



STATE OF NEW JERSEY
OFFICE OF THE GOVERNOR
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TRENTON
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CHRISTINE TODD WHITMAN
GOVERNOR

PETER VERNIERO
CHIEF COUNSEL TO THE GOVERNOR

July 29, 1994

The Honorable Christine Todd Whitman
Governor
Office of the Governor
Trenton, New Jersey 08625

Dear Governor Whitman:

We are pleased to submit the report of the Advisory Panel on Government Contracting Procedures in accordance with your Executive Order No. 6.

The report is a result of three public hearings, during which nearly 50 individuals testified, and our consideration of over 70 responses received in response to our invitation for written comments. A majority of commenters favored at least some modification of the present system.

We are available to discuss any aspect of this report at your convenience. We thank you for the opportunity to serve you in this capacity.

Respectfully submitted,

Peter Verniero, Chief Counsel
Chairman

Deborah T. Poritz
Attorney General

Brian Clymer
State Treasurer

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REPORT TO THE GOVERNOR

BY

THE ADVISORY PANEL ON GOVERNMENT

CONTRACTING PROCEDURES

July 29, 1994

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EXECUTIVE SUMMARY

I. PUBLIC OUTREACH

The Advisory Panel, established by Governor Whitman pursuant to Executive Order No. 6, conducted three public hearings, during which nearly 50 individuals testified, and reviewed over 70 responses to its invitation for written comments.

II. SCOPE OF REVIEW

The Advisory Panel considered questions relating to the manner in which bond sales of the State and its authorities are to be conducted, in addition to the selection of professional services necessary for this purpose and the selection of other professionals whose services may be required by such public entities.

III. SUMMARY OF THE CURRENT SYSTEM

Certain bond issues are required by law to be sold on a competitive basis. In most other cases, the system is governed by provisions of Executive Order No. 92, issued on May 4, 1993. The competitive selection of professionals whose services are required in connection with the issuance of bonds and the competitive appointment of the professionals are mandated by Executive Order No. 92 and Executive Order No. 79, respectively.

IV. SUMMARY OF PUBLIC COMMENTS

Comments ranged from full support for the current system of competitively bidding bond sales and State contracts to the belief that the State would be better served by negotiated contracts. A majority of the commenters favored at least some modification of the present system.

V. RECOMMENDATIONS

Generally, we recommend that the State and its authorities make available to the public the reasons, based on specific criteria, for selecting a type of sale and the professionals retained in connection with that sale. We also recommend that in establishing policies and procedures for these selections, issuers should provide particular consideration for firms with a presence in New Jersey and for minority and women-owned firms.

Specifically, we recommend the following:

- A. Method of Bond Sale. Competitive bond sales should be required for State, State-backed issues and State entities, except in certain circumstances in which it is determined that a negotiated sale will better serve the requirements of the particular financing.

Under Executive Order No. 92, issued on May 4, 1993, bonds are generally required to be sold on a competitive basis. Under certain circumstances upon approval of the Treasurer, Executive Order No. 92 also permits negotiated bond sales. The Advisory Panel recommends that the flexibility to conduct negotiated sales be retained. We, however, recommend that the decision to allow a negotiated sale be made in accordance with specific criteria and that the basis for the decision be available to the public.

- B. Selection of Financial Advisors and Underwriters. The State and its authorities should establish open and competitive procedures that maintain integrity and assure the highest quality of services at the lowest price.

Although under Executive Order No. 92 the selection of underwriters and financial advisors is conducted on a competitive basis, specific criteria for such selections were not established. The Advisory Panel proposes such selection criteria for use in the selection of underwriters and financial advisors.

We further recommend that even in cases where bonds are sold on a negotiated basis, the selection of underwriters should be made through a competitive process.

Under Executive Order No. 92, the Treasurer is required to be involved in the selection of all underwriters and financial advisors. Certain issuers have been authorized by statute to make selection decisions and we recommend that they retain that authority. We further recommend that the Treasurer would be involved in those selection decisions only in cases where the State provides financial support for the bond issue.

- C. **Selection of Bond Counsel.** The appointment of bond counsel should be made on a competitive basis where price is a factor but not the sole factor.

