

Version 2.1, April 2024

# N.J. Local Public Contracts Law and Regulations **Reference Guide**

Includes N.J.S.A. 40A:11, N.J.A.C. 5:34 and related laws and rules, with pertinent and supporting information

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Center for Government Services,  
Division of Continuing Studies, Rutgers University  
in cooperation with the  
Division of Local Government Services,  
NJ Department of Community Affairs

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## Version 2 LPCL Reference Guide Change Log

This log will reflect incremental changes made over time in this Guide.

Date	Version #	Description of change
4/2024	2.1	<ul style="list-style-type: none"><li>• Updated link to adopted Design Build Rules (p. xi and 95).</li><li>• N.J.S.A. 40A:11-51 repealed (p.73).</li><li>• N.J.A.C. 34-10 Design build regulatory reference and link added</li><li>• Requirements for Russia and Belarus vendor certification updated (p., 87-88) .</li><li>• In Appendix C, at 40A:11-13 (p. 94), added a link to an MS Word version of the current (30/20/20) DEP standard solid waste collection specification document.</li><li>• Added reference to LFN 2012-12, Electric and Natural Gas Supply Procurement Guidance, (p.95).</li><li>• Expanded and updated public work regulation and reporting content, generally in Appendix E (p. 97-101) including online reporting of wages and “The “Wall.”<ul style="list-style-type: none"><li>○ Appendix A - Prevailing wage threshold for municipalities increase taking effect on 7/1/2024 of \$19,375 (p. 86).</li><li>○ Added reference to the meaning of “custom fabrication” as being public work and subject to prevailing wages, (p.97)</li></ul></li><li>• New section on PL 2021, c.301 on lowest bid for prevailing wage contract bids that are 10% less than second lowest bidder and required specification language. (p.101).</li><li>• Added UCC private on-site inspection services as Competitive contracting at 40A:11-4.1(s) (P.L. 2022. C.139) (p.9).</li><li>• Amendments to 40A:11-3 pursuant to P.L. 2023, c.252, effective April 8, 2024 (p.6).</li><li>• Added new P.L. 2023, c.160 as N.J.S.A. 40A:11-13a. (p38).</li></ul>
11/2022	2.0	Release of Version 2.0

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### Useful Reference Guide Links

The most recent version of the LPCL Reference Guide can be [downloaded from this link](#) or by using this QR code:



The Guide and Supplemental LPCL Procurement Resources can be found through the **LPCL Resource Documents** link at <https://cgs.rutgers.edu/programs/public-purchasing>.

Sign up at this link to be notified when updates to the Guide are released:  
<https://go.rutgers.edu/LPCL Ref Guide Notice>.

**PLEASE REPORT** non-working links, errors, or questions to the editor at [bloustein.local@rutgers.edu](mailto:bloustein.local@rutgers.edu).

# READ THIS FIRST!

## HOW TO USE THIS GUIDE

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This 2<sup>nd</sup> Edition of this Reference Guide (Ver. 2.1) reprints the Local Public Contracts Law (LPCL, N.J.S.A. 40A:11), Local Public Contracting Rules (N.J.A.C. 5:34), and includes various supplemental regulations and guidance material. The statutory, regulatory, and guidance content is current as of April, 2024. It is intended for contracting units and their procurement professionals and advisors that fall under the LPCL.

It is the goal of the Division of Local Government Services (DLGS) and the Rutgers Center for Government Services (CGS) to provide periodic updates. When available, updates and supplemental downloadable resources are posted in an [online Box folder](#)\* and on the DLGS website. Notice of updates will be disseminated to the local government procurement community through a [CGS mailing list](#), the DLGS GovConnect email service, and through professional associations.

The handbook is divided into two parts: Part One reprints the Local Public Contracts Law and provides internet links to several related statutes; Part Two reprints the primary administrative rules related to the Local Public and Public School Contracts Laws. The Table of Contents and LPCL text sections contain general headings that identify related sections of individual laws intended to assist the reader in finding specific sections of law. Several sections are general in nature and reflect a variety of laws related to the listed topic. Similarly, several commonly used individual sections of law are highlighted in bold to assist users.

The document is designed to be used as either a paper-based document with an extensive Table of Contents, or as a PDF with [clickable links](#) that make moving between the Table of Contents and related content and online links convenient when viewed on a computer.

Several appendices follow Part 1, the Local Public Contracts Law. They include:

- [Appendix A](#) displays the current public bidding and quotation thresholds.
- [Appendix B](#) includes the text of several statutes not readily referenced elsewhere that are related to the LPCL and are shown in pertinent part.
- [Appendix C](#) lists supplemental references to LPCL sections. Many LPCL section text titles have links to Appendix C listings of associated N.J.A.C. regulations (e.g., [40A:11-3. Bid threshold; period of contracts](#)) or DLGS Local Finance Notices. The appendix can also be used directly to find related material.
- [Appendix D](#) is a standalone list of procurement related statutes and guidance with their related web references. These references should be read alongside the Local Public Contracts Law. Questions concerning it should be reviewed by contracting professionals and their legal advisors.
- [Appendix E](#) addresses the field of *public work* and prevailing wage contracting. It lists, summarizes, and provides links to important laws and regulations that are part of public work/prevaling wage laws governing this evolving area.

Part Two is a reprint of N.J.A.C. 5:34, its Appendices (including fillable forms), along with sections of N.J.A.C. 5:30 related to local government procurement practices. It also includes N.J.A.C. 5:32-5 that covers certification requirements of Qualified Purchasing Agents. The editor has added embedded weblink to assist users. Embedded links do not appear in the official N.J.A.C.

For PDF users, a [“Return to Contents”](#) link in the footer of each page will bring the user back to the Table of Contents.

Users are encouraged to report any non-working links or errors to the editor at [bloustein.local@rutgers.edu](mailto:bloustein.local@rutgers.edu).

## Acknowledgements

Marc Pfeiffer developed and edited this Guide. Mr. Pfeiffer is a former Division of Local Government Services Deputy Director and currently Associate Director of Bloustein Local, part of the Center for Urban Policy Research at the Rutgers Bloustein School of Planning and Public Policy. He was assisted in the original version by Joseph A. Valenti, who retired as Chief of the Division's Bureau of Local Management Services after 37 years of service to the state and the local government purchasing community. Between them, separately and together, they led administration of the State's local public contracting laws for almost 40 years.

The Division of Local Government Services provided editorial guidance and support for this project. The Division thanks Bloustein Local and the Center for Government Services for their efforts and hopes that local procurement professionals find it a valuable resource.

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Any omissions or errors are the sole responsibility of the author.

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*Note: At the editor's discretion, web links to online statutory or other regulatory references have embedded weblinks for easy accessibility. Embedded links do not appear in the adopted rules.*

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## Part One

### LOCAL PUBLIC CONTRACTS LAW

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#### N.J.S.A. 40A:11-1 et seq.

##### **40A:11-1. Short title; citation**

This act shall be known and may be cited as the "Local Public Contracts Law."

L.1971, c. 198, s. 1, eff. July 1, 1971.

##### **40A:11-2. Definitions**

As used herein the following words have the following definitions, unless the context otherwise indicates:

(1) "Contracting unit" means:

(a) Any county; or

(b) Any municipality; or

(c) Any board, commission, committee, authority or agency, which is not a State board, commission, committee, authority, except as provided pursuant to P.L.2013, c.4, or agency, and which has administrative jurisdiction over any district other than a school district, project, or facility, included or operating in whole or in part, within the territorial boundaries of any county or municipality which exercises functions which are appropriate for the exercise by one or more units of local government, including functions exercised in relation to the administration and oversight of a tourism district located in a municipality in which authorized casino gaming occurs, and which has statutory power to make purchases and enter into contracts awarded by a contracting agent for the provision or performance of goods or services.

The term shall not include a private firm that has entered into a contract with a public entity for the provision of water supply services pursuant to P.L.1995, c.101 (C.58:26-19 et al.).

"Contracting unit" shall not include a private firm or public authority that has entered into a contract with a public entity for the provision of wastewater treatment services pursuant to P.L.1995, c.216 (C.58:27-19 et al.).

"Contracting unit" shall not include a duly incorporated nonprofit association that has entered into a contract with the governing body of a city of the first class for the provision of water supply services or wastewater treatment services pursuant to section 2 of P.L.2002, c.47 (C.40A:11-5.1).

"Contracting unit" shall not include an entity that has entered into a contract for management and operation services with a local hospital authority established pursuant to P.L.2006, c.46 (C.30:9-23.15 et al.).

(2) "Governing body" means:

(a) The governing body of the county, when the purchase is to be made or the contract or agreement is to be entered into by, or on behalf of, a county; or

(b) The governing body of the municipality, when the purchase is to be made or the contract or agreement is to be entered into by, or on behalf of, a municipality; or

(c) Any board, commission, committee, authority or agency of the character described in subsection (1) (c) of this section.

(3) "Contracting agent" means the governing body of a contracting unit, or appointed membership of a State authority authorized to enter into a cooperative purchasing agreement pursuant to P.L.2013, c.4, or its authorized designee, which has the power to prepare the advertisements, to advertise for and receive bids and, as permitted by this act, to make awards for the contracting unit in connection with purchases, contracts or agreements.

(4) "Purchase" means a transaction, for a valuable consideration, creating or acquiring an interest in goods, services and property, except real property or any interest therein.

(5) (Deleted by amendment, P.L.1999, c.440.)

(6) "Professional services" means services 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. Professional services may also mean services rendered in the provision or performance of goods or services that are original and creative in character in a recognized field of artistic endeavor.

(7) "Extraordinary unspecifiable services" means services which are specialized and qualitative in nature requiring expertise, extensive training and proven reputation in the field of endeavor.

(8) (Deleted by amendment, P.L.1999, c.440.)

(9) "Work" includes services and any other activity of a tangible or intangible nature performed or assumed pursuant to a contract or agreement with a contracting unit.

(10) "Homemaker--home health services" means at-home personal care and home management provided to an individual or members of the individual's family who reside with the individual, or both, necessitated by the individual's illness or incapacity. "Homemaker--home health services" includes, but is not limited to, the services of a trained homemaker.

(11) "Recyclable material" means those materials which would otherwise become municipal solid waste, and which may be collected, separated or processed and returned to the economic mainstream in the form of raw materials or products.

(12) "Recycling" means any process by which materials which would otherwise become solid waste are collected, separated or processed and returned to the economic mainstream in the form of raw materials or products.

(13) "Marketing" means the sale, disposition, assignment, or placement of designated recyclable materials with, or the granting of a concession to, a reseller, processor, materials recovery facility, or end-user of recyclable material, in accordance with a district solid waste management plan adopted pursuant to P.L.1970, c.39 (C.13:1E-1 et seq.) and shall not include the collection of such recyclable material when collected through a system of routes by local government unit employees or under a contract administered by a local government unit.

(14) "Municipal solid waste" means, as appropriate to the circumstances, all residential, commercial and institutional solid waste generated within the boundaries of a municipality; or the formal collection of such solid wastes or recyclable material in any combination thereof

when collected through a system of routes by local government unit employees or under a contract administered by a local government unit.

(15) "Distribution" (when used in relation to electricity) means the process of conveying electricity from a contracting unit that is a generator of electricity or a wholesale purchaser of electricity to retail customers or other end users of electricity.

(16) "Transmission" (when used in relation to electricity) means the conveyance of electricity from its point of generation to a contracting unit that purchases it on a wholesale basis for resale.

(17) "Disposition" means the transportation, placement, reuse, sale, donation, transfer or temporary storage of recyclable materials for all possible uses except for disposal as municipal solid waste.

(18) "Cooperative marketing" means the joint marketing by two or more contracting units of the source separated recyclable materials designated in a district recycling plan required pursuant to section 3 of P.L.1987, c.102 (C.13:1E-99.13) pursuant to a written cooperative agreement entered into by the participating contracting units thereof.

(19) "Aggregate" means the sums expended or to be expended for the provision or performance of any goods or services in connection with the same immediate purpose or task, or the furnishing of similar goods or services, during the same contract year through a contract awarded by a contracting agent.

(20) "Bid threshold" means the dollar amount set in section 3 of P.L.1971, c.198 (C.40A:11-3), above which a contracting unit shall advertise for and receive sealed bids in accordance with procedures set forth in P.L.1999, c.440 (C.40A:11-4.1 et al.).

(21) "Contract" means any agreement, including but not limited to a purchase order or a formal agreement, which is a legally binding relationship enforceable by law, between a vendor who agrees to provide or perform goods or services and a contracting unit which agrees to compensate a vendor, as defined by and subject to the terms and conditions of the agreement. A contract also may include an arrangement whereby a vendor compensates a contracting unit for the vendor's right to perform a service, such as, but not limited to, operating a concession.

(22) "Contract year" means the period of 12 consecutive months following the award of a contract.

(23) "Competitive contracting" means the method described in sections 1 through 5 of P.L.1999, c.440 (C.40A:11-4.1 thru 40A:11-4.5) of contracting for specialized goods and services in which formal proposals are solicited from vendors; formal proposals are evaluated by the purchasing agent or counsel or administrator; and the governing body awards a contract to a vendor or vendors from among the formal proposals received.

(24) "Goods and services" or "goods or services" means any work, labor, commodities, equipment, materials, or supplies of any tangible or intangible nature, except real property or any interest therein, provided or performed through a contract awarded by a contracting agent, including goods and property subject to N.J.S.12A:2-101 et seq.

(25) "Library and educational goods and services" means textbooks, copyrighted materials, student produced publications and services incidental thereto, including but not limited to books, periodicals, newspapers, documents, pamphlets, photographs, reproductions,

microfilms, pictorial or graphic works, musical scores, maps, charts, globes, sound recordings, slides, films, filmstrips, video and magnetic tapes, other printed or published matter and audiovisual and other materials of a similar nature, necessary binding or rebinding of library materials, and specialized computer software used as a supplement or in lieu of textbooks or reference material.

(26) "Lowest price" means the least possible amount that meets all requirements of the request of a contracting agent.

(27) "Lowest responsible bidder or vendor" means the bidder or vendor: (a) whose response to a request for bids offers the lowest price and is responsive; and (b) who is responsible.

(28) "Official newspaper" means any newspaper designated by the contracting unit pursuant to R.S.35:1-1 et seq.

(29) "Purchase order" means a document issued by the contracting agent authorizing a purchase transaction with a vendor to provide or perform goods or services to the contracting unit, which, when fulfilled in accordance with the terms and conditions of a request of a contracting agent and other provisions and procedures that may be established by the contracting unit, will result in payment by the contracting unit.

(30) "Purchasing agent" means the individual duly assigned the authority, responsibility, and accountability for the purchasing activity of the contracting unit, and who has such duties as are defined by an authority appropriate to the form and structure of the contracting unit, and P.L.1971, c.198 (C.40A:11-1 et seq.) and who possesses a qualified purchasing agent certificate.

(31) "Quotation" means the response to a formal or informal request made by a contracting agent by a vendor for provision or performance of goods or services, when the aggregate cost is less than the bid threshold. Quotations may be in writing, or taken verbally if a record is kept by the contracting agent.

(32) "Responsible" means able to complete the contract in accordance with its requirements, including but not limited to requirements pertaining to experience, moral integrity, operating capacity, financial capacity, credit, and workforce, equipment, and facilities availability.

(33) "Responsive" means conforming in all material respects to the terms and conditions, specifications, legal requirements, and other provisions of the request.

(34) "Public works" means building, altering, repairing, improving or demolishing any public structure or facility constructed or acquired by a contracting unit to house local government functions or provide water, waste disposal, power, transportation, and other public infrastructures.

(35) "Director" means the Director of the Division of Local Government Services in the Department of Community Affairs.

(36) "Administrator" means a municipal administrator appointed pursuant to N.J.S.40A:9-136 and N.J.S.40A:9-137; a business administrator, a municipal manager or a municipal administrator appointed pursuant to the "Optional Municipal Charter Law," P.L.1950, c.210 (C.40:69A-1 et seq.); a municipal manager appointed pursuant to "the municipal manager form of government law," R.S.40:79-1 et seq.; or the person holding responsibility for the overall operations of an authority that falls under the "Local Authorities Fiscal Control Law," P.L.1983, c.313 (C.40A:5A-1 et seq.).



(37) "Concession" means the granting of a license or right to act for or on behalf of the contracting unit, or to provide a service requiring the approval or endorsement of the contracting unit, and which may or may not involve a payment or exchange, or provision of services by or to the contracting unit.

(38) "Index rate" means the rate of annual percentage increase, rounded to the nearest half-percent, in the Implicit Price Deflator for State and Local Government Purchases of Goods and Services, computed and published quarterly by the United States Department of Commerce, Bureau of Economic Analysis.

(39) "Proprietary" means goods or services of a specialized nature, that may be made or marketed by a person or persons having the exclusive right to make or sell them, when the need for such goods or services has been certified in writing by the governing body of the contracting unit to be necessary for the conduct of its affairs.

(40) "Service or services" means the performance of work, or the furnishing of labor, time, or effort, or any combination thereof, not involving or connected to the delivery or ownership of a specified end product or goods or a manufacturing process. Service or services may also include an arrangement in which a vendor compensates the contracting unit for the vendor's right to operate a concession.

(41) "Qualified purchasing agent certificate" means a certificate granted by the director pursuant to section 9 of P.L.1971, c.198 (C.40A:11-9).

(42) "Mistake" means, for a public works project, a clerical error that is an unintentional and substantial computational error or an unintentional omission of a substantial quantity of labor, material, or both, from the final bid computation.

L.1971, c.198, s.2; amended 1975, c.353, s.1; 1983, c.331, s.1; 1987, c.102, s.30; 1991, c.143, s.7; 1992, c.98, s.1; 1995, c.101, s.11; 1995, c.103, s.3; 1995, c.216, s.10; 1999, c.440, s.6; 2002, c.47, s.7; 2006, c.46, s.11; 2009, c.166, s.1; 2010, c.108, s.1; 2013, c.4, s.2; 2016, c.55, s.8.

#### **40A:11-2.1. Civil action brought on behalf of local contracting unit<sup>1</sup>**

a. A local contracting unit as defined in and subject to the provisions of the "Local Public Contracts Law," P.L.1971, c.198 (C.40A:11-1 et seq.), shall implement and comply with the provisions of P.L.2012, c.25 (C.52:32-55 et al.), except that the contracting unit shall rely on the list developed by the State Department of the Treasury pursuant to section 3 of P.L.2012, c.25 (C.52:32-57).

b. If the local contracting unit determines that a person or entity has submitted a false certification concerning its engagement in investment activities in Iran pursuant to section 4 of P.L.2012, c.25 (C.52:32-58), the local contracting unit shall report to the New Jersey Attorney General the name of that person or entity, and the Attorney General shall determine whether to bring a civil action against the person to collect the penalty prescribed in paragraph (1) of subsection a. of section 5 of P.L.2012, c.25 (C.52:32-59). The local contracting unit may also report to the municipal attorney or county counsel, as appropriate, the name of that person, together with its information as to the false certification, and the municipal attorney or county counsel, as appropriate, may determine to bring such civil action against the person to collect such penalty.

L.2012, c.25, s.7.

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<sup>1</sup> See Appendix B for full reprint of N.J.S. 52:32-55

**40A :11-2.2. Local contracting unit, compliance; report of false certification.**

a. A local contracting unit as defined in and subject to the provisions of the "Local Public Contracts Law," P.L.1971, c.198 (C.40A:11-1 et seq.), shall implement and comply with the provisions of P.L.2022, c.3 (C.52:32-60.1 et al.), except that the contracting unit shall rely on the list developed by the Department of the Treasury pursuant to subsection b. of section 1 of P.L.2022, c.3 (C.52:32-60.1).

b. If the local contracting unit determines that a person has submitted a false certification concerning its engagement in prohibited activities in Russia or Belarus pursuant to section 1 of P.L.2022, c.3 (C.52:32-60.1), the local contracting unit shall report to the New Jersey Attorney General the name of that person or entity, and the Attorney General shall determine whether to bring a civil action against the person to collect the penalty prescribed in subsection c. of section 1 of P.L.2022, c.3 (C.52:32-60.1).

c. The local contracting unit may also report to the municipal attorney or county counsel, as appropriate, the name of that person, together with its information as to the false certification, and the municipal attorney or county counsel, as appropriate, may determine to bring such civil action against the person to collect such penalty.

L.2022, c.3, s.2.

**40A:11-3. Bid threshold; period of contracts<sup>2</sup>**

a. (1) When the cost or price of a contract, in the aggregate does not exceed in a contract year the total sum of \$17,500, the governing body by ordinance or resolution, as appropriate to the contracting unit, may authorize a purchasing agent or other designated employee to award the contract without public advertising for bids.

(2) Notwithstanding the provisions of any other law, rule, or regulation to the contrary, a contract having an anticipated value in excess of \$17,500, but below the contracting unit's applicable public bidding threshold, is not required to be awarded by the governing body of the contracting unit and may be awarded by the qualified purchasing agent of the contracting unit.

(3) The governing body of a contracting unit that has designated a purchasing agent pursuant to subsection a. of section 9 of P.L.1971, c.198 (C.40A:11-9) may establish a bid threshold of up to \$25,000 or the threshold amount adjusted by the Governor pursuant to subsection c. of this section.

(4) The governing body of any contracting unit may adopt an ordinance or resolution to set a lower threshold for the receipt of public bids or the solicitation of competitive quotations.

(5) Bidding thresholds established by the governing body of a contracting unit pursuant to paragraphs (2) or (3) of this subsection may be granted for each contract or by a general delegation of the power to negotiate and award the contracts pursuant to this section.

b. Any contract made pursuant to this section may be awarded for a period of up to 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. The Division of Local Government Services shall adopt and promulgate rules and regulations concerning the methods of accounting for all contracts that do not coincide with the contracting unit's fiscal year.

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<sup>2</sup> A table of current and prior bid thresholds is found in Appendix A

c. The Governor, in consultation with the Department of the Treasury, shall, no later than March 1 of every fifth year beginning in the fifth year after the year in which P.L.1999, c.440 takes effect, adjust the threshold amount, in direct proportion to the rise of the index rate as that term is defined in section 2 of P.L.1971, c.198 (C.40A:11-2), and shall round the adjustment to the nearest \$1,000. The Governor shall, no later than June 1 of every fifth year, notify each governing body of the adjustment. The adjustment shall become effective on July 1 of the year in which it is made.

L.1971, c. 198, s. 3; amended 1975, c. 353, s. 2; 1977, c. 53, s. 1; 1979, c. 350, s. 1; 1985, c. 60, s. 1; 1985, c. 469, s. 6; 1991, c. 143, s. 1; 1996, c. 113, s. 18; 1999, c. 440, s. 7; 2009, c.166, s.2.; 2023, c.252, s.6

#### **40A:11-4. Contracts required to be advertised, disqualification of bidder**

a. Every 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 this act or specifically by any other law. The governing body of a contracting unit may, by resolution approved by a majority of the governing body and subject to subsections b. and c. of this section, disqualify a bidder who would otherwise be determined to be the lowest responsible bidder, if the governing body finds that it has had prior negative experience with the bidder.

b. As used in this section, "prior negative experience" means any of the following:

- (1) the bidder has been found, through either court adjudication, arbitration, mediation, or other contractually stipulated alternate dispute resolution mechanism, to have: failed to provide or perform goods or services; or failed to complete the contract in a timely manner; or otherwise performed unsatisfactorily under a prior contract with the contracting unit;
- (2) the bidder defaulted on a contract, thereby requiring the local unit to utilize the services of another contractor to provide the goods or perform the services or to correct or complete the contract;
- (3) the bidder defaulted on a contract, thereby requiring the local unit to look to the bidder's surety for completion of the contract or tender of the costs of completion; or
- (4) the bidder is debarred or suspended from contracting with any of the agencies or departments of the executive branch of the State of New Jersey at the time of the contract award, whether or not the action was based on experience with the contracting unit.

c. The following conditions apply if the governing body of a contracting unit is contemplating a disqualification based on prior negative experience:

- (1) The existence of any of the indicators of prior negative experience set forth in this section shall not require that a bidder be disqualified. In each instance, the decision to disqualify shall be made within the discretion of the governing body and shall be rendered in the best interests of the contracting unit.
- (2) All mitigating factors shall be considered in determining the seriousness of the prior negative experience and in deciding whether disqualification is warranted.
- (3) The bidder shall be furnished by the governing body with a written notice (a) stating that a disqualification is being considered; (b) setting forth the reason for the disqualification; and (c) indicating that the bidder shall be accorded an opportunity for a hearing before the governing body if the bidder so requests within a stated period of time. At the hearing, the bidder shall

show good cause why the bidder should not be disqualified by presenting documents and testimony. If the governing body determines that good cause has not been shown by the bidder, it may vote to find the bidder lacking in responsibility and, thus, disqualified.

(4) Disqualification shall be for a reasonable, defined period of time which shall not exceed five years.

(5) A disqualification, other than a disqualification pursuant to which a governing body is prohibited by law from entering into a contract with a bidder, may be voided or the period thereof may be reduced, in the discretion of the governing body, upon the submission of a good faith application under oath, supported by documentary evidence, setting forth substantial and appropriate grounds for the granting of relief, such as reversal of a judgment, or actual change of ownership, management or control of the bidder.

(6) An opportunity for a hearing need not be offered to a bidder whose disqualification is based on its suspension or debarment by an agency or department of the executive branch of the State of New Jersey. The term of such a disqualification shall be concurrent with the term of the suspension or debarment by the State agency or department.

L.1971, c. 198, s. 4; amended 1975, c. 353, s. 3; 1979, c. 350, s. 2; 1985, c. 60, s. 2; 1985, c. 469, s. 7; 1999, c. 440, s. 8.

## Competitive Contracting

### 40A:11-4.1. Purposes for which competitive contracting may be used by local units

1. Notwithstanding the provisions of any law, rule, or regulation to the contrary, competitive contracting may be used by local contracting units in lieu of public bidding for procurement of specialized goods and services the price of which exceeds the bid threshold, for the following purposes:

- a. The purchase or licensing of proprietary computer software designed for contracting unit purposes, which may include hardware intended for use with the proprietary software. This subsection shall not be utilized for the purpose of acquiring general purpose computer hardware or software;
- b. The hiring of a for-profit entity or a not-for-profit entity incorporated under Title 15A of the New Jersey Statutes for the purpose of:
  - (1) the operation and management of a wastewater treatment system, a stormwater management system, or a water supply or distribution facility of the type described in subsection (37) of section 15 of P.L.1971, c.198 (C.40A:11-15), provided that competitive contracting shall not be used as a means of awarding contracts pursuant to P.L.1985, c.37 (C.58:26-1 et al.) and P.L.1985, c.72 (C.58:27-1 et al.);
  - (2) the operation, management or administration of recreation or social service facilities or programs, which shall not include the administration of benefits under the Work First New Jersey program established pursuant to P.L.1997, c.38 (C.44:10-55 et seq.), or under General Assistance;
  - (3) the operation, management or administration of data processing services; or

- (4) the operation and management of a county hospital pursuant to the "Local Hospital Authority Law," P.L.2006, c.46 (C.30:9-23.15 et al.);
- c. (Deleted by amendment, P.L.2009, c.4).
  - d. Homemaker--home health services;
  - e. Laboratory testing services;
  - f. Emergency medical services;
  - g. Contracted food services;
  - h. Performance of patient care services by contracted medical staff at county hospitals, correctional facilities and long-term care facilities;
  - i. At the option of the governing body of the contracting unit, any good or service that is exempt from bidding pursuant to section 5 of P.L.1971, c.198 (C.40A:11-5);
  - j. Concessions;
  - k. The operation, management or administration of other services, with the approval of the Director of the Division of Local Government Services;
  - l. Maintenance, custodial, and groundskeeping services;
  - m. Consulting services;
  - n. Emergency medical billing services;
  - o. Property appraisal services;
  - p. Reassessment or revaluation services;
  - q. Grant writing services;
  - r. Animal control services.
  - s. Private on-site inspection agency services, as may be authorized by rules and regulations adopted by the Department of Community Affairs.

Any purpose included herein shall not be considered by a contracting unit as an extraordinary unspecifiable service pursuant to subparagraph (ii) of paragraph (a) of subsection (1) of section 5 of P.L.1971, c.198 (C.40A:11-5).

As used in this section, "stormwater management system" means the same as that term is defined in section 3 of P.L.2019, c.42 (C.40A:26B-3).

L.1999, c.440, s.1, amended 2009, c.4, s.7; 2015, c.95, s.25; 2016, c.55, s.9; 2019, c.42, s.21; 2022, c.139, s.3.

#### **40A:11-4.2. Term of contract; exceptions**

Unless an exception is provided for under section 15 of P.L.1971, c.198 (C.40A:11-15) permitting a longer contract duration, contracts awarded pursuant to section 5 of P.L.1999, c.440 (C.40A:11-4.5) may be for a term not to exceed five years.

L.1999, c. 440, s. 2.

#### **40A:11-4.3. Competitive contracting process: resolution, administration**

- a. In order to initiate competitive contracting, the governing body shall pass a resolution authorizing the use of competitive contracting each time specialized goods or services enumerated

in section 1 of P.L.1999, c.440 (C.40A:11-4.1) are desired to be contracted. If the desired goods or services have previously been contracted for using the competitive contracting process then the original resolution of the governing body shall suffice.

b. The competitive contracting process shall be administered by a purchasing agent qualified pursuant to subsection b. of section 9 of P.L.1971, c.198 (C.40A:11-9), or, by legal counsel of the contracting unit, or by an administrator of the contracting unit. Any contracts awarded under this process shall be made by resolution of the governing body of the contracting unit, subject to the provisions of subsection e. of section 5 of P.L.1999, c.440 (C.40A:11-4.5).

L.1999, c. 440, s. 3.

#### **40A:11-4.4. Request for proposals; documentation; provisions**

The competitive contracting process shall utilize request for proposals documentation in accordance with the following provisions:

a. The purchasing agent or counsel or administrator shall prepare or have prepared a request for proposal documentation, which shall include: all requirements deemed appropriate and necessary to allow for full and free competition between vendors, but no financial statement shall be required of vendors if either a guarantee, by certified check, cashier's check or bid bond, or a surety company certificate is also required to be furnished by the bidder, unless any law or regulation of the United States imposes a condition upon the awarding of a monetary grant to be used for the purchase, contract or agreement, which condition requires that a financial statement be submitted; information necessary for potential vendors to submit a proposal; and a methodology by which the contracting unit will evaluate and rank proposals received from vendors.

b. The methodology for the awarding of competitive contracts shall be based on an evaluation and ranking, which shall include technical, management, and cost related criteria, and may include a weighting of criteria, all developed in a way that is intended to meet the specific needs of the contracting unit, and where such criteria shall not unfairly or illegally discriminate against or exclude otherwise capable vendors. When an evaluation methodology uses a weighting of criteria, at the option of the contracting unit the weighting to be accorded to each criterion may be disclosed to vendors prior to receipt of the proposals. The methodology for awarding competitive contracts shall comply with such rules and regulations as the director may adopt, after consultation with the Commissioner of Education, pursuant to the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.).

c. At no time during the proposal solicitation process shall the purchasing agent or counsel or administrator convey information, including price, to any potential vendor which could confer an unfair advantage upon that vendor over any other potential vendor. If a purchasing agent or counsel or administrator desires to change proposal documentation, the purchasing agent or counsel or administrator shall notify only those potential vendors who received the proposal documentation of any and all changes in writing and all existing documentation shall be changed appropriately.

d. All proposals and contracts shall be subject to the provisions of section 1 of P.L.1977, c.33 (C.52:25-24.2) requiring submission of a statement of corporate ownership and the provisions of P.L.1975, c.127 (C.10:5-31 et seq.) concerning equal employment opportunity and affirmative



action.

L.1999, c.440, s.4; amended 2014, c.52, s.2

#### **40A:11-4.5. Competitive contracting proposal solicitation**

Competitive contracting proposals shall be solicited in the following manner:

- a. A notice of the availability of request for proposal documentation shall be published in an official newspaper of the contracting unit at least 20 days prior to the date established for the submission of proposals. The contracting unit shall promptly reply to any request by an interested vendor by providing a copy of the request for proposals. The contracting unit may charge a fee for the proposal documentation that shall not exceed \$50.00 or the cost of reproducing the documentation, whichever is greater.
- b. Each interested vendor shall submit a proposal which shall include all the information required by the request for proposals. Failure to meet the requirements of the request for proposals may result in the contracting unit disqualifying the vendor from further consideration. Under no circumstances shall the provisions of a proposal be subject to negotiation by the contracting unit.
- c. If the contracting unit, at the time of solicitation, utilizes its own employees to provide the goods or perform the services, or both, considered for competitive contracting, the governing body shall, at any time prior to, but no later than the time of solicitation for competitive contracting proposals, notify affected employees of the governing body's intention to solicit competitive contracting proposals. Employees or their representatives shall be permitted to submit recommendations and proposals affecting wages, hours, and terms and conditions of employment in such a manner as to meet the goals of the competitive contract. If employees are represented by an organization that has negotiated a contract with the contracting unit, only the bargaining unit shall be authorized to submit such recommendations or proposals. When requested by such employees, the governing body shall provide such information regarding budgets and the costs of performing the services by such employees as may be available. Nothing shall prevent such employees from making recommendations that may include modifications to existing labor agreements in order to reduce such costs in lieu of award of a competitive contract, and agreements implementing such recommendations may be considered as cause for rejecting all other proposals.
- d. The purchasing agent or counsel or administrator shall evaluate all proposals only in accordance with the methodology described in the request for proposals. After proposals have been evaluated, the purchasing agent or counsel or administrator shall prepare a report evaluating and recommending the award of a contract or contracts. The report shall list the names of all potential vendors who submitted a proposal and shall summarize the proposals of each vendor. The report shall rank vendors in order of evaluation, shall recommend the selection of a vendor or vendors, as appropriate, for a contract, shall be clear in the reasons why the vendor or vendors have been selected among others considered, and shall detail the terms, conditions, scope of services, fees, and other matters to be incorporated into a contract. The report shall 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 governing body shall have the right to reject all proposals for any of the reasons set forth in section 21 of P.L.1999, c.440 (C.40A:11-13.2).

e. Award of a contract shall be made by resolution of the governing body of the contracting unit within 60 days of the receipt of the proposals, except that the proposals of any vendors who consent thereto, may, at the request of the contracting unit, be held for consideration for such longer period as may be agreed.

f. The report prepared pursuant to subsection d. of this section shall become part of the public record and shall reflect the final action of the governing body. Contracts shall be executed pursuant to section 14 of P.L.1971, c.198 (C.40A:11-14).

g. The clerk or secretary of the contracting unit shall publish a notice in the official newspaper of the contracting unit summarizing the award of a contract, which shall include but not be limited to, the nature, duration, and amount of the contract, the name of the vendor and a statement that the resolution and contract are on file and available for public inspection in the office of the clerk or secretary of the municipality, county, local public authority or special district of the governing body.

h. All contract awards shall be subject to rules concerning certification of availability of funds adopted pursuant to section 3 of P.L.1971, c.198 (C.40A:11-3) and section 15 of P.L.1971, c.198 (C.40A:11-15).

i. The director, after consultation with the Commissioner of Education, may adopt additional rules and regulations, in accordance with the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), as may be necessary to effectuate the provisions of sections 1 through 5 of P.L.1999, c.440 (C.40A:11-4.1 through C.40A:11-4.5).

L.1999, c. 440, s. 5.

#### **40A:11-4.6. Implementation of energy savings improvement program by contracting unit: definitions**

- a. (1) A contracting unit, as defined in P.L.1971, c.198 (C.40A:11-1 et seq.), may implement an energy savings improvement program in the manner provided by this section whenever it determines that the savings generated from reduced energy use from the program will be sufficient to cover the cost of the program's energy conservation measures as set forth in an energy savings plan. Under such a program, a contracting unit may enter into an energy savings services contract with an energy services company to implement the program or the contracting unit may authorize separate contracts to implement the program. The provisions of P.L.1971, c.198 (C.40A:11-1 et seq.) shall apply to any contracts awarded pursuant to this section to the extent that the provisions of such law are not inconsistent with any provision of this section.
- (2) A contracting unit facility alteration required to properly implement other energy efficiency or energy conservation measures, or both, may be included as part of an energy savings services contract, in which case, notwithstanding any other provision of law, rule, regulation, or order to the contrary, the facility alteration may be undertaken or supervised by the energy services company performing the energy savings services contract if:
- (a) the total cost of the improvement does not exceed 15 percent of the total cost of the work to be performed under the energy savings services contract; and
  - (b) (i) the improvement is necessary to conform to a law, rule, or regulation, or order, or (ii) an analysis within an approved proposal, or the contracting unit, at the time of the award of the proposal, demonstrates that there is an economic advantage to the contracting unit



- implementing the improvement as part of the energy savings services contract, and the savings rationale for the improvement is documented and supported by reasonable justification.
- b. (1) To be eligible to enter into an energy savings services contract, an energy services company shall be a commercial entity that is qualified to provide energy savings services in accordance with the provisions of this section. A contracting unit may determine to enter into an energy savings services contract either through public advertising for bids and the receipt of bids therefor or through competitive contracting in lieu of public bidding in the manner provided by sections 1 through 5 of P.L.1999, c.440 (C.40A:11-4.1 et seq.).
- (2) (a) Public works activities performed under an energy savings improvement program shall be subject to all requirements regarding public bidding, bid security, performance guarantees, insurance and other public contracting requirements that are applicable to public works contracts, to the extent not inconsistent with this section. A general contractor, energy services company serving as general contractor, or any subcontractor hired for the furnishing of plumbing and gas fitting and all kindred work, and of steam and hot water heating and ventilating apparatus, steam power plants and kindred work, and electrical work, structural steel and ornamental iron work, shall be classified by the Division of Property Management and Construction in the Department of the Treasury in order to perform public works activities under an energy savings improvement program.
- (b) Individuals or organizations performing energy audits, acting as commissioning agents, or conducting verification of energy savings plans, implementation of energy conservation measures, or verifying guarantees shall be prequalified by the Division of Property Management and Construction in the Department of the Treasury to perform their work under an energy savings improvement program.
- (3) (a) An energy services company may be designated as the general contractor for improvements to be made pursuant to an energy savings plan, provided that the hiring of subcontractors that are required to be classified pursuant to subparagraph (a) of paragraph (2) of this subsection shall be performed in accordance with the procedures and requirements set forth pursuant to the public bidding requirements of the contracting unit. A contract with an energy savings company shall include, but not be limited to: preparation of an energy savings plan; the responsibilities of the parties for project schedules, installations, performance and quality, payment of subcontractors, project completion, commissioning, savings implementation; a requirement that the savings to be achieved by energy conservation measures be verified upon commissioning of the improvements; allocation of State and federal rebates and tax credits; and any other provisions deemed necessary by the parties.
- (b) All workers performing public works activities for subcontractors awarded contracts by an energy services company pursuant to this section shall be paid prevailing wages in accordance with the "New Jersey Prevailing Wage Act," P.L.1963, c.150 (C.34:11-56.25 et seq.). All subcontractors shall comply with the provisions of "The Public Works Contractor Registration Act," P.L.1999, c.238 (C.34:11-56.48 et seq.). Only firms appropriately classified as contractors by the Division of Property Management and Construction shall be eligible to be awarded a contract as a subcontractor of an energy services company under this section for performing public works activities pursuant to regulations adopted by the Division of Property Management and Construction.

(c) In order to expedite communications with an energy services company and facilitate the implementation of an energy savings improvement program, a contracting unit may designate or appoint an employee of the contracting unit with decision-making authority to coordinate with the energy services company and to address issues associated with the implementation of an energy savings improvement program as they arise, provided that any decision requiring a change order shall be made only upon the approval of the contracting unit.

(4) Except as provided in paragraph (5) of this subsection, a subsidiary or wholly-owned or partially-owned affiliate of the energy services company shall not be an eligible contractor or subcontractor under an energy savings services contract.

(5) When the energy services company is the manufacturer of direct digital control systems and contracts with the contracting unit to provide a guaranteed energy savings option pursuant to subsection f. of this section, the specification of such direct digital control systems may be treated as proprietary goods and if so treated, the bid specification shall set forth an allowance price for its supply by the energy services company which shall be used by all bidders in the public bidding process. Direct digital controls shall be open protocol format and shall meet the interoperability guidelines established by the American Society of Heating, Refrigerating and Air-Conditioning Engineers. Each contract to be entered into pursuant to this section between a contracting unit and an energy services company that is the manufacturer of direct digital control systems where such direct digital control systems are treated as proprietary goods as part of the contract, shall first be reviewed and approved by the Board of Public Utilities for the purpose of affirming the reasonableness of such allowance price. If the board does not disapprove of the contract within 14 days of receipt thereof, the contract shall be deemed approved.

c. An energy savings improvement program may be financed through a lease-purchase agreement or through the issuance of energy savings obligations pursuant to this subsection.

(1) An energy savings improvement program may be financed through a lease-purchase agreement between a contracting unit and an energy services company or other public or private entity. Under a lease-purchase agreement, ownership of the energy savings equipment or improved facilities shall pass to the contracting unit when all lease payments have been made. Notwithstanding the provisions of any other law to the contrary, the duration of such a lease-purchase agreement shall not exceed 15 years, except that the duration of a lease purchase agreement for a combined heat and power or cogeneration project shall not exceed 20 years. For the purposes of this paragraph, the duration of the repayment term of a lease-purchase agreement shall commence on the date upon which construction and installation of the energy savings equipment, “combined heat and power facility” or “cogeneration facility,” as those terms are defined pursuant to section 3 of P.L.1999, c.23 (C.48:3-51), or other energy conservation measures undertaken pursuant to the energy savings plan, have been completed.

(2) Any lease-purchase agreement entered into pursuant to this subsection, may contain: a clause making it subject to the availability and appropriation annually of sufficient funds as may be required to meet the extended obligation; and a non-substitution clause maintaining that if the agreement is terminated for non-appropriation, the contracting unit may not replace the leased equipment or facilities with equipment or facilities that perform the same or similar functions.

(3) A contracting unit may arrange for incurring energy savings obligations to finance an energy savings improvement program. Energy savings obligations may be funded through appropriations for utility services in the annual budget of the contracting unit and may be issued as refunding bonds pursuant to N.J.S.40A:2-52 et seq., including the issuance of bond anticipation notes as may be necessary, provided that all such bonds and notes mature within the periods authorized for such energy savings obligations. Energy savings obligations may be issued either through the contracting unit or another public agency authorized to undertake financing on behalf of the unit.

(4) Lease-purchase agreements and energy savings obligations shall not be used to finance maintenance, guarantees, or verification of guarantees of energy conservation measures. Lease-purchase agreements and energy savings obligations may be used to finance the cost of an energy audit or the cost of verification of energy savings as part of adopting an energy savings plan. Notwithstanding any law to the contrary, lease-purchase agreements and energy savings certificates shall not be excepted from any budget or tax levy limitation otherwise provided by law. Maturity schedules of lease-purchase agreements or energy savings obligations shall not exceed the estimated average useful life of the energy conservation measures.

- d. (1) The energy audit component of an energy savings improvement program shall be conducted either by the contracting unit or by a qualified independent third party retained by the governing body for that purpose. It shall not be conducted by an energy services company subsequently hired to develop an energy savings improvement program. The energy audit shall identify the current energy use of any or all facilities and energy conservation measures that can be implemented in which the energy savings and energy efficiency could be realized and maximized.

(2) To implement an energy savings improvement program, a contracting unit shall develop a plan that consists of one or more energy conservation measures. The plan shall:

- (a) contain the results of an energy audit;
- (b) describe the energy conservation measures that will comprise the program;
- (c) estimate greenhouse gas reductions resulting from those energy savings;
- (d) identify all design and compliance issues that require the professional services of an architect or engineer and identify who will provide these services;
- (e) include an assessment of risks involved in the successful implementation of the plan;
- (f) identify the eligibility for, and costs and revenues associated with the PJM Independent System Operator for demand response and curtailable service activities;
- (g) include schedules showing calculations of all costs of implementing the proposed energy conservation measures and the projected energy savings;
- (h) identify maintenance requirements necessary to ensure continued energy savings, and describe how they will be fulfilled; and
- (i) if developed by an energy services company, a description of, and cost estimates of an energy savings guarantee.

All professionals providing engineering services under the plan shall have errors and omissions insurance.

- (3) Prior to the adoption of the plan, the contracting unit shall contract with a qualified third party to verify the projected energy savings to be realized from the proposed program have been calculated as required by subsection e. of this section.
- (4) Upon adoption, the plan shall be submitted to the Board of Public Utilities, which shall post it on the Internet on a public webpage maintained for such purpose. If the contracting unit maintains its own website, it shall also post the plan on that site. The board may require periodic reporting concerning the implementation of the plan.
- (5) Verification by a qualified third party shall be required when energy conservation measures are placed in service or commissioned, to ensure the savings projected in the energy savings plan shall be achieved.
- (6) Energy-related capital improvements that do not reduce energy usage may be included in an energy savings improvement program but the cost of such improvements shall not be financed as a lease-purchase or through energy savings obligations authorized by subsection c. of this section. Nothing herein is intended to prevent financing of such capital improvements through otherwise authorized means.
- (7) A qualified third party when required by this subsection may include an employee of the contracting unit who is properly trained and qualified to perform such work.
- e. (1) (a) The calculation of energy savings for the purposes of determining that the energy savings resulting from the program will be sufficient to cover the cost of the program's energy conservation measures, as provided in subsection a. of this section, shall involve determination of the dollar amount saved through implementation of an energy savings improvement program using the guidelines of the International Performance Measurement and Verification Protocol or other protocols approved by the Board of Public Utilities and standards adopted by the Board of Public Utilities pursuant to this section. The calculation shall include all applicable State and federal rebates and tax credits, but shall not include the cost of an energy audit and the cost of verifying energy savings. The calculation shall state which party has made application for rebates and credits and how these applications translate into energy savings.
- (b) During the procurement phase of an energy savings improvement program, an energy service company's proposal submitted in response to a request for proposal shall not include a savings calculation that assumes, includes, or references capital cost avoidance savings, the current or projected value of a "solar renewable energy certificate," as defined pursuant to section 3 of P.L.1999, c.23 (C.48:3-51), or other environmental or similar attributes or benefits of whatever nature that derive from the generation of renewable energy, and any costs or discounts associated with maintenance services, an energy savings guarantee, or third party verification of energy conservation measures and energy savings. The calculation of energy savings shall utilize and specifically reference as a benchmark the actual demand and energy components of the public utility tariff rate applicable to the contracting unit then in effect, and not a blended rate that aggregates, combines, or restates in any manner the distinct demand and energy components of the public utility tariff rate into a single combined or restated tariff rate. If an energy services company submits a proposal to a contracting unit that does not calculate projected energy savings in the manner required by this subsection, such proposal shall be rejected by the contracting unit.

(2) For the purposes of this section, the Board of Public Utilities shall adopt standards and uniform values for interest rates and escalation of labor, electricity, oil, and gas, as well as standards for presenting these costs in a life cycle and net present value format, standards for the presentation of obligations for carbon reductions, and other standards that the board may determine necessary.

- f. (1) When an energy services company is awarded an energy savings services contract, it shall offer the contracting unit the option to purchase, for an additional amount, an energy savings guarantee. The guarantee, if accepted by a separate vote of the governing body of the contracting unit, shall insure that the energy savings resulting from the energy savings improvement program, determined periodically over the duration of the guarantee, will be sufficient to defray all payments required to be made pursuant to the lease-purchase agreement or energy savings obligation, and if the savings are not sufficient, the energy services company will reimburse the contracting unit for any additional amounts. Annual costs of a guarantee shall not be financed or included as costs in an energy savings plan but shall be fully disclosed in an energy savings plan.

(2) When a guaranteed energy savings option is purchased, the contract shall require a qualified third party to verify the energy savings at intervals established by the parties.

(3) When an energy services company is awarded an energy savings services contract to provide or perform goods or services for the purpose of enabling a contracting unit to conserve energy through energy efficiency equipment, including a “combined heat and power facility” as that term is defined pursuant to section 3 of P.L.1999, c.23 (C48:3-51), on a self-funded basis, such contract shall extend for a term of up to 15 years for energy efficiency projects, and for up to 20 years for a combined heat and power facility after construction completion. If a contracting unit shall elect to contract with an energy services company for an energy savings guarantee in connection with a contract awarded pursuant to this section, such guarantee may extend for a term of up to 15 years for energy efficiency projects, or up to 20 years for a combined heat and power facility after construction completion.

- g. As used in this section:

"direct digital control systems" means the devices and computerized control equipment that contain software and computer interfaces that perform the logic that control a building's heating, ventilating, and air conditioning system. Direct digital controls shall be open protocol format and shall meet the interoperability guidelines established by the American Society of Heating, Refrigerating and Air-Conditioning Engineers;

"energy conservation measure" means an improvement that results in reduced energy use, including, but not limited to, installation of energy efficient equipment; demand response equipment; combined heat and power systems; facilities for the production of renewable energy; water conservation measures, fixtures or facilities; building envelope improvements that are part of an energy savings improvement program; and related control systems for each of the foregoing;

"energy related capital improvement" means a capital improvement that uses energy but does not result in a reduction of energy use;

"energy saving obligation" means a bond, note or other agreement evidencing the obligation to repay borrowed funds incurred in order to finance energy saving improvements;

"energy savings" means a measured reduction in fuel, energy, operating or maintenance costs resulting from the implementation of one or more energy conservation measures services when compared with an established baseline of previous fuel, energy, operating or maintenance costs, including, but not limited to, future capital replacement expenditures avoided as a result of equipment installed or services performed as part of an energy savings plan;

"energy savings improvement program" means an initiative of a contracting unit to implement energy conservation measures in existing facilities, provided that the value of the energy savings resulting from the program will be sufficient to cover the cost of the program's energy conservation measures;

"energy savings plan" means the document that describes the actions to be taken to implement the energy savings improvement program;

"energy savings services contract" means a contract with an energy savings company to develop an energy savings plan, prepare bid specifications, manage the performance, provision, construction, and installation of energy conservation measures by subcontractors, to offer a guarantee of energy savings derived from the implementation of an energy savings plan, and may include a provision to manage the bidding process;

"energy services company" means a commercial entity that is qualified to develop and implement an energy savings plan in accordance with the provisions of this section;

"public works activities" means any work subject to the provisions of P.L.1963, c.150 (C.34:11-56.25 et seq.); and

"water conservation measure" means an alteration to a facility or equipment that reduces water consumption, maximizes the efficiency of water use, or reduces water loss.

- h. (1) The Director of the Division of Local Government Services in the Department of Community Affairs, the State Treasurer, and the Board of Public Utilities may take such action as is deemed necessary and consistent with the intent of this section to implement its provisions.
- (2) The Director of the Division of Local Government Services in the Department of Community Affairs, the State Treasurer, and the Board of Public Utilities may adopt implementation guidelines or directives, and adopt such administrative rules, pursuant to the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), as are necessary for the implementation of those agencies' respective responsibilities under this section, except that notwithstanding any provision of P.L.1968, c.410 (C.52:14B-1 et seq.) to the contrary, the Director of the Division of Local Government Services in the Department of Community Affairs, the State Treasurer, and the Board of Public Utilities may adopt, immediately upon filing with the Office of Administrative Law, such rules and regulations as deemed necessary to implement the provisions of this act which shall be effective for a period not to exceed 12 months and shall thereafter be amended, adopted or re-adopted in accordance with the provisions of P.L.1968, c.410 (C.52:14B-1 et seq.).

L.2009, c.4, s.6; amended 2012, c.55, s.3.



## **Local Unit Electronic Procurement Act**

### **40A:11-4.7. Short title.**

This act shall be known and may be cited as the "Local Unit Electronic Procurement Act."

L.2018, c.156, s.1.

### **40A:11-4.8. Findings, declarations relative to electronic purchase of certain commodities.**

The Legislature finds and declares that advances in electronic technology offer opportunities to enhance governmental efficiencies. In order to explore these avenues of improved government efficiency and commerce, it is in the best interests of this State to allow local units of government to adopt proven technologies for the procurement of goods, services, public works construction, and sale of surplus personal and real property through means of electronic technology, and to allow the Department of Community Affairs to promulgate standards for the use of these technologies that provide for the integrity and procedural protections of sealed public bidding and competitive contracting translated to an electronic environment.

L.2018, c.156, s.2.

### **40A:11-4.9. Definitions relative to electronic purchase of certain commodities.**

As used in P.L.2018, c.156 (C.40A:11-4.7 et al.):

"Director" means the Director of the Division of Local Government Services in the Department of Community Affairs;

"Electronic procurement" means the use of computer technology and the Internet for the advertising and submission of public bids, providing notice of revisions or addenda to advertisements or bid documents, the receipt of proposals and quotations, competitive contracting, the use of reverse auctions, and related practices to assist in determining the lowest responsible bidder or proposer who is most advantageous, price and other factors considered, as appropriate, for goods and services, the sale of personal property, and other public procurement-related activities and services as may be determined appropriate by the director;

"Goods and services" means any work, labor, commodities, equipment, materials, or supplies of any tangible or intangible nature, except real property or any interest therein, provided or performed through a contract awarded by a contracting agent, including goods and property subject to N.J.S.12A:2-101 et seq.;

"Local unit" means a school district as defined in the "Public School Contracts Law," N.J.S.18A:18A-1 et seq., or a contracting unit as defined in the "Local Public Contracts Law," P.L.1971, c.198 (C.40A:11-1 et seq.);

"Public works construction" means any contract that is subject to the "New Jersey Prevailing Wage Act," P.L.1963, c.150 (C.34:11-56.25 et seq.); and

"Real property" shall include, in addition to the usual connotations thereof, development rights or easements, or any right, interest, or estate in the area extending above any real property, or capital improvement thereon, to such a height or altitude as any title, interest, or estate in real property may extend, commonly known as "air rights," and subject to, but not limited to, the "Local Lands and Buildings Law," P.L.1971, c.199 (C.40A:12-1 et seq.).

L.2018, c.156, s.3.

**40A:11-4.10. Authorization for local units to use electronic purchase of certain commodities.**

Local units are authorized to use electronic procurement practices for such purposes as may be authorized by the governing body of the local unit, and subject to the provisions of P.L.2018, c.156 (C.40A:11-4.7 et al.).

L.2018, c.156, s.4.

**40A:11-4.11. Authorization for local unit, joint purchasing unit, or cooperative pricing system to use electronic purchase of certain commodities.**

A local unit or joint purchasing unit or cooperative pricing system is also authorized to use electronic procurement practices for the following purposes:

(a) to purchase electric generation service, electric related service, gas supply service, or gas related service, either separately or bundled, for its own facilities so long as the purchase otherwise complies with the provisions of the "Electric Discount and Energy Competition Act," P.L.1999, c.23 (C.48:3-49 et al.); and

(b) the sale of surplus personal property that shall otherwise comply with the provisions of section 36 of P.L.1971, c.198 (C.40A:11-36).

Contracts awarded for the administration of electronic procurement practices shall be subject to the requirements of the "Local Public Contracts Law," P.L.1971, c.198 (C.40A:11-1 et seq.) and the "Public School Contracts Law," N.J.S.18A:18A-1 et seq., except that they shall be considered as purposes for which competitive contracting may be used.

L.2018, c.156, s.5.

**40A:11-4.12. Rules, regulations.**

a. The director, in consultation with the State Comptroller and pursuant to the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), shall adopt rules and regulations to effectuate the provisions of this act.

The rules promulgated pursuant to this section shall include, but shall not be limited to, practices that, notwithstanding any other law to the contrary:

(1) convert the law, principals, safeguards, and procedures related to sealed bidding to an electronic procurement environment;

(2) authorize local units of government to accept commercial standards for electronic forms of bid security; and

(3) establish minimum standards that must be met by systems and services providing and administering electronic procurement activities.

The director shall also consult with the Attorney General to develop safeguards to protect against collusion and bid rigging, with the Division of Purchase and Property in the Department of the



Treasury to develop practices used for electronic procurement, and with the Office of Information Technology in, but not of, the Department of the Treasury, to ensure the privacy and security of electronic transactions.

b. With regard to the notices, advertising bids, or requests for proposals required to be published in an official newspaper of the local unit, such notices, advertising bids, or requests for proposals, as appropriate, shall not be eliminated under the provisions of P.L.2018, c.156 (C.40A:11-4.7 et al.), and shall continue to be published as required by law.

c. Notwithstanding any law, rule, or regulation to the contrary, plans and specifications for public works construction contracts that require the seal and signature of a professional engineer, architect, or land surveyor may be included in an electronic file used for electronic procurement as long as the original document from which the electronic file is derived contains a physical or electronic seal and signature as otherwise required by law; however, if and when the State Board of Engineers and Land Surveyors and the New Jersey State Board of Architects adopt rules to permit digital seals and signatures, those rules shall supersede this provision.

L.2018, c.156, s.6.

