

Appendix C-1

40A:11-5. Exceptions

Any contract the amount of which exceeds the bid threshold, may be negotiated and awarded by the governing body without public advertising for bids and bidding therefor and shall be awarded by resolution of the governing body if:

(1) The subject matter thereof consists of:

(a) (i) Professional services. The governing body shall in each instance state supporting reasons for its action in the resolution awarding each contract and shall forthwith cause to be printed once, in the official newspaper, a brief notice stating the nature, duration, service and amount of the contract, and that the resolution and contract are on file and available for public inspection in the office of the clerk of the county or municipality, or, in the case of a contracting unit created by more than one county or municipality, of the counties or municipalities creating such contracting unit; or (ii) Extraordinary unspecifiable

services. The application of this exception shall be construed narrowly in favor of open competitive bidding, whenever possible, and the Division of Local Government Services is authorized to adopt and promulgate rules and regulations after consultation with the Commissioner of Education limiting the use of this exception in accordance with the intention herein expressed. The governing body shall in each instance state supporting reasons for its action in the resolution awarding each contract and shall forthwith cause to be printed, in the manner set forth in subsection (1) (a) (i) of this section, a brief notice of the award of such contract;

(b) The doing of any work by employees of the contracting unit;

(c) The printing of legal briefs, records and appendices to be used in any legal proceeding in which the contracting unit may be a party;

(d) The furnishing of a tax map or maps for the contracting unit;

(e) The purchase of perishable foods as a subsistence supply;

(f) The supplying of any product or the rendering of any service by a public utility, which is subject to the jurisdiction of the Board of Public Utilities or the Federal Energy Regulatory Commission or its successor, in accordance with tariffs and schedules of charges made, charged or exacted, filed with the board or commission;

(g) The acquisition, subject to prior approval of the Attorney General, of special equipment for confidential investigation;

(h) The printing of bonds and documents necessary to the issuance and sale thereof by a contracting unit;

(i) Equipment repair service if in the nature of an extraordinary unspecifiable service and necessary parts furnished in connection with such service, which exception shall be in accordance with the requirements for extraordinary unspecifiable services;

- (j) The publishing of legal notices in newspapers as required by law;
- (k) The acquisition of artifacts or other items of unique intrinsic, artistic or historical character;
- (l) Those goods and services necessary or required to prepare and conduct an election;
- (m) Insurance, including the purchase of insurance coverage and consultant services, which exception shall be in accordance with the requirements for extraordinary unspecifiable services;

- (n) The doing of any work by handicapped persons employed by a sheltered workshop;
- (o) The provision of any goods or services including those of a commercial nature, attendant upon the operation of a restaurant by any nonprofit, duly incorporated, historical society at or on any historical preservation site;
- (p) (Deleted by amendment, P.L.1999, c.440.)

- Library and educational goods and services;
- (q) (Deleted by amendment, P.L.2005, c.212).
- (r) The marketing of recyclable materials recovered through a recycling program, or the marketing of any product intentionally produced or derived from solid waste received at a resource recovery facility or recovered through a resource recovery program, including, but not limited to, refuse-derived fuel, compost materials, methane gas, and other similar products;
- (s) (Deleted by amendment, P.L.1999, c.440.)
- (t) Contracting unit towing and storage contracts, provided that all such contracts shall be pursuant to reasonable non-exclusionary and non-discriminatory terms and conditions, which may include the provision of such services on a rotating basis, at the rates and charges set by the municipality pursuant to section 1 of P.L.1979, c.101 (C.40:48-2.49). All contracting unit towing and storage contracts for services to be provided at rates and charges other than those established pursuant to the terms of this paragraph shall only be awarded to the lowest responsible bidder in accordance with the provisions of the "Local Public Contracts Law" and without regard for the value of the contract therefor;
- (u) The purchase of steam or electricity from, or the rendering of services directly related to the purchase of such steam or electricity from a qualifying small power production facility or a qualifying cogeneration facility as defined pursuant to 16 U.S.C.s.796;
- (v) The purchase of electricity or administrative or dispatching services directly related to the transmission of such purchased electricity by a contracting unit engaged in the generation of electricity;

- (w) The printing of municipal ordinances or other services necessarily incurred in connection with the revision and codification of municipal ordinances;
- (x) An agreement for the purchase of an equitable interest in a water supply facility or for the provision of water supply services entered into pursuant to section 2 of P.L.1993, c.381 (C.58:28-2), or an agreement entered into pursuant to P.L.1989, c.109 (N.J.S.40A:31-1 et al.), so long as such agreement is entered into no later than six months after the effective date of P.L.1993, c.381;
- (y) A contract for the provision of water supply services entered into pursuant to P.L.1995, c.101 (C.58:26-19 et al.);
- (aa) The cooperative marketing of recyclable materials recovered through a recycling program;
- (bb) A contract for the provision of wastewater treatment services entered into pursuant to P.L.1995, c.216 (C.58:27-19 et al.);
- (cc) Expenses for travel and conferences;
- (dd) The provision or performance of goods or services for the support or maintenance of proprietary computer hardware and software, except that this provision shall not be utilized to acquire or upgrade non-proprietary hardware or to acquire or update nonproprietary software;
- (ee) The management or operation of an airport owned by the contracting unit pursuant to R.S.40:8-1 et seq.;
- (ff) Purchases of goods and services at rates set by the Universal Service Fund administered by the Federal Communications Commission;
- (gg) A contract for the provision of water supply services or wastewater treatment services entered into pursuant to section 2 of P.L.2002, c.47 (C.40A:11-5.1), or the designing, financing, construction, operation, or maintenance, or any combination thereof, of a water supply facility as defined in subsection (16) of section 15 of P.L.1971, c.198 (C.40A:11-15) or a wastewater treatment system as defined in subsection (19) of section 15 of P.L.1971, c.198 (C.40A:11-15), or any component part or parts thereof, including a water filtration system as defined in subsection (16) of section 15 of P.L.1971, c.198 (C.40A:11-15);
- (hh) The purchase of electricity generated from a power production facility that is fueled by methane gas extracted from a landfill in the county of the contracting unit.
- (2) It is to be made or entered into with the United States of America, the State of New Jersey, county or municipality or any board, body, officer, agency or authority thereof or any other state or subdivision thereof.
- (3) Bids have been advertised pursuant to section 4 of P.L.1971, c.198 (C.40A:11-4) on two occasions and (a) no bids have been received on both occasions in

response to the advertisement, or (b) the governing body has rejected such bids on two occasions because it has determined that they are not reasonable as to price, on the basis of cost estimates prepared for or by the contracting agent prior to the advertising therefor, or have not been independently arrived at in open competition, or (c) on one occasion no bids were received pursuant to (a) and on one occasion all bids were rejected pursuant to (b), in whatever sequence; any such contract may then be negotiated and may be awarded upon adoption of a resolution by a two-thirds affirmative vote of the authorized membership of the governing body authorizing such contract; provided, however, that:

- (i) A reasonable effort is first made by the contracting agent to determine that the same or equivalent goods or services, at a cost which is lower than the negotiated price, are not available from an agency or authority of the United States, the State of New Jersey or of the county in which the contracting unit is located, or any municipality in close proximity to the contracting unit;
- (ii) The terms, conditions, restrictions and specifications set forth in the negotiated contract are not substantially different from those which were the subject of competitive bidding pursuant to section 4 of P.L.1971, c.198 (C.40A:11-4); and
- (iii) Any minor amendment or modification of any of the terms, conditions, restrictions and specifications, which were the subject of competitive bidding pursuant to section 4 of P.L.1971, c.198 (C.40A:11-4), shall be stated in the resolution awarding such contract; provided further, however, that if on the second occasion the bids received are rejected as unreasonable as to price, the contracting agent shall notify each responsible bidder submitting bids on the second occasion of its intention to negotiate, and afford each bidder a reasonable opportunity to negotiate, but the governing body shall not award such contract unless the negotiated price is lower than the lowest rejected bid price submitted on the second occasion by a responsible bidder, is the lowest negotiated price offered by any responsible vendor, and is a reasonable price for such goods or services.

Whenever a contracting unit shall determine that a bid was not arrived at independently in open competition pursuant to subsection (3) of this section it shall thereupon notify the county prosecutor of the county in which the contracting unit is located and the Attorney General of the facts upon which its determination is based, and when appropriate, it may institute appropriate proceedings in any State or federal court of competent jurisdiction for a violation of any State or federal antitrust law or laws relating to the unlawful restraint of trade.

(4) The contracting unit has solicited and received at least three quotations on materials, supplies or equipment for which a State contract has been issued pursuant to section 12 of P.L.1971, c.198 (C.40A:11-12), and the lowest responsible quotation is at least 10% less than the price the contracting unit would be charged for the identical materials, supplies or equipment, in the

same quantities, under the State contract. Any such contract entered into pursuant to this subsection may be awarded only upon adoption of a resolution by the affirmative vote of two-thirds of the full membership of the governing body of the contracting unit at a meeting thereof authorizing such a contract. A copy of the purchase order relating to any such contract, the requisition for purchase order, if applicable, and documentation identifying the price of the materials, supplies or equipment under the State contract and the State contract number shall be filed with the director within five working days of the award of any such contract by the contracting unit. The director shall notify the contracting unit of receipt of the material and shall make the material available to the State Treasurer. The contracting unit shall make available to the director upon request any other documents relating to the solicitation and award of the contract, including, but not limited to, quotations, requests for quotations, and resolutions. The director periodically shall review material submitted by contracting units to determine the impact of such contracts on local contracting and shall consult with the State Treasurer on the impact of such contracts on the State procurement process. The director may, after consultation with the State Treasurer, adopt rules in accordance with the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.) to limit the use of this subsection, after considering the impact of contracts awarded under this subsection on State and local contracting, or after considering the extent to which the award of contracts pursuant to this subsection is consistent with and in furtherance of the purposes of the public contracting laws.

