

CHAPTER 34**LOCAL PUBLIC CONTRACTS****Authority**

N.J.S.A. 52:27BB-1 et seq., 40A:11-11 et seq.

Source and Effective Date

R.1990 d.595, effective December 3, 1990.
See: 22 N.J.R. 724(a), 22 N.J.R. 3639(a).

Executive Order No. 66(1978) Expiration Date

Chapter 34, Local Public Contracts, expires December 3, 1995.

Chapter Historical Note

This chapter 34, Capital Budget Manual, was adopted pursuant to authority of N.J.S.A. 52:27BB-10 and was filed and became effective on September 21, 1970, as R.1970 d.113. See: 2 N.J.R. 61(c), 2 N.J.R. 81(b). Amendment which deleted this chapter 34, Capital Budget Manual, in its entirety was filed and became effective on September 14, 1978, as R.1978 d.322. See: 10 N.J.R. 416(d).

Chapter 34, Local Public Contracts, became effective December 3, 1990, as R.1990 d.595. See: Source and Effective Date.

See section annotations for specific rulemakings.

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SUBCHAPTER 1. GENERAL PROVISIONS AND CONTRACTS THROUGH STATE AGENCY**5:34-1.1 Application, compliance and penalties**

(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), by whatever name called.

(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.

(c) Any person knowingly failing to discharge the responsibilities required by these rules shall be subject to the misdemeanor penalties prescribed by N.J.S.A. 52:27BB-51 in addition to such other sanctions as may pertain.

5:34-1.2 Contracts through State agency

Any local contracting unit purchasing, pursuant to N.J.S.A. 40A:11-12, materials, supplies or equipment under a contract entered into by the State Division of Purchase and Property shall authorize the award of such contract by resolution of the governing body unless the contract is awarded by a contracting agent pursuant to N.J.S.A. 40A:11-3.

SUBCHAPTER 2. EXTRAORDINARY, UNSPECIFIABLE SERVICES

5:34-2.1 Definition of extraordinary, unspecifiable services

Extraordinary, unspecifiable services are defined by the Local Public Contracts Law, N.J.S.A. 40A:11-1 et seq., at N.J.S.A. 40A:11-2(7) as "services which are specialized and qualitative in nature requiring expertise, extensive training and proven reputation in the field of endeavor." N.J.S.A. 40A:11-5(1)(a)ii permits local 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.

(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 retained under this exception to study, survey or prepare specifications for a given system, function or equipment, may be selected without competitive bidding to operate, implement or provide any material or services.

Case Notes

Reinsurance portion of county's insurance agreement was under "extraordinary, unspecifiable services" exception to bidding requirements. Local 1081 of Communications Workers of America, AFL-CIO v. Essex County, 255 N.J.Super. 671, 605 A.2d 1154 (A.D.1992).

County's purchase of insurance and consultant services was under "extraordinary, unspecifiable services" exception to bidding requirements. Local 1081 of Communications Workers of America, AFL-CIO v. Essex County, 255 N.J.Super. 671, 605 A.2d 1154 (A.D.1992).

5:34-2.3 Procedures for implementation of the exception

(a) If the estimated cost or price exceeds the informal quotation threshold of N.J.S.A. 40A:11-6.1, 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:11-6.1.

(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:11-3, 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, is required to place a notice of the action in a newspaper. (See N.J.S.A. 40A:11-5(1)(a) for full requirement.)

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County's purchase of insurance and consultant services was under "extraordinary, unspecifiable services" exception to bidding requirements. Local 1081 of Communications Workers of America, AFL-CIO v. Essex County, 255 N.J.Super. 671, 605 A.2d 1154 (A.D.1992).

5:34-2.4 Examples for purposes of guidance

(a) The Division believes that the following services satisfy all the criteria for an EUS and they are therefore listed as examples for purposes of guidance:

1. Specification drafting;

2. Management consultant studies;
3. Labor management consultants;
4. Certified landscape architects;
5. EDP preliminary feasibility surveys, design of systems and preparation of specifications;
6. Expert financial advisors;
7. Public relations consultants;
8. Insurance, including the purchase of insurance coverage and consultant services;
9. Child custody, foster care, and similar services when contracted directly with the individuals performing the services and not with any firm, corporation or partnership which employs others to perform the work;
10. Establishment of a fixed assets inventory when the total system includes an accounting component;
11. Expert witnesses; and
12. Clerk of the works or construction advisor (not the actual construction).