### General Contracting Provisions

#### **40A:11-4.13 Required use of unit concrete products that utilize carbon footprint-reducing technology.**

a. Notwithstanding the provisions of any other law, rule, or regulation to the contrary, a local contracting unit shall, whenever technically feasible, use or require the use of unit concrete products that utilize carbon footprint-reducing technology, which may include permeable pavers, when entering into a contract for the purchase of unit concrete products, or for any construction or improvement project that requires the use of unit concrete products, including the replacement of impervious surfaces with permeable pavement.

b. The director, in consultation with the Department of Environmental Protection, shall develop and publish guidelines for implementing the requirement established pursuant to subsection a. of this section. The guidelines shall conform to any standards or procedures established pursuant to section 10 of P.L.2021, c.278 (C.52:27D-141.17). Whenever a local contracting unit purchases unit concrete products, or undertakes any construction or improvement project that requires the use of unit concrete products, the local contracting unit shall follow the guidelines therefor established by the director.

c. In preparing the specifications for a contract for the purchase of unit concrete products, or for any construction or improvement project that requires the use of unit concrete products, a local contracting unit shall include in the invitation to bid, including in the specifications for all contracts for county or municipal work or for work for which it will pay any part of the cost, or work which by contract or ordinance it will ultimately own and maintain, where relevant, a statement that any response to the invitation shall use unit concrete products that utilize carbon footprint-reducing technology whenever technically feasible. The local contracting unit shall include in its project specifications a specific line item for each unit concrete product to be used in the project.

d. The provisions of this section shall not apply to:

(1) any binding contractual obligations for the purchase of goods or services entered into prior to the effective date of P.L.2021, c.278 (C.52:27D-141.15 et al.);

(2) bid packages advertised and made available to the public, or to any competitive and sealed bids received by the local contracting unit, prior to the effective date of P.L.2021, c.278 (C.52:27D-141.15 et al.);

(3) any amendment, modification, or renewal of a contract, which contract was entered into prior to the effective date of P.L.2021, c.278 (C.52:27D-141.15 et al.) where the application would delay timely completion of a project or involve an increase in the total moneys to be paid by the local contracting unit under that contract; or

(4) a contract when the head of a local contracting unit determines, in their sole discretion, that the purchase and use of unit concrete products that utilize carbon footprint-reducing technology would increase the cost of the contract.

e. As used in this section:

"Director" means the Director of the Division of Local Government Services in the Department of Community Affairs.

"Local contracting unit" means any public agency subject to the provisions of the "Local Public Contracts Law," P.L.1971, c.198 (C.40A:11-1 et seq.), the "Public School Contracts Law," N.J.S.18A:18A-1 et seq., the "State College Contracts Law," P.L.1986, c.43 (C.18A:64-52 et seq.), or the "County College Contracts Law," P.L.1982, c.189 (C.18A:64A-25.1 et seq.).

"Permeable pavement" means a concrete product that allows rainwater to penetrate the pavement and percolate into the supporting soils and includes, but is not limited to, pervious concrete, permeable interlocking concrete pavers, and concrete grid pavers.

"Unit concrete product" means a concrete building product that is fabricated under controlled conditions separate and remote from the intended point of use and is produced in a wet cast or dry cast method in a factory setting and then transported to the location of intended use for installation, including, but not limited to, all concrete pavers, whether permeable or non-permeable, and concrete block. "Unit concrete product" shall not include ready mix concrete, sand, stone, gravel, or bituminous concrete or asphalt.

"Unit concrete product that utilizes carbon footprint-reducing technology" means a unit concrete product that is certified by the Department of Environmental Protection, or any independent third party authorized by the department, pursuant to section 10 of P.L.2021, c.278 (C.52:27D-141.17), as generating at least 50 percent less carbon dioxide emissions in the production and utilization of the unit concrete product than conventional unit concrete products made with ordinary Portland cement. Such products shall also conform with the relevant requirements of the "State Uniform Construction Code Act," P.L.1975, c.217 (C.52:27D-119 et seq.) that incorporate by reference TMS 402/602 Building Code Requirements and Specification for Masonry Structures.

L. 2021, c.278, s.7.

#### **40A:11-5. Exceptions**

Any contract the amount of which exceeds the bid threshold, may be negotiated and awarded by the governing body without public advertising for bids and bidding therefor and shall be awarded by resolution of the governing body if:

(1) The subject matter thereof consists of:

(a) (i) Professional services. The governing body shall in each instance state supporting reasons for its action in the resolution awarding each contract and shall forthwith cause to be printed once, in the official newspaper, a brief notice stating the nature, duration, service and amount of the contract, and that the resolution and contract are on file and available for public inspection in the office of the clerk of the county or municipality, or, in the case of a contracting unit created by more than one county or municipality, of the counties or municipalities creating the contracting unit; or (ii) Extraordinary unspecifiable services. The application of this exception shall be construed narrowly in favor of open competitive bidding, whenever possible, and the Division of Local Government Services is authorized to adopt and promulgate rules and regulations after consultation with the Commissioner of Education limiting the use of this exception in accordance with the intention herein expressed. The governing body shall in each instance state supporting reasons for its action in the resolution awarding each contract and shall forthwith cause to be printed, in the manner set forth in subsection (1) (a) (i) of this section, a brief notice of the award of the contract;

(b) The doing of any work by employees of the contracting unit;

(c) The printing of legal briefs, records, and appendices to be used in any legal proceeding in which the contracting unit may be a party;

(d) The furnishing of a tax map or maps for the contracting unit;

(e) The purchase of perishable foods as a subsistence supply;

(f) The supplying of any product or the rendering of any service by a public utility, which is subject to the jurisdiction of the Board of Public Utilities or the Federal Energy Regulatory Commission or its successor, in accordance with tariffs and schedules of charges made, charged or exacted, filed with the board or commission;

(g) The acquisition, subject to prior approval of the Attorney General, of special equipment for confidential investigation;

(h) The printing of bonds and documents necessary to the issuance and sale thereof by a contracting unit;

(i) Equipment repair service if in the nature of an extraordinary unspecifiable service and necessary parts furnished in connection with the service, which exception shall be in accordance with the requirements for extraordinary unspecifiable services;

(j) The publishing of legal notices in newspapers as required by law;

(k) The acquisition of artifacts or other items of unique intrinsic, artistic or historical character;

(l) Those goods and services necessary or required to prepare and conduct an election;

(m) Insurance, including the purchase of insurance coverage and consultant services, which exception shall be in accordance with the requirements for extraordinary unspecifiable services;

- (n) The doing of any work by persons with disabilities employed by a sheltered workshop;
- (o) The provision of any goods or services including those of a commercial nature, attendant upon the operation of a restaurant by any nonprofit, duly incorporated, historical society at or on any historical preservation site;
- (p) (Deleted by amendment, P.L.1999, c.440.)
- (q) Library and educational goods and services;
- (r) (Deleted by amendment, P.L.2005, c.212).
- (s) The marketing of recyclable materials recovered through a recycling program, or the marketing of any product intentionally produced or derived from solid waste received at a resource recovery facility or recovered through a resource recovery program, including, but not limited to, refuse-derived fuel, compost materials, methane gas, and other similar products;
- (t) (Deleted by amendment, P.L.1999, c.440.)
- (u) Contracting unit towing and storage contracts, provided that all of the contracts shall be pursuant to reasonable non-exclusionary and non-discriminatory terms and conditions, which may include the provision of the services on a rotating basis, at the rates and charges set by the municipality pursuant to section 1 of P.L.1979, c.101 (C.40:48-2.49). All contracting unit towing and storage contracts for services to be provided at rates and charges other than those established pursuant to the terms of this paragraph shall only be awarded to the lowest responsible bidder in accordance with the provisions of the "Local Public Contracts Law" P.L.1971, c.198 (C.40A:11-1 et seq.) and without regard for the value of the contract therefor;
- (v) The purchase of steam or electricity from, or the rendering of services directly related to the purchase of steam or electricity from a qualifying small power production facility or a qualifying cogeneration facility as defined pursuant to 16 U.S.C. s.796;
- (w) The purchase of electricity or administrative or dispatching services directly related to the transmission of purchased electricity by a contracting unit engaged in the generation of electricity;
- (x) The printing of municipal ordinances or other services necessarily incurred in connection with the revision and codification of municipal ordinances;
- (y) An agreement for the purchase of an equitable interest in a water supply facility or for the provision of water supply services entered into pursuant to section 2 of P.L.1993, c.381 (C.58:28-2), or an agreement entered into pursuant to P.L.1989, c.109 (N.J.S.40A:31-1 et al.), so long as the agreement is entered into no later than six months after the effective date of P.L.1993, c.381;
- (z) A contract for the provision of water supply services entered into pursuant to P.L.1995, c.101 (C.58:26-19 et al.);
- (aa) The cooperative marketing of recyclable materials recovered through a recycling program;
- (bb) A contract for the provision of wastewater treatment services entered into pursuant to P.L.1995, c.216 (C.58:27-19 et al.);
- (cc) Expenses for travel and conferences;
- (dd) The provision or performance of goods or services for the support or maintenance of proprietary computer hardware and software, except that this provision shall not be utilized to acquire or upgrade non-proprietary hardware or to acquire or update non-proprietary software;

(ee) The management or operation of an airport owned by the contracting unit pursuant to R.S.40:8-1 et seq.;

(ff) Purchases of goods and services at rates set by the Universal Service Fund administered by the Federal Communications Commission;

(gg) A contract for the provision of water supply services or wastewater treatment services entered into pursuant to section 2 of P.L.2002, c.47 (C.40A:11-5.1), or the designing, financing, construction, operation, or maintenance, or any combination thereof, of a water supply facility as defined in subsection (16) of section 15 of P.L.1971, c.198 (C.40A:11-15) or a wastewater treatment system as defined in subsection (19) of section 15 of P.L.1971, c.198 (C.40A:11-15), or any component part or parts thereof, including a water filtration system as defined in subsection (16) of section 15 of P.L.1971, c.198 (C.40A:11-15); or

(hh) The purchase of electricity generated from a power production facility that is fueled by methane gas extracted from a landfill in the county of the contracting unit.

(2) It is to be made or entered into with the United States of America, the State of New Jersey, county, or municipality, or any board, body, officer, agency, or authority thereof, or any other state or subdivision thereof.

(3) Bids have been advertised pursuant to section 4 of P.L.1971, c.198 (C.40A:11-4) on two occasions and (a) no bids have been received on both occasions in response to the advertisement, or (b) the governing body has rejected the bids on two occasions because it has determined that they are not reasonable as to price, on the basis of cost estimates prepared for or by the contracting agent prior to the advertising therefor, or have not been independently arrived at in open competition, or (c) on one occasion no bids were received pursuant to (a) and on one occasion all bids were rejected pursuant to (b), in whatever sequence; a contract may then be negotiated and may be awarded upon adoption of a resolution by a two-thirds affirmative vote of the authorized membership of the governing body authorizing the contract; provided, however, that:

(i) A reasonable effort is first made by the contracting agent to determine that the same or equivalent goods or services, at a cost which is lower than the negotiated price, are not available from an agency or authority of the United States, the State of New Jersey or of the county in which the contracting unit is located, or any municipality in close proximity to the contracting unit;

(ii) The terms, conditions, restrictions, and specifications set forth in the negotiated contract are not substantially different from those which were the subject of competitive bidding pursuant to section 4 of P.L.1971, c.198 (C.40A:11-4); and

(iii) Any minor amendment or modification of any of the terms, conditions, restrictions, and specifications, which were the subject of competitive bidding pursuant to section 4 of P.L.1971, c.198 (C.40A:11-4), shall be stated in the resolution awarding the contract; provided further, however, that if on the second occasion the bids received are rejected as unreasonable as to price, the contracting agent shall notify each responsible bidder submitting bids on the second occasion of its intention to negotiate, and afford each bidder a reasonable opportunity to negotiate, but the governing body shall not award the contract unless the negotiated price is lower than the lowest rejected bid price submitted on the second occasion by a responsible bidder, is the lowest negotiated price offered by any responsible vendor, and is a reasonable price for goods or services.

Whenever a contracting unit shall determine that a bid was not arrived at independently in open competition pursuant to subsection (3) of this section it shall thereupon notify the county

prosecutor of the county in which the contracting unit is located and the Attorney General of the facts upon which its determination is based, and when appropriate, it may institute appropriate proceedings in any State or federal court of competent jurisdiction for a violation of any State or federal antitrust law or laws relating to the unlawful restraint of trade.

(4) The contracting unit has solicited and received at least three quotations on materials, supplies, or equipment for which a State contract has been issued pursuant to section 12 of P.L.1971, c.198 (C.40A:11-12), and the lowest responsible quotation is at least 10 percent less than the price the contracting unit would be charged for the identical materials, supplies, or equipment, in the same quantities, under the State contract. A contract entered into pursuant to this subsection may be awarded only upon adoption of a resolution by the affirmative vote of two-thirds of the full membership of the governing body of the contracting unit at a meeting thereof authorizing the contract. A copy of the purchase order relating to the contract, the requisition for purchase order, if applicable, and documentation identifying the price of the materials, supplies or equipment under the State contract and the State contract number shall be filed with the director within five working days of the award of the contract by the contracting unit. The director shall notify the contracting unit of receipt of the material and shall make the material available to the State Treasurer. The contracting unit shall make available to the director upon request any other documents relating to the solicitation and award of the contract, including, but not limited to, quotations, requests for quotations, and resolutions. The director periodically shall review material submitted by contracting units to determine the impact of the contracts on local contracting and shall consult with the State Treasurer on the impact of the contracts on the State procurement process. The director may, after consultation with the State Treasurer, adopt rules in accordance with the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.) to limit the use of this subsection, after considering the impact of contracts awarded under this subsection on State and local contracting, or after considering the extent to which the award of contracts pursuant to this subsection is consistent with and in furtherance of the purposes of the public contracting laws.

(5) Notwithstanding any provision of law, rule, or regulation to the contrary, the subject matter consists of the combined collection and marketing, or the cooperative combined collection and marketing of recycled material recovered through a recycling program, or any product intentionally produced or derived from solid waste received at a resource recovery facility or recovered through a resource recovery program including, but not limited to, refuse-derived fuel, compost materials, methane gas, and other similar products, provided that in lieu of engaging in public advertising for bids and the bidding therefor, the contracting unit shall, prior to commencing the procurement process, submit for approval to the Director of the Division of Local Government Services, a written detailed description of the process to be followed in securing the services. Within 30 days after receipt of the written description the director shall, if the director finds that the process provides for fair competition and integrity in the negotiation process, approve, in writing, the description submitted by the contracting unit. If the director finds that the process does not provide for fair competition and integrity in the negotiation process, the director shall advise the contracting unit of the deficiencies that must be remedied. If the director fails to respond in writing to the contracting unit within 30 days, the procurement process as described shall be deemed approved. As used in this section, "collection" means the physical removal of recyclable materials from curbside or any other location selected by the contracting unit.

(6) Notwithstanding any provision of law, rule, or regulation to the contrary, the contract is for the provision of electricity by a contracting unit engaged in the distribution of electricity for retail sale, for the provision of wholesale electricity by a municipal shared services energy authority as



defined pursuant to section 3 of P.L.2015, c.129 (C.40A:66-3), or for the provision of administrative or dispatching services related to the transmission of electricity, provided that in lieu of engaging in public advertising for bids and the bidding therefor, the contracting unit shall, prior to commencing the procurement process, submit for approval to the Director of the Division of Local Government Services, a written detailed description of the process to be followed in securing these services. The process shall be designed in a way that is appropriate to and commensurate with industry practices, and the integrity of the government contracting process. Within 30 days after receipt of the written description, the director shall, if the director finds that the process provides for fair competition and integrity in the negotiation process, approve, in writing, the description submitted by the contracting unit. If the director finds that the process does not provide for fair competition and integrity in the negotiation process, the director shall advise the contracting unit of the deficiencies that must be remedied. If the director fails to respond in writing to the contracting unit within 30 days, the procurement process, as submitted to the director pursuant to this section, shall be deemed approved.

L.1971, c. 198, s. 5; amended 1975, c. 353, s. 4; 1976, c. 20; 1977, c. 53, s. 2; 1982, c. 208; 1983, c. 209; 1983, c. 331, s. 2; 1985, c. 436; 1986, c. 61; 1987, c. 102, s. 32; 1989, c. 92; 1989, c. 159, s. 1; 1991, c. 142, s. 1; 1991, c. 143, s. 2; 1991, c. 368; 1993, c. 381, s. 4; 1995, c. 101, s. 12; 1995, c. 103, s. 4; 1995, c. 216, s. 11; 1997, c. 387, s. 2; 1999, c. 440, s. 9; 2002, c. 47, s. 8; 2003, c. 150, s. 2; 2005, c. 212, s. 2; 2005, c. 296, s. 1; 2015, c.129, s.28; 2017, c.131, s.174.

#### **40A:11-5.1. Authority of city of first class to contract for water supply, wastewater treatment services**

The Legislature finds and declares it to be in the public interest and to be the public policy of the State to foster and promote by all reasonable means the collection, storage and distribution of an adequate supply of water for the inhabitants and businesses of the counties and municipalities of this State and to foster and promote the public health by providing for the collection and treatment of sewerage through adequate sewerage facilities.

To further promote these interests, and notwithstanding the provisions of any other law, rule or regulation to the contrary, the governing body of a city of the first class may enter into a contract with a duly incorporated nonprofit association for the provision of water supply services as defined in subsection (16) of section 15 of P.L.1971, c.198 (C.40A:11-15), or for the provision of wastewater treatment services as defined in subsection (19) of section 15 of P.L.1971, c.198 (C.40A:11-15), or both, as the case may be.

The governing body of a city of the first class that has entered into a contract with a duly incorporated nonprofit association pursuant to this section shall obtain the written opinion of bond counsel as to the effect of the contract on the tax exempt status of existing and future financing instruments executed by the parties given the terms of the contract and the federal laws or regulations concerning this matter.

Any concession fee or monetary benefit paid by a duly incorporated nonprofit association to the governing body of a city of the first class shall be used for the purposes of reducing or off-setting property taxes, reducing water supply services or wastewater treatment services charges, rates or fees, one-time nonrecurring expenses or capital asset expenditures related to water supply facilities or wastewater treatment systems.

Upon executing such contract, the duly incorporated nonprofit association shall be deemed to be providing essential governmental functions on behalf of the city of the first class and, to the extent permitted in the contract, shall exercise all powers and responsibilities of the city of the first class

related to the provision of water supply services and wastewater treatment services now or hereinafter provided under law.

The authorization provided in this section shall be subject to the provisions of sections 3 through 6 of P.L.2002, c.47 (C.58:28-4 through 58:28-7).

L.2002, c. 47, s. 2.

#### **40A:11-5.2. Applicability of C.40A:11-1 et seq. to certain contracts by city of first class**

Notwithstanding the provisions of P.L.2002, c.47 (C.40A:12-17.1 et al.) to the contrary, any expenditure of funds by a duly incorporated nonprofit association that has entered into a contract with the governing body of a city of the first class pursuant to sections 1 and 2 of P.L.2002, c.47 (C.40A:12-17.1 and 40A:11-5.1) for any capital improvements to, or construction of, water supply facilities or wastewater treatment systems shall be subject to the provisions of the "Local Public Contracts Law," P.L.1971, c.198 (C.40A:11 -1 et seq.) whenever the funds have been derived from the proceeds of obligations or other available public moneys of any public entity including, but not limited to, debt issued by the New Jersey Environmental Infrastructure Trust established pursuant to P.L.1985, c.334 (C.58:11B-1 et seq.), as amended and supplemented by P.L.1997, c.224, or a city of the first class.

L.2002, c. 47, s. 12.

#### **40A:11-6. Emergency contracts**

Any contract may be negotiated or awarded for a contracting unit without public advertising for bids and bidding therefor, notwithstanding that the contract price will exceed the bid threshold, when an emergency affecting the public health, safety or welfare requires the immediate delivery of goods or the performance of services; provided that the awarding of such contracts is made in the following manner:

- a. The official in charge of the agency wherein the emergency occurred, or such other officer or employee as may be authorized to act in place of that official, shall notify the purchasing agent, a supervisor of the purchasing agent, or a designated representative of the governing body, as may be appropriate to the form of government, of the need for the performance of a contract, the nature of the emergency, the time of its occurrence and the need for invoking this section. If that person is satisfied that an emergency exists, that person shall be authorized to award a contract or contracts for such purposes as may be necessary to respond to the emergent needs. Such notification shall be reduced to writing and filed with the purchasing agent as soon as practicable.
- b. Upon the furnishing of such goods or services, in accordance with the terms of the contract, the contractor furnishing such goods or services shall be entitled to be paid therefor and the contracting unit shall be obligated for said payment. The governing body of the contracting unit shall take such action as shall be required to provide for the payment of the contract price.
- c. The Director of the Division of Local Government Services in the Department of Community Affairs shall prescribe rules and procedures to implement the requirements of this section.
- d. The governing body of the contracting unit may prescribe additional rules and procedures to implement the requirements of this section.

L.1971, c. 198, s. 6; amended 1975, c. 353, s. 5; 1977, c. 53, s. 3; 1979, c. 350, s. 3; 1985, c. 60, s. 3; 1985, c. 469, s. 8; 1999, c. 440, s. 10.



#### **40A:11-6.1. Award of contracts**

All contracts enumerated in this section shall be awarded as follows:

- a. For all contracts that in the aggregate are less than the bid threshold but 15 percent or more of that amount, and for those contracts that are for subject matter enumerated in subsection (1) of section 5 of P.L.1971, c.198 (C.40A:11-5), except for paragraph (a) of that subsection concerning professional services and paragraph (b) of that subsection concerning work by employees of the contracting unit, the contracting agent shall award the contract after soliciting at least two competitive quotations, if practicable. The award shall be made to a vendor whose response is most advantageous, price and other factors considered. The contracting agent shall retain the record of the quotation solicitation and shall include a copy of the record with the voucher used to pay the vendor.
- b. When in excess of the bid threshold, and after documented effort by the contracting agent to secure competitive quotations, a contract for extraordinary unspecifiable services may be awarded upon a determination in writing by the contracting agent that the solicitation of competitive quotations is impracticable. Any such contract shall be awarded by resolution of the governing body.
- c. If authorized by the governing body by resolution or ordinance, all contracts that are in the aggregate less than 15 percent of the bid threshold may be awarded by the contracting agent without soliciting competitive quotations.
- d. Whenever two or more responses to a request of a contracting agent offer equal prices and are the lowest responsible bids or proposals, the contracting unit may award the contract to the vendor whose response, in the discretion of the contracting unit, is the most advantageous, price and other factors considered. In such a case, the award resolution or purchase order documentation shall explain why the vendor selected is the most advantageous.

L.1975, c. 353, s. 6; amended 1977, c. 53, s. 4; 1983, c. 418; 1999, c. 440, s. 11.

#### **40A:11-7. Contracts not to be divided**

- a. No contract in the aggregate which is single in character or which necessarily or by reason of the quantities required to effectuate the purpose of the contract includes the provision or performance of additional goods or services, shall be divided, so as to bring it or any of the parts thereof under the bid threshold, for the purpose of dispensing with the requirement of public advertising and bidding therefor.
- b. In contracting for the provision or performance of any goods or services included in or incidental to the provision or performance of any work which is single in character or inclusive of the provision or performance of additional goods or services, all of the goods or services requisite for the completion of such contract shall be included in one contract.

L.1971, c. 198, s. 7; amended 1975, c. 353, s. 7; 1979, c. 350, s. 4; 1985, c. 60, s. 4; 1985, c. 469, s. 9; 1999, c. 440, s. 12.

#### **40A:11-7.1. Rules concerning determinations of aggregation**

For the purpose of ensuring consistency between the "Local Public Contracts Law," P.L.1971, c.198 (C.40A:11-1 et seq.), and the "Public School Contracts Law," N.J.S.18A:18A-1 et seq., the Director of the Division of Local Government Services in the Department of Community Affairs, after consultation with the Commissioner of Education and pursuant to the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), shall adopt rules concerning determinations of aggregation for the purposes of

whether a contract is subject to public bidding as set forth in sections 3, 4 and 7 of P.L.1971, c.198 (C.40A:11-3, 40A:11-4 and 40A:11-7) and N.J.S.18A:18A-3, N.J.S.18A:18A-4, and N.J.S.18A:18A-8.

L.1999, c. 440, s. 13.

#### **40A:11-8. Bids for provision or performance of goods or services**

Every contracting agent shall, at intervals to be fixed by the governing body, solicit by public advertisement the submission of bids for the provision or performance of goods or services which are and which under section 4 of P.L.1971, c.198 (C.40A:11-4) can be contracted to be provided or performed only after public advertisement for bids and bidding therefor and all contracts for the provision or performance of such goods or services shall be awarded only in that manner.

L.1971, c. 198, s. 8; amended 1999, c. 440, s. 14.

#### **40A:11-9. Designation of contracting unit's purchasing agent, authority, responsibility, accountability; qualifications**

a. The governing body of any contracting unit may by ordinance, in the case of a municipality, by ordinance or resolution, as the case may be, in the case of a county, or by resolution in all other cases, designate an individual to serve as the contracting unit's purchasing agent. The individual designated as the purchasing agent pursuant to this subsection shall be assigned the authority, responsibility, and accountability for the purchasing activity for the contracting unit, to prepare public advertising for bids and to receive bids for the provision or performance of goods or services on behalf of the contracting unit and to award contracts permitted pursuant to subsection a. of section 3 of P.L.1971, c.198 (C.40A:11-3) in the name of the contracting unit, and conduct any activities as may be necessary or appropriate to the purchasing function of the contracting unit as its contracting agent. The individual designated to serve as the purchasing agent of a contracting unit pursuant to this subsection shall possess a qualified purchasing agent certificate pursuant to this section. The individual designated as the purchasing agent pursuant to this subsection may be a part-time or full-time employee of the contracting unit, an independent contractor, or an individual employed by another contracting unit through a shared services agreement.

b. The Director of the Division of Local Government Services, after consultation with the Commissioner of Education, shall establish criteria to qualify individuals who have completed appropriate training and possess such purchasing experience as deemed necessary to serve as a purchasing agent, and, when determined to be necessary by the director, have passed an examination administered by the director pursuant to this section. The criteria established by the director shall include, but are not limited to, the following:

- (1) is a citizen of the United States;
- (2) is of good moral character;
- (3) is a high school graduate or equivalent;
- (4) has at least two years of higher education, and two years of full time governmental experience performing duties relative to those of public procurement provided, however, that additional years of experience may be substituted for years of higher education, on a one to one basis;
- (5) has successfully received certificates indicating satisfactory completion of a series of training courses in public procurement as determined by the director and provided by either the Division of Local Government Services, or, with the approval of the director, by a county

college or Rutgers, The State University of New Jersey, all under the supervision of instructors who meet criteria established by the director;

(6) has submitted completed application forms, including proof of education and experience, as set forth in this subsection, accompanied by a fee in the amount of \$150 payable to the State Treasurer, to the Director of the Division of Local Government Services at least 30 days prior to the administration of a State examination;

(7) has successfully passed a State examination for a qualified purchasing agent certificate. The director shall hold examinations semi-annually or at such times as the director may deem appropriate. An individual shall be eligible to take the State examination for a qualified purchasing agent certificate without having taken the courses required pursuant to paragraph (5) of this subsection if the individual has been certified by the division as a certified municipal finance officer, a certified county finance officer, or a certified county purchasing officer.

The director shall issue a qualified purchasing agent certificate to an individual who passes the examination upon payment to the director of a fee of \$25 which shall be payable to the State Treasurer.

c. The criteria established by the director to authorize purchasing agents, pursuant to subsection b. of this section, shall include, but are not limited to, completion of a course in green product purchasing, as established by the director pursuant to regulation. Any person qualified pursuant to subsection b. of this section prior to the establishment of the course in green product purchasing, shall in order to continue to be qualified, take and successfully complete the course within four years from the date the course is established. For the purposes of this subsection and section 2 of P.L.2007, c.332 (C.40A:11-9.1), "green product" means any commodity or service that has a lesser or reduced negative effect on human health and the environment when compared with competing commodities or services. Items considered in this comparison may include, but are not limited to: raw materials acquisition, production, manufacturing, packaging, distribution, reuse, operation, maintenance, disposal, energy efficiency, recycled content resource use, transportation, and durability.

d. (1) Renewal of the qualified purchasing agent certification shall be required every three years, subject to the applicant's fulfillment of continuing education requirements, the submission of an application for renewal, and the payment of a renewal fee, all as determined by the director.

(2) In the event that an individual holding a qualified purchasing agent certificate allows the certificate to lapse by failing to renew the certificate, the individual shall be required to apply to take the qualifying examination required pursuant to subsection b. of this section and pay a fee as determined by the director, except that when an individual applies within six months of the expiration of the certificate, the application may be made in the same manner as renewal and except that such application may be made in the same manner as a renewal within 12 months of the expiration of the certificate if the director determines that either of the following circumstances prevents a certificate holder from earning the required continuing education units within six months of the expiration of the certificate:

(1) a flood, hurricane, superstorm, tornado, or other natural disaster, and a state of emergency has been declared as a result thereof by the Governor; or

(2) a medical event or condition.

- e. (1) An individual who obtained a qualified purchasing agent certificate prior to enactment of P.L.2009, c.166 (C.40A:11-9a et al.) shall be exempt from taking the State qualifying examination, but shall adhere to all requirements for renewal pursuant to subsection d. of this section. If such a qualified purchasing agent certificate expires due to the failure of the holder to renew the certificate as prescribed in subsection d. of this section, that individual shall be required to pass the qualifying examination as provided pursuant to subsection b. of this section in order to be issued a new qualified purchasing agent certificate.
- (2) An individual who has been certified by the Department of Education as a school business administrator and has performed duties relative to public procurement for at least three years shall be exempt from taking the courses required pursuant to paragraph (5) of subsection b. of this section and the state qualifying examination, and upon application to the director and the payment of the fee imposed pursuant to subsection b. of this section, shall be issued a qualified purchasing agent certificate.
- f. Those persons who have been performing the duties of a purchasing agent for a contracting unit pursuant to P.L.1971, c.198 (C.40A:11-1 et seq.), or school board pursuant to N.J.S.18A:18A-1 et seq. for at least three continuous years, prior to the first day of the sixth month following the promulgation of rules and regulations to effectuate the purposes of P.L.2009, c.166 (C.40A:11-9a et al.), and did not possess a qualified purchasing agent certificate at that time, may take the State qualifying examination, if not otherwise exempt under subsection e. of this section, without the courses required in subsection b. of this section.
- g. Following the appointment of a purchasing agent for a contracting unit pursuant to subsection a. of this section, if the person appointed no longer performs such duties, the governing body or chief executive officer, as appropriate to the form of government, may appoint, for a period not to exceed one year commencing from the date of the vacancy, a person who does not possess a qualified purchasing agent certificate to serve as a temporary purchasing agent. Any person so appointed may, with the approval of the director, be reappointed as a temporary purchasing agent for a maximum of one additional year following the end of the first temporary appointment. No contracting unit shall employ a temporary purchasing agent for more than two consecutive years.
- h. The director may revoke or suspend a qualified purchasing agent certificate for dishonest practices or willful or intentional failure, neglect, or refusal to comply with the laws relating to procurement, or for other good cause. The governing body, together with the chief executive officer of any contracting unit, or a board of education, may request the director to review the behavior or practices of a person holding a qualified purchasing agent certificate. Prior to taking any adverse action against a person, the director or the director's designee shall convene a hearing, upon due notice, affording the person an opportunity to be heard. If the qualified purchasing agent certificate held by a person serving as a purchasing agent is revoked, the director shall order that person to no longer perform the duties of purchasing agent, and the person shall not be eligible to serve as a purchasing agent or to make application for recertification for a period of five years from the date of revocation.
- i. The director may adopt and promulgate rules and regulations to effectuate the purposes of P.L.1971, c.198. Notwithstanding any provision of P.L.1968, c.410 (C.52:14B-1 et seq.) to the contrary, any such regulations shall be effective immediately upon filing with the Office of Administrative Law and shall be effective for a period not to exceed 365 days and may thereafter be amended, adopted or readopted by the director in accordance with the requirements of P.L.1968,

c.410. In order to better manage the workload of implementing the provisions of P.L.1971, c.198, the director may establish a transition process for administering an examination for individuals serving as purchasing agents on the effective date of P.L.1971, c.198, issuing and renewing qualified purchasing agent certificates to eligible individuals, prescribing a schedule by which such certificates will be issued and renewed, and such other matters as the director determines to be necessary to the implementation of P.L.1971, c.198.

L.1971, c.198, s.9; amended 1975, c.353, s.8; 1977, c.53, s.5; 1999, c.440, s.15; 2007, c.332, s.1; 2009, c.166, s.3; 2015, c.95, s.45.

#### **40A:11-9a Current purchasing agent, lower bid threshold**

An individual who is the duly authorized purchasing agent of a contracting unit and does not possess a qualified purchasing agent certificate on the date of enactment of P.L.2009, c.166 may continue to be referred to as the purchasing agent, but the bid threshold for that contracting unit shall be set at \$17,500 until such time as that individual obtains a qualified purchasing agent certificate. A contracting unit exercising this authority shall file a letter to this effect with the director.

L.2009, c.166, s.4.

#### **40A:11-9.1. List of sources for green product purchasing**

The State Treasurer, through the Division of Purchase and Property, in consultation with the Department of Environmental Protection and any other appropriate State agencies, shall develop a list of sources for green product purchasing by contracting units, and provide regular revisions of the list, on the Internet web page of the Department of the Treasury and shall have the authority to specify appropriate and reasonable standards for the identification of a list of sources for green products.

L.2007, c. 332, s. 2.

#### **40A:11-10. Joint agreements for provision and performance of goods and services; cooperative marketing; authorization**

- (a) (1) The governing bodies of two or more contracting units may provide by joint agreement for the provision and performance of goods and services for use by their respective jurisdictions.
- (2) The governing bodies of two or more contracting units providing sewerage services pursuant to the "sewerage authorities law," P.L.1946, c.138 (C.40:14A-1 et seq.), the "municipal and county utilities authorities law," P.L.1957, c.183 (C.40:14B-1 et seq.), R.S.58:14-1 et seq. or R.S.40:63-68 et seq. may provide by joint agreement for the purchase of goods and services related to sewage sludge disposal.
- (3) The governing body of two or more contracting units providing electrical distribution services pursuant to and in accordance with R.S.40:62-12 through R.S.40:62-25, may provide by joint agreement for the provision or performance of goods or services related to the distribution of electricity.
- (4) The governing bodies of two or more contracting units may provide for the cooperative marketing of recyclable materials recovered through a recycling program.
- (5) The governing bodies of two or more contracting units may provide by joint agreement for the purchase of the services of a private aggregator for the purpose of facilitating the joint action of two or more municipalities in granting municipal consent for the provision of cable

television service pursuant to R.S.40:48-1 et seq. and the "Cable Television Act," P.L.1972, c.186 (C.48:5A-1 et seq.) as amended and supplemented.

(6) The governing bodies of two or more contracting units may provide by joint agreement for the purchase of fire equipment.

(b) The governing body of any contracting unit may provide by joint agreement with the board of education of any school district or any State or county college for the provision and performance of goods and services for use by their respective jurisdictions.

(c) Such agreement shall be entered into by resolution adopted by each of the participating bodies and boards, which shall set forth the categories of goods or services to be provided or performed, the manner of advertising for bids and of awarding of contracts, the method of payment by each participating body and board, and other matters deemed necessary to carry out the purposes of the agreement.

(d) Each participating body's and board's share of expenditures for purchases under any such agreement shall be appropriated and paid in the manner set forth in the agreement and in the same manner as for other expenses of the participating body and board.

L.1971, c. 198, s. 10; amended 1977, c. 182; 1985, c. 452, s. 1; 1991, c. 143, s. 3; 1995, c. 103, s. 5; 1995, c. 356, s. 7; 1999, c. 440, s. 16; 2003, c. 38, s. 2; 2013, c.89; 2013, c.207, s.2.

#### **40A:11-11. Additional matters regarding contracts for the provision and performance of goods and services**

(1) The contracting units entering into a joint agreement pursuant to section 10 of P.L.1971, c.198 (C.40A:11-10) may designate a joint contracting agent.

(2) Contracts made pursuant to a joint purchasing agreement shall be subject to all of the terms and conditions of this act.

(3) Any contracting unit serving as a joint contracting agent pursuant to this section, may make an appropriation to enable it to perform any such contract and may anticipate as revenue payments to be made and received by it from any other party to the agreement. Any items so included in a local budget shall be subject to the approval of the Director, Division of Local Government Services, who shall consider the matter in conjunction with the requirements of chapter 4 of Title 40A of the New Jersey Statutes. The agreement and any subsequent amendment or revisions thereto shall be filed with the Director of the Division of Local Government Services in the Department of Community Affairs.

(4) Any joint contracting agent so designated pursuant to a joint purchasing agreement shall have the sole responsibility to comply with the provisions of section 23 of P.L.1971, c.198 (C.40A:11-23).

(5) The governing bodies of two or more contracting units or boards of education or for purposes related to the distribution of electricity, the governing bodies of two or more contracting units providing electrical distribution services pursuant to R.S.40:62-12 through R.S.40:62-25, may by resolution establish a cooperative pricing system as hereinafter provided. Any such resolution shall establish procedures whereby one participating contracting unit in the cooperative pricing system shall be empowered to advertise and receive bids to provide prices for all other participating contracting units in such system for the provision or performance of goods or services; provided, however, that no contract shall be awarded by any participating contracting unit for a price which exceeds any other price available to the participating contracting unit, or for a purchase of goods or services in deviation from the specifications, price or quality set forth by the participating contracting unit.



(6) The governing body of a county government may establish a cooperative pricing system for the voluntary use of contracting units within the county.

No vendor shall be required or permitted to extend bid prices to participating contracting units in a cooperative pricing system unless so specified in the bids.

No cooperative pricing system and agreements entered into pursuant to such system, or joint purchase agreements established pursuant to this act, the "Interlocal Services Act," P.L.1973, c.208 (C.40:8A-1 et seq.) or any other provision of law, shall become effective without prior approval of the Director of the Division of Local Government Services and said approval shall be valid for a period not to exceed five years.

The director's approval shall be based on the following:

- (a) Provision for maintaining adequate records and orderly procedures to facilitate audit and efficient administration, and
- (b) Adequacy of public disclosure of such actions as are taken by the participants, and
- (c) Adequacy of procedures to facilitate compliance with all provisions of the "Local Public Contracts Law" and corresponding regulations, and
- (d) Clarity of provisions to assure that the responsibilities of the respective parties are understood.

Failure of the Director of the Division of Local Government Services to approve or disapprove a properly executed and completed application to establish a cooperative pricing system and agreements entered into pursuant to such system or other joint purchase agreement within 45 days from the date of receipt of said application by the director shall constitute approval of said application, which shall be valid for a period of five years, commencing from the date of receipt of said application by the director.

The Director of the Division of Local Government Services is hereby authorized to promulgate rules and regulations specifying procedures pertaining to cooperative pricing systems and joint purchase agreements entered into pursuant to this act, the "Interlocal Services Act," P.L.1973, c.208 (C.40:8A-1 et seq.) and any other provision of law.

L.1971, c. 198, s. 11; amended 1975, c. 353, s. 9; 1977, c. 53, s. 6; 1979, c. 420; 1991, c. 143, s. 4; 1995, c. 356, s. 8; 1999, c. 440, s. 17.

#### **40A:11-12. Contracting unit purchases through State agency: procedure**

a. Any contracting unit under this act may without advertising for bids, or having rejected all bids obtained pursuant to advertising therefor, purchase any goods or services under any contract or contracts for such goods or services entered into on behalf of the State by the Division of Purchase and Property in the Department of the Treasury.

b. A contracting unit may also use, without advertising for bids, or having rejected all bids obtained pursuant to advertising, the Federal Supply Schedules of the General Services Administration or schedules from other federal procurement programs promulgated by the Director of the Division of Purchase and Property in the Department of the Treasury pursuant to section 1 of P.L.1996, c.16 (C.52:34-6.1), subject to the following conditions:

- (1) the price of the goods or services being procured is no greater than the price offered to federal agencies;
- (2) (Deleted by amendment, P.L.2006, c.10);



(3) the contracting unit receives the benefit of federally mandated price reductions during the term of the contract;

(4) the price of the goods or services being procured is no greater than the price of the same or equivalent goods or services under the State contract, unless the contracting unit determines that because of factors other than price, selection of a vendor from the Federal Supply Schedules or schedules from other federal procurement programs would be more advantageous to the contracting unit;

(5) a copy of the purchase order relating to any such contract, the requisition or request for purchase order, if applicable, and documentation identifying the price of the goods or services under the Federal Supply Schedules or schedules from other federal procurement programs shall be filed with the Director of the Division of Purchase and Property in the Department of the Treasury within five working days of the award of any such contract by the contracting unit.

c. Whenever a purchase is made, the contracting unit shall place its order with the vendor offering the lowest price, including delivery charges, that best meets the requirements of the contracting unit. Prior to placing such an order, the contracting unit shall document with specificity that the goods or services selected best meet the requirements of the contracting unit.

L.1971, c. 198, s. 12; amended 1996, c. 16, s. 3; 1999, c. 440, s. 18; 2006, c. 10, s. 4.

**40A:11-12.1 through 12.6:** Obsolete laws that were repealed in 1999.

**40A:11-12.7 Contracting unit may use electronic procurement processes.**

Notwithstanding any provisions of the "Local Public Contracts Law," P.L.1971, c.198 (C.40A:11-1 et seq.) to the contrary, a contracting unit may use electronic procurement processes for public works construction contracts pursuant to the requirements of section 4 of P.L.2020, c.59 (C.52:34A-4).

L.2020, c.59, s.14

**40A:11-13. Specifications**

Any specifications for the provision or performance of goods or services under this act shall be drafted in a manner to encourage free, open and competitive bidding. In particular, no specifications under this act may:

(a) Require any standard, restriction, condition or limitation not directly related to the purpose, function or activity for which the contract is awarded; or

(b) Require that any bidder be a resident of, or that the bidder's place of business be located in, the county or municipality in which the contract will be awarded or performed, unless the physical proximity of the bidder is requisite to the efficient and economical performance of the contract; except that no specification for a contract for the collection and disposal of municipal solid waste shall require any bidder to be a resident of, or that the bidder's place of business be located in, the county or municipality in which the contract will be performed; or

(c) Discriminate on the basis of race, religion, sex, national origin, creed, color, ancestry, age, marital status, affectional or sexual orientation, familial status, liability for service in the Armed Forces of the United States, or nationality; or

(d) Require, with regard to any contract, the furnishing of any "brand name," but may in all cases require "brand name or equivalent," except that if the goods or services to be provided or

performed are proprietary, such goods or services may be purchased by stipulating the proprietary goods or services in the bid specification in any case in which the resolution authorizing the contract so indicates, and the special need for such proprietary goods or services is directly related to the performance, completion or undertaking of the purpose for which the contract is awarded; or

(e) Fail to include any option for renewal, extension, or release which the contracting unit may intend to exercise or require; or any terms and conditions necessary for the performance of any extra work; or fail to disclose any matter necessary to the substantial performance of the contract.

(f) Require that any bidder submit a financial statement if either a guarantee, by certified check, cashier's check or bid bond, or a surety company certificate is also required to be furnished by the bidder, unless any law or regulation of the United States imposes a condition upon the awarding of a monetary grant to be used for the purchase, contract or agreement, which condition requires that a financial statement be submitted.

(g) As used in this subsection:

"asphalt price index" means the asphalt price index as determined and published by the New Jersey Department of Transportation;

"basic asphalt price index" means the asphalt price index for the month preceding the month in which the bids are opened;

"department" means the New Jersey Department of Transportation;

"fuel price index" means the fuel price index as determined and published by the New Jersey Department of Transportation; and

"pay item" means a specifically described item of work for which the bidder provides a per unit or lump sum price in a bid specification determined and published by the New Jersey Department of Transportation.

In addition to the requirements of paragraphs (a) through (f) of this section, any bid specification for the provision or performance of goods or services under P.L.1971, c.198 (C.40A:11-1 et seq.) that includes the purchase or use of 1,000 or more tons of hot mix asphalt shall include a pay item for an asphalt price adjustment reflecting changes in the cost of asphalt cement. The pay item for asphalt price adjustment shall apply to each ton of hot mix asphalt purchased or used by the contracting unit. Any bid specification prepared pursuant to P.L.1971, c.198 (C.40A:11-1 et seq.) that includes the purchase or use of less than 1,000 tons of hot mix asphalt shall include a pay item for an asphalt price adjustment applicable to any quantity of hot mix asphalt exceeding 1,000 tons that may be purchased or used in the work in the event that performance of the work, including change orders, requires more than 1,000 tons of hot mix asphalt. As set forth in section 7 of P.L.1971, c.198 (C.40A:11-7), no contract shall be divided to disaggregate the quantity of hot mix asphalt or equivalent asphalt cement-based paving product to be purchased or used for the purpose of avoiding compliance with this paragraph.

The asphalt price adjustment shall be calculated in accordance with the formula and relevant instructions published in the most recent edition of the "New Jersey Department of Transportation Standard Specifications for Road and Bridge Construction." All invoices for

payment shall be accompanied by the calculation of any asphalt price adjustment and a showing of the current month's asphalt price index and the basic asphalt price index.

Every bid specification prepared pursuant to P.L.1971, c.198 (C.40A:11-1 et seq.) shall be eligible for a fuel price adjustment. Fuel that is eligible for a fuel price adjustment shall be the sum of the quantities of the eligible pay items in the contract multiplied by the fuel usage factors as determined by the department. The types of fuel furnished shall be at the discretion of the contractor.

The fuel requirement for items not determined by the department to be eligible, and for pay items in the bid specifications calling for less than 500 gallons of fuel, shall not be eligible for a fuel price adjustment. If more than one pay item has the same nomenclature but with different thicknesses, depths, or types, each individual pay item must require 500 gallons or more of fuel to be eligible for a fuel price adjustment. If more than one pay item has the same nomenclature, similar pay items shall be combined and the combination must require 500 gallons or more of fuel to be eligible for the fuel price adjustment.

Fuel price index adjustments shall not be made in those months for which the monthly fuel price index has changed by less than five percent from the basic fuel price index.

Any specification which knowingly excludes prospective bidders by reason of the impossibility of performance, bidding or qualification by any but one bidder, except as provided herein, shall be null and void and of no effect and shall be readvertised for receipt of new bids, and the original contract shall be set aside by the governing body.

Any specification for a contract for the collection and disposal of municipal solid waste shall conform to the uniform bid specifications for municipal solid waste collection contracts established pursuant to section 22 of P.L.1991, c.381 (C.48:13A-7.22).

Any specification may include an item for the cost, which shall be paid by the contractor, of creating a file to maintain the notices of the delivery of labor or materials required by N.J.S.2A:44-128.

Any prospective bidder who wishes to challenge a bid specification shall file such challenges in writing with the contracting agent no less than three business days prior to the opening of the bids. Challenges filed after that time shall be considered void and having no impact on the contracting unit or the award of a contract.

L.1971, c. 198, s. 13; amended 1991, c. 381, s. 48; 1996, c. 81, s. 7; 1999, c. 440, s. 19.

**40A :11-13a Contracts, low-volume road, reclaimed asphalt pavement, maximum percentage, total pavement mixtures.**

a. Notwithstanding any law, rule, or regulation to the contrary, when entering into a contract for a local road project on a low-volume road, which project does not receive State funds, a local contracting unit, as defined in and subject to the provisions of the "Local Public Contracts Law," P.L.1971, c.198 (C.40A:11-1 et seq.), shall authorize the contracted party to use reclaimed asphalt pavement constituting a maximum of 50 percent, by weight, of the total pavement mixture for base and intermediate pavement courses, and a maximum of 35 percent, by weight, of the total pavement mixture for surface pavement courses, provided that any person or entity that seeks to enter into or renew a contract for the project certifies to the local contracting unit, prior to the award of the contract, that:

(1) all asphalt mixtures containing reclaimed asphalt pavement used in the local road project consist of only materials, mixtures, binders, and aggregates that have been approved under current Department of Transportation standard specifications;

(2) the person or entity will maintain records of all stockpiles of reclaimed asphalt pavement used in the local road project including, but not limited to, any test results, approval letters from the Department of Transportation, requests for approval to the department and all data submitted therewith, and drawings of stockpile locations at the plant site, including unapproved stockpiles, copies of which shall be provided to the local contracting unit upon request; and

(3) the person or entity will maintain records of any performance testing performed on the local road project, copies of which shall be provided to the local contracting unit upon request.

b. As used in this section, "low-volume road" means a road, street, or thoroughfare which has an equivalent (80kN) single-axle load level of 300,000 or less over a 20-year design period, and is open to travel by the public.

c. Nothing in P.L.2023 c.160 (C.27:2-8.1 et al.) shall be construed as prohibiting a contractor from installing asphalt mixtures that have been approved by the New Jersey Department of Transportation in compliance with the New Jersey Department of Transportation specification for high reclaimed asphalt pavement mixtures.

L.2023, c.160, s.2.

#### **40A:11-13.1. Payment from bequest, legacy or gift; conditions**

Goods or services, the payment for which utilizes only funds received by a contracting unit from a bequest, legacy or gift, shall be subject to the provisions of P.L.1971, c.198 (C.40A:11-1 et seq.), except that if such bequest, legacy or gift contains written instructions as to the specifications, manufacturer or vendor, or source of supply of the goods or services to be provided or performed, such instructions shall be honored, provided that the bequest, legacy or gift is used in a manner consistent with N.J.S.40A:5-29.

L.1999, c. 440, s. 20.

#### **40A:11-13.2. Rejection of bids; reasons**

A contracting unit may reject all bids for any of the following reasons:

- a. The lowest bid substantially exceeds the cost estimates for the goods or services;
- b. The lowest bid substantially exceeds the contracting unit's appropriation for the goods or services;
- c. The governing body of the contracting unit decides to abandon the project for provision or performance of the goods or services;
- d. The contracting unit wants to substantially revise the specifications for the goods or services;
- e. The purposes or provisions or both of P.L.1971, c.198 (C.40A:11-1 et seq.) are being violated;
- f. The governing body of the contracting unit decides to use the State authorized contract pursuant to section 12 of P.L.1971, c.198 (C.40A:11-12).

L.1999, c. 440, s. 21.

#### **40A:11-14. Form of contracts**

All contracts for the provision or performance of goods or services shall be in writing. The governing body of any contracting unit may, subject to the requirements of law, prescribe the form and manner in which contracts shall be made and executed, and the form and manner of execution and approval of all guarantee, indemnity, fidelity and other bonds.

L.1971, c. 198, s. 14; amended 1975, c. 353, s. 10; 1999, c. 440, s. 22.

#### **40A:11-15. Duration of certain contracts**

All contracts for the provision or performance of goods or services shall be awarded for a period not to exceed 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) shall be awarded for a period not to exceed 12 consecutive months. Contracts may be awarded for longer periods of time as follows:

(1) Supplying of:

(a) (Deleted by amendment, P.L.1996, c.113.)

(b) (Deleted by amendment, P.L.1996, c.113.)

(c) Thermal energy produced by a cogeneration facility, for use for heating or air conditioning or both, for any term not exceeding 40 years, when the contract is approved by the Board of Public Utilities. For the purposes of this paragraph, "cogeneration" means the simultaneous production in one facility of electric power and other forms of useful energy such as heating or process steam;

(2) (Deleted by amendment, P.L.1977, c.53.)

(3) The collection and disposal of municipal solid waste, the collection and disposition of recyclable material, or the disposal of sewage sludge, for any term not exceeding in the aggregate, five years;

(4) The collection and recycling of methane gas from a sanitary landfill facility, for any term not exceeding 25 years, when such contract is in conformance with a district solid waste management plan approved pursuant to P.L.1970, c.39 (C.13:1E-1 et seq.), and with the approval of the Division of Local Government Services in the Department of Community Affairs and the Department of Environmental Protection. The contracting unit shall award the contract to the highest responsible bidder, notwithstanding that the contract price may be in excess of the amount of any necessarily related administrative expenses; except that if the contract requires the contracting unit to expend funds only, the contracting unit shall award the contract to the lowest responsible bidder. The approval by the Division of Local Government Services of public bidding requirements shall not be required for those contracts exempted therefrom pursuant to section 5 of P.L.1971, c.198 (C.40A:11-5);

(5) Data processing service, for any term of not more than seven years;

(6) Insurance, including the purchase of insurance coverages, insurance consulting or administrative services, claims administration services and including participation in a joint self-insurance fund, risk management program or related services provided by a contracting unit insurance group, or participation in an insurance fund established by a local unit pursuant to N.J.S.40A:10-6, or a joint insurance fund established pursuant to P.L.1983, c.372 (C.40A:10-36 et seq.), for any term of not more than three years;

(7) Leasing or servicing of (a) automobiles, motor vehicles, machinery, and equipment of every nature and kind, for a period not to exceed five years, (b) machinery and equipment used in the generation of electricity by a municipal shared services energy authority established pursuant to section 4 of P.L. , c. (C. ) (pending before the Legislature as this bill), or a contracting unit engaged in the generation of electricity, for a period not to exceed 20 years; provided, however, a contract shall be awarded only subject to and in accordance with the rules and regulations promulgated by the Director of the Division of Local Government Services in the Department of Community Affairs;

(8) The supplying of any product or the rendering of any service by a company providing voice, data, transmission or switching services for a term not exceeding five years;

(9) Any single project for the construction, reconstruction, or rehabilitation of any public building, structure, or facility, or any public works project, including the retention of the services of any architect or engineer in connection therewith, for the length of time authorized and necessary for the completion of the actual construction;

(10) The providing of food services for any term not exceeding three years;

(11) On-site inspections and plan review services undertaken by private agencies pursuant to the "State Uniform Construction Code Act," P.L.1975, c.217 (C.52:27D-119 et seq.) for any term of not more than three years;

(12) (Deleted by amendment, P.L.2009, c.4.)

(13) (Deleted by amendment, P.L.1999, c.440.)

(14) (Deleted by amendment, P.L.1999, c.440.)

(15) Leasing of motor vehicles, machinery, and other equipment primarily used to fight fires, for a term not to exceed ten years, when the contract includes an option to purchase, subject to and in accordance with rules and regulations promulgated by the Director of the Division of Local Government Services in the Department of Community Affairs;

(16) The provision of water supply services or the designing, financing, construction, operation, or maintenance, or any combination thereof, of a water supply facility, or any component part or parts thereof, including a water filtration system, for a period not to exceed 40 years, when the contract for these services is approved by the Division of Local Government Services in the Department of Community Affairs, the Board of Public Utilities, and the Department of Environmental Protection pursuant to P.L.1985, c.37 (C.58:26-1 et al.), except that no approvals shall be required for those contracts otherwise exempted pursuant to subsection (30), (31), (34), (35) or (43) of this section. For the purposes of this subsection, "water supply services" means any service provided by a water supply facility; "water filtration system" means any equipment, plants, structures, machinery, apparatus, or land, or any combination thereof, acquired, used, constructed, rehabilitated, or operated for the collection, impoundment, storage, improvement, filtration, or other treatment of drinking water for the purposes of purifying and enhancing water quality and insuring its portability prior to the distribution of the drinking water to the general public for human consumption, including plants and works, and other personal property and appurtenances necessary for their use or operation; and "water supply facility" means and refers to the real property and the plants, structures, or interconnections between existing water supply facilities, machinery and equipment and other property, real, personal, and mixed, acquired, constructed, or operated, or to be acquired, constructed or



operated, in whole or in part by or on behalf of a political subdivision of the State or any agency thereof, for the purpose of augmenting the natural water resources of the State and making available an increased supply of water for all uses, or of conserving existing water resources, and any and all appurtenances necessary, useful, or convenient for the collecting, impounding, storing, improving, treating, filtering, conserving, or transmitting of water and for the preservation and protection of these resources and facilities and providing for the conservation and development of future water supply resources;

(17) The provision of resource recovery services by a qualified vendor, the disposal of the solid waste delivered for disposal which cannot be processed by a resource recovery facility or the residual ash generated at a resource recovery facility, including hazardous waste and recovered metals and other materials for reuse, or the design, financing, construction, operation, or maintenance of a resource recovery facility for a period not to exceed 40 years when the contract is approved by the Division of Local Government Services in the Department of Community Affairs, and the Department of Environmental Protection pursuant to P.L.1985, c.38 (C.13:1E-136 et al.); and when the resource recovery facility is in conformance with a district solid waste management plan approved pursuant to P.L.1970, c.39 (C.13:1E-1 et seq.). For the purposes of this subsection, "resource recovery facility" means a solid waste facility constructed and operated for the incineration of solid waste for energy production and the recovery of metals and other materials for reuse; or a mechanized composting facility, or any other facility constructed or operated for the collection, separation, recycling, and recovery of metals, glass, paper, and other materials for reuse or for energy production; and "residual ash" means the bottom ash, fly ash, or any combination thereof, resulting from the combustion of solid waste at a resource recovery facility;

(18) The sale of electricity or thermal energy, or both, produced by a resource recovery facility for a period not to exceed 40 years when the contract is approved by the Board of Public Utilities, and when the resource recovery facility is in conformance with a district solid waste management plan approved pursuant to P.L.1970, c.39 (C.13:1E-1 et seq.). For the purposes of this subsection, "resource recovery facility" means a solid waste facility constructed and operated for the incineration of solid waste for energy production and the recovery of metals and other materials for reuse; or a mechanized composting facility, or any other facility constructed or operated for the collection, separation, recycling, and recovery of metals, glass, paper, and other materials for reuse or for energy production;

(19) The provision of wastewater treatment services or the designing, financing, construction, operation, or maintenance, or any combination thereof, of a wastewater treatment system, or any component part or parts thereof, for a period not to exceed 40 years, when the contract for these services is approved by the Division of Local Government Services in the Department of Community Affairs and the Department of Environmental Protection pursuant to P.L.1985, c.72 (C.58:27-1 et al.), except that no approvals shall be required for those contracts otherwise exempted pursuant to subsection (36) or (43) of this section. For the purposes of this subsection, "wastewater treatment services" means any services provided by a wastewater treatment system, and "wastewater treatment system" means equipment, plants, structures, machinery, apparatus, or land, or any combination thereof, acquired, used, constructed, or operated for the storage, collection, reduction, recycling, reclamation, disposal, separation, or other treatment of wastewater or sewage sludge, or for the final disposal of residues resulting from the treatment of wastewater, including, but not limited to, pumping and ventilating



stations, facilities, plants and works, connections, outfall sewers, interceptors, trunk lines, and other personal property and appurtenances necessary for their operation;

(20) The supplying of goods or services for the purpose of lighting public streets, for a term not to exceed five years;

(21) The provision of emergency medical services for a term not to exceed five years;

(22) Towing and storage contracts, awarded pursuant to paragraph u. of subsection (1) of section 5 of P.L.1971, c.198 (C.40A:11-5) for any term not exceeding three years;

(23) Fuel for the purpose of generating electricity for a term not to exceed eight years;

(24) The purchase of electricity or administrative or dispatching services related to the transmission of electricity, from a supplier of electricity subject to the jurisdiction of a federal regulatory agency, from a qualifying small power producing facility or qualifying cogeneration facility, as defined by 16 U.S.C.s.796, or from any supplier of electricity within any regional transmission organization or independent system operator or from an organization or operator or their successors, by a contracting unit engaged in the generation of electricity for retail sale, as of May 24, 1991, for a term not to exceed 40 years, or by a contracting unit engaged solely in the distribution of electricity for retail sale for a term not to exceed ten years, except that a contract with a contracting unit, engaged solely in the distribution of electricity for retail sale, in excess of ten years, shall require the written approval of the Director of the Division of Local Government Services. If the director fails to respond in writing to the contracting unit within 10 business days, the contract shall be deemed approved;

(25) Basic life support services, for a period not to exceed five years. For the purposes of this subsection, "basic life support" means a basic level of prehospital care, which includes but need not be limited to patient stabilization, airway clearance, cardiopulmonary resuscitation, hemorrhage control, initial wound care, and fracture stabilization;

(26) (Deleted by amendment, P.L.1999, c.440.)

