

## **54 N.J.R. 1307(a)**

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### **SPECIAL ADOPTION**

#### **Reporter**

54 N.J.R. 1307(a)

***NJ - New Jersey Register > 2022 > JULY > JULY 5, 2022 > SPECIAL ADOPTION > COMMUNITY AFFAIRS -- DIVISION OF LOCAL GOVERNMENT SERVICES***

#### **Agency**

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COMMUNITY AFFAIRS > DIVISION OF LOCAL GOVERNMENT SERVICES

#### **Administrative Code Citation**

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**Specially Adopted and Concurrently Proposed New Rules: N.J.A.C. 5:34-10**

#### **Text**

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##### **Use of Design-Build Project Delivery for Construction Projects**

Specially Adopted and Concurrently Proposed New Rules Authorized: May 27, 2022, by the Lieutenant Governor Sheila Y. Oliver, Commissioner.

Filed: May 27, 2022, as R.2022 d.078.

Authority: N.J.S.A. 18A:18A-68 and 40A:11-60.

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Concurrent Proposal Number: PRN 2022-091.

Effective Date: May 27, 2022.

Expiration Date: November 23, 2022.

Please submit written comments on the notice of proposal by September 3, 2022, through email to [dlgs@dca.nj.gov](mailto:dlgs@dca.nj.gov) by regular mail to:

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Department of Community Affairs

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For comments submitted through email, please name the subject heading "NJAC 5:34-10: Design-Build Regulations"

The agency specially adopted and concurrently proposed new rules follows:

### **Summary**

The standard method that local governments and boards of education use for procurement and delivery of public works construction projects is "design-bid-build." In the "design-bid-build" process, the contracting unit awards the contract to the lowest responsible bidder that demonstrates the ability to complete the project specified in the design provided in the bid specifications. By contrast, in a design-build project, the contracting unit solicits design proposals from prospective contractors that work in tandem with design professionals and other members of the contractor's design-build team.

Subject to rules promulgated by the Department of Community Affairs (Department), in consultation with the New Jersey Department of Education, P.L. 2021, c. 71, allows government entities subject to either the Local Public Contracts Law (N.J.S.A. 40A:11-1 et seq.), or the Public School Contracts Law (N.J.S.A. 18A:18A-1 et seq.), to use the design-build method of project delivery for construction projects with a cost equal to or exceeding \$ 5,000,000. Pursuant to N.J.S.A. 40A:11-60 and 18A:18A-68, respectively, the within regulations implementing P.L.

2021, c. 71, for applicable local government and school district construction projects took effect upon filing with the Office of Administrative Law and are being concurrently proposed for final adoption.

N.J.A.C. 5:34-10.1 states the purpose and applicability of the design-build rules promulgated by the Department, specifically to establish requirements and procedures for the procurement of design-build contracts by local government contracting units pursuant to Sections 26 through 33 at P.L. 2021, c.71 (N.J.S.A. 40A:11-53 through 40A:11-60) and board of education contracting units pursuant to Sections 34 through 41 at P.L. 2021, c. 71 (N.J.S.A. 18A:18A-61 through 18A:18A-68). These rules provide for contracting units to select design-builders according to the proposal that is most advantageous to the contracting unit, based upon a "best value selection" process premised on a combination of cost and qualitative factors. The solicitation process is divided into two phases: a request for qualifications and a subsequent request for proposals to those contractors prequalified to submit proposals for the project. School facilities projects in a Schools Development Authority (SDA) school district are subject to N.J.A.C. 19:36 in place of this subchapter.

N.J.A.C. 5:34-10.2 defines multiple key terms as used in the subchapter. The term "contracting unit" as used in this subchapter applies to both local governments and boards of education.

N.J.A.C. 5:34-10.3 specifies what a contracting unit must do to authorize solicitation proposals for a construction project utilizing the design-build process. In its authorization to commence the design-build process, the governing body must determine that, when compared to the design-bid-build process, design-build project delivery will facilitate a shorter overall design and construction process including, but not limited to, reducing the likelihood of work stoppages and change orders that would increase project costs. A contracting unit cannot use design-build project delivery for projects that can be reasonably, and in good faith, estimated to have a cost below \$ 5,000,000. However, for purposes of meeting the \$ 5,000,000 threshold, a contracting unit may group more than one project together, so long as those projects are single in character and components of the same work.

N.J.A.C. 5:34-10.4 requires a contracting unit to either contract with a qualified outside firm or designate a qualified employee to provide architectural, engineering, or surveying services on behalf of the contracting unit, as well as provide technical advice, construction review services, and professional expertise on behalf of the contracting unit for the duration of a design-build project. A construction manager may also serve as the contracting unit's on-site representative for the duration of the project, whose services shall include, but need not be limited to, technical support in the area of scheduling, cost estimating, document control, hosting progress meetings, project coordination with design-builder, and inspection of construction during all phases of the design-build project.

N.J.A.C. 5:34-10.5 establishes the responsibilities of the technical review committee, which is a selection committee responsible for reviewing, evaluating, and scoring bidder responses to a contracting unit's request for qualifications (RFQ) and request for proposals (RFP). Before reviewing and evaluating statements of qualifications and proposals, each committee member, and advisor thereof, shall certify that they have no conflict of interest with respect to any of the bidders to be evaluated, any of the key team members, named subcontractors or subconsultants to the bidders, or any of the principals, subsidiaries, or parent companies of such bidders. A contracting unit's qualified purchasing agent (QPA) shall serve in the role of administer the selection process and serve as selection coordinator for the technical review committee, unless the contracting unit does not have a QPA or the contracting unit's QPA is otherwise unable to serve on the committee.

N.J.A.C. 5:34-10.6 establishes the required elements of a request for qualifications along with how contracting units are to solicit bidders' statements of qualification in response thereto. A request for qualifications must furnish sufficient information to allow bidders to prepare informed statements of qualification and be crafted in such a way as to encourage free, fair, and open competition without unfairly or illegally discriminating against otherwise capable bidders. This section also specifies certain evaluation factors that a technical review committee must use in considering submitted statements of qualification and deciding which bidders are prequalified to

receive a request for proposals (RFP). The contracting unit may charge a fee for the qualifications documentation that shall not exceed \$ 50.00 or the cost of reproducing the documentation, whichever is greater.

N.J.A.C. 5:34-10.7 specifies the required elements of a bidder's response to a request for qualifications, which the rules call a "statement of qualifications." This section also specifies certain evaluation factors that a technical review committee must use to review and evaluate each bidder's statement of qualification and determine the relative ability of each such bidder to perform the work under the design-build contract. The committee is further obligated to verify that the bidder, along with other [page=1308] named members of the bidder's proposed design-build team, have Public Works Contractor Registration certificates and are neither debarred under the State's prevailing wage law, nor debarred from receiving Federal government contracts. Key team members shall not be replaced without contracting unit approval. This section also lays out the permissible methodologies by which a technical review committee is to evaluate a bidder's prior performance on the contracting unit's prior design-build projects, if any. The technical review committee shall qualify no fewer than two, but no more than six, of the bidders to submit proposals, with the prequalified bidders notified, in writing. All bidders shall have the right to review statements of qualification submitted to the contracting unit.

N.J.A.C. 5:34-10.8 establishes required criteria for a request for proposals issued by a contracting unit to prequalified bidders, along with the minimum time period to submit a proposal in response thereto. The request for proposals shall be prepared by the contracting unit using a design professional or design official and must be crafted in such a way as to encourage full, free, fair, and open competition without unfairly or illegally discriminating against otherwise capable design-builders. The contracting unit may charge a fee for the request for proposal documentation that shall not exceed \$ 50.00 or the cost of reproducing the documentation, whichever is greater.

N.J.A.C. 5:34-10.9 sets forth the process for prequalified bidders to respond to a request for proposals, the content required to be submitted with the proposal, and the process by which a

technical review committee is to evaluate each proposal. A prequalified bidder's proposal shall consist of a technical proposal and a separate sealed price proposal. Before the deadline for proposal submission, the contracting unit may provide for an optional or mandatory conference at a designated date, time, and location at which prequalified bidders may ask questions and seek clarification concerning any of the information, data, or documents contained within the RFP. The technical evaluation committee shall evaluate each responsive proposal, in accordance with the proposal evaluation criteria and the weight assigned to each, specified in the RFP. Once evaluated, the committee shall total and submit the scores for each technical proposal to the selection coordinator, who shall determine the combined scores for each bidder based on their technical and price proposals. A minimum of 50 percent consideration shall be based on the cost of the price proposal. After the proposals have been evaluated, the selection coordinator shall prepare a report on committee's proposal evaluations and award recommendation, which shall be available to the public at least 48 hours prior to the governing body's award of the contract or when made available to the governing body, whichever is sooner, except that the details of each bidders' respective technical proposals shall not be disclosed.

