

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

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

Source and Effective Date

R.1995 d.633, effective November 8, 1995.
See: 27 N.J.R. 3259(a), 27 N.J.R. 4885(b).

Executive Order No. 66(1978) Expiration Date

Chapter 34, Local Public Contracts, expires on November 8, 2000.

Chapter Historical Note

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). The amendment which deleted 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, was adopted as new rules by R.1990 d.595, effective December 3, 1990. See: 22 N.J.R. 724(a), 22 N.J.R. 3639(a). As part of R.1990 d.595, Subchapter 7, Cooperative Pricing and Joint Purchasing Systems, was recodified from N.J.A.C. 5:30-17. Subsequent amendments to Subchapter 7 were made by R.1991 d.284, effective June 3, 1991. See: 23 N.J.R. 933(a), 23 N.J.R. 1787(a). Subchapter 7, Cooperative Pricing and Joint Purchasing Systems, was repealed and replaced with new rules on the same subject by R.1992 d.401, effective October 5, 1992. Pursuant to Executive Order No. 66(1978), Chapter 34, Local Public Contracts, was readopted as R.1995 d.633, effective November 8, 1995. See: Source and Effective Date. See, also, section annotations.

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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 the 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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(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.

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 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

SUBCHAPTER 7. COOPERATIVE PRICING AND JOINT PURCHASING SYSTEMS

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 or Cooperative Purchasing Form CP-2060, Request for Registration or Modification of a Commodity Resale System, are available from the Division of Local Government Services at CN 803, Trenton, New Jersey 08625-0803.

(e) When the lead agency is a board of education or educational service commission and the entire membership of a cooperative purchasing system established and properly registered with the Division are boards of education, the purchase of any work, materials or supplies shall be conducted pursuant to the Public Schools Contracts Law (N.J.S.A. 18A:18A-11 et seq.)

(f) In a cooperative purchasing system established and properly registered with the Division where the lead agency is a board of education or educational service commission and the membership of the system is composed of boards of education and local contracting units as defined in N.J.S.A. 40A:11-2(1), the purchase of any work, materials or supplies shall be conducted pursuant to the Local Public Contracts Law (N.J.S.A. 40A:11-1 et seq.)

Amended by R.1995 d.633, effective December 4, 1995.
See: 27 N.J.R. 3259(a), 27 N.J.R. 4885(b).

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).

“Commodity resale system” means a purchasing system in which a local contracting unit purchases either gasoline, diesel fuel, snow removal chemicals, public works materials and supplies or any other such materials as may be approved by the Director for its own consumption and then sells all or a portion thereof to another local contracting unit.

“Contracting unit” means 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.

“Form CP-2060” means a Request for Registration or Modification of a Commodity Resale System which contains the following information: action requested, identification of the lead agency (seller), participating contracting units (purchaser) and commodity being resold.

“Joint purchasing system” means a cooperative purchasing system in which the lead agency 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.

“Snow removal chemicals” means snow grits, calcium chloride (rock salt), sand or similar substance used for deicing or improving vehicular traction on snow or ice covered roadways.

Amended by R.1995 d.633, effective December 4, 1995.
See: 27 N.J.R. 3259(a), 27 N.J.R. 4885(b).

5:34-7.3 Cooperative purchasing system creation

(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 local contracting unit designated as the lead agency shall authorize the creation of the system by resolution. The authorizing resolution shall identify the system established as either a joint purchasing system or a cooperative pricing system.

(c) Motions made, carried, and recorded in the written minutes of a business meeting of a board of education may be substituted for a resolution.

Amended by R.1995 d.633, effective December 4, 1995.
See: 27 N.J.R. 3259(a), 27 N.J.R. 4885(b).

5:34-7.4 Cooperative purchasing system 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.

(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);