

NYC's Subcontractor Approval Process (RFAS): What Recourse Does A Subcontractor Have?

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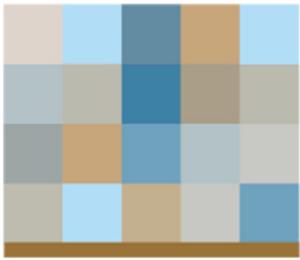
The New York City Procurement Policy Board Rules (“PPB Rules”) provides precious little in the way of guidance with respect to matters related to the approval of subcontractors by NYC agencies. There is no process for the review or appeal from an adverse determination by an agency rejecting a subcontractor’s request for approval (Request for Approval Subcontractor or “RFAS”).

This often leads to subcontractors attempting to resolve any adverse issues related to their RFAS by communication with the agency, usually through the prime contractor involved in submitting the RFAS and/or the Agency Chief Contracting Officer (“ACCO”). In these circumstances, what is a “rejected” subcontractor left with to do in the event these “informal” efforts at resolution are unsuccessful or are simply ignored by the agency? In a recent matter we handled on behalf of a rejected subcontractor, the subcontractor was left with no alternative but to turn to the courts for relief via an Article 78 proceeding. Typically, an Article 78 proceeding to judicially appeal an agency’s actions is viewed as a last resort due primarily to the limited basis for judicial review it provides and the extremely high burden of proof it demands.

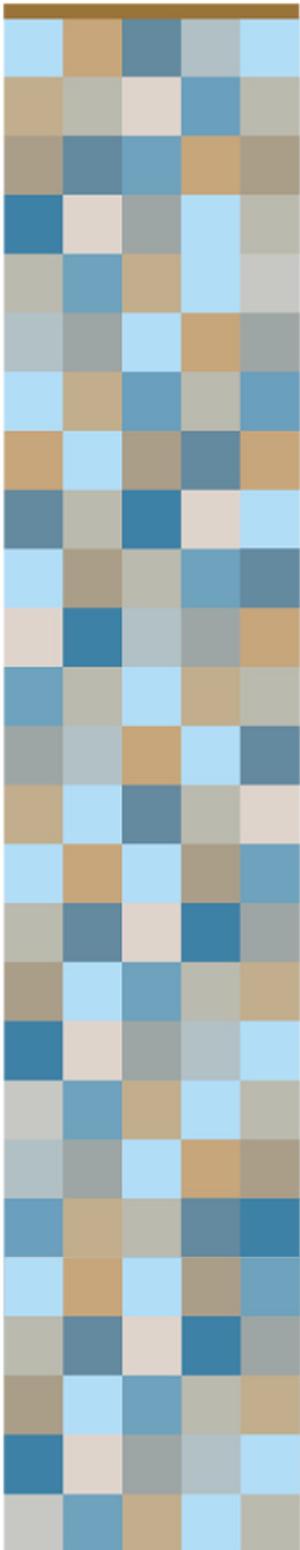
In this challenging matter, all avenues to amicably resolve the agency’s concerns or reservations regarding the subcontractor had been exhausted. The agency refused to discuss, meet, or even consider a fair resolution which would have allowed the subcontractor to work on the projects of its valued general contractor clients, the subcontractor was left with no other alternative but to seek review via the notorious Article 78 proceeding.

The “RFAS” Process and the PPB Rules

The PPB Rules, other than providing specifically for an agency’s authority to approve proposed subcontractors for its projects, does not provide any procedure for such process. Section 4-13 of the PPB Rules provides general criteria to be considered by an agency in making its determination. However, the PPB Rules do not specify any procedure for making that determination. For example, they do not provide that the proposed subcontractor will be provided with notice or an opportunity to be heard on



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any issues regarding its “responsibility” or any other performance criteria to be considered by an agency. Lastly, and perhaps more importantly, the PPB Rules are silent on any procedure for review or appeal of an agency determination or the denial or rejection of an RFAS submitted by a general contractor on behalf of its proposed subcontractor(s).

In this instance, the subcontractor had repeatedly requested an opportunity to meet with the agency to review the denial of its RFAS. The agency refused to meet with the subcontractor and, instead, advised the subcontractor, through the prime contractor for the project at issue, that the subcontractor would simply “never” be approved as a subcontractor.

After several discussions with agency personnel, including attorneys in its General Counsel’s office, it became apparent that the agency would not provide the subcontractor with any “opportunity to be heard” with respect to its RFAS on the projects at issue (there were actually several substantial projects for which the subcontractor’s RFAS were submitted by two different general contractors and rejected by the same agency).

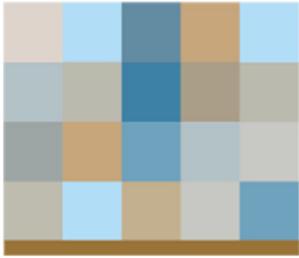
As such, and given the financial significance of the forthcoming projects on which the subcontractor was already the proposed low subcontractor for its trade, the subcontractor was left with no alternative but to seek judicial review of the agency’s determination.

The Article 78 Petition

Even though it is well-settled law that a disappointed bidder, let alone a subcontractor, does not have a “property right” in a rejected bid awarded to another contractor, we constructed several strong arguments on the subcontractor’s behalf in support of the Article 78 proceeding. While this defied conventional wisdom, we believed we could creatively “make the case,” despite the odds. Too much was at stake, perhaps even the very survival of the subcontractor, not to try.

Among the classic Article 78-type arguments we forcefully made were that:

- (i) the agency’s actions violated lawful procedure and deprived the subcontractor of due process;
- (ii) the agency’s refusal to approve the subcontractor was without basis in fact and was not supported by competent, substantial evidence; and



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(iii) the agency abused its discretion as to the measure or mode of the penalty imposed.

The Happy Ending

After filing the Article 78 petition in court, we asked to speak with NYC Corporation Counsel attorneys. We had several discussions with Corporation Counsel and agency attorneys and leadership. We carefully reviewed all of the prior issues which had led to the agency's rejection of the subcontractor and, more importantly, reviewed the subcontractor's more recent satisfactory performance and experiences with NYC, New York State, and other public and private owners in the several years since. We are pleased to report that we were able to reach a satisfactory resolution, clearing the path for the subcontractor to submit RFAS applications on new projects.

MHH Commentary

As stated above, Article 78s are typically (and rightfully) viewed as a course of last resort due to the extremely high burden of proof and legal standards applicable to them. To be resourceful for a client, however, particularly one with so much at stake, was very gratifying. This case demonstrates that even a notorious "Article 78" proceeding, in the hands of skilled construction counsel, can be a vehicle for successful redress given careful consideration and appropriate presentation of the unique facts and circumstances underlying the agency determination in any particular case.

In this matter, the Article 78 proceeding provided the right pathway to a fair resolution that cleared the path for the subcontractor.

If you have any questions or concerns regarding this matter, the RFAS submittal process or Article 78 proceedings in general, please feel free to contact us.

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