

## UNDERSTANDING THE ESSENTIAL ELEMENTS OF A PUBLIC CONTRACT

### The First Step in a Trouble-Free Project

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#### I. Contract

An Agreement between two or more persons which creates an obligation to do or not to do a particular thing. Its essentials are competent parties, subject matter, legal consideration, mutuality of agreement and mutuality of obligation.

What is a public contract?

A contract for goods or services where one of the parties is a public entity.

#### II. New Jersey Local Public Contracts Law

N.J.S.A. 40A:11-1, *et seq.* The requirements of a public contract are set forth in the New Jersey Local Public Contracts Law and the New Jersey Administrative Code. The purpose of the Local Public Contracts Law is to benefit taxpayers by securing competition and guarding against favoritism, improvidence, extravagance and corruption.

How does the Local Public Contracts Law strive to meet its goals?

- a. By requiring public bidding on contracts in excess of \$17,500.00 (contracts in excess of \$25,000.00 if the contracting unit has a qualified purchasing agent);
- b. By requiring advertising of projects;
- c. Limiting restrictive specifications (or equals);

#### III. Types of Contracts

a. No-Bid Contracts. N.J.S.A. 40A:11-5 sets forth exceptions to the bidding requirement primarily for professional services, engineers, architects and lawyers. Other notable areas include the supply of any product rendered by a public utility, which is regulated by the BPU or the Federal Energy Regulatory Commission, printing of bond documents, printing of legal notices required by law, insurance, including the purchase of insurance coverage and consultant services, contract for the provision of water supply services, expenses for travel and conferences, marketing and recyclable materials. The other main area would be extraordinary, unspecifiable services, which may include equipment repair.

b. **Competitive Contracting.** Pursuant to N.J.S.A. 40A:11.4.1, competitive contracting in lieu of public bidding provides for proposals for the procurement of specialized goods and services where the price exceeds the bid threshold. Typical types would include the purchase of proprietary software designed for the contracting unit's purposes, operation and maintenance of wastewater treatment system, emergency medical systems and concessions. In order to take advantage of this type of contracting, the governing body must pass a resolution authorizing the use of the competitive contracting for each time it uses it. It requires that the process be administered by a review committee, which could be the purchasing agent, executive direction and/or lawyer. The contracting body would put out requests for proposals, which would include qualifications and price, among other items of importance. Criteria must be established by the review committee to determine which proposal is the most beneficial to the governing body or the proposal must be made within 60 days of receipt by action of the governing body. Notice of the award must be published.

c. **Contracts in the Amount of Under 15% of the Bid Threshold.**

Contracts in the amount not to exceed 15% of the bid threshold, \$2,650 (\$3,750 with a QPA) may be awarded without quotations or bids provided a resolution authorizing the purchasing agent to purchase in those amounts is approved by the governing body.

d. **Quotations.**

Contracts up to \$17,500 (or \$25,000 with QPA) quotations are required. The governing body must try to obtain two quotes and award the lowest price and other factors considered.

e. **Contracts Required to be Bid.**

If the contract is over the bid threshold amount, it must be publicly bid. The following are the basic requirements for a publicly bid contract.

i. It must be advertised for a minimum of ten (10 days); the exception is for municipal solid waste services, which require sixty (60) days procurement; N.J.S.A. 40A:11-23;

ii. Notice of Revisions.

(1) All contracts, except construction and solid waste must be published five (5) days prior to bidding opening, Saturdays, Sundays and holidays excepted, and copies forwarded to anyone who has received a bid package;

(2) Construction contracts - notice given is seven (7) days prior to bid opening, Saturdays, Sundays and holidays excepted, to any person who has received a bid package.

The following are typical front end documents included in the bid documents:

- i. a bid bond, as required by N.J.S.A. 40A:11-21; 10% of bid amount, not to exceed \$20,000.00;
- ii. consent of surety, pursuant to N.J.S.A. 40A:11-22; required for all improvements to real property in excess of \$100,000.
- iii. statement of ownership, pursuant to N.J.S.A. 52:25-24.2;
- iv. subcontractor identification form, pursuant to N.J.S.A. 40A:11-16;
- v. bidders' acknowledgment of revisions or addenda N.J.S.A. 40A:11-23(a);
- vi. business registration as required by N.J.S.A. 52:32-44;
- vii. public contractor's registration form N.J.S.A. 34:11-56.51;
- viii. N.J.S.A. 34:11-56.25 *et seq.* prevailing wage compliance declaration;
- ix. equipment certification as required by N.J.S.A. 40A:11-20;
- x. non-collusion affidavit as required by N.J.S.A. 52:34-15;
- xi. bidder's corporation resolution, evidence of the Authority to bind the bidder where bidder is a corporation or a partnership;
- xii. bidder's checklist for Mandatory requirements N.J.S.A. 40A:11-23.2;
- xiii. bidder's qualification form, which is a series of questions regarding the bidder's history and his previous experience;

#### **IV. Contract Terms**

The following is a list of key contract requirements for construction contracts:

- i. Price: types of payments
  - a. Lump sum - contract is awarded based upon a single price;

