses these issues by rule.

Issues of timeliness. The truism that “time is money” has no greater application than in the area of procurement. The months-long (and too often years-long) procurement process is costly for the contracting agencies, the vendors, for the consumers of City services, and for the City’s taxpayers.

In order to provide the desired public accountability, the staff proposes replacing the relatively narrow procurement indicators required by the Charter to be included in the Mayor’s Management Report with a more comprehensive annual mayoral procurement report. Along with the “stick” of accountability, the staff recommends that the Commission encourage MOC to continue to use the “carrot” of enhanced authority for those agencies whose record is positive. The staff further proposes that the Commission support the extension of interest payments for late payment to human services providers, and the expansion of the no-interest loan fund available at contract award.

The staff believes that the Commission should encourage those other governmental units, such as the Department of Investigation and the Comptroller, that have a role in the procurement process, to act as expeditiously as possible. Therefore, the staff proposes that the Charter be amended to clearly define the limits of the Comptroller’s role in the registration process, and to provide a clearer procedure for the provision of information requested by the Comptroller.

Recognition of superior performance. It is in the City’s best interest to recognize those vendors who provide superior performance, particularly in the provision of human services. Toward this end, the staff believes that the Commission in its final report

should indicate the potential usefulness that a PPB study that would identify: (1) possible objective and quantitative markers of performance that might be established (recognizing that these are likely to be different among different service sectors); (2) the nature of possible rewards; and (3) the criteria for the conduct of a program of superior performance recognition.

E. Explanation of Specific Procurement-Related Proposals

In order better to achieve the goals articulated above, the staff has developed a number of specific proposals for revision of the Charter, primarily involving revisions to Chapter 13. The underlying themes of these proposals are flexibility and accountability. Through the public testimony it has received and study it has done, the staff has determined that a significant need for reform exists, not in the aims of the Charter's procurement provisions, but in the Charter's mechanisms for achieving those aims. The Charter contains a number of provisions mandating inflexible methods for how certain topics must be addressed. This inflexibility may hamstring the City and its contractors and potential contractors, because it does not allow the City to adapt to their concerns and needs as they change over time.

As a general matter, the PPB, through its rulemaking ability, is better suited to provide this needed flexibility, while doing so in a thoughtful manner. Therefore, the staff proposes below a number of revisions that, while retaining the goals of the specific provisions at issue, revise those provisions to allow for flexibility, as appropriate, in meeting those goals. In most of these situations, the flexibility is provided by removing specific procedural requirements from the Charter, and having the Charter require the

PPB to promulgate rules on the given topics. In addition, the staff has proposed several revisions that address accountability and security concerns.

Alternative procurement methods

Under Charter § 312(b), consistent with State law, contracts—except for small purchases, emergency procurements, and intergovernmental procurements—must be awarded by competitive sealed bidding, except if a “special case” exists. Section 312(c) defines “special case” as “a situation in which it is either not practicable or not advantageous to the city to use competitive sealed bidding” for certain enumerated reasons or for “such other reasons as defined by rule of the procurement policy board.” Under Charter § 317(a), if an agency determines that a special case exists, it “shall select the most competitive alternative method of procurement provided for by sections three hundred eighteen through three hundred twenty-two which is appropriate under the circumstance.” Sections 318 through 321 contain provisions regarding competitive sealed proposals, competitive sealed bids and proposals from prequalified vendors, and sole source procurements. Section 322 empowers agencies to award contracts, if there is a special case, “according to another procurement procedure established by rule of the procurement policy board, under circumstances, defined by rule of the procurement policy board, in which the use of such procedures is in the best interest of the city.”

The staff does not propose to change this structure in any substantive manner. However, the details contained in Sections 318 through 321, regarding the method by which certain types of procurements are done, have been seen as overly restrictive and, as discussed above, as not providing sufficient flexibility. Therefore, the staff’s proposal is to repeal Sections 318 through 321, and to give the PPB the power, in Section 317, to

promulgate rules for all alternative procurement methods. The proposed revision to Section 317 requires the PPB to promulgate rules regarding competitive sealed proposals, sole source procurements, and procurements from prequalified vendors, methods of procurement that are currently addressed in Sections 318 through 321. The proposal keeps the substance of current Section 322, but moves it to Section 317. The staff proposes to repeal Section 323—regarding multi-step sealed proposals—as being a matter that, as with other procurement methods other than competitive sealed bidding, is more appropriately addressed by the PPB. The proposed repeal of Sections 318 through 323 requires, of course, renumbering of the subsequent Chapter 13 sections, as well as amendment of numerous cross-references throughout Chapter 13.

VENDEX

The City currently uses a computerized vendor integrity data system, known as “VENDEX,” to help agencies make responsibility determinations concerning potential contractors and subcontractors. See PPB Rules § 2-08(e). VENDEX was established pursuant to Section 6-116.2 of the New York City Administrative Code. Section 6-116.2 contains detailed requirements for the VENDEX system, including the information that must be submitted, the timing of the submission of information, the consequences for failure to submit information, and the limited circumstances under which exceptions may be made to the requirements of the section. See Section 6-116.2(b) and subsequent subdivisions.

The information received by the staff indicates that all of the institutional participants in the City’s procurement process appreciate the importance of responsibility determinations and the value of the VENDEX system in helping agencies make those

determinations. Furthermore, the Mayor, acting through MOC, and the Comptroller—the parties jointly responsible for all policy decisions regarding VENDEX (see Section 6-116.2(b)(i)—have worked together to improve VENDEX to the extent possible. They are, however, limited by the mandates set forth in Section 6-116.2, mandates that have proven over time to be overly restrictive.