Before awarding a design-build contract, N.J.A.C. 5:34-10.9 also requires the governing body to determine that there was adequate competition for the contract. The technical review committee shall have considered at least two complete and responsive proposals before the governing body can proceed with a preliminary or final award of the contract. The notice of award shall be final if the governing body accepts a proposal without change, or preliminary if the governing body authorizes further negotiation with the successful design-builder. The governing body shall authorize final award of the contract upon reaching a negotiated agreement with the design-builder. In the event the parties fail to reach a negotiated agreement, then the governing body may authorize a notice of award to be issued to the next highest-ranked bidder. Unless and until a statement proposal is accepted by the governing body, the drawings, specifications, and other information in the proposal shall remain the property of the bidder. Once a proposal is accepted

by the governing body and a notice of award issued, the disclosure of the proposal and information therein, along with ownership of the drawings, specifications, and information therein, shall be determined, in accordance with existing law and the terms of the final contract.

N.J.A.C. 5:34-10.10 sets forth the circumstances under which proposals may be rejected and new proposals solicited. Within 30 days after receiving written notice of non-award, an unsuccessful bidder may request, in writing, to review the proposals submitted, the technical review committee evaluation scores from the selection process, and the final recommendation of award document. Technical proposals shall be redacted to the extent necessary to prevent revealing the trade secrets and proprietary commercial or financial information incorporated into another bidder's technical proposal. The governing body may cancel a notice of final award at any time before the execution of the design-build contract by the contracting unit if the contracting unit deems it advisable to do so in the interest of the contracting unit or the public.

N.J.A.C. 5:34-10.11 establishes criteria for payment of a stipend to eligible bidders submitting responsive but unsuccessful proposals in response to the contracting unit's RFP. The terms and conditions for the payment of a stipend shall be included in the RFQ and RFP.

N.J.A.C. 5:34-10.12 addresses records retention and disclosure requirements for documents relating to the design-build project.

N.J.A.C. 5:34-10.13 states that any firm or individual who makes, or causes to be made, a false, deceptive, or fraudulent statement in its submittal in response to the RFQ or RFP or in the course of any hearing, litigation, mediation, or other proceeding may be disqualified from bidding, suspended, and/or debarred, and/or may be subject to prosecution pursuant to applicable law.

N.J.A.C. 5:34-10.14 disqualifies design professionals and other professional consultants participating in the preparation of an RFQ or an RFP from participating as a bidder, or subconsultant to a bidder, submitting a statement of qualifications in response to the RFQ or a proposal in response to the RFP.

N.J.A.C. 5:34-10.15 details the procedures to be followed for the contracting unit and a successful bidder to execute the contract. No agreement is valid or binding on the contracting unit unless and until it is executed by an appropriately authorized representative of the contracting unit. If the design-builder fails to return the executed contract and other required documents within the time specified by the contracting unit, the design-bidder may take whatever action is appropriate and authorized by law, including, but not limited to, withdrawing or canceling the notice of award to the delinquent bidder and awarding the contract to the next-highest ranked bidder; cancelling the procurement; or proceeding to recover under the bid bond submitted with the price proposal. All contracts executed pursuant to this subchapter shall provide for, among other things, termination for the convenience of the contracting unit and for cause. Subject to the contracting unit's cancellation rights set forth at N.J.A.C. 5:34-10.10(e), upon the successful bidder's submission of all required documentation or materials, as specified in the notice of award, and the contracting unit's acceptance of such documentation, the contracting unit will execute the design-build contract and provide the successful bidder with the fully executed design-build contract.

N.J.A.C. 5:34-10.16 addresses the circumstances under which a design-builder may remove or substitute key team members during the procurement process and post-award.

N.J.A.C. 5:34-10.17 pertains to the design and construction of a design-build project, including matters, such as management, quality control, inspection, project close-out and, for school facilities projects, approval by the State Department of Education for final educational adequacy.

N.J.A.C. 5:34-10.18 governs the process for how a contracting unit evaluates a design-builder's performance on the design-build project. These performance evaluations will be used by the contracting unit in evaluating and scoring bidders as to their prior experience on future contracting unit projects.

N.J.A.C. 5:34-10.19 establishes the process for bidder protests and protests by the design-builder regarding the contracting unit's performance evaluation during the project. This section



includes the process by which a contracting unit must consider requests for informal hearings and issue a decision following an informal hearing. The provisions at N.J.S.A. 40A:11-50 shall govern a design-builder's challenge to a design-build performance evaluation by a contracting unit that is subject to the Local Public Contracts Law.

As the Department has provided a 60-day comment period on this notice of specially adopted and concurrently proposed new rules, this notice is excepted from the rulemaking calendar requirement pursuant to N.J.A.C. 1:30-3.3(a)5.

[page=1309]

### **Social Impact**

The specially adopted and concurrently proposed new rules include measures taken to promote workforce diversity as one of the factors to be considered in prequalifying prospective design-builders. In addition, the rules on prequalifying bidders factor in circumstances where a contracting unit has established set-aside goals for qualified minority, women's, and/or veteran's business enterprises or small business enterprises, pursuant to the Local Public Contracts Law or Public School Contracts Law, as applicable, that could apply to the design-build procurement. Together these provisions constitute a positive social impact as they acknowledge the compelling interest local governments and boards of education have in achieving diversity and helping the growth of firms that often have fewer resources. The rules establish a procurement process that balances the interest in transparency by bidders and the larger public while protecting the proprietary information and trade secrets of design-build firms submitting proposals.

### **Economic Impact**

The specially adopted and concurrently proposed new rules establish procedures to enable a local government or board of education to procure eligible construction projects on a best-value basis by utilizing the design-build process. In fulfilling the Legislature's objective of providing

local governments and boards of education added flexibility versus the traditional design-bid-build method, these rules promote fair competition and overall integrity with respect to procurement and project delivery; benefitting design-build firms along with the taxpayers that are ultimately responsible for funding projects. The extent of information that must be provided to bidders in requests for qualifications and advertisements thereof, along with requests for proposals, aims to provide as much information as possible concerning the project, which will allow for fully informed responses from which a contracting unit can select the most advantageous proposal based on price and other factors.

### **Federal Standards Statement**

A Federal standards analysis is not required because the specially adopted and concurrently proposed new rules are not being proposed in order to implement, comply with, or participate in any program established under Federal law or under a State law that incorporates or refers to Federal law, standards, or requirements.

### **Jobs Impact**

The Department does not anticipate that the specially adopted and concurrently proposed new rules will have a direct impact on the creation or loss of jobs.

### **Agriculture Industry Impact**

The Department does not anticipate that the specially adopted and concurrently proposed new rules would have an impact on the agriculture industry.

### **Regulatory Flexibility Statement**

The specially adopted and concurrently proposed new rules impose recordkeeping requirements on "small businesses," as defined by the New Jersey Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., but only for those small businesses that elect to compete for design-build contracts solicited by local governments and boards of education.

The specially adopted and concurrently proposed new rules specify a 10-year recordkeeping requirement imposed on winning bidders, which term is consistent with potential liability under the statute of repose set at N.J.S.A. 2A:14-1.1 for claims arising from the faulty design, planning, or construction of an improvement to real property. However, it is unlikely that a small business would have to employ professional services to comply with the records retention requirements of a contract under the specially adopted and concurrently proposed new rules. The Department cannot with accuracy ascertain the annual costs to comply with the recordkeeping requirements of the specially adopted and concurrently proposed new rules, as the costs of the recordkeeping involved in design-build procurements, as with other construction procurements, is normally included within the base contract price. However, it is estimated that the document filing, storage, and retrieval costs imposed on the winning awardee of the design build contract by the terms and conditions of the design-build contract, as well as the specially adopted and concurrently proposed new rules, may amount to several thousand dollars over the life of the design-build contract, inclusive of the 10-year storage obligation. However, costs related to document retention could be reduced to the extent that a local government or school district utilizes an electronic procurement platform where documents are submitted and received online. As the document retention and recordkeeping requirements imposed by the specially adopted and concurrently proposed new rules are critical to upholding the fiscal integrity of the bidding and construction process and are necessary to protect local governments and boards of education during and after design and construction, no exemption for a small business awardee of the design build contract would be warranted.

P.L. 2021, c. 71, requires bidders to be classified by the New Jersey Division of Property Management and Construction (DPMC) or the New Jersey Department of Transportation (DOT), where applicable, to perform work on a design-build project for a local government or a board of education. The Legislature intended to ensure the firms competing for a design-build contract have the capacity and capability to perform the work, which helps to protect taxpayers from excessive delays, cost overruns, and poor execution. As such, the Department does not have

the latitude to exempt prospective bidders on a design-build project from the process for obtaining DPMC and/or DOT classification. Moreover, N.J.S.A. 18A:18A-26 through 33 of the Public School Contracts Law requires DPMC classification for bidders on school facilities projects.