(5) Notwithstanding any provision of law, rule or regulation to the contrary, the subject matter consists of the combined collection and marketing, or the cooperative combined collection and marketing of recycled material recovered through a recycling program, or any product intentionally produced or derived from solid waste received at a resource recovery facility or recovered through a resource recovery program including, but not limited to, refuse-derived fuel, compost materials, methane gas, and other similar products, provided that in lieu of engaging in such public advertising for bids and the bidding therefor, the contracting unit shall, prior to commencing the procurement process, submit for approval to the Director of the Division of Local Government Services, a written detailed description of the process to be followed in securing said services. Within 30 days after receipt of the written description the director shall, if the director finds that the process provides for fair competition and integrity in the negotiation process, approve, in writing, the description submitted by the contracting unit. If the director finds that the process does not provide for fair competition and integrity in the negotiation process, the director shall advise the contracting unit of the deficiencies that must be remedied. If the director fails to respond in writing to the contracting unit within 30 days, the procurement process as described shall be deemed approved. As used in this section, "collection" means the physical removal of recyclable materials from curbside or any other location selected by the contracting unit.

(6) Notwithstanding any provision of law, rule or regulation to the contrary, the contract is for the provision of electricity by a contracting unit engaged in the distribution of electricity for retail sale, or for the provision of administrative or dispatching services related to the transmission of such electricity, provided that in lieu of engaging in public advertising for bids and the bidding therefor, the contracting unit shall, prior to commencing the procurement process, submit for approval to the Director of the Division of Local Government Services, a written detailed description of the process to be followed in securing such services. Such process shall be designed in a way that is appropriate to and commensurate with industry practices, and the integrity of the government contracting process. Within 30 days after receipt of the written description, the director shall, if the director finds that the process provides for fair competition and integrity in the negotiation process, approve, in writing, the description submitted by the contracting unit. If the director finds that the process does not provide for fair competition and integrity in the negotiation process, the director shall advise the contracting unit of the deficiencies that must be remedied. If the director fails to respond in writing to the contracting unit within 30 days, the procurement process, as submitted to the director pursuant to this section, shall be deemed approved.

L.1971, c. 198, s. 5; amended 1975, c. 353, s. 4; 1976, c. 20; 1977, c. 53, s. 2; 1982, c. 208; 1983, c. 209; 1983, c. 331, s. 2; 1985, c. 436; 1986, c. 61; 1987, c. 102, s. 32; 1989, c. 92; 1989, c. 159, s. 1; 1991, c. 142, s. 1; 1991, c. 143, s. 2; 1991, c. 368; 1993, c. 381, s. 4; 1995, c. 101, s. 12; 1995, c. 103, s. 4; 1995, c. 216, s. 11; 1997, c. 387, s. 2; 1999, c. 440, s. 9; 2002, c. 47, s. 8; 2003, c. 150, s. 2; 2005, c. 212, s. 2; 2005, c. 296, s. 1.

40A:11-6. Emergency contracts

Any contract may be negotiated or awarded for a contracting unit without public advertising for bids and bidding therefor, notwithstanding that the contract price will exceed the bid threshold, when an emergency affecting the public health, safety or welfare requires the immediate delivery of goods or the performance of services; provided that the awarding of such contracts is made in the following manner:

- a. The official in charge of the agency wherein the emergency occurred, or such other officer or employee as may be authorized to act in place of that official, shall notify the purchasing agent, a supervisor of the purchasing agent, or a designated representative of the governing body, as may be appropriate to the form of government, of the need for the performance of a contract, the nature of the emergency, the time of its occurrence and the need for invoking this section. If that person is satisfied that an emergency exists, that person shall be authorized to award a contract or contracts for such purposes as may be necessary to respond to the emergent needs. Such notification shall be reduced to writing and filed with the purchasing agent as soon as practicable.
- b. Upon the furnishing of such goods or services, in accordance with the terms of the contract, the contractor furnishing such goods or services shall be entitled to be paid therefor and the contracting unit shall be obligated for said payment. The governing body of the contracting unit shall take such action as shall be required to provide for the payment of the contract price.
- c. The Director of the Division of Local Government Services in the Department of Community Affairs shall prescribe rules and procedures to implement the requirements of this section.
- d. The governing body of the contracting unit may prescribe additional rules and procedures to implement the requirements of this section.

L.1971, c. 198, s. 6; amended 1975, c. 353, s. 5; 1977, c. 53, s. 3; 1979, c. 350, s. 3; 1985, c. 60, s. 3; 1985, c. 469, s. 8; 1999, c. 440, s. 10.

Appendix C-3

Emergency Procedures

N.J.S.A. 40A:11-6(a)

A. The official in charge of the agency wherein the emergency occurred, or such other officer or employee as may be authorized to act in place of that official, shall notify the purchasing agent, a supervisor of the purchasing agent, or a designated representative of the governing body, as may be appropriate to the form of government, of the need for the performance of a contract, the nature of the emergency, the time of its occurrence and the need for invoking this section. If that person is satisfied that an emergency exists, that person shall be authorized to award a contract or contracts for such purposes as may be necessary to respond to the emergent needs. Such notification shall be reduced to writing and filed with the purchasing agent as soon as practicable.

Appendix C-4

Emergency Demolition

Construction Official, Fire Marshal and/or Director of Public Works declares the emergency demolition.

Re: N.J.A.C. U.C.C. 5:23-2:23

Unsafe structures

- (a) All buildings or structures that shall become unsafe, or unsanitary, or that contain deficient or blocked exitway facilities, or which constitute a fire hazard or are otherwise dangerous to human life or the public welfare, or that by reason of illegal or improper use or occupancy shall be deemed unsafe buildings or structures, shall be taken down and removed or made safe and secure.
- (b) A vacant building that is unguarded or open at door or window shall be deemed a fire hazard and unsafe within the meaning of this chapter.

1. Examination and record of damaged structure: The appropriate subcode official shall examine every building or structure reported as dangerous, unsafe structurally, unsanitary or constituting a fire hazard and shall prepare a report to be filed in a docket of unsafe structures and premises, stating:

- (a) the use of the structure
- (b) the nature of the hazard
- (c) the nature and estimated amount of damages, if any, caused by collapse or failure.

2. Notice of unsafe structure: If an unsafe or unsanitary condition is found in a building or structure, the construction official shall serve a written notice (a) describing the building or structure deemed unsafe (b) and specifying the required repairs or improvements to be made to render the building or structure safe and secure, or requiring the unsafe building or structure or portion thereof to be vacated or demolished within a stipulated time.

Appendix C-5

Extraordinary Unspecifiable (EUS)

Authorization Code: N.J.S.A. 40A:1102

Extraordinary Unspecifiable Services are defined as:

Services which are specialized and qualitative in nature requiring expertise,

Extensive training and proven reputation in the field of endeavor.

If specification can be drafted properly, services cannot be said to be qualitative.

If they can be reflected precisely in exact specifications, services are not unspecifiable.

Appendix C-5a

STANDARD CERTIFICATION DECLARATION FOR AN EXTRAORDINARY UNSPECIFIABLE SERVICE

TO: Members of the Governing Body

FROM:

Name and Title of the Contracting Unit's Designated Administrative Official

DATE:

SUBJECT: This is a contract for _____

This is to request your approval of a resolution authorizing a contract to be

executed as follows: _____

Firm:

Cost:

Duration: Purpose: _____

This is to request an award of a contract without the receipt of formal bids as an Extraordinary Unspecifiable Service [N.J.S.A. 40A:11-5(1)(a)(ii) and N.J.A.C. 5:34-2.3(b)]. I do hereby certify to the following:

1. **Provide a clear description of the nature of the work to be done.** *(Provide a complete description)*
2. **Describe in detail why the contract meets the provisions of the statute and rules:**
(Do not just rewrite or paraphrase the statute or rule, or merely state a desire to have a reliable job performed — provide a complete explanation. However, pursuant to N.J.S.A. 40A:11-5(1)(m), it is permissible by law that insurance contracts and/or services can cite the statutory provision)
3. **The service(s) is of such a specialized and qualitative nature that the performance of the service(s) cannot be reasonably described by written specifications because:**
(Describe why it is "qualitative in nature requiring the need for expertise, extensive training and proven reputation". Provide a complete explanation why it is not reasonably possible to draft specifications Please note this provision does not apply to insurance contracts and/or services and should thus be marked as non-applicable.)
4. **Describe the informal solicitation of quotations:**
(List vendors contacted, prices and terms provided. If this has not been done explain in detail). The lowest quotation is: (If no quotation(s) is received, explain why in detail)

5. **I have reviewed the rules of the Division of Local Government Services pursuant to N.J.A.C. 5:34-2.1 et seq. and certify that the proposed contract may be considered an extraordinary unspecifiable service in accordance with the requirements thereof.**

Respectfully,

Name _____
(Signature)

Title

(Original to be retained by governing body's Clerk with the affirmed copy of the resolution; signed duplicate to be kept by appropriate official.)

Appendix C-6

LOCAL PUBLIC CONTRACTS LAW APPLICATION OF N.J.A.C. 5:30-11.1 ET SEQ.

SUBCHAPTER 11. CHANGE ORDERS AND OPEN-END CONTRACTS

5:30-11.1 Application, compliance and penalties

- (a) Unless specifically stated to the contrary, the rules in this subchapter apply to all local government agencies that are encompassed by the definition of contracting unit in N.J.S.A. 40A:112(1) by whatever name called, and referred to in this subchapter as contracting units.
- (b) Every governing body and chief executive officer shall take all steps necessary so that all officials and employees shall be aware of and comply with the requirements of these rules.

5:30-11.2 Definitions

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

"Change order" means a properly prepared document authorized by the governing body which directs and authorizes a vendor providing goods or performing services to a contracting unit pursuant to a contract awarded by governing body resolution to change the quantity or character of goods provided or services performed from that originally specified or estimated and to correspondingly change the payment due therefore.