(27) The provision of transportation services to an elderly person, an individual with a disability, or an indigent person for any term of not more than three years. For the purposes of this subsection, "elderly person " means a person who is 60 years of age or older. "Individual with a disability" means a person of any age who, by reason of illness, injury, age, congenital malfunction, or other permanent or temporary incapacity or disability, are unable, without special facilities or special planning or design to utilize mass transportation facilities and services as effectively as persons who are not so affected. "Indigent person " means a person of any age whose income does not exceed 100 percent of the poverty level, adjusted for family size, established and adjusted under section 673(2) of subtitle B, the "Community Services Block Grant Act," Pub.L.97-35 (42 U.S.C. s.9902 (2));

(28) The supplying of liquid oxygen or other chemicals, for a term not to exceed five years, when the contract includes the installation of tanks or other storage facilities by the supplier, on or near the premises of the contracting unit;

(29) The performance of patient care services by contracted medical staff at county hospitals, correction facilities, and long term care facilities, for any term of not more than three years;

(30) The acquisition of an equitable interest in a water supply facility pursuant to section 2 of P.L.1993, c.381 (C.58:28-2), or a contract entered into pursuant to the "County and Municipal Water Supply Act," N.J.S.40A:31-1 et seq., if the contract is entered into no later than January 7, 1995, for any term of not more than forty years;

(31) The provision of water supply services or the financing, construction, operation, or maintenance or any combination thereof, of a water supply facility or any component part or parts thereof, by a partnership or copartnership established pursuant to a contract authorized under section 2 of P.L.1993, c.381 (C.58:28-2), for a period not to exceed 40 years;

(32) Laundry service and the rental, supply, and cleaning of uniforms for any term of not more than three years;

(33) The supplying of any product or the rendering of any service, including consulting services, by a cemetery management company for the maintenance and preservation of a municipal cemetery operating pursuant to the "New Jersey Cemetery Act," N.J.S.8A:1-1 et seq., for a term not exceeding 15 years;

(34) A contract between a public entity and a private firm pursuant to P.L.1995, c.101 (C.58:26-19 et al.) for the provision of water supply services may be entered into for any term which, when all optional extension periods are added, may not exceed 40 years;

(35) A contract for the purchase of a supply of water from a public utility company subject to the jurisdiction of the Board of Public Utilities in accordance with tariffs and schedules of charges made, charged or exacted or contracts filed with the Board of Public Utilities, for any term of not more than 40 years;

(36) A contract between a public entity and a private firm or public authority pursuant to P.L.1995, c.216 (C.58:27-19 et al.) for the provision of wastewater treatment services may be entered into for any term of not more than 40 years, including all optional extension periods;

(37) The operation and management of a facility under a license issued or permit approved by the Department of Environmental Protection, including a wastewater treatment system, a stormwater management system, or a water supply or distribution facility, as the case may be, for any term of not more than ten years. For the purposes of this subsection, "wastewater treatment system" refers to facilities operated or maintained for the storage, collection, reduction, disposal, or other treatment of wastewater or sewage sludge, remediation of groundwater contamination, stormwater runoff, or the final disposal of residues resulting from the treatment of wastewater; "stormwater management system" means the same as that term is defined in section 3 of P.L.2019, c.55 (C.40A:26B-3) and "water supply or distribution facility" refers to facilities operated or maintained for augmenting the natural water resources of the State, increasing the supply of water, conserving existing water resources, or distributing water to users;

(38) Municipal solid waste collection from facilities owned by a contracting unit, for any term of not more than three years;

(39) Fuel for heating purposes, for any term of not more than three years;

(40) Fuel or oil for use in motor vehicles for any term of not more than three years;

(41) Plowing and removal of snow and ice for any term of not more than three years;

(42) Purchases made under a contract awarded by the Director of the Division of Purchase and Property in the Department of the Treasury for use by counties, municipalities, or other contracting units pursuant to section 3 of P.L.1969, c.104 (C.52:25-16.1), for a term not to exceed the term of that contract;

(43) A contract between the governing body of a city of the first class and a duly incorporated nonprofit association for the provision of water supply services as defined in subsection (16) of this section, or wastewater treatment services as defined in subsection (19) of this section, may be entered into for a period not to exceed 40 years;

(44) The purchase of electricity generated through class I renewable energy or from a power production facility that is fueled by methane gas extracted from a landfill in the county of the contacting unit for any term not exceeding 25 years;

(45) The provision or performance of goods or services for the purpose of producing class I renewable energy or class II renewable energy, as those terms are defined in section 3 of P.L.1999, c.23 (C.48:3-51), at, or adjacent to, buildings owned by, or operations conducted by, the contracting unit, the entire price of which is to be established as a percentage of the resultant savings in energy costs, for a term not to exceed 15 years; provided, however, that a contract shall be entered into only subject to and in accordance with guidelines promulgated by the Board of Public Utilities establishing a methodology for computing energy cost savings and energy generation costs; and

(46) A power supply contract, as defined pursuant to section 3 of P.L.2015, c.129 (C. 40A:66-3), between a member municipality as defined pursuant to section 3 of P.L. 2016 , c.129 (C.40A:66-3), and the municipal shared services energy authority established pursuant to the provisions of P.L.2016, c.129 (C. 40A:66-1 et al.) to meet the electric power needs of its members, for the lease, operation, or management of electric generation within a member municipality's corporate limits and franchise area or the purchase of electricity, or the purchase of fuel for generating units for a term not to exceed 40 years.

(47) A contract entered into pursuant to paragraph (2) of subsection a. of section 6 of P.L.2006, c.46 (C.30:9-23.20) between a county hospital authority and a manager for the management, operation, and maintenance of a hospital owned by the authority or the county for a term not to exceed 20 years, provided, however, that a contract entered into pursuant to paragraph (2) of subsection a. of section 6 of P.L.2006, c.46 (C.30:9-23.20) may be renewed for two additional periods, not to exceed five years each.

(48) (a) A lease agreement that provides for the use, lease, lease-back, acquisition, operation, or maintenance of ferry boats and related facilities and services, for a period not to exceed 20 years, except as provided by paragraph (b) of this subsection. For the purposes of this subsection, "related facilities and services" includes, but is not limited to, docks and terminals, parking facilities, intermodal facilities, ingress and egress to the parking and terminal facilities, and the provision of goods and services to the public, provided that a contract for the provision or performance of such goods or services is related to ferry services and requires:

(1) a total capital expenditure exceeding \$300,000, as certified by the chief financial officer of the contracting unit, including but not limited to capital expenditures made by the lessee; or

(2) a capital improvement that has a life expectancy upon completion exceeding 20 years, as certified by the chief financial officer of the contracting unit.

(b) A lease agreement for a capital improvement under subparagraph (2) of paragraph (a) of this subsection may be awarded for a period not to exceed 50 years.

(c) Each worker employed in a construction project under a contract executed pursuant to this subsection shall be paid not less than the prevailing wage rate for the worker's craft or trade as determined by the Commissioner of Labor and Workforce Development pursuant to P.L.1963, c.150 (C.34:11-56.25 et seq.).

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: a. The contract shall be awarded by resolution of the governing body upon a finding by the governing body that the services are being performed in an effective and efficient manner; b. No contract shall be extended so that it runs for more than a total of five consecutive years; c. Any price change included as part of an extension shall be based upon the price of the original contract as cumulatively adjusted pursuant to any previous adjustment or extension and shall not exceed the change in the index rate for the 12 months preceding the most recent quarterly calculation available at the time the contract is renewed; and d. The terms and conditions of the contract remain substantially the same.

All multiyear leases and contracts entered into pursuant to this section, including any two-year or one-year extensions, except contracts involving the supplying of electricity for the purpose of lighting public streets and contracts for thermal energy authorized pursuant to subsection (1) above, construction contracts authorized pursuant to subsection (9) above, contracts for the provision or performance of goods or services or the supplying of equipment to promote energy conservation through the production of class I renewable energy or class II renewable energy authorized pursuant to subsection (45) above, contracts for water supply services or for a water supply facility, or any component part or parts thereof authorized pursuant to subsection (16), (30), (31), (34), (35), (37), or (43) above, contracts for resource recovery services or a resource recovery facility authorized pursuant to subsection (17) above, contracts for the sale of energy produced by a resource recovery facility authorized pursuant to subsection (18) above, contracts for wastewater treatment services or for a wastewater treatment system or any component part or parts thereof authorized pursuant to subsection (19), (36), (37), or (43) above, contracts for the operation and maintenance of a stormwater management system authorized pursuant to subsection (37) above, and contracts for the purchase of electricity or administrative or dispatching services related to the transmission of electricity authorized pursuant to subsection (24) above and contracts for the purchase of electricity generated from a power production facility that is fueled by methane gas authorized pursuant to subsection (44) above, and power supply contracts authorized pursuant to subsection (46) respectively, shall contain a clause making them subject to the availability and appropriation annually of sufficient funds as may be required to meet the extended obligation, or contain an annual cancellation clause.

The Division of Local Government Services in the Department of Community Affairs shall adopt and promulgate rules and regulations concerning the methods of accounting for all contracts that do not coincide with the fiscal year.

All contracts shall cease to have effect at the end of the contracted period and shall not be extended by any mechanism or provision, unless in conformance with the "Local Public Contracts Law," P.L.1971, c.198 (C.40A:11-1 et seq.), except that a contract may be extended by mutual agreement of the parties to the contract when a contracting unit has commenced rebidding prior to the time the contract expires or when the awarding of a contract is pending at the time the contract expires.

L.1971, c. 198, s. 15; amended 1975, c. 326, s. 33; 1975, c. 353, s. 11; 1977, c. 53, s. 7; 1978, c. 154; 1981, c. 2, s. 1; 1981, c. 551, s. 1; 1982, c. 67, s.1; 1983, c. 176; 1983, c. 195; 1983, c. 398; 1983, c. 426; 1985, c. 37, s. 19; 1985, c. 38, s. 37; 1985, c. 72, s. 19; 1985, c. 452, s. 2; 1986, c. 47; 1986, c. 177; 1987, c. 102, s. 31; 1989, c. 159, s. 2; 1991, c. 142, s. 2; 1991, c. 143, s. 5; 1991, c. 312; 1991, c. 356; 1991, c. 381, s. 49; 1991, c. 407; 1991, c. 451; 1992, c. 63; 1992, c. 98, s. 2; 1993, c. 381, s. 5; 1994, c. 71; 1995, c. 3; 1995, c. 41, s. 2; 1995, c.1 01, s. 13; 1995, c. 216, s. 12; 1995, c. 371; 1996, c. 113, s. 19; 1997, c. 288; 1999, c. 23, s. 64; 1999, c. 440, s. 23; 2002, c. 47, s. 9; 2003, c. 150, s. 3; 2005, c. 296, s. 2; 2008, c. 83, s. 3; 2009, c. 4, s. 8; 2015, c.129, s.29; 2016, c.55, s.10; 2019, c.42, s.22; 2019, c.79.

#### **40A:11-15.1. Insurance contract to fund actuarial liability**

Notwithstanding the provisions of subsection (6) of section 15 of P.L.1971, c.198 (C.40A:11-15) to the contrary, a county or a municipality in which a pension fund has been established pursuant to P.L.1943, c.160 (C. 43:10-18.1 et seq.), R.S.43:10-1 through R.S.43:10-18, P.L.1948, c.310 (C.43:10-18.50 et seq.), or P.L.1954, c.218 (C.43:13-22.3 et seq.), may enter into an insurance contract to fund the actuarial liability of its pension system, for a term which may not exceed the term of the actuarial liability covered by the contract.

L.1985, c. 68, s. 1; amended 1994, c. 185, s. 2.

#### **40A:11-15.2. Contracts for purchase of electricity for new county correction facility**

In the case of construction of a new county correction facility, in addition to the purchase of thermal energy, contracts for the purchase of electricity shall be permitted pursuant to subsection (1)(c) of section 15 of P.L.1971, c.198 (C.40A:11-15).

L.1999, c. 23, s. 63.

#### **40A:11-15.3. Contract for marketing of recyclable materials**

a. Notwithstanding the provisions of section 15 of P.L.1971, c.198 (C.40A:11-15) to the contrary, a county government contracting unit may enter into or extend a contract for the marketing of recyclable materials recovered through a recycling program subject to the following conditions:

- (1) The program includes one or more interlocal services agreements with municipalities in that county for the delivery of recyclable materials to a contractor; and
- (2) The contract for the marketing of recyclable material includes fixed or formula based fees for the marketing services so provided and the contractor owns the buildings and equipment necessary to perform the contract.

b. Whenever an existing contract satisfies the conditions contained in subsection a. of this section, the contract may be extended for a period of up to 10 years; however, the length of the existing contract together with any extension thereof shall not exceed a total of 12 years. A new contract for the marketing of recyclable materials shall not exceed 10 years. Notwithstanding the provisions of section 5 of P.L.1971, c.198 (C.40A:11-5) to the contrary, a new contract for the marketing of recyclable materials for a term exceeding five years shall be entered into pursuant to public bidding or competitive contracting.

L.2003, c. 150, s. 1.

## Public Works Contracting Generally

### 40A:11-16. Separate plans for various types of work; bids; contracts

- a. (1) In the preparation of plans and specifications for the construction, alteration or repair of any public building by any contracting unit, when the entire cost of the work will exceed the bid threshold, the architect, engineer or other person preparing the plans and specifications may prepare separate plans and specifications for branches of work in the following categories:
- (1) The plumbing and gas fitting and all kindred work;
  - (2) Steam power plants, steam and hot water heating and ventilating and refrigeration apparatus and all kindred work;
  - (3) Electrical work, including any electrical power plants, tele-data, fire alarm, or security system;
  - (4) Structural steel and ornamental iron work; and
  - (5) General construction, which shall include all other work required for the completion of the project.
- (2) With regard to the branch work categories in paragraph (1) of this subsection, the contracting agent shall advertise for and receive, in the manner provided by law, either (a) separate bids for each of said categories, or (b) single bids by general contractors for all the work, goods and services required to complete the public building to be included in a single overall contract, or (c) both. In the case of separate bids under (a) or (c) of this paragraph, contractors for categories (1) through (4) shall not be required to name subcontractors in their bid. In the case of a single bid under (b) or (c), there shall be set forth in the bid the name or names of all subcontractors to whom the general contractor will subcontract for categories (1) through (4). Subcontractors who furnish general construction work pursuant to category (5), or subcontractors who furnish work to named subcontractors pursuant to categories (1) through (4) shall not be named in the bid. Notwithstanding the foregoing provisions of this paragraph, a contracting unit may choose to require in its bid specification that a subcontractor shall be named in a bid when, in the case of (a) of this paragraph, separate bids for each category, the work of that subcontractor exceeds 35 percent of the contracting unit's estimated amount of value of the work, which shall be set forth in the bid specification.
- (3) The contracting unit shall require evidence of performance security to be submitted simultaneously with the bid. Evidence of performance security may be supplied by the bidder on behalf of himself and any or all subcontractors, or by each respective subcontractor, or by any combination thereof which results in evidence of performance security equaling, but in no event exceeding, the total amount bid.
- b. Whenever a bid sets forth more than one subcontractor for any of the categories (1) through (4) in paragraph 1 of subsection a. of this section, the bidder shall submit to the contracting unit a certificate signed by the bidder listing each subcontractor named in the bid for that category. The certificate shall set forth the scope of work, goods and services 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 certificate shall be submitted to the contracting unit simultaneously with the list of the subcontractors. The certificate may take the form of a single certificate listing all subcontractors or, alternatively, a separate certificate



may be submitted for each subcontractor. 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.

c. Contracts shall be awarded to the lowest responsible bidder. In the event that a contract is advertised for both separate bids for each branch of work and for bids for all work, goods, and services, said contract shall be awarded in the following manner: If the sum total of the amounts bid by the lowest responsible bidder for each branch is less than the amount bid by the lowest responsible bidder for all the work, goods and services, the contracting unit shall award separate contracts for each of such branches to the lowest responsible bidder therefor, but if the sum total of the amounts bid by the lowest responsible bidder for each branch is not less than the amount bid by the lowest responsible bidder for all the work, goods and services, the contracting unit shall award a single overall contract to the lowest responsible bidder for all of such work, goods and services. In every case in which a contract is awarded for a single overall contract, all payments required to be made under such contract for work, goods and services supplied by a subcontractor shall, upon the certification of the contractor of the amount due to the subcontractor, be paid directly to the subcontractor.

d. (Deleted by amendment, P.L.2015, c.201).

e. (Deleted by amendment, P.L.2015, c.201).

f. (Deleted by amendment, P.L.2015, c. 201).

L.1971, c.198, s.16; amended 1975, c.353, s.12; 1979, c.350, s.5; 1985, c.60, s.5; 1985, c.469, s.10; 1987, c.48, s.1; 1997, c.408; 1999, c.440, s.24; 2009, c.187; 2012, c.59, s.5; 2015, c.201, s.2.

#### **40A:11-16.1. \$100,000 contracts for improvements to real property; retainage, security**

Whenever any contract, the total price of which exceeds \$100,000.00, entered into by a contracting unit, for the construction, reconstruction, alteration or repair of any building, structure, facility or other improvement to real property, requires the withholding of payment of a percentage of the amount of the contract, the contractor may agree to the withholding of payments in the manner prescribed in the contract, or may deposit with the contracting unit registered book bonds, entry municipal bonds, State bonds or other appropriate bonds of the State of New Jersey, or negotiable bearer bonds or notes of any political subdivision of the State, the value of which is equal to the amount necessary to satisfy the amount that otherwise would be withheld pursuant to the terms of the contract. The nature and amount of the bonds or notes to be deposited shall be subject to approval by the contracting unit. For purposes of this section, "value" shall mean par value or current market value, whichever is lower.

If the contractor agrees to the withholding of payments, the amount withheld shall be deposited, with a banking institution or savings and loan association insured by an agency of the Federal government, in an account bearing interest at the rate currently paid by such institutions or associations on time or savings deposits. The amount withheld, or the bonds or notes deposited, and any interest accruing on such bonds or notes, shall be returned to the contractor upon fulfillment of the terms of the contract relating to such withholding. Any interest accruing on cash payments withheld shall be credited to the contracting unit.

L.1979, c. 152, s. 1; amended 1991, c. 434, s. 1.



#### **40A:11-16.2. Partial payments; deposit bonds**

Any contract, the total price of which exceeds \$100,000.00, entered into by a contracting unit involving the construction, reconstruction, alteration, repair or maintenance of any building, structure, facility or other improvement to real property, shall provide for partial payments to be made at least once each month as the work progresses, unless the contractor shall agree to deposit bonds with the contracting unit pursuant to P.L.1979, c.152 (C.40A:11-16.1).

L.1979, c. 464, s. 1; amended 1999, c. 440, s. 25.

#### **40A:11-16.3. Withholding of payments**

a. With respect to any contract entered into by a contracting unit pursuant to section 1 of P.L.1979, c.464 (C.40A:11-16.2) for which the contractor shall agree to the withholding of payments pursuant to P.L.1979, c.152 (C.40A:11-16.1), 2% of the amount due on each partial payment shall be withheld by the contracting unit pending completion of the contract.

b. Upon acceptance of the work performed pursuant to the contract for which the contractor has agreed to the withholding of payments pursuant to subsection a. of this section, all amounts being withheld by the contracting unit shall be released and paid in full to the contractor within 45 days of the final acceptance date agreed upon by the contractor and the contracting unit, without further withholding of any amounts for any purpose whatsoever, provided that the contract has been completed as indicated. If the contracting unit requires maintenance security after acceptance of the work performed pursuant to the contract, such security shall be obtained in the form of a maintenance bond. The maintenance bond shall be no longer than two years and shall be no more than 100% of the project costs.

L.1979, c. 464, s. 2; amended 1991, c. 434, s. 2; 1999, c. 440, s. 26.

#### **40A:11-16.4. Partial payments for materials**

Any contract entered into by a contracting unit pursuant to section 1 of P.L.1979, c.464 (C.40A:11-16.2) may also provide for partial payments at least once in each month with respect to all materials placed along or upon the site, or stored at secured locations, which are suitable for use in the execution of the contract, if the person providing the materials furnishes releases of liens for the materials at the time each estimate of work is submitted for payment. The total of all the partial payments shall not exceed the cost of the materials.

L.1979, c. 464, s. 3; amended 1999, c. 440, s. 27.

#### **40A:11-16.5. Renegotiation of contract to reflect increase in solid waste disposal costs**

Any person entering into a contract with a contracting unit pursuant to the provisions of P.L.1971, c.198 (C.40A:11-1 et seq.), which contract requires the contractor to provide for the disposal of solid waste, shall have the right to renegotiate the contract to reflect any increase in solid waste disposal costs whenever:

- a. the increase occurred as a result of compliance with an order issued by the Department of Environmental Protection, in conjunction with the Board of Public Utilities, directing the solid waste be disposed at a solid waste facility other than the facility previously utilized by the person to whom the contract has been awarded; or
- b. the increase in solid waste disposal costs occurred as a result of lawful increases in the rates, fees or charges imposed on the disposal of solid waste at the solid waste facility utilized by the person to whom the contract has been awarded.

L.1989, c. 236, s. 1.

**40A:11-16.6. Definitions relative to value engineering change orders: requirement for certain contracts**

a. For the purpose of this act:

"Construction" means the construction, reconstruction, demolition, erection, alteration, or repair of a structure or other improvement to real property, other than the construction, reconstruction, demolition, or renovation of a public building.

"Value engineering construction change order" means a change order that results in cost reductions to a project or any portion of the work from the original bid specifications after a construction contract is awarded.

"Value engineering construction proposal" means a cost reduction proposal based on analysis by a contractor of the functions, systems, equipment, facilities, services, supplies, means and methods of construction, and any other item needed for the completion of the contract consistent with the required performance, quality, reliability, and safety.

b. All construction contracts issued by a contracting unit when the total price of the originally awarded contract equals or exceeds \$5,000,000, shall allow for value engineering construction change orders to be approved after the award of the contract.

c. Value engineering construction change orders shall be subject to the following provisions:

(1) Value engineering construction change orders shall not be used to impair any of the essential functions, or characteristics of the project, or any portion of the work involved.

(2) The contractor shall submit a value engineering construction proposal that completely describes the changes to the original specifications or proposal, impact on other project components, advantages and disadvantages of the proposed change, cost estimates and calculations on which they are based, any impact on the contract time schedule, and any other relevant information that the contracting unit may require in order to review the value engineering construction proposal. The contractor's cost for developing the value engineering construction proposal shall not be eligible for reimbursement by the contracting unit.

(3) The contractor shall be liable for all reasonable costs incurred by the contracting unit for the technical evaluation and engineering review of a value engineering construction proposal presented by the contractor.

(4) The contracting unit's engineer shall prepare a written report for the governing body that shall evaluate the value engineering construction proposal, make a recommendation on whether or not it should be accepted, rejected, or modified, and state to the contracting unit and contractor the amount of any projected cost savings.

(5) The proposal shall not be approved unless the engineer reports to the governing body that the proposal appears consistent with the required performance, quality, reliability, and safety of the project and does not impair any of the essential functions, or characteristics of the project, or any portion of the work involved.

(6) The contracting unit shall have the sole discretion to approve or disapprove a value engineering construction proposal.

(7) The contractor and the contracting unit shall equally share in the cost savings generated on the contract as a result of an approved value engineering construction change order. Once the project is completed, the contracting unit's engineer shall verify the cost savings to reflect the

actual cost of the work, and such verified cost saving shall be the basis for the savings shared equally with the contractor.

(8) The contractor shall have no claim against the contracting unit as a result of the contracting unit's disapproval of a value engineering construction proposal.

(9) A contracting unit shall include in its bid specifications and contract documents procedures to regulate the value engineering construction change order process. Such procedures shall be based on procedures established by the New Jersey Department of Transportation, or any other appropriate State agency, or rules adopted by the director of the Division of Local Government Services.

d. This section shall not invalidate or impair rules regarding change orders adopted by the director of the Division of Local Government Services prior to the effective date of this act. Notwithstanding any provision of P.L.1968, c.410 (C.52:14B-1 et seq.) to the contrary, the director may adopt, immediately upon filing with the Office of Administrative Law, such rules and regulations as the director deems necessary to implement the provisions of P.L.2005, c.67 (C.40A:11-16.6) which shall be effective for a period not to exceed 12 months. The regulations shall thereafter be amended, adopted or readopted in accordance with the provisions of P.L.1968, c.410 (C.52:14B-1 et seq.).

L.2005, c. 67, s. 1.

#### **40A:11-16.7. Changed conditions clauses for certain local public contracts.**

1. All construction contracts issued by a contracting unit for bids which were advertised on or after the effective date of P.L.2017, c.317 (C.40A:11-16.7 et seq.) shall include the changed conditions contract provisions set forth in this section, which provisions shall be deemed to be a part of any such contract even if not expressly incorporated therein, and which provisions may not be modified in any manner by the contracting unit.

a. A contract subject to this section shall include the following differing site conditions provisions:

(1) If the contractor encounters differing site conditions during the progress of the work of the contract, the contractor shall promptly notify the contracting unit in writing of the specific differing site conditions encountered before the site is further disturbed and before any additional work is performed in the impacted area.

(2) Upon receipt of a differing site conditions notice in accordance with paragraph (1) of this subsection, or upon the contracting unit otherwise learning of differing site conditions, the contracting unit shall promptly undertake an investigation to determine whether differing site conditions are present.

(3) If the contracting unit determines different site conditions that may result in additional costs or delays exist, the contracting unit shall provide prompt written notice to the contractor containing directions on how to proceed.

(4) (a) The contracting unit shall make a fair and equitable adjustment to the contract price and contract completion date for increased costs and delays resulting from the agreed upon differing site conditions encountered by the contractor.

(b) If both parties agree that the contracting unit's investigation and directions decrease the contractor's costs or time of performance, the contracting unit shall be entitled to a fair and equitable downward adjustment of the contract price or time of performance.

(c) If the contracting unit determines that there are no differing site conditions present that would result in additional costs or delays, the contracting unit shall so advise the contractor, in writing, and the contractor shall resume performance of the contract, and shall be entitled to pursue a differing site conditions claim against the contracting unit for additional compensation or time attributable to the alleged differing site conditions.

(5) Execution of the contract by the contractor shall constitute a representation that the contractor has visited the site and has become generally familiar with the local conditions under which the work is to be performed.

(6) As used in this subsection, "differing site conditions" mean physical conditions at the contract work site that are subsurface or otherwise concealed and which differ materially from those indicated in the contract documents or are of such an unusual nature that the conditions differ materially from those ordinarily encountered and generally recognized as inherent in the work of the character provided for in the contract.

b. A contract subject to this section shall include the following suspension of work provisions:

(1) The contracting unit shall provide written notice to the contractor in advance of any suspension of work lasting more than 10 calendar days of the performance of all or any portion of the work of the contract.

(2) If the performance of all or any portion of the work of the contract is suspended by the contracting unit for more than 10 calendar days due to no fault of the contractor or as a consequence of an occurrence beyond the contracting unit's control, the contractor shall be entitled to compensation for any resultant delay to the project completion or additional contractor expenses, and to an extension of time, provided that, to the extent feasible, the contractor, within 10 calendar days following the conclusion of the suspension, notifies the contracting unit, in writing, of the nature and extent of the suspension of work. The notice shall include available supporting information, which information may thereafter be supplemented by the contractor as needed and as may be reasonably requested by the contracting unit. Whenever a work suspension exceeds 60 days, upon seven days' written notice, either party shall have the option to terminate the contract for cause and to be fairly and equitably compensated therefor.

(3) Upon receipt of the contractor's suspension of work notice in accordance with paragraph (2) of this subsection, the contracting unit shall promptly evaluate the contractor's notice and promptly advise the contractor of its determination on how to proceed in writing.

(4) (a) If the contracting unit determines that the contractor is entitled to additional compensation or time, the contracting unit shall make a fair and equitable upward adjustment to the contract price and contract completion date.

(b) If the contracting unit determines that the contractor is not entitled to additional compensation or time, the contractor shall proceed with the performance of the contract work, and shall be entitled to pursue a suspension of work claim against the contracting unit for additional compensation or time attributable to the suspension.

(5) Failure of the contractor to provide timely notice of a suspension of work shall result in a waiver of a claim if the contracting unit can prove by clear and convincing evidence that the lack of notice or delayed notice by the contractor actually prejudiced the contracting unit's ability to adequately investigate and defend against the claim.

c. A contract subject to this section shall include the following change in character of work provisions:

(1) If the contractor believes that a change directive by the contracting unit results in a material change to the contract work, the contractor shall so notify the contracting unit in writing. The contractor shall continue to perform all work on the project that is not the subject of the notice.

(2) Upon receipt of the contractor's change in character notice in accordance with paragraph (1) of this subsection, the contracting unit shall promptly evaluate the contractor's notice and promptly advise the contractor of its determination on how to proceed in writing.

(3) (a) If the contracting unit determines that a change to the contractor's work caused or directed by the contracting unit materially changes the character of any aspect of the contract work, the contracting unit shall make a fair and equitable upward adjustment to the contract price and contract completion date. The basis for any such price adjustment shall be the difference between the cost of performance of the work as planned at the time of contracting and the actual cost of such work as a result of its change in character, or as otherwise mutually agreed upon by the contractor and the contracting unit prior to the contractor performing the subject work.

(b) If the contracting unit determines that the contractor is not entitled to additional compensation or time, the contractor shall continue the performance of all contract work, and shall be entitled to pursue a claim against the contracting unit for additional compensation or time attributable to the alleged material change.

(4) As used in this subsection, "material change" means a character change which increases or decreases the contractor's cost of performing the work, increases or decreases the amount of time by which the contractor completes the work in relation to the contractually required completion date, or both.

d. A contract subject to this section shall include the following change in quantity provisions:

(1) The contracting unit may increase or decrease the quantity of work to be performed by the contractor.

(2) (a) If the quantity of a pay item is cumulatively increased or decreased by 20 percent or less from the bid proposal quantity, the quantity change shall be considered a minor change in quantity.

(b) If the quantity of a pay item is increased or decreased by more than 20 percent from the bid proposal quantity, the quantity change shall be considered a major change in quantity.

(3) For any minor change in quantity, the contracting unit shall make payment for the quantity of the pay item performed at the bid price for the pay item.

(4) (a) For a major increase in quantity, the contracting unit or contractor may request to renegotiate the price for the quantity in excess of 120 percent of the bid proposal quantity. If a mutual agreement cannot be reached on a negotiated price for a major quantity increase, the contracting unit shall pay the actual costs plus an additional 10 percent for overhead and an additional 10 percent for profit, unless otherwise specified in the original bid.

(b) For a major decrease in quantity, the contracting unit or contractor may request to renegotiate the price for the quantity of work performed. If a mutual agreement cannot be reached on a negotiated price for a major quantity decrease, the contracting unit shall pay the actual costs plus an additional 10 percent for overhead and an additional 10 percent for profit, unless otherwise specified in the original bid; provided, however, that the contracting unit shall not make a payment in an amount that exceeds 80 percent of the value of the bid price multiplied by the bid proposal quantity.

(5) As used in this subsection, the term "bid proposal quantity" means the quantity indicated in the bid proposal less the quantities designated in the project plans as "if and where directed."

L.2017, c.317, s.1.

#### **40A:11-16.8. Rules, regulations.**

2. The Commissioner of Community Affairs, not later than 90 days immediately following the effective date of P.L.2017, c.317 (C.40A:11-16.7 et seq.), shall promulgate rules and regulations pursuant to the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.) as may be necessary to standardize the forms and procedures throughout the State for the new changed conditions process.

*(Editor's Note: As of this publication rules have not been adopted, but 40A:11-16.7 is otherwise in force.)*

L.2017, c.317, s.2.

#### **40A:11-17. Number of working days specified**

All specifications for the doing of any public work for a contracting unit shall fix the date before which the work shall be completed, or the number of working days to be allowed for its completion; and every such contract shall contain a provision for a deduction, from the contract price, or any wages paid by the contracting unit to any inspector or inspectors necessarily employed by it on the work, for any number of days in excess of the number allowed in the specifications.

L.1971, c. 198, s. 17, eff. July 1, 1971.

#### **40A:11-18. American goods and products to be used where possible**

Each local unit shall provide, in the specifications for all contracts for county or municipal work or for work for which it will pay any part of the cost, or work which by contract or ordinance it will ultimately own and maintain, that only manufactured and farm products of the United States, wherever available, be used in such work.

L.1971, c. 198, s. 18, eff. July 1, 1971. Amended by L.1982, c. 107, s. 1.

#### **40A:11-19. Liquidated damages; void provisions as to contractor's remedies**

Any contract made pursuant to P.L.1971, c.198 (C.40A:11-1 et seq.) may include liquidated damages for the violation of any of the terms and conditions thereof or the failure to perform said contract in accordance with its terms and conditions, or the terms and conditions of P.L.1971, c.198 (C.40A:11-1 et seq.). Notwithstanding any other provision of law to the contrary, it shall be void, unenforceable and against public policy for a provision in a contract entered into under P.L.1971, c.198 (C.40A:11-1 et seq.) to limit a contractor's remedy for the contracting unit's negligence, bad faith, active interference, tortious conduct, or other reasons unanticipated by the parties that delay the contractor's performance, to giving the contractor an extension of time for performance under the contract. For the purposes of this section, "contractor" means a person, his assignees or legal representatives with whom a contract with a contracting unit is made.

L.1971, c. 198, s. 19; amended 1999, c. 440, s. 28; 2001, c. 206, s. 1.

##### **40A:11-19.1. Payment of interest by contracting unit; definitions**

2. A contracting unit, as defined in section 2 of P.L.1971, c.198 (C.40A:11-2), shall pay interest on the amount due a business concern pursuant to a properly executed invoice, when required, if the required payment is not made on or before the required payment date.

Unless otherwise provided for in the contract, the required payment date shall be 60 calendar days from the date specified in the contract or if no required payment is specified in the contract, then the required payment date shall be 60 calendar days from the receipt of a properly executed



invoice, or 60 calendar days from the receipt of goods or services, whichever is later. Interest shall not be paid unless goods and services are rendered.

Interest on amounts due shall be paid to the business concern for the period beginning on the day after the required payment date and ending on the date on which the check for payment is drawn.

Interest shall be paid at the rate specified by the State Treasurer for State late payments to business concerns pursuant to section 4 of P.L.1987, c.184 (C.52:32-35).

Interest may be paid by separate payment to a business concern, but shall be paid within 30 days of the late payment.

A contracting unit may waive the interest payment for a delinquency due to circumstances beyond the control of the contracting unit, including but not limited to a strike or natural disaster.

As used in this section, "business concern" means any person engaged in a trade or business, including a private nonprofit entity operating as an independent contractor, providing goods or services directly to a contracting unit or to a designated third party and operating pursuant to a contract with a contracting unit which requires either a single payment or multiple payments, but shall not include a "public utility" as defined in R.S.48:2-13.

L.2018, c.127, s.2.

#### **40A:11-20. Certificate of bidder showing ability to perform contract**

There may be required from any bidder submitting a bid on public work to any contracting unit, duly advertised for in accordance with law, a certificate showing that he owns, leases, or controls all the necessary equipment required by the plans, specifications and advertisements under which bids are asked for and if the bidder is not the actual owner or lessee of any such equipment, his certificate shall state the source from which the equipment will be obtained, and shall be accompanied by a certificate from the owner or person in control of the equipment definitely granting to the bidder the control of the equipment required during such time as may be necessary for the completion of that portion of the contract for which it is necessary.

L.1971, c. 198, s. 20, eff. July 1, 1971.

#### **40A:11-21. Guarantee to be furnished with bid**

A person bidding on a contract for 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, shall furnish a guarantee as provided for herein. A contracting unit may provide that a person bidding on any other contract, advertised in accordance with law, shall furnish a guarantee as provided for herein. The guarantee shall be payable to the contracting unit so that if the contract is awarded to the bidder, the bidder will enter into a contract therefor and will furnish any performance bond or other security required as a guarantee or indemnification. The guarantee shall be in the amount of 10% of the bid, but not in excess of \$20,000.00, except as otherwise provided herein, and may be given, at the option of the bidder, by certified check, cashier's check or bid bond. In the event that any law or regulation of the United States imposes any condition upon the awarding of a monetary grant to any contracting unit, which condition requires the depositing of a guarantee in an amount other than 10% of the bid or in excess of \$20,000.00 the provisions of this section shall not apply and the requirements of the law or regulation of the United States shall govern.

L.1971, c. 198, s. 21; amended 1974, c. 189; 1999, c. 39, s. 3; 1999, c. 440, s. 29.



#### **40A:11-22. Surety company certificate**

- a. A person bidding on a contract for the erection, alteration or repair of a building, structure, facility or other improvement to real property, the total price of which exceeds \$100,000, shall furnish a certificate from a surety company, as provided for herein. A contracting unit may provide that a person bidding on any other contract shall furnish a certificate from a surety company, as provided for herein.
- b. When a surety company bond is required in the advertisement or specifications for a contract, every contracting unit shall require from any bidder submitting a bid in accordance with plans, specifications and advertisements, as provided for by law, a certificate from a surety company stating that it will provide the contractor with a bond in such sum as is required in the advertisement or in the specifications.

This certificate shall be obtained for a bond—

- (1) For the faithful performance of all provisions of the specifications or for all matters which may be contained in the notice to bidders, relating to the performance of the contract, and
- (2) If any be required, for a guarantee bond for the faithful performance of the contract provisions relating to the repair and maintenance of any work, project or facility and its appurtenances and keeping the same in good and serviceable condition during the term of the bond as provided for in the notice to bidders or in the specifications, or
- (3) In such other form as may be provided in the notice to bidders or in the specifications.

If a bidder desires to offer the bond of an individual instead of that of a surety company, the bidder shall submit with the bid a certificate signed by such individual similar to that required of a surety company.

The contracting unit may reject any such bid if it is not satisfied with the sufficiency of the individual surety offered.

L.1971, c. 198, s. 22; amended 1999, c. 39, s. 4; 1999, c. 440, s. 30.

### **Bid Specifications and Advertising Generally**

#### **40A:11-23. Advertisements for bids: bids; general requirements**

- a. All advertisements for bids shall be published in an official newspaper of the contracting unit sufficiently in advance of the date fixed for receiving the bids to promote competitive bidding, but in no event less than 10 days prior to such date; except that all advertisements for bids on contracts for the collection and disposal of municipal solid waste shall be published in an official newspaper of the contracting unit circulating in the county or municipality, and in at least one newspaper of general circulation published in the State, sufficiently in advance of the date fixed for receiving the bids to promote competitive bidding, but not less than 60 days prior to that date. For all contracts, the date fixed for receiving the bids shall not fall on a Monday, or any day directly following a State or federal holiday.
- b. The advertisement shall designate the manner of submitting and the method of receiving the bids and the time and place at which the bids will be received. If the published specifications provide for receipt of bids by mail, those bids which are mailed to the contracting unit shall be sealed and shall

only be opened for examination at such time and place as all bids received are unsealed and announced. At such time and place the contracting agent of the contracting unit shall publicly receive the bids, and thereupon immediately proceed to unseal them and publicly announce the contents, which announcement shall be made in the presence of any parties bidding or their agents, who are then and there present, and shall also make proper record of the prices and terms, upon the minutes of the governing body, if the award is to be made by the governing body of the contracting unit, or in a book kept for that purpose, if the award is to be made by other than the governing body, and in such latter case it shall be reported to the governing body of the contracting unit for its action thereon, when such action thereon is required. No bids shall be received after the time designated in the advertisement.

c. Notice of revisions or addenda to advertisements or bid documents shall be provided as follows:

- 1) For all contracts except those for construction work and municipal solid waste collection and disposal service, notice shall be published no later than seven days, Saturdays, Sundays, and holidays excepted, prior to the date for acceptance of bids, in an official newspaper of the contracting unit and be provided to any person who has submitted a bid or who has received a bid package, in one of the following ways: i) in writing by certified mail or ii) by certified facsimile transmission, meaning that the sender's facsimile machine produces a receipt showing date and time of transmission and that the transmission was successful or iii) by a delivery service that provides certification of delivery to the sender.
- 2) For all contracts for construction work, notice shall be provided no later than seven days, Saturdays, Sundays, or holidays excepted, prior to the date for acceptance of bids, to any person who has submitted a bid or who has received a bid package in any of the following ways: i) in writing by certified mail or ii) by certified facsimile transmission, meaning that the sender's facsimile machine produces a receipt showing date and time of transmission and that the transmission was successful or iii) by a delivery service that provides certification of delivery to the sender.
- 3) For municipal solid waste collection and disposal contracts, notice shall be published in an official newspaper of the contracting unit and in at least one newspaper of general circulation published in the State no later than seven days, Saturdays, Sundays, and holidays excepted, prior to the date for acceptance of bids.

d. Failure of the contracting unit to advertise for the receipt of bids or to provide proper notification of revisions or addenda to advertisements or bid documents related to bids as prescribed by this section shall prevent the contracting unit from accepting the bids and require the readvertisement for bids pursuant to subsection a. of this section. Failure to obtain a receipt when good faith notice is sent or delivered to the address or telephone facsimile number on file with the contracting unit shall not be considered failure by the contracting unit to provide notice.

L.1971, c. 198, s. 23; amended 1975, c. 353, s. 13; 1983, c. 174; 1985, c. 429; 1991, c. 381, s. 50; 1997, c. 243. 1999, c. 440, s. 31; 2005, c. 191, s. 5; 2007, c. 4, s. 1.

#### **40A:11-23.1. Plans, specifications, bid proposal documents; required contents**

All plans, specifications and bid proposal documents for the erection, alteration, or repair of a building, structure, facility or other improvement to real property, the total price of which exceeds the amount set forth in, or the amount calculated by the Governor pursuant to, section 3 of P.L.1971, c.198 (C.40A:11-3), shall include:

- a. a document for the bidder to acknowledge the bidder's receipt of any notice or revisions or addenda to the advertisement or bid documents; and

b. a form listing those documentary and informational forms, certifications, and other documents that the contracting agent requires each bidder to submit with the bid. The form shall 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. Each bidder shall complete this form and submit it with the bid proposal in addition to those documentary and informational forms, certifications, and other documents that are listed on the form; and

c. a statement indicating whether uniformed law enforcement officers will be required for the project. The statement shall include a line item allowance, which shall be a good faith effort on the part of the contracting unit, to reasonably estimate the total cost of traffic control personnel, vehicles, equipment, administrative, or any other costs associated with additional traffic control requirements required by the contracting unit, or any other public entity affected by the project, above and beyond the bidder's traffic control personnel, vehicles, equipment, and administrative costs. The individuals responsible for the assignment of uniformed law enforcement officers for any municipalities affected by a project shall be required to determine where traffic safety control is needed for a project, and calculate the number and placement of all necessary personnel, equipment, and the costs associated with these, including hourly rates, and submit this information to the contracting unit.

The contracting unit shall not be responsible for additional traffic control costs beyond the number of working days specified in the construction contract in accordance with section 17 of P.L.1971, c.198 (C.40A:11-17), when such a delay is caused by the contractor and liquidated damages have been assessed.

The statement prescribed under this subsection shall not be required if the contracting unit will provide for the direct payment of uniformed law enforcement officers and any additional costs directly associated with the provision of those officers; and

d. at the option of the contracting unit, specified alternate proposals in addition to a base specification. When the contracting unit specifies alternate proposals, the determination of which bidder's response to a request for bids offers the lowest price shall be made on the basis of the price of: (i) the base specification plus the price of any selected specified alternate proposals; or (ii) a choice of specified alternative proposals within the limit of funds that may be made available for a project. If a contracting unit provides for more than one specified alternate proposal, the contracting unit shall specify in the bid specification the criteria or ranked order by which specified alternate proposals shall be selected and included in the award of the contract by the governing body, provided that this requirement shall only apply to a project with a total estimated cost, including specified alternate proposals, of greater than \$500,000. The aggregate dollar value of accepted specified alternative proposals shall not exceed 50 percent of the base bid. If a contracting unit is found in a court of law to have chosen specific alternative proposals in a manner intended to award a contract to a specific vendor, the bids shall be voided, the contracting unit shall rebid the project, and a plaintiff who prevails in any proceeding shall be entitled to a reasonable attorney's fee.

For the purposes of this subsection:

"Specified alternate proposal" means a requirement of the bid specification for bidders to submit prices for reduced, modified or supplemental work in addition to the base proposal which may include, but not be limited to, a change in project scope or the use of alternative materials or methods of construction;

"Base specification" means the plans and specifications for the erection, alteration or repair of the building, structure, facility or other improvement to real property that are required to be met by all bidders without exception; and

e. in the case of a project that includes the removal of soil from the site, disclosure of any documentation relative to the known soil conditions at the site including, but not limited to, any test results specifying the level of contamination, if any, of the soil that has been found at the site of the project, or if a project is located on a site with historical or suspected contamination, a line item allowance or minimum unit price line item for soil testing and contaminated soil disposal, which shall be a good faith effort on the part of the contracting unit to reasonably estimate the total cost of testing the soil and disposing of it.

L.1999, c.39, s.1; amended 2006, c.9; 2009, c.292; 2012, c.73, s.1.

**40A:11-23.1a. Approval of change order under certain circumstances.**

In the case of a project for the erection, alteration, or repair of a building, structure, facility or other improvement to real property, the total price of which exceeds the amount set forth in, or the amount calculated by the Governor pursuant to, section 3 of P.L.1971, c.198 (C.40A:11-3), that does not have historical or suspected soil contamination, or for which the plans, specifications and bid proposal documents for the project do not include a line item allowance or minimum unit price line item for soil testing and contaminated soil disposal pursuant to subsection e. of section 1 of P.L.1999, c.39 (C.40A:11-23.1), and contaminated soil from the site cannot be disposed of pursuant to the plans, specifications and bid proposal documents due to the contaminated soil being found to be different from the type or quality originally disclosed, the contracting unit shall approve, consistent with and subject to the "Local Public Contracts Law," P.L.1971, c.198 (C.40A:11-1 et seq.), and any rules or regulations adopted pursuant thereto, a change order to reimburse the contractor for the additional reasonable costs, as determined by the contracting unit, required to test and dispose of the contaminated soil.

L.2012, c.73, s.2.

**40A:11-23.2. Required mandatory items for bid plans, specification**

When required by the bid plans and specifications, the following requirements shall be considered mandatory items to be submitted at the time specified by the contracting unit for the receipt of the bids; the failure to submit any one of the mandatory items shall be deemed a fatal defect that shall render the bid proposal unresponsive and that cannot be cured by the governing body:

- a. A guarantee to accompany the bid pursuant to section 21 of P.L.1971, c.198 (C.40A:11-21);
- b. A certificate from a surety company pursuant to section 22 of P.L.1971, c.198 (C.40A:11-22);
- c. A statement of corporate ownership pursuant to section 1 of P.L.1977, c.33 (C.52:25-24.2);
- d. A listing of subcontractors pursuant to section 16 of P.L.1971, c.198 (C.40A:11-16);
- e. A document provided by the contracting agent in the bid plans, specifications, or bid proposal documents for the bidder to acknowledge the bidder's receipt of any notice or revisions or addenda to the advertisement or bid documents; and
- f. (Deleted by amendment, P.L.2009, c.315.)

L.1999, c. 39, s. 2; amended 2004, c. 57, s. 1; 2009, c.315, s.1.

#### **40A:11-23.3. Withdrawal of public works bid**

a. In the case of a bidding process for a public works contract, a bidder may request withdrawal of a bid, due to a mistake on the part of the bidder, within five business days after a bid opening. As used in this section, "mistake" shall have the same meaning as provided in paragraph 42 of section 2 of P.L.1971, c.198 (C.40A:11-2).

b. To request the withdrawal of a public works bid, a bidder shall submit a request for withdrawal in writing by certified or registered mail to the address to which the bid was submitted. The request shall be effective upon mailing. The request shall include evidence, including any pertinent documents, demonstrating that a mistake was made and was of so great a consequence that:

- (1) the enforcement of the contract, if actually made, would be unconscionable;
- (2) the mistake relates to a material feature of the bid;
- (3) the mistake occurred notwithstanding the fact that the bidder exercised reasonable care in preparation of the bid; and
- (4) the bidder making the mistake is able to get relief by way of withdrawing the bid without serious prejudice to the contracting unit, except for the loss of the bargain to the contracting unit.

c. A purchasing agent qualified pursuant to subsection b. of section 9 of P.L.1971, c.198 (C.40A:11-9), or legal counsel for the contracting unit, or the chief administrative officer of the contracting unit, shall review the request for bid withdrawal. No later than the next meeting of the governing body of the contracting unit following receipt of the withdrawal request, the individual responsible for reviewing the request shall make a recommendation to the governing body of the contracting unit concerning the disposition of the request. The governing body of the contracting unit shall act upon the request to withdraw the bid no later than at its next regular meeting.

d. The purchasing agent, legal counsel, or chief administrative officer responsible for reviewing the request pursuant to subsection b. of this section, shall act in good faith in reviewing the request and in making a recommendation to the governing body concerning the disposition of a request to withdraw a bid.

e. A contracting unit whose governing body grants a request to withdraw a bid shall return the bid guarantee to the bidder. Once the decision to approve the withdrawal is made, the contracting unit shall continue the award process with the remaining bids.

f. If a bidder withdraws a bid, the bidder shall be disqualified from future bidding on the same project, including whenever all bids are rejected pursuant to section 21 of P.L.1999, c.440 (C.40A:11-13.2).

L.2010, c.108, s.3.

#### **40A:11-23.4. "Bulletin NJ"**

*(Editor's Note – The provisions of N.J.S.A. 40A:11-23.4 and 23.5) have never been implemented)*

a. The Division of Local Government Services in the Department of Community Affairs, in consultation with the Office of Information Technology, shall design, develop, and maintain a single, searchable Internet database, to be known as "Bulletin NJ," that contains and displays information on requests for proposals and other government procurement opportunities published by a contracting unit or a board of education, as defined by N.J.S.18A:18A-2.

b. Each entry in the Internet database shall include information as required pursuant to rules and regulations adopted by the Division of Local Government Services.

c. In addition to the requirements specified in subsection a. of this section, the Internet database shall:

- (1) be accessible from the Division of Local Government Services Internet website;
- (2) display all of the information required by subsection b. of this section;
- (3) be searchable by the name of the contracting unit or board of education publishing the request for proposals;
- (4) be reviewed and updated at least once per month or more frequently as new information becomes available or changes are necessary; and

(5) provide an opportunity for the public to submit input and feedback concerning the utility of the Internet database and recommendations for its improvement.

d. All contracting units and boards of education, as defined by N.J.S.18A:18A-2, are directed to submit information as required pursuant to rules and regulations adopted by the Division of Local Government Services.

e. Nothing in this section shall require the disclosure of information deemed confidential by State or federal law.

f. Nothing in this section shall be interpreted to invalidate or otherwise impact an otherwise valid contract entered in to pursuant to the "Local Public Contracts Law," P.L.1971, c.198 (C.40A:11-1 et seq.) or the "Public School Contracts Law," N.J.S.18A:18A-1 et seq.

L.2011, c.71, s.1.

#### **40A:11-23.5. Rules, regulations**

The Division of Local Government Services in the Department of Community Affairs shall adopt, pursuant to the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), rules and regulations to effectuate the purposes of this act (L.2011,c.71; c.40A:11-23.4)

L.2011, c.71, s.2.

#### **40A:11-24. Time for making awards; deposits returned**

a. The contracting unit shall award the contract or reject all bids within such time as may be specified in the invitation to bid, but in no case more than 60 days, except that the bids of any bidders who consent thereto may, at the request of the contracting unit, be held for consideration for such longer period as may be agreed. All bid security, except the security of the three apparent lowest responsible bidders, shall be returned, unless otherwise requested by the bidder, within 10 days after the opening of the bids, Sundays and holidays excepted, and the bids of such bidders shall be considered as withdrawn. Within three days, Sundays and holidays excepted, after the awarding and signing of the contract and the approval of the contractor's performance bond, the bid security of the remaining unsuccessful bidders shall be returned to them.

b. The contract shall be signed by all parties within the time limit set forth in the specifications, which shall not exceed 21 days, Sundays and holidays excepted, after the making of the award; provided, however, that all parties to the contract may agree to extend the limit set forth in the



specifications beyond the 21 day limit required in this subsection. The contractor, upon written request to the contracting unit, is entitled to receive, within seven days of the request, an authorization to proceed pursuant to the terms of the contract on the date set forth in the contract for work to commence, or, if no date is set forth in the contract, upon receipt of authorization. If for any reason the contract is not awarded and the bidders have paid for or paid a deposit for the plans and specifications to the contracting unit, the payment or deposit shall immediately be returned to the bidders when the plans and specifications are returned in reasonable condition within 90 days of notice that the contract has not been awarded.

L.1971, c. 198, s. 24; amended by L. 1975, c. 353, s. 14; 1977, c. 53, s. 8; 1983, c. 175; 1987, c. 48, s. 2.

### **Prequalification of Bidders**

#### **40A:11-25. General power to provide qualification for bidders**

The governing body of any contracting unit may establish reasonable regulations appropriate for controlling the qualifications of prospective bidders upon contracts to be awarded on behalf of the contracting unit, by the class or category of goods or services to be provided or performed, which may fix the qualifications required according to the financial ability and experience of the bidders and the capital and equipment available to them pertinent to and reasonably related to the class or category of goods or services to be provided or performed in the performance of any such contract, and may require each bidder to furnish a statement thereof; and if such governing body is not satisfied with the qualifications of any bidder as founded upon such statement, it may refuse to furnish the bidder with any plans or specifications for any public contract or consider any bid made by the bidder for any contract.

Prior to the adoption of any such regulations, a contracting unit shall submit them to a public hearing. Notice of the hearing and a general description of the subject matter of the regulations to be adopted shall be published in not less than two newspapers circulating in the county or municipality in which the contracting unit is located. Publication shall precede by at least 20 days the date set in the notice for the hearing. The clerk or secretary of the governing body of the contracting unit shall keep a record of the proceedings and of the testimony of any citizen or prospective bidder. Within 10 days after the completion of the hearings, the proposed regulations and a true copy of the hearings shall be forwarded to the Director of the Division of Local Government Services for the director's approval. This approval shall be indicated by a letter from the director to the governing body of the contracting unit. If the director fails to approve or disapprove the regulations within 30 days of their receipt by the director, they shall take effect without the director's approval. The director may disapprove such proposed regulations only if the director finds that:

- (a) They are written in a manner which will unnecessarily discourage full, free and open competition; or
- (b) They unnecessarily restrict the participation of small businesses in the public bidding process; or
- (c) They create undue preferences; or
- (d) They violate any other provision of this act, or any other law.

If the director disapproves such proposed regulations within the 30-day period prescribed, they shall be of no force and effect and may not be required as a condition to the acceptance of a bid on any public contract by the contracting unit. Any appeal from a decision of the director to the Local



Finance Board shall be subject to the provisions of the "Local Government Supervision Act (1947)", P.L.1947, c.151 (C.52:27BB-1 et seq.).

No qualification rating of any bidder shall be influenced by the bidder's race, religion, sex, national origin, nationality or place of residence or business.

Nothing contained in this act shall limit the right of any court to review a refusal to furnish any such plans or specifications or to consider any bid on any contract advertised.

Any such governing body may adopt a standard form of statement or questionnaire for bidders on public works contracts, and in such case their action shall be governed as provided herein.

