



# State of New Jersey

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## BY U.S. MAIL AND ELECTRONIC MAIL

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County of Hudson, Office of County Counsel  
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**Re: OSC File No. 24-346 Hudson County - Medical/Fiscal Administration at the Hudson County Correctional Center**

Dear Mr. Battista:

On November 17, 2023, County Counsel's office, on behalf of Hudson County (County), submitted to the Office of the State Comptroller (OSC) the following: (1) Specifications for the Medical Health Care Management, Mental Health Care Management, and Fiscal Management at the Hudson County Correctional Center (HCCC), dated July 2023 (2023 Specifications); (2) the selected proposer's (Proposer)<sup>1</sup> Technical and Cost Proposal for the Specifications, dated September 22, 2023 (Proposal); (3) OSC Compliance form B1, dated November 17, 2023; (4) an email from Assistant County Counsel, dated November 17, 2023, with an undated memorandum attached indicating that the County intends to award a one-year non-fair and open professional services contract to the Proposer on December 20, 2023 in the amount of \$13,488,000, pursuant to N.J.S.A. 40A:11-5(1)(a)(i), without publicly advertising for bids (collectively referred to as the 2023 Procurement throughout this letter).

OSC has reviewed the County's initial submission as well as additional documents requested by OSC and provided by the County on January 10, 2024 and February 23, 2024. In addition, on

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<sup>1</sup> For purposes of this public letter OSC has removed references to the business name of the selected proposer.

February 9, 2024, OSC interviewed County Counsel and the County's qualified purchasing agent (QPA) regarding this proposed contract.

Although OSC has previously requested a corrective action plan (CAP) from the County on December 12, 2023, December 20, 2023, and January 16, 2024, thus far the County has not provided one. By letter dated January 23, 2024, the County advised OSC that it does not anticipate re-procuring the services and believes a CAP is not required. Through this letter, OSC reiterates its determination that a CAP is necessary before proceeding with the contract award so that the County can procure patient care services for inmates at HCCC in compliance with the Local Public Contracts Law, (LPCL) N.J.S.A. 40A:11-1 to -60. Additionally, as more fully set forth below, OSC finds that the County:

- (1) failed to provide OSC the 30-day prior notice of this procurement as required by N.J.S.A. 52:15C-10(b);
- (2) improperly relied upon the professional services exception to public bidding under the LPCL, N.J.S.A. 40:11-5(1)(a)(i) (professional services exception), to select the Proposer for the services described in the 2023 Specifications;
- (3) impermissibly seeks to award a professional services contract, that may be extended for up to three years despite the LPCL specifically limiting such contracts to 12 consecutive months; and
- (4) employed an approach to procuring inmate patient care services that resulted in less transparency and less competition than the law requires.

As detailed below, the County followed the same procurement process in 2018, and OSC's conclusions from 2018 have not changed. The procurement of a management firm to provide a turn-key solution for health care management, mental health care management, fiscal management, and other administrative services at HCCC may not be procured by the professional services exception. Rather, the County must either (1) issue a publicly advertised competitive contracting request for proposals and award to the firm whose proposal is most advantageous to the County, price and other factors considered, pursuant to N.J.S.A. 40A:11-4.1 to -4.5, for a term of up to five years, as permitted by N.J.S.A. 40A:11-4.2 (competitive contracting); or (2) issue a publicly advertised bid and award to the lowest responsible bidder pursuant to N.J.S.A. 40A:11-4, for a term of up to three years, as permitted by N.J.S.A. 40A:11-15(29).

## **Background**

### **A. The Local Public Contracts Law**

The LPCL provides that "[e]very contract awarded by the contracting agent for the provision or performance of any goods or services, the cost of which in the aggregate exceeds the bid threshold, shall be awarded only by resolution of the governing body of the contracting unit to

the lowest responsible bidder after public advertising for bids and bidding therefor, except as is provided otherwise in [the LPCL] or specifically by any other law.” N.J.S.A. 40A:11-4. Since the LPCL was enacted in 1971, the Legislature has enacted numerous individual exceptions to public bidding under N.J.S.A.40A:11-5. Generally, exceptions to bidding apply in situations in which public bidding would be meaningless or impractical. *Capasso v. L. Pucillo & Sons*, 132 N.J. Super. 542, 550 (1994), *aff’d*, 132 N.J. Super. 473 (App. Div. 1974). Currently, there are 37 exceptions, none of which exempts inmate patient care services as described in the 2023 Specifications or the earlier 2018 procurement. Importantly, the New Jersey Supreme Court has construed the LPCL exceptions to public bidding requirements strictly “so as not to dilute this policy or permit a public body to avoid pertinent legislative enactments.” *National Waste Recycling, Inc. v. Middlesex County Improvement Authority*, 150 N.J. 209, 223 (1996). The longstanding judicial policy in construing cases governed by the LPCL has been to curtail the discretion of local authorities by demanding strict compliance with public bidding guidelines. *L. Pucillo & Sons v. Mayor of New Milford*, 73 N.J. 349, 356 (1977).