"Chief executive officer" means the elected or appointed individual with the highest level of administrative authority of the contracting unit. **In** the case of a municipality, this may refer to the mayor as appropriate to the form of government; in the case of a county, the director of a board of chosen freeholders, county executive, or county manager as appropriate to the form of government; in the case of an authority, the chair of the authority; and, in the case of a fire district, the president or other presiding officer of the board of fire commissioners.

"Open-end contracts" means those contracts for which price bids were solicited on a unit basis because exact quantities needed were not known at the time bids were sought. Such contracts, when advertised and awarded, must include a minimum and a maximum number of units that can be ordered for each item under the contract. Zero is an acceptable minimum. Orders placed under such open-end contracts shall not be considered as change orders for purposes of this section, but shall be subject to the requirements specified in N.J.A.C. 5:30-11.10. Examples include, but are not limited to, blacktopping and office supplies such as stationery.

5:30-11.3 General requirements for all change orders

- (a) No changes in quantities, work performed, services rendered, materials, supplies or equipment delivered or provided shall be authorized, permitted or accepted except by the procedures established herein. All change orders unless otherwise stated in this subchapter shall be subject to the following:

1. Each change order shall be in writing and shall be numbered consecutively (beginning with number one) and attached to the original purchase order or contract for each project.

2. Change orders which result in payment reduction below the originally contracted price may be made by locally established procedure, provided that any change orders increasing cost on the same contract shall include reference to such reductions.
3. Quantities of items or work shall not be changed in such a manner as to nullify the effect of the competitive determination of lowest responsible bidder which was made at the time of contract award, if at said time the changes could have been reasonably foreseen.
4. Responsibility required by these rules to be exercised specifically by the governing body, including authorization of change orders, shall not be delegated except for minor field (site) modifications pursuant to N.J.A.C. 5:30-11.4.
5. Change orders may be executed by the representative appointed by the governing body but the responsibility for the authorization of change orders shall not be delegated by the governing body except for minor field (site) modifications pursuant to N.J.A.C. 5:3011.4.
6. Change orders shall be used to change the number of units or items originally advertised and contracted for, provided that:
 - i. Unit prices or a price methodology were sought in the original specifications and included in the contract;
 - ii. The original specification and the contract included a provision that the unit prices could be so used; and
 - iii. If (a)6i and ii above were not contained in the original specification, a change order shall not be issued.
7. Change orders shall not be used to substantially change the quality or character of the items or work to be provided, inasmuch as such would have been a determining factor in the original bidding.
8. Change orders shall not serve the purpose of escalation clauses and, therefore, shall not be utilized to effectuate upward price adjustments.
9. Total number of change orders executed for a particular contract shall not cause the originally awarded contract price to be exceeded by more than 20 percent unless otherwise authorized by these rules.
10. If proposed change orders do exceed the 20 percent limitation of (a)9 above, no work shall be performed or purchases made until the procedures of N.J.A.C. 5:30-11.9 have been completed. If the governing body determines issuance of the change order is not justifiable, a new contract shall be executed in accordance with the Local Public Contracts Law.
11. Before authorizing any change orders resulting in additional expenditures, the availability of funds shall be certified in writing by the chief financial officer or certifying finance officer, as appropriate.
12. The 20 percent limitation of (a)9 above shall not apply to emergency situations as defined within N.J.S.A. 40A:11-6.
13. Change order authorizations shall not be withheld until the completion of the entire project.

5:30-11.4 Procedures for minor field (site) modifications

The governing body shall be required to authorize all change orders, except that minor field (site) modifications (for example, additional fill stone needed, modifications of footings, additional rock blasting) may be authorized, provided that they do not affect the overall scope of work of the contract, by the designated representative of the governing body. These change orders shall result only in minor price increases to the originally awarded contract price.

5:30-11.5 General procedures for change orders

- (a) The governing body approval process for change orders shall be as follows:
1. The chief executive officer of the contracting unit or his or her designee shall file with the governing body a request for the change order, stating the facts involved and indicating that the proposed change order may be allowed under these rules. If the request and justification are prepared by other than an official of the contracting unit, they must be countersigned by the chief executive officer or his or her designee.
 2. The governing body shall take such steps as it may find appropriate to assure that a change is necessary and that the work will be completed.
 3. The governing body shall then pass a resolution authorizing a written amendment to a contract covering the change(s) to be made. The exact form of this amendatory contract shall be at the discretion of the contracting unit attorney.
 4. The resolution described in (a)3 above shall be passed before execution of the change order. No work shall be performed or purchases made on the involved phase of the contract until the resolution is passed.

5:30-11.6 Change orders for professional services and extraordinary unspecifiable services

- (a) This section shall apply only to change orders for professional and extraordinary, unspecifiable services contracts.
- (b) In case of conflict with the general requirements of N.J.A.C. 5:30- 11.3, the specific language of this section shall prevail but, otherwise, the requirements of N.J.A.C. 5:30-11.3 shall be satisfied.
- (c) Changes should be within the scope of activities of the original contract, and not for the purpose of undertaking new or different work or projects. Changes in payments for activities within the scope of activities of the contract shall be in accordance with a schedule of specific charges or rates contained in the contract and shall be effectuated by a written change order authorized by the governing body. If such a schedule is not included in the contract, the contract should be amended to provide for same.
- (d) The 20 percent limitation of N.J.A.C. 5:30-11.3 (a)9 shall not apply to professional and consultant contracts.
- (e) If the change is not within the scope of activities of the original contract and the contract was awarded without competitive bidding being required by law or rule, as is the case for professional services and certain authorized extraordinary unspecifiable services in accordance with N.J.S.A. 40A:11-5 (1)(a)(0), any change beyond the original scope of activities shall be made by amendatory contract approved by the governing body.

5:30-11.7 Change orders for materials, supplies and equipment which are part of construction contract

- (a) The requirements of this section shall apply only to change orders for materials, supplies and equipment which are part of construction contracts.
- (b) In case of conflict with the general requirements of N.J.A.C. 5:30- 11.3, the specific language of this section shall prevail but, otherwise, the requirements of N.J.A.C. 5:30-11.3 shall be satisfied.
- (c) Change orders for materials, supplies and equipment items which are part of a contract which is primarily a construction contract shall be processed in accordance with the rules governing construction contracts. Contracts awarded on a unit price basis (including, but not limited to, asphalt overlays, curbing) as an open-end contract shall be handled under the section dealing with open-end contracts. However, contracts awarded for the paving, construction or reconstruction of specifically described streets, parking lots, or sections shall be treated as construction contracts.

5:30-11-13 Change orders for construction, reconstruction and major repair contracts

- (a) The requirements of this section shall apply only to the particular type of contract in question.
- (b) In case of conflict with the general requirements of N.J.A.C. 5:30- 11.3, the specific language of this section shall prevail but, otherwise, the requirements of N.J.A.C. 5:30-11.3 shall be satisfied.
- (c) Change orders for construction, reconstruction and major repair contracts shall be limited to the following types:
 - 1. Unforeseeable problems, which are defined as conditions or circumstances that could not be foreseen at the time the specifications were written and the contract awarded; provided that a substantial amount of the construction would be delayed, which would result in substantial increases in costs above the original contract amount or substantial inconvenience to the public if bidding were to be required; and
 - 2. Minor modifications to effect economies, improve service or resolve minor problems with affected property owners.
- (d) Change orders for construction, reconstruction and major repair contracts shall not be made for the following:
 - 1. Changes that materially expand upon the size, nature or scope of the project as it was originally described in the bid specifications; or
 - 2. Extra work that could reasonably be effectuated by a separately bid contract without unduly disrupting the basic work or imposing adverse cost consequences.

5:30-11.9 Procedures for change orders which exceed 20 percent limitation

- (a) General provisions regarding the procedures for change orders which exceed the 20 percent limitation are as follows:
 - 1. The procedures in this section shall only be followed when a particular change order on any type of contract, except professional and extraordinary unspecifiable service contracts, will cause the total amount of change orders executed for the particular contract to exceed the originally awarded contract price by more than 20 percent. The

purpose of the procedures is to allow for such a change only in limited instances. Such a change shall not be permitted when the factual circumstances make it reasonably possible to execute a new contract for the additional work. Such a change may be allowed, for example, when an unforeseen circumstance or differing site condition is combined with a situation which renders execution of a new contract an unreasonable interference with the efficient completion of the work.

2. Generally such change orders are not justifiable and the ready issuance of them by contracting units would constitute an abuse of these rules.

(b) A written certification justifying the performance of the work or the furnishing of the services which would necessitate issuance of such a change order shall be filed by the contractor with the chief executive officer or designee. This certification shall include an explanation of the factual circumstances which necessitate issuance of the change order; a statement indicating why these circumstances could not have been foreseen; a statement indicating why issuance of the change order would be in the best interests of the contracting unit and would not constitute an abuse of these rules; and, if the nature of the change order is technical, the certification shall include a certified statement from the contractor's appropriate expert, such as an engineer or architect. This statement shall explain in detail the factual circumstances which necessitate issuance of the proposed change order. A rewrite or paraphrase of the rules in this subchapter is not acceptable.

(c) The governing body approval process for change orders which exceed the 20 percent limitation is as follows:

1. The chief executive officer or his or her designee shall file a request for the change order with the governing body. This request shall include a statement indicating why the proposed change may be allowed under this subchapter. A copy of the certification required under (b) above must also be attached to the request.
2. If the certification required pursuant to (b) above includes a certified statement from an engineer or other expert as required by (b) above, the request to the governing body shall also include a statement from the contracting unit's engineer or an official or employee with the appropriate expertise. This statement shall explain in detail the factual circumstances which justify issuance of the proposed change order. A rewrite or paraphrase of the rules in this subchapter is not acceptable.
3. The governing body shall take appropriate steps to assure that the change order is proper and allowable under this subchapter.
4. The governing body shall then pass a resolution authorizing a written amendatory contract to be entered into covering the change(s) to be made. The exact form of this amendatory contract shall be at the discretion of the contracting unit attorney.
5. The resolution described in (c)4 above shall be passed before execution of the change order.
6. The governing body shall cause to be printed once, in an official newspaper, a brief notice indicating the additional amount to be expended, the original contract price, the nature of the original and additional work and why it is necessary to expend the additional funds. A copy of the advertisement shall also be filed with the clerk or secretary of the governing body and be available for inspection by the public.

