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New Jersey Department of Community Affairs  
Division of Local Government Services

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Notice Number

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# LOCAL FINANCE NOTICE

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## Recent Local Public Contracts Law Amendments: Three New Laws

This Local Finance Notice reviews three recent laws that affect various provisions of the Local Public Contracts Law. Recipients of this Notice are asked to share it with their purchasing professionals, governing bodies, chief executive and administrative officers, legal counsel, and construction advisors.

The three laws affect dispute resolution procedures for construction contracts; submission requirements of bidders utilizing multiple, specialty subcontractors on construction contracts; and the requirements for providing notice of changes to bid receipt or specification requirements. Of critical importance is the effective date of each law. Contracting units that currently have outstanding bids or that are planning to go out to bid shortly should carefully review the changes immediately.

Local officials that also received Local Finance Notice AU-98-1, regarding use of credit cards, should note that the reference to a copy of the full Attorney General Opinion on the World Wide Web was inaccurate. The full text can be found at the following location: <http://www.state.nj.us/dca/dcadlgs.htm>.

### **Mandatory Construction Contract Dispute Procedures P.L. 1997, c. 371, (N.J.S.A. 40A:11-41.1) Effective January 13, 1998**

P.L. 1997, c. 371 amends provisions of the Local Public Contracts Law, related to construction contracts, by requiring that all construction contract documents contain provisions for an alternative dispute resolution (ADR) procedure for resolving disputes that may arise under the contract. All local contracting units must review this amendment to determine what immediate impact it may have on the contracting units' activities, as well as the manner in which to implement its requirements in the future. Since the amendment became effective on January 13, 1998, it has immediate impact on any contracting unit, which is in the process of developing specifications, advertising for bids, or reviewing bid proposals for construction contracts.

In requiring that all construction contract documents must provide that disputes be submitted to a process of resolution utilizing ADR practices, the law provides that these practices may include, but are not limited to, mediation, binding arbitration, or nonbinding arbitration, all pursuant to industry standards. The law also provides that alternative dispute resolution must be utilized to attempt to resolve disputes arising under contracts executed after the law's effective date, **prior** to such disputes being submitted to a court for adjudication. The law does not, however, preclude contracting units from seeking injunctive or declaratory relief at any time.

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The law does not require that a specific type of ADR be utilized. Rather, it is a contracting unit's prerogative to determine the type of ADR it will utilize, as long as the process selected conforms to industry standards. . Therefore, a contracting unit may utilize any of a wide range of practices, the determination of which should be made in consultation with the project engineer, architect, or other construction expert advising a contracting unit.

The law provides several clarifications and exceptions to the use of the ADR procedure:

- Notwithstanding the requirement to use ADR, a contracting unit may seek injunctive or declaratory relief in court at any time.
- The requirement to provide for ADR does not apply to disputes arising with regard to the contracting process, i.e., disputes relating to bid solicitation, the contract award process, or the formation of contract or subcontracts.
- When a dispute concerns more than one contract, i.e., a construction contract and a related contract involving design, architecture, management, or engineering,; or, when more than one dispute of a similar nature arises under a construction contract, all interested parties may be included in the ADR proceeding, at the request of one of the contracting parties, unless determined to be inappropriate by the person appointed to resolve the dispute.
- The term "construction contract" includes contracts for construction, or its related architecture, engineering, or construction management.

Because the law takes effect immediately, contracting units currently evaluating bids should consult with their legal counsel, at once, to determine the effect of the law on construction contracts that are pending award. The law does not specifically require that **specification** documents contain provisions for the ADR procedures. Rather, it requires that such procedures be included in all "...construction contract documents entered into after the effective date of the law." The Division advises that a conservative approach be followed; and, accordingly, recommends that the ADR procedures be part of bid specifications. Therefore, contracting units with construction contracts currently out for bid, should immediately consult with their professionals to develop an ADR procedure, issue a specification amendment prior to receipt of bids, and extend the bid due date. Contracting units currently preparing bid specifications should carefully consider the ADR option it selects for its bid specification.

To assist local units in understanding the ADR process, the Division expects that various professional organizations will offer seminars to their members over the next several months to review this subject in greater detail. A copy of the act is attached to this Notice.

