

NEW JERSEY ADMINISTRATIVE CODE (N.J.A.C. 17:12)

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SUBCHAPTER 1. DESCRIPTION OF ORGANIZATION; MEANS OF PROCUREMENT ([Return to top](#))

§ 17:12-1.1 General course and method of operation

(a) The Division of Purchase and Property, in and of the New Jersey Department of the Treasury, provides centralized procurement and related services to agencies of the Executive Branch of State government. Within its statutory framework, the primary mission of the Division is to procure, in a timely and effective manner, contracts for the goods and services necessary for the daily operation of State government. In addition to a program support unit, the Division includes the Procurement Bureau, the Contract Compliance and Audit Unit, and the Distribution and Support Services Unit. This chapter sets forth the rules that apply to the Division, State agencies and other public entities, and vendors participating in the State's procurement and contracting processes.

(b) The Director of the Division of Purchase and Property (Division) is charged with the responsibility for establishing contracts and issuing purchase orders, the cost of which is to be paid with State funds or funds in the State's custody and control, and occasionally those contracts involving no cost to the State or those generating revenue for the State. If the aggregate amount involved does not exceed the threshold established pursuant to *N.J.S.A. 52:34-7*, any procurement or contract may be made, negotiated, or awarded by the Director without advertising, in any manner the Director may deem effective and practicable to permit full and free competition.

(c) When the aggregate amount exceeds the threshold established pursuant to *N.J.S.A. 52:34-7*, the Division shall, as prescribed and/or practicable, use one of the following methods to procure the needed goods and/or services:

1. An advertised competitive bidding process that utilizes a Request for Proposal or Request for Qualifications and permits such full and free competition as is consistent with the procurement of goods and services necessary to meet the requirements of the using agency or agencies; or

2. A non-advertised procurement process in accordance with applicable statutes and with the requirements and restrictions expressly set forth in this chapter, specifically pertaining to contracting pursuant to:

i. *N.J.S.A. 52:34-6.1*, with a conforming product or service provider holding a current Federal supply schedule contract or other Federal procurement program contract having most favorable pricing, as described at *N.J.A.C. 17:12-1A.5*;

ii. *N.J.S.A. 52:34-6.2*, by participating in cooperative procurement agreements formed with or by another state or states, or a political subdivision thereof or of New Jersey, or with or by a nationally recognized and accepted cooperative procurement entity with which other states participate, as described at *N.J.A.C. 17:12-1A.3*;

iii. *N.J.S.A. 30:6-23* et seq. and Executive Order No. 67 (2005), through the set-aside of select goods or services for exclusive access by using agencies from the designated Central Non-profit Agency to provide for meaningful employment of New Jersey citizens with special needs;

iv. *N.J.S.A. 30:4-95*, through the set-aside of select goods or services for exclusive access by using agencies from the New Jersey Department of Corrections' DeptCor unit to provide opportunities for meaningful skills development and work habits of the institutionalized labor pool; or

v. *N.J.S.A. 52:34-8* et seq., when the subject matter and/or circumstance necessitates waiver of advertising procurements and upon written approval of the State Treasurer, as described at *N.J.A.C. 17:12-1A.2(c)*.

(d) An agreement between one State agency and another State agency or quasi-State agency to meet the need for goods or services of one of the agencies, which need would otherwise be addressed through a procurement is not a procurement and need not adhere to procedures pertaining to the processes set forth above in (c) above.

(e) The Director may delegate to staff within the Division review and signatory authority for the approval and execution of specifications, award recommendations, contracts, and purchase orders for such amounts as the Director may establish from time to time and implement through the issuance of policy memoranda.

§ 17:12-1.2 Public information

(a) The public is encouraged to obtain information concerning the State procurement program and RFPs by accessing the Division's Internet site at www.state.nj.us/treasury/purchase. If the information being sought is not available on the Division's website, the public can request information by posing questions via the Division's website, by writing to the Director of the Division of Purchase and Property, PO Box 039, Trenton, New Jersey 08625-0039, or by visiting the Division's reception area at 33 West State Street, 9th Floor.

(b) After the opening of sealed proposals, all information submitted by bidders in response to a solicitation of proposals is considered public information, notwithstanding any disclaimers to the contrary submitted by a bidder, except when an RFP contains a negotiation component or as may be exempted from public disclosure by the Open Public Records Act, *N.J.S.A. 47:1A-1* et seq. (OPRA), and the common law. As a part of its proposal, each bidder may identify any data or materials it asserts are exempt from public disclosure under OPRA and/or the common law, explaining the basis for such assertion. Assertions that the entire proposal and/or prices are exempt from public disclosure under OPRA, the common law, or the U.S. Copyright Act are overbroad and will not be honored by the Division. In the event that a public request is made for materials that the bidder has identified as confidential, the Director shall have the final authority to determine whether the materials are exempt from public disclosure under OPRA and shall take action as required by applicable law. The bidder or contractor may elect to defend its assertion of exemption from the public disclosure requirements of OPRA or the common law, but in doing so, all costs and expenses

associated therewith shall be the responsibility of the bidder or contractor. The State assumes no such responsibility or liability.

(c) When the RFP permits negotiation with bidders after the submission of proposals, such proposals shall be made publicly available only after issuance of a notice of intent to award.

§ 17:12-1.3 Definitions

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

"Advertised procurement" refers to the formal process used by the Division to obtain sealed proposals in response to a Request for Proposal.

"Agreement" refers to documentation that establishes a mutually binding legal relationship and conveys contractual terms, conditions, and/or requirements between two, or among more than two, public entities applicable to intrastate or interstate actions.

"Best and final offer" or "BAFO" means a price timely submitted by a bidder upon invitation by the Division after proposal opening, with or without prior discussion or negotiation.

"Bid security" means a guarantee, in a form acceptable to the Division, that the bidder, if selected, will accept the contract as bid; otherwise, the bidder or, as applicable, its guarantor will be liable for the amount of the loss suffered by the State, which loss may be partially or completely recovered by the State in exercising its rights against the instrument of bid security.

"Bidder" means a vendor who has offered a proposal in response to the Division's solicitation of proposals.

"Business organization" means an individual, partnership, association, joint stock company, trust, corporation, or other legal business entity or successor thereto.

"Business registration" means the formal certification by the Department of the Treasury's Division of Revenue that a business entity, upon its application to the Division of Revenue, has attained and maintained status as a registered business in accordance with the provisions of *N.J.S.A. 52:32-44*.

"Bypass" means a contract award made to other than the lowest priced responsive proposal from a responsible bidder. A bypass occurs when the Director determines that the responsive proposal, which is most advantageous to the State, is not the lowest priced responsive proposal.

"Compatible" relates to instances when, in the Director's business judgment, it is advantageous to procure materials, supplies, or services that are, or equipment that is, capable of performing in conjunction with those previously procured, where the use of materials, supplies, services, or equipment at variance with those previously procured may degrade or impair the performance of those previously procured and/or negatively impact upon warranties or licenses of those previously procured.

"Competitive range" means the group of responsive proposals that are among the most highly rated proposals.

"Contract" means a mutually binding legal relationship obligating the contractor to furnish goods and/or services and the purchaser to pay for them, subject to appropriation where the using agency derives its annual budget by means of appropriation from the State Legislature. For publicly advertised contracts, the contract typically consists of the Division's standard terms and conditions, the RFP, the responsive proposal, the notice of acceptance or award, any subsequent written document memorializing the agreement, any amendments or modifications to any of these documents and any attachments, addenda or other supporting documents, or other writings agreed to by the State and the contractor describing the work to be performed.

"Contract Compliance and Audit Unit" (CCAU) refers to the unit within the Division of Purchase and Property having the responsibility and authority to audit State contract usage to promote compliance with contract provisions and applicable procurement mandates and guidelines. CCAU acts as the initial arbiter of complaints filed by using agencies pursuant to *N.J.A.C. 17:12-4* and has oversight responsibility for contracts that are subject to waiver of advertising pursuant to *N.J.S.A. 52:34-9* and 10. In addition, CCAU monitors using agencies and contracted vendors to ensure their conformance with State procurement statutes, rules, and contractual terms, conditions, and requirements.

"Contractor" refers to a business entity awarded a contract by the Division.

"Cooperative procurement agreement" refers to a contractual relationship in which the Division, pursuant to the provisions of *N.J.S.A. 52:34-6.2*, joins with, or is joined by, another state or states or political divisions thereof or of New Jersey, or with a nationally recognized and accepted cooperative procurement entity in which other states participate, for the acquisition of goods and/or services that have been, or are to be, procured through competitive bidding.

"Cooperative Purchasing Program" refers to the Division's intrastate program that provides procurement-related assistance to local New Jersey governmental entities and boards of education, State and county colleges and other public entities having statutory authority to utilize select State contracts issued by the Division, pursuant to the provisions of *N.J.S.A. 52:25-16.1 et seq.*

"Day" or "business day" means any weekday, excluding Saturdays, Sundays, State legal holidays, and State-mandated furlough days.

"Delegated Purchasing Authority" or "DPA" refers to the Director's assignment of authority to State using agencies to make purchases when the product or service being procured is not available under an existing Division-issued State contract and when the cost does not exceed the statutorily defined formal advertised bidding threshold pursuant to *N.J.S.A. 52:34-7*.

"Director" means the Director of the Division of Purchase and Property or the Director's designee.

"Distribution and Support Services" (DSS) refers to the unit within the Division that provides warehousing and distribution services to State and other governmental agencies to meet their product requirements and administers the State's surplus property programs, including the computer distribution program.

"Division" means the Division of Purchase and Property and its support and operational units, including the Procurement Bureau, CCAU, and DSS.

"Environmental" refers to those products or services adapted for use in, or required for long-term serviceability to, localized natural or man-made environmental conditions.

"Federal supply schedule contract" refers to a contract established and administered by contracting agencies of the Federal government, including and particularly the General Services Administration, which may, at the discretion of the Division, serve as an alternate price guide for the purchase of goods and services by State using agencies.

"Filed" means received by the Director or her or his Division representative.

"Hearing officer" means the Director's representative from within or outside the Division, but independent of the procurement process, appointed by the Director to review the written record of an advertised procurement, and/or, in the discretion of the Director, to preside over an in-person presentation or informal hearing in response to a vendor's challenge, in accordance with *N.J.S.A. 52:34-10.10*, and as set forth in *N.J.A.C. 17:12-3.2* and *3.3*.

"Homeland security" and "domestic preparedness" refer to circumstances that may be cause for immediate procurement action necessary to meet potential or existing life and safety or security concerns as deemed essential by the Governor or other authorized State official and sanctioned as such by the State Treasurer.

"Negotiation component" refers to an RFP provision that establishes the Division's intent to negotiate with bidders pursuant to the provisions of *N.J.S.A. 52:34-12(f)*, the codified generic procedures set forth at *N.J.A.C. 17:12-2.7*, and the specified provisions for negotiation set forth in the RFP.

"Performance security" means a guarantee, executed subsequent to award, in a form acceptable to the Division, that the successful bidder will complete the contract as agreed and that the State will be protected from loss in the event the contractor fails to complete the contract as agreed.

"Procurement" refers to the processes used by the Division to establish formal contracts by which using agencies can purchase required goods and services.

"Procurement agreement" refers to a contractual relationship that is contemplated or created under the Division's prerogatives established by *N.J.S.A. 52:34-6.2*, concerning cooperative agreements, when the relationship is initiated prior to or during the competitive bidding process.

"Procurement Bureau" refers to the Divisional unit responsible for the preparation, advertisement, and issuance of RFPs, for the tabulation and evaluation of proposals and for recommending award(s) of contract(s) to the Director.

"Professional," relative to contract services and as differentiated from "technical" services, refers to services performed by a person authorized by law to practice a recognized profession and whose practice is regulated by law or the performance of which services requires knowledge of an advanced type in a field of learning acquired by a prolonged formal course of specialized instruction and study as distinguished from general academic instruction or apprenticeship and training. Professional services include those services rendered in the provision of goods or performance of services that are original and creative in character in a recognized field of artistic endeavor, as well as extraordinary, non-specifiable services if, after evaluation and assessment, such services are determined to be such that they cannot reasonably be described by written specifications.

