

The City of Newark's Misapplication of the Adopt-a-Park Statute to Renovate a Public Ice Rink

INVESTIGATIVE REPORT

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Table of Contents

I. Introduction	3
<hr/>	
II. Background	4
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A. Relevant Statutes Governing Contracts Awarded by Municipalities	4
B. The City of Newark and the Sharpe James and Kenneth A. Gibson Recreation and Aquatic Center	6
III. Methodology	7
<hr/>	
IV. Investigative Findings	8
<hr/>	
A. Newark Executed an Agreement for Repairs and Renovations to the Ice Rink and the Recreation Center that Contravenes the Adopt-a-Park Statute	8
B. Newark Risked Wasting Taxpayer Funds and Undermining Public Confidence in the Operation of Local Government by Circumventing the Procurement Process Required by the LPCL	11
C. Newark Impermissibly Used the Adopt-a-Park Statute in Other Circumstances	14
D. Proper Use of the Adopt-a-Park Statute to Enter into a Park Improvement Agreement	14
V. Recommendations	16
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I. Introduction

An Office of the State Comptroller (OSC) investigation has found that the City of Newark improperly relied on *N.J.S.A. 40:12-20 et seq.*, also referred to as the State of New Jersey’s Adopt-a-Park Statute, to enter into a \$5.4 million construction contract that should have been publicly advertised and awarded to the lowest responsible bidder as required by the Local Public Contracts Law (LPCL).¹ The Adopt-a-Park Statute permits a municipality to contract with a private entity for the maintenance, operation, or improvement of a public park, without the need to seek competitive pricing, as long as the agreement comes at no cost to the municipality. Stated differently, under the Adopt-a-Park Statute, costs associated with a public park project must be paid by the private entity and not the municipality.²

On June 4, 2018, Newark entered into an agreement (the “Agreement”) with Devils Renaissance Development, LLC (DRD), a private business entity associated with the New Jersey Devils, under the Adopt-a-Park Statute for the purpose of repairing and renovating an ice rink located within the Sharpe James and Kenneth A. Gibson Recreation and Aquatic Center (the “Recreation Center”).³ Newark’s actions in entering into and effectuating this Agreement exceeded the authority granted to it under the Adopt-a-Park Statute and resulted in a no-bid contract. OSC’s investigation found that Newark funded the repair and renovation project in its entirety, contrary to the express provisions of the Adopt-a-Park Statute and in violation of the LPCL. In fact, Newark incurred \$5.225 million of municipal debt to effectuate the repairs and renovations.

This is not the first time Newark has improperly relied upon the Adopt-a-Park Statute to enter into contracts for public park improvements. OSC’s investigation revealed at least two other contracts between Newark and non-profit organizations that appear to run contrary to the express provisions of the statute because Newark provided funding.

Newark is a local government entity funded by taxpayer dollars and, as such, has a responsibility to spend its money in a fiscally responsible manner and in accordance with applicable law. The LPCL is designed to guard against corruption, waste, and abuse of taxpayer money. By awarding this contract without public bidding, Newark violated the LPCL, sidestepped its safeguards, and risked paying more for the repairs and renovations to the ice rink. OSC, through its findings and recommendations, seeks to ensure that in the future Newark strictly complies with the LPCL and the Adopt-a-Park Statute to guard against wasteful and abusive spending.

¹ *N.J.S.A. 40A:11-1 et seq.*

² Under the Adopt-a-Park Statute, the municipality is only permitted to supply equipment, materials, supplies, or services, such as recycling or disposal services, to assist the private entity.

³ DRD agreed to donate its services under the Agreement and stated to OSC that it did not receive any fees for its work associated with the project. Representatives from DRD and Newark told OSC that DRD acted as the general contractor for the project and forwarded funds it received from Newark to the respective contractors.