### **Specification of Subcontractor's Scope of Work P.L. 1997, c. 408 (N.J.S.A. 40A:11-16)**

This law amends the section of the Local Public Contracts Law that governs the submission of bids for construction contracts. Specifically, the amendment establishes a new requirement relating to the submission of construction bids, when the single prime contracting model is used, i.e., where all the work and materials required to complete the project are to be included in a single overall contract.

The amendment requires that, for single prime contracting bids, bidders that propose using **more than one** subcontractor for any of the specialized "sub-prime" contractors must submit, a certificate with their bids listing each subcontractor named in the bid for that category. Specifically, "the certificate shall set forth the

scope of work for which the subcontractor has submitted a price quote and which the bidder has agreed to award to each subcontractor, should the bidder be awarded the contract." The law further requires that:

1. The certificate shall be submitted to the contracting unit simultaneously with the list of the subcontractors.
2. The certificate may take the form of a single certificate listing all subcontractors or, alternatively, a separate certificate may be submitted for each subcontractor.
3. If a bidder does not submit a certificate or certificates to the contracting unit, the contracting unit shall award the contract to the next lowest responsible bidder.

This law takes effect on April 19, 1998 (90 days from its enactment on January 19, 1998). A copy of the amended section, with the new text highlighted, is included with this Notice.

### **Notice Requirements for Changes to Bid Advertisements and Specifications P.L. 1997, c. 243 (N.J.S.A. 40A:11-23)**

This chapter amends the section of the Local Public Contracts Law pertaining to advertisements for bids and modifies the procedures, which contracting units must follow in providing notice of changes to advertisements or bid documents. Previously, all notices of revisions or addenda to advertisements or bid documents were required to be published in a legal newspaper no later than five days prior to the bid due date, and also to be sent by certified mail to anyone who had submitted a bid package or received a copy of the bids. The amendments affect all types of contracts, except for contracts for collection and disposal of municipal solid waste.

The new law establishes different procedures for providing notice of changes to advertisements or bid documents for three categories of contracts: construction work, solid waste collection and disposal, and all other contracts.

Regarding **construction** contracts, notice of changes must now be provided no later than **seven** days, weekends and holidays excepted, prior to the date on which bids are due. Notice must be provided to any person who has submitted a bid or has received a bid package. This eliminates the requirement for publishing the notice in the newspaper. The amendment provides that notice may be provided in any of the following ways:

1. in writing by certified mail; or
2. by certified fax transmission, where the sender's fax machine produces a receipt showing the date and time of transmission, and verification that the transmission was successful; or
3. by a delivery service that provides certification of delivery to the sender.

This permits use of overnight delivery services where the sender receives verification of delivery. Regardless of the method of notice utilized, delivery must be made no later than seven days prior to the date on which bids are to be submitted.

The requirements relating to the provisions of notice of changes or revisions to advertisements or bid documents involving solid waste disposal and collection contracts remain unchanged. Such notices must be published in an official newspaper of the contracting unit and in at least one newspaper of general circulation published in the State no later than five days, Saturdays, Sundays, and holidays excepted, prior to the date for acceptance of bids.

For **all other contracts**, notice of revisions or addenda must be provided in two ways. First, such notice must be **published** in an official newspaper of the contracting unit no later than **five** days, weekends and holidays excepted, prior to the date on which bids are due. Second, **notice** must be provided to any person (the above five day notice criteria applies) who has submitted a bid or has received a bid package, using one of the following means:

1. in writing by certified mail; or
2. by certified fax transmission, where the sender's fax machine produces a receipt showing the date and time of transmission, and verification that the transmission was successful; or,
3. by a delivery service that provides certification of delivery to the sender.

Here too, the law permits use of overnight delivery services where the sender receives verification of delivery. Regardless of the method of notice utilized, delivery must be made no later than five days prior to the date on which bids are to be submitted.

While this law was approved on September 5, 1997, it became effective on the first day of the fourth month following enactment; February 1, 1998. The text of the amended N.J.S.A. 40A:11-23 is included with this Notice.

