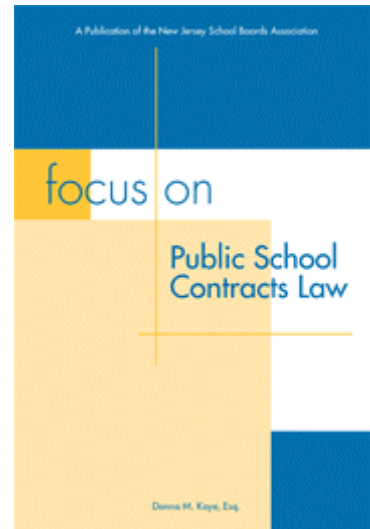


## INTRODUCTION

The NJSBA Legal Department has added a new publication to its *Focus On School Law Library* series. This publication provides a comprehensive overview of public school procurement law. It reflects the latest statutes, administrative code provisions, and case law in the area of public school contracts. *Focus On: Public School Contracts Law* (2004) provides information and guidance to board members in meeting legal requirements for school purchases. The book is also a valuable resource for board legal counsel, school business administrators and others involved in procuring goods and services for public schools. For ordering information, please go to [http://www.njsba.org/Pubs/price\\_list.htm](http://www.njsba.org/Pubs/price_list.htm) --scroll halfway down the page.



The following is a more general question and answer document on public school contracts based primarily on Title 18A. As a basic reference, it does not purport to be a comprehensive overview of the law, and does not incorporate the pertinent body of administrative code, related administrative or judicial rulings. **This document is not to be construed as legal advice;** it is not a substitute for consulting with board counsel, should any legal issue arise under procurement law or under any other law.

For additional information about procurement, readers may consult the website maintained by the Department of Community Affairs, Division of Local Government Services, at <http://www.nj.gov/dca/lgs/lpcl/index.shtml>.

This document is not a substitute for consulting with board counsel.  
 It does not constitute legal advice.  
 This document is based on Title 18A of the New Jersey Statutes.  
 Additional information about public school contract law can be found in  
 administrative code, and administrative and judicial rulings.

## PUBLIC CONTRACTING FOR BOARDS OF EDUCATION

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**PURCHASES/CONTRACTS-GENERAL PROVISIONS**

**Who is authorized to make purchases and award contracts on behalf of a board of education?**

A board of education, having the authority to make purchases pursuant to N.J.S.A. 18A:18A-2a, may duly assign that authority to a purchasing agent as permitted by the Public School Contracts Law. N.J.S.A. 18A:18A-2b.

A board of education may formally by resolution authorize the purchasing agent to award contracts below the bid threshold. Such authorization may be granted for each contract, or by a general delegation of the power to negotiate and award such contracts. N.J.S.A. 18A:18A-3(a). The statute does not authorize the purchasing agent to award contracts above the threshold; the board retains the authority to award such contracts by board resolution. See N.J.S.A. 18A:18A-37b.

**Who may be the district’s purchasing agent?**

A “purchasing agent” is defined by N.J.S.A. 18A:18A-2b as the secretary, business administrator or business manager of the board who is duly assigned the authority, responsibility and accountability for the board’s purchasing activity, having the power to prepare advertisements, to advertise for and receive bids and to award contracts as permitted by chapter N.J.S.A. 18A:18A. The board may delegate an officer, committee(s) or employee(s) to perform these activities if there is no secretary, business administrator or business manager.

**Who is a “qualified” purchasing agent?**

A “qualified” purchasing agent who has completed appropriate training and possesses purchasing experience deemed necessary to permit the board of education to establish a threshold higher than \$17,500, up to a maximum of \$25,000. (N.J.S.A. 18A:18A-2b; N.J.S.A. 18A:18A-3; N.J.S.A. 40A:11-9) Regulations define appropriate training and experience. N.J.S.A. 40A:11-9b.

**Who is authorized to advertise, prepare advertisements and receive bids?**

The purchasing agent who has been duly assigned these responsibilities by the board of education, has the authority to perform these activities. N.J.S.A. 18A:18A-2b

**What is a contract under the Public School Contracts Law, and does it include a purchase order?**

A “contract” is any legally binding agreement, including a purchase order, between a vendor of goods or services, and a board of education who agrees to compensate the vendor. The contract is subject to its terms and conditions. A contract may also include

an arrangement whereby a vendor compensates a board of education for the vendor's right to perform a service, such as operating a concession. N.J.S.A. 18A:18A-2n. All contracts for the provision or performance of goods and services must be in writing. N.J.S.A. 18A:18A-40.

A "purchase order" is a document issued by the purchasing agent authorizing a purchase transaction with a vendor for goods or services, which, when fulfilled according to the terms and conditions of the purchasing agent's request and any other procedures that may be established by the board, will result in payment by the board. N.J.S.A. 18A:18A-2v.

**What are "goods and services?"**

"Goods and/or services" are any work, labor, commodities, equipment, materials or supplies of any tangible or intangible nature, except real property or any interest therein, provided or performed through a contract awarded by a purchasing agent, including goods and property subject to N.J.S.A. 12A:2-101 et seq. (Uniform Commercial Code) N.J.S.A. 18A:18A-2q.

"Service or services" means the performance of work or the furnishing of labor, time or effort or any combination thereof not involving or connected to the delivery or ownership of a specified end product or goods or a manufacturing process. It may also include an arrangement in which a vendor compensates the board of education for the vendor's right to operate a concession. N.J.S.A. 18A:18A-2dd.

"Work" means any task, program, undertaking, or activity, related to any development, redevelopment, construction or reconstruction performed or provided pursuant to a contract with a board of education. N.J.S.A. 18A:18A-2k.

**Do contracts for "goods and services" include construction contracts?**

Yes. The broad definition of "goods and services," which includes "any work," encompasses contracts for "public works." "Public works" means building, altering, repairing, improving or demolishing any public structure or facility constructed or acquired by a board of education to house school district functions or provide water, waste disposal, power, transportation and other public infrastructures. N.J.S.A. 18A:18A-2z.

**Must all contracts be in writing?**

Yes. All contracts for the provision or performance of goods or services must be in writing. The State Board of Education may prescribe the form and manner for making and executing contracts, and the form and manner of execution and approval of all guarantee, indemnity, fidelity and other bonds. N.J.S.A. 18A:18A-40.

**May a board require a contractor to pay liquidated damages for violating the terms of a contract?**

Yes. Any contract may include liquidated damages for violating the terms of the contract or for failing to perform the contract in accordance with its terms or with the provisions of the Public School Contracts Law. N.J.S.A. 18A:18A-41. A liquidated damages clause

is a provision which states that a specific sum of money will be recoverable as damages by a particular party should a breach of the agreement occur. This makes it unnecessary for a court to determine damages in the event of a breach.

**Who is responsible for inspecting goods and services received by the district?**

All goods and services provided or performed under a contract must be inspected by the purchasing agent, or if the district has no purchasing agent, by an appropriate board employee to whom the power has been delegated by the board. Subject to the board's approval, such person shall condemn any goods or services that in his/her judgment do not conform to the specs of the contract. N.J.S.A. 18A:18A-44.

**Are boards of education and board officers held harmless for actions taken by virtue of the Public School Contracts Law?**

The law states that no damages shall lie against the State Board, any State official or any board of education or any of its officers because of any action taken by virtue of the provisions of Chapter 18A (Public School Contracts Law). N.J.S.A. 18A:18A-46.

**May a board paying for a contract with federal funds, indemnify the federal government?**

Yes. Where the federal government undertakes a project for the benefit of a board, which project is paid for in any part by federal funds, the board may enter into an agreement indemnifying the USA or any board, body, officer, or agency thereof, from loss or damage to the property of others. N.J.S.A. 18A:18A-47.

**Can the Commissioner of Education withhold State aid from a school district for failure to comply with the provisions of the Public School Contracts Law?**

The Commissioner has the general authority to withhold State aid for violations of law or regulation. See N.J.S.A. 18A:55-2. However, under N.J.S.A. 18A:18A-46.1 (P.L. 1999 c.55) there are certain limitations on the Commissioner's ability to withhold State aid for violations of the extraordinary unspecifiable services (EUS) exception to the bidding requirements. These provisions do not limit the Commissioner's authority to supervise compliance and seek other remedies under school law.

**May a board of education enter into a contract without receiving the contractor's proof of business registration?**

No. A "government contracting agency" in New Jersey is precluded from entering into a contract with a contractor unless it receives proof of business registration at the time of the bid proposal submission in response to a request for bids or proposals, or for other transactions before the issuance of a purchasing order or other contracting document. P.L. 2004 c. 57.

## **DURATION OF CONTRACTS**

**What is the general rule regarding the duration of contracts?**

All contracts for goods or services may not be awarded for a period that exceeds 24 consecutive months, except for certain enumerated contracts that may be for longer periods. Contracts for professional services that are exempt from bidding, however, may

not be awarded for a period to exceed 12 consecutive months. N.J.S.A. 18A:18A-3; N.J.S.A. 18A:18A-42.

Contracts for goods and services awarded pursuant to competitive contracting may not be for a term that exceeds five years, unless the law specifically states it may be for a longer term. N.J.S.A. 18A:18A-4.2.