To guard against potential misuse, the boundaries of the term “professional services” have been narrowly drawn by the Legislature to mean:

[S]ervices rendered or performed by a person authorized by law to practice a recognized profession, whose practice is regulated by law, and the performance of which services requires knowledge of an advanced type in a field of learning acquired by a prolonged formal course of specialized instruction and study as distinguished from general academic instruction or apprenticeship and training.

[N.J.S.A. 40A:11-2(6).]

The above definition is limited to services performed by a *person* with specific credentials. As explained below, the definition does not apply to a full-service management company that performs a bundle of health care, mental health care, fiscal management, and administrative services at HCCC. When interpreting a statute, courts ascribe statutory words their ordinary meaning and significance, and read them in context with related provisions so as to give meaning to the legislation as a whole. *Lane v. Holderman*, 23 N.J. 304, 313 (1957); *Chasin v. Montclair State Univ.*, 159 N.J. 418, 426–27 (1999). Here, relying on the professional services exception to hire a management firm to provide inmate patient care services at HCCC ignores the plain reading of the statute and renders meaningless N.J.S.A. 40A:11-4.1(h), which expressly authorizes counties to procure inmate patient care services at HCCC through the issuance of a request for proposals awarded based on price and other factors using competitive contracting.

## **B. The 2018 Procurement for the Medical Health Care Management, Mental Health Care Management, and Fiscal Management at HCCC and subsequent renewals**

The County first relied on the professional services exception to procure a management firm to provide medical, mental health, and fiscal management to inmates at HCCC in May 2018 (2018

Procurement). When submitted to OSC on May 14, 2018, the County estimated its value at \$5 million per year, for a total of approximately \$15 million over the course of three years. The County did not publicly advertise the opportunity, but rather issued the 2018 specifications to chosen vendors on May 1, 2018 (2018 Specifications). The County provided notice to OSC after those specifications were issued to chosen vendors, but before proposals were due on June 11, 2018. At that time, the County expressed an urgency to make an award quickly because of recent inmate and detainee deaths and the expected termination of its existing contractor. In view of the County's concerns about the health and safety of inmates and detainees, and despite the County's failure to provide OSC with the statutorily required 30-day notice prior to the commencement of the 2018 Procurement, on May 31, 2018, OSC informed the County that it would not perform a full review at that time. As part of its preliminary review, OSC noted that "the County's intent to pursue this contract as one for 'professional services' for a duration of up to three years may conflict with N.J.S.A. 40A:11-15 which limits contracts for 'professional services' to a period not to exceed 12 consecutive months."

Notwithstanding OSC's guidance regarding the 12-month limitation for a professional services contract, by Resolution dated July 12, 2018, the County awarded Wellpath LLC (Wellpath) a:

one year professional service contract, with an option for the County to renew for year 2 and year 3 . . . for a contract price as follows:

|                  |                             |
|------------------|-----------------------------|
| Year 1:          | \$7,675,073.60 <sup>2</sup> |
| Optional Year 2: | \$7,857,393.80              |
| Optional Year 3: | \$8,043,965.40              |

By letter dated October 15, 2018, OSC advised the County that it impermissibly relied on the professional services exception to award the 2018 Procurement. Further, OSC concluded that going forward the services must be procured by either (1) the issuance of a publicly advertised bid awarded to the lowest responsible bidder pursuant to N.J.S.A. 40A:11-4, for a term of up to three years, as permitted by N.J.S.A. 40A:11-15(29); or (2) the issuance of a publicly advertised competitive contracting request for proposals awarded to the firm whose proposal is most advantageous to the County, price and other factors considered, pursuant to N.J.S.A. 40A:11-4.1 to -4.5, for a term of up to five years, as permitted by N.J.S.A. 40A:11-4.2. OSC also reminded the County of its responsibility to submit proposed solicitations valued at or above OSC's statutory threshold<sup>3</sup> at least 30 days prior to the commencement of the procurement process.

The County, which had already awarded the contract, disagreed with OSC's position. In January 2019, the County filed a complaint against OSC in the Chancery Division, Hudson County, seeking a declaratory judgment whether its 2018 Procurement complied with the LPCL. The case was

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<sup>2</sup> Note there was an interim Resolution 373-6-2019 amending the contract to add additional funds based on staffing changes, and to adjust the term of the contract to October 1, 2018 through September 30, 2019.

<sup>3</sup> As of July 1, 2020, OSC's statutory review threshold increased from \$10 million to \$12.5 million.

later transferred to the Appellate Division, which dismissed it because the Court found the County failed to assert a concrete claim against OSC. The County argued that a judicial decision with respect to whether the procurement process complied with the LPCL would provide legal clarity for the next procurement. The Court, however, found that argument unpersuasive, stating, “[o]ur authority is limited to the adjudication of ‘actual cases and controversies.’ Actions that are essentially requests for advisory opinions will be dismissed.” *County of Hudson v. State of New Jersey Office of the State Comptroller, No. A-3088-18T1 (App. Div. Dec. 30, 2020)(slip op. at 3)*. Additionally, the Court stated that the County nonetheless would have to comply with the notice provisions of N.J.S.A. 52:15C-10 for any re-procurement of the services, and the decision with respect to the procurement of the 2018 contract might not necessarily apply to a re-procurement, depending on the specifications. The Court stated that:

Uncertainty with respect to the CCS<sup>4</sup> contract, if such uncertainty exists, is the result of the *county’s failure* to fulfill its statutory obligation to provide timely notice to the State Comptroller. There is no doubt that the county is now aware that it is required to provide the State Comptroller notice “at the earliest time practicable,” N.J.S.A. 52:15C-10(b)(1), of its intention to procure a new contract after expiration of the CCS agreement. We must respect the legislative preference to have the county’s procurement process for a new agreement reviewed in the first instance by the State Comptroller. The statute contemplates a cooperative effort between the local government entity and the State Comptroller to ensure compliance with the LPCL.