L.1971, c. 198, s. 25; amended 1999, c. 440, s. 32.

#### **40A:11-26. Standard questionnaire; effect of unsatisfactory answers**

The governing body of any contracting unit may adopt a standard form of statement or questionnaire for bidders and may require from any person proposing to bid upon any such contract a statement or answers showing the bidder's financial ability and experience in performing public sector work and describing the equipment available to such bidder in the performance of such contract, and if not satisfied with the sufficiency of this statement or answers may refuse to furnish plans and specifications to the bidder.

L.1971, c. 198, s. 26; amended 1999, c. 440, s. 33.

#### **40A:11-27. Standard statements and questionnaires; prospective bidders; responses**

Such statements and questionnaires shall be standardized for like classes of goods or services to be submitted to prospective bidders who may be required to respond to questions under oath. The statement or answer shall disclose fully the financial ability, adequacy of plant and equipment, organization and prior experience of the prospective bidder, and such other pertinent and material facts as may be required.

L.1971, c. 198, s. 27; amended 1999, c. 440, s. 34.

#### **40A:11-28. Classification of prospective bidders; notice**

Prospective bidders shall be classified as to the character and amount of goods or services contracts as to which they shall be qualified to submit bids, and bids shall be accepted only from persons so qualified. The classification shall be made and an immediate notice thereof shall be sent to the prospective bidders by certified or registered mail within eight days after the date of receipt of the responsive statement or answers.

L.1971, c. 198, s. 28; amended 1999, c. 440, s. 35.

#### **40A:11-29. Reclassification of prospective bidders; request for; time limit**

If any person, after being notified of a classification, shall be dissatisfied therewith or with the classification of other bidders, that person may request in writing a hearing before such governing body, and may present such further evidence with respect to the financial responsibility, organization, plant and equipment, or experience of that person or other prospective bidders as might tend to justify a different classification.

Where a request is made for the change of classification of another prospective bidder, the applicant therefor shall notify such other bidder by certified or registered mail of the time and place of hearing, as fixed by the governing body, and at the hearing shall present satisfactory evidence that the notice was served as herein required, before any matters pertaining to a change of

classification of such other bidder shall be taken up. After hearing such evidence the governing body may, in its discretion, by appropriate action, change or retain the classification of any bidder.

No change in classification to be effective for any contract where bidding therefor has been duly advertised, shall be made unless the written request therefor shall have been received at least 20 days before the final day for submission of bids.

All requests for change in classification and notice of any action sent by certified or registered mail to the parties directly affected thereby, shall be acted upon by the governing body concerned at least eight days prior to the date fixed for the next opening of bids on any contract or contracts for which such persons might be qualified to bid as a result of the reclassification.

L.1971, c. 198, s. 29; amended 1999, c. 440, s. 36.

#### **40A:11-30. Board of review upon classification; membership, et cetera**

There is hereby established a board of review upon classification and reclassification of prospective bidders. This board shall consist of one member of the governing body of the contracting unit concerned and two citizens of the county or municipality to be designated by such governing body. In all counties having a county supervisor, he shall be a member of the board of review instead of one of the citizens. The clerk of the contracting unit shall be the secretary of the board of review and shall keep a complete record of its proceedings and decisions. The members of the board shall serve without compensation.

L.1971, c. 198, s. 30, eff. July 1, 1971.

#### **40A:11-31. Reconsideration by board of review; request for; time limit**

Any prospective bidder who is dissatisfied with an original classification or reclassification may upon receipt of notice thereof, request in writing a hearing of the matter before the board of review. The request shall be filed with the contracting agent and the secretary of the board.

The board shall hold a hearing at which the prospective bidder shall be entitled to be heard and to submit additional information.

The board shall review the responsibility of all prospective bidders who have filed statements or answers, considering both the statement, answers and any additional information given at the hearing, and shall certify to the contracting unit concerned, its decision as to the original classifications or reclassifications, if any. The decisions shall be made by a majority vote.

In order for any change in classification by the board to be effective for a contract previously advertised, the request shall be filed not less than five days prior to the final day for submission of bids, and the board shall hold a hearing and act upon the request not less than two days prior to the date fixed for the next opening of bids on any public works contract for which such prospective bidders might be qualified to bid as a result of the reclassification.

L.1971, c. 198, s. 31; amended 1999, c. 440, s. 37.

#### **40A:11-32. Rejection of bids after qualification of bidder; hearing**

Nothing herein contained shall be construed as depriving any governing body of the right to reject a bid at any time prior to the actual award of a contract, where the circumstances of the prospective bidder have changed subsequent to the qualification and classification of the bidder, which in the opinion of the awarding contracting unit would adversely affect the responsibility of the bidder. Before taking final action on any such bid, the contracting agent concerned shall notify the

bidder and afford the bidder an opportunity to present any additional information which might tend to sustain the existing classification.

No person shall be qualified to bid on any contract unless that person shall have submitted a statement or answers as herein required within a period of six months preceding the date of opening of bids for the contract, if the bidders thereon are required to be classified hereunder. In any case where the contracting unit shall require classification of the bidders in compliance with these sections, each bidder on any contract shall be required to submit a statement listing the changes in the statement or answers herein required as part of the bidder's bid submission.

L.1971, c. 198, s. 32; amended 1999, c. 440, s. 38.

#### **40A:11-33. Forfeiture of deposit in certain cases**

A deposit made by any person who makes or causes to be made a false, deceptive or fraudulent statement or answers in response to a questionnaire or in the course of a hearing hereunder may be caused to be forfeited, as liquidated damages by and to the contracting unit.

L.1971, c. 198, s. 33, eff. July 1, 1971.

#### **40A:11-34. Penalties for false statements**

Any person who makes or causes to be made, a false, deceptive or fraudulent statement in the statement or answers in response to the questionnaire, or in the course of any hearing hereunder, shall be guilty of a misdemeanor, and upon conviction shall be punishable by a fine of not less than \$100.00 nor more than \$1,000.00, and shall be permanently disqualified from bidding on all public work or contracts of the contracting unit which submitted the questionnaire; or, in the case of an individual or an officer or employee charged with the duty of responding to the questionnaire for a person, firm, copartnership, association or corporation, by such fine or by imprisonment, not exceeding 6 months, or both.

L.1971, c. 198, s. 34, eff. July 1, 1971.

### **General Provisions**

#### **40A:11-35. Indemnity agreements; Federal projects for benefit of municipality**

Any contracting unit may enter into an agreement indemnifying the United States of America, or any board, body, officer or agency thereof, from loss or damage to the property of others resulting from the furtherance of any project, undertaken or to be undertaken by the Federal Government for the benefit of such contracting unit where the cost or any part thereof is to be paid out of Federal funds.

L.1971, c. 198, s. 35, eff. July 1, 1971.

#### **40A:11-36. Sale or other disposition of personal property**

Any contracting unit by resolution of its governing body may authorize by sealed bid or public auction the sale of its personal property not needed for public use.

(1) If the estimated fair value of the property to be sold exceeds 15 percent of the bid threshold in any one sale and it is neither livestock nor perishable goods, it shall be sold at public sale to the highest bidder.

(2) The contracting unit need not advertise for bids when it makes any such sale to the United States, the State of New Jersey, another contracting unit, any body politic to which it contributes

tax raised funds, any foreign nation which has diplomatic relations with the United States, or any governmental unit in the United States.

(3) Notice of the date, time and place of the public sale together with a description of the items to be sold and the conditions of sale shall be published in an official newspaper. Such sale shall be held not less than seven nor more than 14 days after the latest publication of the notice thereof.

(4) If no bids are received the property may then be sold at private sale without further publication or notice thereof, but in no event at less than the estimated fair value; or the contracting unit may if it so elects reoffer the property at public sale. As used herein, "estimated fair value" means the market value of the property between a willing seller and a willing buyer less the cost to the contracting unit to continue storage or maintenance of any personal property not needed for public use to be sold pursuant to this section.

(5) A contracting unit may reject all bids if it determines such rejection to be in the public interest. In any case in which the contracting unit has rejected all bids, it may readvertise such personal property for a subsequent public sale. If it elects to reject all bids at a second public sale, pursuant to this section, it may then sell such personal property without further publication or notice thereof at private sale, provided that in no event shall the negotiated price at private sale be less than the highest price of any bid rejected at the preceding two public sales and provided further that in no event shall the terms or conditions of sale be changed or amended.

(6) If the estimated fair value of the property to be sold does not exceed the applicable bid threshold in any one sale or is either livestock or perishable goods, it may be sold at private sale without advertising for bids.

(7) Notwithstanding the provisions of this section, by resolution of the governing body, a contracting agent may include the sale of personal property no longer needed for public use as part of specifications to offset the price of a new purchase.

L.1971, c. 198, s. 36; amended 1999, c. 440, s. 39.

#### **40A:11-37. Division of Local Government Services to assist contracting units**

The Division of Local Government Services in the Department of Community Affairs is hereby authorized to assist contracting units in all matters affecting the administration of this law.

L.1971, c. 198, s. 37; amended 1999, c. 440, s. 40.

##### **40A:11-37.1. Rules**

Pursuant to the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), the Director of the Division of Local Government Services after consultation with the Commissioner of Education may adopt rules implementing the provisions of the "Local Public Contracts Law," P.L.1971, c.198 (C.40A:11-1 et seq.) and the "Public School Contracts Law," N.J.S.18A:18A-1 et seq.

L.1999, c. 440, s. 44.

#### **40A:11-38. Statutes repealed**

The following sections, chapter and acts, together with all amendments and supplements thereto, are hereby repealed:

Chapter 25 of Title 40 of the Revised Statutes;

Sections 40:9-3; 40:15-1; 40:50-1 to 40:50-5 inclusive and 40:50-7, of the Revised Statutes;

Laws of 1943, c. 198 (C. 40:50-5.1 to C. 40:50-5.4 inclusive);

Laws of 1945, c. 158 (C. 40:50-5.5);

Laws of 1945, c. 160 (C. 40:50-5.6);

Laws of 1949, c. 67 (C. 40:50-8);

Laws of 1962, c. 168 (C. 40:50-5.7);

Laws of 1953, c. 395 (C. 40:25-1.1);

Laws of 1964, c. 245 (C. 40:50-7.1 to C. 40:50-7.3 inclusive);

Laws of 1967, c. 228 (C. 40:23-6.34 to C. 40:23-6.37 inclusive);

L.1969, c. 104, s. 1 (C. 40:25-4.5).

L.1971, c. 198, s. 38, eff. July 1, 1971.

#### **40A:11-39. Effective date**

This act shall take effect July 1, 1971 but any action, purchase, sale, contract or agreement taken, made or entered into prior to this date pursuant to any of the acts, amendments and supplements hereby repealed are hereby validated and confirmed, provided that in no event shall a lease entered into prior to the effective date of this act be renewed or extended, except in accordance with the terms and provisions of this act.

L.1971, c. 198, s. 39, eff. July 1, 1971.

#### **40A:11-40. Authorization to purchase specific materials at auction; procedure**

Notwithstanding any provisions of the "Local Public Contracts Law," P.L.1971, c.198 (C.40A:11-1 et seq.), to the contrary, the governing body may by resolution authorize the purchasing agent of the contracting unit to purchase specific materials at auction for a price not to exceed 85% of the price of equivalent materials as determined pursuant to this section. Such resolution shall be adopted at least 10 days prior to the auction and shall be filed with the Director of the Division of Local Government Services within 3 days of its adoption. Any such auction shall be open to any person to attend and bid on such materials, shall be conducted pursuant to N.J.S.12A:2-328, and shall be conducted by a licensed auctioneer. Prior to adoption of the resolution, the purchasing agent shall solicit at least three written quotations of prices for which new materials equivalent to those to be purchased at auction were actually sold within the previous year. The lowest of the three prices so quoted shall be the determining price quotation for the authorization to purchase at auction for a price not to exceed 85% thereof. The authorizing resolution adopted by the governing body shall set forth the three price quotations so quoted and the sources thereof, and shall state that the expenditure of money for the purchase is not made in violation of N.J.S.40A:4-57, and has been properly certified by the chief finance officer of the local unit.

Any purchasing agent who shall purchase materials at auction pursuant to this section shall, within 14 days of the occurrence of such auction, file a report with the clerk of the governing body and the director, setting forth: the nature, quantity and price of the materials so purchased; the three price quotations solicited prior to such auction, and the sources thereof; and, the name and license number of the auctioneer who conducted such auction.

L.1979, c. 222, s. 1; amended 1994, c. 114, s. 10.

## Set Aside Contracts

### 40A:11-41. Definitions

As used in this act:

- a. "County or municipal contracting agency" shall mean the governing body of a county or municipality or any department, board, commission, committee, authority or agency of a county or municipality but shall not include school districts;
- b. "Minority group members" shall mean persons who are black, Hispanic, Portuguese, Asian-American, American Indian or Alaskan natives;
- c. "Qualified women's business enterprise" shall mean a business which has its principal place of business in this State, is independently owned and operated, is at least 51 percent owned and controlled by women and is qualified pursuant to section 25 of P.L.1971, c.198 (C.40A:11-25);
- d. "Qualified minority business enterprise" shall mean a business which has its principal place of business in this State, is independently owned and operated, is at least 51 percent owned and controlled by minority group members and is qualified pursuant to section 25 of P.L.1971, c.198 (C.40A:11-25);
- e. "Qualified small business enterprise" shall mean a business which has its principal place of business in this State, is independently owned and operated and meets all other qualifications as may be established in accordance with P.L.1981, c.283 (C.52:27H-21.1 et seq.);
- f. "Set-aside contracts" shall mean (1) a contract for goods, equipment, construction, or services which is designated as a contract for which bids are invited and accepted only from qualified small business enterprises, qualified veteran business enterprises, qualified minority business enterprises or qualified women's business enterprises, as appropriate, (2) a portion of a contract when that portion has been so designated, or (3) any other purchase or procurement so designated;
- g. "Total procurements" shall mean all purchases, contracts or acquisitions of a county or municipal contracting agency, whether by competitive bidding, single source contracting, or other method of procurement, as prescribed or permitted by law;
- h. "Veteran" means any resident of this State now or hereafter who has served in any branch of the Armed Forces of the United States or a Reserve component thereof or the National Guard of this State or another state as defined in section 1 of P.L.1963, c.109 (C.38A:1-1), and has been discharged honorably or under general honorable conditions from such service, except that the veteran shall present to the Adjutant General of the Department of Military and Veterans' Affairs sufficient evidence of a record of service, which shall include the applicant's DD-214, DD-215, or DD-256 form as issued by the federal government; NGB-22 or other approved separation forms as outlined by all branches of the Armed Forces; a county-issued veteran identification card pursuant to P.L.2012, c.30 (C.40A:9-78.1 et seq.); or a veteran identification card as issued by the United States Department of Veterans Affairs under the "Veterans Identification Card Act of 2015," (38 U.S.C. s.5706) and receive a determination of status no later than the date established for the submission of bids; and
- i. "Qualified veteran business enterprise" shall mean a business which has its principal place of business in this State, is independently owned and operated, is at least 51 percent owned and controlled by a veteran or that wherein at least twenty five percent of the required workforce



for the contract are veterans, including new hires if additional workers are required to perform the contract, and is qualified pursuant to section 25 of P.L.1971, c.198 (C.40A:11-25). The business shall also submit forms quarterly to the contracting agency showing proof of veteran status for all the veteran employees.

L.1985, c.482, s.1; amended 2013, c.5, s.1; 2019, c.500, s.11.

#### **40A:11-42. Set-aside programs authorized**

- a. The governing body of a county or municipality may, by ordinance or resolution, as appropriate, establish a qualified minority business enterprise set-aside program. In authorizing such a program, the governing body of a county or municipality shall establish a goal for its contracting agencies of setting aside a certain percentage of the dollar value of total procurements to be awarded as set-aside contracts to qualified minority business enterprises.
- b. The governing body of a county or municipality may, by ordinance or resolution, as appropriate, establish a qualified women's business enterprise set-aside program. In authorizing such a program, the governing body of a county or municipality shall establish a goal for its contracting agencies of setting aside a certain percentage of the dollar value of total procurements to be awarded as set-aside contracts to qualified women's business enterprises.
- c. The governing body of a county or municipality may, by ordinance or resolution, as appropriate, establish a qualified small business enterprise set-aside program. In authorizing such a program, the governing body of a county or municipality shall establish a goal for its contracting agencies of setting aside a certain percentage of the dollar value of total procurements to be awarded as set-aside contracts to qualified small business enterprises.
- d. The governing body of a county or municipality may, by ordinance or resolution, as appropriate, establish a qualified veteran business enterprise set-aside program. In authorizing such a program, the governing body of a county or municipality shall establish a goal for its contracting agencies of setting aside a certain percentage of the dollar value of total procurements to be awarded as set-aside contracts to qualified veteran business enterprises.

L.1985, c.482, s.2; amended 2013, c.5, s.2.

#### **40A:11-43. Attainment of goals**

- a. Any goal established pursuant to section 2 of this act may be attained by requiring that a portion of a contract be subcontracted to a qualified small business enterprise, qualified veteran business enterprise, qualified minority business enterprise or qualified women's business enterprise, in addition to designating entire contracts to these enterprises.
- b. Each contracting agency shall make a good faith effort to attain any goal established by its governing body. The governing body shall evaluate each contracting agency's efforts by comparing the percentage of the dollar value of a contracting agency's total procurements awarded to qualified small business enterprises, qualified veteran business enterprise, qualified minority business enterprises or qualified women's business enterprises, as appropriate, to the percentage of the dollar value of the county's or municipality's total procurements awarded to qualified small business enterprises, qualified veteran business enterprise, qualified minority business enterprises or qualified women's business enterprises, as appropriate.

L. 1985, c. 482, s. 3; amended 2013, c.5, s.3.

#### **40A:11-44. "Local Public Contracts Law" applicable**

All provisions of the "Local Public Contracts Law," P.L. 1971, c. 198 (C. 40A:11-1 et seq.) and any supplements thereto, shall apply to purchases, contracts and agreements made pursuant to this act unless otherwise superseded by the provisions of this act.

L. 1985, c. 482, s. 4, eff. Jan. 17, 1986.

#### **40A:11-45. Designation as set-aside**

Notwithstanding the provisions of any law to the contrary, a contracting agency of a county or municipality which has established a qualified small business enterprise set-aside program, qualified veteran business enterprise set-aside program, a qualified minority business enterprise set-aside program or a qualified women's business enterprise set-aside program shall designate that a contract, subcontract or other means of procurement of goods, services, equipment, or construction be awarded to a qualified small business enterprise, qualified veteran business enterprise, a qualified minority business enterprise or a qualified women's business enterprise, if a contracting agency is likely to receive bids from at least two qualified small business enterprises, qualified veteran business enterprises, qualified minority business enterprises or qualified women's business enterprises, as appropriate, at a fair and reasonable price.

Such designations shall be made prior to any advertisement for bids, if required. Once designated, the advertisement for bids, if necessary, shall indicate that the contract to be awarded is a qualified small business enterprise set-aside contract, qualified veteran business enterprise set-aside contract, a qualified minority business enterprise set-aside contract or a qualified women's business enterprise set-aside contract, as appropriate. All advertisements for bids shall be published in at least one newspaper which will best provide notice thereof to qualified small business enterprises, qualified veteran business enterprises, qualified minority business enterprises or to qualified women's business enterprises, as appropriate, sufficiently in advance of the date fixed for receiving the bids to promote competitive bidding, but shall not be published less than 10 days prior to that date.

L. 1985, c. 482, s. 5; amended 2013, c.5, s.4.

#### **40A:11-46. Set-aside cancellation**

a. If the contracting agency determines that two bids from qualified small, qualified veteran, qualified minority or qualified women's businesses cannot be obtained, the contracting agency may withdraw the designation of the set-aside contract and resolicit bids on an unrestricted basis pursuant to the provisions of P.L. 1971, c. 198 (C. 40A:11-1 et seq.). The cancelled designation shall not be considered in determining the percentage of contracts awarded pursuant to subsection b. of section 3 of this act.

b. If the contracting agency determines that the acceptance of the lowest responsible bid will result in the payment of an unreasonable price, the contracting agency shall reject all bids and withdraw the designation of the set-aside contract. Qualified small business enterprises, qualified veteran business enterprises, qualified minority business enterprises or qualified women's business enterprises, as appropriate, shall be notified in writing of the set-aside cancellation, the reasons for the rejection and the agency's intent to resolicit bids on an unrestricted basis pursuant to the provisions of P.L. 1971, c. 198 (C. 40A:11-1 et seq.). The cancelled bid solicitation shall not be considered in determining the percentage of contracts awarded pursuant to subsection b. of section 3 of this act.

L. 1985, c. 482, s. 6; amended 2013, c.5, s.4.

#### **40A:11-47. False information; penalties**

Where the governing body of a county or municipality determines that a business has been classified as a qualified small business enterprise, qualified veteran business enterprise, qualified minority business enterprise or qualified women's business enterprise on the basis of false information knowingly supplied by the business and has been awarded a contract to which it would not otherwise have been entitled under this act, the governing body shall have the authority to:

- a. Assess against the business any difference between the contract and what the governing body's cost would have been if the contract had not been awarded in accordance with the provisions of this act;
- b. In addition to the amount due under subsection a., assess against the business a penalty in an amount of not more than 10% of the amount of the contract involved; and
- c. Order the business ineligible to transact any business with the governing body or contracting agency of the governing body for a period to be determined by the governing body.

Prior to any final determination, assessment or order under this section, the governing body shall afford the business an opportunity for a hearing on the reasons for the imposition of the penalties set forth in subsection a., b. or c. of this section.

L. 1985, c. 482, s. 7, amended 2013, c.5, s.4.

#### **40A:11-48. Annual agency report**

Each contracting agency of a county or municipality which has established a qualified small business enterprise set-aside program, a qualified veteran business enterprise set-aside program, a qualified minority business enterprise set-aside program or a qualified women's business enterprise set-aside program shall submit a report to its governing body by January 31 of each year describing the agency's efforts in attaining the set-aside goals and the percentage of the dollar value of total procurements awarded pursuant to subsection b. of section 3 of this act. The governing body shall publish a list of each agency's attainments in the immediately preceding local fiscal year, to include the county or municipal average, in at least one newspaper circulating in the county or municipality, as appropriate, by March 1 of each year.

L. 1985, c. 482, s. 8, eff. Jan. 17, 1986.

#### **40A:11-49. Rules, regulations**

The Director of the Division of Local Government Services in the Department of Community Affairs may adopt rules and regulations pursuant to the provisions of the "Administrative Procedure Act," P.L. 1968, c. 410 (C. 52:14B-1 et seq.) as he may deem necessary to effectuate the purposes of this act.

*(Editor's Note: no rules have been adopted. The statute guides implementation.)*

L. 1985, c. 482, s. 9; amended 2013, c.5, s.7.

<b>Alternative Dispute Resolution/Pay-to-Play/Public Private Partnerships</b>
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#### **40A:11-50. Process of resolution for construction contract disputes**

All construction contract documents entered into in accordance with the provisions of P.L.1971, c.198 (C.40A:11-1 et seq.) after the effective date of P.L.1997, c.371 (C.40A:11-50) shall provide that disputes arising under the contract shall be submitted to a process of resolution pursuant to

alternative dispute resolution practices, such as mediation, binding arbitration or non-binding arbitration pursuant to industry standards, prior to being submitted to a court for adjudication. Nothing in this section shall prevent the contracting unit from seeking injunctive or declaratory relief in court at any time. The alternative dispute resolution practices required by this section shall not apply to disputes concerning the bid solicitation or award process, bid withdrawal, or to the formation of contracts or subcontracts to be entered into pursuant to P.L.1971, c.198 (C.40A:11-1 et seq.).

Notwithstanding industry rules or any provision of law to the contrary, whenever a dispute concerns more than one contract, such as when a dispute in a contract involving construction relates to a contract involving design, architecture, engineering or management, upon the demand of a contracting party, other interested parties to the dispute shall be joined unless the arbitrator or person appointed to resolve the dispute determines that such joinder is inappropriate. Notwithstanding industry rules or any provision of law to the contrary, whenever more than one dispute of a similar nature arises under a construction contract, or related construction contracts, upon the demand of a contracting party, the disputes shall be joined unless the arbitrator or person appointed to resolve the dispute determines that the disputes are inappropriate for joinder.

For the purposes of this section, the term "construction contract" means a contract involving construction, or a contract related thereto concerning architecture, engineering or construction management.

L.1997, c.371, s.1; amended 2010, c.108, s.2.

**40A:11-51.** (Repealed by P.L. 2023, c.30, s.37, eff. April 3, 2023)

**40A:11-52 Definitions relative to public-private projects.**

1. a. As used in this section:

"Authority" means the New Jersey Economic Development Authority established pursuant to section 4 of P.L.1974, c.80 (C.34:1B-4).

"Bundling" means the use of a solicitation for multiple projects in one single contract, through a public-private partnership project delivery method, the result of which restricts competition.

"Local government unit" means a county, a municipality, or any board, commission, committee, authority or agency thereof that is subject to the provisions of the "Local Public Contracts Law," P.L.1971, c.198 (C.40A:11-1 et seq.), including a housing authority or redevelopment agency created or continued under the "Local Redevelopment and Housing Law," P.L.1992, c.79 (C.40A:12A-1 et seq.). A local government unit shall not include a public entity that has entered into a contract with a private firm or a public authority pursuant to the "New Jersey Wastewater Treatment Public-Private Contracting Act," P.L.1995, c.216 (C.58:27-19 et al.), for the provision of wastewater treatment services.

"Project" means the development, construction, reconstruction, repair, alteration, improvement, extension, operation, and maintenance of any building, local or county road, vertical structure, or facility constructed or acquired by a local government unit to operate local government functions, including any infrastructure or facility used or to be used by the public or in support of a public purpose or activity; and including any site acquisition, provided that, with respect to a project, a qualifying project shall include an expenditure of at least \$10 million in public funds, or any expenditure in solely private funds.

"Public building, road, structure, infrastructure, or facility" means any site building, road, structure, infrastructure, or facility used or to be used by a local government unit to house a local government function or functions, including any infrastructure or facility used or to be used by the public, or in support of a public purpose or activity.

"Public-private partnership agreement" means an agreement entered into by a local government unit and a private entity pursuant to this section for the purpose of permitting a private entity to assume full financial and administrative responsibility for the development, construction, reconstruction, repair, alteration, improvement, extension, operation, and maintenance of a project of, or for the benefit of, the local government unit.

b. (1) A local government unit may enter into a contract with a private entity, subject to subsection f. of this section, to be referred to as a public-private partnership agreement, that permits the private entity to assume full financial and administrative responsibility for a project of, or for the benefit of, the local government unit, provided that the project is financed in whole by the private entity and the local unit retains full ownership of the land upon which the project is located.

(2) A public-private partnership agreement may include an agreement under which a local government unit and a private entity enter into a lease of a revenue-producing public building, road, structure, infrastructure, or facility in exchange for up-front or structured financing by the private entity for the project. Under the lease agreement, the private entity shall be responsible for the management, operation, and maintenance of the building, road, structure, infrastructure, or facility. The private entity shall receive some or all, as per the agreement, of the revenue generated by the building, road, structure, infrastructure, or facility, and shall operate the building, road structure, infrastructure, or facility in accordance with local government unit standards. At the end of the lease term, subsequent revenue generated by the building, road, structure, infrastructure, or facility, along with management, operation, and maintenance responsibility, shall revert to the local government unit. A lease agreement entered into pursuant to this section shall be limited in duration to a term of not more than 30 years. A lease agreement shall be subject to all applicable provisions of current law governing leases by a local government unit not inconsistent with the provisions of this section. For the purposes of this section, "revenue-producing" shall include leaseback arrangements.

(3) Bundling of projects shall be prohibited under this section.

(4) Nothing in this section shall be construed to exempt a local government unit from provisions of the "Local Bond Law," N.J.S.40A:2-1 et seq., or the "Local Authorities Fiscal Control Law," P.L.1983, c.313 (C.40A:5A-1 et seq.), or other law, that may apply to local government unit borrowing or financing, including but not limited to provisions requiring review by and approval from the Local Finance Board or the Director of the Division of Local Government Services in the Department of Community Affairs.

c. (1) Unless otherwise set forth herein, a private entity that assumes full financial and administrative responsibility for a project pursuant to this section shall not be subject to the procurement and contracting requirements of all statutes applicable to the local government unit at which the project is completed, including, but not limited to, the "Local Public Contracts Law," P.L.1971, c.198 (C.40A:11-1 et seq.).

(2) Notwithstanding any provision of law to the contrary, a public entity shall be empowered to enter into contracts with a private entity and its affiliates without being subject to the procurement and contracting requirements of any statute applicable to the public entity provided that the private entity has been selected by the local government unit pursuant to a solicitation of proposals or qualifications from at least two private entities, or it has received an unsolicited proposal and

followed the procedure set forth in paragraph (4) of subsection j. of this section. A local government unit shall be the owner or lessee of any project being financed by a local government unit.

(3) Prior to the commencement of work on a project, the private entity shall establish a construction account and appoint a third-party financial institution, who shall be prequalified by the State Treasurer, to act as a collateral agent, and manage the construction account. The construction account shall include the funding, financial instruments, or both, that shall be used to fully capitalize and fund the project, and the collateral agent shall maintain a full accounting of the funds and instruments in the account. The funds and instruments in the construction account shall be held in trust for the benefit of the contractor, construction manager, and design-build team involved in the project. The funds and instruments in the construction account shall not be the property of the private entity unless all amounts due to the construction account beneficiaries are paid in full. The construction account shall not be designated for more than one project.

d. Each worker employed in the construction, rehabilitation, or building maintenance services of facilities by a private entity that has entered into a public-private partnership agreement with a local government unit pursuant to this section shall be paid not less than the prevailing wage rate for the worker's craft or trade as determined by the Commissioner of Labor and Workforce Development pursuant to P.L.1963, c.150 (C.34:11-56.25 et seq.) and P.L.2005, c.379 (C.34:11-56.58 et seq.).

e. (1) All building construction projects under a public-private partnership agreement entered into pursuant to this section shall contain a project labor agreement. The project labor agreement shall be subject to the provisions of P.L.2002, c.44 (C.52:38-1 et seq.), and shall be in a manner that to the greatest extent possible enhances employment opportunities for individuals residing in the county of the project's location. The general contractor, construction manager, design-build team, or subcontractor for a construction project proposed in accordance with this paragraph shall be registered pursuant to the provisions of P.L.1999, c.238 (C.34:11-56.48 et seq.), and shall be classified by the Division of Property Management and Construction, or shall be prequalified by the Department of Transportation, New Jersey Transit, or the New Jersey Turnpike Authority, as appropriate, to perform work on a public-private partnership project.

(2) All projects proposed in accordance with this section shall be submitted to the State Treasurer, in consultation with the New Jersey Economic Development Authority and the Department of Community Affairs for a review and approval in accordance with subsection f. of this section prior to the execution of the public-private partnership agreement and, when practicable, are encouraged to adhere to the Leadership in Energy and Environmental Design Green Building Rating System as adopted by the United States Green Building Council, the Green Globes Program adopted by the Green Building Initiative, or a comparable nationally recognized, accepted, and appropriate sustainable development rating system.

(3) The general contractor, construction manager, or design-build team shall be required to post a performance bond to ensure the completion of the project and a payment bond guaranteeing prompt payment of moneys due in accordance with and conforming to the requirements of N.J.S.2A:44-143 et seq.

(4) Prior to being submitted to the State Treasurer for review and approval, all projects proposed in accordance with this section shall be subject to a public hearing, the record of which shall be made available to the public within seven days following the conclusion of the hearing, after the ranking of proposals takes place pursuant to paragraph (5) of subsection j. of this section. The local government unit shall provide notice of the public hearing no less than 14 days prior to the date of the hearing. The notice shall prominently state the purpose and nature of the proposed



project, and shall be published on the official Internet website of the local government unit and at least once in one or more newspapers with Statewide circulation.

(5) Prior to entering into a public-private partnership, the local government unit shall determine: (i) the benefits to be realized by the project; (ii) the cost of project if it is developed by the public sector supported by comparisons to comparable projects; (iii) the maximum public contribution that local government unit will allow under the public-private partnership; (iv) a comparison of the financial and non-financial benefits of the public-private partnership compared to other options including the public sector option; (v) a list of risks, liabilities and responsibilities to be transferred to the private entity and those to be retained by the local government unit; and (vi) if the project has a high, medium or low level of project delivery risk and how the public is protected from these risks.

(6) Prior to entering into a public-private partnership, the local government unit at a public hearing shall find that the project is in the best interest of the public by finding that (i) it will cost less than the public sector option, or if it costs more there are factors that warrant the additional expense; (ii) there is a public need for the project and the project is consistent with existing long-term plans; (iii) there are specific significant benefits to the project; (iv) there are specific significant benefits to using the public-private partnership instead of other options including No-Build; (v) the private development will result in timely and efficient development and operation; and (vi) the risks, liabilities and responsibilities transferred to the private entity provide sufficient benefits to warrant not using other means of procurement.

f. (1) All projects proposed in accordance with this section shall be submitted to the State Treasurer for review and approval, which shall be conducted in consultation with the Commissioner of the Department of Community Affairs. The projects are encouraged, when practicable, to adhere to the green building manual prepared by the Commissioner of Community Affairs pursuant to section 1 of P.L.2007, c.132 (C.52:27D-130.6).

(2) All projects proposed in accordance with this section that have a transportation component or impact the transportation infrastructure shall be submitted to the State Treasurer, in consultation with the Commissioner of the Department of Transportation, for review and approval.

(3) (a) In order for an application to be complete and considered by the State Treasurer, the application shall include, but not be limited to: (i) a full description of the proposed public-private partnership agreement between the local government unit and the private developer, including all information obtained by and findings of the local government unit pursuant to paragraphs (4) and (5) of subsection e. of this section; (ii) a full description of the project, including a description of any agreement for the lease of a revenue-producing facility related to the project; and (iii) the estimated costs and financial documentation for the project showing the underlying financial models and assumptions that determined the estimated costs. The financial documentation shall include at least three different projected estimated costs showing scenarios in which materially different economic circumstances are assumed and an explanation for how the estimated costs were determined based on the three scenarios; (iv) a timetable for completion of the construction of the project; (v) an analysis of all available funding options for the project, including an analysis of the financial viability and advisability of such project, along with evidence of the public benefit in advancing the project as a public-private partnership; (vi) a record of the public hearing held pursuant to paragraph (4) of subsection e. of this section, which shall have been made available to the public within seven days following the conclusion of the hearing; and (vii) any other requirements that the State Treasurer deems appropriate or necessary. The application shall also include a resolution by the local government unit's governing body of its intent to enter into a public-private partnership agreement pursuant to this section.

(b) As part of the estimated costs and financial documentation for the project, the application shall contain a long-range maintenance plan and a long-range maintenance bond and shall specify the expenditures that qualify as an appropriate investment in maintenance. The long-range maintenance plan shall be approved by the State Treasurer pursuant to regulations promulgated by the State Treasurer that reflect national building maintenance standards and other appropriate building maintenance benchmarks.

(4) The State Treasurer, in consultation with the authority and the Commissioner of the Department of Community Affairs, shall review all completed applications, and request additional information as is needed to make a complete assessment of the project. No public-private partnership agreement shall be executed until approval has been granted by the State Treasurer. Prior to a final decision by the State Treasurer on the application, the authority and the Department of Community Affairs shall be afforded the opportunity to provide comments on the application that they deem appropriate, and the State Treasurer shall consider any comments submitted by the authority and the Department of Community Affairs with respect to the application. In order to approve the application, the State Treasurer shall find that: (i) the local government unit's assumptions regarding the project's scope, its benefits, its risks and the cost of the public sector option were fully and reasonably developed; (ii) the design of the project is feasible; (iii) the experience and qualifications of the private entity; (iv) the financial plan is sound; (v) the long-range maintenance plan is adequate to protect the investment; (vi) the project is in the best interest of the public, using the criteria in paragraph (6) of subsection e. of this section; (vii) a resolution by the local government unit's governing body of its intent to enter into a public-private partnership agreement for the project has been received; and (viii) the term sheet for any proposed procurement contains all necessary elements. The State Treasurer shall retain the right to revoke approval if the project has substantially deviated from the plan submitted pursuant to this section, and shall retain the right to cancel a procurement after a short list of private entities is developed if deemed in the public interest.

(5) The State Treasurer, the authority, and division may promulgate any rules and regulations necessary to implement this subsection, including, but not limited to, provisions for fees to cover administrative costs, and for the determination of minimum local government unit standards for the operation of the project, and for the qualification for professional services, construction contracting, and other relevant qualifications.

g. A project with an expenditure of under \$50 million developed under a public-private partnership agreement shall include a requirement that precludes contractors from engaging in the project if the contractor has contributed to the private entity's financing of the project in an amount of more than 10% of the project's financing costs.

h. The power of eminent domain shall not be delegated to any private entity under the provisions of P.L.2018, c.90 (C.40A:11-52 et al.); however, a local government unit may dedicate any property interest, including improvements and tangible personal property of the local government unit for public use in a qualifying project if the local government unit finds that so doing will serve the public purpose of the project by minimizing the cost of the project to the local government unit or reducing the delivery time of a project.

i. Any public-private partnership agreement, if appropriate, shall include provisions affirming that the agreement and any work performed under the agreement are subject to the provisions of the "Construction Industry Independent Contractor Act," P.L.2007, c.114 (C.34:20-1 et seq.). Any public-private partnership agreement shall also include, at a minimum: (i) the term of the agreement; (ii) the total project cost; (iii) a completion date guarantee; (iv) a provision for damages if the private entity fails to meet the completion date; and (v) a maximum rate of return to the

private entity and a provision for the distribution of excess earnings to the local government unit or to the private party for debt reduction.

j. (1) A private entity seeking to enter into a public-private partnership agreement with the local government unit shall be qualified by the local government unit as part of the procurement process, provided such process ensures that the private entity and its subcontractors and consultants, when relevant meet at least the minimum qualifications standards promulgated by the State Treasurer, in consultation with the New Jersey Economic Development Authority, Department of Community Affairs, and such other local government unit standards for qualification for professional services, construction contracting, and other qualifications applicable to the project, prior to submitting a proposal under the procurement process.

(2) A request for qualifications for a public-private partnership agreement shall be advertised at least 45 days prior to the anticipated date of receipt. The advertisement of the request for qualifications shall be published on the official Internet website of the local government unit and at least one or more newspapers with Statewide circulation.

(3) After the local government unit determines the qualified respondents utilizing, at minimum, the qualification standards promulgated by the State Treasurer, the local government entity shall issue a request for proposals to each qualified respondent no less than 45 days prior to the date established for submission of the proposals. The request for proposals shall include relevant technical submissions, documents, and the evaluation criteria to be used in the selection of the designated respondent. The evaluation criteria shall be, at minimum, criteria promulgated by the State Treasurer, in consultation with the New Jersey Economic Development Authority and Department of Community Affairs.

(4) The local government unit may accept unsolicited proposals from private entities for public-private partnership agreements. If the local government unit receives an unsolicited proposal and determines that it meets the standards of this section, the local government unit shall publish a notice of the receipt of the proposal on the Internet site of the local government unit and through advertisement in at least one or more newspapers with Statewide circulation. The local government unit shall also provide notice of the proposal at its next scheduled public meeting and to the State Treasurer. To qualify as an unsolicited proposal, the unsolicited proposal shall at a minimum include a description of the public-private project, the estimated construction and life-cycle costs, a timeline for development, proposed plan of financing, including projected revenues, public or private, debt, equity investment, description of how the project meets needs identified in existing plans, the permits and approvals needed to develop the project from local, state and federal agencies and a projected schedule for obtaining such permits and approvals, a statement of risks, liabilities and responsibilities to be assumed by the private entity. The notice shall provide that the local government unit shall accept, for 120 days after the initial date of publication, proposals meeting the standards of this section from other private entities for eligible projects that satisfy the same basic purpose and need. A copy of the notice shall be mailed to each municipal and county local government body in the geographic area affected by the proposal.

(5) After the proposal or proposals have been received, and any public notification period has expired, the local government unit shall rank the proposals in order of preference. In ranking the proposals, the local government unit shall rely upon, at minimum, the evaluation criteria promulgated by the State Treasurer, in consultation with the New Jersey Economic Development Authority and the Department of Community Affairs. In addition, the local government unit may consider factors that include, but may not be limited to, professional qualifications, general business terms, innovative engineering, architectural services, or cost-reduction terms, finance plans, and the need for local government funds to deliver the project and discharge the agreement.

The private entity selected shall comply with all laws and regulations required by the State government entity, including but not limited to section 1 of P.L.2001, c.134 (C.52:32-44), sections 2 through 8 of P.L.1975, c.127 (C.10:5-32 to 38), section 1 of P.L.1977, c.33 (C.52:25.24-2), P.L.2005, c.51 (C.19:44A-20.13 et al.); P.L.2005, c.271 (C.40A:11-51 et al.), Executive Order No. 117 of 2008, Executive Order No. 118 of 2008, Executive Order No. 189, prior to executing the public private partnership agreement. If only one proposal is received, the local government unit shall negotiate in good faith and, if not satisfied with the results of the negotiations, the local government unit may, at its sole discretion, terminate negotiations.

(6) The local government unit may require, upon receipt of one or more proposals, that the private entity assume responsibility for all costs incurred by the local government unit before execution of the public-private partnership agreement, including costs of retaining independent experts to review, analyze, and advise the local government unit with respect to the proposal.

(7) Stipends may be used on public private partnership projects when there is a substantial opportunity for innovation and the costs for developing a proposal are significant. The local government unit may elect to pay unsuccessful proposers for the work product they submit with their proposal in response to a request for proposals. The use by the local government unit of any design element contained in an unsuccessful proposal shall be at the sole risk and discretion of the local government unit and shall not confer liability on the recipient of the stipulated stipend amount. After payment of the stipulated stipend amount, the local government unit and the unsuccessful proposer shall jointly own the rights to, and may make use of any work product contained in the proposal, including the technologies, techniques, methods, processes, ideas, and information contained in the proposal, project design, and project financial plan. The use by the unsuccessful proposer of any part of the work product contained in the proposal shall be at the sole risk of the unsuccessful proposer and shall not confer liability on the local government unit. The State Treasurer, in consultation with the New Jersey Economic Development Authority of New Jersey and Department of Community Affairs shall promulgate guidelines based upon which any stipends paid by a local government unit are to be based.

(8) The local government unit shall set aside one percent of each project and remit it the Public Private Partnership Review fund established pursuant to P.L.2018, c.90 (C.40A:11-52 et al.), for purposes of plan review and analysis required under the bill.

(9) Nothing in this section shall be construed as or deemed a waiver of the sovereign immunity of the State, the local government unit or an affected locality or public entity or any officer or employee thereof with respect to the participation in or approval of all or any part of the public-private project.

L.2018, c.90, s.1.

### **Design Build Construction Contract Laws**

#### **40A:11-53 Definitions**

26. As used in sections 26 through 33 of P.L.2021, c.71 (C.40A:11-53 through C.40A:11-60):

"Acceptance" means the adoption of a law, ordinance, or resolution by the State of New Jersey, any of its political subdivisions, any authority created by the Legislature of the State of New Jersey and any instrumentality or agency of the State of New Jersey or of any of its political subdivisions, authorizing the execution of a design-build contract.

"Contracting unit" means a government entity that enters into contracts pursuant to the "Local Public Contracts Law," P.L.1971, c.198 (C.40A:11-1 et seq.).

"Delivery system" means the procedure used to develop and construct a project.

"Design-bid-build" means the delivery system used in public projects in which a licensed and prequalified design professional or designated employee develops the project design in its entirety; the contracting unit then solicits bids and awards the contract to the lowest responsible bidder that demonstrates the ability to complete the project specified in the design.

"Design-build contract" means a contract between a contracting unit and a design-builder to provide labor, materials, and other construction services for a public project. A design-build contract may be conditional upon subsequent refinements in scope and price, and may permit the contracting unit to make changes in the scope of the project without invalidating the design-build contract.

"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 is registered pursuant to the provisions of P.L.1999, c.238 (C.34:11-56.48 et seq.), and classified by the New Jersey Division of Property Management and Construction or the New Jersey Department of Transportation, where applicable, to perform work on a design-build project.

"Design professional" means the entity, whether natural person, partnership, joint stock company, corporation, trust, professional corporation, business association, or other legal business entity or successor that provides licensed and prequalified architectural, engineering, or surveying services in accordance with R.S.45:3-1 et seq., and P.L.1938, c.342 (C.45:8-27 et seq.), and that shall be responsible for planning, designing and observing the construction of the project or projects.

"Evaluation factors" means the requirements for the first phase of the selection process, and shall include, but not be limited to: specialized experience, training certification of professional and field workforce, technical competence, capacity to perform, safety modification rating, past performance and other appropriate factors. Price shall only be considered in the second phase of the selection process.

"Proposal" means an offer to enter into a design-build contract.

"Stipend" means the fee paid to a design-builder by the contracting unit to encourage competition.

L.2021, c.71, s.26

#### **40A:11-54. Entry into design-build contracts permitted**

27. a. If a contracting unit determines in its discretion that the design-build approach meets their needs better than the traditional design-bid-build approach established under New Jersey public procurement statutes for the project or projects under consideration, it shall be the public policy of this State to permit that contracting unit to enter into design-build contracts as defined in section 26 of P.L.2021, c.71 (C.40A:11-53), provided the following conditions are met:

(1) The project or projects under consideration have a cost equal to or exceeding \$5,000,000.

(2) The contracting unit shall, prior to issuing solicitations, publish procedures consistent with regulations promulgated by the Department of Community Affairs, where applicable for the



solicitation and award of design-build contracts, and shall adhere to sections 26 through 33 of P.L.2021, c.71 (C.40A:11-53 through C.40A:11-60) and those procedures; and

(3) The contracting unit shall, for each public project or projects under sections 26 through 33 of P.L.2021, c.71 (C.40A:11-53 through C.40A:11-60), make a determination based on the timeliness of the project or projects that it is in the best interest of the public to enter into a design-build contract to complete the public project or projects.

b. All workers employed in a design-build construction project shall be paid the prevailing wage determined by the Commissioner of Labor pursuant to the provisions of the "New Jersey Prevailing Wage Act," P.L.1963, c.150 (C.34:11-56.25 et seq.).

c. All design-build construction projects shall be encouraged to adhere to the Leadership in Energy and Environmental Design Green Building Rating System as adopted by the United States Green Building Council, the Green Globes Program adopted by the Green Building Initiative, or a comparable nationally recognized, accepted, and appropriate sustainable development system.

d. Any design-build contract awarded pursuant to sections 26 through 33 of P.L.2021, c.71 (C.40A:11-53 through C.40A:11-60) may be reviewed by the Office of the State Comptroller.

L.2021, c.71, s.27.

#### **40A:11-55. Procedures for awarding design-build contracts**

28. a. The contracting unit shall adopt the following procedures for awarding design-build contracts:

(1) The contracting unit shall either appoint a licensed and prequalified design professional, or designate an employee of the contracting unit licensed to provide architectural, engineering, or surveying services, to provide technical advice, construction review services, and professional expertise on behalf of the contracting unit;

(2) The contracting unit shall develop, with the assistance of the design professional or designated employee, performance criteria and a scope of work statement that defines the project and provides prospective design-builders with sufficient information regarding the contracting unit's requirements. The statement shall include: evaluation factor criteria and preliminary design documents, general budget parameters, and general schedule or delivery requirements to enable the design-builders to submit proposals which meet the contracting unit's needs. When the design-build selection procedure is used and the contracting unit contracts for development of the scope of work statement, the design-builder shall contract for architectural or engineering services as defined by and in accordance with R.S.45:3-1 et seq., P.L.1938, c.342 (C.45:8-27 et seq.), and all other applicable licensing statutes;

(3) Once the contracting unit has developed a scope of work statement which adequately defines the contracting unit's requirements for the project or projects, the contracting unit shall solicit proposals of qualification from design-builders. The contracting unit shall solicit proposals of qualification in accordance with the requirements of the applicable public procurement laws of the State of New Jersey.

(4) The contracting unit shall establish a technical review committee, which shall consist of a representative of the contracting unit, the contracting unit's project manager, and the contracting unit's authorized design professional. The contracting unit's attorney may advise the technical review committee. The technical review committee shall have the responsibility to evaluate bids based on rating and scoring proposals, and shall evaluate design-builders based on their



qualifications. A member of the technical review committee shall not have a personal or financial interest in any of the design-builders submitting proposals.

b. The factors used to evaluate proposals of qualification shall be stated in the solicitation and shall include, but not be limited to: specialized experience and technical competence, training certification of professional and field workforce, principal location of the company, capability to perform, safety modification rating, past performance of the individual members of the design-builder's team in their respective capacities, including the architect-engineer and construction members of the team, and other appropriate technical and qualification factors as determined by the Department of Community Affairs, where applicable. Each solicitation for proposals of qualification shall establish the relative importance assigned to the evaluation factors and sub-factors to be considered.

c. A solicitation for proposals of qualification shall state the maximum number of design-builders that are to be selected to submit second proposals. The maximum number specified in the solicitation shall be at least two and shall not exceed six.

d. The contracting unit may offer a stipend, based upon the project size and type, which shall not exceed three percent of the project's estimated cost, to any design-builder providing design, construction information, or materials presented in response to a request for second proposals. This stipend is intended to encourage the submission of proposals and to increase competition.

e. On the basis of the proposal of qualification, the technical review committee shall select the most highly qualified number of design-builders specified in the solicitation and request the selected design-builders to submit a second proposal and sealed bid. Each solicitation for second proposals shall establish the relative importance assigned to the evaluation factors to be considered.

f. The technical review committee shall evaluate each second proposal based on the technical submission for the proposal, including design concepts or proposed solutions to requirements addressed within the scope of work, and the evaluation factors, including a minimum of 50 percent consideration based on the cost of the bid. g. The contracting unit shall separately evaluate the submissions described above, and award the contract in accordance with section 32 of P.L.2021, c.71 (C.40A:11-59).

L.2021, c.71, s.28.

#### **40A:11-56. Evaluation factors contained in proposals**

29. a. Each request for proposals shall contain evaluation factors prepared by a design professional or designated employee as defined in section 26 of P.L.2021, c.71 (C.40A:11-53). The design professional or designated employee that develops the evaluation factors shall be disqualified from submitting a proposal to enter into the design-build contract, and the design-builder shall not be permitted to delegate services under the design-build contract to the design professional or designated employee that developed the evaluation factors.

b. The design professional or designated employee that develops the evaluation factors shall be either an employee of the contracting unit or shall be engaged in compliance with applicable New Jersey public procurement laws, and to the extent allowed by law may delegate the development of specific aspects of the design criteria to other consultants.

c. The contracting unit, in consultation with the design professional or designated employee, shall determine the scope and level of detail required for the evaluation factors. The evaluation factors should be detailed enough to permit qualified persons to submit proposals in accordance with the solicitation, given the nature of the public project and the level of design to be provided in the proposal.

L.2021, c.71, s.29.

#### **40A:11-57. Inclusions in solicitations for design-build contracts**

30. a. Solicitations for each design-build contract shall include, but not be limited to, the following:

- (1) The identity of the contracting unit which shall award the design-build contract;
- (2) The procedures to be followed for submitting proposals, the criteria for evaluation of proposals and their relative weight, and the procedures for making awards, including a reference to the requirements of sections 26 through 33 of P.L.2021, c.71 (C.40A:11-53 through C.40A:11-60) and the regulations of the contracting unit;
- (3) The proposed terms and conditions for the design-build contract;
- (4) A description of the drawings, specifications, or other submittals to be submitted with the proposal, with guidance as to the form and level of completeness of the drawings, specifications, or submittals that shall be acceptable;
- (5) A schedule for planned commencement and completion of the design-build contract;
- (6) Budget limits for the design-build contract, if any;
- (7) Affirmative action, disadvantaged business or set-aside goals or requirements for the design-build contract, in accordance with the requirements of all rules, regulations, standards, or policies adopted by the contracting unit;
- (8) The required qualifications of the design-builder;
- (9) Requirements for contractors and the design professional to have performance bonds, payment bonds, and insurance, and to meet all the qualifications of the Division of Property Management and Construction in the Department of the Treasury or the Department of Transportation where applicable; and
- (10) A statement that the prospective design-builder is in compliance with all applicable laws, including the "New Jersey Prevailing Wage Act," P.L.1963, c.150 (C.34:11-56.25 et seq.), "The Public Works Contractor Registration Act," P.L.1999, c.238 (C.34:11-56.48 et seq.), and the "Construction Industry Independent Contractor Act," P.L.2007, c.114 (C.34:20-1 et seq.).

b. The solicitation may include any other information which the contracting unit in its discretion chooses to supply, including without limitation, surveys, soils reports, drawings or models of existing structures, environmental studies, photographs or references to public records.

c. Notice of solicitations shall be advertised in the same manner in which proposals generally are solicited for public projects.

L.2021, c.71, s.30.

#### **40A:11-58. Inclusions on design-build team**

31. a. Each design-build team shall include a licensed or prequalified design professional independent from the contracting unit's licensed architect or engineer. The licensed or prequalified design professional shall be named in any proposal submitted to the contracting unit.
- b. Proposals shall be sealed and shall not be opened until expiration of the time established for making proposals as set forth in the solicitation.
- c. Proposals shall identify each person to whom the design-builder proposes to delegate obligations under the design-build contract. Persons so identified shall not be replaced without the approval of the contracting unit.
- d. Proposals shall establish the cost of the design-build contract which shall not be exceeded if the proposal is accepted without change. Afterward, the maximum cost in the proposal may be converted to fixed prices by negotiated agreement between the contracting unit and the design-builder.
- e. All proposals shall be received and opened at a previously announced time, where a synopsis of each shall be publicly read and recorded consistent with the provisions of subsection f. of this section.
- f. Unless and until a proposal is accepted, the drawings, specifications and other information in the proposal shall remain the property of the person making the proposal. The contracting unit shall make reasonable efforts to maintain the secrecy and confidentiality of all proposals, and all information contained in the proposals, and shall not disclose the proposals or the information contained therein to the design-builders' competitors or the public. Once 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.

L.2021, c.71, s.31.

#### **40A:11-59. Submission of received proposals**

32. a. Once received, proposals shall be submitted to the design professional or designated employee retained by the contracting unit. No proposal shall be considered until certification is issued by the design professional or designated employee retained by the contracting unit that the proposal is consistent with the evaluation factors. No proposal for a design-build contract may be accepted unless the contracting unit determines that there was adequate competition for such contract.
- b. The technical review committee shall score the technical proposals using the criteria and methodology set forth in the request for proposals in accordance with paragraph (2) of subsection a. of section 30 of P.L.2021, c.71 (C.40A:11-57) and make an award recommendation to the governing body of the contracting unit. The governing body of the contracting unit shall make the design-build contract award decision, consistent with the award recommendation.
- c. The contracting unit shall evaluate the received technical proposals and price bid against the published factors and weighting to arrive at a composite score. The contracting unit shall make public the design-builder to be awarded the contract for the project. After the award decision is

made, the contracting unit shall make public the sealed price bid for each proposal submitted to the contracting unit by a design-builder.

d. Acceptance of a proposal shall be made by written notice to the design-builder which submitted the accepted proposal. At the same time notice of acceptance is delivered, the contracting unit shall also inform, in writing, the other design-builders that their proposals were not accepted.

e. The contracting unit shall have the right to reject any and all proposals, except for the purpose of evading the provisions and policies of sections 26 through 33 of P.L.2021, c.71 (C.40A:11-53 through C.40A:11-60). The contracting unit shall solicit new proposals using the same evaluation factors, budget constraints, or qualifications, unless there has been a material change in circumstances affecting the needs of the contracting unit, including but not limited to an environmental issue, natural disaster, state of emergency, or unforeseen fiscal constraint.

f. Proposals may be withdrawn for any reason at any time prior to acceptance.

g. When a design-builder receives notification from a public body that the proposal, which it has submitted, has not been accepted, the design-builder may, within 30 days, request to review the design-build proposals submitted, the technical review committee evaluation scores from the selection process, and the final recommendation of award document. The design-builder shall submit this request in writing.

L.2021, c.71, s.32.

#### **[40A:11-60. Regulations\\*](#)**

33. Notwithstanding 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, regulations that the Department of Community Affairs deems necessary to implement the provisions of sections 26 through 30 of P.L.2021, c.71 (C.40A:11-53 through C.40A:11-57), which regulations shall be effective for a period not to exceed 180 days from the date of the filing. The Department of Community Affairs shall thereafter amend, adopt, or readopt the regulations pursuant to the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.).

\* Will download an Microsoft Word document.

L.2021, c.71, s.33.

