

5:34-8
CONTRACTS SUBJECT TO PUBLIC BIDDING

5:34-8.1 Multi-year contracts

- (a) All multi-year contracts, including all multi-year leases and multi-year leases with option to purchase which are authorized under N.J.S.A. 40A:11- 15(7), 40A:11-15(15) or 18A:18A-42(f), and other multi-year contracts subject to N.J.S.A. 40A:11-15 and 18A:18A-42 for the procurement of goods or services shall be subject to competitive bidding if the cumulative amount to be expended during the duration of the multi-year lease or contract exceeds the threshold for competitive bidding for the contracting unit.
- (b) Pursuant to the provisions of N.J.S.A. 40A:11-15 or 18A:18A-42, a contract award that was based upon receipt of quotations shall not be extended if the total value of the contract exceeds the bid threshold, which includes the original award plus any extension.

5:34-8.2 Determinations of aggregation

- (a) This section shall affect determinations of aggregation for purposes of whether a contract is subject to public bidding as set forth in N.J.S.A. 40A:11-3, 40A:11-4 and 40A:11-7, and as set forth in N.J.S.A. 18A:18A- 3, 18A:18A-4, and 18A:18A-8, and is adopted pursuant to N.J.S.A. 40A:11-7.1 and 18A:18A-8.1. The provisions of this section shall not apply to those goods or services where the work is single in character and for those goods or services that are necessary for the completion of such a contract.
- (b) To determine if goods or services that are expected to be used will reach the bid threshold during the contract year, the contracting agent or purchasing agent, as defined at N.J.A.C. 5:34-1.2, shall use professional judgment based on prior experience of the contracting unit, estimates and plans for the upcoming contract year based on information such as the contracting unit's budget and purchasing history, and the amount purchased in the previous contract year. 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 a contract.
- (c) To determine if goods or services that are expected to be used during a contract year should be combined with other similar goods or services in a single bid, the contracting agent or purchasing agent shall use the following methods or techniques as may be appropriate:
 - 1. The contracting agent or purchasing agent shall request the various organizational components of the contracting unit to estimate and provide the contracting agent or purchasing agent with their needs.
 - 2. Based upon appropriate study and evaluation of the competitive marketplace, the contracting agent or purchasing agent shall determine the range of goods and services that are best suited for aggregation to maximize potential cost savings and to maximize vendor participation. This can be accomplished by:
 - i Determining whether there are vendors capable of submitting bids on a range of goods or services that are sufficiently similar; or

- ii Determining that commercial business practices related to the provision or performance of the goods or services will result in a price advantage to the contracting unit if the goods or services were made part of a separate contract.
3. In considering if a particular good or service is subject to public bidding, the amount of money spent with a given vendor shall not in itself be a determining factor of reaching the threshold.
4. In determining if various expenditures are part of the same work or are similar goods or services, the emphasis shall be placed on the purpose of the goods and services rather than from whom they are purchased.
5. Where portions of any goods or services can be purchased through provision of law that do not require the contracting unit to publicly bid, such as a State, county, or cooperative purchasing contract, any remaining portions may be counted as separate from the portion that is not required to be bid. Such purchases may be considered as a separate aggregation calculation for the purpose of reaching the bid threshold.