- b. Unit Price - provides for payment based upon individual increments of work;
  - c. Allowances - contract provides each bidder with a specific dollar amount for work that cannot be adequately specified;
  - d. Alternatives - additional or optional work that the owner may want done; usually dependent upon price.
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- ii. Time of Completion: N.J.S.A. 40A:11-17 requires that the amount of working days for each contract be specified.
  - iii. Scope of Work: a general description of the work that is anticipated to be performed under the contract.
  - iv. Integration of Contract Documents: most contracts provide that the contract documents include the contract general conditions, the drawings and the specifications.
  - v. Subcontracts: most contracts provide that the contractor agrees to bind each subcontractor to the terms of the general construction contract.
  - vi. Permits. This sets forth who is responsible for getting the permits for construction and who pays permit fees.
  - vii. Suspension of Work, no damage for delay provisions. N.J.S.A. 40A:11-11 provides that to limit a contractor's remedy for the contracting unit's negligence, bad faith, active interference, tortious conduct or other reasons not contemplated by the parties that delay the contractor's performance to give a contractor an extension of time for performance under the contract is void under public policy. However, the provision can be drafted such to limit the contractor's right to additional compensation to actions by the contracting unit and not third parties.
  - viii. Liquidated Damages. A contract may provide for a daily damage amount for a contractor's failing to complete the project on time. Liquidated damages are normally used when actual damages would be difficult to quantify and must bear a rational relation to what anticipated damages could be on the project. Extremely high liquidated damage provisions may be invalidated if a court determines that they constitute a penalty. N.J.S.A. 40A:11-11.
  - ix. Prevailing Wages. A contract for construction, reconstruction,

demolition, alteration and maintenance work shall provide that all contracts in excess of \$2,000 in a case of an Authority and \$10,750 in the case of a municipality shall require the contracting unit to pay prevailing wages for all contracts for work defined in N.J.S.A. 34:11-56.25 and require that certified payroll records be submitted to the contracting units for each employee on the project.

- x. Indemnity Provisions. Most contracts provide to the greatest extent allowable by law the contractor shall hold harmless and indemnify the owner, its employees and engineers for any and all claims that arise out of the contractor's performance of the contract, including attorney's fees and cost of suit.
- xi. Termination Provisions.
  - a. Termination for Default: contracts will provide for a termination of the contractor for his material failure to properly follow the contract specifications, violation of laws, failure to make adequate progress, general poor performance and bankruptcy of the contractor. These termination provisions must be carefully drafted and followed, including any and all notice provisions required. Generally, the termination provision will provide adequate notice be given to the contractor and a time for the contractor to cure his default.
  - b. Termination for Convenience: this provision provides that an owner may terminate the contract for reasons other than the default of the contractor. Generally, it will provide that in the event the owner terminates the contract for its convenience, the owner is responsible to pay the contractor for all of the work the contractor has performed to date, including reasonable costs of termination. The AIA documents also allow for the contractor to be paid for his anticipated profits of the work not performed.
  - c. Termination by Contractor: generally, the contract will allow a contractor to terminate its agreement with the owner in the event the owner's failure to make timely payments in accordance with the contract provisions. Again, there is normally a notice provision which will allow the owner to cure any default.
- xii. Changes to Work Provisions: a contract shall provide for changes in the work which were not originally contemplated in the original design and/ or scope of work. These provisions normally provide that the contractor

submit a price, either lump sum or unit, for the changes in the work. The best practice would be that these changes be approved as to scope and price prior to the work beginning and an executed change order be issued. In cases where a price cannot be agreed to, many contracts provide that the owner may direct the contractor to perform work on a time and materials basis.

- xiii. Application for Payments
  - a. Payment for stored materials: as provided for in N.J.S.A. 40A:11-16.4
  - b. Retainage - N.J.S.A. 40A:11-16.1 limits retainage to two percent (2%) for contracts in excess of \$100,000.
  - c. Final Estimate Payments - provides for the release of retainage, all documents that need to be provided including warranties, release of liens from contractor and subcontractors.
- xiv. Liens: provision addresses the times when a subcontractor or materialman may file a lien against the project funds.
- xv. No Waiver Provision - a general provision that provides that in the event the owner does not enforce a specific provision during the course of the contract term, it does not waive enforcement of the provision in the future.
- xvi. No Oral Agreement Provision - the contract may only be modified by a writing executed by all parties.
- xvii. Warranty/Maintenance Period - Typically contractor warrants that its work is in conformance with the specifications and drawings and agrees to repair any defective work for a period of one year.
- xviii. Maintenance Bond, supplying of a maintenance bond up to two years in accordance with N.J.S.A. 40A:11-22.
- xix. Alternate Dispute Resolution - Pursuant to N.J.S.A. 40A:11-50 all construction contracts must include an ADR provision as a prerequisite to filing a lawsuit. This provision does not apply to bid protests.
- xx. Americans with Disabilities Act, 42 U.S.C. § 12101.
- xxi. Affirmative Action - No Discrimination, N.J.A.C 17.27-5.2.

- xxii. Insurance Provisions - Provides the types and amounts required for the contractor to provide. Usually requires the owner, employees and consultants list as additional insured on the policy. These provisions should be reviewed by the owner's insurance consultant to determine if the policy as specified are generally available in the market place to contractors.

