

MODEL STATEMENT OF PROCUREMENT POLICY

FOR

PUBLIC HOUSING AUTHORITIES

OPERATING IN NEW JERSEY

REV. 4 (11/00)

This Model Procurement Policy for Public Housing Authorities Operating in New Jersey was prepared by Terrence J. Corrison, Esq. and Donald A. Caminiti, Esq. of the law firm of Breslin and Breslin, P.A., Hackensack, New Jersey in conjunction with Rutgers University, Center for Government Studies. The Policy was originally prepared in 1994 for use in the Procurement and Contract Management Course of the New Jersey Public Housing Authority Training Program sponsored by the New Jersey Department of Community Affairs.

PREFACE

This Model Statement of Procurement (hereinafter the "Statement") for Public Housing Authorities (hereinafter PHA's) operating in New Jersey reflects a compilation of various federal and state laws, regulations, rules and policies. The Statement was first prepared on behalf of the Training Committee appointed by the New Jersey Department of Community, Division of Housing to conduct a course of instruction for Executive Directors in Procurement and Contract Management. Representatives of the Department of Community Affairs, Division of Housing and Division of Local Government Services, U.S. Department of Housing and Urban Development, the New Jersey Chapter of NAHRO and N.J.A.H.R.A. participated in the initial review of this policy.

Revisions have been made since the original review in 1994, the most recent being those made in November 2000 reflecting comprehensive changes to the New Jersey Local Public Contracts law effective April 17, 2000. These changes include but are not limited to changes to the bid threshold and the way it is set, certification of purchasing agents, competitive purchasing for all matters exceeding 15% of the bid threshold and an optional competitive contracting process. The policy as amended will be submitted to HUD for its approval.

The Statement is intended to provide Public Housing Authorities operating in New Jersey with a comprehensive document which incorporates both Federal and New Jersey procurement laws, regulations and rules. The provisions reviewed and adopted are 24 C.F.R. 85.36 adopted March 1988, (hereinafter the "Act"), HUD Handbook 7460.8 Rev. 1 adopted January 1993, (hereinafter the "Handbook") and the Model Procurement Policy, (hereinafter MPP) appended thereto as well as the Local Public Contracts Law contained in N.J.S.A. 40A:11-1 et seq. and rules promulgated pursuant thereto provided in N.J.A.C. 5:34-1 et seq and %:30-5.1 and 11.1.

The Statement provides Housing Authorities in New Jersey with procurement guidelines which reflect both State and Federal laws and is intended to resolve many of the conflicts which have plagued Housing Authorities in addressing the various laws and rules in the past. In deciding which

state or federal law or rule to adopt the "common rule" contained in 24 C.F.R. 85.36(b) was employed. The rule provides that PHA's use their own procurement procedures that reflect applicable State and local laws and regulations, provided that they conform to applicable Federal law. Where both state and federal laws encompass the same area, the stricter or more limiting rule which encourages competition is adopted. In some cases the federal procurement policies are stated but notations or comments serve as reminders to consult applicable New Jersey laws or rules. In some instances the Statement contains provisions which are recommended but which appear in neither state or federal law or rules. These instances are specifically noted in the comments. While this Statement is intended to be utilized to assist Housing Authorities in complying with both federal and state laws, Executive Directors and Contracting Officers should be familiar with the provisions on which it is based and should consult those provisions when conflicts arise. References which should be available to all Executive Directors and procurement agents include the HUD Handbook, Model Procurement Policy, N.J.S.A. 40A:11-1 et seq., N.J.A.C. 5:34-1 et seq. 5:30-5.1 and 11.1 and N.J.S.A.40A:9-22.1 et seq. In some instances it will also be advisable to consult Housing Authority counsel, and representatives of HUD and the Division of Local Government Services.

ACKNOWLEDGMENT

While much of this statement was newly drafted in 1994, a large portion was adopted from existing Housing Authority Statements. Acknowledgment and thanks must be given to the Housing Authorities of Jersey City and the City of Passaic from which statements many of these provisions and comments were adopted as well as to Joseph Valenti of the Division of Local Government Services whose comparative analysis of New Jersey and federal laws was most useful in preparing this Statement.