*Recipients of this Notice are asked to share it with their procurement professionals, governing bodies, chief executive and administrative officers, legal counsel, and construction advisors.*

## Beth Gates

Beth Gates, Director  
Division of Local Government Services

Distribution: Municipal Clerks, Clerks to the Boards of Chosen Freeholders, Authority Executive Directors,  
Boards of Fire Commissioners

**Mandatory Construction Contract Dispute Procedures****P.L. 1997, c. 371 (N.J.S.A. 40A:11-41.1)**

Effective January 13, 1998

(All text is new law)

N.J.S.A. 40A:11-41.1 All construction contract documents entered into in accordance with the provisions of P.L.1971, c.198 (C.40A:11-1 et seq.) after the effective date of P.L.1997 c.371 (C.40A:11-41.1) (*Note: effective date is January 13, 1998*) shall provide that disputes arising under the contract shall be submitted to a process of resolution pursuant to alternative dispute resolution practices, such as mediation, binding arbitration or non-binding arbitration pursuant to industry standards, prior to being submitted to a court for adjudication. Nothing in this section shall prevent the contracting unit from seeking injunctive or declaratory relief in court at any time. The alternative dispute resolution practices required by this section shall not apply to disputes concerning the bid solicitation or award process, or to the formation of contracts or subcontracts to be entered into pursuant to P.L.1971, c.198 (C.40A:11-1 et seq.).

Notwithstanding industry rules or any provision of law to the contrary, whenever a dispute concerns more than one contract, such as when a dispute in a contract involving construction relates to a contract involving design, architecture, engineering or management, upon the demand of a contracting party, other interested parties to the dispute shall be joined unless the arbitrator or person appointed to resolve the dispute determines that such joinder is inappropriate. Notwithstanding industry rules or any provision of law to the contrary, whenever more than one dispute of a similar nature arises under a construction contract, or related construction contracts, upon the demand of a contracting party, the disputes shall be joined unless the arbitrator or person appointed to resolve the dispute determines that the disputes are inappropriate for joinder.

For the purposes of this section, the term "construction contract" means a contract involving construction, or a contract related thereto concerning architecture, engineering or construction management.

**Specification of Sub-Contractor's Scope of Work****P.L. 1997, c. 408 (N.J.S.A. 40A:11-16)**

Effective April 19, 1998

(changes shown in underscore)

Section 16 of P.L.1971, c.198 (C.40A:11-16) is amended to read as follows:

16. Separate plans for various types of work; bids; contracts

In the preparation of plans and specifications for the erection, alteration or repair of any public building by any contracting unit, when the entire cost of the work will exceed the amount set forth in, or the amount calculated by the Governor pursuant to, section 3 of P.L.1971, c.198 (C.40A:11-3), the architect, engineer or other person preparing the plans and specifications may prepare separate plans and specifications for

- (1) The plumbing and gas fitting and all kindred work;
- (2) Steam power plants, steam and hot water heating and ventilating apparatus and all kindred work;
- (3) Electrical work;
- (4) Structural steel and ornamental iron work; and
- (5) All other work required for the completion of the project.

The contracting unit or its contracting agent shall advertise for and receive, in the manner provided by law, either (a) separate bids for each of said branches of work, or (b) bids for all the work and materials required to complete the building to be included in a single overall contract, or (c) both. In the case of a single bid under (b) or (c), there will be set forth in the bid the name or names of all subcontractors to whom the bidder will subcontract the furnishing of plumbing and gas fitting, and all kindred work, and of the steam and hot water heating and ventilating apparatus, steam power plants and kindred work, and electrical work, structural steel and ornamental iron work, each of which subcontractors shall be qualified in accordance with this act. The contracting unit shall require evidence of performance security to be submitted simultaneously with the list of the subcontractors. Evidence of performance security may be supplied by the bidder on behalf of himself and any or all subcontractors, or by each respective subcontractor, or by any combination thereof which results in evidence of performance security equating, but in no event exceeding, the total amount bid.

Whenever a bid sets forth more than one subcontractor for any of the specialty trade categories (1) through (4) specified hereinabove in this section, the bidder shall submit to the contracting unit a certificate signed by the bidder listing each subcontractor named in the bid for that category. The certificate shall set forth the scope of work for which the subcontractor has submitted a price quote and which the bidder has agreed to award to each subcontractor should the bidder be awarded the contract. The certificate shall be submitted to the contracting unit simultaneously with the list of the subcontractors. The certificate may take the form of a single certificate listing all subcontractors or, alternatively, a separate certificate may be submitted for each subcontractor. If a bidder does not submit a certificate or certificates to the contracting unit, the contracting unit shall award the contract to the next lowest responsible bidder.