II. Background

A. Relevant Statutes Governing Contracts Awarded by Municipalities

1. The Local Public Contracts Law

"[C]ontracts for public improvements are among the most important contracts that public entities enter."⁴ Absent specific exceptions, the LPCL requires a municipality to award a contract in excess of \$17,500 to the "lowest responsible bidder" following public advertisement of the contract.⁵ The LPCL defines "lowest responsible bidder" as "the bidder or vendor: (a) whose response to a request for bids offers the lowest price and is responsive; and (b) who is responsible."⁶

"The purpose of the public bidding requirement is to 'secure for the public the benefits of unfettered competition,' and to 'guard against favoritism, improvidence, extravagance, and corruption.'"⁷ Put another way, "public bidding obviously fosters competition among bidders. The more companies can bid on a project, the greater the likelihood that the public entity will receive the lowest possible contract price from responsible bidders."⁸ With these principles in mind, New Jersey courts have "curtailed 'the discretion of local authorities by demanding strict compliance with public bidding guidelines.'"⁹

2. The Adopt-a-Park Statute

Municipal contracts exceeding the bid threshold are generally subject to the public bidding requirements of the LPCL. An agreement executed under the Adopt-a-Park Statute is exempt from those requirements.¹⁰

New Jersey courts have strictly construed exceptions to the public bidding requirements of the LPCL "so as not to dilute [the public policy] or permit a public body to avoid pertinent legislative enactments."¹¹

⁴ *Tormee Constr. v. Mercer Cty Improvement Auth.*, 143 N.J. 143, 148 (1995) (citing 34 Michael A. Pane, *New Jersey Practice, Local Government Law* § 204, at 343 (2d ed. 1993)).

⁵ N.J.S.A. 40A:11-4. The bid threshold for municipalities that have appointed a Qualified Purchasing Agent is \$44,000. Department of Community Affairs, Division of Local Government Services, *Local Finance Notice 2020-14* (June 24, 2020).

⁶ N.J.S.A. 40A:11-2(27). The LPCL defines "responsible" as "able to complete the contract in accordance with its requirements, including but not limited to requirements pertaining to experience, moral integrity, operating capacity, financial capacity, credit, and workforce, equipment, and facilities availability." N.J.S.A. 40A:11-2(32). "Responsive" is defined as "conforming in all material respects to the terms and conditions, specifications, legal requirements, and other provisions of the request." N.J.S.A. 40A:11-2(33).

⁷ *Nat'l Waste Recycling, Inc. v. Middlesex Cty. Improvement Auth.*, 150 N.J. 209, 219 (1997) (quoting *Terminal Constr. Corp. v. Atl. Cty. Sewerage Auth.*, 67 N.J. 403, 410 (1975)).

⁸ *Tormee Constr.*, 143 N.J. at 148 (citing *Skakel v. Twp. of North Bergen*, 37 N.J. 369, 378 (1962)).

⁹ *Borough of Princeton v. Bd. of Chosen Freeholders of Mercer*, 169 N.J. 135, 160 (2001) (quoting *L. Pucillo & Sons, Inc. v. Mayor and Council of the Borough of New Milford*, 73 N.J. 349, 356 (1977)).

¹⁰ N.J.S.A. 40:12-28.

¹¹ *Nat'l Waste Recycling, Inc.*, 150 N.J. at 223 (quoting *Autotote Ltd. v. New Jersey Sports & Exposition Auth.*, 85 N.J. 363, 370 (1981)).

Likewise, it is appropriate in evaluating Newark's conduct to strictly construe the powers granted to local governments under the Adopt-a-Park Statute.¹²

In 1992, the Legislature enacted the Adopt-a-Park Statute to provide a way to improve and maintain New Jersey's municipal and county parks without cost to local governments. The Legislature expressly recognized that while local governments "often do not have the funds to expend for the proper maintenance, operation, or improvement of [their] parks," private entities "have a public service interest as well as financial incentive in ensuring that such parks are well cared for."¹³

In order to extend the life of existing parks, reduce the need for large capital expenditures for new parks, and allow any savings to be applied to other public purposes,¹⁴ the Adopt-a-Park Statute permits a local government to enter into an agreement with a private entity or non-profit organization "to provide for the maintenance, operation, or improvement of a park . . . at no cost to the local government."¹⁵ Although the agreement must come at no cost to the local government, the Adopt-a-Park Statute does allow it to provide "equipment, materials, supplies, or services" such as "solid waste recycling or disposal services" to "assist the participating entity with its park maintenance, operation, or improvement responsibilities."¹⁶

In exchange for participating in such an undertaking, the Adopt-a-Park Statute permits the participating entity to erect signage at the park it adopted indicating that "it has assumed all or a portion of the maintenance, operation, or improvement responsibilities for the park as a public service."¹⁷ The participating entity must pay all costs associated with the signage, unless it is a non-profit organization.¹⁸

