

LOCAL PUBLIC AND PUBLIC SCHOOL CONTRACTS LAWS - SPECIAL  
CIRCUMSTANCES**5:34-9.1 Purchase of proprietary goods or services**

- (a) In determining whether a good or service meets the definition of "proprietary" set forth in N.J.S.A. 40A:11-2(39) or 18A:18A-2cc, the terms used in the definition of "proprietary" shall be defined as follows:
1. "Specialized nature" means that the purpose to which the goods or services will be used has such unique characteristics that only the goods or services of a single vendor are capable of meeting the contracting unit's needs. The following shall be considered as non-limiting examples of goods or services that may, under appropriate conditions, meet the test of being of a specialized nature:
    - i. The use of a good or service other than the proprietary one will undermine the functionality or operational performance of existing facilities; or
    - ii. The good or service is patented and the patented feature is essential for operational performance.
  2. "Necessary for the conduct of its affairs" means that the public need for the proprietary designation is of such a compelling nature that the value to the public that is gained by the proprietary designation overshadows the public benefit of permitting "brand name or equivalent" and the benefits of such competition. The following shall be considered as non-limiting examples of goods or services that may, under appropriate conditions, meet the test of being necessary for the conduct of its affairs:
    - i. The contracting unit has a substantial investment in facilities, training, replacement parts, or complimentary items that warrants reliance on a specific manufacturer or vendor to maintain the value of the investment.
    - ii. Unique circumstances as to a facility or environment preclude the use of other goods or services.
- (b) Prior to advertising for the receipt of bids that includes proprietary goods or services, the contracting agent or purchasing agent shall certify in writing to the chief executive officer of the contracting unit an explanation of why the goods or services are of a specialized nature and necessary for the conduct of the affairs of the local contracting unit. The description shall not consist of rewriting or paraphrasing the statute or regulations but shall be specific to the circumstances. Such certification shall be included as part of the bid documents.
- (c) The resolution of the governing body required by N.J.S.A. 40A:11-13(d) or 18A:18A-15d shall include a description of why the goods or services are specialized

in nature and necessary for the conduct of the affairs of the contracting unit. The description shall not consist of rewriting or paraphrasing the statute or regulations but shall be specific to the circumstances.

- (d) When taken in context of computer systems or dedicated software, the use of the proprietary designation shall be interpreted to allow for competition within the purposes for which the software is to be used. The competitive contracting process at N.J.S.A. 40A:11-4.1 et seq. and 18A:18A-4.1 et seq. is intended to allow for competition where there may be a limited number of vendors selling certain types of application software, that is, financial, human resources, web site hosting, computerized telephone systems, geographic information, police records, or computerized dispatch systems. The competitive contracting process is not intended for those circumstances that involve networking or telecommunications switching services.

### **5:34-9.2 Use of "brand name or equivalent" pursuant to N.J.S.A. 40A:11-13 and 18A:18A-15**

- (a) To encourage free, open, and competitive bidding, prior to referencing a "brand name or equivalent" in a bid specification pursuant to N.J.S.A. 40A:11-13 or 18A:18A-15, a contracting agent or purchasing agent shall first consider using a specification based on any of the following:
1. A standard issued by a national or international testing or standards setting organization, including, but not limited to, the American Society for Testing and Materials (ASTM), National Institute of Standards and Technology (NIST), Internet Engineering Task Force (IETF), International Standards Organization (ISO), IEEE Industry Standards and Technology Organization (IEEE- ISTO), any entity accredited to set standards by the American National Standards Institute (ANSI);
  2. A generic specification available through a commercial or non-commercial service such as MasterSpec® or similar service; or
  3. Specialized programs such as a listing in the Building Products Pre Approval Program maintained by the National Institute of Building Sciences.
- (b) A contracting agent or purchasing agent shall not use a "brand name or equivalent" unless they have knowledge that at least one equal exists. If there are no equals or if the nature of the brand name good or service effectively restricts bidders to that single good or service, the contracting agent or purchasing agent must consider the matter subject to the provisions of proprietary goods or services at N.J.A.C. 5:34-9.1.
- (c) When a specification uses "brand name or equivalent," the listed brand name shall serve as a reference or point of comparison for the functional or operational characteristic desired for the good or service being requested. Where a bidder submits an equivalent, it shall be the responsibility of the bidder to document the equivalence

claim. Failure to submit such documentation shall be grounds for rejection of the claim of equivalence.

- (d) Under no circumstance shall specifications require any form of "pre- approval" or "pre-qualification" of an equivalent product before the submission of bids.