**What are the goods and services for which the board may enter into contracts of greater than 24 months?**

Contracts for the following goods and services may be awarded for a period to exceed 24 consecutive months under N.J.S.A. 18A: 18A-42 are:

- a. Supplying of fuel for heating (for a term not exceeding **three years** in the aggregate); Supplying of fuel or oil for motor vehicles or equipment (for a term not exceeding **three years** in the aggregate); Supplying of thermal energy produced by a cogeneration facility for use for heating and/or air conditioning, where the contract is approved by BPU (for a term not exceeding **40 years**)
- b. Plowing or snow/ice removal (for a term not exceeding **three years** in the aggregate)
- c. Collection and disposal of garbage and refuse (for a term not exceeding **three years** in the aggregate)
- d. Data processing service (for a term of not more than **seven years**)
- e. Insurance, including the purchase of insurance coverage, consultant or administrative services, and participation in a joint self-insurance fund, risk management program or related services provided by a school board insurance group or participation in an insurance fund established by a county or a joint insurance fund established pursuant to N.J.S.A. 40A:10-36 et seq. (for a term of not more than **three years**)
- f. Leasing or servicing of items: motor vehicles, electronic communications equipment, every kind of machinery and equipment, textbooks, non-consumable instructional materials (for a term not exceeding **five years** in the aggregate). These contracts may be awarded only in accordance with State Board rules and regulations
- g. Supplying of any product or performing any service by a company providing voice, data, transmission or switching services (for a term not exceeding **five years** )
- h. (deleted by P.L. 1999 c. 440)

- i. Driver education instruction conducted by a private, licensed driver education schools (for a term not exceeding **three years** in the aggregate)
- j. Provision or performance of goods or services for the purpose of conserving energy in the buildings owned by any local board of education, the entire price of which must be established as a percentage of the resultant savings in energy costs (for a term not exceeding **15 years**). These contracts must be entered into only in accordance with guidelines promulgated by BPU establishing a methodology for computing energy costs.
- k. Any single construction project or any public works project, including the retention of an architect or engineer's services in connection with the project for the **length of time authorized and necessary** for completion of actual construction.
- l. Laundry service and rental, supply and cleaning of uniforms (for a term not exceeding **three years**)
- m. Food supplies and food services (for a term of not more than **three years**)
- n. Purchases made under a State contract through the Division of Purchase and Property in the Department of the Treasury, for use by counties, municipalities or other contracting units pursuant to N.J.S.A. 52:25-16.1 (for a term **not to exceed the term of the State contract**)

**May contracts be extended?**

Yes, all contracts for which the statutory length of the contract is three years or less, except for professional services, may include provisions for extensions. N.J.S.A. 18A:18A-42. The provision for extension may permit no more than one two-year, or two one-year extensions. Such extensions may only be awarded if:

- a. by board resolution upon the board's finding that the services are being performed in an effective and efficient manner;
- b. the contract with extension does not run more than five consecutive years;
- c. the price change is based on original contract price as cumulatively adjusted pursuant to any previous adjustment or extension, and may not exceed the change in index rate for the 12 months preceding the most recent quarterly calculation available at the time of renewal of contract; and
- d. the terms and conditions remain substantially the same.

Language permitting an extension and price changes as part of the extension, must be included in the original contract and should be included in the specs.

**Is there any other procedure or mechanism to extend an expired contract where the contract has expired but the board hasn't yet awarded a new contract?**

**N.J.S.A. 18A:18A-42 (last paragraph)**

Yes, a board may extend the contract beyond its expiration where the bid process has already begun as follows: A contract may be extended by mutual agreement of the parties to the contract when a board has commenced rebidding prior to the time the contract expires or when the contract award is pending at the time the contract expires.

Otherwise, all contracts cease to have effect at the end of the contracted period. Contracts may not be extended by any other procedure or mechanism.

**Must multiyear contracts be conditioned on the availability of funds?**

With the exception of certain contracts listed in the paragraph below, multi-year leases and contracts and extensions must contain a clause making them subject to the availability and appropriation annually of sufficient funds as may be required to meet the extended obligation, or contain an annual cancellation clause. N.J.S.A. 18A:18A-42 (last paragraph).

Such a clause is not required for contracts involving insurance (N.J.S.A. 18A:18A-42e), for thermal energy (N.J.S.A. 18A:18A-42a) or goods or services to promote energy conservation (N.J.S.A. 18A:18A-42j).

## **CONTRACTS UNDER THE BID THRESHOLD**

**What is the bid threshold?**

The bid threshold is defined in N.J.S.A. 18A:18A-2m as “the dollar amount set in N.J.S. 18A:18A-3, above which a board of education shall advertise for and receive sealed bids in accordance with procedures set forth in N.J.S. 18A:18A-1 et seq.”

N.J.S.A. 18A:18A-3 establishes a bid threshold of \$17,500. It also states that if the purchasing agent is qualified, the board may establish a bid threshold up to \$25,000. Note that board action is required in order to establish a bid threshold of any amount, higher or lower, than \$17,500.

**Will the threshold be adjusted periodically?**

Yes. Starting in 2005 and every five years after that, the Governor, in consultation with the Department of the Treasury, must adjust the threshold amount in direct proportion to the change in the index rate, rounded to the nearest \$1,000. The Governor will notify school districts of the new figure no later than June 1 of the year in which it is made. The adjustment will become effective on July 1.

The index rate is defined as the rate of annual percentage increase rounded to the nearest half percent in the *Implicit Price Deflator for State and Local Government Purchases of Goods and Services*, published quarterly by the U.S. Department of Commerce, Bureau of Economic Analysis.

**May a board of education establish a bid threshold lower than \$17,500?**

Yes, the board may require public bidding for contracts costing less than \$17,500, by adopting a resolution setting a lower threshold for the receipt of public bids or the solicitation of competitive quotations.

**May a board of education establish a bid threshold higher than \$17,500 ?**

Yes, if it has a “qualified” purchasing agent.

If the board’s purchasing agent is qualified the board may establish a bid threshold up to \$25,000. As noted previously, a “qualified” purchasing agent is a purchasing agent who has completed appropriate training and possesses purchasing experience deemed necessary to permit the board of education to establish a threshold higher than \$17,500. (N.J.S.A. 18A:18A-2b; N.J.S.A. 18A:18A-3; N.J.S.A. 40A:11-9.)

**For contracts under the threshold, must a board publicly advertise for bids?**

Generally, if the cost of a contract in the aggregate does not exceed the bid threshold of \$17,500 (or whatever other threshold the board has established) in a contract year, a purchasing agent so authorized by a board of education may award a contract without competitive contracting (N.J.S.A. 18A:18A-4.1) or public advertising for bids. N.J.S.A. 18A:18A-3a. However, competitive quotations may be required.

**How does a board determine the cost of a contract “in the aggregate?”**

The board must add together the amount spent or to be spent for obtaining goods or services in connection with the same immediate purpose or task, or for the furnishing of similar goods or services, during the same contract year through a contract awarded by a purchasing agent. N.J.S.A. 18A:18A-2 (l).

**Can a board divide contracts so that purchases fall under the threshold?**

No. N.J.S.A. 18A:18A-8 explicitly prohibits a board from dividing contracts for the purpose of dispensing with the bidding requirements. A contract that in the aggregate is single in character, or that requires additional quantities of goods or services to fulfill its purpose, must not be divided to bring it or part of it under the bid threshold in order to avoid public advertising and bidding. When a board contracts for goods or services that are included in or incidental to the performance of work that is single in nature, or to the performance of work that includes the provision of additional goods or services, all of the goods and services required to complete the contract must be included in one contract. The Director of the Division of Local Government Services in the Department of Community Affairs, after consultation with the Commissioner of Education, and pursuant to the Administrative Procedure Act, is statutorily required to adopt rules concerning determinations of aggregation.

**Must the board grant authorization to the purchasing agent for each contract to be negotiated and awarded without bidding?**

The purchasing agent must receive authorization by board resolution to award contracts below the bid threshold without public advertising for bids. Such authorization may be

granted for each contract, or by a general delegation of the power to negotiate and award such contracts. N.J.S.A. 18A:18A-3a.

**Must a board solicit quotations for contracts that cost less than the bid threshold?**

For all contracts that in the aggregate are less than the bid threshold but 15% or more of that amount, the purchasing agent must solicit at least two competitive quotations, if practicable. N.J.S.A. 18A:18A-37a. Also, if practicable, the purchasing agent must solicit at least two competitive quotations for all contracts which pursuant to N.J.S.A. 18A:18A-5 are specifically exempt from advertising for formal bidding, except for professional services and work by board employees. N.J.S.A. 18A:18A-37.

For all contracts that are in the aggregate less than 15% of the threshold (*i.e.*, less than \$2,625 -- or higher if the board has set a higher threshold where the purchasing agent is qualified or lower if the board has set a lower threshold) the purchasing agent may award contracts without soliciting quotations if the board so authorizes by resolution. N.J.S.A. 18A:18A-37c.

The threshold and index rate is determined by the federal government and are posted quarterly.

## **SOLICITING QUOTATIONS**

**What is a quotation?**

A quotation is defined in N.J.S.A. 18A:18A-2 as “the response to a formal or informal request made by a purchasing agent to a vendor for provision or performance of goods or services, when the aggregate cost is less than the bid threshold. Quotations may be in writing, or taken verbally if a record is kept by the purchasing agent.”