"Protest" means a timely filed challenge to a specification in an advertised RFP, to a rejection of a proposal declared non-responsive, or to a contract award decision made by the Director.

"Publicly available," with respect to any procurement, either in printed or electronic format, means access to the record of any particular procurement or contract for review and/or copying, with the exception of any material deemed by the Director to be proprietary, confidential, or subject to any privilege, or exclusion under OPRA, the common law, and/or U.S. copyright law.

"Purchase" or "purchasing" refers to the acquisition of goods and/or services accomplished through the issuance of a purchase order.

"Purchasing agreement" refers to a contractual relationship that is contemplated or created under the Division's prerogatives established by *N.J.S.A. 52:34-6.2*, concerning cooperative agreements, when the relationship is initiated after the competitive bidding has been conducted.

"Quasi-State agency" refers to any agency commission, board, authority, or other such governmental entity, which is established and is allocated to a State department or any bi-state governmental entity of which the State of New Jersey is a member.

"Request for Proposal (RFP)" means all documents, whether attached or incorporated by reference, used for a publicly advertised procurement process that solicits proposals or offers to provide the goods and/or services specified therein.

"Responsible bidder" refers to a bidding entity deemed by the Division to have integrity and to be reliable and capable of performing all contract requirements.

"Responsive proposal" refers to a proposal that is deemed by the Division and/or evaluation committee to have adequately addressed all material provisions of an RFP's terms and conditions, specifications, and other requirements.

"Safety" refers to those products or services required to comply with mandated or accepted State or Federal codes and standards designed to insure against personal harm or injury.

"Sealed proposal" means that the contents of the proposal cannot be opened or viewed before the formal opening of proposals without leaving evidence that the document has been opened or viewed.

"Signed" means a physical or electronic signature evincing a bidder's intent to be bound.

"Standardization" relates to instances when, in the Director's business judgment, it is advantageous to procure materials, supplies, or equipment consistent and compatible in design, fit, style, composition, or manufacture with materials, supplies, or equipment currently in use or to procure services identical or approximate to those previously procured, notwithstanding that materials, supplies, equipment, or services at variance to those previously procured can be used without negatively impacting the performance of those previously procured. Standardization is appropriate in instances where cost savings relating to maintenance, technical support, training, and/or parts inventory can be reasonably anticipated by procuring materials, supplies, equipment, or services identical or approximate to those previously procured.

"Technical," relative to contract services and as differentiated from "professional" services, refers to services that require the application of a special skill or practical knowledge in such areas as information technology, telecommunications, electronics, or other applied sciences.

"Term contract" means a contract which establishes a source or sources of supply of goods and/or services for a specified period of time, usually characterized by an estimated or definite minimum quantity, with the possibility of additional requirements beyond the minimum, all at predetermined unit prices.

"Using agency" refers to a State department or agency, a quasi-State governmental entity, or a Cooperative Purchasing Program participant authorized to purchase products and/or services under a specific contract procured by the Division.

"Vendor performance database" refers to Division records pertaining to contract performance, including formal complaints, CCAU investigation reports, using agency records and/or satisfaction surveys or any other information assembled by CCAU which may be helpful in assessing the past performance of a vendor.

"Waiver of advertising contract" means a contract awarded without public advertisement pursuant to the provisions of *N.J.S.A. 52:34-9* and 10.

§ 17:12-1.4 Application of rules

Except as otherwise provided in this chapter, these rules shall apply to all advertised and non-advertised contracts awarded by the Division or under the authority of the Division, including all Delegated Purchasing Authority contracts as set forth in Department of the Treasury Circular 11-10-DPP, Delegated Purchasing Authority, as amended or re-designated, and accessible at <http://www.nj.gov/infobank/circular/circindx.htm>.

§ 17:12-1.5 Procurement efficiency program

In accordance with the provisions of *N.J.S.A. 52:27B-56* and in order to maintain the State's procurement system at a level to meet common industry standards of efficiency, the Director shall make an assessment from each contract in the amount of one quarter of one percent of the value of all transactions on contracts as defined in the RFP.

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§ 17:12-1A.1 Formal, advertised, competitive procurement

(a) Except as provided in this subchapter, all procurements shall be effected through formal, advertised, competitive bidding procedures requiring timely submission of sealed proposals.

(b) The Director shall structure RFPs for formal, advertised, competitive procurements to provide for a single contract award to a single bidder, unless contract awards to multiple bidders are permitted as hereinafter provided in this subchapter.

(c) The Director may structure an RFP for formal, advertised, sealed bidding to include multiple lines encompassing more than one commodity, group of commodities, service or group of services, with separate contract awards for each price line or grouping of price lines.

(d) Pursuant to the provisions of *N.J.S.A. 52:34-12.1*, the Director may structure an RFP for formal, advertised, sealed bidding to be awarded to multiple bidders to meet the anticipated needs of State agencies and, if the State contracts are to be extended to Cooperative Purchasing Program participants pursuant to *N.J.A.C. 17:12-2.3*, the anticipated needs of Cooperative Purchasing Program participants, based upon one or more of the following criteria:

1. The anticipated quantities of products and/or services required by using agencies;
2. The needs of using agencies for prompt access to providers of maintenance, repair parts, and service;
3. The needs of using agencies for cost-efficient, timely local deliveries;
4. The needs of using agencies to purchase materials, supplies, services, or equipment compatible with those previously purchased;
5. The needs of using agencies for standardization of equipment, interchangeability of parts, or continuation of services;

6. The collective safety, environmental, or technological needs of using agencies; and/or
7. Any other factors that the Director determines make multiple awards necessary to serve the State's interests.

(e) The Division's record of each contract procurement conducted under the provisions of (d) above shall document the reason(s) for the multiple contract award structure.

(f) All advertised procurements shall be conducted pursuant to the provisions of *N.J.A.C. 17:12-2*.

§ 17:12-1A.2 Exceptions to formal, advertised, competitive procurement

(a) All contracts issued by the Division shall be formally advertised and competitively procured with requirements for the submission of sealed proposals, except for the following types of contracts:

1. Contracts between State agencies or between State agencies and quasi-State agencies where one qualified agency can provide services to meet specified needs of another agency, including the transactions between using agencies and the designated Central Non-Profit Agency pursuant to *N.J.S.A. 30:6-23* et seq. and Executive Order No. 67 (2005) and between using agencies and the Department of Corrections' Bureau of State Use Industries/DEPTCOR pursuant to *N.J.S.A. 30:4-95*;

2. Purchase orders issued or awarded under the provisions of the Division's Delegated Purchasing Authority program pursuant to the provisions of (b) below;

3. Contracts awarded by the Division upon approval by the State Treasurer to waive the public advertisement requirement, pursuant to the provisions of (c) below;

4. Cooperative procurement agreements with one or more other states, or political subdivisions thereof or of New Jersey, or with a nationally recognized and accepted cooperative procurement entity in which other states participate, pursuant to the provisions of *N.J.A.C. 17:12-1A.3*; or

5. Contracts issued by the Division that allow the use of Federal procurement program contractors, including those with Federal supply schedule contracts issued by the Federal General Services Administration, pursuant to the provisions of *N.J.A.C. 17:12-1A.5*.

(b) Delegated Purchasing Authority purchases. State using agencies may make purchases pursuant to their assigned Delegated Purchasing Authority under the conditions set forth in (b)1 through 6 below, with provision for exception as set forth in (b)7 below. Records of all Delegated Purchasing Authority purchases shall be maintained by State agencies pursuant to each agency's record retention schedule.

1. The purchase does not exceed the formal advertised bidding threshold established at *N.J.S.A. 52:25-23* or *52:34-7*, or the adjusted amount established under the provisions of *N.J.S.A. 52:34-7.1*, and therefore does not require formal, advertised, sealed bidding.

2. The using agency's anticipated fiscal year volume for a qualifying item or service is no greater than the formal advertised bidding threshold amount set forth in (b)1 above.

3. The purchase is one that cannot be made through a State contract, the State Distribution and Support Services Unit, the Department of Corrections' Bureau of State Use Industries/DEPTCOR, or the Central Non-profit Agency (CNA), ACCSES NJ, Inc.

4. The purchase has not been divided to circumvent the dollar limit imposed.

5. The purchase is compliant with the Delegated Purchasing Authority procedures set forth in the Department of the Treasury Circular 11-10-DPP, Delegated Purchasing Authority, as amended or re-designated, and accessible at <http://www.nj.gov/infobank/circular/circindx.htm>.

6. Should violations of Delegated Purchasing Authority provisions be verified, the Director may rescind or reduce the level of Delegated Purchasing Authority granted the offending State agency.

7. As established at *N.J.S.A. 52:25-23.d*, through written order or pursuant to a written request from a State agency, the Director may authorize a State agency to undertake an advertised procurement in excess of the amount delegated to the agency under *N.J.S.A. 52:25-23*, but less than \$ 250,000 when the procurement is limited to the needs of the specific agency under the following conditions:

- i. The advertised procurement shall be conducted in accordance with statutes, regulations and policies governing State procurement;

- ii. The Director shall designate a person within the Division to assist the State agency with the advertised procurement;

iii. Under no circumstances shall the State agency proceed with the advertised procurement until the Director has given the agency written authorization to proceed; and

iv. The State agency shall maintain a record of each contract awarded by the agency, including proper proof that the contract was duly advertised and achieved competition, which shall be available for audit by the Division.

(c) Waiver of Advertising procurements. In accordance with the provisions of *N.J.S.A. 52:34-8*, contracting for goods and/or services in excess of the competitive bidding threshold established at *N.J.S.A. 52:34-7*, or the adjusted amount established under the provisions of *N.J.S.A. 52:34-7.1*, without public advertising, requires prior approval by the State Treasurer or the Treasurer's designee. Awards of waiver of advertising contracts shall be made in accordance with the procedures set forth in the Department of the Treasury Circular 11-14-DPP, Requests for Waivers of Advertising, as amended or re-designated, and may occur when the following conditions have been met:

1. The State agency initiating the Request for Waiver of Advertising procurement is addressing one or more of the following situations:

i. The services to be performed are of a technical and professional nature or are to be performed under the supervision of the Director and paid on a time basis;

ii. The purchase is of perishable foods or subsistence supplies;

iii. The transaction is a lease of office space, machinery, specialized equipment, building or real property, as needed for the State's business;

iv. The purchase is of supplies or services as to which proposal prices after advertising therefor were not reasonable or independently attained, provided that no negotiated purchase, contract, or agreement may be entered into unless each responsible bidder is notified, the negotiated price is lower than the lowest rejected price, and the price is the lowest negotiated price offered by any responsible bidder;

v. The purchase is from the Federal or any State government or any political subdivision thereof;

vi. A public exigency, that is, life, health, and/or other emergency that requires the immediate delivery of essential goods and/or performance of a service;

vii. Only one source of supply is available;

viii. More favorable terms can be obtained from a primary source of supply;

ix. The purchase is of styled or seasonal clothing;

x. The product(s) is (are) traded on a national commodity exchange and market fluctuations require immediate action;

xi. The purchase is of equipment of a technical nature and standardization of equipment and interchangeability of parts is in the public interest; and/or

xii. The purchase is of equipment, goods, or services related to homeland security and domestic preparedness and is paid for or reimbursed by Federal funds awarded by the U.S. Department of Homeland Security or other Federal agency, from vendors participating in a Federal procurement program, in consultation with the New Jersey Office of Homeland Security and Preparedness;

2. The Request for Waiver of Advertising packet includes documentation that establishes that informal competitive bidding was conducted if the procurement is addressing any situation(s) described in (c)1i, ii, iii, iv, viii, ix, xi, and/or xii above, and which includes written justification for any bypass of a lower bidder, or, as applicable to the sole source circumstance addressed at (c)1vii above, that due diligence was applied to determine that only one source of supply is available; and

3. The Treasurer has signed the Request for Waiver of Advertising document prepared and submitted by the State agency via the Division, except when oral authorization has been granted by the Treasurer, the Director, or their respective designees to address life, health, and/or other emergencies.