Presently, firms are pre-qualified and listed for each transaction. Except in rare instances, final selections are based primarily on price although Executive Order No. 92 does not expressly mandate price as the sole factor. Our review revealed certain flaws in the present pre-qualification and selection process, including a lack of consistent and expressed criteria and failure to afford sufficient weight to experience-related criteria such as past performance. We believe that a process that emphasizes both price and quality will best serve the public.

Accordingly, we propose that the Attorney General establish procedures for the appointment of bond counsel on a competitive basis in accordance with criteria which place appropriate weight on a firm's qualifications, suitability for a particular transaction, and fees.

To simplify matters for frequent issuers, we further propose an annual RFP process to allow the appointment of a group of qualified firms that would be designated as appointed counsel for a specific period.

The Panel recommends that the basis for the selection of bond counsel be publicly available.

- D. **Selection of Architects, Engineers and Accountants.** The State and its authorities would be well served by continuation of modified competitive practices for the selection of architects, engineers and accountants.

The Panel's recommendation continues the current system with minor modification.

REPORT OF THE
ADVISORY PANEL ON GOVERNMENT CONTRACTING PROCEDURES

I. PUBLIC OUTREACH

On January 27, 1994, Governor Christine Todd Whitman issued Executive Order No. 6 creating the Advisory Panel on Government Contracting Procedures (Advisory Panel). The Advisory Panel consisted of the Chief Counsel to the Governor, who served as Chair, the Attorney General, and the Treasurer. Under the Order the Advisory Panel was directed to make a comprehensive review of the procedures established pursuant to Executive Order No. 79, issued on January 12, 1993, and Executive Order No. 92, issued on May 4, 1993. Those previous Executive Orders generally established as the policy of the State the requirement that bonds, notes and other instruments and contracts for underwriting, bond counsel, architectural, engineering and other similar professional services be sold or awarded, respectively, on a competitive basis.

In issuing Executive Order No. 6, Governor Whitman recognized the importance of conducting a thorough analysis of the effect of these procedures and directed that the views of the public and of those directly affected by Executive Order Nos. 79 and 92 be solicited. The Governor also expressed the goals of achieving integrity in the award of State contracts and the best economic results with the highest degree of quality from the various providers.

In furtherance of its mandate, the Advisory Panel invited written comment and conducted three public hearings in Room 319 of the State House in Trenton, New Jersey. The hearings took place on the following days:

Friday, April 29, 1994 (at which time we heard principally from financial advisors and investment bankers);

Friday, May 6, 1994 (at which time we heard principally from bond counsel); and

Friday, May 13, 1994 (at which time we heard principally from engineering, architectural and accounting firms).

We encouraged legislators, members of the public and other interested persons to testify on any of the above dates. We asked professionals who wished to make presentations to the Advisory Panel to appear on the date assigned to discuss issues pertaining to their professions.

The Panel mailed written notice of the proceedings to underwriters, financial advisors, bond counsel and other professionals, along with members of the Legislature. A copy of the notice was posted on the official bulletin board within the Office of Secretary of State. In addition, invitations to participate in this process were published in the:

Asbury Park Press,
Bergen Record,
Bond Buyer,
Camden Courier Post,
New Jersey Law Journal,
Star Ledger, and
Trenton Times.

We requested a prescribed format for written comments in order to ensure that issues raised by Executive Order No. 79 and Executive Order No. 92 were addressed. In submitting written comments, participants were asked to address any or all of the following questions in the order presented below:

1. Whether their comments apply to Executive Order No. 79, Executive Order No. 92, or both.
2. Whether they are members of the public or persons or entities that have been directly affected by Executive Order No. 79 or Executive Order No. 92. Participants were asked to indicate in what capacity they were affected by either Executive Order, e.g., as issuing entities, underwriters, financial advisors, bond counsel, architects, engineers or other professionals.
3. Whether they perceived any change in the quality of service provided by professionals selected in accordance with competitive procedures under Executive Order No. 79

or Executive Order No. 92. They were asked to explain their responses and, if professionals whose services were engaged through such competitive procedures, they were further asked to indicate whether such procedures in any way affected the manner or level of service that they provided.

