

Statement of Basis and Purpose of Proposed Rules

These proposed Procurement Policy Board (PPB) amendments would update the provisions of the PPB Rules relating to the filing of PASSPort questionnaires and PASSPort questionnaire exemptions for certain vendors.

The PPB is proposing amendments in order to codify current practices regarding PASSPort questionnaire filing exemptions for governmental and quasi-governmental agencies and partial waivers for portions of the PASSPort questionnaires when in the best interest of the City.

Section 1 of this proposed rule would amend PPB Rule § 2-08(e) to replace the reference to “VENDEX” with “PASSPort” in the subdivision title, replace references to “VENDEX” with “PASSPort” and clarify language in paragraph (2), replace references to “VENDEX” with “PASSPort” in paragraphs (3) and (4), replace the heading of current paragraph (5) “Exemption: Information Not Required by Local Law” with “Waiver: Limited Exceptions in the Best Interest of the City” and revise the remaining language, amend paragraph (6) to replace the terms “exemption” with “waiver” and “exempt” with “waive”, create a new paragraph (7) providing disclosure exemptions for government and quasi-government entities, amend current paragraph (7) to update its paragraph number and add the waivers and disclosure exemptions to the reporting requirements, amend paragraph (8) to update its paragraph number, amend subparagraph (8)(ii) to replace reference to “VENDEX” with “PASSPort”, amend paragraph (9) to update its paragraph number and replace reference to “VENDEX” with “PASSPort”, amend paragraph (10) to update its paragraph number, and amend paragraph (11) to update its paragraph number and replace reference to “VENDEX” with “PASSPort”.

Section 2 of this proposed rule would amend PPB Rule § 2-08(f)(2) to replace reference to “VENDEX” with “PASSPort.”

Section 3 of this proposed rule would amend PPB Rule § 2-08(g)(1) to replace reference to “VENDEX” with “PASSPort.”

Section 4 of this proposed rule would amend PPB Rule § 2-08(h)(3) to replace reference to “VENDEX” with “PASSPort.”

Section 5 of this proposed rule would amend PPB Rule § 2-08(o) to replace reference to “VENDEX” with “PASSPort.”

Section 6 of this proposed rule would amend PPB Rule § 2-08(p) to replace all references to “VENDEX” with “PASSPort”, in paragraphs (4), (5), and (6).

The PPB’s authority to promulgate these rules is found in Sections 311 and 1043 of the New York City Charter.

The new material added in the text of the rule is underlined and the deleted material is in [brackets]. “Shall” and “must” denote mandatory requirements and may be used interchangeably in the rules of this department, unless otherwise specified or unless the context clearly indicates otherwise.

Section 1. The heading and Paragraphs (2), (3), (4), (5), (6), (7), (8), (9), (10) and (11) of Subdivision (e) of Section 2-08 of Title 9 of the Rules of the City of New York are amended to read as follows:

(e) [VENDEX] PASSPort questionnaire.

(2) Obligation to File Questionnaires. [VENDEX] Contractors shall file updated PASSPort questionnaires [shall be completed and filed by the contractor] at least once [within each] every three years. [period within which such contractor does business with the City.] If any information required in the PASSPort questionnaire has changed in the time since the last update, including during the term of the contract, such that the contractor’s questionnaire is no longer accurate, the contractor shall update its responses in the PASSPort questionnaire to supply any changed information prior to any new contract award. Each contractor shall certify at the time of award of each contract that all the information [submitted within such three year period] provided in its PASSPort questionnaire is current, accurate and complete. Such certification shall be valid for 30 days. No contract shall be awarded absent such certification. [If changes have occurred within the three year period, the contractor shall update, prior to contract award, any previously-submitted VENDEX questionnaire to supply any changed information, and shall certify that both the updated and unchanged information is current, accurate and complete.] If [VENDEX] PASSPort questionnaires have not been submitted within three years, then such questionnaires shall be completed and filed:

(i) by applicants, at the time of an application for inclusion on a prequalified list, provided that this requirement shall not apply to applications under HHS Accelerator pursuant to 9 RCNY § 3-16;

(ii) by contractors, when requested by an agency or by the CCPO, but in any event before the Recommendation for Award is approved or not later than:

(A) thirty days after registration of the contract in the case of a contract of whatever value if the aggregate value of City contracts, franchises, and concessions awarded to that contractor including this one during the immediately preceding twelve-month period equals or exceeds \$250,000, and

(B) thirty days after registration of the contract, where permitted pursuant to paragraphs (3) and (4) of this subdivision; or

(iii) by subcontractors, within thirty days after the ACCO has received from the prime contractor written notification of the identity of the proposed subcontractor and granted preliminary approval, if the aggregate value of City contracts, franchises, and concessions awarded that subcontractor including this one during the immediately preceding twelve-month period equals or exceeds \$250,000.

