

Subchapter 5, Powers of the Director, discusses injunctions, auditing, hearings, and license suspensions and revocations.

Subchapter 6, Crime, states that it is a crime to alter or tamper with a gallons totalizer.

## OTHER AGENCIES

### (a)

#### OFFICE OF THE STATE COMPTROLLER

##### Rules of the Office of the State Comptroller

##### Readoption with Recodification and Amendments: N.J.A.C. 17:44 as 19:70

##### Recodifications with Amendments: N.J.A.C. 17:44- 1.3, 1.4, 1.5, and 2.2 as 19:70-1A.1, 1A.2, 1A.3, and 1.6, Respectively

##### Adopted New Rules: N.J.A.C. 19:70-1.3, 1.4, 1.5, 1A.4, 1A.5, 3.5, 4, and 5

##### Adopted Repeal: N.J.A.C. 17:44-3.6

Proposed: February 5, 2024, at 56 N.J.R. 178(a).

Adopted: December 30, 2024, by Kevin D. Walsh, Acting State Comptroller.

Filed: December 30, 2024, as R.2025 d.021, with **non-substantial changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-6.3).

Authority: N.J.S.A. 52:15C-1 et seq., specifically 52:15C-8.a.

Effective Dates: December 30, 2024, Readoption;  
February 3, 2025, Recodifications,  
Amendments, New Rules, and Repeal.

Expiration Date: December 30, 2031.

##### Summary of Public Comments and Agency Responses:

The official comment period ended April 5, 2024. The Office of the State Comptroller (OSC) received comments from the following individuals and their respective organizations:

Comments 1 through 12: Gerald T. Reiner, Jr. Purchasing Manager, Bergen County Utilities Authority.

Comments 13 through 31: Northern New Jersey Association of Purchasing Officials by Maria Rivera, Qualified Purchasing Agent, Perth Amboy, Helen P. Fiore, Qualified Purchasing Agent, Monmouth County, and Anne Marie Wright, Qualified Purchasing Agent, Camden County.

Comments 32 through 44: Frank Marshall, Associate General Counsel, New Jersey League of Municipalities.

Comment 45, 46, and 47: John Donnadio, Executive Director, New Jersey Association of Counties (NJ-AC).

1. COMMENT: The commenter states that N.J.A.C. 19:70-3.1(g)1 does not include a reference to N.J.S.A. 40:37A-131.d.

RESPONSE: The OSC directs the commenter to N.J.S.A. 52:15C-10, which sets forth contracts that are not subject to review by the OSC and does not reference N.J.S.A. 40:37A-131.d. The commenter is referencing a law regarding county improvement authorities, which is not the subject of this rulemaking.

2. COMMENT: The commenter states that proposed N.J.A.C. 19:70-3.1(g)3 is vague and non-specific, stating that the reference to "other related activities or contracts" is confusing at best.

RESPONSE: The OSC disagrees with the comment and directs the commenter to N.J.S.A. 52:15C-10.b(1), which authorizes the OSC to review "other related activities and contracts." N.J.A.C. 19:70-3.1(g)3 provides notice to contracting units that other related activities and contracts exceeding the post-award review threshold and, thus, the higher pre-advertisement review threshold also are subject to OSC review. This not only includes the preparation of any bid specification for request for proposals, but also any concession, amendment, or extension of a contract, and the purchase, sale, or lease of real estate meeting the post-award review and pre-advertisement review thresholds. To further clarify,

N.J.A.C. 19:70-3.1(g)2 and 3 are changed upon adoption to expressly include such contracts exceeding the post-award and pre-advertisement review thresholds. Pursuant to N.J.S.A. 52:15C-7, the Legislature authorized the OSC to monitor the process of soliciting proposals for, and the process of awarding contracts made by, contracting units. Although the Legislature identified certain types of contracts as not part of the review process implemented at N.J.A.C. 19:70-3.1(g)3, but for those contracts specifically excepted from the review process, OSC has broad jurisdiction, as appropriate, to review other contracts. This approach is consistent with OSC's enabling legislation, which recognizes that there is a compelling need for State government to exercise independence and integrity in the oversight of the Executive Branch of State government, including all entities exercising Executive Branch authority, public institutions of higher education, independent State authorities, units of local government, and boards of education. The OSC has been empowered to provide oversight functions that strengthen public accountability with the goal of increasing public trust and confidence that every tax dollar collected by the government is spent wisely and well. The OSC further notes that the regulation addresses what is required in as much detail as possible in view of the varying kinds of related activities and contracts that are within its review jurisdiction. That however, does not mean that "other related activities" that may not be listed in this regulation are not subject to review. In light of a long history of creativity employed by contracting units to structure procurements, transactions, and contracts in innovative ways to meet the public entity's needs, "other related activities" is used to capture the products of that creativity. Determining what these "other related activities" are require review and are fact-sensitive.

3. COMMENT: The commenter states that proposed N.J.A.C. 19:70-3.1(g)4 is not needed and exceeds the statutory authority for the OSC. The Governor, through an Executive Order, may suspend and amend regulations temporarily, as needed, and the OSC need not include an advanced provision they are not entitled to regulate.

RESPONSE: The proposed rule is intended to give contracting units notice that, as has occurred in the past, the Governor may sign an Executive Order that requires OSC review of specific contracts and procurements in addition to OSC's statutory responsibilities. Thus far, Executive Order No. 125 (2013) and Executive Order 166 (2020) have been signed requiring OSC oversight of Federally funded procurements related to Superstorm Sandy and COVID-19. As proposed, this provision was intended to alert the public and regulated entities that executive orders are a source of law that have in the past, and may in the future, impacted which contracts and procurements should be submitted for OSC's review. However, based on comments to the rulemaking, the OSC will delete N.J.A.C. 19:44-3.1(g)4 upon adoption.

4. COMMENT: The commenter states that, with respect to proposed N.J.A.C. 19:70-3.3(a)11, the reference for requirements at N.J.A.C. 5:34-7 and 7.9 refer to various types of cooperative purchasing systems, not just cooperative pricing systems, and suggests changing this to a general cooperative purchasing system.

RESPONSE: The OSC thanks the commenter for their input. OSC has revised N.J.A.C. 19:70-3.3(a)11 and 3.4(a)14, so that "cooperative purchasing systems" is used in place of "cooperative pricing system" because "cooperative purchasing systems" is a more inclusive term. As defined at N.J.A.C. 5:34-7.2, "cooperative purchasing system" includes a cooperative pricing system, joint purchasing system, commodity resale system, county cooperative contract purchasing system, or regional cooperative pricing system. This does not constitute a substantial change because the cross-reference in the existing regulation is to cooperative pricing systems and joint purchasing systems, which together represent cooperative purchasing systems pursuant to N.J.A.C. 5:34-7.2. Therefore, the revision is consistent with the existing regulation, clarifies the cross-reference therein, and makes the language of the rule consistent with the cooperative purchasing system regulations to which it cites. The OSC also refers the commenter to the Responses to Comments 5, 7, 8, 16, and 35.

5. COMMENT: The commenter states that N.J.A.C. 19:70-3.3(a)10 implies direct communication between the OSC and a contracted professional service without the local unit knowing. The commenter further states that this denies the ability for the contracting unit to manage

their own contract and that such direct communication should only occur in the context of an audit.

RESPONSE: The OSC agrees that, unless otherwise authorized by the contracting unit, communications regarding a contract review should remain between the contracting unit and OSC. Note that N.J.A.C. 19:70-3.3(a)9 and 3.4(a)12, which require a contracting unit to provide contact information for a contracting unit's employee who can communicate with OSC regarding the contract and participate in the contract review as needed. N.J.A.C. 19:70-3.3(a)10 requires a contracting unit to identify, only by name, the individual or firm that prepared or assisted with the preparation of the solicitation or specifications, if other than the contracting unit. OSC requires this information to be provided, among other reasons, to assist it with identifying possible conflicts of interest in the procurement, or if required by audit.

6. COMMENT: The commenter states that proposed N.J.A.C. 19:70-3.3(b)4 creates a required document for an optional meeting. The commenter states that this implies more value and weight on a pre-bid meeting than what would be legally allowed.

RESPONSE: The proposed regulation states that attendance sheets from a pre-bid meeting should be submitted to OSC, if applicable. The information is relevant to competition, which is an important part of OSC's oversight of procurements. OSC also notes that although pre-bid meetings may not be required as a condition of bidding pursuant to the Local Public Contracts Law (LPCL) and Public School Contracts Law (PSCL), other contracting units subject to OSC oversight may hold mandatory pre-bid meetings. To clarify, OSC will revise N.J.A.C. 19:70-3.3(b)4 and 3.4(c)4 to only require pre-bid attendance sheets for mandatory pre-bid meetings only.

7. COMMENT: The commenter, who appears to be referencing proposed N.J.A.C. 19:70-3.3(c), contends that the proposed rules set an unreasonable timeframe of 10 days versus 10 business days. The commenter suggests that 10 business days be used and expresses concern that the proposed rules, through using the term "shall" implies that there may be a penalty.

RESPONSE: Based on the OSC's experience with contract reviews meeting the post-award review threshold, 10 days is a reasonable period to respond to a request for additional documents. Pursuant to N.J.S.A. 52:15C-10.a, contracting units are required to provide the OSC with notice of a contract award within 20 business days. As OSC's request is related to a post-award review, the contracting unit should have documents related to the contract in its possession and readily available. The 10-day timeframe attempts to strike a balance between OSC's and a contracting unit's interests. Additionally, "shall" implies what is required, as opposed to what is permissive or discretionary. There is nothing in the regulation, current or as proposed, which creates, authorizes, or implies any penalties associated with this regulation. The OSC is clarifying what it believes is required to comply with this regulation. The OSC also refers the commenter to the Responses to Comments 4, 5, 8, 16, and 35.

8. COMMENT: The commenter states that N.J.A.C. 19:70-3.4(a)14 references the generalization of the use of cooperative pricing versus cooperative purchasing and notes that there are different types of cooperative purchasing systems.

RESPONSE: The OSC thanks the commenter for its comment. OSC has revised N.J.A.C. 19:70-3.3(a)11 and 3.4(a)14, so that "cooperative purchasing systems" is used in place of "cooperative pricing system" because "cooperative purchasing system" is a more inclusive term. As defined at N.J.A.C. 5:34-7.2, "cooperative purchasing system" includes a cooperative pricing system, joint purchasing system, commodity resale system, county cooperative contract purchasing system, or regional cooperative pricing system. This does not constitute a substantial change because the cross-reference in the existing regulation is to cooperative pricing systems and joint purchasing systems, which together represent cooperative purchasing systems pursuant to N.J.A.C. 5:34-7.2. Therefore, the revision is consistent with the existing regulation, clarifies the cross-reference therein, and makes the language of the rule consistent with the cooperative purchasing system regulations to which it cites. The OSC also refers the commenter to the Responses to Comments 4, 5, 7, 16, and 35.

9. COMMENT: The commenter states that N.J.A.C. 19:70-3.4(b) is vague and nonspecific. The commenter inquires to what degree, and how

should, the agency provide notice, is there a timeframe, can the OSC pause a bid opening, or may the OSC extend the bid date by directive?

RESPONSE: The requirement to notify OSC of any subsequent addendum or clarification that would change the bid or award process from the process set forth in the documents presented to OSC in support of a waiver request, even if a waiver has been granted, is already included in OSC's existing rules at N.J.A.C. 17:44-3.5(b). The requirements at N.J.A.C. 19:70-3.4(b), thus, already appear in OSC's existing rules in the context of waivers at N.J.A.C. 17:44-3.5(b) and in the proposed new rules at N.J.A.C. 19:70-3.6. The OSC notes that this rulemaking provides that a contracting unit has an ongoing duty to notify OSC of any addendum or clarification that would materially change the procurement process or award process by adding subsection (c) at N.J.A.C. 19:70-3.4, which governs all pre-advertisement reviews. In OSC's experience since 2008, contracting units may receive OSC approval to advertise, but then subsequently revise a proposed solicitation for various reasons, including, but not limited to, a change in project scope or funding. Such material changes to the proposed procurement that are outside of OSC's initial approval may not be compliant with applicable public contracting laws, rules, and regulations. Thus, to the extent possible, contracting units should ensure that any proposed solicitation is in substantially final form when submitted to OSC for review. As stated at N.J.A.C. 19:70-3.4(b), the timeframe contemplated by the rulemaking for notifying OSC of changes is the interval between OSC review and the contracting unit's receipt of bids. To the extent the proposed material change in the procurement does not comply with applicable law, OSC may rescind its approval and require the contracting unit to take corrective action related to the procurement.

10. COMMENT: The commenter alerts OSC that there is an error at N.J.A.C. 19:70-3.6 and that "©" should be revised to "(c)."

RESPONSE: The OSC thanks the commenter for its alert. However, as published in the New Jersey Register, there is no error; the text was published correctly.

11. COMMENT: The commenter states that the proposed regulations do not constrict the review period to a reasonable one and states that OSC has no provision or formal method for impasse and cure of an extraneous long bid review period.

RESPONSE: The Legislature, at N.J.S.A. 52:15C-10, established a short 30-day time frame for OSC review of contracts meeting the pre-advertisement review threshold. This summary process places the initial responsibility on the contracting unit to ensure that its proposed bid solicitation is in final form, has received any internal or external approvals that may be required to advertise the bid solicitation or otherwise proceed with the procurement, and is compliant with applicable public contracting laws, rules, and regulations. Recognizing the importance of such contracts, the Legislature gave OSC the responsibility to review the proposed solicitation within 30 days of submission. OSC's review seeks to identify any irregularities in the proposed process or issues of non-compliance in the documents. OSC's pre-advertisement reviews function as an iterative process in which both OSC and the contracting unit exchange information and share concerns. This process works with the active cooperation and attention of the contracting unit, which has an operational interest in issuing the bid solicitation and proceeding with the contract to meet its needs. Due to this cooperative and iterative process, in OSC's experience, the pre-advertisement contract reviews very rarely result in OSC's determination that the procurement does not comply with applicable contracting laws and should not proceed. OSC provides appropriate and substantial internal reviews of any such matters that reach an impasse or are pending for a long period. In this context, and in view of the short timeframe imposed by the Legislature, a formal method to resolve an impasse is not needed or appropriate.

12. COMMENT: The commenter states that there exists a considerable concern with the lack of staff and resources in the OSC to timely address a return of reviewing additional procurements. The commenter states that OSC does not have enough resources to increase its volume and observes that under the current system, each agency sends documents to the OSC, and that takes an incredible amount of resources. The commenter suggests that there could be a different approach to working with State agencies to clean up standardized grant and contract documents, such as with the New Jersey Department of Transportation (DOT) Local Aid Office, New

Jersey Infrastructure Bank, New Jersey Human Services, NJ Transit, and other agencies that the subrecipient may be receiving and then submitting to OSC for review. The commenter suggests if the OSC would review these agreements at the onset, or those templates, then the local agency can show they are using those pre-approved forms and, thus, make the review easier.