Finally, it is worth noting that small businesses that are design-builders or part of a bidder's design-build team could benefit if a contracting unit has a set-aside program for qualified small business enterprises.

### **Housing Affordability Impact Analysis**

The Department does not anticipate that the specially adopted and concurrently proposed new rules would evoke a change in the average costs associated with housing or with the affordability of housing because the rules pertain to the use of design-build project delivery for construction projects by local governments and boards of education.

### **Smart Growth Development Impact Analysis**

The Department does not anticipate that the specially adopted and concurrently proposed new rules would evoke a change in the housing production within Planning Areas 1 or 2, or within designated centers, under the State Development and Redevelopment Plan because the rules pertain to the use of design-build project delivery for construction projects by local governments and boards of education.

### **Racial and Ethnic Community Criminal Justice and Public Safety Impact**

The specially adopted and concurrently proposed new rules will have no impact on pretrial detention, sentencing, probation, or parole policies concerning juveniles and adults in the State. Accordingly, no further analysis is required.

**Full text** of the specially adopted and concurrently proposed new rules follows:

SUBCHAPTER 10. DESIGN-BUILD CONTRACTS

### 5:34-10.1 Purpose and applicability of rules

(a) This subchapter is adopted by the Department of Community Affairs, in consultation with the Department of Education, to establish requirements and procedures for the procurement of design-build contracts by local government contracting units pursuant to sections 26 through 33 of P.L. 2021, c. 71 (N.J.S.A. 40A:11-53 through 40A:11-60) and board of education contracting units pursuant to Sections 34 through 41 at P.L. 2021, c. 71 (N.J.S.A. 18A:18A-61 through 18A:18A-68).

(b) This subchapter provides for contracting units to select design-builders according to the proposal that is most advantageous to the contracting unit, based upon a "best value selection" process premised on a combination of cost and qualitative factors. The rules provide for the following two-phase selection process:

1. The public advertisement of a request for qualifications (RFQ) that describes the design-build project, outlines the scope of work for the project and solicits responses delineating the qualifications of bidders; and

2. The issuance of a request for proposal (RFP) to prequalified bidders, selected on the basis of their responses to the RFQ, which outlines the [page=1310] criteria to be used for selection and the weight that will be given to each of these criteria in the evaluation process, and which solicits a proposal consisting of a technical proposal and a price proposal.

(c) This subchapter shall not apply to school facilities projects in an SDA school district. The procurement of design-build contracts for school facilities projects in an SDA school district shall be subject to the rules promulgated by the New Jersey School Development Authority at N.J.A.C. 19:36. All other school construction projects for which a contracting unit is using design-build project delivery shall be subject to this subchapter.

### 5:34-10.2 Definitions

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

"Acceptance" means the adoption of a resolution by a contracting unit authorizing the execution of a design-build contract.

"Act" means sections 26 through 41 at P.L. 2021, c. 71.

"Best value selection" means a process in which consideration is given to both a price proposal and a technical proposal, and the award of the design-build contract is based upon a combination of price and qualitative considerations pursuant to sections 28 and 36 at P.L. 2021, c. 71, and N.J.A.C. 5:34-10.8, such that the successful bidder is the one whose price bid and technical proposals together are most advantageous to the contracting unit, price, and other factors considered.

"Bidder" means a design-builder submitting a statement of qualifications, or a statement of qualifications and proposal, in response to a request for qualifications or request for proposals for an award of a design-build contract.

"Construction documents" means the plans, specifications, and other documents prepared by the design-builder that set forth in detail the design for, and other necessary requirements relating to, the construction of the design-build project.

"Contract milestones" means the dates identified in the project schedule by which the design-builder must complete certain critical activities to advance the project.

"Contracting unit" means a government entity that enters into contracts pursuant to the Local Public Contracts Law, P.L. 1971, c. 198 (N.J.S.A. 40A:11-1 et seq.), or pursuant to the Public School Contracts Law, P.L. 1977, c. 144 (N.J.S.A. 18A:18A-1 et seq.).

"Delivery system" means the procedure used to develop and construct a project.

"Design-bid-build" means the delivery system used in public projects in which a licensed and prequalified design professional or designated employee develops the project design in its entirety; the contracting unit then solicits bids and awards the contract to the lowest responsible bidder that demonstrates the ability to complete the project specified in the design.

"Design-build contract" means a contract between a contracting unit and a design-builder to provide labor, materials, and other construction services for a public project. A design-build contract may be conditional upon subsequent refinements in scope and price and may permit the contracting unit to make changes in the scope of the project without invalidating the design-build contract.

"Design-build project" means the planning, acquisition, demolition, construction, improvement, alteration, modernization, renovation, reconstruction, or rehabilitation of all or any part of a facility or right-of-way, or of any other personal property necessary for, or ancillary to, any facility or right-of-way, and shall include fixtures, furnishings, and equipment, and shall also include, but is not limited to, site acquisition, site development, architectural and engineering services, construction management, legal services, financing costs, and administrative costs and expenses incurred in connection with the project.

"Design-build project delivery" means a project delivery system that combines all or some portions of the design and construction phases of a construction project into a single contract, including, without limitation, design, regulatory permit approvals, and utility relocation and construction.

"Design-builder" means the entity, whether natural person, partnership, joint stock company, corporation, trust, professional corporation, business association, or other legal business entity or successor, that proposes to design and construct any public project, who possesses a public works contractor registration pursuant to the provisions at P.L. 1999, c. 238 (N.J.S.A. 34:11-56.48 et seq.), and classified by the New Jersey Division of Property Management and

Construction or the New Jersey Department of Transportation, where applicable, to perform work on the project.

"Design official" means an employee of the contracting unit that is both licensed to provide architectural, engineering, and/or surveying services, in accordance with N.J.S.A. 45:3-1 et seq., and P.L. 1938, c. 342 (N.J.S.A. 45:8-27 et seq.), and designated by the contracting unit to be responsible for planning, designing, and observing the construction of a design-build project or projects on behalf of the contracting unit.

"Design professional" means the entity, whether natural person, partnership, joint stock company, corporation, trust, professional corporation, business association, or other legal business entity or successor, that provides licensed and prequalified architectural, engineering, and/or surveying services, in accordance with N.J.S.A. 45:3-1 et seq., and P.L. 1938, c. 342 (N.J.S.A. 45:8-27 et seq.), and that shall be responsible for planning, designing, and observing the construction of the project or projects on behalf of the contracting unit or the design builder.

"Key team member" means an individual identified as having a responsible role in the successful completion of the design-build contract, in the bidder's statement of qualifications and proposal, which response is made part of the contract.

"Legal requirements" means all applicable Federal, State, and local laws, acts, statutes, ordinances, codes, executive orders, rules, and regulations in effect, or hereinafter promulgated, that apply to the design-builder's performance of services or work under the agreement, including, but not limited to, the New Jersey Prevailing Wage Act, P.L. 1963, c. 150 (N.J.S.A. 34:11-56.25 et seq.), the Public Works Contractor Registration Act, P.L. 1999, c. 238 (N.J.S.A. 34:11-56.48 et seq.), and the Construction Industry Independent Contractor Act, P.L. 2007, c. 114 (N.J.S.A. 34:20-1 et seq.), the Occupational Safety and Health Act of 1970, the Soil, Erosion, and Sediment Control Act, as well as any requirements of State, Federal, or local authorities having jurisdiction over the project, as applicable.



"Notice of award" or "NOA" means a written notice from the contracting unit to the bidder prior to award, setting forth the contracting unit's intention to enter into a design-build contract with the bidder.

"Performance specifications" means a document provided in the RFP setting forth a description of an end result, objective, or standard of performance that the design-builder is expected to achieve in designing and constructing the project.

"Prequalification" means the contracting unit's approval of a bidder to submit a statement of proposal in response to a request for proposals for a design-build contract.

"Prequalified bidder" means a bidder designated by the contracting unit, based on a statement of qualifications submitted by the bidder, as eligible to submit a proposal in response to a request for proposals issued by the contracting unit.

"Prescriptive specifications" means a document provided in the request for proposals that contains a description of the materials to be employed and/or the manner in which the work is to be performed that the design-builder is required to follow.

"Price proposal" means a sealed proposal containing the maximum cost of providing the required design and construction and other services described in the RFP, which shall not be exceeded if the contracting unit accepts the proposal without change.

"Proposal" means a technical proposal and price proposal submitted together by a bidder in response to a request for proposals from a contracting unit.

"Proposal evaluation factors" means the requirements for the second phase of the selection process when statements of proposal are reviewed.

"Protest" means a challenge to a decision, statement, action, or alleged inaction of the contracting unit.

