EMERGENCY ADOPTION
COMMUNITY AFFAIRS

DIVISION OF LOCAL GOVERNMENT SERVICES

Emergency Purchases and Contracts

Adopted Emergency Amendment and Concurrent Proposed Amendment: N.J.A.C. 5:34-6.1

Emergency Amendment Adopted and Concurrent Proposed Amendment Authorized: August 1, 2023, by Jacqueline A. Suárez, Director of the Division of Local Government Services.

Filed: August 2, 2023, as R.2023 d.101.

Gubernatorial Approval: August 1, 2023.


Calendar Reference: See the notice introduction below for explanation of exception to calendar requirement.

Concurrent Proposal Number: PRN 2023-090.

Effective Date: August 2, 2023.

Expiration Date: October 1, 2023.

Please submit written comments on the notice of proposal by September 20, 2023, through email to dljes@dea.nj.gov or by regular mail to:

Jason R. Martucci, Esq.
Administrative Practice Officer
Division of Local Government Services
Department of Community Affairs
PO Box 803
Trenton, NJ 08625-0803

For comments submitted through email, please name the subject heading “NJAC 5:34-6.1 Amendment: Emergency Contract Awards.”

This is an emergency adoption and concurrent proposal by the Director of the Division of Local Government Services (Division) in the Department of Community Affairs, adopting an amendment to permit municipalities that are under enhanced State oversight to award a multi-year emergency contract for solid waste collection and/or recycling collection, under certain circumstances, subject to Director approval. The amendment is being adopted on an emergency basis and will become effective upon acceptance for filing by the Office of Administrative Law (see N.J.S.A. 52:14B-4(c) as implemented at N.J.A.C. 1:30-6.5(b)). Concurrently, the provisions of this emergency adoption are proposed for readoption pursuant to the normal rulemaking requirements of the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. The rules will become effective upon acceptance for filing by the Office of Administrative Law (N.J.A.C. 1:30-6.5(d)) if filed on or prior to the emergency expiration date.

As this rulemaking involves an imminent peril subject to the provisions at N.J.S.A. 52:14B-4(c), it is excepted from the rulemaking calendar requirements, pursuant to N.J.A.C. 1:30-3.3(a).

The agency emergency adoption and concurrent proposal follows.

Summary

This rulemaking amends N.J.A.C. 5:34-6.1 to authorize municipalities that are subject to enhanced State oversight under various State statutes to enter into a multi-year solid waste collection and/or recycling collection contract on an emergency basis under certain circumstances, upon prior approval by the Director of the Division of Local Government Services in the New Jersey Department of Community Affairs (Director). A municipality is deemed subject to enhanced State oversight if the municipality is under the Transitional Aid to Localities Program or any successor discretionary aid programs for municipalities in fiscal distress (N.J.S.A. 52:27D-118.42a), State Supervision Act (N.J.S.A. 52:27BB-54 et seq.), Municipal Rehabilitation and Economic Recovery Act (N.J.S.A. 52:27BB-1 et seq.), Municipal Stabilization and Recovery Act (N.J.S.A. 52:27BBBB-1 et seq.), or a financial review board instituted pursuant to N.J.S.A. 52:27D-118.30a.

N.J.S.A. 40A:11-6 establishes the procedure for a contracting unit subject to the Local Public Contracts Law (N.J.S.A. 40A:11-1 et seq.) to negotiate or award a contract without public advertising for competitive bids, notwithstanding that the contract price will exceed the contracting unit’s bid threshold, when “an emergency affecting the public health, safety or welfare requires the immediate delivery of goods or the performance of services.” N.J.A.C. 5:34-6.1 prescribes various provisions implementing N.J.S.A. 40A:11-6. For instance, the need for the goods or services could not have been reasonably foreseen or must have arisen, notwithstanding a good faith effort to plan for the purchase of such goods or services. Further, the contract shall be of such limited duration as to meet only the immediate needs of the emergency.

Local governments throughout the State have faced significant price increases and supply constraints when undertaking various procurements. The problem is particularly acute for local governments that contract with private haulers for solid waste and recycling collection. In certain cases, no private haulers have responded to advertised bids, or a lack of competition has resulted in a single bid at an exorbitant price, and municipalities have resorted to emergency short-term extensions of existing hauling contracts as a provisional solution. As private garbage haulers are often required to make significant investments in equipment and personnel to undertake refuse collection in a municipality, private haulers are demonstrating reluctance to enter into a contract with a one-year maximum duration. Current labor shortages and long lead times for equipment, such as sanitation trucks, limit the ability of local governments to directly undertake solid waste and recycling collection within a short timeframe.