(b) The Division believes that the following services do not satisfy all the criteria for an EUS and they are therefore listed as examples for purposes of guidance:

1. Facilities management contracts (for data processing or other operations);
2. EDP services, including programming, service bureau processing, rental of data processing equipment, purchasing of data processing equipment. These activities are in some cases complex but are specifiable;
3. Construction management contracts (involving price guarantee, responsibility for entering into contracts for actual construction, or actual or contingent responsibility for conducting the construction, etc.);
4. Physical taking of a fixed assets inventory;
5. Electrical equipment maintenance;
6. Maintenance of typewriters, dictating machines and other common office equipment;
7. Tradesmen;
8. Heating specialists;
9. Maintenance of motor vehicle fleets;
10. Feeding programs; and
11. Revaluation services.

Case Notes

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SUBCHAPTER 3. CERTAIN LEASES OF EQUIPMENT AND SERVICE AGREEMENTS BEYOND THE FISCAL YEAR, ADOPTED PURSUANT TO N.J.S.A. 40A:11-15

5:34-3.1 Duration of contract

(a) Leases (which term includes rental agreements) and service agreements for items authorized by the applicable provision of N.J.S.A. 40A:11-15 shall not be renewed or extended beyond the maximum allowable statutory period. The specifications for rebidding after the maximum allowable statutory period should not require that the equipment be in the possession and/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 allowable 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 maximum allowable statutory period. Such renewals may be authorized only by resolution of the governing body.

5:34-3.2 Application of bidding requirements

All leases or service agreements authorized under N.J.S.A. 40A:11-15 shall be subject to competitive bidding if the cumulative amount to be expended during the duration of the multi-year lease exceeds the competitive bidding threshold of N.J.S.A. 40A:11-3.

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) In instances in which a lessor desires 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 authorizes 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. N.J.S.A. 40A:11-15 does, however, provide several exceptions to this requirement. (See N.J.S.A. 40A:11-15 for details.)

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 proposals, when in accordance with a formal written plan of time-phased expansion, prepared prior to solicitation of bids, and when the 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.

SUBCHAPTER 4. CHANGE ORDERS AND OPEN-END CONTRACTS

5:34-4.1 Definitions

(a) A change order is a properly prepared document authorized by the governing body which directs and authorizes a contractor, consultant or other vendor performing work for or supplying materials and supplies to a local unit pursuant to a contract to change the quantity or character of work, service, or materials to be performed, rendered or furnished, from that originally specified or estimated and to correspondingly change the payment due therefor.

(b) Open-end contracts are 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. 5:34-4.9. Examples include, but are not limited to, blacktopping and office supplies such as stationery.

5:34-4.2 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 price 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. 5:34-4.3.

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. 5:34-4.3.

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. 5:34-4.8 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 procedures of 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 governing body shall be assured in writing that adequate appropriations are available in accordance with N.J.A.C. 5:34-5, Certification of Funds.

13. The 20 percent limitation of (a)9 above shall not apply to emergency situations as defined within N.J.S.A. 40A:11-6.

14. Change order authorizations shall not be withheld until the completion of the entire project.

Administrative Correction.
See: N.J.R. January 7, 1991.

5:34-4.3 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.

5:34-4.4 General procedures for all change orders

(a) The governing body approval process for change orders shall be as follows:

1. The chief executive officer of the governmental 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 governmental 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 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 local 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.

5:34-4.5 Professional and Extraordinary, Unspecifiable Services consultant contracts

(a) The rules 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. 5:34-4.2, the specific language of the particular section shall prevail but, otherwise, the requirements of N.J.A.C. 5:34-4.2 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. 5:34-4.2(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)), any change beyond the original scope of activities shall be made by amendatory contract approved by the governing body.

