

i. Nonseparated groups: The maximum allowable height and area shall be determined by applying the more restrictive of the height and area limitations of each group, as per Tables 504.3, 504.4, and 506.2 of the building subcode, to the entire building.

(1)-(3) (No change.)

ii. Separated groups: Each portion of the building containing a group shall be completely separated from adjacent groups by a fire barrier or horizontal assembly, or both, having a fire resistance rating in accordance with Table 707.3.10 of the building subcode; mixed occupancies shall use the highest applicable rating from Table 707.3.10. For buildings equipped throughout with an automatic sprinkler system, the required fire resistance rating for groups other than H is permitted to be reduced by one hour but shall not be reduced to less than one hour. Each portion of the building shall comply with the height limitation of Tables 504.3 and 504.4 of the building subcode for that group. In each story, the area shall be such that the sum of the ratios of the floor area of each group divided by the allowable area of Table 506.2 of the building subcode for each group shall not exceed 1.0.

(1) (No change.)

iii. Separate buildings: If each group is separated from other groups by fire walls that meet the requirements of Table 601 of the building subcode, then each group shall be considered a separate building. Each building shall comply with the height and area limitation of Tables 504.3, 504.4, and 506.2 of the building subcode.

(1) (No change.)

4. (No change.)

(f) Exterior Wall Fire Resistance Ratings and Maximum Area of Exterior Wall Openings: The following exterior wall fire resistance ratings and maximum area of exterior wall openings apply in changes of use:

TABLE F
(No change.)

1. Exterior Wall Protection: If the group of a building is changed to a higher hazard classification in accordance with Table F, the requirements for exterior wall fire resistance rating in the table below shall be met.

i. The requirements for exterior wall fire resistance rating shall not apply to exterior walls which face buildings on the same lot where the buildings are such that, if combined into one structure, the resulting building would comply with the height and area limitations of Tables 504.3, 504.4, and 506.2 of the building subcode.

ii.-iii. (No change.)

2. (No change.)

(g)-(q) (No change.)

SUBCHAPTER 12. ELEVATOR SAFETY SUBCODE

5:23-12.2 Referenced standards

(a)-(b) (No change.)

(c) Maintenance of elevator devices installed under ASME A17.1 shall conform with the following:

1. Maintenance of elevator devices installed under ASME A17.1 shall comply with Sections 8.6.1 through 8.6.11 except for: 8.6.5.8, 8.6.7.3, 8.6.7.4, 8.6.7.8, 8.6.7.9, 8.6.7.11, 8.6.7.12, 8.6.8.2, 8.6.8.3, 8.6.11.6, and 8.6.11.10.

i. Section 8.6.1.2.2 shall apply only for newly installed elevators and elevators undergoing an alteration per Section 8.7.

2.-3. (No change.)

(d)-(f) (No change.)

(a)

DIVISION OF LOCAL GOVERNMENT SERVICES

Use of Design-Build Project Delivery for Construction Projects

Adopted New Rules: N.J.A.C. 5:34-10

Proposed: July 5, 2022, at 54 N.J.R. 1307(a).

Adopted: November 21, 2022, by the Lieutenant Governor Sheila Y. Oliver, Commissioner.

Filed: November 22, 2022, as R.2022 d.153, 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. 18A:18A-68 and 40A:11-60.

Effective Date: November 22, 2022.

Expiration Date: August 7, 2027.

On May 27, 2022, the Commissioner of the New Jersey Department of Community Affairs (Department) adopted, in consultation with the New Jersey Department of Education, rules allowing government entities subject to either the Local Public Contracts Law (N.J.S.A. 40A:11-1 et seq.) or the Public School Contracts Law (N.J.S.A. 18A:18A-1 et seq.) to use the design-build method of project delivery for construction projects with a cost equal to or exceeding \$5,000,000. Pursuant to N.J.S.A. 40A:11-60 and 18A:18A-68, respectively, the rules implementing P.L. 2021, c. 71, for applicable local government and school district construction projects, 54 N.J.R. 1307(a), took effect upon filing with the Office of Administrative Law and were scheduled to expire 180 days from filing. The instant notice of adoption is a final adoption of the rules specially adopted and concurrently proposed at 54 N.J.R. 1307(a), with non-substantial changes not requiring additional public notice and comment, making them permanent.

Summary of Public Comments and Agency Responses:

The commenters below submitted comments, which are summarized and responded to below.

Jack Kocsis, Jr., Chief Executive Officer, Associated Construction Contractors of New Jersey (ACCNJ)

1. COMMENT: ACCNJ strongly opposes the unilateral promulgation of this rulemaking. The Department of Community Affairs' special adoption and concurrent proposal of the new rules effective upon filing with the Office of Administrative Law is problematic. The Department's departure from traditional rulemaking, open comment period, and customary adoption defies logic and temporarily removes a necessary layer of transparency paramount to the Design-Build Act's success.

RESPONSE: The Legislature established the regulatory process under which the subject rules were promulgated. N.J.S.A. 18A:18A-68 and 40A:11-60 both state that "[N]otwithstanding the provisions of the 'Administrative Procedure Act,' P.L. 1968, c. 410 (C.52:14B-1 et seq.) to the contrary, the Department of Community Affairs shall adopt, immediately upon filing with the Office of Administrative Law..." rules the Department deems necessary to implement the provisions at P.L. 2021, c. 71, that are relevant to contracting units subject to either the Public School Contracts Law or the Local Public Contracts Law. Upon filing, the Department was given 180 days by the Legislature to "amend, adopt, or readopt the regulations pursuant to the 'Administrative Procedure Act'..." The special adoption and concurrent proposal process allowed local governments and school districts to begin utilizing the design-build process for eligible public works construction projects, pending the receipt of public comment on the rules.

2. COMMENT: N.J.A.C. 5:34-10.1(c) removes the applicability of the rules from school facilities projects located in a Schools Development Authority (SDA) district, which ACCNJ strongly opposes. Rather, in consultation with the Schools Development Authority, the Department should be updating the Schools Development Authority's design-build rules at N.J.A.C. 19:36-1 to abide by the process outlined in the Design-Build Act. As a matter of law, the Schools Development Authority was not carved out of the Design-Build Act, but was expressly included in the legislation. The lack of consistency in New Jersey's procurement laws is well documented, and something the ACCNJ and government leadership have fought tirelessly to address. The Design-Build Act was a part of that effort, as it was intended to provide a standardized procurement process for the design-build delivery method. Your rulemaking provisions jeopardize and potentially injure this process.

RESPONSE: As stated in the Response to Comment No. 1, N.J.S.A. 18A:18A-68 and 40A:11-60 provide the underlying authority for the Department of Community Affairs to adopt rules authorizing design-build project delivery for entities subject to the Public School Contracts Law

and the Local Public Contracts Law, respectively. The School Development Authority has procurement authority independent from either of the above-referenced laws, and P.L. 2021, c. 71 does not grant the Department statutory authority to dictate what procedures the Authority, or any other State agency, must follow in the procurement of its design-build contracts. As boards of education begin to use design-build project delivery for eligible projects, the Department will evaluate its rules and consult with the Schools Development Authority, as needed, to determine whether further changes to the Department's design-build regulations may be warranted.

3. COMMENT: N.J.A.C. 5:34-10.7(a)5 calls for the New Jersey Department of the Treasury's Division of Property Management and Construction (DPMC) "Design-Build" classification for "key team members and other subcontractors." This language appears to be problematic in a practical sense. Specifically, there are currently 31 general contracting firms that have obtained a "Design-Build" classification. Requiring "key team members and other subcontractors" to have the same classification as a general contractor is inconsistent with the intent of the law. Further, the subcontracting community does not have the necessary prerequisites to obtain a "Design-Build" classification and may be precluded from working with a general contractor on these projects if this specific provision is left unchanged.

RESPONSE: N.J.A.C. 5:34-10.7(a)5, as proposed, was meant to require such classifications of design-builders, any subcontractors, and key team members as may be required for a particular project. The Department will change the rule upon adoption to clarify that a subcontractor shall be required to possess only those classifications and ratings issued by the DPMC that are relevant to the project.

**Ryan Sharpe, Director of Government Affairs and Communications,
Utility and Transportation Contractors of New Jersey**

4. COMMENT: The definition of the term "design-build project delivery" at N.J.A.C. 5:34-10.2 should be amended to remove the phrase "utility relocation and construction." No contractual relationship typically exists between the contractor and the utility companies. The existing relationship is between the utility and the owner of the property.

RESPONSE: To avoid implying a contractual relationship where none may exist, the Department will change N.J.A.C. 5:34-10.2 upon adoption to remove the phrase "utility relocation and construction" from the definition of "design-build project delivery." As the definition still encompasses all portions of a construction project's design and construction phases without limitation, any work involving utility infrastructure owned by the contracting unit would continue to be encompassed by the defined term.

5. COMMENT: The definition of the term "design-builder" should be amended to clarify that no new classification and licensure system will be established for design-builders. We do not believe the intent of A-1285 was to create a new classification and new application process in order to perform design-build work. Moreover, contractors should continue to be classified on their individual qualifications to perform specific work. In addition, we recommend that language be included in the definition of "design-builder" to clarify that the individual members of the design-build team—and not the entire design-build team—must possess the necessary qualifications.

RESPONSE: The Department will change, upon adoption, the definition of "design-builder" at N.J.A.C. 5:34-10.2 to clarify that the design-builder shall possess such classifications from the DPMC and/or the New Jersey Department of Transportation (NJDOT), as are relevant to the design-build project. The definition will also be changed upon adoption to clarify that the individual members of the design-build team are to possess the requisite classifications or ratings rather than the design-build team as a whole.

6. COMMENT: N.J.A.C. 5:34-10.3(b) states, "[F]or purposes of meeting the minimum monetary threshold at (a) above, a contracting unit may group more than one project together, so long as those projects are single in character and components of the same work." The design-build statute does not expressly authorize the bundling of contracts; therefore, we request that this language be removed. Should this language remain in the rules, we suggest capitalizing "work" to prevent confusion and make it clear that this refers to the definition provided at N.J.A.C. 5:34-10.2.

RESPONSE: References at N.J.S.A. 18A:18A-62 and 40A:11-54 to "project or projects" contemplate the grouping of projects. However, the wording at N.J.A.C. 5:34-10.3(b) prevents contracting units from grouping unrelated projects under the same design-build procurement. The Department cannot change N.J.A.C. 5:34-10.3(b) upon final adoption to capitalize the word "work" as proposed by the commenter, consistent with the Rules of Agency Rulemaking, N.J.A.C. 1:30; however, the Department anticipates issuing additional guidance further addressing this provision.

7. COMMENT: References to "named subcontractors" at N.J.A.C. 5:34-10.5(e) should be replaced with the phrase "potential subcontractors." Including named subcontractors is difficult if a proposal cannot be generated for the subcontractor's work, which would be based on anticipated quantities and design elements.

RESPONSE: In the interest of greater clarity and flexibility, the Department will change N.J.A.C. 5:34-10.5(e) upon adoption to read "named subcontractors or subconsultants, any subcontractors and subconsultants from which the bidder, at the time of the proposal, expects to consider selecting once anticipated quantities and design elements of the project are known ..." A design-builder may have a pool of subcontractors or subconsultants that they routinely work with, and from which one or more could be chosen, depending on the final project design.

8. COMMENT: N.J.A.C. 5:34-10.6 should be amended to clarify that, in addition to any required advertising, the use of electronic procurement pursuant to the Local Public Contracts Law may be utilized for this and all other permitted aspects of the bid process.

RESPONSE: Although there is nothing prohibiting contracting units from utilizing electronic procurement platforms for design-build projects pursuant to P.L. 2018, c. 156, P.L. 2020, c. 59, and the implementing rules at N.J.A.C. 5:34-5, the Department agrees to add new N.J.A.C. 5:34-10.3(e), expressly stating that electronic procurement may be utilized for design-build projects, as permitted by law.

