

Notice Number

Date

LOCAL FINANCE NOTICE**Extraordinary Unspecifiable Services**

One of the recent changes to Local Public Contracts Law rules amended the requirements for compliance with the extraordinary unspecifiable services (EUS) bidding exemption pursuant to N.J.S.A. 40A:11-5(1)(a)(ii). Those amendments eliminated the previous listing of services considered to be qualified or not qualified as EUS's. At the time of the changes, the Division stated that it preferred and intended to provide EUS examples through the issuance of a Local Finance Notice, rather than through the promulgation of rules. This Notice provides those examples and additional guidance on the use of the EUS process.

Highlights of the Rule Amendment

The rule did not change the application of the terms and the determination and award of an EUS contract. However, the following summarizes the important amendments or modifications to the rule:

- The definition of the EUS was removed from N.J.A.C. 5:34-2.1 and relocated to N.J.A.C. 5:34-1.2, the definition provision of the Local Public Contracts Law rules.
- As an alternative to an EUS, it is strongly suggested that contracting unit officials consider the use of competitive contracting pursuant to N.J.S.A. 40A:11-4.1 (k) instead of the EUS provision. [N.J.A.C. 5:34-2.2 (c)]
- If a vendor participates in the early stages of procurement, such as conducting a survey or study or preparing specifications, appropriate care must be taken so that a firm is not authorized to participate in competitive bidding or competitive contracting, if its earlier participation would give it unfair advantage. [N.J.A.C. 5:34-2.2 (e)]
- The list of examples (N.J.A.C. 5:34-2.4) was repealed, to be replaced with this guidance.

(continued on next page)

Types of Services That Satisfy The Criteria for an EUS

The list of examples of what constituted and what did not constitute an EUS was eliminated with the repeal of N.J.A.C. 5:34-2.4. However, during the proposed rule comment period, local officials stated that the examples provided guidance to contracting units because they listed the types of services that satisfied the criteria for an EUS. Therefore, they requested that the section be inserted back into the EUS rule. The Division carefully considered the comments and concluded that examples would best serve as policy guidelines rather than directives. The list has also been updated to reflect current practices and needs.

For purposes of guidance, the Division finds that based on individual local circumstances, the following services might satisfy all the criteria for an EUS and they are therefore listed as examples:

1. Specification drafting;
2. Management consultant studies;
3. Labor management consultants;
4. Certified landscape architects;
5. Information and telecommunications technology preliminary feasibility surveys, design of systems and preparation of specifications, web site design, maintenance, and hosting;
6. Expert financial advisors;
7. Public relations consultants;
8. Child custody, foster care, and similar services when contracted directly with the individuals performing the services and not with any firm, corporation or partnership which employs others to perform the work;
9. Establishment of a fixed assets inventory when the total system includes an accounting component;
10. Expert witnesses; and
11. Clerk of the works or construction advisor (not the actual construction).

In all cases, advice of legal counsel should be obtained to ensure that the criteria are met.

The Division also concludes that under most circumstances the following services **do not** satisfy all the criteria for an EUS and they are therefore listed as examples of contracts that are not eligible for the EUS exemption for purposes of guidance:

1. Facilities management contracts (for data processing or other operations);
2. Information technology services, including programming, service bureau processing, rental of information technology equipment, purchasing of information technology data processing equipment, Internet service providers. These activities are in some cases complex but are specifiable, and may be viable candidates for the competitive contracting process;
3. Construction management contracts (involving price guarantee, responsibility for conducting the construction, etc);
4. Physical taking of a fixed assets inventory;
5. Electrical equipment maintenance;
6. Maintenance of non-proprietary computers and networking equipment, and common office equipment;
7. Tradesmen;
8. Heating specialists;
9. Maintenance of motor vehicle fleets;
10. Feeding programs; and
11. Revaluation services.

Advice of legal counsel should be obtained if a contracting unit determines that individual circumstances might permit the use of an EUS for these purposes.

Insurance Satisfies the Criteria for an EUS

Insurance, including, the purchase of insurance coverage and consultant services, is a limited exception to the public advertising and bidding requirements by virtue of N.J.S.A. 40A:11-5(1)(a)(ii) and 40A:11-5(1)(m), in that it is considered an EUS. The statutory language means that procedural requirements of an EUS must be met to document the governing body's action. The contracting unit is required to do the following:

- When the insurance contract is in excess of the bid threshold, efforts must be made to secure competitive quotations. [N.J.S.A. 40A:11-6.1(b)] The Division has found that in most circumstances solicitation of quotations is practicable for insurance purposes;
- State supporting reasons for its action in the resolution awarding such contracts (i.e., that the law permits insurance to be considered an EUS);
- Print once in the official newspaper, a brief notice stating the nature, duration, service and amount of the contract(s);
- Contract(s) must be on file and available for public inspection in the office of the clerk of the contracting unit.

Since "insurance" includes the purchase of insurance coverage and consultant services, it is considered as a "statutory" EUS and does not require supporting reasons for its action beyond citing the statutory reference. The Division has also concluded that those services that are part of traditional insurance coverage, such as administrative services, claims administration services, risk assignment, participation in a joint self-insurance fund, a risk management program, or related services could qualify as an EUS.

General Summary

Before the governing body can award a contract under the EUS provisions, a designated administrative official of the contracting unit must file a certificate with the governing body. The certificate must describe clearly the nature of the work to be done; state that is not reasonably possible to draft specifications; describe the informal solicitation of quotations; and describe in detail why the contract meets the provisions of the statutes and the rules. The certification must be kept with the resolution awarding the contract. [N.J.A.C. 5:34-2.3(b)] **Do not file the certification with the Division.**

A standard certification format has been included with this Notice and can also be downloaded from the Division's website at www.state.nj.us/dca/lgs

If, after your review of this Notice, you have any questions concerning its contents, or the EUS process generally, please direct them to the Division's Bureau of Local Management Services at (609) 292-7842, by fax at (609) 633-6243 or by e-mail at lpcl@dca.state.nj.us

Enclosure

Distribution: Municipal Clerks, Clerks to the Boards of Freeholders, Authority Executive Directors, Boards of Fire Commissioners (recipients to distribute copies to other appropriate officials); and members of professional purchasing organizations (through their organizations).

**STANDARD CERTIFICATION DECLARATION FOR AN EXTRAORDINARY
UNSPECIFIABLE SERVICE**

TO: Members of the Governing Body

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

DATE:

SUBJECT: This is a contract for _____

This is to request your approval of a resolution authorizing a contract to be executed as follows:

Firm: _____

Cost: _____

Duration: _____

Purpose: _____

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

1. Provide a clear description of the nature of the work to be done:

(Provide a complete description)

2. Describe in detail why the contract meets the provisions of the statute and rules:

(Do not just rewrite or paraphrase the statute or rule, or merely state a desire to have a reliable job performed – provide a complete explanation. However, pursuant to N.J.S.A. 40A:11-5(1)(m), it is permissible by law that insurance contracts and/or services can cite the statutory provision)

3. The service(s) is of such a specialized and qualitative nature that the performance of the service(s) cannot be reasonably described by written specifications because:

(Describe why it is “qualitative in nature requiring the need for expertise, extensive training and proven reputation”. Provide a complete explanation why it is not reasonably possible to draft specifications. Please note this provision does not apply to insurance contracts and/or services and should thus be marked as non-applicable.)

4. Describe the informal solicitation of quotations:

(List vendors contacted, prices and terms provided. If this has not been done explain in detail). The lowest quotation is: (If no quotation(s) is received, explain why in detail)

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

Respectfully,

Name _____

(Signature)

Title _____

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