5:34-4.6 Change orders for materials, supplies and equipment which are part of construction contract

(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. 5:34-4.2, the specific language of the particular section shall prevail but, otherwise, the requirements of N.J.A.C. 5:34-4.2 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 or sections shall be treated as construction contracts.

5:34-4.7 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. 5:34-4.2, the specific language of the particular section shall prevail but, otherwise, the requirements of N.J.A.C. 5:34-4.2 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.

5:34-4.8 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 consultant 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. The Division of Local Government Services emphasizes that 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 his 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 local 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 a newspaper authorized by law to publish its legal advertisements, 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 of the governing body and be available for inspection by the public.

(d) Reporting requirements under this section are as follows:

1. Actions taken under the provisions of this section shall be reported in the annual audit filed with the Division of Local Government Services.

2. On or before the last day of February, the clerk of the governing body shall report to the Division of Local Government Services all change orders from the previous year which exceeded the 20 percent limitation. This report shall be made on a form provided by the Division of Local Government Services.

5:34-4.9 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. 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. The Certificate of Availability of Funds required by N.J.A.C. 5:34-5 shall be executed each time an order is placed, covering the amount of the order unless the local unit wishes to commit and certify the full amount at the outset. Note that the point at which the Certificate must be executed is just before the local unit incurs a contractual liability on its part.

3. Orders shall be placed by the official authorized to serve as contracting agent, subject to such controls or approval requirements as the governing body, chief executive or other administrative officer may lawfully impose.

SUBCHAPTER 5. CERTIFICATION OF FUNDS AND APPLICABLE ACCOUNTING PROCEDURES

5:34-5.1 General requirements

(a) The chief financial officer, appointed pursuant to N.J.S.A. 40A:9-140.1 et seq., shall be responsible for determining the availability of sufficient funds. 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 contracting 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. 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 authorized administrative official or employee issuing the contract or making the purchase shall ascertain from 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.

5:34-5.2 Procedure

(a) The following procedure shall be utilized by the governing body for the certification of funds:

1. The chief financial officer or certifying finance officer, as appropriate, charged with the responsibility of maintaining the financial records of the local unit shall certify in writing to the governing body the availability or lack thereof of adequate funds for each contract which is pending approval by the governing body. Said certification shall designate specifically the line item appropriation(s) of the official budget to which the contract will be properly charged, taking care 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.

2. No resolution 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, contractor or other entrepreneur shall be enacted unless it shall recite that such a certificate showing availability of funds has been provided. The resolution shall specify the exact line item appropriation(s) or ordinance which shall be charged.

3. The certification of availability of funds shall be attached to the original copy of the resolution or ordinance and kept in the files of the municipal clerk, clerk of the board of chosen freeholders or secretary to the governing body.

4. Before certifying to the legality of a resolution or ordinance authorizing the entering into of a contract, the local unit's attorney shall be satisfied that a certificate of availability of funds has been provided.

5. A contracting unit's governing body shall not enter into or execute a contract unless it has been presented with a written certification from its chief financial officer or certifying finance officer, as appropriate, stating the availability of sufficient funds for the contract(s) pending approval by the governing body.

5:34-5.3 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, it may enter into a contract for a period extending beyond the time period funded in the temporary budget, subject to the following:

1. The full cost of the contract for that fiscal year shall be certified against the temporary budget, which must contain sufficient appropriations therefor; or

2. If the full cost of that year is not charged against the temporary budget, at least the pro-rated amount reflecting all liability to be incurred through March 31, or later if permitted by statute, must be charged and certified, and the contract must contain a clause making its continuation past such date subject to the appropriation of sufficient funds. Immediately after the final budget adoption, a certificate of available funds shall be prepared for the remaining balance and filed with the original ordinance or resolution.

(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, then the certification of available funds shall be as follows:

1. The full maximum amount covered by the contract shall be charged against the budget at the time the contract is awarded, and the full amount shall be certified; or

2. No amount shall be chargeable or certified until such time as goods or services are ordered or otherwise called for. Prior to incurring the liability by placing the order, the certification of available funds shall be made by the chief financial officer or certifying finance officer, as appropriate, and attached to the file copy of the purchase order or other such document. It shall be the responsibility of the official responsible for issuing the purchase order to notify and seek the certification of availability of funds from the chief financial officer or certifying finance officer, as appropriate.