9. COMMENT: Considering that the design-build process is new to New Jersey, we are concerned that bidders could be penalized for their lack of experience as a design-build team. This has the potential to favor out-of-State contractors who have performed work in states having already implemented the design-build system. To prevent the disparate treatment of New Jersey contractors—many of whom will be working together for the first time—we request that language be added at N.J.A.C. 5:34-10.7 stating that prior experience as a design-build team shall not preclude any contractors from the bidding process nor be used to favor one bidder over another in the scoring process. Absent the inclusion of a clarifying statement, inserting the phrase "if any" after each mention of the words "construction projects" at paragraph (a)2 and after "public works projects" at paragraph (a)3 would help to ensure that lack of experience will not be used to disadvantage any bidder unfairly.

RESPONSE: Although contracting units should be able to assess the experience of a prospective design-builder and each member of their proposed team, the Department acknowledges that, due to design-build project delivery for local government and non-SDA school district projects only coming online this year, New Jersey-based firms could be placed at a disadvantage if a design-build team's prior experience on design-build projects were to be a significant evaluation criteria factor. As such, the Department will adopt N.J.A.C. 5:34-10.7 and 10.8 without the substantive change proposed by the commenter to avoid expiration of the specially adopted rules, but, in a subsequent rulemaking, will propose further amendments to address the concerns raised by the commenter.

10. COMMENT: N.J.A.C. 5:34-10.7(f) states that "[K]ey team members shall not be replaced without the approval of the technical review committee." There may be designated key team members who leave a bidder's employ for reasons beyond the bidder's control. For instance, employees could resign, assume a position with a different company, or choose to retire. As such, we suggest adding language stating that this approval "cannot be unreasonably withheld."

RESPONSE: Upon adoption, the Department will change N.J.A.C. 5:34-10.7(f) to clarify that the technical review committee must have a reasonable basis for denying the design-builder's request to replace a key team member designated in its statement of qualifications.

11. COMMENT: N.J.A.C. 5:34-10.8(a) states that the return date for submission of proposals by prospective design-builders shall be no less

than 14 days after the issuance of a request for proposals by the contracting unit. Setting 14 days as the minimum time period for bid submission is impracticable for what is often a complicated and time-consuming process that is highly dependent on the size of the project. Some projects require 14 days to prepare a bid. A review of Florida's design-build standards is instructive since it has substantial experience with the design-build process. As such, we suggest incorporating some aspects of the Florida standards and, specifically, establishing a minimum 21-day window to submit bids with no cap on the maximum number of days. In addition, we recommend the creation of "sliding scale" submission deadlines that take into consideration the size and scope of a project.

RESPONSE: At this juncture, the Department will adopt N.J.A.C. 5:34-10.8 without the change suggested by the commenter, but, as contracting units begin utilizing design-build project delivery, the Department will consider the experience of contracting units and prospective design builders in determining whether it is necessary to extend the minimum deadline for submission of design-build proposals. With respect to the commenter's recommendation to allow sliding scale submission deadlines, the regulation does not prohibit a contracting unit from allowing a greater number of days for responses.

12. COMMENT: N.J.A.C. 5:34-10.9(g) should be amended to establish a process for a bidder to appeal a determination made by a design professional or design official that a proposal is incomplete or non-responsive.

RESPONSE: At this juncture, the Department will adopt N.J.A.C. 5:34-10.9(g) without the change proposed by the commenter, but, as contracting units begin utilizing design-build project delivery, the Department will consider the experience of contracting units and prospective design builders in determining whether it is necessary to create a mandatory appeal process for determinations of non-responsiveness.

13. COMMENT: N.J.A.C. 5:34-10.9(h) allows a technical review committee to conduct interviews with each bidder prior to ranking the bidders' respective technical proposals. Preparing for an interview requires a significant commitment of a bidder's time and resources. As such, we recommend that a contracting unit's request for proposal (RFP) be required to specify whether the technical review committee will conduct interviews.

RESPONSE: The Department acknowledges the commenter's concern and further recognizes a need to broaden N.J.A.C. 5:34-10.9 to address circumstances when interviews may be required to clarify an individual response. The Department will adopt N.J.A.C. 5:34-10.9 without the change proposed by the commenter to avoid expiration of the specially adopted rules, but will address these matters in a separate rule proposal to be issued in the near future.

14. COMMENT: To ensure complete transparency in the bid review and award process, we recommend the addition of language at N.J.A.C. 5:34-10.9(k) stating that price proposals shall be made public, along with the technical scores, at a prescribed time and location as delineated in Section b at N.J.S.A. 40A:11-23 in the Local Public Contracts Law. Furthermore, making the selection coordinator reports available 48 hours prior to the contract award does not afford losing bidders sufficient time to thoroughly review and prepare a protest of an award. Thus, we suggest "48 hours" be changed to "five business days."

RESPONSE: For goods or services procured through competitive contracting, N.J.S.A. 40A:11-4.5.c requires the proposal evaluation report be made available to the public at least 48 hours prior to the awarding of the contract, or when made available to the governing body, whichever is sooner. The time period specified at N.J.A.C. 5:34-10.9(k) was adapted from the above-referenced statute. However, upon further consideration, the Department concurs with the commenter that the greater complexity of design-build proposals compared to most goods and services procured through competitive contracting warrants the proposal evaluation report to be made public for a greater length of time. As such, the Department will adopt the above-referenced provision at N.J.A.C. 5:34-10.9(k) without change, to avoid expiration of the specially adopted rules, but will issue a subsequent rule proposal to amend N.J.A.C. 5:34-10.9(h) to extend the minimum time period to five business days from 48 hours. With respect to the disclosure of price proposals and the scores for each

technical proposal, the Department will change N.J.A.C. 5:34-10.9(k) upon adoption to clarify that the dollar amount of each bidder's price proposal shall be included in the evaluation report, along with a breakdown of the evaluation scores for each bidder. Pursuant to N.J.A.C. 5:34-10.9(f), public disclosure of the price proposals would be required once the governing body awards the contract.

15. COMMENT: N.J.A.C. 5:34-10.10(b) should be amended to include the following language: "If all bids are rejected, the governing body shall not have any right to use any of the drawings, specifications, or design proposal concepts in any re-bid, including a decision to utilize the Design-Bid-Build method of procurement. Ownership of all design documents shall remain with the bidders."

RESPONSE: The Department does not find that the requested change at N.J.A.C. 5:34-10.10(b) is necessary. N.J.A.C. 5:34-10.9(o) already incorporates the language from N.J.S.A. 18A:18A-66.f and 40A:11-58.f stating "[U]nless and until a statement proposal is accepted by the governing body, the drawings, specifications, and other information in the proposal shall remain the property of the bidder."

16. COMMENT: To perform a thorough review of a proposal and score, a bidder must be able to access the bid proposal and any other documents related to the contract award. Therefore, we suggest the addition of language at N.J.A.C. 5:34-10.10(d), stating that the unsuccessful bidder shall, upon request, be provided with copies of all relevant materials. The contracting unit may charge the requestor a reasonable fee for the cost of producing said materials.

RESPONSE: N.J.A.C. 5:34-10.10(d) currently only states that an unsuccessful bidder has the right to review the proposals submitted, the technical review committee evaluation scores, and the final recommendation of the award document (that is, the proposal evaluation report). The Department agrees that expressly allowing an unsuccessful bidder to obtain copies of said documents would allow the opportunity for a more thorough review. As such, the Department will adopt the above-referenced provision at N.J.A.C. 5:34-10.9(k) without change to avoid expiration of the specially adopted rules, but will propose amendments at N.J.A.C. 5:34-10.10(d) in a separate rule proposal to allow an unsuccessful bidder to obtain copies of the materials referenced in the subsection, subject to such costs as the contracting unit may charge pursuant to the Open Public Records Act (N.J.S.A. 47:1A-1 et seq.) The Department notes that the current requirement at subsection (d) that the contracting unit redacts technical proposals "to the extent necessary to prevent revealing the trade secrets and proprietary commercial or financial information incorporated into another bidder's technical proposal" would remain.

17. COMMENT: N.J.A.C. 5:30-10.10(e) should be amended to require that, if a contracting unit is supplying a stipend to unsuccessful bidders submitting design-build proposals, the contracting unit provide the stipend to all bidders if the owner cancels the project. Language should be included stating that if the contracting unit cancels and gives notice of the final award, the contracting unit shall pay any stipend as stipulated in the RFP.

RESPONSE: Pursuant to N.J.S.A. 18A:18A-63 and 40A:11-54, the matter of whether to issue a stipend is solely within the discretion of the contracting unit. As such, the Department will not change its rules, making the requirement to pay a stipend mandatory in this circumstance. However, the Department agrees to change N.J.A.C. 5:34-10.11(a) to clarify that a contracting unit may agree to pay a stipend to all bidders in the event of project cancellation. N.J.A.C. 5:34-10.11(b) already requires the contracting unit to include the terms and conditions for payment of the stipend in both the RFQ and RFP, so no further changes are needed to address project cancellation.

18. COMMENT: As bidders' proposals may contain proprietary information, N.J.A.C. 5:34-10.12(a) should be amended to state that only the successful bid proposal is subject to the provisions of the Open Public Records Act, and unsuccessful proposals shall not be disclosed.

RESPONSE: The Department finds that there are sufficient protections in place for bidders' proprietary information. N.J.A.C. 5:34-10.10(d) already permits an unsuccessful bidder to access all technical proposals submitted in response to an RFP, subject to redactions to prevent revealing trade secrets and proprietary commercial or financial information. N.J.S.A. 47:1A-1 exempts from disclosure pursuant to the Open Public

Records Act (OPRA) “trade secrets and proprietary commercial or financial information obtained from any source.” Nevertheless, to ease the administrative burden faced by contracting units in making determinations pursuant to the above-referenced OPRA exception, in a subsequent rule proposal, the Department will agree to propose amendments at N.J.A.C. 5:34-10.10(a) in a subsequent rulemaking to allow contracting units discretion to require bidders to specify which information in their proposals is proprietary; with the caveat that the bidder’s determination would not be binding upon the contracting unit.

19. COMMENT: N.J.A.C. 5:34-10.12(c) requires the contracting unit or the design-builder to produce records relating to the project within four business days of a request by the Director of the Division of Local Government Services. Locating and securing these records, which may be maintained off-site, could require substantially more time than the “four business days” allotted in the proposed rules. Therefore, we recommend changing “four business days” to “10 business days.”

RESPONSE: The Department acknowledges that the varying size and staff capacity of local governments and school districts may impact their ability to effectively respond to records requests as to a design-build project. Although the Department will adopt the above-referenced provision at N.J.A.C. 5:34-10.12(c) without change, to prevent the expiration of the specially adopted rules, the Department will issue a subsequent rule proposal in the near future to amend N.J.A.C. 5:34-10.12(c) in the manner sought by commenter.

20. COMMENT: N.J.A.C. 5:34-10.16(a) should be amended to state that a contracting unit’s written approval of a request to substitute a bidder’s key team members “cannot be unreasonably withheld.” Team members may leave the employ of a bidder for reasons that are beyond the bidder’s control.

RESPONSE: In order to clarify the degree of contracting unit discretion, the Department agrees to change N.J.A.C. 5:34-10.6(a) upon adoption to state that the contracting unit shall have a reasonable basis upon which to deny a request for substitution of a bidder’s key team member.

