**COMMUNITY AFFAIRS**

**DIVISION OF LOCAL GOVERNMENT SERVICES**

**Use of Design-Build Project Delivery for Construction Projects**

**Adopted New Rules: N.J.A.C. 5:34-10**

Proposed: July 5, 2022, at 54 N.J.R. 1307(a).

Adopted: November 21, 2022, by the Lieutenant Governor Sheila Y. Oliver, Commissioner.

Filed: November 22, 2022, as R.2022 d.153, **with non-substantial changes** not requiringadditional public notice and comment (see N.J.A.C. 1:30-6.3).

Authority: N.J.S.A. 18A:18A-68 and 40A:11-60.

Effective Date: November 22, 2022.

Expiration Date: August 7, 2027.

On May 27, 2022, the Commissioner of the New Jersey Department of Community Affairs (Department) adopted, in consultation with the New Jersey Department of Education, rules allowing government entities subject to either the Local Public Contracts Law (N.J.S.A. 40A:11-1 et seq.) or the Public School Contracts Law (N.J.S.A. 18A:18A-1 et seq.) to use the design-build method of project delivery for construction projects with a cost equal to or exceeding $5,000,000. Pursuant to N.J.S.A. 40A:11-60 and 18A:18A-68, respectively, the rules implementing P.L. 2021, c. 71, for applicable local government and school district construction projects, 54 N.J.R. 1307(a), took effect upon filing with the Office of Administrative Law and were scheduled to expire 180 days from filing. The instant notice of adoption is a final adoption of the rules specially adopted and concurrently proposed at 54 N.J.R. 1307(a), with non-substantial changes not requiring additional public notice and comment, making them permanent.

**Summary** of Public Comments and Agency Responses:

The commenters below submitted comments, which are summarized and responded to below.

**Jack Kocsis, Jr., Chief Executive Officer, Associated Construction Contractors of New Jersey (ACCNJ)**

1. COMMENT: ACCNJ strongly opposes the unilateral promulgation of this rulemaking. The Department of Community Affairs’ special adoption and concurrent proposal of the new rules effective upon filing with the Office of Administrative Law is problematic. The Department’s departure from traditional rulemaking, open comment period, and customary adoption defies logic and temporarily removes a necessary layer of transparency paramount to the Design-Build Act’s success.

RESPONSE: The Legislature established the regulatory process under which the subject rules were promulgated. N.J.S.A. 18A:18A-68 and 40A:11-60 both state that “[N]otwithstanding the provisions of the ‘Administrative Procedure Act,’ P.L. 1968, c. 410 (C.52:14B-1 et seq.) to the contrary, the Department of Community Affairs shall adopt, immediately upon filing with the Office of Administrative Law…” rules the Department deems necessary to implement the provisions at P.L. 2021, c. 71, that are relevant to contracting units subject to either the Public School Contracts Law or the Local Public Contracts Law. Upon filing, the Department was given 180 days by the Legislature to “amend, adopt, or readopt the regulations pursuant to the ‘Administrative Procedure Act’…” The special adoption and concurrent proposal process allowed local governments and school districts to begin utilizing the design-build process for eligible public works construction projects, pending the receipt of public comment on the rules.

2. COMMENT: N.J.A.C. 5:34-10.1(c) removes the applicability of the, rules from school facilities projects located in a Schools Development Authority (SDA) district, which ACCNJ strongly opposes. Rather, in consultation with the Schools Development Authority, the Department should be updating the Schools Development Authority’s design-build rules at N.J.A.C. 19:36-1 to abide by the process outlined in the Design-Build Act. As a matter of law, the Schools Development Authority was not carved out of the Design-Build Act, but was expressly included in the legislation. The lack of consistency in New Jersey’s procurement laws is well documented, and something the ACCNJ and government leadership have fought tirelessly to address. The Design-Build Act was a part of that effort, as it was intended to provide a standardized procurement process for the design-build delivery method. Your rulemaking provisions jeopardize and potentially injure this process.

RESPONSE: As stated in the Response to Comment No. 1, N.J.S.A. 18A:18A-68 and 40A:11-60 provide the underlying authority for the Department of Community Affairs to adopt rules authorizing design-build project delivery for entities subject to the Public School Contracts Law and the Local Public Contracts Law, respectively. The School Development Authority has procurement authority independent from either of the above-referenced laws, and P.L. 2021, c. 71 does not grant the Department statutory authority to dictate what procedures the Authority, or any other State agency, must follow in the procurement of its design-build contracts. As boards of education begin to use design-build project delivery for eligible projects, the Department will evaluate its rules and consult with the Schools Development Authority, as needed, to determine whether further changes to the Department’s design-build regulations may be warranted.

3. COMMENT: N.J.A.C. 5:34-10.7(a)5 calls for the New Jersey Department of the Treasury’s Division of Property Management and Construction (DPMC) “Design-Build” classification for “key team members and other subcontractors.” This language appears to be problematic in a practical sense. Specifically, there are currently 31 general contracting firms that have obtained a “Design-Build” classification. Requiring “key team members and other subcontractors” to have the same classification as a general contractor is inconsistent with the intent of the law. Further, the subcontracting community does not have the necessary prerequisites to obtain a “Design-Build” classification and may be precluded from working with a general contractor on these projects if this specific provision is left unchanged.