Therefore, in order to obtain the necessary flexibility, the staff proposes adding a new subdivision to the Charter (to the current Section 335, to be renumbered as Section 329) that would continue the VENDEX system, but would have its details governed by rules jointly promulgated by the Mayor and the Comptroller. This proposed revision provides that the portions of Section 6-116.2 relating to VENDEX would be of no further force and effect, but also provides—as is currently provided in Section 6-116.2—that the mayor would operate the system, and that the Mayor and the Comptroller would be jointly responsible for all policy decisions related to the system. The proposed revision also adopts language from Section 6-116.2, regarding access to the database’s information and social security numbers, that seemed important to have continued, but that did not relate to the contents or workings of the database.

The staff notes that, with technology advances, it is now possible to design a responsibility system that would allow for different reporting requirements for different variables (value of contract, type of procurement, industry) instead of “one size fits all.” The staff believes that, to make this effort correctly, the City needs the flexibility of rule-making.

The staff also notes that the intent of the provision, as reflected in some of the proposed language, is to make the Mayor and Comptroller the sole and exclusive parties

responsible for the new system. Local legislation restricting that exclusive responsibility would be considered a curtailment.

The staff also proposes creating a different effective date for the VENDEX-related changes. Unlike the other changes, which would take effect immediately upon approval by referendum, these changes would take effect nine months later. This later effective date would allow sufficient time for the Mayor and Comptroller to implement rules governing the new system.

Employment reports

Under Charter § 1305(e), proposed contractors and subcontractors for contracts above a certain monetary value must submit employment reports. While the commissioner may set the monetary level and may, by rule, provide for certain exemptions from the employment report requirements, Section 1305(e) has, in practice, proved overly rigid, particularly as to the required elements of the employment report. Therefore, as with the proposed VENDEX revision, the staff proposes a revision to Section 1305(e) that, while still mandating employment reports, allows the commissioner of DSBS greater flexibility to promulgate rules governing the contents of the reports, the procedural rules to be followed by contractors and the procuring agencies, and the consequences flowing from incomplete or substantively problematic reports.

As with the staff's proposal regarding VENDEX, the staff recommends that the employment report changes take effect nine months later after the other changes. This later effective date would allow sufficient time for DSBS to implement rules governing the new system.

Registration

Charter §§ 93 and 328 give the Comptroller certain specific powers in connection with the registration of contracts. Specifically, a contract may not be implemented until it is registered by the Comptroller. The Charter requires the Comptroller to register a contract within 30 days of its being filed.

The Comptroller may, however, refuse to register a contract where he has information indicating that: (i) there are insufficient appropriated funds to pay the estimated cost of the contract; (ii) a certification by the Mayor (regarding certain procedural requirements) or by Corporation Counsel (regarding the legal authority of the agency to award the contract) has not been made; or (iii) the proposed vendor has been debarred (a procedure that no longer exists in the current Charter). In addition, when the Comptroller has reason to believe that there may have been corruption in the letting of the contract or that the proposed contractor is involved in corrupt activity, the Comptroller may deliver to the Mayor a written objection to the contract's registration, stating his grounds in detail. The Mayor must respond by identifying the corrective actions he is taking or by indicating in detail the reasons he disagrees with the Comptroller, but once he provides such a response, the Mayor may require registration despite the Comptroller's objections.

Historically, tension has existed between Mayors and Comptrollers over the use of this registration function, on occasion, as a vehicle for Comptrollers to raise various policy objections to particular procurements and/or to procurement processes, without a clear corruption-related basis for such objections. The 1975 Charter Revision Commission attempted to resolve this tension by mandating that the registration process

occur within a limited 30-day time frame. But the problems continued beyond that charter revision, so the 1989 Charter Revision Commission revisited the issue, and sought to clarify and circumscribe the Comptroller's role. The compromise reached by the 1989 Charter Revision Commission was for the Comptroller's role to remain primarily ministerial (checking for sufficient funds, the appropriate certifications, and whether the proposed vendor has been debarred), with only limited discretion to raise the possibility of corruption and compel the Mayor to respond, and without discretion to affect the ultimate outcome where the Mayor intended a contract to be registered. Structure and Processes, 42 N.Y.L. Sch. L. Rev. at 895-96. This compromise (as currently set forth in the Charter) involved a "limited role for the comptroller," and "kept the policy goal of mayoral accountability intact." *Id.* Following the 1989 Charter revision, the PPB promulgated a rule (Rule 2-12) setting forth the documents which must be included with any contract submitted for registration, to permit the Comptroller to discharge his mandate to ensure that procedural requisites were met. Nonetheless, tensions persisted following the 1989 Charter revision.

Notwithstanding the efforts by successive Charter Revision Commissions and ruling by the courts, the registration process is still not a smooth one in every instance. When the Comptroller objects to a given contract—whether based upon a suspicion of corruption or upon other grounds, such as policy or price—such an objection can set in motion a lengthy and divisive tug-of-war with no real rules for resolving the dispute. A practice has evolved whereby the Comptroller, constrained by the language of the Charter, writes a letter “returning” (i.e., not rejecting or refusing to register) a contract that has been submitted by the Mayor, purportedly for the purpose of “allowing” the

agency or the Mayor to respond to various questions the Comptroller has, provide various documents (besides those required by the PPB rules) the Comptroller wishes to review, or take an opportunity to reconsider the procurement. On occasion, the Comptroller engages in this “returning” process more than once for the same contract. However, the Comptroller lacks the legal authority to engage in this process because it is outside the structure and intent of the Charter. Although the vast majority of contracts are registered without any such dispute, the potential for a detailed examination by the Comptroller of every aspect of the policy and pricing decisions behind each contract has a corrosive effect upon agencies’ decision-making processes, and particularly upon their efficiency and timeliness.