RESPONSE: As the comment does not relate to any proposed change, it is beyond the scope of the current rulemaking. However, OSC welcomes dialogue with the commenter on this subject. In addition, OSC has provided guidance and continues to provide guidance to State departments and agencies that provide funding to local governments and school districts to ensure that those agencies are providing procurement guidance that is compliant with applicable State and Federal public contracting laws, rules, and regulations. In addition, OSC provides training and other resources to all contracting units to ensure compliance with procurement laws.

13. COMMENT: Commenters ask for clarification regarding N.J.A.C. 19:70-3.1(a) and 3.4(c), related to situations in which contracts exceed the pre- or post-advertisement review threshold and contracting units are required to provide OSC documentation and information no later than 20 business days after the contract award. Specifically, commenters: (a) request guidance regarding the recommended processes for collecting and compiling the data required for reporting within the 20-day timeframe, including identifying the specific data elements that must be reported and any templates or tools provided by the OSC to facilitate data collection; (b) seek clarification on the consequences of non-compliance with the reporting requirements, as well as any procedures for requesting extensions or exemptions in cases where the 20-day timeframe is not feasible; (c) state that they would appreciate any information on training sessions or resources offered by the OSC to help them understand and comply with the reporting requirements, as well as information on any feedback mechanisms for ongoing communication to address any challenges that may arise during the reporting process; and (d) request clarification regarding whether the amounts for pre- and post-advertisement review thresholds apply to individual contracts exceeding those thresholds or if the amounts apply cumulatively to awarded bidders.

RESPONSE: OSC notes that N.J.A.C. 19:70-3.1 and 3.4 are being recodified from N.J.A.C. 17:44-3.1 and 3.4(b), respectively, and, therefore, N.J.A.C. 19:70-3.1 and 3.4 are not new to this rulemaking and do not impose any new reporting requirements on contracting units, except as clarified below. Both N.J.A.C. 19:70-3.1(a) and its predecessor, N.J.A.C. 17:44-3.1, require contracting units to notify OSC of a contract award meeting the definition of post-award review threshold (currently established at \$2.5 million, but less than \$12.5 million as defined at N.J.A.C. 19:70-1.2). N.J.A.C. 19:70-3.3(a), formerly N.J.A.C. 17:44-3.3(a), requires contracting units to provide information regarding the awarded contract not less than 20 business days after the contract award, a timeframe established by statute at N.J.S.A. 52:15C-10.a. To that end, N.J.A.C. 19:70-3.3(a)1 through 11 includes information and documentation that should be in the possession of the contracting unit within 20 business days after the resolution authorizing the contract award. Therefore, contracting units are required to complete and submit OSC's Form A within 20 business days of a contract award and provide the information required as set forth at N.J.A.C. 19:70-3.3(a)1 through 11. With this in mind, at N.J.A.C. 19:70-3.3(b) (formerly N.J.A.C. 17:44-3.3(b)), OSC has identified documents to be submitted within 10 days of an OSC request. If a document is unavailable to the contracting unit when the OSC request is made, the contracting unit may explain why it is not available and provide an estimated time for submission to the OSC. With respect to pre-advertisement reviews, N.J.A.C. 19:70-3.4(c) (formerly N.J.A.C. 17:44-3.4(b)), the information and documents listed at paragraphs (c)1 through 12 should be available within 20 business days after contract award. If a document is unavailable to the contracting unit, the contracting unit shall explain why it is not available and provide an estimated time for submission to OSC. Consequences for failure to cooperate with OSC may result in a request for a corrective action plan, a monitoring plan, a public letter or report, or other appropriate exercise of OSC's statutory powers pursuant to N.J.S.A. 52:15C-1 through 24 and N.J.S.A. 52:15B-1 through 16. OSC regularly provides training regarding its submission process and will continue to do so. In response to part (d)

of the comment, OSC advises that post-award and pre-advertisement review thresholds apply to individual contracts and not to contracts that cumulatively meet the post-award or pre-advertisement threshold through individual procurements resulting in multiple awards. OSC directs the commenters to the definition of "contract" at N.J.A.C. 19:70-1.2, which references a single agreement. Therefore, a contracting unit is required to notify OSC of individual contracts that exceed the post-award and pre-advertisement thresholds. The definition of "contract" was amended to include any individual amendment, extension, modification, or change order to a contract, or the renewal of a contract. This amendment reflects OSC's longstanding interpretation of "contract." OSC also directs the commenters to N.J.A.C. 19:70-3.2, which addresses contract valuation and also refers to the singular "contract." OSC's prior rule on this subject, N.J.A.C. 17:44-3.2(a)3, stated that "Notice is required of change orders if the value of the particular change order exceeds \$2 million." N.J.A.C. 19:70-3.2 was amended to clarify OSC's longstanding practice of reviewing contract amendments when the amendment or proposed amendment itself exceeds the post-award or pre-advertisement review threshold. In response to these comments, the OSC will revise N.J.A.C. 19:70-3.2(b) to clarify that if an extension, amendment, or change order itself meets the post-award threshold or pre-advertisement review threshold, notice is required pursuant to N.J.A.C. 19:70-3.1 and 3.2. To further clarify, and consistent with N.J.A.C. 19:70-3.2, OSC will change N.J.A.C. 19:70-3.1(a) by adding "any amendments, extensions, modifications, change orders, renewals" regarding timely notice to OSC and new paragraph (b)2.

This does not constitute a substantial change because, in these revisions, pursuant to the existing regulation at N.J.A.C. 17:44-3.2(a) and (b), and to clarify the submission requirements related to the existing regulation, the OSC is reiterating the longstanding practice by OSC and its contracting units of valuing amendments, extensions, modifications, and change orders that independently meet the notice requirements, and the submission procedures for such notices.

14. COMMENT: The commenters state that N.J.A.C. 19:70-3.2 states that for a multiyear contract, the contract value is calculated by multiplying the number of base years (excluding renewal terms) times the yearly amount of the contract. The commenters ask for the definition of a "base year." The commenters additionally ask if contracting units should use the base amount for calculating the reporting requirements.

RESPONSE: OSC directs the commenters to N.J.A.C. 19:70-3.2(b), which states that a "base year" excludes any renewal terms or options. The total value of the contract is calculated by multiplying the number of base years times the yearly amount of the contract. For example, if a contract for management services has an initial term of two years estimated to cost \$7.5 million per year with two one-year options to renew, for OSC valuation purposes, the contracting unit would multiply \$7.5 million by two base years (because the initial term is two years), resulting in a contract valuation of \$15 million and the contract being subject to OSC pre-advertisement review (because its value meets the pre-advertisement review threshold of \$12.5 million). If the contracting unit exercises its option to renew for year three or four, the contracting unit would provide OSC post-award notice pursuant to N.J.A.C. 19:70-3.1(a) for each renewal year.

15. COMMENT: The commenters state that N.J.A.C. 19:70-3.3 is proposed for amendment to clarify the post-award review threshold and process to include additional documents and information required as submission items, including attendance sheets from pre-bid meetings. The commenters further state that the requirement for attendance sheets raises enforcement concerns, as contracting units lack a means to compel an attendee at a pre-bid meeting to identify themselves. If a sign-in sheet is used, the requirement to submit these attendance sheets raises enforcement concerns for the contracting unit.

RESPONSE: N.J.A.C. 19:70-3.3(b)3 requires the submission of attendance sheets from a pre-bid meeting, if applicable. Although pre-bid meetings are not permissible under certain procurement statutes, such as LPCL, PSCL, and County College Contracts Law, State departments and agencies may require bidders to attend a pre-bid meeting as a condition of bid submission. For those procurements, the attendance sheet documents the meeting and attendees eligible to submit a bid. Upon adoption, OSC is changing N.J.A.C. 19:70-3.3(b)4 and 3.4(c)4, such that contracting

units are required to submit attendance sheets from a mandatory pre-bid meeting, if applicable.

16. COMMENT: The commenters note amendments to existing rules regarding cooperative contracts and ask OSC: (a) for clarification regarding the rationale for the proposed changes and how these changes will align with existing procurement practices; (b) for information regarding the potential impact these changes will have on the procurement process for contracting units; (c) whether any alternative solutions have been considered as opposed to these proposed changes; (d) if there are any anticipated benefits, as well as drawbacks to these proposed changes; (e) for information regarding the documents OSC would want produced in response to changes to cooperative contracts pursuant to N.J.A.C. 19:70-3.3 (particularly to comply with N.J.A.C. 5:34-7.9); and (f) for clarification as to whether each member to a cooperative contract exceeding pre-and post-review thresholds must provide documentation to OSC for review or if only those members themselves exceeding the threshold will have to submit for review.

RESPONSE: OSC is amending its rules to provide clarity to contracting units that are both administering a cooperative purchasing system as a lead agency and participating as a registered member pursuant to N.J.A.C. 5:34-7.1 through 7.32 (LPCL Cooperative Purchasing Rules). The OSC rules do not alter, or in any way add to the responsibilities of, either a lead agency or registered member. Rather, the OSC rules place the lead agency and registered member on notice that it must provide evidence to OSC of compliance with the LPCL Cooperative Purchasing Rules. Therefore, the OSC rules have no impact on the procurement process set forth in the LPCL Cooperative Purchasing Rules. Currently, OSC requests evidence of compliance with the LPCL Cooperative Purchasing Rules as part of contract review, if applicable. Placing contracting units on notice that OSC will review their procurement process for compliance with the LPCL Cooperative Purchasing Rules should result in enhanced compliance by both lead agencies and registered members. Regarding part (e) of the comment, the OSC directs the commenters to the LPCL Cooperative Purchasing Rules that establish requirements for the various cooperative purchasing systems, as defined at N.J.A.C. 5:34-7.2. Restating the LPCL Cooperative Purchasing Rules in the OSC rules would result in unnecessary duplication of regulatory requirements. OSC, however, agrees that N.J.A.C. 19:70-3.3(a)11 and 3.4(a)14 should be clarified to apply to all cooperative purchasing systems pursuant to the LPCL Cooperative Purchasing Rules instead of "cooperative pricing systems" and makes that revision upon adoption. See also the Responses to Comments 5 and 8. In response to part (f) of the comment, OSC references the definition of contract at N.J.A.C. 19:70-1.2. Lead agencies and registered members pursuant to the LPCL Cooperative Purchasing Rules have independent responsibilities to notify OSC of contracts meeting the post-award review threshold or pre-advertisement review threshold. A lead agency is required to value a proposed bid or master contract pursuant to N.J.A.C. 19:70-3.2 and applicable LPCL Cooperative Purchasing Rules. Similarly, a registered member must provide OSC notice when making a purchase using a cooperative contract in accordance with OSC's post-award review threshold or pre-advertisement review threshold and demonstrate compliance with the LPCL Cooperative Purchasing Rules as applied to a registered member.

This does not constitute a substantial change because the cross-reference in the existing regulation is to cooperative pricing systems and joint purchasing systems, which together represent cooperative purchasing systems pursuant to N.J.A.C. 5:34-7.2. Therefore, the revision is consistent with the existing regulation, clarifies the cross-reference therein, and makes the language of the rule consistent with the cooperative purchasing system regulations to which it cites. The OSC also refers the commenter to the Responses to Comments 4, 5, 7, 8, and 35.

17. COMMENT: The commenters seek information regarding non-contracting unit parties assisting with solicitations/specifications. Proposed N.J.A.C. 19:70-3.3(a)10 states: "[For] [c]ontracts meeting the post-award review threshold and reviewed on a post-award basis, the contracting unit shall provide the OSC with the following documentation and information ... If other than the contracting unit, the name of an individual or firm that prepared or assisted with the preparation of the solicitation or specifications." The commenters state that this proposed change has raised questions as to the level of detail OSC seeks from

contracting units in terms of private parties that assist with the preparation of solicitations or specifications. The commenters request clarification as to why information on firms is needed. There is concern that requiring this information may deter firms from taking part in the preparation of specifications.

RESPONSE: The OSC requires this information in order to identify any conflicts of interest in the procurement and to evaluate whether all bidders were on the same footing, thus, providing fair and open competition. For many contracts, the name of the engineering or architectural firm is listed on the bid specifications and, therefore, readily apparent. Firms in contract with a contracting unit to assist in the preparation of specifications, or people or firms that offer their services for free to a public entity, should not have an expectation of privacy for such work. Allowing such firms to submit a bid or proposal in response to the invitation to bidders or request for proposals that they drafted is a clear conflict of interest. Also, OSC's experience has been that the absence of transparency on this issue undermines the public's interest in preventing fraud, waste, and abuse in procurements, which is a central purpose of New Jersey's procurement laws.

18. COMMENT: The commenters state that N.J.A.C. 19:70-3.4(c) is proposed to be amended such that: "Upon the award of a contract meeting the pre-advertisement review threshold, contracting units shall provide the following additional documents and information to the Public Contracting Oversight Division ... A description of any pre-award or post-award bid protest and any available related documents." The commenters state that the requirement for documents related to bid protests has raised questions as to whether OSC wishes to have documentation provided regarding all bid protests, including those which are clearly frivolous or not based on fact. The commenters request clarity as to whether OSC seeks documentation regarding unfounded or frivolous bid protests.

RESPONSE: The OSC notes that the requirement to provide documents related to bid protests and any decisional documents that arise as a result of the protest is found in the existing rules at N.J.A.C. 17:44-3.4(b)6 and is being recodified as N.J.A.C. 19:70-3.4(c)11. Therefore, this requirement is not new to this rulemaking. For clarification, contracting units should disclose bid protests regardless of whether the bid protest is deemed frivolous by the contracting unit.

19. COMMENT: The commenters state that N.J.A.C. 19:70-3.4 and proposed new N.J.A.C. 19:70-3.6 are proposed for amendment to clarify that contracting units have ongoing duties to notify OSC of addenda that would change the procurement process or award process. The commenters ask for clarity regarding what should be contained in the notification to OSC as to addenda and whether the notice should relate to changes of content, timing, or other aspects relevant to the use of addenda. The commenters note that the proposed new rules state that notification must be given to OSC for addenda that would materially change the procurement process or award process and seek clarification regarding what would constitute a material change in the procurement process or award process. The commenters also ask if contracting units will have to wait to issue addenda or clarifications until OSC approval is granted.

RESPONSE: OSC refers the commenters to the Response to Comment 9, regarding N.J.A.C. 19:70-3.4(c). This subsection is included in the existing rules at N.J.A.C. 17:44-3.5 and, although revised for clarification and added at N.J.A.C. 19:70-3.4, this is not a new requirement. Examples of a material change in the procurement process or award process include a change from awarding to the lowest responsible bidder to an evaluation-based procurement based on price and other factors. A contracting unit that is making material changes to the procurement or award process must alert OSC as soon as possible explaining the reason and nature of such material change. Pursuant to N.J.A.C. 19:70-3.6(b), the ongoing duty to notify OSC of material changes to a procurement process applies to any waivers of the 30-day OSC pre-advertisement review period. OSC will evaluate the change and advise the contracting unit how to proceed.