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Table of Abbreviations

Act	24 CFR 85.36
FAR	Federal Acquisition Regulation (48 CFR 1 <u>et seq.</u>)
Handbook	HUD Handbook 7460.8 Rev. 1 (adopted January 1993)
MPP	HUD Model Procurement Policy (appended to HUD Handbook 7460.8)
N.J.S.A.	New Jersey Statutes Annotated
N.J.A.C.	New Jersey Administrative Code
PHA	Public Housing Authority
Statement	Model Statement of Procurement for Public Housing Authorities

**MODEL STATEMENT OF PROCUREMENT POLICY FOR PUBLIC
HOUSING AUTHORITIES OPERATING IN NEW JERSEY**

Established for the Housing Authority of _____ (hereinafter the "PHA") by Board action on _____. This Statement of Procurement Policy complies with HUD's Annual Contributions Contract (ACC), HUD Handbook 7460.8, "Procurement Handbook for Public Housing Agencies", the procurement standards of 24 CFR 85.36, N.J.S.A. 40A: 11-1, et seq. (the New Jersey Local Public Contracts Law) and Rules contained in New Jersey Administrative Code (N.J.A.C. 5:34-1.1 et seq. and 5:30-5.1 and 11.1)

I. GENERAL PROVISIONS

A. PURPOSE

The purpose of this Statement of Procurement Policy is to provide for the fair and equitable treatment of all persons or firms involved in purchasing by the PHA: assure that supplies, services and construction are procured efficiently, effectively, and at the most favorable prices available to the PHA; promote competition in contracting; provide safeguards for maintaining a procurement system of quality and integrity; and assure that PHA purchasing actions are in full compliance with applicable Federal standards, HUD regulations, and State laws.

Source: HUD Model Procurement Policy (April 11, 1991) (hereinafter "MPP") Sec. I-A; and 24 CFR 85.36 (hereinafter referred to as the "Act") Sec. (b) (1).

B. APPLICATION

- This Statement of Procurement Policy (Statement) applies to all contracts for procurement of supplies, services and construction entered into by the PHA after the effective date of this Statement. It shall apply to every expenditure of funds by the PHA for public purchasing, irrespective of the source of funds, including contracts which do not involve an obligation of funds (such as concession contracts); however, nothing in this Statement shall prevent the PHA from complying with the terms and conditions of any grant, contract, gift or bequest that is otherwise consistent with law. The term "procurement", as used herein, includes both contract and modifications

(including change orders) for construction or services, as well as purchase, lease, or rental of supplies and equipment.

Source: MPP Sec. I-B and 40A:11-4.1 (as to Concession Contracts) and 40A:11-13.1 (as to gifts and bequests).

C. PUBLIC ACCESS TO PROCUREMENT INFORMATION

Procurement information shall be a matter of public record to the extent provided in N.J.S.A. 47:1A-1 et seq. (New Jersey Right to Know Law), and shall be available to the public as provided in that statute.

Source: MPP Sec. I-C; N.J.S.A. 47:1A-1 et seq.

II. PROCUREMENT AUTHORITY AND ADMINISTRATION

A. All procurement transactions shall be administered by the Contracting Officer, who shall be the Executive Director or other individual he or she has authorized in writing. The Executive Director shall issue operational procedures to implement this Statement, which shall be based on HUD Handbook 7460.8, N.J.S.A. 40A:11-1 et seq. and N.J.A.C. 5:34-1 et seq. as they may be amended and supplemented. The Executive Director shall also establish a system of sanctions for violations of the ethical standards described in Section IX below, consistent with State Law.

Source: MPP (Sec. II-A)

Notwithstanding the foregoing, the PHA may by Resolution, establish the office of purchasing agent (which may be the Executive Director or his designee) or purchasing department. Such purchasing agent or department shall have the authority, responsibility and accountability as the contracting agent for all purchasing activity, to prepare public advertising for bids, to review bids and to award contracts which do not exceed the bid threshold set forth in N.J.S.A. 40A:11-3 and Section III(C) of this policy and conduct any activities as may be necessary or appropriate to the purchasing function.

Source: Adapted from N.J.S.A. 40A:11-9 (1999).

