

## NOTICE OF ADOPTION OF FINAL RULE

The Procurement Policy Board has adopted amendments to **Chapter 3 Methods of Source Selection** of its Rules pursuant to Section 311 of the New York City Charter. The amendments were published in *The City Record* on April 27, 2012, and the required public hearing was held on June 4, 2012. The amendments were adopted by the Procurement Policy Board on April 8, 2013. These rules will take effect 30 days after publication.

### **Statement of Basis and Purpose**

Prior to recent amendments to New York State General Municipal Law § 103, contracts for public work and contracts for purchase contracts (i.e., contracts for the purchase of goods and standard services) had to be procured, as a general matter, by publicly advertised, low sealed bid. The recent changes to GML § 103 (the “Best Value Law”) give the City the option to procure purchase contracts based on best value to the City, as that phrase is defined in State Finance Law § 163. Under that section, best value is defined in terms of the optimization of quality, cost and efficiency.

In light of the Best Value Law, the amendments:

- set forth the rules governing competitive sealed bids to be awarded on the basis of best value to the City,
- require agencies to state in the bid for goods or standard services whether the award will be made on the basis of price only or will be made on the basis of best value to the City,
- requires that if award is made on the basis of best value, the bid include a statement of how best value will be determined,
- set forth the criteria that may be considered by the agency when award is to be made on the basis of best value,
- requires documentation by the agency of the reasons for determining that a bid represents best value, and,
- allows multiple award task order purchases among multiple contractors pursuant to competitive sealed bids for the purchase of goods and standard services where it is determined by the agency to be in the best interests of the City.

### **The Rule Amendments**

New material is underlined and deletions are [bracketed].

**Section 1. Subdivision (a) of section 3-02 of Chapter 3 of Title 9 of the Rules of the City of New York is amended to read as follows:**

(a) Application. This section shall apply to all procurements made by competitive sealed bidding [including multi-step sealed bidding].

**Section 2. Subparagraph (iv) of paragraph (2) of subdivision (b) of section 3-02 of Chapter 3 of Title 9 of the Rules of the City of New York is amended to read as follows:**

- (iv) a statement regarding how the award will be made:
  - (A) for construction, a statement that award shall be made to the lowest responsive and responsible bidder;
  - (B) for purchase of goods and standard services, a statement that award shall be made to the lowest responsive and responsible bidder or to the bidder whose bid represents the best value to the City by optimizing quality, cost and efficiency. If award will be made on the basis of best value to the City, such statement shall include how best value will be determined in accordance with 3-02(o);

**Section 3. Subdivision (d) of section 3-02 of Chapter 3 of Title 9 of the Rules of the City of New York is amended to read as follows:**

- (d) Bidder Submissions.
  - (1) Bid Form and Content. The IFB shall provide a form on which the bidder shall insert the bid price, or other information requested, if any, pursuant to 3-02 (o)(1), and shall sign and submit along with all other necessary submissions. Bids shall be typewritten or written legibly in ink. Erasures or alterations shall be initialed by the signer in ink. All bids shall be signed in ink. The bid invitation also shall require that the bid be submitted in a sealed envelope, addressed as required in the bid documents, on or before the time and at the place designated in the bid documents. If so provided in the solicitation, sealed bids may be submitted electronically. Where award will be made to the bidder whose bid represents the best value to the City, the IFB may also provide that other information requested, if any, may be submitted up to thirty (30) days from the bid opening by all bidders whose bids are to be considered pursuant to 3-02(o)(1)(iii).
  - (2) Bid Samples and Descriptive Literature. The IFB shall state that the submission of bid samples and descriptive literature [should not be submitted unless expressly requested and that], regardless of any attempt by a bidder to condition the bid, [unsolicited bid samples or descriptive literature that are submitted at the bidder's risk] will not be [examined or tested and will not be] deemed to vary any of the provisions of the IFB.

