



CIRCULAR

STATE OF NEW JERSEY

DEPARTMENT OF THE TREASURY

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| NO.: 26-09-DPP | ORIGINATING AGENCY: DIVISION OF PURCHASE AND PROPERTY | PAGE 1 OF 9 |
| EFFECTIVE DATE: IMMEDIATE | EXPIRATION DATE: INDEFINITE | SUPERSEDES: 24-21-DPP |
| SUBJECT: REQUESTS FOR WAIVERS OF ADVERTISING | | |
| ATTENTION: ALL DIRECTORS OF ADMINISTRATION | | |
| FOR INFORMATION CONTACT: waiverpreapproval@treas.nj.gov | | |

I. POLICY

The law and policy of this State is for all goods and services to be procured, to the extent feasible, through publicly advertised bidding. Contract procurements done with a waiver of advertising, as a statutory exception to the law and policy requiring advertised bidding, are expressly limited to very specific circumstances or types of purchases. Thus, contracts procured with a waiver of public advertising (waivers) are strictly scrutinized and require substantial justification from the requesting agency. Therefore, it is essential that the agency contact the Contract Compliance and Audit Unit (CCAU) for pre-approval as soon as a possible waivered procurement need is identified to determine if a waiver of advertising is the appropriate and legally justifiable procurement method.

Further, competition must be pursued by the agency for all waivers, except for purchases from the Federal or any state government or a political subdivision thereof, sole source and public exigency purchases, as required under N.J.A.C. 17:12-1A.2(c)(1)(v), (vi) and (vii).

Waivered procurements, once approved by the Treasurer's Office, result in a legally binding contract and must meet all applicable contracting statutory requirements. For that reason, the State of New Jersey Combined Standard Terms and Conditions are required for every waivered contract and must be signed by the proposed vendor. Further, all registrations, certifications, and disclosures required by the Standard Terms and Conditions must also be provided by the vendor.

Agencies are not permitted to direct the vendor to provide goods and/or services to the State before the final waiver package is approved and the Request for Waiver of Advertising form (CC-129) is signed by the Treasurer's Office or without seeking prior permission for an Authorized Confirming Waiver.

II. PURPOSE

To provide guidelines, instructions and criteria for submitting requests for State contracts when the requirement for advertising is waived because the request falls within the statutory exceptions to advertising set forth in N.J.S.A. 52:34-9 and N.J.S.A. 52:34-10.

III. DEFINITIONS

A. The following terms and definitions apply to this policy:

1. "Confirming Waiver" – State Contract created when a using agency directs a vendor to provide the goods and/or services to the State under the contract before the official Request for Waiver of Advertising Form (CC-129) has been signed by the Treasurer's Office. There are two types of confirming waivers: Authorized Confirming and Unauthorized Confirming.
2. "Authorized Confirming Waiver" – State contract created when a using agency directs a vendor to provide goods and/or services to the State after having been granted express, written approval by an authorized person at the Division of Purchase and Property (DPP) or the Treasurer's Office. This type of confirming waiver is to be requested only when there is a critical and immediate need to provide a service, or a good, that has a direct impact on the health and safety of the public. The vendor must agree to the State of New Jersey Combined Standard Terms and Conditions, and must also meet the requirements of P.L.2005, c.51, and Executive Order 333 (2023) before approval will be granted. The formal Request for Waiver of Advertising Form (CC-129) and all supporting forms should be emailed to the CCAU, Waiver Coordinator, at waiverpreapproval@treas.nj.gov within three (3) business days of receipt of the written approval to proceed with the Authorized Confirming Waiver.
3. "Unauthorized Confirming Waiver" – State contract created when a using agency directs a vendor to provide goods and/or services to the State before the Request for Waiver of Advertising Form (CC-129) is signed by the Treasurer's Office and without seeking prior permission for an Authorized Confirming Waiver. Unauthorized Confirming Waivers are a serious departure from, and violation of State procurement law, policy, and procedure. Those employees responsible at the agency for the procurement can be held personally liable for the cost. In such cases, DPP notifies the employee's supervisor and the head of the agency, in writing, of the violation, with a copy to the State Auditor, Office of Legislative Services, and the State Treasurer.
4. "Sole Source Waiver" – State contract created without public advertisement pursuant to N.J.S.A. 52:34-10(c) because only one source of supply is available. The agency must be able to document, to the satisfaction of the Assistant Director of CCAU, and the Attorney General, that only one vendor can supply the required good or service.
5. "Public Exigency" – State contract procured when the life, safety, or health of the public must be sustained through the immediate performance of services, or delivery of goods.
6. "Professional Services" – As defined at N.J.S.A. 52:34-10.8, services rendered, or performed by a person authorized by law to practice a recognized profession, the practice of which is regulated by law, or the performance of the services requires knowledge of an advanced type in a field of learning acquired by a prolonged formal course of specialized instruction and study as distinguished from general academic instruction, or apprenticeship and training. Professional services contracts shall also include those services rendered in the provision of goods, or performance of services that are original and creative in character, in a recognized field of artistic endeavor, as well as extraordinary, unspecifiable services, if, after evaluation and assessment, such services cannot reasonably be described by written specifications. This definition is strictly enforced by the Attorney General.
7. "Technical Services" – Services that require the application of a special skill, or practical knowledge in such areas as information technology, telecommunications, electronics, or other applied sciences.