RESPONSE: N.J.A.C. 5:34-10.7(a)5, as proposed, was meant to require such classifications of design-builders, any subcontractors, and key team members as may be required for a particular project. The Department will change the rule upon adoption to clarify that a subcontractor shall be required to possess only those classifications and ratings issued by the DPMC that are relevant to the project.

**Ryan Sharpe, Director of Government Affairs and Communications, Utility and Transportation Contractors of New Jersey**

4. COMMENT: The definition of the term “design-build project delivery” at N.J.A.C. 5:34-10.2 should be amended to remove the phrase “utility relocation and construction.” No contractual relationship typically exists between the contractor and the utility companies. The existing relationship is between the utility and the owner of the property.

RESPONSE: To avoid implying a contractual relationship where none may exist, the Department will change N.J.A.C. 5:34-10.2 upon adoption to remove the phrase “utility relocation and construction” from the definition of “design-build project delivery.” As the definition still encompasses all portions of a construction project's design and construction phases without limitation, any work involving utility infrastructure owned by the contracting unit would continue to be encompassed by the defined term.

5. COMMENT: The definition of the term “design-builder” should be amended to clarify that no new classification and licensure system will be established for design-builders. We do not believe the intent of A-1285 was to create a new classification and new application process in order to perform design-build work. Moreover, contractors should continue to be classified on their individual qualifications to perform specific work. In addition, we recommend that language be included in the definition of “design-builder” to clarify that the individual members of the design-build team – and not the entire design-build team – must possess the necessary qualifications.

RESPONSE: The Department will change, upon adoption, the definition of “design-builder” at N.J.A.C. 5:34-10.2 to clarify that the design-builder shall possess such classifications from the DPMC and/or the New Jersey Department of Transportation (NJDOT), as are relevant to the design-build project. The definition will also be changed upon adoption to clarify that the individual members of the design-build team are to possess the requisite classifications or ratings rather than the design-build team as a whole.

6. COMMENT: N.J.A.C. 5:34-10.3(b) states, “[F]or purposes of meeting the minimum monetary threshold at (a) above, a contracting unit may group more than one project together, so long as those projects are single in character and components of the same work.” The design-build statute does not expressly authorize the bundling of contracts; therefore, we request that this language be removed. Should this language remain in the rules, we suggest capitalizing “work” to prevent confusion and make it clear that this refers to the definition provided at N.J.A.C. 5:34-10.2.

RESPONSE: References at N.J.S.A. 18A:18A-62 and 40A:11-54 to “project or projects” contemplate the grouping of projects. However, the wording at N.J.A.C. 5:34-10.3(b) prevents contracting units from grouping unrelated projects under the same design-build procurement. The Department cannot change N.J.A.C. 5:34-10.3(b) upon final adoption to capitalize the word “work” as proposed by the commenter, consistent with the Rules of Agency Rulemaking, N.J.A.C. 1:30; however, the Department anticipates issuing additional guidance further addressing this provision.

7. COMMENT: References to “named subcontractors” at N.J.A.C. 5:34-10.5(e) should be replaced with the phrase “potential subcontractors.” Including named subcontractors is difficult if a proposal cannot be generated for the subcontractor’s work, which would be based on anticipated quantities and design elements.

RESPONSE: In the interest of greater clarity and flexibility, the Department will change N.J.A.C. 5:34-10.5(e) upon adoption to read “named subcontractors or subconsultants, any subcontractors and subconsultants from which the bidder, at the time of the proposal, expects to consider selecting once anticipated quantities and design elements of the project are known …” A design-builder may have a pool of subcontractors or subconsultants that they routinely work with, and from which one or more could be chosen, depending on the final project design.

8. COMMENT: N.J.A.C. 5:34-10.6 should be amended to clarify that, in addition to any required advertising, the use of electronic procurement pursuant to the Local Public Contracts Law may be utilized for this and all other permitted aspects of the bid process.

RESPONSE: Although there is nothing prohibiting contracting units from utilizing electronic procurement platforms for design-build projects pursuant to P.L. 2018, c. 156, P.L. 2020, c. 59, and the implementing rules at N.J.A.C. 5:34-5, the Department agrees to add new N.J.A.C. 5:34-10.3(e), expressly stating that electronic procurement may be utilized for design-build projects, as permitted by law.

9. COMMENT: Considering that the design-build process is new to New Jersey, we are concerned that bidders could be penalized for their lack of experience as a design-build team. This has the potential to favor out-of-State contractors who have performed work in states having already implemented the design-build system. To prevent the disparate treatment of New Jersey contractors – many of whom will be working together for the first time – we request that language be added at N.J.A.C. 5:34-10.7 stating that prior experience as a design-build team shall not preclude any contractors from the bidding process nor be used to favor one bidder over another in the scoring process. Absent the inclusion of a clarifying statement, inserting the phrase “if any” after each mention of the words “construction projects” at paragraph (a)2 and after “public works projects” at paragraph (a)3 would help to ensure that lack of experience will not be used to disadvantage any bidder unfairly.

RESPONSE: Although contracting units should be able to assess the experience of a prospective design-builder and each member of their proposed team, the Department acknowledges that, due to design-build project delivery for local government and non-SDA school district projects only coming online this year, New Jersey-based firms could be placed at a disadvantage if a design-build team’s prior experience on design-build projects were to be a significant evaluation criteria factor. As such, the Department will adopt N.J.A.C. 5:34-10.7 and 10.8 without the substantive change proposed by the commenter to avoid expiration of the specially adopted rules, but, in a subsequent rulemaking, will propose further amendments to address the concerns raised by the commenter.