(d) The clerk or secretary of the governing body of each contracting unit shall report to the Director on an appendix to the contracting unit's annual budget all change orders from the previous fiscal year which exceeded the 20 percent limitation. This report shall be made on a form provided

by the Director. A summary of the report shall be included as supplemental material in the annual audit of the contracting unit.

5:30-11.10 Open-end contracts

(a) The issuance of purchase orders pursuant to an open-end contract shall be considered to be the carrying out of the contract and not a change order. The following requirements shall apply:

1. Purchase orders under open-end contracts shall not be used for purposes such as changing the quality or character of items to be provided, nor to exceed the maximum number(s) of items or units provided for in the original specifications and contract. Such changes would constitute a change order.
2. Each time a purchase order is placed, the contracting agent shall ensure that funds are available for the purchase through either an encumbrance or certification of availability of funds.
3. Purchase orders shall be placed by the contracting agent, subject to such controls or approval requirements as the governing body, chief executive or other administrative officer may lawfully impose.

Appendix C-7

“New Jersey Local Unit Pay-To-Play” Law

Excerpted from Chapter 19, P.L. 2004 (as amended by P.L. 2005, c.51)

N.J.S.A. 19:44A-20.4 et seq.

AN ACT concerning certain campaign contributions by certain business entities and county political party committees, supplementing P.L.1973, c.83 (C.19:44A-1 et seq.), and amending P.L.1973, c.83.

...

19:44A-20.4 Contributors to county committee of political party of elective officers; eligibility for county contracts.

3. Notwithstanding the provisions of any other law to the contrary:

a county, or any agency or instrumentality thereof, shall not enter into a contract having an anticipated value in excess of \$17,500, as determined in advance and certified in writing by the county, agency or instrumentality, with a business entity, except a contract that is awarded pursuant to a fair and open process, if, during the preceding one-year period, that business entity has made a contribution that is reportable by the recipient under P.L.1973, c.83 (C.19:44A-1 et seq.), to any county committee of a political party in that county if a member of that political party is serving in an elective public office of that county when the contract is awarded or to any candidate committee of any person serving in an elective public office of that county when the contract is awarded; and

a business entity that has entered into a contract having an anticipated value in excess of \$17,500 with a county, or any agency or instrumentality thereof, except a contract that is awarded pursuant to a fair and open process, shall not make such a contribution, reportable by the recipient under P.L.1973, c.83 (C.19:44A-1 et seq.), to any county committee of a political party in that county if a member of that political party is serving in an elective public office of that county when the contract is awarded or to any candidate committee of any person serving in an elective public office of that county when the contract is awarded, during the term of that contract.

No such committee shall accept such a contribution from a business entity during the term of its contract with the county.

L.2004,c.19,s.3.

19:44A-20.5 Contributors to municipal committee of political party of elective officers; eligibility for municipal contracts.

4. Notwithstanding the provisions of any other law to the contrary:

a municipality, or any agency or instrumentality thereof, shall not enter into a contract having an anticipated value in excess of \$17,500, as determined in advance and certified in writing by the municipality, agency or instrumentality, with a business entity, except a contract that is awarded pursuant to a fair and open process, if, during the preceding one-year period, that business entity has made a contribution that is reportable by the recipient under P.L.1973, c.83 (C.19:44A-1 et seq.), to any municipal committee of a political party in that municipality if a member of that political party is serving in an elective public office of that municipality when the contract is awarded or to any candidate committee of any person serving in an elective public office of that municipality when the contract is awarded; and

a business entity that has entered into a contract having an anticipated value in excess of \$17,500 with a municipality, or any agency or instrumentality thereof, except a contract that is awarded pursuant to a fair and open process, shall not make such a contribution, reportable by the recipient under P.L.1973, c.83 (C.19:44A-1 et seq.), to any municipal committee of a political party in that municipality if a member of that political party is serving in an elective public office of that municipality when the contract is awarded or to any candidate committee of any person serving in an elective public office of that municipality when the contract is awarded, during the term of that contract.

No such committee shall accept such a contribution from a business entity during the term of its contract with the municipality.

L.2004,c.19,s.4.

19:44A-20.6 Certain contributions deemed as contributions by business entity.

5. When a business entity is a natural person, a contribution by that person's spouse or child, residing therewith, shall be deemed to be a contribution by the business entity. When a business entity is other than a natural person, a contribution by any person or other business entity having an interest therein shall be deemed to be a contribution by the business entity.

L.2004,c.19,s.5.

19:44A-20.7 Definitions relative to certain campaign contributions.

6. As used in sections 2 through 12 of this act:

"business entity" means any natural or legal person, business corporation, professional services corporation, limited liability company, partnership, limited

partnership, business trust, association or any other legal commercial entity organized under the laws of this State or of any other state or foreign jurisdiction;

"interest" means the ownership or control of more than 10% of the profits or assets of a business entity or 10% of the stock in the case of a business entity that is a corporation for profit, as appropriate;

"fair and open process" means, at a minimum, that the contract shall be: publicly advertised in newspapers or on the Internet website maintained by the public entity in sufficient time to give notice in advance of the contract; awarded under a process that provides for public solicitation of proposals or qualifications and awarded and disclosed under criteria established in writing by the public entity prior to the solicitation of proposals or qualifications; and publicly opened and announced when awarded. The decision of a public entity as to what constitutes a fair and open process shall be final.

"State agency in the Legislative Branch" means the Legislature of the State and any office, board, bureau or commission within or created by the Legislative Branch.

L.2004,c.19,s.14; amended 2005, c.51, s.14.

19:44A-20.8 Business entity to provide written certification, ELEC reports.

7. a. Prior to awarding any contract, except a contract that is awarded pursuant to a fair and open process, a State agency in the Legislative Branch, a county, or a municipality shall require the business entity to which the contract is to be awarded to provide a written certification that it has not made a contribution that would bar the award of a contract pursuant to this act.

b. A business entity shall have a continuing duty to report to the Election Law Enforcement Commission any contributions that constitute a violation of this act that are made during the duration of a contract.

L.2004,c.19,s.7; amended 2005, c.51, s.15. **19:44A-20.9**

Repayment of contribution.

8. If a business entity makes a contribution that would cause it to be ineligible to receive a public contract or, in the case of a contribution made during the term of a public contract, that would constitute a violation of this act, the business entity may request, in writing, within 60 days of the date on which the contribution was made, that the recipient thereof repay the contribution and, if repayment is received within those 60 days, the business entity would again be eligible to receive a contract or would no longer be in violation, as appropriate.

L.2004,c.19,s.8.

19:44A-20.10 Violations by business entities, penalties.

9. A business entity which is determined by the Election Law Enforcement Commission to have willfully and intentionally made a contribution or failed to reveal a contribution in violation of this act may be liable to a penalty of up to the value of its contract with the public entity and may be debarred by the State Treasurer from contracting with any public entity for up to five years. L.2004,c.19,s.9.

19:44A-20.11 Penalty for acceptance of unlawful contribution.

10. Any person who is determined by the Election Law Enforcement Commission to have willfully and intentionally accepted a contribution in violation of the provisions of sections 1 through 4 of this act shall be liable to a penalty for each such violation equal to the penalties set forth in subsection e. of section 22 of P.L.1973, c.83 (C.19:44A-22).
L.2004,c.19,s.10.

19:44A-20.12 Construction of act relative to public exigency.

11. Nothing contained in this act shall be construed as prohibiting the awarding of a contract when the public exigency requires the immediate delivery of goods or performance of emergency services as determined by the State Treasurer.

L.2004,c.19,s.11.

19:44A-20.11 Penalty for acceptance of unlawful contribution.

10. Any person who is determined by the Election Law Enforcement Commission to have willfully and intentionally accepted a contribution in violation of the provisions of sections 1 through 4 of this act shall be liable to a penalty for each such violation equal to the penalties set forth in subsection e. of section 22 of P.L.1973, c.83 (C.19:44A-22).

L.2004,c.19,s.10.

19:44A-20.12 Construction of act relative to public exigency.

11. Nothing contained in this act shall be construed as prohibiting the awarding of a contract when the public exigency requires the immediate delivery of goods or performance of emergency services as determined by the State Treasurer. L.2004,c.19,s.11.

Temporary and Executing

12.Nothing contained in this act shall be construed as affecting the eligibility of any business entity to perform a public contract because that entity made a contribution to any committee during the one-year period immediately preceding the effective date of this act.

L.2004,c.19,s.12.

C.19:44A-11.3a Limitations on receipt of contributions, certain, between county committees; violations, penalties.

13. In addition to any other applicable limit prescribed by law, between January 1 and June 30 of each year, a county committee of a political party shall not make a contribution to any other county committee of a political party, nor shall any such county committee accept a contribution from any other county committee during that time period. In addition to any other penalty provided by law, a county committee that willfully and intentionally violates this section, or willfully and intentionally makes a contribution to any candidate or committee with the intent, condition, understanding or belief that the candidate or committee has made or shall make a contribution to another county committee, shall be liable to a penalty equal to four times the amount of the contribution.

14. Section 2 of P.L.1973, c.83 (C.19:44A-22) is amended to read as follows: C.19:44A-22

Violations; civil penalties; forfeiture.