"Public highway" means public roads, streets, expressways, freeways, parkways, motorways, and boulevards, including bridges, tunnels, overpasses, underpasses, interchanges, rest areas, express bus roadways, [page=1311] bus pullouts and turnarounds, park-ride facilities, traffic circles, grade separations, traffic control devices, the elimination or improvement of crossings of railroads and highways, whether at grade or not at grade, bicycle and pedestrian pathways, and pedestrian and bicycle bridges traversing public highways.

"Public transportation project" means in connection with public transportation service, passenger stations, shelters, terminals, automobile parking facilities, ferries and ferry facilities, including capital projects for ferry terminals, approach roadways, pedestrian accommodations, parking, docks and other necessary land-side improvements, ramps, track connections, signal systems, power systems, information and communication systems, roadbeds, transit lanes, or rights-of-way, equipment storage, pedestrian walkway, and bridges connecting to passenger stations and servicing facilities, bridges, grade crossings, maintenance facilities, and garage facilities.

"Punchlist" means the list of incomplete or defective work, including work that does not comply with applicable code or legal requirements, to be performed or remedied by the design-builder. Punchlist(s) shall be prepared by the bridging architect in conjunction with the design professional prior to the issuance of the certificate of substantial completion.

"Qualification evaluation factors" means the requirements for the first phase of the selection process when statements of qualification are reviewed, and shall include, but not be limited to: specialized experience, training certification of professional and field workforce, technical competence, capacity to perform, safety modification rating, past performance, and other appropriate factors.

"Ranking" means the process of listing responsive bidders in order of highest to lowest total scores, based upon selection criteria specified in the RFQ and/or RFP.

"Request for proposals" or "RFP" means the document issued by the contracting unit in the second phase of a two-phase selection process that describes the procurement process and forms the basis for the design-build proposals.

"Request for qualifications" or "RFQ" means the document advertised by the contracting unit in the first phase of the two-phase selection process that describes the project in enough detail to allow potential bidders to determine if they wish to compete for a design-build contract and that requests information from bidders regarding the qualifications, experience, and organizational structure of the bidder's proposed design-build team, which information can be used by the contracting unit to prequalify bidders to submit proposals for a design-build contract.

"Schedule" means the schedule prepared and submitted by the bidder in its technical proposal to the contracting unit, wherein the bidder identifies all critical, and certain non-critical, activities, contract milestones, and the projected and actual time periods for completing such activities and contract milestones.

"SDA school district" means a school district that received education opportunity aid or preschool expansion aid in the 2007-2008 school year, as defined at P.L. 2007, c. 260, § 39 (N.J.S.A. 18A:7G-3).

"Selection coordinator" means the administrator of the operations and procedures of the selection process, whose activities shall include, but are not limited to, scheduling of meetings, preparing agendas, recording scores, verifying submittal information, preparing minutes of selection committee meetings, and other similar administrative duties.

"Specification" means a written description included as part of the construction documents, which sets forth the detailed technical and functional characteristics of, or the discrete design for, an item of material, equipment, or work to be incorporated into the design-build project, or a requirement of the work to be performed. A specification may include a statement of any of the contracting unit's requirements and may provide for inspection, testing, or the preparation of a

construction item before procurement. Specifications shall augment and complement the drawings and plans prepared by the design-builder.

"Statement of qualifications" means the document(s) submitted by bidders in response to an RFQ that describes the qualifications and capabilities of the bidder and its key team members to perform the scope of services to be included in a design-build contract.

"Stipend" means the fee paid to a design-builder by a contracting unit to encourage competition.

"Substantial completion" means that point in time in the progress of the design-build project when certain conditions specified by the design-build contract have occurred, including, but not limited to, the issuance of a temporary certificate of occupancy, the creation of a punchlist, and the determination that the design-build project is ready for use or occupancy, in accordance with its intended use.

"Technical review committee" means a selection committee composed of at least a qualified purchasing agent designated as the contracting unit's purchasing agent, the contracting unit's authorized design professional or design official, and the contracting unit's project manager, if this individual is separate from the other aforementioned members, who are responsible for reviewing and evaluating responses by bidders to an RFQ and RFP. If a contracting unit subject to the Local Public Contracts Law does not have a designated purchasing official that is certified as a qualified purchasing agent, then the governing body shall appoint, as applicable to the contracting unit, a business administrator, municipal manager, chief financial officer, or treasurer onto the committee. If a contracting unit subject to the Public School Contracts Law does not have a designated purchasing official that is certified as a qualified purchasing agent, then the board of education shall appoint the school business administrator to serve on the committee. No governing body member shall be appointed to the technical review committee.

"Technical proposal" means the design solutions and other qualitative factors that are provided by a bidder in response to an RFP.

"Transportation project" means the construction or reconstruction of a public highway, public transportation project infrastructure, rail freight infrastructure, or other surface, underground, airborne, or waterborne transportation infrastructure for the movement of people and/or goods.

"Two-phase selection process" means a procurement process in which the first phase consists of prequalifying bidders based on statements of qualification submitted in response to an RFQ, and the second phase consists of the submission of price and technical proposals by bidders in response to an RFP.

"Work" means all design and construction services performed by the design-builder and its team, including providing all material, equipment, tools, and labor, necessary to complete the construction, as described in, and reasonably inferable from, the construction documents and the design-build contract.

#### 5:34-10.3 Authorization to commence design-build process

(a) For a construction project that can be reasonably, and in good faith, estimated to have a cost equal to or exceeding \$ 5,000,000, the governing body of a contracting unit may adopt a resolution to authorize utilization of design-build project delivery in lieu of a design-bid-build delivery system. In its authorization to commence the design-build process, the governing body must determine that, when compared to the design-bid-build process, design-build project delivery will facilitate a shorter overall design and construction process including, but not limited to, reducing the likelihood of work stoppages and change orders that would increase project costs. Design-build project delivery shall not be utilized for projects that cannot be reasonably, and in good faith, estimated to have a cost equal to or exceeding \$ 5,000,000.

(b) For purposes of meeting the minimum monetary threshold at (a) above, a contracting unit may group more than one project together, so long as those projects are single in character and components of the same work.

(c) A resolution adopted pursuant to (a) above shall also establish procedures for the solicitation and award of the design-build contract that are consistent with this subchapter.

(d) No board of education may authorize commencement of a design-build process for a school facilities project until such time as the Department of Education approves the board's application pursuant to N.J.A.C. 6A:26-3 and, if the capital project requires the board to issue bonds, a successful voter referendum or authorization by a municipal governing body or board of estimate, as applicable, to the school district type.

#### 5:34-10.4 Design professional and construction manager for contracting unit

(a) A contracting unit shall either engage a design professional or appoint a design official to provide architectural, engineering, or [page=1312] surveying services on behalf of the contracting unit, as well as provide technical advice, construction review services, and professional expertise on behalf of the contracting unit for the duration of a design-build project.

(b) A contracting unit may appoint a construction manager to serve as the contracting unit's on-site representative for the duration of the project, whose services shall include, but need not be limited to, technical support in the area of scheduling, cost estimating, document control, hosting progress meetings, project coordination with the design-builder, and inspection of construction during all phases of the design-build project.

#### 5:34-10.5 Responsibilities of technical review committee

(a) When the design and construction of a project will be undertaken pursuant to this subchapter, the resolution authorizing the solicitation of a design-build contract shall designate a technical review committee to evaluate statements of qualifications and proposals. The purchasing agent, or the individual appointed if either a contracting unit does not have a designated purchasing official certified as a qualified purchasing agent or the purchasing agent is unable to serve on the committee, shall administer the selection process and serve as selection coordinator for the technical review committee. The contracting unit shall have the

discretion to add additional members to the technical review committee. The contracting unit's attorney may advise the technical review committee.

(b) Each member of the technical review committee shall be responsible for evaluating and scoring the statements of qualifications and proposals submitted by bidders in response to an RFQ or RFP, either separately or together.

(c) The technical review committee may use such advisors as it deems necessary to give opinions on evaluating proposals. The names of such advisors shall be included in the report submitted to the governing body. If a municipality is without a designated purchasing official certified as a qualified purchasing agent and appoints an individual other than their chief financial officer to serve on the technical review committee, the chief financial officer shall serve as an advisor to the committee, unless a conflict of interest pursuant to (f) or (g) below prevents the chief financial officer from serving in that capacity.

(d) Once the statements of qualifications are received and the identity of the bidders is ascertained, the members of the technical evaluation committee will be given a list of all bidders.

(e) Before reviewing and evaluating statements of qualifications and proposals, each committee member, and advisor thereof, shall certify that they have no conflict of interest with respect to any of the bidders to be evaluated, any of the key team members, named subcontractors or subconsultants to the bidders, or any of the principals, subsidiaries, or parent companies of such bidders.