The proposed language to be added to Charter § 328 neither broadens nor narrows the legally-permissible grounds for the Comptroller to delay registration. Instead, it recognizes the inherent political tension between the Mayor and the Comptroller in this arena, and provides a mechanism for resolving disputes in a timely fashion. Rather than permit the Comptroller simply to disregard the limits of his Charter mandate (and even assuming he is confining that review to the corruption-related grounds the Charter envisioned), the proposed amendment permits the Comptroller a one-time request for supplemental information, tolling the 30-day registration period for the time it takes the agency to respond to such request. To address the situation of the Comptroller’s not discovering the need for additional information until a point very near the end of his period, the amendment provides for up to five additional days to conclude his review if less than five days remain in the 30-day time frame. Rather than attempt to limit the nature of the information or documents the Comptroller may request, the amendment

provides that the Mayor must respond to the request in writing, but may provide only the information or documents he deems appropriate. Once the Mayor has responded, the Comptroller must thereafter register the contract or invoke one of his Charter-authorized grounds for refusing.

To govern a situation where the Comptroller nonetheless fails to act as the Charter specifies within the specified time frames, the amendment provides that the City's financial data base must allow for the requisite registration actions to be accomplished by the Mayor.

Purchases of Specific Goods

As a general matter, goods must be purchased by the Department of Citywide Administrative Services ("DCAS"), except as otherwise provided in Chapter 13 or other law. See Charter § 329(b). Under Charter § 329(c), an agency may directly purchase goods in an amount not to exceed \$1,000, and may purchase goods in an amount not to exceed \$5,000 with the prior approval of the commissioner of the DCAS. These limitations do not apply to purchases by an agency under a vendor contract entered into by DCAS. Charter § 329(d) provides that the \$1,000 limit may be raised to \$5,000 by the DCAS commissioner with the approval of the Mayor. Increases in the limits above \$5,000 also require the approval of the Comptroller. For the reasons below, the staff recommends amending Section 329 to include a new subdivision providing that, at the discretion of DCAS, there be an exception for individual procurements of specific goods that are used by individual agencies.

Some specific goods are purchased for use by only one agency, and could be more efficiently procured by that agency than by DCAS because of that agency's detailed

knowledge about the product. The staff's recommendation, which permits DCAS to delegate the purchase of specific goods to an agency, would give the procuring agency the freedom to take action in individualized cases only, and would still require it to procure common items through DCAS.

The proposal would ensure that the agency with expertise about the product's specifications and use would fully control the procurement process, and would allow DCAS to expend its resources on procurement of those more general or common items purchased by many agencies. Such delegation would also eliminate an often time consuming step in the procurement process, thereby expediting the purchase. While the recommendation permits the delegation for specific goods regardless of cost, it does not increase dollar limits for goods DCAS is suited to purchasing, such as those that will generally be needed by more than one agency. For example, in the case of bomb defusing robots, it is unlikely that more than one or two agencies would make such a purchase, and therefore there would be no monetary gain or other benefit realized by their procurement by DCAS.⁸

Security

Since the tragedy of September 11, the City has had a greatly increased need to procure security-related goods and services vital to the protection of the City and its citizens. There are circumstances where the need being addressed is so sensitive that public knowledge of even the fact of the procurement could be considered problematic. Therefore, the staff proposes an exception to the public notice and hearing requirements

⁸ This significant recommendation was offered to the Commission by Jordan Glickstein, Deputy ACCO, NYPD.

contained in Sections 325 and 326 for situations where the notice or hearing would disclose information or strategy that could be detrimental to the security of the City or its citizens.

Procurement reports

The staff believes that, as important as flexibility is, it must be balanced by accountability. As the Mayor is ultimately responsible for the City's procurement system, the public should be given information that will enable it to determine whether the City has performed its procurement function well. While Charter § 12 currently requires that a summary of procurement actions taken during the previous fiscal year be included in the Mayor's Management Report, the required information is narrow. Therefore, the staff proposes repealing the requirement for MMR procurement indicators, and instead adding a new requirement, to be placed in Charter § 16, that the Mayor prepare an annual procurement report, to be made public and submitted to the Council, that would include not only procurement activity indicators but also indicators on agency performance.

Financial audits

The staff received input to the effect that certain contractors, particularly human service agencies, must go through multiple financial audits in a given year, in the situation where the contractor has multiple contracts with one or several City agencies. It seems to the staff that there may be situations where the City may be able to do the financial audits it needs, without requiring the contractor to go through duplicative audits.

Therefore, the staff proposes adding a subdivision to Charter § 311 providing that the PPB may promulgate rules for annual financial audits of contractors.

Goals of Chapter 13

The staff believes that there may be value to making explicit in Chapter 13 certain principles underlying the chapter. In this regard, the staff proposes adding a subdivision to Charter § 310 to achieve this goal. First, as is already provided by law, the Charter should indicate that City procurements should provide the City with goods, services, and construction of maximum quality and lowest cost, while guarding against fraud, favoritism, and corruption. Second, consistent with the Charter's current structure, the Charter should make explicit that the Mayor has ultimate responsibility for procurements and the administration of contracts.

Finally, the staff believes it is appropriate to add to the Charter a statement of aspiration regarding the decision to procure. While this language would only be aspirational, the Charter should indicate that procuring entities are encouraged to consider whether the decision to procure, or not procure, in a particular circumstance, such as service delivery choices, is in the City's best interest.

F. Proposed Procurement-Related Charter Revisions

To provide the Commission with a complete understanding of how the staff recommendations would be effectuated through the Charter, this section provides draft amendments to the Charter text.