22. a. (1) Except as provided in subsection e. or f., any person, including any candidate, treasurer, candidate committee or joint candidates committee, political committee, continuing political committee, political party committee or legislative leadership committee, charged with the responsibility under the terms of this act for the preparation, certification, filing or retention of any reports, records, notices or other documents, who fails, neglects or omits to prepare, certify, file or retain any such report, record, notice or document at the time or during the time period, as the case may be, and in the manner prescribed by law, or who omits or incorrectly states or certifies any of the information required by law to be included in such report, record, notice or document, any person who proposes to undertake or undertakes a public solicitation, testimonial affair or other activity relating to contributions or expenditures in any way regulated by the provisions of this act who fails to comply with those regulatory provisions, and any other person who in any way violates any of the provisions of this act shall, in addition to any other penalty provided by law, be liable to a penalty of not more than \$3,000.00 for the first offense and not more than \$6,000.00 for the second and each subsequent offense.

(2) No person shall willfully and intentionally agree with another person to make a contribution to a candidate, candidate committee, joint candidates committee, political committee, continuing political committee, political party committee, or legislative leadership committee with the intent, or upon the condition, understanding or belief, that the recipient candidate or committee shall make or have made a contribution to another such candidate or committee, but this paragraph shall not be construed to prohibit a county or municipal committee of a political party from making a contribution or contributions to any candidate, candidate committee, joint candidates committee, political committee, continuing political committee, political party committee, or legislative leadership committee. A finding of a violation of this paragraph shall be made only upon clear and convincing evidence. A person who violates the provisions of this paragraph shall be liable to a penalty equal to four times the amount of the contribution which that person agreed to make to the recipient candidate or committee.

b. Upon receiving evidence of any violation of this section, the Election Law Enforcement Commission shall have power to hold, or to cause to be held under the provisions of subsection d. of this section, hearings upon such violation and, upon finding any person to have committed such a violation, to assess such penalty, within the limits prescribed in subsection a. of this section, as it deems proper under the circumstances, which penalty shall be paid forthwith into the State Treasury for the general purposes of the State.

c. In assessing any penalty under this section, the Election Law Enforcement Commission may provide for the remission of all or any part of such penalty conditioned upon the prompt correction of any failure, neglect, error or omission constituting the violation for which said penalty was assessed.

d. The commission may designate a hearing officer to hear complaints of violations of this act. Such hearing officer shall take testimony, compile a record and make factual findings, and shall submit the same to the commission, which shall have power to assess penalties within the limits and under the conditions prescribed in subsections b. and c. of this section. The commission shall review the record and findings of the hearing officer, but it may also seek such additional testimony as it deems necessary. The commission's determination shall be by majority vote of the entire authorized membership thereof.

e. Any person who willfully and intentionally makes or accepts any contribution in violation of section 4 of P.L.1974, c.26 (C.19:44A-29) or section 18, 19 or 20 of P.L.1993, c.65 (C.19:44A-11.3, C.19:44A-11.4 or C.19:44A-11.5), shall be liable to a penalty of:

(1) Not more than \$5,000.00 if the cumulative total amount of those contributions is less than or equal to \$5,000.00;

(2) Not more than \$75,000.00 if the cumulative total amount of those contributions was more than \$5,000.00 but less than \$75,000; and

(3) Not more than \$100,000.00 if the cumulative total amount of those contributions is equal to or more than \$75,000.00.

f. In addition to any penalty imposed pursuant to subsection e. of this section, a person holding any elective public office shall forfeit that public office if the Election Law Enforcement Commission determines that the cumulative total amount of the illegal contributions was more than \$50,000.00 and that the violation had a significant impact on the outcome of the election.

g. Any penalty prescribed in this section shall be enforced in a summary proceeding under the "Penalty Enforcement Law of 1999," P.L.1999, c.274 (C.2A:58-10 et seq.).

15. This act shall take effect on January 1, 2006. Approved June 16, 2004.

PROMPT PAYMENT STATUTORY REFERENCES

CHAPTER 96, P.L. 2006

AN ACT concerning the prompt payment of construction contracts and amending P.L.1991,

c.133. BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

1. Section 1 of P.L.1991, c.133 (C.2A:30A-1) is amended to read as follows:

C.2A:30A-1 Definitions.

1. As used in this act:

"Billing" means, in accordance with the terms and definitions of the applicable contract, any periodic payment, final payment, written approved change order or request for release of retainage.

"Prime contractor" means a person who contracts with an owner to improve real property.

"Improve" means: to build, alter, repair or demolish any structure upon, connected with, on or beneath the surface of any real property; to excavate, clear, grade, fill or landscape any real property; to construct driveways and private roadways on real property; to furnish construction related materials, including trees and shrubbery, for any of the above purposes; or to perform any labor upon a structure, including any design, professional or skilled services furnished by an architect, engineer, land surveyor or landscape architect licensed or registered pursuant to the laws of this State.

"Structure" means all or any part of a building and other improvements to real property.

"Owner" means any person, including any public or governmental entity, who has an interest in the real property to be improved and who has contracted with a prime contractor for such improvement to be made. "Owner" shall be deemed to include any successor in interest or agent acting on behalf of an owner.

"Prime rate" means the base rate on corporate loans at large United States money center commercial banks.

"Real property" means the real estate that is improved upon or to be improved upon.

"Subcontractor" means any person who has contracted to furnish labor, materials or other services to a prime contractor in connection with a contract to improve real property.

"Subsubcontractor" means any person who has contracted to furnish labor, materials or other services to a subcontractor in connection with a contract to improve real property.

2. Section 2 of P.L.1991, c.133 (C.2A:30A-2) is amended to read as follows:

C.2A:30A-2 Payment to prime contractor, subsubcontractor, timely payment; exceptions; disputes; resolution.

2. a. If a prime contractor has performed in accordance with the provisions of a contract with the owner and the billing for the work has been approved and certified by the owner or the owner's authorized approving agent, the owner shall pay the amount due to the prime contractor for each periodic payment, final payment or retainage monies not more than 30 calendar days after the billing date, which for a periodic billing, shall be the periodic billing date specified in the contract. The billing shall be deemed approved and certified 20 days after the owner receives it unless the owner provides, before the end of the 20-day period, a written statement of the amount withheld and the

reason for withholding payment, except that in the case of a public or governmental entity that requires the entity's governing body to vote on authorizations for each periodic payment, final payment or retainage monies, the amount due may be approved and certified at the next scheduled public meeting of the entity's governing body, and paid during the entity's subsequent payment cycle, provided this exception has been defined in the bid specifications and contract documents.

b. If a subcontractor or subsubcontractor has performed in accordance with the provisions of its contract with the prime contractor or subcontractor and the work has been accepted by the owner, the owner's authorized approving agent, or the prime contractor, as applicable, and the parties have not otherwise agreed in writing, the prime contractor shall pay to its subcontractor and the subcontractor shall pay to its subsubcontractor within 10 calendar days of the receipt of each periodic payment, final payment or receipt of retainage monies, the full amount received for the work of the subcontractor or subsubcontractor based on the work completed or the services rendered under the applicable contract. In the case of ongoing work on the same project for which partial payments are made, the amount of money owed for work already completed shall only be payable if the subcontractor or subsubcontractor is performing to the satisfaction of the prime contractor or subcontractor, as applicable.

c. If a payment due pursuant to the provisions of this section is not made in a timely manner, the delinquent party shall be liable for the amount of money owed under the contract, plus interest at a rate equal to the prime rate plus 1%. Interest on amounts due pursuant to this section shall be paid to the prime contractor, subcontractor or subsubcontractor for the period beginning on the day after the required payment date and ending on the day on which the check for payment has been drawn. The provisions of this subsection c. shall not apply to any transportation project as defined in section 3 of P.L. 1984, c.73 (C.27:1B-3), if that project receives federal funding and the awarding agency has been notified by the federal government that it will be classified as a high risk grantee pursuant to 49 C.F.R. 18.12.

d. A prime contractor, subcontractor or subsubcontractor may, after providing seven calendar days' written notice to the party failing to make the required payments, suspend performance of a construction contract, without penalty for breach of contract, until the payment required pursuant to this section is made, if the contractor, subcontractor or subsubcontractor: is not paid as required by this section; is not provided a written statement of the amount withheld and the reason for the withholding; and the payor is not engaged in a good faith effort to resolve the reason for the withholding. The provisions of this subsection d. shall not apply to any transportation project as defined in section 3 of P.L. 1984, c.73 (C.27:1B-3), if that project receives federal funding and the application of this provision would jeopardize the funding because the owner could not meet the federal standards for financial management systems as outlined in 49 C.F.R. 18.20.

e. (1) The rights, remedies or protections provided by this section for prime contractors, subcontractors and subsubcontractors shall be in addition to other remedies provided pursuant to any other provision of State law. To the extent that the provisions of this section provide greater rights, remedies or protections for prime contractors, subcontractors and subsubcontractors than other provisions of State law, the provisions of this section shall supersede those other provisions.

(2) No provision of this section shall be construed as restricting in any way the rights or remedies provided by any other applicable State or federal law to an owner who is a resident homeowner or purchaser with respect to the real property being improved.

f. All contracts for the improvement of structures entered into after the effective date of P.L.2006, c.96 between owners, prime contractors, subcontractors or subsubcontractors shall provide that disputes regarding whether a party has failed to make payments required pursuant to this section may be submitted to a process of alternative dispute resolution. Alternative dispute resolution permitted by this section shall not apply to disputes concerning the bid solicitation or award process, or to the

formation of contracts or subcontracts. In any civil action brought to collect payments pursuant to this section, the action shall be conducted inside of this State and the prevailing party shall be awarded reasonable costs and attorney fees.

3. This act shall take effect immediately, but shall not apply to contracts for the improvement of structures entered into before the effective date.

Approved September 1, 2006.