(3) Late Filing of Information: When Permitted. The [VENDEX] PASSPort questionnaire may be submitted within thirty days after registration of the contract as provided in paragraph (4) of this subdivision in the following circumstances:

- (i) emergency procurements as defined by 9 RCNY § 3-06;
- (ii) accelerated purchases as defined by 9 RCNY § 3-07;
- (iii) on a contract-by-contract basis where the CCPO, upon the written request of the ACCO, has determined that expedited procurement action is required due to urgent circumstances;
- (iv) buy-against procurements pursuant to 9 RCNY § 4-07 where the contractor has not previously submitted a [VENDEX] PASSPort questionnaire; and
- (v) on a contract-by-contract basis with respect to information not required by local law where the CCPO, upon the written request of the ACCO, has determined that a specific portion of the information required by the questionnaire but not by local law is not accessible to the contractor despite good faith efforts to complete the filing in a timely fashion. The determination shall set forth with particularity the information which may be submitted late and the reasons for the later completion of the filing, and shall include the specific date by which the information shall be submitted.

(4) Late Filing of Information: Required Findings. In the circumstances set forth in paragraph (3) of this subdivision, the [VENDEX] PASSPort questionnaire may instead be submitted after registration of the contract, provided that:

- (i) the ACCO has notified the contractor in writing of its obligation to submit the [VENDEX] PASSPort questionnaire as set forth in subdivision (e)(2) above;
- (ii) the ACCO has determined that sufficient information concerning the prospective contractor is otherwise available to permit the determination of responsibility prior to receipt of the questionnaire; and
- (iii) in addition, where the basis for the delayed submittal is an expedited procurement action due to urgent circumstances, the ACCO must provide a separate additional determination setting forth the specific documented reasons it is not feasible for the contractor to complete all or some specific portion of the [VENDEX] PASSPort questionnaire as set forth in subdivision (e)(2) above. The ACCO's determination shall include the name and telephone number of the authorized representative of the contractor who provided information on which the ACCO relied in making the non-feasibility determination.

(5) [Exemption: Information Not Required by Local Law] Waiver: Limited Exception in the Best Interest of the City. On a contract-by-contract basis, where a contractor demonstrates compelling reasons that it is not feasible to supply a specifically identified portion of information which is required by the questionnaire but not by local law, the CCPO may [exempt a contractor from the requirement to supply that] waive a portion of the required information when such waiver is in the best interest of the City, upon the written application of the ACCO setting forth with particularity:

- (i) the efforts to obtain the required information;
- (ii) the name and telephone number of the authorized representative of the contractor who made the request for [exemption] waiver on behalf of the contractor;
- (iii) the information to be covered by the [exemption] waiver;
- (iv) the compelling reasons why [an exemption] a waiver should be granted in this case, including why the circumstances are such that it is in the best interests of the City that the contract be awarded to this contractor; and

- (v) the basis for finding the sufficient information concerning the prospective contractor is otherwise available to permit the determination of responsibility absent the exempted information. [In these cases the CCPO shall state the reasons that granting the exemption serves the best interests of the City and shall provide a copy of this determination to the Comptroller within five days]

Waivers pursuant to this section, including the determination of which information to waive, may be made in the sole discretion of the CCPO, and are conditional on a vendor's sufficient progress of discussions regarding questionnaire submissions. In these cases, the CCPO shall set forth the details of the waiver, including a statement of the specific reasons why granting such a waiver serves the best interests of the City, and include that information in the computerized database. The CCPO shall provide a copy of this determination to the Comptroller within five days. Such waiver shall only be valid for the specific contract identified in the application, and an ACCO must complete a new application for a waiver upon the award of a new contract.

(6) [Exemption:] Waiver: Sole Source. In the case of a specific contract awarded in accordance with the sole source provision of Section 3-05 of these Rules where a contractor refuses to supply some portion of the required information, but the need for the goods, services, or construction is such that it is in the best interests of the City that the contract be awarded, the CCPO may [exempt] waive [the contractor from the requirement of some] a specifically identified portion of information required by local law concerning the creation and maintenance of a computerized database upon the written application of the ACCO setting forth with particularity:

- (i) the efforts to obtain the required information;
- (ii) the name and telephone number of the authorized representative of the contractor who refused, on behalf of the contractor, to supply the required information;
- (iii) the information to be covered by the [exemption] waiver;
- (iv) the reasons why [an exemption] a waiver should be granted in this case; and
- (v) the basis for finding that sufficient information concerning the prospective contractor is otherwise available to permit the determination of responsibility absent the [exempted] waived information.

