

CHAPTER 34

LOCAL PUBLIC AND PUBLIC SCHOOL CONTRACTS LAWS

Authority

N.J.S.A. 18A:18A-49.2 and 40A:11-37.1.

Source and Effective Date

R.2000 d.485, effective November 6, 2000.
See: 32 N.J.R. 3237(a), 32 N.J.R. 4300(a).

Executive Order No. 66(1978) Expiration Date

Chapter 34, Local Public and Public School Contracts Laws, expires on November 6, 2005.

Chapter Historical Note

Chapter 34, Capital Budget Manual, was adopted as R.1970 d.113, effective September 21, 1970. See: 2 N.J.R. 61(c), 2 N.J.R. 81(b).

Chapter 34, Capital Budget Manual, was repealed by R.1978 d.322, effective September 14, 1978. See: 10 N.J.R. 416(d).

Chapter 34, Local Public Contracts, was adopted as new rules, and Subchapter 7, Cooperative Pricing and Joint Purchasing Systems, was recodified from N.J.A.C. 5:30-17 by R.1990 d.595, effective December 3, 1990. See: 22 N.J.R. 724(a), 22 N.J.R. 3639(a).

Subchapter 7, Cooperative Pricing and Joint Purchasing Systems, was repealed and Subchapter 7, Cooperative Pricing and Joint Purchasing Systems, was adopted as new rules by R.1992 d.401, effective October 5, 1992. See: 24 N.J.R. 2667(a), 24 N.J.R. 3529(a).

Pursuant to Executive Order No. 66(1978), Chapter 34, Local Public Contracts, was readopted as R.1995 d.633, effective November 8, 1995. See: 27 N.J.R. 3259(a), 27 N.J.R. 4885(b).

Pursuant to Executive Order No. 66(1978), Chapter 34, Local Public and Public School Contracts Laws, was readopted as R.2000 d.485, effective November 6, 2000, and Subchapter 4, Change Orders and Open-End Contracts, was recodified as N.J.A.C. 5:30-11 and Subchapter 5, Certification of Funds and Applicable Accounting Procedures, was recodified as N.J.A.C. 5:30-5 by R.2000 d.485, effective December 4, 2000. See: Source and Effective Date. See, also, section annotations.

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SUBCHAPTER 1. GENERAL PROVISIONS AND DEFINITIONS

5:34-1.1 Application and compliance

(a) Unless specifically stated to the contrary, the rules in this chapter apply to all local government agencies that are encompassed by the definition of contracting unit in N.J.S.A. 40A:11-2(1), and by all boards of education meeting the definition of board of education in N.J.S.A. 18A:18A-2a by whatever name called.

(b) Every governing body, chief executive officer, or chief school administrator shall take reasonable steps to provide training so that all officials and employees responsible for the administration of public contracts are aware of and are able to comply with the requirements of the law and these rules.

(c) These rules are adopted by the Director of the Division of Local Government Services after consultation with the Commissioner of Education pursuant to N.J.S.A. 40A:11-37.1 and 18A:18A-49.2.

(d) Public housing authorities that operate subject to the authority of the U.S. Department of Housing and Urban Development will adhere to procurement procedures which reflect N.J.S.A. 40A:11-1 et seq. and related rules, provided that procurements conform to applicable Federal law and the standards required therein and to 24 CFR 85.36(b) that requires where both State and Federal law encompass the same procurement, the stricter or more limiting procedure which encourages competition shall be used.

Amended by R.2000 d.485, effective December 4, 2000.
See: 32 N.J.R. 3237(a), 32 N.J.R. 4300(a).

Rewrote the section.

5:34-1.2 Definitions

The following words and terms, as used in this chapter, shall have the following meanings, unless the context indicates otherwise:

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

"Bid threshold" means the dollar amount set in N.J.S.A. 40A:11-3, and in N.J.S.A. 18A:18A-3, above which a contracting unit shall advertise for and receive sealed bids.

"Board of education" means and includes the board of education of any local school district, consolidated school district, regional school district, educational services commission, county special services school district, county vocational school and any other board of education or other similar body other than the State Board of Education, the Commission on Higher Education or the Presidents' Council, established and operating under the provisions of Title 18A of the New Jersey Statutes and having authority to make purchases and to enter into contracts for the provision or performance of goods or services. The term "board of education" also shall include the board of trustees of a charter school established under P.L. 1995, c.426 (N.J.S.A. 18A:36A-1 et seq.).

"Competitive contracting" means the method described in N.J.S.A. 40A:11-4.1 et seq. and 18A:18A-4.1 et seq. of contracting for specialized goods and services in which formal proposals are solicited from vendors.