40A:5-17. Approval and payment of claims and required general books of account

Approval and payment of claims and required general books of account. a. Approval of claims. The governing body shall approve or disapprove all claims. In the case of a county, other than a county which has adopted a form of government pursuant to the "Optional County Charter Law," P.L. 1972, c. 154 (C. 40:41A-1 et seq.), the governing body may, by resolution, designate one person who may approve claims between meetings of the governing body. The specified designee shall be chosen from the following positions: the certified financial officer, chief fiscal officer, county administrator, director of finance, treasurer or comptroller. Any approval by the designated person shall be presented to the county governing body at its next meeting for ratification, except that, prior to being paid, such vouchers shall be brought to the attention of the freeholder who has responsibility for the designee. The county governing body may establish a maximum dollar amount for which payment may be approved without prior approval of the governing body. Claims shall be approved or disapproved in the manner prescribed by rules made and promulgated by the bureau unless the governing body adopts an ordinance or resolution, as may be appropriate, in the case of a county, or an ordinance, in the case of a municipality, including the following provisions:

(1) Designating an approval officer with the title of certifying and approval officer;

(2) Prescribing the duties of the approval officer, including the making of certifications required by 40A:5-16b., ascertaining the existence of proper and sufficient appropriations for the payments to be made and determining that there is legal authority for the payments, evidenced by action of a purchasing department or agent or officer in respect to the goods or services ordered and the incurring of the expense therefor;

(3) Prescribing the procedure for approving and certifying to the proper officer claims for payments and drawing checks therefor;

(4) Prescribing the procedure for certifying approved claims to the governing body and regulating its action of approval or disapproval thereon.

b. Payment of claims. A resolution or an ordinance adopted pursuant to this section may also provide a method of disbursing moneys or payment of claims approved, but if it does not so provide the method shall be as follows:

(1) In the case of a county organized pursuant to the provisions of the "Optional County Charter Law" (P.L. 1972, c. 154; C. 40:41A-1 et seq.), by check issued upon the requisition of and signed by the chief executive officer and countersigned by the treasurer, and in all other counties by check issued upon requisition of the clerk of the board of chosen freeholders, signed by the county treasurer and countersigned by such other officer or officers as are designated by ordinance or resolution of the governing body;

(2) In the case of a municipality, by check drawn on the municipality, signed by the mayor or other chief executive officer and the municipal clerk and countersigned by such other officer or officers as are designated by ordinance.

- c. Required general books of account. The bureau shall prescribe the kind and manner of keeping of general books of account for the financial officers of the local units and said officers shall be required to keep and maintain said books.

Amended by L. 1985, c. 127, s. 1, eff. April 12, 1985.

40A:11-16.2 Partial payments; deposit bonds.

1. Any contract, the total price of which exceeds \$100,000.00, entered into by a contracting unit involving the construction, reconstruction, alteration, repair or maintenance of any building, structure, facility or other improvement to real property, shall provide for partial payments to be made at least once each month as the work progresses, unless the contractor shall agree to deposit bonds with the contracting unit pursuant to P.L.1979, c.152 (C.40A:11-16.1).
L.1979,c.464,s.1; amended 1999, c.440, s.25.

40A:11-50. Process of resolution for construction contract disputes

1. All construction contract documents entered into in accordance with the provisions of P.L.1971, c.198 (C.40A:11-1 et seq.) after the effective date of P.L.1997, c.371 (C.40A:11-50) shall provide that disputes arising under the contract shall be submitted to a process of resolution pursuant to alternative dispute resolution practices, such as mediation, binding arbitration or non-binding arbitration pursuant to industry standards, prior to being submitted to a court for adjudication. Nothing in this section shall prevent the contracting unit from seeking injunctive or declaratory relief in court at any time. The alternative dispute resolution practices required by this section shall not apply to disputes concerning the bid solicitation or award process, or to the formation of contracts or subcontracts to be entered into pursuant to P.L.1971, c.198 (C.40A:11-1 et seq.).

Notwithstanding industry rules or any provision of law to the contrary, whenever a dispute concerns more than one contract, such as when a dispute in a contract involving construction relates to a contract involving design, architecture, engineering or management, upon the demand of a contracting party, other interested parties to the dispute shall be joined unless the arbitrator or person appointed to resolve the dispute determines that such joinder is inappropriate. Notwithstanding industry rules or any provision of law to the contrary, whenever more than one dispute of a similar nature arises under a construction contract, or related construction contracts, upon the demand of a contracting party, the disputes shall be joined unless the arbitrator or person appointed to resolve the dispute determines that the disputes are inappropriate for joinder.

For the purposes of this section, the term "construction contract" means a contract involving construction, or a contract related thereto concerning architecture, engineering or construction management

L.1997, c.371.

Appendix C-9

Procurement Standards

2 PART 200.317 - 326

§200.317 Procurements by states.

When procuring property and services under a Federal award, a state must follow the same policies and procedures it uses for procurements from its non-Federal funds. The state will comply with §200.322 Procurement of recovered *materials* and ensure that every purchase order or other contract includes any clauses required by section §200.326 Contract provisions. All other non-Federal entities, including subrecipients of a state, will follow §§200.318 General procurement standards through 200.326 Contract provisions.

§200.318 General procurement standards.

(a) The non-Federal entity must use its own documented procurement procedures which reflect applicable State, local, and tribal laws and regulations, provided that the procurements conform to applicable Federal law and the standards identified in this part.

(b) Non-Federal entities must maintain oversight to ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

(c)(1) The non-Federal entity must maintain written standards of conduct covering conflicts of interest and governing the actions of its employees engaged in the selection, award and administration of contracts. No employee, officer, or agent may participate in the selection, award, or administration of a contract supported by a Federal award if he or she has a real or apparent conflict of interest. Such a conflict of interest would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in or a tangible personal benefit from a firm considered for a contract. The officers, employees, and agents of the non-Federal entity may neither solicit nor accept gratuities, favors, or anything of monetary value from contractors or parties to subcontracts. However, non-Federal entities may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value. The standards of conduct must provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the non-Federal entity.

(2) If the non-Federal entity has a parent, affiliate, or subsidiary organization that is not a state, local government, or Indian tribe, the non-Federal entity must also maintain written standards of conduct covering organizational conflicts of interest. Organizational conflicts of interest means that because of relationships with a parent company, affiliate, or subsidiary organization, the non-Federal entity is unable or

appears to be unable to be impartial in conducting a procurement action involving a related organization.

(d) The non-Federal entity's procedures must avoid acquisition of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.

(e) To foster greater economy and efficiency, and in accordance with efforts to promote cost-effective use of shared services across the Federal Government, the non-Federal entity is encouraged to enter into state and local intergovernmental agreements or inter-entity agreements where appropriate for procurement or use of common or shared goods and services.

(f) The non-Federal entity is encouraged to use Federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs.

(g) The non-Federal entity is encouraged to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions. Value engineering is a systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lower cost.

(h) The non-Federal entity must award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources. See also §200.213 Suspension and debarment.

(i) The non-Federal entity must maintain records sufficient to detail the history of procurement. These records will include, but are not necessarily limited to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.

(j)(1) The non-Federal entity may use a time and materials type contract only after a determination that no other contract is suitable and if the contract includes a ceiling price that the contractor exceeds at its own risk. Time and materials type contract means a contract whose cost to a non-Federal entity is the sum of:

(i) The actual cost of materials; and

(ii) Direct labor hours charged at fixed hourly rates that reflect wages, general and administrative expenses, and profit.

(2) Since this formula generates an open-ended contract price, a time-and-materials contract provides no positive profit incentive to the contractor for cost control or labor efficiency. Therefore, each contract must set a ceiling price that the contractor exceeds at its own risk. Further, the non-Federal entity awarding such a contract must

assert a high degree of oversight in order to obtain reasonable assurance that the contractor is using efficient methods and effective cost controls.

(k) The non-Federal entity alone must be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to, source evaluation, protests, disputes, and claims. These standards do not relieve the non-Federal entity of any contractual responsibilities under its contracts. The Federal awarding agency will not substitute its judgment for that of the non-Federal entity unless the matter is primarily a Federal concern. Violations of law will be referred to the local, state, or Federal authority having proper jurisdiction.

[78 FR 78608, Dec. 26, 2013, as amended at 79 FR 75885, Dec. 19, 2014; 80 FR 43309, July 22, 2015]

§200.319 Competition.

(a) All procurement transactions must be conducted in a manner providing full and open competition consistent with the standards of this section. In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, or invitations for bids or requests for proposals must be excluded from competing for such procurements. Some of the situations considered to be restrictive of competition include but are not limited to:

(1) Placing unreasonable requirements on firms in order for them to qualify to do business;

(2) Requiring unnecessary experience and excessive bonding;

(3) Noncompetitive pricing practices between firms or between affiliated companies;

(4) Noncompetitive contracts to consultants that are on retainer contracts;

(5) Organizational conflicts of interest;

(6) Specifying only a “brand name” product instead of allowing “an equal” product to be offered and describing the performance or other relevant requirements of the procurement; and

(7) Any arbitrary action in the procurement process.

(b) The non-Federal entity must conduct procurements in a manner that prohibits the use of statutorily or administratively imposed state, local, or tribal geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts state licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criterion

provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

(c) The non-Federal entity must have written procedures for procurement transactions. These procedures must ensure that all solicitations:

(1) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description must not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured and, when necessary, must set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a “brand name or equivalent” description may be used as a means to define the performance or other salient requirements of procurement. The specific features of the named brand which must be met by offers must be clearly stated; and

(2) Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

(d) The non-Federal entity must ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, the non-Federal entity must not preclude potential bidders from qualifying during the solicitation period.

[78 FR 78608, Dec. 26, 2013, as amended at 79 FR 75885, Dec. 19, 2014]

§200.320 Methods of procurement to be followed.

The non-Federal entity must use one of the following methods of procurement.

(a) Procurement by micro-purchases. Procurement by micro-purchase is the acquisition of supplies or services, the aggregate dollar amount of which does not exceed the micro-purchase threshold (§200.67 Micro-purchase). To the extent practicable, the non-Federal entity must distribute micro-purchases equitably among qualified suppliers. Micro-purchases may be awarded without soliciting competitive quotations if the non-Federal entity considers the price to be reasonable.

(b) Procurement by small purchase procedures. Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than the Simplified Acquisition Threshold. If small purchase procedures are used, price or rate quotations must be obtained from an adequate number of qualified sources.