§ 17:12-1A.3 Cooperative agreements

(a) Pursuant to the provisions of *N.J.S.A. 52:34-6.2*, the Director may, prior to, during, or after an advertised competitive procurement for the purchase of goods and/or services conducted by another state or other states, or political subdivision(s) thereof or of New Jersey, or by a nationally recognized and accepted cooperative procurement entity in which another state participates, or other states participate, or

after the award of contract(s) thereof, enter into a cooperative agreement with said state(s), political subdivision(s), or entity when the Director deems such agreement to be the most cost-effective contractual solution. Cost effectiveness shall be determined by considering pertinent factors, such as the following:

1. Lower than current State contract pricing that will afford material cost savings;
2. Lower than pricing for comparable goods or services of other State or public entity contracts;
3. Expanded product or service availability;
4. The ability to avoid the cost and time of a State procurement;
5. A record of satisfactory vendor performance;
6. Lower minimum purchase requirements;
7. A comparatively better quality of goods or services; and
8. Administrative cost factors required to participate in the cooperative agreement.

(b) Any such cooperative agreement shall provide for the combined requirements of the cooperating parties to be, or to have been, procured through an advertised competitive bidding process.

(c) Prior to entering into any purchasing agreement or procurement agreement, the Director shall:

1. Review and approve the specifications and proposed terms and conditions of the contract between the product or service provider and the other state(s), political subdivision(s) thereof, or nationally recognized and accepted cooperative procurement entity in which another state or other states participate;
2. Comply with legal provisions for notification, as applicable; and
3. Require the contractor or scheduled contract awardee to execute an addendum containing the State contracting terms and conditions and any other terms making the procurement agreement more favorable to the State, as determined by the Director.

(d) The Director may solicit and award such contracts, provided that the cooperative agreement specifies that each party to the agreement is solely responsible for purchases made by such entity under the terms of any resultant contract.

§ 17:12-1A.4 (Reserved)

§ 17:12-1A.5 Use of Federal supply schedule contracts

(a) *N.J.S.A. 52:34-6.1* establishes that the Director, on behalf of State agencies of the executive branch of State government, including quasi-State agencies identified in *N.J.S.A. 52:27B-56.1* (hereinafter collectively referred to as "State agencies"), shall promulgate Federal supply schedules of the Federal General Services Administration or schedules from other Federal procurement programs (hereinafter collectively referred to as "Federal supply schedule contracts"), as alternate price guides for the purchase of goods and services, subject to the following conditions:

1. The price of the good and/or service being procured is no greater than the price offered to Federal agencies;
2. The State receives the benefit of any contract price reductions, whether statutory, regulatory or contractual in nature, during the term of the contract; and
3. The price of the good and/or service under consideration for purchase via a Federal supply schedule contract is not equal to or greater than the State contract price for the same or equivalent goods or services, unless the Director determines that the best interests of the State are served by use of the proposed Federal supply schedule-based contract.

(b) A public entity 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 a good and/or service based upon a Federal supply schedule contract shall abide by procurement provisions and procedures as set forth in administrative rules promulgated by the Division of Local Government Services, Department of Community Affairs.

(c) A using agency intending to purchase a good and/or service from a vendor based upon that vendor's Federal supply schedule contract shall comply with all provisions and procedures detailed in the Department of the Treasury Circular 12-07-DPP, Purchases from Federal Supply Schedules or Schedules of

Other Federal Procurement Programs, as amended or re-designated, that sets forth essential procedural and documentary requirements.

(d) A vendor offering a good and/or service to State agencies referencing a Federal supply schedule contract must meet the specific eligibility criteria and procedural provisions set forth and standardized in the Department of the Treasury Circular 12-07-DPP, Purchases from Federal Supply Schedules or Schedules of Other Federal Procurement Programs, as amended or re-designated, which is a condition to be communicated to the vendor by the using agency contemplating such purchase activity. The circular is accessible at <http://www.nj.gov/infobank/circular/circindx.htm>.

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§ 17:12-2.1 Advertising

(a) Advertising is required when the contract amount is expected to exceed the public bidding threshold or is not subject to the relevant exceptions of *N.J.S.A. 52:34-6*, 9, or 10. Public notice of the bidding opportunity shall be placed on the Division's website and with other media, including newspapers, as required by law at *N.J.S.A. 52:34-12* and determined by the State Treasurer to provide best notice thereof to bidders. Advertisements shall be made a minimum of seven business days in advance of the announced deadline for receipt of proposals to encourage free and open competition.

(b) If, during the course of an advertised procurement pursuant to (a) above, it becomes necessary to alter any of the terms, conditions, or requirements of the request for proposal, such alterations shall be set forth in addenda to the RFP and shall be advertised a minimum of seven business days in advance of the announced deadline for receipt of proposals.

(c) In addition to statutorily mandated public advertising, the Division shall also publish notices of bidding opportunities on the Division's website.

(d) As a service to vendors interested in competing for State contracts to be awarded by the Division and to any other parties seeking information about bidding opportunities available via the Division's competitive contract procurement program, the Division provides an on-line self-registration service known as the e-RFP Notification Service. Vendors and other interested parties can register to receive direct e-mail notices pertaining to the Division's procurements for goods or services based upon specific commodity classes or codes. As this is a self-registration process, it does not create an entitlement for any party to receive notice of any particular solicitation of proposals, and the Division and the State shall not be liable for any losses, claims, or damages of any kind if a vendor or other party, for any reason, is not registered or does not receive an e-mail notice. It is the responsibility at all times for e-RFP Notification Service registrants to exercise due diligence in reviewing the notices on the Division's website to assure their awareness of State bidding opportunities announced by the Division.

§ 17:12-2.2 Requirements for bidding and contract award

(a) In order to be eligible for consideration for award of contract, the bidder's proposal shall conform to the following requirements or be subject to designation as a non-responsive proposal for non-compliance:

1. Be enclosed and sealed, which for electronic format submissions shall be as described in the RFP document. Faxed or e-mailed proposals shall not be accepted when the submission of a sealed proposal is a requirement;

2. Be submitted on or before the due date and time and at the place specified in the RFP;

3. Be signed by a representative of the bidding entity in accordance with the provisions for such signature as set forth in the RFP;

4. Contain all RFP-required certifications, forms, and attachments, completed and signed as required.

An RFP may designate certain forms and/or certifications that need not be included in the bidder's proposal but that must be provided by a successful bidder upon request prior to an award of contract;

5. Be accompanied by bid security in the amount and form specified, when required by the RFP;

6. Include all RFP-required pricing information;

7. Be preceded by the bidder's attendance and registration at any pre-proposal conference and/or site inspection for which attendance and registration is mandatory pursuant to the RFP. However, the Director reserves the right to waive this requirement upon terms the Director deems acceptable, if doing so is in the State's best interest;

8. Contain initials adjacent to any actual or apparent price alterations. If a unit price in a bidder's proposal has been altered or appears to be an alteration, the bidder's initials shall appear adjacent to the alteration. However, in the event that there is at least one duplicate copy of the proposal included in the bidder's sealed proposal packet, and if during the immediately subsequent proposal review process it is noted that there is an uninitialed price alteration and that the copy reflects the same alteration, the copy shall be placed with the original and maintained as part of the official record. The uninitialed price change or changes would then be accepted as eligible for further evaluation. Examples of alterations include, but are not limited to, crossouts, erasures, white-outs, writeovers, and strikeovers, with re-entered prices. If the alteration has not been initialed, that particular item only shall be rejected, except if the extended price is verifiably correct and does not contain an alteration or if the extended total price is verifiably correct and does not contain an alteration, it shall be considered the offered price. In the event of a rejection of a single line of a proposal responding to a request for multiple prices for multiple items, the remainder of the proposal shall be evaluated, unless otherwise stipulated in the RFP;

9. Be prepared in ink or typewritten or, as applicable, in the electronic format specified by the RFP. If information essential for an effective evaluation, including, but not limited to, price, terms, and product description, is submitted in pencil, the proposal shall be rejected unless that same essential information appears elsewhere in the proposal, or in the copies thereof, either typewritten or printed, and provided that the information is entirely consistent with the information submitted in pencil and does not invite any other interpretation; and

10. If the RFP contains set-aside program provisions for a specified category or specified categories of businesses, be submitted by a business properly approved by and registered with the New Jersey Department of the Treasury unit responsible for administering the State's small business registration program in accordance with the administrative rules at *N.J.A.C. 17:13*, governing the State's set-aside programs.

(b) Any proposal failing to comply with the provisions of (a) above shall be subject to automatic rejection.

§ 17:12-2.3 Extension of contracts for local use

(a) The Director may, through provision in an RFP, extend a State contract for use by New Jersey's local governments; volunteer fire departments and first-aid or rescue squads; school districts; county colleges; State colleges; quasi-State agencies; independent authorities; and independent institutions of higher education.

(b) If after award of a contract, either the Director or the contractor seeks to extend a contract for use by the Cooperative Purchasing Program participants, the Director and contractor may agree to such arrangement, provided the contractor agrees in writing to extend the contract to all Cooperative Purchasing Program participants on the same terms and conditions as set forth in the underlying State contract.

(c) In the event a contract permits extension for use by the Cooperative Purchasing Program participants, such use shall be limited to the goods and services that are the subject of the contract and shall be subject to the terms and conditions of the contract, as appropriate.

§ 17:12-2.4 Bid security

(a) The Director may require bid security when appropriate, based upon a review of market conditions and an evaluation of potential risk to the State.

(b) Bid security, in such amount as the Director deems necessary, shall consist of a certified or cashier's check drawn to the order of "Treasurer, State of New Jersey," an individual or annual bid bond issued by an insurance or security company authorized to do business in the State of New Jersey, or an irrevocable letter of credit issued by a Federally insured financial institution and naming "Treasurer, State of New Jersey" as beneficiary, and/or other form of security as required by the Director.

(c) A bidder's failure to submit the required bid security with its proposal shall be cause for rejection of the proposal.

§ 17:12-2.5 Performance security

(a) The Director may determine performance security is warranted for a particular contract and, if so, shall set the amount of security necessary to protect the State's interests.

(b) Performance security, in such amount as the Director deems necessary, shall consist of a certified or cashier's check drawn to the order of "Treasurer, State of New Jersey," an individual or annual performance bond issued by an insurance or security company authorized to do business in the State of New Jersey, or an irrevocable letter of credit issued by a Federally insured financial institution and naming "Treasurer, State of New Jersey" as beneficiary, and/or other form of security as required by the Director.

(c) A contractor's failure to submit the required performance security is sufficient cause for the Director to cancel the contract and assess the contractor for any costs incurred by the State.

§ 17:12-2.6 Receipt and public availability of proposals

(a) Proposals must be received before the publicly announced deadline at the place designated for proposal submission. All other proposals shall be rejected. The Director may, in the event of inclement weather or other condition affecting or likely to affect bidders' timely delivery of proposals, postpone the deadline to the next operable business day. If timely delivery of a physical or electronic proposal is not possible due to a documentable cause of delay on the date of proposal opening and that is beyond the control of said vendor, said vendor can request, prior to the set deadline, that the Director postpone the deadline. If the Director determines that a postponement is in the State's best interest, the Director shall designate a revised same-day deadline. In either of these circumstances, the Director shall post notice of the postponement of the deadline for proposal submission on the Division's website. All previously received proposals will remain sealed until the revised proposal opening time.

(b) Promptly after the deadline for submission of proposals, the opening and reading of proposals shall be conducted.

(c) If a proposal timely received by the Division was not opened because it was misplaced by the Division or due to any other inadvertence by the Division, the Director shall set a date, time, and place for the opening of that proposal and notify and invite all participating bidders to attend.

(d) If there is no public representation at a proposal opening event, the Division may opt to forgo the reading of proposals.

(e) For RFPs having a negotiation component, only the names and addresses of the bidders will be publicly announced at the proposal opening. Files relating to such procurements will be available for public review, upon request and upon scheduling by the Director, only after issuance of a notice of intent to award by the Division.

(f) If an RFP has a negotiation component, the proposals and documentation relating to negotiations shall not be available for public inspection until after a notice of intent to award has been issued by the Division. After the notice of intent to award has been issued, each proposal and, if applicable, documentation relating to any negotiations will be available for public inspection in accordance with governing law.