Section one. Subdivision c of section 12 of the New York city charter, as amended by a vote of the electorate at a general election held on November 7, 1989, is hereby amended to read as follows:

c. The management report shall include a review of the implementation of the statement of needs as required by subdivision h of section two hundred four and shall contain for each agency

(1) program performance goals for the current fiscal year and a statement and explanation of performance measures;

(2) a statement of actual performance for the entire previous fiscal year relative to program performance goals;

(3) a statement of the status of the agency's internal control environment and systems, including a summary of any actions taken during the previous fiscal year, and any actions being taken during the current fiscal year to strengthen the agency's internal control environment and system;

(4) a summary of rulemaking actions undertaken by the agency during the past fiscal year including

(a) the number of rulemaking actions taken,

(b) the number of such actions which were not noticed in the regulatory agenda prepared for such fiscal year, including a summary of the reasons such rules were not included in such regulatory agenda, and

(c) the number of such actions which were adopted under the emergency rulemaking procedures; and

(5) [a summary of the procurement actions taken during the previous fiscal year, including: (i) for each of the procurement methods specified in section three hundred twelve, the number and dollar value of the procurement contracts entered into during such fiscal year; and (ii) for all procurement contracts entered into pursuant to a procurement method other than that specified in paragraph one of subdivision a of section three hundred twelve, the number and dollar value of such procurement contracts by each of the reasons specified in paragraph one of subdivision b of section three hundred twelve; and

(6)] an appendix indicating the relationship between the program performance goals included in the management report pursuant to paragraph two of this subdivision and the corresponding expenditures made pursuant to the adopted budget for the previous fiscal year.

§ 2. Section 16 of the New York city charter, as added by a vote of the electorate at a general election held on November 7, 1989, is hereby amended to read as follows:

§ 16 [Report] Reports on social indicators and procurement. a. Report of social indicators. The mayor shall submit an annual report to the council, borough presidents, and community boards analyzing the social, economic and environmental health of the city and proposing strategies for addressing the issues raised in such analysis. The report shall present and analyze data on the social, economic and environmental conditions which are significantly related to the jurisdiction of the agencies responsible for the services specified in section twenty seven hundred four, the health and hospitals

corporation, and such other agencies as the mayor shall from time to time specify. The report shall include the generally accepted indices of unemployment, poverty, child welfare, housing quality, homelessness, health, physical environment, crime, and such other indices as the mayor shall require by executive order or the council shall require by local law. Such report shall be submitted no later than sixty days before the community boards are required to submit budget priorities pursuant to section two hundred thirty and shall contain: (1) the reasonably available statistical data, for the current and previous five years, on such conditions in the city and, where possible, in its subdivisions; and a comparison of this data with such relevant national, regional or other standards or averages as the mayor deems appropriate; (2) a narrative discussion of the differences in such conditions among the subdivisions of the city and of the changes over time in such conditions; and (3) the mayor's short and long term plans, organized by agency or by issue, for responding to the significant problems evidenced by the data presented in the report.

b. Report on procurement. Not later than September seventeenth in each year, the mayor shall make public and submit to the council a procurement report. The procurement report shall include, but not be limited to, indicators on the city's procurement activities as well as agencies' performance relative to the procurement process.

§ 3. Section 310 of the New York city charter, as amended by a vote of the electorate at a general election held on November 7, 1989, is hereby amended to read as follows:

§ 310 Scope. a. Except as otherwise provided in this charter or by statute,

1. all goods, services or construction to be paid for out of the city treasury or out of moneys under the control of or assessed or collected by the city shall be procured as prescribed in this chapter; provided, however, that for (i) the office of an independently elected city official, or (ii) the council, where the provisions of this chapter require action by the mayor or an appointee of the mayor in regard to a particular procurement except for mayoral action pursuant to subdivision c of section three hundred [thirty-four] twenty-eight, such action shall not be taken by the mayor or such appointee of the mayor, but shall be taken respectively, by (i) by such elected official or (ii) the speaker of the council, or another member of the council designated by the speaker with the approval of a majority of the members of the council, and

2. all goods, services or construction to be procured by an entity, the majority of the members of whose board are city officials or are individuals appointed directly or indirectly by city officials shall be procured as prescribed in this chapter; provided, however, that where the provisions of this chapter require action by the mayor or an appointee of the mayor in regard to a particular procurement except for mayoral action pursuant to subdivision c of section three hundred [thirty-four] twenty-eight, such action shall not be taken by the mayor or such appointee of the mayor, but shall be taken by the governing board of such entity or by the chair of the board or chief executive officer of such entity pursuant to a resolution adopted by such board delegating such authority to such officer.

b. The goal of procurements under this chapter is to, consistent with law, provide the city with goods, services and construction of maximum quality and lowest cost, while guarding against fraud, favoritism and corruption. Once a decision to procure is made by the city, the mayor or the procuring entity has ultimate responsibility and power to procure and administer the contract, consistent with this chapter, upon such terms as shall be found by the mayor or the procuring entity to promote the goal stated in this subdivision. In addition, the mayor or procuring entity is encouraged, in this regard, to consider whether the decision to procure, or not, is in the best interest of the city or the procuring entity.

§ 4. Section 311 of the New York city charter, as amended by local law 61 for the year 1991, local law number 91 for the year 1996, and local law number 34 for the year 2002, is hereby amended by amending subdivision b and adding a new subdivision d, as follows, and by relettering subdivisions d, e, and f as subdivisions e, f, and g:

b. The board shall promulgate rules as required by this chapter, including rules establishing:

1. the methods for soliciting bids or proposals and awarding contracts, consistent with the provisions of this chapter;

2. the manner in which agencies shall administer contracts and oversee the performance of contracts and contractors;

3. standards and procedures to be used in determining whether bidders are responsible;

4. the circumstances under which procurement may be used for the provision of technical, consultant or personal services, which shall include but not be limited to,

circumstances where the use of procurement is (a) desirable to develop, maintain or strengthen the relationships between non-profit and charitable organizations and the communities where services are to be provided, (b) cost-effective, or (c) necessary to (i) obtain special expertise, (ii) obtain personnel or expertise not available in the agency, (iii) to provide a service not needed on a long-term basis, (iv) accomplish work within a limited amount of time, or (v) avoid a conflict of interest;

5. the form and content of the files which agencies are required to maintain pursuant to section three hundred [thirty-four] twenty-eight and such other contract records as the board deems necessary and appropriate;

6. the time schedules within which city officials shall be required to take the actions required by this chapter, sections thirteen hundred four and thirteen hundred five, or by any rule issued pursuant thereto, in order for contracts to be entered into, registered or otherwise approved, and recommended time schedules within which city officials should take action pursuant to any other provision of law or rule regarding individual contracts. The promulgation of rules defining time schedules for actions by the division of economic and financial opportunity of the department of business services and the division of labor services of such department shall require the approval of each division, as such rules pertain to actions required of such divisions, prior to the adoption of such rules by the procurement policy board;

7. procedures for the fair and equitable resolution of contract disputes; and

8. such other rules as are required by this chapter.

d. The board may promulgate rules for annual financial audits of vendors, including rules providing for consolidated audits across multiple contracts held by vendors with one or multiple agencies.