(c) Procurement by sealed bids (formal advertising). Bids are publicly solicited and a firm fixed price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for

bids, is the lowest in price. The sealed bid method is the preferred method for procuring construction, if the conditions in paragraph (c)(1) of this section apply.

(1) In order for sealed bidding to be feasible, the following conditions should be present:

(i) A complete, adequate, and realistic specification or purchase description is available;

(ii) Two or more responsible bidders are willing and able to compete effectively for the business; and

(iii) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

(2) If sealed bids are used, the following requirements apply:

(i) Bids must be solicited from an adequate number of known suppliers, providing them sufficient response time prior to the date set for opening the bids, for local, and tribal governments, the invitation for bids must be publically advertised;

(ii) The invitation for bids, which will include any specifications and pertinent attachments, must define the items or services in order for the bidder to properly respond;

(iii) All bids will be opened at the time and place prescribed in the invitation for bids, and for local and tribal governments, the bids must be opened publicly;

(iv) A firm fixed price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs must be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and

(v) Any or all bids may be rejected if there is a sound documented reason.

(d) Procurement by competitive proposals. The technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. If this method is used, the following requirements apply:

(1) Requests for proposals must be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals must be considered to the maximum extent practical;

(2) Proposals must be solicited from an adequate number of qualified sources;

(3) The non-Federal entity must have a written method for conducting technical evaluations of the proposals received and for selecting recipients;

(4) Contracts must be awarded to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered; and

(5) The non-Federal entity may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort.

(e) [Reserved]

(f) Procurement by noncompetitive proposals. Procurement by noncompetitive proposals is procurement through solicitation of a proposal from only one source and may be used only when one or more of the following circumstances apply:

(1) The item is available only from a single source;

(2) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;

(3) The Federal awarding agency or pass-through entity expressly authorizes noncompetitive proposals in response to a written request from the non-Federal entity; or

(4) After solicitation of a number of sources, competition is determined inadequate.

[78 FR 78608, Dec. 26, 2013, as amended at 79 FR 75885, Dec. 19, 2014; 80 FR 54409, Sept. 10, 2015]

§200.321 Contracting with small and minority businesses, women's business enterprises, and labor surplus area firms.

(a) The non-Federal entity must take all necessary affirmative steps to assure that minority businesses, women's business enterprises, and labor surplus area firms are used when possible.

(b) Affirmative steps must include:

(1) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;

(2) Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;

(3) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority businesses, and women's business enterprises;

(4) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority businesses, and women's business enterprises;

(5) Using the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Minority Business Development Agency of the Department of Commerce; and

(6) Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (1) through (5) of this section.

§200.322 Procurement of recovered materials.

A non-Federal entity that is a state agency or agency of a political subdivision of a state and its contractors must comply with section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act. The requirements of Section 6002 include procuring only items designated in guidelines of the Environmental Protection Agency (EPA) at 40 CFR part 247 that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds \$10,000 or the value of the quantity acquired during the preceding fiscal year exceeded \$10,000; procuring solid waste management services in a manner that maximizes energy and resource recovery; and establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines.

[78 FR 78608, Dec. 26, 2013, as amended at 79 FR 75885, Dec. 19, 2014]

§200.323 Contract cost and price.

(a) The non-Federal entity must perform a cost or price analysis in connection with every procurement action in excess of the Simplified Acquisition Threshold including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, the non-Federal entity must make independent estimates before receiving bids or proposals.

(b) The non-Federal entity must negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration must be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

(c) Costs or prices based on estimated costs for contracts under the Federal award are allowable only to the extent that costs incurred or cost estimates included in

negotiated prices would be allowable for the non-Federal entity under Subpart E—Cost Principles of this part. The non-Federal entity may reference its own cost principles that comply with the Federal cost principles.

(d) The cost plus a percentage of cost and percentage of construction cost methods of contracting must not be used.

§200.324 Federal awarding agency or pass-through entity review.

(a) The non-Federal entity must make available, upon request of the Federal awarding agency or pass-through entity, technical specifications on proposed procurements where the Federal awarding agency or pass-through entity believes such review is needed to ensure that the item or service specified is the one being proposed for acquisition. This review generally will take place prior to the time the specification is incorporated into a solicitation document. However, if the non-Federal entity desires to have the review accomplished after a solicitation has been developed, the Federal awarding agency or pass-through entity may still review the specifications, with such review usually limited to the technical aspects of the proposed purchase.

(b) The non-Federal entity must make available upon request, for the Federal awarding agency or pass-through entity pre-procurement review, procurement documents, such as requests for proposals or invitations for bids, or independent cost estimates, when:

(1) The non-Federal entity's procurement procedures or operation fails to comply with the procurement standards in this part;

(2) The procurement is expected to exceed the Simplified Acquisition Threshold and is to be awarded without competition or only one bid or offer is received in response to a solicitation;

(3) The procurement, which is expected to exceed the Simplified Acquisition Threshold, specifies a “brand name” product;

(4) The proposed contract is more than the Simplified Acquisition Threshold and is to be awarded to other than the apparent low bidder under a sealed bid procurement; or

(5) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the Simplified Acquisition Threshold.

(c) The non-Federal entity is exempt from the pre-procurement review in paragraph (b) of this section if the Federal awarding agency or pass-through entity determines that its procurement systems comply with the standards of this part.

(1) The non-Federal entity may request that its procurement system be reviewed by the Federal awarding agency or pass-through entity to determine whether its system meets these standards in order for its system to be certified. Generally, these reviews must occur where there is continuous high-dollar funding, and third party contracts are awarded on a regular basis;

(2) The non-Federal entity may self-certify its procurement system. Such self-certification must not limit the Federal awarding agency's right to survey the system. Under a self-certification procedure, the Federal awarding agency may rely on written assurances from the non-Federal entity that it is complying with these standards. The non-Federal entity must cite specific policies, procedures, regulations, or standards as being in compliance with these requirements and have its system available for review.

§200.325 Bonding requirements.

For construction or facility improvement contracts or subcontracts exceeding the Simplified Acquisition Threshold, the Federal awarding agency or pass-through entity may accept the bonding policy and requirements of the non-Federal entity provided that the Federal awarding agency or pass-through entity has made a determination that the Federal interest is adequately protected. If such a determination has not been made, the minimum requirements must be as follows:

(a) A bid guarantee from each bidder equivalent to five percent of the bid price. The “bid guarantee” must consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of the bid, execute such contractual documents as may be required within the time specified.

(b) A performance bond on the part of the contractor for 100 percent of the contract price. A “performance bond” is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.

(c) A payment bond on the part of the contractor for 100 percent of the contract price. A “payment bond” is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

§200.326 Contract provisions.

The non-Federal entity's contracts must contain the applicable provisions described in Appendix II to Part 200—Contract Provisions for non-Federal Entity Contracts Under Federal Awards.

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Integrity Bulletin

U.S. Department of Housing and Urban Development
Office of Inspector General

“In government contracting, we can’t afford the luxury of mistakes. You must be aware of what is going on and what you can do to protect both the government and yourself.”

– Federal Acquisition Institute

Procurement & Contracting: Five Ground Rules for Grantees and Subrecipients

Purpose

Goods and services must be procured in an effective manner and in compliance with Federal, State, and local laws. These laws exist to ensure that funds are awarded through fair and open competition and are spent on eligible and reasonably priced goods and services. Although the majority of grantees and subrecipients comply with these rules and regulations, we are issuing this bulletin to assist you in identifying potential weaknesses in procurement and contracting procedures. Weak or nonexistent procurement policies and management oversight can entice some employees to manipulate contracts to their personal benefit and can result in costly, wasteful, or unenforceable contracts. However, the very act of monitoring procurements and contracts has a deterrent effect on fraud and poor management and thereby enhances the integrity of the program.

While the information contained in this bulletin does not supersede previously issued guidance currently in effect, it should serve as a useful tool in highlighting important requirements and establishing self-assessments of your procurement and contracting activities.

Background



al grants are covered either by a new common rule at 2 CFR (Code of Federal Regulations) Part 200, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, or the previous version at 24 CFR Parts 84 and 85 (for grants made before December 14, 2014). Grantees are also required to follow applicable State or local laws on procurement, depending on their location. If there are inconsistencies among Federal, State, or local laws, the strictest of the requirements applies.

Although the administrative procedures concerning procurement may vary, there are several major requirements that should be met consistently. While reviewers must concentrate on administrative compliance, they also should be alert to indications of fraud and abuse. When indications of irregularity are uncovered, additional assessment of the situation may be needed. It is prudent for elected officials and executives to be alert to any controversies or complaints regarding these activities and the staff responsible for them.

Ensure That Five Ground Rules Are in Place

A primary duty of elected officials and executives in regard to procurement and contracts is to ensure that policies and procedures are in place and comply with all Federal, State, and local requirements. Ask any business leader what is the greatest challenge in these times, and the most likely answer will be “to manage costs.” Procurement and contracting are key areas in which grantees can control costs. Generally, elected officials approve the procurement policy, and executives are responsible for executing the policy and ensuring that it is followed. Regardless of whether the executive administers procurement directly, delegates it to other officials or subrecipients, or contracts out the procurement process, the grantee is ultimately responsible. You should ensure that checks and balances are in place to detect and prevent violations of procurement rules and procedures. In other words, internal controls and a quality control system should be in place so you can have assurances that rules are followed. While you must follow all requirements, you will position yourself well for meeting other rules by ensuring that five basics are in place.

1. Maintain Separation of Duties

The most direct way to prevent fraud is to eliminate the opportunity.

The person(s) delegated to do the ordering should be different from the person(s) receiving and accepting the goods and the person(s) paying for the order. When this is not possible due to the limited size of staff or when the process is decentralized, as in the case of an outstationed project manager, additional rules should be used, such as limiting dollar authorizations and periodic reviews by an independent individual. The grantee should ensure that only designated individuals have the authority to make binding contracts. If you have a small staff, you must devise a method for independent oversight. The rule of thumb should be that if an employee touches the money, mail, or goods purchased, he or she should not touch the books.