Prior to the present emergency adoption and concurrent proposal, N.J.A.C. 5:34-6.1(a)5 prohibited use of the emergency purchasing procedure to enter into a multi-year contract under any circumstances. In consultation with the New Jersey Department of Education and the New Jersey Department of Environmental Protection, the Director has promulgated an amendment at N.J.A.C. 5:34-6.1 authorizing the Director to permit a municipality subject to enhanced State oversight to utilize the emergency procurement procedure to enter into a solid waste collection and/or recycling collection contract with a duration exceeding one year. A municipality subject to enhanced State oversight that seeks authorization to enter into a multi-year emergency contract would be required to demonstrate:

- the existence of an actual or imminent emergency requiring the immediate delivery of solid waste collection and/or recycling collection services;
- the need for the solid waste collection and/or recycling collection services could not have been reasonably foreseen, or the need for such service has arisen notwithstanding a good faith effort on the part of the contracting unit to plan for the services required by the contracting unit;
- the proposed duration of the contract is necessary to meet the immediate needs of the emergency and facilitate the provision of the services on a non-emergency basis;
- the proposed contract is for solid waste collection and/or recycling collection services critical to the health, safety, and welfare of the residents living in the municipality wherein the contracting unit is entering into the contract;
- the municipality is taking sufficient measures to ultimately ensure that the services being contracted for will be able to be provided on a non-emergency basis;
- the proposed contract would not otherwise exceed the applicable maximum term permitted pursuant to N.J.S.A. 40A:11-15; and
- the contracting unit has adequately investigated all potential alternatives to the proposed multi-year contract.

The municipality must demonstrate that a prior bid for the service failed to elicit at least one response from a responsible and responsive bidder, or that all responsible and responsive bids were rejected for either substantially exceeding the municipality’s appropriation or the Local Public Contract Law is being violated, or that service delivery could be...
discontinued before the municipality can facilitate the provision of the service on a non-emergency basis. A copy of the request must also be provided to the New Jersey Department of Environmental Protection.

The municipality would be required to report, to the Division, the status of the contract and further planning being undertaken for the purchase of the services. The prohibition on multi-year emergency contracts would still apply to boards of education and other entities subject to the Public School Contracts Law (N.J.S.A. 18A:18A-1 et seq.), along with all other contracting units subject to the Local Public Contracts Law.

The present circumstances constitute an imminent peril to the public health, safety, and welfare that require their immediate effectiveness through an emergency adoption. This rulemaking is necessary to provide municipalities subject to enhanced State oversight with greater flexibility to provide garbage collection and recycling collection services critical to the health, safety, and welfare of its residents on an emergent basis, while instituting robust oversight ensuring such multi-year emergency contracts are only awarded after exhaustion of other potential avenues for meeting a critical need.

Pursuant to the authority granted at N.J.S.A. 52:14B-4(c), the Director of the Division of Local Government Services intends the concurrent rulemaking to be permanently effective upon the filing of its notice of readoption with the Office of Administrative Law.

Social Impact

The emergency adopted and concurrently proposed amendment will protect the public interest by ensuring that, when an emergency contract of greater than one year is the only available avenue through which to do so, municipalities under enhanced State oversight will continue to receive delivery of solid waste and recycling collection services that are critical to the health, safety, and welfare of its residents. Save for one, all New Jersey municipalities currently under enhanced State oversight pursuant to various State laws rank among the highest in socio-economic distress as measured by the Department of Community Affairs’ most recent Municipal Revitalization Index (2020)—the residents of which are particularly vulnerable to interruptions in municipal service delivery. Ranked highest in socio-economic distress, the City of Camden is subject to the City of Atlantic City, ranked third-highest in socio-economic distress, is subject both to the State Supervision Act (N.J.S.A. 52:27B-54 et seq.) and the Municipal Stabilization and Recovery Act (N.J.S.A. 52:27B88B-1 et seq.). The City of Atlantic City, ranked third-highest in socio-economic distress, is subject both to the State Supervision Act (N.J.S.A. 52:27B-54 et seq.) and the Municipal Stabilization and Recovery Act (N.J.S.A. 52:27BB88B-1 et seq.). Camden and Atlantic City, in addition to the municipalities of Paterson, Penns Grove, Trenton, Salem, Seaside Heights, and Union City, are in the Division’s Transitional Aid program; all of which are in the top 25 of socio-economic distress. The publicity that could result from discontinuance of solid waste and/or recycling collection in these particularly distressed municipalities has the potential to feed into negative perceptions that could deter investment and job creation.

Director approval of such contracts will ensure that this exception to competitive bidding will be under rigorous oversight to prevent subversion of free, fair, and open competition in public procurement, in addition to the existing heightened oversight exercised by the Division over these municipalities’ day-to-day operations. For example, municipalities under the Transitional Aid program are assigned a Division staff member to monitor their day-to-day operations; matters such as hiring and procurement are subject to prior Division approval pursuant to a Memorandum of Understanding to which the municipality is a signatory.

Economic Impact

For municipalities under enhanced State oversight, the emergency adopted and concurrently proposed amendment is anticipated to have a positive economic impact by increasing local government flexibility to conduct emergency procurements, as needed, to continue public services crucial to economic activity—specifically, solid waste and recycling collection services. Director approval of emergency contracts with a duration exceeding one year will ensure such contracts are awarded only as a last resort. Requirement Director approval through this rulemaking will reduce the risk of waste, fraud, and collusion that could result from unnecessarily bypassing competitive procurement when otherwise required by law.

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Federal Standards Statement

No Federal standards analysis is required because the emergency adopted and concurrently proposed amendment is not being proposed to implement, comply with, or participate in any program established pursuant to Federal law or under a State law that incorporates or refers to Federal law, standards, or requirements.

