

13th Annual Public Works Continuing Education Conference

Purchasing Update

Location:
Bally's
Atlantic City, NJ
March 15, 2017

Prepared and Presented By:
Joseph A. Valenti, LLC

I. Functions of Public Procurement in Local Government

A. The Terms

1. Public Purchasing
2. Public Procurement

B. The Procurement Environment

1. Where does the Local Public Contracts Law, and other “procurement laws” fit into the scheme of competing interests and policies?
2. The role of an individual as the:
 - a. Purchasing agent
 - b. Qualified purchasing agent duly assigned the authority, responsibility and accountability for the purchasing activity
 - c. Contracting agent
3. Factors influencing the role of a purchasing agent:
 - a. The form of government
 - b. The procurement function’s location in a specific governmental structure
 - c. The scope of other “assigned” activities
 - d. The nature of the position: full-time, part-time, shared services, or the circuit rider approach
 - e. The continuing educational efforts and professional commitments put forth by public purchasing officials

II. Highlights of the Local Public Contracts Law

A. Definitions (40A:11-2)

1. Contracting Agent (3)
2. Aggregate (19) “Aggravation”
3. Goods and/or Services (24)
4. Lowest Responsible Bidder (27)
 - Responsible (32)
 - Responsive (33)
5. Public Works (34)
6. Proprietary (39)
7. Service or Services (40)

B. Bid Threshold: Period of Contracts (40A:11-3)

1. \$40,000 - \$6,000 – with QPA
2. \$17,500 - \$2,625 – without a QPA
3. 2 year schedule for certain public works projects
4. Pay to Play threshold for professional services - \$17,500

C. Award of Contracts: Bidder Disqualification (40A:11-4)

1. Award by resolution of governing body which cost exceeds the bid threshold
2. Prior negative experience- bidder is given a hearing if bidder bids on next project and “appears” to be the “lowest responsible bidder”
3. A non-responsible bidder’s hearing is different

D. Exceptions (40A:11-5)

1. Equipment repair service (EUS) (i)
2. Water supply services (58:26-19) (z)
3. Wastewater treatment services (58:27-19) (bb)
4. Water supply services or wastewater treatment services pursuant to 40A:11-5(gg), 40A:11-5.1, 40A:11-15 (16) and (19)
5. Combination on the rejection of bids
 - “...on the basis of cost estimates prepared for or by...”
 - “...such contract may then be negotiated, but according to (i) (ii) (iii)” (3)

E. Emergency Contracts (40A:11-6)

1. ...Affecting public health, safety or welfare requiring immediate delivery of goods or performance of services
2. “Designated Chain of Command” (N.J.A.C. 5:34-6) – mandatory

F. Specifications (40A:11-13) – “One size fits all”

1. Drafting of specs- encourage free, open and competitive bidding
2. Mandatory pre-bid meeting v. attendance is strongly recommended
3. No pre-approval of an “equivalent” prior to receipt of bids [5:34-9.2(d)]
4. Charging the potential bidder(s) a fee if they intend to submit an equivalent brand name which will be reviewed by public owner's engineer
5. Notice of the Delivery of Labor or Materials (N.J.S.A. 2A:44-128a.) permits a beneficiary to obtain a lien for the value of the labor or the materials provided
6. Challenge to bid specs: no less than 3 business days prior to the bid opening Jen Electric, Inc. v. County of Essex 197 N.J. 627 (2009) Impact

on design consultants and others in developing specs will be closely scrutinized

7. Bid specs include use of 1,000+ tons of hot mix asphalt (cement) and shall include a pay item for any adjustment
8. Eligible fuel price adjustment shall be the sum of the quantities of the eligible pay items in the contract x the fuel usage factors as determined by the NJDOT

G. Payment from Bequest, Legacy or Gift (40A:11-13.1)

1. Written instructions as to the specs
2. Pursuant to N.J.S.A. 40A:5-29

H. Rejection of All Bids (40A:11-13.2)

1. What the courts have stated
2. Meaning of the word “substantially”

I. Duration of Certain Contracts (40A:11-15)

1. All contracts awarded for a period not to exceed 24 consecutive months except:
 - ...for the length of time authorized and necessary for completion of the actual construction (9)
 - Provision of water supply services or construction...of a water supply facility (40 years) (58:26-1 et seq.) (16)
 - Provision of resource recovery services or construction of a resource recovery facility (40 years) (17)
 - Provision of wastewater treatment services (40 years) (19)
 - Provision of water supply services (58:28-2) (40 years) (31)
 - Provision of wastewater treatment services (Public/Private or Public Authority) (40 years) (58:27-19) (36)
 - Operation & management of a facility under a license permitted or approved by DEP (10 years) (37)

2. The one-two year or the two-one year extensions subject to limitations
3. Cessations of contracts, “end when they end,” and extensions under two conditions

J. Separate Plans for Various Types of Work (40A:11-16)

1. The term “public building” is more expansive in provisions 40A:11-16.1, 40A:11-16.6, 40A:11-21 and 40A:11-22
2. The name or listing of the 4 sub prime specialty contractors: Plumbing/ Gas Fitting, HVAC (refrigeration), Electrical (tele-data, fire alarm or security system), Structural Steel/Ornamental Iron, (5th category not required to be provided by GC)
3. Contractors and their subs are not required to be named or listed (category 5)
4. N.J.S.A. 40A:11-16b is to prevent “bid shopping,” last two sentences in paragraph sounds like it belongs in 40A:11-23.2 – mandatory rejection
5. Certification of payments by GC for work completed by subs can be paid directly to subs, but who does the local contracting unit have the contract with?

