



THE CITY OF NEW YORK
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Craig R. Hammerman
District Manager, Community Board 6
250 Baltic Street
Brooklyn, NY 11201

Dear Mr. Hammerman:

In response to your letter dated September 9, 2005, we reviewed certain aspects of the construction project contracting process, specifically in relation to the bidding process, contract changes, and contract defaults.

Bidding Process. According to the Mayor's Office of Contract Services (MOCS), the method most often used for awarding contracts for construction projects is the competitive sealed bid, where the major basis for selecting a responsible vendor is the lowest price. Competitive sealed bids are also used for purchasing goods and services. Contracts awarded using this method have consistently represented approximately one-third of the total value of all contracts citywide over each of the past three years. The other most common methods for awarding contracts during this period are renewals (average of 26 percent of total value) and request for proposals (16 percent).

Under New York State competitive bidding laws (General Municipal Law §§ 103-104), the city is required to use only the competitive sealed bid method of procurement for the vast majority of its capital construction work. The state has not afforded the city the discretion to handle construction contracts in the manner you describe for the State of Pennsylvania (best value, etc.). In most cases, the city cannot pre-qualify construction bidders. Instead, the city is permitted to undertake only some very basic types of screening of bidders. For example, the Invitation for Bids sets forth various requirements for the procurement. Bids can be rejected if they are found to be "non-responsive" to the requirements of the job, and the low bidder can be disqualified if the agency determines that it is "non-responsible," i.e., that it lacks the business integrity, financial capacity and/or track record of acceptable performance.

As part of the responsibility determination, the City Charter, Administrative Code, and Procurement Policy Board Rules require agencies to prepare evaluations of contractor performance for submission to the city's VENDEX database, which is where information on vendor responsibility is stored. In 2005, agencies completed 87 percent of required evaluations. Overall, 81 percent of vendors achieved ratings of satisfactory or better (which included 42 percent with excellent/very good ratings), with no below-par sub-ratings. These evaluations are used to "determine whether to renew, extend, or terminate existing contracts that are scheduled to continue, and, if continued, whether there is a need for the vendor to develop and implement a corrective action plan to address identified problems." Also, all vendors who obtain \$100,000 or

more (on an annual basis) of city contracts/sub-contracts are required to complete questionnaires for VENDEX that document the vendor's business integrity, financial capacity, and ability to perform.

MWBE Procurement Opportunities. The city has recently launched an expanded program to promote procurement opportunities for minority- and women-owned businesses (MWBEs), as a result of Local Law 129 and Executive Order 71, both of 2005. Beginning July 1, 2006, all primary contractors providing construction services will be required to meet specific goals for MWBE participation in subcontracting opportunities below \$1 million. Goals will also apply to the award of prime contracts that are themselves below \$1 million in value. Data on city agencies' success in attaining these goals will begin to be reported, in accordance with Local Law 129, in April 2007.

Capital Contract Changes. Changes to construction contracts are called change orders, and authorize additional work to be performed that is either necessary to complete the work in the original contract or to add work that would not result in a material change to the scope of the contract. Change orders are not subject to competitive bidding requirements because they are not viewed as new procurements. The city is allowed to modify contracts without competition "so long as such modification does not alter the essential identity or the main purpose of the contract."

These amendments to a construction contract increase the funding, and must be registered by the Comptroller. Change orders may occur due to:

- the need for extra work;
- price overruns or underruns (on a unit price item);
- design errors or omissions;
- unanticipated field conditions; or
- non-material scope changes.

We used city financial data to measure total capital contract changes that have occurred since a project's inception. Our analysis summarizes the total original maximum amount of all contracts entered into by an agency in a given fiscal year and the current revised maximum amount of these contracts. (Note that our analysis focused on *capital* contract data as compared to the *construction* contract data reported by MOCS in its annual "Agency Procurement Indicators" report. City contracts are funded by the capital budget if, as per Comptroller's Directive No.10, they are tangible city property or other assets, with useful lives of five or more years (tied to the life of the bonds), and costing at least \$35,000. This qualification allows contracts that are not necessarily construction-related to be classified as capital contracts (for example, computer equipment or vehicle purchases). Hence, our analysis captures a broader universe of contracts than what MOCS includes in their report.)

Since capital construction and construction-related projects are frequently multiyear in duration, changes to capital contracts may take place up to several years after the inception of the original contract. Hence, we analyzed data on capital contracts started in 2000 and 2001 for agencies with significant capital budgets.

As of April 2006, there has been an overall increase of 15 percent in the total maximum contract amount of capital contracts started in 2000. For capital contracts started in 2001, there has been an overall increase of 9 percent in total maximum contract amount

The three agencies with the largest capital contracting budgets are the Department of Design and Construction (DDC), the Department of Environmental Protection (DEP), and the Department of Transportation (DOT). Together they were responsible for roughly 85 percent of original contract amounts of the agencies we examined. The three agencies were responsible for 69 percent of the total changes to contracts begun in 2000, and 85 percent of total changes to contracts begun in 2001. While the DDC and DOT changes were spread out over a number of contracts, two-thirds of the total 18 percent increase in DEP's fiscal year 2000 contracts resulted from just six contracts (out of 170 total registered in 2000).

