

OFFICE OF ENVIRONMENTAL REMEDIATION  
NOTICE OF ADOPTION OF AMENDMENTS TO RULES OF THE NEW YORK  
CITY BROWNFIELD INCENTIVE GRANT PROGRAM

NOTICE IS HEREBY GIVEN PURSUANT TO THE AUTHORITY VESTED in the Director of Environmental Remediation by subdivision e of section 15 of the New York City Charter, that the Office of Environmental Remediation promulgates and adopts amendments to rules relating to the New York City Brownfield Incentive Grant Program.

The rules were proposed and published on September 1, 2011. A public hearing was held on October 3, 2011. This rule was not included on the office's most recent regulatory agenda.

**STATEMENT OF BASIS AND PURPOSE**

Pursuant to subdivision e of section 15 of the New York City Charter, the Office of Environmental Remediation ("OER") promulgates and adopts amendments to the rules for the City's Brownfield Incentive Grant Program. These amendments arise from OER's experience in managing the brownfield grant program in its first year. They also reflect the market reality of how investigation and cleanup work at brownfield sites is performed.

The amendments cover three issues, described in detail below:

- 1) Clarify the role of "qualified vendors";
- 2) Lift the indemnification requirement for certain contractors; and
- 3) Relax the requirement of notifying the City of shareholders.

## **Qualified Vendors**

The amendments clarify the role of “qualified vendors” by defining them to be environmental professionals or consultants, or architects, engineers, lawyers, or other professionals, or their firms, who are qualified to perform, subcontract and/or supervise work eligible for reimbursement with City grant funds. The definition of qualified vendors also includes other such qualified entities, such as community based organizations preparing an application for a brownfield opportunity grant from the New York state department of state, community development corporations, local development corporations, and community development financial institutions. Qualified vendors will continue to be required to indemnify both the City and the grant administration contractor for all services and activities to be performed in relation to the grant.

## **Indemnification and Insurance**

Through OER’s experience in administering the grant program, it has learned that at many work sites, eligible work will include site work (e.g., excavation and removal of soil) that is typically performed by contractors who are directly hired by the grantee developer. These contractors are neither qualified vendors nor are they hired by qualified vendors. Under the current rules, these contractors would be required to indemnify the City and the grant administration contractor. There is evidence that small and medium-sized developers would opt out of the City’s program rather than require their contractors performing work on site to agree to indemnify the City and the grant administration contractor. Therefore, the amendment removes the indemnification requirement for these contractors. Instead, it requires that contractors who are directly hired by grantee developers to perform remedial work under an approved remedial action work plan must

maintain insurance that is adequate for the nature and scope of services performed, as determined by OER. That insurance must name the City and the grant administration contractor as additional insureds. In addition to the insurance protection, the City is still protected by the grantee developer's obligation to indemnify the City and the grant administration contractor for all services and activities performed relating to the grant, and this would include the services of these site contractors.

Additionally, the amendment provides greater flexibility to OER in administering the program by permitting OER, in select cases or categories, to waive the requirement that eligible services or activities be performed by a qualified vendor. In deciding whether to grant a waiver, the office will consider certain factors, such as: the degree of risk of injury or damage in the work performed, whether the work is adequately covered by insurance, and the expected quality of the work.

### **Shareholders**

Finally, the amendment relaxes the requirement that where a limited liability company owns a brownfield project, the grant application must identify all owners with a *ten percent* share in the company. The amendment requires identification only of owners with a *twenty-five percent* interest in the limited liability company, because the stricter requirement of ten percent does not provide information useful to OER and delays approval of otherwise-eligible grant applications.

“Shall” and “must” denote mandatory requirements and may be used interchangeably in the rules of this office, unless otherwise specified or unless the context clearly indicates otherwise.

New text is underlined; deleted material is in [brackets].

Section 1. Section 43-1416 of Chapter 14 of Title 43 of the Rules of the City of New York is amended by adding a new subdivision l, and renumbering subdivisions l through o to be subdivisions m through p, to read as follows:

l. “Qualified vendor” or “vendor” means:

(1) an environmental professional or consultant or firm thereof;

(2) an architect, engineer, attorney, or other professional or firm thereof;

(3) a community based organization preparing an application for a brownfield opportunity grant from the New York state department of state; or

(4) a community development corporation, local development corporation, community development financial institution, or another similar entity,

that is qualified by the grant administration contractor to perform, subcontract, and/or supervise work eligible for reimbursement under the New York city brownfield incentive grant program.

§ 2. Subdivision e of section 43-1420 of Chapter 14 of Title 43 of the Rules of the City of New York is amended to read as follows:

e. All applications shall include:

1. the identity of all applicants. Where a limited liability company owns a brownfield project, all parties with a [ten] twenty-five percent ownership interest in the limited liability company shall be individually identified in the application.

2. the street address of the property;

3. the location of the property, by borough, block and lot;

4. the zoning designation of the property;

5. a description of the development plan for the property;

6. the grant type(s) applied for; and

7. any other information requested by the office.

§ 3. Section 43-1421 of Chapter 14 of Title 43 of the Rules of the City of New York is amended to read as follows:

## § 43-1421 Agreements

a. Brownfield incentive grants require an executed agreement between the grantee and the grant administration contractor prior to the disbursement of funds.

b. Brownfield incentive grant agreements shall include:

1. A grantee shall indemnify both the city of New York and the grant administration contractor for all services and activities to be performed in relation to the grant, including, but not limited to, all services and activities that will be [performed using] reimbursed with grant funds.

2. A [grantee's] grantee must require its qualified vendors [and contractors shall] to indemnify both the city of New York and the grant administration contractor for all services and activities to be performed in relation to the grant, including, but not limited to, all services and activities that will be reimbursed with grant funds.

3. All eligible services and/or activities must be performed by a qualified vendor, except in the following circumstances:

A. A grantee may directly hire a contractor, other than a qualified vendor, to perform remedial work under an approved remedial action work plan, provided that the grantee requires the contractor to maintain insurance that is adequate for the nature and scope of the services and activities performed, as determined by the office. That insurance must name the city of New York and the grant administration contractor as additional insureds.

B. In select cases or categories, the office may waive the requirement that eligible services and/or activities be performed by a qualified vendor. In deciding whether to waive this requirement, the office will consider at a minimum:

i. The degree of risk in the work performed, including the risk of injury to persons or damage to property or the risk of other claims, damages or losses;

ii. Whether the work performed is adequately covered by insurance; and

iii. Whether the office is assured that the work performed will be of sufficient quality.

[3.] 4. A grantee shall accept all terms of the grant including, but not limited to, administration of grants by the grant administration contractor.

[4.] 5. Project information required by the office. A grantee shall provide basic information required for each grant in a manner and form developed by the office for this purpose. Information required by the office may include:

A. a schedule for work;

B. details of the planned development;

C. an estimate of the number of jobs to be created by the planned development;

D. estimated costs of the planned development;

E. basic development information, including, but not limited to, the square footage of residential, commercial, industrial, and open space to be created; and

F. the number of residential affordable housing units to be created.

[5.] 6. A grantee shall agree to office requirements for future reporting on projects related to each grant. Such reporting shall be submitted on forms developed by the office for this purpose and may include details of the outcome of each project after grant activities are completed, including, but not limited to:

- A. whether the proposed development was constructed;
- B. whether a government remediation program was utilized for the cleanup; and
- C. an update of information contained in paragraph 4 of this subdivision.