(g) After award of contract(s), all proposals shall be considered public documents under OPRA unless an OPRA exemption is applicable. The following provisions shall apply for all procurements:

1. Within its proposal, the bidder must identify in writing any data or materials it asserts are exempt from public inspection under OPRA or other governing law, and explain the legal basis for all such assertions;

2. Assertion by a bidder that its entire proposal is, or prices offered are, exempt from public inspection under OPRA or other governing law shall be presumed to be contrary to the law, and the Division need not give the bidder's assertion any effect. Such an assertion may result in the rejection of the proposal; and

3. In the event that the Division receives a challenge from any person or entity to a bidder's assertion that any of its data or materials are exempt from public inspection, the Division shall give the bidder notice of the challenge, and the Division shall allow the bidder to respond to the challenge in the same manner as the Division is afforded. The notice given by the Division shall be as much notice as practicable based on the circumstances of the challenge and the Division's legal obligations. If the bidder fails to timely respond to the notice of the challenge, the Division shall make its own determination as to whether the bidder's data or materials are exempt from public inspection under OPRA and shall not be liable to the bidder for any decision the Division makes.

§ 17:12-2.7 Evaluation of proposals for formal, advertised, competitive procurements

(a) Proposals shall be evaluated in either of two ways, with a recommendation for proposed award(s) made to the Director upon conclusion of the evaluation. All recommendations, whether prepared by an evaluation committee or by a Division staff member assigned to conduct the procurement, are advisory in nature and not binding upon the Director. The evaluation methods are:

1. By an evaluation committee appointed by the Director prior to the date of the scheduled proposal opening event. The Director shall appoint the members of the evaluation committee on the basis of professional resumes supplied by the proposed members. No member of the evaluation committee shall have any personal, financial, or familial interest that would affect his or her ability to evaluate the proposals objectively and impartially. Each member of the evaluation committee shall certify in writing that no such real or apparent conflict of interest exists. Members of evaluation committees shall conduct evaluations of proposals objectively, impartially, and with propriety. The Director retains the discretion to reject proposed members, remove sitting members and add additional members to an evaluation committee; or

2. By a Division staff member assigned to conduct the procurement.

(b) For all RFPs that set forth evaluation criteria, values, or utility models to be applied by the evaluators in assessing the proposals, and that do not reveal specific, assigned weights or elements, the evaluation committee or assigned Division staff member shall, prior to the opening of proposals, determine, document, and date-stamp such weighted evaluation criteria, values, or utility models. For RFPs not having a negotiation component, the pre-set weighted evaluation criteria, values, or utility models shall be available to the public at the proposal opening event.

(c) Proposals shall be evaluated by the Division for compliance with the provisions of *N.J.A.C. 17:12-2.2* and by the evaluation committee or the assigned Division staff member for responsiveness to the material requirements of the RFP. A proposal that is not compliant with the provisions of *N.J.A.C. 17:12-2.2* or responsive to the material requirements of the RFP shall not be eligible for further consideration for award of contract, and the bidder offering said proposal shall receive notice of the rejection of its proposal.

(d) The Director may waive minor irregularities or omissions in a proposal.

(e) The evaluation committee or the assigned Division staff member may, by written request, ask a bidder to clarify, in writing, its proposal in order to determine whether a proposal should be further considered for award. The process of clarification is not an opportunity for a bidder to revise or modify its proposal, and any response or portion of a response by a bidder to the Division's written request for clarification that attempts to revise or modify its proposal shall be given no effect.

(f) The evaluation committee or assigned Division staff member shall determine which proposals are in the competitive range. Proposals deemed not to be in the competitive range need not be further evaluated. Proposals in the competitive range, except as may be limited as specified in this section, shall be evaluated by the evaluation committee or the assigned Division staff member on the basis of price and the other evaluation criteria set forth in the RFP. Upon conclusion of the evaluation of the proposals, the committee

or the assigned Division staff member shall prepare a written report with a recommendation for award based on its evaluation of the proposals, for the Director's consideration.

(g) The Director shall review the award recommendation and documentation presented by the evaluation committee or the assigned Division staff member, and may accept it, modify it, reject it, or refer the modified award recommendation and documentation back to the evaluation committee or assigned Division staff member for additional consideration. The Director retains the discretion to issue a notice of intent to award to a responsible bidder whose conforming proposal is most advantageous to the State, price and other factors considered, or to reject all proposals when the Director determines it is in the public interest or the State's interest to do so.

(h) The Director shall issue the notice of intent to award to all participating bidders. The notice of intent to award document sent to the scheduled contract awardee(s) shall include the identification of certification(s) and/or other essential documents that were not required to be included with the proposal but are required for contract award and a designated date when the required certifications and/or documents are due. A scheduled awardee's failure to comply within the time afforded shall constitute grounds for the Director's rescission of the notice of intent to award to the non-responding scheduled awardee. If the requested materials are not timely submitted, the Director may refer the matter back to the evaluation committee or the assigned Division staff member for consideration as to whether the scheduled award should proceed, with reconsideration of all pertinent factors, including the issue of assessment of costs incurred by the State as a result of the scheduled awardee's delay by, or the non-award of the contract to, the named awardee.

(i) In the event that it is determined that all proposals shall be rejected or no award shall be made, the Director shall so notify all bidders.

(j) In addition to the requirements for the evaluation of proposals set forth in (a) through (i) above, the following requirements shall apply to publicly advertised procurements that contain a negotiation component:

1. The RFP shall state that the State may negotiate with bidders;
2. If it is determined by the evaluation committee or assigned Division staff member that negotiations shall be conducted, the evaluation committee or assigned Division staff member will negotiate only with bidders whose proposals are determined by the evaluation committee or the assigned Division staff member to be in the competitive range. Further, if the evaluation committee or assigned Division staff member determines that the number of proposals in the competitive range precludes timely and effective negotiations with each bidder or determines that pricing offered in any one or more of the viable proposals exceeds the amount of funding available for the procurement, the evaluation committee or assigned Division staff member may further limit the number of proposals in the competitive range;
3. In the event the evaluation committee or assigned Division staff member decides to conduct negotiations, the evaluation committee or assigned Division staff member shall notify each bidder whose proposal has been deemed to be in the competitive range of the intent to negotiate. The notice may identify, in general terms, the elements or factors upon which the State intends to base its negotiations or may be tailored to each individual bidder. Alternatively, the evaluation committee or assigned Division staff member may opt to conduct a Best and Final Offer process with the bidder whose proposal is, or bidders whose proposals are, deemed to be in the competitive range;
4. During the course of negotiations, no bidder's technical proposal or pricing shall be revealed to any other bidder or to any person who is not a member of the evaluation committee or Division staff involved with the conduct of the negotiations;
5. With reasoned and documentable cause, the evaluation committee or assigned Division staff member, or a Director-assigned negotiator, may opt to conduct additional rounds of negotiations with a single bidder or with more than one bidder in the competitive range and not with others; and the basis for deciding which bidder is, or which bidders are, chosen for any additional rounds of negotiations shall be documented as part of the Division's record of negotiations;
6. As provided for in negotiations under paragraph (j)3 above, the evaluation committee or assigned Division staff member may request all bidders in the competitive range to submit a Best and Final Offer. If the evaluation committee or assigned Division staff member elects to do so, written notice shall be

provided to all bidders in the competitive range of the time and place for submission of a Best and Final Offer. If deemed in the best interests of the State, additional Best and Final Offers may be requested. Although bidders' Best and Final Offers must be in writing, the Division's requests for them may initially be made orally to expedite the evaluation process but must be promptly confirmed in writing;

7. If a bidder does not respond to the request for a Best and Final Offer or asserts that its last price is firm, that bidder's most recent prior offer will be considered to be its Best and Final Offer; and

8. All discussions conducted during a negotiated procurement shall be documented as part of the record of the procurement.

§ 17:12-2.8 Poor performance as a basis for bypass of low bidder

(a) A record of poor performance on prior and/or current State contracts by a bidder submitting a lower priced proposal is sufficient basis for bypassing its proposal. In determining whether a bidder's poor performance warrants the bypass of its proposal, the Director shall take into consideration the frequency and seriousness of the bidder's poor performance as a contractor. Poor contract performance is evidenced by:

1. Complaints filed pursuant to *N.J.A.C. 17:12-4.3*, which have been resolved against rather than in favor of the contractor; or

2. Other information contained in the Division's vendor performance records, a using agency's records, or obtained from audits or investigations of the bidder's prior work experience completed by the Division, a using agency, a Cooperative Purchasing Program participant, or, its current licensure, registration, or certification status and relevant prior licensure, registration, or certification history, or its status or rating with established business/financial reporting services, as applicable.

(b) The Director may, in those instances where there is evidence of a record of poor performance by a bidder with customers other than the State, request additional information beyond that in the bidder's proposal from the bidder in question regarding the bidder's present capability to perform adequately under the terms of the contract in question. If the bidder's response to the Division's request, in the Director's discretion, fails to demonstrate its current ability to perform adequately, the Director may bypass that bidder's proposal.

(c) Subsections (a) and (b) above shall not be construed to otherwise limit the Director's authority to bypass lower-priced proposals or proposals that are otherwise less advantageous to the State, in accordance with the statutory authority established at *N.J.S.A. 52:34-12(g)*.

(d) Notice of a decision to bypass a bidder's proposal based upon poor performance shall be given to that bidder at the time the notice of intent to award is issued to all bidders.

(e) After receiving notice of bypass for poor performance, that bidder, in accordance with the provisions of *N.J.A.C. 17:12-3.3*, may challenge the bypass decision. If in the Director's judgment the bidder has substantiated its ability to perform the contract, or it is otherwise in the public interest, the Director may reverse the decision to bypass and may withdraw the notice of intent to award to allow the bidder's proposal to be evaluated and considered for award, if it was not evaluated with the other proposals.

§ 17:12-2.9. (Reserved)

§ 17:12-2.10 Tie proposals

(a) In the event that proposals submitted by two or more bidders are tied with respect to price, and the application of the other evaluation criteria specified in the RFP does not provide a basis to distinguish between or among the tied proposals, the Director shall award the contract based on a review of the following factors listed in order of priority:

1. Tie-breaking provision(s) set forth in the RFP;
2. A usable cash- or volume-based discount that renders one proposal more favorably priced;
3. Delivery advantage, specifically shorter proposed time frames for delivery and/or closer proximity to the point of delivery;

4. Active registration on the date of proposal opening as an approved small business with the Department of the Treasury unit responsible for administering the State's small business registration program; and

5. In-State location.

(b) When application of the above distinguishing factors does not result in a breaking of the tie status, the Director may, if practicable, make multiple awards.

§ 17:12-2.11 Proposal errors

(a) Prior to the opening of proposals, any bidder may request that its proposal be withdrawn. Such requests must be made to the Director in writing. If the request is granted, the bidder may submit another proposal, as long as the replacement proposal is received prior to the announced date and time for proposal opening and at the place specified.

(b) If, after proposal opening but before contract award, a bidder discovers an error in its proposal, that bidder may make written request to the Director for authorization to withdraw its proposal from consideration for award. If the bidder's request to withdraw is made in good faith, and the State will not be significantly prejudiced by granting the withdrawal of the proposal beyond the loss of the benefit of the bargain to the State of the withdrawing bidder's offer, the Director shall grant the request. Evidence of the bidder's good faith can be demonstrated by one or more of the following factors:

1. A mistake that is so significant that to enforce the contract resulting from the proposal would be unconscionable;

2. A mistake that relates to a material feature or term of the contract; and

3. A mistake that occurred notwithstanding the bidder's exercise of reasonable care.

(c) If, during a proposal evaluation process, an obvious pricing error made by a bidder deemed to be a potential contract awardee is found, the Director shall issue written notice to that bidder. The bidder will have five business days after receipt of the notice to confirm its pricing. If the bidder fails to respond, its proposal shall be considered withdrawn, and no further consideration shall be given to it.