10. COMMENT: N.J.A.C. 5:34-10.7(f) states that “[K]ey team members shall not be replaced without the approval of the technical review committee.” There may be designated key team members who leave a bidder’s employ for reasons beyond the bidder’s control. For instance, employees could resign, assume a position with a different company, or choose to retire. As such, we suggest adding language stating that this approval “cannot be unreasonably withheld.”

RESPONSE: Upon adoption, the Department will change N.J.A.C. 5:34-10.7(f) to clarify that the technical review committee must have a reasonable basis for denying the design-builder’s request to replace a key team member designated in its statement of qualifications.

11. COMMENT: N.J.A.C. 5:34-10.8(a) states that the return date for submission of proposals by prospective design-builders shall be no less than 14 days after the issuance of a request for proposals by the contracting unit. Setting 14 days as the minimum time period for bid submission is impracticable for what is often a complicated and time-consuming process that is highly dependent on the size of the project. Some projects require 14 days to prepare a bid. A review of Florida’s design-build standards is instructive since it has substantial experience with the design-build process. As such, we suggest incorporating some aspects of the Florida standards and, specifically, establishing a minimum 21-day window to submit bids with no cap on the maximum number of days. In addition, we recommend the creation of “sliding scale” submission deadlines that take into consideration the size and scope of a project.

RESPONSE: At this juncture, the Department will adopt N.J.A.C. 5:34-10.8 without the change suggested by the commenter, but, as contracting units begin utilizing design-build project delivery, the Department will consider the experience of contracting units and prospective design builders in determining whether it is necessary to extend the minimum deadline for submission of design-build proposals. With respect to the commenter’s recommendation to allow sliding scale submission deadlines, the regulation does not prohibit a contracting unit from allowing a greater number of days for responses.

12. COMMENT: N.J.A.C. 5:34-10.9(g) should be amended to establish a process for a bidder to appeal a determination made by a design professional or design official that a proposal is incomplete or non-responsive.

RESPONSE: At this juncture, the Department will adopt N.J.A.C. 5:34-10.9(g) without the change proposed by the commenter, but, as contracting units begin utilizing design-build project delivery, the Department will consider the experience of contracting units and prospective design builders in determining whether it is necessary to create a mandatory appeal process for determinations of non-responsiveness.

13. COMMENT: N.J.A.C. 5:34-10.9(h) allows a technical review committee to conduct interviews with each bidder prior to ranking the bidders’ respective technical proposals. Preparing for an interview requires a significant commitment of a bidder’s time and resources. As such, we recommend that a contracting unit’s request for proposal (RFP) be required to specify whether the technical review committee will conduct interviews.

RESPONSE: The Department acknowledges the commenter’s concern and further recognizes a need to broaden N.J.A.C. 5:34-10.9 to address circumstances when interviews may be required to clarify an individual response. The Department will adopt N.J.A.C. 5:34-10.9 without the change proposed by the commenter to avoid expiration of the specially adopted rules, but will address these matters in a separate rule proposal to be issued in the near future.

14. COMMENT: To ensure complete transparency in the bid review and award process, we recommend the addition of language at N.J.A.C. 5:34-10.9(k) stating that price proposals shall be made public, along with the technical scores, at a prescribed time and location as delineated in Section b at N.J.S.A. 40A:11-23 in the Local Public Contracts Law. Furthermore, making the selection coordinator reports available 48 hours prior to the contract award does not afford losing bidders sufficient time to thoroughly review and prepare a protest of an award. Thus, we suggest “48 hours” be changed to “five business days.”

RESPONSE: For goods or services procured through competitive contracting, N.J.S.A. 40A:11-4.5.c requires the proposal evaluation report be made available to the public at least 48 hours prior to the awarding of the contract, or when made available to the governing body, whichever is sooner. The time period specified at N.J.A.C. 5:34-10.9(k) was adapted from the above-referenced statute. However, upon further consideration, the Department concurs with the commenter that the greater complexity of design-build proposals compared to most goods and services procured through competitive contracting warrants the proposal evaluation report to be made public for a greater length of time. As such, the Department will adopt the above-referenced provision at N.J.A.C. 5:34-10.9(k) without change, to avoid expiration of the specially adopted rules, but will issue a subsequent rule proposal to amend N.J.A.C. 5:34-10.9(h) to extend the minimum time period to five business days from 48 hours. With respect to the disclosure of price proposals and the scores for each technical proposal, the Department will change N.J.A.C. 5:34-10.9(k) upon adoption to clarify that the dollar amount of each bidder’s price proposal shall be included in the evaluation report, along with a breakdown of the evaluation scores for each bidder. Pursuant to N.J.A.C. 5:34-10.9(f), public disclosure of the price proposals would be required once the governing body awards the contract.

15. COMMENT: N.J.A.C. 5:34-10.10(b) should be amended to include the following language: “If all bids are rejected, the governing body shall not have any right to use any of the drawings, specifications, or design proposal concepts in any re-bid, including a decision to utilize the Design-Bid-Build method of procurement. Ownership of all design documents shall remain with the bidders.”