§ 5. Subdivision b of section 312 of the New York city charter, as amended by local law number 35 for the year 1994 and local law number 3 for the year 1997, is hereby amended to read as follows:

b. 1. Except as provided for in sections three hundred fourteen, three hundred fifteen and three hundred sixteen, contracts shall be awarded by competitive sealed bidding under such rules as shall be made by the procurement policy board, except that, in a special case as defined in subdivision b of this section, the head of an agency proposing to award such contract may order otherwise in accordance with policies and procedures established by the procurement policy board.

2. A determination by the head of an agency to use other than competitive sealed bidding except as provided for by sections three hundred fourteen and three hundred sixteen shall be made in writing, stating the reasons why competitive sealed bidding is not practicable or not advantageous and why the method of procurement selected pursuant to section three hundred seventeen is the most competitive alternative that is appropriate under the circumstances. The head of the agency shall include the determination or a summary of the determination in the notice of solicitation, or for an emergency procurement in the notice of award, required to be published pursuant to section three hundred [twenty-five] nineteen of this chapter.

§ 6. Subdivision b of section 313 of the New York city charter, as renumbered and amended by a vote of the electorate at a general election held on November 7, 1989, is hereby amended to read as follows:

b. Procedures for competitive sealed bidding.

1. Bids shall be solicited through an invitation for bids, which shall include a purchase description and a notice of where vendors may obtain a copy of all contractual terms and conditions applicable to the procurement. A notice of the intention to solicit bids shall be publicly advertised in accordance with the provisions of section three hundred [twenty-five] nineteen of this chapter. The terms of such contracts shall be settled by the corporation counsel as an act of preliminary specification to an invitation for bids.

2. The agency letting the contract may reject all bids if it shall deem it for the interest of the city so to do; if not, it shall, without other consent or approval, award the contract to the lowest responsible bidder, unless the mayor shall determine in writing, justifying the reasons therefor, that it is the best interest of the city that a bid other than that of the lowest responsible bidder shall be accepted. Such determination shall be published in the City Record. Tie bids are to be decided by the agency letting the contract and the award made. Whenever a contract is awarded to other than the lowest bidder because the lowest bidder is determined by the agency not to be a responsible bidder or because the lowest bid is determined by the agency to not meet the requirements and criteria set forth in the invitation for bids, the agency making such determination and awarding such contract shall immediately notify the lowest bidder of such determination and shall file in the agency contract file a statement in detail of the reasons therefor.

3. Any bidder who is declared not responsible by an agency and any bidder whose bid is determined by an agency to not meet the requirements and criteria set forth in the invitation for bids may, within five days of receipt of notice of the agency decision, appeal such decision to the agency head. A determination of an agency head of an appeal of a decision of non-responsibility may be appealed to the mayor who shall take final action regarding such matter. A determination of an agency head of an appeal of a decision that a bid does not meet the requirements and criteria set forth in the invitation for bids shall be final.

§ 7. Section 315 of the New York city charter, as amended by local law 3 for the year 1997, is hereby amended to read as follows:

§ 315. Emergency procurement. Notwithstanding the provisions of section three hundred twelve of this chapter, in the case of an unforeseen danger to life, safety, property or a necessary service, an emergency procurement may be made with the prior approval of the comptroller and corporation counsel, provided that such procurement shall be made with such competition as is practicable under the circumstances, consistent with the provisions of section three hundred seventeen of this chapter. A written determination of the basis for the emergency and the selection of the contractor shall be placed in the agency contract file and the determination or summary of such determination shall be included in the notice of the award of contract published pursuant to section three hundred [twenty-five] nineteen of this chapter.

§ 8. Section 317 of the New York city charter, as added by a vote of the electorate at a general election held on November 7, 1989, is hereby amended to read as follows:

§ 317 Alternatives to competitive sealed bidding. a. If, in accordance with section three hundred twelve, an agency determines that the use of competitive sealed bidding is not practicable or not advantageous to the city, the agency shall select the most competitive alternative method of procurement provided for by [sections three hundred eighteen through three hundred twenty-two] rule of the procurement policy board which is appropriate under the circumstance. Each agency contract file shall contain documentation of such determination and of the basis upon which each contract is awarded, as is required by the procurement policy board.

b. The procurement policy board shall promulgate rules establishing methods for procurements by competitive sealed proposals, sole source procurements, and procurements from vendors who have been prequalified in accordance with section three hundred eighteen.

c. A contract may also be awarded according to another procurement procedure established by rule of the procurement policy board, under circumstances, defined by rule of the procurement policy board, in which the use of such procedures is in the best interest of the city. An agency determination to utilize such other alternative procurement procedure for a particular procurement or for a particular type of procurement shall require the written approval of the mayor prior to seeking bids or proposals. The agency contract file shall contain the determination to use such other procurement procedure which shall state (1) which circumstances defined by the board to be in the best interest of the city apply to the procurement, including the basis upon which the agency made such determination, and (2) which procedure, as defined by the board pursuant to this section, was used in awarding the contract.

[b]d. Each contract for goods, services or construction in value of more than two million dollars proposed by an agency to be awarded which is let by other than (i) competitive sealed bidding, (ii) competitive sealed bids from prequalified vendors, or (iii) competitive sealed proposals, where the weight assigned to each of the factors or criteria to be considered in selecting the proposal most advantageous to the city was set forth in a writing filed in the agency contract file prior to the opening of proposals, shall require the approval of the mayor or a deputy mayor prior to its execution. The mayor or deputy mayor shall not delegate the authority to make such approvals to any other body or official.