**Section 4. Paragraph (2) of subdivision (l) of section 3-02 of Chapter 3 of Title 9 of the Rules of the City of New York is amended to read as follows:**

- (2) Opening and Recording. Bids and modifications shall be opened publicly, at the time, date, and place designated in the IFB. The name of each bidder, the bid price, and such other information as is deemed appropriate shall be read aloud or otherwise made available. These requirements may be met through access to a

computer terminal at the location where bids are to be opened, provided that paper documents are available upon request at the time of bid opening. This information also shall be recorded at the time of bid opening. The bids shall be tabulated or a bid abstract prepared and made available for public inspection. The opened bids shall be available for public inspection at a reasonable time after bid opening but in any case before vendor selection except to the extent the bidder designates trade secrets or other proprietary data to be confidential. Material so designated shall accompany the bid and shall be readily separable from the bid in order to facilitate public inspection of the nonconfidential portion of the bid. Prices, makes, and model or catalog numbers of the items offered, deliveries, and terms of payment shall be publicly available at a reasonable time after bid opening but in any event before vendor selection regardless of any designation to the contrary at the time of bid opening. For bids on construction contracts submitted in accordance with Section 3-02 (b)(2)(xix)(xx)(K)(J) of these Rules, the sealed list of subcontractors submitted with the low bid shall be opened after such low bid has been announced and the names of the subcontractors shall be announced. The sealed lists of subcontractors submitted by all other bidders pursuant to Section 3-02 (b)(xix)(xx)(2)(K)(J) of these Rules shall be returned to such bidders unopened after the contract award.

**Section 5. Subparagraph (iii) of paragraph (3) of subdivision (m) of section 3-02 of Chapter 3 of Title 9 of the Rules of the City of New York is amended to read as follows:**

(iii) Mistakes Where Intended Correct Bid is Not Evident. Mistakes may not be corrected after bid opening. A bidder may be permitted to withdraw a [low] bid where a unilateral error or mistake has been discovered in the bid and the Contracting Officer makes the following determination, which shall be approved by the ACCO:

(A) the mistake was known or made known to the agency prior to vendor selection or within three days after the opening of the bid, whichever period is shorter;

(B) the price bid was based on an error of such magnitude that enforcement would be unconscionable;

(C) the bid was submitted in good faith and the bidder submits credible evidence that the mistake was a clerical error as opposed to a judgment error;

(D) the error in bid is actually due to an unintentional and substantial arithmetic error or unintentional omission of a substantial quantity of work, labor, material, goods, or services made directly in the compilation of the bid, which unintentional arithmetic error or unintentional omission can be clearly shown by objective evidence drawn from inspection of the original work

paper, documents, or materials used in the preparation of the bid sought to be withdrawn; and

(E) it is possible to place the City in the same condition that had existed prior to the receipt of the bid.

Upon the approval of the ACCO, the bid may be withdrawn, and the bid bond or other security returned to the bidder. If the bid was the low bid or the bid that represents best value, then [T]the contract shall either be awarded to the next lowest bidder or bidder that represents the next best value to the City, as appropriate, or resolicited pursuant to these Rules. Under no circumstances shall a bid be amended or revised to rectify the error or mistake.

**Section 6. Subdivision (o) of section 3-02 of Chapter 3 of Title 9 of the Rules of the City of New York is amended to read as follows:**

(o) Bid Evaluation and Vendor Selection.

(1) [Bidder]Vendor Selection.

(i) Contracts for Construction. [General.] The responsible bidder whose bid meets the requirements and objectively measurable evaluation criteria set forth in the IFB, and whose bid price is the lowest responsive and responsible bid price or, if the IFB has so stated, the lowest responsive and responsible evaluated bid price, shall be selected for the contract. A bid shall not be evaluated for any requirement or criterion that is not disclosed in the IFB.

(ii) Contracts for Purchase of Goods and Standard Services. Prior to the bid, the ACCO shall determine whether the goods or standard services shall be awarded to the lowest responsive and responsible bidder or to the responsive and responsible bidder whose bid represents the best value to the City. The responsive and responsible bidder whose bid meets the requirements and objectively measurable evaluation criteria set forth in the IFB, and whose bid price is the lowest, or whose bid represents the best value to the City by optimizing quality, cost and efficiency, shall be selected for the contract.