RESPONSE: The Department does not find that the requested change at N.J.A.C. 5:34-10.10(b) is necessary. N.J.A.C. 5:34-10.9(o) already incorporates the language from N.J.S.A. 18A:18A-66.f and 40A:11-58.f stating “[U]nless and until a statement proposal is accepted by the governing body, the drawings, specifications, and other information in the proposal shall remain the property of the bidder.”

16. COMMENT: To perform a thorough review of a proposal and score, a bidder must be able to access the bid proposal and any other documents related to the contract award. Therefore, we suggest the addition of language at N.J.A.C. 5:34-10.10(d), stating that the unsuccessful bidder shall, upon request, be provided with copies of all relevant materials. The contracting unit may charge the requestor a reasonable fee for the cost of producing said materials.

RESPONSE: N.J.A.C. 5:34-10.10(d) currently only states that an unsuccessful bidder has the right to review the proposals submitted, the technical review committee evaluation scores, and the final recommendation of the award document (that is, the proposal evaluation report). The Department agrees that expressly allowing an unsuccessful bidder to obtain copies of said documents would allow the opportunity for a more thorough review. As such, the Department will adopt the above-referenced provision at N.J.A.C. 5:34-10.9(k) without change to avoid expiration of the specially adopted rules, but will propose amendments at N.J.A.C. 5:34-10.10(d) in a separate rule proposal to allow an unsuccessful bidder to obtain copies of the materials referenced in the subsection, subject to such costs as the contracting unit may charge pursuant to the Open Public Records Act (N.J.S.A. 47:1A-1 et seq.) The Department notes that the current requirement at subsection (d) that the contracting unit redacts technical proposals “to the extent necessary to prevent revealing the trade secrets and proprietary commercial or financial information incorporated into another bidder’s technical proposal” would remain.

17. COMMENT: N.J.A.C. 5:30-10.10(e) should be amended to require that, if a contracting unit is supplying a stipend to unsuccessful bidders submitting design-build proposals, the contracting unit provide the stipend to all bidders if the owner cancels the project. Language should be included stating that if the contracting unit cancels and gives notice of the final award, the contracting unit shall pay any stipend as stipulated in the RFP.

RESPONSE: Pursuant to N.J.S.A. 18A:18A-63 and 40A:11-54, the matter of whether to issue a stipend is solely within the discretion of the contracting unit. As such, the Department will not change its rules, making the requirement to pay a stipend mandatory in this circumstance. However, the Department agrees to change N.J.A.C. 5:34-10.11(a) to clarify that a contracting unit may agree to pay a stipend to all bidders in the event of project cancellation. N.J.A.C. 5:34-10.11(b) already requires the contracting unit to include the terms and conditions for payment of the stipend in both the RFQ and RFP, so no further changes are needed to address project cancellation.

18. COMMENT: As bidders’ proposals may contain proprietary information, N.J.A.C. 5:34-10.12(a) should be amended to state that only the successful bid proposal is subject to the provisions of the Open Public Records Act, and unsuccessful proposals shall not be disclosed.

RESPONSE: The Department finds that there are sufficient protections in place for bidders’ proprietary information. N.J.A.C. 5:34-10.10(d) already permits an unsuccessful bidder to access all technical proposals submitted in response to an RFP, subject to redactions to prevent revealing trade secrets and proprietary commercial or financial information. N.J.S.A. 47:1A-1 exempts from disclosure pursuant to the Open Public Records Act (OPRA) “trade secrets and proprietary commercial or financial information obtained from any source.” Nevertheless, to ease the administrative burden faced by contracting units in making determinations pursuant to the above-referenced OPRA exception, in a subsequent rule proposal, the Department will agree to propose amendments at N.J.A.C. 5:34-10.10(a) in a subsequent rulemaking to allow contracting units discretion to require bidders to specify which information in their proposals is proprietary; with the caveat that the bidder’s determination would not be binding upon the contracting unit.

19. COMMENT: N.J.A.C. 5:34-10.12(c) requires the contracting unit or the design-builder to produce records relating to the project within four business days of a request by the Director of the Division of Local Government Services. Locating and securing these records, which may be maintained off-site, could require substantially more time than the “four business days” allotted in the proposed rules. Therefore, we recommend changing “four business days” to “10 business days.”

RESPONSE: The Department acknowledges that the varying size and staff capacity of local governments and school districts may impact their ability to effectively respond to records requests as to a design-build project. Although the Department will adopt the above-referenced provision at N.J.A.C. 5:34-10.12(c) without change, to prevent the expiration of the specially adopted rules, the Department will issue a subsequent rule proposal in the near future to amend N.J.A.C. 5:34-10.12(c) in the manner sought by commenter.

20. COMMENT: N.J.A.C. 5:34-10.16(a) should be amended to state that a contracting unit’s written approval of a request to substitute a bidder’s key team members “cannot be unreasonably withheld.” Team members may leave the employ of a bidder for reasons that are beyond the bidder’s control.

RESPONSE: In order to clarify the degree of contracting unit discretion, the Department agrees to change N.J.A.C. 5:34-10.6(a) upon adoption to state that the contracting unit shall have a reasonable basis upon which to deny a request for substitution of a bidder’s key team member.