Jobs Impact

The Director anticipates that the emergency adopted and concurrently proposed amendment will have an impact on jobs only insofar as increased flexibility for municipalities under enhanced State oversight to contract for solid waste collection and recycling collection services on an emergency basis is needed to continue public services critical to economic activity. In this regard, jobs will be preserved and a risk to new job creation would be prevented.

Agriculture Industry Impact

The Director does not anticipate that the emergency adopted and concurrently proposed amendment will have an impact on the agriculture industry, as it pertains to emergency procurement of solid waste collection and recycling collection services by municipalities under enhanced State oversight.

Regulatory Flexibility Statement

The emergency adopted and concurrently proposed amendment would not impose any reporting, recordkeeping, or compliance requirements on “small businesses” as defined by the New Jersey Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., as the rulemaking only applies to specified municipalities.

Housing Affordability Impact Analysis

The emergency adopted and concurrently proposed amendment will have no anticipated impact on housing production in Planning Areas 1 and 2, or within designated centers, under the State Development and Redevelopment Plan, as it pertains to emergency procurement of solid waste collection and recycling collection services by municipalities under enhanced State oversight.

Smart Growth Development Impact Analysis

The emergency adopted and concurrently proposed amendment will have no anticipated impact on job creation, increasing flexibility for municipalities under enhanced State oversight to contract for solid waste collection and/or recycling collection services critical to economic activity. In this regard, jobs will be preserved and a risk to new job creation would be prevented.

Racial and Ethnic Community Criminal Justice and Public Safety Impact

The emergency adopted and concurrently proposed amendment will have no anticipated impact on public safety or criminal justice policies concerning juveniles and adults in the State. Accordingly, no further analysis is required.

**FULL TEXT**

5:34-6.1 General requirements

(a) The use of emergency purchasing pursuant to N.J.S.A. 40A:11-6 or 18A:18A-7 shall be subject to the following requirements:

1. -4. (No change.)

5. Under no circumstances shall the emergency purchasing procedure be used by a board of education to enter into a multi-year contract, and no contracting unit shall utilize the emergency purchasing procedure to enter into a multi-year contract for solid waste collection and/or recycling collection, except as otherwise permitted pursuant to (c) below.

(b) (No change.)

(c) With prior Director approval, a municipality that is subject to enhanced State oversight may use the emergency purchasing procedure to enter into a multi-year contract for solid waste collection and/or recycling collection. For purposes of this subsection, a
municipality is subject to enhanced State oversight if the municipality is under the Transitional Aid to Localities Program or any successor discretionary aid programs for municipalities in fiscal distress (N.J.S.A. 52:27D-118.42a); State Supervision Act (N.J.S.A. 52:27BB-54 et seq.); Municipal Rehabilitation and Economic Recovery Act (N.J.S.A. 52:27BBB-1 et seq.); Municipal Stabilization and Recovery Act (N.J.S.A. 52:27BBBB-1 et seq.); or a financial review board instituted pursuant to N.J.S.A. 52:27D-118.30a.

1. The Director may issue an approval pursuant to this subsection, with or without conditions, upon finding that:
   i. The municipality has otherwise met the requirements at (a) above;
   ii. The proposed contract is for solid waste collection and/or recycling collection and is critical to the health, safety, and welfare of the residents living in the municipality wherein the contracting unit is entering into the contract;
   iii. The proposed duration of the contract is necessary to meet the immediate needs of the emergency and facilitate the provision of the solid waste collection and/or recycling collection on a non-emergency basis;
   iv. The municipality is taking sufficient measures to ultimately ensure that the solid waste collection and/or recycling collection services being contracted for will be able to be provided on a non-emergency basis;
   v. The proposed contract would not otherwise exceed the applicable maximum duration set forth at N.J.S.A. 40A:11-15(3); and
   vi. The municipality has adequately investigated all potential alternatives to the proposed multi-year contract.

2. The municipality shall demonstrate that:
   i. A prior bid for solid waste collection and/or recycling collection failed to elicit at least one response from a responsible and responsive bidder or that all responsible and responsive bids were rejected because either:
      (1) The lowest bid substantially exceeds the contracting unit’s appropriation for solid waste collection and/or recycling collection; or
      (2) The purposes or provisions or both of the Local Public Contracts Law (N.J.S.A. 40A:11-1 et seq.) are being violated; and
   ii. Service delivery could be discontinued before the municipality can facilitate the provision of the service on a non-emergency basis.

3. The municipality shall provide a copy of any request for approval of an emergency solid waste collection and/or recycling collection contract pursuant to this subsection to the Bureau of Solid Waste Planning and Licensing in the New Jersey Department of Environmental Protection at:
   PO Box 420
   Mail Code: 401-02C
   401 East State Street
   2nd Floor, West Wing
   Trenton, NJ 08625-0420

4. In such intervals as are required by the Director, a municipality subject to enhanced oversight that obtains approval pursuant to this subsection shall update the Director on the status of the contract and measures being undertaken for the provision of the solid waste collection and/or recycling collection on a non-emergency basis.