(f) A committee member or advisor shall be deemed to have a conflict of interest if their review and evaluation of statements of qualifications and statements of proposal would violate the Local Government Ethics Law, N.J.S.A. 40A:9-22.1 et seq., or the School Ethics Act, N.J.S.A. 18A:12-21 et seq., as applicable. Any person with a conflict of interest related to the design-build project solicitation shall not participate in the evaluation process or advise technical review committee members.

(g) Notwithstanding the definition of technical review committee, should any of the technical review committee members indicate that a conflict of interest exists once the identity of the bidders is revealed, that member shall not serve on the committee and an appropriate official with sufficient knowledge and expertise to review and evaluate statements of qualifications and statements of proposal shall be appointed instead. If a technical review committee member is discovered to have a conflict of interest, the governing body shall remove the member from the committee.

#### 5:34-10.6 Request for qualifications

(a) The contracting unit shall advertise a solicitation of statements of qualifications from bidders in an official newspaper of the contracting unit, a newspaper with Statewide circulation, and on the contracting unit's official website, if one exists, no less than 30 days prior to the date on which responses to the request are due. The published notice shall contain, at a minimum:

1. A general description of the design-build project;
2. Information on how requests for qualifications may be obtained;
3. The manner of submitting, and the method of receiving, the statement of qualifications; and
4. The time and place at which the statements of qualifications will be received.

(b) Prior to advertising the request for qualifications on a design-build project valued at \$ 12,500,000 or more, or such other threshold as may be established by the Office of the State Comptroller, the contracting unit shall submit the request for qualifications and accompanying documents to the Office of the State Comptroller for review and approval pursuant to N.J.S.A. 52:15C-10.

(c) A request for qualifications must furnish sufficient information to allow bidders to prepare informed statements of qualification. At a minimum, a request for qualifications shall contain the following:



1. A scope of work statement, including:

i. Project type, size, and scope;

ii. Preliminary design documents;

iii. General budget parameters, if any; and

iv. General schedule or delivery requirements;

2. For projects involving vertical construction, a statement that the bidder and, to the extent necessary for the project, key team members and other subcontractors have a current design-build classification from the New Jersey Division of Property Management and Construction (DPMC) in the New Jersey Department of the Treasury;

3. Required minimum classifications and aggregate rating limits to which the bidder and, as applicable, key team members and other subcontractors must be assigned by the New Jersey Department of the Treasury, Division of Property Management and Construction, pursuant to N.J.A.C. 17:19-1; or the New Jersey Department of Transportation pursuant to N.J.A.C. 16:44-3 and 16:44A-3, as applicable to the project;

4. Qualification evaluation factors, which shall include:

i. Experience level and degree of technical competence;

ii. Training of, and certifications held by, the professional and field workforce;

iii. Principal location of the bidder and key team members, to the extent that it would materially impact project delivery;

iv. Performance capability;

v. Certifications, classifications, and ratings possessed by the design-builder, key team members, and other subcontractors as relevant to the project;

vi. Past performance of the individual members of the design-builder's team in their respective capacities, including the architect-engineer and construction members of the team;

vii. Measures taken by the bidder and members of the proposed design-build team to promote workforce diversity with respect to women and minorities; and

viii. Other technical factors; as may be relevant to the project;

5. A statement of the maximum number of bidders to be prequalified to submit a statement of proposal;

6. If the design-build contract is subject to any set-aside goals established by the contracting unit pursuant to P.L. 1985, c. 482 (N.J.S.A. 40A:11-41 et seq.), or P.L. 1985, c. 490 (N.J.S.A. 18A:18A-51 et seq.), as applicable, a statement to that effect; and

7. If the contracting unit is offering a stipend to bidders prequalified to provide a statement of proposal, the terms and conditions for payment thereof.

(d) An RFQ must be crafted in such a way as to encourage free, fair, and open competition without unfairly or illegally discriminating against otherwise capable design-builders. No RFQ may:

1. Require any standard, restriction, condition, or limitation not directly related to the project's purpose, function, or activity;

2. Discriminate on the basis of race, religion, sex, national origin, creed, color, ancestry, age, marital status, affectional or sexual orientation, familial status, liability for service in the Armed Forces of the United States, or nationality;

3. Require in the scope of work statement the furnishing of any "brand name" without allowing an equivalent, except that proprietary goods or services are permitted only if the need for same is directly related to the performance, completion, or undertaking of the project;

4. Require a financial statement to be provided with the statement of qualifications; or

[page=1313] 5. Require that the bidder, or any key team member identified by the bidder, be a resident of, or have their place of business located in, the county or municipality in which the contract will be awarded or performed.

(e) The contracting unit may charge a fee for the qualifications documentation that shall not exceed \$ 50.00 or the cost of reproducing the documentation, whichever is greater.

5:34-10.7 Statements of qualifications; qualification of bidders to submit statements of proposal

(a) Each bidder's statement of qualifications shall contain, at a minimum, the following:

1. An organizational chart of the bidder and the key team members of the proposed design-build team;
2. A list of current construction projects, and construction projects completed within the last five years, on which the bidder and key team members of the proposed design-build team have worked that are of similar size, scope, and complexity to the contracting unit's project, regardless of method of project delivery;
3. A listing of all the contracting unit's public works projects on which the design-builder and proposed design-build team have performed work within the past five years;
4. For transportation projects, the minimum classifications and aggregate rating limits to which the bidder and, as applicable, key team members and other subcontractors have been assigned by the New Jersey Department of Transportation pursuant to N.J.A.C. 16:44-3 and 16:44A-3, as applicable to the project. When a transportation project includes the installation, replacement, or rehabilitation of associated water, sewer, or stormwater infrastructure, the design-build team shall also possess classifications and aggregate rating limits issued by the New Jersey Division of Property Management and Construction in the New Jersey Department of the Treasury (DPMC) that are relevant to such work;

5. For all projects other than transportation projects, documentation that the bidder and, to the extent necessary for the project, key team members and other subcontractors have a current DPMC design build classification and such other DPMC classifications and ratings issued pursuant to N.J.A.C. 17:19-1, as may be necessary for the project;
6. A listing of all public works projects for which a contracting unit has made a determination of prior negative experience with respect to the design-builder or members of its proposed design-build team within the past five years pursuant to N.J.S.A. 40A:11-4 or 18A:18A-4;
7. Training certification of the bidder's professional and field workforce, along with that of the members of the proposed design-build team;
8. Safety experience modification rating (EMR) of the bidder and construction members of its proposed design-build team;
9. Measures taken by the bidder and members of the proposed design-build team to promote workforce diversity with respect to women and minorities;
10. If the contract is subject to any set-aside goals established by the contracting unit pursuant to P.L. 1985, c. 482 (N.J.S.A. 40A:11-41 et seq.), or P.L. 1985, c. 490 (N.J.S.A. 18A:18A-51 et seq.), as applicable, a statement as to whether the design-builder and/or any key team members are a qualified minority business enterprise, a qualified women-owned business enterprise, a qualified small business enterprise, or a qualified veteran-owned business enterprise, as defined pursuant to the applicable law. Documentation supporting such a designation shall accompany the statement;
11. If the design-build contract will be subject to a project labor agreement pursuant to P.L. 2002, c. 44 (N.J.S.A. 52:38-1 et seq.), a statement to that effect;
12. A copy of the bidder's Public Works Contractor Registration certificate, along with a copy of the certificates of the proposed members of the bidder's design-build team required to be registered under the law;

13. A certification that the bidder, along with the bidder's proposed design-build team, including individually named key team members, is in compliance with, and is not currently debarred from awards of State or local contracts for one or more violations of, the New Jersey Prevailing Wage Act, Public Works Contractor Registration Act, and the Construction Industry Independent Contractor Act; and

14. A certification that the bidder, along with the bidder's proposed design-build team including individual key team members, is not debarred from awards of Federal contracts for public work, as defined at N.J.S.A. 52:32-44.1.

(b) The technical review committee shall review and evaluate each bidder's statement of qualification and determine the relative ability of each such bidder to perform the work under the design-build contract. Before evaluating a bidder's statement of qualification, the committee shall:

1. Verify with the Department of Labor and Workforce Development that the bidder and any listed members of the bidder's proposed design-build team, including individually named key team members, that are required to have Public Works Contractor Registration certificates, are current with their respective registrations;

2. Review the Department of Labor and Workforce Development's Prevailing Wage Debarment List to confirm that the bidder and any listed members of the bidder's proposed design-build team, including individually named key team members, are not currently debarred; and

3. Review the Federal government's debarment database to confirm that the bidder and any listed members of the bidder's proposed design-build team, including individually named key team members, and affiliates thereof are not debarred, pursuant to N.J.S.A. 52:32-44.1;

(c) The evaluation of the qualifications of each bidder shall include, but need not be limited to, consideration of the following factors:

1. The level of experience of the bidder and the key team members of its proposed design-build team on design-build projects and/or design-bid-build projects of similar size, scope, and complexity;
2. Training certification of the bidder's professional and field workforce, along with that of the members of the proposed design-build team;
3. Safety experience modification rating (EMR) of the bidder and construction members of its proposed design-build team;
4. Measures taken by the bidder and key team members to promote workforce diversity with respect to women and minorities; and
5. Any other pertinent information necessary to establish the qualifications of the bidder and proposed design-build team to undertake the design-build contract.