20. COMMENT: The commenters state that N.J.A.C. 19:70-3.5 proposes a new rule regarding documentation and information required for emergency procurements. The commenters state that the contents of the section, however, predominantly cite different pieces of information that should be submitted to OSC, with less emphasis on actual documents (notwithstanding the request at paragraph (a)10 for a copy of the fully executed contract). The commenters ask for clarity regarding what

documents OSC would be looking for in relation to emergency procurements.

RESPONSE: In response to this comment, N.J.A.C. 19:70-3.1(d) is being changed to add reference to a form for notice of emergency contracts, which will provide contracting units with an easy way to provide this information. In addition, OSC directs the commenters to N.J.A.C. 19:70-3.5(a)11, which requires any documents describing the nature of the threat to public health, safety, or welfare and a justification for the immediate need for the goods and services, and N.J.A.C. 19:70-3.5(a)12, which requires resolution or minutes of the governing body or other documentation approving the contract award, as applicable. The existing forms do not require items not already set forth in the existing rules.

21. COMMENT: The commenters seek clarification regarding goods and services eligible for procurement through State contracts. The commenters state that N.J.A.C. 19:70-3.8 is proposed for amendment to expand requirements for additional documents and information to cover purchases made pursuant to State contracts. The proposed change to paragraph (a) would require a contracting unit that purchases goods or services from a State contract to "demonstrate compliance with the procedures established in the State contract, if applicable." The commenters also request clarification regarding the reporting requirements and procedures for ensuring compliance with State contracts, including any documentation or protocols that must be followed to demonstrate adherence to contract terms. The commenters further wish to know if there are limitations or exceptions to these guidelines that would be beneficial to know.

RESPONSE: The OSC notes that LPCL and PSCL allow contracting units to make purchases using State contracts and that, in doing so, a contracting unit must follow the requirements of that contract as required pursuant to N.J.A.C. 5:34-7.29(d). As the requirements or limitations for each State contract vary, it is the contracting unit's responsibility to review the State contract, comply with the procedures established pursuant to the State contract, and demonstrate to OSC that it followed those procedures. The OSC notes that State contracts will often include a method of operation, which provides using agencies with a guide to the procedures to be followed. For contracts meeting the post-award or pre-advertisement review threshold, contracting units must demonstrate to OSC that State contract procedures were followed.

22. COMMENT: The commenters state that N.J.A.C. 19:70-3.11 is proposed for amendment to clarify that a contracting unit may not proceed with a procurement process meeting the pre-advertisement review threshold until the contracting unit is provided written notice to proceed by the OSC and that contracting units shall cooperate fully with the OSC during the review. Proposed new subsection (c) includes that the OSC may conduct further fact-finding, issue a referral, or issue a letter or report identifying deficiencies or violations of law in the procurement process, which may be made public. The commenters further seek clarification as to whether the letter/report could be issued to identify deficiencies prior to advertising with revised specifications. The commenters wish to know at what point in time the letter or report will be made public.

RESPONSE: The OSC notes that the timing of the issuance of a report will depend on whether the contract review is post-award or pre-advertisement and the specific facts related to each contract review. The OSC may make public the determination of a contract review in accordance with N.J.A.C. 19:70-3.9 and N.J.S.A. 52:15C-10.b(5) (the statutory cross-reference is added to the subsection upon adoption).

23. COMMENT: The commenters state that pursuant to proposed new N.J.A.C. 19:70-5.3, Causes for debarment of a person(s), there is concern that some of the debarment elements rely on subjective elements. For example, at paragraph (a)8, the regulation would permit the OSC to debar a party found in "Violation of any laws that may bear upon a lack of responsibility or moral integrity." Further, at paragraph (a)10, the regulation would permit debarment of a party with a record for performance, provided the poor performance has occurred within a "reasonable time" preceding the determination to debar. The commenters further state that there is some concern regarding the use of "moral integrity," as well as "reasonable time," and the openness to interpretation of these terms. In the absence of a definition for laws bearing on moral integrity, as well as a definition for a reasonable time in the updated code,

consideration may be warranted for a different choice of language in these subsections.

24. COMMENT: The commenters state that the proposed new N.J.A.C. 19:70-5.5, Procedures, period of debarment, and scope of debarment affecting the debarment of a person(s), states at subsection (d), that "A debarment may include all known affiliates of a person, provided that each decision to include an affiliate is made on a case-by-case basis after giving due regard to all relevant facts and circumstances." The commenters further state that questions have arisen regarding the level of detail to which "all known affiliates of a person" extends. The commenters ask whether the term "known affiliates of a person" means only businesses bearing a legal tie to the subject person, or if it means a larger understanding. The commenters raise concerns that this language could be construed to include people with family ties to the debarred party, as well as subcontractors regularly in the employ of the debarred party and the level to which the OSC will scrutinize affiliates of a person.

RESPONSE TO COMMENTS 23 AND 24: The OSC directs the commenters to N.J.A.C. 19:70-5.1, which sets forth the purpose and scope of Subchapter 5. Subchapter 5 addresses debarment, suspension, and disqualification of a person or persons under contract with the OSC. Subchapter 5 does not apply to OSC contract reviews pursuant to N.J.S.A. 52:15C-10. In addition, these rules, which are required pursuant to Executive Order No. 189 (1988), are consistent with that executive order and corresponding rules by other State agencies adopted pursuant to the executive order related to debarments, suspensions, and disqualifications.

25. COMMENT: The commenters state that, pursuant to N.J.A.C. 19:70-1.6, a five-year retention period is in place for partners to public contracts. The commenters wish to ensure that this five-year retention period does not conflict with the record retention schedule established by the New Jersey Department of the Treasury.

RESPONSE: The OSC notes that the five-year retention period currently codified at N.J.A.C. 17:44-2.2 is authorized pursuant to N.J.S.A. 52:15C-14.d. This regulation is not being amended, but merely recodified to N.J.A.C. 19:70. It has been in place since 2010 and its language regulates record retention of contractors.

26. COMMENT: The commenters state that several amendments have been proposed for third-party contracts and that the rationale for these changes is not discussed in detail in the summary of proposed changes.

RESPONSE: OSC revised the definition of "third-party contract" to clarify that the term applies to a contract between a State entity and a third-party provider pursuant to Circular 21-14-OMB/DPP. Therefore, the term does not apply to local government units or public schools. The existing regulation addresses renewal contracts only and has been recodified to N.J.A.C. 19:70-3.7(b). As revised, N.J.A.C. 19:70-3.7(a) clarifies which documents are to be submitted by a State entity when submitting a third-party contract for post-award or pre-advertisement review. To clarify that the regulation applies to State entities only, the OSC amends the regulation heading to "Notice, documents, and information required for 'State' third-party contracts."

27. COMMENT: The commenters state that N.J.A.C. 19:70-3.8 is proposed for amendment to include the contracting unit's insurance broker contracts when submitting an insurance contract for OSC review. The commenters wish to have more information regarding the rationale for this change and how it will affect the procurement process.

RESPONSE: N.J.A.C. 19:70-3.8(a)6 requires contracting units to submit their insurance broker contracts when procuring insurance using the extraordinary unspecifiable services exception to bidding pursuant to N.J.S.A. 40A:11-5.a(ii) or 18A:18A-5.a(2). The OSC's experience of reviewing contracts for insurance since 2008 is that the contracting unit's insurance broker often conducts the procurement on behalf of the contracting unit. The OSC further notes that, in many instances, the contracting unit misunderstands that there is a separate required procurement process for an insurance broker or consulting services, and the insurance itself, or the contracting unit incorrectly believes that an agreement with an insurance broker is sufficient to obtain insurance or third-party administration services. By providing OSC with the insurance broker contract, OSC will better understand the terms and conditions of that agreement and responsibilities of the broker in procuring insurance for the contracting unit. This information will not have any effect on contracting units that are in compliance with the extraordinary

unspecifiable services procurement process. The OSC further notes that OSC's audits of local governments have revealed an extensive waste of taxpayer funds through the procurement of insurance. Based on these findings, OSC has elected to subject contracts involving insurance to greater scrutiny during its procurement reviews to ensure the contracts comply with applicable public contracting laws.

28. COMMENT: The commenters state that within the proposed amendments, the Division of Local Government Services (DLGS) is invoked for oversight purposes. The commenters would like an explanation regarding the interplay of DLGS and OSC and what their oversight scope shall be pursuant to the proposed amendments.

RESPONSE: N.J.A.C. 19:70-3.8(a)7iv requires contracting units to submit the approval from the DLGS to engage in competitive contracting pursuant to N.J.S.A. 40A:11-4.1.k, if applicable. When required, OSC requests evidence of such approval as part of our compliance review. The OSC rules do not otherwise reference the DLGS, nor do these rules in any way alter oversight by the DLGS. Both the DLGS and OSC have distinct statutory roles and work together when appropriate to fulfill their duties.

29. COMMENT: The commenters state that several amendments have been proposed to change OSC's audit and referral process in the context of public contracting matters and requests an overview of these proposed changes.

RESPONSE: The commenters do not reference any specific proposed rule or amendment. To the extent the commenters' question is related to N.J.A.C. 19:70-3.11(c) and (d), the rules clarify that OSC may conduct further fact-finding, issue a referral, or issue a letter or report identifying deficiencies or violations of law in the procurement process, which may be made public. Proposed new subsection (d) includes that the State Comptroller may direct the contracting unit to submit and comply with a corrective action plan or implement a training and/or monitoring program. OSC directs the commenters to the reports section of its website for examples of reports involving procurements, which are issued in accordance with OSC's statutory powers.

30. COMMENT: The commenters request clarification regarding the timeline for implementing the amended rules and any transitional measures that may be necessary for compliance.

RESPONSE: In accordance with N.J.A.C. 1:30-6.6(b), these rules are effective upon publication of the notice of adoption in the New Jersey Register. Public awareness of changes to existing rules and the proposal of new rules is implemented through the rulemaking process, including the notice of proposed rulemaking, comment period, and notice of adoption. Other than the rulemaking process, there is no transitional period.

31. COMMENT: The commenters request clarification regarding whether OSC's review of contracts will continue to take place within 30 days of submission by contracting units.

RESPONSE: For contracts meeting the pre-advertisement review threshold, there is no change to the 30-day review period established pursuant to N.J.S.A. 52:15C-10.b. The OSC will communicate concerns regarding the procurement process and identify issues of non-compliance with applicable public contracting laws, rules, and regulations to the contracting unit. During this statutorily imposed pause on the issuance of a solicitation meeting the pre-advertisement review threshold, contracting units must revise the documents to comply with applicable law or otherwise provide a satisfactory resolution to deficiencies or errors identified by the OSC through a cooperative and iterative process. Contracting units are responsible for meeting any deadlines for issuing a solicitation to meet their operational needs and, therefore, are encouraged to cooperate with OSC by responding to any questions or concerns regarding a pre-advertisement review in a timely manner.

32. COMMENT: The commenter contends that the OSC did not follow Executive Order No. 63 (2019), which requires rulemaking agencies to meet with stakeholders in advance of crafting and publishing rules. The commenter requests that the OSC withdraw the rulemaking until such time as interested stakeholders can meet with the OSC to further discuss the rulemaking or, in the alternative, extend the comment period to allow additional and comprehensive feedback from impacted stakeholders.

RESPONSE: The OSC complied with all of the mandates of Executive Order No. 63 (2019), as well as all applicable laws on rulemaking. The OSC has independent oversight of local governments, school districts,

State universities and colleges, county colleges, and Executive Branch entities. As such, the OSC determined that consistent with its statutorily required independence, it was more appropriate to survey its years of experience conducting thousands of audits, reviews, and investigations to inform the proposed rules.

33. COMMENT: The commenter states that N.J.A.C. 19:70-3.1 exceeds the statutory authority for the OSC. Specifically, N.J.A.C. 19:70-3.1(g) outlines what the term "contract" means in the subchapter. The commenter states this section is vague and confusing and strongly recommends that it be clarified to outline the contracts that the OSC has authority to review. The commenter further states that N.J.A.C. 19:70-3.1(g)4 includes any procurement process subject to Executive Order and that the OSC need not include a provision it is not entitled to regulate because the Governor, through Executive Order, may suspend and amend regulations temporarily, as needed.

RESPONSE: The OSC refers the commenter to the Responses to Comments 2 and 3 and N.J.A.C. 19:70-1.2, which amends the definition of "contract" to include "any amendments, extensions, modifications, or change orders thereto, or renewals thereof." In addition, N.J.A.C. 19:70-3.1(a) is being modified to include that contracting units are required to notify OSC of "any amendment, extension, change order or renewal that itself meets the pre-advertisement review threshold not less than 30 days before the amendment, extension or change order is to be executed." This does not constitute a substantial change because, in these revisions, pursuant to the existing regulation at N.J.A.C. 17:44-3.2(a) and (b), the OSC is reiterating its longstanding practice and its contracting units of valuing amendments, extensions, modifications, and change orders that independently meet the notice requirements at N.J.A.C. 17:44-3.2(a) and (b).

34. COMMENT: The commenter states that N.J.A.C. 19:70-3.2(b) addresses how to determine the value for a multiyear contract by multiplying the number of base years times the yearly amount of the contract. The commenter states that the term "base years" is undefined and, therefore, will lead to various interpretations. In addition, the commenter states that the determination established through OSC's rules only works if the contract is for the same or similar goods or services or construction work. It seems the proposed rules are trying to address the concept of aggregation in the Local Public Contracts Law rules. N.J.A.C. 5:34-8.2(b) outlines how to aggregate and instead of base year states "when calculating the amount purchased in the previous contract year, the calculation shall be based on the period of 12 consecutive months following the award of contract." The commenter states that any OSC rule adopted related to this should mirror, or better follow, N.J.A.C. 5:34-8.2(b). The commenter further states that recodified N.J.A.C. 19:70-3.2(d) estimated values for cooperative purchasing would be determined based on the estimated quantities to be purchased submitted by the cooperative purchasing system's members and projected use(s) based on prior purchases. The commenter objects to using both prior purchases and estimated purchases to determine the contract value.

RESPONSE: The OSC directs the commenter to the Response to Comment 14. The OSC disagrees with the commenter's objection to valuation, including a projection based on prior purchases, as this is a common method for contracting units to estimate the value of a future procurement. The OSC further notes that, pursuant to N.J.A.C. 5:34-7.27, lead agencies of a cooperative purchasing system may require members to report purchases pursuant to a cooperative contract to track and evaluate the utilization of contracts by their members, which provides additional information to determine the projected value.