21. COMMENT: The scoring system for post-award design-builder evaluation established pursuant to N.J.A.C. 5:34-10.18 is subjective and does not adequately reflect a design-builder’s performance. Specifically, under this ranking system, a design-builder who complies with all terms of a contract only receives a rating of “Satisfactory” and can only secure an “Outstanding” rating by “exceeding” the contract requirements. We believe any design-builder who meets the terms of a contract should receive an “Outstanding” rating. Moreover, the evaluation ratings are vague and subjective to each reviewer and, thus, could be abused to favor certain bidders or could create the appearance of an unfair evaluation process. As such, we suggest eliminating the “Outstanding” and “Very Good” rankings and amending the scoring system to award a 100 percent rating to any design-builder who consistently meets the contract requirements. In addition, we recommend adding technical measures to the enumerated categories to ensure a fully objective evaluation process.

RESPONSE: The Department finds that the current post-award evaluation rating rubric established at N.J.A.C. 5:34-18 provides sufficient objectivity in evaluating a design-builder’s performance. Each rating, which ranges from “Outstanding” to “Unsatisfactory,” references the design-builder’s performance when measured against the terms of the design-build contract. The classifications of “Outstanding” and “Very Good” should be limited to those design-builders that consistently exceed the requirements of the underlying contract.

22. COMMENT: N.J.A.C. 5:34-10.19(b) states that a bidder that intends to submit, or has submitted, a proposal may request an informal hearing before the contracting unit to protest the RFP documents or process must do so, in writing, at least five business days prior to the date and time scheduled for the opening of the technical proposals. As the need to protest may not be apparent in this time frame, we suggest extending this deadline to submit notice that a bidder wishes to protest the RFP process. Moreover, providing all materials required to mount a protest can take substantial time. Therefore, we recommend that all materials required for the protest be provided 15 days after the submission of a notice of intent to protest.

RESPONSE: In response to the commenter’s concern regarding the amount of time necessary for a bidder to file a thorough protest, the

Department will adopt the above-referenced provision at N.J.A.C. 5:34-10.19(b) without change to prevent the expiration of the specially adopted rules, but will issue a subsequent rule proposal in the near future that proposes amending N.J.A.C. 5:34-10.19 to institute a requirement to file with the contracting unit a notice of intent to protest within a certain number of days of the RFQ or RFP becoming available, from which point, the bidder would have no more than a certain number of days within which to file a formal protest with the contracting unit.

23. COMMENT: Providing the contracting unit with sole discretion on whether to grant a hearing unfairly limits a bidder’s ability to protest. As such, we suggest that N.J.A.C. 5:34-10.19(c) and (g)1 be amended to create an additional level of appeal to ensure the bidder is given sufficient opportunity to dispute the contracting unit’s determination.

RESPONSE: The Department does not agree to make the change requested by the commenter. N.J.A.C. 5:34-10.19(g)1 requires the contracting unit to issue a determination on any protest or challenge at N.J.A.C. 5:34-10.19. The protestor must submit all legal and factual arguments, materials, or other documents that support the protestor’s position. However, what is within the sole discretion of the contracting unit is whether to render a decision on the protest solely on the materials submitted as part of the protest or allow the protestor to present oral testimony in a quasi-legislative hearing. Any further challenges to the contracting unit’s determination can be made through the courts or, if applicable, the dispute resolution procedures set forth at N.J.S.A. 40A:11-50.

24. COMMENT: Allowing up to 30 days for a governing body or hearing officer to issue a decision on a bidder protest could unnecessarily delay important public works projects. Therefore, we recommend amending N.J.A.C. 5:34-10.19(g)2 to replace “30 calendar days” with “14 calendar days.”

RESPONSE: Due to the varying size and staff capacity of local governments and school districts, the Department will not change the current 30-day window, as it finds that shortening the timeframe for issuing a decision on a bidder’s protest would unreasonably limit contracting units’ ability to thoughtfully consider all arguments presented by the bidder.

Lori Simeon, President, Governmental Purchasing Association of New Jersey

25. COMMENT: With respect to N.J.A.C. 5:34-10.7(a)7, which requires a bidder to submit the training certification of the bidder’s professional and field workforce, along with that of the members of the proposed design-build team, we are not sure what certification is being requested or required. What would be considered a training certification? Will contractors have to attend classes and courses as we do to obtain our Qualified Purchasing Agent certificates? The Department should potentially amend this provision to include firm profiles, resumes, and project examples.

RESPONSE: N.J.A.C. 5:34-10.7(a)7 establishes minimum content for a bidder’s statement of qualifications. Contracting units would not be precluded from requiring firm profiles as part of their requests for qualifications; however, each bidder’s statement of qualifications is already required to provide details concerning experience. Training certifications can include, but are not necessarily limited to, areas such as training on safety, particular equipment, or processes. However, for purposes of greater clarity, the Department will change N.J.A.C. 5:34-10.7(a)7 upon adoption to make the word “certification” plural.

26. COMMENT: The minimum time period established at N.J.A.C. 5:34-10.8(a) for responses to RFPs should be increased from 14 days to at least 20 days, which would be the minimum timeframe for competitive contracting solicitations. We suggest going even further and making it more like the 60 days given to respond to solid waste bid solicitations.

RESPONSE: At this juncture, the Department will adopt N.J.A.C. 5:34-10.8 without the change suggested by the commenter, but, as contracting units begin utilizing design-build project delivery, the Department will consider the experience of contracting units and prospective design builders in determining whether it is necessary to extend the minimum deadline for submission of design-build proposals. The existing rules give contracting units the discretion to offer a greater number of days for bidders to respond.

27. COMMENT: N.J.A.C. 5:34-10.9(m) requires the technical review committee to consider at least two complete and responsive proposals before the governing body can award the contract. No restriction on the number of proposals should be required. Provided that the solicitation was done in a fair and open manner, we see no conflict if only one proposal is submitted. Also, if the proposed awarded bidder decides to withdraw from the award, do we then offer the project award to the next bidder?

RESPONSE: N.J.S.A. 18A:18A-67.a and 40A:11-59.a state that “[N]o proposal for a design-build contract may be accepted unless the contracting unit determines that there was adequate competition for such contract.” At P.L. 2021, c. 71, the term “acceptance” is used to mean a selection of the design-builder’s proposal by the contracting unit. Further, both above-referenced statutes have repeated references to the evaluation and consideration of “proposals” plural. The Department finds that “adequate competition” would require the comparison of at least two complete proposals to determine which is the most advantageous to the contracting unit in terms of price and other factors.

If, after the award of a design-build contract, the successful bidder decides to withdraw, N.J.A.C. 5:34-10.15(c) would allow the contracting unit to withdraw or cancel the notice of award and award the contract to the next-highest ranked bidder. Upon adoption, the Department will change this subsection to replace a mistaken reference to “design-bidder” with the term “contracting unit.”

28. COMMENT: N.J.A.C. 5:34-10.9(n) authorizes a contracting unit to negotiate with a successful bidder post-award; however, what is the reason an entity would want to negotiate post-award? The submitted price is the submitted price. Local governments are only allowed to negotiate if bids were negotiated twice with no bidders.

RESPONSE: N.J.S.A. 18A:18A-66.d and 40A:11-58.d authorize school districts and local governments, respectively, to negotiate with a design-builder post-contract award. N.J.A.C. 5:34-10.9(n) establishes the framework pursuant to which such negotiations can take place, if the contracting unit elects to do so.

29. COMMENT: It is mentioned several times about what to charge for the RFQ and RFP. Since many entities are moving forward with E-bidding, would E-bidding be allowed? If so, it should state that here.

RESPONSE: As stated in the response to prior comments, the Department will change its rules upon adoption to create new N.J.A.C. 5:34-10.3(e), explicitly authorizing the use of electronic procurement platforms for design-build construction projects.

30. COMMENT: N.J.A.C. 5:34-10.7(a)8 requires bidders to include their safety experience modification rating (EMR), along with the EMR rating of the construction members of its proposed design-build team, in their statements of the proposal. This should be optional as many local units are not familiar with or understand what an EMR is.

RESPONSE: N.J.S.A. 18A:18A-63.b and 40A:11-55.b both require consideration of a “safety modification rating” in the evaluation of statements of qualification. EMR ratings (an equivalent term) evaluate the risk of work-related injuries and are used by insurance firms to calculate the cost of worker’s compensation insurance premiums. Lower EMR ratings indicate that a firm is less of a risk for work-related injuries among its employees, which is reflected in lower worker’s compensation premiums.

31. COMMENT: For a bidder to be qualified to receive an RFP, the bidder must provide a copy of their Public Works Contractor Registration (PWCR) certificate along with those of the proposed members of the design-build team that are required by law to have a PWCR. To comport with the New Jersey Public Works Contractor Registration Act, this should not be a mandatory item at the time of proposal but at contracting award.

RESPONSE: With design-bid-build project delivery, a bidder must provide the contracting unit with their PWCR certificate before the contract can be awarded. By contrast, the first phase of the design-build process involves qualifying the design-builders to receive RFPs. As design-builders must have a PWCR to perform work on the project, along with the team members required by law to have a PWCR, the Department finds it appropriate to disqualify from receiving an RFP those that cannot produce a PWCR.

32. COMMENT: Why are the technical and price proposals separated at N.J.A.C. 5:34-10.9(b)6? This reads like the two-envelope system for

the qualified selection process in Federal procurement. This also implies a paper-only system. Also, the reference to a bid bond creates legal issues in that it is in reference to the lowest responsive, responsible bidder.

RESPONSE: P.L. 2021, c. 71, requires the submission of separate technical and price proposals in response to an RFP. As stated in the response to prior comments, the Department will change its rules upon adoption to create a separate subsection expressly authorizing the use of electronic procurement platforms for design-build construction projects. Finally, the Department does not find the bid bond requirement to conflict with the nature of the design-build method of project delivery. As with design-bid-build projects, the bid bond would help ensure that the design-builder awarded the contract will perform the work on the project.

33. COMMENT: The price proposal should not be given a weight of 50 percent. This negates some of the benefits of the design-build process and will favor back-ended low-bid situations.

RESPONSE: N.J.S.A. 18A:18A-63.f and 40A:11-55.f require the price proposal to be weighted at least 50 percent. The Department does not have the discretion to deviate from this minimum percentage.

34. COMMENT: There is no reference or definition of the Greatest Maximum Price or GMP, which should be included in the regulations to protect the contracting unit.

RESPONSE: The term referenced by the commenter does not appear in the rules, and there is insufficient context from which to understand what section or sections the commenter is referencing.

Thomas J. Duch, Esq., Bergen County Counsel and County Administrator, on behalf of the County of Bergen

35. COMMENT: N.J.A.C. 5:34-10.1(b)1, 10.2, 10.4(a), and 10.6(c)1iii should be amended to incorporate specifications into the request for the qualifications stage of the design-build procurement. Specifically:

- Amend N.J.A.C. 5:34-10.1(b)1 to include the phrase “including any and all specifications prepared by the contracting unit” between the words “project” and “and”;
- Amend N.J.A.C. 5:34-10.2 to define the term “preliminary design documents” as meaning “the initial design elements of the project which may include detailed specifications prepared by the contracting unit. The contracting unit shall utilize a design professional or design official to prepare the preliminary design documents. The preliminary design documents may range from general descriptions of the project to required necessary specifications for the project”;
- Amend the following existing definitions at N.J.A.C. 5:34-10.2:
 - “Construction documents” to reference authorship by the contracting unit and the design-builder;
 - “Prescriptive specifications” to include any and all documents the contracting unit finds appropriate to provide;
 - Qualification evaluation factors” to include evaluation of a design-builder’s capacity to execute the necessary specifications of the design-build project;
 - “Request for qualifications” to state that the request for qualifications describes the project in enough detail as determined by the contracting unit, including any and all specifications prepared by the contracting unit; and
 - “Specification” to mean a written description included as part of the request for qualifications as well as the construction documents, further stating that “[S]pecifications prepared by the contracting unit shall augment and complement any drawings and plans prepared by the design-builder”;
- Amend N.J.A.C. 5:34-10.4(a) to specifically require a design professional or design official retained by the contracting unit to provide design documents and specifications as part of their services; and
- Amend N.J.A.C. 5:34-10.6(c)1iii to include specifications within the scope of work statement required to be provided in the request for qualifications.