§ 9. Sections 318 through 323 of the New York city charter, as amended (except for section 319) by local law number 3 for the year 1997, are hereby repealed.

§ 10. Sections 324 through 335 of the New York city charter are hereby renumbered as follows:

<u>old number</u>	<u>new number</u>
324	318
325	319
326	320
327	321
328	322
329	323
330	324
331	325
332	326
333	327
334	328
335	329

§ 11. Section 318 of the New York city charter, as added by a vote of the electorate at a general election held on November 7, 1989, as formerly numbered section

324 and as renumbered as section 318 by section 10 of these revisions, is amended by the addition of a new subdivision c as follows:

c. If, pursuant to section three hundred seventeen, the procurement policy board promulgates a rule allowing for selective solicitation from a list of prequalified vendors, an agency determination to employ selective solicitation for a particular procurement or for a particular category of procurement shall be made in writing by the agency and approved by the mayor.

§ 12. Section 319 of the New York city charter, as amended by local law number 46 for the year 1995 and local law number 59 for the year 1996, as formerly numbered section 325 and as renumbered as section 319 by section 10 of these revisions, is amended to read as follows:

§ 319. Notification of contract opportunities and awards. a. Pursuant to rules of the procurement policy board, each agency shall

1. for each category of goods, services or construction which is regularly procured by the agency, periodically publish in the City Record a notice soliciting the names of vendors interested in being notified of future procurement opportunities in each such category,

2. for each category of goods, services or construction for which the agency prequalifies vendors for future procurement, periodically publish in the City Record a notice soliciting the names and qualifications of vendors interested in being considered for prequalification for such category, and

3. publish in the City Record, and, where appropriate, in newspapers of city, state or national distribution and trade publications, notice of

(a) the solicitation of bids or proposals pursuant to section three hundred thirteen and three hundred seventeen [through three hundred twenty-two], where the value of a contract is estimated to be above the small purchase limits, except where, [the agency has determined] pursuant to subdivision b of section three hundred [eighteen or three hundred twenty that] ~~seventeen, the~~ solicitation [should be] is limited to prequalified vendors,

(b) the award of a contract exceeding the small purchase limits in value. Each such notice of award shall indicate the name of the contractor, the dollar value of the contract, the procurement method by which the contract was let, and for contracts let by other than competitive sealed bidding, a citation of the clause of subdivision b of section three hundred twelve pursuant to which a procurement method other than competitive sealed bidding was utilized.

b. The procurement policy board, in consultation with the commissioner of citywide administrative services, shall promulgate rules providing for the publication and content of notices of contract actions required by this chapter. Such rules shall include provisions regarding

- i. the timing and frequency of notices,
- ii. the required duration of solicitation periods,
- iii. the form and content of notices, including the organization and presentation of such notices within standard categories of goods, services and construction which are sufficiently detailed to provide meaningful distinctions among categories.

c. The notice required by subparagraph a of paragraph three of subdivision a of this section shall not apply to contracts awarded on an emergency basis pursuant to section three hundred fifteen, provided that the agency shall, as soon as is practicable,

publish notice that such a contract has been entered into, pursuant to rules of the procurement policy board, nor shall such notice requirements apply where the notice would disclose litigation strategy or otherwise impair the conduct of litigation by the city. In addition, such notice requirements shall not apply where the notice would disclose information or strategy that may be detrimental to the security of the city or its citizens.

d. Notwithstanding any other provision of this section, whenever an agency determines that there is only a single source for a good, service or construction, and determines to engage in a sole source procurement pursuant to subdivision b of section three hundred seventeen, the agency shall give immediate notice in the City Record of such determination and shall in such notice solicit the application of vendors qualified to provide such good, service or construction, or interested in providing such good service or construction in the future. The procurement policy board shall by rule define the timing and duration of such notification to ensure that vendors qualified to provide such good, service or construction have sufficient opportunity to express their interest to the agency prior to the initiation of any sole source negotiation; provided, however, that if the agency has determined that it should not reveal to the vendor with whom it is negotiating that it is doing so on a sole source basis under circumstances defined by rule of the procurement policy board, the notice required by this subdivision shall be made upon the completion of such negotiations or the award of the contract. Vendors interested in providing such good, service or construction in the future shall be prequalified in accordance with section three hundred eighteen, or shall be included for receipt of notice in accordance with subdivision a of section three hundred nineteen. Notwithstanding the above, the notice requirements of this subdivision shall not apply where notice would

disclose information or strategy that may be detrimental to the security of the city or its citizens.

§ 13. Subdivision b of section 320 of the New York city charter, as amended by local law number 8 for the year 2002, as formerly numbered section 326 and as renumbered as section 320 by section 10 of these revisions, is amended to read as follows:

b. The requirements of this section shall not apply to any procurement (i) let pursuant to a finding of an emergency under section three hundred fifteen, (ii) required to be made on an accelerated basis due to markets which experience significant, short-term price fluctuations, as identified by rule of the board, [or] (iii) where a public hearing would disclose litigation strategy or otherwise impair the conduct of litigation by the city; or (iv) where a public hearing would disclose information or strategy that may be detrimental to the security of the city or its citizens.

§ 14. Section 321 of the New York city charter, as added by a vote of the electorate at a general election held on November 7, 1989, as formerly numbered section 327 and as renumbered as section 321 by section 10 of these revisions, is amended to read as follows:

§ 321 Certification of legal authority and procedural requisites. a. In the case of any contract which is let by other than competitive sealed bidding, the mayor shall certify, prior to the filing of the contract with the comptroller for registration in accordance with section three hundred [twenty-eight] twenty-two of this chapter, that the procedural requisites for the solicitation and award of the contract have been met. The mayor may

delegate such function to the agency proposing to award a contract only upon adequate assurance of an agency's capacity to comply with procedural requirements.

b. The corporation counsel shall certify prior to the filing of a contract with the comptroller for registration in accordance with section three hundred [twenty-eight] twenty-two of this chapter, that each agency proposing to award a contract has legal authority to award each such contract.