Legislative statements accompanying the original Adopt-a-Park legislation and its 1996 amendment underscore the intent of the Legislature in enacting the statute: local governments should not incur costs in connection with services rendered under the Adopt-a-Park Statute.¹⁹ A statement accompanying the 1992 version of the statute provides: "This bill would authorize any municipality to enter into an agreement with a business entity . . . at no cost to that municipality."²⁰ The statement accompanying the 1996 amendment of the Adopt-a-Park Statute is in accord: "This bill would provide public park and recreation agencies with the ability to provide for and expand public park and recreation services and facilities with the assistance of a business entity or a nonprofit organization. This option is especially useful at this time of fiscal austerity in government."²¹

¹² As former New Jersey Supreme Court Justice John J. Francis cautioned, "[i]n this field it is better to leave the door tightly closed than to permit it to be ajar, thus necessitating forevermore in such cases speculation as to whether or not it was purposely left that way." *Hillside v. Sternin*, 25 N.J. 317, 326 (1957).

¹³ *N.J.S.A.* 40:12-20.

¹⁴ *Ibid.*

¹⁵ *N.J.S.A.* 40:12-22 (emphasis added).

¹⁶ *N.J.S.A.* 40:12-23.

¹⁷ *N.J.S.A.* 40:12-25(b)(2).

¹⁸ *N.J.S.A.* 40:12-25(b).

¹⁹ The 1996 Amendment expanded the types of agreements from those involving park maintenance to those involving park maintenance, improvement, or operation.

²⁰ Statement, General Assembly, No. A938 (Feb. 13, 1992).

²¹ Statement, General Assembly, No. S905 (Dec. 5, 1996).

B. The City of Newark and the Sharpe James and Kenneth A. Gibson Recreation and Aquatic Center

Newark is located in Essex County and has a population of approximately 311,000. Newark operates six recreation centers, including the Recreation Center.²² The Recreation Center is located in Newark's East Ward and offers a variety of activities and programs such as yoga, boxing, and arts and crafts.²³ It also houses an ice rink made available for use by youth hockey organizations and members of the public.

²² See City of Newark, *Information Card – Recreation Centers*, <https://www.newarknj.gov/card/recreation-centers> (2021).

²³ See City of Newark, *Sharpe James/Kenneth A. Gibson Recreation and Aquatic Center*, <https://www.newarknj.gov/card/sharpe-james-kenneth-a-gibson-recreation-aquatic-center> (2021).

III. Methodology

OSC's Procurement Division received and reviewed the Agreement between Newark and DRD pursuant to its statutory authority under *N.J.S.A. 52:15C-10*. The matter was then referred to OSC's Investigations Division for further inquiry. To conduct this investigation, OSC obtained and examined numerous documents, including the Agreement entered into between Newark and DRD; Newark Resolution 7R1-A(S) authorizing execution of that agreement; Newark Resolution 6PSF-b permitting, among other things, the issuance of \$5,225,000 in municipal bonds to finance the repairs and renovations to the ice rink at the Recreation Center; construction meeting minutes associated with the Recreation Center repairs and renovations; invoices submitted by DRD and various contractors; Newark's Budget Report regarding payments made pursuant to the Agreement; and correspondence between Newark and DRD. OSC also reviewed additional Adopt-a-Park agreements entered into by Newark, and one Adopt-a-Park agreement entered into by another municipality.

OSC interviewed various current and former Newark employees, including the former Business Administrator (BA), Director of Purchasing, Director of Engineering, and a Project Coordinator. OSC also interviewed representatives from DRD and the Law Director from a northern New Jersey municipality that properly used the Adopt-a-Park Statute to enter into a park improvement agreement.

OSC sent discussion drafts of this Report to Newark, its former BA, DRD, and the northern New Jersey municipality to provide them with an opportunity to comment on the facts and issues identified during this investigation. In preparing this Report, OSC considered the responses received and incorporated them where appropriate.

In its response to OSC's discussion draft, Newark broadly asserted that its actions performed in connection with the Agreement—namely, applying to, and appearing before, the Local Finance Board²⁴ for approval to issue the municipal bonds necessary to finance the project, authorizing execution of the Agreement by way of City Council resolution, and submitting the contract with DRD to OSC as required by *N.J.S.A. 52:15C-10*—demonstrate that the City was acting transparently and in good faith. OSC does not dispute that Newark took the above steps. Those steps, however, do not alter OSC's conclusion that Newark improperly relied on the Adopt-a-Park Statute and failed to comply with all applicable procurement laws.