4. Whether they noted any economic impact of the new process (e.g., has it resulted in the payment of higher or lower fees by them as clients or to them as professionals).
5. Whether they generally support the continuation of competitive processes for the selection of professionals and/or the sale of bonds, notes and other instruments, and why or why not.
6. Whether procedures implemented under either Executive Order No. 79 or Executive Order No. 92 should be changed, and any recommended changes.
7. Any other issues that participants wished to raise.

The Advisory Panel received over 70 written responses to its invitation for comments, and nearly 50 individuals testified during the public hearings. Participants in State contracts, members of the Legislature and interested members of the public appeared before the Advisory Panel to express their views. Members of the Advisory Panel and staff also sought informal comments from professionals and representatives of the agencies and authorities affected by the Executive Orders, as well as from members of the Legislature. Some of those commenting expressed full support for the current system of competitively bid State contracts, others believe that the State would be better served by negotiation of bond sales, and yet others suggested various combinations of competitive and negotiated sales. A majority of commenters favored at least some modification of the present system.

II. SCOPE OF REVIEW

The Governor charged the Advisory Panel with examining several issues that have been of concern to the public in recent years. First, we have considered questions relating to the

manner in which bonds issued by the State and its authorities are to be conducted. In this regard, we have examined the aspects of both "competitive" and "negotiated" bond offerings and have weighed the merits of each of these types of bond sales. Second, we have considered questions relating to the method of contracting for professional services necessary when the State and its authorities issue bonds. These services include bond counsel and either underwriting or financial advisory services, depending upon the method of sale selected. The issue of whether the bonds will be sold via negotiated or competitive method is separate from whether the professionals needed to undertake the transaction are selected on a competitive basis. Beyond these two levels of inquiry, our third area of responsibility related generally to architectural, engineering, and accounting services required by the State and its public authorities.

III. SUMMARY OF CURRENT SYSTEM

There are several fundamental differences between a competitive bond sale and a negotiated bond sale. Competitive bond sales are traditionally utilized for those issues that are straightforward and readily received in the market. In a competitive sale, the issuer publishes a "Notice of Sale" announcing a scheduled sale date on which investment banking firms may submit a qualified offer to purchase the bonds at a price specified on a bid form. The issuer and its financial advisor, if one has been hired for the financing, structure the bond issue and determine the terms of the sale. The "Notice of Sale" sets forth these terms and conditions. Investment bankers form their own syndicates and submit their bids to purchase the bonds. Depending on market volatility, the bond credit ratings, and the size of the transaction, anywhere from three to ten syndicates may submit bids for the bonds. Usually, the number ranges from five to seven. The issuer then determines to sell the bonds to the bidding syndicate that offers the lowest cost.

In a negotiated sale, the issuer chooses the senior or lead manager and other underwriting firms that will participate in the sale and those firms have the exclusive right to sell the bonds to interested investors. Since Executive Order No. 92 was issued, the Treasurer has selected senior or lead managers and co-managers after review of responses to a Request for Proposal (RFP) relating to the specific transaction. This process involves consideration of qualifications, experience, recommended financial strategies and a structure for the financing as well as

fees. In New Jersey the number of responses usually ranges from at least eight to as many as twenty-five.

The responsibilities of the lead manager in a negotiated transaction include:

- 1) Assisting the issuer to structure the transaction with types of bonds that appeal to the full spectrum of potential investors as well as recommending the inclusion of special financial products which help lower the interest cost.

- 2) Leading the marketing of the issue by targeting potential buyers, conducting extensive informational conferences between the issuer and potential buyers, and then following up with those investors at the time of sale.

- 3) Representing the underwriting group in setting the price for the bonds and the various fees to be paid to the group. These prices and fees have become relatively standardized in the market and can be checked by the issuer for comparables.

Currently, certain bond issues that are backed by the State's full faith and credit or by a pledge of State revenues subject to appropriation are required by law to be issued on a competitive basis. These include new money issues of State General Obligation bonds and Transportation Trust Fund Authority bonds. In most other cases, issuers have statutory discretion to sell bonds through either competitive or negotiated methods but, since the issuance of Executive Order No. 92, have been required to seek the Treasurer's approval prior to conducting a negotiated bond sale.