### **5:34-9.3 Cancellation or postponement of receipt of bids or proposals**

- (a) Publicly announced receipt of bids or competitive contracting proposals shall be considered cancelled when the contracting unit must amend or modify the bid specifications and cannot meet the requirements of N.J.S.A. 40A:11- 23 and 18A:18A-21. The following procedures shall be used in the event a contracting unit cancels the receipt of publicly advertised bids or competitive contracting proposals:
1. All vendors who have either submitted bids or proposals, or received specifications or request for proposals, shall be notified by telephone, fax, or e-mail that the receipt thereof has been cancelled, the reason therefore, and notification regarding the return of the unopened bids pursuant to this section.
  2. The contracting unit shall allow vendors to retrieve bids or proposals that had been:
    - i. Submitted at or before the time of cancellation;
    - ii. Previously sent but had not arrived by the time of cancellation; or
    - iii. For those not picked up by a vendor within 10 business days of being notified of their availability, the contracting unit shall return them, unopened, by certified mail or other delivery service that provides a delivery receipt.
  3. On the day and time originally scheduled for receipt of bids or proposals, a notice shall be posted at the place where bids were to have been received, stating that the receipt of bids or proposals has been cancelled. No bids or proposals are to be received at this time.
  4. All advertisements for the receipt of rescheduled bids or proposals must adhere to the requirements of N.J.S.A. 40A:11-23 or 18A:18A-21, as appropriate to the contracting unit for the statutory number of days between notice and when new bids or proposals can be received.
- (b) Publicly announced receipt of bids or competitive contracting proposals shall be considered postponed when an unforeseen circumstance occurs that would affect or prohibit the opening of bids or proposals. The opening of the bids or proposals must occur within five days, excluding Saturdays, Sundays, and holidays, of the original date of the receipt of bids or proposals. The following procedures shall be used in the event a contracting unit must postpone the receipt of publicly advertised bids or competitive contracting proposals:
1. As soon as practicable, all vendors who have either submitted bids or proposals, or received specifications or request for proposals, shall be notified

by telephone, fax, or e-mail that the receipt thereof has been postponed and the reason therefore.

2. If possible, on the day and time originally scheduled for receipt of bids or proposals, a notice shall be posted at the place where bids were to have been received, stating that the receipt of bids or proposals has been postponed.
3. In the event of a postponement, no bids or proposals shall be opened.

#### **5:34-9.4 Concessions**

- (a) The Local Public Contracts Law, N.J.S.A. 40A:11-1 et seq., and the Public School Contracts Law, N.J.S.A. 18A:18A-1 et seq., define the term "concession" as the granting of a license or right to act for or on behalf of the contracting unit, or to provide a service requiring the approval or endorsement of the contracting unit, and which may or may not involve a payment or exchange, or provision of services by or to the contracting unit. In the case of the Public School Contracts Law, vending machines are specifically excluded from the definition. Further, a concession is only subject to this section if it is awarded to or supports a for-profit organization or purpose.
- (b) Concessions are specifically deemed to include, but are not limited to, the following:
  1. The right to publish a map, newsletter, directory, or calendar containing the meeting schedules and other information about contracting unit services or activities where the contractor sells advertising as full or partial payment for providing the service;
  2. Installation of "welcome to (name of entity)" signs on public property where a local organization pays a fee to the sign manufacturer, who may or may not make a payment to the contracting unit, and includes the name of the local organization on the sign;
  3. Use of public space or facilities (such as scoreboards, bus shelter or facility advertising) for advertising in exchange for fees or services, or discounts on services;
  4. Installation of vending machines in public facilities (except for vending machines in schools);
  5. The donation, sale, installation, or maintenance of equipment or facilities for use of the contracting unit;
  6. The choice of a local or long distance telephone service for pay phones on public property;
  7. Copying machines in a government or library facility made available for public use;
  8. The right to sell goods or services on public property; or
  9. Other services, rights or use as may meet the definition of concession.

- (c) A concession shall not be deemed to include contributions of goods, services, or financial support for the sponsorship of the celebration of public events where the contributions offset in full or in part the cost of the specific event. For the purpose of providing examples, such public events include, but are not limited to, seasonal recreation programs, concert series, holiday celebrations, and tourism related programs. In addition, vending machines in public facilities that are considered as protected speech under the United States Constitution, such as newspapers, or facilities used for collection of material being sent through a pickup and delivery service are not deemed to be a concession.
- (d) Prior to commencing procurement of any concession, the governing body of the contracting unit shall:
1. Obtain from legal counsel an opinion of the legality of procuring the concession; and
  2. Pass a resolution authorizing the procurement of a concession. The resolution shall include:
    - i. A description of the public need to award a concession;
    - ii. The concession to be awarded;
    - iii. The considerations, including the benefits and any risks the governing body took into account in reaching the decision to award a concession;
    - iv. An estimate of the total value of the concession;
    - v. If any, an estimate of any revenue or services to be received by the contracting unit;
    - vi. The basis of award of the concession is based upon the most advantageous price and other factors or the lowest responsible bidder;
    - vii. An estimate of any costs to be incurred by the contracting unit as part of the concession;
    - viii. Any services, facilities, or endorsement to be provided by the contracting unit; and
    - ix. The method to be used to procure the concession pursuant to (g) below.
- (e) The original legal opinion and resolution required in (d) above shall suffice for purposes of the subsequent procurement of a particular concession where the entire procurement process had been previously completed.
- (f) The total estimated value of the concession shall be considered as the aggregate value in determining the procurement method that will be used. The concession shall be awarded in accordance with the relevant procedure for the method used to procure the concession. The total estimated value shall include all revenue, if any, that may be expected to be received by the concessionaire, which shall be deemed to include the

value of all payments, goods, and services received by the contracting unit. A specific exception to this subsection shall be the use of bank automated teller machines or other cash vending machines. The threshold for this service shall be based on the estimated annual value of fees charged to users of the service and the value of all payments, goods and services received by the contracting unit.