[*Id.* at 4 (emphasis added).]

Resolutions of the County Board of Commissioners indicate that the County has awarded Wellpath approximately \$39,500,000 towards these services from 2018 through October 2023, but that no individual award exceeded OSC’s pre-advertisement review threshold until now. The County’s notifications to OSC from 2019 through 2022 were submitted after the contracts were awarded because all were under OSC’s pre-advertisement award threshold of \$12.5 million.

Even though the 2018 contract signed by the County and Wellpath, subsequent resolutions, and internal County communications refer to optional years and renewals,<sup>5</sup> County Counsel asserts

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<sup>4</sup> Correct Care Solutions (CCS) is now Wellpath, LLC.

<sup>5</sup> The Board of Commissioners’ resolutions, however, predominantly describe contracts with Wellpath as either exercising an optional year or as renewals. Resolution 530-9-2019 describes the contract beginning October 1, 2019 as an “option to renew.” In September 2020, the County decided to assess the contract cost and staffing based on the needs at HCCC. To preserve the continuity of services at HCCC, the County awarded a two-month extension and further stated that “if a contract is awarded for *year three (3) of this contract* then the amount of the award shall be retroactive to October 1, 2020.” (Emphasis added.). By Resolution 702-11-2020, the Board of Commissioners again described the 2018 Procurement as having

that, for each year between 2019 and 2023, the County awarded new professional services contracts for single years. After the issuance of the 2018 Specifications, the County continued to renew its existing relationship with Wellpath and did not again issue specifications until 2023.

### **C. The 2023 Procurement for the Medical Health Care Management, Mental Health Care Management and Fiscal Management at HCCC**

On July 31, 2023, the County sent the 2023 Specifications to eight hand-selected potential vendors, as well as a ninth vendor on August 7, 2023. The County did not publicly advertise a notice of the 2023 Specifications. When asked whether the County understood that it could have reached out to potential vendors and also publicly advertised the solicitation, County Counsel stated that County did not advertise because "I may have gotten vendors that I didn't really want to participate." County Counsel added "[w]hy go beyond what we felt was a good pool of possible candidates," and stated "I don't want to do business with CFG."<sup>6</sup>

Prior to receiving proposals, the County accepted questions and provided responses to potential proposers on September 6, 2023. On September 22, 2023, the County received six proposals in response to the privately solicited 2023 Specifications. The County did not conduct a public opening of the proposals, the cost of which ranged from \$12,689,173 to \$16,839,107. The County formed an evaluation committee and evaluated the proposals with the assistance of a non-voting medical consultant, County Counsel, and the QPA. None of the evaluation committee members or the non-voting assistants signed a certification that they did not have a conflict of interest involving the firms that submitted proposals. The County also invited each proposer to make a 90 minute presentation to committee members and answer their questions. Two proposers were interviewed more than once. The County advised OSC that the evaluation committee selected the Proposer and then negotiated contract terms and conditions with that firm. The County provided notice to OSC of this proposed contract award on November 17, 2023.

County Counsel told OSC that the reason the County preferred using the professional services exception, despite OSC's prior findings and guidance, is because when using the professional services exception, he can negotiate with a vendor and "do whatever I want as long as I'm not violating the law." County Counsel explained that he wanted to have "face to face interaction with people, be able to speak with them, have them make their presentations.... ask their own independent questions."

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an option to renew for years two and three. On November 24, 2020, the Board of Commissioners awarded a 10-month contract for the remainder of the contract year. The County's submission to OSC of a contract award to Wellpath for services at HCCC in the amount of \$11,053,007.28 on October 11, 2022 described the contract as a renewal. Additionally, Wellpath's proposals dated November 20, 2020 and September 14, 2022 also describe the contracts as renewals. County Counsel, who signed each of the Resolutions regarding Wellpath services admitted to OSC that the resolutions and contracts with Wellpath presented the actions to the public and OSC as extensions and renewals, rather than new stand-alone contracts, and "the language could have been a little more artful."

<sup>6</sup> CFG Health Systems, LLC was a prior medical services provider at HCCC.

County Counsel explained that one of the reasons the County did not use competitive contracting is because the procurement process does not allow for latitude to engage in person-to-person interaction or negotiation of contract terms after proposals are opened. In fact, interviews with proposers are permissible under competitive contracting during which proposers may clarify, but may not alter a material term of a proposal. County Counsel also indicated the County did not use competitive contracting because “you also have to open it up to the public.”