Executive Order No. 92 has, since May, 1993, also required that bond counsel appointments for all State and State authority issuers be made on a competitive basis. The Report of the Treasurer accompanying Executive Order No. 92 established a process by which issuers commence the appointment process via written request to the Attorney General and the Treasurer. The Attorney General is required to review the qualifications of firms. A committee, comprised of the Treasurer, the Attorney General and the Chairperson of the authority issuer, determines which firms will be asked to submit proposals for appointment on a particular transaction. It is this Committee that ultimately selects bond counsel.

Prior to the issuance of Executive Order No. 92, the

manner in which bond counsel was selected varied among State and authority issuers. Selections of bond counsel for State issues were made pursuant to N.J.S.A. 52:17A-13, which authorizes the Attorney General, with the approval of the Governor, to designate special counsel. This was also the procedure for selection of bond counsel for several State authorities, e.g., the New Jersey Wastewater Treatment Trust, the New Jersey Transportation Trust Fund Authority, the New Jersey Water Supply Authority and the New Jersey Building Authority. In appropriate circumstances, selections were made after requests for proposals had been solicited by the Attorney General. Some authorities, like the New Jersey Sports and Exposition Authority and the New Jersey Educational Facilities Authority, utilized the services of the same bond counsel for several years. Others, like the New Jersey Housing and Mortgage Finance Agency, the New Jersey Economic Development Authority and the New Jersey Health Care Facilities Financing Authority, made appointments on a transaction-by-transaction basis from standing lists of designated bond counsel firms.

Presently, firms are pre-qualified and listed for each transaction. Except in rare instances, final selections are based primarily on price, although Executive Order No. 92 does not expressly mandate price as the sole factor. Our review revealed certain flaws in the present pre-qualification and selection process, including a lack of consistent and expressed criteria and failure to afford sufficient weight to experience-related criteria such as past performance.

The appointment of architects, engineers and other similar professionals on a competitive basis was the subject of Executive Order No. 79. That Executive Order directed the Treasurer to establish "by regulation" procedures to require the use of a "modified competitive process" for purchases, contracts or agreements for which public advertising for bids was not otherwise required pursuant to the State laws that govern such contracts. The Executive Order further directed that the procedures established pursuant thereto also include a requirement that the reasons why a particular vendor was selected over any other competing vendor should be set forth in a written report. Pending development of formal procedures by regulation, the former Treasurer issued guidelines for the implementation of modified competitive bidding in accordance with Executive Order No. 79. It is pursuant to those guidelines that contracts have been awarded for professional services since Executive Order No. 79 was issued.

IV. SUMMARY OF PUBLIC COMMENT

Bond underwriters, financial advisors, and bond counsel voiced many concerns to the Advisory Panel. Issues were raised over the timing of bond deals and the importance of securing the best interest rates, methods to encourage creative ideas for financing, and the criteria that should determine whether selections are made on a competitive or negotiated basis.

Several common themes emerged from the testimony from underwriters and financial advisors. Many believe that the State should consider competitive bond sales when credit quality is strong, the structure of the financing is simple and market conditions are stable. On the other hand, negotiated bond sales were encouraged as allowing more flexibility in timing sales, more effective pre-sale marketing, better opportunities to re-price bond issues and stronger relationships between the State and the investment professionals. Executive Order No. 92 was also faulted for allegedly leading to a decline in the quality of underwriting services to the State. According to some commenters, the competitive system enforced under Executive Order No. 92 has created artificially low pricing which in turn has reduced incentives to provide services above a minimal level.

A similar complaint was raised by bond counsel. They argued that the quality of their services is compromised by trying to bid at the lowest price. Below-cost bids, some claimed, can cause bond counsel to "cut corners" in their work. One suggestion was for bond counsel to bid for contracts based on an hourly rate. Some bond counsel also contended that a lack of continuity results from appointing a different bond counsel to each transaction. They maintained that selections should be for longer terms.

