

NOTICE

OF ADOPTION OF FINAL RULE

The Procurement Policy Board (PPB) has adopted amendments to: **§ 3-02, Competitive Sealed Bidding, of chapter 3 of Title 9 of the Rules of the City of New York; and to § 4-02, Contract Changes, and § 4-06, Prompt Payment, of chapter 4 of Title 9 of the Rules of the City of New York, and to promulgate a new rule, § 4-13, Subcontracting, of chapter 4 of Title 9 of the Rules of the City of New York**, pursuant to Sections 311 and 1043 of the New York City Charter. The amendment was published on May 13, 2009 in the City Record. A public hearing was held on June 18, 2009. The amendment was adopted by the Procurement Policy Board on June 24, 2009.

Basis and Purpose of the Amendment

The amendments to rule 3-02 conform the existing rule to recent changes in State law requiring bidders to submit separate lists of subcontractors it intends to use with bids where separate specifications are not required pursuant to the WICKS law. The amendment to rule 4-06 adds a requirement that all construction contracts include a payment clause that requires payment to subcontractors in accordance with section 106-b of the General Municipal Law. The new rule codifies existing contract language and city practice by requiring contracts to obtain agency approval of all subcontractors and, in accordance with recent changes in State law, provides for circumstances where a contractor can change subcontractors listed in its bid.

The Amended Rule

In the amendment, which immediately follows this notice, new material is underlined and deletions are bracketed.

Jose Maldonado, Chair

Section 1. Subparagraph (xix)(K) of paragraph (2) of subdivision (b) of section 3-02 of Title 9 of the Rules of the City of New York is amended as follows:

- * * *
- (b) **Invitation for Bids.**
- * * *
- (2) Content. The Invitation for Bids shall include the following:
- * * *

(xix) where applicable for construction contracts, the following shall be additionally included:

* * *

(J) a notice that contract award is subject to the provisions of Section 6-108.1 of the New York City Administrative Code relating to the LBE program and its implementing rules[.]; and

(K) a requirement that, where the preparation of separate specifications is not required for plumbing and gas fitting; steam heating, hot water heating, ventilating and air conditioning apparatus; and electric wiring and standard illumination fixtures pursuant to New York General Municipal Law §101, the bidder shall submit with its bid a separate sealed list that names each subcontractor that the bidder will use to perform such work on the contract, and the agreed-upon amount to be paid to each.

* * *

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

(l) Receipt, Opening, and Recording of Bids.

* * *

(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)(xix)(K) 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)(K) of these Rules shall be returned to such bidders unopened after the contract award.

Section 3. Paragraph (4) of subdivision (b) of section 4-02 of Title 9 of the Rules of the City of New York is amended as follows:

(b) Types of Changes Permitted.

* * *

(4) Subcontracts. Changes to construction subcontracts shall be made in accordance with Section 4-13 (d) of these Rules.

Section 4. Subparagraph (i) of paragraph (2) of subdivision (e) of section 4-06 of Title 9 of the Rules of the City of New York is amended as follows:

(e) Additional Requirements for Construction and Construction-Related Services Contracts.

(2) Subcontracts.

(i) All construction contracts awarded by the City shall include:

(A) a payment clause that obligates the prime contractor(s) to pay each subcontractor and vendor (including a materials vendor) not later than seven days after receipt of payment out of amounts paid to the contractor by the City for work performed by the subcontractor or supplier under that contract and that provides for the payment of interest by the prime contractor in accordance with Section 106-b of the New York State General Municipal Law on amounts not timely paid to a subcontractor, and

(B) a clause requiring the prime contractor to include in each of its subcontracts a provision requiring each subcontractor to include the same payment clause in their contracts with each lower-tier subcontractor or vendor.

(ii) If a prime contractor is paid interest earned due to late payments by an agency, the proportionate share of that interest

shall be forwarded by the prime contractor to each of its subcontractors and vendors.

Section 5. A new section 4-13 of Title 9 of the Rules of the City of New York is proposed as follows:

Section 4-13 SUBCONTRACTS

(a) Policy. Consistent with the terms of the contract, a vendor may enter into subcontracts where the contracting agency approves. The City has an interest in ensuring that all City work is performed by appropriate persons.

(b) Form. All subcontracts made by the vendor shall be in writing. A vendor shall not be entitled to payment for any work performed by a subcontractor prior to the vendor entering into a written subcontract with the subcontractor and complying with the provisions of this section.

(c) Approval. All subcontractors must be approved by the agency prior to commencing work under the subcontract.

(d) Approval Process.

(1) Before entering into any subcontracts, the vendor shall submit a written statement to the agency giving the name and address of the proposed subcontractor, the portion of the work and materials that the subcontractor is to perform and furnish, and the estimated cost of the subcontract.

(2) Upon receipt of the above, the agency in its discretion may grant or deny preliminary approval for the vendor to contract with the subcontractor.

(3) The Agency shall notify the vendor within thirty days whether preliminary approval has been granted. If preliminary approval is granted the vendor shall provide such documentation as may be requested by the agency to show that the proposed subcontractor has the necessary facilities, skill, integrity, past experience and financial resources to perform the required work, including, as applicable, but not limited to:

(i) Completed VENDEX questionnaires, if and as required under Rule 2-08(e);

(ii) References;

(iii) Licenses;

(iv) Documentation that the subcontractor has been certified by DSBS as a minority-owned, women-owned or emerging business enterprise.

(4) Upon receipt of all relevant documentation, the agency shall notify the vendor in writing whether the proposed subcontractor is approved. If the proposed subcontractor is not approved, the vendor may submit another proposed subcontractor unless the vendor decides to do the work. No subcontractor shall be permitted to perform work unless approved by the agency.

(e) Change of Subcontractor

For construction contracts where a list of subcontractors has been submitted in accordance with Section 3-02 (b)(xix)(K) of these Rules, any change of subcontractor or agreed-upon amount to be paid to a subcontractor shall require the approval of the City upon a showing of a legitimate construction need for such change. A legitimate construction need shall include, but not be limited to, a change in project specifications, a change in construction material costs, a change to subcontractor status as determined to Section 222 (2)(e) of the New York State Labor Law, or the subcontractor has become otherwise unwilling, unable or unavailable to perform the subcontract. Documents relating to the City's approval of changes of subcontractors pursuant to this subdivision shall be open to public inspection.

(f) Payment

Payment to subcontractors shall be made in accordance with Section 4-06(e)(2) of these Rules.

(g) Privity

The approval by the City of a subcontractor shall not establish privity between that subcontractor and the City or relieve the vendor of any obligations under the contract.