21. COMMENT: The scoring system for post-award design-builder evaluation established pursuant to N.J.A.C. 5:34-10.18 is subjective and does not adequately reflect a design-builder’s performance. Specifically, under this ranking system, a design-builder who complies with all terms of a contract only receives a rating of “Satisfactory” and can only secure an “Outstanding” rating by “exceeding” the contract requirements. We believe any design-builder who meets the terms of a contract should receive an “Outstanding” rating. Moreover, the evaluation ratings are vague and subjective to each reviewer and, thus, could be abused to favor certain bidders or could create the appearance of an unfair evaluation process. As such, we suggest eliminating the “Outstanding” and “Very Good” rankings and amending the scoring system to award a 100 percent rating to any design-builder who consistently meets the contract requirements. In addition, we recommend adding technical measures to the enumerated categories to ensure a fully objective evaluation process.

RESPONSE: The Department finds that the current post-award evaluation rating rubric established at N.J.A.C. 5:34-18 provides sufficient objectivity in evaluating a design-builder’s performance. Each rating, which ranges from “Outstanding” to “Unsatisfactory,” references the design-builder’s performance when measured against the terms of the design-build contract. The classifications of “Outstanding” and “Very Good” should be limited to those design-builders that consistently exceed the requirements of the underlying contract.

22. COMMENT: N.J.A.C. 5:34-10.19(b) states that a bidder that intends to submit, or has submitted, a proposal may request an informal hearing before the contracting unit to protest the RFP documents or process must do so, in writing, at least five business days prior to the date and time scheduled for the opening of the technical proposals. As the need to protest may not be apparent in this time frame, we suggest extending this deadline to submit notice that a bidder wishes to protest the RFP process. Moreover, providing all materials required to mount a protest can take substantial time. Therefore, we recommend that all materials required for the protest be provided 15 days after the submission of a notice of intent to protest.

RESPONSE: In response to the commenter’s concern regarding the amount of time necessary for a bidder to file a thorough protest, the Department will adopt the above-referenced provision at N.J.A.C. 5:34-10.19(b) without change to prevent the expiration of the specially adopted rules, but will issue a subsequent rule proposal in the near future that proposes amending N.J.A.C. 5:34-10.19 to institute a requirement to file with the contracting unit a notice of intent to protest within a certain number of days of the RFQ or RFP becoming available, from which point, the bidder would have no more than a certain number of days within which to file a formal protest with the contracting unit.

23. COMMENT: Providing the contracting unit with sole discretion on whether to grant a hearing unfairly limits a bidder’s ability to protest. As such, we suggest that N.J.A.C. 5:34-10.19(c) and (g)1 be amended to create an additional level of appeal to ensure the bidder is given sufficient opportunity to dispute the contracting unit’s determination.

RESPONSE: The Department does not agree to make the change requested by the commenter. N.J.A.C. 5:34-10.19(g)1 requires the contracting unit to issue a determination on any protest or challenge at N.J.A.C. 5:34-10.19. The protestor must submit all legal and factual arguments, materials, or other documents that support the protestor's position. However, what is within the sole discretion of the contracting unit is whether to render a decision on the protest solely on the materials submitted as part of the protest or allow the protestor to present oral testimony in a quasi-legislative hearing. Any further challenges to the contracting unit’s determination can be made through the courts or, if applicable, the dispute resolution procedures set forth at N.J.S.A. 40A:11-50.

24. COMMENT: Allowing up to 30 days for a governing body or hearing officer to issue a decision on a bidder protest could unnecessarily delay important public works projects. Therefore, we recommend amending N.J.A.C. 5:34-10.19(g)2 to replace “30 calendar days” with “14 calendar days.”

RESPONSE: Due to the varying size and staff capacity of local governments and school districts, the Department will not change the current 30-day window, as it finds that shortening the timeframe for issuing a decision on a bidder’s protest would unreasonably limit contracting units’ ability to thoughtfully consider all arguments presented by the bidder.

**Lori Simeon, President, Governmental Purchasing Association of New Jersey**

25. COMMENT: With respect to N.J.A.C. 5:34-10.7(a)7, which requires a bidder to submit the training certification of the bidder’s professional and field workforce, along with that of the members of the proposed design-build team, we are not sure what certification is being requested or required. What would be considered a training certification? Will contractors have to attend classes and courses as we do to obtain our Qualified Purchasing Agent certificates? The Department should potentially amend this provision to include firm profiles, resumes, and project examples.

RESPONSE: N.J.A.C. 5:34-10.7(a)7 establishes minimum content for a bidder’s statement of qualifications. Contracting units would not be precluded from requiring firm profiles as part of their requests for qualifications; however, each bidder’s statement of qualifications is already required to provide details concerning experience. Training certifications can include, but are not necessarily limited to, areas such as training on safety, particular equipment, or processes. However, for purposes of greater clarity, the Department will change N.J.A.C. 5:34-10.7(a)7 upon adoption to make the word “certification” plural.

26. COMMENT: The minimum time period established at N.J.A.C. 5:34-10.8(a) for responses to RFPs should be increased from 14 days to at least 20 days, which would be the minimum timeframe for competitive contracting solicitations. We suggest going even further and making it more like the 60 days given to respond to solid waste bid solicitations.

RESPONSE: At this juncture, the Department will adopt N.J.A.C. 5:34-10.8 without the change suggested by the commenter, but, as contracting units begin utilizing design-build project delivery, the Department will consider the experience of contracting units and prospective design builders in determining whether it is necessary to extend the minimum deadline for submission of design-build proposals. The existing rules give contracting units the discretion to offer a greater number of days for bidders to respond.

