



NYC Department Of Parks Initiates Prequalification For Contractors

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Some may recall the “midnight massacre” in 2008, when in one late-night backroom legislative deal, signed by our accidental governor, David Patterson, the Wicks Law was sacrificed on the altar of random PLA expansion. In this “deal,” Mayor Bloomberg also had his long time wish for prequalification authority granted. Everyone seemed to get their share of the deal: labor, public agencies, general contractors long opposed to Wicks’ Law ... all except the subcontracting community.

Now the broad pre-qualification authority granted governmental agencies throughout NYS is coming home to roost. New York City’s first effort in this area will be with smaller projects at NYC Department of Parks and Recreations (“DPR”). Rest assured, however, that this is only the beginning. Prequalification will spread way beyond this limited initial effort throughout all New York City agencies and elsewhere. Frankly, it is a public owner’s dream come true.

DPR is currently seeking to establish a list of prequalified general contractors for non-complex “general construction” site work. By establishing contractors’ qualifications in advance, DPR maintains that it will have a “pool of competent contractors from which it can draw to promptly and effectively reconstruct and construct its parks, playgrounds, beaches, gardens and green-streets.” DPR will select contractors from the list for construction and reconstruction work of up to \$3,000,000 per contract. Put more candidly, DPR will now be able to procure construction services based upon whom it wants to do business with or even allow to bid.

DPR defines “general construction” work to include, but not be limited to, site work (e.g. excavation, grading, paving, concrete work), general landscaping, necessary

utility connections and meters (e.g. water, electric and sewer), and furnishing and/or the repair of miscellaneous stainless steel and painted milled steel fabrications (e.g. railings, permanent fences and gates).

However, exceptions apply. General Construction work will not include:

- (1) Projects deemed by the Commissioner to be ones of historical significance or ones regulated by the Landmarks Preservation Commissioner or the New York State Historic Preservation Office;
- (2) Projects utilizing Federal or State funding;
- (3) Projects involving the construction of new and/or fabricated buildings, and/or the rehabilitation of existing buildings;
- (4) Projects which are subject to continued environmental regulatory reviews, and/or inspections and/or in which contaminated and/or hazardous material are known to be on site;
- (5) Projects for which the primary scope requires plumbers and/or electricians licensed by the New York City Department of Buildings; and
- (6) General landscaping work which requires that the Contractor be certified by the New York State Department of Agriculture & Markets to perform work within the Asian Longhorned Beetle Quarantine Zone.

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DPR will only consider applicants, in DPR's exclusive discretion, that demonstrate that they:

- (1) Have completed projects of similar type, size, complexity and scope;
- (2) Have the ability, either through their own employees or through subcontractors, to provide the construction services required for the project;
- (3) Have the financial capability, responsibility and reliability required for the project, including the operational capacity to commence and complete the work on the anticipated schedule;
- (4) Have a satisfactory track record for complying with existing labor standards, maintaining harmonious labor relations, complying with equal employment opportunity requirements and anti-discrimination laws, and demonstrating a commitment to working with minority and women-owned businesses through joint ventures or subcontractor relationships;
- (5) Possess a satisfactory record of protecting the health and safety of workers on public works projects and job sites as demonstrated by the prospective bidder's experience modification rate for each of the last three years; and
- (6) Have a satisfactory record of business integrity.

All of this, in my opinion, is vulnerable to subjective interpretation and abuse, giving the government far too much control over access to the bid room.

Even more significantly, this process excludes all of this work to other than M/WBE-certified contractors or those venturing with such entities. DPR will only consider applications from contractors which meet any one of the following criteria:

1. The submitting entity must be a Certified Minority/ Women Business Enterprise (M/WBE); or
2. The submitting entity must be a registered joint venture or have a valid legal agreement as a joint venture, with at least one of the entities in the venture being a certified M/WBE; or
3. The submitting entity must indicate a commitment to

sub-contract no less than 50% of any awarded job to a certified M/WBE for each and every work order awarded.

Thus, this entire "prequalification" program that DPR is implementing is completely and exclusively tied to M/WBE development. "Ordinary" small businesses, with all the challenges they face, need not apply.

G&C Commentary

My long-held, strong bias is for sealed competitive bidding in the public sector. Prequalification greatly undermines that process. There should be no "gate keeper" at the bid room door. The government controlling in advance who may bid is a fundamental game changer. Currently, anyone who can produce a bid bond, having been carefully vetted by an independent surety, may bid. Only after being determined to be, by objective pricing, the apparent lowest responsive and responsible bidder is the contractor carefully vetted by the public owner with regard to responsibility issues such as, character, capability and capital. This is one of the hallmarks, and one of the great strengths, of public contracting.

The Bloomberg administration has long sought to "privatize" public contracting. One need look no further than New York City's "CM-Build" project delivery contract, illegal for a number reasons (e.g., violates the public bidding law, the Wicks Law, public bonding requirements, etc.), to see this clearly. Now with broad prequalification authority, the government gains even greater power to control with whom it is dealing, much like a private sector owner.

No doubt, many contractors today will speak favorably of prequalification since they feel it will limit competition. For those, this attitude will prevail until they are on the wrong side of government-caused favoritism and/or other abuse with regard to the award of a much-desired contract. In such case, thanks to this new law, they will be powerless to protest. It will remain to be seen whether giving public owners the unfettered power of a private owner in selecting bidders may in the future cause currently sympathetic contractors to seriously regret their current point of view. One thing history has certainly shown, any "creative" idea to move away from open-to-all sealed competitive bidding in the public sector inevitably leaves to favoritism, fraud and corruption.