## APPENDIX A

### Local Public Contracts Law and Public School Contracts Law Contracting Thresholds as of July 1, 2023

Procurement Thresholds under the Local Public Contracts Law and Public School Contracts Law		
N.J.S.A. 40A:11-3(a) and (c); 18A:18A-3(a) and (c)	LPCL	PSCL
Bid threshold with a QPA*	\$44,000	\$44,000
Quote threshold with a QPA (15% of bid threshold)	\$6,600	\$6,600
Bid threshold without a QPA	\$17,500	\$32,000
Quote threshold without a QPA (15% of bid threshold)	\$2,625	\$4,800

\*Qualified Purchasing Agent - N.J.S.A. 40A:11-9(b) and N.J.A.C. 5:32-4

Statutory Reference	Description	Current Threshold*
18A:39-3	School Districts, Boards of Education for Transporting Pupils	\$22,400
27:2-1	Contracts for Work on Public Thoroughfares (paving)	\$22,400
27:16-16	County Road Improvements	\$22,400

Prevailing Wage Threshold for Public Work		
Statutory Reference	Description	Current Threshold*
34:11-56.25	Prevailing Wage Contracts for Municipalities (5-year cycle 2019-2024) Effective 7/1/2024	\$16,263 \$19,375
34:11-56.25	Prevailing Wage Contracts for All Other Contracting Units	\$2,000

State Comptroller Proposal and Contract Reporting Thresholds*		
Description	Current Threshold*	Reporting Time-frame
Contracts involving consideration or expenditures of:	\$2,500,000 to \$12,500,000	<b>20 business days <u>after</u></b> contract awarded
	Above \$12,500,000	<b>30 business days <u>prior</u></b> to public advertisement or other Public/Private Solicitation
Contracts issued pursuant to an Emergency or Public Exigency	More than \$2,500,000	No Later than <b>30 business days <u>after</u></b> contract award

\*Current as of July 1, 2023 for all LPCL and PSCL contracting units.

**Find OSC reporting forms**, on the [OSC Website](#), under Procurement Resources for the “Local Public Contracts Law Required” Forms and When They’re Due” link.

## APPENDIX B

### RELATED PROCUREMENT STATUTES

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#### 1. Provisions concerning the purchasing agent and chief financial officers (*pertinent part in italics*)

##### 40A:9-140.1. Definitions

As used in this act:

- a. "Director" means the Director of the Division of Local Government Services.
- b. "Municipal finance officer" means a municipal director of finance, assistant director of finance, fiscal officer, municipal comptroller, assistant comptroller, municipal treasurer, assistant municipal treasurer or deputy treasurer who is not a member of the governing body of a municipality.
- c. "Local unit" means a municipality or a utility owned by a single municipality or owned jointly by one or more municipalities, which together do not comprise a county.
- d. *"Chief financial officer" means the official appointed pursuant to section 5 of P.L.1988, c.110 (C.40A:9-140.10) to be responsible for the proper financial administration of the municipality under the "Local Government Supervision Act (1947)," P.L.1947, c.151 (C.52:27BB-1 et seq.); the "Local Bond Law," (N.J.S.40A:2-1 et seq.); the "Local Budget Law," (N.J.S.40A:4-1 et seq.); the "Local Fiscal Affairs Law," (N.J.S.40A:5-1 et seq.); and the "Local Public Contracts Law," P.L.1971, c.198 (C.40A:11-1 et seq.) in those municipalities that have not appointed a purchasing agent pursuant to that law;* and such other statutes, and such rules and regulations promulgated by the Director of the Division of Local Government Services, the Local Finance Board, or any other State agency, as may pertain to the financial administration of the municipality.

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#### 2. Provisions regarding public contracts and the Country of Iran (P.L. 2012, c.25) and the countries and Russia and Belarus (P.L. 2022, c.3)

*The following (in pertinent parts) applies to state agencies, LPCL contracting units, boards of education under the Public School Contracts Law, and county colleges under the County College Contracts Law (all citations are found below).*

Adopted 10 years apart in response to international events, these two laws prohibit contracting units from entering into contracts with companies found by the State Treasurer to have business interests in Iran (2012) and Russia and Belarus (2022) respectively. The laws required bidders to submit a certification form documenting compliance. The 2022 Russia and Belarus law has been subject to modification due to litigation (described below).

The following explains current compliance requirements.

**P.L. 2012, c.25, Country of Iran:** N.J.S.A. 52:32-56 through -60 requires certification and [40A:11-2.1](#) affects civil action brought on behalf of local contracting unit. A model Certification Form and instructions for its use are available as a [Word](#) document ("11 – Iran Disclosure").

**P.L. 2022, c.3, Countries of Russia and Belarus:** N.J.S.A. 52:32-60.1 through -60.4, 40A:11-2.2 and 18A:18A-49.5 for PSCL units.

[Local Finance Notice 2024-4 \(superseding LFN 2023-11, page 5\)](#) advises that courts have stopped the state from enforcing part of the Russia/Belarus law that is in conflict with federal law. That



eliminated the previous requirement of submission of a specific vendor certification form, prior to award.

The remaining part of the law requires that each vendor submit a form indicating if they appear on the federal government's [list of Specially Designated Nationals and Blocked Persons promulgated by the Office of Foreign Assets Control](#) (aka, [OFAC list](#)). A Treasury developed vendor certification form, modified for LPCL use can be [downloaded here](#).

The LFN also requires that when a contract for goods or services is awarded, renewed, amended, or extended, a contracting unit shall:

- 1) require a vendor or contractor to certify, using the vendor certification as a template, that the vendor or contractor is not identified on the OFAC list due to activity related to Russia and/or Belarus, and
- 2) type the vendor's or contractor's name and address into the OFAC list search to determine whether they appear on the list due to activity related to Russia and/or Belarus.
- 3) When searching the OFAC list, the vendor or contractor is considered to be engaging in activity related to Russia and/or Belarus if the term Russia or Belarus comes up next to their name under the "Program(s)" column.<sup>4</sup> If a vendor or contractor discloses their presence on the OFAC list but claims to have a license or other exemption enabling their doing business in Russia and/or Belarus, the vendor or contractor should be required to provide proof of such exemption.

The LFN should be consulted by a legal advisor if there is a claimed exemption or an inconsistency in what is found online versus the vendor's certification.

A final issue is the contract threshold over which a vendor certification is required, The LFN notes that a certification is not required for contracts over the state agency quotation threshold of \$1,000. As the law is not specific on this issue, the LFN advises that:

"a contracting unit should rely on the advice of legal counsel in determining whether to apply its own local quote threshold to the Russia-Belarus certification; the Division will defer to contracting units on this point."

Finally, the threshold calculation is subject to routine determinations related to aggregation.

*The provisions of the LFN, driven by C.40A:11-2.1, would also apply to the similar laws affecting public schools (C.18A:18A-49.4) and county colleges (C.18A:64A-25.43).*

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### 3. Provisions regarding using national purchasing cooperative contracts

See also [LFN 2012-10](#) for implementation guidance

#### **[52:34-6.2](#) Cooperative purchasing agreements with other states for purchases of goods, services; rules, regulations.**

...

b. (1) The director may elect to purchase goods or services through a contract awarded pursuant to a cooperative purchasing agreement whenever the director determines this to be the most cost-effective method of procurement. Prior to entering into any contract to be awarded or already awarded through a cooperative purchasing agreement, the director shall review and approve the specifications and proposed terms and conditions of the contract.

(2) The director may also elect to purchase goods or services through a contract awarded pursuant to a nationally-recognized and accepted cooperative purchasing agreement that has been developed utilizing a

competitive bidding process, in which other states participate, whenever the director determines this to be the most cost-effective method of procurement. Prior to entering into any contract to be awarded through a nationally-recognized and accepted cooperative purchasing agreement that has been developed utilizing a competitive bidding process, the director shall review and approve the specifications and proposed terms and conditions of the contract.

(3) Notwithstanding any other law to the contrary, any contracting unit authorized to purchase goods, or to contract for services, may make purchases and contract for services through the use of a nationally-recognized and accepted cooperative purchasing agreement that has been developed utilizing a competitive bidding process by another contracting unit within the State of New Jersey, or within any other state, when available. Prior to making purchases or contracting for services, the contracting unit shall determine that the use of the cooperative purchasing agreement shall result in cost savings after all factors, including charges for service, material, and delivery, have been considered.

For purposes of this paragraph, "contracting unit" means any county, municipality, special district, school district, fire district, State college or university, public research university, county college, or any board, commission, committee, authority or agency, which is not a State board, commission, committee, authority or agency, and which has administrative jurisdiction over any district, included or operating in whole or in part, within the territorial boundaries of any county or municipality which exercises functions which are appropriate for the exercise by one or more units of local government, and which has statutory power to make purchases and enter into contracts awarded by a contracting agent for the provision or performance of goods or services, and the New Jersey Transit Corporation created pursuant to P.L.1979, c.150 (C.27:25-1 et seq.).

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*P.L. 2011, c.139 as amended*

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#### **4. Provisions concerning use of Procurement Cards and payments via Electronic Funds Transfers and Claimant Certifications**

N.J.S.A. 40A:5-16.5 allowed contracting units to pay vendors via electronic funds transfers (EFT) which led to new rules on how to implement an EFT program. This also led to changes in regulatory requirements for a vendor (claimant) to certify goods and services were provided as required.

The rules recodified procedures related to existing use of Procurement Cards at [N.J.A.C. 5:30-9A](#) (municipalities, counties, fire districts, and local authorities) and [5:31-4](#) (specifically local authorities and fire districts) which are available online. [LFN 2018-13](#) provides detailed guidance on these issues.

##### **40A:5-16.5 Certain government entities authorized to adopt policies for payment of claims electronically; definitions.**

1. a. Notwithstanding any laws, rules, or regulations to the contrary, the governing body of a local unit, board of education, or county college may adopt policies, by ordinance or resolution, as appropriate, for the payment of claims pursuant to N.J.S.40A:5-17, N.J.S.18A:19-2, or other applicable law, through the use of one or more standard electronic funds transfer technologies in lieu of payment through the use of signed checks or warrants.

b. (1) Any policy adopted pursuant to subsection a. of this section shall explicitly list the forms of standard electronic funds transfer technologies that may be used by that local unit, board of education, or county college.

(2) A policy adopted pursuant to subsection a. of this section shall designate the chief financial officer of the local unit, board of education, or county college as being responsible for the oversight and administration

of the disbursement policy and associated systems. The chief financial officer shall document and implement internal controls sufficient to ensure safe and proper use of the system and mitigate the potential for fraud and abuse.

c. As used in this section:

“Chief financial officer” means the official designated by the governing body to be responsible for the proper administration of the finances of the local unit, board of education, or county college under any statutes and such rules and regulations promulgated by any State agency as may pertain to the financial administration of the local unit, board of education, or county college.

“Governing body” means the board, body, or administrator, by whatever name it may be known, having charge of the finances of the local unit, board of education, or county college.

“Internal controls” mean fiscal and operational controls that ensure safe and proper use of a standard electronic funds transfer system and mitigate the potential for fraud and abuse.

“Local unit” means a local unit as defined in N.J.S.40A:5-2.

“Standard electronic funds transfer technologies” mean technologies that facilitate the transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, initiated by means such as, but not limited to, an electronic terminal, telephone, or computer or magnetic tape for the purpose of ordering, instructing, or authorizing a financial institution to debit or credit an account, and incorporate, at a minimum, internal controls set forth in regulations promulgated by the Local Finance Board.

d. The Local Finance Board, in consultation with the Commissioner of Education and the Secretary of Higher Education, may adopt rules and regulations, pursuant to the “Administrative Procedure Act,” P.L.1968, c.410 (C.52:14B-1 et seq.), for the purpose of implementing the provisions of this act.

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## **5. Public Works Change Order Practices: N.J.S.A. 40A:11-16.7 and N.J.A.C. 5:30-11**

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Prior to the enactment of [N.J.S.A 40A:11-16.7](#) (“changed conditions” law) change orders for public works construction projects were addressed in rules at N.J.A.C. 5:30-11.

The changed conditions law created new, detailed definitions and requirements to address the different circumstances that can result in construction contract change orders. The law also required that the language of the law be included in all construction projects to address four circumstances that could happen during a public works contract (listed by subsection letter in 16.7)

- a) Differing site conditions
- b) Owner’s suspension of work
- c) Change in material change character of work
- d) Change in quantity

While rules adopted by Commissioner of DCA were authorized, rules have not been adopted at this time.

Other laws also address change orders. Examples include value engineering change orders at N.J.S.A. 40A:11-16.6, contaminated soil practices at N.J.S.A. 40A:11-23.1a, and at N.J.S.A. 40A:13(g) for asphalt use.

The existing rules at N.J.A.C. 5:30-11 focus primarily, though not exclusively on authorization procedures to be used by contracting units to process and approve change orders under different circumstances (including non-public works changes).

Generally, these rules can operate side-by-side with the different statutes. For example, if differing site conditions are encountered, the contracting unit should:

- Apply the law at N.J.S.A. 40A:11-16.7(a) (otherwise, the subsection appropriate to the change) concerning their obligations of notice, investigation, direction, and price adjustment calculations.
- Then apply the rules at N.J.A.C. 5:30-11.5 through .9 for the explicit documentation, procedural, and approval steps to follow, which are generally not in conflict with 16.7(a).
- When there is conflict (perhaps where the law and rule provide differing definitions or thresholds), the law would supersede the rule.
- When an irreconcilable conflict exists, agency legal counsel should be asked to provide guidance based on the specific circumstance.

Change orders in construction works can be some of the most challenging and controversial processes. They can involve several parties: contractors, subcontractors, architects, engineers, suppliers, and others. They can also have a significant impact on the public. The change order laws and rules are intended to work together so all parties are treated fairly with accountability and a level of transparency that informs the public.

## APPENDIX C

### LOCAL PUBLIC CONTRACT REFERENCE CROSSWALK

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(Note: LFN refers to Local Finance Notices, formal guidance issued by the Division of Local Government Services)

#### **40A:11-3 Bid threshold; period of contracts**

[LFN 2020-14R](#) Adjustment of Public Bidding Thresholds and Office of State Comptroller Reporting Thresholds Effective July 1, 2020

[LFN 2017-10](#) Certification of Availability of Funds rules found at N.J.A.C. 5:30-5.3 – 5.5

Official details on bid thresholds are on the Division of Purchase and Property website as follows:

- [5-year change schedules](#)
- [2-year change schedules](#)
- [State agencies from DPP](#)

#### **40A:11-4 Contracts required to be advertised; disqualification of bidder**

[N.J.A.C. 5:34-9.5\(d\)](#) Miscellaneous Circumstances

#### **40A:11-4.1 Purposes for which competitive contracting may be used by local units**

[N.J.A.C. 5:34-4](#) Administration of Competitive Contracting Process

[LFN 2010-9](#) State Comptroller Report

[LFN 2009-10](#) Contracting for Renewable Energy Services: Update on Power Purchase Agreements

[LFN 2016-19, p 1-2](#) Expanded scope of services that can be procured via competitive contracting (this list is included in the list at 40A:11-4.1)

#### **40A:11-4.3 Competitive contracting process; resolution, administration**

[N.J.A.C. 5:34-4.3](#) Opening, Evaluating and Awarding Competitive Contracts

[N.J.A.C. 5:34-9.4](#) Concessions

#### **40A:11-4.6 Implementation of energy savings improvement program by contracting unit; definitions**

[LFN 2009-11](#) Implementing an Energy Savings Improvement Program

[LFN 2011-17](#) Update on Implementing Energy Savings Improvement Programs

#### **40A:11-4.7 through 4.12 Local Unit Electronic Procurement Act**

[LFN 2019-15](#) General Guidance on specific areas: energy supply purchase, sale of personal property, sale of Solar RECs

[LFN 2021-18](#) Procurement Regulations: Goods, Services, and Public Works Contracts

#### **40A:11-5 Exceptions**

[N.J.A.C. 5:34-9.5\(c\)](#) Notice of Award for Professional Services

[LFN 2010-3](#) (A, B) Publication of Contract Award Notices

[N.J.A.C. 5:34-2](#). Extraordinary Unspecifiable Services

[LFN 2005-33](#) (A) Contracts for private inspection firms are subject to bidding and other requirements of the LPCL. See also N.J.S.A. 40A:11-4.1(s) for impact of competitive contracting.

[N.J.A.C. 5:34-7.30](#) Purchases at 10 percent less than State contract price; N.J.S.A. 40A:11-5(4)

[N.J.A.C. 5:34-9.6](#) Purchasing at 10 percent less than a State cooperative contract price

[LFN 2010-3](#) (D) Contracting Unit Agreements with State Higher Education Institutions (p5)

[Index Rate calculation](#) for current quarter for contract extension pricing.

#### **40A:11-6 Emergency contracts**

[N.J.A.C. 5:34-6](#) Emergency Purchases and Contracts

[Storm/Disaster Response Local Finance Notice](#) (example) addressing budgeting, procurement, and overtime payment prohibition for elected officials and management

##### **40A:11-6.1 Award of contracts**

[N.J.A.C. 5:34-9.5\(b\)](#) Miscellaneous Circumstances

[LFN 2020-14R](#) Adjustment of Public Bidding Threshold

##### **40A:11-7.1 Rules concerning determinations of aggregation**

[N.J.A.C. 5:34-8.2](#) Determinations of Aggregation

[N.J.A.C. 5:34-8.3](#) When Determinations of Aggregation are Found to be Incorrect

[N.J.A.C. 5:34-8.4](#) Intentional Miscalculations to Avoid Public Bidding

##### **40A:11-9 Designation of contracting unit's purchasing agent, authority, responsibility, accountability; qualifications.**

[N.J.A.C. 5:32-4](#) Qualified Purchasing Agents Regulations

[LFN 2014-17](#) Qualified Purchasing Agent Regulations

##### **40A:11-9.1 List of sources for green product purchasing**

Division of Purchase and Property: [buying and using environmentally preferable products](#)

##### **40A:11-10. Joint agreements for provision and performance of goods and services; cooperative marketing; authorization**

[LFN 2016-19, p 4-5](#) Describes laws that expand cooperative purchasing agencies to include State universities and colleges, County colleges, non-public schools, and state “educational research and services corporations” to manage cooperative purchasing programs (e.g., NJ Edge).

##### **40A:11-11 Additional matters regarding contracts for the provision and performance of goods and services**

[N.J.A.C. 5:34-7](#) Cooperative Purchasing

[Cooperative Purchasing - A Guide for Local Officials \(Current Edition\)](#)



#### **40A:11-12 Contracting unit purchases through State agency; procedure**

[N.J.A.C. 5:34-7.29](#) The State of New Jersey's Cooperative Purchasing Program

[LFN 2012-10](#) Using National Cooperative Contracts: Application of P.L. 2011, c. 139

[N.J.A.C. 5:34-9.7](#) Use of the General Services Administration's Federal Supply Schedules

#### **40A:11-13 Specifications**

40A:11-13(d) [N.J.A.C. 5:34-9.1](#) Purchase of Proprietary Goods or Services

40A:11-13(d) [N.J.A.C. 5:34-9.2](#) Use of "Brand Name or Equivalent"

[N.J.A.C. 7:26H-6.1 through 6.18](#) "Uniform Bid Specifications for Municipal Solid Waste Collection Contracts" rule (displayed as one section at a time)

Appendix A (of the rule): DEP Uniform Bid Specifications for Solid Waste ([PDF](#) or [MS Word](#))

[LFN 2010-10](#) Solid Waste Collection and Transportation Contractor Wage Record Keeping, N.J.S.A. 34:11-68

[LFN 2016-19, page 2](#) Contracts for Asphalt Work under Local Public Contracts Law (asphalt price indexing)

#### **40A:11-15 Duration of certain contracts**

[N.J.A.C. 5:34-3](#) Certain Leases of Equipment and Service Agreements Beyond the Fiscal Year

40A:11-15(3) [N.J.A.C. 5:34-9.5\(a\)](#) Collection of Solid Waste includes both municipal solid waste and from facilities owner by the contracting unit

40A:11-15(7) [N.J.A.C. 5:34-8.1](#) Multi-Year Contracts

#### **40A:11-16 Separate plans for various types of work; bids; contracts**

[LFN 2010-4](#) (page 4-5) Price adjustments in local public contracts for asphalt cement, and fuel

#### **40A:11-16.6 Definitions relative to value engineering change orders; requirement for certain contracts**

[LFN 2005-22](#) Implementation of Value Engineering Procedures in Construction Contracts

#### **40A:11-19.1 Prompt Payment**

[LFN 2019-02](#) Prompt Payment Requirement for Goods and Services: Local Public & Public School Contracts Laws

[LFN 2006-21](#) Prompt Payment of Construction Contracts

#### **40A:11-23 Advertisements for bids; bids; general requirements**

[N.J.A.C. 5:34-9.3](#) Cancellation or Postponement of Receipt of Bids or Proposals

[LFN 2008-21R](#) Online Auctions and Other Procurement Related Issues

[LFN 2013-1](#) Limits on Bid Acceptance Dates (this is referenced as an example; similar subsequent Notices have not been issued)

#### **40A:11-23.1 Plans, specifications, bid proposal documents; required contents**

[LFN 2010-4](#) Law allows for base and alternate bids for public works contracts over \$500,000 (pp. 3-4)

#### **40A:11-23.3 Withdrawal of public works bid**

[LFN 2011-12](#) Local Public Contracts Law Amendment - Withdrawal of Bids for Public Works Contracts

#### **40A:11-23.4 "Bulletin NJ"**

Program has not been implemented

#### **40A:11-25 Provisions for Pre-qualification of Bidders**

[LFN 2016-12](#) Local Public Contracts Law Process for Enacting Bidder Prequalification Regulations

#### **40A:11-36 Sale or other disposition of personal property**

[LFN 2021-18](#) and [N.J.A.C. 5:34-5.8](#)

For the sale of land and buildings, see N.J.S.A. 40A:12 generally and [N.J.A.C. 5:34-5.9](#)

#### **40A:11-37.1. (LPCL) Rules**

[N.J.A.C. 5:34](#) Generally

#### **40A:11-52 Public Private Partnerships**

[Public Private Partnership \(P3\)](#) website

[Public Private Partnership rules](#)

#### **40A:11-52 through 60 Design Build Construction**

- [N.J.A.C. 5:34-10 Design-Build Rules - 2022](#)

## APPENDIX D

### IMPORTANT PUBLIC PROCUREMENT AND PRACTICE RELATED LAW REFERENCES

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#### [Division of Local Government Services Public Procurement website](#)

[Business Registration Certificate](#) information, [registration/verification inquiry](#), and [day-to-day instructions](#).

#### **Coronavirus (COVID-19) Emergency Procurement**

- [LFN 2020-6 Coronavirus Response – Emergency Procurement & Use of Storm Recovery Reserves](#)
- [LFN 2020-10 COVID-19 – Supplemental Emergency Procurement Guidance](#)

Credit Cards: Limits on Government Use – [LFN 2018-13, page 9](#) and [N.J.A.C. 5:30-9A.5 and 7](#)

[Design-Build construction process rules](#)

[Electronic Funds Transfer & Claimant Certification](#) (LFN 2018-13)

**Energy Procurement:** review documents at [NJ Local Agency Procurement Law](#)/Local Government Energy Related Links/ and [LFN 2012-12, Electric and Natural Gas Supply Procurement Guidance](#)

[Equal Employment Opportunity in Public Contracting](#)

[Payment of Late Fees or Interest on Procurements – LFN 2010-3](#)

[Petroleum Price Change Price Adjustments – LFN 2005-24](#)

[Political Contribution Disclosure \(Pay-to-Play\)](#) DLGS web site. Also see [LFN 2023-14](#), Pay-to-Play Law Updates for Local Governments (Elections Transparency Act).

[Procurement Card \(P-Card\) and Electronic Funds Transfer Use – LFN 2018-13](#)

#### **Prompt Payment Requirements:**

- [Prompt Payment of Construction Contracts](#)
- [Prompt Payment Requirements for Goods and Services](#)

**Public Work Prevailing Wage and Contractor Registration Laws:** [Appendix E](#) (next page)

#### **State Comptroller Procurement References**

- [Forms for submissions of required contracts and notifications](#)
- [General Procurement Resources](#)

#### **US OMB Uniform Guidance (UG) Procurement Aids**

- [LPCL UG Procurement Checklist – Office of State Comptroller](#)
- [FEMA Contract Provisions Guide, June 2021](#)
- [Purchasing Goods or Services Through Cooperative Purchasing Programs](#)

## APPENDIX E

### PREVAILING WAGE LAW FOR PUBLIC WORK

#### SIGNIFICANT REFERENCES

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#### 1. General References – Administered by the NJ Department of Labor and Work Force Accountability (DOLWD)

- [Public Work Prevailing Wage Webpage](#) (Dept. of Labor and Workforce Development)
- [Prevailing Wage Statute and Regulations](#)
- [Prevailing Wage Frequently Asked Questions \(DOLWD\)](#)
- [LFN 2021-20 – Discussion and Update on Various Public Works Contracting Issues](#)

#### 2. Definition of Public Contract Work: [N.J.S.A. 34:11-56.26\(5\)](#)

Public work means any construction, reconstruction, demolition, alteration, custom fabrication, duct cleaning, or repair work, or maintenance work, including painting and decorating, done under contract and paid for in whole or in part out of the funds of the public body, except work performed under a rehabilitation program.

Public work also means construction, reconstruction, demolition, alteration, custom fabrication, duct cleaning, or repair work done on any property or premises, whether or not the work is paid from public funds, if at the time of entering into the contract:

- Not less than 55% of the property or premises is leased by a public body, or is subject to an agreement to be subsequently leased by the public body; and
- The portion of the property or premises that is leased or subject to an agreement to be subsequently leased by the public body measures more than 20,000 square feet.

“Maintenance work” encompasses:

- the repair of existing facilities when the size, type or extent of such facilities is not thereby changed or increased; and
- any work on a “maintenance-related project,” which means a project related to the repair of existing facilities when the size, type or extent of such facilities is not thereby changed or increased that:
  - exceeds the scope of work and capabilities of in-house maintenance personnel;
  - requires the solicitation of bids; and
  - has an aggregate value exceeding \$50,000.

“Custom fabrication” as used above has precise definition in the law in paragraph (12). Architects and engineers should be sure to review the meaning to ensure the bid specification is clear about the use of prevailing wages for this purpose.

#### 3. Definition of Prevailing Wages: [N.J.S.A. 34:11-56.26\(9\)](#)

"Prevailing wage" means the wage rate paid by virtue of collective bargaining agreements by employers employing a majority of workers of that craft or trade subject to said collective bargaining agreements, in the locality in which the public work is done.

#### 4. Prevailing Wage Rates and Craft Trade Unions and Jurisdiction

- [Prevailing Wage Rates on Construction-Related Public Works Projects.](#)
- [List of Unions and PW County Jurisdiction](#)

## 5. Certified Payrolls for Prevailing Wage Compliance [N.J.S.A. 34:11-56.29](#)

1. The contractor and all subcontractors must provide the contracting unit with certified payroll records for each employee performing work on a prevailing wage project.
2. Contractors and subcontractors must use the DOLWD Form MW-562 for certifying payroll records; owner/operators must also be included in the certification.
3. Certified payroll records shall be provided for each pay period within ten (10) days of the payment of wages. In turn, the contracting unit must collect, file, and store all certified payroll records on the project and make them available for inspection during normal business hours. Union representatives and other interested parties want to inspect these forms to ensure that workers on the job are properly classified and the required wages are being paid.
4. In 2023 the state launched [NJ Wage Hub](#) for *online certified payrolls*. Contracting units are encouraged to register and start using the dashboard prior to its use becoming mandatory in August 2024. This [explanatory video](#) provides an overview of the website. Agency access should be by the official designated to accept certifications.

## 6. Public Works Contractor Registration [N.J.S.A. 34:11-56.48](#)

- All contractors and subcontractors who bid on or engage in construction related public work must register with the DOLWD.
- The Public Works Contractor Registration Act establishes a unified procedure for the registration of contractors and subcontractors engaged in public works building projects. The act requires an annual registration fee of \$500, and after successful completion of two consecutive years of registration, a contractor may elect to register for a two-year period and pay a registration of \$750.
- To obtain a Public Works Contractor Registration, if the contractor directly employs craftworkers, the contractor must complete a certification form that documents compliance and provide supporting documents that the contractor participates in a registered apprenticeship program as defined in N.J.S.A. 34:11-56.50 for each craft they employ. (N.J.S.A. 34:11-56.52). This law was amended in 2023 ([P.L. 2023, c.138](#)) to give the commissioner added authority to ensure that the apprenticeship certification made by the contractor meets all of the requirements of law
- Website to search for [Registered Public Works Contractors](#)

## 7. Contractor Debarment for Prevailing Wage Violations [N.J.A.C. 12:60-7 et seq.](#)

- Contractors violating the N.J. Prevailing Wage Act are subject to administrative fees and penalties and may be debarred (i.e., prohibited) from work on future public works contracts.
  - Before awarding a prevailing wage contract subject to the Prevailing Wage Act, a contracting unit needs to review the DOLWD's [Prevailing Wage Debarment List](#) database to confirm whether the contractor and any listed subcontractors are currently debarred.
  - If listed, the contracting unit cannot award the contract to the contractor. Likewise, if a debarred entity appears on a contractor's Ownership Disclosure Statement (submitted with the bid proposal) the contract cannot be awarded to that contractor.

- [N.J.S.A. 52:32-44.1](#) prohibits any contractor that is debarred from contracting with a federal government agency, along with any affiliates of the debarred contractor, from contracting for “public work” with any State or local government entity.
  - The federal and state definitions for public work are similar, but not identical. A contract solely for demolition work would not come under the federal debarment law; nor would painting, decorating, or routine maintenance work.
  - Prior to award of a contract for public work as defined at N.J.S.A. [52:32-44.1](#), the contractor must provide a written certification (submitted with the bid proposal) to the contracting unit that neither the contractor nor the contractor’s affiliates are debarred at the federal level from contracting with a federal government agency. This form should be part of the public works bid package.
  - Prior to contract award, the contracting unit must consult the federal [System for Award Management \(SAM\)](#) *exclusions* (i.e., debarred) database **to verify** whether the contractor and any affiliated individuals or entities listed on the certification are currently debarred from contracting with a federal government agency.
  - As of April 4, 2022 the federal identifier used to identify businesses in [SAM.gov](#) eliminated the use of the DUNS number. Requirements for contracts for “public work” should now require the submission of the “Unique Entity ID” issues by sam.gov. Existing SAM registered entities can find their Unique Entity ID by following the steps [here](#). New entities can get their Unique Entity ID at [SAM.gov](#) and, if required, complete an entity registration.

## 8. Workplace Accountability in Labor List (the Wall)

A law enacted several years ago is now in effect. [P.L. 2020, c. 366](#) directed the DOLWD to create a list of businesses who fail to satisfy their outstanding liabilities to the State for violations of State wage, benefit and tax laws enforced by the department. Examples of outstanding liabilities include unpaid wages due to workers, unemployment insurance contributions due to the state, or worker’s compensation penalties. Coverage was subsequently ordered to include family temporary disability leave, and gross income tax laws. Rules were also adopted at [N.J.A.C. 12:8](#).

The department established the [Office of Strategic Enforcement and Compliance](#) (OSEC) to administer the Wall. Contracting “on the Wall” are available as a PDF or Excel download here: [www.nj.gov/labor/ea/osec/wall.shtml](#). **Any business whose name appears on the WALL is prohibited from public contracting** under N.J.S.A. 34:1A-1.16. As an evolving area of law, additional guidance expected in 2024.

The Wall law provides for exceptions where a contract can still be awarded to a business on the Wall. If a contracting unit runs across a situation where local circumstances may warrant the award of a contract to a vendor on the Wall, legal counsel should review the law and rules and if necessary contact the office at [OSECInquiries@dol.nj.gov](#) or 609-376-4952.

## 9. Recapitulation of Procedures to Verify the Legal Status of Contractors

Sections 6-8 above highlight additional actions a purchasing agent must undertake under DOLWD laws before awarding a contract to a vendor that is otherwise qualified to receive an award. The actions require review:



1. That a Public Work Contractor Registration submitted by a bidder is valid on the [Registered Public Works Contractor website](#).
2. Of the DOLWD's [Prevailing Wage Debarment List](#) database to confirm whether the contractor and any listed subcontractors are currently debarred.
3. Of the federal [System for Award Management \(SAM\) exclusions](#) (i.e., debarred) database to verify whether the contractor and any affiliated individuals or entities listed on the certification are currently debarred from contracting with a federal government agency.
4. A review of the latest Wall download to ensure that the **business name [does not appear on the WALL](#) is prohibited from public contracting** under N.J.S.A. 34:1A-1.16.

## 10. Stop Work Orders Issued by Department of Labor and Workforce Development

- N.J.S.A. [34:1A-1.17](#) and [34:11-56.35](#) authorize the DOLWD to issue stop-work orders against LPCL and PSCL contracting unit contractors that are determined to be violating any State wage, benefit or tax law; including laws on prevailing wage, unemployment insurance, workers' compensation insurance, and temporary disability insurance. The law also allows general contractors to terminate any sub-contractors found to be violating the law.
- The stop-work order is the last step of the DOLWD enforcement power. It usually follows efforts to obtain contractor compliance. Because the contracting unit is also affected by the order, the contracting unit should be in contact with DOLWD officials if their contractors are found to be violating any of the laws.

## 11. Equal Employment Opportunity & Affirmative Action (EEO/AA)

- The state's equal employment opportunity and affirmative action (EEO/AA) in public procurement laws are responsible for ensuring EEO/AA compliance on construction contracts, which are defined as contracts for "construction, alteration, repair, or demolition of any building or other public work. The law is administered by the Department of Treasury's [Public Contracts Equal Employment Opportunity Compliance Monitoring](#) office.
- Each contracting unit must appoint an individual to ensure the unit complies with the law and regulation. This is the Public Agency Compliance Officer (PACO). While all vendors are responsible for obtaining and providing certification with bids or other contract documents, public works contractors have specific responsibilities during the life of a construction contract. The PACO is responsible for ensuring the contracting unit remains in compliance.
- A helpful guide to the contracting unit's and PACO's responsibilities is found in the office's publication [Public Agency Guidelines for Administering Equal Employment Opportunity and Affirmative Action in Public Contracts](#).

## 12. Optional Set-Aside of Construction Contracts

- [N.J.S.A 40A:11-41](#) through 11-49 allow counties or municipalities to create contract set-aside programs for minority, women, small business, and veteran business enterprises.
- In addition [N.J.S.A. 52:38-7](#) allows local government and school districts the option of either retaining or transferring to the Department of Labor an amount equal to one half of one percent (0.5%) of the value of any construction contract for purposes of: 1) recruitment and training of women and minorities in the construction industry; or (2) providing incentives or otherwise facilitating a local hiring and employment program.

### 13. Project Labor Agreements

- A project labor agreement (PLA) is a form of pre-contract collective bargaining agreement covering terms and conditions of a specific public works project. The agreement is a result from discussions/negotiations between the contracting unit and local labor unions. The agreement requires bidders to use specific unions if they are awarded the contract and ensures that any labor issues that occur on the job will be expeditiously resolved.
- Contracting units are authorized to, but not required to enter into project labor agreements for any public works project for construction, reconstruction, demolition or renovation, so long as: 1) the project requires payment of prevailing wage under State law; and 2) the total project cost, exclusive of land acquisition costs, will equal or exceed \$5 million.
- There is limited formal guidance on PLA's. [LFN 2021-20 \(page 6-7\)](#) provides basic information about them. The enabling laws are N.J.S.A. 52:38-1 et seq. Web searches for "NJ project labor agreement" will come up with examples of local governments and state agency PLAs (particularly, EDA and the Schools Development Authority).
- A contracting unit may submit a written request to the Department of Labor and Workforce Development, Office of the Commissioner for assistance in facilitating negotiation of a project labor agreement and may also ask the Department for a written advisory statement on whether a finalized project labor agreement conforms with the underlying law.

### 14. Standard Language Requiring Prevailing Wages and When a Lowest Responsible Bidder Price is 10 Percent Less Than the Second Lowest Bid

- [N.J.S.A. 34:11-56.27](#) took effect in 2023 and must be followed for publicly bid contracts. It has two requirements:
  - 1) It requires bid specifications for public work covered by the Prevailing Wage Act (PWA) to include Department of Labor and Workforce Development language that requires a contractor to pay the required wage under the law.
  - 2) When the lowest responsible bid for a PWA covered contract is 10 percent or more lower than the next lowest bid, the bidder must certify to the contracting unit that the required wage rates will be paid. If the bidder does not provide the certification prior to the award of the contract, the contract must be awarded to the next lowest responsible and responsive bidder.
- The Department of Labor and Workforce Development (NJDOLE) proposed rules at N.J.A.C. 12:60-9 for standard bid language for contracts requiring prevailing wages and a model form for use when the low bidder is 10 percent or higher than the next lowest bidder. As of June 2023, those rules have not been adopted. Nonetheless, the law is in effect.
- Contracting units should include in their PWA specifications and contracts: 1) the required language for prevailing wage compliance and, 2) that if the otherwise lowest responsible bidder is 10 percent or more lower than the next lowest bid, the bidder must complete the required certification prior to award. *The language requiring prevailing wages may supersede existing standard specification and contract text.*
- A Word document of the NJ DOLE rule [proposal of required language and model form is found here](#). The language should appear in all bid specifications for PWA work.

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## PART TWO

### LOCAL PUBLIC CONTRACTS LAW AND RELATED REGULATIONS - N.J.A.C. 5:34, N.J.A.C., 5:32, 5:30

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#### SUBCHAPTER 1. GENERAL PROVISIONS AND DEFINITIONS

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##### 5:34-1.1 Application and compliance

- (a) Unless specifically stated to the contrary, the rules in this chapter apply to all local government agencies that are encompassed by the definition of contracting unit in N.J.S.A. 40A:11-2(1), and by all boards of education meeting the definition of board of education in N.J.S.A. 18A:18A-2a by whatever name called.
- (b) Every governing body, chief executive officer, or chief school administrator shall take reasonable steps to provide training so that all officials and employees responsible for the administration of public contracts are aware of and are able to comply with the requirements of the law and these rules.
- (c) These rules are adopted by the Director of the Division of Local Government Services after consultation with the Commissioner of Education pursuant to N.J.S.A. 40A:11-37.1 and 18A:18A-49.2.
- (d) Public housing authorities that operate subject to the authority of the U.S. Department of Housing and Urban Development will adhere to procurement procedures which reflect N.J.S.A. 40A:11-1 et seq. and related rules, provided that procurements conform to applicable Federal law and the standards required therein and to 24 CFR 85.36(b) that requires where both State and Federal law encompass the same procurement, the stricter or more limiting procedure which encourages competition shall be used.

##### 5:34-1.2 Definitions

The following words and terms, as used in this chapter, shall have the following meanings, unless the context indicates otherwise:

*"Aggregate" or "aggregation"* means the sums expended or to be expended for the provision or performance of any goods or services in connection with the same immediate purpose or task, or the furnishing of similar goods or services, during the term of the contract awarded by a contracting agency.

*"Bid threshold"* means the dollar amount set in N.J.S.A. 40A:11-3, and in N.J.S.A. 18A:18A-3, above which a contracting unit shall advertise for and receive sealed bids

*"Board of education"* means and includes the board of education of any local school district, consolidated school district, regional school district, educational services commission, county special services school district, county vocational school and any other board of education or other similar body other than the State Board of Education, the Commission on Higher Education or the Presidents' Council, established and operating under the provisions of Title 18A of the New Jersey Statutes and having authority to make purchases and to enter into contracts for the provision or performance of goods or services. The term "board of education" also shall include the board of trustees of a charter school established under P.L. 1995, c.426 (N.J.S.A. 18A:36A-1 et seq.).

"*Competitive contracting*" means the method described in N.J.S.A. 40A:11-4.1 et seq. and 18A:18A-4.1 et seq. of contracting for specialized goods and services in which formal proposals are solicited from vendors.

"*Concession*" means the granting of a license or right to act for or on behalf of the contracting unit, or to provide a service requiring the approval or endorsement of the contracting unit, and which may or may not involve a payment or exchange, or provision of services by or to the contracting unit.

"*Contract*" means any agreement, including, but not limited to, a purchase order or a formal agreement, which is a legally binding relationship enforceable by law, between a vendor who agrees to provide or perform goods or services and a contracting unit which agrees to compensate a vendor, as defined by and subject to the terms and conditions of the agreement. A contract also may include an arrangement whereby a vendor compensates a contracting unit for the vendor's right to perform a service, such as, but not limited to, operating a concession.

"*Contracting agent*" means the governing body of a contracting unit or its authorized designee that has the power to prepare the advertisements, to advertise for and receive bids and, as permitted by law, to make awards for the contracting unit in connection with contracts.

"*Contracting unit*" means: any county; municipality; board of education; or any board, commission, committee, authority or agency, which is not a State board, commission, committee, authority, or agency, and which has administrative jurisdiction over any district project, or facility, included or operating in whole or in part, within the territorial boundaries of any county or municipality which exercises functions which are appropriate for the exercise by one or more units of local government, and which has statutory power to make purchases and enter into contracts awarded by a contracting agent for the provision or performance of goods or services.

"*Contract year*" means the period of 12 consecutive months following the award of a contract.

"*Director*" means the Director of the Division of Local Government Services in the Department of Community Affairs.

"*Division*" means the Division of Local Government Services in the Department of Community Affairs.

"*Extraordinary unspecifiable services*" or "*EUS*" means services which are specialized and qualitative in nature requiring expertise, extensive training and proven reputation in the field of endeavor.

"*Goods and services*" or "*goods or services*" means any work, labor, commodities, equipment, materials, or supplies of any tangible or intangible nature, except real property or any interest therein, provided or performed through a contract awarded by a contracting agent, including goods and property subject to N.J.S.A. 12A:2-101 et seq.

"*Governing body*" means: the governing body of the county, when the purchase is to be made or the contract is to be entered into by, or in behalf of, a county; the governing body of the municipality, when the purchase is to be made or the contract is to be entered into by, or on behalf of, a municipality; a board of education, when the purchase is to be made or the contract is to be entered into by, or on behalf of, a school district; or any board, commission, committee, authority or agency of the character described in definition of contracting unit.

"*Lowest price*" means the least possible amount that meets all requirements of the request of a contracting agent.

"*Lowest responsible bidder or vendor*" means the bidder or vendor:

1. Whose response to a request for bids offers the lowest price and is responsive; and
2. Who is responsible.

"*Multi-year contract*" means a contract or other agreement operating in excess of 12 consecutive months.

"*Official newspaper*" means any newspaper designated by the contracting unit pursuant to N.J.S.A. 35:1-1 et seq.

"*Purchase*" means a transaction, for a valuable consideration, creating or acquiring an interest in goods, services and property, except real property or any interest therein.

"*Purchase order*" means a document issued by the contracting agent authorizing a purchase transaction with a vendor to provide or perform goods or services to the contracting unit, which, when fulfilled in accordance with the terms and conditions of a request of a contracting agent and other provisions and procedures that may be established by the contracting unit, will result in payment by the contracting unit.

"*Purchasing agent*" means the individual duly assigned the authority, responsibility, and accountability for the purchasing activity of the contracting unit, and who has such duties as are defined by an authority appropriate to the form and structure of the contracting unit; or in the case of a board of education, the secretary, business administrator or the business manager of the board of education duly assigned the authority, responsibility and accountability for the purchasing activity of the board of education and having the power to prepare advertisements, to advertise for and receive bids and to award contracts as permitted by N.J.S.A. 18A:18A-1 et seq., but if there be no secretary, business administrator or business manager, such officer, committees or employees to whom such power has been delegated by the board of education.

"*Professional services*" means services 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. Professional services may also mean services rendered in the provision or performance of goods or services that are original and creative in character in a recognized field of artistic endeavor.

"*Public works*" means building, altering, repairing, improving or demolishing any public structure or facility constructed or acquired by a contracting unit to house local government or school district functions or provide water, waste disposal, power, transportation (but not the contracting for transportation services), and other public infrastructures.

"*Remaining amount*" means the value of similar goods and services that are needed for the remainder of the current contract year, plus those similar goods and services to be needed in the subsequent contract year.

"*Responsible*" means able to complete the contract in accordance with its requirements, including, but not limited to, requirements pertaining to experience, moral integrity, operating capacity, financial capacity, credit, and workforce, equipment, and facilities availability.

"*Responsive*" means conforming in all material respects to the terms and conditions, specifications, legal requirements, and other provisions of the request.

"Service or services" means the performance of work, or the furnishing of labor, time, or effort, or any combination thereof, not involving or connected to the delivery or ownership of a specified end product or goods or a manufacturing process. Service or services may also include an arrangement in which a vendor compensates the contracting unit for the vendor's right to operate a concession.

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## **SUBCHAPTER 2. EXTRAORDINARY UNSPECIFIABLE SERVICES**

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### **5:34-2.1 Use of extraordinary unspecifiable services**

N.J.S.A. 40A:11-5(1)(a)ii and 18A:18A-5a(2) permit contracting units to award contracts without competitive bidding for extraordinary unspecifiable services. The application of this exception for extraordinary unspecifiable services shall be construed narrowly in favor of open competitive bidding wherever possible.

### **5:34-2.2 General requirements limiting the use of the exception**

- (a) The assertion that the service can only be provided by a single contractor ("sole source") shall not be sufficient to justify avoidance of competitive bidding as an extraordinary, unspecifiable service (hereinafter referred to as EUS).
- (b) The fact that the service is in the nature of a personal, human, social or training services contract, or includes within its description such terms as "technical," "management," "consultant," or similar descriptions suggesting some special nature shall not in itself be sufficient to utilize this exception. The need for expertise, extensive training and proven reputation in the field of endeavor must be critical and essential to the project, and not merely a desire to have a reliable job performed.
- (c) The services must be of such a qualitative nature that the performance of the services cannot be reasonably described by written specifications. However, services previously bid or generally characterized as being of a continuous ongoing nature shall be subject to the presumption that such services may not be classified as an EUS, unless a contracting unit can demonstrate in writing its inability to prepare written specifications describing the qualitative nature of the performance of the services required. If written specifications can be prepared describing the qualitative nature of the performance of the services, then they shall be so written, but notwithstanding that the other criteria of the definition may be met. Contracting unit officials might also consider the use of competitive contracting pursuant to N.J.S.A. 40A:4.1(k) or 18A:18A-4.1(k).
- (d) Services that meet the requirements of EUS may not be combined with other work in a contract which is predominantly characterized as being a biddable activity so as to avoid the necessity of bidding for the work which in its own right is subject to competitive bidding.
- (e) No firm, having been previously contractually retained under this exception to study, survey, or prepare specifications for a given system, function, or equipment, may be selected without competitive bidding or competitive contracting to operate, implement, or provide any material or services on the basis of intimate or specialized knowledge acquired as a result thereof. Such a firm is not authorized to participate in competitive bidding or competitive contracting if its earlier participation would give it unfair advantage.

### **5:34-2.3 Procedures for implementation of the exception**

- (a) If the estimated cost or price exceeds the 15 percent of the bid threshold of N.J.S.A. 40A:11-6.1a or 18A:18A-37a, quotations as to the cost or price must be solicited by the contracting agent



whenever practicable, and the contract shall be awarded in accordance with the requirements of N.J.S.A. 40A:11-6.1a or 18A:18A-37a.

(b) Before the governing body awards a contract under the EUS provisions which exceeds the bid threshold established in accordance with N.J.S.A. 40A:11- 6.1b or 18A:18A-37b, a designated administrative official of the contracting unit must file a certificate with the governing body clearly describing the nature of the work to be done, stating that it is not reasonably possible to draft specifications, describing the informal solicitation of quotations, and describing in detail why the contract meets the provisions of the statute and these rules. A mere recitation of the language in the statute shall not be sufficient for this purpose. A standard certification format is available from the Division of Local Government Services and must be utilized. The certification must be kept with the resolution awarding the contract.

(c) The governing body, in addition to stating the supporting reasons for its action in the resolution awarding the contract, shall place a notice of the action in an official newspaper pursuant to N.J.S.A. 40A:11-5(1)(a) and 18A:18A-5(a)(2).

#### **5:34-2.4 (Reserved)**

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### **SUBCHAPTER 3. CERTAIN LEASES OF EQUIPMENT AND SERVICE AGREEMENTS BEYOND THE FISCAL YEAR**

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#### **5:34-3.1 Duration of contract**

(a) Leases (which term includes rental agreements) and service agreements for items authorized by N.J.S.A. 40A:11-15(7) and 40A:11-15(15) or N.J.S.A. 18A:18A-42(f) shall not be renewed or extended beyond the number of years set forth in each such statutory provision. The specifications for rebidding after the maximum number of years should not require that the equipment be in the possession or service of the contracting unit.

(b) Such leases and service agreements may be written for any period of time not to exceed the maximum statutory period, or for shorter periods with provision for renewal at the option of the contracting unit, provided that such renewal shall not cause the cumulative length to exceed the permitted length of time. Such renewals may be authorized only by resolution of the governing body.

#### **5:34-3.2 Application of bidding requirements**

(a) All multi-year contracts, including all multi-year leases and multi-year leases with option to purchase, which are authorized under N.J.S.A. 40A:11- 15(7), 40A:11-15(15) or 18A:18A-42(f), and other multi-year contracts subject to N.J.S.A. 40A:11-15 and 18A:18A-42 for the procurement of goods or services shall be subject to competitive bidding if the cumulative amount to be expended during the duration of the multi-year lease or contract exceeds the threshold for competitive bidding for the contracting unit.

(b) Change orders to reflect price increases shall not be required for purchases that are part of a contract where the bid specifications included provisions for price changes based on an objective benchmark not under the direct control of the supplier.

(c) Leases of textbooks and services incidental thereto may be made, negotiated or awarded by a board of education without public advertising for bids.

### **5:34-3.3 Option to purchase, prohibitions, cancellation clause**

- (a) In addition to providing for the use of equipment during the period of the lease, the lease may provide for rental payments to be credited towards the purchase price for purpose of acquisition of the equipment if the contracting unit, at its sole option, decides to buy the equipment, and said option was included in the original specifications and in the original contract.
- (b) Leases shall not, however, provide for the acquisition of ownership at the beginning of the lease term, with installment payments to be made thereafter.
- (c) If the contracting unit anticipates that a lessor may desire to assign its right to receive lease payments to an outside non-contractual third party, provision for such assignment must have been permitted by the lease specifications and be included in the lease agreement, and the lessee must be notified in writing by the lessor before payments may be made to a third party pursuant to such an assignment.
- (d) While N.J.S.A. 40A:11-15 and 18A:18A-42 authorize lease arrangements, such contractual arrangements must contain a clause making them subject to the availability and appropriation annually of sufficient funds as may be required to meet the extended obligation, or contain an annual cancellation clause.

### **5:34-3.4 Equipment changes**

- (a) Equipment leased shall not be expanded, upgraded or otherwise materially changed or increased in cost during the term of the lease without competitive bidding, except as follows:
  - 1. Equipment changes which were specifically described, either by itemization or by performance standards, in the original bidding specifications and for which all bidders were requested to submit bid proposals, when in accordance with a formal written plan of time-phased expansion, prepared prior to solicitation of bids, and when the bid proposals for such changes were considered in the determination of the successful bidder; or
  - 2. An item of equipment which is discontinued by the vendor may be replaced with a comparable model which performs the same or increased workload provided that neither the workload nor the cost exceeds that specified in the original contract or the plan of expansion referred to in (a)1 above.
- (b) Any such changes made in accordance with this section shall be made by an amendatory contract and the procedure followed shall be in compliance with the regulations regarding change orders.

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## **SUBCHAPTER 4. ADMINISTRATION OF COMPETITIVE CONTRACTING PROCESS**

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### **5:34-4.1 Definitions**

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

*"Administrator"* means:

- 1. In the case of a municipality, a municipal administrator appointed pursuant to N.J.S.A. 40A:9-136 and N.J.S.A. 40A:9-137; a business administrator, a municipal manager or a municipal administrator appointed pursuant to the Optional Municipal Charter Law, P.L.

- 1950, c.210 (N.J.S.A. 40:69A-1 et seq.); or a municipal manager appointed pursuant to the municipal manager form of government law. N.J.S.A. 40:79-1 et seq.;
2. In the case of a county, an individual appointed pursuant to N.J.S.A. 40A:9-42, 40:41A-42, 40:41A-47, or 40:41A-82;
  3. In the case of an authority, as defined in the Local Authorities Fiscal Control Law, P.L. 1983, c. 313 (N.J.S.A. 40A:5A-1 et seq.), a full-time professional employee of the authority found by the governing body to possess the experience and skill necessary to properly administer the competitive contracting process; or
  4. In the case of a board of education, the administrator shall be defined pursuant to N.J.S.A. 18A:18A-4.3.b.

"*Authorized agent*" means a duly-appointed qualified purchasing agent, legal counsel, or administrator of a contracting unit using competitive contracting in accordance with this subchapter.

#### **5:34-4.2 Model evaluation criteria**

(a) The following, as appropriate to individual circumstances, shall be used as criteria for evaluating requests for proposals (RFPs) under the competitive contracting process described in N.J.S.A. 40A:11-4.1 et seq. and 18A:18A-4.1 et seq. These criteria are not intended to be limiting or all-inclusive, and they may be adapted or supplemented in order to meet a contracting unit's individual needs as competitive contracting may dictate. No criteria shall unfairly or illegally discriminate or exclude otherwise capable vendors.

1. Technical criteria:

i. Proposed methodology:

- (1) Does the vendor's proposal demonstrate a clear understanding of the scope of work and related objectives?
- (2) Is the vendor's proposal complete and responsive to the specific RFP requirements?
- (3) Has the past performance of the vendor's proposed methodology been documented?
- (4) Does the vendor's proposal use innovative technology and techniques?

ii. Are sound environmental practices such as recycling, energy efficiency, and waste reduction used?

2. Management criteria:

i. Project management:

- (1) How well does the proposed scheduling timeline meet the contracting unit's needs?
- (2) Is there a project management plan?

ii. History and experience in performing the work:

- (1) Does the vendor document a record of reliability of timely delivery and on-time and on-budget implementation?

- (2) Does the vendor demonstrate a track record of service as evidenced by on-time, on-budget, and contract compliance performance?
    - (3) Does the vendor document industry or program experience?
    - (4) Does the vendor have a record of moral integrity?
  - iii. Availability of personnel, facilities, equipment and other resources:
    - (1) To what extent does the vendor rely on in-house resources vs. contracted resources?
    - (2) Are the availability of in-house and contract resources documented?
  - iv. Qualification and experience of personnel:
    - (1) Documentation of experience in performing similar work by employees and when appropriate, sub-contractors?
    - (2) Does the vendor make use of business capabilities or initiatives that involve women, the disadvantaged, small and/or minority owned business establishments?
    - (3) Does the vendor demonstrate cultural sensitivity in hiring and training staff?
- 3. Cost criteria:
  - i. Cost of goods to be provided or services to be performed:
    - (1) Relative cost: How does the cost compare to other similarly scored proposals?
    - (2) Full explanation: Is the price and its component charges, fees, etc. adequately explained or documented?
  - ii. Assurances of performance:
    - (1) If required, are suitable bonds, warranties, or guarantees provided?
    - (2) Does the proposal include quality control and assurance programs?
  - iii. Vendor's financial stability and strength:
    - (1) Does the vendor have sufficient financial resources to meet its obligations?

#### **5:34-4.3 Opening and evaluating proposals and awarding competitive contracts**

- (a) The request for proposals document shall state the time and place for receiving and opening the proposals, and shall specify the criteria that will be used to evaluate proposals.
- (b) At the time and place proposals are due, the names of all the vendors and the price of their respective proposals shall be announced in public. Prior to opening such proposals, the authorized agent shall, if not provided as part of the request for proposals document, describe the specific weighting of any evaluation criteria, which may be used for evaluating the proposals.
- (c) Vendors and the general public may be prohibited from physically attending a proposal opening if, during a state of emergency declared by the Governor for public health reasons, the emergency reasonably prevents the local unit from accommodating in-person attendance. In the event the

contracting unit cannot accommodate in-person attendance at a proposal opening for public health reasons during a state of emergency declared by the Governor, the contracting unit must broadcast the proposal opening live at the contracting unit's facilities. Another local unit's facilities may be used for the public opening of proposals in the event that the local unit cannot use its facilities for said purpose.

1. The advertisement for proposals must include explicit instructions on how the public can remotely access the opening, along with a statement that in-person attendance is prohibited due to public health-related restrictions on public gatherings due to a declared state of emergency.
2. The contracting unit shall use web-conference call or online livestreaming technology with both video and audio capability, with the video showing sufficient scope and coverage, so that the official opening the proposals can be clearly seen to be opening only the proposals timely submitted.
3. At the opening, the title of the proposal must be clearly announced. If the contracting unit has solicited paper-based proposals, the contracting unit shall display each sealed proposal package, back and front, for the camera prior to opening the proposals. In addition to announcing the vendor name and price as required by (b) above, the presence of any documents required to be part of the proposal submission shall be noted for each proposal.

(d) The evaluation of request of proposals shall be subject to the following requirements:

1. The request for proposals document shall state the criteria for evaluating the proposals.
2. Where not otherwise required to do so by other applicable Federal, State and local regulations, the authorized agent may appoint a committee to assist in the evaluation of the proposals. Committees shall be subject to the following requirements:
  - i. If a committee is to be used, the names of the individuals who serve as committee members shall not be publicly disclosed until the evaluation report is presented to the governing body. Committee members shall be familiar with the need for the goods to be provided or the services to be performed in the request for proposals.
  - ii. Committee members may conduct their work separately or together.
  - iii. While a member of the governing body is not required to be a committee member, no more than one less than the majority of the current membership of the governing body may serve on a committee.
  - iv. The committee may use advisors, as it deems necessary to give opinions on evaluating proposals, except that the advisors shall be subject to the provisions of (e) below. The names of such advisors shall be included in the report submitted to the governing body.
  - v. Meetings of the committee are advisory in nature and are not subject to the Open Public Meetings Act, N.J.S.A. 10:4-1 et seq.
3. At the option of the contracting unit, the request for proposals document may, after proposals are received and opened, but prior to completing the evaluation of the proposals, provide the opportunity for vendors to provide clarification regarding their submission. The presentation shall address only those matters specified by the contracting unit. The presentation shall not be used for negotiation of a contract contrary to law.