(d) The process for evaluating the bidder's prior performance on the contracting unit's prior design-build projects, if any, by a technical review committee shall be specified in the RFQ. Such process shall consist of:

1. A mathematical tabulation and averaging of the scores of all prior performance evaluations within a specified time period;
2. Consideration of particularly favorable or unfavorable evaluations individually and with reference to other evaluations;
3. Consideration of multiple evaluations over the course of a given project, to show consistency of performance, deterioration of performance, or efforts at improvement and recovery; or
4. A combination of the above methodologies.

(e) On the basis of the submitted statements of qualification, the technical review committee shall qualify no fewer than two, but no more than six, of the bidders to submit proposals. The contracting unit shall provide written notification to all bidders submitting statements of

qualification of whether or not they have been being prequalified to receive requests for proposal. All bidders shall have the right to review statements of qualification submitted to the contracting unit.

(f) Key team members shall not be replaced without approval of the technical review committee.

#### 5:34-10.8 Request for proposals

(a) The contracting unit shall issue a request for proposals to each bidder qualified pursuant to N.J.S.A. 5:34-10.7 no fewer than 14 days prior to the date established for submission of statements of proposal. The date fixed for receiving the proposals shall not fall on a Monday or any day directly following a State or Federal holiday. A request for proposals shall be prepared by the contracting unit using a design professional or design official and must be crafted in such a way as to encourage free, fair, and open competition without unfairly or illegally discriminating against otherwise capable design-builders. No RFP shall contain the elements prohibited for RFQs pursuant to N.J.A.C. 5:34-10.6(d).

(b) The request for proposals shall include, without limitation:

[page=1314] 1. The technical proposal and price proposal forms;

2. Proposed terms and conditions of the design-build contract;

3. Instructions to bidders, including the manner of submitting and the method of receiving the statement of proposal;

4. Evaluation factor criteria for proposals, including the relative importance assigned to the factors and sub-factors to be considered with respect to the technical proposal and the price proposal. The evaluation factors for technical proposals may include, but need not be limited to, experience, design concepts, management approach, diversity, proposed technical solutions, plans for quality assurance and control, and the design-builder's understanding of the means and methods needed to complete the project on time and within budget;

5. A description of the drawings, specifications, or other submittals to be provided with the technical proposal, with guidance as to the form and level of completeness of the drawings, specifications, or submittals that will be acceptable;
6. Site development requirements, including, but not limited to, parking, lighting, equipment, and landscaping;
7. Description of physical relationships between site elements;
8. Specific architectural style or concept;
9. Performance specifications and prescriptive specifications regarding materials, systems, performance criteria, energy efficiency, life cycle costs, and known environmental issues;
10. Engineering, architectural, and/or environmental reports (for example, geotechnical evaluations, building evaluations, and/or environmental preliminary assessments);
11. In the case of a project that includes the removal of soil from the site, any documentation relative to the known soil conditions at the site including, but not limited to, any test results specifying the level of contamination, if any, of the soil that has been found at the site of the project;
12. If a project is located on a site with historical or suspected contamination, a line-item allowance or minimum unit price line item for soil testing and contaminated soil disposal, which shall be a good faith effort on the part of the contracting unit to reasonably estimate the total cost of testing and disposing of the soil;
13. Assignment of responsibility for obtaining required approvals and permits;
14. Budget limits for the work, if any;
15. Insurance requirements, and bonding or guarantees as may be required for public works projects under the Local Public Contracts Law or Public School Contracts Law;



16. A schedule for planned commencement and completion of the design-build contract;

17. Amount of the stipend, if any;

18. For projects by contracting units subject to the Local Public Contracts Law, a statement pursuant to N.J.S.A. 40A:11-23.1.c indicating whether uniformed law enforcement officers will be required for the project;

19. A form listing all documentary and informational forms, certifications, and other documents that the contracting unit requires each bidder to submit with their statement of proposal, along with a means by which the bidder can indicate their inclusion of said items with the statement of proposal;

20. A means of acknowledging of receipt of revisions or addenda to the RFP; and

21. The documents required to be submitted by the successful bidder upon notice of award.

(c) The contracting unit may charge a fee for the request for proposal documents not to exceed \$ 50.00, or the cost of reproducing the documents, whichever is greater.

#### 5:34-10.9 Statements of proposal; award of contract

(a) The RFP shall require the submission of a sealed statement of proposal in two separate parts: a technical proposal and a price proposal. The technical and price proposals shall be evaluated separately, in accordance with the evaluation factors and process set forth in the RFP.

(b) In addition to such drawings, specifications, data, calculations, or other submittals as the contracting unit requires to be submitted with the technical proposal, or the bidder is otherwise required by law to submit with their statement of proposal, a bidder's technical proposal shall include:

1. A list of each person to whom the bidder as design-builder proposes to delegate obligations under the design-build contract, including key team members;

2. Pursuant to the provisions at N.J.S.A. 40A:11-22 or 18A:18A-25, as applicable, a surety company bond or guarantee, as specified in the RFP;
3. Acknowledgment of receipt of revisions or addenda to the RFP;
4. A statement that the bidder is in compliance with all laws applicable to the project, including the New Jersey Prevailing Wage Act, P.L. 1963, c. 150 (N.J.S.A. 34:11-56.25 et seq.), the Public Works Contractor Registration Act, P.L. 1999, c. 238 (N.J.S.A. 34:11-56.48 et seq.), and the Construction Industry Independent Contractor Act, P.L. 2007, c. 114 (N.J.S.A. 34:20-1 et seq.);
5. If required by the contracting unit, a certificate pursuant to N.J.S.A. 40A:11-20 or 18A:18A-23, as applicable, showing that the design-builder and construction members of the proposed design-build team own, lease, or otherwise control all the necessary equipment required by the plans and specifications of the design-build project; and
6. Such other documentation as required by law to be submitted with a bid for a design-bid-build project.

(c) The price proposal, which shall be a separate sealed document clearly identifying the bidder's name, project number, a statement of ownership disclosure pursuant to N.J.S.A. 52:25-24.2 for the bidder and proposed key team members, a bid bond pursuant to N.J.S.A. 40A:11-21 or 18A:18A-24, as applicable, and other information required by the RFP, shall provide a price for all design services and construction work required to complete construction of the design-build project. The named price shall not be exceeded if the proposal is accepted by the contracting unit without change. The price proposals shall remain sealed until such time as provided at (f) below.

(d) Before the proposal submission deadline, the contracting unit may provide for a conference at a designated date, time, and location at which prequalified bidders may ask questions and

seek clarification concerning any of the information, data, or documents contained within the RFP. A pre-proposal conference may be mandatory or optional, as stated in the RFP.

(e) The submission of technical and price proposals is conclusive evidence that the bidder has completely reviewed the RFP, along with the proposed terms and conditions of the design-build contract and fully understands and agrees to all the requirements, terms, and conditions set forth therein.

(f) Sealed technical proposals shall not be opened until expiration of the time established for submission as set forth in the RFP. The contracting unit shall make reasonable efforts to maintain the secrecy and confidentiality of all technical proposals, and all information contained in the technical proposals, and shall not disclose the proposals or the information contained therein to the design-builders' competitors or the public except as otherwise permitted pursuant to this section and N.J.A.C. 5:34-10.12. All price proposals shall be made public once the governing body awards the contract.

(g) Before the technical review committee begins evaluating the technical proposals, the contracting unit's design professional or design official shall examine all documents required to be submitted with the statement of proposal. All statements of proposal considered by the technical review committee shall be complete and certified by the design professional or design official as responsive to each of the proposal evaluation factors established in the RFP. Any statements of proposal deemed incomplete or otherwise non-responsive shall be submitted by the design professional or design official to the technical review committee, along with the reasons for the determination. If a bidder's technical proposal, price proposal, or both, must be rejected as non-responsive, the technical review committee shall notify the bidder, in writing, of the rejection of its proposal and the reasons for the rejection within 10 business days of receiving the proposal, unless the RFP specifies a different time period for the committee to notify the bidder.

(h) The technical review committee, meeting together, may conduct interviews with each bidder prior to ranking the bidders' respective technical proposals.

[page=1315] (i) The technical evaluation committee shall evaluate each technical proposal, in accordance with the proposal evaluation criteria and the weight assigned to each, specified in the RFP. Once evaluated, the committee shall total and submit the scores for each technical proposal to the selection coordinator.