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

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

9. Other services, rights or use as may meet the definition of concession.

(c) A concession shall not be deemed to include contributions of goods, services, or financial support for the sponsorship of the celebration of public events where the contributions offset in full or in part the cost of the specific event. For the purpose of providing examples, such public events include, but are not limited to, seasonal recreation programs, concert series, holiday celebrations, and tourism related programs. In addition, vending machines in public facilities that are considered as protected speech under the United States Constitution, such as newspapers, or facilities used for collection of material being sent through a pickup and delivery service are not deemed to be a concession.

(d) Prior to commencing procurement of any concession, the governing body of the contracting unit shall:

1. Obtain from legal counsel an opinion of the legality of procuring the concession; and
2. Pass a resolution authorizing the procurement of a concession. The resolution shall include:
 - i. A description of the public need to award a concession;
 - ii. The concession to be awarded;
 - iii. The considerations, including the benefits and any risks the governing body took into account in reaching the decision to award a concession;
 - iv. An estimate of the total value of the concession;
 - v. If any, an estimate of any revenue or services to be received by the contracting unit;
 - vi. The basis of award of the concession is based upon the most advantageous price and other factors or the lowest responsible bidder;
 - vii. An estimate of any costs to be incurred by the contracting unit as part of the concession;
 - viii. Any services, facilities, or endorsement to be provided by the contracting unit; and
 - ix. The method to be used to procure the concession pursuant to (g) below.

(e) The original legal opinion and resolution required in (d) above shall suffice for purposes of the subsequent procurement of a particular concession where the entire procurement process had been previously completed.

(f) The total estimated value of the concession shall be considered as the aggregate value in determining the procurement method that will be used. The concession shall be

awarded in accordance with the relevant procedure for the method used to procure the concession. The total estimated value shall include all revenue, if any, that may be expected to be received by the concessionaire, which shall be deemed to include the value of all payments, goods, and services received by the contracting unit. A specific exception to this subsection shall be the use of bank automated teller machines or other cash vending machines. The threshold for this service shall be based on the estimated annual value of fees charged to users of the service and the value of all payments, goods and services received by the contracting unit.

(g) Unless otherwise specifically provided for by law, concessions shall be awarded through either of the following means:

1. By informal quotations, when the total estimated value of the concession is less than the bid threshold; or
2. By receipt of public bid or competitive contracting, when the total estimated value of the concession exceeds the bid threshold or at any time at the option of the governing body.

(h) While contracting units that are boards of education are not required to use the concession process for food and drink vending machines, the use of these provisions are recommended to enhance the integrity of the procurement process. If a contracting unit that is a board of education combines food and drink vending machines with concessions in a single procurement, the procedures of this section shall apply for the entire procurement.

5:34-9.5 Miscellaneous circumstances

(a) When a single contract for the collection of solid waste includes both municipal solid waste, pursuant to N.J.S.A. 40A:11-15(3), and collection from facilities owned by a contracting unit, pursuant to N.J.S.A. 40A:11-15(38), the contract may be granted for a term of not more than five years.

(b) When contracts for goods or services are less than 15 percent of the bid threshold, the purchasing agent shall employ sound business practices in awarding the contract. For the purpose of this subsection, sound business practice means employing such judgment that the price charged to the contracting unit reflects current market conditions and the quantity and delivery needs of the contracting unit.

(c) When a notice of award for professional services, competitive contracting, and extraordinary unspecifiable services is required to be published in the official newspaper of the contracting unit, such a notice shall be published no later than 20 calendar days after the passage of the resolution awarding the contract.

(d) Pursuant to N.J.S.A. 40A:11-4b(1) and 18A:18A-4b(1) with regard to the use of mediation to reach a finding of prior negative experience, if the mediation activity included a requirement of confidentiality and if no final determination of responsibility was reached, such mediation activity shall not be considered as a cause for a finding of prior negative experience, unless stipulation was made to the contrary.

(e) In a contracting unit subject to the Public School Contracts Law, a purchasing agent may appoint a "duly authorized designee" to act on behalf of and be responsible to the purchasing agent for such actions as related to purchasing. The purchasing agent shall recommend such designee to the Board of Education for their consideration and approval. The designee cannot act on behalf of the purchasing agent until Board approval is received. Under these circumstances, the purchasing agent shall continue to hold the authority, responsibility and accountability for the purchasing activity of the contracting unit. The use of this provision does not permit a "duly authorized designee" to exercise the authority of a qualified purchasing agent.

APPENDIX

The examples that follow relate to N.J.A.C. 5:34-8.3, which identifies practices that should be used in instances where the initial estimates of goods or services needed during the current contract year were anticipated to be less than the bid threshold, or had been exempt from public bidding, but are later found to be incorrect. The rule sets forth practices to follow in determining if the remaining amount should be publicly bid, or if quotations should be solicited. The following situations repeat each rule and provide an interpretative model.