(e) The process of establishing weighting criteria and evaluating proposals shall result in a finding that a specific proposal is the most advantageous, price and other factors considered, or that all proposals should be rejected.

(f) Before reviewing any proposals, each person evaluating a proposal shall assess their own affiliations and financial interest and those of their families that relate to their duties as someone evaluating a proposal to ensure they do not have a conflict of interest. For these purposes, a person has a conflict of interest with a proposal if that person or spouse, parent, or child would be in violation of the Local Government Ethics Law, N.J.S.A. 40A:9–22.1 et seq., or the School Ethics Act, N.J.S.A. 18A:12–21 et seq. as appropriate. Any person with a conflict of interest related to the competitive contracting proposal shall not participate in the evaluation process.

(g) Prior to evaluating the proposals, each individual participating in the evaluation of a proposal shall execute a statement in accordance with (e) above certifying they do not have a conflict of interest. Such statement shall reflect the provisions at (e) above, which relate to possible conflict of interest situations. This statement shall be filed with the authorized agent, prior to the beginning of the evaluation process. The certification shall be as follows:

I hereby certify that I have reviewed the conflict of interest standards in the Local Government Ethics Law or the School Ethics Act, as appropriate, and that I do not have a conflict of interest with respect to the evaluation of this proposal. I further certify that I am not engaged in any negotiations or arrangements for prospective employment or association with any of those submitting proposals or their parent or subsidiary organization.

#### **5:34-4.4      Use of competitive contracting for non-listed services**

(a) The authorized agent shall apply to the Director for approval to use the provisions of N.J.S.A. 40A:11-4.1k and 18A:18A-4.1k requesting the use of competitive contracting for the operation, management, or administration of services not otherwise listed in N.J.S.A. 40A:11-4.1a through j and 18A:18A- 4.1a through j. The application shall be in letter form and shall provide the information reasonably required for the Director to respond to the request. If the Director finds that the subject matter of the application is consistent with the intent of the statutory provisions encouraging competitive contracting, then the Director shall approve the request. The Director may consider the level and characteristics of the service and competition in the market. Prior to submitting an application, an applicant may request to consult with the Director or designee to review issues regarding a potential application.

(b) Services that meet the requirements for procurement through competitive contracting may not be combined or included in a contract with other services which are required to be procured through competitive bidding so as to avoid the statutory obligation for the procurement of such other services through competitive bidding.

#### **5:34-4.5      Reserved**



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## SUBCHAPTER 5. ELECTRONIC PROCUREMENT

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### 5:34-5.1 Purpose

The purpose of this subchapter is to promulgate minimum standards for local unit procurement of goods, services, and public works, the sale of surplus personal property, and the sale and lease of real property through means of electronic technology, with such standards providing for the integrity and procedural protections of sealed public bidding and competitive contracting in an online environment.

### 5:34-5.2 Definitions

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

“Bid” means the response submitted by an offeror through an electronic procurement platform in response to a request for bids, for which the contract is awarded to the lowest responsible and responsive bidder or, in the case of the sale or surplus property (including renewable energy certificates) or the sale or lease of real property, to the highest bidder. This term also encompasses a bid being submitted through a paper-based process parallel to electronic bid submission.

“BPU” means the New Jersey Board of Public Utilities.

“Commodity” or “commodities” means gasoline, diesel fuel, snow removal chemicals, public works materials and supplies, including road and roadway construction materials, or any other such materials as may be approved by the Director to be procured by a local unit through a reverse auction.

“Electronic procurement” means the use of computer technology and the Internet for the solicitation and submission of offers; the provision of notice of revisions or addenda to advertisements or offer documents; the use of reverse auctions; and related practices to assist in determining the successful offeror pursuant to law for goods and services contracts, public works contracts, the sale of personal property, and other public procurement-related activities and services as may be determined appropriate by the Director.

“Electronic procurement platform” or “platform” means a computer software program facilitating electronic procurement of goods and services and public works contracts provided by the vendor of the software over the internet as a service, except that this term shall not include an electronic municipal tax lien service subject to the provisions of N.J.S.A. 54:5-19.1a and N.J.A.C. 5:33. This term shall also encompass platforms for the online competitive sale of surplus property or real property, or competitive solicitations for the lease of real property. E-mail systems, including, but not limited to, Outlook, Gmail, and Hotmail shall not constitute electronic procurement platforms for purposes of this subchapter; however, this definition shall not be interpreted to prohibit either party from receiving email prompts concerning answers to offeror questions, issuance of notices, or other information transmitted through the electronic procurement platform.

“Energy” means gas supply service or gas related service or electric generation service or electric related service as set forth in the Electric Discount and Energy Competition Act (P.L. 1999, c.23) and Board of Public Utilities rules regarding Government Energy Aggregation Programs at N.J.A.C. 14:4-6

“Local unit” means a board of education as defined in the “Public School Contracts Law,” N.J.S.A. 18A:18A-1 et seq., or a contracting unit as defined in the “Local Public Contracts Law,” P.L.1971, c.198 (N.J.S.A40A:11-1 et seq.).

“National cooperative contract” means a contract that has been developed utilizing a competitive bidding process by a contracting unit as defined at N.J.S.A. 52:34-6.2b(3) that is located in another state. For purposes of this definition “competitive bidding process” requires open competition, or competition among qualified or pre-qualified offerors, submission of bids, advertisement of the procurement as a national cooperative contract or a regional contract that includes New Jersey in its region, and awarded pursuant to a “lowest responsible,” “most advantageous to the local unit, price and other factors considered,” or other similar standard legally employed by the local unit awarding the contract.

“Offer” means the response submitted by an offeror through an electronic procurement platform, or submitted by paper if allowed by the local unit in parallel with electronic submission, in response to a solicitation for bids, proposals, qualifications, or quotations conducted in a manner authorized under the laws of the State of New Jersey.

“Offeror” means an individual or entity submitting an offer through an electronic procurement platform in response to a solicitation for bids, proposals, qualifications, or quotations conducted in a manner authorized under the laws of the State of New Jersey, or an individual or entity submitting a paper-based response if allowed by the local unit in parallel with electronic submission.

“Offer package” means the forms, documents, and data entry fields provided to prospective offerors for use in responding to a solicitation.

“Offer submission” means documents and information entered into data entry fields that comprise an offeror’s response to a solicitation for bids, proposals, qualifications, or quotations conducted through an electronic procurement platform or a paper-based submission process if allowed by the local unit in parallel with electronic submission.

“Personal identifying information” means information that can be used to distinguish or trace an individual’s identity including, but not limited to, the individual’s name, Social Security number, or biometric records, alone or when combined with other personal or identifying information that is linked, or linkable, to a specific individual, such as, but not limited to, a mother’s maiden name and date and place of birth.

“Public works” mean as set forth at N.J.A.C. 5:34-1.2. The term “public works” shall include “public works construction” contracts as defined at N.J.S.A. 40A:11-4.9.

“Qualifications” means responses submitted by contractors or vendors in response to a request for qualifications solicited by a local unit, from which the local unit will determine which contractors or vendors are permitted to submit bids or proposals.

“Real property” shall include, in addition to land and anything growing on, attached to, or erected on the land, development rights or easements, or any right, interest, or estate in the area extending above any real property, or capital improvement thereon, to such a height or altitude as any title, interest, or estate in real property may extend, commonly known as “air rights.”

“REC” means a renewable energy certificate issued by the New Jersey Board of Public Utilities such as, but not limited to, solar renewable energy certificates (SRECs).

“Reverse auction” means an auction where bidders submit progressively lower bids versus a bidder’s initial bid, with the winner submitting the lowest responsible bid, rather than a standard auction process where the highest bid wins.

“Set-aside program” means a program enacted by a local unit as permitted under N.J.S.A. 18A:18A-51 through 59 or 40A:11-41 through 49, as applicable, whereby certain contracts or portions thereof are reserved for qualified minority business enterprises, qualified women’s business enterprises, qualified small business enterprises, qualified veterans business enterprises, or any

other qualified business enterprises for which set-aside programs are permitted under the Local Public Contracts Law or Public School Contracts Law.

“Surplus property” means personal property not needed for a local unit’s public use. This term shall encompass renewable energy certificates (RECs) but shall not include personal property that is necessary or incidental to the furnishing, refurbishing, or refurbishing of a building sold or leased as part of an online auction of real property.

#### **5:34-5.3 Electronic procurement platforms – local unit procurement of goods and services and public works**

- (a) An electronic procurement platform used for local government procurement shall provide, at a minimum:
1. Detailed online instructions on how to use the platform;
  2. An online offeror registration process that will reliably confirm the identity of the person or entity registering, as well as any individuals authorized to sign and submit offers. This registration should include full contact information, including a physical address and the logging of the IP address used to create the offeror’s account;
  3. The ability to upload and save onto the platform, any completed forms, disclosures, and certifications that, pursuant to New Jersey law, must either accompany an offer or must be submitted to the local unit prior to contract award, and, prior to submission, prompt offerors when such documents have not been incorporated into an offeror’s response;
  4. The ability for offerors to electronically transmit, and local units to receive, all documents and information responsive to, and required to be submitted either with the offer or before the contract award;
  5. Timestamping and logging of all local unit and offeror actions on the platform, including IP address.
  6. The ability for prospective offerors to post questions, and the local unit to post responses thereto, in a manner visible to all prospective offerors. This shall not absolve the local unit from issuing a notice of revision or addenda when required pursuant to N.J.S.A. 18A:18A-21 and 40A:11-23, or any other applicable law;
  7. The ability of a local unit to extend the amount of time for submission of offers beyond the originally advertised time;
  8. The ability of the local unit to view which prospective offerors have interacted with the procurement solicitation, as well as immediately view submitted offers after the submission deadline has passed;
  9. Individual user accounts with password protected access for local unit officers and employees, wherein permitted activities on the platform can be restricted and segregated. Individual user account activity shall be archived to facilitate administrative review and investigation. The platform shall set a maximum time for inactivity before the user is automatically logged out;
  10. Platform-related help desk support for prospective offerors and the local unit through the internet, e-mail, and at least one toll-free telephone number;
  11. Web-based training, including online tutorials, for both prospective offerors and those local unit officers and employees responsible for administering the local unit’s competitive procurement process;

12. A standard complaint procedure concerning platform-related problems for both the local unit and offerors. The complaint procedure shall require that a complaint log be maintained which shall be available to the local unit for inspection, along with a record of problems arising with the system and the resolution of same;
  13. The ability to accommodate such set-aside programs as a local unit may establish for one or more procurements; and
  14. The ability to download and print each package of submitted offer documents, tabulate offers into a spreadsheet format, publish offer results and local unit contract awards online, as desired by the local unit.
- (b) Prospective offerors must be able to obtain specifications, plans, and any other documents pertaining to a solicitation for bids, proposals, qualifications, or quotations conducted in a manner authorized under the laws of the State of New Jersey; including bid checklists and any documents required to be submitted by an offeror upon submitting an offer or before the local unit can award a contract. If a local unit conducts a procurement through a platform that requires payment of a registration or other fee before such materials can be obtained, the materials shall also be made available to prospective offerors on the local unit's website and/or at the local unit's offices during the local unit's regular business hours. For materials obtained at the local unit's offices, the local unit shall not charge a prospective offeror in excess of what can otherwise be charged for obtaining such documents if the local unit did not employ an electronic procurement platform.
- (c) All information pertaining to a competitive procurement conducted through an electronic procurement platform shall be transmitted and received through the platform and accessible within the platform. Offer submissions shall be transmitted to a secure electronic lockbox, to which access shall be restricted to individuals specifically authorized by the local unit with all activity in the lockbox logged. The contents of offer submissions connected with a competitive procurement shall not be able to be accessed before the submission deadline, except that for reverse auctions, the lowest bid amount may be visible. Notwithstanding the provisions of this subsection, authorized persons within the local unit shall have the exclusive ability to view a competitive quotation as received in real time.
- (d) For contracts subject to competitive procurement, the names of all offerors and the price of their respective offers shall be verbally announced in public by the local unit once the submission deadline has passed. The local unit may also display the results for public view on a screen and/or post the results on the local unit's website. Prior to the submission deadline, local units shall have the sole discretion on whether to release the names of prospective offerors that have obtained offer packages.
- (e) Notwithstanding the provisions of any other law to the contrary, where a prospective offeror has obtained an offer package through an electronic procurement platform, notices of revisions or addenda shall be transmitted to the prospective offeror through the electronic procurement platform in lieu of the method of delivery otherwise required under New Jersey law for the procurement solicitation. A local unit, at its option, may choose to supplement platform originated notices of revisions or addenda by using the provisions otherwise required by State law. Receipt of notices of revisions or addenda transmitted through an electronic procurement platform shall be evidenced by a time stamp generated by the platform confirming when notice was transmitted to the prospective offeror. For prospective offerors obtaining offer packages from the local unit offices, notices of revisions or addenda shall be transmitted in the manner required under New Jersey law for the solicitation.

- (f) Local units may accept a bid bond, performance bond, or surety company certificate in a format where the bond or certificate can be verified electronically through a verification code issued by the surety agency. Notwithstanding the requirements of (c) above, a local unit may accept a guarantee in the form of a cashier's check or certified check when authorized by law; however:
  - 1. The offeror shall include an image of the check upon submitting an offer submission through the electronic procurement platform.
  - 2. The physical check shall be sealed upon submission to the local unit and clearly marked as part of the offeror's response;
  - 3. The local unit shall receive the physical check from the offeror no later than the deadline for receipt of offer submissions; and
  - 4. The local unit cannot open the sealed envelope containing the physical check until the time and place of the opening of offer submissions.
- (g) Engineering and architectural documents requiring an engineer's or architect's seal and/or signature shall have digital seals and digital signatures pursuant to rules promulgated by the New Jersey Board of Professional Engineers and Land Surveyors and the New Jersey Board of Architects, respectively. Electronic signatures or digital signatures may be utilized for all other documents requiring a signature from the offeror.
- (h) A local unit may utilize an electronic procurement system to solicit competitive quotations pursuant to N.J.S.A. 18A:18A-3 or 40A:11-6.1, with the local unit having the exclusive ability to view quotes as received in real time. The platform shall permit the local unit to maintain a downloadable and printable record of the quote solicitation.
- (i) Notwithstanding the fact that a winning public works bid was submitted through an electronic procurement platform, a request by a winning bidder to withdraw a public works bid pursuant to N.J.S.A. 40A:11-23.3 must be transmitted by certified or registered mail.

#### **5:34-5.4 Procurements using electronic procurement platform and parallel paper-based process**

In a single competitive procurement that is not a reverse auction, a local unit may allow offerors the option of using either an electronic procurement platform or the paper-based process set forth in the Local Public Contracts Law, N.J.S.A. 40A:11-1 et seq., Public School Contracts Law N.J.S.A.18A:18A-1 et seq., or such other New Jersey law as may be applicable to the procurement, to submit an offer. All paper-based offer submissions shall be opened at the same date and time as offers submitted through the local unit's electronic procurement platform, at which time the local unit shall upload the paper-based offer submissions onto the platform. This section shall not be interpreted to prevent local units from requiring all offers to be submitted through an electronic procurement platform and prohibiting paper-based offer submissions.

#### **5:34-5.5 Advertisements; time for response**

- (a) All notices and advertisements that the Local Public Contracts Law, Public School Contracts Law, or any other law requires to be published in one or more newspapers shall continue to be published as required by law regardless of whether the local unit is utilizing an electronic procurement platform.
  - 1. In any instance where a local unit utilizes an electronic procurement platform for a competitive procurement, any newspaper notice or advertisement required by law shall contain, in addition to such other information as may be required pursuant to law, a

statement that the procurement is being conducted through an electronic procurement platform along with the name and internet address of the platform.

2. If a local unit is utilizing both an electronic procurement platform and a paper-based offer submission process for the same procurement, the advertisement shall state that offers may be submitted by either method. A local unit must establish a uniform submission deadline across both methods that complies with the Local Public Contracts Law, Public School Contracts Law, or such other law as may apply to the procurement.
- (b) If a local unit conducts a procurement through a platform that requires payment of a fee before any offer documents can be accessed on the platform, the advertisement shall state that such materials can be obtained from the local unit's offices during regular business hours and must include the address of the building where the materials can be obtained, along with the regular business hours.
- (c) The minimum amount of time to submit an offer under the Local Public Contracts Law, Public School Contracts Law, or any other law shall remain the same as for paper-based procurement.

#### **5:34-5.6 Reverse auctions generally**

- (a) A local unit may only utilize a reverse auction for purchases of energy and commodities..
- (b) If the local unit is utilizing an electronic procurement platform with a reverse auction format, the local unit shall publish all required notices and advertisements in one or more newspapers pursuant to the Local Public Contracts Law or Public School Contracts Law, as applicable. In addition to the content required pursuant to N.J.A.C. 5:34-5.5(a)1, the advertisement shall also include the period when bids will be accepted and reference the local unit's right to reject all bids pursuant to law. Bidding must either take place, or close, no earlier than 10 days after the date of newspaper publication.
- (c) Bidders shall not be able to view the identity of other bidders in the reverse auction while the auction is in progress.
- (d) Unless otherwise specified under this subchapter, all bidders shall upload, to the platform, any documents or information that are required to accompany a bid pursuant to the Local Public Contracts Law or the Public School Contracts Law by no later than when a bidder places its first bid.
- (e) The Director shall have the sole discretion to establish a pilot program evaluating the feasibility of reverse auctions for other goods and services procurements.

#### **5:34-5.7 Additional provisions applicable to reverse auctions for procurement of energy supply from third-party supplier**

- (a) A local unit may only utilize an electronic procurement platform for energy supply if the platform vendor is registered with the BPU as an "energy agent" pursuant to the New Jersey Electric Discount and Energy Competition Act of 1999 (EDECA).
- (b) Only those third-party energy suppliers that are licensed by the BPU are eligible bidders. Third-party energy suppliers licensed by the BPU may only submit bids to local units located within their permitted service area.
- (c) The local unit shall provide the advertisement of the reverse auction to each eligible third-party energy supplier that is not registered on the electronic procurement platform through e-mail or regular mail, except where an eligible supplier affirmatively opts-out of receiving such notices. Notwithstanding the requirements of N.J.A.C. 5:35-5.4(a), e-mail notices transmitted to all



eligible third-party energy suppliers pursuant to this section shall be in lieu of newspaper advertisement.

- (d) As with the electronic procurement of other goods and services, the energy supplier shall provide to the local unit, all documents that are required to be submitted pursuant to law prior to contract award.
- (e) To facilitate locking in spot pricing, the governing body of a local unit procuring energy through an electronic procurement platform may adopt a resolution or ordinance, as appropriate, authorizing its purchasing agent to award a contract to the successful bidder shortly after bids are closed if the price is below a specified amount. The purchasing agent shall report back to the governing body with the reverse auction results.

#### **5:34-5.8 Sale of surplus property**

- (a) The sale of surplus property pursuant to N.J.S.A. 18A:18A-45 or 40A:11-36 may be conducted on an electronic procurement platform either through an online public auction or through the online equivalent of a sealed bid process.
- (b) An electronic procurement platform used for the sale of surplus property shall provide, at a minimum:
  - 1. Detailed online instructions on how to use the platform;
  - 2. A bid registration process that will reliably confirm the identity of the person or entity bidding, as well as any individuals authorized to submit bids. This registration should include full contact information, including a physical address and the logging of the IP address used to create the account;
  - 3. The ability to upload and save onto the platform any completed forms, disclosures, and certifications that, pursuant to New Jersey law, must be submitted to the local unit;
  - 4. Timestamping and logging of all local unit and bidder actions on the platform, including IP address;
  - 5. The ability for prospective bidders to post questions, and the local unit to post responses thereto, in a manner visible to all prospective bidders. This shall not absolve the local unit from issuing a notice of revision or addenda as may be required pursuant to law;
  - 6. Individual user accounts with password protected access for local unit officers and employees, wherein permitted activities on the platform can be restricted and segregated. Individual user account activity shall be archived to facilitate administrative review and investigation. The platform shall set a maximum time for inactivity before the user is automatically logged out;
  - 7. Platform-related help desk support for prospective bidders and the local unit through the internet, e-mail, and at least one toll-free telephone number; and
  - 8. A standard complaint procedure concerning platform-related problems for both the local unit and bidders. The complaint procedure shall require that a complaint log be maintained, which shall be available to the local unit for inspection, along with a record of problems arising with the system and the resolution of same.
- (c) The governing body of a local unit must adopt an authorizing resolution for each online sale of surplus property containing, at a minimum, the following:
  - 1. A description of the surplus property;

2. A statement that the surplus property is no longer needed for public use and that the sale will be held on an electronic procurement platform either through an online public auction or the online equivalent of a sealed bid process;
  3. The name of the electronic procurement platform;
  4. For each item of surplus property that is part of a local unit's fixed asset inventory, the description of each item shall include information that sufficiently identifies the item and provides an audit trail;
  5. For surplus property that is not part of the local unit's fixed asset inventory, except for motorized vehicles titled in the name of the local unit, a general description sufficient to inform the public of the item or items being sold. If RECs are being sold through online public auction, the number of RECs to be sold shall be stated in the resolution;
  6. For each motorized vehicle titled in the name of the local unit, a description of each vehicle with sufficient detail to inform the public of the item being sold, along with the vehicle information number (VIN) displayed on the title;
  7. If the sale is being conducted through an online public auction:
    - i. The date and time of the online auction. If the online auction will take place over a set number of hours or days, the resolution shall state the dates and times upon which the sale will commence and conclude; and
    - ii. Whether a reserve price is to be set and, if so, the amount of the reserve price.
  8. A statement that the local unit reserves the right to reject all bids if the local unit determines such rejection to be in the public interest; and
- (d) No single resolution shall authorize more than one online sale; however, multiple items of surplus property may be sold at a single online sale. In the resolution authorizing an online sale, the governing body may delegate, to the purchasing agent, the authority to accept or reject bids on any item where the winning bid comes in under the local unit's bid threshold.
- (e) If a local unit has rejected all bids pursuant to N.J.S.A. 18A:18A-45(e) or 40A:11-36(5) and holds a subsequent public sale of surplus property, the subsequent public sale shall be authorized by the governing body in a separate resolution from the resolution authorizing the initial public sale.
- (f) Advertisements of the online sale of surplus property shall continue to be published in the local unit's official newspaper pursuant to N.J.S.A. 18A:18A-45 or 40A:11-36. The advertisement shall, at a minimum, set forth:
1. A general description of the surplus property to be sold and the conditions of sale;
  2. State that the public sale is being held online, and whether it will be held as an online auction or by the online equivalent of a sealed bid process;
  3. Include the name of the electronic procurement platform on which the sale is being conducted, along with the website address of the platform;
  4. If the public sale is being conducted through an online public auction, the date and time of the online auction. If the online public auction will take place over a set number of hours or days, the advertisement shall state the dates and times upon which the auction will commence and conclude;

5. If the public sale is being conducted through the online equivalent of sealed bid submission, the date and time by which bids must be submitted; and
  6. A statement that the local unit reserves the right to reject all bids if the local unit determines such rejection to be in the public interest.
- (g) An online sale shall commence not less than seven, nor more than 14, days after the date of publication of the advertisement.
- (h) If the local unit is using a live auction that permits bidders the option to submit bids online, the advertisement shall, at a minimum, set forth:
1. A general description of the surplus property to be sold and the conditions of sale;
  2. The time, date, and location of the auction; and
  3. A statement that bidders may participate either in person or electronically, along with the website address where bidders can obtain information on participating electronically.
- (i) If a local unit receives no bids for an item of surplus property at an initial public sale, and the local unit places the item up for a subsequent online auction, the local unit may set by resolution, a “buy it now” price that, once a bidder agrees to pay, concludes all bidding. The “buy it now” price shall be no less than the estimated fair value of the item of surplus property.
- (j) In the event there are no bidders, or a minimum reserve price was not met for an item, the electronic procurement platform may provide an option of continuing or reopening a sale after the close of an online public auction. The potential for this occurrence must be provided for in the agreement between the local unit and the electronic procurement platform vendor, with the provision made clear to bidders on the platform’s website. In the event of a continuance or reopening, those bidders who participated in the sale shall be notified of the new date, but the local unit is not required to publish an additional notice in its official newspaper.
- (k) An electronic procurement platform vendor may collect monies from the sale of surplus property through an online public auction, deduct the commission owed, and disburse the balance of proceeds to the local unit, but only if:
1. The contract between the platform vendor and the local unit expressly provides for this arrangement; and
  2. The electronic procurement platform vendor either holds the proceeds in an escrow account, or otherwise posts a surety bond, auctioneer’s bond, or insurance in an amount sufficient to cover the potential loss of such funds.

**5:34-5.9 Sale of real property by municipalities, counties, and fire districts pursuant to the local lands and buildings law**

- (a) The sale of real property by open public sale at auction to the highest bidder pursuant to N.J.S.A. 40A:12-13 may be conducted on an electronic procurement platform.
- (b) An electronic procurement platform used for the sale of real property pursuant to this section shall provide, at a minimum:
1. Detailed online instructions on how to use the platform;
  2. A bid registration process that will reliably confirm the identity of the person or entity bidding as well as any individuals authorized to submit bids. This registration should include full contact information, including a physical address and the logging of the IP address used to create the account;

3. The ability to upload and save onto the platform any completed forms, disclosures, and certifications that, pursuant to New Jersey law, must be submitted to the municipality, county, or fire district;
  4. Timestamping and logging of all actions by a bidder or the municipality, county, or fire district on the platform, including IP address;
  5. The ability for prospective bidders to post questions, and the municipality, county, or fire district to post responses thereto, in a manner visible to all prospective bidders. This shall not absolve the municipality, county, or fire district from issuing a notice of revision or addenda as may be required pursuant to law;
  6. Individual user accounts with password protected access for municipal, county, or fire district officers and employees, wherein permitted activities on the platform can be restricted and segregated. Individual user account activity shall be archived to facilitate administrative review and investigation. The platform shall set a maximum time for inactivity before the user is automatically logged out;
  7. Platform-related help desk support for prospective bidders and the municipality, county, or fire district through the Internet, e-mail, and at least one toll-free telephone number; and
  8. A standard complaint procedure concerning platform-related problems for both the government entity and bidders. The complaint procedure shall require that a complaint log be maintained, which shall be available to the government entity for inspection, along with a record of problems arising with the system and the resolution of same.
- (c) Advertisements of the online public auction for the sale of real property shall continue to be published in a newspaper circulating in the municipality or municipalities in which the land is situated pursuant to N.J.S.A. 40A:12-13(a). The advertisement shall, at a minimum, include:
1. The address where each parcel of real property is located, along with the block and lot;
  2. That an auction for sale to the highest bidder of the parcel or parcels of real property is being held online;
  3. The name of the electronic procurement platform on which the auction is being conducted, along with the website address of the platform;
  4. The dates and times upon which the online auction will commence and conclude;
  5. Any conditions of sale and restrictions on use as may be permitted pursuant to N.J.S.A. 40A:12-13(a);
  6. As may be applicable, the time within which any conditions of sale shall be operative;
  7. Any reservation by the governing body of the right to reject all bids where the highest bid is not accepted; and
  8. If applicable, a description of any estate or interest that the municipality, county, or fire district intends to retain, along with a statement that bidders shall be required to submit a bid under Option A and Option B as set forth in at N.J.S.A. 40A:12-13(a).
- (d) An online auction for the sale of real property shall commence not less than seven days after the date of the last newspaper publication advertising the online auction.
- (e) If the district is using a live auction that allows for bidders to participate electronically, the advertisement shall at minimum include, in addition to the content required at (b)1, 5, 6, 7, and 8 above, the date, time, and place of the auction, a statement that bidders may participate either

in person or electronically and the website address where bidders can obtain information on participating electronically.

**5:34-5.10 Lease of real property to highest bidder by municipalities, counties, and fire districts pursuant to the local lands and buildings law**

- (a) The lease of real property to the highest bidder at a competitive solicitation held pursuant to N.J.S.A. 40A:12-14 may be conducted on an electronic procurement platform.
- (b) An electronic procurement platform used for the solicitation of bids for the lease of real property pursuant to this section shall provide, at a minimum:
  - 1. Detailed online instructions on how to use the platform;
  - 2. A bid registration process that will reliably confirm the identity of the person or entity bidding, as well as any individuals authorized to submit bids. This registration should include full contact information, including a physical address and the logging of the IP address used to create the account;
  - 3. The ability to upload and save onto the platform any completed forms, disclosures, and certifications that, pursuant to New Jersey law, must be submitted to the municipality, county, or fire district;
  - 4. Timestamping and logging of all actions by the bidder and the municipality, county, or fire district on the platform, including IP address;
  - 5. The ability for prospective bidders to post questions, and the municipality, county, or fire district to post responses thereto, in a manner visible to all prospective bidders. This shall not absolve the government entity from issuing a notice of revision or addenda as may be required pursuant to law;
  - 6. Individual user accounts with password protected access for municipal, county, or fire district officers and employees, wherein permitted activities on the platform can be restricted and segregated. Individual user account activity shall be archived to facilitate administrative review and investigation. The platform shall set a maximum time for inactivity before the user is automatically logged out;
  - 7. Platform-related help desk support for prospective bidders and the municipality, county, or fire district through the Internet, e-mail, and at least one toll-free telephone number; and
  - 8. A standard complaint procedure concerning platform-related problems for the government entity and bidders. The complaint procedure shall require that a complaint log be maintained, which shall be available to the government entity for inspection, along with a record of problems arising with the system and the resolution of same.
- (c) Advertisements of the online competitive solicitation for the lease of real property shall continue to be published in a newspaper circulating in the municipality or municipalities in which the leasehold is situated pursuant to N.J.S.A. 40A:12-14(a). The advertisement shall, at a minimum, set forth:
  - 1. The address where each parcel of real property is located along with the block and lot and, if a capital improvement or space therein or thereon is to be leased, a brief description of the capital improvement;

2. That the competitive solicitation of a lessor is being held online and that the lease shall be awarded to the highest bidder either through an online public auction or through the online equivalent of a sealed bid submission;
  3. The name of the electronic procurement platform on which the competitive solicitation is being conducted, along with the website address of the platform;
  4. If an online auction is being held, the dates and times upon which the sale will commence and conclude;
  5. If the public sale is being conducted through the online equivalent of sealed bid submission, the date and time by which bids must be submitted;
  6. Any conditions, restrictions, and limitations upon the tenancy subject to the lease; and
  7. Any reservation by the governing body of the right to reject all bids where the highest bid is not accepted.
- (d) An online auction for the lease of real property shall commence not less than seven days after the date of the last newspaper publication advertising the online auction.
- (e) If the public solicitation is being conducted through the electronic equivalent of sealed bids, the date of the deadline for submitting bids shall be no less than seven days after the date of the last newspaper publication advertising the sale.
- (f) If a planned live auction allows bidders to participate electronically, the advertisement shall, in addition to the content required at (b)1, 6, and 7 above:
1. State that the lease shall be awarded to the highest bidder by open public bidding at auction;
  2. Set forth the date, time, and place of the auction; and
  3. Include a statement that bidders may participate in the auction either in person or electronically and the internet address of the website where bidders can obtain information on participating electronically;

#### **5:34-5.11 Sale of real property by boards of education**

- (a) The sale of real property to the highest bidder at a public sale held pursuant to N.J.S.A. 18A:20-6 and 18A:20-7 may be conducted on an electronic procurement platform.
- (b) An electronic procurement platform used for the sale of real property pursuant to this section shall provide, at a minimum:
1. Detailed online instructions on how to use the platform;
  2. A bid registration process that will reliably confirm the identity of the person or entity bidding, as well as any individuals authorized to submit bids. This registration should include full contact information, including a physical address, and the logging of the IP address used to create the account;
  3. The ability to upload and save onto the platform any completed forms, disclosures, and certifications that, pursuant to New Jersey law, must be submitted to the board of education;
  4. Timestamping and logging of all board of education and bidder actions on the platform, including IP address;



5. The ability for prospective bidders to post questions, and the board of education to post responses thereto, in a manner visible to all prospective bidders. This shall not absolve the board of education from issuing a notice of revision or addenda as may be required pursuant to law;
  6. Individual user accounts with password protected access for board of education officers and employees, wherein permitted activities on the platform can be restricted and segregated. Individual user account activity shall be archived to facilitate administrative review and investigation. The platform shall set a maximum time for inactivity before the user is automatically logged out;
  7. Platform-related help desk support for prospective bidders and the board of education through the Internet, e-mail, and at least one toll-free telephone number; and
  8. A standard complaint procedure concerning platform-related problems for both the board of education and bidders. The complaint procedure shall require that a complaint log be maintained, which shall be available to the board of education for inspection, along with a record of problems arising with the system and the resolution of same.
- (c) Advertisements of the online public sale shall continue to be published pursuant to N.J.S.A.18A:20-6 in a newspaper published in the school district, or if none are published therein, then a newspaper circulating in the school district. The advertisement shall, at a minimum, set forth:
1. The address where each parcel of real property is located, along with the block and lot;
  2. That the public sale is being held online and that the real property shall be sold to the highest bidder either through an online public auction or through the online equivalent of sealed bid submission;
  3. Include the name of the electronic procurement platform on which the public sale is being conducted, along with the website address of the platform;
  4. If an online auction is being held, the dates and times upon which the sale will commence and conclude;
  5. If the public sale is being conducted through the online equivalent of sealed bid submission, the date and time by which bids must be submitted;
  6. Any reservation by the board of the right to reject all bids where the board of education does not accept the highest bid; and
  7. Any conditions of sale and restrictions on use as may be permitted by law to be imposed by a board of education.
- (d) If a live auction is being held that allows for bidders to participate electronically, the advertisement shall, in addition to the content required at (b)1, 6, and 7:
1. State that the sale of the real property shall be made to the highest bidder by open public bidding at auction;
  2. Set forth the date, time, and place of the auction; and
  3. Include a statement that bidders may participate in the public auction either in person or electronically and the Internet address of the website where bidders can obtain information on participating electronically.

**5:34-5.12 Lease of real property to highest bidder by boards of education**

- (a) The lease of real property to the highest bidder pursuant to N.J.S.A. 18A:20-8.2 may be conducted on an electronic procurement platform.
- (b) An electronic procurement platform used for the solicitation of bids for the lease of real property pursuant to this section shall provide, at a minimum:
  - 1. Detailed online instructions on how to use the platform;
  - 2. A bid registration process that will reliably confirm the identity of the person or entity bidding, as well as any individuals authorized to submit bids. This registration should include full contact information, including a physical address and the logging of the IP address used to create the account;
  - 3. The ability to upload and save onto the platform any completed forms, disclosures, and certifications that, pursuant to New Jersey law, must be submitted to the board of education;
  - 4. Timestamping and logging of all actions by the bidder and the board of education on the platform, including IP address;
  - 5. The ability for prospective bidders to post questions, and the board of education to post responses thereto, in a manner visible to all prospective bidders. This shall not absolve the board of education from issuing a notice of revision or addenda as may be required pursuant to law;
  - 6. Individual user accounts with password protected access for board of education officers and employees, wherein permitted activities on the platform can be restricted and segregated. Individual user account activity shall be archived to facilitate administrative review and investigation. The platform shall set a maximum time for inactivity before the user is automatically logged out;
  - 7. Platform-related help desk support for prospective bidders and the board of education through the Internet, e-mail, and at least one toll-free telephone number; and
  - 8. A standard complaint procedure concerning platform-related problems for both the board of education and bidders. The complaint procedure shall require that a complaint log be maintained, which shall be available to the board of education for inspection, along with a record of problems arising with the system and the resolution of same.
- (c) Advertisements of the online competitive solicitation for the lease of real property shall continue to be published in a newspaper published in the school district in which the leasehold is situated, or if none are published therein, a newspaper circulating in the district in which the leasehold is situated. The advertisement shall, at a minimum, set forth:
  - 1. The address where each parcel of real property is located, along with the block and lot and, if a capital improvement or space therein or thereon is to be leased, a brief description of the capital improvement;
  - 2. That the competitive solicitation of a lessor is being held online and that the lease shall be awarded to the highest bidder through the online equivalent of a sealed bid submission;
  - 3. The name of the electronic procurement platform on which the competitive solicitation is being conducted, along with the website address of the platform;
  - 4. The date and time by which bids must be submitted;

5. Any conditions, restrictions, and limitations upon the tenancy subject to the lease; and
6. Any reservation by the board of the right to reject all bids where the board does not accept the highest bid.

#### **5:34-5.13 Fees and procurement of electronic procurement platforms**

- (a) For public works contracts or contracts for goods or services, an electronic procurement platform vendor shall not charge an offeror
  1. A fee of more than \$50.00 per offer submission;
  2. A fee of more than \$50.00 for accessing documents and information connected to an offer (not including any fees required for platform registration);
  3. A percentage of the winning offer; or
  4. Separate fees for accessing documents or information connected to an offer and for submitting an offer.
- (b) In the case of reverse auctions for energy, the electronic procurement platform vendor may base its fee on the amount of electricity or natural gas purchased.
- (c) If a procurement is subject to a local unit's set-aside program, any fee charged by the electronic procurement platform vendor to either access documents and information or submit an offer in connection with the procurement shall be waived by the platform vendor or refunded to the offeror by the local unit.
- (d) For any contract for an electronic procurement platform where the aggregate fees to be charged over the life of the intended contract will exceed the local unit's bid threshold, an electronic procurement platform shall not be construed to fall under one of the exceptions to public advertising for bids set forth at N.J.S.A. 18A:18A-5 or 40A:11-5, except as set forth at N.J.S.A. 40A:11-5(3) or 18A:18A-5(c). Nothing in this section shall be interpreted to prohibit a local unit from procuring an electronic procurement platform under an emergency contract pursuant to N.J.S.A. 18A:18A-7 or 40A:11-6, as applicable, and N.J.A.C. 5:34-6.1 under circumstances when an emergency contract may be awarded pursuant to law.
- (e) The use of an electronic procurement platform may be procured through competitive contracting pursuant to N.J.S.A. 40A:11-4.1 et seq. or 18A:18A-4.1 et seq., as appropriate, without seeking prior approval of the Director of the Division of Local Government Services.
- (f) A local unit may procure use of an electronic procurement platform through cooperative purchasing.
  1. Subject to the provisions at N.J.A.C. 5:34-7, a lead agent in a cooperative purchasing system as defined at N.J.A.C. 5:34-7.2 may enter into a contract for an electronic procurement platform that can in turn be made available for use by the system's members;
  2. A local unit may procure an electronic procurement platform;
    - i. Under a contract entered into on behalf of the State by the Division of Purchase and Property in the Department of the Treasury for which the terms are extended to local units, subject to the provisions of N.J.S.A. 40A:11-12 or 18A:18A-10, as applicable, and N.J.A.C. 5:34-7.29; or
    - ii. Utilizing the Federal Supply Schedules of the General Services Administration or schedules from other Federal procurement programs promulgated by the Director of

the Division of Purchase and Property in the Department of the Treasury subject to the provisions of N.J.S.A. 40A:11-12 or 18A:18A-10, as applicable, and N.J.A.C. 5:34-9.7.

3. A local unit may, pursuant to N.J.S.A. 52:34-6.2, procure an electronic procurement platform through a national cooperative contract. Prior to awarding a contract to an electronic procurement platform vendor that would otherwise need to be procured competitively, the local unit shall determine that the use of the national cooperative contract shall result in cost savings after all applicable factors have been considered. The local unit shall document the cost savings calculation.
- (g) A bid specification or RFP for an electronic procurement platform shall specify whether the local unit is to pay for the system with offerors using the platform without charge, or whether the platform vendor is to be compensated solely through charging fees to offerors using the platform, or whether the platform vendor is to provide a response under both options.
- (h) When an electronic procurement platform vendor is to be compensated solely through charging fees to offerors and prospective offerors using the platform, in determining whether the value of the contract will exceed the local unit's bid threshold, the local unit shall utilize the fees and charges together with a good-faith aggregate estimate of the number of platform users that would be subject to such fees and charges over the contract term.
  1. If the electronic procurement platform is solicited through a competitive contracting process, the platform vendor with the lowest aggregate fees and charges to offerors shall prevail on the price factor.
  2. If the electronic procurement platform will be awarded to the lowest responsible bidder, the platform vendor with the lowest aggregate fees and charges to offerors shall be the low bidder.

#### **5:34-5.14 Cybersecurity and data ownership**

- (a) At a minimum, the following cybersecurity framework shall be followed for all electronic procurement platforms:
  1. The platform shall:
    - i. Be hosted on FedRAMP Moderate Impact Level Authorized dedicated servers or in a FedRAMP Moderate Impact Level Authorized Cloud, unless the host of the dedicated servers or cloud provides annual evidence of satisfactory cybersecurity internal controls is provided through a SOC2 audit report. When using cloud services, the platform vendor shall check provider credentials and contracts to ensure FedRAMP Moderate Impact compliance;
    - ii. Encrypt passwords and personal identifying information, as well as offer document submissions transmitted to an electronic lockbox before opening by the local unit;
    - iii. Maintain personal identifying information only to the minimum extent and for the minimum duration necessary for platform processes to function. Social Security numbers shall not be utilized as identification numbers for system purposes;
    - iv. Employ a password policy adhering to at least the minimum standards established by the National Institute of Standards and Technology in the United States Department of Commerce, or such other successor organization as may be established by the Federal government;

- v. Undertake stress testing and regular security risk assessments for detecting compromises and implement regular security updates;
    - vi. Develop a cybersecurity incident response plan along with a disaster recovery or business continuity plan;
    - vii. Create and regularly test all back up, information disposal, and disaster recovery procedures; and
    - viii. If dedicated servers are used, the servers shall be located on United States soil.
  2. The platform vendor shall notify the local unit as soon as possible of any cybersecurity incidents resulting in data being compromised;
  3. Platform vendor staff with access to platform data shall be educated in current security measures appropriate to the level and type of access to the data; and
  4. The platform vendor shall have a computer security incident response team (CSIRT) in place and a plan of action to remediate all incidents where data has been compromised.
- (b) The local unit shall require the electronic procurement platform vendor to provide annual evidence of satisfactory cybersecurity internal controls. The local unit shall have the latitude to require a SOC2 audit report or alternate evidence such as, but not limited to, International Standards Organization (ISO) certification.
- (c) All information and data submitted by the offeror in response to a local unit procurement solicitation, or competitive solicitation in relation to surplus property or real property, is deemed property of the local unit. The platform vendor shall have a protocol to submit this information and data to the local unit in a universal electronic format, including all offeror personal identifying information, in a universal format appropriate to the information or data being transmitted such as, but not necessarily limited to, PDF or Excel-based documents.
- (d) The local unit shall adhere to all applicable records retention requirements set forth at law and shall not utilize an electronic procurement platform vendor as the permanent repository of such records. The electronic procurement platform vendor shall provide the local unit with all records referenced at (c) above within 30 days of the solicitation closing or such alternate timeframe as the local unit and the vendor agree upon. Under no circumstances may the platform vendor purge such information and data before providing it to the local unit.

#### **5:34-5.15 Contracts with electronic procurement platform vendors**

- (a) All contracts between a local unit and an electronic procurement platform vendor shall:
1. In addition to being reviewed by legal counsel if deemed necessary by the local unit, be reviewed and approved by a qualified purchasing agent or, in lieu of a qualified purchasing agent, the chief financial officer or equivalent, or the school business administrator, as appropriate to the type of entity, prior to the execution of the contract as to the terms, including satisfaction of the requirements of this section;
  2. Be awarded by the governing body notwithstanding the value of the contract, or whether the contract was procured competitively or through cooperative purchasing, except in circumstances where an emergency contract may be entered into pursuant to law; and
  3. Contain adequate provisions for compensating the local unit against losses caused as a result of negligence or misconduct on the part of the platform vendor and the platform vendor's employees and agents.

- (b) The following terms shall not be enforceable in a contract between a local unit and an electronic procurement platform vendor:
  - 1. A provision requiring the local unit to indemnify or hold harmless a platform vendor or its employees and agents; and
  - 2. A provision requiring binding arbitration as a means of dispute resolution between the local unit and the platform vendor.
- (c) All disputes between the parties and disputes concerning the contract or its operation shall be in writing and forwarded to the other party through registered or certified mail. New Jersey law shall apply to and govern the contract and the relationship between the local unit and the platform vendor. All contracts shall have appropriate provisions for service of process to the vendor.
- (d) All contracts entered into between the local unit and the electronic procurement platform vendor shall be in writing, executed by all parties, and have appropriate provisions for termination of the contract, including, but not limited to, termination for failure to perform on the part of the vendor.
- (e) Contracts for electronic procurement platforms shall not be considered data processing service contracts pursuant to N.J.S.A. 40A:11-15(5), and the total duration of a contract for an electronic procurement platform shall not exceed five years.

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## **SUBCHAPTER 6. EMERGENCY PURCHASES AND CONTRACTS**

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### **5:34-6.1 General requirements**

- (a) The use of emergency purchasing pursuant to N.J.S.A. 40A:11-6 or 18A:18A-7 shall be subject to the following requirements:
  - 1. An actual or imminent emergency must exist requiring the immediate delivery of the goods or the performance of the service;
  - 2. As soon as reasonably possible, but within three days of declaring the emergency, the chief school administrator of a board of education shall notify the superintendent of education for the county of the nature of the emergency and the estimated needs for goods and services necessary to respond to it;
  - 3. The emergency purchasing procedure may not be used unless the need for the goods or services could not have been reasonably foreseen or the need for such goods or services has arisen notwithstanding a good faith effort on the part of the contracting unit to plan for the purchase of any goods or services required by the contracting unit;
  - 4. The contract shall be of such limited duration as to meet only the immediate needs of the emergency; and
  - 5. Under no circumstances shall the emergency purchasing procedure be used to enter into a multi-year contract.
- (b) The governing body of each contracting unit shall adopt rules or regulations as appropriate to the contracting unit to ensure that there is a procedure for determining and confirming the existence of an emergency and that the provisions for emergency purchasing pursuant to N.J.S.A. 40A:11-6 or 18A:18A-7 may be implemented. Such rules or regulations shall include such provisions that ensure that if initially designated individuals are not available, there is a designated



chain of command to ensure that there are always appropriate individuals available to make such decisions.

**5:34-6.2 (Reserved)**

**5:34-6.3 (Reserved)**

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## **SUBCHAPTER 7. COOPERATIVE PURCHASING**

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### **5:34-7.1 Applicability and authority**

- (a) The rules in this subchapter shall be known as the Cooperative Purchasing Rules.
- (b) These rules shall apply to all contracting units.
- (c) This subchapter is adopted under the authority of P.L. 1999, c. 440 (N.J.S.A. 40A:11-11).
- (d) Copies of all cooperative purchasing forms are available from the Division of Local Government Services at PO Box 803, Trenton, New Jersey 08625-0803 or at the Division's web site at [www.nj.gov/dca/dlgs/programs/NJ\\_LAPL.shtml](http://www.nj.gov/dca/dlgs/programs/NJ_LAPL.shtml) under Cooperative Purchasing.
- (e) When the lead agency of a cooperative pricing system, joint purchasing system or regional cooperative pricing system established and properly registered with the Division is a board of education or educational service commission the provision and performance of goods and services shall be conducted pursuant to the Public School Contracts Law (N.J.S.A. 18A:18A-1 et seq.). All other lead agencies shall follow the Local Public Contracts Law (N.J.S.A. 40A:11-1 et seq.).
- (f) Boards of education as defined in N.J.S.A. 18A:18A-2 that pursue joint purchasing as described in N.J.S.A. 18A:18A-11 shall be subject to the rules set forth in this subchapter.

### **5:34-7.2 Definitions**

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

*"Application"* means the forms and all supporting documents for creation, amendment or renewal of a cooperative purchasing system.

*"Commodity resale system"* means a purchasing system in which a local contracting unit purchases either gasoline, diesel fuel, snow removal chemicals, public works materials and supplies, including road and roadway construction materials, or any other such materials as may be approved by the Director for its own consumption and then sells all or a portion thereof to another local contracting unit.

*"Contracting unit"* means any county; municipality; board of education; or any board, commission, committee, authority or agency, which is not a State board, commission or committee, authority or agency, and which has administrative jurisdiction over any district, project, or facility, included or operating in whole or in part within the territorial boundaries of any county or municipality which exercises functions which are appropriate for the exercise by one or more units of local government or board of education and which has statutory power to make purchases and enter into contracts awarded by a contracting agent for the provision or performance of goods or services.

*"Cooperative pricing system"* means a purchasing system in which a local contracting unit advertises for bids and awards a master contract to a successful vendor for its own quantities and the estimated quantities submitted by the individual registered members.

*"Cooperative purchasing system"* means a cooperative pricing system, joint purchasing system, commodity resale system, county cooperative contract purchasing system or regional cooperative pricing system which has been approved and registered pursuant to this subchapter.

*"County cooperative contract purchasing system"* means a cooperative purchasing system that shall only be formed by a county and in which the county advertises for bids and awards a contract to the successful vendor.

*"Energy"* means gas supply service or gas related service or electric generation service or electric related service as set forth in the Electric Discount and Energy Competition Act (P.L. 1999, c.23) and the Interim Government Energy Aggregation Program Standards promulgated by the Board of Public Utilities on June 24, 1999.

*"Form CCCP-1917"* means Request For Registration Or Modification of a County Cooperative Contract Purchasing System which contains the following information: action requested; name of the county cooperative contract purchasing system; name of contract, address, and phone number of lead agency; and certification of compliance with N.J.S.A. 40A:11-1 et seq.

*"Form CP-2001"* means Request For Registration Or Modification of a Cooperative Purchasing System which contains the following information: action requested; name of cooperative purchasing system; name of contact, address, and phone number of lead agency; name of participating contracting units affected by request; and certification of compliance with N.J.S.A. 40A:11-1 et seq. and 18A:18A-1 et seq., as appropriate.

*"Form CP-2060"* means a Request for Registration or Modification of a Commodity Resale System which contains the following information: action requested, identification of the lead agency (seller), participating contracting units (purchaser) and commodity being resold.

*"Joint purchasing system"* means a cooperative purchasing system in which the lead agency serves as the purchasing agent for the membership of the system with all of the duties and responsibilities attendant thereto. The lead agency advertises for bids and awards a single contract to a vendor providing for the payment to the contractor for its own needs and for the needs of the participating registered members of the system. The only contractual relationship is between the lead agency and the vendor.

*"Lead agency"* means the contracting unit which is responsible for the management of the cooperative purchasing system.

*"Regional cooperative pricing system"* means a cooperative pricing system composed of two or more registered cooperative pricing systems and their participating contracting units which have agreed to join together for the provision and performance of goods and services, including the purchase of energy.

*"Registered member"* means a contracting unit which has been approved by the Director for participation in a cooperative purchasing system.

*"Snow removal chemicals"* means snow grits, calcium chloride (rock salt), sand or similar substance used for deicing or improving vehicular traction on snow or ice covered roadways.

### **5:34-7.3 Cooperative pricing system or joint purchasing system creation**

(a) Two or more contracting units may join together to form a cooperative pricing system or a joint purchasing system for the provision and performance of goods and services.

(b) The contracting unit designated as the lead agency shall authorize the creation of the system by resolution. The authorizing resolution shall identify the system established as either a joint purchasing system or a cooperative pricing system.

(c) Motions made, carried, and recorded in the written minutes of a business meeting of a board of education shall be considered to be the same as a resolution.

**5:34-7.4 Cooperative pricing system or joint purchasing system formal agreement**

(a) A cooperative pricing system or joint purchasing system shall be based on a formal agreement entered into between the lead agency and each contracting unit. Each agreement shall be authorized by resolution.

(b) At a minimum, the formal agreement shall include the following:

1. Reference to the authorizing statute;
2. Identification of the type of purchasing system;
3. Description of the items of the goods and services to be purchased;
4. The manner of advertising for bids and of awarding contracts;
5. Clear and specific assignment of responsibilities, duties and rights of all contracting units;
6. Provision for any sharing of administrative costs and/or payment for goods and services purchased, together with any necessary standards of performance;
7. Length of the agreement not to exceed 5 years pursuant to N.J.A.C. 5:34-7.5(f);
8. The name of the lead agency for the system:
  - i. As an option, the responsibility of serving as lead agency may rotate, at the most once a year, among the registered members. Provision for this rotation shall be included in the agreement;
  - ii. Rotation of lead agency responsibilities among registered members shall not invalidate contracts or purchase orders with contractors that are in effect at the time of rotation;
  - iii. The Director shall be notified in writing within 30 days of any change in the lead agency; and
9. A requirement that the system identifier shall appear on all documentation related to purchases made through the system, including bidding documents, purchase orders, vouchers, contracts and records.

**5:34-7.5 Cooperative pricing system or joint purchasing system registration**

(a) A cooperative pricing system or joint purchasing system shall be subject to registration with and approval by the Director.

(b) The lead agency of a proposed system shall apply to the Director on behalf of the system's participating contracting units.

(c) Applications shall be made on Form CP-2001.

(d) The Director shall act upon the application within the time provided for review pursuant to N.J.A.C. 5:34-7.28.

(e) In reviewing the application, the Director shall utilize the following criteria, as established by N.J.S.A. 40A:11-11:

1. Provision for maintaining adequate records and orderly procedures to facilitate audit and efficient administration;
2. Adequacy of public disclosure of such actions as are taken by the participants;
3. Adequacy of procedures to facilitate compliance with all provisions of the Local Public Contracts Law, Public School Contracts Law and corresponding rules; and
4. Clarity of provisions to assure that the responsibilities of the respective parties are understood.

(f) Approval shall be for a period not to exceed five years, and shall be limited to the terms, participants and scope of services presented for approval. Any subsequent changes shall be submitted to the Director on Form CP- 2001.

(g) The lead agency shall notify the Director in writing of a decision to terminate the registration of the system prior to its approved expiration date.

**5:34-7.6 Cooperative pricing system or joint purchasing system membership registration**

(a) A contracting unit may apply for membership in an approved cooperative purchasing system by passage of a resolution and executing a formal agreement with the lead agency.

(b) The lead agency shall apply to the Director for approval on behalf of the proposed new member on Form CP-2001.

(c) The Director shall act upon the application within the time provided for review pursuant to N.J.A.C. 5:34-7.28.

(d) Participation in the system for all registered members terminates on the system expiration date assigned by the Director.

(e) The lead agency shall notify the Director in writing within five days of the withdrawal of any registered member from an approved cooperative purchasing system.

(f) A registered member which has formally terminated its participation in an approved cooperative purchasing system, may renew its membership by following the procedure defined in this section.

(g) A registered member of a cooperative purchasing system shall retain membership in a system until the member formally withdraws from participation or the system is dissolved.

**5:34-7.7 Cooperative pricing system or joint purchasing system identifier**

(a) The Director shall assign an alpha-numeric system identifier to each cooperative pricing system or joint purchasing system at the time of its approval.

(b) The system identifier shall be included on all bidding documents, purchase orders, vouchers, contracts and records relating to the operations of the approved cooperative purchasing system.

**5:34-7.8 Cooperative pricing system or joint purchasing system renewal**

(a) Documents requesting the renewal of the registration of a cooperative pricing system or joint purchasing system shall be submitted to the Director for review and approval prior to the date set by the Director for the expiration of the system's registration.

- (b) The lead agency shall authorize the renewal of the system by resolution.
- (c) The lead agency shall apply to the Director on behalf of its membership for system renewal for a period not to exceed five years.
- (d) The renewal application package shall at a minimum include the following:
  - 1. Form CP-2001;
  - 2. Lead agency resolution reauthorizing the system; and
  - 3. A list of the current membership of the System.
- (e) The time for the review-approval period shall commence only upon the determination by the Director that the application for system renewal is complete.
- (f) The lead agency shall notify the Director in writing of a decision not to renew the system's registration.

**5:34-7.9 Cooperative pricing system or joint purchasing system administrative responsibilities**

- (a) Upon approval of system registration and annually thereafter either on the anniversary of the registration of the system or in January of each succeeding year, the lead agency shall publish in its official newspaper a notice similar in content to the following:

Notice of Cooperative Purchasing

(Name of lead agency) acts as lead agency in a cooperative purchasing agreement in cooperation with (list number) registered members. Under this system, the (name of lead agency) solicits competitive bids for certain items purchased by registered members. This is a (specify, joint purchasing system or cooperative pricing system) as defined and regulated by N.J.A.C. 5:34-7. Interested citizens or vendors may obtain information regarding the manner of operation of this system by contacting (name, address and phone number of lead agency). System Identifier \_\_\_\_\_, approved by the New Jersey Division of Local Government Services through (expiration date of the system).

- (b) Prior to the advertisement for bids, a registered member may request a review copy of the bid specifications.
- (c) Before seeking bids, the lead agency shall obtain from the registered members:
  - 1. In the case of a joint purchasing system, the exact quantity of goods to be provided or services to be performed that the lead agency shall purchase for the registered members.
  - 2. In the case of a cooperative pricing system, the estimated quantities that each registered member proposes to contract for during the life of the master contract.
- (d) The lead agency of a joint purchasing system shall disclose in the specifications, the quantities and details of delivery required.
- (e) The lead agency of a cooperative pricing system shall include in the specifications lead agency requirements, stated in definite quantities; and registered member requirements, stated as individual estimated needs.