(j) After the technical proposals have been reviewed and scores are submitted, the selection coordinator shall assign the maximum price points to the lowest total dollar price proposal. All other responsive proposals shall be scored based upon the percentage that each price proposal exceeds the lowest price proposal. The bidder shall show all amounts in words and figures. In the event of a discrepancy between the words and figures, the amount shown in words shall govern.

(k) The selection coordinator shall determine the combined scores for each bidder based on their technical and price proposals. A minimum of 50 percent consideration shall be based on the cost of the price proposal. After the proposals have been evaluated, the selection coordinator shall prepare a report concerning the technical review committee's proposal evaluations and award recommendation. The report shall list the names of all bidders submitting a proposal and shall summarize each statement of proposal submitted. The report shall rank the bidders in order of evaluation, clearly state the reasons for the committee's award recommendation, and detail the terms, conditions, scope of services, fees, and other matters to be incorporated into the contract. The bidder with the highest overall score shall be recommended to the contracting unit's governing body for an award of the design-build contract. The report shall be made available to the public at least 48 hours prior to the governing body's award of the contract or when made available to the governing body, whichever is sooner, except that the details of each bidder's respective technical proposals shall not be disclosed.

(l) A bidder may withdraw a proposal for any reason at any time prior to the contracting unit's governing body award of the contract either on a preliminary or final basis. If a bidder withdraws a proposal, the bidder shall be disqualified from submitting a future proposal on the same project, including whenever a contracting unit rejects all proposals pursuant to N.J.A.C. 5:34-10.10.

(m) Before awarding a design-build contract, the governing body shall determine that there was adequate competition for the contract. The technical review committee shall have considered at least two complete and responsive proposals before the governing body can proceed with awarding the contract.

(n) If the governing body approves the recommendation and awards the contract, the contracting unit shall notify the successful design-builder, in writing, and the ownership of the drawings, specifications, and information therein, shall be determined, in accordance with the terms of the design-build contract, as permitted by law.

1. The notice of award shall be final if the governing body accepts a proposal without change, or preliminary if the governing body authorizes further negotiation with the successful bidder.

2. If the governing body preliminarily awards a design-build contract, the maximum cost in the successful bidder's price proposal may be modified by negotiated agreement between the contracting unit and the design builder if the parties agree to further modification of the proposal prior to final award. In negotiations with the successful bidder, boards of education cannot agree to a project cost higher than that authorized by voter referendum, a municipal governing body, or the board of estimate, as applicable, to the type of school district. The governing body shall authorize final award of the contract upon reaching a negotiated agreement with the design-builder. In the event the parties fail to reach a negotiated agreement, then the governing body may authorize a notice of award to be issued to the next highest-ranked bidder.

(o) Unless and until a statement proposal is accepted by the governing body, the drawings, specifications, and other information in the proposal shall remain the property of the bidder.

Once a proposal is accepted by the governing body and a notice of award issued, the disclosure of the proposal and information therein, along with ownership of the drawings, specifications, and information therein, shall be determined, in accordance with existing law and the terms of the final contract.

5:34-10.10 Rejection of statements of proposal; cancellation of contract award

(a) Proposals received after the submission date and time prescribed in the advertisement and RFP shall be rejected.

(b) The contracting unit shall have the right to reject any and all proposals, except for purposes of evading P.L. 2021, c. 71, when it is otherwise deemed to be in the interest of the contracting unit or the public to do so. A governing body may not award a design-build contract unless the technical review committee evaluated at least two complete and responsive proposals from design-builders.

(c) A governing body that rejects all proposals may solicit new proposals using the same qualifications, evaluation factors, and budget constraints, unless there has been a material change in circumstances affecting the needs of the contracting unit, including, but not limited to, environmental issues, natural disaster, statement of emergency, or unseen fiscal constraint. When soliciting new proposals, the contracting unit shall start the process by soliciting new statements of qualifications.

(d) Upon award of the design-build contract, the contracting unit shall, within five days, notify all unsuccessful bidders, in writing, that the contracting unit awarded the design-build contract to another design-builder. Within 30 days after receiving the written notice, an unsuccessful bidder may request, in writing, to review the proposals submitted, the technical review committee evaluation scores from the selection process, and the final recommendation of award document. Technical proposals shall be redacted to the extent necessary to prevent revealing the trade secrets and proprietary commercial or financial information incorporated into another bidder's technical proposal.

(e) The governing body may cancel a notice of final award at any time before the execution of the design-build contract by the contracting unit if the contracting unit deems it advisable to do so in the interest of the contracting unit or the public.

5:34-10.11 Criteria for payment of stipend

(a) At the discretion of the contracting unit, a stipend of no more than three percent of the design-build project's estimated costs may be paid to eligible bidders who submit responsive, but unsuccessful proposals, in response to the RFP. The decision to issue such a stipend shall be based on the contracting unit's analysis of the design-build project's size, scope, and complexity, and the anticipated degree of competition during the procurement process. The purpose of the stipend is to encourage competition by offering to compensate responsive, but unsuccessful bidders, for a portion of the estimated proposal development costs.

(b) The terms and conditions for the payment of a stipend shall be included in the RFQ and RFP.

(c) Bidders submitting a response to the RFP that is determined by the contracting unit in its sole discretion to be incomplete or otherwise non-responsive will not be entitled to a stipend.

5:30-10.12 Disclosure; access and record retention

(a) Any and all submissions made in response to any RFQ and any RFP, are subject to the provisions of the Open Public Records Act, N.J.S.A. 47:1A-1 et seq., and the exceptions from disclosure provided therein, except that technical proposals shall not be subject to disclosure prior to award of the contract.

(b) The design-builder awarded a design-build contract shall make available records and accounts pertaining to the design-build project to the Office of the State Comptroller in any investigations, examinations, and inspections that they may undertake of the activities related to the financing and undertaking of design-build projects. The design-builder shall also cooperate, upon request, in sharing information with other State or Federal entities.

(c) The design-builder and contracting unit shall retain all records and accounts, including records and accounts of subcontractors and subconsultants, for design-build project activities, as necessary to evidence compliance with the Act and all applicable rules and contractual requirements. Such records shall be retained for 10 years following substantial completion of a design-build project, and any additional period required for the resolution of litigation, claims, or audit findings. At any time, upon request of the Director of the Division of Local Government Services in the New Jersey Department of Community Affairs, the contracting unit and the design-builder shall make records relating to the [page=1316] design-build project available to the Division, within four business days of the request for documents, at no cost to the Division.

(d) In the event that any litigation, claim, audit, or request pursuant to the Open Public Records Act, N.J.S.A. 47:1A-1 et seq., relating to the procurement or the performance of work under the design-build contract is commenced prior to expiration or termination of the design-build contract, all records relating to the procurement and the contract shall be retained until all litigation, claims, audit findings, document requests, and related appeals, if any, have been resolved with finality.

#### 5:34-10.13 Fraudulent statements

Any firm or individual who makes, or causes to be made, a false, deceptive, or fraudulent statement in its submittal in response to the RFQ or RFP, or in the course of any hearing, litigation, mediation, or other proceeding may be disqualified from bidding, suspended, and/or debarred, and/or may be subject to prosecution pursuant to applicable law.

#### 5:34-10.14 Disqualification from bidding for conflicts of interest

Design professionals and other professional consultants participating in the preparation of an RFQ or an RFP will not be permitted to participate as a bidder or subconsultant to a bidder submitting a statement of qualifications or a proposal.

#### 5:34-10.15 Contract approval and execution



(a) Prior to the execution of a design-build contract, the bidder that was provided a notice of final award by the contracting unit shall exist in the legal status in which it will perform its responsibilities pursuant to the design-build contract.

(b) The contracting unit shall send the successful design-builder a notice of award letter pursuant to N.J.A.C. 5:34-10.9(n). The notice of award letter shall contain a list of the additional documents required to be submitted by the design-builder with the executed contract. The notice of award will specify the time within which the executed contract and required documents must be returned.

(c) If the design-builder fails to return the executed contract and other required documents within the time specified by the contracting unit, the design-bidder may take whatever action is appropriate and authorized by law including, but not limited to, withdrawing or canceling the notice of award to the delinquent bidder and awarding the contract to the next-highest ranked bidder; cancelling the procurement; or proceeding to recover under the bid bond submitted with the price proposal, in accordance with N.J.A.C. 5:34-10.9(b).

(d) All contracts executed pursuant to this subchapter shall provide for, among other things, termination for the convenience of the contracting unit and for cause.

(e) No agreement is valid or binding on the contracting unit, unless and until it is executed by an appropriately authorized representative of the contracting unit. Any work performed prior to the execution of the contract by the successful bidder is voluntary and represents a gift to the contracting unit. In the event the notice of award is cancelled or withdrawn, the successful bidder is not entitled to any remuneration for any work performed prior to the execution of the contract.