In the following situations, the remaining amount (as previously defined) means: the value of similar goods and services that are needed for the remainder of the current contract year, plus the value of similar goods and services needed in the subsequent contract year.

SITUATION 1

N.J.A.C. 5:34-8.3(c): If the remaining amount exceeds the bid threshold, public bidding should take place as soon as possible.

Example: Assume that a contracting unit has a bid threshold of \$17,500 and is on a calendar year budget cycle. To date they have purchased \$15,000 worth of chain link fence through solicitation of quotations. In December, the Recreation Director advises the purchasing agent that one field and a parking area were excluded from the initial solicitation and that an additional \$10,000 worth of chain link fence needs to be purchased for the remainder of the year. The Recreation Director further advises that an additional \$21,000 worth of chain link fence is required for anticipated projects in the next year.

Solution: The purchasing agent or contracting agent would have to immediately initiate public bidding proce-

dures to procure the remaining chain link fence, because the additional need this year, plus the need next year, exceeds the bid threshold.

SITUATION 2

N.J.A.C. 5:34-8.3(d): If the remaining amount is between 15 percent and 100 percent of the contracting unit's bid threshold, and the contracting unit has previously designated an elected official to determine whether public bidding or the solicitation of quotations is most advantageous to the contracting unit, then the purchasing agent or contracting agent may seek authorization from the governing body or its designee to solicit quotations or publicly bid the remaining amount.

Example: The following example relates to situations where similar goods or services will not be required in the subsequent contract year, and the contracting agent or purchasing agent has the option to either publicly bid the remaining amount, or seek authorization from the governing body or its designee to solicit quotations.

Assume that a contracting unit has a bid threshold of \$17,500 and is on a calendar year budget cycle. To date they have purchased \$15,000 worth of chain link fence through solicitation of quotations. In December, the Recreation Director informs the purchasing agent or contracting agent that one field was excluded from the initial solicitation, resulting in an additional current year purchase of \$10,000. The Recreation Director further advises that no purchases of chain link fence are required for the subsequent year.

Solution: The purchasing agent or contracting agent may seek authorization from the governing body or its designee to solicit quotations or publicly bid the remaining amount because it is between 15 percent and 100 percent of the contracting unit's bid threshold.

SITUATION 3

N.J.A.C. 5:34-8.3(d): If the remaining amount is between 15 percent and 100 percent of the contracting unit's bid threshold, and the contracting unit has previously designated an elected official to determine whether public bidding or the solicitation of quotations is most advantageous to the contracting unit, then the purchasing agent or contracting agent may seek authorization from the governing body or its designee to solicit quotations or publicly bid the remaining amount.

Example: The following example relates to situations where the remaining amount equals the value of similar goods or services to be purchased for the current contract year plus the value of similar goods or services for the subsequent contract year and is equal to between 15 percent and 100 percent of the contracting unit's bid threshold.

Assume that a contracting unit has a bid threshold of \$17,500 and is on a calendar year budget. To date, they have purchased \$15,000 worth of chain link fence through solicitation of quotations. In December, the Recreation Director informs the purchasing agent or contracting agent that one field was excluded from the initial solicitation resulting in an additional need for \$5,000 worth of chain link fence for the remainder of the current contract year. The Recreation Director advises further that \$10,000 worth of additional chain link fence needs to be purchased during the subsequent year. The additional \$15,000 of new chain link fence (\$5,000 for the remainder of the current contract year, and

\$10,000 for the subsequent contract year) is less than the bid threshold of \$17,500.

Solution: Since the remaining amount is between 15 percent and 100 percent of the contracting unit's bid threshold, the purchasing agent or contracting agent may seek authorization from the governing body or its designee to solicit quotations or publicly bid the remaining amount.

SITUATION 4

N.J.A.C. 5:34-8.3(e): If the remaining amount is less than 15 percent of the contracting unit's bid threshold, the contracting agent or purchasing agent is authorized to solicit quotations for the purchase of the remaining amount.

Example: Assume that a contracting unit has a bid threshold of \$17,500 and is on a calendar year budget cycle. To date they have purchased \$15,000 worth of chain link fence through solicitation of quotations. In December, the Recreation Director informs the purchasing agent or contracting agent that the engineer miscalculated the area, and that an additional 40 linear feet of chain link fence needs to be purchased. The cost for the additional chain link fence is \$2,600.

Solution: The purchasing agent or contracting agent would be able to solicit quotations for the remaining chain link fence, because \$2,600 (the remaining amount of goods to be purchased) is less than 15 percent of the contracting unit's bid threshold.