(d) If it is discovered that there is an arithmetic disparity between the unit price and the total extended price, the unit price shall prevail. If there is any other ambiguity in the pricing other than a disparity between the unit price and extended price and the bidder's intention is not readily discernible from other parts of the proposal, the Director may seek clarification from the bidder to ascertain the true intent of the proposal.

(e) The Director shall:

1. Terminate any contract without delay upon discovery of an error that occurred during the proposal evaluation process and led to an erroneous award. It is not the intent of this provision to reconsider the Director's business judgment in making an award. The Director shall document the error and promptly notify all affected parties; and

2. Bar issuance of new purchase orders and cancel outstanding purchase orders made under the contract being terminated.

§ 17:12-2.12 Registration of corporations and other business entities

(a) In accordance with the provisions of *N.J.S.A. 52:32-44.1.b.*, business organizations seeking to do business with the State of New Jersey must be business-registered with the New Jersey Department of the Treasury's Division of Revenue prior to the time a contract or purchase order is awarded or authorized. Proof of such registration must be provided by an intended contract or purchase order awardee upon request by the Division or using agency.

(b) In accordance with *N.J.S.A. 52:32-44.1.c.*, subcontractors that are business organizations must be registered with the New Jersey Department of the Treasury's Division of Revenue and provide evidence thereof to the prime contractor before being permitted by the prime contractor to sign a subcontract under a State contract.

(c) Each prime contractor shall receive and maintain the names and current addresses of all subcontractors performing State contract work for the contractor and shall forward such information and proof of their business registration to the Division for the Director's approval prior to the commencement of work by subcontractors in accordance with the express provisions of the binding contract.

§ 17:12-2.13 Preference laws; out-of-State vendors

(a) The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

"In-State preference" or "in-state preference" means a procedure established by statute, rule, regulation, or practice whereby a state or local government procurement agency gives a bidder an advantage in the evaluation of proposals based on whether the bidder maintains its principal place of business within the borders of the state or locality, and includes any advantage given to a bidder based on whether the goods or services offered in a proposal were produced, manufactured, mined, or grown within the borders of the state or locality.

"Out-of-State bidder" means a bidder that does not have a regular place of business in New Jersey.

"Principal place of business" means a bidder's office, factory, warehouse, or other space which is recognized by a state or local government as the basis for applying an in-state preference in favor of the bidder.

"Regular place of business" means a bona fide office, factory, warehouse, or other space that is regularly maintained by the bidder, occupied by one or more of the bidder's employees, and used in carrying on the bidder's business. The maintenance of a temporary job site or field office in New Jersey, the storage of goods in New Jersey, and the employment of an independent agent or subcontractor in New Jersey do not, individually or combined, constitute a regular place of business.

(b) Pursuant to the provisions of *N.J.S.A. 52:32-1.4* et seq., the Director shall apply on a reciprocal basis against an out-of-State bidder any in-state preference that is applied in favor of that bidder by the state or locality in which the bidder maintains its principal place of business.

(c) The Director shall provide notice of the Division's intent as to in-state preference through appropriate language in the terms, conditions, and/or specifications of the RFP.

(d) For purposes of implementing the provisions of this section, the Director shall make available upon request for public inspection a list of states having statutes, rules, and/or regulations that grant in-state preferences in the competitive bidding for goods and services. Such list may be based on surveys conducted by the Division and/or by research conducted by national organizations of state and local governments, procurement agencies, government officials, and purchasing agents, such as the National Association of State Purchasing Officials, the National Institute of Governmental Purchasing, and the Council of State Governments. In addition, the Director may receive and review information from prospective bidders that indicates that any state or local government agency outside of New Jersey applies an in-state preference in its procurement statutes, rules, regulations, ordinances, charters, or practices.

(e) The Director shall also apply in-State preference in the evaluation of proposals whenever a proposal is received from an out-of-State bidder where residential preference statutes, rules, regulations, or practices exist in political sub-divisions of a state. It shall be the responsibility of the bidder or bidders for a specific procurement to provide written evidence to the Director of the existence of such local government preference rules, regulations, ordinances, charters, or practices either with the bidder's proposal or within five business days after the deadline for proposal submission. Written evidence that is not provided to the Director within five business days of the public bid opening may not be considered in the evaluation of that procurement, but may be retained and considered in the evaluation of subsequent procurements.

(f) Consistent with the procedures and practices of the Division, the Director shall reasonably apply any reciprocal in-State preference in a similar manner and to similar effect as the other state or locality. Where an in-state preference is applied by another state or locality in the form of a percentage which is added to or subtracted from bidders' prices, markups, or discounts, the Director shall similarly apply the same percentage against an affected out-of-State bidder. Where an in-state preference is applied by another

state or a locality in the form of a categorical rejection of certain proposals, the Director shall apply a similar categorical rejection against an affected out-of-State bidder.

(g) The bidder or bidders that would benefit by the imposition of in-State preference must otherwise be eligible for an award as a responsive and responsible bidder.

(h) The Director may waive a reciprocal in-State preference in a specific procurement where such waiver would be in the best interests of the State, including where the resulting prices for goods and services would exceed the reasonable estimate of the using agency or would otherwise be unreasonably high, or where the State is entering into a long-term contract or a contract for large quantities of goods or services.

(i) The Director shall, as necessary, waive a reciprocal in-State preference on procurements supported by Federal funds where Federal rules prohibit the use of residential preference.

(j) The Director may waive reciprocal in-State preference when the action would result in an award to a bidder having a poor record of performance, pursuant to *N.J.A.C. 17:12-2.8* or a record of complaints and/or contract terminations pursuant to *N.J.A.C. 17:12-4*.

(k) The Director may waive reciprocal in-State preference when a public exigency requires the immediate delivery of articles or performance of the service.

(l) Nothing in this section shall be deemed to modify or restrict the authority of the Director, pursuant to *N.J.S.A. 52:34-12*, to award any contract to the bidder the Director determines has offered the proposal that is "most advantageous to the State, price and other factors considered."

§ 17:12-2.14 Mutual cancellation of contract

After contract award and upon receipt of a request from a contractor, the Director may, under extraordinary circumstances, agree to a mutual cancellation of the contract. In cases where the contractor is seeking contract cancellation, the Director may require the contractor to pay for any administrative expenses incurred as a result of contract cancellation and subsequent re-award.

SUBCHAPTER 3. PROTEST PROCEDURES [\(Return to top\)](#)

§ 17:12-3.1 Informal hearings; subject matter

(a) The purpose of this subchapter is to provide the procedures that govern the challenge of an action of the Director in the issuance of an advertised RFP or the award of a contract or contracts resulting from an advertised RFP as described at *N.J.A.C. 17:12-2*. A protest is defined as follows:

1. A timely filed challenge to a term, condition or requirement of a specification contained within an advertised RFP; or
2. A timely filed challenge to a contract award decision made by the Director.

(b) Protests of the type described in this subchapter, for the purpose of this chapter, are not contested cases subject to the requirements of the Administrative Procedure Act, *N.J.S.A. 52:14B-1* et seq., and the Uniform Administrative Procedure Rules, *N.J.A.C. 1:1*. Final agency determinations by the Director on matters of protest are appealable to the Appellate Division of the Superior Court of New Jersey.

§ 17:12-3.2 Protest procedures; challenges to a specification

(a) A vendor intending to submit a proposal in response to an advertised RFP, pursuant to *N.J.S.A. 52:34-6* et seq., and finding cause to challenge a specification contained within the RFP, may submit a written protest to the Director, setting forth, in detail, the grounds for such protest.

(b) The written protest shall be submitted to the Director only after the Division has formally responded to questions posed during the RFP-established question and answer period and in sufficient time to permit a review of the merits of the protest and to take appropriate action as may be necessary, prior to the scheduled deadline for proposal submission.

1. A protest of a specification of any proposal solicitation document issued by the Director shall contain the following items:

- i. Identification of the Division's solicitation number for the particular procurement;
- ii. The specification(s) at issue and the specific grounds for challenging the cited specification(s), including all arguments, materials, or other documentation that may support the protester's position that the specification should be changed; and
- iii. A statement as to whether the protester requests an opportunity for an in-person presentation and the reason(s) for the request.

2. The Director may disregard a protest not containing all of the items set forth in (b)1 above.

3. In order to provide sufficient time for full assessment of the issue(s) of the challenge and, if merited, to effect changes to the RFP and public notice of such changes, the Director may disregard any protest of specifications filed fewer than seven business days prior to the scheduled deadline for proposal submission.

(c) The Director shall, upon receipt of a timely protest of a specification contained in an advertised RFP, issue a final written decision on the protest prior to the public opening and reading of proposals received in response to that RFP.

(d) The Director may resolve a protest of a specification by amending the RFP and extending the deadline for proposal submission, by canceling the procurement, or by any other appropriate means.

1. The Director has sole discretion to determine if an in-person presentation by the protester is necessary to reach an informed decision on the matter(s) of the protest. In-person presentations are fact-finding for the benefit of the Director. The Director has the discretion to limit attendance at an in-person presentation to those bidders likely to be affected by the outcome of the protest.

2. The Director, or the Director's designee from within or outside the Division, may perform a review of the written record or conduct an in-person presentation. In the case of a review or an in-person presentation being handled by a hearing officer designee from outside the Division, the determination of such designee shall be in the form of a report to the Director, which shall be advisory in nature and not binding on the Director. All parties shall receive a copy of the hearing officer's report and shall have 10 business days to provide written comments or exceptions to the Director. Subsequent to the 10-business-day period for comments/exceptions, the Director shall make a final written decision on the matter. In the case of a review or in-person presentation being handled by a designee from within the Division, the determination shall be issued by the Director, or the Director's designee, and such determination shall be a final agency decision pursuant to *N.J.A.C. 17:12-3.1(b)*.

§ 17:12-3.3 Protest procedures; challenge to a contract award decision

(a) A bidder, having submitted a proposal in response to an advertised RFP administered pursuant to *N.J.S.A. 52:34-6* et seq., may submit a written protest to the Director concerning the following:

1. Rejection of its proposal, or a portion thereof, when such rejection arises as a consequence of failure to comply with any of the prerequisites set forth in *N.J.A.C. 17:12-2.2*, Requirements for bidding and contract award. Such a protest may not challenge the existence of the prerequisite(s) cited as cause for the rejection but may assert that the facts of a particular case are sufficient to satisfy or conform to the cited prerequisite(s); and/or

2. Notice of award of contract(s) or of intent to award contract(s) pertaining to the subject procurement.

(b) A bidder, having submitted a proposal in response to an advertised RFP and finding cause to protest the award decision pursuant to (a)1 or 2 above, shall make written request to the Director, setting forth, in detail, the specific grounds for challenging the rejection of its proposal or for challenging the scheduled contract award, as applicable. The protest shall be filed within 10 business days following the bidder's receipt of written notification that its proposal is non-responsive or of notice of the intent to award, as applicable, or, pursuant to (e) below, prior to the deadline specified in the Division's notice of intent to award communication to the bidder, whichever date is earlier.

1. A protest regarding the Director's decision to award a contract shall contain the following items:

- i. Identification of the Division's solicitation number for the particular procurement;

ii. The specific grounds for challenging the intended contract award, including all arguments, materials and/or other documentation that may support the protester's position that the contract award should be overturned; and

iii. A statement as to whether the protester requests an opportunity for an in-person presentation and the reason(s) for the request.

2. The Director may disregard a protest not containing all of the items set forth in (b)1 above.

3. The Director may disregard any protest of award filed after the 10 day protest period and proceed with the award of contract(s).

(c) The Division shall, except as set forth in (e) below, hold all contract awards for 10 business days, pending potential protests from bidders. For publicly advertised procurements, the Division shall notify all bidders of the outcome of the competition by issuance of a notice of intent to award. If the contract award is protested pursuant to (a)2 above, the Division shall not award the contract in question until a final decision is rendered by the Director on the merits of the protest. The Director may award the contract, notwithstanding the receipt of a protest pursuant to the above provisions, if the failure to award the contract will result in substantial cost to the State or if public exigency so requires. In such event, the Director shall notify all interested parties.