27. COMMENT: N.J.A.C. 5:34-10.9(m) requires the technical review committee to consider at least two complete and responsive proposals before the governing body can award the contract. No restriction on the number of proposals should be required. Provided that the solicitation was done in a fair and open manner, we see no conflict if only one proposal is submitted. Also, if the proposed awarded bidder decides to withdraw from the award, do we then offer the project award to the next bidder?

RESPONSE: N.J.S.A. 18A:18A-67.a and 40A:11-59.a state that “[N]o proposal for a design-build contract may be accepted unless the contracting unit determines that there was adequate competition for such contract.” At P.L. 2021, c. 71, the term “acceptance” is used to mean a selection of the design-builder’s proposal by the contracting unit. Further, both above-referenced statutes have repeated references to the evaluation and consideration of “proposals” plural. The Department finds that “adequate competition” would require the comparison of at least two complete proposals to determine which is the most advantageous to the contracting unit in terms of price and other factors.

If, after the award of a design-build contract, the successful bidder decides to withdraw, N.J.A.C. 5:34-10.15(c) would allow the contracting unit to withdraw or cancel the notice of award and award the contract to the next-highest ranked bidder. Upon adoption, the Department will change this subsection to replace a mistaken reference to “design-bidder” with the term “contracting unit.”

28. COMMENT: N.J.A.C. 5:34-10.9(n) authorizes a contracting unit to negotiate with a successful bidder post-award; however, what is the reason an entity would want to negotiate post-award? The submitted price is the submitted price. Local governments are only allowed to negotiate if bids were negotiated twice with no bidders.

RESPONSE: N.J.S.A. 18A:18A-66.d and 40A:11-58.d authorize school districts and local governments, respectively, to negotiate with a design-builder post-contract award. N.J.A.C. 5:34-10.9(n) establishes the framework pursuant to which such negotiations can take place, if the contracting unit elects to do so.

29. COMMENT: It is mentioned several times about what to charge for the RFQ and RFP. Since many entities are moving forward with E-bidding, would E-bidding be allowed? If so, it should state that here.

RESPONSE: As stated in the response to prior comments, the Department will change its rules upon adoption to create new N.J.A.C. 5:34-10.3(e), explicitly authorizing the use of electronic procurement platforms for design-build construction projects.

30. COMMENT: N.J.A.C. 5:34-10.7(a)8 requires bidders to include their safety experience modification rating (EMR), along with the EMR rating of the construction members of its proposed design-build team, in their statements of the proposal. This should be optional as many local units are not familiar with or understand what an EMR is.

RESPONSE: N.J.S.A. 18A:18A-63.b and 40A:11-55.b both require consideration of a “safety modification rating” in the evaluation of statements of qualification. EMR ratings (an equivalent term) evaluate the risk of work-related injuries and are used by insurance firms to calculate the cost of worker’s compensation insurance premiums. Lower EMR ratings indicate that a firm is less of a risk for work-related injuries among its employees, which is reflected in lower worker’s compensation premiums.

31. COMMENT: For a bidder to be qualified to receive an RFP, the bidder must provide a copy of their Public Works Contractor Registration (PWCR) certificate along with those of the proposed members of the design-build team that are required by law to have a PWCR. To comport with the New Jersey Public Works Contractor Registration Act, this should not be a mandatory item at the time of proposal but at contracting award.

RESPONSE: With design-bid-build project delivery, a bidder must provide the contracting unit with their PWCR certificate before the contract can be awarded. By contrast, the first phase of the design-build process involves qualifying the design-builders to receive RFPs. As design-builders must have a PWCR to perform work on the project, along with the team members required by law to have a PWCR, the Department finds it appropriate to disqualify from receiving an RFP those that cannot produce a PWCR.

32. COMMENT: Why are the technical and price proposals separated at N.J.A.C. 5:34-10.9(b)6? This reads like the two-envelope system for the qualified selection process in Federal procurement. This also implies a paper-only system. Also, the reference to a bid bond creates legal issues in that it is in reference to the lowest responsive, responsible bidder.

RESPONSE: P.L. 2021, c. 71, requires the submission of separate technical and price proposals in response to an RFP. As stated in the response to prior comments, the Department will change its rules upon adoption to create a separate subsection expressly authorizing the use of electronic procurement platforms for design-build construction projects. Finally, the Department does not find the bid bond requirement to conflict with the nature of the design-build method of project delivery. As with design-bid-build projects, the bid bond would help ensure that the design-builder awarded the contract will perform the work on the project.

33. COMMENT: The price proposal should not be given a weight of 50 percent. This negates some of the benefits of the design-build process and will favor back-ended low-bid situations.

RESPONSE: N.J.S.A. 18A:18A-63.f and 40A:11-55.f require the price proposal to be weighted at least 50 percent. The Department does not have the discretion to deviate from this minimum percentage.

34. COMMENT: There is no reference or definition of the Greatest Maximum Price or GMP, which should be included in the regulations to protect the contracting unit.

RESPONSE: The term referenced by the commenter does not appear in the rules, and there is insufficient context from which to understand what section or sections the commenter is referencing.