(c) Contracts up to 12 months not coinciding with fiscal year: When a contract is awarded for a period of up to 12 months not coinciding with the established fiscal year of the local unit, the following methods shall be followed for purposes of accounting and providing the certification of available funds:

1. If the contract is for a professional service or is essentially a single undertaking or project with one basic work project required (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 cost of the contract shall be chargeable to and certified against the budget or appropriation of the year in which the contract is awarded. This method may also, at local option, be followed for contracts described in (c)2 below.

2. If the contract is not of the character described in (c)1 above, and provides for goods or services to be provided at separate intervals over the contract period, then the amounts for which liability is to be incurred shall be charged and certified to the two respective years' appropriations at the times, as appropriate, of the contract being awarded (with respect to the amount from the first fiscal year); the adoption of the temporary budget (for the period at least through March 31); and the adoption of the final budget (for the remainder of the contract for the second fiscal year).

(d) Multi-year contract requirements are as follows:

1. Contracts entered into pursuant to N.J.S.A. 40A:11-15 for periods in excess of 12 months shall be charged and certified as follows:

i. For construction and related services authorized by N.J.S.A. 40A:11-15(9), to the budget or appropriation in full at the time of contract award;

ii. For other contracts, to the respective budgets in accordance with the time(s) at which the respective work or services are performed or liability for payment otherwise incurred, and 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.

2. All multi-year leases and contracts except contracts specifically exempted pursuant to N.J.S.A. 40A:11-15 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.

(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 local unit's attorney rules that this action does not constitute the binding of a future governing body in an unlawful manner and 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. The general rule is that liabilities shall not be incurred and payments shall not be made without sufficient appropriation. (See N.J.S.A. 40A:4-57.) When a contractual liability may be 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 simply recite that fact and cite the statute.

2. Contracts for services to be paid from savings generated or from State or Federal aid funds not yet received and appropriated are not permitted; an appropriation must be made at the outset.

SUBCHAPTER 6. EMERGENCY PURCHASES AND CONTRACTS

5:34-6.1 General requirements

(a) No contracts shall be entered into on an emergency basis pursuant to N.J.S.A. 40A:11-6 unless the circumstances meet all of the following requirements:

1. An actual or imminent emergency must exist requiring the immediate delivery of the article or the performance of the service;

2. The emergency condition must affect the public health, safety or welfare and require the immediate delivery of the article or the performance of the service to alleviate such effect;

3. The emergency purchasing procedure may not be used unless the need for the articles or services could not have been reasonably foreseen or the need for such articles or services has arisen notwithstanding a good faith effort on the part of the contracting unit to plan for the purchase of any articles 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.

5:34-6.2 Procedure for emergency purchases and contracts

(a) A written requisition for the performance of work or labor, or the furnishing of materials, supplies or services, as defined in N.J.A.C. 5:34-6.1 is filed with the contracting agent (usually the purchasing agent) or his or her deputy in charge describing the nature of the emergency, the time of its occurrence and the need for invoking this section, certified by the officer or director in charge of the department wherein the emergency occurred, or by his or her designee.

The contracting agent or his or her deputy in charge, if he or she is satisfied that the emergency exists, is then authorized to award a contract for said work or labor, materials, supplies or services.

(b) A governing body may by resolution reserve the power to award emergency contracts. Said resolution may distinguish between situations involving imminent peril to life or property and situations that are urgent but could wait until the governing body can convene.

(c) Upon the furnishing of such work or labor, materials, supplies or services, in accordance with the terms of the contract or agreement, the contractor furnishing such work or labor, materials, supplies 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.

(d) Payments made under emergency circumstances shall not be in excess of the available budgeted appropriations, as such would constitute a violation of the Local Budget Law, N.J.S.A. 40A:1 et seq., at N.J.S.A. 40A:4-57.