## **Findings**

Based on the facts shared by the County in response to OSC’s inquiries during this review, and in view of the applicable law, OSC finds as follows:

### **A. The County failed to provide timely notice of the 2023 Procurement as required by N.J.S.A. 52:15C-10(b).**

OSC finds that the County did not provide OSC with timely notice of the 2023 Procurement in violation of N.J.S.A. 52:15C-10(b)(1), which requires contracting units, such as the County, to provide OSC written notice “at the earliest time practicable as the contracting unit commences the procurement process, but no later than the time the contracting unit commences preparation of: any bid specification or request for proposals.” Unless waived by OSC, N.J.S.A. 52:15C-10(b)(2) requires a 30-day period for OSC to review the proposed procurement before issuance to ensure compliance with applicable public contracting laws, rules, and regulations. N.J.S.A. 52:15C-10(b)(4).

While the County law department works in cooperation and consultation with the QPA regarding submission to OSC, and both the QPA and County law department have historically submitted procurements to OSC on behalf of the County, the County law department is responsible for submitting potential procurements to OSC for pre-advertisement review if the contract is valued at \$12.5 million or more. With respect to the 2023 Procurement, County Counsel told OSC, “I think our last contract was \$11 million, just under \$11.1 million.” County Counsel told OSC that County staff had internal discussions “and based on those internal discussions, you know, my good faith business judgment based on what was being told, was that it was going to be under \$12 million.” Other than those discussions, the County did not conduct any meaningful cost analysis regarding this procurement before the 2023 Specifications were released.

The County explained that approximately \$1.7 million of the costs in the 2023 Procurement proposals was unexpected due to the County’s failure to account for the increased costs resulting from attrition of County-employed nurses at HCCC who had retired or terminated employment between 2018 and 2023. Apparently, the County-employed nurses at HCCC were under the direction and supervision of Wellpath, and Wellpath did not adjust its invoicing to the County from 2018-2023 to account for nursing attrition. The County contends that it was only after proposals were received that the County performed an analysis of the costs associated with the attrition of County-employed nurses at HCCC.

Although the County knew that the lowest proposal was more than the OSC pre-advertisement threshold as of September 22, 2023 when proposals were received, it waited until November 17, 2023 to provide notice to OSC that it intended to award a contract to the Proposer at its December 20, 2023 Board of Commissioners meeting in the amount of \$13,488,000 for one year. When asked why the County waited almost two months before informing OSC of the proposed contract with the Proposer, County Counsel stated he was optimistic that the County could negotiate downward a number from the Proposer.

By submitting the 2023 Procurement more than three months after the commencement of the procurement, and two months after it knew the lowest cost proposal exceeded OSC's pre-advertisement review threshold, the County has demonstrated disregard for both OSC's statutorily established oversight created by the Legislature, and the Appellate Division's express direction to the County regarding its future procurements for these services. Consequently, the County violated the notice provisions of N.J.S.A. 52:15C-10(b).

### **B. The County's use of the Professional Service Exception is not compliant with the LPCL**

The County's reliance on the professional services exception to award this contract is a departure from both the plain text of the N.J.S.A. 40A:11-5(a)(1)(i) and judicial interpretations of the LPCL. OSC has reviewed the 2023 Specifications, and, except as described below, has found the scope of work to be substantially the same as set forth in the 2018 Procurement. However, in the 2023 Procurement the County has added medical addiction treatment services and electronic records management<sup>7</sup> (EMR) to the scope of work. The scope of work in the 2023 Specifications includes an array of tasks to provide inmate patient care services beginning with inmate intake, including screening, sick call, infirmary, and ambulatory care to be provided by a management company that employs both licensed professionals and unlicensed administrative staff. The County's stated program objectives are to provide comprehensive health care management, mental health care management, Medication Assisted Treatment (MAT)<sup>8</sup> management, and fiscal management services to inmates at HCCC. Under the 2023 Specifications, the successful contractor is required to enter into a memorandum of understanding with the County's current provider of clinical services for MAT. Therefore with respect to the MAT program, the successful contractor is expected to provide administrative and operational support, rather than medical services.

Below are examples of the administrative, fiscal, and management services the County is seeking in addition to clinical care services by physicians and nurses, for the management and operation of health care services at HCCC that do not meet the professional services definition:

1. inmate Medicaid or health insurance enrollment under the Affordable Care Act;
2. medical claims auditing;
3. appropriate processing of federal, state and County inmate medical claims;

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<sup>7</sup> In October 2019, Wellpath began providing its proprietary EMR at the HCCC.

<sup>8</sup> The Medication Assisted Treatment (MAT) program treats inmates with opioid use disorder.

4. payment to hospital providers and other medical/health providers within 30 days of receipt of claims, when appropriate;
5. utilization of a computerized medical claims system;
6. utilization of an electronic medical records system;
7. prompt response to inquiries regarding medical claims by health care providers;
8. mailing of all payments to medical and health care providers;
9. preparation of year end 1099 reports;
10. initiation and management of third party reimbursement for eligible inmates and detainees;
11. procurement and oversight of subcontractors to provide specific services required by the 2023 Specifications, as appropriate;
12. preparation of daily, weekly, monthly, quarterly and annual reports covering a range of activities to measure the overall management and operation of health care services provided at HCCC; and
13. preparation of an annual management plan and report of utilization statistics and narrative summary delineating the accomplishments of the contractor.

