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RECENT LOCAL PUBLIC CONTRACTS LAW AMENDMENTS**P.L. 1999, c.39, Effective July 1, 1999**

This Local Finance Notice reviews a recent law concerning certain provisions of the Local Public Contracts Law that affect construction contracts. Recipients of the Notice are asked to share it with their purchasing professionals, governing bodies, chief executive and administrative officers, legal counsel, engineers, and construction advisors.

P.L. 1999, c.39, amends two existing, and adds two new provisions to the Local Public Contracts Law which will become effective on July 1, 1999, and relate to changes and additions to certain requirements for bidding on local public construction contracts. The changes include the following (explained in detail below):

1. N.J.S.A. 40A:11-21 was amended to make a bid guarantee mandatory on all construction contracts in excess of \$100,000. Prior to the enactment, this was a common practice, but optional.
2. N.J.S.A. 40A:11-22 was amended to require a certificate of surety for all construction contracts over \$100,000. Again, this common practice is now required for contracts over \$100,000.
3. N.J.S.A. 40A:11-23.1 requires a contracting unit to prepare a document for bidders to acknowledge receipt of any notice or revisions or addenda to the bid advertisement or bid documents. This is to provide standards for acknowledgment that changes in documents or information have been received.
4. N.J.S.A. 40A:11-23.2 requires bid packages to include a form listing all documents, informational forms, certifications, and any other documents that must be submitted with a bid. This is to provide a standard for listing all material that must be submitted with a bid.

This Notice also reviews two previous amendments, one to the Local Public Contracts Law, and one to the New Jersey Surety Bond Act. The first amendment related to the naming of subcontractors when a "single-prime" bid is used for construction contracts. The second amendment established new requirements for surety bond companies that provide payment or performance bonds on construction and public works projects.

1. Mandatory Bid Guarantee Requirement

N.J.S.A. 40A:11-21 was amended to provide that anyone bidding on a local public construction contract exceeding \$100,000 **shall** provide a bid guarantee. A "construction contract" has been defined to include the erection, alteration, or repair of a public building, structure, facility or other improvement to real property, the total price of which exceeds \$100,000. The Division's reading of the phrase "other improvement to

real property" includes road construction and roadway construction projects, as well as above and below ground utility construction projects.

With regard to any other contracts, including construction contracts for \$100,000 or less and all non-construction contracts, it remains within the discretion of a local contracting unit to determine whether to require a bid guarantee. Further, while initially considered in the legislation, a provision to allow the submission of a letter of credit as a bid guarantee **was deleted** from the law, thus letters of credit **are not** acceptable as bid guarantees for construction contracts exceeding \$100,000. The requirement that a bid guarantee be in the amount of 10% of the bid, but not in excess of \$20,000, remains in effect.

2. Mandatory Surety Bond Requirement

N.J.S.A. 40A:11-22 was amended to provide that anyone bidding on a local public construction contract exceeding \$100,000 shall furnish a certificate (a certificate of surety) from a surety company. The type of construction contract is the same as those included in N.J.S.A. 40A:11-21. Similar to N.J.S.A. 40A:11-21, a local contracting unit has the discretion to determine whether a certificate from a surety company shall be required for any other contracts, including construction contracts for \$100,000 or less and all non-construction contracts. Other statutory requirements of N.J.S.A. 40A:11-22 have not been affected by P.L. 1999, c.39.

3. Acknowledgment of Receipt of Changes to Bid Documents Form

This new requirement is intended to eliminate uncertainty that can arise when bid specifications or advertisements are amended. This form, "Acknowledgment Of Receipt Of Changes to Bid Documents", allows a bidder to acknowledge the bidder's receipt of any notice or revisions or addenda to the advertisement or bid documents.

4. Bid Document Submission Checklist

This is a form where the contracting agent lists those documentary and informational forms, certifications, and other documents that each bidder is required to submit with the bid. It is to eliminate problems that arise when bidders claim they "did not know" about a form, and then attempt to use the legal process to delay or gain advantage over other bidders. It is a common practice used by many contracting units today, and is now a requirement for all construction contracts in excess of the bid threshold.

The form must list each of the items to be submitted with the bid proposal and a place for the bidder to indicate, by initialing each entry, that the bidder has included those required items with the completed bid proposal. The completion and submission of this form, is in addition to other required documents, forms and certificates that may be listed on the form and submitted with a bid proposal.

In an effort to provide clarity and to eliminate inconsistencies, the law also clarified the mandatory nature of submitting certain documents with the bid. Under the law, when required by the bid plans and specifications, certain documents are now considered mandatory, and must be submitted at the time specified by a local contracting unit for the receipt of bids. The required documents are as follows:

- A bid guarantee as required by N.J.S.A. 40A:11-21;
- A certificate from a surety company, pursuant to N.J.S.A. 40A:11-22;
- A statement of corporate ownership, pursuant to N.J.S.A. 52:25-24.2;

- A listing of subcontractors as required by N.J.S.A. 40A:11-16; and
- A document provided by the contracting agent in the bid plans, specifications, or bid proposal documents for a bidder to acknowledge the bidder's receipt of any notice or revisions or addenda to an advertisement or bid documents.