Example of Inadequate Separation of Duties

- An audit found that all Community Development Block Grant (CDBG)-related mail, including vendor invoices, was opened by a finance director. The director also was responsible for cash receipts and reconciling bank statements. Because this violated the separation of duties principle, the director should have had someone else who didn't have access to the financial records, be responsible for opening and logging in the mail. In addition, bank reconciliations should be done by an employee who is not responsible for cash receipts.

2. Provide Competencies and Training

A best practice for grantees is to have a knowledgeable entity review their procurement policies and procedures to ensure that they meet HUD and Office of Management and Budget requirements. In addition, contracting staff should be sufficiently trained to perform its duties and meet its responsibilities.

Many Federal and State contracting officers have strict training requirements, but these requirements may not always flow down to the local grantee or subrecipient level. Many of the grantee's expenditures go through this process, making it a high-risk area requiring competent and ethical staff that performs at a high level.



For this reason, it is up to the grantee to ensure that a standard is in place and that anyone hired to conduct procurement activities has appropriate training and experience. The grantee should also provide continuing training in procurement and contracting to ensure that its staff keeps up to date on procurement requirements, such as the new 2 CFR Part 200. Training is available from many State agencies, the National Procurement Institute, the Public Contract Institute, or private firms, but it must be tailored to Federal grant requirements.

Example of Poor Policies or Training

- City councilmembers approved a construction contract for \$782,215 for the rehabilitation of 28 residential streets. A month later, the councilmembers approved a change order that increased the contract from \$782,215 to more than \$2.1 million, which allowed the contractor to perform additional construction work on 16 more residential streets. Regulations required that the city make available preaward review procurement documents, such as proposals or invitations for bids, independent cost estimates, etc., when a proposed contract modification changed the scope of a contract or increased the contract amount by more than \$100,000. Although the city obtained approval from councilmembers for the material change order, there was no documentation to show that it performed a cost or price analysis as required by 24 CFR 85.36(f)(1). This condition occurred because the city had policies and procedures that were separate from its implemented program procedures, which did not consider applicable HUD rules and regulations to ensure proper documentation of its program-funded procurement actions. The grantee should have used the HUD-required procurement rules.

3. Insist on Good Record Keeping



Grantees should ensure that policies and procedures are comprehensive regarding the level of documentation to be maintained on procurements and contracts. While outside parties or subrecipients may conduct the procurements, the grantee is responsible for ensuring that all original records are available and readily accessible for audit or other reviews.

While it is not required, you may want to consider requiring that periodic reports on procurement activities be reviewed by management to ensure transparency and integrity in the process. Reviewing these reports may disclose conflicts of interest or other abuses. Reports to consider obtaining are

- **A spend map**, a periodic plan for what is to be bought. Understand what (and how) you and your subrecipient spend.
- **A contracts register** of vendors, contractors, and subcontractors by date and type of procurement (micropurchases, small purchases, requests for proposals, and sole-source and competitive bids), funding source, and amount of the contract, along with a brief description.
- **A Summary of change orders** by contract.
- A report that **cross-checks** vendor addresses and phone numbers with those of employees.
- A report of any **purchases lacking invoices**.

Examples of Poor Record Keeping

- During an audit, a city did not provide complete file documentation for its procurement and expenditure transactions, resulting in many requests for missing documents. After the audit fieldwork ended, the city provided more than 18,000 pages of documentation to support its procurements and expenditures. A

review comparing the work activity logs, provided as support for payments for a drainage cleaning contractor, to the contractor's invoices found that the work activity logs were not complete. The city will need to work with HUD to review the records and determine whether they support the procurements and costs claimed. The grantee should have ensured that it received and maintained all necessary support. In labor hour contracts, the city needed to ensure that it received signed time and attendance reports and that those reports indicated which hours were for which approved activities.

- An audit of a State found that it did not require its contractor to bill by the detailed tasks listed in its \$144 million CDBG Disaster Recovery-funded contract. Since the State allowed the contractor to bill by position and total hours worked, it could not determine what tasks the contractor had completed or whether it had overpaid the contractor for any task. The State should have required the contractor to bill by task.

4. Maximize Competition

Ensuring that procurements are conducted and contracts are awarded in a way that obtains the most competition will serve the agency well. If you encounter any of the issues listed below, you should dig deeper to ensure that procurements are being made properly:



- Use of sole-source contracts,
- Insufficient price or rate quotes from qualified sources,
- Lack of independent cost estimates or cost analyses,
- A failure to rotate vendors on lower priced purchases,
- The use of unreasonably narrow or specific qualification criteria or bid specifications,
- Short timeframes for responding to offers,
- An insufficient number of responsive bidders,
- Overuse of change orders,
- Failure to check government debarment lists,
- Overuse of small purchase contracts,
- Lack of outreach to women and minority business enterprises, and
- An excessive number of small purchase contracts close to the small purchase dollar limit.

Example of Poor Procurement Practices

- An Authority's procurement process for its HOME Investment Partnerships Program had significant problems. The Authority awarded 27 contracts valued at \$1.8 million to 10 contractors during the audit period. The Authority:
 - Accepted faxed bids in the procurement process for four clients. There were two contracts awarded based on a faxed bid. The related payments totaling \$114,014 were unsupported. Regulations at 24 CFR 85.36(d)(2)(ii)(C) state that if sealed bids are used, all bids will be publicly opened at the time and place prescribed in the invitation for bids. The grantee's program manual required sealed bids.

- > Executed a contract for services when different sealed bids were submitted on the same day from the same contractor for the same project, which resulted in an unsupported payment of \$8,000. There was no documentation explaining why the bid awarded was greater than the lowest bid submitted. Regulations at 24 CFR 85.36(d)(2)(ii)(D) state that a contract will be awarded to the lowest responsive and responsible bidder.
- > Paid contractors before inspection and project completion contrary to the Authority's management plan requirements. The Authority's management plan states that the Authority must ensure that work is inspected before making payment to contractors.
- > Did not ensure that the amount of the bid submitted by the contractor equaled the accepted bid amount on the bid summary. The bid form submitted by the contractor listed a bid in both numerical and written form, and the Authority accepted the numerical bid amount. The Authority's bid form states that bid amounts must be stated in both words and figures and that in case of a discrepancy, words will govern.
- > Accepted bids for demolition services when the demolition method was not known at the time the bids were received. Since the demolition method was not known, the Authority could not have determined an accurate cost estimate. Regulations at 24 CFR 85.36(f) state that subgrantees must perform a cost or price analysis in connection with every procurement action. Grantees must make independent estimates before receiving bids or proposals. It was determined later that the demolition work was not done on several units, although the grantee paid for the work.

5. Uphold Ethics and Bar Conflicts of Interest

HUD requires that a written code of standards be included in the procurement policy, and many State and local conflict-of-interest laws also have requirements. Ensure that your guiding principles bar those in positions of trust from personally gaining from transactions and that the process is fair to all seeking to do business with the grantee or subrecipients.



A common problem is the lack of understanding of what “appearances of conflicts” entails. Too often, managers believe that indirect or noncash gifts are not considered a conflict of interest. Examples are vendor or contractor donations to employee fund-raising drives, event tickets, meals, or giveaway gifts like a Thanksgiving turkey or iPad drawing given to an employee-affiliated organization. These gifts could be considered potential conflicts of interest so it's best to be wary of accepting anything of value from a contractor. If you are unsure whether it is legal or creates an appearance of a conflict, seek expert advice.

As a grantee, you have an obligation to not only avoid conflicts of interest yourself, but also to be alert and question real or apparent conflicts by any others, including subrecipients. Conflict-of-interest restrictions also extend to immediate family members, business partners, or organizations where they may be employed or seeking employment.

Ethics also entails maintaining integrity through strong financial controls to avoid embezzlement and theft of assets. During fiscal years 2011 to 2015, the Office of Inspector General (OIG) investigated and obtained 239 convictions of grantee staff members or contractors.

Examples of Ethical Violations

- A grantee, through its subrecipient, administered its CDBG revolving Economic Development Loan programs, including a commercial loan program. A commercial loan of \$200,000 was made at a 2 percent interest rate to relocate several manufacturing businesses into one central location. There was a potential conflict of interest as the loan was made to a local for-profit corporation, the president of which was also on the board of directors of the subrecipient that made and administered the loan on behalf of the city. HUD regulations prohibit participation in the administration of a contract if there is a real or apparent conflict of interest. The grantee should have been aware of and monitor for conflicts of interest between a subrecipient and entities that it supported with grant funds.
- Following an OIG investigation, a former CDBG grant administrator was sentenced to 36 months' probation and ordered to pay restitution to HUD in the amount of \$116,064. Over a 4-year period, the defendant received a salary from a city department as the grant administrator and also formed a company and was its executive director. The defendant awarded several CDBG contracts to this company. He collected a salary from the city as a grant administrator and also collected a salary as the executive director of his company, which was paid using CDBG funds.

In Summary – Stay Alert

Most procurement and contracting problems come to light through complaints, protests, and alertness to unusual circumstances. Be sensitive to any findings on the procurement process by your independent public auditor. Also, be vigilant for any controversies or complaints regarding these activities and the staff members responsible for them. You should understand the types of purchases that are not allowed or exceed needs. Remember, even allowable costs can be disallowed if they are unreasonable or not for an eligible or allowed purpose. While there are many schemes and poor practices in the procurement and contracting areas, following the above basics will give you and your agency an advantage in preventing and detecting fraud and avoiding repayment of funds. If you are in doubt about a situation, don't ignore it. Get advice from your counsel, HUD office, or other experts.

**Serious allegations of fraud should be reported to your local
HUD Office of Inspector General or to the HUD OIG
hotline at <http://www.hudoig.gov/report-fraud>.**