Contracts shall be awarded to the lowest responsible bidder. In the event that a contract is advertised in accordance with (c) above said contract shall be awarded in the following manner: If the sum total of the amounts bid by the lowest responsible bidder for each branch is less than the amount bid by the lowest responsible bidder for all the work and materials, the contracting unit shall award separate contracts for each of such branches to the lowest responsible bidder therefor, but if the sum total of the amounts bid by the lowest responsible bidder for each branch is not less than the amount bid by the lowest responsible bidder for all the work and materials, the contracting unit shall award a single overall contract to the lowest responsible bidder for all of such work and materials. In every case in which a contract is awarded under (b) above, all payments required to be made under such contract for work and materials supplied by a subcontractor shall, upon the certification of the contractor of the amount due to the subcontractor, be paid directly to the subcontractor.

(cf: P.L.1987, c.48, s.1)

**Notice Requirements for Changes to Bid Specifications****P.L. 1997, c. 243 (N.J.S.A. 40A:11-23)**

Effective February 1, 1998

(new content shown in underscore)

1. Section 23 of P.L.1971, c.198 (C.40A:11-23) is amended to read as follows:

23. a. Advertisements for bids; bids; general requirements. All advertisements for bids shall be published in a legal newspaper sufficiently in advance of the date fixed for receiving the bids to promote competitive bidding, but in no event less than 10 days prior to such date; except that all advertisements for bids on contracts for the collection and disposal of municipal solid waste shall be published in a legal newspaper circulating in the county or municipality, and in at least one newspaper of general circulation published in the State, sufficiently in advance of the date fixed for receiving the bids to promote competitive bidding, but not less than 60 days prior to that date.

b. The advertisement shall designate the manner of submitting and the method of receiving the bids and the time and place at which the bids will be received. If the published specifications provide for receipt of bids by mail, those bids which are mailed to the contracting unit shall be sealed and shall only be opened for examination at such time and place as all bids received are unsealed and announced. At such time and place the contracting agent of the contracting unit shall publicly receive the bids, and thereupon immediately proceed to unseal them and publicly announce the contents, which announcement shall be made in the presence of any parties bidding or their agents, who are then and there present, and shall also make proper record of the prices and terms, upon the minutes of the governing body, if the award is to be made by the governing body of the contracting unit, or in a book kept for that purpose, if the award is to be made by other than the governing body, and in such latter case it shall be reported to the governing body of the contracting unit for its action thereon, when such action thereon is required. No bids shall be received after the time designated in the advertisement.

c. Notice of revisions or addenda to advertisements or bid documents shall be provided as follows:

1) For all contracts except those for construction work and municipal solid waste collection and disposal service, notice shall be published no later than five days, Saturdays, Sundays, and holidays excepted, prior to the date for acceptance of bids, in an official newspaper of the contracting unit and be provided to any person who has submitted a bid or who has received a bid package, in one of the following ways: i) in writing by certified mail or ii) by certified facsimile transmission, meaning that the sender's facsimile machine produces a receipt showing date and time of transmission and that the transmission was successful or iii) by a delivery service that provides certification of delivery to the sender.

2) For all contracts for construction work, notice shall be provided no later than seven days, Saturday, Sundays, or holidays excepted, prior to the date for acceptance of bids, to any person who has submitted a bid or who has received a bid package in any of the following ways: i) in writing by certified mail or ii) by certified facsimile transmission, meaning that the sender's facsimile machine produces a receipt showing date and time of transmission and that the transmission was successful or iii) by a delivery service that provides certification of delivery to the sender.

3) For municipal solid waste collection and disposal contracts, notice shall be published in an official newspaper of the contracting unit and in at least one newspaper of general circulation published in the State no later than five days, Saturdays, Sundays, and holidays excepted, prior to the date for acceptance of bids.

d. Failure of the contracting unit to advertise for the receipt of bids or to provide proper notification of revisions or addenda to advertisements or bid documents related to bids as prescribed by this section shall prevent the contracting unit from accepting the bids and require the readvertisement for bids pursuant to subsection a. of this section. Failure to obtain a receipt when good faith notice is sent or delivered to the address or telephone facsimile number on file with the contracting unit shall not be considered failure by the contracting unit to provide notice.

(cf: P.L.1991, c.381, s.50)