(d) The protest accepted by the Director shall be resolved by written decision on the basis of the Director's review of the written record including, but not limited to, the written protest, the terms, conditions and requirements of the RFP, the proposals submitted in response to the RFP, the evaluation committee report and/or the award recommendation document, pertinent administrative rules, statutes, and case law, and any associated documentation the Director deems appropriate. In cases where no in-person presentation is held, such review of the written record shall, in and of itself, constitute an informal hearing.

1. The Director has sole discretion to determine if an in-person presentation by the protester is necessary to reach an informed decision on the matter(s) of the protest. In-person presentations are fact-finding for the benefit of the Director. The Director has the discretion to limit attendance at an in-person presentation to those parties likely to be affected by the outcome of the protest.

2. The Director, or the Director's designee from within or outside the Division, may perform a review of the written record or conduct an in-person presentation directly. In the case of a review or in-person presentation being handled by a hearing officer designee from outside the Division, the determination of such designee shall be in the form of a report to the Director, which shall be advisory in nature and not binding on the Director. All parties shall receive a copy of the hearing officer's report and shall have 10 business days to provide written comments or exceptions to the Director. Subsequent to the 10-business-day period for comments/exceptions, the Director shall make a final written decision on the matter. In the case of a review or in-person presentation being handled by a designee from within the Division, the determination shall be issued by the Director, or the Director's designee, and such determination shall be a final agency decision pursuant to *N.J.A.C. 17:12-3.1(b)*.

(e) The Director may, in instances where public exigency exists or where there is potential for substantial cost benefit or other such advantage to the State, modify or amend the time periods noted in this subchapter. In these instances, the Director shall give adequate notice to the parties involved.

§ 17:12-3.4 Discovery procedures

Notwithstanding the provisions set forth in *N.J.A.C. 17:12-3.2(b)1* and *3.3(b)1*, the Director is entitled to request, receive, and review copies of any and all records and documents deemed appropriate and relevant to the issues and arguments set forth in the protest. Upon receipt of the Director's request, the bidder shall promptly provide the requested records and documents free of charge in the time, place, and manner specified by the Director. If the protesting bidder fails to comply with the provisions of this section, such failure may constitute a reasonable basis for the Director to resolve the protest against the bidder submitting the protest. The Director may also consider relevant information requested and received from other parties deemed appropriate by the Director.

SUBCHAPTER 4. COMPLAINT AND AUDIT PROCEDURES [\(Return to top\)](#)

§ 17:12-4.1 Purpose and scope of subchapter

The purpose of this subchapter is to set forth the procedure for using agencies to file complaints related to contracts arising as a result of procurements conducted under the provisions of *N.J.S.A. 52:34-6 et seq.* If a using agency does not use this complaint process, the State does not waive any of its rights or remedies available at law or in equity.

§ 17:12-4.2 General

The provisions of this subchapter deal specifically with means of assuring prompt action in cases where a State contract user, by filing a formal complaint with CCAU, claims that a State contractor's performance fails to meet contract requirements, and establishing a record that documents a contractor's poor performance in cases where a contractor's performance fails to meet contract requirements. The Director may, pursuant to *N.J.A.C. 17:12-2.8*, refrain from doing business with any vendor for repeated or excessive breaches of State contract terms, including, but not limited to, those listed in *N.J.A.C. 17:12-4.3(b)*, as necessary to protect the State's best interests.

§ 17:12-4.3 Filing of complaints; subject matter

(a) Using agencies shall promptly initiate and file a formal complaint of any failure by a contractor to comply with the provisions, terms, and conditions of a State contract. The complaint shall be in writing and on Form PB-36 or the equivalent and be submitted to the CCAU. Complaints are not required where a contract contains specific performance standards including, but not limited to, liquidated damages. In such cases, the using agency may consult with CCAU prior to imposing the contract standards.

(b) Alleged breaches of contract provisions that may be reported to the CCAU include, but are not limited to:

1. Failure by the contractor to deliver goods or services at the time and place or in the manner, quantity or quality specified;
2. Demand for prices other than those specified in the contract;
3. Delivery of unauthorized substitutes or ungraded material where grading is required;
4. Sale of goods which are not authorized by the contract;
5. Failure to install goods; improper installation;
6. Any other failure to comply with contract specifications or failure to achieve a satisfactory rating for the service provided under the contract if quality assurance surveys are performed;
7. Conflict of interest; and
8. Failure to comply with any relevant legal or contractual requirement.

§ 17:12-4.4 Time frames

(a) As soon as possible after receipt of the complaint, CCAU will provide written notice to the contractor against which the complaint was filed.

(b) Once notified, the contractor must reply to the complaint within 10 business days of its receipt thereof or, pursuant to (f) below, prior to the deadline specified in CCAU's notice of complaint, whichever date is earlier. The contractor may cure or submit a corrective action plan for any defects during that period. A cure or corrective action plan may be taken into consideration by CCAU in determining whether a complaint is to be resolved against the contractor. The contractor shall notify CCAU of any cure or corrective action plan effected by the contractor. However, such a cure or corrective action plan shall not serve as cause for automatic invalidation of a meritorious complaint.

(c) The using agency may file, with CCAU, a response to the submission of the contractor within five business days of receipt thereof and provide a copy of its response to the contractor.

(d) As soon as practicable after receipt of the response provided in (c) above, CCAU shall issue an initial determination to the contractor and complainant regarding the merits of the complaint. The contractor or complainant may file an appeal to the Director within 10 business days of receipt of CCAU's initial determination or, pursuant to (f) below, prior to the deadline specified in CCAU's initial determination, whichever date is earlier.

(e) If the Director finds that a complaint against a contractor is valid, the contractor shall be notified of the time by which corrections are to be made.

(f) Any time frame specified in this subchapter may be shortened or extended by the Director or CCAU for good cause. In such instances, the Director shall give adequate notice to the parties involved.

(g) A pending complaint or an initial determination by the CCAU shall not prevent the State from exercising any other right or seeking any remedy available at law or in equity.

§ 17:12-4.5 Resolution of complaints

(a) A CCAU-adjudicated complaint appealed to the Director shall be resolved by written decision on the basis of the Director's review of the written record including, but not limited to, the complaint and any attachments, the terms, conditions and requirements of the contract which includes the proposal submitted by the contractor, pertinent administrative rules, statutes and case law, and any associated documentation the Director deems appropriate. Such review of the written record shall, in and of itself, constitute an informal hearing.

(b) At the discretion of the Director, the complainant and/or respondent may be required to make an in-person presentation, which may include an opportunity to submit additional documentation relevant to the issues set forth in the original complaint. In-person presentations as convened under this subchapter are fact-finding for the benefit of the Director. At such in-person presentations, the State shall be represented by pertinent members of the Division and by the Office of the Attorney General, if required. The Director has the discretion to limit attendance at an in-person presentation to those parties likely to be affected by the outcome of the complaint process.

(c) The Director, or the Director's designee from within or outside the Division, may perform a review of the written record or conduct an in-person presentation directly. In the case of a review or in-person presentation being handled by a hearing officer designee from outside the Division, the determination of such designee shall be in the form of a report to the Director, which shall be advisory in nature and not binding on the Director. All parties shall receive a copy of the hearing officer's report and shall have 10 business days to provide written comments or exceptions to the Director. Subsequent to the 10-business-day period for comments/exceptions, the Director shall make a final written decision on the matter. In the case of a review or in-person presentation being handled by a designee from within the Division, the determination shall be issued by the Director, or the Director's designee, and such determination shall be a final agency decision, which shall be appealable to the Appellate Division of the Superior Court.

(d) Hearings arising under this subchapter are not contested cases subject to the requirements of the Administrative Procedure Act, *N.J.S.A. 52:14B-1 et seq.*, and the Uniform Administrative Procedure Rules, *N.J.A.C. 1:1*. The period during which a complaint is being handled administratively shall not toll the running of any limitations period in the New Jersey Contractual Liability Act, *N.J.S.A. 59:13-1 et seq.*

(e) An initial decision by the CCAU pending on appeal before the Director or a final determination by the Director or Director's designee shall not prevent the State from exercising any other right or seeking any other remedy available at law or in equity.

§ 17:12-4.6 Rejection of goods and/or services

Nothing in the rules set forth in this subchapter shall preclude a using agency from rejecting the goods or services in question if, upon delivery, defects are substantial and not curable by the contractor within a reasonable time. If goods or services are rejected, the agency shall notify the Division immediately.

§ 17:12-4.7 Emergency situations

When, in the discretion of the Director, the non-compliance by the contractor affects or may affect the health, safety, or welfare of the State or its citizenry, the Director shall immediately contact the contractor and attempt to obtain full compliance. If no resolution is immediately forthcoming, the Director may, without delay, engage a substitute contractor and charge the non-complying contractor any additional costs the State incurs as a result of the substitution.

§ 17:12-4.8 Effect of contractor non-compliance with contract provisions

(a) The Director may, in the following circumstances, terminate the State contract with a non-complying contractor and immediately purchase or direct the using agency to purchase goods or obtain services from another source and charge the defaulting contractor the difference in price, if any:

1. Refusal of a non-complying contractor to bring goods or services into compliance in the time or manner specified by the Director or CCAU;

2. Refusal of a contractor to answer inquiries by the Division or failure of a contractor to respond to a formal complaint within 10 business days of receipt or prior to the deadline specified in CCAU's notice of complaint, as mandated in *N.J.A.C. 17:12-4.4(b)*;

3. Rejection of goods under *N.J.A.C. 17:12-4.6*.

(b) The Director may, upon continued or willful failure to perform, suspend or debar the contractor pursuant to *N.J.A.C. 17:12-6*.

§ 17:12-4.9 Audit and complaint discovery procedures

(a) CCAU, either as part of discovery in connection with a complaint filed under this subchapter, or for any other reason, is entitled to request, receive, review, and audit copies of any and all records and documents related to a State contract at any time. Upon receipt of the CCAU request, the contractor shall promptly provide the requested records and documents free of charge in the time, place, and manner specified by CCAU.

(b) Failure of the contractor to comply with the requirements of this section may, at the reasonable discretion of the Director:

1. Constitute sufficient basis to resolve the issue(s) in the complaint against the non-compliant contractor. CCAU may also consider relevant information requested and received from other parties deemed appropriate by the Director; and/or

2. Be used by the State to prove contract non-compliance and may be the basis for the State to take any action or seek any remedy available under the contract, at law or in equity.

(c) The audit result and any information received in response to a CCAU request pursuant to this section may be used by the State to establish contract non-compliance, to take any action, or seek any remedy available under the contract, at law, or in equity.

SUBCHAPTER 5. POLITICAL CONTRIBUTION COMPLIANCE REVIEW PROCESS [\(Return to top\)](#)

§ 17:12-5.1 Background and program administration responsibility

(a) Chapter 51 and the administrative rules of New Jersey Election Law Enforcement Commission at *N.J.A.C. 19:25* prohibit the award of contracts in excess of \$ 17,500 by State agencies and authorities to business entities that have made or solicited certain disqualifying political contributions, specifically contributions in excess of \$ 300.00 to gubernatorial candidate committees, and State and county political party committees. Additionally, Chapter 51 requires disclosure by all business entities to be awarded State contracts in excess of \$ 17,500 of all contributions to Continuing Political Committees that are organized under *Section 527 of the Internal Revenue Code*. The Department of the Treasury was made responsible for

conducting the review of all State agency and authority contracts and purchases in excess of \$ 17,500 for any contribution by an intended contractor that represents an apparent conflict of interest that may preclude such award. Chapter 51 expressly excepts, from application of these review requirements, the award of a contract "when the public exigency requires the immediate delivery of goods or performance of services as determined by the State Treasurer."

(b) Effective November 15, 2008, Executive Order No. 117 (2008) expanded the definition of "business entity," by prohibiting contracting with business entities that have contributed more than \$ 300.00 to legislative leadership committees and municipal political committees and to a candidate committee or election fund of any candidate for the newly created office of Lieutenant Governor. Effected that same date, Executive Order No. 118 (2008) added redevelopers to the definition of business entities and State redevelopment agencies to the definition of State agencies and institutions. The Division's Chapter 51 Review Unit reviews all certification and disclosure forms received from the Division and other State agencies and State authorities submitted pursuant to affected law and executive order and issues a determination regarding each submission's approval or ineligibility for contract award.