5:34-8.3 When determinations of aggregation are found to be incorrect

- (a) In each instance of (a)1 and 2 below, the amount required to be procured, is hereinafter defined to be the "remaining amount." This section shall affect determinations of aggregation pursuant to N.J.S.A. 40A:11-3, 40A:11-4 and 40A:11-7, and as set forth in N.J.S.A. 18A:18A-3, 18A:18A-4, and 18A:18A-8, and is adopted pursuant to N.J.S.A. 40A:11-7.1 and 18A:18A-8.1 when:
 1. Initial estimates of goods or services needed during the contract year are incorrectly anticipated to be less than the bid threshold; or
 2. Initial estimates of goods or services needed during the contract year that had been exempt from public bidding are later found to be incorrect.
- (b) When either of the conditions in (a)1 or 2 above exist, the provisions of this section shall apply.
- (c) If the remaining amount exceeds the bid threshold, public bidding for the remaining amount should take place as soon as practicable after the purchasing agent or contracting agent becomes aware of the change in needs. (see chapter Appendix A)
- (d) Subject to the provisions of (d)1 and 2 below, the contracting agent or purchasing agent may seek authorization from the governing body or its designee to solicit quotations or publicly bid the remaining amount. If the remaining amount is between 15 percent and 100 percent of the contracting unit's bid threshold, then:
 1. The governing body may designate in advance an elected official to determine whether public bidding or the solicitation of quotations would be most advantageous in these circumstances; or
 2. If the governing body fails to designate an elected official, it retains the responsibility to make the determination by resolution. (See chapter Appendix A)

- (e) If the remaining amount to be procured by the contracting unit is less than 15 percent of its bid threshold, the contracting agent or purchasing agent may solicit quotations for the remaining amount.
- (f) In seeking the governing body's or its designee's authorization to solicit quotations under (d) and (e) above, the contracting agent or purchasing agent shall:
 - 1. Certify to the governing body or its designee, as appropriate, the need for additional goods and services;
 - 2. Provide a description of how similar goods or services have been procured during the contract year to date;
 - 3. Obtain a resolution from the governing body or written approval from its designee, as appropriate, approving the purchase; and
 - 4. Provide a report of all procurements made under this section to the full governing body.
- (g) No additional goods or services shall be procured through the solicitation of quotations under (d) above until the resolution or written approval approving the purchase has been passed by the governing body or in the case of a designated elected official, other required form of written approval has been obtained. (see chapter Appendix A)
- (h) If the actual need for goods or services that are publicly bid are found during the course of the contract to be greater than the amount bid, the change order procedures set forth in N.J.A.C. 5:30-11 or 6A:23A-21.9 shall be used, as appropriate.

Contracts issued pursuant to this section shall include a reference to the subsection under which the purchase is authorized.

5:34-8.4 Intentional miscalculations to avoid public bidding

Under no circumstance shall a contracting unit avoid bidding by knowingly miscalculating estimates, taking advantage of differences between contract year and fiscal year, or using another mechanism or artifice intended to intentionally avoid public bidding.

5:34-8.5 Bid opening during public health emergency

- (a) Bidders and the general public may be prohibited from physically attending a bid opening if, during a state of emergency declared by the Governor for public health reasons, the emergency reasonably prevents the local unit from accommodating in-person attendance. In the event the contracting unit cannot accommodate in-person attendance at a bid opening for public health reasons during a state of emergency declared by the Governor, the contracting unit must broadcast the bid opening live from the contracting unit's facilities. Another local unit's facilities may be used for bid opening in the event that the local unit cannot use its facilities for conducting the bid opening.
- (b) The advertisement for bids must include explicit instructions on how the public can remotely access the opening, along with a statement that in-person attendance is prohibited due to public health-related restrictions on public gatherings due to a declared state of emergency.

- (c) The contracting unit shall use web-conference call or online livestreaming technology with both video and audio capability, with the video showing sufficient scope and coverage so that the official opening the bids can be clearly seen to be opening only the bids timely submitted.
- (d) At the opening, the title of the bid must be clearly announced. If the contracting unit has solicited paper-based bids, the contracting unit shall display each sealed bid package, back and front, for the camera prior to opening the bid. The contents of each bid package shall be read aloud upon opening, including the price(s) and noting, at a minimum, the presence of any documents required to be part of the bid submission.
- (e) After the close of the bid opening, at a minimum, the bid package of the apparent low bidder shall be fully scanned and posted to the contracting unit's website. In cases where there is no single low bidder, but many low bidders due to the method of award by individual items, all bids should be scanned and posted to the website. Instructions should be provided to all bidders with the full web address where the bid results can be found.