35. COMMENT: The commenter states that the information that the OSC is requiring at N.J.A.C. 19:70-3.3, for the most part, is already provided to the DLGS. The new required documents are not providing OSC with additional information but are instead imposing a greater burden on local governments. The OSC and DLGS should work in conjunction to obtain the appropriate documents necessary. The commenter suggests the following specific changes: N.J.A.C. 19:70-3.3(a)10 implies direct communication between the OSC and a contracted professional service without the local unit's knowledge. This is infeasible, as it denies the ability for the contracting unit to manage their own contract. Such powers of direct communication should only apply in an audit. N.J.A.C. 19:70-3.3(a)11, the reference for requirements at N.J.A.C.

5:34-7 and 7.9 refers to various types of cooperative purchasing systems, not just cooperative pricing systems. This should be changed to a general cooperative purchasing system and not pricing. The commenter claims that N.J.A.C. 19:70-3.3(c) sets an unreasonable timeframe of 10 days rather than 10 business days to provide additional documents requested by the OSC. The commenter suggests that, at a minimum, the timeframe be changed to 10 business days. In addition, since the requirement is a mandate, the commenter is concerned that a penalty could be levied where additional time is needed to provide the requested documents.

RESPONSE: The DLGS does not have a formal role and is not normally directly involved in OSC's procurement reviews, which are initiated by contracting units. It would be inefficient for OSC to rely upon DLGS to obtain documents that are in the possession of, and should be readily available to, contracting units. The OSC also refers the commenter to Responses to Comments 4, 5, 7, 8, and 16.

36. COMMENT: The commenter states that N.J.A.C. 19:70-3.4(a)14 addresses the generalization of the use of cooperative pricing versus cooperative purchasing and that there are different types of cooperative purchasing systems. The commenter states that the regulations should reflect that difference.

RESPONSE: The OSC refers the commenter to the Responses to Comments 4, 5, 7, 8, and 16.

37. COMMENT: The commenter states that N.J.A.C. 19:70-3.4(b) is vague, confusing, and nonspecific. The commenter questions to what degree and how an agency should provide notice, is there a timeframe, can the OSC pause a bid opening, or may the OSC extend the bid date by directive? Furthermore, local units need to ensure compliance with the Local Public Contracts Law and, according to the commenter, these requirements may create a conflict.

RESPONSE: The OSC refers the commenter to the Responses to Comments 9 and 13.

38. COMMENT: The commenter states that the Local Public Contracts Law, N.J.S.A. 40A:11-6, and N.J.A.C. 5:34-6, provides the procurement process that must be followed when an emergency affecting the public health, safety, or welfare requires the immediate delivery of goods or the performance of services. N.J.A.C. 19:70-3.5 greatly expands what is required pursuant to the Local Public Contracts Law in an emergent situation. Municipalities must be able to respond to an emergency without an extra layer of bureaucracy.

RESPONSE: The OSC refers the commenter to the Response to Comment 20. The OSC further notes that its review of public emergency contracts meeting the post-award review threshold does not change the requirements pursuant to the Local Public Contracts Law. With respect to the commenter's concern regarding an extra layer of bureaucracy, the OSC directs the commenter to N.J.S.A. 52:15C-10.c and N.J.A.C. 19:70-3.1(d), which require a contracting unit to notify the OSC of an emergency contract 30 business days after the emergent situation has been addressed and a contract has been awarded.

39. COMMENT: The commenter notes that N.J.A.C. 19:70-3.6(c) requires the OSC to respond to a waiver request, in writing, but expresses concern that the OSC is not obligated to grant a waiver request. The commenter states that there are many deadlines that local government units must meet when procuring goods or services or public works projects. The commenter contends that the rule permits a State agency to unilaterally make a decision, with no appeal process, that could jeopardize grant funding, incur civil penalties, or delay necessary projects. The commenter requests that the OSC be consistent within its own proposed rules for responding to requests for waivers within 10 calendar days and establish an appeal process.

RESPONSE: See the Responses to Comments 9 and 19. The OSC further states that its determination regarding a waiver request is fact sensitive and based on a contracting unit's stated reasons for such request. The consequence to the contracting unit of OSC not granting a waiver of the 30-day review period is either proceeding with: (i) a pre-advertisement review in the normal course; or (ii) an emergency procurement pursuant to N.J.S.A. 40A:11-6, 18A:18A-7, 52:34-10, or 52:15C-10.c or other applicable law, which does not delay the procurement. For that reason, contracting units are not being deprived of the ability to meet the public entity's operational needs and, thus, no appeal process is required. Further, providing an appeal process from this decision not to grant an

exception to the length of the pre-advertisement review will take both OSC and the contracting unit additional time, which could be better spent by proceeding with one of the two options listed above.

40. COMMENT: The commenter states that N.J.A.C. 19:70-3.7(a), relating to third-party contracts, requires the local contracting unit to provide OSC with 30 days' notice prior to contract renewal. The commenter requests that the OSC be given a deadline of 10 days to review and make a determination, so the local contracting unit is provided with enough time to meet the statutory requirements and deadlines for contract renewal. The commenter further states that N.J.A.C. 19:70-3.7(a)4 requires the contracting unit to provide the OSC with the source of funding for third-party contracts meeting the pre-advertisement review threshold. The commenter questions the need to continually provide the OSC with the source of funding for contract awards. For a local contracting unit to enter into a contract, the chief financial officer must certify that the funds are available. Given the value of the contracts requiring OSC review, the funding will be grants and/or bonding.

RESPONSE: The OSC refers the commenter to the Response to Comment 26. The OSC further states that contracting units are required to identify the source of funding for a contract because often a funding source, such as Federal funding, includes requirements concerning the procurement process or limitations on how the funds may be used.

41. COMMENT: The commenter states that N.J.A.C. 19:70-3.9(b) permits the OSC to provide notice of a written determination of violations to procurement and other laws and provides the contracting unit with the opportunity to comment. However, the OSC is not required to consider that information in the final report. The commenter strongly urges that "may take under consideration" be changed to "shall be taken under consideration." If the State Comptroller disagrees with the information provided by the local contracting unit, they must document, in writing, why they disagree. In addition, the OSC should be prohibited from providing any public notice until the local contracting unit submits comments and the OSC responds to said comments. Otherwise, any report issued by the OSC has the potential to be biased and one-sided. Further, any response in the final report should be published as an appendix and said documents should not be edited.

RESPONSE: N.J.A.C. 19:70-3.9(c) states: "Prior to making any written determination public, the contracting unit will be provided with a confidential draft and the opportunity to comment or provide additional documentation or information, which the State Comptroller may take under consideration." As part of its standard practice, the OSC considers all relevant information regarding a procurement submitted by a contracting unit. The OSC provides discretion in this regulation in the event information provided is not relevant. The OSC, in its discretion, attaches responses to its public reports. At times, the OSC will decline to produce such responses because they contain confidential information, alleged facts that OSC cannot confirm, facts that OSC has found to be false, or assertions involving third parties that have not been provided notice and an opportunity to comment. The OSC may also revise a report in response to the comments received, which may result in the deletion of statements included in the confidential draft provided to the contracting unit from the public report, or the addition of statements that were not previously considered and were brought to OSC's attention. The OSC will consider requests to attach responses to its reports, but declines to require itself to do so in every report issued. This has been OSC's practice since its inception.

42. COMMENT: The commenter states that N.J.A.C. 19:70-3.11(d) permits the OSC to direct the contracting unit to submit and comply with a corrective action plan or implement a training and/or monitoring program that may consist of a defined period of oversight for contracts of significant consideration. The commenter states that it has many serious concerns with this new overreaching requirement and asks what does "contracts of significant consideration" mean? The commenter asks: (1) if there is a dollar threshold or if it is up to the determination of OSC; and (2) if it is based upon the determination of the OSC, what are the parameters; (3) what role the DLGS, Division of Purchase and Property, or Division of Wage and Hour and Contract Compliance have in the determination or oversight?

RESPONSE: Pursuant to N.J.S.A. 52:15C-7.b, the Legislature gave the OSC the authority to monitor the process of soliciting proposals for, and

the process of awarding contracts by, contracting units that involve a significant consideration or expenditure of funds or are comprised of complex or unique components, or both, as determined by the State Comptroller. This determination is fact-sensitive and involves the countless areas in which government operates, and it is, thus, not appropriate or possible to provide a dollar threshold or to set forth factors relevant to this determination. The amendments in this rulemaking provide contracting units with notice as to OSC's contract review process, approval, and further action that may be taken by OSC based on deficiencies, or violations discovered during a contract review in order to implement OSC's obligation to monitor procurements. The OSC regularly confers with other agencies when applying their rules and policies, but operates independent of them in accordance with its statutory mandate.

43. COMMENT: The commenter requests that N.J.A.C. 19:70-5 be amended to hold the local contracting unit harmless. The commenter further states that if the investigation is found to be erroneous and has resulted in employment action against an employee of the subject entity, then the State Comptroller's officer, not the employer, shall be held financially accountable and liable for subsequent actions taken by the employee.

RESPONSE: The OSC refers the commenter to the Responses to Comments 23 and 24. N.J.A.C. 19:70-5.1, which sets forth the purpose and scope of Subchapter 5, addresses debarment, suspension, and disqualification of a person or persons under contract with OSC. Subchapter 5 does not apply to OSC contract reviews pursuant to N.J.S.A. 52:15C-10. In addition, this chapter, which is required pursuant to Executive Order 189 (1988), is consistent with that Executive Order and corresponding rules by other State agencies adopted pursuant to the Executive Order related to debarments, suspensions, and disqualifications.

44. COMMENT: The commenter states that it is concerned that the proposed regulations do not include provisions or formal methods for impasse and cure of an extraneous long bid review period. The commenter strongly recommends that the rules be amended to include a formal process to address these issues, including an appeal process. In addition, the commenter asserts that the rulemaking places new mandates on local contracting units and suggests that the rules should be reexamined to determine the necessity of some of the new requirements and funding for local governments to offset the new requirements.

RESPONSE: The OSC refers the commenter to the Response to Comment 11. In addition, the OSC disagrees with the commenter that the rulemaking places new mandates on local governments. The OSC notes that the commenter does not reference any new mandate with specificity or identify any expenditure local governments will have to make to comply with this rulemaking. These OSC rules, as initially promulgated in 2010 and as amended through this rulemaking, clarify OSC's longstanding review process for contracts meeting the pre-advertisement or post-award review thresholds to ensure compliance with applicable public contracting laws.

45. COMMENT: The commenter states that OSC failed to follow the guidelines established by Governor Phil Murphy in Executive Order No. 63 (2019), which, in part, recommends that when considering rule changes, "State entities should engage with affected communities and provide various groups to work in partnership with the State in crafting solutions." The commenter states, to the best of NJ-AC's knowledge, counties, municipalities, licensed professionals, or other stakeholders, provided zero input into the rulemaking, which will unfortunately lead to further overreaching by the OSC to conduct investigations and issue proclamations of wrongdoing through social media, the press, or other outlets without due process of the law. NJ-AC urges the OSC to withdraw the rulemaking, to meet with stakeholders, and to discuss how the OSC may become a resource for local governments and property taxpayers.

RESPONSE: The OSC refers the commenter to the Response to Comment 32. The OSC refers the commenter to its website and social media for resources available to local governments to assist them in complying with the law, safeguarding taxpayer funds, and guarding against fraud, waste, and abuse. The OSC also welcomes the opportunity to continue assisting local governments with training and other forms of education.

46. COMMENT: The commenter states that the rulemaking ignores, circumvents, or undermines the critical roles played by DLGS in the Department of Community Affairs (DCA) as a valuable and trusted resource for local governing bodies; the Office of Attorney General as the State's chief law enforcement agency; and the Judiciary as the final arbiter of the law.

RESPONSE: As the comment does not relate to any proposed change, it is beyond the scope of the current rulemaking. The OSC further notes that although it regularly confers with other Executive Branch departments, it is an independent agency tasked with oversight of counties, among other entities, with the goal of preventing and detecting fraud, waste, and abuse. The OSC's enabling legislation recognizes that there is a compelling need for State government to exercise independence and integrity in the oversight of the Executive Branch of State government, including all entities exercising Executive Branch authority, public institutions of higher education, independent State authorities, units of local government, and boards of education. The OSC has been empowered to provide oversight functions that strengthen public accountability with the goal of increasing public trust and confidence that every tax dollar collected by government is spent wisely and well.

47. COMMENT: The commenter states that NJ-AC is concerned with the fact that the rulemaking will effectively exempt the OSC from the Open Public Records Act (OPRA).

RESPONSE: The rulemaking does not exempt the OSC from the Open Public Records Act. N.J.A.C. 19:70-1.5 clarifies that certain records either obtained or created by the OSC in the course of its statutory duties to oversee, investigate, and audit contracting units remain confidential, as required through OSC's enabling legislation.

#### Summary of Agency-Initiated Changes Upon Adoption:

The OSC is making the following non-substantial agency-initiated changes upon adoption:

1. Adding at N.J.A.C. 19:70-1.5(a)3 "pursuant to N.J.S.A. 52:15C-10.b(5) and N.J.A.C. 19:70-3.9" as amended by this rulemaking for clarity and consistency with this chapter and the Agency's enabling statute.

2. Adding at N.J.A.C. 19:70-1.6(b) "as that term is defined pursuant to N.J.A.C. 19:70-1.2" as amended by this rulemaking for clarity and consistency with this chapter.

3. Adding at N.J.A.C. 19:70-1A.3(b) "Information communicated by or between a contracting unit and the State Comptroller pursuant to N.J.S.A. 52:15C-10.b shall be considered advisory, consultative, or deliberative material for purposes of P.L. 1963, c. 73 (N.J.S.A. 47:1A-1 et seq.), as amended and supplemented, except for written determinations designated by the State Comptroller as public records pursuant to N.J.A.C. 19:70-3.9" as amended by this rulemaking for clarity and consistency with this chapter, the Agency's enabling statutes, and the additional referenced statutes, N.J.S.A. 47:1A-1 et seq. This change does not change any existing requirements at N.J.S.A. 47:1A-1 et seq.

4. N.J.A.C. 19:70-3.3(c) and 3.4(c) are changed to clarify that additional documents associated with the contract award and directions for documents to be included with a contracting unit's notice to OSC, respectively, are available on the OSC website.

5. N.J.A.C. 19:70-5.1 is changed to reference N.J.S.A. 52:15C-5.c as the more specific reference, rather than the more generic N.J.S.A. 52:15C-5.

#### Federal Standards Statement

With the exception of adopted new Subchapter 4, the rules readopted with recodifications, amendments, new rules, and a repeal are not mandated by Federal law and do not set forth standards comparable to any Federal standards. Accordingly, no further analysis is required.

Subchapter 4 sets forth rules governing the MFD, which performs program integrity oversight of the New Jersey Medicaid program. Medicaid is a Federally created, State-implemented program that provides medical assistance to the poor at the expense of the public taxpayers. See Title XIX of the Social Security Act, 42 U.S.C. §§ 1396 et seq.; see also the Medical Assistance and Health Services Act, N.J.S.A. 30:4D-1 et seq. Substantive Federal and State laws, rules, regulations, and guidance for the Medicaid program are promulgated by the Centers for Medicare and Medicaid Services (CMS) and DMAHS, respectively. Subchapter 4 conforms to the Federal standards.