IV. STATUTORY EXCEPTIONS PERMITTING WAIVERED CONTRACTS**A. N.J.S.A. 52:34-9(a)**

Services to be performed by the contractor are of a technical and professional nature. See definition of "Professional Services" and "Technical Services" set forth in III. (A.) (6.) and III. (A.) (7.) above.

B. N.J.S.A. 52:34-9(b)

The purchase of perishable foods or subsistence supplies. Perishable or subsistence foods are those which spoil or deteriorate rapidly, i.e., fresh vegetables, meats, fish, dairy and bread items.

C. N.J.S.A. 52:34-9(c)

The lease of such office space, office machinery, specialized equipment, buildings, or real property as may be required for the conduct of the State's business.

D. N.J.S.A. 52:34-9(d)

The acquisition of any real property by gift, grant, purchase, or any other lawful manner in the name of and for the use of the State for the purpose of State business in accordance with appropriations made when monies are required for the acquisition.

E. N.J.S.A. 52:34-9(e)

Supplies or services for which the prices after advertised bidding are not reasonable or have not been independently determined in open competition due to a failed bid.

F. N.J.S.A. 52:34-10(a)

The purchase is to be made from, or the contract to be made with, the Federal or any State Government or any agency or political subdivision thereof.

G. N.J.S.A. 52:34-10(b)

Public exigency requires the immediate delivery of the goods or performance of the service. Waivers are granted for public exigency when the following conditions prevail and are documented by the using agency:

- A potential health or safety hazard exists;
- Homeland Security or other purchases of goods and services, which cannot be publicly advertised because of an overriding State safety or security concern; or
- A critical agency mandate, statutory, or operational requirement that must be fulfilled immediately.

POOR PLANNING DOES NOT CONSTITUTE PUBLIC EXIGENCY.

Further, the agency should begin immediate steps to acquire the goods or services through a subsequent procurement by a procurement method that allows for competition. See section V(E), below.

H. N.J.S.A. 52:34-10(c)

Only one (1) source of supply is available. The agency must thoroughly document why the recommended contractor is the only available source that can provide the item or services required, and why seemingly comparable goods do not satisfy the documented needs of the agency. A thorough explanation must be included as to what attempts were made to obtain competition and the results. Sole source procurements are typically approved only when patent, trademark or other intellectual property limitation prevents competition. Sole source justification is a legal determination subject to the review and approval of the Attorney General's office.

I. N.J.S.A. 52:34-10(d)

More favorable terms can be obtained from a primary source of supply. This citation should be used in cases where the intended procurement will be made directly from the prime manufacturer or supplier

at a reduced cost, which results from the elimination of intermediaries, i.e., distributors, dealers, and wholesalers. This citation can also be used when special or spot purchases are attainable at reduced cost or with more favorable delivery schedules.