A significant difference between the 2018 Procurement and the 2023 Procurement is that the 2023 Procurement required proposers to include pricing for EMR software for contract years one through three. Attached to the 2023 Specifications, at Appendix L, is a request for proposals that the County had previously released for EMR software pursuant to N.J.S.A. 40A:11-4.1, using competitive contracting as the procurement method. The 2023 Specifications state that the County "paused the effort in light of this healthcare vendor solicitation." The QPA told OSC that, in response to the EMR competitive contracting solicitation, the County did not receive submissions appropriate for the County's needs. The EMR software was then incorporated into the 2023 Procurement. When OSC asked County Counsel how the EMR software met the definition of professional services, he stated that "he wasn't focusing on the medical records" and that "one could argue that that might not be professional services." The County's QPA stated that EMR is a tool for management of the HCCC contract and could be separated from the actual contract for management. By issuing EMR software separately using competitive contracting, however, the County has acknowledged that the EMR software cannot be awarded as a professional service without public bidding.

County Counsel told OSC that the County shared the definition for professional services under the LPCL with its outside medical consultant, who is a physician, however, he did not know whether the consultant has a law degree. The medical consultant calculated that between approximately 90-95% of the services would be classified as professional services. The medical consultant's analysis is undated and unsigned, but was prepared after the Proposer's proposal was submitted, as it includes the Proposer's Year 1 Price Breakdown. The outside medical consultant's analysis is broken down as follows:

| Cost Category  | Year 1 Price Breakdown | % of Year 1 Price | Professional Service | Rationale   |
|--|------------------------|-------------------|----------------------|---|
| Direct Medical Services Labor Costs (MD, Midlevel, Nursing (RNs/LPNs), Mental Health, MAT, Dental, etc.) |                        | 77.6%             | yes                  | Direct medical labor. This should be a definite yes   |
| Medical & Dental Supplies  |                        | 1.3%              | no                   | Supplies are not likely considered professional services  |
| Other Third Party Direct Medical Costs (Labs, X-ray, etc.)   |                        | 5.0%              | yes                  | Cost of performing services includes specimen collection or imaging & interpretation, which require specialized training (e.g., x-ray tech, phlebotomy, radiology). Autotote 85 NJ is similar as most of these staff are not authorized by law to practice but are specialized nonetheless. |
| Insurance Costs (Malpractice/PLGL, Worker's Comp & EPL)  |                        | 4.9%              | maybe                | This is directly related to staffing of the medical labor, and is an inter-related & mandatory ancillary cost associated with the labor   |
| Performance Bond   |                        | 0.3%              | no                   | not likely considered professional services   |
| Other Direct Administrative Costs (IT, Travel, Office Supplies, etc.)                                    |                        | 1.0%              | no                   | not likely considered professional services, except maybe the IT portion, if that can be tied to the deployment & maintenance of the Electronic medical record  |
| Management & Oversight (Regional Oversight Staff & Travel, Payroll Processing, Legal Support, etc.)      |                        | 7.1%              | yes                  | Per the <i>Nachtigall</i> 302 NJ, the planning and coordination of the professional services is highly specialized, and inseparable from the predominant nature of the entire proposal.   |
| Profit   |                        | 2.9%              | no                   | No  |
| Total  |                        | 100.0%            |                      |   |
|  |                        | total no          | 5.5%                 |   |
|  |                        | total yes         | 89.6%                |   |
|  |                        | total             |                      |   |
|  |                        | maybe             | 4.9%                 |   |

The medical consultant's analysis did not address or account for the four statutory criteria that must be satisfied under the professional services exception from bidding. In reaching the calculation that approximately 90-95% of the services meet the definition of professional services, the medical consultant relied on two court decisions, *Autotote Ltd. v. New Jersey Sports and Exposition Auth.*, 85 N.J. 363 (1981), and *Nachtigall v. New Jersey Tpk. Auth.*, 302 N.J. Super. 123 (App. Div. 1997). These cases, however, involved state agencies (and in

*Nachtigall*, one bi-state authority) that are not subject to the LPCL or its restrictive definition of professional services. The Legislature has provided both the New Jersey Sports and Exposition Authority (NJSEA) and the New Jersey Turnpike Authority (NJTA) greater discretion in contracting than has been delegated to local governments subject to the LPCL.

Importantly, in construing exceptions to bidding under the LPCL, the Supreme Court has repeatedly stated that:

"[p]ublic bidding statutes exist for the benefit of taxpayers, not bidders, and should be construed with sole reference to the public good." *National Waste, supra*, 150 N.J. at 220 (citations omitted). Accordingly, this Court has curtailed "the discretion of local authorities by demanding strict compliance with public bidding guidelines." *L. Pucillo & Sons, Inc. v. Mayor and Council of the Borough of New Milford*, 73 N.J. 349, 356 (1977) (citations omitted). See also *Autotote Ltd. v. New Jersey Sports & Exposition Auth.*, 85 N.J. 363, 370 (1981) (noting that courts have construed LPCL strictly "so as not to dilute [public policy] or permit a public body to avoid pertinent legislative enactments").