²⁴ The Local Finance Board is within the Department of Community Affairs' Division of Local Government Services and is responsible "for promulgating rules and regulations on the fiscal operations, fiscal reporting and overseeing the fiscal condition of all New Jersey municipalities, counties, local authorities and special districts." See Department of Community Affairs, Division of Local Government Services, *DLGS Activities*, <https://www.nj.gov/dca/divisions/dlgs/about/activities.html> (2021).

IV. Investigative Findings

A. Newark Executed an Agreement for Repairs and Renovations to the Ice Rink at the Recreation Center that Contravenes the Adopt-a-Park Statute

On June 4, 2018, Newark and DRD executed the Agreement under the Adopt-a-Park Statute “for the purpose of improving the rink facilities” located within the Recreation Center at a cost of \$5.4 million to the City.²⁵ The Agreement states that DRD agreed to:

(i) [make] the needed improvements to the Rink . . . including but not limited to the construction, reconstruction, stabilization, repair, rehabilitation, renovation and restoration . . . of the Rink, including all design, development and construction activities related thereto (collectively, the “Project”) and (ii) in partnership with [Newark] . . . develop activities, training and programming at the Rink upon completion of the Project.²⁶

DRD agreed to donate its administrative and management services to Newark, and, as such, did not receive any financial compensation for its participation in the project. Representatives from DRD and Newark told OSC that DRD acted as the general contractor for the project and forwarded funds it received from Newark to the respective contractors.

DRD representatives also told OSC that the organization relied on Newark’s representations that the Agreement could be executed under the Adopt-a-Park Statute. The City stated in its response that the Agreement was negotiated with DRD; that each side was represented by attorneys in the drafting of that document; and that each side was responsible for coming to their own conclusions regarding the propriety of the Agreement.

The Agreement cites various provisions of the Adopt-a-Park Statute, including the provision exempting it from the requirements of the LPCL. Specifically, the Agreement states that it “is not subject to the requirements or provisions of the [LPCL].”²⁷ It also cites the provision permitting a municipality to provide equipment, materials, supplies, and services.

In contrast, the Agreement omits any reference to the section of the Adopt-a-Park Statute prohibiting municipalities from incurring costs in connection with such agreements. The omission of the provision, when other terms of the law were relied on, is notable and consistent with Newark’s intention to incur all costs associated with the project.

As discussed in detail below, the Agreement contravenes the Adopt-a-Park Statute in two fundamental ways. First, in violation of the statutory requirement that such agreements must come “at no cost” to a municipality, Newark agreed to fund the *entire* project. In fact, Newark issued \$5.225 million of

²⁵ Agreement, at 1.

²⁶ Agreement, at 3.

²⁷ Agreement, at 1-3.

municipal debt to fund the project. Second, the way in which Newark drafted the Agreement improperly suggested that Section 23 of the Adopt-a-Park Statute permitted the City to provide funding in addition to “equipment, materials, supplies, and/or services.”

1. Newark Funded the Project at a Cost of \$5.4 Million

The Agreement provides that “[Newark] has committed to funding the Project Costs . . . in connection with the Project.”²⁸ Section 6(a) states that “[Newark] shall be solely responsible for all Project Costs.”²⁹ That same paragraph provides that “[n]either [DRD] nor any of its affiliates or contractors shall be responsible or liable for the payment of Project Costs.”³⁰ Similarly, Section 6(g) absolves DRD and the contractors of any financial responsibility by stating, “[n]either [DRD], nor any of its contractors or agents shall have any obligation to commit any funds or to incur any Project Costs.”³¹ Paragraph 6(g) also contains a lengthy statement, emphasized in bold font, highlighting the parties’ intent that Newark be solely responsible for funding the project.³²

Documents submitted by Newark—including Standard Invoices, Applications for Certifications for Payment, and a Budget Activity Report—confirm, consistent with the Agreement, that Newark paid \$5,451,249 for repairs and renovations associated with the project.