RESPONSE: The Department anticipates issuing further guidance on the matter of design specificity; however, the Department will adopt the above-referenced subsections without the above-referenced changes proposed by the commenter. As contracting units begin utilizing design-build project delivery, the Department will consider the experience of

contracting units and prospective design builders in determining whether it is necessary to provide greater detail on the permissible level of detail in design documents and project specifications.

36. COMMENT: The definition of “design official” at N.J.A.C. 5:34-10.2 should be amended to state that the official would be designated by the contracting unit to substitute the phrase “plan, design and observe” for the current “be responsible for planning, designing, and observing” before “the construction of a design-build project or projects on behalf of the contracting unit throughout the duration of the design-build project or projects on behalf of the contracting unit.”

RESPONSE: The Department does not see a need for the requested change. Further, the language sought by the commenter could be interpreted as placing the design official in a role akin to an engineer and/or architect in a design-bid-build project, where the contracting unit is solely responsible for the design element.

37. COMMENT: The Department should amend N.J.A.C. 5:34-10.6(c) to add after “[O]ther technical factors; as may be relevant to the project,” the phrase “including restoration and rehabilitation projects, as determined by the contracting unit and provided in the requests for qualifications.”

RESPONSE: The determination of whether a technical factor specified in the RFQ is relevant to the project should not be left solely within the contracting unit’s determination. A technical factor that is not relevant to a project could potentially be used to unfairly limit competition, and to allow a contracting unit to define relevance as it sees fit would hinder a bidder from challenging the procurement process on that basis.

38. COMMENT: At 5:34-10.6(d)1, the word “directly,” located before the word “related,” should be deleted, such that no RFQ may require any standard, restriction, condition, or limitation not related to the project’s purpose, function, or activity.

RESPONSE: The Department will not make the change requested by the commenter, as it would increase the risk of an RFQ or RFP being tailored to a specific design-builder and, thereby, deprive other design-builders of a level playing field.

39. COMMENT: N.J.A.C. 5:34-10.17(c) should be amended to remove the word “interim” throughout the subsection.

RESPONSE: The above-referenced provision is meant to limit contracting unit liability when finalizing the design and plans in collaboration with the design-builder. Outside of this process, the terms of the design-build contract would govern the liability of the respective parties with respect to design. N.J.S.A. 18A:18A-66.f and 40A:11-58.f each state that “[O]nce a proposal is accepted, the disclosure of the proposal and the information in the proposal, and the ownership of the drawings, specifications, and information therein, shall be determined in accordance with existing law and the terms of the design-build contract.” At this time, the Department finds that the issue of liability in connection with a finalized design can be adequately addressed in the underlying design-build contract; and declines to make the change requested by the commenter.

40. COMMENT: The following sentence should be inserted at N.J.A.C. 5:34-10.19(b): “The nature and extent of detail in the preliminary design documents and/or specifications prepared by the contracting unit shall not be a basis to protest the design build project process.”

RESPONSE: The Department will not make the change requested by the commenter, as it finds that the proposed language would unduly restrict the ability of a bidder to enter a protest concerning a request for qualifications or request for proposals.

Federal Standards Statement

No Federal standards analysis is required because the adopted new rules are not adopted in order to implement, comply with, or participate in any program established under Federal law or under a State law that incorporates or refers to Federal law, standards, or requirements.

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

SUBCHAPTER 10. DESIGN-BUILD CONTRACTS

5:34-10.1 Purpose and applicability of rules

(a) This subchapter is adopted by the Department of Community Affairs, in consultation with the Department of Education, to establish requirements and procedures for the procurement of design-build contracts by local government contracting units pursuant to sections 26 through 33 of P.L. 2021, c. 71 (N.J.S.A. 40A:11-53 through 40A:11-60) and board of education contracting units pursuant to Sections 34 through 41 at P.L. 2021, c. 71 (N.J.S.A. 18A:18A-61 through 18A:18A-68).

(b) This subchapter provides for contracting units to select design-builders according to the proposal that is most advantageous to the contracting unit, based upon a “best value selection” process premised on a combination of cost and qualitative factors. The rules provide for the following two-phase selection process:

1. The public advertisement of a request for qualifications (RFQ) that describes the design-build project, outlines the scope of work for the project and solicits responses delineating the qualifications of bidders; and

2. The issuance of a request for proposal (RFP) to prequalified bidders, selected on the basis of their responses to the RFQ, which outlines the criteria to be used for selection and the weight that will be given to each of these criteria in the evaluation process, and which solicits a proposal consisting of a technical proposal and a price proposal.

(c) This subchapter shall not apply to school facilities projects in an SDA school district. The procurement of design-build contracts for school facilities projects in an SDA school district shall be subject to the rules promulgated by the New Jersey School Development Authority at N.J.A.C. 19:36. All other school construction projects for which a contracting unit is using design-build project delivery shall be subject to this subchapter.

5:34-10.2 Definitions

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

“Acceptance” means the adoption of a resolution by a contracting unit authorizing the execution of a design-build contract.

“Act” means sections 26 through 41 at P.L. 2021, c. 71.

“Best value selection” means a process in which consideration is given to both a price proposal and a technical proposal, and the award of the design-build contract is based upon a combination of price and qualitative considerations pursuant to sections 28 and 36 at P.L. 2021, c. 71, and N.J.A.C. 5:34-10.8, such that the successful bidder is the one whose price bid and technical proposals together are most advantageous to the contracting unit, price, and other factors considered.

“Bidder” means a design-builder submitting a statement of qualifications, or a statement of qualifications and proposal, in response to a request for qualifications or request for proposals for an award of a design-build contract.

“Construction documents” means the plans, specifications, and other documents prepared by the design-builder that set forth in detail the design for, and other necessary requirements relating to, the construction of the design-build project.

“Contract milestones” means the dates identified in the project schedule by which the design-builder must complete certain critical activities to advance the project.

“Contracting unit” means a government entity that enters into contracts pursuant to the Local Public Contracts Law, P.L. 1971, c. 198 (N.J.S.A. 40A:11-1 et seq.), or pursuant to the Public School Contracts Law, P.L. 1977, c. 144 (N.J.S.A. 18A:18A-1 et seq.).

“Delivery system” means the procedure used to develop and construct a project.

“Design-bid-build” means the delivery system used in public projects in which a licensed and prequalified design professional or designated employee develops the project design in its entirety; the contracting unit then solicits bids and awards the contract to the lowest responsible bidder that demonstrates the ability to complete the project specified in the design.

“Design-build contract” means a contract between a contracting unit and a design-builder to provide labor, materials, and other construction services for a public project. A design-build contract may be conditional

upon subsequent refinements in scope and price and may permit the contracting unit to make changes in the scope of the project without invalidating the design-build contract.

“Design-build project” means the planning, acquisition, demolition, construction, improvement, alteration, modernization, renovation, reconstruction, or rehabilitation of all or any part of a facility or right-of-way, or of any other personal property necessary for, or ancillary to, any facility or right-of-way, and shall include fixtures, furnishings, and equipment, and shall also include, but is not limited to, site acquisition, site development, architectural and engineering services, construction management, legal services, financing costs, and administrative costs and expenses incurred in connection with the project.

“Design-build project delivery” means a project delivery system that combines all or some portions of the design and construction phases of a construction project into a single contract, including, without limitation, design*[,]* ***and*** regulatory permit approvals*[, and utility relocation and construction]*.

“Design-builder” means the entity, whether natural person, partnership, joint stock company, corporation, trust, professional corporation, business association, or other legal business entity or successor, that proposes to design and construct any public project, who possesses a public works contractor registration pursuant to the provisions at P.L. 1999, c. 238 (N.J.S.A. 34:11-56.48 et seq.), and *[classified by]* ***who possesses, along with other individual members of the design-build team, requisite classifications or ratings from*** the New Jersey Division of Property Management and Construction or the New Jersey Department of Transportation, where applicable, ***relevant*** to perform work on the project.

“Design official” means an employee of the contracting unit that is both licensed to provide architectural, engineering, and/or surveying services, in accordance with N.J.S.A. 45:3-1 et seq., and P.L. 1938, c. 342 (N.J.S.A. 45:8-27 et seq.), and designated by the contracting unit to be responsible for planning, designing, and observing the construction of a design-build project or projects on behalf of the contracting unit.

“Design professional” means the entity, whether natural person, partnership, joint stock company, corporation, trust, professional corporation, business association, or other legal business entity or successor, that provides licensed and prequalified architectural, engineering, and/or surveying services, in accordance with N.J.S.A. 45:3-1 et seq., and P.L. 1938, c. 342 (N.J.S.A. 45:8-27 et seq.), and that shall be responsible for planning, designing, and observing the construction of the project or projects on behalf of the contracting unit or the design builder.

“Key team member” means an individual identified as having a responsible role in the successful completion of the design-build contract, in the bidder’s statement of qualifications and proposal, which response is made part of the contract.

“Legal requirements” means all applicable Federal, State, and local laws, acts, statutes, ordinances, codes, executive orders, rules, and regulations in effect, or hereinafter promulgated, that apply to the design-builder’s performance of services or work under the agreement, including, but not limited to, the New Jersey Prevailing Wage Act, P.L. 1963, c. 150 (N.J.S.A. 34:11-56.25 et seq.), the Public Works Contractor Registration Act, P.L. 1999, c. 238 (N.J.S.A. 34:11-56.48 et seq.), and the Construction Industry Independent Contractor Act, P.L. 2007, c. 114 (N.J.S.A. 34:20-1 et seq.), the Occupational Safety and Health Act of 1970, the Soil, Erosion, and Sediment Control Act, as well as any requirements of State, Federal, or local authorities having jurisdiction over the project, as applicable.

“Notice of award” or “NOA” means a written notice from the contracting unit to the bidder prior to award, setting forth the contracting unit’s intention to enter into a design-build contract with the bidder.

“Performance specifications” means a document provided in the RFP setting forth a description of an end result, objective, or standard of performance that the design-builder is expected to achieve in designing and constructing the project.

“Prequalification” means the contracting unit’s approval of a bidder to submit a statement of proposal in response to a request for proposals for a design-build contract.

“Prequalified bidder” means a bidder designated by the contracting unit, based on a statement of qualifications submitted by the bidder, as eligible to submit a proposal in response to a request for proposals issued by the contracting unit.

“Prescriptive specifications” means a document provided in the request for proposals that contains a description of the materials to be employed and/or the manner in which the work is to be performed that the design-builder is required to follow.

“Price proposal” means a sealed proposal containing the maximum cost of providing the required design and construction and other services described in the RFP, which shall not be exceeded if the contracting unit accepts the proposal without change.

“Proposal” means a technical proposal and price proposal submitted together by a bidder in response to a request for proposals from a contracting unit.

“Proposal evaluation factors” means the requirements for the second phase of the selection process when statements of proposal are reviewed.

“Protest” means a challenge to a decision, statement, action, or alleged inaction of the contracting unit.

“Public highway” means public roads, streets, expressways, freeways, parkways, motorways, and boulevards, including bridges, tunnels, overpasses, underpasses, interchanges, rest areas, express bus roadways, bus pullouts and turnarounds, park-ride facilities, traffic circles, grade separations, traffic control devices, the elimination or improvement of crossings of railroads and highways, whether at grade or not at grade, bicycle and pedestrian pathways, and pedestrian and bicycle bridges traversing public highways.