[*Borough of Princeton v. Bd of Chosen Freeholders of Mercer*, 169 N.J. 135, 159-160 (2001).]

*Autotote* involved the installation and servicing of highly sophisticated betting equipment. The Court recognized that in the rapidly developing field of betting equipment, the contract services called for such a degree of technical knowledge and professional skill as to fall within NJSEA's professional services exception. Further, the Court held that, under the circumstances presented in *Autotote*, the award of the contract without public bidding was authorized under the "public convenience exception." *Autotote*, 85 N.J. at 373. The Court did "not find the legislative definitions of 'professional services' in another of our public bidding statutes, the Local Public Contracts Law, N.J.S.A. 40A:11-2, to be helpful in [its] attempt to ascertain the scope of the exception in N.J.S.A. 5:10-21."<sup>9</sup> *Id.* at 371. Thus, *Autotote* lends no support to the County's position, but rather expressly distinguishes the LPCL professional service definition in making

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<sup>9</sup> Referencing the NJSEA professional service exception, repealed at that cite and revised per P.L.1981, c. 447 (N.J.S.A. 5:10-21.1 to -21.6) to a professional and technical service exception. See also, State General Public Bidding Law, P.L. 1954, c. 48 (N.J.S.A. 52:34-6 to -20), which has a similar exception to the public bidding requirement. Compare N.J.S.A. 52:34-9(a) to N.J.S.A. 5:10-21.3(a). Note, N.J.S.A. 52:34-6 et seq. had not yet been amended by P.L. 2005, c. 336, §8 (N.J.S.A. 52:34-10.8) to add a definition of professional services at the time of *Autotote*.

its conclusions. *Ibid.* In *Princeton*, the Court found *Autotote* to be of marginal relevance. *Princeton*, 169 N.J. at 163.<sup>10</sup>

*Nachtigall* is even more clearly unhelpful. There, the court reviewed the procurement process employed by a consortium of state and bi-state authorities<sup>11</sup> subject to varying procurement statutes, none of which was the LPCL. 302 N.J. Super. at 127. Noting that the state bidding statutes did not define “professional services,” *Nachtigall* determined that the contract at issue fell within the professional services exception under the state bidding laws based on the reasoning in *Autotote*. It found that if the highly sophisticated betting system in *Autotote* constituted professional services, then the contract in *Nachtigall* for an EZ Pass Toll System must also be considered a professional services contract. 302 N.J. Super. at 136. In making their decisions, neither the *Autotote* nor the *Nachtigall* courts interpreted the LPCL. Rather these cases are limited to procurements conducted by state authorities for highly technical services and not a management contract.

Appropriately applying the LPCL statutory definition to the scope of work, OSC finds that the staff associated with the cost categories Other Third Party Direct Medical Costs (Labs, X-ray, etc.), Insurance Costs, and Management & Oversight (Regional Oversight Staff & Travel, Payroll Processing, Legal Support, etc.) do not meet the first criterion of the definition of professional services. OSC further finds that the medical consultant did not conduct the analysis on an individual staff position basis, but rather grouped together costs by category. The medical consultant’s chart does not appear to analyze whether staff such as medical assistants, unit coordinators, administrative coordinators, medical records administrators, medical records clerks, and X-ray technicians meet the statutory definition. Additionally, incorporating the provision of and pricing for EMR into the 2023 Specifications at Appendix L further reduces the percentage of the costs that fall within the professional service exception. Therefore, OSC concludes that the medical consultant’s analysis is insufficient to make a determination as to the percentage of staff who meet the statutory definition. More importantly, the medical consultant and the County misapply the holdings of both *Autotote* and *Nachtigall* to impermissibly expand the LPCL professional services exception.

County Counsel told OSC it was his opinion and he made a recommendation to the County administration that the professional services exception was the appropriate method to procure the services. Prior to making this letter public, the County clarified that “the decision to award the contract by way of professional services exception was not a unilateral determination by the County Counsel but a considered determination by the County administration, including the

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<sup>10</sup> OSC notes that *Princeton* did not involve the professional services exception, but rather the bidding exemption under the LPCL for real estate transactions. In *Princeton*, the Appellate Division and Supreme Court both held that, for purposes of the LPCL, the contracts in question were solid waste disposal services agreements subject to the LPCL bidding requirements, and were not entitled to the real estate transaction exception as easements for real property. *Princeton*, 169 N.J. at 161.

<sup>11</sup> In Fall 1995, they were the New Jersey Turnpike Authority, the New Jersey Highway Authority, the South Jersey Transportation Association, the Port Authority of New York and New Jersey and, as of the summer of 1996, the Delaware Department of Transportation. *Nachtigall*, 302 N.J. Super. at 127.