**Full text** of the readopted and recodified rules can be found in the New Jersey Administrative Code at N.J.A.C. 19:70.

**Full text** of the adopted recodifications, amendments, and new rules follows (additions to proposal indicated in boldface with asterisks **\*thus\***; deletions from the proposal indicated in brackets with asterisks **\*[thus]\***):

## CHAPTER 70

### OFFICE OF THE STATE COMPTROLLER RULES

#### SUBCHAPTER 1. OFFICE OF THE STATE COMPTROLLER

##### 19:70-1.1 Authority, purpose, and scope

(a) This chapter is promulgated pursuant to the authority of the Office of the State Comptroller (OSC), N.J.S.A. 52:15C-1 et seq.

(b) The rules in this chapter set forth the organization of the OSC and explain its functions pertaining to: the routine, periodic, and random audits and performance reviews of State agencies and all entities exercising executive branch authority; the oversight of public contracting to guard against fraud, waste, and abuse; the investigation of the management and expenditure of public funds; assessments of the performance and management of programs and the extent to which they are achieving their goals and objectives; and oversight of the Medicaid program.

(c) The provisions of this chapter apply to covered entities and contracting units.

(d) OSC's powers, functions, and duties are established pursuant to N.J.S.A. 52:15C-1 et seq., 52:15B-1 et seq.; and the Medicaid Program Integrity and Protection Act, N.J.S.A. 30:4D-53 through 64. The Office of the Inspector General created pursuant to N.J.S.A. 52:15B-1 et seq., was abolished and all of its functions, powers, and duties were transferred to, and established within, the OSC, pursuant to N.J.S.A. 52:15C-21. The Office of the Medicaid Inspector General created pursuant to N.J.S.A. 30:4D-53 et seq., was abolished and all of its functions, powers, and duties were transferred to, and established within, the OSC, pursuant to N.J.S.A. 52:15C-23. The OSC carries out its powers, functions, and duties through its divisions and projects.

##### 19:70-1.2 Definitions

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

"Audit Division" means the division within the OSC that is responsible for reviewing the performance of covered entities and conducting audits in accordance with Generally Accepted Government Auditing Standards issued by the U.S. Government Accountability Office.

"Contract" means an agreement supported by consideration and enforceable at law and any amendments, extensions, modifications, or change orders thereto, or renewals thereof. Examples include, but are not limited to: grants supported by consideration, purchases of goods or services, leases, concession agreements, agreements for sale, loan agreements, agreements with entities to indemnify or insure, agreements to join certain shared service agreements, including joint insurance funds, brokerage agreements, land transactions (excluding land condemnations), certain memoranda of understanding, purchase orders, and third-party contracts.

"Cooperative contract" means a contract for the use and benefit of other contracting units, such as pursuant to N.J.S.A. 52:34-6.2 or 40A:11-11(6) or N.J.A.C. 5:34-7.

"Emergency procurement" means a contract entered into pursuant to an emergency condition that is a threat to public health, welfare, or safety and requires the immediate performance of services or delivery of goods.

"Investigations Division" means the division within the OSC that detects and uncovers misconduct, fraud, waste, and abuse at all levels of New Jersey government, including all entities exercising executive branch authority, public institutions of higher education, independent State

authorities, units of local government, and boards of education through investigations, evaluations, inspections, and other reviews.

"Medicaid" or "Medicaid program" means the New Jersey Medicaid program established pursuant to the New Jersey Medical Assistance and Health Services Act, N.J.S.A. 30:4D-1 et seq., the NJ FamilyCare program established pursuant to the Family Health Care Coverage Act, N.J.S.A. 30:4J-8 et seq., the New Jersey Charity Care program established pursuant to the Health Care Facilities Planning Act, N.J.S.A. 26:2H-18.51 et seq., and other related programs administered by the Department of Human Services and coordinate State agencies.

"Medicaid Fraud Division" (MFD) means the division within the OSC that works to protect the integrity of New Jersey's Medicaid program. The Medicaid Fraud Division reviews State oversight, as well as contracted vendor oversight, of the Medicaid program to identify vulnerabilities, recover misspent funds, and recommend program integrity enhancements. In addition, the MFD suspends/excludes Medicaid providers, as warranted, and, on its own behalf and through third-party vendors, audits, investigates, and reviews Medicaid health care providers to detect fraud, waste, and abuse in the Medicaid program and recover funds that are improperly paid.

"Post-award review threshold" means the dollar amount, established in consultation with the Department of the Treasury, of contracts that must be submitted to the OSC pursuant to N.J.S.A. 52:15C-10.a. Effective July 1, 2020, the post-award review threshold is \$2.5 million or greater, but less than \$12.5 million. Review thresholds are adjusted in accordance with N.J.S.A. 52:15C-10.d.

"Pre-advertisement review threshold" means the dollar amount, established in consultation with the Department of the Treasury, of contracts that must be submitted to the OSC pursuant to N.J.S.A. 52:15C-10.b. Effective July 1, 2020, the pre-advertisement review threshold is \$12.5 million or greater. Review thresholds are adjusted in accordance with N.J.S.A. 52:15C-10.d.

"Procurement process" means any method used to obtain goods or services, land, leaseholds, or concessions and includes, but is not limited to: bidding, competitive contracting, negotiations, requests for proposals, expressions of interest, requests for qualifications, requests for offerings or quotes, or the waiver of, or other exception to, an advertising process.

"Project" means any special undertaking, unit, or bureau that may be created from time to time as determined by the State Comptroller to serve a distinct purpose by carrying out the duties and functions of the OSC and fulfilling its responsibilities as set forth by law, executive order, directive, or other similar authority.

"Public Contracting Oversight Division" means the division within the OSC responsible for the oversight, review, and monitoring of procurements by contracting units to safeguard public money, deter corruption and favoritism, and encourage competition.

"Third-party contract" means a contract between a State entity and a third-party provider pursuant to the Attorney General formal opinion No. 21 (July 22, 1976) to provide services to private individuals, who are eligible for public assistance or are medically indigent, to defray the costs thereof. Examples of services covered by a third-party contract include: payments for hospital and convalescent care centers, foster care, nursing homes, and professionals providing services for clients of State agencies where the agency itself is neither the consumer of the service, nor the receiver of direct benefits associated with such services.

##### 19:70-1.3 Public notice of rulemakings

(a) The OSC shall make available on its website all notices of rulemaking activity and public hearing information, as applicable, pursuant to N.J.S.A. 52:14B-3. The OSC shall distribute such notices through its electronic mailing list in accordance with N.J.S.A. 52:14B-4.

(b) The OSC shall publish all notices of proposal on its website, which shall constitute its "other secondary notice" as required pursuant to N.J.A.C. 1:30-5.2(a)6ii(4)(A).

#### 19:70-1.4 Opportunity to be heard; petitions and public hearings for rulemaking

(a) The OSC shall provide a 60-day period from the publication of a notice of proposal for the receipt of comments related to the proposal. The OSC shall provide an additional 30-day period for the receipt of comments on a notice of proposal if sufficient public interest is demonstrated within the initial comment period. Public interest in the extension of a comment period shall be sufficient if:

1. At least 100 persons submit written requests to extend the comment period; and
2. A majority of the comments submitted pose an objection to the notice of proposal.

(b) The OSC shall conduct a public hearing on a notice of proposal if, within 30 days following publication of the notice of proposal in the New Jersey Register:

1. A public hearing is requested by a committee of the Legislature;
2. A public hearing is requested by a governmental agency or subdivision; or
3. Sufficient public interest in a public hearing is demonstrated, as set forth at (c) below.

(c) The State Comptroller shall determine whether sufficient public interest in holding a public hearing has been demonstrated based on a review of written requests submitted to the address to which comments are to be sent, as stated in the notice of proposal. Public interest in holding a public hearing shall be sufficient if:

1. At least 100 persons submit written requests to hold a public hearing to present data, arguments, or views that raise a substantial issue as to the impact of the notice of proposal on the regulated community or the general public that has not been anticipated by the OSC; and
2. No other public hearing on the notice of proposal has been scheduled or held by the OSC pursuant to this section or other applicable law or rule.

(d) Written comments submitted pursuant to (a) above do not constitute a request for a public hearing, unless a specific request for a hearing is included. A specific request for a hearing shall include the basis for the hearing request.

(e) For the purposes of (a)1 and (c)1 above, a professional organization or law firm that submits a request on behalf of a group of interested parties shall be considered one person.

(f) Any public hearing held pursuant to (a) above shall be conducted consistent with the requirements at N.J.A.C. 1:30-5.5. The OSC may, but shall not be required to, hold more than one public hearing on any notice of proposal.

(g) A petition for the OSC to adopt a new rule, or amend or repeal an existing rule, shall be submitted, in writing, addressed to the State Comptroller and, at a minimum, include:

1. Name of the petitioner;
2. Date;
3. The rule to be amended or repealed or, if a new rule, the nature of the proposed new rule;
4. OSC's statutory authority to amend, repeal, or adopt the proposed rule;
5. A narrative statement explaining the need for the amendment, repeal, or proposed rule.

(h) Within 60 days of the receipt of a petition for rulemaking submitted in accordance with (g) above, the State Comptroller shall consider the merits of the petition and issue a determination that includes one of the following actions:

1. Denial. If a petition for rulemaking is denied, the OSC shall provide the petitioner with the reasoning for the denial and include such explanation in its notice of action;
2. Granting the petition and initiating a rulemaking proceeding within 90 days, unless the petitioner and the OSC agree, in writing, to a longer period of time; or
3. Referral of the petition for further consideration. If a petition for rulemaking is referred, the OSC shall provide the petitioner with the reasoning for the referral and include such explanation in its notice of action. A referral shall conclude within 90 days of the referral, unless the petitioner and the OSC agree, in writing, to a longer period of time, at which time OSC shall deny or grant the petition.

(i) Any notice of action pursuant to (g) above shall be consistent with the filing and publication requirements at N.J.A.C. 1:30-4.2.

#### 19:70-1.5 Records designated confidential

(a) In addition to records designated as exempt from disclosure pursuant to the Open Public Records Act, N.J.S.A. 47:1A-1 et seq., the following records shall not be considered government records subject to public access pursuant to N.J.S.A. 47:1A-1 et seq.:

1. Any record, as defined at N.J.S.A. 47:1A-1.1, obtained by, or from, the OSC during the course of:
  - i. An audit pursuant to N.J.S.A. 52:15C-5, 7, and 8 and 30:4D-57 and 60;
  - ii. An investigation pursuant to N.J.S.A. 52:15B-7, 8, and 9; 52:15C-9(a); and 30:4D-53, 54, 60, 61, and 62;
  - iii. An evaluation pursuant to N.J.S.A. 52:15B-8;
  - iv. An inspection pursuant to N.J.S.A. 52:15B-8 and 30:4D-57.c(10);
  - v. A request for assistance and cooperation, including surveys, pursuant to N.J.S.A. 52:15C-14;
  - vi. A request for information pursuant to N.J.S.A. 52:15C-6 and 14 and 30:4D-61;
  - vii. A performance review pursuant to N.J.S.A. 52:15C-7 and 8 and 30:4D-60;
  - viii. A contract review pursuant to N.J.S.A. 52:15C-10; or
  - ix. Other reviews;
2. A complaint or referral to or by the OSC and the identity of the complainant;

3. Information communicated for notice and review by or between covered entities or contracting units and the OSC, except for written determinations designated by the State Comptroller as public records **\*pursuant to N.J.S.A. 52:15C-10.b(5) and N.J.A.C. 19:70-3.9\***;

4. Any preliminary or draft report or letter issued to a covered entity or contracting unit, the final report of which shall be a public record; and

5. Work papers, memoranda reports, plans, or other records that are made, maintained, or kept as part of any investigation, audit, or contract review by the OSC.

(b) If a person requests access to a government record that the OSC obtained from another public agency during the course of an audit, investigation, performance review, or contract review, and such record was open for public inspection, examination, or copying before the audit, investigation, or review by the OSC, then the public entity from which the OSC obtained the record shall comply with the request if made pursuant to N.J.S.A. 47:1A-1 et seq., and (c) below.

(c) In order to preserve confidentiality in accordance with N.J.S.A. 52:15C-14, the public agency that receives a request which in any way identifies the record sought by means of a reference to the State Comptroller's audit, review, or investigation, or a subpoena issued pursuant to such investigation, the public agency's response shall not disclose the existence of the State Comptroller's request for such document.

#### 19:70-1.6 Authority to audit or review contract records

(a) Relevant records of private vendors or other persons entering into contracts with covered entities are subject to audit or review by the OSC pursuant to N.J.S.A. 52:15C-14.d.

1. Vendors, contractors, and other persons entering into contracts with covered entities should exercise sound business judgment in preserving documentation and data, which include, at a minimum, contract documents, purchase orders, and change orders.

(b) All covered entities shall insert the following language in any new contract:

"(The contract partner, **\*as that term is defined pursuant to N.J.A.C. 19:70-1.2\***) shall maintain all documentation related to products, transactions, or services under this contract for a period of five years from the date of final payment. Such records shall be made available to the New Jersey Office of the State Comptroller upon request."

### SUBCHAPTER 1A. ORGANIZATIONAL RULES

#### 19:70-1A.1 Independent Office of the State Comptroller

(a) The OSC is an independent office that reports directly to the Governor. Allocated in, but not of, the New Jersey Department of the

Treasury, the OSC is independent of any supervision or control by the State Treasurer. The OSC promotes the integrity and transparency of government operations by, among other things, reviewing public contracts, investigating allegations of fraud, waste, and abuse at all levels of New Jersey government, including all entities exercising executive branch authority, public institutions of higher education, independent State authorities, units of local government, and boards of education, and conducting audits of covered entities in accordance with Generally Accepted Government Auditing Standards. In addition, the OSC conducts investigations and audits concerning fraud, waste, and abuse in the Medicaid program in accordance with N.J.S.A. 52:15C-23. The OSC's work is carried out by divisions and projects in accordance with its statutory powers.

(b)-(c) (No change.)

#### 19:70-1A.2 Establishment and functions of the Audit Division

(a) There is established within the OSC an Audit Division. The Audit Division, among other functions, conducts research and performs preliminary evaluations that may lead to recommendations regarding the need for an audit; conducts performance audits of the Executive Branch of State government, including all entities exercising executive branch authority, public institutions of higher education, and independent State authorities and their vendors; and conducts performance audits of local government units and boards of education. The Audit Division may issue public letters or reports based on its findings.

(b)-(c) (No change.)