(f) Subject to the contracting unit's cancellation rights set forth at N.J.A.C. 5:34-10.10(e), upon the successful bidder's submission of all required documentation or materials, as specified in the notice of award, and the contracting unit's acceptance of such documentation, the contracting

unit will execute the design-build contract and provide the successful bidder with the fully executed design-build contract.

5:34-10.16 Deletion or substitution of key team members

(a) No substitutions or deletions of key team members may be made during the selection process or after award of the contract, without prior written approval from the contracting unit.

(b) Unauthorized changes to a bidder's key team members who were specifically identified in statement of proposal at any time during the selection process may result in the elimination of the bidder from further consideration.

5:34-10.17 Design and construction

(a) The design-builder shall employ or contract with an architect of record and shall be responsible for the technical integrity of final project design, constructability, extensions of the design, and operability and maintainability, pursuant to the RFP and/or in the design-build contract.

(b) The role of the design-builder may include, but need not be limited to, the management and control of quality, cost, and the integrated schedule for design, permit applications, material and equipment acquisition, construction, training for operation and maintenance, inspection, and close out of the project.

(c) The contracting unit's review and acceptance of interim design submissions and/or construction documents is for the purpose of mutually establishing a conformed set of contract documents compatible with the requirements of the work. Neither the contracting unit's acceptance of interim design submissions nor construction documents shall be deemed to transfer design liability from the design-builder to the contracting unit.

(d) With respect to school facilities projects, once the plans and specifications are complete, and have been accepted by the contracting unit, the design-builder shall submit the completed

plans and specifications for the school facilities project to the New Jersey Department of Education for approval of final educational adequacy, pursuant to N.J.A.C. 6A:26-5.4.

5:34-10.18 Post-award evaluation of design-builder by contracting unit

(a) Every design-builder awarded a design-build contract procured pursuant to this subchapter will be subject to evaluation, in accordance with this section. The performance evaluation will consider the design-builder's performance as a contractor in the following categories: quality of work, scheduling, management, cost control and change orders, safety and industrial hygiene, small business goals, and close-out.

(b) The design-builder's performance will be evaluated periodically during the progress of the project. The evaluation will be performed by a reviewer with direct involvement in the management or supervision for the project.

(c) The design-builder's performance evaluations will be used by the contracting unit in evaluating and scoring bidders as to their prior experience on contracting unit projects, in accordance with the provisions of this chapter.

(d) Design-builders shall be evaluated on their construction performance with respect to the various evaluation categories using the following evaluation ratings:

1. Outstanding (O) or 100 percent--far exceeds the contract requirements by consistently exhibiting excellent performance. Always meets, and almost always exceeds, the contract requirements;

2. Very Good (VG) or 90 percent--often exceeds the contract requirements and frequently provides a high level of performance. Typically meets and often exceeds the contract requirements;

3. Satisfactory (S) or 80 percent--provides an acceptable level of performance consistently meeting the contract requirements;

4. Marginal (M) or 70 percent--performs slightly below the requirements of the contract, meeting the contract requirements on an intermittent basis; and

5. Unsatisfactory (U) or 60 percent--fails to meet important contract requirements, resulting in a negative impact on the entire project.

(e) The numerical scores established at (d) above may be subject to special adjustment factors for certain categories deemed by the contracting unit to be particularly critical to contractor performance, with such special adjustment factors specified in the RFP. The numerical ratings for each category shall be tabulated to arrive at an overall numerical evaluation score for each performance evaluation.

#### 5:34-10.19 Protests and administrative hearings

(a) A bidder that intends to submit or has submitted a statement of qualifications for the first phase of the design-build procurement may request an informal hearing before the contracting unit to protest the RFQ process or documents by submitting a written protest to the contracting unit at least five business days prior to the date and time scheduled for opening of the statements of qualifications, setting forth in detail the grounds for such protest. The protest must contain all legal and factual arguments, materials, or other documents that support the protestor's position, and must indicate whether the protestor requests an informal hearing. The contracting unit may deny any protest that is filed less than five business days prior to the scheduled opening of statements of [page=1317] qualifications, or that fails to provide the specific reasons for and arguments supporting the protest.

(b) A bidder that intends to submit or has submitted a statement of proposal for the second phase of the design-build procurement may request an informal hearing before the contracting unit to protest the RFP process or documents by submitting a written protest to the contracting unit at least five business days prior to the date and time scheduled for opening of the technical proposals, setting forth in detail the grounds for such protest. The protest must contain all legal and factual arguments, materials, or other documents that support the protestor's position, and

must indicate whether the protestor requests an informal hearing. The contracting unit may deny any protest that is filed less than five business days prior to the scheduled opening of technical proposals, or that fails to provide the specific reasons for and arguments supporting the protest.

(c) A bidder protesting its failure to be prequalified, or the prequalification of another bidder may request an informal hearing before the contracting unit to protest the prequalification by submitting a written protest to the contracting unit setting forth the specific grounds for challenging the prequalification. The protest must contain all factual and legal arguments, materials, or other documents that support the protestor's position, and must indicate whether the protestor requests an informal hearing. The protesting bidder must submit a written protest within five business days of receiving written notification of their prequalification or failure to be prequalified. The contracting unit may deny any protest that is filed more than five business days after the bidder's receipt of written notification, or any protest that fails to provide the specific reasons for and arguments supporting the protest.

(d) A bidder protesting the scoring of its technical and/or price proposals, or those of another bidder, may request an informal hearing before the contracting unit to protest the scoring of technical and/or price proposals, by submitting a written protest to the contracting unit setting forth the specific grounds for challenging such scorings. The protest must contain all factual and legal arguments, materials, or other documents that support the protestor's position and a statement as to whether the protestor requests the opportunity for an informal hearing. The protestor must submit a written protest within five business days of the public announcement of the bidders' scores. The contracting unit may deny any such protest that is filed more than five business days after the public announcement of the bidder's scores, or any protest that fails to provide the specific reasons for and arguments supporting the protest.

(e) A bidder that has submitted a proposal may request an informal hearing before the contract to protest the award of a contract to another bidder by submitting to the contracting unit a written protest, setting forth the specific grounds for challenging such award, within five business days of the public announcement of the award. The protest must contain all factual and legal

arguments, materials, or other documents that support the protestor's position and a statement as to whether the protestor requests an informal hearing. The contracting unit may deny any protest that is filed more than five business days after the public announcement of the award, or any protest that fails to provide the specific reasons for and arguments supporting the protest.

(f) Challenges by a design-builder of a design-build performance evaluation by a contracting unit subject to the Public School Contracts Law may request an informal hearing before the contracting unit by submitting to the contracting unit a written protest setting forth the specific grounds for such protest, within 15 calendar days after the date of receipt of written notification of the performance evaluation. The protest must contain all factual and legal arguments, materials, or other documents that support the protestor's position and must indicate whether the protestor requests an informal hearing. The contracting unit may deny any protest that is filed more than 15 calendar days after the design-builder's receipt of written notification of the performance evaluation, or any protest that fails to provide the specific reasons for and arguments supporting the protest.

(g) Hearing procedures shall be, as follows:

1. The contracting unit, in its sole discretion, shall determine whether to grant an informal hearing regarding any protest. Informal hearings are for fact-finding purposes for the benefit of the contracting unit and the contracting unit shall have the sole discretion as to whether to hold an informal hearing. Alternatively, the contracting unit may determine that sufficient information already exists in the record so that a decision may be made without a hearing, and the contracting unit may waive the hearing and issue a final determination, accordingly. In the event that the contracting unit determines that a hearing is not necessary, a written decision will be issued by the contracting unit within five business days of receipt of all documents related to the protest;

2. Informal hearings will be held, where feasible, within 14 business days of the receipt of the request. Hearings will be heard, where practicable, by either the governing body or a hearing

officer designated by the governing body. The governing body or the hearing officer shall issue a final written decision within 30 calendar days of the conclusion of the hearing unless, due to the circumstances of the hearing, a greater timeframe is required. For all protests of the RFQ or RFP processes and documents, the written decision will issue prior to the opening of statements of qualification or proposals, respectively. If a decision based upon a protest results in a modification of the aforesaid process or documents, such decision shall be conveyed to all potential bidders by addendum; and

3. In an informal hearing, the contracting unit may, in instances where public exigency exists or where there is potential for substantial savings to the contracting unit, modify, or amend the time frames or any other requirements provided in this subchapter. In these instances, the contracting unit shall document, for the record, the rationale for such amendment and give adequate notice to the parties.

(h) The provisions at N.J.S.A. 40A:11-50 shall govern a design-builder's challenge to a design-build performance evaluation by a contracting unit that is subject to the Local Public Contracts Law.

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