(7) Exemption: Entities Not Required to Complete Disclosures. On a contract-by-contract basis, governmental bodies and quasi-governmental bodies may not be required to complete PASSPort questionnaires upon written application of the ACCO setting forth with particularity the entity's accountability, including but not limited to information concerning:

- (i) The name and telephone number of the authorized representative of the contractor who made the request for exemption on behalf of the entity;
- (ii) the number of members of the entity's Board of Directors or Board of Trustees, including any members appointed by an elected official;
- (iii) any other information regarding the public's review, direction, or control over the entity's operations;
- (iv) the compelling reasons why an exemption should be granted in this case, including why the circumstances are such that it is in the best interests of the City to award the contract to this contractor;

(v) the basis for finding that sufficient information concerning the prospective contractor is otherwise available to render a determination of responsibility absent the exempted filing, including whether the entity's employees are subject to any other public filing requirements; and

(vi) any other information demonstrating that the prospective contractor is otherwise publicly accountable.

The application for exemption by the ACCO must be reviewed and approved by the CCPO in writing. Such exemption shall only be valid for the specific contract identified in the application, and an ACCO must complete a new application for an exemption upon the award of a new contract.

[7] (8) Reporting Requirement for Late Filings, Waivers, and Exemptions. A copy of the written request of the ACCO and the determination of the CCPO permitting late filing of required information pursuant to subdivision (e)(3) and (4) of this section, [or] granting [an exemption] a waiver pursuant to subdivision (e)(5) and (6) of this section, or granting an exemption pursuant to subdivision (e)(7) of this section shall be filed by the CCPO with the Comptroller within five days after it is made or approved by the CCPO.

[8] (9) Contract terms and conditions.

(i) Late filing. Whenever the CCPO has permitted the filing of some or all of the required information within thirty days after the registration of the contract, the contract shall contain a clause requiring the submission of the required information within the required time period as a material term and condition of the contract and permitting termination without penalty to the City for violation of the condition, or in the event that:

(A) the Mayor or his/her designee determines on the basis of the belatedly filed information that it is in the best interest of the City to terminate the contract, and/or

(B) the Comptroller or his/her designee determines that the belatedly filed information reveals matters which if provided earlier would have provided a basis for an objection to registration of the contract by the Comptroller and the Mayor or his/her designee determines that he/she would have agreed with such determination and therefore it is in the best interest of the City to terminate the contract.

(ii) Subcontractors. Where appropriate, City contracts shall contain a clause requiring prime contractors to notify subcontractors of their obligation to complete and file [VENDEX] PASSPort Questionnaires within thirty days after the ACCO has granted preliminary approval of the identified subcontractor, if the aggregate value of City contracts, franchises, and concessions awarded to a subcontractor during the immediately preceding twelve-month period equals or exceeds \$250,000.

[(9)] (10) Failure to Submit Information as Required: Consequences. Whenever a late filing of required information has been permitted in accordance with subdivision (e)(3) and (4) of this section and the contractor has failed to submit the required information within the required time period, that fact shall be communicated to the CCPO and the Comptroller immediately and shall be included within the [VENDEX] PASSPort data base. Until such time as the required information has been filed with the CCPO,

(i) no further contract shall be awarded to that contractor,

(ii) the contractor shall be ineligible to bid or propose or otherwise be awarded a further contract, and

(iii) no payments shall be made to the contractor for performance pursuant to that contract unless authorized in writing by the CCPO.

[(10)] (11) The Procurement Policy Board shall provide the City Council with periodic reports concerning permission for late filings and exemptions at intervals and with contents agreed upon by the Procurement Policy Board and the City Council.

[(11)] (12) The questionnaire responses shall be entered into the citywide computerized [VENDEX] PASSPort database no later than the completion of the Recommendation for Award.

§2. Paragraph 2 of Subdivision (f) of Section 2-08 of Title 9 of the Rules of the City of New York is amended to read as follows:

(2) For any contract or subcontract that is subject to the Vendor Name Check process set forth in section (f)(1), the CCPO may charge a fee for the administration of the [VENDEX] PASSPort system, including the Vendor Name Check process, in the amount of \$175 for contracts of an estimated value less than or equal to \$1,000,000 and \$350 for contracts of an estimated value greater than \$1,000,000. Such fee will be charged against payments made to the vendor on the contract at issue. The timing of the contract award shall not be affected by a fee incurred but not yet paid by the vendor. A prime vendor is responsible for the payment of fees for any subcontractors of the vendor for which Vendor Name Check requests are made. Nothing contained in these Rules shall prohibit a prime vendor from recovering from its subcontractors the amount of such fees attributable to those subcontractors. The [VENDEX] PASSPort administrative fee may be waived at the discretion of the CCPO if it is determined that such waiver is in the City's best interest.