(iii) If award will be made based on best value, best value may be determined by the ACCO, or the ACCO may convene a committee to make such determination. Any such committee shall consist of persons with knowledge, expertise and experience sufficient to make a fair and reasonable determination. As set forth below the ACCO, or the committee as the case may be, may determine best value by consideration of price together with other factors deemed relevant by the ACCO and set forth in the IFB. In making such determination the ACCO, or committee, shall consider the low responsive bid and the next low responsive bids that are within ten percent (10%) of the low responsive bid in

price, or such higher percentage as approved by the CCPO either on an individual basis or by category or class. Such factors may include:

(1) features of the offered product or service set forth in detailed specifications for the product offered;

(2) warranties and or maintenance to be provided with the product or service;

(3) references, past performance and reliability, including reliability or durability of the product being offered and current or past experience with the provision of similar goods or services;

(4) organization, staffing (both members of staff and particular abilities and experience), and ability to undertake the type and complexity of the work;

(5) financial capability; and

(6) record of compliance with all federal, State and local laws, rules, licensing requirements, where applicable, and executive orders, including but not limited to compliance with existing labor standards and prevailing wage laws.

The ACCO, or committee, may consider any and all information related to such factors in determining best value and may require additional information to be submitted by the bidders with the bid, or alternatively, within up to thirty (30) days from the bid opening from all bidders whose bids are to be considered pursuant to in 3-02(o)(1)(iii). If a committee is used to evaluate the bids, then written evaluation forms shall be completed to record the evaluation of the bids and shall be signed and dated by all members of the committee.

(2) Negotiation with the apparent lowest responsive and responsible bidder or responsive and responsible bidder providing best value. Upon determination of the apparent lowest responsive and responsible bidder or responsive and responsible bidder providing best value, pursuant to 3-02(0)(1), and prior to award, the Contracting Officer may elect to open negotiations with the selected vendor in an effort to improve the bid to the City with respect to the price only if award will be made to the lowest responsive and responsible bidder, or if award will be made to the responsive and responsible bidder whose bid represents the best value to the City, with respect to any of the factors considered in determining best value. In the event the apparent [lowest responsive and responsible]winning bidder declines to negotiate, the Contracting Officer may elect to either award the contract to the apparent [lowest responsive and responsible] winning bidder or may, upon written approval by the ACCO, reject

all bids in accordance with this section. The result of negotiations, if any, shall be documented in the Recommendation for Award.

(3) Award. Upon the determination of the [lowest responsive and responsible] apparent winning bidder pursuant to 3-02(o)(1), a Recommendation for Award shall be approved by the ACCO and the contract shall be awarded to that bidder. Where the award is based on best value to the City, the ACCO shall set forth in the Recommendation for Award the reasons that the bid represents the best value to the City and the factors considered by the agency.

**Section 7. Paragraph (1) of subdivision (p) of section 3-02 of Chapter 3 of Title 9 of the Rules of the City of New York is amended to read as follows:**

(1) Definition. Low Tie Bids are low responsive bids from responsible bidders that are identical in price, meeting all the requirements and criteria set forth in the IFB when the selection of the winning bidder is based on price alone.

**Section 8. Subdivisions (s) and (t) of section 3-02 of Chapter 3 of Title 9 of the Rules of the City of New York are amended to read as follows:**

(s) [Multi-Step Sealed Bidding

(1) Conditions for Use. Multi-step sealed bidding may be used when it is determined by the ACCO that it is impracticable to prepare specifications to support vendor selection based solely on price.

(2) Evaluation.

(i) Once the technical proposals have been evaluated, price bids from only those vendors whose technical proposals have been found acceptable shall be considered and evaluated.

(ii) Price bids may be solicited at the same time as technical proposals, in separate sealed envelopes, or after evaluation of technical proposals, only from those whose technical proposals have been found acceptable.

(iii) Price bids shall not be opened until the technical evaluation is complete. Price bids from vendors whose technical proposals have been found unacceptable shall not be opened until after registration of the contract.