**When must a board solicit quotations?**

For all contracts that in the aggregate are less than the bid threshold but 15% or more of that amount, the purchasing agent must solicit at least two competitive quotations, if practicable. N.J.S.A. 18A:18A-37a. Also, the purchasing agent must solicit two competitive quotations for all contracts exceeding the threshold, which pursuant to N.J.S.A. 18A:18A-5 are specifically exempt from advertising for formal bidding, except for professional services and work by board employees. N.J.S.A. 18A:18A-37a.

**When may contracts be awarded without obtaining quotations?**

For all contracts that are in the aggregate less than 15% of the threshold (*i.e.*, less than \$2,625 -- higher if the board has set a higher threshold where the purchasing agent is qualified or lower if the board has established a lower threshold) the award may be made without soliciting quotations. The purchasing agent may make the award of such contracts if the board so authorizes by resolution. N.J.S.A. 18A:18A-37c.

**When may a board award a contract for an EUS over the threshold, without soliciting quotations?**

A contract for extraordinary unspecifiable services (EUS) in excess of the threshold may be awarded after the purchasing agent has made documented efforts to secure competitive

quotations and has determined in writing that solicitation of competitive quotations is impracticable. Any such contract must be awarded by board resolution. N.J.S.A. 18A:18A-37b.

**Must the award be made solely on the price of the respective quotations?**

No. The award is to be made to the vendor whose response is most advantageous, price and other factors considered. N.J.S.A. 18A:18A-37a.

**What if there are two or more equal responses that are the lowest responsible proposals or bids?**

The board, in its discretion, may award the contract to the vendor whose response is the most advantageous, price and other factors considered. The award resolution or purchase order documentation must explain why the vendor selected is the most advantageous. N.J.S.A. 18A:18A-37d.

**What paperwork must the purchasing agent retain related to the solicitation of quotes?**

The purchasing agent must retain the record of the quotation solicitation and must include a copy of the record with the voucher used to pay the vendor. N.J.S.A. 18A:18A-37a.

## **FORMAL BIDDING**

**When must a board award a contract through formal bidding ?**

The board must solicit bids by public advertisement on an annual basis, or more frequently as fixed by the board. N.J.S.A. 18A:18A-9. The board must use the formal bidding process for every contract for which the cost in the aggregate exceeds the bid threshold, except for goods and services specifically excepted. (See, **FORMAL BIDDING-EXEMPTIONS**, this document). The formal bidding process requires an award of the contract by resolution to the lowest responsible bidder after public advertising for bids and bidding. N.J.S.A. 18A:18A-4a.

**How does a board determine who is the lowest responsible bidder?**

N.J.S.A. 18A:18A-2t defines a “lowest responsible bidder or vendor” as the bidder or vendor: (1) whose response to a request for bids offers the lowest price and is responsive; and (2) who is responsible.

A “responsive” bidder is one whose bid conforms in all material respects to the terms and conditions, specifications, legal requirements and other provisions of the request. N.J.S.A. 18A:18A-2y.

A bidder who is “responsible” means that the bidder is able to complete the contract in accordance with its requirements, including but not limited to requirements pertaining to experience, moral integrity, operating capacity, financial capacity, credit and workforce, equipment and facilities availability. N.J.S.A. 18A:18A-2x.

**What if the lowest bids submitted by responsible bidders are of equal amount?**

The board in its discretion may award the contract to the vendor whose response, is the most advantageous, price and other factors considered. The award resolution or purchase order documentation must explain why the vendor selected is the most advantageous. N.J.S.A. 18A:18A-37d.

**FORMAL BIDDING-EXEMPTIONS**

**When may a contract be awarded without formal bidding?**

Generally, the board must use the formal bidding process for contracts for which the cost in the aggregate exceeds the bid threshold. N.J.S.A. 18A:18A-4. If a contract does not exceed the threshold, it need not be formally bid. Rather, competitive quotations must be obtained for most contracts that do not exceed the bid threshold. N.J.S.A. 18A:18A-37a.

There are three categories of exemptions from the bidding requirement for all contracts for which the aggregate cost exceeds the threshold:

- **one**, for purchases of goods and services that are specifically excepted from bidding under N.J.S.A. 18A:18A-5a, as will be discussed below;
- **two**, for purchases of goods and services obtained through competitive contracting pursuant to specific statutory authority (see section of this document, **COMPETITIVE CONTRACTING**).
- **Three**, in addition to these two specific exemptions, there are a number of other situations in which a board may enter into a contract that was not formally bid, the cost of which exceeds the threshold. Certain enumerated conditions apply to these situations, as set forth in statute. Those situations permitting purchases without formal bidding are:
  - a) for contracts with other public bodies;
  - b) where the board has advertised and failed to receive reasonable bids;
  - c) in cases of emergency;
  - d) for purchases made pursuant to a State contract entered into by the Division of Purchase and Property;
  - e) for purchases made for reprographic equipment and services pursuant to the Federal Supply Schedules of the General Services Administration; and
  - f) where the board has solicited 3 quotations on purchases for which a State contract has been issued and the lowest responsible quotation is at least 10% lower than under the State contract.

**What goods and services are specifically set forth as exceptions from the requirement for advertising for bids under N.J.S.A. 18A:18A-5a?**

A board must negotiate and award any contract, the amount of which exceeds the bid threshold, by resolution at a public meeting without public advertising for bids and bidding, for the following 23 items. N.J.S.A. 18A:18A-5a.

1. professional services

2. extraordinary unspecifiable services (EUS) which cannot reasonably be described by written specifications (to be narrowly construed in favor of open competitive bidding; DCA is authorized to adopt regulations after consultation with Commissioner of Education)
3. work to be done by board employees
4. printing of legal notices, briefs, records and appendices to be used in any legal proceeding in which the board may be a party
5. library and educational goods and services
6. food supplies purchased according to State Board regulations and N.J.S.A. 18A:18A-6 (fresh milk)
7. products or services from a public utility that is regulated by BPU
8. printing of bonds and documents necessary to the board's issuing and selling bonds
9. equipment repair if an EUS, and necessary parts provided in connection with the equipment repair service (note: requirements concerning EUS in #2. above apply)
10. insurance, including purchase of coverage and consultant services (note: requirements concerning EUS in #2. above apply)
11. publishing of legal notices in newspapers as required by law
12. acquisition of items of unique intrinsic, artistic or historic character (*e.g.*, artifacts)
13. goods or services necessary to prepare and conduct an election
14. (deleted by P.L. 1999 c.440)
15. (deleted by P.L. 1999 c.440)
16. (deleted by P.L. 1999 c.440)
17. work done by persons with disabilities employed by a sheltered workshop
18. expenses for travel and conferences
19. goods or services for the support or maintenance of proprietary computer hardware and software; not for acquiring or upgrading non-proprietary hardware or software

20. purchases at rates set by the Universal Service Fund administered by FCC
21. goods and services paid with funds raised by or collected from students to support student-oriented items (e.g., yearbooks, class rings/gift); are deposited in school or student activity accounts; require no budget appropriation from board.
22. food services provided by food service management companies according to Dept. of Agriculture, Bureau of Child Nutrition Programs procedures
23. vending machines providing food or drink

A vending machine that is exempt from the bidding process may be competitively contracted at the board's option, under N.J.S.A. 18A:18A-4.1(h).

A vending machine that contains items other than food and drink is not exempt from bidding, nor is it a concession or other item permitted to be competitively contracted. N.J.S.A. 18A:18A-2aa .

**Must a board solicit quotations for goods and services that are specifically exempted from advertising for bids?**

For all contracts that in the aggregate cost less than the bid threshold but 15% or more of that amount, the purchasing agent must solicit at least two competitive quotations, if practicable. N.J.S.A. 18A:18A-37a. Also, the purchasing agent must solicit two competitive quotations if practicable for all contracts which pursuant to N.J.S.A. 18A:18A-5 are specifically excepted from advertising for formal bidding, except for professional services and work by board employees. N.J.S.A. 18A:18A-37.

For all contracts that are in the aggregate less than 15% of the threshold (less than \$2,625 -- higher if the board has set a higher threshold where the purchasing agent is qualified or lower if the board has established a lower threshold) the purchasing agent may award contracts without soliciting quotations if the board so authorizes by resolution. N.J.S.A. 18A:18A-37c.

**How can I tell if it is a professional service?**

Professional services are performed by a person authorized by law to practice a recognized profession, whose practice is regulated by law, and the performance of which services requires knowledge of an advanced type in a field of learning acquired by a prolonged formal course of specialized instruction and study as distinguished from general academic instruction or apprenticeship and training. Professional services may also mean services rendered in the provision or performance of goods or services that are original and creative in character in a recognized field of artistic endeavor. N.J.S.A. 18A:18A-2h.

**Are there special publication and other requirements for awards of professional services contracts?**

There are additional requirements for awards of contracts for professional services. When the board passes a resolution awarding a contract for professional services, it must state supporting reasons for its action in the resolution. Then, it must “forthwith” have a brief notice printed once in the official newspaper, stating the nature, duration, service and amount of the contract, and stating that the resolution and contract are on file and available for public inspection in the board office. N.J.S.A. 18A:18A-5.