“Public transportation project” means in connection with public transportation service, passenger stations, shelters, terminals, automobile parking facilities, ferries and ferry facilities, including capital projects for ferry terminals, approach roadways, pedestrian accommodations, parking, docks and other necessary land-side improvements, ramps, track connections, signal systems, power systems, information and communication systems, roadbeds, transit lanes, or rights-of-way, equipment storage, pedestrian walkway, and bridges connecting to passenger stations and servicing facilities, bridges, grade crossings, maintenance facilities, and garage facilities.

“Punchlist” means the list of incomplete or defective work, including work that does not comply with applicable code or legal requirements, to be performed or remedied by the design-builder. Punchlist(s) shall be prepared by the bridging architect in conjunction with the design professional prior to the issuance of the certificate of substantial completion.

“Qualification evaluation factors” means the requirements for the first phase of the selection process when statements of qualification are reviewed, and shall include, but not be limited to: specialized experience, training certification of professional and field workforce, technical competence, capacity to perform, safety modification rating, past performance, and other appropriate factors.

“Ranking” means the process of listing responsive bidders in order of highest to lowest total scores, based upon selection criteria specified in the RFQ and/or RFP.

“Request for proposals” or “RFP” means the document issued by the contracting unit in the second phase of a two-phase selection process that describes the procurement process and forms the basis for the design-build proposals.

“Request for qualifications” or “RFQ” means the document advertised by the contracting unit in the first phase of the two-phase selection process that describes the project in enough detail to allow potential bidders to determine if they wish to compete for a design-build contract and that requests information from bidders regarding the qualifications, experience, and organizational structure of the bidder’s proposed design-build team, which information can be used by the contracting unit to prequalify bidders to submit proposals for a design-build contract.

“Schedule” means the schedule prepared and submitted by the bidder in its technical proposal to the contracting unit, wherein the bidder identifies all critical, and certain non-critical, activities, contract milestones, and the projected and actual time periods for completing such activities and contract milestones.

“SDA school district” means a school district that received education opportunity aid or preschool expansion aid in the 2007-2008 school year, as defined at P.L. 2007, c. 260, § 39 (N.J.S.A. 18A:7G-3).

“Selection coordinator” means the administrator of the operations and procedures of the selection process, whose activities shall include, but are not limited to, scheduling of meetings, preparing agendas, recording scores, verifying submittal information, preparing minutes of selection committee meetings, and other similar administrative duties.

“Specification” means a written description included as part of the construction documents, which sets forth the detailed technical and functional characteristics of, or the discrete design for, an item of material, equipment, or work to be incorporated into the design-build project, or a requirement of the work to be performed. A specification may include a statement of any of the contracting unit’s requirements and may provide for inspection, testing, or the preparation of a construction item before procurement. Specifications shall augment and complement the drawings and plans prepared by the design-builder.

“Statement of qualifications” means the document(s) submitted by bidders in response to an RFQ that describes the qualifications and capabilities of the bidder and its key team members to perform the scope of services to be included in a design-build contract.

“Stipend” means the fee paid to a design-builder by a contracting unit to encourage competition.

“Substantial completion” means that point in time in the progress of the design-build project when certain conditions specified by the design-build contract have occurred, including, but not limited to, the issuance of a temporary certificate of occupancy, the creation of a punchlist, and the determination that the design-build project is ready for use or occupancy, in accordance with its intended use.

“Technical review committee” means a selection committee composed of at least a qualified purchasing agent designated as the contracting unit’s purchasing agent, the contracting unit’s authorized design professional or design official, and the contracting unit’s project manager, if this individual is separate from the other aforementioned members, who are responsible for reviewing and evaluating responses by bidders to an RFQ and RFP. If a contracting unit subject to the Local Public Contracts Law does not have a designated purchasing official that is certified as a qualified purchasing agent, then the governing body shall appoint, as applicable to the contracting unit, a business administrator, municipal manager, chief financial officer, or treasurer onto the committee. If a contracting unit subject to the Public School Contracts Law does not have a designated purchasing official that is certified as a qualified purchasing agent, then the board of education shall appoint the school business administrator to serve on the committee. No governing body member shall be appointed to the technical review committee.

“Technical proposal” means the design solutions and other qualitative factors that are provided by a bidder in response to an RFP.

“Transportation project” means the construction or reconstruction of a public highway, public transportation project infrastructure, rail freight infrastructure, or other surface, underground, airborne, or waterborne transportation infrastructure for the movement of people and/or goods.

“Two-phase selection process” means a procurement process in which the first phase consists of prequalifying bidders based on statements of qualification submitted in response to an RFQ, and the second phase consists of the submission of price and technical proposals by bidders in response to an RFP.

“Work” means all design and construction services performed by the design-builder and its team, including providing all material, equipment, tools, and labor, necessary to complete the construction, as described in, and reasonably inferable from, the construction documents and the design-build contract.

5:34-10.3 Authorization to commence design-build process

(a) For a construction project that can be reasonably, and in good faith, estimated to have a cost equal to or exceeding \$5,000,000, the governing body of a contracting unit may adopt a resolution to authorize utilization of design-build project delivery in lieu of a design-bid-build delivery system. In its authorization to commence the design-build process, the governing body must determine that, when compared to the design-bid-build process, design-build project delivery will facilitate a shorter overall

design and construction process including, but not limited to, reducing the likelihood of work stoppages and change orders that would increase project costs. Design-build project delivery shall not be utilized for projects that cannot be reasonably, and in good faith, estimated to have a cost equal to or exceeding \$5,000,000.

(b) For purposes of meeting the minimum monetary threshold at (a) above, a contracting unit may group more than one project together, so long as those projects are single in character and components of the same work.

(c) A resolution adopted pursuant to (a) above shall also establish procedures for the solicitation and award of the design-build contract that are consistent with this subchapter.

(d) No board of education may authorize commencement of a design-build process for a school facilities project until such time as the Department of Education approves the board’s application pursuant to N.J.A.C. 6A:26-3 and, if the capital project requires the board to issue bonds, a successful voter referendum or authorization by a municipal governing body or board of estimate, as applicable, to the school district type.

(e) Electronic procurement through the use of electronic procurement platforms as defined at N.J.A.C. 5:34-5.2 may be utilized for design-build projects as permitted by law.

5:34-10.4 Design professional and construction manager for contracting unit

(a) A contracting unit shall either engage a design professional or appoint a design official to provide architectural, engineering, or surveying services on behalf of the contracting unit, as well as provide technical advice, construction review services, and professional expertise on behalf of the contracting unit for the duration of a design-build project.

(b) A contracting unit may appoint a construction manager to serve as the contracting unit’s on-site representative for the duration of the project, whose services shall include, but need not be limited to, technical support in the area of scheduling, cost estimating, document control, hosting progress meetings, project coordination with the design-builder, and inspection of construction during all phases of the design-build project.

5:34-10.5 Responsibilities of technical review committee

(a) When the design and construction of a project will be undertaken pursuant to this subchapter, the resolution authorizing the solicitation of a design-build contract shall designate a technical review committee to evaluate statements of qualifications and proposals. The purchasing agent, or the individual appointed if either a contracting unit does not have a designated purchasing official certified as a qualified purchasing agent or the purchasing agent is unable to serve on the committee, shall administer the selection process and serve as selection coordinator for the technical review committee. The contracting unit shall have the discretion to add additional members to the technical review committee. The contracting unit’s attorney may advise the technical review committee.

(b) Each member of the technical review committee shall be responsible for evaluating and scoring the statements of qualifications and proposals submitted by bidders in response to an RFQ or RFP, either separately or together.

(c) The technical review committee may use such advisors as it deems necessary to give opinions on evaluating proposals. The names of such advisors shall be included in the report submitted to the governing body. If a municipality is without a designated purchasing official certified as a qualified purchasing agent and appoints an individual other than their chief financial officer to serve on the technical review committee, the chief financial officer shall serve as an advisor to the committee, unless a conflict of interest pursuant to (f) or (g) below prevents the chief financial officer from serving in that capacity.

(d) Once the statements of qualifications are received and the identity of the bidders is ascertained, the members of the technical evaluation committee will be given a list of all bidders.

(e) Before reviewing and evaluating statements of qualifications and proposals, each committee member, and advisor thereof, shall certify that they have no conflict of interest with respect to any of the bidders to be evaluated, any of the key team members, named subcontractors or subconsultants to the bidders, ***any subcontractors and subconsultants from which the bidder, at the time of the proposal, expects to consider**

selecting once anticipated quantities and design elements of the project are known,* or any of the principals, subsidiaries, or parent companies of such bidders.

(f) A committee member or advisor shall be deemed to have a conflict of interest if their review and evaluation of statements of qualifications and statements of proposal would violate the Local Government Ethics Law, N.J.S.A. 40A:9-22.1 et seq., or the School Ethics Act, N.J.S.A. 18A:12-21 et seq., as applicable. Any person with a conflict of interest related to the design-build project solicitation shall not participate in the evaluation process or advise technical review committee members.

(g) Notwithstanding the definition of technical review committee, should any of the technical review committee members indicate that a conflict of interest exists once the identity of the bidders is revealed, that member shall not serve on the committee and an appropriate official with sufficient knowledge and expertise to review and evaluate statements of qualifications and statements of proposal shall be appointed instead. If a technical review committee member is discovered to have a conflict of interest, the governing body shall remove the member from the committee.

5:34-10.6 Request for qualifications

(a) The contracting unit shall advertise a solicitation of statements of qualifications from bidders in an official newspaper of the contracting unit, a newspaper with Statewide circulation, and on the contracting unit's official website, if one exists, no less than 30 days prior to the date on which responses to the request are due. The published notice shall contain, at a minimum:

1. A general description of the design-build project;
2. Information on how requests for qualifications may be obtained;
3. The manner of submitting, and the method of receiving, the statement of qualifications; and
4. The time and place at which the statements of qualifications will be received.

(b) Prior to advertising the request for qualifications on a design-build project valued at \$12,500,000 or more, or such other threshold as may be established by the Office of the State Comptroller, the contracting unit shall submit the request for qualifications and accompanying documents to the Office of the State Comptroller for review and approval pursuant to N.J.S.A. 52:15C-10.

(c) A request for qualifications must furnish sufficient information to allow bidders to prepare informed statements of qualification. At a minimum, a request for qualifications shall contain the following:

1. A scope of work statement, including:
 - i. Project type, size, and scope;
 - ii. Preliminary design documents;
 - iii. General budget parameters, if any; and
 - iv. General schedule or delivery requirements;
2. For projects involving vertical construction, a statement that the bidder and, to the extent necessary for the project, key team members and other subcontractors have a current design-build classification from the New Jersey Division of Property Management and Construction (DPMC) in the New Jersey Department of the Treasury;
3. Required minimum classifications and aggregate rating limits to which the bidder and, as applicable, key team members and other subcontractors must be assigned by the New Jersey Department of the Treasury, Division of Property Management and Construction, pursuant to N.J.A.C. 17:19-1; or the New Jersey Department of Transportation pursuant to N.J.A.C. 16:44-3 and 16:44A-3, as applicable to the project;
4. Qualification evaluation factors, which shall include:
 - i. Experience level and degree of technical competence;
 - ii. Training of, and certifications held by, the professional and field workforce;
 - iii. Principal location of the bidder and key team members, to the extent that it would materially impact project delivery;
 - iv. Performance capability;
 - v. Certifications, classifications, and ratings possessed by the design-builder, key team members, and other subcontractors as relevant to the project;

vi. Past performance of the individual members of the design-builder's team in their respective capacities, including the architect-engineer and construction members of the team;

vii. Measures taken by the bidder and members of the proposed design-build team to promote workforce diversity with respect to women and minorities; and

viii. Other technical factors; as may be relevant to the project;

5. A statement of the maximum number of bidders to be prequalified to submit a statement of proposal;

6. If the design-build contract is subject to any set-aside goals established by the contracting unit pursuant to P.L. 1985, c. 482 (N.J.S.A. 40A:11-41 et seq.), or P.L. 1985, c. 490 (N.J.S.A. 18A:18A-51 et seq.), as applicable, a statement to that effect; and

7. If the contracting unit is offering a stipend to bidders prequalified to provide a statement of proposal, the terms and conditions for payment thereof.