§ 15. Section 322 of the New York city charter, as added by a vote of the electorate at a general election held on November 7, 1989, as formerly numbered section 328 and as renumbered as section 322 by section 10 of these revisions, is amended to read as follows:

§ 322 Registration of contracts by the comptroller. a. No contract or agreement executed pursuant to this charter or other law shall be implemented until [(1) a copy has been filed with the comptroller and (2) either the comptroller has registered it or thirty days have elapsed from the date of filing, whichever is sooner, unless an objection has been filed pursuant to subdivision c of this section, or the comptroller has grounds for not registering the contract under subdivision b of this section] it has been registered or deemed registered in accordance with this section. If a copy of a contract, is filed with the comptroller, the comptroller shall, within thirty days of such filing, either (1) register the contract, (2) file with the mayor a certificate of refusal to register pursuant to subdivision b of this section, (3) file with the mayor an objection pursuant to subdivision c of this section, or (4) file with the agency, with a copy to the mayor, a request for supplemental information pursuant to subdivision d of this section. If the comptroller fails to take one of

these actions within thirty days of the date that the contract is filed with the comptroller (exclusive of any period of tolling pursuant to subdivision d), the contract shall be deemed registered.

b. [Subject to the provisions of subdivision c of this section, the comptroller shall register a contract within thirty days unless] The comptroller may, within thirty days of the date of filing of the contract with the comptroller's office, file with the mayor a certificate of refusal to register, if the comptroller has information indicating that:

i. there remains no unexpended and unapplied balance of the appropriation or fund applicable thereto, sufficient to pay the estimated expense of executing such contract, as certified by the officer making the same;

ii. that a certification required by section three hundred [twenty- seven] twenty-one of this chapter has not been made; or

iii. the proposed vendor has been debarred by the city in accordance with the provisions of former section three hundred thirty-five.

Such certificate shall be signed by the comptroller or his designee and delivered to the mayor within such thirty day period.

c. The comptroller may, within thirty days of the date of filing of the contract with the comptroller's office, object in writing to the registration of the contract, if in the comptroller's judgment there is sufficient reason to believe that there is possible corruption in the letting of the contract or that the proposed contractor is involved in corrupt activity. Such objection shall be signed by the comptroller or his designee and

delivered within such thirty day period to the mayor setting forth in detail the grounds for the comptroller's determination. After the mayor has responded to the comptroller's objections in writing, indicating (i) the corrective actions if any, that have been taken or will be taken in response to the comptroller's objections, or (ii) the reasons why the mayor disagrees with the comptroller's objections, the mayor may require registration of the contract despite the comptroller's objections. Such response by the mayor shall not serve as the basis for further objection by the comptroller, and the comptroller shall register the contract within ten days of receipt of the mayor's response. [The agency's filing of the written response with the comptroller, together with any supplemental information the agency deems appropriate to provide, shall not serve as the basis for a further request for supplemental information.] If the comptroller fails to do so, the contract shall be deemed registered.

d. If the comptroller wishes to request supplemental information for the purpose of deciding whether there is a basis for an objection pursuant to subdivision c of this section, the comptroller may, within thirty days of the date of filing of the contract with the comptroller's office, file with the agency, with a copy to the mayor, a written request for such supplemental information. Such a request for supplemental information shall thereafter toll the thirty day period until the date upon which the agency files with the comptroller a written response to such request. The comptroller may file only one such request for supplemental information for each contract or agreement. The agency's written response shall contain whatever information the agency deems appropriate to provide. Upon receipt of such written response, the Comptroller must, within the time remaining in the thirty day period or within five days of receipt of the written response,

whichever is later, register the contract, file with the Mayor a certificate of refusal to register pursuant to subdivision b of this section or file with the Mayor an objection pursuant to subdivision b of this section, or the contract shall be deemed registered.

e. Any city computer system concerning the registration of contracts shall permit the mayor, once thirty days (or such longer period as may result in accordance with the tolling provisions of subdivision d of this section) elapse from the date that a contract or agreement was filed with the comptroller, to cause that contract or agreement to be registered in accordance with subdivision a or c of this section, unless the comptroller has indicated in the system within that time period either that the contract or agreement has been registered, that a certificate of refusal to register has been filed pursuant to subdivision b of this section, or that an objection has been filed pursuant to subdivision c of this section, or unless the mayor or agency has withdrawn the contract from the comptroller. In addition, such computer system shall permit the mayor, once ten days elapse from the date that the mayor requires the contract to be registered notwithstanding the comptroller's objection under subdivision c of this section, to cause that contract or agreement to be registered, unless the comptroller has indicated in the system within that time period that the contract has been registered, or unless the mayor has withdrawn the contract from the comptroller.

f. The requirements of this section shall not apply to

(1) an emergency contract awarded pursuant to section three hundred fifteen or to an accelerated procurement as defined under section three hundred [twenty-six] twenty, provided that the agency shall, as soon as is practicable, submit any such contract to the

comptroller for an audit of the procedures and basis for the determination of the need for an emergency or accelerated procurement, or

(2) a contract awarded pursuant to this chapter for the provision of goods, services or construction that is not to be paid for out of the city treasury or out of moneys under the control of the city, provided that the board of the entity awarding such a contract shall within ten days of awarding contract, file a copy of such contract and any related materials specified by the mayor, with the mayor or the mayor's designee for purposes of section three hundred [thirty-four] twenty-eight of this charter.

§ 16. Section 323 of the New York city charter, as amended by a vote of the electorate at a general election held on November 7, 1989 and by local law number 59 for the year 1996, as formerly numbered section 329 and as renumbered as section 323 by section 10 of these revisions, is amended by the addition of a new subdivision e as follows:

e. A specific procurement of a specific good may be delegated by the commissioner of citywide administrative services, in the best interest of the city, to any agency for direct purchase by such agency, and shall not be subject to the provisions of subdivisions b, c or d of this section.