**How can I tell if a good or service is an EUS?**

Generally, EUS are services which are specialized and qualitative in nature requiring expertise, extensive training and proven reputation in the field of endeavor. N.J.S.A. 18A:18A-2g.

An EUS that is exempt from the bidding requirements cannot reasonably be described by written specifications. The statute authorizes the adoption of rules and regulations limiting the use of the exemption to narrow circumstances. N.J.S.A. 18A:18A-5.

Any good or service for which a board is permitted to use competitive contracting under N.J.S.A. 18A:18A-4.1 may not be considered by a board of education as an extraordinary unspecifiable service exempt from formal bidding. See N.J.S.A. 18A:18A-4.1 (language after subsection k).

**Are there special publication and other requirements when awarding a contract for an EUS?**

The board must in each instance state supporting reasons for its action in the resolution awarding the contract. Then, it must “forthwith” have a brief notice printed once in the official newspaper, stating the nature, duration, service and amount of the contract, and stating that the resolution and contract are on file and available for public inspection in the board office. N.J.S.A. 18A:18A-5.

**Must a board pass a resolution for the purchase of textbooks and materials exceeding the threshold if it has already approved the selection?**

No. N.J.S.A. 18A:18A-4d. If the purchase of textbooks and materials (exceptions from bidding pursuant to 18A:18A-5(5) - library and educational goods and services, which are defined in N. J.S.A. 18A:18A-2r to include textbooks among other items) is approved by a board of education pursuant to its annual obligation to select textbooks, (N.J.S.A. 18A:34-1; recorded roll call vote of the majority of the full membership), the purchase does not require the further adoption of a resolution for purchase.

**Are there any special procedures for the purchase of fresh milk?**

Yes. The board must require the vendor to agree in writing to furnish sufficient amounts of milk (as specified in the statute) from New Jersey producers or associations of producers. The agreement must be filed with the Secretary of Agriculture. Vendors failing to purchase sufficient milk, except for inability, are subject to a penalty which is

to paid to the school district. Vendors who violate the agreement are ineligible for milk contracts for three years thereafter. N.J.S.A. 18A:18A-6.

**FORMAL BIDDING-ADVERTISEMENT FOR BIDS**  
**N.J.S.A. 18A: 18A-21 to 26**

The following apply except for small business, minority business, or women's business enterprise set-aside programs.

**When must the advertisement be placed?**

All advertisements for bids must be published in an official newspaper sufficiently in advance of the date fixed for receiving the bids to promote competitive bidding, but no less than ten days prior to that date. N.J.S.A. 18A:18A-21a.

**What information must the advertisement contain?**

The advertisement must designate the manner of submitting and receiving the bids, and the time and place at which the bids will be received. N.J.S.A. 18A:18A-21b.

**How are mailed bids unsealed and announced?**

If the published specifications provide for receipt of bids by mail, bids that are mailed to the board must be sealed and only opened for examination at the time and place that all bids received are unsealed and announced. At the time and place for unsealing bids, the purchasing agent of the board must publicly receive the bids and immediately proceed to unseal them and publicly announce the contents. The announcement must be made in the presence of any parties bidding or their agents, who are present. A proper record of the prices and terms must be recorded in the board minutes. N.J.S.A. 18A:18A-21b.

**May bids be received after the time designated in the advertisement?**

No. N.J.S.A. 18A:18A-21b.

**Addenda: May the board revise its advertisements or bid documents?**

Yes. N.J.S.A. 18A:18A-21c. But it must give appropriate notice as described below:

For all contracts except for construction work, notice must be published no later than 5 days (not including Saturdays, Sundays and holidays) prior to the date for acceptance of bids, in an official newspaper of the board and be provided to any person who has submitted a bid or who has received a bid package, in one of the following ways:

- a. in writing by certified mail;
- b. by certified facsimile transmission, meaning that the sender's facsimile machine produces a receipt showing date and time of transmission and that the transmission was successful; or
- c. by a delivery service that provides certification of delivery to the sender.

For construction work contracts, notice must be provided no later than 7 days (not including Saturdays, Sundays and holidays) prior to the date for acceptance of bids, to any person who has submitted a bid or who has received a bid package in any of the following ways:

- a. in writing by certified mail;
- b. by certified facsimile transmission, meaning that the sender's facsimile machine produces a receipt showing date and time of transmission and that the transmission was successful; or
- c. by a delivery service that provides certification of delivery to the sender.

*Comment: For construction contracts, the notice of the revision need not be published in a newspaper. This is probably because of the voluminous nature of construction documents.*

**What are the consequences of a board failure to advertise for bids, or failure to give appropriate notice of revisions to its advertisement ?**

N.J.S.A. 18A:18A-21d. Failure to advertise for the receipt of bids as prescribed, or failure to provide proper notification of revisions or addenda to advertisements or bid documents as prescribed will prevent the board from accepting the bids and require readvertisement for bids. Failure to obtain a receipt when good faith notice is sent or delivered to the address or telephone facsimile number on file with the board will not be considered failure by the board to provide notice.

**FORMAL BIDDING-SPECIFICATIONS**

**Does 18A list any requirements for specifications ?**

18A states that the specifications :

- ✓ *must* be drafted in a way that encourages free, open and competitive bidding
- ✓ if the entire cost of the contract will exceed \$20,000, must state that upon completion of the contract the board, through its authorized agent will, report to the department regarding the contractor's performance and that the board will furnish a report from time to time during performance if the contractor is in default. N.J.S.A. 18A:18A-15 (Follows e.)
- ✓ if the contract is for doing any work for a board, *must* fix the date before which the work must be completed, or the number of working days to be allowed for its completion; and every such contract must contain a provision for a deduction, from the contract price, or any wages paid by the board to any inspectors necessarily employed by it on the work, for any number of days in excess of the number allowed in the specifications. N.J.S.A. 18A:18A-19.
- ✓ for all contracts for work for which it will pay any part of the cost, or work which by contract it will ultimately own and maintain, *must* state that only manufactured and farm products of the United States, wherever available, will be used in such work. N.J.S.A. 18A:18A-20.

The specs *must not*: (N.J.S.A. 18A:18A-15)

- a. require any standard, restriction, condition or limitation not directly related to the purpose, function or activity for which the contract is awarded;
- b. require that the bidder's residence or business be located in the county or district in which the contract will be awarded or performed, unless proximity is required for the efficient and economical performance of the contract;
- c. 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 US, or nationality;
- d. require the furnishing of any "brand name" but may require "brand name or equivalent;"

Exception: proprietary goods or services (patented or copyrighted) may be purchased by stating the proprietary items in the specs if the resolution authorizing the contract so indicates, and the special need for the proprietary items is directly related to the undertaking of the purpose for which the contract is awarded.

- e. fail to include any option for renewal, extension or release that the board may intend to exercise or require, or any terms and conditions necessary for the performance of any extra work, or fail to disclose any matter necessary to the substantial performance of the contract; or
- f. knowingly exclude prospective bidders by making it impossible for any but one bidder. A spec that does so will be null and void, the contract set aside; and the board must readvertise the specs. However, this provision does not prevent a board from designating that a contract shall be awarded to a small business enterprise, a minority business enterprise or a women's business enterprise.

***Bequests and legacies: May a board honor specific instructions made by a donor of funds, as to the use of those funds?***

**N.J.S.A. 18A:18A-15.1**

Yes. If the board makes a purchase exclusively from funds received from a bequest, legacy or gift that contains written instructions as to the specs, manufacturer or vendor, or source of supply of the goods or services, those instructions must be honored.

***Trade-ins: May the sale of personal property no longer needed for school purposes be included as part of the specifications to offset the price of a new purchase?***

Yes. N.J.S.A. 18A:18A-45 g permits a board to pass a resolution authorizing its purchasing agent to include the sale of personal property no longer needed for school

purposes as part of the specs to offset the price of a new purchase. This is permitted despite the general requirement that boards must sell certain personal property by sealed bid or resolution.

**Equipment certification: May a board request assurances that a bidder has the ability to perform the contract?**

Yes. N.J.S.A. 18A:18A-23. A bidder on a “public work” contract may be required to produce a certificate showing that he owns, leases or controls all the necessary equipment required by the plans, specs, and advertisements. If the bidder is not the actual owner or lessee of such equipment, his certificate must state the source from which the equipment will be obtained, and must be accompanied by a certificate from the owner or person in control of the equipment definitely granting to the bidder the control of the equipment, for the period during which the equipment is necessary for completion of the contract.

**Bid guarantee: May a board require that the bid be accompanied by a bid guarantee/bid bond, certified check or cashier's check?**

Yes. N.J.S.A. 18A:18A-24. A board of education may require in the notice to bidders or in the specifications that bidders accompany the bid by a guarantee, payable to the board, stating that if the contract is awarded to the bidder, the bidder will enter into a contract and will furnish any performance bond or other security required as a guarantee or indemnification.

This bid guarantee must be in the amount of 10% of the bid, but not more than \$20,000 unless a U.S. law or regulation requires a different amount. The guarantee may be given at the option of the bidder, by certified check, cashier’s check, or bid bond.