A "New Jersey preference" also was proposed by New Jersey bond counsel. Several have taken the position that only attorneys admitted to practice law in New Jersey should be appointed as bond counsel by the State. Some proponents of that position stated that bond counsel appointments should be limited to firms that maintain bona fide offices in New Jersey.

Other professionals, such as engineers, architects and accountants, also suggested modifications to the current system under Executive Order No. 92. To help potential bidders

formulate their best response to a State request, these professionals urged the State to define the scope of the job as clearly as possible. Different groups had their own specific suggestions. One criticism from design engineers was that using price as the major criterion for selection leads to higher construction costs and operation and maintenance fees allegedly because low cost designs are not complete or of the highest quality. For this reason, several engineering groups suggested that engineers be hired according to qualifications-based selections. Similarly, an association of professional architects believes that architects should be selected on the basis of qualifications and competence. Audit and accounting professionals commented that competitive bidding leads to substandard work. It was suggested that to protect their profits after having their low bid accepted, such professionals may not commit the hours or resources necessary to complete the job properly.

We appreciate the fact that several legislators appeared before us. Senator Peter Inverso endorsed Senate Bill No. 260, legislation he has sponsored to expand the powers of the New Jersey Commission on Capital Budgeting and Planning to include an annual assessment of the amount of State debt and to make recommendations concerning increases in State debt. The commission would be renamed the "New Jersey Capital Planning and Debt Management Commission." Assemblyman Rodney Frelinghuysen supported the formation of a "New Jersey Bond Review Board" that would review and reject or approve the issuance of all authorized State government bonds. This board would be established under Assembly Bill No. 580, which is sponsored by the Assemblyman.

Assemblymen Monroe Lustbader and David Russo testified in support of Assembly Bill No. 198, legislation that they have sponsored to codify the competitive selection of bond underwriters, financial advisors and bond counsel. Assemblyman Russo expressed support for Assembly Bill No. 364, which would exempt architects, engineers and land surveyors from the regular competitive bidding process but would subject them to certain uniform statutory procedures.

We considered carefully these legislative proposals and believe our recommendations, if accepted, would eliminate the need for specific legislation in this area.

V. RECOMMENDATIONS

A. METHOD OF BOND SALE

Competitive bond sales should be required for State, State-backed issues and State entities, except in certain circumstances where it is determined that a negotiated sale will better serve the requirements of a particular financing.

Competitive bond sales often provide an effective method of sale for a particular financing at a low cost. We recommend that the State continue its requirement of competitive sale for bonds issued by the State and by State entities and for State-backed bonds.

There are certain circumstances, however, in which a competitive sale does not necessarily provide the State with either the lowest price available or the highest quality services and ideas needed to structure or market a transaction. We therefore recommend that negotiated sales be permitted in those instances in which the requirements of a particular financing can be better served through a negotiated process. We also recommend that, even in a negotiated sale, competitive procedures be established for selection of the financing team. Moreover, to assure the public the highest level of integrity in the negotiated sale, we believe that the basis for the decision to undertake a negotiated sale, as well as the selection process, should be available to the public.

The circumstances under which a negotiated bond sale is likely to provide higher quality services at lower prices are the following:

1) Sale of complex or poor credits. In those instances, informational meetings with investors need to be supplemented by follow-up sales calls by an underwriter to assure sufficient demand for the bonds to produce the lowest available prices.

2) Sale of a complex financing structure, including those transactions which involve the simultaneous sale of more than one series with each series structured differently. Complex financing structures may require attracting several different

segments of the market at the same time and, thus, may benefit from the intensive pre-sale marketing associated with a negotiated sale.

3) Volatile market conditions. This circumstance by itself may not require a negotiated sale to produce the lowest price but, in conjunction with some of the other circumstances, may be a factor.

4) Large issue size. Issues exceeding \$300 million may in some instances be too large to attract enough bids to achieve truly competitive pricing.

5) Programs that are new to the investors. In those instances in which an issuer is developing a new bond program and that program is unknown to investors, a negotiated sale may provide the necessary investor education.

6) Financial techniques which are new to investors. In those instances in which new financial techniques have been proposed to the issuer and those techniques are relatively new to investors, a negotiated bond sale is likely to produce greater demand for the bonds.