Purchasing Department and corrections leadership, and in consultation with [the medical consultant].” It is noteworthy that, despite challenging OSC’s conclusions regarding the 2018 Procurement, County Counsel never contacted the Division of Local Government Services within the Department of Community Affairs regarding whether using this exception to bidding is compliant with the LPCL, even though County Counsel acknowledged that it is the state agency specifically authorized to assist contracting units in all matters affecting the administration of the LPCL. N.J.S.A. 40A11-37.

**C. The Professional Services Exception to bidding is limited to a contract term of twelve months with no extensions authorized.**

In the 2023 Procurement, proposers were instructed to complete Appendix F, a cost matrix for each staff position required under the 2023 Specifications, and Appendix G to reflect their fully loaded firm fixed prices for all of the services under the contract for years one through three.

The County insists that even though Appendices F and G required three years of pricing, it intends to enter into a one-year agreement. County Counsel explained: “I don’t view this as a three year contract. I just view this as a one year contract where the other party committed to certain pricing.” In response to a proposer’s question about whether the County would extend the contract term as stated in the 2023 Specifications to three years with two optional one-year renewals, the County responded:

No, on the extension of the contract. The County has been in contract with its current medical provider for a period of five (5) years. For that time period the County and vendor entered into five (5) contracts with each of the contracts being one (1) year in duration.<sup>12</sup> While the County cannot promise or guaranty it will extend or renew the contract under consideration for an award for more than one (1) year at a time, the County has no intention, unless circumstances dictate otherwise, to renew its current process every year during the next three (3) years. That is why the County is asking for pricing for three (3) years. However, the County does reserve the right to renew the current process every year. The County is following the same process it employed five years ago when the current medical vendor was selected. The County believes its business needs are best served by employing the current procurement model.

The County’s response, in combination with the requirement to include three years of pricing, created an expectation on the part of the prospective proposers of renewals for at least three

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<sup>12</sup> As explained above, the Board of Commissioner resolutions predominantly refer to the annual contracts as renewals.

years. County Counsel's notes from the Medical Review Panel Agenda for the July 2023 evaluation reflect the same intention:

County not looking to do this every year – history has shown the County kept its word- when we first did this in 2018 we said we were looking for a long-term relationship- you produce and within reason we will renew you – and we did that

As described above, Board of Commissioner resolutions, submissions by the County to OSC, internal County communications, and communications by Wellpath predominantly describe HCCC contracts between 2019 and 2022 as renewals of the 2018 contract. Similarly, in a clear effort to bypass legal requirements and shoehorn the contract inappropriately into the professional services exception, the 2023 Specifications seek to create a contract that may be extended beyond the initial one-year term.

Although certain longer contract terms are authorized by the LPCL, the maximum duration for a professional services contract is 12 months. *See Township of Lawrence v. Ewing-Lawrence Sewerage Authority*, 233 N.J. Super. 253, 258 (Law Div. 1989). To the extent the County relies upon the professional services exception, it must also adhere to the 12-month contract term limitation. Both N.J.S.A. 40A:11-15 (first unnumbered paragraph) and N.J.S.A. 40A:11-3(b)<sup>13</sup> provide that all contracts shall be awarded for a period not to exceed 24 consecutive months, except that contracts for professional services pursuant to N.J.S.A. 40A:11-5 shall be awarded for a period not to exceed 12 consecutive months. Additionally, the LPCL makes it clear that contracts for professional services may not be extended: "Any contract for services *other than professional services*, the statutory length of which contract is for three years or less, may include provisions for no more than one two-year, or two one-year, extensions, subject to the following limitations." N.J.S.A. 40A:11-15 (emphasis added). Therefore, the County inappropriately awarded and entered into renewals of the 2018 contract for a total of five years. Similarly, because any professional services contract is limited to 12 months, the County inappropriately issued the 2023 Specifications as a professional service contract while requiring three years of pricing and describing the term to include the option of two, one- year renewals.

#### **D. The County's reliance on the Professional Services Exception results in a lack of transparency and limited competition.**

OSC additionally finds that the procurement approach employed by the County, in addition to being unauthorized by law, also resulted in less transparency and limited competition. The County appears to misunderstand that it can accomplish its goals of procuring the services of a vendor capable of providing appropriate health care without violating state law.

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<sup>13</sup> N.J.S.A. 40A:11-3(b) states: "Any contract made pursuant to this section may be awarded for a period of 24 consecutive months, except that contracts for professional services pursuant to subparagraph (i) of paragraph (a) of subsection (1) of section 5 of P.L.1971, c. 198 (C.40A:11-5) may be awarded for a period not exceeding 12 consecutive months."

Before 2018, the County used competitive contracting to procure health care services. County Counsel told OSC that the “whole process was fraught with litigation, number one. But number two, more importantly, in the 2017, 2018 period, we had a horrible experience at the facility with deaths and lack of medical care provided by the then medical services provider.”<sup>14</sup> Based on that experience, County Counsel advised OSC that the County did not want to do business with that prior medical services provider at HCCC. Moreover, the County did not want to “go beyond what we felt was a good pool of possible candidates.” County Counsel explained that the County then decided using the professional services exception to procure these services would be preferable because he wanted to engage in face-to-face negotiations, adding that “[i]n professional services, I can do whatever I want as long as I’m not violating the law.”