**Guarantee certificate: May a board of education require that the bid also be accompanied by a surety certificate (guarantee certificate) stating that the bidder is prepared to submit a performance bond?**

Yes. N.J.S.A. 18A:18A-25. When a performance bond is required in the advertisement or specifications for a contract, every board must require a bidder to submit a certificate from a surety company stating that it will provide the contractor with a bond in the sum that is required in the advertisement or in the specs. This certificate must be obtained for a bond:

- a. for the faithful performance of all provisions of the specs or matters contained in the notice to bidders including guarantees under N.J.S.A. 2A:44-143 -147 (Bonds of Contractors on Public Works and Improvements); and
- b. if any be required, for a guarantee bond for the faithful performance of the contract provision relating to repair and maintenance of the work, project, and facility and keeping it in good and serviceable condition during the term of the bond as provided for in the notice to bidders or in the specs; or
- c. in such other form as may be provided in the notice to bidders or in the specs.

**May a bidder offer the bond of an individual surety instead of a surety company?**

Yes, with conditions. If a bidder desires to offer the bond of an individual instead of that of a surety company, the bidder must submit with the bid a certificate signed by the individual similar to that required of a surety company. A board may reject a bid if it is not satisfied with the sufficiency of the individual surety offered. N.J.S.A. 18A:18A-25.

**How does a prospective bidder challenge the bid specifications?**

**N.J.S.A. 18A:18A-15**

The prospective bidder must file such a challenge in writing with the purchasing agent no less than three business days prior to the opening of bids. Challenges filed after that time will be considered void and will have no impact on the board of education or the award of a contract.

**FORMAL BIDDING-REJECTION OF BIDS**

**When may a board reject an individual bid?**

The formal bidding process requires an award of the contract by resolution to the lowest responsible bidder. N.J.S.A. 18A:18A-4a. It therefore follows that a board may reject an individual bid if it is not the lowest responsible bidder.

**Who is the "lowest responsible bidder?"**

N.J.S.A. 18A:18A-2t defines a "lowest responsible bidder or vendor" as the bidder or vendor: (1) whose response to a request for bids offers the lowest price and is responsive; and (2) who is responsible.

A "responsive" bidder is one whose bid conforms in all material respects to the terms and conditions, specifications, legal requirements and other provisions of the request.

N.J.S.A. 18A:18A-2y.

A bidder who is "responsible" means that the bidder is able to complete the contract in accordance with its requirements, including but not limited to requirements pertaining to experience, moral integrity, operating capacity, financial capacity, credit and workforce, equipment and facilities availability." N.J.S.A. 18A:18A-2 x.

**May a board reject all bids?**

Yes, a board may reject all bids for any of the following reasons (N.J.S.A. 18A:18A-22):

- a. the lowest bid substantially exceeds the cost estimates for the goods or services;
- b. the lowest bid substantially exceeds the board of education's appropriation for the goods or services;
- c. the board of education decides to abandon the project;

- d. the board of education wants to substantially revise the specifications for the goods or services;
- e. the purposes or provisions of the Public School Contracts Law are being violated;
- f. the board of education decides to use the State authorized contract.

**May a board reject the bid of a bidder who has not submitted an application for classification pursuant to N.J.S.A. 18A:18A-28?**

Yes. Pursuant to N.J.S.A. 18A:18A-26, a board must require that all bidders on contracts for “public work” contracts exceeding the cost of \$20,000, be classified in accordance with N.J.S.A. 18A:18A-27. The board may only accept bids on such contracts from bidders so classified.

A bidder may not bid on any “public work” contract with the board of education exceeding \$20,000 if the bidder has not submitted the statement to the Department required for classification by N.J.S.A. 18A:18A-28, within a period of one year preceding the date of opening of bids for the board’s contract. N.J.S.A. 18A:18A-32.

Every bidder must submit with his/her bid an affidavit that subsequent to the latest statement submitted by him/her, there has been no material adverse change in his/her qualification information, except as may be set forth in such affidavit. N.J.S.A. 18A:18A-32.

( For more information about the bidder classification process, see this document, **PUBLIC WORKS-BIDDER CLASSIFICATION.**)

**May a board disqualify a bidder with whom it had a negative experience in the past?**

Yes. N.J.S.A. 18A:18A-4a. If the board finds that it has had “prior negative experience” (as defined below) with a bidder who would otherwise be the lowest responsible bidder, it may, by resolution approved by a majority of the board, disqualify the bidder.

**What “prior negative experience” warrants a board’s disqualification of a bidder?**

“Prior negative experience” is defined in N.J.S.A. 18A:18A-4b. to mean any one of these occurrences:

- a. In a court proceeding, an arbitration, mediation or other contractual dispute resolution mechanism, the bidder was found to have performed unsatisfactorily under a prior contract with the board. Examples of unsatisfactory experience include failure to provide goods or perform services and failure to complete the contract in a timely manner.
- b. The bidder defaulted on a contract, thereby requiring the board to use the services of another contractor to provide the goods, perform the services, or correct or complete the contract.

- c. The bidder defaulted on a contract, which required the board to look to the bidder's surety for completion of the contract or payment of completion costs.
- d. The bidder is disbarred or suspended from contracting with any agencies or departments of the executive branch of the State at the time of the contract award, whether or not the debarment or suspension was based on experience with the board of education.).

**Must a board of education disqualify a low bidder who has "prior negative experience?"**

No. Unless the disqualification is one pursuant to which a board of education is prohibited by law from entering into, the decision to disqualify is discretionary with the board. The decision is to be made in the best interests of the board. The board must consider all mitigating factors in determining the seriousness of the prior negative experience and in deciding whether disqualification is warranted. N.J.S.A. 18A:18A-4c.(1).

**What are the procedures for notifying a bidder that he/she is disqualified?**

The board of education must provide the bidder with a written notice stating that disqualification is being considered and naming the reason for the disqualification. The notice must also indicate that if the bidder makes a request within a stated period of time for a hearing before the board of education, the bidder will be provided an opportunity for a hearing. N.J.S.A. 18A:18A-4c.(3). However, an opportunity for a hearing need not be offered to a bidder whose disqualification is based on its suspension or debarment by an agency or department of the executive branch of the State. N.J.S.A. 18A:18A-4c.(6).

**What happens at the disqualification hearing before the board of education?**

At the hearing, the bidder will show cause why he/she should not be disqualified, by presenting documents and testimony. If the board of education determines that good cause has not been shown by the bidder, it may vote to find the bidder lacking in responsibility and thus disqualified. N.J.S.A. 18A:18A-4c.(3).

**Is disqualification forever?**

No. Disqualification shall be for a reasonable, defined period of time, which may not exceed five years. However, unless the disqualification legally precludes a board from contracting with a particular bidder (such prevailing wage violations), the board may in its discretion, void a disqualification or reduce the period of disqualification. It may do so upon the submission of a good faith application under oath, supported by documentary evidence, setting forth substantial and appropriate grounds for the granting of relief, such as reversal of a judgment, or actual change of ownership, management or control of the bidder. N.J.S.A. 18A:18A-4c.(4) and (5).

The term of a disqualification based on suspension or debarment by an agency or department of the executive branch of the State shall be concurrent with the term of the suspension or debarment by such agency or department. N.J.S.A. 18A:18A-4c.(6).

## **FORMAL BIDDING-AWARDING CONTRACTS**

### **How are mailed bids unsealed and announced?**

If the published specs provide for receipt of bids by mail, bids that are mailed to the board must be sealed and only opened for examination at the time and place that all bids received are unsealed and announced. At the time and place for unsealing bids, the purchasing agent of the board must publicly receive the bids and immediately proceed to unseal them and publicly announce the contents. The announcement must be made in the presence of any parties bidding or their agents, who are present. A proper record of the prices and terms must be recorded in the board minutes. N.J.S.A. 18A:18A-21b.

### **When must the contract be awarded or bids rejected?**

The board must award the contract or reject all bids within the time specified in the invitation to bid, but not later than within 60 days. The bids of any bidders who consent may, at the request of the board, be held for consideration for a longer period as may be agreed. N.J.S.A. 18A:18A-36.

### **When must the board return the bid security of the unsuccessful bidders?**

All bid security except the security of the three apparent lowest responsible bidders must, if requested, be returned after ten days from the opening of the bids, not counting Sundays and holidays. The bids of such bidders will be considered withdrawn. Within three days after the awarding of the contract and the approval of the contractor's performance bond the bid security of the remaining unsuccessful bidders shall be returned "forthwith," not counting Sundays and holidays. N.J.S.A. 18A:18A-36a.

### **When must the contract be signed?**

All parties must sign the contract within the time limit set forth in the specifications, which must not exceed 21 days, not counting Sundays and holidays, after the making of the award. However, all parties to the contract may agree to extend the time set forth in the specifications beyond 21 days. N.J.S.A. 18A:18A-36b.

### **May the contractor obtain an authorization to begin work?**

Yes. Upon written request to the board of education, the contractor is entitled to receive, within seven days of the request, an authorization to begin work according to the date set forth in the contract, or if none is set forth, upon receipt of the authorization. N.J.S.A. 18A:18A-36.

### **If the contract is not awarded, are the bidders entitled to return of payments they made to the board for plans and specs?**

Yes. If for any reason the contract is not awarded, the payment or deposit must be immediately returned to the bidders when the plans and specs are returned in reasonable condition, within 90 days of notice that the contract has not been awarded. N.J.S.A. 18A:18A-36.