§3. Subparagraphs (i), (ii) and (iv) of Paragraph 1 of Subdivision (g) of Section 2-08 of Title 9 of the Rules of the City of New York are amended to read as follows:

(i) the [VENDEX] PASSPort database of debarred, suspended, and ineligible contractors;

(ii) [VENDEX] PASSPort and other records of evaluations of performance, as well as verifiable knowledge of contracting and audit personnel;

(iv) information supplied by the prospective contractor, including bid or proposal information, [VENDEX] PASSPort and prequalification questionnaire replies, financial data, information on production equipment, and personnel information;

§4. Paragraph 3 of Subdivision (h) of Section 2-08 of Title 9 of the Rules of the City of New York is amended to read as follows:

(3) The determination of non-responsibility shall be included in the [VENDEX] PASSPort database.

§5. Subdivision (o) of Section 2-08 of Title 9 of the Rules of the City of New York is amended to read as follows:

(o) Documentation. Documents reflecting the agency determination of non-responsibility and any appeal and decision with respect to appeal, and evidence of having supplied written notifications as required by these Rules, shall be sent to the CCPO for inclusion in the [VENDEX] PASSPort database.

§6. The introductory paragraph and Paragraphs (4), (5) and (6) of Subdivision (p) of Section 2-08 of Title 9 of the Rules of the City of New York are amended to read as follows:

(p) Rehabilitation of Vendors. An application for a declaration of rehabilitation may be made by any vendor who has been found non-responsible by one or more City agencies, if such vendor has either declined to appeal or exhausted the process for appealing such non-responsibility determination(s) as set forth in this section, or by any vendor that is the subject of any unfavorable responsibility information recorded in the [VENDEX] PASSPort database as a caution(s). A declaration of rehabilitation will not result in deletion of the underlying non-responsibility determination or caution from the [VENDEX] PASSPort database, but a summary of such declaration or of any decision denying such an application shall be entered into the [VENDEX] PASSPort database for consideration by agency Contracting Officers in making future responsibility determinations. In making responsibility determinations, Contracting Officers may rely upon the declaration of rehabilitation in lieu of requiring a vendor to explain negative responsibility information in accordance with subdivision (g)(2) of this section.

(4) Notice to Agencies. The applicant shall concurrently provide a copy of its application for rehabilitation to the Department of Investigation, the Comptroller and to the Contracting Officer of any agency that found such applicant non-responsible or requested that negative responsibility information be entered as a caution in the [VENDEX] PASSPort database.

(5) CCPO Decision. The CCPO shall review the filing, shall consult with the Department of Investigation and may consult with any other relevant government agency, prior to making a final decision concerning the application for a declaration of rehabilitation. The CCPO may seek additional information from the applicant. Upon review of the filing and any subsequent submission by the applicant, the CCPO shall issue a decision granting or denying the application for declaration of rehabilitation. In making such decision, the CCPO may consider a broad range of factors, which may include, but is not limited to, the following:

- (i) The public policy expressed in these Rules that the vendors have the capability in all respects to perform fully the requirements of public contracting and the business integrity to justify the award of public tax dollars;
- (ii) The bearing of any criminal, false, fraudulent or other activities of the vendor, its affiliates and current and past owners, principals, employees, or their associates or other persons or entities on the skill, judgment and integrity of the vendor or on its fitness or ability to perform as a public contractor, and the time elapsed since and seriousness of such activities;
- (iii) Any information produced by the vendor or available from other sources relevant to its rehabilitation, including the adequacy of the remedies or corrective actions identified

by the applicant, or to any other factor bearing on the vendor's skill, judgment and integrity or its fitness or ability to perform as a public contractor.

The CCPO may condition any declaration of rehabilitation upon the applicant's completion of the specific additional corrective actions, if any, set forth in such declaration. The CCPO decision granting or denying the application for declaration of rehabilitation shall be final and a record of the determination shall be included in the [VENDEX] PASSPort database.

(6) Notification of Decision. A copy of the CCPO decision granting or denying the application for declaration of rehabilitation shall be mailed to the vendor, with copies to the Department of Investigation, the Comptroller and the Contracting Officer of any agency that found such applicant non-responsible or requested that negative responsibility information be entered as a caution in the [VENDEX] PASSPort database.