The failure to submit any one of these mandatory documents with the bid shall be deemed a fatal defect. It shall render a bidder's bid proposal unresponsive, and shall constitute a fatal defect that cannot be cured by a governing body, and causes the bid to be rejected without opportunity to cure the defect.

The new amendment however, does not provide guidance on the status of other forms, certifications and documents that may be required by a contracting agent. The courts have been consistent in holding the omission of forms as generally fatal if an omission could affect the determination of the lowest responsible bidder, or provide a bidder a potential or actual competitive advantage over another bidder. When it comes to determining the status of forms other than those listed above, the local unit attorney should be consulted for guidance.

5. Detailing of Subcontractor Work - Single Prime Bids

The Division would also like to call your attention to P.L. 1997, c.408, which amended the Local Public Contracts Law at N.J.S.A. 40A:11-16. This section governs the submission of bids for construction contracts. Specifically, the amendment established a new requirement relating to the submission of construction bids, when the single prime contracting model is used, i.e., where all the work and materials required to complete the project are to be included in a single overall contract.

The law requires that, for single prime contracting bids, bidders that propose using **more than one** subcontractor for any of the four specialized "sub-prime" categories must submit a certificate with their bids listing each subcontractor named in the bid for that category. Specifically, "the certificate shall set forth the scope of work for which the subcontractor has submitted a price quote and which the bidder has agreed to award to each subcontractor, should the bidder be awarded the contract." The law further requires that:

1. The certificate shall be submitted to the contracting unit simultaneously with the list of the subcontractors.
2. The certificate may take the form of a single certificate listing all subcontractors or, alternatively, a separate certificate may be submitted for each subcontractor.
3. If a bidder does not submit a certificate or certificates to the contracting unit, the contracting unit shall award the contract to the next lowest responsible bidder.

The third point listed above should be considered, since one of the mandatory documents to be submitted pursuant to P.L. 1999, c.39, is a listing of subcontractors as required by N.J.S.A. 40A:11-16. The law, P.L. 1997, c.408, requires award of a contract to the next lowest responsible bidder, while P.L. 1999, c.39, does not address the issue of the status of those remaining bids if a higher ranked bid must be rejected because the list of subcontractors was not submitted. Your attorney may have to be consulted for a proper course of action.

6. Surety Bonds for Public Works Projects — A Reminder

P.L. 1995, c.384, established requirements for surety bond companies that provide payment or performance bonds on public works projects. These amendments to the New Jersey Surety Bond Act (N.J.S.A. 2A:44-143 through

2A:44-147), also known as the Public Works Bond Act, established requirements for surety companies which relate to the dollar value of the payment and performance bonds required to be furnished for public works projects. Different requirements are set for different bond value thresholds. In addition to general requirements applicable to all sureties, specific requirements are established for companies providing bonds below \$850,000, between \$850,000 but not more than \$3.5 million, and greater than \$3.5 million.

A common standard for all surety companies is that they must complete a Surety Disclosure Statement and Certification for all payment and performance bonds, regardless of project cost (N.J.S.A. 2A:44-143d). The law is silent about standards for bonds under the \$850,000 threshold. For public works projects which are at least \$850,000, a surety company must hold a current certificate of authority issued by the U.S. Secretary of Treasury (known as U.S. Treasury Circular 570) that is valid in New Jersey, or meets certain standards that have been promulgated by the N.J. Commissioner of Insurance (N.J.A.C. 11:1-41.1 et seq.).

P.L. 1999, c. 39, amended N.J.S.A. 40A:11-22 to require that anyone bidding on a local public construction project exceeding \$100,000 must furnish a certificate of surety from a surety company. The application of criteria in P.L. 1995, c.384 is relevant here. You may wish to review Local Finance Notice AU-97-1 (4/30/97) for a more detailed review of the matter.

P.L. 1999, c.39, takes effect on July 1, 1999 (the first day of the fourth month from its enactment of March 12, 1999). A copy of the new and amended sections, with the new text highlighted, is included with this Notice. Further, a sample Acknowledgment of Receipt of Changes to Bid Documents Form, and a sample Bid Document Submission Checklist have been included with this Notice for your review and consideration.

Ulrich H. Steinberg, Jr.

Ulrich H. Steinberg, Jr., Director
Division of Local Government Services

Enclosure

Distribution: Municipal Clerks, Clerks to the Boards of Chosen Freeholders, Authority Executive Directors, Boards of Fire Commissioners