§ 17:12-5.2 Definitions

The following terms and words, when used in this subchapter, shall have the following meanings unless the context indicates otherwise.

"Business entity" means that term as defined by *N.J.S.A. 19:44A-20.17* and Executive Order No. 117 (2008).

"Chapter 51" means P.L. 2005, c. 51, codified as *N.J.S.A. 19:44A-20.13* et seq. (which substantially codified Executive Order No. 134 (2004) and Executive Order No. 18 (2005)).

"Contribution" means a contribution reportable by the recipient under "The New Jersey Campaign Contributions and Expenditures Reporting Act" (*N.J.S.A. 19:44A-1* et seq.), which is defined by the Election Law Enforcement Commission in *N.J.A.C. 19:25-24.1*.

"State agencies and authorities" means all State agencies, including any of the principal departments in the Executive Branch, and any division, board, bureau, office, commission, or other instrumentality within or created by such department and any independent State authority, board, commission, instrumentality, or agency, including any State redevelopment agency.

§ 17:12-5.3 Review of submissions

(a) Any business that is requested to do so by a State agency or authority must submit completed certification and disclosure forms. The Division Review Unit will review the certification and disclosure forms completed by business entities and submitted by State agencies and authorities for compliance to the requirements of the governing statute and executive orders. If the Review Unit cannot make a determination of compliance or non-compliance to the Chapter 51, Executive Order Nos. 117 and 118 (2008) requirements based upon the documentation submitted by the requesting agency or authority, the Review Unit will require the requesting agency or authority to provide clarification or additional information as needed to complete the review and render a determination of eligibility.

(b) If or when the documentation provided to the Review Unit is sufficient and verifiable as meriting approval as necessary to proceed with an award of contract, the Review Unit shall issue a two-year certification to the business entity effective as of the date of approval by the Review Unit and inform the requesting agency or authority of such approval.

(c) A business entity must continue to comply with all statutory and executive order requirements during the two-year certification period. If there are any changes in political contributions or the business entity's ownership structure, the approved business entity must re-submit a complete a new set of forms.

§ 17:12-5.4 Determination of business entity ineligibility

If the Review Unit determines that the business entity has made a disqualifying contribution or that a conflict of interest exists, the Review Unit will advise the State agency or authority in writing of that

circumstance and will identify the basis for the determination. The State agency or authority shall inform the business entity of the ineligibility determination.

§ 17:12-5.5 Reconsideration of determination of ineligibility

If a business entity believes that the determination of ineligibility was in error, it may request reconsideration by the Director. A request for reconsideration of the ineligibility determination must be made in writing to the Director within 10 business days of the business entity's receipt of the State agency's or authority's notice of ineligibility or prior to the deadline specified in that agency's or authority's notice of ineligibility, whichever date is earlier. Upon review of the written record or, if required at the discretion of the Director, an in-person presentation by the business entity in support of its request for reconsideration, and of the information provided to the Director by the Review Unit concerning its determination of ineligibility, the Director shall issue a written decision on the matter under reconsideration.

§ 17:12-5.6 Appeal of Director's determination

A business entity shall have 10 business days following its receipt of the Director's written decision to appeal the Director's decision to the State Treasurer. The Treasurer shall determine whether the matter is contested within the meaning of the Administrative Procedures Act, *N.J.S.A. 52:14B-1 et seq.* and *52:14F-1 et seq.*, and the Uniform Administrative Procedure Rules, *N.J.A.C. 1:1*, and if so, shall refer the matter to the Office of Administrative Law for an initial decision, and thereafter shall issue a final decision. If the State Treasurer determines the matter is not contested, the State Treasurer shall issue a written final determination. The business entity can file an appeal of the Treasurer's final decision with the Appellate Division of New Jersey Superior Court.

§ 17:12-5.7 Public exigency

Pursuant to *N.J.S.A. 19:44A-20.22*, if a State agency or authority determines that a public exigency requires a particular transaction to proceed without Chapter 51 review, or despite potential Chapter 51 ineligibility, the agency or authority shall present the information relating to the exigent circumstances to the Review Unit as soon in the procurement process as possible. The Review Unit will coordinate consideration of the exigent circumstances by the State Treasurer.

SUBCHAPTER 6. DEBARMENT, SUSPENSION AND DISQUALIFICATION OF A PERSON(S)

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§ 17:12-6.1. Purpose and scope

The purpose of this subchapter is to set forth the procedures that apply to debarment, suspension and disqualification of a person or persons from public contracting. This subchapter shall apply to all contracts awarded pursuant to *N.J.S.A. 52:34-6 et seq.* Hearings arising as a result of this subchapter are contested cases subject to the requirements of the Administrative Procedures Act, *N.J.S.A. 52:14B-1 et seq.*, and the Uniform Administrative Procedure Rules, *N.J.A.C. 1:1*.

§ 17:12-6.2. Definitions

The following words and terms, when used in this subchapter, shall have the following meanings unless the context indicates otherwise.

"Affiliates" means persons having a relationship such that any one of them directly or indirectly controls or has the power to control another.

"Attorney General" means the Attorney General of the State of New Jersey or the Attorney General's designee.

"Debarment" means an exclusion from Division of Purchase and Property (Division) contracting, on the basis of a lack of responsibility evidenced by an offense, failure, or inadequacy of performance, for a reasonable period of time commensurate with the seriousness of the offense, failure, or inadequacy of performance.

"Disqualification" means a debarment or a suspension which denies or revokes a qualification to bid or otherwise engage in Division contracting which has been granted or applied for pursuant to statute, or rules and regulations.

"Division contracting" means any arrangement giving rise to an obligation to supply anything or perform any service via a contract issued by the Division of Purchase and Property, other than by virtue of State employment, or to supply anything to or perform any service for a private or public person where the Division provides substantial financial assistance and retains the right to approve or disapprove the nature or quality of the goods or services or the persons who may supply or perform the same.

"Person" means any natural person, company, firm, association, corporation, or other entity.

"Suspension" means an exclusion from Division contracting for a temporary period of time, pending the completion of an investigation or legal proceedings.

§ 17:12-6.3. Causes for debarment of a person(s)

(a) In the public interest, the Director shall debar a person for any of the following causes:

1. Commission of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract, or subcontract thereunder, or in the performance of such contract or subcontract;

2. Violation of the Federal Organized Crime Control Act of 1970, or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, perjury, false swearing, receiving stolen property, obstruction of justice, or any other offense indicating a lack of business integrity or honesty;

3. Violation of the Federal or State antitrust statutes, or of the Federal Anti-Kickback Act (*18 U.S.C. 874, 40 U.S.C. 276b, c*);

4. Violation of any laws governing the conduct of elections of the Federal Government, State of New Jersey or of its political subdivision;

5. Violation of the "Law Against Discrimination" (P.L. 1945, c.169, *N.J.S.A. 10:5-1 et seq.*, as supplemented by P.L. 1975, c.127), or of the act banning discrimination in public works employment (*N.J.S.A. 10:2-1 et seq.*) or of the act prohibiting discrimination by industries engaged in defense work in the employment of persons therein (c.114, L. 1942, *N.J.S.A. 10:1-10 et seq.*);

6. Violation of any laws governing hours of labor, minimum wage standards, prevailing wage standards, discrimination in wages, or child labor;

7. Violation of any laws governing the conduct of occupations or professions or regulated industries;

8. Violation of any laws which may bear upon a lack of responsibility or moral integrity;

9. Willful failure to perform in accordance with contract specifications or within contractual time limits, including, but not limited to, failure to accept purchase orders and maintain prices or any terms and conditions as bid;

10. A record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts, provided that such failure or unsatisfactory performance has occurred within a reasonable time preceding the determination to debar and was caused by acts within the control of the person debarred;

11. Violation of contractual or statutory provisions regulating contingent fees;

12. Any other cause affecting responsibility as a State contractor of such serious and compelling nature as may be determined by purchase and property to warrant debarment, including but not limited to, making a material false representation in a bid, even if such conduct has not been or may not be prosecuted as violations of such laws or contracts;

13. Debarment by some other department or agency in the Executive Branch;

14. Any offer or agreement to pay or to make payment either directly or indirectly, any fee, commission, compensation, gift, gratuity, or other thing of value of any kind to any State officer or employee or special State officer or employee, as defined by *N.J.S.A. 52:13D-13b* and e, in the Department

of the Treasury or any other agency with which such vendor transacts or offers or proposes to transact business, or to any member of the immediate family as defined by *N.J.S.A. 52:13D-13i*, of any such officer or employee, or any partnership, firm, or corporation with which they are employed or associated, or in which such officer or employee has an interest within the meaning of *N.J.S.A. 52:13D-13g*;

15. Failure by a vendor to report to the Attorney General and to the Executive Commission on Ethical Standards in writing forthwith the solicitation of any fee, commission, compensation, gift, gratuity or other thing of value by any State officer or employee or special State officer or employee;

16. Failure by a vendor to report in writing forthwith or failure to obtain a waiver from the Executive Commission on Ethical Standards, who may undertake, directly or indirectly, any private business, commercial or entrepreneurial relationship with, whether or not pursuant to employment, contract or other agreement, express or implied, or sell any interest in such vendor to, any State officer or employee or special State officer or employee having any duties or responsibilities in connection with the purchase, acquisition or sale of any property or services by or to any State agency or any instrumentality thereof, or with any person, firm or entity with which he or she is employed or associated or in which he or she has an interest within the meaning of *N.J.S.A. 52:13D-13g*;

17. Influence or attempt to influence or cause to be influenced, any State officer or employee or special State officer or employee in his or her official capacity in any manner which might tend to impair the objectivity or independence of judgment of said officer or employee;

18. Cause or influence or attempt to cause or influence, any State officer or employee or special State officer or employee to use, or attempt to use, his or her official position to secure unwarranted privileges or advantages for the vendor or any other person.

§ 17:12-6.4. Conditions affecting the debarment of a person(s)

(a) The following conditions shall apply concerning debarment:

1. Debarment shall be made only upon approval of the Director, except as otherwise provided by law.

2. The existence of any of the causes set forth in *N.J.A.C. 17:12-6.3* shall not necessarily require that a person be debarred. In each instance, the decision to debar shall be made within the discretion of the Director, unless otherwise required by law, and shall be rendered in the best interests of the State.

3. All mitigating factors shall be considered in determining the seriousness of the offense, failure or inadequacy of performance and in deciding whether debarment is warranted.

4. The existence of a cause set forth in *N.J.A.C. 17:12-6.3(a)1* through 8 shall be established upon the rendering of a final judgment or conviction including a guilty plea or a plea of nolo contendere by a court of competent jurisdiction or by an administrative agency empowered to render such judgment. In the event an appeal taken from such judgment or conviction results in reversal thereof, the debarment shall be removed upon the request of the debarred person unless other cause for debarment exists.

5. The existence of a cause set forth in *N.J.A.C. 17:12-6.3(a)9* through 12 shall be established by evidence which the Director determines to be clear and convincing in nature.

6. Debarment for the cause set forth in *N.J.A.C. 17:12-6.3(a)13* shall be proper, provided that one of the causes set forth in *N.J.A.C. 17:12-6.3(a)1* through 12 was the basis for debarment by the original debarring agency. Such debarment may be based entirely on the record of facts obtained by the original debarring agency, or upon a combination of such facts and additional facts.

§ 17:12-6.5. Procedures, period of debarment and scope of debarment affecting the debarment of a person(s)

(a) The procedures, the period of debarment, and the scope of debarment to be followed by the Director are explained below:

1. The Director, seeking to debar a person or his or her affiliates, shall furnish such party with a written notice stating that debarment is being considered, setting forth the reasons for the proposed debarment, and indicating that such party will be afforded an opportunity for a hearing if he or she so requests within a stated period of time. All such hearings shall be conducted in accordance with the provisions of the

Administrative Procedures Act. However, where another department or agency has imposed debarment upon a party, the Director may also impose a similar debarment without affording an opportunity for a hearing, provided that the Director furnishes notice of the proposed similar debarment to that party, and affords that party an opportunity to present information in his or her behalf to explain why the proposed similar debarment should not be imposed in whole or in part.