In response to the discussion draft, Newark asserted that when read together, a State Constitutional provision and the Adopt-a-Park Statute section authorizing a municipality to provide “equipment, materials, supplies, or services” permitted the City to fund the \$5.4 million project in its entirety. Specifically, Newark relied on Article IV, Section 7, Paragraph 11 of the New Jersey Constitution, which states that “[t]he provisions of this Constitution and any law concerning municipal corporations shall include not only those granted in express terms but also those of necessary or fair implication, or incident to the powers expressly conferred, or essential thereto, and not inconsistent with or prohibited by this Constitution or by law.” It argued that its conduct was not improper in view of “the principle that enabling statutes are entitled to liberal construction in favor of the municipality” and because it possesses “implied or incidental powers that arise in support of the express powers.”

Newark’s reliance on these provisions is mistaken. Its express and implied powers under the New Jersey Constitution cannot be “inconsistent with or prohibited . . . by law.”³³ The Adopt-a-Park Statute provides an express statutory limitation on municipal procurement power. Here, Newark’s conduct in funding the

²⁸ Agreement, at 3.

²⁹ The Agreement broadly defines “Project Costs” as follows:

As used herein, “Project Costs” shall mean costs, expenses, fees, claims for concealed or unknown conditions and obligations (“Costs”) in connection with, related to or arising or resulting from the Project, whether incurred by [DRD] or any of its contractors or agents, or the City, and Project Costs may exceed the maximum authorized by the Municipal Council if an Emergency has been declared by the City.

Agreement, at 13, ¶ 6(b).

³⁰ Agreement, at 12, ¶ 6(a)

³¹ Agreement, at 16, ¶ 6(g)

³² Agreement, at 17, ¶ 6(g).

³³ *N.J. Const. art. IV, § 7, ¶ 11*; see also *Varsolona v. Breen Capital Servs. Corp.*, 180 N.J. 605, 625 (2004) (stating that under *N.J. Const. art. IV, § 7, ¶ 11*, “[e]xpress [municipal] powers as well as those that arise by fair implication are given broad latitude, so long as they are not wielded in contravention of the overarching statutory grant of authority or conflict otherwise with an express statutory limitation or prohibition.” (emphasis added)).

project in its entirety directly contradicts the Adopt-a-Park Statute’s express requirement that agreements come at “no cost to the local government”³⁴ and contravenes the legislative findings and public policy on which the statute is based.

Newark further claimed that its prior reliance on the Adopt-a-Park Statute for two separate park projects supports its use of the statute here. Those park projects are distinguishable from the Agreement, however, because they did not involve the use of municipal funds. In fact, correspondence received from Newark during the course of this investigation confirmed that municipal funds were not expended for those projects.

2. Newark Funded the Project Through the Issuance of Municipal Debt

Newark assumed \$5.225 million of municipal debt to finance the project. In April 2017, Newark’s City Council approved and adopted a bond ordinance permitting Newark to issue approximately \$33.4 million in municipal bonds for 35 capital improvement projects, including \$5.225 million for the purpose of “[r]edesigning and replacing the Ironbound Ice Rink System.”³⁵ The Newark City Council Resolution permitting Newark to enter into the Agreement cites the bond ordinance and states that Newark has “been able to allocate funding for the park’s renovation, improvement, and construction in the amount of \$5,500,000.00” (comprised of \$5.225 million of municipal debt and a \$275,000 down payment).

The Agreement also mentions the bond ordinance, stating that Newark has agreed to provide the “funding that will complete the Project . . . for an estimated cost of \$5,432,401.00, not to exceed the authorized amount of \$5,500,000.00 [Ordinance 6PSF-b 041917.]”³⁶

In its response to the discussion draft of this Report, Newark stated that “the City received approval from the State Fiscal Monitors and the Local Finance Board in order to Bond for this project at an amount of 5.5 million dollars.” The approval of financing is separate and distinct from Newark’s obligation to comply with procurement laws.

3. The Agreement Impermissibly Expands the Powers Granted to a Municipality under Section 23 of the Adopt-a-Park Statute

OSC’s investigation revealed that Newark included language in the Agreement not otherwise present in the Adopt-a-Park Statute, seemingly in an attempt to expand the powers that the statute provides to municipalities.

Section 23 of the Adopt-a-Park Statute permits a municipality to provide assistance to the private entity that entered into a park maintenance or improvement agreement, but such assistance is limited to equipment, materials, supplies, and services. Section 23 identifies solid waste recycling and disposal services as examples of what is permitted. The Adopt-a-Park Statute does not permit the municipality to otherwise provide funding. Newark, in its Agreement with DRD, agreed “to provide the equipment, materials, supplies, and/or services *and funding* that will complete the Project and accomplish the Renovation.”³⁷

³⁴ N.J.S.A. 40:12-22.