SUBCHAPTER 7. COOPERATIVE PRICING AND JOINT PURCHASING SYSTEMS

Subchapter Historical Note

Subchapter 7, Cooperative Pricing and Joint Purchasing Systems, was recodified from N.J.A.C. 5:30-17 by R.1990 d.595. See: 22 N.J.R. 724(a), 22 N.J.R. 3629(a). This subchapter was repealed by R.1992 d.401, effective October 5, 1992, and was replaced with new rules on the same subject. Previous Subchapter 7 annotations follow:

See section annotations of current rules for additional rulemaking.

5:34-7.1 Applicability
Amended by R.1991 d.284, effective June 3, 1991.
See: 23 N.J.R. 933(a), 23 N.J.R. 1787(a).
N.J.S.A. 5:27BB-1 reference deleted.

5:34-7.2 Definition
Amended by R.1991 d.284, effective June 3, 1991.
See: 23 N.J.R. 933(a), 23 N.J.R. 1787(a).
Exclusion of joint purchasing systems composed only of Boards of Education.

5:34-7.3 Basis for cooperative purchasing
Amended by R.1991 d.284, effective June 3, 1991.
See: 23 N.J.R. 933(a), 23 N.J.R. 1787(a).
Certified copy may be substituted for a resolution;
(b)8 added to require use of L.G.S. ID code number.

5:34-7.4 Approval and registration
Amended by R.1991 d.284, effective June 3, 1991.
See: 23 N.J.R. 933(a), 23 N.J.R. 1787(a).
Exclusion of joint purchasing systems composed only of Boards of Education.

5:34-7.7 Local administrative responsibilities
Amended by R.1991 d.284, effective June 3, 1991.
See: 23 N.J.R. 933(a), 23 N.J.R. 1787(a).

Total contract purchase requirements at (e)2i(2) now based on N.J.A.C. 5:43-4; circumstances requiring issuance of contract award or purchase order distinguished at (h)2.

5:34-7.1 Applicability and authority

(a) These rules shall apply to contracting units as defined in N.J.A.C. 5:34-7.2.

(b) These rules shall not extend to joint purchasing systems comprised only of boards of education covered under N.J.S.A. 18A:18A-11.

(c) This subchapter is adopted under the authority of P.L. 1979, c.420 (N.J.S.A. 40A:11-11(5)).

(d) Copies of Cooperative Purchasing Form CP-2001, Request For Registration Or Modification of a Cooperative Purchasing System, are available from the Division of Local Government Services at CN 803, Trenton, New Jersey 08625-0803.

5:34-7.2 Definitions

The following words and terms, 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 of a cooperative purchasing system (N.J.A.C. 5:34-7.3); system registration (N.J.A.C. 5:34-7.5); membership registration (N.J.A.C. 5:34-7.6); system renewal (N.J.A.C. 5:34-7.8); or member renewal (N.J.A.C. 5:34-7.9).

"Contracting unit" means a unit of local government as defined in N.J.S.A. 40A:11-2(1) and boards of education authorized under N.J.A.C. 6:20-8.7 by the Commissioner of Education.

"Cooperative pricing system" means a purchasing system in which the lead agency advertises for bids, awards a master contract to the vendor providing for its own needs and for the prices to be extended to registered members, and notifies them of the bid prices awarded. The registered members then contract directly with the vendor for their own needs, subject to the specifications in the master contract.

"Cooperative purchasing system" means either joint purchasing or cooperative pricing systems.

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

"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:11-11.

"Joint purchasing system" means a cooperative purchasing system in which the lead agency has complete purchasing responsibility for the registered members, and 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.

"Registered member" means a contracting unit which has been approved by the Director for participation in a cooperative purchasing system.

5:34-7.3 Creation of a cooperative purchasing system

(a) Two or more contracting units may join together to form a cooperative purchasing system for the purchase of work, services, materials or supplies.

(b) The contracting unit designated as the lead agency must authorize the creation of the system by resolution or ordinance as appropriate. The authorizing ordinance or 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 may be substituted for a resolution.

5:34-7.4 Formal agreement

(a) A cooperative 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 or ordinance, as appropriate.