Selection of Other Than Lowest Bidder

(t) Notification of Non-Responsiveness or Non-Responsibility. If the ACCO determines that [the lowest bidder ] a bidder is either not responsible or not

responsive, [the lowest] such bidder shall immediately be notified in writing of such determination and the reasons therefor, and the right to appeal the determination, if applicable. A copy of the notification shall be filed with the CCPO and Comptroller.

**Section 9. Section 3-02 of Chapter 3 of Title 9 of the Rules of the City of New York is amended by adding a new subdivision (t) to read as follows:**

(t) Multiple Award Task Order or Purchase Order Contracts.

(1) Determination. Multiple award task order contracts for standard services or multiple award purchase order contracts for goods may be awarded upon a determination by the ACCO that it is in the best interest of the City to award multiple contracts for goods or standard services to multiple contractors and to allocate work among such contractors through a task order or purchase order system. The criteria to be considered by the ACCO in making such determination may include the following: the nature of the goods or standard services to be procured; the expected frequency of task order or purchase order issuance; the capacity of vendors to provide all of the required services within the required timeframes; and the potential advantage of multiple contracts (e.g., more favorable terms; more competitive pricing, etc.).

(2) Method.

(i) Multiple awards may be made for contracts for goods or standard services, pursuant to competitive sealed bids where award is made based on price only, or based on best value pursuant to the criteria set forth in 3-02(o)(1), in conjunction with the procedures prescribed in this subdivision. The IFB shall also state the procedures and criteria to be used in selecting the vendor to perform on an individual task order or goods to be purchased pursuant to an individual purchase order. The agency may:

(a) select the vendor that represents the best value to the City for that particular task order or purchase order, as determined pursuant to 3-02(o), based on each vendor's bid, or

(b) the agency may solicit offers for each task order or purchase order from all awarded vendors. If the agency solicits offers for each task order or purchase order, each vendor shall receive each solicitation and have a reasonable opportunity to compete to provide the standard services or goods.

The agency may set forth an alternative method of assigning task orders or purchase orders if it is determined by the CCPO to be in the City's best interest and is set forth in the IFB. In the event that such alternative method is used for standard services, each vendor with a contract shall receive notice of assignment of each task order at the time each task order

is issued, regardless of whether each vendor with a contract received the solicitation for the task order.

(ii) The following list constitutes acceptable alternative methods of assigning task orders:

- (A) rotation, or other non-discretionary method of assignment, including where assignment pursuant to such method may be varied based on stated criteria (e.g., capacity or past performance);
- (B) assignment to or competition among particular vendor(s) with technical expertise particularly suited to the task order;
- (C) assignment to a particular vendor based on a vendor's particular geographic location, experience or knowledge;
- (D) assignment to a particular vendor based on the agency's need to distribute task orders among vendors; and
- (E) any other method approved by the CCPO as set forth in the IFB.

(iii) In the event that a vendor selected pursuant to one of the selection methods in paragraphs (i) or (ii) above is unable to perform the services on an individual task order or provide the goods to be purchased pursuant to an individual purchase order for reasons such as lack of capacity or conflict of interest, the agency may disqualify that vendor for purposes of that task order and select another vendor with approval of the CCPO.

(iv) Price shall be the primary factor considered in making individual vendor selection decisions, and no task order shall be issued unless the ACCO determines that the proposed price is fair and reasonable. Prices set forth in a multiple award contract shall represent maximum prices that may be set forth in individual task orders issued to that vendor.

(3) Duration. Unless otherwise approved by the CCPO, contracts awarded pursuant to this section shall have a total term including all renewals, of not more than three years. Task orders, or purchase orders may extend beyond the expiration of the contract term, in which event the terms and conditions of the contract shall continue to apply to the task order or purchase order until its termination or expiration. Task orders, or purchase orders, shall have a maximum term of three years or, if issued for a specific project, until the specific project is completed. Notwithstanding the above, a task order may be extended beyond or further extended beyond the expiration of the contract term, or beyond the expiration of the task order, with approval of the CCPO.