## **PUBLIC WORKS: BIDDER CLASSIFICATION**

### **What is a contract for public works?**

“Public works” is defined in N.J.S.A. 18A:18A-2 z to mean “the building, altering repairing, improving or demolishing any public structure or facility constructed or acquired by a board of education to house school district functions or provide water, waste disposal, power, transportation and other public infrastructures.”

### **Must a board require that all bidders for public works be qualified in accordance with a statutory classification?**

For “public work,” the entire cost of which will exceed \$20,000, bidders must be classified in accordance with regulations adopted by the State Treasurer. N.J.S.A. 18A:18A-26; See, N.J.A.C. 17:19-1.1 et seq.

State regulations must comply with requirements set forth in N.J.S.A. 18A:18A-27. N.J.S.A. 18A:18A-27 states that the State Treasurer may establish reasonable regulations appropriate for controlling the qualifications of prospective bidders upon contracts for “public works” exceeding the bid threshold, and may require each bidder to furnish a statement of their qualifications. The provision sets forth a list describing the manner in which the regulations must be written so that they do not discourage competition or discriminate.

A board may only accept bids from bidders that are qualified in accordance with such classification. N.J.S.A. 18A:18A-26.

### **How does a board of education know if a bidder is qualified in accordance with such classification?**

A bidder may be required to submit along with his bid a “Notice of Classification” which tells the district that the bidder is prequalified. See, N.J.A.C. 17:19-2.5, 2.11. A bidder must also submit a “Total Amount of Uncompleted Contracts” wherein the bidder certifies the dollar amount of uncompleted contracts. See, N.J.A.C. 17:19-2.12 (A contractor shall include with each bid a statement of the current value and status of its uncompleted work.....”)

### **How are bidders classified?**

They are classified as to the character and amount of the “public work” contracts. N.J.S.A. 18A:18A-29.

N.J.S.A. 18A:18A-27 states that the State Treasurer may establish reasonable regulations appropriate for controlling the qualifications of prospective bidders on public works contracts the entire cost of which will exceed the bid threshold, by amount, class or category of goods or services. The regulations may fix the qualifications according to the financial ability and experience of the bidders and the capital and equipment available to them as relevant and pertinent. The qualification rating of a bidder must not be influenced by the bidder’s race, religion, sex, national origin, nationality or place of residence. The regulations may require the bidder to furnish a statement of classification.

The regulations will only be effective if formally adopted.

The regulations must be written in a manner which:

- a. will not unnecessarily discourage open competition;
- b. will not unnecessarily restrict the participation of small business;
- c. will not create undue preferences; and
- d. will not violate any law.

**How does a bidder obtain a classification?**

Together with a \$10 filing fee, a person must file with the Department of the Treasury a statement under oath in response to a standardized questionnaire prepared by the Department. The statement must detail the financial ability, adequacy of plant and equipment, organization and prior experience of the prospective bidder, and may contain other pertinent facts. N.J.S.A. 18A:18A-28.

**Does a board of education's experience with a contractor affect a contractor's classification?**

Yes. The Department of the Treasury must consider reports filed by boards of education as a basis for denial of a favorable classification. N.J.S.A. 18A:18A-29.

**Does a board of education have a responsibility to report a contractor's performance?**

If the entire cost of a contract for public works will exceed \$20,000 the board through its authorized agent must report upon completion of the contract to the Department regarding the contractor's performance. The board must also furnish a report from time to time during performance if the contractor is in default. N.J.S.A. 18A:18A-15 (after e).

**May a board of education appeal the classification of a bidder?**

Yes. Any person may appeal his/her own classification or the classification of another person, if dissatisfied with that classification. The person appealing may submit a written request for a hearing before the Department, and may present evidence with respect to financial ability, plant and equipment, or prior experience.

Where the request for a hearing is related to the classification of another person, the applicant must notify the bidder, by registered mail, of the time and place of the hearing. At the hearing the board must present to the Department satisfactory evidence that such notice was given. After the hearing, the Department may change or affirm the classification. N.J.S.A. 18A:18A-30.

**What if the board learns of subsequent developments that could affect the responsibility of a bidder already qualified and classified?**

The board must transmit such information to the Department for its review and consideration of the classification. Prior to taking action on the bid of such a bidder, the

board of education concerned must notify the bidder and give him an opportunity to present to the Department any additional information which might tend to substantiate the existing classification. N.J.S.A. 18A:18A-31.

**Are there penalties for fraudulent statements made in the questionnaire or at the hearing?**

Yes. Such deception will be considered a misdemeanor. A person so convicted will be fined up to \$1,000 and may be imprisoned for up to six months. The corporation will be disqualified from bidding on any public work for five years. The board of education may cause the forfeiture of any bid security (certified check or certificate of deposit) as liquidated damages. N.J.S.A. 18A:18A-35.

**PUBLIC WORKS: PREVAILING WAGE**

**Prevailing Wage Act: Must contractors be paid prevailing wage on contracts for public work?**

School work is subject to prevailing wage for public work contracts exceeding \$2,000. N.J.S.A. 34:11-56.26(11)(b); N.J.A.C. 12:60-8.1. A public body awarding a contract for public work must ascertain the list of contractors who have failed to pay prevailing wage, and must not award the contract to such contractor pursuant to N.J.S.A. 34:11-56.38.

**Are there any special provisions in Title 18A regarding prevailing wage?**

Yes. N.J.S.A. 18A:20-4.4 concerns the applicability of the Prevailing Wage Act to contracts for property to be subsequently leased by a board of education.

**Prevailing Wage Act: Must contractors be registered in order to bid on contracts for public work?**

Yes. All contractors, subcontractors and lower tier subcontractors of a contractor, entering into a public works contract for the “construction, reconstruction, demolition, alteration, repair or maintenance of a public building regularly open to and used by the general public or a public institution” subject to the New Jersey Prevailing Wage Act, must register with the Department of Labor prior to submitting their bid. P.L. 99, c. 238, “Public Works Contractor Registration Act,” N.J.S.A. 34:11-56.48 et seq.

A bidder must attach the certificate to the bid. A contractor is not precluded from bidding if he has submitted a registration application to the Department of Labor and includes a copy of the application with the bid. The law applies to any contract that was entered into before April 11, 2000, the effective date of P.L. 99 c. 238. Existing contractors on prevailing wage projects must comply and must present the board with the certificate.

**CONSTRUCTION**

**What are the conditions required by Title 18A for entering into a contract for the building, alteration, improvement or repair of school buildings?**

The statutes, N.J.S.A. 18A: 18A-16; 16.1; 17; 17.1; 19, state that

- √ All plans and specifications must be drawn or under the supervision of the board employee to whom such responsibility was delegated. N.J.S.A. 18A:18A-16.
- √ All plans and specifications for construction, remodeling or renovation (as defined in N.J.S.A. 18A:18A-17) must provide facilities for the physically handicapped; failure to do so may result in the Commissioner's withholding of all or part of any State aid pursuant to a district paid pursuant to chapter 58. (N.J.S.A. 18A:18A-17.1) (State School Building Aid Act of 1970, N.J.S.A. 18A:58-33.6).
- √ All specifications for the doing of any "work" for a board must fix the date before which the work must be completed, or the number of working days to be allowed for its completion; and every such contract must contain a provision for a deduction, from the contract price, or any wages paid by the board to any inspector or inspectors necessarily employed by it on the work, for any number of days in excess of the number allowed in the specifications. N.J.S.A. 18A: 18A-19.

Specs for contracts for the doing of all "work" for which it will pay any part of the cost, or which by contract it will ultimately own and maintain, that only manufactured and farm products of the US, wherever available, will be used in such work. N.J.S.A. 18A:18A-20.

**Who must approve the final plans and specifications?**

School construction projects require approval from the Department of Education for educational adequacy and conformity with the district's long range facility plan, and approval by the Department of Community Affairs or municipal code official for conformity with the Uniform Commercial Code, or "UCC" (N.J.S.A. 52:27D-119 et seq.). Any objections from the municipal planning board must be considered. N.J.S.A. 40:55D-31. No change in any plans or specs that have been approved may be made unless the change has been submitted to and approved by the entity that originally approved the plans N.J.S.A. 18A:18A-16.

The procedures for obtaining these approvals and a determination of which costs are eligible for state financing ("final eligible costs") depends on whether the project is a "school facilities project" and whether it is undertaken by the district or by the New Jersey Schools Construction Corporation. See, Educational Facilities and Construction Financing Act (EFCFA), N.J.S.A. 18A:7G-1 et seq. ; See also, N.J.S.A. 18A:18A-16. N.J.S.A. 18A:18A-49.

The State Board is prohibited from adopting regulations or policies that require, as a condition for approval of plans and specifications for the erection, alteration, improvement or repair of a public school facility, capacity requirements that exclude space occupied by movable furniture, equipment and other items when calculating net square footage. N.J.S.A. 18A:18A-16.1.

**What are the five primes ?**

N.J.S.A. 18A: 18A-18a

The categories of work, or “primes” are :

Plumbing and gas fitting work;

Heating and ventilating systems and equipment;

Electrical work, including electrical power plant;

Structural steel and ornamental iron work; and

General construction, which includes all other work and materials required for the completion of the project.

**In a construction contract, must a board solicit bids for each of the five primes, as well as solicit bids for a single overall contract?**

N.J.S.A. 18A: 18A-18b

No. It used to be the law that, for construction contracts for which the entire cost of work would exceed the bid threshold, boards of education had to solicit bids both ways.