1. The specification shall list the registered members who have submitted estimates, their delivery address, their estimated maximum quantities and other relevant information to permit the bidder to understand what is potentially involved.
- (f) The lead agency in a joint purchasing system and the individual registered members in a cooperative pricing system shall be responsible for compliance with the change order requirements of N.J.A.C. 5:34-4.
- (g) Each registered member may, by resolution, provide for and authorize payment in advance for estimated administrative costs to be paid to the lead agency for a joint purchasing or cooperative pricing system. Such administrative costs shall be budgeted by the lead agency as a Special Item of Revenue offset with appropriations.
- (h) No contract shall be made by any registered member for a price which exceeds any other price available to the registered member.

**5:34-7.10 Cooperative purchasing system requirement for bids**

- (a) Each request for bids shall contain the following:
1. Language requiring uniform bid price(s) for both the lead agency and registered members. A provision with respect to the registered members shall be included substantially as follows:

**REQUIREMENTS OF REGISTERED MEMBERS**

☐ Check here if willing to provide the goods or services herein bid upon to registered members of the (System Name and System Identifier) who have submitted estimates, without substitution or deviation from specifications, size, features, quality, price or availability as herein set forth. It is understood that orders will be placed directly by the registered members identified herein by separate contract, subject to the overall terms of the master contract to be awarded by the (name of the lead agency), and that no additional service or delivery charges will be allowed except as permitted by these specifications.

☐ Check here if not willing to extend prices to registered members of the (System Name and System Identifier) who have submitted estimates as described above. It is understood that this will not adversely affect consideration of this bid with respect to the needs of (name of the lead agency).

2. A statement as to the procedure to be followed in the event that the lowest responsible bidder, in the bid document, declines to extend prices to the registered members who submitted estimates. Examples of such procedures include:
  - i. The contract for the stated needs of the lead agency will be awarded to the lowest responsible bidder, and new bids will be sought and a master contract subsequently awarded with respect to the needs of the registered members who have submitted estimates;
  - ii. The contract for the needs of the lead agency will be awarded to the lowest responsible bidder, and a master contract for the registered members who have submitted estimates will be awarded to the next lowest bidder whose bid agrees to extend prices; or



- iii. The contract for the needs of the lead agency will be awarded, all other bids shall be rejected and no further bids will be sought by the lead agency on behalf of the registered members who have submitted estimates.
- (b) The master contract shall state that the bid prices may be extended to registered members who have not submitted estimates prior to the advertisement for bids with the written approval of the lead agency and the contractor.
- (c) A statement as to whether or not insurance certificates and/or performance bonds are necessary.

**5:34-7.11 Cooperative pricing system financial and contractual details**

- (a) The lead agency shall certify the funds available for its own needs.
- (b) The master contract executed shall provide for the following:
  - 1. The quantities ordered for the lead agency's own needs; and
  - 2. The estimated aggregate quantities to be ordered by the registered members who submitted estimates, subject to the specifications and prices set forth in the master contract.
- (c) The lead agency shall supply the registered members of the cooperative pricing system who have submitted estimates, the name of the successful bidder, prices awarded and the contract identification number. A registered member may request a copy of the specifications. Each registered member who submitted estimates may then order directly from the vendor. If the cost of the order is under the bid threshold, and if the contracting agent is authorized to do so, then the contracting agent may issue a purchase order, pursuant to N.J.S.A. 40A:11-3a or 18A:18A-3a, as appropriate. If the cost of the order exceeds the bid threshold, then the contract must be awarded by resolution of the governing body in accordance with N.J.S.A. 40A:11-4a or 18A:18A-4a, as appropriate. The system identifier shall be affixed to each purchase order or contract and shown on all forms pertaining thereto.
- (d) Registered members who submit estimates shall not issue orders and contractors shall not make deliveries, that deviate from the specifications or price as set forth in the master contract.

**5:34-7.12 Cooperative pricing system use of pre-existing contracts**

- (a) A registered member of a cooperative pricing system which has not submitted estimates to the lead agency before the advertisement for bids may participate in the resulting contract for that particular item only with the prior written approval of the lead agency and the contractor.
- (b) A contracting unit which is not a registered member of a cooperative pricing system at the time of the awarding of a contract may participate in the contract once it has become a registered member of the system and has received the written approval of the lead agency and the contractor.
- (c) This section shall not apply to joint purchasing systems.

**5:34-7.13 Regional cooperative pricing system**

- (a) Two or more registered cooperative pricing systems may join together for the provision **and performance of goods and services, including the purchasing of energy. The registered membership of each individual cooperative pricing system shall be deemed to be a member of the**

regional cooperative pricing system upon submission to the Director a list of the membership of each system comprising the regional cooperative pricing system.

(b) Registration of a regional cooperative pricing system shall be pursuant to the requirements set forth in N.J.A.C. 5:34-7.5.

(c) When a municipality which has aggregated its residents or business customers for gas supply service or electric generation service becomes a member of a regional cooperative pricing system for the purpose of purchasing energy, it shall simultaneously notify the lead agency of the cooperative pricing system of which it is a member and the lead agency of the regional cooperative pricing system of the participation of its residential or business customers and their respective energy supply demands.

#### **5:34-7.14 Joint purchasing systems financial and contractual details, exclusive of boards of education**

(a) The financial and contractual details set forth in this section shall apply only to contracting units subject to the requirements of the Local Public Contracts Law (N.J.S.A. 40A:11-1 et seq.). Boards of education shall be subject to the financial and contractual details set forth in the Public School Contracts Law (N.J.S.A. 18A:18A-1.1 et seq.) and the administrative requirements contained in N.J.A.C. 6A:23A.

(b) In the case of a joint purchasing system, the lead agency shall comply with the certification of funds requirement of N.J.A.C. 5:30-5 with respect to the full amount of the contract and Division of Local Government Services' requirements for Encumbrance Accounting Systems.

(c) The funds of the lead agency applicable to its own share of the contract to be awarded shall be charged to regular appropriations in its budget.

(d) Prior to handling the funds of the other registered members, the lead agency shall request approval of the Director for a Dedication by Rider pursuant to N.J.S.A. 40A:4-39, entitled "Receipts from Other Agencies participating in the (Name of System) joint purchasing system, System Identifier \_\_\_\_." In order to meet the statutory requirement that expenditures under a Rider may be made only in accordance with the availability of funds, the following steps shall be taken:

1. Prior to the award of contract, the chief financial officer of each registered member (other than the lead agency) shall issue a certificate of available funds, in accordance with N.J.A.C. 5:30-5.
2. The contracting agent of each registered member, with authorization by resolution of the governing body if over the statutory bid limit, shall issue a purchase order to the lead agency together with a copy of its certification of available funds.
3. The lead agency shall, in accordance with N.J.A.C. 5:30-5, issue its own certificate, covering the full amount of the proposed contract including both its own share and those of the registered members. The certificate shall be conditional with respect to the amounts due from the registered members so that the certificate shall read in part as in the following example:

\$5,000 From (Lead Agency) appropriation number 207, Road Department, Other Expenses.

\$2,000 Due from (Name of registered member) pursuant to its purchase order number 70243 and Certification of Available Funds dated \_\_\_\_, (Lead Agency) Dedication by Rider Account Number 7.

\$1,000 Due from (Name of registered member) per its purchase order Number A- 402 and Certification of Available Funds dated \_\_\_\_\_, (Lead Agency) Dedication by Rider Account Number 7.

\$8,000 Total Certified.

4. The lead agency shall then award the total contract to the successful bidder.
5. The lead agency shall not advance funds of its own to cover the purchase on behalf of the registered members but shall make payments only upon receipt of the funds. Payments to the lead agency shall be made promptly in accordance with an agreed-upon schedule, which may include making payment to the lead agency in advance of receipt of goods. The voucher providing for the advance payment shall indicate:

"Transfer of funds to (name of lead agency) as cash advance to enable it to purchase the following on behalf of (name of registered member) as Lead Agency in (name of joint purchasing system), System Identifier \_\_\_\_\_." "(Then list what is to be purchased.)"
6. Funds received by the lead agency as advances from registered members shall be:
  - i. Placed in a separate bank account established within the Rider and held in trust for the purpose of permitting the lead agency to serve as contracting agent for the awarding of joint purchasing contracts;
  - ii. Used only for the payment of actual bills to the contractors pursuant to the overall joint purchasing agreement; and
  - iii. Returned immediately to the registered member upon any determination that the full amount is not needed for payments as initially expected.

#### **5:34-7.15 Commodity resale system registration**

- (a) A contracting unit which purchases gasoline, diesel fuel or snow removal chemicals, public works materials and supplies, including road and roadway construction materials or any other such materials as may be approved by the Director directly from a vendor for its own consumption, may resell a portion of that commodity to another local contracting unit.
- (b) All commodity resale systems shall be subject to an initial registration with and approval by the Director. In reviewing the application, the Director shall utilize the criteria set forth in N.J.A.C. 5:34-7.5(e).
- (c) Approval shall be for a period not to exceed five years.
- (d) The lead agency of the proposed system shall apply to the Director on behalf of the other participating unit(s).
- (e) Application shall be made on Form CP-2060.
- (f) The lead agency shall authorize the creation of the resale system by resolution.
- (g) The lead agency acting on behalf of itself and any participating contracting unit shall at the time of initial system registration or when a new member is added to the system, submit to the Director a copy of the purchase agreement or contract between the units and all confirming resolutions.
- (h) The Director shall act upon the application pursuant to N.J.A.C. 5:34-7.5.

- (i) Any change in the status of the system, the addition or deletion of a member or commodity, shall be submitted by the lead agency to the Director on Form CP-2060.
- (j) The Director shall be notified in writing by the lead agency within 10 days of any change in the status of the commodity resale system.

**5:34-7.16 Commodity resale system renewal**

- (a) Documents requesting the renewal of the registration of a commodity resale system shall be submitted to the Director for review and approval 45 days prior to the date set by the Director for the expiration of the system's registration.
- (b) The lead agency shall apply to the Director for renewal of the Commodity Resale System for a period not to exceed five years.
- (c) The renewal package shall include the following:
  - 1. Form CP-2060;
  - 2. The lead agency resolution reauthorizing the system; and
  - 3. A list of the current membership of the system.
- (d) The time for the review-approval period shall commence upon the determination by the Director that the application for system renewal is complete.
- (e) The lead agency shall notify the Director in writing of a decision not to renew the system's registration.

**5:34-7.17 Accounting requirements for commodity resale systems**

- (a) The accounting requirements set forth in this section shall apply only to contracting units subject to the requirements of the Local Public Contracts Law (N.J.S.A. 40A:11-1 et seq.). Boards of education shall be subject to the financial and contractual details set forth in the Public School Contracts Law (N.J.S.A. 18A:18A-1.1 et seq.) and the administrative requirements contained in N.J.A.C. 6A:23A.
- (b) Expenditure of lead agency funds applicable to its own use of the commodity shall be charged to current fund appropriations in its annual budget.
- (c) The lead agency shall request approval of the Director for a Dedication by Rider pursuant to N.J.S.A. 40A:4-39, entitled "Receipts from Other Agencies participating in the (Name of System) Commodity Resale System, System Identifier." In order to meet the statutory requirement that expenditures under a Rider may be made only in accordance with the availability of funds, the following steps shall be taken:
  - 1. The authorized contracting agent of each registered member shall issue a purchase order to the lead agency, together with a copy of its certification of available funds, and resolution of the governing body if projected expenditures exceed the statutory bid threshold;
  - 2. The lead agency, at agreed upon intervals, shall submit to the participating members of the system an invoice for the amount of the commodity consumed. Payments to the lead agency shall be made by appropriation in the annual budget; and
  - 3. Funds received by the lead agency from registered members shall be:
    - i. Placed in a bank account established by Rider and held in trust; and
    - ii. Used only for the payment or purchase of the resale commodity consumed.

#### **5:34-7.18 Energy aggregation**

- (a) A municipality may provide energy supply to residents and businesses situated within its territorial boundaries.
- (b) A county government may enter into a contract for a government energy aggregation program only if one or more constituent municipalities in the county adopt an ordinance authorizing the county to enter into such a contract.
- (c) A county government energy aggregation program shall only be conducted for residential and business customers located within the constituent municipalities that have approved participation in the county's government aggregation program.
- (d) Only counties and municipalities acting pursuant to the conditions set forth in this chapter may aggregate residential and business customers for gas supply or for electric generation services.
- (e) A cooperative pricing system undertaking energy aggregation in which the lead agency is not a county or municipality and the membership includes a mix of local contracting units including municipalities and counties, shall not include municipalities and counties who seek to provide energy to residents and businesses.

#### **5:34-7.19 Cooperative purchasing of energy**

- (a) Two or more contracting units may join together to form a cooperative pricing system for the sole specific purpose of purchasing energy, or an existing registered cooperative purchasing system may add energy as a commodity to be purchased, pursuant to the Electric Discount and Energy Competition Act (P.L. 1999, c.23) and the Interim Government Energy Aggregation Program Standards promulgated by the Board of Public Utilities.
- (b) The purchase of energy shall be subject to the terms and conditions of the bid specifications and a master contract. The specifications shall be drafted pursuant to Section 4.1a and 4.1b, Bidding Specifications of the Interim Government Energy Aggregation Program Standards promulgated by the Board of Public Utilities.
- (c) Take and pay contracts for the purchase of energy where the government aggregator commits to pay for a certain amount of energy, whether or not the energy is actually received or used by the government aggregator or participants in a cooperative pricing system are specifically prohibited.

#### **5:34-7.20 Binding estimate option**

Notwithstanding any of the restrictions or conditions set forth in this chapter, the lead agency of a cooperative purchasing system shall determine prior to the solicitation of bids whether the estimates submitted by a duly registered member of the system shall be considered firm and binding or a member may withdraw its estimate even after a supplier has been selected. The mechanism for determining systemwide consensus shall be the responsibility of the lead agency.

#### **5:34-7.21 County cooperative contract purchasing system creation**

- (a) Only a county may establish a county cooperative contract purchasing system. The county, at its discretion and with the approval of the vendor, may permit contracting units located within the county's geographic boundaries to procure the provision and performance of goods and services for their own needs, subject to the specifications, terms and conditions set forth in the contract awarded by the county.

(b) A county shall authorize the establishment of a county cooperative contract purchasing system by resolution.

**5:34-7.22 County cooperative contract purchasing system registration**

(a) A county cooperative contract purchasing system shall be subject to registration with and approval by the Director.

(b) Application for registration shall be made on CCCP-1917.

(c) The Director shall act upon the application within the time provided for review pursuant to N.J.A.C. 5:34-7.28.

(d) In reviewing the application, the Director shall utilize the following criteria, as established by N.J.S.A. 40A:11-11(5):

1. Provision for maintaining adequate records and orderly procedures to facilitate audit and efficient administration;
2. Adequacy of public disclosure of such actions taken by the lead agency;
3. Adequacy of procedures to facilitate compliance with all provisions of the Local Public Contracts Law and corresponding rules; and
4. Clarity of provision to assure that the responsibilities of the respective parties are understood.

(e) Approval shall be for a period not to exceed five years, and shall be limited to the terms and scope of services presented for approval. Any subsequent changes shall be submitted to the Director on Form CCCP-1917 for county cooperative contract purchasing system.

(f) A county shall notify the Director in writing of a decision to terminate the registration of the system.

**5:34-7.23 County cooperative contract purchasing system identifier**

(a) The Director shall assign a system identifier to each county cooperative contract purchasing system at the time of its approval.

(b) The identifier shall be included on all contracts, purchase orders, bidding documents, vouchers and records relating to the operations of the county cooperative contract purchasing system.

(c) The identifier shall be provided to each local contracting unit purchasing under the terms and conditions of a contract awarded by the county as a county cooperative contract purchasing system. The participating contracting units shall include the system identifier on all contracts, purchase orders, documents, vouchers and records relating to the purchases made through a county cooperative contract purchasing system.

**5:34-7.24 County cooperative contract purchasing system administrative responsibilities**

(a) Upon approval of a county cooperative contract purchasing system registration and annually thereafter either on the anniversary of the registration of the system or in January of each succeeding year, the lead agency shall publish in its official newspaper a notice similar in content to the following:



### Notice of County Cooperative Contract Purchasing System

The County of (name of county) acts as lead agency in a county cooperative contract purchasing system. Under this system, the County solicits competitive bids for certain items to be purchased. Local contracting units within the county may purchase under the terms and conditions of selected contracts awarded by the County without the necessity of securing formal bids. This is a county cooperative contract purchasing system as defined and regulated by N.J.A.C. 5:34-7. Interested citizens or vendors may obtain information regarding the manner of operation of this system by contacting (name, address and phone number of system contact). The System Name Is \_\_\_\_\_. The System Identifier is: \_\_\_\_\_. The Systems' establishment was approved by the Director of the Division of Local Government Services and has an expiration date of (expiration date).

- (b) The county shall make the contract number available to any contracting unit within the county which seeks to purchase under the terms of a contract awarded by the county.
- (c) A county managing a county cooperative contract purchasing system shall include in the specifications the county's own requirements, stated in definite quantities. The county shall identify the contracting units which may purchase under the terms of the contract if awarded.

#### **5:34-7.25 County cooperative contract purchasing system county requirement for bids**

- (a) Each request for bids to be included in the county cooperative contract purchasing system by the county shall contain the following:
1. Language requiring uniform bid price(s) for both the county and those contracting units located within the county's geographic boundaries. A provision with respect to the registered members shall be included substantially as follows:

##### **ACCOMMODATION OF LOCAL CONTRACTING UNITS WITHIN THE COUNTY OF (Name of County)**

☐ Check here if willing to provide the goods and services herein bid upon to local governmental contracting units located within the County of (insert name of county) (System Name and Identifier) without substitution or deviation from specifications, size features, quality, price or availability as herein set forth. It is understood that orders will be placed directly by the contracting units, subject to the overall terms of the contract to be awarded by the County of (name of the county), and that no additional service or delivery charges will be allowed except as permitted by these specifications.

☐ Check here if not willing to extend prices to contracting units located in the County of (name of county) affect consideration of this bid with respect to the needs of (name of the lead agency).

2. A statement as to the procedure to be followed in the event that the lowest responsible bidder declines to extend prices to the contracting units located within the county's geographic boundaries. The contract for the stated needs of the county will be awarded to the lowest responsible bidder, and specifically not made available to contracting units within the county.

#### **5:34-7.26 County cooperative contract purchasing system renewal**

- (a) Documents requesting the renewal of the registration of a county cooperative contract purchasing system shall be submitted to the Director for review and approval prior to the date set by the Director for the expiration of the system's registration.
- (b) The county shall authorize the renewal of the system by resolution.
- (c) The county shall apply to the Director for system renewal for a period not to exceed five years.
- (d) The renewal application package shall at a minimum include the following:
  - 1. Form CCCP-1917; and
  - 2. County resolution reauthorizing the system.
- (e) The 10-day period for the review and approval of the renewal of a county cooperative contract purchasing system registration shall commence only upon the determination by the Director that the application renewal is complete.
- (f) The county shall notify the Director in writing of a decision not to renew the system's registration.

#### **5:34-7.27 Member reports**

At the discretion of the lead agency for a cooperative purchasing system, county cooperative contract purchasing system and any energy cooperative pricing system, participants shall file such reports, forms or documents designated by the lead agency, setting forth the use and expenditures related to contracts executed by the participants of the cooperative purchasing system. Such reports may be used to track and evaluate the utilization of the contracts executed by the lead agency on behalf of the participants.

#### **5:34-7.28 Time for review-all systems**

- (a) The Director shall approve or reject all applications within 45 days.
- (b) The 45 day review period shall commence only upon the determination by the Director that the application is complete.
- (c) Failure of the Director to act upon an application within 45 days shall constitute a default approval of the application for a period of five years or in the case of new membership, until the date previously approved by the Director for the termination of system registration pursuant to N.J.A.C. 5:34-7.5(f).

#### **5:34-7.29 The State of New Jersey's cooperative purchasing program**

- (a) The system identifier of 1 NJCP shall represent the State of New Jersey Cooperative Purchasing Program administered by the Division of Purchase and Property within the Department of the Treasury. This identifier shall be used by all contracting units purchasing under the Division of Purchase and Property's Cooperative Purchasing Program.
- (b) Participation in the State Cooperative Purchasing (Pricing) Program does not require a formal agreement with the Division of Purchase and Property, nor is approval of the Director required.

(c) Contracts awarded under a State Cooperative Purchasing contract that are in excess of the contracting units bid threshold shall be made by resolution of the governing body. A resolution of the governing body shall not be required for State Cooperative Purchasing contracts for textbooks or other educational material that were previously approved by a board of education as part of the board's adopted curriculum policies.

(d) The terms and conditions of the contracts awarded by the State Division of Purchase and Property shall be binding upon the contracting unit and the vendor. When using a State contract, contracting units are not entitled to any bonding or indemnification protection that is provided to the State unless specifically extended to the contracting unit by the vendor. A vendor is not required to extend such protections, but may do so upon agreement with the contracting unit.

(e) A correctly prepared and properly executed purchase order by a contracting unit shall serve as a contract between the contracting unit and a contractor awarded a contract pursuant to N.J.S.A. 40A:11-12 or 18A:18A-10. In addition to the system identifier, each purchase order shall include the State contract number on which the purchase is based.

**5:34-7.30 Application of N.J.S.A. 40A:11-5(4) or 18A:18A-5.e: purchases at 10 percent less than State contract price**

(a) In applying the provisions of N.J.S.A. 40A:11-5(4) or 18A:18A-5.e, the purpose of purchasing identical materials, supplies, or equipment, in the same quantities, under a State contract without public bidding, the following conditions shall apply. For the purpose of this section, the term contract item shall mean the item being purchased that is the identical material, supply, or equipment.

1. Quotations for the contract item shall not be received from any vendor to whom the State contract has been awarded and where such vendor has agreed to extend the contract pricing for the item to local contracting units pursuant to N.J.S.A. 52:25-16.1.
2. When a State contract includes different prices based on the quantity or volume purchased, the contracting unit shall base its quotations on identical quantities or volume levels.
3. Terms and conditions of the State contract, as found in the Notice of Award related to length of contract, warranty, delivery, and spotting terms, supply, costs, payment terms, installation, and other related items (except bonding and indemnification provisions) are met by the vendor providing the quotation.
4. If the specification for a contract item in a Notice of Award includes a specific manufacturer's brand and model number, quotations shall be based on the same manufacturer's brand and model number.
5. If the specification for a contract item in a Notice of Award for the contract item is based on a performance specification, the contracting agent may receive quotations reflecting different manufacturer's brand and models, and when making the contract award, the contracting agent shall certify in writing that the item being purchased is identical to or exceeds the specification of the contract item.
6. Only those options or alternatives that are provided for in a Notice of Award may be purchased by a contracting unit. The addition of non-included options or alternates as a part of a contract award under this section is prohibited.

### **5:34-7.31 Authority of Director**

- (a) The Director shall take whatever additional action deemed advisable to assure the orderly conduct of cooperative purchasing systems in accordance with sound financial administration in accordance with statutory responsibilities.
- (b) The Director shall prepare such guidelines as determined necessary to assist contracting units in the creation and administration of cooperative purchasing systems.

### **5:34-7.32 Enforcement**

- (a) All cooperative purchasing systems shall comply with the provisions of these rules at all times. The lead agency of any cooperative purchasing system deemed by the Director to be in noncompliance shall be notified by certified mail. The lead agency shall explain in writing within 10 working days the steps being taken to correct the noncompliance. Failure of the lead agency to respond within the time provided shall result in the notification to the lead agency by the Director by certified mail to appear before the Director, or his or her designee. Notice shall be given at least 10 working days prior to the date of appearance and shall detail the nature of the alleged noncompliance. Failure to appear may result in the suspension or termination of the registration of the system.
- (b) No later than five days after an appearance required herein, the Director shall issue a written determination on the issue of regulatory compliance. A copy of the determination shall be forwarded by certified mail to the lead agency.
- (c) A determination of noncompliance shall result in the immediate commencement of a 15 day grace period. During this time, the lead agency shall rectify all items of noncompliance, to the satisfaction of the Director.
- (d) Failure of the lead agency to undertake such action as required by the Director to resolve the issue of noncompliance may result in the suspension or termination of the registration of the system.

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## **SUBCHAPTER 8. CONTRACTS SUBJECT TO PUBLIC BIDDING**

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### **5:34-8.1 Multi-year contracts**

- (a) All multi-year contracts, including all multi-year leases and multi-year leases with option to purchase which are authorized under N.J.S.A. 40A:11- 15(7), 40A:11-15(15) or 18A:18A-42(f), and other multi-year contracts subject to N.J.S.A. 40A:11-15 and 18A:18A-42 for the procurement of goods or services shall be subject to competitive bidding if the cumulative amount to be expended during the duration of the multi-year lease or contract exceeds the threshold for competitive bidding for the contracting unit.
- (b) Pursuant to the provisions of N.J.S.A. 40A:11-15 or 18A:18A-42, a contract award that was based upon receipt of quotations shall not be extended if the total value of the contract exceeds the bid threshold, which includes the original award plus any extension.

### **5:34-8.2 Determinations of aggregation**

- (a) This section shall affect determinations of aggregation for purposes of whether a contract is subject to public bidding as set forth in N.J.S.A. 40A:11-3, 40A:11-4 and 40A:11-7, and as set forth in N.J.S.A. 18A:18A- 3, 18A:18A-4, and 18A:18A-8, and is adopted pursuant to N.J.S.A. 40A:11-7.1 and 18A:18A-8.1. The provisions of this section shall not apply to those goods or services where the

work is single in character and for those goods or services that are necessary for the completion of such a contract.

(b) To determine if goods or services that are expected to be used will reach the bid threshold during the contract year, the contracting agent or purchasing agent, as defined at N.J.A.C. 5:34-1.2, shall use professional judgment based on prior experience of the contracting unit, estimates and plans for the upcoming contract year based on information such as the contracting unit's budget and purchasing history, and the amount purchased in the previous contract year. When calculating the amount purchased in the previous contract year, the calculation shall be based on the period of 12 consecutive months following the award of a contract.

(c) To determine if goods or services that are expected to be used during a contract year should be combined with other similar goods or services in a single bid, the contracting agent or purchasing agent shall use the following methods or techniques as may be appropriate:

1. The contracting agent or purchasing agent shall request the various organizational components of the contracting unit to estimate and provide the contracting agent or purchasing agent with their needs.
2. Based upon appropriate study and evaluation of the competitive marketplace, the contracting agent or purchasing agent shall determine the range of goods and services that are best suited for aggregation to maximize potential cost savings and to maximize vendor participation. This can be accomplished by:
  - i. Determining whether there are vendors capable of submitting bids on a range of goods or services that are sufficiently similar; or
  - ii. Determining that commercial business practices related to the provision or performance of the goods or services will result in a price advantage to the contracting unit if the goods or services were made part of a separate contract.
3. In considering if a particular good or service is subject to public bidding, the amount of money spent with a given vendor shall not in itself be a determining factor of reaching the threshold.
4. In determining if various expenditures are part of the same work or are similar goods or services, the emphasis shall be placed on the purpose of the goods and services rather than from whom they are purchased.
5. Where portions of any goods or services can be purchased through provision of law that do not require the contracting unit to publicly bid, such as a State, county, or cooperative purchasing contract, any remaining portions may be counted as separate from the portion that is not required to be bid. Such purchases may be considered as a separate aggregation calculation for the purpose of reaching the bid threshold.

#### **5:34-8.3 When determinations of aggregation are found to be incorrect**

(a) In each instance of (a)1 and 2 below, the amount required to be procured, is hereinafter defined to be the "remaining amount." This section shall affect determinations of aggregation pursuant to N.J.S.A. 40A:11-3, 40A:11-4 and 40A:11-7, and as set forth in N.J.S.A. 18A:18A-3, 18A:18A-4, and 18A:18A-8, and is adopted pursuant to N.J.S.A. 40A:11-7.1 and 18A:18A-8.1 when:

1. Initial estimates of goods or services needed during the contract year are incorrectly anticipated to be less than the bid threshold; or

2. Initial estimates of goods or services needed during the contract year that had been exempt from public bidding are later found to be incorrect.
- (b) When either of the conditions in (a)1 or 2 above exist, the provisions of this section shall apply.
- (c) If the remaining amount exceeds the bid threshold, public bidding for the remaining amount should take place as soon as practicable after the purchasing agent or contracting agent becomes aware of the change in needs. (See chapter Appendix A.)
- (d) Subject to the provisions of (d)1 and 2 below, the contracting agent or purchasing agent may seek authorization from the governing body or its designee to solicit quotations or publicly bid the remaining amount. If the remaining amount is between 15 percent and 100 percent of the contracting unit's bid threshold, then:
1. The governing body may designate in advance an elected official to determine whether public bidding or the solicitation of quotations would be most advantageous in these circumstances; or
  2. If the governing body fails to designate an elected official, it retains the responsibility to make the determination by resolution. (See chapter Appendix A.)
- (e) If the remaining amount to be procured by the contracting unit is less than 15 percent of its bid threshold, the contracting agent or purchasing agent may solicit quotations for the remaining amount.
- (f) In seeking the governing body's or its designee's authorization to solicit quotations under (d) and (e) above, the contracting agent or purchasing agent shall:
1. Certify to the governing body or its designee, as appropriate, the need for additional goods and services;
  2. Provide a description of how similar goods or services have been procured during the contract year to date;
  3. Obtain a resolution from the governing body or written approval from its designee, as appropriate, approving the purchase; and
  4. Provide a report of all procurements made under this section to the full governing body.
- (g) No additional goods or services shall be procured through the solicitation of quotations under (d) above until the resolution or written approval approving the purchase has been passed by the governing body or in the case of a designated elected official, other required form of written approval has been obtained. (See chapter Appendix A.)
- (h) If the actual need for goods or services that are publicly bid are found during the course of the contract to be greater than the amount bid, the change order procedures set forth in N.J.A.C. 5:30-11 or 6A:23A-21.1 shall be used, as appropriate.
- (i) Contracts issued pursuant to this section shall include a reference to the subsection under which the purchase is authorized.

#### **5:34-8.4 Intentional miscalculations to avoid public bidding**

Under no circumstance shall a contracting unit avoid bidding by knowingly miscalculating estimates, taking advantage of differences between contract year and fiscal year, or using another mechanism or artifice intended to intentionally avoid public bidding.



### **5:34-8.5 Bid opening during public health emergency**

(a) Bidders and the general public may be prohibited from physically attending a bid opening if, during a state of emergency declared by the Governor for public health reasons, the emergency reasonably prevents the local unit from accommodating in-person attendance. In the event the contracting unit cannot accommodate in-person attendance at a bid opening for public health reasons during a state of emergency declared by the Governor, the contracting unit must broadcast the bid opening live from the contracting unit's facilities. Another local unit's facilities may be used for the bid opening in the event that the local unit cannot use its facilities for conducting the bid opening.

(b) The advertisement for bids must include explicit instructions on how the public can remotely access the opening, along with a statement that in-person attendance is prohibited due to public health-related restrictions on public gatherings due to a declared state of emergency.

(c) The contracting unit shall use web-conference call or online livestreaming technology with both video and audio capability, with the video showing sufficient scope and coverage so that the official opening the bids can be clearly seen to be opening only the bids timely submitted.

(d) At the opening, the title of the bid must be clearly announced. If the contracting unit has solicited paper-based bids, the contracting unit shall display each sealed bid package, back and front, for the camera prior to opening the bid. The contents of each bid package shall be read aloud upon opening, including the price(s) and noting, at a minimum, the presence of any documents required to be part of the bid submission.

(e) After the close of the bid opening, at a minimum, the bid package of the apparent low bidder shall be fully scanned and posted to the contracting unit's website. In cases where there is no single low bidder, but many low bidders due to the method of award by individual items, all bids should be scanned and posted to the website. Instructions should be provided to all bidders with the full web address where the bid results can be found.

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## **SUBCHAPTER 9. SPECIAL CIRCUMSTANCES**

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### **5:34-9.1 Purchase of proprietary goods or services**

(a) In determining whether a good or service meets the definition of "proprietary" set forth in N.J.S.A. 40A:11-2(39) or 18A:18A-2cc, the terms used in the definition of "proprietary" shall be defined as follows:

1. "Specialized nature" means that the purpose to which the goods or services will be used has such unique characteristics that only the goods or services of a single vendor are capable of meeting the contracting unit's needs. The following shall be considered as non-limiting examples of goods or services that may, under appropriate conditions, meet the test of being of a specialized nature:
  - i. The use of a good or service other than the proprietary one will undermine the functionality or operational performance of existing facilities; or
  - ii. The good or service is patented and the patented feature is essential for operational performance.

2. "Necessary for the conduct of its affairs" means that the public need for the proprietary designation is of such a compelling nature that the value to the public that is gained by the proprietary designation overshadows the public benefit of permitting "brand name or equivalent" and the benefits of such competition. The following shall be considered as non-limiting examples of goods or services that may, under appropriate conditions, meet the test of being necessary for the conduct of its affairs:
    - i. The contracting unit has a substantial investment in facilities, training, replacement parts, or complimentary items that warrants reliance on a specific manufacturer or vendor to maintain the value of the investment.
    - ii. Unique circumstances as to a facility or environment preclude the use of other goods or services.
- (b) Prior to advertising for the receipt of bids that includes proprietary goods or services, the contracting agent or purchasing agent shall certify in writing to the chief executive officer of the contracting unit an explanation of why the goods or services are of a specialized nature and necessary for the conduct of the affairs of the local contracting unit. The description shall not consist of rewriting or paraphrasing the statute or regulations but shall be specific to the circumstances. Such certification shall be included as part of the bid documents.
- (c) The resolution of the governing body required by N.J.S.A. 40A:11-13(d) or 18A:18A-15d shall include a description of why the goods or services are specialized in nature and necessary for the conduct of the affairs of the contracting unit. The description shall not consist of rewriting or paraphrasing the statute or regulations but shall be specific to the circumstances.
- (d) When taken in context of computer systems or dedicated software, the use of the proprietary designation shall be interpreted to allow for competition within the purposes for which the software is to be used. The competitive contracting process at N.J.S.A. 40A:11-4.1 et seq. and 18A:18A-4.1 et seq. is intended to allow for competition where there may be a limited number of vendors selling certain types of application software, that is, financial, human resources, web site hosting, computerized telephone systems, geographic information, police records, or computerized dispatch systems. The competitive contracting process is not intended for those circumstances that involve networking or telecommunications switching services.

#### **5:34-9.2 Use of "brand name or equivalent" pursuant to N.J.S.A. 40A:11-13 and 18A:18A-15**

- (a) To encourage free, open, and competitive bidding, prior to referencing a "brand name or equivalent" in a bid specification pursuant to N.J.S.A. 40A:11-13 or 18A:18A-15, a contracting agent or purchasing agent shall first consider using a specification based on any of the following:
1. A standard issued by a national or international testing or standards setting organization, including, but not limited to, the American Society for Testing and Materials (ASTM), National Institute of Standards and Technology (NIST), Internet Engineering Task Force (IETF), International Standards Organization (ISO), IEEE Industry Standards and Technology Organization (IEEE- ISTO), any entity accredited to set standards by the American National Standards Institute (ANSI);
  2. A generic specification available through a commercial or non-commercial service such as MasterSpec® or similar service; or
  3. Specialized programs such as a listing in the Building Products Pre Approval Program maintained by the National Institute of Building Sciences.

(b) A contracting agent or purchasing agent shall not use a "brand name or equivalent" unless they have knowledge that at least one equal exists. If there are no equals or if the nature of the brand name good or service effectively restricts bidders to that single good or service, the contracting agent or purchasing agent must consider the matter subject to the provisions of proprietary goods or services at N.J.A.C. 5:34-9.1.

(c) When a specification uses "brand name or equivalent," the listed brand name shall serve as a reference or point of comparison for the functional or operational characteristic desired for the good or service being requested. Where a bidder submits an equivalent, it shall be the responsibility of the bidder to document the equivalence claim. Failure to submit such documentation shall be grounds for rejection of the claim of equivalence.

(d) Under no circumstance shall specifications require any form of "pre- approval" or "pre-qualification" of an equivalent product before the submission of bids.

### **5:34-9.3 Cancellation or postponement of receipt of bids or proposals**

(a) Publicly announced receipt of bids or competitive contracting proposals shall be considered cancelled when the contracting unit must amend or modify the bid specifications and cannot meet the requirements of N.J.S.A. 40A:11- 23 and 18A:18A-21. The following procedures shall be used in the event a contracting unit cancels the receipt of publicly advertised bids or competitive contracting proposals:

1. All vendors who have either submitted bids or proposals, or received specifications or request for proposals, shall be notified by telephone, fax, or e-mail that the receipt thereof has been cancelled, the reason therefore, and notification regarding the return of the unopened bids pursuant to this section.
2. The contracting unit shall allow vendors to retrieve bids or proposals that had been:
  - i. Submitted at or before the time of cancellation;
  - ii. Previously sent but had not arrived by the time of cancellation; or
  - iii. For those not picked up by a vendor within 10 business days of being notified of their availability, the contracting unit shall return them, unopened, by certified mail or other delivery service that provides a delivery receipt.
3. On the day and time originally scheduled for receipt of bids or proposals, a notice shall be posted at the place where bids were to have been received, stating that the receipt of bids or proposals has been cancelled. No bids or proposals are to be received at this time.
4. All advertisements for the receipt of rescheduled bids or proposals must adhere to the requirements of N.J.S.A. 40A:11-23 or 18A:18A-21, as appropriate to the contracting unit for the statutory number of days between notice and when new bids or proposals can be received.

(b) Publicly announced receipt of bids or competitive contracting proposals shall be considered postponed when an unforeseen circumstance occurs that would affect or prohibit the opening of bids or proposals. The opening of the bids or proposals must occur within five days, excluding Saturdays, Sundays, and holidays, of the original date of the receipt of bids or proposals. The following procedures shall be used in the event a contracting unit must postpone the receipt of publicly advertised bids or competitive contracting proposals:

1. As soon as practicable, all vendors who have either submitted bids or proposals, or received specifications or request for proposals, shall be notified by telephone, fax, or e-mail that the receipt thereof has been postponed and the reason therefore.
2. If possible, on the day and time originally scheduled for receipt of bids or proposals, a notice shall be posted at the place where bids were to have been received, stating that the receipt of bids or proposals has been postponed.
3. In the event of a postponement, no bids or proposals shall be opened.

#### **5:34-9.4 Concessions**

(a) The Local Public Contracts Law, N.J.S.A. 40A:11-1 et seq., and the Public School Contracts Law, N.J.S.A. 18A:18A-1 et seq., define the term "concession" as the granting of a license or right to act for or on behalf of the contracting unit, or to provide a service requiring the approval or endorsement of the contracting unit, and which may or may not involve a payment or exchange, or provision of services by or to the contracting unit. In the case of the Public School Contracts Law, vending machines are specifically excluded from the definition. Further, a concession is only subject to this section if it is awarded to or supports a for-profit organization or purpose.

(b) Concessions are specifically deemed to include, but are not limited to, the following:

1. The right to publish a map, newsletter, directory, or calendar containing the meeting schedules and other information about contracting unit services or activities where the contractor sells advertising as full or partial payment for providing the service;
2. Installation of "welcome to (name of entity)" signs on public property where a local organization pays a fee to the sign manufacturer, who may or may not make a payment to the contracting unit, and includes the name of the local organization on the sign;
3. Use of public space or facilities (such as scoreboards, bus shelter or facility advertising) for advertising in exchange for fees or services, or discounts on services;
4. Installation of vending machines in public facilities (except for vending machines in schools);
5. The donation, sale, installation, or maintenance of equipment or facilities for use of the contracting unit;
6. The choice of a local or long distance telephone service for pay phones on public property;
7. Copying machines in a government or library facility made available for public use;
8. The right to sell goods or services on public property; or
9. Other services, rights or use as may meet the definition of concession.

(c) A concession shall not be deemed to include contributions of goods, services, or financial support for the sponsorship of the celebration of public events where the contributions offset in full or in part the cost of the specific event. For the purpose of providing examples, such public events include, but are not limited to, seasonal recreation programs, concert series, holiday celebrations, and tourism related programs. In addition, vending machines in public facilities that are considered as protected speech under the United States Constitution, such as newspapers, or facilities used for collection of material being sent through a pickup and delivery service are not deemed to be a concession.

(d) Prior to commencing procurement of any concession, the governing body of the contracting unit shall:

1. Obtain from legal counsel an opinion of the legality of procuring the concession; and
2. Pass a resolution authorizing the procurement of a concession. The resolution shall include:
  - i. A description of the public need to award a concession;
  - ii. The concession to be awarded;
  - iii. The considerations, including the benefits and any risks the governing body took into account in reaching the decision to award a concession;
  - iv. An estimate of the total value of the concession;
  - v. If any, an estimate of any revenue or services to be received by the contracting unit;
  - vi. The basis of award of the concession is based upon the most advantageous price and other factors or the lowest responsible bidder;
  - vii. An estimate of any costs to be incurred by the contracting unit as part of the concession;
  - viii. Any services, facilities, or endorsement to be provided by the contracting unit; and
  - ix. The method to be used to procure the concession pursuant to (g) below.

(e) The original legal opinion and resolution required in (d) above shall suffice for purposes of the subsequent procurement of a particular concession where the entire procurement process had been previously completed.

(f) The total estimated value of the concession shall be considered as the aggregate value in determining the procurement method that will be used. The concession shall be awarded in accordance with the relevant procedure for the method used to procure the concession. The total estimated value shall include all revenue, if any, that may be expected to be received by the concessionaire, which shall be deemed to include the value of all payments, goods, and services received by the contracting unit. A specific exception to this subsection shall be the use of bank automated teller machines or other cash vending machines. The threshold for this service shall be based on the estimated annual value of fees charged to users of the service and the value of all payments, goods and services received by the contracting unit.

(g) Unless otherwise specifically provided for by law, concessions shall be awarded through either of the following means:

1. By informal quotations, when the total estimated value of the concession is less than the bid threshold; or
2. By receipt of public bid or competitive contracting, when the total estimated value of the concession exceeds the bid threshold or at any time at the option of the governing body.

(h) While contracting units that are boards of education are not required to use the concession process for food and drink vending machines, the use of these provisions are recommended to enhance the integrity of the procurement process. If a contracting unit that is a board of education

combines food and drink vending machines with concessions in a single procurement, the procedures of this section shall apply for the entire procurement.

**5:34-9.5 Miscellaneous circumstances**

- (a) When a single contract for the collection of solid waste includes both municipal solid waste, pursuant to N.J.S.A. 40A:11-15(3), and collection from facilities owned by a contracting unit, pursuant to N.J.S.A. 40A:11-15(38), the contract may be granted for a term of not more than five years.
- (b) When contracts for goods or services are less than 15 percent of the bid threshold, the purchasing agent shall employ sound business practices in awarding the contract. For the purpose of this subsection, sound business practice means employing such judgment that the price charged to the contracting unit reflects current market conditions and the quantity and delivery needs of the contracting unit.
- (c) When a notice of award for professional services, competitive contracting, and extraordinary unspecifiable services is required to be published in the official newspaper of the contracting unit, such a notice shall be published no later than 20 calendar days after the passage of the resolution awarding the contract.
- (d) Pursuant to N.J.S.A. 40A:11-4b(1) and 18A:18A-4b(1) with regard to the use of mediation to reach a finding of prior negative experience, if the mediation activity included a requirement of confidentiality and if no final determination of responsibility was reached, such mediation activity shall not be considered as a cause for a finding of prior negative experience, unless stipulation was made to the contrary.
- (e) In a contracting unit subject to the Public School Contracts Law, a purchasing agent may appoint a "duly authorized designee" to act on behalf of and be responsible to the purchasing agent for such actions as related to purchasing. The purchasing agent shall recommend such designee to the board of education for their consideration and approval. The designee cannot act on behalf of the purchasing agent until board approval is received. Under these circumstances, the purchasing agent shall continue to hold the authority, responsibility, and accountability for the purchasing activity of the contracting unit. The use of this provision does not permit a "duly authorized designee" to exercise the authority of a duly-appointed qualified purchasing agent.

**5:34-9.6 Purchasing at 10 percent less than a State cooperative contract price**

- (a) A contracting unit that procures materials, supplies, or equipment for at least 10 percent less than the State cooperative contract price, pursuant to N.J.S.A. 40A:11-5(4) submit the following documentation to the Director of the Division of Local Government Services within five working days of the award of any such contract:
  - 1. A copy of the purchase order;
  - 2. A copy of the requisition or request for purchase order (if applicable);
  - 3. The written certification of its purchasing agent stating that the purchase price of the materials, supplies or equipment is at least 10 percent less than the State contract price;
  - 4. Documentation verifying that the materials, supplies or equipment purchased by the contracting unit are identical to the materials, supplies or equipment on State contract;
  - 5. A copy of each request for quotation issued by the purchasing agent;



6. Copies of each of the three quotations received by the purchasing agent, which shall include the vendor's name, address, identification of items offered, prices quoted, and the percent discount (if applicable); and
  7. A copy of the adopted resolution, approving or awarding the contract for the purchase of materials, supplies, or equipment, approved by two-thirds affirmative vote of the full membership of the governing body.
- (b) All purchase orders or contract documents shall include the identifier "N.J.A.C. 5:34-9.6" and the State contract number in order to validate the legal basis under which the purchase was made, and to assist in the conduct of audits and other reviews for statutory compliance.
- (c) The Division has provided an optional submission checklist in chapter Appendix B, "Purchasing At 10 Percent Less Than The State Cooperative Contract Price N.J.S.A. 40A:11-5(4)." The checklist is intended to help contracting units comply with the provisions of this section. The checklist is available in the public contracts law section of the Division's website [www.nj.gov/dca/dlgs/](http://www.nj.gov/dca/dlgs/).

#### **5:34-9.7 Use of the General Services Administration's Federal Supply Schedules**

- (a) A contracting unit statutorily subject to 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., may use without advertising for bids, or having rejected all bids obtained pursuant to N.J.S.A. 40A:11-13.2 or 18A:18A-22, as appropriate, the Federal Supply Schedules procurement programs, or update thereto. A contracting unit shall, pursuant to N.J.S.A. 40A:11-12.b or 18A:18A-10.b, submit the following documentation to the Director of the Division of Purchase and Property within five working days of the award of any such contract:
1. A copy of the purchase order;
  2. A copy of the requisition or request for purchase order (if applicable); and
  3. Documentation identifying the price of the goods or services, under the Federal Supply Schedules or schedules from other Federal procurement programs.
- (b) All purchase orders or contract documents shall include the identifier "N.J.A.C. 5:34-9.7" and if available, the State contract number issued by the Division of Purchase and Property in order to validate the legal basis under which the purchase was made, and to assist in the conduct of audits and other reviews for statutory compliance.
- (c) Contracting units statutorily authorized to contract under 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. and procuring goods or services under the General Services Administration's Federal Supply Schedules or schedules from other Federal procurement programs or update thereto, shall comply with administrative rule promulgated by the Department of the Treasury Purchase Bureau at [N.J.A.C. 17:12-1A.5](#), Use of Federal Supply Schedules.  
*(Editor's note: the N.J.A.C. link above requires the user to click through a CAPTCH page)*
- (d) The Division has provided an optional submission checklist in chapter Appendix C, "Use of the General Services Administration's Federal Supply Schedules N.J.S.A. 40A:11-12b and N.J.S.A. 18A:18A-10b." The checklist is intended to help contracting units comply with the provisions of this section. The checklist is available in the public contracts law section of the Division's website [www.nj.gov/dca/dlgs/](http://www.nj.gov/dca/dlgs/).

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## SUBCHAPTER 10. DESIGN BUILD PROJECT DELIVERY

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The Design Build Project Delivery rules take up approximately 40 pages. In lieu of reprinting them here, users can obtain [a separate file of the rule at this DLGS link](#).

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### N.J.A.C. 5:34 APPENDIX A

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The examples that follow relate to N.J.A.C. 5:34-8.3, which identifies practices that should be used in instances where the initial estimates of goods or services needed during the current contract year were anticipated to be less than the bid threshold, or had been exempt from public bidding, but are later found to be incorrect. The rule sets forth practices to follow in determining if the remaining amount should be publicly bid, or if quotations should be solicited. The following situations repeat each rule and provide an interpretative model.

In the following situations, the remaining amount (as previously defined) means: the value of similar goods and services that are needed for the remainder of the current contract year, plus the value of similar goods and services needed in the subsequent contract year. In reviewing these examples, be mindful that pursuant to the Public School Contracts Law, N.J.S.A. 18A:18A-1 et seq., the bid threshold for boards of education without an appointed Qualified Purchasing Agent differs from the bid threshold for contracting agencies subject to the Local Public Contracts Law, N.J.S.A. 40A:11-1 et seq.

#### SITUATION 1

**N.J.A.C. 5:34-8.3(c): If the remaining amount exceeds the bid threshold, public bidding should take place as soon as possible.**

**Example:** Assume that a contracting unit has a bid threshold of \$17,500 and is on a calendar year budget cycle. To date they have purchased \$15,000 worth of chain link fence through solicitation of quotations. In December, the Recreation Director advises the purchasing agent that one field and a parking area were excluded from the initial solicitation and that an additional \$10,000 worth of chain link fence needs to be purchased for the remainder of the year. The Recreation Director further advises that an additional \$21,000 worth of chain link fence is required for anticipated projects in the next year.

**Solution:** The purchasing agent or contracting agent would have to immediately initiate public bidding procedures to procure the remaining chain link fence, because the additional need this year, plus the need next year, exceeds the bid threshold.

#### SITUATION 2

**N.J.A.C. 5:34-8.3(d): If the remaining amount is between 15 percent and 100 percent of the contracting unit's bid threshold, and the contracting unit has previously designated an elected official to determine whether public bidding or the solicitation of quotations is most advantageous to the contracting unit, then the purchasing agent or contracting agent may seek authorization from the governing body or its designee to solicit quotations or publicly bid the remaining amount.**

**Example:** The following example relates to situations where similar goods or services will not be required in the subsequent contract year, and the contracting agent or purchasing agent has the

option to either publicly bid the remaining amount, or seek authorization from the governing body or its designee to solicit quotations.

Assume that a contracting unit has a bid threshold of \$17,500 and is on a calendar year budget cycle. To date they have purchased \$15,000 worth of chain link fence through solicitation of quotations. In December, the Recreation Director informs the purchasing agent or contracting agent that one field was excluded from the initial solicitation, resulting in an additional current year purchase of \$10,000. The Recreation Director further advises that no purchases of chain link fence are required for the subsequent year.

Solution: The purchasing agent or contracting agent may seek authorization from the governing body or its designee to solicit quotations or publicly bid the remaining amount because it is between 15 percent and 100 percent of the contracting unit's bid threshold.

### SITUATION 3

**N.J.A.C. 5:34-8.3(d): If the remaining amount is between 15 percent and 100 percent of the contracting unit's bid threshold, and the contracting unit has previously designated an elected official to determine whether public bidding or the solicitation of quotations is most advantageous to the contracting unit, then the purchasing agent or contracting agent may seek authorization from the governing body or its designee to solicit quotations or publicly bid the remaining amount.**

**Example:** The following example relates to situations where the remaining amount equals the value of similar goods or services to be purchased for the current contract year plus the value of similar goods or services for the subsequent contract year and is equal to between 15 percent and 100 percent of the contracting unit's bid threshold.

Assume that a contracting unit has a bid threshold of \$17,500 and is on a calendar year budget. To date, they have purchased \$15,000 worth of chain link fence through solicitation of quotations. In December, the Recreation Director informs the purchasing agent or contracting agent that one field was excluded from the initial solicitation resulting in an additional need for \$5,000 worth of chain link fence for the remainder of the current contract year. The Recreation Director advises further that \$10,000 worth of additional chain link fence needs to be purchased during the subsequent year. The additional \$15,000 of new chain link fence (\$5,000 for the remainder of the current contract year, and \$10,000 for the subsequent contract year) is less than the bid threshold of \$17,500.

Solution: Since the remaining amount is between 15 percent and 100 percent of the contracting unit's bid threshold, the purchasing agent or contracting agent may seek authorization from the governing body or its designee to solicit quotations or publicly bid the remaining amount.

### SITUATION 4

**N.J.A.C. 5:34-8.3(e): If the remaining amount is less than 15 percent of the contracting unit's bid threshold, the contracting agent or purchasing agent is authorized to solicit quotations for the purchase of the remaining amount.**

**Example:** Assume that a contracting unit has a bid threshold of \$17,500 and is on a calendar year budget cycle. To date they have purchased \$15,000 worth of chain link fence through solicitation of quotations. In December, the Recreation Director informs the purchasing agent or contracting agent

that the engineer miscalculated the area, and that an additional 40 linear feet of chain link fence needs to be purchased. The cost for the additional chain link fence is \$2,600.

Solution: The purchasing agent or contracting agent would be able to solicit quotations for the remaining chain link fence, because \$2,600 (the remaining amount of goods to be purchased) is less than 15 percent of the contracting unit's bid threshold.

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**N.J.A.C. 5:34 APPENDIX B**

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**N.J. DIVISION OF LOCAL GOVERNMENT SERVICES SUBMISSION CHECKLIST**

Purchase At 10 Percent Less Than The State Cooperative Contract Price (*N.J.S.A. 40A:11-5(4)*)

Contracting Unit's Name:		County:	
Item(s) Purchased:		Date:	

The Local Public Contracts Law at N.J.S.A. 40A:11-5(4) requires information on this particular type of purchasing transaction(s) to be filed with the Director of the Division of Local Government Services. The rule, N.J.A.C. 5:34-9.6, codifies and supplements the requirements of the provisions of law. The rule requires documentation to be submitted to the Director within five (5) working days of the award of any such contract. The following documentation is submitted:

DOCUMENTATION INCLUDED WITH SUBMISSION

		Yes	No
1	Copy of the purchase order with the reference N.J.A.C. 5:34-9.6 included		
2	Copy of the requisition or request for purchase order (if applicable);		
3	Written certification by the purchasing agent stating that the purchase price of the materials, supplies or equipment is at least 10 percent less than the State contract price.		
4	Documentation verifying that the materials, supplies or equipment purchased by the contracting unit are identical to the materials, supplies or equipment on State contract.		
5	Copy of each request for quotation issued by the purchasing agent; and,		
6	Copy of each of the three (3) quotations received by the purchasing agent, which shall include the vendor's name and address and identification of items offered, prices quoted, and percent discount (if applicable); and,		
7	Copy of the adopted resolution approved by two-thirds affirmative vote of the full membership of the governing body.		

OTHER COMMENTS: Please use a separate sheet of paper and attach to Checklist.

FORM SUBMITTED BY:

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(Please Print Name)

(Title)

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(Telephone or E-mail)

(Date)

Please return this form with all the required documentation to the Bureau of Local Management Services at the Division of Local Government Services, at PO Box 803, Trenton, NJ 08625-0803.

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**N.J.A.C. 5:34 APPENDIX C**

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**N.J. DIVISION OF LOCAL GOVERNMENT SERVICES SUBMISSION CHECKLIST**

Use Of The General Services Administration's Federal Supply Schedules

(N.J.S.A. 40A:11-12b. and N.J.S.A. 18A:18A-10b.)

Contracting Unit's Name:		County:	
Item(s) Purchased:		Date:	

The Local Public Contracts Law at N.J.S.A. 40A:11-12b and the Public School Contracts Law at N.J.S.A. 18A:18A-10b require information on this particular type of purchasing transaction(s) to be filed with the Director of the Division of Purchase and Property. The rule, N.J.A.C. 5:34-9.7, codifies and supplements the requirements of the provisions of law. The rule requires documentation to be submitted to the Director within five (5) working days of the award of any such contract under the General Services Administration's Federal Supply Schedules or schedules from other Federal procurement programs pursuant to N.J.S.A. 40A:11-12(b) or 18A:18A-10(b). The following documentation is submitted:

DOCUMENTATION INCLUDED WITH SUBMISSION

		Yes	No
1	Copy of the purchase order with the reference N.J.A.C. 5:34-9.7 included;		
2	Copy of the requisition or request for purchase order (if applicable);		
3	Documentation identifying the price of goods or services under the General Services Administration's Federal Supply Schedules or schedules from other Federal procurement programs pursuant to N.J.S.A. 40A:11-12.b of 18A:18A-10.b.		

OTHER COMMENTS: Please use a separate sheet of paper and attach to Checklist.

FORM SUBMITTED BY:

_____ (Please Print Name)	_____ (Title)
_____ (Telephone or E-mail)	_____ (Date)

Please return this form with all the required documentation to the Division of Purchase and Property, Attn: Co-op Liaison, PO Box 230, Trenton, New Jersey 08625-0230.



## **LOCAL PUBLIC CONTRACTS LAW APPLICATION OF N.J.A.C. 5:30-5.1 ET SEQ.**

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### **SUBCHAPTER 5. ENCUMBRANCE ACCOUNTING AND CERTIFICATIONS OF AVAILABILITY OF FUNDS**

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#### **5:30-5.1 General authority**

(a) This subchapter shall apply to all government agencies subject to the authority of the Local Finance Board pursuant to the Local Budget Law (N.J.S.A. 40A:4-1 et seq.) or the Local Authorities Fiscal Control Act (N.J.S.A. 40A:5A-1 et seq.). For the purpose of this subchapter, such government agencies shall be referred to as local units.

(b) Every governing body and chief executive officer shall take reasonable steps as necessary so that all officials and employees responsible for the administration of public contracts are aware of and are able to comply with the requirements of the law and these rules.