(d) An RFQ must be crafted in such a way as to encourage free, fair, and open competition without unfairly or illegally discriminating against otherwise capable design-builders. No RFQ may:

1. Require any standard, restriction, condition, or limitation not directly related to the project's purpose, function, or activity;

2. Discriminate on the basis of race, religion, sex, national origin, creed, color, ancestry, age, marital status, affectional or sexual orientation, familial status, liability for service in the Armed Forces of the United States, or nationality;

3. Require in the scope of work statement the furnishing of any "brand name" without allowing an equivalent, except that proprietary goods or services are permitted only if the need for same is directly related to the performance, completion, or undertaking of the project;

4. Require a financial statement to be provided with the statement of qualifications; or

5. Require that the bidder, or any key team member identified by the bidder, be a resident of, or have their place of business located in, the county or municipality in which the contract will be awarded or performed.

(e) The contracting unit may charge a fee for the qualifications documentation that shall not exceed \$50.00 or the cost of reproducing the documentation, whichever is greater.

5:34-10.7 Statements of qualifications; qualification of bidders to submit statements of proposal

(a) Each bidder's statement of qualifications shall contain, at a minimum, the following:

1. An organizational chart of the bidder and the key team members of the proposed design-build team;

2. A list of current construction projects, and construction projects completed within the last five years, on which the bidder and key team members of the proposed design-build team have worked that are of similar size, scope, and complexity to the contracting unit's project, regardless of method of project delivery;

3. A listing of all the contracting unit's public works projects on which the design-builder and proposed design-build team have performed work within the past five years;

4. For transportation projects, the minimum classifications and aggregate rating limits to which the bidder and, as applicable, key team members and other subcontractors have been assigned by the New Jersey Department of Transportation pursuant to N.J.A.C. 16:44-3 and 16:44A-3, as applicable to the project. When a transportation project includes the installation, replacement, or rehabilitation of associated water, sewer, or stormwater infrastructure, the design-build team shall also possess classifications and aggregate rating limits issued by the New Jersey Division of Property Management and Construction in the New Jersey Department of the Treasury (DPMC) that are relevant to such work;

5. For all projects other than transportation projects, documentation that the bidder and, to the extent necessary for the project, key team members and other subcontractors have a current DPMC *[design build]* ***design-build*** classification and such other DPMC classifications and ratings issued pursuant to N.J.A.C. 17:19-1, as may be necessary for the project*. **Key team members and other subcontractors shall be**

required to possess only those classifications and ratings issued by the DPMC that are relevant to the project*;

6. A listing of all public works projects for which a contracting unit has made a determination of prior negative experience with respect to the design-builder or members of its proposed design-build team within the past five years pursuant to N.J.S.A. 40A:11-4 or 18A:18A-4;

7. Training certification*s* of the bidder's professional and field workforce, along with that of the members of the proposed design-build team;

8. Safety experience modification rating (EMR) of the bidder and construction members of its proposed design-build team;

9. Measures taken by the bidder and members of the proposed design-build team to promote workforce diversity with respect to women and minorities;

10. If the contract is subject to any set-aside goals established by the contracting unit pursuant to P.L. 1985, c. 482 (N.J.S.A. 40A:11-41 et seq.), or P.L. 1985, c. 490 (N.J.S.A. 18A:18A-51 et seq.), as applicable, a statement as to whether the design-builder and/or any key team members are a qualified minority business enterprise, a qualified women-owned business enterprise, a qualified small business enterprise, or a qualified veteran-owned business enterprise, as defined pursuant to the applicable law. Documentation supporting such a designation shall accompany the statement;

11. If the design-build contract will be subject to a project labor agreement pursuant to P.L. 2002, c. 44 (N.J.S.A. 52:38-1 et seq.), a statement to that effect;

12. A copy of the bidder's Public Works Contractor Registration certificate, along with a copy of the certificates of the proposed members of the bidder's design-build team required to be registered under the law;

13. A certification that the bidder, along with the bidder's proposed design-build team, including individually named key team members, is in compliance with, and is not currently debarred from awards of State or local contracts for one or more violations of, the New Jersey Prevailing Wage Act, Public Works Contractor Registration Act, and the Construction Industry Independent Contractor Act; and

14. A certification that the bidder, along with the bidder's proposed design-build team including individual key team members, is not debarred from awards of Federal contracts for public work, as defined at N.J.S.A. 52:32-44.1.

(b) The technical review committee shall review and evaluate each bidder's statement of qualification and determine the relative ability of each such bidder to perform the work under the design-build contract. Before evaluating a bidder's statement of qualification, the committee shall:

1. Verify with the Department of Labor and Workforce Development that the bidder and any listed members of the bidder's proposed design-build team, including individually named key team members, that are required to have Public Works Contractor Registration certificates, are current with their respective registrations;

2. Review the Department of Labor and Workforce Development's Prevailing Wage Debarment List to confirm that the bidder and any listed members of the bidder's proposed design-build team, including individually named key team members, are not currently debarred; and

3. Review the Federal government's debarment database to confirm that the bidder and any listed members of the bidder's proposed design-build team, including individually named key team members, and affiliates thereof are not debarred, pursuant to N.J.S.A. 52:32-44.1;

(c) The evaluation of the qualifications of each bidder shall include, but need not be limited to, consideration of the following factors:

1. The level of experience of the bidder and the key team members of its proposed design-build team on design-build projects and/or design-build projects of similar size, scope, and complexity;

2. Training certification of the bidder's professional and field workforce, along with that of the members of the proposed design-build team;

3. Safety experience modification rating (EMR) of the bidder and construction members of its proposed design-build team;

4. Measures taken by the bidder and key team members to promote workforce diversity with respect to women and minorities; and

5. Any other pertinent information necessary to establish the qualifications of the bidder and proposed design-build team to undertake the design-build contract.

(d) The process for evaluating the bidder's prior performance on the contracting unit's prior design-build projects, if any, by a technical review committee shall be specified in the RFQ. Such process shall consist of:

1. A mathematical tabulation and averaging of the scores of all prior performance evaluations within a specified time period;

2. Consideration of particularly favorable or unfavorable evaluations individually and with reference to other evaluations;

3. Consideration of multiple evaluations over the course of a given project, to show consistency of performance, deterioration of performance, or efforts at improvement and recovery; or

4. A combination of the above methodologies.

(e) On the basis of the submitted statements of qualification, the technical review committee shall qualify no fewer than two, but no more than six, of the bidders to submit proposals. The contracting unit shall provide written notification to all bidders submitting statements of qualification of whether or not they have been being prequalified to receive requests for proposal. All bidders shall have the right to review statements of qualification submitted to the contracting unit.

(f) Key team members shall not be replaced without approval of the technical review committee. ***The committee shall have a reasonable basis for any denial.***

5:34-10.8 Request for proposals

(a) The contracting unit shall issue a request for proposals to each bidder qualified pursuant to N.J.S.A. 5:34-10.7 no fewer than 14 days prior to the date established for submission of statements of proposal. The date fixed for receiving the proposals shall not fall on a Monday or any day directly following a State or Federal holiday. A request for proposals shall be prepared by the contracting unit using a design professional or design official and must be crafted in such a way as to encourage free, fair, and open competition without unfairly or illegally discriminating against otherwise capable design-builders. No RFP shall contain the elements prohibited for RFQs pursuant to N.J.A.C. 5:34-10.6(d).

(b) The request for proposals shall include, without limitation:

1. The technical proposal and price proposal forms;

2. Proposed terms and conditions of the design-build contract;

3. Instructions to bidders, including the manner of submitting and the method of receiving the statement of proposal;

4. Evaluation factor criteria for proposals, including the relative importance assigned to the factors and sub-factors to be considered with respect to the technical proposal and the price proposal. The evaluation factors for technical proposals may include, but need not be limited to, experience, design concepts, management approach, diversity, proposed technical solutions, plans for quality assurance and control, and the design-builder's understanding of the means and methods needed to complete the project on time and within budget;

5. A description of the drawings, specifications, or other submittals to be provided with the technical proposal, with guidance as to the form and level of completeness of the drawings, specifications, or submittals that will be acceptable;

6. Site development requirements, including, but not limited to, parking, lighting, equipment, and landscaping;

7. Description of physical relationships between site elements;

8. Specific architectural style or concept;

9. Performance specifications and prescriptive specifications regarding materials, systems, performance criteria, energy efficiency, life cycle costs, and known environmental issues;

10. Engineering, architectural, and/or environmental reports (for example, geotechnical evaluations, building evaluations, and/or environmental preliminary assessments);

11. In the case of a project that includes the removal of soil from the site, any documentation relative to the known soil conditions at the site including, but not limited to, any test results specifying the level of contamination, if any, of the soil that has been found at the site of the project;

12. If a project is located on a site with historical or suspected contamination, a line-item allowance or minimum unit price line item for

soil testing and contaminated soil disposal, which shall be a good faith effort on the part of the contracting unit to reasonably estimate the total cost of testing and disposing of the soil;

13. Assignment of responsibility for obtaining required approvals and permits;

14. Budget limits for the work, if any;

15. Insurance requirements, and bonding or guarantees as may be required for public works projects under the Local Public Contracts Law or Public School Contracts Law;

16. A schedule for planned commencement and completion of the design-build contract;

17. Amount of the stipend, if any;

18. For projects by contracting units subject to the Local Public Contracts Law, a statement pursuant to N.J.S.A. 40A:11-23.1.c indicating whether uniformed law enforcement officers will be required for the project;

19. A form listing all documentary and informational forms, certifications, and other documents that the contracting unit requires each bidder to submit with their statement of proposal, along with a means by which the bidder can indicate their inclusion of said items with the statement of proposal;

20. A means of acknowledging receipt of revisions or addenda to the RFP; and

21. The documents required to be submitted by the successful bidder upon notice of award.

(c) The contracting unit may charge a fee for the request for proposal documents not to exceed \$50.00, or the cost of reproducing the documents, whichever is greater.

5:34-10.9 Statements of proposal; award of contract

(a) The RFP shall require the submission of a sealed statement of proposal in two separate parts: a technical proposal and a price proposal. The technical and price proposals shall be evaluated separately, in accordance with the evaluation factors and process set forth in the RFP.

(b) In addition to such drawings, specifications, data, calculations, or other submittals as the contracting unit requires to be submitted with the technical proposal, or the bidder is otherwise required by law to submit with their statement of proposal, a bidder's technical proposal shall include:

1. A list of each person to whom the bidder as design-builder proposes to delegate obligations under the design-build contract, including key team members;

2. Pursuant to the provisions at N.J.S.A. 40A:11-22 or 18A:18A-25, as applicable, a surety company bond or guarantee, as specified in the RFP;

3. Acknowledgment of receipt of revisions or addenda to the RFP;

4. A statement that the bidder is in compliance with all laws applicable to the project, including the New Jersey Prevailing Wage Act, P.L. 1963, c. 150 (N.J.S.A. 34:11-56.25 et seq.), the Public Works Contractor Registration Act, P.L. 1999, c. 238 (N.J.S.A. 34:11-56.48 et seq.), and the Construction Industry Independent Contractor Act, P.L. 2007, c. 114 (N.J.S.A. 34:20-1 et seq.);

5. If required by the contracting unit, a certificate pursuant to N.J.S.A. 40A:11-20 or 18A:18A-23, as applicable, showing that the design-builder and construction members of the proposed design-build team own, lease, or otherwise control all the necessary equipment required by the plans and specifications of the design-build project; and

6. Such other documentation as required by law to be submitted with a bid for a design-bid-build project.

(c) The price proposal, which shall be a separate sealed document clearly identifying the bidder's name, project number, a statement of ownership disclosure pursuant to N.J.S.A. 52:25-24.2 for the bidder and proposed key team members, a bid bond pursuant to N.J.S.A. 40A:11-21 or 18A:18A-24, as applicable, and other information required by the RFP, shall provide a price for all design services and construction work required to complete construction of the design-build project. The named price shall not be exceeded if the proposal is accepted by the contracting unit without change. The price proposals shall remain sealed until such time as provided at (f) below.