- J. N.J.S.A. 52:34-10(e)
Articles of wearing apparel that are styled or seasonal in character.
- K. N.J.S.A. 52:34-10(f)
Commodities traded on a national commodity exchange are to be purchased and market fluctuations require immediate action.
- L. N.J.S.A. 52:34-10(g)
The equipment to be purchased is of a technical nature and the procurement thereof without advertising is necessary in order to assure standardization of equipment and interchangeability of parts in the public interest.
- M. N.J.S.A. 52:34-10.6
Any purchase by the State of equipment, goods, or services related to homeland security and domestic preparedness, that is paid for or reimbursed by federal funds awarded by the U.S. Department of Homeland Security or other federal agency, from vendors participating in a federal procurement program established by a federal department or agency or the purchase has been approved by the State Treasurer in consultation with the New Jersey Domestic Security Preparedness Task Force. The Director of the Division of Purchase and Property may also enter into or participate in procurement agreements with one or more other states, or political subdivisions or compact agencies thereof, for the purchase of such equipment, goods, or services to meet the domestic preparedness and homeland security needs of this State.

V. PROCEDURE

A. Pre-approval

The Agency must request pre-approval to use the waiver process from the DPP before proceeding with any waivered contract. The agency must send an e-mail to the DPP at waiverpreapproval@treas.nj.gov setting forth:

1. That the agency has conducted a thorough search of State contracts and that the good or service is not available under State contract. Minor differences in the specification are not justification for an agency to bypass existing State contracts to obtain certain goods or services.
2. The specific commodity or service that the agency seeks to procure by a waivered contract.
3. The statutory citation the agency will use to justify the proposed waivered contract and the facts to support that justification.
4. How competition will be sought (unless the good or service is to be supplied by a "sole source," or is a public exigency that requires immediate procurement of the good or service).
5. The monetary amount of the proposed waivered contract.
6. The term of the proposed waivered contract, i.e., its start and end dates.
7. The funding source.
8. OMB and OIT approvals, when required (see V.B. below).

B. OMB and OIT Approvals

Procurement of professional and consultant(s) services, telecommunications, information technology equipment, hardware and software, as well as Non-IT Equipment, can only be made with the express approval of the appropriate State agencies, as required under Circulars 24-22-DPP/OMB/OIT and 24-04-OMB/DPP/OIT. **Failure to provide the required approval documents with the waiver pre-approval request will result in automatic rejection.**

1. Consultants and Professional Services, and Non-IT Equipment

All requests to hire consultants to perform professional services that exceed \$250,000 must be approved by the Office of Management and Budget (OMB) pursuant to Circular 24-22-DPP/OMB/OIT. Approval documents must be submitted with the waiver pre-approval request. The requests should be sent to OMBProfServices@treas.nj.gov.

Additionally, all Non-IT equipment over \$75,000 must be approved by OMB pursuant to Circular 24-04-OMB/DPP/OIT. These requests should be sent to OMB.Equipment@treas.nj.gov.

A copy of the contractually required final report(s) for consultant services must be submitted to OMB. Please do not submit the reports to the DPP.

2. Telecommunications and Information Technology Consultant Services, Equipment, IT Hardware, Software, Subscription-Based Solutions and Related Services.

All waivers for services and equipment acquisitions for telecommunications and/or information technology must be approved by OIT, as well as OMB, if required, prior to submission to DPP for processing and must comply with Circulars 24-22-DPP/OMB/OIT and 24-04-OMB/DPP/OIT. Approval documents must be submitted with the waiver pre-approval request. Proposed software/license agreements must be reviewed and approved by the Attorney General's Office. Please submit the OIT Pre Approval Request via the SimpliGov Procurement Tracking application available on the myNJ portal. If you have any further questions or concerns, please reach out to the External Procurement Unit at OIT.Core@tech.nj.gov or call 609-376-7094.

IT approval requests require the following forms:

- Vendor Proposal
- TIP executive summary and TIP mark up or an email from the SAR team that no TIP is needed (SARmeeting@tech.nj.gov)
- NJCCIC Data Classification Form-Completed by the Agency (riskreview@cyber.nj.gov)
- OHSP State of New Jersey Security Due Diligence Third-Party Information Security Questionnaire (Required for all cloud solutions – I/P/SaaS)

C. OSC Approval

The contracting agency shall provide notice to the Office of the State Comptroller no later than 20 business days after the award of a contract involving consideration or an expenditure of more than \$3 million but less than \$15.2 million.

For waivers that exceed \$15.2 million, the contracting agency must obtain OSC preapproval prior to soliciting vendors for quotes or proceeding with the purchase. The OSC preapproval form can be found at www.nj.gov/comptroller/.