³⁵ Ordinance of the City of Newark, 6PSF-b 041917 (Apr. 27, 2017).

³⁶ Agreement, at 3.

³⁷ Agreement, at 3 (emphasis added).

The inclusion of the term “funding” exceeds the powers granted by the statute and contradicts *N.J.S.A. 40:12-22*, which clearly states that any such agreement shall be “at no cost to the [municipality].” Furthermore, the plain language of the Adopt-a-Park Statute clearly expresses the Legislature’s intent that such agreements come at no cost to the municipality by finding that “municipalities often do not have the funds to expend for the proper maintenance, operation, or improvement, of their parks;” “that private businesses located near county or municipal parks have a public service interest as well as a private financial incentive in ensuring that such parks are well cared for;” and “that such businesses often have financial and other resources available to them to devote to such a worthy purpose.”³⁸

B. Newark Risked Wasting Taxpayer Funds and Undermining Public Confidence in the Operation of Local Government by Circumventing the Procurement Process Required by the LPCL

Because the Agreement was not permissible under the Adopt-a-Park Statute, Newark should have utilized the procurement process set forth in the LPCL to award the contract for repairs and renovations to the Recreation Center. The public bidding process set forth in the LPCL was designed to serve dual purposes: (1) ensure that municipalities “will receive the lowest possible contract price from responsible bidders”³⁹ and (2) “guard against favoritism, improvidence, extravagance, and corruption.”⁴⁰ “The more companies that can bid on a project, the greater the likelihood that the public entity will receive the lowest possible contract price from responsible bidders.”⁴¹

As discussed below, Newark’s justifications for circumventing the public bidding process required by the LPCL are not supported by law. Its failure to comply with this process not only violated the LPCL and the Adopt-a-Park Statute, but also may have led to increased costs for its taxpayers and risked undermining the public’s confidence in local government.

1. Newark’s Process of Awarding Contracts for Construction Projects, Generally

While Newark has not adopted written policies and procedures directing the way in which it procures construction services under the LPCL, its Director of Purchasing and a project coordinator explained to OSC the process the city ordinarily follows. The Director of Purchasing told OSC that the process begins when a department—such as the Department of Engineering—submits to the Department of Purchasing (Purchasing) a request to approve a proposed project. The request includes a project’s specifications and the amount of funding necessary to complete the project. The project coordinator informed OSC that specifications are drafted so that Newark pays only what is necessary to complete a project.

³⁸ *N.J.S.A. 40:12-20*.

³⁹ *Tormee Constr.*, 143 N.J. at 148.

⁴⁰ *Nat’l Waste Recycling, Inc.*, 150 N.J. at 219 (quoting *Terminal Constr. Corp.*, 67 N.J. at 410).

⁴¹ *Tormee Constr.*, 143 N.J. at 148 (citing *Skakel v. Twp. of North Bergen*, 37 N.J. 369, 378 (1962)).

Purchasing then generates a bid package for potential vendors explaining the project and its requirements.⁴² According to the project coordinator, Purchasing generally creates two sets of bid packages—one for architectural or engineering services and one for construction services. The bid packages are advertised for a specific period of time on Newark’s website, in local publications, and on the website of a non-profit organization located in Newark. After the bid advertisement period has ended, representatives from Newark open and announce the bids in a public setting.⁴³

The Director of Purchasing told OSC that Newark reviews and grades the bids following the bid opening event. In doing so, Newark first determines whether the bids contain any fatal defects. If so, such bids are disqualified. For bids that do not contain any fatal defects, the City performs a calculation to determine: (1) the lowest bidder, (2) the most responsible bidder, and (3) the most responsive bidder (*i.e.*, the bidder that met all requirements specified by the bid).

According to the Director of Purchasing, the bid packages are then sent to the requesting department for its recommendation of the “lowest responsible bidder.”⁴⁴ The requesting department’s recommendation is sent to Purchasing for review and approval by the Director of Purchasing.

Once a “lowest responsible bidder” has been selected, the bid package goes before the City Council for approval by resolution.⁴⁵ If approved, Newark and the selected vendor finalize contractual language.