We recommend that when an authority or issuer determines that the sale of bonds should be negotiated with an underwriter based on the above standards, the issuer or authority make a public finding that a negotiated sale is warranted. Such findings should be filed with the the Treasurer. Justification in support of each decision should not be stated in general terms but should be specific to the particular bond sale.

We recognize that certain issuers engage in similar types of transactions on a somewhat regular basis. In such cases, it may be appropriate for frequent issuers to make determinations with respect to the method of sale that will be utilized for two or more transactions, provided that the transactions are part of a larger bonding program of similarly secured financings. In this instance, issuers should be asked to render public determinations with respect to these financing programs at least annually.

B. SELECTION OF FINANCIAL ADVISORS AND UNDERWRITERS

The State and its authorities should establish open and competitive procedures that maintain integrity and assure the highest quality of services at the lowest price.

With regard to issuers or authorities whose bonds are secured by appropriations from the State's General Fund, the full faith and credit of the State or otherwise by State revenues, we propose the following guidelines for the selection of financial advisors and/or investment bankers:

1) A request for proposal and criteria for selection shall be developed by the issuer and the Treasurer for each financing. It is suggested that criteria for such selections include, but not be limited to:

Quality of response regarding the proposed bond structure, credit, and/or marketing strategy;

Sophisticated cash flow capabilities as required by a particular financing;

Development of a new idea;

Demonstrated ability to distribute New Jersey securities;

Quality of relevant service to the State in previous transactions;

Experience with similar financings in which the firm and its proposed financing team participated; and,

Proposed fees for the particular bond sale.

2) The issuer and the Treasurer shall select the financial advisor and/or underwriters for the financing.

3) The selection¹ and criteria applied shall be made available to the public.¹

1. We recommend that the State and its authorities be required to undertake the process outlined herein, except in

For issuers or authorities whose bonds are not secured by appropriations from the State's General Fund, full faith and credit of the State or otherwise by State revenues, we recommend that issuers be directed to formulate procedures consistent with the above criteria for the selection of financial advisors and/or underwriters and to make those procedures and criteria available to the public. Such procedures should provide for an open and competitive process. Information regarding specific selections and criteria should also be made public by issuers when particular selections are made.

We recommend that, in establishing policies and procedures for the selection of financial advisors and underwriters, issuers provide particular consideration for firms with a presence in New Jersey and for minority and women-owned firms.

The allocation of bonds and fees received by each member of the underwriting syndicate and a breakout of the costs of issuance paid by the issuer should be reported to the Treasurer and be publicly available within 30 days of the closing of the bond issue. We also recommend that the Treasurer set such terms and conditions as may be necessary to implement this reporting provision.

(Footnote 1 continued from previous page)
those rare instances in which each of the following three criteria have been met:

- 1) An innovative idea has been brought to the issuer;
- 2) A request for proposal cannot be constructed without communicating the new idea; and
- 3) The issue would not benefit from a competitive selection process.

C. SELECTION OF BOND COUNSEL

The appointment of bond counsel should be made on a competitive basis where price is a factor but not the sole factor.

As in the selection of any other professionals, the State and its bond issuing authorities have dual interests in selecting bond counsel: they must be able to obtain the highest quality of service at the lowest price. With this in mind, we recommend the competitive selection of bond counsel through a process that includes an evaluation of the suitability of firms on the basis of enumerated criteria.² Reports of fees paid to bond counsel and the criteria used for such appointments should be available to the public.

Our review of the process for selecting bond counsel must include consideration of the laws that govern a number of those appointments. Specifically, N.J.S.A. 52:17A-13 provides:

No special counsel shall be employed for the State or for or by any officer, department, board, body, commission or instrumentality of the State Government except by authority of the Attorney-General, and then only with the approval of the Governor, and provided that appropriations have been made therefor, unless the matter be of such an emergency and shall be so declared by the Governor.