D. Supplemental Waivers

A State agency may submit a request for a supplemental waiver if it requires an increase of the original waiver amount or an increase to the original term. This request should follow the same procedural requirements as the initial waiver request.

- The State agency needs to obtain the vendor's agreement to the supplement in writing [even in the case of a supplement which will operate as a no-cost extension of the term].
- It is important to note that this writing should include confirmation from the vendor that it accepts the previously signed New Jersey Standard Terms and Conditions (ST&C's), as well as the original pricing, for the additional funding and/or time extension sought in the supplement.
- The State agency should retain and send the CCAU a copy of the written document, which constitutes the written agreement for the supplement. Since the waiver represents a contract initiated by the State agency, it must prepare and maintain all pertinent records associated with this contract.

State agencies are reminded of the State's law and policy in favor of "publicly advertised bidding." Accordingly, State agencies should keep track of the expiration date(s) of waiver of advertisement contract(s) and proactively prepare for same.

E. Procurement of new advertised, federal supply schedule or cooperative contract(s)

If the State agency requires a new contract award to follow the expiration of a waiver or supplement waiver, it should act in a proactive and timely manner.

The State agency must submit an immediate request to DPP, if the DPP must procure a good or service on its behalf through a formal public advertisement or through a federal supply schedule (GSA) contract pursuant to N.J.S.A. 52:34-6.1 or cooperative contract pursuant to N.J.S.A. 53:34-6.2.

Requests should be made to DPP's Central Intake Unit at centralintake@treas.nj.gov and include the Agency Procurement Request Form, all required approvals, and a complete detailed Scope of Work.

F. State Contract Manager

For each waiver submitted by the agency to DPP, the agency shall designate a State Contract Manager for the procurement. The State Contract Manager is the State employee responsible for the overall management and administration of the contract. Upon approval of the waiver by the Treasurer, the State Contract Manager shall provide the contractor under the waiver with their name, department, division, agency, address, telephone number, and email address. The State Contract Manager is responsible for coordinating all aspects of the use of the contract by the agency, and for resolving minor disputes between the contractor and the State, in accordance with Circular 14-08-DPP.

The State Contract Manager shall have the following additional duties:

1. Attend required training as established by the CCAU and pass the required State Contract Manager test.
2. If the State Contract Manager determines that the contractor has failed to perform the work of the contract, and is unable to resolve that failure to perform directly with the contractor, the State Contract Manager shall file a Formal Complaint with the CCAU and request the CCAU to assist in the resolution of the contract performance problem with the contractor.

3. The State Contract Manager is responsible for obtaining permission from the Director of DPP to reduce the scope of work, amend the contract, or add work, special projects, to the contract after contract award.
4. The State Contract Manager is responsible for completion of the Project Performance Assessment Form when provided by CCAU, with a copy to the Deputy Director of OMB. The Project Performance Assessment Form shall be submitted annually for multi-year IT and Professional Services contracts and upon completion of the contract. For contracts of one (1) year or less, the Project Performance Assessment Form shall be submitted within six (6) months of signing and at project completion.
5. For IT and Professional Services contracts, the State Contract Manager is responsible for submitting the final report to the Deputy Director of OMB.
6. The State Contract Manager is also responsible for formally reporting, to the Assistant Director of CCAU, using the CC-36 Formal Complaint form, all instances when deliverables, i.e., commodities and/or services, including pricing and/or billing, are not in accordance with the contract specifications or scope of work.

G. Competition

1. Agencies are required to seek as much competition, as reasonable and practical, under the circumstances for each waiver requested. Agencies are reminded that regulations require the agency to obtain competition for many of the statutory waiver exceptions. (See N.J.A.C. 17:12-1A.2.) When competition is required, the agency shall **solicit** at least three (3) written quotations for the service(s) and/or good(s) contemplated under the waiver.

Agencies are encouraged to use the NJSTART and NJSAVI databases to identify vendors that provide the good(s) or service(s) sought through the waiver procurement.

The competitive process employed by the agency must be:

- Fair and provide all vendors solicited with the same opportunity to bid; and
- Provide bidders with the same information concerning the work to be performed and the terms and conditions of the proposed contract to ensure that all vendors are treated fairly and have the same opportunity to bid on the same work requirements under the same terms and conditions.

For all waivers, the agency must provide a thorough evaluation and analysis of the pricing and technical proposals submitted by all bidders to support the award of the contract to the selected vendor.