**Thomas J. Duch, Esq., Bergen County Counsel and County Administrator, on behalf of the County of Bergen**

35. COMMENT: N.J.A.C. 5:34-10.1(b)1, 10.2, 10.4(a), and 10.6(c)1iii should be amended to incorporate specifications into the request for the qualifications stage of the design-build procurement. Specifically:

* Amend N.J.A.C. 5:34-10.1(b)1 to include the phrase “including any and all specifications prepared by the contracting unit” between the words “project” and “and”;
* Amend N.J.A.C. 5:34-10.2 to define the term “preliminary design documents” as meaning “the initial design elements of the project which may include detailed specifications prepared by the contracting unit. The contracting unit shall utilize a design professional or design official to prepare the preliminary design documents. The preliminary design documents may range from general descriptions of the project to required necessary specifications for the project”;
* Amend the following existing definitions at N.J.A.C. 5:34-10.2:
  + “Construction documents” to reference authorship by the contracting unit and the design-builder;
  + “Prescriptive specifications” to include any and all documents the contracting unit finds appropriate to provide;
  + Qualification evaluation factors” to include evaluation of a design-builder’s capacity to execute the necessary specifications of the design-build project;
  + “Request for qualifications” to state that the request for qualifications describes the project in enough detailas determined by the contracting unit, including any and all specifications prepared by the contracting unit; and
  + “Specification” to mean a written description included as part of the request for qualifications as well as the construction documents, further stating that “[S]pecifications prepared by the contracting unit shall augment and complement any drawings and plans prepared by the design-builder”;
* Amend N.J.A.C. 5:34-10.4(a) to specifically require a design professional or design official retained by the contracting unit to provide design documents and specifications as part of their services; and
* Amend N.J.A.C. 5:34-10.6(c)1iii to include specifications within the scope of work statement required to be provided in the request for qualifications.

RESPONSE: The Department anticipates issuing further guidance on the matter of design specificity; however, the Department will adopt the above-referenced subsections without the above-referenced changes proposed by the commenter. As contracting units begin utilizing design-build project delivery, the Department will consider the experience of contracting units and prospective design builders in determining whether it is necessary to provide greater detail on the permissible level of detail in design documents and project specifications.

36. COMMENT: The definition of “design official” at N.J.A.C. 5:34-10.2 should be amended to state that the official would be designated by the contracting unit to substitute the phrase “plan, design and observe” for the current “be responsible for planning, designing, and observing” before “the construction of a design-build project or projects on behalf of the contracting unit throughout the duration of the design-build project or projects on behalf of the contracting unit.”

RESPONSE: The Department does not see a need for the requested change. Further, the language sought by the commenter could be interpreted as placing the design official in a role akin to an engineer and/or architect in a design-bid-build project, where the contracting unit is solely responsible for the design element.

37. COMMENT: The Department should amend N.J.A.C. 5:34-10.6(c) to add after “[O]ther technical factors; as may be relevant to the project,” the phrase “including restoration and rehabilitation projects, as determined by the contracting unit and provided in the requests for qualifications.”

RESPONSE: The determination of whether a technical factor specified in the RFQ is relevant to the project should not be left solely within the contracting unit’s determination. A technical factor that is not relevant to a project could potentially be used to unfairly limit competition, and to allow a contracting unit to define relevance as it sees fit would hinder a bidder from challenging the procurement process on that basis.

38. COMMENT: At 5:34-10.6(d)1, the word “directly,” located before the word “related,” should be deleted, such that no RFQ may require any standard, restriction, condition, or limitation not related to the project’s purpose, function, or activity.  
RESPONSE: The Department will not make the change requested by the commenter, as it would increase the risk of an RFQ or RFP being tailored to a specific design-builder and, thereby, deprive other design-builders of a level playing field.

39. COMMENT: N.J.A.C. 5:34-10.17(c) should be amended to remove the word “interim” throughout the subsection.

RESPONSE: The above-referenced provision is meant to limit contracting unit liability when finalizing the design and plans in collaboration with the design-builder. Outside of this process, the terms of the design-build contract would govern the liability of the respective parties with respect to design. N.J.S.A. 18A:18A-66.f and 40A:11-58.f each state that “[O]nce a proposal is accepted, the disclosure of the proposal and the information in the proposal, and the ownership of the drawings, specifications, and information therein, shall be determined in accordance with existing law and the terms of the design-build contract.” At this time, the Department finds that the issue of liability in connection with a finalized design can be adequately addressed in the underlying design-build contract; and declines to make the change requested by the commenter.

40. COMMENT: The following sentence should be inserted at N.J.A.C. 5:34-10.19(b): “The nature and extent of detail in the preliminary design documents and/or specifications prepared by the contracting unit shall not be a basis to protest the design build project process.”

RESPONSE: The Department will not make the change requested by the commenter, as it finds that the proposed language would unduly restrict the ability of a bidder to enter a protest concerning a request for qualifications or request for proposals.

**Federal Standards Statement**

No Federal standards analysis is required because the adopted new rules are not adopted in order to implement, comply with, or participate in any program established under Federal law or under a State law that incorporates or refers to Federal law, standards, or requirements.