#### 19:70-1A.3 Establishment and functions of the Public Contracting Oversight Division

(a) There is established within the OSC a Public Contracting Oversight Division. The Public Contracting Oversight Division monitors, reviews, and provides guidance on the solicitation and award process for contracts under the OSC's jurisdiction to ensure competition, transparency, public confidence in government, avoidance of favoritism, and that procurement processes comply with applicable public contracting laws, rules, regulations, and policies including, but not limited to, State contracting laws, N.J.S.A. 52:32-1 et seq., 52:33-1 et seq., and 52:34-1 et seq., Local Public Contracts Law, N.J.S.A. 40A:11-1 et seq., Public School Contracts Law, N.J.S.A. 18A:18A-1 et seq., and State College Contracts Law, N.J.S.A. 18A:64-52 et seq. The Public Contracting Oversight Division provides guidance, in the context of its reviews, to contracting units to correct deficiencies in contracts prior to advertisement and to ensure future contracts comply with applicable procurement processes.

(b) In response to complaints, referrals, and contract reviews, the OSC may investigate to gather additional information regarding the procurement process, contract award process, and financial management and performance of contracting units, and may issue public letters or reports based on these findings. **\*Information communicated by or between a contracting unit and the State Comptroller pursuant to N.J.S.A. 52:15C-10.b shall be considered advisory, consultative, or deliberative material for purposes of P.L. 1963, c. 73 (N.J.S.A. 47:1A-1 et seq.), as amended and supplemented, except for written determinations designated by the State Comptroller as public records pursuant to N.J.A.C. 19:70-3.9.\***

#### 19:70-1A.4 Establishment and functions of the Investigations Division

(a) There is established within the OSC an Investigations Division. The Investigations Division investigates allegations of fraud, waste, and abuse concerning all levels of New Jersey government, including all entities exercising executive branch authority, public institutions of higher education, independent State authorities, units of local government, and boards of education, for the purpose of promoting integrity, efficiency, accountability, and transparency in the administration and operation of New Jersey government.

(b) Among other activities, the Investigations Division monitors the performance and investigates the conduct of elected officials, individual governmental officers, public employees, appointees, and programs; uncovers waste and misconduct involving public funds; assesses the performance and management of programs and the extent to which they are achieving their goals and objectives; and releases reports and letters that contain its findings and recommendations. The Investigations

Division conducts investigations, evaluations, inspections, and reviews in accordance with the Principles and Standards for Offices of Inspector General issued by the Association of Inspectors General.

#### 19:70-1A.5 Establishment and functions of the Medicaid Fraud Division

There is established within the OSC a Medicaid Fraud Division. The Medicaid Fraud Division shall continue the functions, powers, and duties that were formerly performed by the Office of the Medicaid Inspector General, created pursuant to the Medicaid Program Integrity and Protection Act, N.J.S.A. 30:4D-53 et seq., and abolished pursuant to N.J.S.A. 52:15C-23. The Medicaid Fraud Division conducts, coordinates, and supervises State government activities relating to Medicaid fraud, waste, and abuse, and issues reports with recommendations and findings. Pursuant to N.J.S.A. 26:2H-18.60d, the Medicaid Fraud Division also may investigate claims related to charity care and recover monies from third-party payers that were paid as Charity Care subsidies.

### SUBCHAPTER 2. AUDIT DIVISION

Recodify existing 17:44-2.1 and 2.3 through 2.8 as 19:70-2.1 through 2.7 (No change in text.)

### SUBCHAPTER 3. PUBLIC CONTRACTING OVERSIGHT DIVISION

#### 19:70-3.1 Timely notice of certain contracts required

(a) Contracting units shall notify the Public Contracting Oversight Division of the award of contracts **\*[meeting]\* \*or any amendments, extensions, modifications, or change orders thereto or renewals thereof that meet\*** the post-award review threshold no later than 20 business days after the contract award. Contracting units shall utilize the form for notice provided on the OSC's website.

(b) Contracting units shall notify the Public Contracting Oversight Division of any **\*[procurement]\***.

**\*1. Procurement\*** process or contract **\*[meeting]\* \*that meets\*** the pre-advertisement review threshold **\*[no]\* \*not\*** less than 30 days prior to any advertisement of a bid or other solicitation or award of a negotiated contract\*; and

**2. Any amendment, extension, change order, or renewal that itself meets the pre-advertisement review threshold not less than 30 days before the amendment, extension, or change order is to be executed\*.**

(c) For procurements meeting the pre-advertisement review threshold, the OSC's 30-day review period commences when the contracting unit provides, or otherwise makes available, all requested documents and information as prescribed at N.J.A.C. 19:70-3.4. Contracting units shall utilize the form for notice provided on OSC's website.

(d) Contracting units shall notify the Public Contracting Oversight Division of an emergency procurement meeting the post-award review threshold no later than 30 business days after the contract award. **\*Contracting units shall utilize the form for notice provided on the OSC's website.\***

(e) For anticipated procurements in which multiple contracting units are involved, such as joint purchasing agreements or cooperative contracts for goods or services, the contracting unit shall designate an individual to notify the Public Contracting Oversight Division pursuant to this subchapter and provide all necessary documents and information.

(f) Contracting units shall provide the required notice, documents, and information electronically in accordance with the directions provided on the OSC's website. If documents are too large to send electronically or are not available electronically, please contact the Public Contracting Oversight Division for alternative means of submission.

(g) As used in this subchapter, the term contract:

1. Shall not include collective bargaining agreements, developer(s) agreements entered into in conjunction with an approval granted pursuant to the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq., redevelopment agreements entered into pursuant to the Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1 et seq., financial agreements entered into pursuant to the Long Term Tax Exemption Law, N.J.S.A. 40A:20-1 et seq., agreements entered into pursuant to the Five-Year Exemption and Abatement Law, N.J.S.A. 40A:21-1 et seq.,

agreements entered into pursuant to N.J.S.A. 54:4-3.145, agreements entered into pursuant to N.J.S.A. 58:10B-26 through 58:10B-31, and agreements entered into pursuant to the Municipal Landfill Site Closure, Remediation and Redevelopment Act, N.J.S.A. 13:1E-116.1 et seq.;

2. Shall include contracts for the purchase, sale, transfer, or lease of real estate **\*that exceed the post-award and pre-advertisement review thresholds\***; **\*and\***

3. Shall include other related activities or contracts that exceed the **\*post-award and\* pre-advertisement review threshold\*s\*\***; and **\*.\***

**\*[4. Shall include any procurement process subject to executive order. Such executive order may modify or supplement the pre-advertisement review threshold or post-award review threshold and timeframes for OSC review.]\***

#### 19:70-3.2 Determining the value of contracts

(a) When the exact value of a contract is uncertain, contracting units shall act in good faith to ascertain an estimated value. The individual(s) responsible for the procurement shall use professional judgment based on, but not limited to, prior procurements made by the contracting unit for similar goods, services, or construction work.

(b) The contract value is the total estimated value of a contract. For a multiyear contract, the contract value is calculated by multiplying the number of base years (excluding renewal terms) times the yearly amount of the contract. **\*[Although potential]\* \*Potential\*** contract extensions, amendments, or change orders are not included in this calculation<sup>[, if]\*\*.</sup>

**\*(c) If\*** an extension, amendment, or change order itself meets the post-award review threshold, notice is required pursuant to N.J.A.C. 19:70-3.1(a). If an extension, amendment, or change order **\*itself\*** meets the pre-advertisement review threshold, notice is required pursuant to N.J.A.C. 19:70-3.1(b).

**\*[(c)]\* \*(d)\*** If multiple contracts are to be awarded through a single procurement process, the contracting unit shall determine the total estimated contract value by adding together the estimated value of each contract. Notice shall be provided to OSC pursuant to this subchapter.

**\*[(d)]\* \*(e)\*** For cooperative purchasing systems established pursuant to N.J.A.C. 5:34-7, the contract value shall be based on the estimated quantities to be purchased submitted by registered members as provided at N.J.A.C. 5:34-7.9(c) and projected use(s) based on prior purchases.

**\*[(e)]\* \*(f)\*** For concession agreements, the contract value shall be based on the estimated revenue to be earned by the concessionaire for the base term of the contract.

**\*[(f)]\* \*(g)\*** For student transportation contracts, the value shall be based on the estimated value of all routes included in any single procurement process in accordance with N.J.S.A. 18A:39-3.

#### 19:70-3.3 Documents and information required for contracts meeting the post-award review threshold

(a) For contracts meeting the post-award review threshold and reviewed on a post-award basis, the contracting unit shall provide the OSC with the following documentation and information no later than 20 business days after the contract award, using the form for notice provided on the OSC's website:

1.-7. (No change.)

8. The name and address of the contract partner awarded the contract and a brief justification for the award;

9. The name, phone number, and email address of the employee of the contracting unit capable of responding to questions pertaining to the contract;

10. If other than the contracting unit, the name of an individual or firm that prepared or assisted with the preparation of the solicitation or specifications; and

11. For cooperative **\*[pricing]\* \*purchasing\*** systems established pursuant to N.J.A.C. 5:34-7, all documents that evidence the lead agency's compliance with the requirements at N.J.A.C. 5:34-**\*[7.9]\*\*7\***.

(b) The following documents and information should be submitted with the notice at (a) above. If not submitted with the notice, such items shall be submitted within 10 days of an OSC request:

1. A copy of the solicitation document issued by the contracting unit, including, at a minimum, an invitation to bidders, request for proposal, or request for qualifications, along with specifications (blue prints and

drawings are not required), terms and conditions, and addenda issued thereto;

2. A complete list of bids or proposals received and the name and address of each bidder, vendor, or competitor;

3. Evidence of publication of required public notices;

4. Attendance sheets from a **\*mandatory\*** pre-bid meeting, if applicable;

5. Bid tabulation sheets, evaluation memorandum, and/or ranking of bidders, as applicable;

6. Recommendation of award and resolution or minutes of the governing body approving the contract award, as applicable;

7. A copy of the successful bid or proposal, including any forms, certifications, and/or affidavits signed by the contract partner;

8. A copy of the fully executed contract;

9. Any documents explaining or approving a waiver of bidding requirements;

10. Any documents explaining or approving the use of proprietary items, as required at N.J.A.C. 19:70-3.8; and/or

11. Copies of any pre-award or post-award bid protests and any relevant documents, including final agency decisions.

(c) If requested by the OSC, contracting units shall provide any additional documents **\*associated with the contract award\*** within 10 days of the request.

#### 19:70-3.4 Documents and information required for contracts meeting the pre-advertisement review threshold

(a) For contracts meeting the pre-advertisement review threshold and submitted for pre-advertisement review, the contracting unit shall submit to the OSC, at least 30 days prior to any advertisement, negotiation, or solicitation, the following information and documents using the form for notice provided on OSC's website:

1. (No change.)

2. A description of the goods, services, or other subject to be procured;

3. The estimated cost of the goods, services, or other subject to be procured and any documents evidencing how the estimated cost was obtained, such as a construction cost estimate or other cost analysis;

4. The estimated date of advertisement, negotiation, or other solicitation;

5.-7. (No change.)

8. Citations to all relevant statutory, administrative, and other sources of governing law and internal procurement policies;

9. A copy of the proposed solicitation document, including the advertisement, invitation to bidders, request for proposals, or request for qualifications in final form, along with any specifications (blue prints and drawings are not required), terms and conditions, forms, certifications, or affidavits to be signed by the bidder, and, if applicable, the scoring sheet for the evaluation of proposals;

10. Any documents explaining or approving a waiver of or exception to the bidding requirements;

11. Any documents explaining or approving the use of proprietary items, as required at N.J.A.C. 19:70-3.8;

12. The name, phone number, and email address of the employee of the contracting unit capable of responding to questions pertaining to the contract;

13. If other than the contracting unit, the name of an individual or firm that prepared or assisted with the preparation of the solicitation or specifications; and

14. For cooperative **\*[pricing]\* \*purchasing\*** systems established pursuant to N.J.A.C. 5:34-7, all documents that evidence the lead agency's compliance with the requirements at N.J.A.C. 5:34-**\*[7.9]\*\*7\***.

(b) A contracting unit shall have an ongoing duty to notify the OSC of any addendum or clarification that would materially change the procurement process or award process following the OSC review, but before the contracting unit's receipt of bids, proposals, or quotes.

(c) Upon the award of a contract meeting the pre-advertisement review threshold, contracting units shall provide the following additional documents and information to the Public Contracting Oversight Division within 20 business days of the award. Directions for **\*documents to be included with the\*** notice are provided on the OSC's website:

1. (No change.)

2. The final cost of the goods, services, or other subject procured;
  3. Any addenda to the solicitation;
  4. Attendance sheets from a **\*mandatory\*** pre-bid meeting, if applicable;
  5. A complete list of the bids or proposals received and the name and address of each bidder, vendor, or competitor;
  6. Evidence of publication of required public notices;
  7. Bid tabulation sheets, evaluation memorandum or reports, or ranking of bidders, as applicable;
  8. A copy of the successful bid or proposal, including any form, certification, or affidavit signed by the contract partner;
  9. Recommendation of award and resolution or minutes of the governing body approving the contract award, as applicable;
  10. A copy of the fully executed contract;
  11. A description of any pre-award or post-award bid protest and any available related documents; and
  12. The name, phone number, and email address of the employee of the contracting unit capable of responding to questions pertaining to the contract.
- (d) If requested by OSC, contracting units shall provide any additional documents within 10 days of the request.

19:70-3.5 Documents and information required for emergency procurements meeting the post-award review threshold

(a) For emergency procurements meeting the post-award review threshold, contracting units shall provide the OSC with the following information and documents no later than 30 business days after the contract award, using the form provided on the OSC's website:

1. The name of the contracting unit and contract number, if applicable;
2. If other than the contracting unit, the name of the individual or firm that prepared or assisted with the preparation of the solicitation or specifications, if applicable;
3. A description of the goods, services, or other subject procured;
4. The cost of the goods, services, or other subject procured;
5. The source(s) of funding for the contract;
6. A list of all State and Federal grant funds used for the contract and a brief description of any conditions and/or requirements of the grant funds, if applicable;
7. Citations to, and any documentation required by, statutory, administrative, and other sources of governing law, and internal procurement policies authorizing the award of an emergency procurement and documentation evidencing any required approvals;
8. The name and address of the contract partner awarded the contract;
9. The name, phone number, and email address of the employee of the contracting unit capable of responding to questions pertaining to the contract;
10. A copy of the fully executed contract;
11. Any documents describing the nature of the threat to public health, safety, or welfare and a justification for the immediate need for the goods or services; and
12. Resolution or minutes of the governing body or other documentation approving the contract award, as applicable.

19:70-3.6 Process by which contracting units may request a waiver of the 30-day review period and the OSC response

(a) Contracting units seeking to proceed with an advertisement before the expiration of the 30-day review period shall request a waiver of the time period in writing. Such contracting units shall provide the information required at N.J.A.C. 19:70-3.4(a) at the time the waiver is requested and the reason for the waiver request. Other documents shall be supplied, as requested.

(b) Contracting units shall have an ongoing duty to notify the OSC of any subsequent addendum or clarification that would change the bid or award process from the process set forth in the documents presented to the OSC in support of any waiver request, even if a waiver has been granted.