However, P.L. 1999 c. 280 now permits boards to solicit separate bids for (1) each of the five categories of work (five primes), (2) for a single bid on all work, or (3) both.

Where the board solicits a single bid for all the work in a single contract --as in (2) and (3) above-- the bid must set forth in the bids the names of all of the subcontractors to whom the bidder will subcontract each branch of work. The subcontractors so named must be qualified. The school district must require evidence of performance security to be submitted simultaneously with the list of the subcontractors. Evidence of performance security may be supplied by the bidder on behalf of himself, and any or all subcontractors, or by each respective subcontractor, or by any combination thereof which result in evidence of performance security equaling, but in no event exceeding, the total amount bid.

**How are construction bids awarded?**

N.J.S.A. 18A: 18A-18c

Contracts are to be awarded to the lowest responsible bidder in each branch of work in the case of separate bids, and to the single lowest responsible bidder in the case of a single overall bid.

Where the board has solicited bids both ways (separate and overall) the contract is awarded this way:

Take the lowest responsible bid for each of the branches and add them up; compare that sum with the amount bid by the lowest responsible bidder of the single overall contract. If the total of the separate contracts is less than the single contract, the board must award separate contracts; if it is not less, the board must award a single overall contract.

**May a board pay the subcontractor directly?**

N.J.S.A. 18A: 18A-18c

Yes. Payments required to be made for work, goods and services supplied by a subcontractor may, upon the certification of the contractor of the amount due to the subcontractor, be paid directly to the subcontractor. Payments to a lower tier subcontractor for work, goods and services must be made within ten calendar days of the receipt of payment for that work or the delivery of those goods or services by the subcontractor under N.J.S.A. 2A:30A-1 et seq. and implementing regulations.

**Upon completion of a contract must a board report to the Department of the Treasury regarding a contractor's performance?**

If the entire cost of a contract for public work will exceed \$20,000 the board through its authorized agent must report to the Department regarding the contractor's performance. The board must also furnish a report from time to time during performance if the contractor is in default. N.J.S.A. 18A:18A-15.

**Must the contractor deposit performance bonds?**

Yes. A school district must require performance bonds for contracts for the construction, erection, alteration or repair of public buildings or other public works or improvements. N.J.S.A. 2A:44-143 et seq. See also N.J.S.A. 18A:18A-25.

**Must the board make partial payments?**

Where the total price of the contract for construction, reconstruction, alteration, repair or maintenance of any improvement to real property exceeds \$100,000, the contract must provide for partial payments to be made at least once each month as the work progresses, unless the contractor agrees to deposit bonds or notes pursuant to N.J.S.A. 18A:18A-40.2, with the board of education. N.J.S.A. 18A:18A-40.1.

**What kinds of bonds may be deposited?**

If the contractor does not agree to the withholding of a percentage of the amount of the contract, the contractor may deposit with the board negotiable bearer bonds or notes of the State or of any political subdivision of the State. The value (i.e., the lower of par value or current market value) of such bonds must be equal to the amount necessary to satisfy the amount that would be withheld under the contract. The nature and amount of the bonds or notes are subject to approval by the board. N.J.S.A. 18A:18A-40.2.

**What does the board do with the bonds and notes deposited, and interest thereon?**

The bonds or notes deposited, and any interest accruing on the bonds or notes, must be returned to the contractor upon fulfillment of the terms of the contract relating to such withholding. N.J.S.A. 18A:18A-40.2.

**How much must the board withhold on partial payments?**

The amounts that must be withheld are set forth in N.J.S.A. 18A:18A-40.3.

**What does the board do with the amounts withheld, and the interest thereon?**

If the contractor agrees to the withholding of payments, the amount withheld must be deposited with a banking institution or savings and loan association, FDIC insured, in an account bearing interest at the rate currently paid by such institutions or associations on time or savings deposits. The amount withheld shall be returned to the contractor upon fulfillment of the terms of the contract relating to such withholding. Any interest accruing on cash payments withheld shall be credited to the board of education. N.J.S.A. 18A:18A-40.2.

**COMPETITIVE CONTRACTING**

**What is competitive contracting?**

N.J.S.A. 18A:18A-4.1

Usually, goods and services costing more than the threshold must be formally bid unless they are specifically listed as exemptions from formal bidding. However, there are certain specialized goods and services for which the cost exceeds the threshold, that, even though they are not listed as exemptions from formal bidding, need not be formally bid. The district may decide instead to use competitive contracting to procure these goods and services. Also, a district may use competitive contracting at its discretion, to purchase any good or service that is specifically exempted from the formal bidding process.

The competitive contracting process permits less detailed specifications than does formal bidding. It takes a request for proposals approach, and uses evaluation criteria and ranking of proposals to determine the contractor who is the “most advantageous, price and other factors considered,” instead of an award to the “lowest responsible bidder.”

**When can competitive contracting be used?**

N.J.S.A. 18A:18A-4.1

The statute lists the goods and services that may be competitively contracted in sections a through k, as paraphrased below:

- a. Purchase or licensing of proprietary (*e.g., copyrighted or patented--as opposed to general purpose*) computer software designed for board of education purposes, which may include hardware intended for use with the software. “*Proprietary*” is defined in N.J.S.A. 18A:18A-2cc; requires that the need for such goods or services be certified in writing by the board to be necessary for the conduct of its affairs.
- b. Hiring of certain for-profit or not-for profit entities to operate, manage or administrate recreation facilities or programs, social service facilities or programs, or data processing services.
- c. Services provided by an energy services company. This includes the design and maintenance of energy savings equipment or renovations which result in payment derived from the sale of verified energy savings over the term of an agreement with a public utility. The savings must be calculated pursuant to BPU guidelines and the terms of the financing agreement must be reasonable

according to Local Finance Board in consultation with the State Board of Education.

Competitive contracting does not apply to physical improvements that result in energy savings.

- d. Telecommunications transmission or switching services for which the charges are not regulated by BPU.
- e. The purchase or servicing of specialized, technical machinery or equipment, for which specifications cannot reasonably be drawn.

However, if machinery or equipment can be competitively contracted under this provision, it is no longer exempt from bidding as an EUS under N.J.S.A. 18A:18A-5a (2). See, N.J.S.A. 18A:18A-4.1

- f. Food services provided by food service management companies not part of programs administered by the Bureau of Child Nutrition Programs.
- g. Driver education courses provided by licensed driver education schools.
- h. At the board's option, any good or service that is specifically exempt from the bidding process.
- i. Laboratory testing services.
- j. Concessions (defined in N.J.S.A. 18A:18A-2 aa. as “the granting of a license or right to act for or on behalf of the board of education, or to provide a *service* requiring the approval or endorsement of the board of education and which may or may not involve a payment or exchange, or provision of services by or to the board of education provided that the term concession shall not include vending machines.”)

“*Services*” are defined to include an arrangement in which a vendor compensates the board of education for the vendor's right to operate a concession. (N.J.S.A. 18A:18A-2 (dd.)).

Vending machines are specifically excluded from the definition of concession in N.J.S.A. 18A:18A-2aa; vending machines providing food and drink may be competitively contracted at the board's option, under N.J.S.A. 18A:18A-4.1(h).

- k. Other services with the approval of the Division of Local Government Services. (DCA)

**How does a board of education initiate competitive contracting?**

The board of education must pass a resolution to authorize the initial use of competitive contracting each time it wishes to competitively contract for a good or service. If the board has already contracted desired goods or services through the competitive contracting process, then the original resolution of the board shall suffice. N.J.S.A. 18A:18A-4.3a.

**Who administers the competitive contracting process?**

The process must be administered by a qualified purchasing agent, legal counsel of a board of education, or a school business administrator (SBA). N.J.S.A. 18A:18A-4.3b.

**Describe the request for proposals used in the competitive contracting process.**

The person administering the process (qualified purchasing agent, legal counsel or SBA) prepares a request for proposal documentation that must include:

- ✓ All requirements deemed appropriate and necessary to allow for full and free competition between vendors
- ✓ Information necessary for potential vendors to submit a proposal
- ✓ Methodology by which the board will evaluate and rank proposals received from vendors. The evaluation and ranking will be developed in a way to meet the specific needs of the contracting unit, and must include technical, management and cost related criteria, and may include a weighting of criteria. The criteria must not unfairly or illegally discriminate against or exclude capable vendors. N.J.S.A. 18A:18A-4.4 a, b.

**Where a board opts to use weighted criteria, must the board disclose to the vendors the weighting to be accorded to each criterion prior to receipt of the proposals?**

No. At the option of the board of education, it may, but is not required to, disclose to vendors the weighting of the criteria prior to receipt for the proposals. Further, during the proposal solicitation process the person administering the process must not convey any information to any potential vendor that could give that vendor an advantage over others. N.J.S.A. 18A:18A-4.4 b,c.

**What if the purchasing agent, legal counsel or SBA desires to change the proposal documentation?**

Such person must notify only those vendors who received the proposed documentation of all of the changes, and all the existing documentation must be appropriately changed. N.J.S.A. 18A:18A-4.4 c.