**Full text** of the adopted new rules follows (additions to proposal indicated in boldface with asterisks **\*thus\***; deletions from proposal indicated in brackets with asterisks \*[thus]\*):

5:34-10.2 Definitions

The following words and terms, when used in this subchapter, shall have the following meanings unless the context clearly indicates otherwise:

…

“Design-build project delivery” means a project delivery system that combines all or some portions of the design and construction phases of a construction project into a single contract, including, without limitation, design**\***[,]\* \***and\*** regulatory permit approvals\*[, and utility relocation and construction]\*.

“Design-builder” means the entity, whether natural person, partnership, joint stock company, corporation, trust, professional corporation, business association, or other legal business entity or successor, that proposes to design and construct any public project, who possesses a public works contractor registration pursuant to the provisions at P.L. 1999, c. 238 (N.J.S.A. 34:11-56.48 et seq.), and \*[classified by]\* **\*who possesses, along with other individual members of the design-build team, requisite classifications or ratings from\*** the New Jersey Division of Property Management and Construction or the New Jersey Department of Transportation, where applicable, **\*relevant\*** to perform work on the project.

…

5:34-10.3 Authorization to commence design-build process

(a)-(d) (No change from proposal.)

**\*(e) Electronic procurement through the use of electronic procurement platforms as defined at N.J.A.C. 5:34-5.2 may be utilized for design-build projects as permitted by law.\***

5:34-10.5 Responsibilities of technical review committee

(a)-(d) (No change from proposal.)

(e) Before reviewing and evaluating statements of qualifications and proposals, each committee member, and advisor thereof, shall certify that they have no conflict of interest with respect to any of the bidders to be evaluated, any of the key team members, named subcontractors or subconsultants to the bidders, **\*any subcontractors and subconsultants from which the bidder, at the time of the proposal, expects to consider selecting once anticipated quantities and design elements of the project are known,\*** or any of the principals, subsidiaries, or parent companies of such bidders.

(f)-(g) (No change from proposal.)

5:34-10.7 Statements of qualifications; qualification of bidders to submit statements of proposal

(a) Each bidder’s statement of qualifications shall contain, at a minimum, the following:

1.-4. (No change from proposal.)

5. For all projects other than transportation projects, documentation that the bidder and, to the extent necessary for the project, key team members and other subcontractors have a current DPMC \*[design build]\* **\*design-build\*** classification and such other DPMC classifications and ratings issued pursuant to N.J.A.C. 17:19-1, as may be necessary for the project**\*.** **Key team members and other subcontractors shall be required to possess only those classifications and ratings issued by the DPMC that are relevant to the project**\*;

6. (No change from proposal.)

7. Training certification**\*s\*** of the bidder’s professional and field workforce, along with that of the members of the proposed design-build team;

8.-14. (No change from proposal.)

(b)-(e) (No change from proposal.)

(f) Key team members shall not be replaced without approval of the technical review committee. **\*The committee shall have a reasonable basis for any denial.\***

5:34-10.9 Statements of proposal; award of contract

(a)-(j) (No change from proposal.)

(k) The selection coordinator shall determine the combined scores for each bidder based on their technical and price proposals. A minimum of 50 percent consideration shall be based on the cost of the price proposal. After the proposals have been evaluated, the selection coordinator shall prepare a report concerning the technical review committee’s proposal evaluations and award recommendation. The report shall list the names of all bidders submitting a proposal and shall summarize each statement of proposal submitted**\*, including the dollar amount of each bidder’s price proposal, and include a breakdown of the evaluation scores for each bidder\***. The report shall rank the bidders in order of evaluation, clearly state the reasons for the committee’s award recommendation, and detail the terms, conditions, scope of services, fees, and other matters to be incorporated into the contract. The bidder with the highest overall score shall be recommended to the contracting unit’s governing body for an award of the design-build contract. The report shall be made available to the public at least 48 hours prior to the governing body’s award of the contract or when made available to the governing body, whichever is sooner, except that the details of each bidder’s respective technical proposals shall not be disclosed.

(l)-(o) (No change from proposal.)

5:34-10.11 Criteria for payment of stipend

(a) At the discretion of the contracting unit, a stipend of no more than three percent of the design-build project’s estimated costs may be paid to eligible bidders who submit responsive, but unsuccessful proposals, in response to the RFP. The decision to issue such a stipend shall be based on the contracting unit's analysis of the design-build project’s size, scope, and complexity, and the anticipated degree of competition during the procurement process. **\*A contracting unit may agree to pay a stipend to all bidders in the event of project cancellation.\*** The purpose of the stipend is to encourage competition by offering to compensate responsive, but unsuccessful bidders, for a portion of the estimated proposal development costs.

(b)-(c) (No change from proposal.)

5:34-10.15 Contract approval and execution

(a)-(b) (No change from proposal.)

(c) If the design-builder fails to return the executed contract and other required documents within the time specified by the contracting unit, the \*[design-bidder]\* **\*contracting unit\*** may take whatever action is appropriate and authorized by law including, but not limited to, withdrawing or canceling the notice of award to the delinquent bidder and awarding the contract to the next-highest ranked bidder; cancelling the procurement; or proceeding to recover under the bid bond submitted with the price proposal, in accordance with N.J.A.C. 5:34-10.9(b).

(d)-(g) (No change from proposal.)

5:34-10.16 Deletion or substitution of key team members

(a) No substitutions or deletions of key team members may be made during the selection process or after award of the contract, without prior written approval from the contracting unit. **\*The contracting unit shall have a reasonable basis for any denial.\***

(b) (No change from proposal.)