(d) Before the proposal submission deadline, the contracting unit may provide for a conference at a designated date, time, and location at which

prequalified bidders may ask questions and seek clarification concerning any of the information, data, or documents contained within the RFP. A pre-proposal conference may be mandatory or optional, as stated in the RFP.

(e) The submission of technical and price proposals is conclusive evidence that the bidder has completely reviewed the RFP, along with the proposed terms and conditions of the design-build contract and fully understands and agrees to all the requirements, terms, and conditions set forth therein.

(f) Sealed technical proposals shall not be opened until expiration of the time established for submission as set forth in the RFP. The contracting unit shall make reasonable efforts to maintain the secrecy and confidentiality of all technical proposals, and all information contained in the technical proposals, and shall not disclose the proposals or the information contained therein to the design-builders' competitors or the public except as otherwise permitted pursuant to this section and N.J.A.C. 5:34-10.12. All price proposals shall be made public once the governing body awards the contract.

(g) Before the technical review committee begins evaluating the technical proposals, the contracting unit's design professional or design official shall examine all documents required to be submitted with the statement of proposal. All statements of proposal considered by the technical review committee shall be complete and certified by the design professional or design official as responsive to each of the proposal evaluation factors established in the RFP. Any statements of proposal deemed incomplete or otherwise non-responsive shall be submitted by the design professional or design official to the technical review committee, along with the reasons for the determination. If a bidder's technical proposal, price proposal, or both, must be rejected as non-responsive, the technical review committee shall notify the bidder, in writing, of the rejection of its proposal and the reasons for the rejection within 10 business days of receiving the proposal, unless the RFP specifies a different time period for the committee to notify the bidder.

(h) The technical review committee, meeting together, may conduct interviews with each bidder prior to ranking the bidders' respective technical proposals.

(i) The technical evaluation committee shall evaluate each technical proposal, in accordance with the proposal evaluation criteria and the weight assigned to each, specified in the RFP. Once evaluated, the committee shall total and submit the scores for each technical proposal to the selection coordinator.

(j) After the technical proposals have been reviewed and scores are submitted, the selection coordinator shall assign the maximum price points to the lowest total dollar price proposal. All other responsive proposals shall be scored based upon the percentage that each price proposal exceeds the lowest price proposal. The bidder shall show all amounts in words and figures. In the event of a discrepancy between the words and figures, the amount shown in words shall govern.

(k) The selection coordinator shall determine the combined scores for each bidder based on their technical and price proposals. A minimum of 50 percent consideration shall be based on the cost of the price proposal. After the proposals have been evaluated, the selection coordinator shall prepare a report concerning the technical review committee's proposal evaluations and award recommendation. The report shall list the names of all bidders submitting a proposal and shall summarize each statement of proposal submitted*, **including the dollar amount of each bidder's price proposal, and include a breakdown of the evaluation scores for each bidder***. The report shall rank the bidders in order of evaluation, clearly state the reasons for the committee's award recommendation, and detail the terms, conditions, scope of services, fees, and other matters to be incorporated into the contract. The bidder with the highest overall score shall be recommended to the contracting unit's governing body for an award of the design-build contract. The report shall be made available to the public at least 48 hours prior to the governing body's award of the contract or when made available to the governing body, whichever is sooner, except that the details of each bidder's respective technical proposals shall not be disclosed.

(l) A bidder may withdraw a proposal for any reason at any time prior to the contracting unit's governing body award of the contract either on a preliminary or final basis. If a bidder withdraws a proposal, the bidder

shall be disqualified from submitting a future proposal on the same project, including whenever a contracting unit rejects all proposals pursuant to N.J.A.C. 5:34-10.10.

(m) Before awarding a design-build contract, the governing body shall determine that there was adequate competition for the contract. The technical review committee shall have considered at least two complete and responsive proposals before the governing body can proceed with awarding the contract.

(n) If the governing body approves the recommendation and awards the contract, the contracting unit shall notify the successful design-builder, in writing, and the ownership of the drawings, specifications, and information therein, shall be determined, in accordance with the terms of the design-build contract, as permitted by law.

1. The notice of award shall be final if the governing body accepts a proposal without change, or preliminary if the governing body authorizes further negotiation with the successful bidder.

2. If the governing body preliminarily awards a design-build contract, the maximum cost in the successful bidder's price proposal may be modified by negotiated agreement between the contracting unit and the design builder if the parties agree to further modification of the proposal prior to final award. In negotiations with the successful bidder, boards of education cannot agree to a project cost higher than that authorized by voter referendum, a municipal governing body, or the board of estimate, as applicable, to the type of school district. The governing body shall authorize final award of the contract upon reaching a negotiated agreement with the design-builder. In the event the parties fail to reach a negotiated agreement, then the governing body may authorize a notice of award to be issued to the next highest-ranked bidder.

(o) Unless and until a statement proposal is accepted by the governing body, the drawings, specifications, and other information in the proposal shall remain the property of the bidder. Once a proposal is accepted by the governing body and a notice of award issued, the disclosure of the proposal and information therein, along with ownership of the drawings, specifications, and information therein, shall be determined, in accordance with existing law and the terms of the final contract.

5:34-10.10 Rejection of statements of proposal; cancellation of contract award

(a) Proposals received after the submission date and time prescribed in the advertisement and RFP shall be rejected.

(b) The contracting unit shall have the right to reject any and all proposals, except for purposes of evading P.L. 2021, c. 71, when it is otherwise deemed to be in the interest of the contracting unit or the public to do so. A governing body may not award a design-build contract unless the technical review committee evaluated at least two complete and responsive proposals from design-builders.

(c) A governing body that rejects all proposals may solicit new proposals using the same qualifications, evaluation factors, and budget constraints, unless there has been a material change in circumstances affecting the needs of the contracting unit, including, but not limited to, environmental issues, natural disaster, statement of emergency, or unseen fiscal constraint. When soliciting new proposals, the contracting unit shall start the process by soliciting new statements of qualifications.

(d) Upon award of the design-build contract, the contracting unit shall, within five days, notify all unsuccessful bidders, in writing, that the contracting unit awarded the design-build contract to another design-builder. Within 30 days after receiving the written notice, an unsuccessful bidder may request, in writing, to review the proposals submitted, the technical review committee evaluation scores from the selection process, and the final recommendation of award document. Technical proposals shall be redacted to the extent necessary to prevent revealing the trade secrets and proprietary commercial or financial information incorporated into another bidder's technical proposal.

(e) The governing body may cancel a notice of final award at any time before the execution of the design-build contract by the contracting unit if the contracting unit deems it advisable to do so in the interest of the contracting unit or the public.

5:34-10.11 Criteria for payment of stipend

(a) At the discretion of the contracting unit, a stipend of no more than three percent of the design-build project's estimated costs may be paid to

eligible bidders who submit responsive, but unsuccessful proposals, in response to the RFP. The decision to issue such a stipend shall be based on the contracting unit's analysis of the design-build project's size, scope, and complexity, and the anticipated degree of competition during the procurement process. ***A contracting unit may agree to pay a stipend to all bidders in the event of project cancellation.*** The purpose of the stipend is to encourage competition by offering to compensate responsive, but unsuccessful bidders, for a portion of the estimated proposal development costs.

(b) The terms and conditions for the payment of a stipend shall be included in the RFQ and RFP.

(c) Bidders submitting a response to the RFP that is determined by the contracting unit in its sole discretion to be incomplete or otherwise non-responsive will not be entitled to a stipend.

5:30-10.12 Disclosure; access and record retention

(a) Any and all submissions made in response to any RFQ and any RFP, are subject to the provisions of the Open Public Records Act, N.J.S.A. 47:1A-1 et seq., and the exceptions from disclosure provided therein, except that technical proposals shall not be subject to disclosure prior to award of the contract.

(b) The design-builder awarded a design-build contract shall make available records and accounts pertaining to the design-build project to the Office of the State Comptroller in any investigations, examinations, and inspections that they may undertake of the activities related to the financing and undertaking of design-build projects. The design-builder shall also cooperate, upon request, in sharing information with other State or Federal entities.

(c) The design-builder and contracting unit shall retain all records and accounts, including records and accounts of subcontractors and subconsultants, for design-build project activities, as necessary to evidence compliance with the Act and all applicable rules and contractual requirements. Such records shall be retained for 10 years following substantial completion of a design-build project, and any additional period required for the resolution of litigation, claims, or audit findings. At any time, upon request of the Director of the Division of Local Government Services in the New Jersey Department of Community Affairs, the contracting unit and the design-builder shall make records relating to the design-build project available to the Division, within four business days of the request for documents, at no cost to the Division.

(d) In the event that any litigation, claim, audit, or request pursuant to the Open Public Records Act, N.J.S.A. 47:1A-1 et seq., relating to the procurement or the performance of work under the design-build contract is commenced prior to expiration or termination of the design-build contract, all records relating to the procurement and the contract shall be retained until all litigation, claims, audit findings, document requests, and related appeals, if any, have been resolved with finality.

5:34-10.13 Fraudulent statements

Any firm or individual who makes, or causes to be made, a false, deceptive, or fraudulent statement in its submittal in response to the RFQ or RFP, or in the course of any hearing, litigation, mediation, or other proceeding may be disqualified from bidding, suspended, and/or debarred, and/or may be subject to prosecution pursuant to applicable law.

5:34-10.14 Disqualification from bidding for conflicts of interest

Design professionals and other professional consultants participating in the preparation of an RFQ or an RFP will not be permitted to participate as a bidder or subconsultant to a bidder submitting a statement of qualifications or a proposal.

5:34-10.15 Contract approval and execution

(a) Prior to the execution of a design-build contract, the bidder that was provided a notice of final award by the contracting unit shall exist in the legal status in which it will perform its responsibilities pursuant to the design-build contract.

(b) The contracting unit shall send the successful design-builder a notice of award letter pursuant to N.J.A.C. 5:34-10.9(n). The notice of award letter shall contain a list of the additional documents required to be submitted by the design-builder with the executed contract. The notice of award will specify the time within which the executed contract and required documents must be returned.

(c) If the design-builder fails to return the executed contract and other required documents within the time specified by the contracting unit, the *[design-bidder]* ***contracting unit*** may take whatever action is appropriate and authorized by law including, but not limited to, withdrawing or canceling the notice of award to the delinquent bidder and awarding the contract to the next-highest ranked bidder; cancelling the procurement; or proceeding to recover under the bid bond submitted with the price proposal, in accordance with N.J.A.C. 5:34-10.9(b).

(d) All contracts executed pursuant to this subchapter shall provide for, among other things, termination for the convenience of the contracting unit and for cause.

(e) No agreement is valid or binding on the contracting unit, unless and until it is executed by an appropriately authorized representative of the contracting unit. Any work performed prior to the execution of the contract by the successful bidder is voluntary and represents a gift to the contracting unit. In the event the notice of award is cancelled or withdrawn, the successful bidder is not entitled to any remuneration for any work performed prior to the execution of the contract.

(f) Subject to the contracting unit's cancellation rights set forth at N.J.A.C. 5:34-10.10(e), upon the successful bidder's submission of all required documentation or materials, as specified in the notice of award, and the contracting unit's acceptance of such documentation, the contracting unit will execute the design-build contract and provide the successful bidder with the fully executed design-build contract.