(c) The OSC will respond to waiver requests in writing; however, the OSC is not obligated to grant waiver requests.

19:70-3.7 Notice, documents, and information required for **\*State\*** third-party contracts

(a) For proposed **\*State\*** third-party contracts meeting the pre-advertisement review threshold, notice shall be provided by the contracting unit to the Public Contracting Oversight Division no later than 30 days prior to issuance. Notice shall include the following, as applicable:

1. The name of the contracting unit and contract number;
2. The name of the proposed contract partner;
3. The estimated cost of the services and any documents describing how the estimated cost was obtained, such as a cost estimate or other cost analysis;
4. The source(s) of funding;
5. A list of all State and Federal grant funds to be used for the contract and a brief description of any conditions and/or requirements of the grant funds;
6. A description of the services to be provided;
7. The proposed contract in substantially final form; and
8. Any additional information and documentation requested by the OSC.

(b) For renewals of **\*State\*** third-party contracts meeting the pre-advertisement review threshold, notice shall be provided by the contracting unit to the Public Contracting Oversight Division no later than 60 days prior to the annual renewal date. Notice shall include the following:

- 1.-3. (No change.)
4. A copy of the original contract.

(c) For **\*State\*** third-party contracts meeting the post-award review threshold, notice shall be provided by the contracting unit as set forth at N.J.A.C. 19:70-3.3(a).

19:70-3.8 Additional documents and information required for State contract purchases, cooperative contract purchases, sole source provider or proprietary contracts, professional services contracts, insurance contracts, and competitive contracting

(a) The additional documents and information set forth below shall be required to be submitted for the following contracts meeting the post-award review threshold or pre-advertisement review threshold, as applicable:

1. A contracting unit that purchases goods or services from a State contract allowing for such purchases shall demonstrate compliance with the procedures established in the State contract, if applicable;
2. A contracting unit shall briefly explain the reasons for using a cooperative contract or joint purchasing agreement and provide documents evidencing any cost analysis conducted;
3. A contracting unit that intends to make purchases or contract for services through the use of a nationally recognized cooperative contract pursuant to N.J.S.A. 52:34-6.2.b shall submit documents supporting anticipated cost savings, a copy of the national cooperative contract, any agreement between the contracting unit and the vendor, and evidence that the national cooperative contract utilized a competitive selection process;
4. For sole source contracts and contracts requiring brand name or proprietary items, contracting units shall provide documents evidencing the justification for the award, or use of a brand name or proprietary item, including documentation demonstrating that no other vendor can provide comparable products or services and any resolution or approval of the governing body authorizing the use of proprietary or sole source goods or services and any completed waiver documentation. When determining if goods or services are sole source, contracting units shall abide by existing laws and rules limiting the use of the sole source exception;
5. In any type of procurement for which an evaluation committee is appointed, a contracting unit shall provide the list of persons participating on the evaluation committee, documents evidencing the scoring by the evaluation committee, the committee's evaluation of the successful and unsuccessful vendors, and any award recommendation;
6. For insurance contracts, in addition to the documentation required at N.J.A.C. 5:34-2.3, contracting units shall submit the insurance broker contract; and

7. A contracting unit utilizing the competitive contracting process pursuant to N.J.S.A. 40A:11-4.1 et seq., or 18A:18A-4.1 et seq., shall provide the OSC with the following documentation:

- i. The governing body resolution authorizing the use of competitive contracting;
- ii. The notice of contract award published in the official newspaper of the governing body;
- iii. In accordance with N.J.A.C. 5:34-4.3, a certification by evaluation committee members that no conflict of interest related to evaluation of the proposals exists; and
- iv. If applicable, approval by the Director of Local Government Services in accordance with N.J.S.A. 40A:11-4.1.k to engage in competitive contracting.

#### 19:70-3.9 Written determination of contract review as a public record

(a) Pursuant to N.J.S.A. 52:15C-10.b(5), the State Comptroller may designate information submitted for contract review as a public record and make it public.

(b) The State Comptroller may provide notice to the public and a contracting unit of any violations of procurement or other laws.

(c) Prior to making any written determination public, the contracting unit will be provided with a confidential draft and the opportunity to comment or provide additional documentation or information, which the State Comptroller may take under consideration.

#### 19:70-3.10 Requirements for record retention and production

Where applicable, all contracting units shall comply with record retention schedules as established by the State Records Committee pursuant to the Destruction of Public Records Law (1953), N.J.S.A. 47:3-15 et seq. If a contracting unit is not subject to N.J.S.A. 47:3-15 et seq., then relevant records shall be maintained for a period of no less than five years after contract completion. When requested, any contracting unit shall produce any record for audit or review by the OSC.

#### 19:70-3.11 Contract review process, approval, and further action

(a) For contracts meeting the pre-advertisement review threshold, the Public Contracting Oversight Division shall notify the contracting unit, in writing, if the proposed procurement process does not comply with public contracting laws, rules, and regulations, and identify any errors or deficiencies that compromise the purpose of competitive bidding, including, but not limited to, ambiguous and conflicting contract terms, actual or apparent favoritism, or other indications of fraud, waste, and abuse. The contracting unit may not proceed with the procurement process until provided written notice to proceed. Contracting units shall cooperate fully with the Public Contracting Oversight Division during the contract review.

(b) For contracts meeting the post-award review threshold submitted to the OSC for review, the Public Contracting Oversight Division may provide guidance to the contracting unit on ways to improve its procurement process or contract award process, cure any noted deficiencies, or take other appropriate action.

(c) Based on deficiencies or violations discovered during the contract review, the Public Contracting Oversight Division may conduct further fact-finding, issue a referral to an appropriate entity, or issue a letter or report identifying deficiencies or violations of law in the procurement process. \*[In the discretion of the State Comptroller, such]\* **\*Such\*** information may be made available to the public pursuant to **\*N.J.S.A. 52:15C-10.b and\*** N.J.A.C. 19:70-3.9.

(d) Following a determination by the State Comptroller of a deficiency or violation of law, the State Comptroller may direct the contracting unit to submit and comply with a corrective action plan or implement a training and/or monitoring program for such contracting unit. The monitoring program may consist of a defined period of oversight for contracts of significant consideration.

### SUBCHAPTER 4. MEDICAID FRAUD DIVISION

#### 19:70-4.1 Definitions

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

“Confidence interval” means the range of values expected to contain the overpayment amount with a reasonable degree of certainty.

“Confidence level” means the percentage of confidence intervals that would be expected to contain the actual overpayment amount if repeated sampling were to occur.

“Confidence limit” means the upper and lower boundaries of a confidence interval that are formed by adding or subtracting the precision to or from the point estimate, respectively.

“Error rate” means the number of sampling units in error divided by the total number of units sampled. It can also refer to the sample dollars in error divided by the total dollars in the sample.

“Extrapolation” means projecting information obtained from a statistical sample, including, but not limited to, payment errors, to the sample universe.

“Fair hearing” means an evidentiary hearing for contested cases as required pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and 52:14F-1 et seq.

“MFD” means the Medicaid Fraud Division.

“Measurement unit” means the individual item that is reviewed to determine the amount of overpayment for a particular sampling unit.

“Point estimate” means the estimated total overpayment in a universe.

“Precision” means the error caused by selecting a statistical sample as opposed to reviewing the entire universe. Precision may also be referred to as the sampling error or margin of error.

“Sample design” means a method that specifies the manner in which the sampling units are to be selected for the statistical sample.

“Sampling plan” means the plan that specifies the universe and how it was determined, the period of review, the sample design, the sample size, the random number generation, and any other information required to re-create the sample.

“Sampling unit” means the individual item that can be selected from the universe to be a part of the sample.

“Statistical sample” or “statistical sampling” means a probability sample is selected and that the results of the sample are extrapolated. A probability sample means that every unit in the universe has a known, non-zero chance of being selected.

“Waste” means the overutilization or the misuse of Medicaid resources.

“Universe” means the listing of all possible units under review from which the sample is selected.

#### 19:70-4.2 Sampling and extrapolation

(a) The MFD may determine the amount of money erroneously paid to a provider by the use of statistical sampling and extrapolation, rather than by an audit, investigation, or other review of 100 percent of the claims during the period of time under review.

(b) If the MFD chooses to use statistical sampling and extrapolation to determine an overpayment, it will select a probability sample (that is, a random sample) for the review period. The MFD will calculate the net overpayment amount, which is comprised of any underpayments and overpayments in the statistical sample. The MFD will then calculate the total overpayment for the review period by extrapolating to the universe from which the sample was drawn.

(c) If, during the course of the audit, investigation, or other review, any new claims are billed or any original claims that are part of the sample or universe are voided, denied, rebilled, readjudicated, or otherwise adjusted, only the original claims shall remain in the sample or universe.

(d) The MFD may use statistical sampling and extrapolation to determine overpayments regardless of the error rate determined during the review of the sample.

(e) The MFD may use statistical sampling and extrapolation to determine overpayments regardless of sample size.

(f) When the MFD performs an extrapolation, it shall calculate the point estimate and precision in order to determine a confidence interval.

(g) When the MFD uses statistical sampling and extrapolation to determine overpayments, the demand for recovery shall be accompanied by the following information:

1. A sampling plan;
2. The universe from which the sample was drawn;

3. All sampling and measurement units in the statistical sample with a summarized description of the reason(s) for the overpayment determinations.

- i. The formulas and calculation procedures used to determine the amount to be recovered; and
- ii. The confidence level used to calculate the precision of the extrapolated overpayment; and

4. An extrapolation based upon a statistical sample will be presumed, in the absence of expert testimony and evidence to the contrary, to be an accurate determination of the overpayments made or penalty to be imposed. In rebuttal, the provider may submit expert testimony challenging the statistical sample and extrapolation by the MFD.

#### 19:70-4.3 Interest

(a) In accordance with N.J.S.A. 30:4D-17.f, the MFD may impose six percent interest on overpayments made to any person, firm, corporation, partnership, or other legal entity.

(b) Interest shall accrue from the date upon which the overpayment was made to said person, firm, corporation, partnership, or other legal entity until the date upon which repayment is made to the State.

1. Where a series of overpayments have been made to any person, firm, corporation, partnership, or other legal entity, the MFD may, in its sole discretion, compute interest from the date of the last overpayment to the date upon which repayment is made to the State.

2. Interest may be tolled in accordance with N.J.S.A. 30:4D-17.f.

3. Waiver of interest shall be determined as follows:

i. If the MFD issues a preliminary recovery demand notice or final audit report to a provider, it will automatically waive interest imposed pursuant to (a) above if, within 60 days of the provider's receipt of such preliminary recovery demand or final audit report:

(1) The case is resolved pursuant to a signed settlement agreement between the MFD and the provider; or

(2) The provider repays the recovery demand in full to the Medicaid program;

ii. The waiver period may be extended beyond the 60-day timeframe if, in its discretion, the MFD finds that the parties are engaged in good faith efforts to resolve the case;

iii. If the MFD issues a notice of claim to a provider, interest will not be waived unless one or more of the following mitigating circumstances exist and, in its discretion, the MFD finds that waiver is in the best interest of the Medicaid program:

(1) Timely resolution of the case;

(2) Cooperation by the provider;

(3) Responsiveness of the provider;

(4) Demonstration by the provider that the violation that led to the overpayment is corrected; or

(5) Other mitigating circumstances; and

iv. After a case is transmitted to the Office of Administrative Law for a fair hearing, the assessment of interest will not be waived.

(c) In accordance with N.J.S.A. 30:4D-17.e, the MFD may impose a payment of penalty interest on the amount of the excess benefits or overpayments at the maximum legal rate in effect on the date the payment was made to said person, firm, corporation, partnership, or other legal entity for the period from the date upon which payment was made to the date upon which repayment is made to the State.

1. Assessments of penalty interest pursuant to N.J.S.A. 30:4D-17.e(1) shall not be waived under any circumstances.

#### 19:70-4.4 Civil monetary penalties

(a) Pursuant to N.J.S.A. 30:4D-17.e, the MFD may impose civil monetary penalties for violations of the following statutory provisions:

1. Violations of N.J.S.A. 30:4D-17.a, b, c, or d; or

2. Violations of N.J.S.A. 2A:32C-3. Pursuant to N.J.S.A. 2A:32C-3, no proof of specific intent to defraud is required to constitute a violation of the subsection and trigger penalties. Acts occurring by innocent mistake or as a result of mere negligence shall be a defense to an action pursuant to this section. Violations of this paragraph, include:

i. Knowingly presenting, or causing to be presented, to an employee, officer, or agent of the State, or to any contractor, grantee, or other recipient of State funds, a false or fraudulent claim for payment or approval;

ii. Knowingly making, using, or causing to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the State;

iii. Conspiring to defraud the State by getting a false or fraudulent claim allowed or paid by the State;

iv. Having possession, custody, or control of public property or money used, or to be used, by the State and knowingly delivering, or causing to be delivered, less property than the amount for which the person receives a certificate or receipt;

v. Being authorized to make or deliver a document certifying receipt of property used or to be used by the State and, intending to defraud the entity, making or delivering a receipt without completely knowing that the information on the receipt is true;

vi. Knowingly buying, or receiving, as a pledge of an obligation or debt, public property from any person who lawfully may not sell or pledge the property.

(1) "Knowing" and "knowingly" shall have the meaning as set forth at N.J.S.A. 2A:32C-2; or

vii. Knowingly making, using, or causing to be made or used a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the State.

(1) "Knowing" and "knowingly" shall have the meaning as set forth at N.J.S.A. 2A:32C-2.

(b) Examples of instances that may merit civil penalties pursuant to (a) above include, but are not limited to, the following actions:

1. Repeated violations by a party for the same or similar conduct;

2. A party alters or fabricates documentation; or

3. A party fails to produce one-third or more records for goods and services billed to Medicaid when requested by the MFD to produce same.

(c) Pursuant to N.J.S.A. 30:4D-17.e, any person, firm, corporation, partnership, or other legal entity may be assessed the following penalties:

1. Payment of an amount not to exceed three times the amount of the excess benefits or overpayments as determined by the MFD; and

2. Payment in the sum of not less than and not more than the civil penalty allowed pursuant to the Federal False Claims Act, 31 U.S.C. §§ 3729 et seq., as it may be adjusted for inflation pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub.L. 101-410 for each excessive claim for assistance, benefits, or overpayments.

(d) In accordance with N.J.S.A. 30:4D-17.k, the MFD may impose monetary penalties as follows:

1. A person who violates the provisions at N.J.S.A. 30:4D-17.a, b, or c shall be liable for a penalty of not less than \$15,000 and not more than \$25,000 for each violation; and

2. A person who violates the provisions at N.J.S.A. 30:4D-17.d shall be liable for a penalty of not less than \$10,000 and not more than \$25,000 for each violation.