§ 17. Subdivision a of section 327 of the New York city charter, as amended by local law number 68 for the year 1993, as formerly numbered section 333 and as renumbered as section 327 by section 10 of these revisions, is amended to read as follows:

a. Each agency letting contracts shall monitor the performance of every contractor. Information with respect to contractor performance shall be maintained in a

central place in accordance with subdivision c of section three hundred [thirty-four] twenty-eight.

§ 18. Section 329 of the New York city charter, as repealed and reenacted by a vote of the electorate at a general election held on November 6, 2001, as formerly numbered section 335 and as renumbered as section 329 by section 10 of these revisions, is amended to read as follows:

§ 329. a. Centralized evaluation of contractor integrity, performance, and capability. The mayor may evaluate the integrity, performance, and capability of entities that contract with the city, are seeking to contract with the city, or may seek to contract with the city. The mayor may designate one or more agencies to participate in such efforts. The evaluations of the mayor and any agency designated by the mayor may include conclusions regarding whether the entity should be considered a responsible contractor. The mayor and any agency designated by the mayor may make such evaluations and conclusions available to agencies and the public through a centralized data base.

b. 1. The provisions of the administrative code of the city of New York, currently codified in section 6-116.2(b) (and certain other subdivisions of section 6-116.2), relating to a computerized vendor integrity data system known as “VENDEX,” shall be deemed of no further force and effect.

2. A computerized vendor integrity data system shall continue to be required. Notwithstanding any other provision of this charter, the mayor shall be solely and exclusively responsible for the operation of the system. Furthermore, notwithstanding any other provision of this charter, the mayor and the comptroller shall be solely and

exclusively jointly responsible for all policy decisions relating to the system, including the promulgation of any rules deemed necessary in relation to such system.

3. The information contained in this data system shall be required of, and available to, all agencies whose procurements are governed by this chapter. In addition, the mayor and comptroller may, in rules promulgated pursuant to this subdivision, establish other agencies that may access such information. Such information shall be made available to members of the public, in accordance with sections three hundred twenty-eight and one thousand sixty-four of the charter and article six of the public officers law. However, nothing in this subdivision shall be deemed to require the disclosure of information that is confidential, privileged, or the disclosure of which would be contrary to law.

4. Information required from a contractor consisting of a contractor's social security number shall be obtained by the agency, elected official or the council entering into a contract as part of the administration of the taxes administered by the commissioner of finance for the purpose of establishing the identification of persons affected by such taxes.

§ 19. Subdivision e of section 1305 of the New York city charter, as added by local law number 61 for the year 1991, is amended to read as follows:

e. 1. The commissioner shall require employment reports to be submitted in such form and containing such information as the commissioner may prescribe by rule, by contractors to whom agencies propose to award city contracts and their proposed subcontractors, when such contracts or subcontracts have a value above a monetary

threshold that the commissioner shall by rule establish. The commissioner may by rule provide for appropriate exemptions from such requirements.

2. An employment report [shall] may include[, but not be limited to,] information such as employment practices, policies, procedures, statistics and collective bargaining agreements. The contracting agency shall transmit the employment report to the commissioner after the selection of a proposed contractor or subcontractor. The commissioner shall review all employment reports to determine whether such contractors and subcontractors are in compliance with the equal employment opportunity requirement of local, state and federal law and executive orders.

3. Except as provided in [paragraphs] paragraph 4 [, 5 and 6] of this subdivision, a contracting agency may award the contract or approve a subcontractor upon receiving the approval of the division, or after a number of days to be specified by rule have passed since it submitted the employment report of the proposed contractor to the division, whichever is sooner.

4. [If the commissioner notifies the contracting agency that a proposed contractor or subcontractor has failed to submit a complete employment report, the commissioner shall require the contracting agency not to award the contract or approve the subcontractor until after a complete employment report has been submitted to the division for its review.

5. If the commissioner notifies the contracting agency that the division has reason to believe that the contractor or subcontractor is not in substantial compliance with the requirements of this section, the commissioner may require the contracting agency not to

award the contract or approve the subcontractor until the contractor has agreed to take appropriate action to come into compliance with such requirements.

6.] The commissioner shall promulgate rules governing approval of the division, including procedural rules, and rules regarding the consequences of the failure of a proposed contractor or subcontractor to submit a complete employment report and the consequences if the division has reason to believe that the contractor or subcontractor is not in substantial compliance with the requirements of this section. In addition, the [The] commissioner may by rule provide for circumstances when a contract or subcontract may be awarded without the prior approval of the division [, which shall include but not be limited to requirements contracts which may be awarded prior to the approval of an employment report, subject to the condition that a purchase shall not be made under the contract until the division has approved the employment report, emergency contracts, and contracts with contractors or subcontractors for which the division has previously approved an employment report].

[7] 5. The time schedules for actions required to be taken pursuant to this section shall be defined by rule of the procurement policy board in accordance with the provisions of section three hundred eleven.

§ 20. Section 1152 of the New York city charter is amended by the addition of a new subdivision j as follows:

j. 1. Except as provided in paragraph 2 of this subdivision, the amendments to the charter, amending sections twelve, sixteen, one thousand three hundred five, and all changes to chapter 13, approved by the electors on November fourth, two thousand three, shall take effect immediately.

2. Notwithstanding paragraph 1 of this subdivision, the amendments to the charter amending section three hundred three hundred twenty-nine, formerly numbered section three hundred thirty-five, and the amendments to the charter amending section thirteen hundred five, shall take effect nine months from approval by the electors. Officers and employees of the city shall take any actions as are necessary and appropriate to prepare for implementation of the amendments to such section, approved by the electors on November fourth, two thousand three, prior to the effective date prescribed in this paragraph.