#### **5:30-5.2 Encumbrance systems**

(a) All local units except those subject to the Local Authorities Fiscal Control Act (N.J.S.A. 40A:5A-1 et seq.) shall maintain an encumbrance accounting system for all funds as follows:

1. The system shall be designed at a minimum to record charges to amounts appropriated for "Other Expenses" in the same or greater level of detail as "Other Expenses" are maintained in the adopted budget. This shall be done in such a way to record charges against amounts appropriated at the time the charges are authorized so that the funds allocated for such purposes are reserved and cannot be used for other charges within that line item. Examples of such authorization actions include the issuance of a purchase order or the execution of a contract.
2. If the local unit budget uses a greater detail level through the use of object accounts, transactions shall be encumbered at the object level detail.
3. Local units shall maintain internal controls that ensure that all purchases charged to "Other Expense" or other non-salary line items shall be sequentially numbered either through pre-printed multiple copy purchase orders or a computerized system that produces appropriate purchasing internal control.

(b) The Director of the Division of Local Government Services shall make available such technical documents as may be advisable to local units to provide further guidance on encumbrance systems.

(c) The provisions of this section codify and continue the provisions of Technical Accounting Directive No. 1, issued in April of 1985 and effective January 1, 1986.

#### **5:30-5.3 General requirements**

(a) The chief financial officer of a local unit, appointed pursuant to N.J.S.A. 40A:9-140.1 et seq. or N.J.S.A. 40A:9-28.1 et seq., shall be responsible for determining the availability of sufficient funds for all contracts and amendments thereto. The delegation of this duty by the chief financial officer does not relieve him or her of this responsibility.

(b) The governing bodies of all other local units shall designate by resolution or ordinance, as appropriate, an individual to serve as the certifying finance officer. The certifying finance officer shall be responsible for determining the availability of sufficient funds for all contracts and amendments thereto. The delegation of this duty by the certifying finance officer does not relieve him or her of this responsibility.

(c) If a purchase or the execution of a contract does not require, either by State law or any State or local regulation, specific authorization by formal action of the governing body, then the individual approving the contract or release of the purchase order shall be able to ascertain from an appropriate entry made into the local unit's encumbrance system by the chief financial officer or certifying finance officer, as appropriate, that there are available sufficient uncommitted appropriations to provide for the payment. The administrative official or employee shall be so authorized pursuant to N.J.S.A. 40A:11-3.

#### **5:30-5.4 Procedure**

(a) The following procedure shall be utilized for the certification of funds when a contract is to be awarded by the governing body of the local unit:

1. The chief financial officer or certifying finance officer, as appropriate, charged with the responsibility of maintaining the financial records of the contracting unit shall certify in writing to the governing body the availability, or lack thereof, of adequate funds for each contract that is pending authorization by the governing body. Said certification shall designate specifically the line item appropriation(s) of the official budget and/or appropriation from a source other than the budget to which the contract will be properly charged; ensuring that the same funds shall not be certified as available for more than one pending contract. Said officer shall be solely responsible for the accuracy of the certification. The maximum dollar value of the contract pending authorization by the governing body shall be referenced in the certification, unless a special situation set forth in N.J.A.C. 5:30-5.5 permits the certification of either no amount or an amount less than the maximum dollar value of the contract.
2. No resolution or ordinance authorizing the entering into of any contract pursuant to N.J.S.A. 40A:11-1 et seq., or any other law for the expenditure of public funds to a vendor shall be enacted unless the governing body has been provided with the written certification of available funds required by (a)1 above and the resolution or ordinance recites that the required certification of available funds has been provided to the governing body. Either the local unit's attorney or the secretary to the governing body shall ensure that the required certification of available funds has been provided to the governing body prior to it adopting a resolution or ordinance authorizing entering into a contract. The resolution or ordinance authorizing entering into the contract shall also specify the exact line item appropriation(s) and/or appropriation from a source other than the budget, which shall be charged and the maximum dollar value of the contract.
3. The certification of availability of funds shall either be incorporated into the resolution or ordinance authorizing entering into the contract or attached to an original copy of the resolution or ordinance. The certification of availability of funds shall be kept in the files of the municipal clerk, clerk of the board of chosen freeholders, or secretary to the governing body.
4. When a contract is issued as a purchase order or amendment thereto, the budgetary accounting encumbrance process set forth in N.J.A.C. 5:30-5.3(c) and (b) shall take the place

of, and be used instead of, the written certification of available funds described in (a)1 above.

(b) When a contract is awarded and a resolution or ordinance of the governing body is not required, the chief financial officer or certifying finance officer shall cause an appropriate entry to be made into the local unit's encumbrance system pursuant to N.J.A.C. 5:30-5.1 and 5.2 prior to the issuance of a contract.

**5:30-5.5 Methods of accounting for and certifying available funds for special situations**

a) Temporary budget: When a local unit is operating under a temporary budget, as provided for in N.J.S.A. 40A:4-19, the local unit may enter into a contract for a period extending beyond the time period funded in the temporary budget upon compliance with the following:

1. If the full cost of that year is to be charged against the temporary budget at the time the contract is authorized by a resolution or ordinance of the governing body, the written certification of available funds required by N.J.A.C. 5:30-5.4(a) shall certify the availability of the full cost of the contract for that fiscal year in the temporary budget, which must contain sufficient appropriations therefor; or
2. If the full cost of that year would not be charged against the temporary budget at the time the contract is authorized by a resolution or ordinance of the governing body, the written certification of available funds required by N.J.A.C. 5:30-5.4(a) shall certify the availability of at least a prorated amount reflecting all liability to be incurred during the temporary budget period, and the contract must contain a clause making its continuation past the temporary budget period subject to the appropriation of sufficient funds. Immediately after the final budget is adopted, a written certification of available funds shall be prepared for the remaining balance and filed with the original ordinance or resolution authorizing entering into the contract.

(b) Open-end contracts: When a contract provides for certain goods or services to be provided upon request, up to an established maximum, and the local unit is not obligated to order, accept, or pay for said goods or services, except when it orders them, the local unit may enter into the contract upon compliance with the following:

1. If the full amount of the contract is to be charged against the budget at the time the contract is awarded by the governing body, the written certification of available funds required by N.J.A.C. 5:30-5.4(a) shall certify the availability of the full amount of the contract; or
2. If the full amount of the contract would not be charged against the budget at the time the contract is awarded by the governing body, no amount shall be encumbered until such time as goods or services are ordered, pursuant to the open-end contract. When this option is utilized, the budgetary accounting encumbrance process set forth in N.J.A.C. 5:30-5.3(c) and 5:30-5.4(b) shall take the place of, and be used instead of, the written certification of available funds set forth at 5:30-5.4(a).

(c) Contracts up to 12 months not coinciding with fiscal year: When a contract has a term of up to 12 months that does not coincide with the established fiscal year of the local unit, the local unit may enter into the contract upon compliance with the following:

1. If the contract is for a professional service or is for a single undertaking or project with one basic object (such as, but not limited to, contracts for revaluation, codification, management studies, and feasibility surveys), rather than being divisible into separate steps or actions, which in themselves are independently acceptable as complete work products, then the full amount of the contract shall be charged against the budget and/or appropriation from a source other than the budget at the time the contract is authorized by the governing body and the written certification of available funds required by N.J.A.C. 5:30-5.4(a) shall certify the availability of the full amount of the contract. This method may also, at the option of the local unit, be followed for contracts described in (c)2 below.
  2. If the contract is not for a professional service or for a single undertaking or project with one basic object and it provides for goods or services to be provided at separate intervals over the contract period, then the contract shall be charged against the budgets in the two consecutive fiscal years as follows: at the time the contract is awarded by the governing body (for the amount to be incurred during the first fiscal year) and at the time of the adoption of the temporary budget and the adoption of the final budget (for the remaining amount of the contract for the second fiscal year). The written certification of available funds required by N.J.A.C. 5:30-5.4(a) shall certify the availability of the prorated amount reflecting the liability to be incurred during the first fiscal year and a second written certification of available funds shall certify the availability of the remaining amount to be incurred during the second fiscal year.
- (d) Multi-year contract requirements when a contract has a term of more than 12 months, the local unit may enter into the contract upon compliance with the following:
1. If the contract is pursuant to N.J.S.A. 40A:11-15:
    - i. If the contract is for construction and related services authorized by N.J.S.A. 40A:11-15(9), the full amount of the contract shall be charged against the budget and/or appropriation from a source other than the budget at the time the contract is awarded by the governing body and the written certification of available funds required by N.J.A.C. 5:30-5.4(a) shall certify the availability of the full amount of the contract;
    - ii. For all other contracts with a term of more than 12 months, an amount reflecting all liability to be incurred during the fiscal year shall be charged to the budget for each fiscal year covered by the term of the contract, subject to such requirements of this section as might apply with respect to temporary budgets, open-end contracts, or contracts not commencing at the beginning of the fiscal year. The written certification of available funds required by N.J.A.C. 5:30-5.4(a) for each fiscal year shall certify the availability of all funds to be charged to the budget for that fiscal year.
  2. If the contract is for a multi-year lease or a contract that is not specifically exempted pursuant to N.J.S.A. 40A:11-15 or 40A:12-5(b), it shall contain a clause making the contract subject to the availability and appropriation annually of sufficient funds as may be required to meet the extended obligation or contain an annual cancellation clause permitting the local unit to unilaterally cancel the contract for the coming year.

(e) Advance award of contracts: No contract shall be awarded in one fiscal year if the date on which it properly takes effect falls in the next fiscal year unless the contract includes a provision making it subject to the availability and appropriation of sufficient funds in the year in which it takes effect.

(f) Payment from proceeds shall be as follows:

1. Under the circumstances when a contractual liability may be lawfully incurred and a payment may lawfully be made without an appropriation, such as for professional services for liquidation or foreclosure of tax title liens as provided by N.J.S.A. 40:50-6, the certification of available funds should recite that fact and cite the statute.
2. Contracts for services to be paid from savings generated by or from State or Federal aid funds not yet received and appropriated are not permitted unless an appropriation is made prior to the time the expenditure of funds is authorized.

#### **5:30-5.6 Accounting for governmental fixed assets**

(a) All local units shall have and maintain a fixed assets accounting and reporting system that:

1. Establishes and maintains a physical inventory of fixed assets of nonexpendable, tangible property as defined and limited by the U.S. Office of Management and Budget Circular A-87, Cost Principals for State, Local and Indian Governments, incorporated herein by reference, as amended by 62FR45934 (August 29, 1997, and published at [www.whitehouse.gov/wp-content/uploads/legacy\\_drupal\\_files/omb/circulars/A87/a87\\_2004.pdf](http://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A87/a87_2004.pdf) . A local unit may establish a capitalization level less than but not in excess of the threshold in Circular A-87, except that the useful life of such property is at least five years;  
*(Editor's Note, the web link above has been updated from the text of the official rule to access the page that was relocated.)*
2. Places a value on all fixed assets whether constructed or acquired through purchase, grant, or gift. Fixed assets acquired after December 31, 1985 shall be valued on the basis of actual cost; prior to that time, they may be valued at cost or estimated historical cost, the basis of which shall be disclosed in the local unit's annual financial statement;
3. Has a subsidiary ledger, consisting of detailed property records for controlling additions, retirements and transfers of fixed assets. Such ledger shall be maintained and reconciled periodically and at the end of every fiscal year with the general ledger control accounts for fixed assets;
4. Provides property management standards for fixed assets that ensures that:
  - i. Property records are maintained accurately, to reflect a description and source of the property, its ownership, the acquisition cost and date, the percentage of Federal participation in the acquisition, and the location, use, and condition of the property.
  - ii. Property owned by the Federal government is marked as such.
  - iii. Periodic physical inventories are taken and reconciled with property records, with any differences being investigated to reflect the cause of difference;
  - iv. Provides a control system with adequate safeguards against loss, damage, or theft of property, and full investigation and documentation of any losses; and
  - v. Property is adequately maintained to keep the property in good condition; and

5. Provide a Statement of General Fixed Assets in every annual audit report.

(b) The provisions of this section codify and continue the provisions of Technical Advisory Directive No. 2, issued in April of 1985 and effective January 1, 1986, and as amended by Local Finance Notice CFO 96-13.

#### **5:30-5.7 General ledger accounting systems**

(a) All local units shall have and maintain a general ledger for at least the current fund. Nothing shall prohibit a local unit from maintaining a general ledger for other funds.

(b) The general ledger shall be the official permanent financial record of the local unit. It shall provide a summary of all financial transactions as they have been recorded in the books of original entry, using a double entry, self-balancing accounting system with the general ledger facilitating the preparation of the financial statements. The general ledger, together with the books of original entry and supporting subsidiary ledgers shall constitute the complete accounting system.

(c) The provisions of this section codify and continue the provisions of Technical Advisory Directive No. 3, issued in April of 1985 and effective January 1, 1986.

## **LOCAL PUBLIC CONTRACTS LAW APPLICABLE SECTIONS OF**

### **N.J.A.C. 5:30-9A ET SEQ.**

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#### **SUBCHAPTER 5: ELECTRONIC DISBURSEMENTS AND CLAIMANT CERTIFICATION**

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##### **5:30-9A.1 Purpose**

The rules in this chapter set forth standards for local units, local authorities, boards of education, and county colleges to follow when using standard electronic funds transfer technologies for the payment of claims pursuant to [N.J.S.A. 40A:5-17](#) and [18A:19-2](#) or other applicable law in lieu of payment through the use of signed checks or warrants. The rules in this chapter implement minimum fiscal and operational controls applicable to a standard electronic funds transfer technology as a condition of its use by a local unit, local authority, board of education, or county college, thereby mitigating the potential for fraud and abuse in electronic transfer of funds.

##### **5:30-9A.2 Definitions**

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

“Authorized procurement card user” means the individual employee of the local unit, local authority, or county college authorized by the chief administrative officer to make transactions using a procurement card and whose name physically appears on the procurement card.

“Automated clearing house (ACH) transfer” means an electronic funds transfer initiated by the local unit, local authority, board of education, or county college authorizing a banking institution to push funds from the entity’s bank account(s) into a vendor or claimant’s bank account, executed through the automated clearing house (ACH) electronic clearing and settlement system used for financial transactions.



“Board of education” means a board of education as defined by the “Public School Contracts Law,” [N.J.S.A. 18A:18A-1 et seq.](#) The phrase “board of education” shall include a renaissance school project as defined in the Urban Hope Act ([N.J.S.A. 18A:36C-1 et seq.](#)) for purposes of this chapter.

“Charge account” or “charge card” means an account, linked to a credit card issued by a specific vendor to which goods and services may be charged on credit, that must be paid when a statement is issued.

“Chief administrative officer” or “chief executive officer” means the appointed employee who oversees the day-to-day administrative affairs of the local unit, local authority, or county college including, but not limited to, the following titles: business administrator, administrator, township or city manager, executive director, or president. For boards of education, the appointed employee shall be the chief school administrator. In the absence of an appointed chief administrative officer, the person designated by law or the governing body to manage the day-to-day administrative affairs of the entity shall assume the administrative responsibilities set forth in this subchapter.

“Chief financial officer” or “CFO” means the official designated by the governing body to be responsible for the proper administration of the finances of the local unit, local authority, or county college under any statutes and such rules promulgated by any State agency as may pertain to the financial administration of said entities. For boards of education, the appointed employee shall be the school business administrator.

“Claimant certification” or “vendor certification” means a certification pursuant to N.J.S.A. 40A:5-16.a, presented by the person claiming or receiving payment, that a detailed bill of items or demand is correct with regard to all particulars.

“Contract” means the written agreement entered into by a local unit, local authority, or county college and an authorized procurement card user for the purposes authorized in this chapter.

“County college” means county college as defined by the “County College Contracts Law,” P.L. 1982, c. 189 ([N.J.S.A. 18A:64A-25.1 et seq.](#)).

“Disbursement” means any payment of moneys, including any transfer of funds, by any means.

“Electronic funds transfer” means any method of transferring moneys permitted by this rule that does not involve the physical presentation of a paper check, draft, or similar paper instrument including, but not limited to: wire transfers, e-checks, automated clearing house (ACH) transfers, and transactions initiated by phone or fax.

“Electronic data interchange (EDI)” means technology that provides transaction related details, including invoice number(s), pay dates, and other identifying information as appropriate for each transaction.

“Electronic Funds Transfer and Indemnification Agreement” means a signed legally binding indemnification agreement renewed on an annual basis between a local unit, local authority, board of education, or county college and a banking institution authorized to conduct business in New Jersey, which authorizes that institution to access bank accounts for the purpose of conducting electronic funds transfers through the automated clearing house (ACH) operating system.

“Governing body” means the board, commission, council, administrator, or other body by whatever

name it may be known having control of the finances of the local unit, local authority, board of education, or county college. In those entities where a chief executive officer is authorized by law to participate in such control through powers of recommendation, approval, or veto, the term includes such chief executive officer to the extent of such participation.

“Internal controls” mean fiscal and operational controls that ensure safe and proper use of a standard electronic funds transfer system and mitigate the potential for fraud and abuse. For purposes of this chapter, internal controls shall include technological safeguards and cybersecurity practices, as well as processes affected by the governing body, management, and other personnel establishing fiscal and operational controls that reduce exposure to risk of misappropriation.

“Issuer” means the financial institution that has issued a procurement card, provides services, billings, and statements in support of a procurement card or receives payments in satisfaction of obligations created from the use of a procurement card. For purposes of these rules, issuer includes intermediary transfer agents who participate in the process of implementing electronic funds transfers on behalf of the local unit, local authority, or county college.

“Local authority” means an entity subject to the Local Authorities Fiscal Control Law, [N.J.S.A. 40A:5A-1 et seq.](#)

“Local unit” means a local unit as defined in [N.J.S.A. 40A:5-2](#).

“National Automated Clearing House Association (NACHA) file” means a file, formatted to National Automated Clearing House Association (NACHA) specifications, which contains instructions for transferring funds between accounts.

“Payment documentation” means such documentation, including evidence of approvals and certifications, as is required by N.J.S.A. [40A:5-16.b](#), [40A:5-17](#), and 18A:19.1 et seq., and this chapter prior to the legal paying out of moneys.

“Procurement card” or “P-card” means an account or the physical card that represents an account governed by characteristics specific to a procurement card. These characteristics include limits of time, amount, access, and purchase category controlled by the local unit, local authority, or county college in accordance with an agreement with an issuer. While such cards may have the appearance of a credit card, such as Visa™, MasterCard®, American Express, or Discover, such general-purpose cards do not feature the controls that procurement cards have and as such are not permitted under these rules.

“Procurement card statement” is the detailed billing or portion thereof that lists transactions initiated via procurement card, which statement is sufficient for review and reconciliation and constitutes a part of the payment documentation.

“Program manager” means an individual possessing a Qualified Purchasing Agent certification from the Division of Local Government Services who is responsible for day-to-day oversight and management of procurement card usage.

“Reconciliation of activity” means the process used to determine that all transactions utilizing standard electronic funds transfer technologies are accurate, authorized and allocable to encumbered appropriations.

“Standard electronic funds transfer technologies” mean technologies that facilitate the transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, initiated by means such as, but not limited to, an electronic terminal, telephone, computer or magnetic tape for the purpose of ordering, instructing, or authorizing a financial institution to debit or credit an account, and incorporate, at a minimum, internal controls set forth in rules promulgated by the Local Finance Board. No general purpose credit or debit card shall be considered a standard electronic funds transfer technology.

“Supervisory review” means the process performed by an individual in a supervisory capacity to confirm the propriety and accuracy of standard electronic funds transfer technologies use initiated by subordinates.

“Transaction” means any activity that may result in demand for payment.

#### **5:30-9A.3 Authorization to use standard electronic funds transfer technologies for electronic funds transfers**

(a) The governing body of a local unit, local authority, board of education, or county college may adopt policies that permit its specifically named officers and employees to use standard electronic funds transfer technologies for electronic funds transfers, except that boards of education may not utilize procurement cards, charge cards, or charge accounts. Such policies shall be in writing and shall be approved by resolution or ordinance of the governing body, as appropriate. No governing body may adopt policies that fail to implement, at a minimum, the internal controls set forth in this chapter.

(b) This section does not authorize local units, local authorities, boards of education, or county colleges to exceed the maximum bid thresholds or other limits set forth in the Local Public Contracts Law, N.J.S.A. 40A:11-1 et seq., Public School Contracts Law, N.J.S.A. 18A:18A-1 et seq., or the County College Contracts Law, N.J.S.A. 18A:64A-25.1 et seq.

(c) Procurement card issuers and providers of ACH and wire transfer services are to be financial institutions chartered by Federal or State authority. ACH and wire transfer services must be provided by a financial institution covered by the Governmental Unit Deposit Protection Act, N.J.S.A. 17:9-41 et seq.

(d) A procurement card number may be used in lieu of a credit card number required by a vendor.

#### **5:30-9A.4 Standard electronic funds transfer technologies; internal controls and conditions for use**

(a) Local units, local authorities, boards of education, and county colleges shall only initiate and approve electronic funds in accordance with this subchapter. Standard electronic funds transfer technologies shall incorporate, at minimum, the following features and safeguards:

1. The ability to designate specific individuals able to initiate disbursements, barring those not authorized to initiate disbursements from doing so;
2. The ability to designate individuals who may authorize disbursement, and segregate initiation and authorization functions. Password or other security controls shall be in place to restrict access based on an individual’s authorized role;
3. The ability to confirm receipt of payment by vendor;

4. The ability to bar automatic debits from local unit accounts;
5. The ability for appropriate officials to view transaction history, generate activity reports, and conduct supervisory reviews of all transactions;
6. The ability to backup transaction data and store such data offline;
7. Measures to mitigate risk of duplicate payment;
8. The creation and maintenance of an audit trail, such that transaction history, including demands for payment and payment initiation, authorization, and confirmation, can be independently tracked and detailed through the use of an electronic data interchange or functional equivalent;
9. The following cybersecurity best practice framework shall be followed:
  - i. Any system supporting a standard electronic funds transfer technology shall:
    - (1) Be hosted on dedicated servers or in a FedRAMP Moderate Impact Level Authorized Cloud. When using cloud services, the vendor shall check provider credentials and contracts;
    - (2) Encrypt stored and transmitted financial information and personal identification information;
    - (3) Maintain only critical personal identification information. Social Security numbers shall not be utilized as identification numbers for system purposes;
    - (4) Employ a resilient password policy;
    - (5) Undergo regular and stress testing;
    - (6) Have regular security updates on all software and devices carried out;
    - (7) Have back-up plans, information disposal, and disaster recovery procedures created and tested;
    - (8) Undergo regular security risk assessments for detecting compromises, along with regular monitoring for vulnerabilities, with necessary patches and updates being implemented; and
    - (9) Develop a Cybersecurity Incident Response Plan; and
  - ii. The managing organization shall:
    - (1) Check provider credentials and contracts when using cloud services;
    - (2) Educate staff in good security measures and perform employee background checks; and
    - (3) Create a computer security incident response team, generally called a CSIRT;
10. Financial institution providers of standard electronic funds transfer technologies shall

provide annual evidence of satisfactory internal control to the chief financial officer;

11. ACH payments shall follow rules set forth by the National Automated Clearing House Association (NACHA) or an equivalent successor banking industry standard. In addition, the following safeguards shall be instituted:

- i. All electronic funds transfers through the ACH must utilize electronic data exchange (EDI) technology and be subject to an Electronic Funds Transfer and Indemnification Agreement;
- ii. A user that can generate an ACH file shall neither have upload rights nor access that permits editing of a vendor routing number or vendor account number;
- iii. Each edit to vendor ACH information shall be approved by a separate individual and be logged showing the user editing the data, date stamp, IP address, and the approval of the edit;
- iv. Any ACH file that is in plain text format shall not be stored on a local computer past the time transmitted to a bank; and
- v. If supported by the financial institution of a local unit, local authority, board of education, or county college, said entities shall avail themselves of the ability to recall ACH payments via NACHA file;

12. A charge account or charge card issued by a specific vendor, which can only be utilized for goods and services provided by said vendor, may be utilized by local units, local authorities, and county colleges, but must incorporate the following safeguards:

- i. Outstanding balances shall be required to be paid in full each month. No local unit shall utilize revolving charge cards;
- ii. Allows the local unit, local authority, or county college to designate specific employees authorized to utilize the charge account or card and track purchases by individual user;
- iii. Allows dollar amount limits to be placed on each single purchase; and
- iv. Provides the ability to receive itemized statements and pay by invoice; and

13. No charge account or charge card issued by a specific vendor may be utilized for travel or dining expenses.

(b) The governing body of a local unit, local authority, board of education, or county college may only utilize standard electronic funds transfer technologies upon instituting, at a minimum, the following fiscal and operational controls:

1. The appropriate administrative ordinance or resolution shall be adopted authorizing the policies and procedures governing the use of standard electronic funds transfer technologies consistent with this subchapter;
2. The CFO shall ensure that the minimum internal controls set forth in this chapter, along with those internal controls set forth in the policies and procedures of the local unit, local authority, board of education, or county college are in place and being adhered to;

3. Initiation and authorization roles shall be segregated, and password-restricted. The CFO shall be responsible for authorization of all electronic funds transfers, unless the transfer was initiated by the CFO. If the CFO initiates an electronic funds transfer, another officer designated by the governing body that is not under the supervision of the CFO shall be responsible for authorization of the transfer. A backup officer may be designated in the event the CFO or chief administrative officer are unavailable. All payment of claims ordinances or resolutions enacted pursuant to N.J.S.A. [40A:5-17.b](#) shall, at a minimum, comply with the provisions of this section. This section shall not be interpreted to prevent a local unit, local authority, board of education, or county college from requiring more than one officer to authorize an electronic funds transfer.

i. For counties organized pursuant to the provisions of the Optional County Charter Law, N.J.S.A. 40:41A-1 et seq., unless otherwise set forth in an ordinance adopted pursuant to N.J.S.A. [40A:5-17.b](#) that provides a method of disbursing moneys or payment of claims, any electronic funds transfer shall be initiated by the chief executive officer.

ii. For counties not organized pursuant to the provisions of the Optional County Charter Law, N.J.S.A. 40:41A-1 et seq., unless otherwise set forth in a resolution adopted pursuant to N.J.S.A. [40A:5-17.b](#) that provides a method of disbursing moneys or payment of claims, any electronic funds transfer shall be initiated by the clerk of the freeholder board.

iii. Unless otherwise set forth in an ordinance adopted pursuant to N.J.S.A. [40A:5-17.b](#) that provides a method of disbursing moneys or payment of claims, any electronic funds transfer by a municipality shall be initiated by the mayor or other chief executive officer, and authorized by the municipal clerk in addition to the chief finance officer.

4. No local unit, including a county college, shall disburse funds unless the goods and services are certified as having been provided pursuant to N.J.S.A. [40A:5-16.b](#), unless otherwise permitted pursuant to N.J.S.A. [40A:5-16.c\(1\)](#) and this subchapter;

5. Each bill list approved or ratified by the governing body shall indicate the type of standard electronic funds transfer technology that has been or will be utilized in paying the claim, along with a reference that permits tracking;

6. On no less than a weekly basis, activity reports on all transactions utilizing standard electronic funds transfer technologies shall be reviewed by the CFO or another individual under the supervision of the CFO, and in the case of a board of education, an individual appointed by the governing body on an annual basis that is not under the direct supervision of the CFO and is not empowered to initiate or authorize electronic funds transfers. Reconciliation shall be performed on a regular basis. Any activity reports generated by the CFO shall be monitored by another officer, designated by the governing body, who is not under the supervision of the CFO;

7. A user that uploads an ACH file shall check the amounts and recipients against a register displaying ACH payments; and

8. For a charge account or card issued by a specific vendor, a local unit, local authority, or county college shall:

i. Issue a monthly purchase order for each individual charge account or card authorizing a maximum amount that can be expended each month;



- ii. Designate specific employees able to utilize the account or card;
- iii. Require billing by invoice;
- iv. Pay the outstanding balance in full each month; and
- v. Establish policies and procedures for use, such as are required for procurement card usage pursuant to [N.J.A.C. 5:30-9A.7](#), except that the designation of a program manager shall not be required.

**5:30-9A.5 Procurement card limit and control requirements**

(a) A procurement card differs substantially from a credit card issued by a financial institution because of the controls that may be exercised on its use. Before selection of an issuer (and in addition to consideration of fees and rebates, software and computer requirements, and accessibility to the vendor), the following limits and controls shall be incorporated into the procurement card program:

- 1. The ability to control limits on-line and in real-time;
- 2. The ability to establish, change or delete limits on each card individually;
- 3. The ability to categorically restrict the use of individual cards;
- 4. The ability to establish a cumulative limit for a specific period;
- 5. The ability to review current activity on-line; and
- 6. The ability to receive sorted or sortable detailed reports of activity, by authorized card user, department or spending category.

**5:30-9A.6 Claimant certification; when payment can be made without claimant certification**

(a) A certification pursuant to N.J.S.A. [40A:5-16.a](#) that a bill or demand is correct must either feature an original signature, signature stamp, facsimile signature, or electronic signature of the individual making the certification.

(b) For boards of education, claimant certification shall be in accordance with the provisions of [N.J.S.A. 18A:19-3](#).

(c) For a local unit, including a county college, payments may be made without certification by the vendor or claimant as to the bill or demand being correct under the following circumstances:

- 1. When payment to vendors is required in advance of the delivery of the following materials or services, if those materials or services cannot be obtained from any other source at comparable prices, including:
  - i. For such purposes as may be permitted pursuant to [N.J.S.A. 40A:5-16.2](#) and 16.3;
  - ii. Payment obligations to the State or Federal governments;
  - iii. Membership in a nonprofit organization;

- iv. Educational courses, including, but not limited to, those where continuing education credits are awarded;
  - v. Registration for a conference or convention sponsored by a nonprofit organization; and
  - vi. Website hosting, including registration and maintenance of a domain name;
2. When ordering, billing, and payment transactions for goods or services are made through a computerized electronic transaction utilizing standard electronic funds transfer technologies; and
3. Where the local unit institutes a standard policy through resolution or ordinance, as appropriate, to not require a vendor or claimant certification if said vendor or claimant does not provide, as part of its normal course of business, a certification from an individual with knowledge of the transaction that a bill or demand is correct. In instituting such a policy, the local unit shall have the discretion to require vendor or claimant certification as the local unit deems necessary or appropriate.
- (d) The provisions of (c)2 and 3 above shall not apply to the reimbursement of employee expenses or payment for personal services.
- 1. No employee expenses shall be reimbursed, unless the employee provides a detailed statement, certified in writing by the employee, along with documentation in support of each expense.
  - 2. For purposes of this section, a “personal service” shall be a service provided exclusively and entirely by the individual seeking payment.
- (e) Vendor or claimant certification shall not be required as a condition for payment to be made for debt service or any services set forth under [N.J.S.A. 40A:5-16.d.](#)

**5:30-9A.7 Policies and practices governing use of procurement cards; audit**

- (a) The local unit, local authority, or county college shall establish the following procedures to ensure that the use of procurement cards is governed by sound fiscal and management controls:
- 1. All authorized procurement card users, individuals responsible for supervisory review, individuals responsible for activity reconciliations, the purchasing agent, the program manager, the chief administrative officer, and the CFO are required to complete training on the policies and procedures governing the use of procurement cards;
  - 2. Procurement cards shall be issued in the name of a specific individual. Said individual, upon completion of the requisite training, shall complete and sign a contract of understanding that includes financial responsibility for misuse of the procurement card. A card shall not be issued unless it can be shown that such issuance is necessary for the conduct of ongoing operations in the normal course of providing government services;
  - 3. Under no circumstance shall procurement cards be utilized for personal use. Procurement cards shall not be used for travel and dining expenses for government employees, volunteers, or officials. Existing law, [N.J.S.A. 40A:5-16.1](#), provides mechanisms for employees to receive travel and expense funds in advance. Subject to the authorization process and limits of this subchapter,

procurement cards may be used by a Qualified Purchasing Agent of a county, or the County Sheriff or County Prosecutor if authorized by a resolution or ordinance of the governing body of the county, to arrange for travel, room, and board expenses of defendants, witnesses, or experts required for matters before the courts. This section shall not be interpreted to bar the use of procurement cards for the cost of educational courses, or registration for conferences and conventions sponsored by a nonprofit organization;

4. A procurement card is not to be issued to an individual who is neither covered by a fidelity bond nor by a blanket honesty policy held by the local unit, local authority, or county college, and shall be cancelled if a person to whom a procurement card is issued becomes ineligible for coverage under the fidelity bond or blanket honesty policy; and

5. Violations of policies governing the use of procurement cards or intermediary transfer agents shall result in appropriate remedial or disciplinary action without regard to the position held by the card user.

(b) The chief administrative officer, in consultation with the chief financial officer and the program manager, if that individual is someone other than the chief financial officer, will identify positions within the organizational structure that will benefit from the use of a procurement card and establish limits by amount, period (time), and category of usage permissible. Under the supervision of the chief financial officer, the program manager shall develop and administer a supervisory review process, as well as engage in any other oversight or management duties required to ensure the proper usage of procurement cards. The chief financial officer or an individual under the supervision of the chief financial officer other than the program manager shall be responsible for reconciliation of activity.

(c) The program manager, subject to the supervision of the chief financial officer if the program manager is someone other than the chief financial officer, is responsible for the identification, analysis, and management of all risks associated with the use of procurement cards.

(d) The local unit, local authority, or county college shall publish and distribute within the organization all policies and procedures that govern all procurement card users, their supervisors, the purchasing agent, the accounts payable, and accounting personnel responsible for reconciliation of procurement card statements and the disbursement of funds in satisfaction thereof. Said policies and procedures shall, at a minimum, describe the following:

1. Who may use a procurement card;
2. The documentation required to be submitted by authorized procurement card users to support transactions, including electronic funds transfers;
3. The training required before an individual is permitted to use a procurement card;
4. The types of transactions permitted (personal use is not permissible);
5. The initial limits and procedure for establishing or revising limits in the future;
6. Encumbrance of limits assigned or amounts to be transferred electronically;
7. The penalties and disciplinary action to be assessed for improper use of a procurement card;
8. Who is to conduct supervisory reviews;

9. Procedures for contesting items appearing on the procurement card statement;
10. Procedures for collecting restitution resulting from misuse;
11. Reconciliation of activity; and
12. Requirements for distribution of funds to the issuer.

(e) The chief financial officer shall assure that the following information is gathered and reviewed prior to any disbursement of funds to the issuer:

1. Evidence of each transaction, including a receipt or other acceptable documentation provided by the vendor of goods or services, and certified by the authorized procurement card user pursuant to [N.J.S.A. 40A:5-16.b](#), as having been received as described;
2. Evidence of supervisory review, certified by the reviewer that the purchase was appropriate and necessary;
3. A reconciliation of activity performed upon the transaction evidence, supervisory review, and procurement card issuer statement; and
4. A distribution report indicating the complete allocation of funds to be paid against previously appropriated and encumbered items.

(f) The chief financial officer is responsible for monitoring and assessing the quality of internal control performance on a continuing basis to assure that all controls are actively pursued each cycle without exception.

**5:30-9A.8 (Reserved)**

## **LOCAL PUBLIC CONTRACTS LAW APPLICABLE SECTIONS OF N.J.A.C. 5:30-11.1 ET SEQ.**

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### **SUBCHAPTER 11. CHANGE ORDERS AND OPEN-END CONTRACTS**

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#### **5:30-11.1 Application, compliance and penalties**

- (a) Unless specifically stated to the contrary, the rules in this subchapter apply to all local government agencies that are encompassed by the definition of contracting unit in N.J.S.A. 40A:11-2(1) by whatever name called, and referred to in this subchapter as contracting units.
- (b) Every governing body and chief executive officer shall take all steps necessary so that all officials and employees shall be aware of and comply with the requirements of these rules.

#### **5:30-11.2 Definitions**

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

*"Change order"* means a properly prepared document authorized by the governing body which directs and authorizes a vendor providing goods or performing services to a contracting unit pursuant to a contract awarded by governing body resolution to change the quantity or character of goods provided or services performed from that originally specified or estimated and to correspondingly change the payment due therefore.

*"Chief executive officer"* means the elected or appointed individual with the highest level of administrative authority of the contracting unit. In the case of a municipality, this may refer to the mayor as appropriate to the form of government; in the case of a county, the director of a board of chosen freeholders, county executive, or county manager as appropriate to the form of government; in the case of an authority, the chair of the authority; and, in the case of a fire district, the president or other presiding officer of the board of fire commissioners.

*"Open-end contracts"* means those contracts for which price bids were solicited on a unit basis because exact quantities needed were not known at the time bids were sought. Such contracts, when advertised and awarded, must include a minimum and a maximum number of units that can be ordered for each item under the contract. Zero is an acceptable minimum. Orders placed under such open-end contracts shall not be considered as change orders for purposes of this section, but shall be subject to the requirements specified in N.J.A.C. 5:30-11.10. Examples include, but are not limited to, blacktopping and office supplies such as stationery.

### **5:30-11.3 General requirements for all change orders**

(a) No changes in quantities, work performed, services rendered, materials, supplies or equipment delivered or provided shall be authorized, permitted or accepted except by the procedures established herein. All change orders unless otherwise stated in this subchapter shall be subject to the following:

1. Each change order shall be in writing and shall be numbered consecutively (beginning with number one) and attached to the original purchase order or contract for each project.
2. Change orders which result in payment reduction below the originally contracted price may be made by locally established procedure, provided that any change orders increasing cost on the same contract shall include reference to such reductions.
3. Quantities of items or work shall not be changed in such a manner as to nullify the effect of the competitive determination of lowest responsible bidder which was made at the time of contract award, if at said time the changes could have been reasonably foreseen.
4. Responsibility required by these rules to be exercised specifically by the governing body, including authorization of change orders, shall not be delegated except for minor field (site) modifications pursuant to N.J.A.C. 5:30-11.4.
5. Change orders may be executed by the representative appointed by the governing body but the responsibility for the authorization of change orders shall not be delegated by the governing body except for minor field (site) modifications pursuant to N.J.A.C. 5:30-11.4.
6. Change orders shall be used to change the number of units or items originally advertised and contracted for, provided that:
  - i. Unit prices or a price methodology were sought in the original specifications and included in the contract;

- ii. The original specification and the contract included a provision that the unit prices could be so used; and
  - iii. If (a)6i and ii above were not contained in the original specification, a change order shall not be issued.
- 7. Change orders shall not be used to substantially change the quality or character of the items or work to be provided, inasmuch as such would have been a determining factor in the original bidding.
- 8. Change orders shall not serve the purpose of escalation clauses and, therefore, shall not be utilized to effectuate upward price adjustments.
- 9. Total number of change orders executed for a particular contract shall not cause the originally awarded contract price to be exceeded by more than 20 percent unless otherwise authorized by these rules.
- 10. If proposed change orders do exceed the 20 percent limitation of (a)9 above, no work shall be performed or purchases made until the procedures of N.J.A.C. 5:30-11.9 have been completed. If the governing body determines issuance of the change order is not justifiable, a new contract shall be executed in accordance with the Local Public Contracts Law.
- 11. Before authorizing any change orders resulting in additional expenditures, the availability of funds shall be certified in writing by the chief financial officer or certifying finance officer, as appropriate.
- 12. The 20 percent limitation of (a)9 above shall not apply to emergency situations as defined within N.J.S.A. 40A:11-6.
- 13. Change order authorizations shall not be withheld until the completion of the entire project.

#### **5:30-11.4 Procedures for minor field (site) modifications**

The governing body shall be required to authorize all change orders, except that minor field (site) modifications (for example, additional fill stone needed, modifications of footings, additional rock blasting) may be authorized, provided that they do not affect the overall scope of work of the contract, by the designated representative of the governing body. These change orders shall result only in minor price increases to the originally awarded contract price.

#### **5:30-11.5 General procedures for change orders**

- (a) The governing body approval process for change orders shall be as follows:
  - 1. The chief executive officer of the contracting unit or his or her designee shall file with the governing body a request for the change order, stating the facts involved and indicating that the proposed change order may be allowed under these rules. If the request and justification are prepared by other than an official of the contracting unit, they must be countersigned by the chief executive officer or his or her designee.
  - 2. The governing body shall take such steps as it may find appropriate to assure that a change is necessary and that the work will be completed.



3. The governing body shall then pass a resolution authorizing a written amendment to a contract covering the change(s) to be made. The exact form of this amendatory contract shall be at the discretion of the contracting unit attorney.
4. The resolution described in (a)3 above shall be passed before execution of the change order. No work shall be performed or purchases made on the involved phase of the contract until the resolution is passed.

**5:30-11.6 Change orders for professional services and extraordinary unspecifiable services**

- (a) This section shall apply only to change orders for professional and extraordinary, unspecifiable services contracts.
- (b) In case of conflict with the general requirements of N.J.A.C. 5:30- 11.3, the specific language of this section shall prevail but, otherwise, the requirements of N.J.A.C. 5:30-11.3 shall be satisfied.
- (c) Changes should be within the scope of activities of the original contract, and not for the purpose of undertaking new or different work or projects. Changes in payments for activities within the scope of activities of the contract shall be in accordance with a schedule of specific charges or rates contained in the contract and shall be effectuated by a written change order authorized by the governing body. If such a schedule is not included in the contract, the contract should be amended to provide for same.
- (d) The 20 percent limitation of N.J.A.C. 5:30-11.3(a)9 shall not apply to professional and consultant contracts.
- (e) If the change is not within the scope of activities of the original contract and the contract was awarded without competitive bidding being required by law or rule, as is the case for professional services and certain authorized extraordinary unspecifiable services in accordance with N.J.S.A. 40A:11-5(1)(a)(i), any change beyond the original scope of activities shall be made by amendatory contract approved by the governing body.

**5:30-11.7 Change orders for materials, supplies and equipment which are part of construction contract**

- (a) The requirements of this section shall apply only to change orders for materials, supplies and equipment which are part of construction contracts.
- (b) In case of conflict with the general requirements of N.J.A.C. 5:30- 11.3, the specific language of this section shall prevail but, otherwise, the requirements of N.J.A.C. 5:30-11.3 shall be satisfied.
- (c) Change orders for materials, supplies and equipment items which are part of a contract which is primarily a construction contract shall be processed in accordance with the rules governing construction contracts. Contracts awarded on a unit price basis (including, but not limited to, asphalt overlays, curbing) as an open-end contract shall be handled under the section dealing with open-end contracts. However, contracts awarded for the paving, construction or reconstruction of specifically described streets, parking lots, or sections shall be treated as construction contracts.

**5:30-11.8 Change orders for construction, reconstruction and major repair contracts**

- (a) The requirements of this section shall apply only to the particular type of contract in question.

(b) In case of conflict with the general requirements of N.J.A.C. 5:30- 11.3, the specific language of this section shall prevail but, otherwise, the requirements of N.J.A.C. 5:30-11.3 shall be satisfied.

(c) Change orders for construction, reconstruction and major repair contracts shall be limited to the following types:

1. Unforeseeable problems, which are defined as conditions or circumstances that could not be foreseen at the time the specifications were written and the contract awarded; provided that a substantial amount of the construction would be delayed, which would result in substantial increases in costs above the original contract amount or substantial inconvenience to the public if bidding were to be required; and
2. Minor modifications to effect economies, improve service or resolve minor problems with affected property owners.

(d) Change orders for construction, reconstruction and major repair contracts shall not be made for the following:

1. Changes that materially expand upon the size, nature or scope of the project as it was originally described in the bid specifications; or
2. Extra work that could reasonably be effectuated by a separately bid contract without unduly disrupting the basic work or imposing adverse cost consequences.

#### **5:30-11.9 Procedures for change orders which exceed 20 percent limitation**

(a) General provisions regarding the procedures for change orders which exceed the 20 percent limitation are as follows:

1. The procedures in this section shall only be followed when a particular change order on any type of contract, except professional and extraordinary unspecifiable service contracts, will cause the total amount of change orders executed for the particular contract to exceed the originally awarded contract price by more than 20 percent. The purpose of the procedures is to allow for such a change only in limited instances. Such a change shall not be permitted when the factual circumstances make it reasonably possible to execute a new contract for the additional work. Such a change may be allowed, for example, when an unforeseen circumstance or differing site condition is combined with a situation which renders execution of a new contract an unreasonable interference with the efficient completion of the work.
2. Generally such change orders are not justifiable and the ready issuance of them by contracting units would constitute an abuse of these rules.

(b) A written certification justifying the performance of the work or the furnishing of the services which would necessitate issuance of such a change order shall be filed by the contractor with the chief executive officer or designee. This certification shall include an explanation of the factual circumstances which necessitate issuance of the change order; a statement indicating why these circumstances could not have been foreseen; a statement indicating why issuance of the change order would be in the best interests of the contracting unit and would not constitute an abuse of these rules; and, if the nature of the change order is technical, the certification shall include a certified statement from the contractor's appropriate expert, such as an engineer or architect. This statement shall explain in detail the factual circumstances which necessitate issuance of the proposed change order. A rewrite or paraphrase of the rules in this subchapter is not acceptable.

(c) The governing body approval process for change orders which exceed the 20 percent limitation is as follows:

1. The chief executive officer or his or her designee shall file a request for the change order with the governing body. This request shall include a statement indicating why the proposed change may be allowed under this subchapter. A copy of the certification required under (b) above must also be attached to the request.
2. If the certification required pursuant to (b) above includes a certified statement from an engineer or other expert as required by (b) above, the request to the governing body shall also include a statement from the contracting unit's engineer or an official or employee with the appropriate expertise. This statement shall explain in detail the factual circumstances which justify issuance of the proposed change order. A rewrite or paraphrase of the rules in this subchapter is not acceptable.
3. The governing body shall take appropriate steps to assure that the change order is proper and allowable under this subchapter.
4. The governing body shall then pass a resolution authorizing a written amendatory contract to be entered into covering the change(s) to be made. The exact form of this amendatory contract shall be at the discretion of the contracting unit attorney.
5. The resolution described in (c)4 above shall be passed before execution of the change order.
6. The governing body shall cause to be printed once, in an official newspaper, a brief notice indicating the additional amount to be expended, the original contract price, the nature of the original and additional work and why it is necessary to expend the additional funds. A copy of the advertisement shall also be filed with the clerk or secretary of the governing body and be available for inspection by the public.

(d) The clerk or secretary of the governing body of each contracting unit shall report to the Director on an appendix to the contracting unit's annual budget all change orders from the previous fiscal year which exceeded the 20 percent limitation. This report shall be made on a form provided by the Director. A summary of the report shall be included as supplemental material in the annual audit of the contracting unit.

#### **5:30-11.10 Open-end contracts**

(a) The issuance of purchase orders pursuant to an open-end contract shall be considered to be the carrying out of the contract and not a change order. The following requirements shall apply:

1. Purchase orders under open-end contracts shall not be used for purposes such as changing the quality or character of items to be provided, nor to exceed the maximum number(s) of items or units provided for in the original specifications and contract. Such changes would constitute a change order.
2. Each time a purchase order is placed, the contracting agent shall ensure that funds are available for the purchase through either an encumbrance or certification of availability of funds.
3. Purchase orders shall be placed by the contracting agent, subject to such controls or approval requirements as the governing body, chief executive or other administrative officer may lawfully impose.

## **LOCAL PUBLIC CONTRACTS LAW APPLICABLE SECTIONS OF N.J.A.C. 5:32-4.1 ET SEQ.**

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### **SUBCHAPTER 4- QUALIFIED PURCHASING AGENTS**

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#### **5:32-4.1 Qualified purchasing agent**

- (a) An individual shall be considered a qualified purchasing agent pursuant to N.J.S.A. 40A:11-9.b to exercise the supplemental authority as set forth in N.J.S.A. 40A:11-3 and 40A:11-4.3 or 18A:18A-3 and 18A:18A-4.3 upon meeting the criteria relevant to the individual as set forth in N.J.S.A. 40A:11-9.
- (b) To meet the criteria of required training courses set forth in N.J.S.A. 40A:11-9.b(5), an applicant shall successfully complete the following courses provided by the Division of Local Government Services, or, with the approval of the Director, the Center for Government Services at Rutgers, the State University of New Jersey or a county college:
1. Principles of Public Purchasing I;
  2. Principles of Public Purchasing II;
  3. Principles of Public Purchasing III; and
  4. Municipal Finance Administration, or either of the following courses: Municipal Finance Administration for Municipal Clerks or Municipal Finance Administration for Purchasing Agents.
- (c) At least one of the courses established pursuant to (b) above shall incorporate the subject area of green purchasing.
- (d) Upon approval of the Director, for content and format, any of the training courses set forth in (b) above may be combined, or may be incorporated into a new or existing undergraduate or graduate-level course.
- (e) The following individuals who apply for qualified purchasing agent certification must certify to having earned 2.0 contact hours of coursework on the subject area of green purchasing before being eligible to take the certification exam and said coursework shall be approved by the Director as relevant to the subject matter area and the duties of a QPA pursuant to N.J.S.A. 40A:11-9 and this chapter:
1. Individuals who have successfully completed all training courses required pursuant to N.J.S.A. 40A:11-9.b(5) prior to October 20, 2014;
  2. Individuals who have successfully completed one or more of the training courses required pursuant to N.J.S.A. 40A:11-9.b(5) prior to June 30, 2015, and whose remaining coursework will not cover green purchasing; or
  3. Individuals who are otherwise exempt from taking the prerequisite training courses pursuant to N.J.S.A. 40A:11-9.b(7) or 40A:11-9.f.

(f) Individuals applying for a qualified purchasing agent certificate who are exempt from the certification exam pursuant to N.J.S.A. 40A:11-9.e(2), must certify to having earned 2.0 contact hours of coursework on the subject area of green purchasing before being eligible to receive a qualified purchasing agent certificate. Said coursework shall be approved by the Director as relevant to the subject matter area and the duties of a QPA pursuant to N.J.S.A. 40A:11-9 and this chapter.

(g) Applicants for a qualified purchasing agent examination and certification shall submit to the Division an application form approved by the Director. The application submission shall include proof(s) of meeting the requirements in N.J.S.A. 40A:11-9 and as described as part of the application form. At the discretion of the Director, additional information and documentation may be required upon receipt of an application. Each completed application shall be filed with the Division at least 30 calendar days prior to the date of the examination, and shall be accompanied by a fee in the amount of \$ 150.00 payable to the Treasurer, State of New Jersey. The Director shall determine the content of the examination.

(h) Upon meeting the requirements of law, the applicant shall be issued a certificate as a qualified purchasing agent upon payment to the Director of a fee of \$ 25.00 payable to the Treasurer, State of New Jersey.

#### **5:32-4.2 Continuing education requirements**

(a) Renewal of a qualified purchasing agent certificate shall be required every three years, subject to the applicant's fulfillment of continuing education requirements, the submission of an application for renewal, and payment of a \$35.00 fee payable to the order of the Treasurer, State of New Jersey.

1. For certificate renewal cycles commencing before August 1, 2022, applicants shall obtain 20 continuing education contact hours in the subject areas of procurement procedures, office administrative/general duties, ethics, and green purchasing. For certificate renewal cycles commencing on or after August 1, 2022, applicants shall obtain 25 continuing education contact hours in the subject areas of procurement procedures, office administrative/general duties, ethics, and green purchasing. Said credits shall be approved by the Director as relevant to the subject matter area and the duties of a QPA pursuant to N.J.S.A. 40A:11-9 and this chapter, with the following minimum contact hours for each subject area:

- i. Two contact hours in the subject area of procurement procedures for certificate renewal cycles commencing before August 1, 2022, or for certificate renewal cycles commencing on or after August 1, 2022, five contact hours in the subject area of procurement procedures;
- ii. Two contact hours in the subject area of office administrative/general duties;
- iii. Three contact hours in the subject area of ethics; and
- iv. Two contact hours in the subject area of green purchasing.

2. At the option of the applicant, contact hours in the subject areas of information technology and public works compliance, as approved by the Director for relevance to the

subject matter area and the duties of a QPA pursuant to N.J.S.A. 40A:11-9 and this chapter, may be applied toward the number of continuing education contact hours required pursuant to (a)1 above, in addition to the required minimum contact hours.

3. If an applicant has earned at least the minimum number of continuing education contact hours required pursuant to (a)1 above within the renewal period but has not achieved the minimum number of contact hours in a given subject area, the Director has discretion to waive the required minimum upon application and good cause shown, provided that the applicant has earned at least one contact hour in the given subject area.

4. Qualified purchasing agent certificates shall expire and be due for renewal according to the following schedule:

i. All qualified purchasing agent certificates issued prior to January 1, 2005, shall first expire and be due for renewal as of June 30, 2015, and every three years thereafter.

ii. All qualified purchasing agent certificates issued on or after January 1, 2005, but prior to January 1, 2010, shall first expire and be due for renewal as of January 1, 2016, and every three years thereafter.

iii. All qualified purchasing agent certificates issued between January 1, 2010 and April 11, 2012, shall first expire and be due for renewal as of June 30, 2016, and every three years thereafter. All qualified purchasing agent certificates issued after April 11, 2012, shall first expire and be due for renewal either on June 30 or December 31, whichever is sooner, at least three years from when they are first issued, and every three years thereafter, except that no qualified purchasing agent certificate issued after April 11, 2012, shall expire sooner than June 30, 2016.

5. Renewal of qualified purchasing agent certificates shall be requested on a renewal form approved by and submitted to the Director.

6. An individual who holds a qualified purchasing agent certificate and allows such certificate to lapse by failing to renew shall be required to apply to take the qualifying examination and pay the requisite fee for such application in order to obtain a new qualified purchasing agent certification, except that, when an individual applies within six months after the expiration of the certificate, the application may be made in the same manner as a renewal.

7. Within 12 months after the expiration of the certificate, an application may be made in the same manner as renewal, only if the Director determines that a certificate holder is prevented from earning the required continuing education units within six months of the expiration of the certificate. The applicant must demonstrate a good faith effort to earn the required continuing education units within six months after the expiration of the certificate, and that either or both of the conditions in (a)7i and/or ii below made it impossible to obtain the requisite continuing education units. The circumstances preventing renewal that qualify under this paragraph are:

i. A flood, hurricane, superstorm, tornado, or other natural disaster, and a state of emergency has been declared as a result thereof by the Governor; or



- ii. A medical event or condition.

#### **5:32-4.3 Procedures for increasing the bid threshold**

A contracting unit with a purchasing agent who possesses a qualified purchasing agent certificate pursuant to N.J.S.A. 40A:11-9 desiring to take advantage of the supplemental authority of N.J.S.A. 40A:11-3 and 40A:11-4.3 or 18A:18-3 and 18A:18A-4.3 shall have its governing body pass a resolution authorizing the amount of a higher bid threshold for the contracting unit, the amount of which shall not exceed the statutory maximum bid threshold.

#### **5:32-4.4 Vacancy in the office of purchasing agent**

(a) Following the appointment of a purchasing agent for a contracting unit, if the person appointed no longer performs such duties, the governing body or chief executive officer, as appropriate to the form of government, may appoint, for a period not to exceed one year commencing from the date of the vacancy, a person who does not possess a qualified purchasing agent certificate to serve as a temporary purchasing agent. With the approval of the Director, a contracting unit may appoint or reappoint a temporary purchasing agent for a maximum of one additional year following the end of the first temporary appointment. No contracting unit shall employ a temporary purchasing agent for more than two consecutive years.

1. Prior to the end of the first year appointment of a temporary purchasing agent, the governing body, or chief executive officer, as appropriate, shall request, in writing, permission from the Director to appoint a temporary purchasing agent for a second year. A questionnaire approved by the Director shall be completed and included with the written request. The completed questionnaire and any documents submitted in support of said questionnaire shall be exempt from disclosure under the Open Public Records Act, N.J.S.A. 47:1A-1 et seq.
2. Before granting approval to appoint a temporary purchasing agent for a second year, the Director shall be satisfied that the individual is of good moral character and can satisfactorily fulfill the duties of a purchasing agent. Any request to the Director shall provide the following information:
  - i. The candidate's efforts to obtain a qualified purchasing agent certificate;
  - ii. Whether, as a condition of hiring, the contracting unit performed a criminal background check, credit check and judgment search, along with the results thereof;
  - iii. An explanation of any repeat comments on the most recent annual audit, attributable to the office of purchasing agent; and
  - iv. An explanation of any complaints against the office of purchasing agent from a member of the public or other persons that are of a serious nature, such as those involving potential, ongoing, or prior litigation.
3. The Director may request from the governing body or chief executive officer of the contracting unit, as appropriate, such other information as may be necessary to determine the individual's good moral character and ability to fulfill the duties of purchasing agent.

(b) During the term of appointment of a temporary purchasing agent, a contracting unit's bid threshold may remain at an amount up to the maximum allowed for a contracting unit having appointed a person possessing a qualified purchasing agent certificate to serve as the purchasing agent, so long as the governing body has adopted a resolution authorizing such amount. Contracts awarded after a vacancy occurs in the office of a purchasing agent shall be subject to a bid threshold of \$ 17,500, or in the case of boards of education, the bid threshold established by the State Treasurer pursuant to N.J.S.A. 18A:18-3(b), until either the subsequent appointment of a person possessing a qualified purchasing agent certificate to serve as the purchasing agent or the appointment of a temporary purchasing agent pursuant to this section. A contracting unit shall notify its auditor upon a vacancy occurring in the office of a purchasing agent, unless the contracting unit's auditor inquires, on an annual basis, whether the contracting unit has appointed either a purchasing agent or, in lieu of having appointed a purchasing agent, a temporary purchasing agent pursuant to this section.