(e) In accordance with N.J.S.A. 30:4D-17.l, the MFD may additionally assess a penalty of not less than \$25,000 and not more than \$150,000 for each repeat violation when the following conditions are met:

1. A person violates the provisions at N.J.S.A. 30:4D-17.a, b, or c and the aggregate amount obtained or sought to be obtained is \$1,000 or more; and

2. The person has previously been convicted of a violation of the provisions at N.J.S.A. 30:4D-17.a, b, or c within 10 years of the current violation, and the aggregate amount obtained or sought to be obtained was \$1,000 or more.

(f) Nothing in this section will preclude the MFD from also assessing other monetary civil penalties set forth in this chapter or that otherwise may be imposed by law.

(g) Nothing in this section shall preclude the MFD from seeking administrative sanctions against a Medicaid provider, including, but not limited to, suspension, debarment, disqualification, and/or termination from the Medicaid program.

#### 19:70-4.5 Administrative sanctions

(a) The MFD may suspend, debar, or disqualify providers, persons, companies, firms, associations, corporations, or other entities from participation in the Medicaid program in accordance with N.J.A.C. 10:49-11.1, incorporated herein by reference.

(b) If good cause exists to exclude a provider from participation in the Medicaid program pursuant to any of the provisions at N.J.A.C. 10:49-11.1(d)1 through 27, incorporated herein by reference, then the MFD may terminate any existing agreement with a provider in accordance with N.J.A.C. 10:49-3.2(f).

#### 19:70-4.6 Subpoena power of the Medicaid Fraud Division

(a) Pursuant to N.J.S.A. 30:4D-57.c(6), the MFD may compel at a specific time and place, by subpoena, the appearance and sworn testimony of any person whom the Director reasonably believes may be able to give information relating to a matter under investigation.

1. For this purpose, the Medicaid Fraud Division is empowered to administer oaths and examine witnesses under oath, and compel any person to produce at a specific time and place, by subpoena, any documents, books, records, papers, objects, or other evidence that the Director reasonably believes may relate to a matter under investigation.

2. If any person to whom a subpoena is issued fails to appear or, having appeared, refuses to give testimony, or fails to produce the books, papers, or other documents required, the MFD, or its representative, may apply to the Superior Court for an order compelling the person to appear and give testimony or produce the books, papers, or other documents, as applicable. Any person failing to obey the court's order may be punished by the court for contempt.

(b) Pursuant to N.J.S.A. 54:50-9.e, the MFD, as a division of the Office of the State Comptroller, may request and examine tax records and files in the possession of the New Jersey Division of Taxation.

#### 19:70-4.7 Additional information/document submissions

(a) Within 30 calendar days after the MFD has served, on a provider, its preliminary recovery demand, a provider may submit to the MFD clarifying information or supplemental documentation that the provider had not previously provided. Any such documents the provider submits shall not be altered or created for purposes of the MFD audit, investigation, or review.

(b) The provider, or the provider's designee, may request an extension of time beyond the 30-calendar-day timeframe. The request must:

1. Establish good cause for the delay in submitting the records; and
2. Be received by the MFD before the date the records are due to be submitted.

(c) Records not provided to the MFD during the review process, including the timeframes set forth at (a) and (b) above, shall not be admissible in any subsequent contested case proceeding arising out of a finding and order for repayment of any overpayment identified unless the party can demonstrate the following by clear and convincing evidence:

1. The purported records are authentic; and
2. The party had good cause for failing to produce the records within the review timeframe established above.

(d) This section does not preclude providers that have provided records to the MFD during the review process from presenting clarifying information or supplemental documentation in the appeals process in order to defend against any overpayment identified. This section is intended to minimize potential duplication of effort and delay in the audit, investigation, or review process; minimize unnecessary appeals; and otherwise forestall fraud, waste, and abuse in the Medicaid program.

#### 19:70-4.8 Fair hearings

(a) If the MFD takes an enforcement action, including, but not limited to, assessing an overpayment, instituting a monetary penalty, suspending payments, terminating a provider agreement, or denying a provider enrollment/reenrollment application, then the named party or parties may request a fair hearing to contest the agency action.

1. A request for a fair hearing shall be made, in writing, within 20 days of the receipt of the notice of the agency action.

i. Failure to submit a written request for a fair hearing within the 20-day time period shall result in the party forfeiting the opportunity to request a fair hearing.

2. A request for a fair hearing shall include a written response to the MFD's action, including any legal objections and shall set forth all material facts the party or parties contend are contested.

i. Failure to include such a written response shall result in the party forfeiting the opportunity to request a hearing.

(b) If the MFD issues an administrative sanction against a party, including, but not limited to, a suspension, debarment, and/or disqualification action as set forth at N.J.A.C. 10:49-11.1, the named party or parties shall be afforded appeal rights as set forth at N.J.A.C. 10:49-11.1.

(c) If the MFD takes an enforcement action against an individual recipient of medical services from the Division of Medical Assistance and Health Services, the individual shall be afforded appeal rights as set forth at N.J.A.C. 10:49-10.3.

(d) Upon receipt of a request for a fair hearing, the MFD shall inform the Division of Medical Assistance and Health Services of the request.

(e) If the MFD determines, in accordance with applicable law, that a matter is not a contested case, the MFD may request that the Division of Medical Assistance and Health Services decline to hold a hearing, decline to transmit the matter to the Office of Administrative Law for a hearing, and enter a final agency decision based on the record prepared during the administrative process conducted by the MFD.

(f) Fair hearings shall be conducted in accordance with the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and 52:14F-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1.

### SUBCHAPTER 5. DEBARMENT, SUSPENSION, AND DISQUALIFICATION OF A PERSON(S)

#### 19:70-5.1 Purpose and scope

The purpose of this subchapter is to set forth the procedures that apply to debarment, suspension, and disqualification of a person or persons from contracting with the OSC, specifically those contracts awarded pursuant to N.J.S.A. 52:15C-5.c \*[et seq]\*. Hearings arising as a result of this subchapter are contested cases subject to the requirements of the Administrative Procedures Act, N.J.S.A. 52:14B-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1.

#### 19:70-5.2 Definitions

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

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

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

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

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

"Person" means any natural person, company, firm, association, corporation, or other entity that is engaged in or offers or proposes to be engaged in OSC contracting.

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

#### 19:70-5.3 Causes for debarment of a person(s)

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

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

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

3. Violation of the Federal or State antitrust statutes, or of the Federal Anti-Kickback Act or of the Copeland Anti-kickback Act, 18 U.S.C. § 874 and 40 U.S.C. § 3145;

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

5. Violation of the Law Against Discrimination, N.J.S.A. 10:5-1 et seq., or of the act banning discrimination in public works employment, N.J.S.A. 10:2-1 et seq., or of the act prohibiting discrimination by industries engaged in defense work in the employment of persons therein, N.J.S.A. 10:1-10 et seq.;

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

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

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

9. Willful failure to perform in accordance with contract specifications or within contractual time limits;

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

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

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

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

14. Any violation of the prohibited activities set forth at N.J.A.C. 19:70-5.9(a) or failure to report violations of prohibited activities as required pursuant to N.J.A.C. 19:70-5.9(b); or

15. Agreeing with any agency of government to refrain from bidding on public contracts for reasons that, in the discretion of the State Comptroller, warrant debarment.

#### 19:70-5.4 Conditions affecting the debarment of a person(s)

(a) The following conditions shall apply concerning debarment:

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

2. The existence of any of the causes set forth at N.J.A.C. 19:70-5.3 shall not necessarily require that a person be debarred. In each instance, the decision to debar shall be made within the discretion of the State Comptroller, unless otherwise required by law, and shall be rendered in the best interests of the State;

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

4. The existence of a cause set forth at N.J.A.C. 19:70-5.3(a)1 through 8 shall be established upon the rendering of a final judgment or conviction, including a guilty plea or a plea of nolo contendere by a court of competent jurisdiction or by an administrative agency empowered to render such judgment. In the event an appeal taken from such judgment or conviction results in reversal thereof, the debarment shall be removed upon the request of the debarred person unless other cause for debarment exists;

5. The existence of a cause set forth at N.J.A.C. 19:70-5.3(a)9, 10, 11, or 12 shall be established by evidence that the State Comptroller determines to be clear and convincing in nature; and

6. Debarment for the cause set forth at N.J.A.C. 19:70-5.3(a)13 shall be proper, provided that one of the causes set forth at N.J.A.C. 19:70-5.3(a)1 through 12 was the basis for debarment by the original debarring agency. Such debarment may be based entirely on the record of facts obtained by the original debarring agency, or upon a combination of such facts and additional facts.

19:70-5.5 Procedures, period of debarment, and scope of debarment affecting the debarment of a person(s)

(a) The OSC, in seeking to debar a person or his or her affiliates, shall furnish such party with a written notice:

1. Stating that debarment is being considered;

2. Setting forth the reasons for the proposed debarment; and

3. Indicating that such party will be afforded an opportunity for a hearing if he or she so requests within a stated period of time. All such hearings shall be conducted in accordance with the provisions of the Administrative Procedure Act. However, where another department or agency has imposed debarment upon a party, the OSC may also impose a similar debarment without affording an opportunity for a hearing, provided that the OSC furnishes notice of the proposed similar debarment to that party, and affords that party an opportunity to present information in his or her behalf to explain why the proposed similar debarment should not be imposed in whole or in part.

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

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

(d) A debarment may include all known affiliates of a person, provided that each decision to include an affiliate is made on a case-by-case basis after giving due regard to all relevant facts and circumstances.

(e) The offense, failure, or inadequacy of performance of an individual may be imputed to a person with whom he or she is affiliated, where such conduct was accomplished within the course of his or her official duty or was affected by him or her with the knowledge or approval of such person.

#### 19:70-5.6 Causes for suspension of a person(s)

In the public interest, the OSC shall suspend a person(s) for any cause specified at N.J.A.C. 19:70-5.3 or upon adequate evidence that such cause exists.

#### 19:70-5.7 Conditions for suspension of a person(s)

(a) The conditions for suspension shall include the following:

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

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

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

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

5. Reasonable suspicion of the existence of a cause described at N.J.A.C. 19:70-5.3(a)1 through 8 may be established by the rendering of a final judgment or conviction by a court or administrative agency of competent jurisdiction, by grand jury indictment, or by evidence that such violations of civil or criminal law did in fact occur; and

6. A suspension invoked by another agency for any of the causes described at N.J.A.C. 19:70-5.3 may be the basis for the imposition of a concurrent suspension by the OSC, who may impose such suspension without the approval of the Attorney General.

19:70-5.8 Procedures, period of suspension, and scope of suspension affecting the suspension of a person(s)

(a) The procedures, period of suspension, and scope of suspension are:

1. Upon approval of the Attorney General, the State Comptroller may suspend a person, or his or her affiliates, provided that within 10 days after the effective date of the suspension, the State Comptroller provides such party with a written notice:

i. Stating that a suspension has been imposed and its effective date;  
 ii. Setting forth the reasons for the suspension to the extent that the Attorney General determines that such reasons may be properly disclosed;  
 iii. Stating that the suspension is for a temporary period pending the completion of an investigation and such legal proceedings as may ensue; and

iv. Indicating that, if such legal proceedings are not commenced or the suspension removed within 60 days of the date of such notice, the party will be given either a statement of the reasons for the suspension and an opportunity for a hearing if he or she so requests, or a statement declining to give such reasons and setting forth the State Comptroller's position regarding the continuation of the suspension. Where a suspension by another agency has been the basis for suspension by the State Comptroller, the State Comptroller shall note the fact as a reason for suspension;

2. A suspension shall not continue beyond 18 months from its effective date, unless civil or criminal action regarding the alleged violation shall have been initiated within that period, or unless debarment action has been initiated. Whenever prosecution or debarment action has been initiated, the suspension may continue until the legal proceedings are completed; and

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

19:70-5.9 Prohibited activities of persons; reporting requirement

(a) In order to ensure that all persons meet a standard of responsibility that assures the OSC, the State, and its citizens that such persons will both compete and perform honestly in their dealings with the OSC and avoid conflicts of interest, all persons are prohibited from engaging in the following activities:

1. No person shall pay, offer to pay, or agree to pay, either directly or indirectly, any fee, commission, compensation, gift, gratuity, or other thing of value of any kind to any OSC employee or to any member of the immediate family, as defined at N.J.S.A. 52:13D-13.i, of any such member or employee, or to any partnership, firm, or corporation with which such member, employee, or member of their immediate family is employed or associated, or in which such member or employee has an interest within the meaning at N.J.S.A. 52:13D-13.g;

2. No person shall, directly or indirectly, undertake any private business, commercial, or entrepreneurial relationship with, whether or not pursuant to employment, contract or other agreement, express or implied, or sell any interest in such person to, any OSC employee having any duties or responsibilities in connection with the purchase, acquisition, or sale of any property or services by or to the OSC. No person shall, directly or indirectly, undertake any private business, commercial, or entrepreneurial relationship with, whether or not pursuant to employment, contract, or

other agreement, express or implied, or sell any interest in such person to any individual, firm, or entity with which such OSC employee is employed or associated or has an interest within the meaning at N.J.S.A. 52:13D-13.g. Any relationships subject to this provision shall be reported, in writing, forthwith to the State Ethics Commission, which may grant a waiver of this restriction upon application of the OSC employee upon a finding that the present or proposed relationship does not present a potential or actual conflict of interest or the appearance of a conflict of interest;

3. No person shall influence, attempt to influence, or cause to be influenced, any OSC employee in an official capacity in any manner that might tend to impair the objectivity or independence of judgment of said employee; and

4. No person shall cause or influence, or attempt to cause or influence, any OSC employee to use, or attempt to use, his or her official position to secure unwarranted privileges or advantages for the person or any other individual or entity.

(b) All persons shall report to the Attorney General of New Jersey and the State Ethics Commission the solicitation of such persons of any fee, commission, compensation, gift, gratuity, or other thing of value by an OSC employee.

(c) The prohibited activities at (a) above shall not be construed to prohibit a person from offering or giving gifts to or contracting with an OSC employee, nor be construed to prohibit an OSC employee from receiving gifts from or contracting with a person, and shall not be grounds for debarment pursuant to N.J.A.C. 19:70-5.3(a)14, provided that such activities are offered or made under the same terms and conditions that are available to members of the general public and are consistent with any rules promulgated by the State Ethics Commission.

(d) The OSC shall include the prohibited activities and reporting requirements at (a) and (b) above in requests for proposals by the OSC and in all contracts with every person.

19:70-5.10 The extent of debarment, suspension, or disqualification

The exclusion from the OSC contracting by virtue of debarment, suspension, or disqualification shall extend to all OSC contracting and subcontracting within the control or jurisdiction of the OSC. However, when the State Comptroller determines it is essential to the public interest, and upon filing of a finding thereof with the Attorney General, an exception from total exclusion may be made with respect to a particular State contract.

19:70-5.11 Prior notice by the State Comptroller

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

19:70-5.12 List of debarred, suspended, or disqualified persons

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

19:70-5.13 State Comptroller's authority to contract

Nothing in this chapter shall be construed to limit the authority of the State Comptroller to refrain from contracting within the discretion allowed by law.