DPP strongly recommends that communications with vendors throughout the procurement process, including the initial solicitation, be conducted in writing. The preferred method for soliciting competition for waivers is through the use of a Request for Quotation (RFQ). The process employed to retain a vendor under the waiver must be fully detailed and described in the waiver submission.

2. For purchases that do not require competition (e.g. from the Federal or any state government or a political subdivision thereof, sole source and public exigency purchases, as provided under N.J.A.C. 17:12-1A.2(c)(1)(v), (vi) and (vii), please be aware of the following:

For Sole Source Procurements: The agency must thoroughly document why the recommended contractor is the only available source that can provide the item or services required, and why seemingly comparable goods do not satisfy the documented needs of the agency. A thorough

explanation must be included as to what attempts were made to obtain competition and the results. If the agency has been able to obtain several quotes for the goods or services but strongly prefers one vendor over another, it is not a sole source procurement. Sole source procurements are typically approved only when patent, trademark or other intellectual property limitation prevents competition. Sole source justification is a legal determination subject to the review and approval of the Attorney General's office.

For Public Exigency Procurements: The agency must thoroughly document the nature of the public exigency and why the good(s) or service(s) must be provided immediately to respond to the public exigency. The term of a public exigency waiver should be only for the amount of time it will require the agency, working with DPP, to promptly procure the good(s) or service(s) through another procurement method.

VI. SUBMISSION OF COMPLETE WAIVER PACKAGE

A. Required documentation that must be included in all waivers of advertising packages submitted to the CCAU includes:

- CC-129 Request for Waiver of Advertising
- CC-129C Certification of Waiver Funding Availability
- The Request for Quotation (RFQ) or other documents comprising the solicitation
- The list of vendors solicited for a response to RFQ or solicitation
- All responses to the RFQ, Quote(s) Received and Agreement(s)
- State of New Jersey Combined Standard Terms and Conditions
- Ownership Disclosure Form *
- Disclosure of Investigations & Other Actions Involving Vendor Form *
- Disclosure of Investment Activities in Iran Form *
- MacBride Principles Form *
- Public Law 2005, Chapter 271 Form
- Source Disclosure Form (not required for Commodities procurements)
- Certification of Non-Involvement in Prohibited Activities in Russia or Belarus
- Proof of Chapter 51/EO 333 Compliance, or Two-Year Chapter 51/Executive Order 333 Vendor Certification and Disclosure of Political Contributions form (review Fair and Open Exception to Chapter 51) *
- Proof of Business Registration Compliance *
- Proof of AA/EEO Compliance *
- Acord Certificate of Insurance
- Evidence of Price Negotiation
- A copy of the agency's evaluation of the bids and the rationale for selection of the vendor.

*Agencies can submit a screen shot of the NJSTART Vendor Profile "Terms & Categories" tab to satisfy some of the required forms listed above if the appropriate answer(s) have been completed.

The Information Sheet & Checklist for Waivers and Delegated Purchasing Authority (DPA) contains links to many of the forms listed above. Checklist and other forms can be found at:
<http://www.nj.gov/treasury/purchase/forms.shtml>.

B. The following must also be included in the waiver package:

1. Email from CCAU granting authorization to proceed with the waiver process (reference "Pre-approval" in V. A. above).
2. OMB/OIT approvals if required (reference V. B. above).
3. Name of Contract Manager pursuant to N.J.S.A. 52:34-10.7.

C. If an agency has received approval for an authorized confirming waiver, and the vendor has started work or delivered the good(s), the complete waiver package as detailed in subsection A, above, must still be submitted promptly after the vendor delivers the good(s) or begins work.

NOTE: IT IS THE USING AGENCY'S RESPONSIBILITY TO ENSURE THAT ALL VENDORS SOLICITED ARE IN RECEIPT OF THESE MANDATORY FORMS PRIOR TO THE VENDOR(S) SUBMISSION OF WAIVER QUOTATIONS TO YOUR AGENCY. ANY WAIVER OF ADVERTISING PACKAGE THAT DOES NOT CONTAIN ALL OF THE ABOVE-LISTED FORMS SHALL BE RETURNED TO THE REQUESTING AGENCY.

Amy F. Davis
Amy F. Davis, Acting Director
Division of Purchase and Property