5:34-10.16 Deletion or substitution of key team members

(a) No substitutions or deletions of key team members may be made during the selection process or after award of the contract, without prior written approval from the contracting unit. ***The contracting unit shall have a reasonable basis for any denial.***

(b) Unauthorized changes to a bidder's key team members who were specifically identified in statement of proposal at any time during the selection process may result in the elimination of the bidder from further consideration.

5:34-10.17 Design and construction

(a) The design-builder shall employ or contract with an architect of record and shall be responsible for the technical integrity of final project design, constructability, extensions of the design, and operability and maintainability, pursuant to the RFP and/or in the design-build contract.

(b) The role of the design-builder may include, but need not be limited to, the management and control of quality, cost, and the integrated schedule for design, permit applications, material and equipment acquisition, construction, training for operation and maintenance, inspection, and close out of the project.

(c) The contracting unit's review and acceptance of interim design submissions and/or construction documents is for the purpose of mutually establishing a conformed set of contract documents compatible with the requirements of the work. Neither the contracting unit's acceptance of interim design submissions nor construction documents shall be deemed to transfer design liability from the design-builder to the contracting unit.

(d) With respect to school facilities projects, once the plans and specifications are complete, and have been accepted by the contracting unit, the design-builder shall submit the completed plans and specifications for the school facilities project to the New Jersey Department of Education for approval of final educational adequacy, pursuant to N.J.A.C. 6A:26-5.4.

5:34-10.18 Post-award evaluation of design-builder by contracting unit

(a) Every design-builder awarded a design-build contract procured pursuant to this subchapter will be subject to evaluation, in accordance with this section. The performance evaluation will consider the design-builder's performance as a contractor in the following categories: quality of work, scheduling, management, cost control and change orders, safety and industrial hygiene, small business goals, and close-out.

(b) The design-builder's performance will be evaluated periodically during the progress of the project. The evaluation will be performed by a reviewer with direct involvement in the management or supervision for the project.

(c) The design-builder's performance evaluations will be used by the contracting unit in evaluating and scoring bidders as to their prior

experience on contracting unit projects, in accordance with the provisions of this chapter.

(d) Design-builders shall be evaluated on their construction performance with respect to the various evaluation categories using the following evaluation ratings:

1. Outstanding (O) or 100 percent—far exceeds the contract requirements by consistently exhibiting excellent performance. Always meets, and almost always exceeds, the contract requirements;

2. Very Good (VG) or 90 percent—often exceeds the contract requirements and frequently provides a high level of performance. Typically meets and often exceeds the contract requirements;

3. Satisfactory (S) or 80 percent—provides an acceptable level of performance consistently meeting the contract requirements;

4. Marginal (M) or 70 percent—performs slightly below the requirements of the contract, meeting the contract requirements on an intermittent basis; and

5. Unsatisfactory (U) or 60 percent—fails to meet important contract requirements, resulting in a negative impact on the entire project.

(e) The numerical scores established at (d) above may be subject to special adjustment factors for certain categories deemed by the contracting unit to be particularly critical to contractor performance, with such special adjustment factors specified in the RFP. The numerical ratings for each category shall be tabulated to arrive at an overall numerical evaluation score for each performance evaluation.

5:34-10.19 Protests and administrative hearings

(a) A bidder that intends to submit or has submitted a statement of qualifications for the first phase of the design-build procurement may request an informal hearing before the contracting unit to protest the RFQ process or documents by submitting a written protest to the contracting unit at least five business days prior to the date and time scheduled for opening of the statements of qualifications, setting forth in detail the grounds for such protest. The protest must contain all legal and factual arguments, materials, or other documents that support the protestor's position, and must indicate whether the protestor requests an informal hearing. The contracting unit may deny any protest that is filed less than five business days prior to the scheduled opening of statements of qualifications, or that fails to provide the specific reasons for and arguments supporting the protest.

(b) A bidder that intends to submit or has submitted a statement of proposal for the second phase of the design-build procurement may request an informal hearing before the contracting unit to protest the RFP process or documents by submitting a written protest to the contracting unit at least five business days prior to the date and time scheduled for opening of the technical proposals, setting forth in detail the grounds for such protest. The protest must contain all legal and factual arguments, materials, or other documents that support the protestor's position, and must indicate whether the protestor requests an informal hearing. The contracting unit may deny any protest that is filed less than five business days prior to the scheduled opening of technical proposals, or that fails to provide the specific reasons for and arguments supporting the protest.

(c) A bidder protesting its failure to be prequalified, or the prequalification of another bidder may request an informal hearing before the contracting unit to protest the prequalification by submitting a written protest to the contracting unit setting forth the specific grounds for challenging the prequalification. The protest must contain all factual and legal arguments, materials, or other documents that support the protestor's position, and must indicate whether the protestor requests an informal hearing. The protesting bidder must submit a written protest within five business days of receiving written notification of their prequalification or failure to be prequalified. The contracting unit may deny any protest that is filed more than five business days after the bidder's receipt of written notification, or any protest that fails to provide the specific reasons for and arguments supporting the protest.

(d) A bidder protesting the scoring of its technical and/or price proposals, or those of another bidder, may request an informal hearing before the contracting unit to protest the scoring of technical and/or price proposals, by submitting a written protest to the contracting unit setting forth the specific grounds for challenging such scorings. The protest must contain all factual and legal arguments, materials, or other documents that

support the protestor's position and a statement as to whether the protestor requests the opportunity for an informal hearing. The protestor must submit a written protest within five business days of the public announcement of the bidders' scores. The contracting unit may deny any such protest that is filed more than five business days after the public announcement of the bidder's scores, or any protest that fails to provide the specific reasons for and arguments supporting the protest.

(e) A bidder that has submitted a proposal may request an informal hearing before the contract to protest the award of a contract to another bidder by submitting to the contracting unit a written protest, setting forth the specific grounds for challenging such award, within five business days of the public announcement of the award. The protest must contain all factual and legal arguments, materials, or other documents that support the protestor's position and a statement as to whether the protestor requests an informal hearing. The contracting unit may deny any protest that is filed more than five business days after the public announcement of the award, or any protest that fails to provide the specific reasons for and arguments supporting the protest.

(f) Challenges by a design-builder of a design-build performance evaluation by a contracting unit subject to the Public School Contracts Law may request an informal hearing before the contracting unit by submitting to the contracting unit a written protest setting forth the specific grounds for such protest, within 15 calendar days after the date of receipt of written notification of the performance evaluation. The protest must contain all factual and legal arguments, materials, or other documents that support the protestor's position and must indicate whether the protestor requests an informal hearing. The contracting unit may deny any protest that is filed more than 15 calendar days after the design-builder's receipt of written notification of the performance evaluation, or any protest that fails to provide the specific reasons for and arguments supporting the protest.

(g) Hearing procedures shall be, as follows:

1. The contracting unit, in its sole discretion, shall determine whether to grant an informal hearing regarding any protest. Informal hearings are for fact-finding purposes for the benefit of the contracting unit and the contracting unit shall have the sole discretion as to whether to hold an informal hearing. Alternatively, the contracting unit may determine that sufficient information already exists in the record so that a decision may be made without a hearing, and the contracting unit may waive the hearing and issue a final determination, accordingly. In the event that the contracting unit determines that a hearing is not necessary, a written decision will be issued by the contracting unit within five business days of receipt of all documents related to the protest;

2. Informal hearings will be held, where feasible, within 14 business days of the receipt of the request. Hearings will be heard, where practicable, by either the governing body or a hearing officer designated by the governing body. The governing body or the hearing officer shall issue a final written decision within 30 calendar days of the conclusion of the hearing unless, due to the circumstances of the hearing, a greater timeframe is required. For all protests of the RFQ or RFP processes and documents, the written decision will issue prior to the opening of statements of qualification or proposals, respectively. If a decision based upon a protest results in a modification of the aforesaid process or documents, such decision shall be conveyed to all potential bidders by addendum; and

3. In an informal hearing, the contracting unit may, in instances where public exigency exists or where there is potential for substantial savings to the contracting unit, modify, or amend the time frames or any other requirements provided in this subchapter. In these instances, the contracting unit shall document, for the record, the rationale for such amendment and give adequate notice to the parties.

(h) The provisions at N.J.S.A. 40A:11-50 shall govern a design-builder's challenge to a design-build performance evaluation by a contracting unit that is subject to the Local Public Contracts Law.

ENVIRONMENTAL PROTECTION

(a)

DIVISION OF FISH AND WILDLIFE

Conserve Wildlife Matching Grants Program

Adopted Amendments: N.J.A.C. 7:5-2.2, 3.2, 3.3, 3.5, 4.1, 4.2, and 4.3

Proposed: February 7, 2022, at 54 N.J.R. 225(a).

Adopted: November 22, 2022, by Shawn M. LaTourette,

Commissioner, Department of Environmental Protection.

Filed: November 23, 2022, as R.2022 d.157, **without change**.

Authority: N.J.S.A. 39:3-33.11.

DEP Docket Number: 01-22-01.

Effective Date: December 19, 2022.

Expiration Date: December 4, 2027.

The Department of Environmental Protection (Department) is adopting amendments at N.J.A.C. 7:5, which contains the requirements for Division of Fish and Wildlife's administration of the Conserve Wildlife Matching Grants Program. The amendments modify the minimum amount of a grant from \$1,000 to \$2,500, the maximum amount of a grant from \$3,500 to \$10,000, the grantee's match requirement from 100 percent (one-to-one) to 50 percent of the grant amount, and the length of time within which to complete the grant from one year to two years. The amendments also eliminate the required monetary match requirement by allowing the grantee to use in-kind services for the entire match (or any combination of monetary match and/or in-kind services).

The rule adoption can be viewed or downloaded from the Department's website at <https://www.nj.gov/dep/rules/>.

Summary of Public Comments and Agency Responses:

The following persons submitted timely comments on the proposal:

1. Publieee [sic], Jean; and
2. Sachau, Barbara.

A summary of the timely submitted comments and the Department's responses follows. The number(s) in parentheses after each comment identifies the commenter(s) listed above.

1. COMMENT: I am opposed to Conserve Wildlife Foundation and any other strange pal of New Jersey Fish and Wildlife getting grants from the citizens of New Jersey because the citizens of New Jersey don't know where the money is really going. I have been trying to save the lives of wildlife and animals for 25 years and have never seen the Conserve Wildlife group lift a finger in any way to help any wildlife at all. I question their authenticity and do not want any taxpayer dollars to go to this organization. The citizens of New Jersey are being ripped off by these donations. (1)

RESPONSE: Any nonprofit organization that meets the eligibility requirements and has a proposed project to advance endangered, threatened, or nongame wildlife conservation or education in New Jersey is welcome to apply for a Conserve Wildlife Matching Grant. The Conserve Wildlife Foundation, a private 501(c)3 organization with a mission to preserve New Jersey's rare and imperiled wildlife species, is an eligible entity that has applied for, and received, grants from this program in the past. The organization is not otherwise affiliated or involved with the Conserve Wildlife Matching Grant Program in any manner. Furthermore, Fish and Wildlife does not discriminate in favor of, or against, any entity. Proposals are reviewed, ranked, and selected by a committee of Fish and Wildlife's Endangered and Nongame Species Program (ENSP) staff based on current priorities, project categories, and ranking criteria that are shared publicly on the ENSP's Conserve Wildlife Matching Grants webpage. Funded projects are a matter of public record. There are at least 25 funded projects and organizations currently featured on the webpage, and ENSP issues press releases highlighting recently funded projects before, and after, new awards are made. Since the program's launch in 2008, 35 different nonprofit organizations across New Jersey have been awarded Conserve Wildlife Matching Grants.

Grants are not donated to nonprofit entities. The entities must meet the grant requirements and produce meaningful results. In addition, neither