(b) At a minimum, the formal agreement shall include the following:

1. Reference to the authorizing statute;
2. Identification of the type of cooperative purchasing system;
3. Description of the items of work, materials or supplies 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 items 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 lead agency for the system;

i. As an option, the responsibility of 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 identification code shall appear on all documentation related to purchases made through the system, including bidding documents, purchase orders, vouchers and contracts.

5:34-7.5 System registration

(a) All cooperative purchasing systems 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. 5:34-7.10.

(e) 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 as are taken by the participants;

3. Adequacy of procedures to facilitate compliance with all provisions of the Local Public 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 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 within 30 days of a decision to terminate the registration of the system prior to its approved expiration date.

5:34-7.6 Membership registration

(a) A contracting unit may apply for membership in an approved cooperative purchasing system by passage of an

ordinance or resolution, as appropriate, 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. 5:34-7.10.

(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.

Amended by R.1995 d.142, effective March 20, 1995.
See: 26 N.J.R. 4724(a), 27 N.J.R. 1189(a).

5:34-7.7 Identification code

(a) The Director shall assign an alpha-numeric identification code to each cooperative purchasing system at the time of its approval.

(b) The identification code shall be included on all contracts, purchase orders, bidding documents, vouchers and records relating to the operations of the approved cooperative purchasing system.

5:34-7.8 System renewal

(a) Documents requesting the renewal of the registration of a cooperative purchasing system shall be submitted to the Director for review and approval within the 120 day period 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 or ordinance, as appropriate.

(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 include the following:

1. Form CP-2001;

2. Lead agency resolution or ordinance, as appropriate, 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 within 120 days of the expiration of a system's registration.

Amended by R.1995 d.142, effective March 20, 1995.
See: 26 N.J.R. 4724(a), 27 N.J.R. 1189(a).

5:34-7.9 (Reserved)

Repealed by R.1995 d.142, effective March 20, 1995.
See: 26 N.J.R. 4724(a), 27 N.J.R. 1189(a).
Formerly "Registered member renewal".

5:34-7.10 Time for review

(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).

5:34-7.11 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.

5:34-7.12 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 Number ____ (State ID Code), approved by the New Jersey Division of Local Government Services through (expiration date of the system).

(b) The lead agency shall review the bid specifications with the registered members.

(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 items that the lead agency shall purchase for the registered members; or

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) Pursuant to the provisions of N.J.S.A. 40A:5-16.3, 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 purchase or contract shall be made by any registered member for a price which exceeds any other price available to the registered member.

5:34-7.13 Requirements for bids for cooperative pricing systems

(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 item(s) herein bid upon to registered members of the (System Name and ID Code) 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 ID Number) 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.

5:34-7.14 Financial and contractual details for joint purchasing systems

(a) In the case of a joint purchasing system, the lead agency shall comply with the certification of funds requirement of N.J.A.C. 5:34-5 with respect to the full amount of the contract and Division of Local Government Services' requirements for Encumbrance Accounting Systems.

(b) 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.

(c) 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, ID Number ____." 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. 5:34-5.

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. 5:34-5, 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 mem-

bers 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), ID Number ____." "(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 Financial and contractual details for cooperative pricing systems

(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, copies of the specifications, name of the successful bidder, prices awarded and the contract identification number. 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:11-3. 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.A.C. 5:34-5. The identification code 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.

5:34-7.16 The State of New Jersey's cooperative purchasing (pricing) program

(a) The standard identification code 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 identification code shall be used by all contracting units purchasing under the Division of Purchase and Property's Cooperative Purchasing (Pricing) 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) Contracting units, except for boards of education, shall purchase from the State Cooperative Purchasing Program in accordance with N.J.A.C. 5:34-1.2.

5:34-7.17 Authority of Director

(a) The Director shall take whatever additional action deemed advisable to assure the orderly conduct of cooperative purchasing systems in light of sound financial administration in accordance with statutory responsibilities.

(b) The Director shall prepare such guidelines as determined necessary to assist local contracting units in the creation and administration of cooperative purchasing systems.

5:34-7.18 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.