Upon its execution, the contract is sent to the City Clerk for recording and to Purchasing for approval of future payments. The vendor also receives a “Notice to Proceed” once the contract has been executed.

2. Newark Impermissibly Circumvented the Requirements of the LPCL

Although Newark’s general processes appear to comply with the LPCL, OSC’s investigation found that Newark circumvented that law by improperly relying upon the Adopt-a-Park Statute to enter into an agreement with DRD and award a no-bid contract.

When questioned about its use of the Adopt-a-Park Statute to enter into the Agreement, Newark’s former BA cited a number of factors that contributed to Newark’s decision, none of which are recognized under the law. The BA told OSC that DRD was the only organization that possessed the expertise necessary to repair and renovate the ice rink at the Recreation Center.⁴⁶ He maintained this position despite admitting that he did not contact any other entities to inquire into their ability to perform the repairs and renovations.⁴⁷

The former BA told OSC he was interested in “doing something different” because he believed the LPCL process was cumbersome and could take up to nine months to complete. The BA also stated that the Director of Engineering’s large workload and inexperience with ice rink renovations contributed to Newark’s decision to avoid the public bidding process. The Adopt-a-Park Statute, according to the BA,

⁴² N.J.S.A. 40A:11-4(a).

⁴³ *Ibid.*

⁴⁴ N.J.S.A. 40A:11-2(27).

⁴⁵ N.J.S.A. 40A:11-4(a).

⁴⁶ In response to OSC’s discussion draft, DRD claimed that it “was uniquely qualified to perform this work.”

⁴⁷ The former BA told OSC that Newark did not contact DRD until the city determined that it would use the Adopt-a-Park Statute.

provided Newark with a way to execute an agreement with the entity it wanted for the job. None of these factors, however, provided Newark with a legal basis to avoid the requirements of the LPCL and rely on the Adopt-a-Park Statute to execute an agreement under which it funded \$5.4 million for repairs and renovations.

3. Newark Failed to Implement Cost-Saving Measures

Although it is difficult to determine after-the-fact whether the public bidding process would have provided savings to Newark in this instance, it is clear that Newark risked overpayment of construction services by failing to foster competition.

According to representatives from DRD, Newark informed the company that it intended to fully fund the repairs and renovations to the Recreation Center. In its response to OSC's discussion draft, DRD clarified that the two parties engaged in a series of negotiations regarding the scope and cost of the renovations before agreeing to a \$5.5 million estimate representing the least amount of work necessary to rehabilitate the ice rink.

The existence of these negotiations, however, did not relieve Newark of its obligation to follow public bidding requirements and ensure that the contract was awarded through open competition to the lowest responsible bidder as required under the LPCL. Newark did not contact any entity other than DRD to obtain a competing, and potentially more cost-effective, estimate. Newark, likewise, did not solicit quotes from or choose the contractors who ultimately provided the construction services on the project. In fact, one of the project coordinators overseeing the project told OSC that the cost-saving measures built into Newark's ordinary procurement process were "never present."⁴⁸

In their respective responses to OSC's discussion draft, Newark and its former BA claimed that Newark saved a significant amount of money by engaging DRD. However, they do not provide any documentation, such as competing estimates or cost analyses, to support that assertion. Their responses further failed to appreciate that complying with the LPCL by using competitive bidding would not foreclose Newark from obtaining advice from DRD and benefiting from that entity's experience involving ice rink renovations. Newark could have both collaborated with DRD and fully ensured compliance with the LPCL.

4. Newark's Conduct Undermines Public Confidence in the Operation of Local Government

Public confidence in the operation of local government—including the way in which construction contracts are awarded—is of paramount importance. The LPCL aims to uphold and further that confidence by safeguarding against favoritism, improvidence, extravagance, and corruption, whether actual or perceived.

At minimum, Newark's actions—bypassing the requirements of the LPCL, failing to contact other entities besides DRD, and acting based on the BA's assertion that only DRD possessed the necessary expertise for the project—created an appearance of favoritism towards DRD. It is possible that DRD would have been the lowest, most responsible, and most responsive bidder, but simply awarding it the contract, in the absence of a recognized exception to the LPCL, risks undermining public confidence in the operation of local government.

⁴⁸ In its response to the discussion draft, Newark stated that the project manager now denies making this statement.