- (g) Unless otherwise specifically provided for by law, concessions shall be awarded through either of the following means:
1. By informal quotations, when the total estimated value of the concession is less than the bid threshold; or
  2. By receipt of public bid or competitive contracting, when the total estimated value of the concession exceeds the bid threshold or at any time at the option of the governing body.

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

#### **§ 5:34-9.5 Miscellaneous circumstances**

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

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

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

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

(e) In a contracting unit subject to the Public School Contracts Law, a purchasing agent

may appoint a "duly authorized designee" to act on behalf of and be responsible to the purchasing agent for such actions as related to purchasing. The purchasing agent shall recommend such designee to the board of education for their consideration and approval. The designee cannot act on behalf of the purchasing agent until board approval is received. Under these circumstances, the purchasing agent shall continue to hold the authority, responsibility, and accountability for the purchasing activity of the contracting unit. The use of this provision does not permit a "duly authorized designee" to exercise the authority of a duly-appointed qualified purchasing agent.

**§ 5:34-9.6 Purchasing at 10 percent less than a State cooperative contract price**

(a) A contracting unit that procures materials, supplies, or equipment for at least 10 percent less than the State cooperative contract price, pursuant to N.J.S.A. 40A:11-5(4), shall submit the following documentation to the Director of the Division of Local Government Services within five working days of the award of any such contract:

1. A copy of the purchase order;
2. A copy of the requisition or request for purchase order (if applicable);
3. The written certification of its purchasing agent stating that the purchase price of the materials, supplies or equipment is at least 10 percent less than the State contract price;
4. Documentation verifying that the materials, supplies or equipment purchased by the contracting unit are identical to the materials, supplies or equipment on State contract;
5. A copy of each request for quotation issued by the purchasing agent;
6. Copies of each of the three quotations received by the purchasing agent, which shall include the vendor's name, address, identification of items offered, prices quoted, and the percent discount (if applicable); and
7. A copy of the adopted resolution, approving or awarding the contract for the purchase of materials, supplies, or equipment, approved by two-thirds affirmative vote of the full membership of the governing body.

(b) All purchase orders or contract documents shall include the identifier "N.J.A.C. 5:34-9.6" and the State contract number in order to validate the legal basis under which the purchase was made, and to assist in the conduct of audits and other reviews for statutory compliance.

(c) The Division has provided an optional submission checklist in chapter Appendix B, "Purchasing At 10 Percent Less Than The State Cooperative Contract Price N.J.S.A.

40A:11-5(4)." The checklist is intended to help contracting units comply with the provisions of this section. The checklist is available in the public contracts law section of the Division's website <http://www.nj.gov/dca/divisions/dlgs/>.

### **§ 5:34-9.7 Use of the General Services Administration's Federal Supply Schedules**

(a) A contracting unit statutorily subject to the Local Public Contracts Law, N.J.S.A. 40A:11-1 et seq., or the Public School Contracts Law, N.J.S.A. 18A:18A-1 et seq., may use without advertising for bids, or having rejected all bids obtained pursuant to N.J.S.A. 40A:11-13.2 or 18A:18A-22, as appropriate, the Federal Supply Schedules procurement programs, or update thereto. A contracting unit shall, pursuant to N.J.S.A. 40A:11-12.b or 18A:18A-10.b, submit the following documentation to the Director of the Division of Purchase and Property within five working days of the award of any such contract:

1. A copy of the purchase order;
2. A copy of the requisition or request for purchase order (if applicable); and
3. Documentation identifying the price of the goods or services, under the Federal Supply Schedules or schedules from other Federal procurement programs.

(b) All purchase orders or contract documents shall include the identifier "N.J.A.C. 5:34-9.7" and if available, the State contract number issued by the Division of Purchase and Property in order to validate the legal basis under which the purchase was made, and to assist in the conduct of audits and other reviews for statutory compliance.

(c) Contracting units statutorily authorized to contract under the Local Public Contracts Law, N.J.S.A. 40A:11-1 et seq. or the Public School Contracts Law, N.J.S.A. 18A:18A-1 et seq. and procuring goods or services under the General Services Administration's Federal Supply Schedules or schedules from other Federal procurement programs or update thereto, shall comply with administrative rule promulgated by the Department of the Treasury Purchase Bureau at N.J.A.C. 17:12-1A.5, Use of Federal Supply Schedules.

(d) The Division has provided an optional submission checklist in chapter Appendix C, "Use of the General Services Administration's Federal Supply Schedules N.J.S.A. 40A:11-12b and N.J.S.A. 18A:18A-10b." The checklist is intended to help contracting units comply with the provisions of this section. The checklist is available in the public contracts law section of the Division's website <http://www.nj.gov/dca/divisions/dlgs/>.