The Attorney General advises that this provision applies not only to the selection of counsel for the State, but also for many of the authorities that have been affected by the implementation of Executive Order No. 92. These authorities include the New Jersey Economic Development Authority, the New Jersey Building Authority, the New Jersey Wastewater Treatment Trust, the New Jersey Water Supply Authority, the Higher Education Assistance Authority, the Educational Facilities Authority, the Health Care Facilities Financing Authority, the New Jersey Transportation Trust Fund Authority, and the New

2. In a small number of cases, however, where unique circumstances may require the appointment of a firm with a particular expertise, such as prior experience with a transaction, direct appointments should be permitted.

Jersey Transit Corporation. Other authorities have been given specific statutory authorization to appoint bond counsel.

As noted, our review of the present process of pre-qualification and selection of bond counsel revealed certain flaws, including a lack of consistent criteria and failure to afford sufficient weight to experience-related criteria such as past performance. The evaluation of a firm's qualifications prior to distribution of a request for proposal has apparently resulted in a situation where in many cases price has become the sole factor. While the payment of the lowest possible fees remains a matter of great public importance, issuers -- and the public -- must be afforded the highest quality of professional services. We believe that a process that emphasizes both price and quality will best serve the public.

Accordingly, when appointments are to be made pursuant to N.J.S.A. 52:17A-13, we recommend that the Attorney General establish procedures for the appointment of bond counsel on a competitive basis and under criteria which place great weight on the firm's qualifications and suitability for a particular transaction as well as the firm's fee proposal. Such criteria should include, but not be limited to, the following:

1. Experience of the firm and the proposed team with similar transactions.
2. Familiarity with State laws relevant to the proposed bond issue.
3. Proficiency with securities, tax, and other laws relevant to the financing.
4. Quality of proposed legal strategy with respect to specific questions posed in the RFP.
5. Quality of past legal services rendered to the State and its authorities.
6. Fees.

In cases where the Attorney General is not statutorily required to make such appointments, we recommend that issuers be directed to establish their own competitive appointment processes

based on the above criteria to ensure the selection of the most qualified firms at the lowest possible fees. We further recommend that those charged with the responsibility for selecting bond counsel should provide particular consideration with respect to minority and women-owned firms.

To achieve maximum accountability, we recommend that any policies and procedures established by issuers with respect to the appointment of counsel, as well as such procedures as the Attorney General may establish in accordance with N.J.S.A. 52:17A-13, be available to the public.

In recommending that bond counsel be selected through competitive processes, we note that arguments made in opposition to such practices have not been lost on the members of this Panel. We emphasize that in any competitive process, price should not be the sole criterion for selection. Several attorneys who submitted comments during the Panel's proceedings indicated that the submission of artificially low bids may ultimately lead to a reduction in the level of services provided by bond counsel. As was noted during the May 6, 1994 hearing, we expect that bond counsel will remain cognizant of their professional responsibilities to serve their clients in accordance with professional standards without regard to costs. We suggest, moreover, that this is a situation that can be addressed by bond counsel themselves, who should bid responsibly when submitting proposals for prospective engagements with the State and its authorities.

It may also be advisable to consider appointing firms for a series of transactions or for specific time periods in order to allow the cost of the "learning curve" required for certain work to be recovered over time. This approach might also ameliorate concerns expressed formally and informally by issuers, generally those who issue bonds on a regular basis, about the selection processes under Executive Order No. 92. We recommend that a competitive procedure be established whereby a group, or "pool", of bond counsel firms would be appointed to serve as counsel to frequent bond issuers for a specific term. Issuers could then select from the competitively established pool without having to solicit separate proposals for each bond issue. In this manner, issuers such as the New Jersey Health Care Facilities Financing Authority and the New Jersey Economic Development Authority would propose bond counsel to the Attorney General for specific transactions throughout the year without having to wait for the completion of a competitive process on a

transaction-by-transaction basis. This approach should, where appropriate, involve the establishment of a fee schedule for such transactions at the outset of the term. Thus, the dual goals of achieving high quality service and low prices would be served.

With regard to the qualification of bond counsel, we must emphasize that the procurement of professional services is an extremely complex process and must, to some degree, involve a subjective analysis of criteria designed to achieve an objective result. While we recognize that selection processes may vary among issuers, we believe that these procedures should be established upon the three common themes of quality, economy and accountability.