C. Newark Impermissibly Used the Adopt-a-Park Statute in Other Circumstances

As part of its investigation, OSC requested from Newark other agreements it executed under the Adopt-a-Park Statute. In response, Newark produced agreements it executed with non-profit organizations for five park-related projects dating back to 2008. These agreements involved improvement projects such as upgrading baseball diamonds, skate parks, and basketball courts. One agreement involved the investigation into and remediation of environmental issues.

OSC's review of these agreements revealed that Newark has likely misused the Adopt-a-Park Statute in other circumstances. Agreements for two of the projects indicate that Newark, at a minimum, partially funded their completion. For instance, one of the agreements states that "[Newark] agrees to reimburse [the participating entity] . . . in an amount not to exceed \$536,800.00 . . . rendering [Newark] a public funding source." Another states, "[Newark] agrees to contribute \$2,100,000.00 to [the participating entity] to fund Phase I and Phase II of the project, rendering [Newark] a public funding source." Similar to the Recreation Center project, these projects were completed at considerable cost to the City and in direct contravention of the Adopt-a-Park statute.

D. Proper Use of the Adopt-a-Park Statute to Enter into a Park Improvement Agreement

As part of its investigation, OSC examined an agreement for municipal park improvements between a municipality located in northern New Jersey and a private entity that operated a business adjacent to the park. This agreement was executed in compliance with the Adopt-a-Park Statute, came at no cost to the municipality, and serves as an exemplar for other local governments. Some of the more notable points from this agreement are discussed below.

The agreement begins with a number of recitals indicating, among other things, that a private entity operates its business on property adjacent to a park owned and operated by the municipality, and that both the private property and the park were in need of repair. The recitals also state that the municipality does not have the funds necessary to complete the repairs.

The recitals further indicate that the private entity was "willing to make the repairs to [the municipal park] free of cost to the [municipality]" and "has committed to restoration of [the municipal park] in kind."

The agreement also contains the private entity's obligations as follows:

The [private entity], at its expense, shall furnish all such personnel, materials, supplies, equipment, services and utilities, perform all work set forth in the Drawings and take all action as shall be necessary to restore, renovate and improve [the municipal park].

The private entity was also responsible for all costs associated with obtaining the engineering plans necessary to complete the repairs.

In a section entitled "Performance and Breach," the agreement provides that the private entity agreed to make

the improvements “at its sole cost.” This section further provides that the municipality reserved the right to perform the work itself (or employ a contractor to perform the work) if the private entity did not meet its obligations to the municipality’s satisfaction. In that event, the private entity agreed to reimburse the municipality for “any sums including attorney’s fees and costs expended by [the municipality] as a result of the [private entity’s] noncompliance.”

The Law Director for the municipality confirmed to OSC that the municipality did not expend any funds in connection with the municipal park improvement.

V. Recommendations

Municipalities are required to ensure taxpayer dollars are properly expended in accordance with state law. OSC's investigation found that Newark misused the authority granted to municipalities under the Adopt-a-Park Statute and failed to follow applicable procurement law in connection with the \$5.4 million repair and renovation project at the Recreation Center. Newark's conduct raises questions as to whether it received the best value for those repairs and renovations. Its conduct also risked undermining the public's confidence in local government by simply selecting DRD.

The following recommendations aim to ensure that Newark adheres to applicable procurement laws and properly spends taxpayer dollars in the future. These recommendations reflect procurement best practices that should be adhered to by all New Jersey municipalities:

1. Newark should draft and update written policies, practices, and procedures regarding the Local Public Contracts Law, *N.J.S.A. 40A:11-1 et seq.*, to ensure that the violations of law discussed in this report are not repeated;
2. Newark should adhere to the public bidding requirements of the Local Public Contracts Law before awarding contracts governed by that law in order to foster competition and benefit from potential cost savings, unless an exception thereto clearly applies;
3. Newark should adopt policies, practices, and procedures regarding the Adopt-a-Park Statute, *N.J.S.A. 40:12-20 et seq.*, so that taxpayer funds are not expended in connection with agreements entered into under that law; and
4. Newark should ensure that all employees involved in procurements and all elected officials are educated about and understand their responsibilities under the Local Public Contracts Law and the Adopt-a-Park Statute, *N.J.S.A. 40:12-20 et seq.*

Newark in its response has agreed to implement these recommendations.