2. Debarment shall be for a reasonable, definitely stated period of time which as a general rule shall not exceed five years. Debarment for an additional period shall be permitted provided that notice thereof is furnished and the party is afforded an opportunity to present information in his or her behalf to explain why the additional period of debarment should not be imposed.

3. Except as otherwise provided by law, a debarment may be removed or the period thereof may be reduced in the discretion of the Director upon the submission of a good faith application under oath, supported by documentary evidence, setting forth substantial and appropriate grounds for the granting of relief, such as newly discovered material evidence, reversal of a conviction or judgment, actual change of ownership management or control, or the elimination of the causes for which the debarment was imposed.

4. A debarment may include all known affiliates of a person, provided that each decision to include an affiliate is made on a case-by-case basis after giving due regard to all relevant facts and circumstances. The offense, failure or inadequacy of performance of an individual may be imputed to a person with whom he or she is affiliated, where such conduct was accomplished within the course of his or her official duty or was effected by him or her with the knowledge or approval of such person.

§ 17:12-6.6. Causes for suspension of a person(s)

In the public interest, the Director shall suspend a person for any cause specified in *N.J.A.C. 17:12-6.3* or upon adequate evidence that such cause exists.

§ 17:12-6.7. Conditions for suspension of a person(s)

(a) The following conditions concerning suspension are to be adhered to:

1. Suspension shall be imposed only upon approval of the Director and upon approval of the Attorney General, except as otherwise provided by law.

2. The existence of any cause for suspension shall not require that a suspension be imposed, and a decision to suspend shall be made at the discretion of the Director and of the Attorney General and shall be rendered in the best interests of the State.

3. Suspension shall not be based upon unsupported accusation, but upon adequate evidence that cause exists or upon evidence adequate to create a reasonable suspicion that cause exists.

4. In assessing whether adequate evidence exists, consideration shall be given to the amount of credible evidence which is available, to the existence or absence of corroboration as to important allegations, and to inferences which may properly be drawn from the existence or absence of affirmative facts.

5. Reasonable suspicion of the existence of a cause described in *N.J.A.C. 17:12-6.3(a)*1 through 8 may be established by the rendering of a final judgment or conviction by a court or administrative agency of competent jurisdiction, by grand jury indictment, or by evidence that such violations of civil or criminal law did in fact occur.

6. A suspension invoked by another agency for any of the causes described in *N.J.A.C. 17:12-6.3* may be the basis for the imposition of a concurrent suspension by the Director, who may impose such suspension without the approval of the Attorney General.

§ 17:12-6.8. Procedures, period of suspension and scope of suspension affecting the suspension of a person(s)

(a) The following provisions regarding procedures, period of suspension and scope of suspension shall be adhered to by the Director:

1. The Director may suspend a person or his or her affiliates, provided that within 10 days after the effective date of the suspension, the Director provides such party with a written notice:
 - i. Stating that a suspension has been imposed and its effective date;
 - ii. Setting forth the reasons for the suspension to the extent that the Attorney General determines that such reasons may be properly disclosed;
 - iii. Stating that the suspension is for a temporary period pending the completion of an investigation and such legal proceedings as may ensue; and
 - iv. Indicating that, if such legal proceedings are not commenced or the suspension removed within 60 days of the date of such notice, the party will be given either a statement of the reasons for the suspension and an opportunity for a hearing if he or she so requests, or a statement declining to give such reasons and setting forth the Director's position regarding the continuation of the suspension. Where a suspension by another agency has been the basis for suspension by the Director, the Director shall note the fact as a reason for suspension.
2. A suspension shall not continue beyond 18 months from its effective date unless civil or criminal action regarding the alleged violation shall have been initiated within that period, or unless debarment action has been commenced. Whenever prosecution or debarment action has been initiated, the suspension may continue until the legal proceedings are completed.
3. A suspension may include all known affiliates of a person provided that each decision to include an affiliate is made on a case-by-case basis after giving due regard to all relevant facts and circumstances. The offense, failure or inadequacy of performance of an individual may be imputed to a person with whom he or she is affiliated, where such conduct was accomplished within the course of his or her official duty or was effectuated by him or her with the knowledge or approval of such person.

§ 17:12-6.9. The extent of debarment, suspension or disqualification

The exclusion from State contracting by virtue of debarment, suspension, or disqualification shall extend to all State contracting and subcontracting within the control or jurisdiction of the Director including any contracts which utilize State funds. When it is determined by the Director to be essential to the public interest, an exception from total exclusion may be made with respect to a particular State contract. A copy of said exception shall be filed with the Attorney General.

§ 17:12-6.10. Prior notice by the Director

Insofar as practicable, prior notice of any proposed debarment or suspension shall be given by the Director to the Attorney General and the State Treasurer.

§ 17:12-6.11. List of debarred, suspended or disqualified persons

The Director shall supply to the State Treasurer a monthly list of all persons having been debarred, suspended, or disqualified in accordance with the procedures prescribed herein. Such list shall at all times be available for public inspection.

§ 17:12-6.12. Director's authority to contract

Nothing contained herein shall be construed to limit the authority of the Director to refrain from contracting within the discretion allowed by law.

SUBCHAPTERS 7 AND 8. (RESERVED) [\(Return to top\)](#)

**SUBCHAPTER 9. DISTRIBUTION AND SUPPORT SERVICES UNIT, SURPLUS COMPUTER
DISTRIBUTION PROGRAM [\(Return to top\)](#)**

§ 17:12-9.1 Description of organization and program

The Division, as the centralized procurement agency for State government, is responsible for the disposal of State government's surplus personal property. The surplus property programs are administered by the Division's Distribution and Support Services Unit, which through public bidding and auctioning, sells or otherwise disposes of the State's surplus personal property. This subchapter sets forth the rules whereby surplus computer-related equipment is made available for use by local governmental entities, boards of education, nonpublic schools, and nonprofit charitable corporations at no cost.

§ 17:12-9.2 Purpose and intent

The Division has been authorized, pursuant to P.L. 1999, c. 194 (supplementing P.L. 1944, c.112 (*N.J.S.A. 52:27B-1 et seq.*)), to distribute State surplus computer equipment to local governmental units, boards of education, nonpublic schools and nonprofit charitable corporations. The purpose of these regulations is to establish procedures identifying surplus computer equipment eligible for distribution and governing the distribution of such surplus computer equipment to eligible recipients.

§ 17:12-9.3 Definitions

The following words and terms, when used in this subchapter, shall have the following meanings unless the context clearly indicates otherwise.

"Date of availability" means the date that eligible computers and/or peripheral equipment are available for pick up.

"Department" means any Department of the Executive Branch of State government.

"Director" means the Director of the Division of Purchase and Property or the Director's designee.

"Distribution and Support Services (DSS) Unit" refers to a Divisional unit that provides warehousing and distribution services to State and other governmental agencies to meet their product requirements and administers the State's surplus property programs, including the surplus computer distribution programs.

"Division" means the Division of Purchase and Property.

"Eligible computer" means a surplus working computer or central processing unit (CPU), which may include peripherals, such as a mouse, keyboard, monitor, and power cables, that is, a Pentium III-based or equivalent system of recent or current technology, and purged of all user data and software. If transferable under applicable licensing agreements with the manufacturer, an operating system and/or application software may be included or loaded on the CPU.

"Eligible recipient" means local governmental units, boards of education, nonpublic schools and nonprofit charitable corporations, organized pursuant to the New Jersey Nonprofit Corporation Act, *N.J.S.A. 15A:1-1 et seq.*

"Surplus peripheral equipment" means surplus computer accessories not configured in a working computer system and may include printers, monitors, keyboards, mice and/or cables/wires.

"Surplus Property Section" means the segment of the Division's Distribution and Support Services Unit having responsibility for the State's surplus personal property.

§ 17:12-9.4 Procedures

(a) The Director shall make eligible computers and surplus peripheral equipment available to eligible recipients through an initial mailing to all eligible recipients and as provided in this section.

(b) The Surplus Property Section shall be responsible for receipt of eligible computers and surplus peripheral equipment from State Departments and distribution thereof to eligible recipients.

(c) The Surplus Property Section shall advise eligible recipients of the availability/non-availability of eligible computers and/or surplus peripheral equipment on a quarterly basis through a dedicated telephone line and internet posting at www.state.nj.us/treasury/surpluspc. Such internet posting shall include a description of the eligible computer(s) and/or item(s) of surplus peripheral equipment to be available to

eligible recipients and the date of availability. Such internet posting shall be made 60 days prior to the date of availability, which shall be considered a "timely" request.

(d) Eligible recipients having a need for an eligible computer(s) and/or any item(s) of surplus peripheral equipment posted on the internet must advise the Surplus Property Section in writing on their respective letterhead of such interest no later than 30 days prior to the date of availability.

(e) All timely written requests received for an eligible computer(s) and/or any item(s) of surplus peripheral equipment shall be time and date stamped upon receipt by the Surplus Property Section.

(f) Upon the request of the Surplus Property Section, an entity expressing interest in an eligible computer(s) and/or any item(s) of surplus peripheral equipment must provide satisfactory evidence of its status as an eligible recipient. In the case of nonprofit charitable corporations, such evidence shall be proof of organization pursuant to the New Jersey Nonprofit Corporation Act, *N.J.S.A. 15A:1-1 et seq.*

(g) In the event two or more eligible recipients express timely written interest in the same eligible computer(s) and/or item(s) of surplus peripheral equipment, the eligible computer(s) and/or item(s) of surplus peripheral equipment shall be distributed by the Surplus Property Section as follows:

1. If adequate numbers of eligible computer(s) and/or item(s) of surplus peripheral equipment are available, timely written requests from eligible recipients shall be satisfied in their entirety by the Surplus Property Section.

2. If the number of eligible computer(s) and/or item(s) of surplus peripheral equipment available are inadequate to distribute to all eligible recipients, eligible computer(s) and/or item(s) of surplus peripheral equipment shall be distributed on the basis of the order in which timely written requests were first received by the Surplus Property Section, one per eligible recipient.

3. If the number of eligible computers and/or items of surplus peripheral equipment available is greater than the number of eligible recipients providing timely written requests, but fewer than the number necessary to fully respond to each timely written request, one eligible computer and/or one item of surplus peripheral equipment shall be distributed per eligible recipient. Any eligible computer(s) and/or item(s) of surplus peripheral equipment remaining thereafter shall be distributed one per eligible recipient on the basis of the order in which timely written requests were first received by the Surplus Property Section. This procedure shall continue until all eligible computers and/or items of surplus peripheral equipment are distributed.

§ 17:12-9.5 Notification of availability

(a) The Surplus Property Section shall notice an eligible recipient of a determination that an eligible computer(s) and/or item(s) of peripheral equipment are available for pick-up two weeks prior to the date of availability. Such eligible recipient shall advise the Surplus Property Section at the time of such notice of its continued interest in the eligible computer(s) and/or item(s) of surplus peripheral equipment proposed to be distributed to it. An eligible recipient expressing continued interest shall be responsible for picking up the eligible computer(s) and/or item(s) of surplus peripheral equipment at the time and place designated by the Surplus Property Section.

(b) Eligible computer or peripheral equipment not picked up by the eligible recipient at the specified time and place shall be offered to the next eligible recipient in line.

(c) Failure by an eligible recipient expressing continued interest at the time of notice to pick up the eligible computer(s) and/or item(s) of surplus peripheral equipment at the time and place advised shall preclude such eligible recipient from participating in the next quarterly posting of available computer(s) and/or item(s) of surplus peripheral equipment.

§ 17:12-9.6 Condition of eligible computers and items of surplus peripheral equipment distributed hereunder

While the State will make reasonable efforts to ensure that each eligible computer is working, that is, capable of running software, the State makes no express or implied warranty with respect to any eligible computer or peripheral equipment. All eligible computers and/or items of surplus peripheral equipment

shall be offered on an "as is, where is, and with all faults" basis. The State will not be liable for any damages that may result from the use or operation of any transferred computer, peripheral equipment or software.