Of course, that is OSC’s precise concern: using the professional services exception to procure these services violates the LPCL. Competitive contracting prohibits the type of face-to-face negotiations desired by the County. However, when used properly, competitive contracting gives the County the appropriate tools to evaluate proposals to address the County’s concerns regarding a proposer’s performance. The LPCL regulations provide model evaluation criteria such as a proposer’s history and experience in performing the work including evaluation of a proposer’s record of reliability and track record of services and contract compliance performance.<sup>15</sup> Under competitive contracting, the County may include a weighting of evaluation criteria to meet its specific needs while taking cost into consideration. In addition, at its option, the County may ask proposers to clarify a proposal, address matters as specified by the County, and make a presentation to the County.

Competitive contracting also allows for a contract term of up to five years. This flexibility allows the County to award a base term of one year, with the option to renew the contract for four additional years. As explained above, this would satisfy the County’s goals without exceeding the 12-month limitation on professional services contracts.

OSC further notes that in contrast to the professional services exception, the competitive contracting procurement method incorporates both robust transparency and fair competition. Among other things, competitive contracting requires advertisement of the solicitation, the public opening of proposals, that the evaluation report become part of the public record and made available to the public prior to the contract award, and publication of the contract in the contracting unit’s official newspaper. When using the professional services exception, the County is only required publish notice of the contract award in the County’s official newspaper, thus limiting both competition and transparency.

The County is required to comply with the law regardless of its disagreement with it. OSC provides

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<sup>14</sup> The County indicated it was involved in two lawsuits involving the award of inmate patient care services at HCCC: *CFG Health Systems, LLC v. County of Hudson*, 413 N.J. Super 306 (App. Div. 2010); *CFG Health Systems v. County of Hudson*, No. L-6428-10 (App. Div. July 19, 2012).

<sup>15</sup> N.J.A.C. 5:34-4.2.

the above guidance to the County so that going forward it can both comply with the law and conduct a procurement process that accomplishes its goal of engaging with proposers to better understand their proposals and capacity to perform under the contract. The law requires that the competition be conducted in a way that ensures the process is fair and protects the interests of the taxpayers.

## Corrective Action Plan

As explained above, pursuant to N.J.S.A. 52:15C-10(b)(4), OSC finds that the procurement does not comply with the LPCL. At this time, OSC reminds the County that it was previously directed not to proceed with the procurement, and has been directed on three separate occasions to provide a CAP to OSC to describe how the County intends to address the non-compliance and the timeline for re-procurement. OSC finds that the County's repeated refusal to provide the CAP requested by OSC, and its ongoing refusal to address its non-compliance and to re-procure the services in compliance with the law, has resulted in a self-created emergency that the County now seeks to use to again violate laws that are intended to ensure the integrity of the procurement process and to protect taxpayers. Therefore, through this letter pursuant to N.J.S.A. 52:15C-11(b), OSC reports Hudson County's ongoing violations of law and failure to cooperate to the Governor, the President of the Senate, and the Speaker of the General Assembly.

While providing the notice required by N.J.S.A. 52:15C-11(b), before proceeding with the contract award, OSC again directs the County to provide a CAP that addresses re-procurement of the services in compliance with the LPCL, including a timeline for submission of the solicitation to OSC not less than 30 days prior to the County's anticipated advertisement date. The CAP shall be submitted within five days of this letter. Upon receipt, OSC will review the CAP and, if acceptable, issue a final decision in this matter.

## Conclusion

OSC has arrived at the above findings after careful examination of the 2023 Specifications, documents submitted to OSC by the County, applicable law and interviews of County Counsel and the QPA. This review has been guided by the recognition that bidding laws are intended "to guard against favoritism, improvidence, extravagance and corruption" and "to secure for the public the benefits of unfettered competition," *Terminal Const. Corp. v. Atlantic Cty. Sewerage Auth.*, 67 N.J. 403, 410 (1975); *Meadowbrook Carting Co., Inc. v. Borough of Island Heights*, 138 N.J. 307, 313 (1994). The County's 2018 unlawful procurement resulted in an expenditure of over \$39,500,000 for these services over five years. Here again, true open competition was lacking because the County issued the 2023 Specifications to hand-selected firms, instead of conducting an open procurement by publishing a notice of the solicitation in the newspaper. The County's closed procurement also purposefully circumvented the transparency required of public entities, and resulted in private negotiations with County Counsel's preferred vendor, leaving County residents in the dark regarding this significant expenditure of approximately \$13.5 million.

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Hudson County Counsel  
March 21, 2024  
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Even after the Appellate Division's decision, the County has again shown disregard for the requirement that its procurements valued at \$12.5 million or more be timely submitted to OSC. It is against the public interest to permit this significant expenditure of taxpayers' funds to be spent without the protections of New Jersey's public bidding laws and OSC's statutory review. Pending receipt and review of the CAP, in accordance with N.J.S.A. 52:15C-11(b), the County shall not proceed with the contract award.

Sincerely,

KEVIN D. WALSH  
ACTING STATE COMPTROLLER

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