**Must the proposals include a statement of corporate ownership, and statements concerning equal employment opportunity and affirmative action?**

Yes. All proposals and contracts are subject to the provisions of N.J.S.A. 52:25-24.2 which prohibit an award of a public contract if corporate ownership is not disclosed with the bid or prior to receipt of the bid. Also, all proposals and contracts are subject to the provisions contained in the New Jersey Law Against Discrimination (LAD) pertaining to affirmative action and equal employment opportunity in public works contracts, N.J.S.A.

10: 5-31 *et seq.* See also N.J.A.C. 17:27-1.1 *et seq.* The LAD states that failure to include required statements renders a contract null and void. N.J.S.A. 18A:18A-4.4d.

**How does a board of education solicit proposals in competitive contracting?**  
N.J.S.A. 18A:18A-4.5

- a. *Publication.* A notice that proposal documentation is available, must be published in an official newspaper of the board at least 20 days before the date for the submission of proposals. The board must promptly provide a copy of the request for proposals to interested vendors requesting same, and may charge a fee for the copy not to exceed the greater of \$50 or the cost of reproducing the documentation.
- b. *Assure conformity with requirements.* A vendor who submits a proposal that does not meet the requirements of the request may result in the board disqualifying the vendor from further consideration. The provisions of the proposal are not subject to negotiation by the board.
- c. *Permit employee recommendations.* If the board uses its own employees to provide the goods or perform the services that are being considered for competitive contracting, the board must notify affected employees of its intention to competitively contract. The board must notify them no later than the time of solicitation for the proposals. The employees must be permitted to (if they are represented by a bargaining unit, only the bargaining representatives are authorized to) submit recommendations and proposals affecting terms and conditions of employment to meet the goals of the competitive contract. These recommendations may include modifications to existing labor agreements to reduce costs. When the employees request information regarding budgets and the costs of performing the services by such employees, the board must provide available information. A labor agreement implementing such recommendations may be considered cause for rejecting other proposals.
- d. *Prepare report.* The board's qualified purchasing agent, counsel or SBA, must evaluate the proposals in accordance with the methodology described in the request for proposals. After evaluating the proposals, the qualified purchasing agent, etc. must prepare a report evaluating and recommending the contract award.

**When must the report be made available to the public?**

The report must be made available to the public at least 48 hours prior to the awarding of the contract, or when it is made available to the board of education, whichever is sooner. The report will become part of the public record and must reflect the final action of the board of education. N.J.S.A. 18A:18A-4.5d.

**What should the report contain?**

The report should:

- ✓ list the names of all potential vendors who submitted a proposal
- ✓ summarize the proposal of each vendor
- ✓ rank vendors in order of evaluation
- ✓ recommend selection of vendor or vendors for a contract
- ✓ be clear in the reasons why the vendor or vendors has been selected
- ✓ detail the terms, conditions, scope of services, fees and other matters to be incorporated into a contract.

**May the board reject all of the proposals submitted for a competitive contract?**

N.J.S.A. 18A:18A-4.5d; N.J.S.A. 18A:18A-22.

Yes, a board may reject all proposals in competitive contracting for any of the same reasons that bids may be rejected in formal bidding, namely:

- a. the lowest bid substantially exceeds the cost estimates for the goods or services;
- b. the lowest bid substantially exceeds the board of education's appropriation for the goods or services;
- c. the board of education decides to abandon the project;
- d. the board of education wants to substantially revise the specifications for the goods or services;
- e. the purposes or provisions of the school bidding laws are being violated; or
- f. the board of education decides to use the State authorized contract.

**How are contracts awarded under competitive contracting?**

N.J.S.A. 18A:18A-4.3; 18A:18A-4.5 *e.g.*

Contracts must be awarded by resolution of the board within 60 days of the receipt of the proposals. However, if the board requests, it may hold the proposals of any consenting vendors for consideration for such longer period as may be agreed. The board secretary must publish a notice in the official newspaper of the board summarizing the award. The summary must include the nature, duration, and amount of the contract, the name of the vendor and a statement that the resolution and contract are on file and are available for public inspection in the board secretary's office. Any methodology to be used for awarding competitive contracts must comply with rules and regulations that may be adopted by the Director of the Division of Local Government Services in the Department of Community Affairs in consultation with the Commissioner of Education.

N.J.S.A. 18A:18A-4.4b; N.J.S.A. 18A:18A-4.5h.

## **JOINT AGREEMENTS**

### **May a board of education enter into a joint purchase agreement with another school board, a municipality county or authority?**

Yes, two boards may enter into a joint agreement to purchase goods and services. One or more boards may enter into a joint agreement with any municipality or county in the State. N.J.S.A. 18A:18A-11.

### **What is the procedure for entering into such joint agreements for purchases?**

The agreements must be entered into by resolution adopted by each participating board, municipality or county. The agreement must set forth the categories of goods or services to be provided or performed, the manner of advertising for bids and of awarding the contracts, the method of payment by each participant, and other necessary matters. Each participant's share of expenditures will be appropriated and paid in the manner set forth in the agreement and in the same manner as for other expenses of the participant. N.J.S.A. 18A:18A-11 and are subject to all provisions of law and regulations of the State Board. N.J.S.A. 18A:18A-12.

### **How are disputes arising under such joint agreements resolved?**

The statute addresses the procedure for resolving disputes among the boards of education that are parties to the agreement, but not for disputes involving municipalities and counties. If the districts are situated in the same county, the dispute is to be referred to that county superintendent. The determination of the county superintendent will be binding, subject to appeal to the Commissioner and the State Board of Education. If the districts are in more than one county, the disputes will be referred to the county superintendents of the counties for a joint determination. If unable to agree on a joint determination within 30 days, the dispute will be referred to the Commissioner for determination. N.J.S.A. 18A:18A-14.

### **May boards of education jointly operate data processing of their official records and information relating to their official responsibilities?**

Yes. N.J.S.A. 18A:18A-14.1, 2. One board of education may provide electronic data processing services for the board of another district, either by contract or lease. The boards may undertake the joint operation of electronic data processing of the official records and other information related to their official activities, services and responsibilities. The records of any boards participating in such a contract may be combined with the records of other participating local contracting units for the purpose of electronic data processing. Records required by law to be kept confidential, or retained by a particular board officer, will be deemed isolated.

## **SALE OF PERSONAL PROPERTY**

### **How does a board sell its personal property?**

A board may authorize the sale of personal property not needed for school purposes, by resolution and sealed bid or public auction to the highest bidder. N.J.S.A. 18A:18A-45. However, there are some exceptions as noted below.

**What procedures must be followed for public sales?**

Notice of the date, time and place of the public sale, together with a description of the items to be sold and the conditions of sale, must be published once in an official newspaper. The sale must be held not less than seven nor more than 14 days after the publication of the notice. N.J.S.A. 18A:18A-45 b.

**What if no bids are received?**

If no bids are received the property may then be either:

- ✓ sold at private sale without further publication or notice. However, it may not be sold at less than the estimated fair value.
- ✓ reoffered at public sale

**How does a board determine the estimated fair value of property no longer needed?**

It is the market value of the property between a willing seller and a willing buyer, less the cost to the board to continue storage or maintenance of the property. N.J.S.A. 18A:18A-45 d.

**May a board reject all bids?**

Yes, it may reject all bids if it determines this is in the public interest. The board may readvertise for a subsequent sale.

If the board elects to reject all bids at a second sale, it may then sell the property without further publication or notice at private sale. However, this is only permitted if the negotiated price at private sale is not less than the highest price of any bid that had been rejected at the two prior public sales, and if the terms and conditions of sale are not changed or amended. N.J.S.A. 18A:18A-45 e.

**Under what circumstances may a board sell its personal property without advertising for bids?**

- ✓ If the estimated fair value of the property does not exceed 15% of the bid threshold in any one sale or it is either livestock or perishable goods, it may be sold at private sale without advertisement for bids. N.J.S.A. 18A:18A-45 a. and f.
- ✓ If the property is sold to the U.S., the State of New Jersey, another board of education, any body politic, any foreign nation which has diplomatic relations with the US, or any governmental unit in the U.S., it may be sold at private sale without advertisement for bids. N.J.S.A. 18A:18A-45 c.
- ✓ If approved by resolution of the board of education, a purchasing agent may include the sale of personal property no longer needed for school purposes as part of the specifications to offset the price of a new purchase. N.J.S.A. 18A:18A-45 g.

## SET ASIDE CONTRACTS

### **Do the provisions of the Public School Contracts Law apply to purchases and contracts made to a small business enterprise, minority business enterprise or women's business enterprise?**

Yes, the Public School Contracts Law applies to contracts made pursuant to set-aside programs that a board has established by resolution for small business enterprises, minority business enterprises, and women's business enterprises.

However, statute contains specific procedures relating to contracts awarded to such enterprises pursuant to a set-aside program. These provisions are set forth in N.J.S.A. 18A:18A-51 through 59.

## TRANSPORTATION CONTRACTS

### **How does the Public School Contracts Law affect school transportation contracts?**

Contracts for transportation of pupils are covered by N.J.S.A. 18A:39-1 et seq., and not by the Public School Contracts Law. See N.J.S.A. 18A:18A-49.1

The revision of the contracts law does not affect transportation contracts. The revised bid threshold, likewise, does not apply to contracts for transportation. Transportation contracts are governed not by chapter 18A of Title 18A, but rather by chapter 39 of Title 18A. Those provisions are not revised by P.L. 1999 c. 440.