K. \$100,000+ Contracts for Improvement to Real Property, Retainage (40A:11-16.1)

1. Withholding of payments as pursuant to contract v. contractor depositing bonds/notes
2. Who receives the accruing interest?

L. Partial Payments Unless Contractor Deposits Bonds (40A:11-16.2)

1. Once a month as the work progresses
2. Unless contractor has agreed to deposit bonds

M. Withholding of Payments (40A:11-16.3)

1. 2% of the amount due on each partial payment withheld
2. Maintenance Bond—100%, no longer than 2 years

N. Partial Payment for Materials (40A:11-16.4)

1. Materials placed along or upon job site
2. Materials stored at secured locations

O. Value Engineering Change Orders (40A:11-16.6)

1. “VECCO” original bid specs—cost reductions—after construction contract is awarded
2. “VECP” what does the definition really mean?
3. Contracts equal to or exceeding \$5 million shall allow for VECCOs
4. Basic steps by provisions (1)-(9)

P. Number of Working Days (40A:11-17)

1. Tied in with liquidated damages (40A:11-19), and
2. Uniformed law enforcement officers (40A:11-23.1c)

Q. American Goods & Products- Where Possible (40A:11-18)

1. Meaning of the phrase “wherever available?”
2. Meaning of the phrase “of the United States?”

R. Certificate of Bidder- Owns, Leases or Controls All Necessary Equipment Required (40A:11-20)

1. Certificate stating bidder owns, leases or controls all necessary equipment, or

2. Certificate stating bidder is not the actual owner or lessee of all necessary equipment
3. Bidder's certificate in 2 above shall be accompanied by a certificate from the owner or person in control of the necessary equipment granting the bidder control of the equipment for the project

S. Guarantee to be Furnished with Bid (40A:11-21)

1. Bid guarantee- certified check, cashier's check or bid bond
2. Ten (10) % and not in excess of \$20,000
3. In excess of \$100,000- required

T. Surety Company Certificate- Performance Bond (40A:11-22)

1. In excess of \$100,000 required
2. The bond of an individual

U. Advertisements for Bids (40A:11-23)

1. Ten days prior to such date of receipt
2. But not less than 60 days (collection/disposal of municipal solid waste)
3. Never on Mondays or day after a holiday
4. Cancellation or postponement of bids [5:34-9.3(a) and 5:34-9.3(b)]
5. If the 5th day falls on a Monday, you can open the bids- it is not an initial receipt of bids N.J.S.A. 47:1A-1.1(11)
6. Notice of revisions or addenda- construction

V. Plans, Specs, Bid Proposal Documents (40A:11-23.1)

1. Document acknowledging receipt of any notice, revision or addendum

2. Base spec + specified alternate proposals (40A:11-23.1d)
3. Form (Bid Document Submission Checklist) listing required documents, certifications, etc., traffic control costs (40A:11-23.1 c), see also 40A:11-17 & 40A:11-19

W. Required Mandatory Items (40A:11-23.2)

1. Inclusion of mandatory items (a-e), BRC deleted
2. Non-submission considered fatal defects
3. Cannot be cured by governing body
4. Failure to submit- meaning what, not included, incorrectly completed, etc.?

X. Request for Withdrawal of a Bid (40A:11-23.3)

1. Similar law to “Rescission”- public works project
2. A “mistake” as defined in 40A:11-2 (42)
3. Within five (5) business days after a bid opening
4. Process by statute and the request shall include evidence demonstrating the consequences of such a mistake (1)-(4)

Y. Time for Making Awards, Deposits Returned (40A:11-24)

1. Award a contract or reject all bids- 60 days or request an extension, prior to the 60th day
2. Return of the bid security, except the 3 apparent lowest, responsible bidders
3. Signing of the contract (21 days)
4. Contract not awarded, return deposit for plans or specs

Z. Prequalification of Bidders (40A:11-25 to 40A:11-35)

1. Optional
2. The use of the DPM&C Classification Process

AA. Process of Resolution for Construction Contract Disputes (40A:11-50)

1. Alternative dispute resolution practices
2. “Construction Contract” is widely defined
3. All construction contract documents (specs and the contract?) shall provide how disputes shall be resolved before submitting matter to a court for adjudication

III. Change Orders and Open-End Contracts

A. Definitions (5:30-11.2)

1. Change order
2. Open-end contract

B. General Requirements for All Change Orders (CO) (5:30-11.3)

1. Each CO shall be in writing and numbered consecutively
2. Unit prices or a price methodology

C. Minor Field (Site) Modifications (5:30-11.4)

1. Role of governing body
2. Designated representative

D. Change Orders for Construction Contracts (5:30-11.7 and 5:30-11.8)

1. Materials, supplies and equipment

2. Construction, reconstruction and major repairs

E. Procedures for Change Orders Exceeding 20% Limitation (5:30-11.9)

1. A written certification justifying the performance of work

2. Governing body approval process

3. Administrative reporting requirement

F. Open-End Contracts (5:30-11.10)

1. Not considered change orders

2. Use of purchase orders under open-end contracts