We note with concern the issue raised with respect to the appointment of "out-of-state firms" for bond counsel services. Questions were raised as to the legality or propriety of "out-of-state firms" performing legal services for the State. The Attorney General indicates that a preliminary review of the materials submitted in support of this contention suggests that the law in this area is unsettled. The Attorney General notes that there is no formal opinion that is directly on point in the State of New Jersey. Therefore, the Attorney General has advised that her office will seek a ruling from the New Jersey Supreme Court Committee on the Unauthorized Practice of Law in regard to this issue and that she will prepare submissions to aid the Supreme Court Committee in its review. In any event, we recommend that, in establishing policies and procedures for the selection of bond counsel, issuers provide particular consideration for New Jersey law firms.

It is, therefore, the view of this Panel that counsel be selected pursuant to an established set of criteria that include price as a factor. It must be emphasized, however, that quality should not be sacrificed for price. It is most desirable to develop procedures whereby the individual or entity that is statutorily charged with making decisions exercise that discretionary power in consideration of the interests of others who may be affected by the transaction. In some cases, other parties to bond transactions, such as borrowers, might be afforded a consultative role with respect to the appointment of professionals that will be engaged to work on their respective borrowings.

In every case, the interests of the public must be served. For this reason, we recommend that reports containing

information relative to the decisions regarding the method of bond sale and selection of professionals be prepared by the issuer or contracting authority and filed with the Attorney General on a regular basis.

D. APPOINTMENT OF ARCHITECTS, ENGINEERS AND ACCOUNTANTS

The State and its authorities would be well served by continuation of modified competitive practices for the selection of architects, engineers and accountants.

Those who presented testimony at the May 13, 1994 hearing on this matter and others who have submitted written comments with respect to Executive Order No. 79 generally favored the continuation of modified competitive processes for the selection of architects, engineers, and accountants. Representatives of the architectural and engineering professions were very supportive of the concept of "Qualification Based Selections" (QBS). Some emphasized, however, that the scope of work for a particular contract must be clearly defined in order to ensure that the contracting agency or authority will receive the best possible responses. Other individuals who testified at the hearing, most notably from the accounting profession, indicated that it was their view that competitive bidding would lead to sub-standard work in audit and accounting services provided to governmental bodies. As in the case of bond counsel, we stress that such professionals have a responsibility to satisfy all professional standards, regardless of cost. We are again of the view that this concern can be ameliorated by the bidding professionals themselves who should bid responsibly and accurately.

Some commenters are of the opinion that the State and its authorities are not utilizing qualification based selection processes for the selection of architects, engineers and accountants at present. We have discussed these procedures with representatives from the Division of Building and Construction in the Department of the Treasury and representatives of the New Jersey Department of Transportation. We are satisfied that each of these agencies, whose contracting activities constitute a significant portion of the State's requirements, employ competitive practices that are designed to achieve the goal of engaging qualified professionals at favorable prices. While the procedures employed by these two contracting bodies differ

slightly, the underlying principles are the same. In each case, quality of service receives primary emphasis and fee negotiations are undertaken with the professional whose qualifications for a particular job are of the highest quality. The procedures utilized by DBC and NJDOT are not dissimilar to those established for use by the Federal government under the federal "Brooks Act" (P.L. 92-582). While it may be advisable for the State to develop, over time, a uniform approach to the qualification and selection of architects, engineers and accountants, we are satisfied that the procedures that are employed by DBC and NJDOT, respectively, serve the State's interest in achieving quality service at good prices.

We believe, further, that the State and its authorities would be well served by a continuation of modified competitive practices for the selection of architects, engineers and accountants. We note, in this regard, that the agencies of the State and State authorities have separate legislative mandates with respect to the power to contract. For this reason, we do not believe that the promulgation of regulations by the Treasurer called for under Executive Order No. 79 is the most desirable manner of ensuring that competitive practices are utilized. We recommend that agencies and authorities establish their own procedures for competitive selection of architects, engineers and accountants. Such practices should be aimed at the fundamental goals of ensuring that each contracting entity of the State will receive the best services at the lowest costs.

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The Panel acknowledges with gratitude the work of its staff and the other participants who assisted the Panel in its preparation of this report.