Changes to Capital Contracts, Selected Agencies, Fiscal Years 2000 and 2001								
<i>Dollars in thousands</i>								
Agency	2000				2001			
	No. of Contracts	Original Maximum Contract Amount	Changes to Max Contract Amount	Percent Change	No. of Contracts	Original Maximum Contract Amount	Changes to Max Contract Amount	Percent Change
DCAS	96	\$102,515	\$87,233	85%	120	\$124,448	\$23,946	19%
DDC	268	1,368,484	119,988	9%	318	1,031,160	96,913	9%
DEP	170	574,411	101,728	18%	181	1,277,693	93,014	7%
DHS	16	1,731	24	1%	26	5,837	149	3%
DOHMH	14	7,991	4,902	61%	22	12,964	(23)	0%
DOT	69	314,485	52,852	17%	62	541,866	63,406	12%
DPR	206	116,999	14,835	13%	289	228,948	(3,727)	-2%
DSNY	39	46,532	4,629	10%	50	74,091	19,357	26%
FDNY	34	7,746	1,027	13%	31	14,294	(324)	-2%
HHC	109	18,472	11,860	64%	218	61,797	6,239	10%
HPD	198	57,146	504	1%	177	29,190	21	0%
NYPD	65	2,872	128	4%	30	10,361	334	3%
TOTAL	1,284	\$2,619,384	\$399,709	15%	1,524	\$3,412,650	\$299,305	9%

SOURCE: IBO.
NOTE: Total of changes through April 2006.

A small number of contracts are often responsible for the major share of total agency contract changes. For contracts registered in 2000, three agencies (Department of Citywide Administrative services (DCAS), Health & Hospitals Corporation (HHC), and Department of Health and Mental Hygiene (DOHMH) had disproportionately large percentage increases compared to the average for all agencies. In each case, however, just a few isolated contracts were responsible for the majority of the changes. Two contracts (out of 96) were responsible for the entire 85 percent increase for DCAS while one contract (out of 14) was responsible for the entire 61 percent increase for HHC. In the HHC case, two contracts were responsible for almost the entire 64 percent increase (note that HHC is subject to a different set of procurement laws and regulations than are the other city agencies listed here). Two agencies (Department of Sanitation, or DSNY, and DCAS) had disproportionately large percentage increases compared to the average for all agencies for contracts registered in 2001. Two contracts (out of 50) were responsible for almost the entire 26 percent increase for DSNY while one contract (out of 120) was responsible for almost the entire 19 percent increase for DCAS.

Sources of Contract Changes. Although there are cases where a fairly small number of contracts account for the majority of changes, the aggregate amount of changes to the contracts we examined is large.

The general city practice is to assume an industry-standard 10 percent contingency on construction projects. The contingency is for the types of changes noted above. When changes to contracts arise, they do not require the review and approval of the Office of Management and Budget (OMB), which initially approves the budget for capital projects and issues a certificate to proceed for the specific project) as long as the changes are within the 10 percent contingency and fall within the accepted scope of changes.

Once a project is put out for bid, if the winning bid is more than the budgeted amount but within the 10 percent contingency, there is no necessity for agencies to amend the “certificate to proceed” that is submitted to and approved by OMB. As a result, however, the actual available contingency amount may be less than 10 percent, and insufficient to cover normal changes—hence requiring a change order. In other words, some share of the contract changes we observed may actually fall within a standard 10 percent contingency that had not been adjusted for actual bid amounts.

In addition to OMB review, the rules of the Procurement Policy Board require all changes that cumulatively exceed the greater of 10 percent of the original contract amount or \$100,000 be approved by MOCS.

In light of the Mayor’s efforts to streamline the procurement process, MOCS has delegated authority to review some of these change orders to the agencies, and is also making efforts to improve the change order process, by standardizing forms and procedures and developing electronic tracking. The Mayor’s Design and Construction Excellence Initiative, launched in 2004, also addresses the process. By focusing on the pre-design and design phases that lead up to a construction project and maximizing the amount of project scope and site information that is used in compiling the contract documents, change orders may be prevented.

Contract Defaults. Contract defaults result from vendors’ poor performance or inability to continue to perform. Based on MOCS data, there were a total of 19 contract defaults citywide in 2005, of which 13 were for construction projects. As a basis of comparison, there were 48,247 contracts awarded in 2005, of which 3,105 were for construction projects. Hence, it appears that construction contract defaults are relatively rare occurrences. Unfortunately, there is no data available on the dollar value of the defaulted contracts.

Contract Defaults, 2005		
Agency	Number of Contract Defaults	Number of Construction Defaults
DEP	3	2
DPR	9	9
DSNY	2	2
HRA	5	-
Total	19	13

SOURCES: IBO; Mayor’s Office of Contract Services.

I hope this information is helpful to you. If we can provide further information on this analysis we would be happy to.

Sincerely,

C. Preston Niblack

c. M. Simpson
T. Matthews