- B. The Executive Director or his/her designee shall ensure that:
1. Procurement requirements are subject to a planning process to assure efficient and economical purchasing;
 2. Contracts and modifications are in writing, clearly specifying the desired supplies, services or construction, and are supported by sufficient documentation regarding the history of the procurement, including as a minimum the method of procurement chosen, the selection of the contract type, the rationale for selecting or rejecting offers, and the basis for the contract price;
 3. For procurement other than small purchases, where time permits, public notice of an upcoming procurement should be given at least ten days before a solicitation is issued. The PHA should provide offerors with as much time as possible to respond to solicitations and should attempt to provide at least 15 days between issuance of the solicitation and receipt of offers, but in no event may the time in which an offeror can respond to a solicitation be less than ten days in accordance with N.J.S.A. 40A:11-23, for Publicly Bid Contracts or twenty days in accordance with N.J.S.A. 40A:11-4.5a for optional New Jersey Competitive Contracting as per Section III(E) of this policy.
 4. Solicitation procedures are conducted in full compliance with Federal Standards stated in 24 CFR 85.36, or State and Local Law that are more stringent, provided they are consistent with 24 CFR 85.86;
 5. An independent cost estimate is prepared before solicitation issuance and is appropriately safeguarded for each procurement above the small purchase limitation, and a cost or price analysis is conducted of the responses received for all procurement.
 6. Contract award is made to the responsive and responsible bidder (or offeror for procurement under small purchase procedures) offering the lowest price (for sealed bid contracts) or contract award is made to the offeror whose proposal offers the greatest value to the PHA, considering price, technical, and other factors as specified in the solicitation (for contract awards based on competitive proposals); unsuccessful firms are notified within ten days after contract award;

7. There are sufficient unencumbered funds available to cover the anticipated cost of each procurement before contract award or modification (including change orders), work is inspected before payment, and payment is made promptly for contract work performed and accepted; and
8. The PHA complies with applicable HUD review requirements, as provided in the operational procedures supplementing this statement;
9. The Contracting Officer has maintained records sufficient to detail the significant history of a procurement. These records will include, but are not necessarily limited to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.

Source: Partially MPP Sec. II-B; Act Sec. (b)(9); Sec. 7; Based in part on N.J.A.C. 5:30-5.1 et seq.

C. This Statement and any later changes shall be submitted to the Board of Commissioners for approval. The Board appoints and delegates procurement authority to the Executive Director [or Purchasing Agent] and is responsible for ensuring that any procurement policies adopted are appropriate for the PHA.

Source: MPP Sec. II-C

III. PROCUREMENT METHODS

A. SELECTION OF METHOD

If it has been decided that the PHA will directly purchase the required items, one of the following procurement methods shall be chosen, based on the nature of an anticipated dollar value of total requirement.

B. SMALL PURCHASE PROCEDURES

1. **General**

Any purchase, contract or agreement for the performance of any work or the furnishing or hiring of materials or supplies, the cost or price of which, together with any other sums expended or to be expended for the performance of any work or services in connection with the same immediate program, undertaking, or activity or project or the furnishing of similar materials or supplies during the same fiscal year paid with or out of public funds, does not exceed in the fiscal year the total sum of Seventeen Thousand Five Hundred Dollars (\$17,500.00) or Twenty-five Thousand Dollars if the PHA purchasing agent is qualified in accordance with N.J.S.A. 40A:11-9 (or such other threshold amount as may be established in accordance with N.J.S.A. 40A:11-3) may be made in accordance with the small purchase procedures authorized in this section.

Contract requirements shall not be artificially divided so as to constitute a small purchase under this section (except as may be reasonably necessary to comply with Section VIII. A of this Statement). For a contract which is single in character or inclusive of the provision or performance of additional goods or services, all of the goods or services requisite for the completion of such contract shall be included in one contract.

2. **Duration.**

Any purchase contract or agreement made pursuant to this section may be awarded for a period of 24 consecutive months, except that professional service contracts which are awarded without competitive bidding may be awarded for a period not exceeding 12 months unless

they are awarded pursuant to the optional New Jersey Competitive Contracting provisions set forth in Section III(E) in which case they may be awarded for a period not exceeding five years.

Source: MPP Sec III-B-1; N.J.S.A. 40A: 11-3 (as amended, 1999), and 11-7 and Act Sec. (d) (1).

3. Purchasing Authority

When authorized by Resolution small purchases under this Section may be made by the Purchasing Agent or Department. Such authorization may be granted for each contract or by a general delegation of power to negotiate and award such contracts.

Source: N.J.S.A. 40A:11-3 (as amended 1999).

Comment: This provision incorporates both the federal small purchase procedure with the New Jersey bidding threshold. While the federal act sets a threshold of \$100,000.00 above which formal bidding or competitive proposals are required, in New Jersey the threshold is currently set at \$17,500.00 (unless the purchasing agent is qualified pursuant to N.J.S.A. 40A:11-9 in which the threshold is currently \$25,000.00). This figure is adjusted by the Governor in consultation with the Dep't. of Treasury every five years. Since the "stricter policy applies" the small purchase threshold in New Jersey is \$17,500 or \$25,000.00 (as applicable) rather than \$100,000.00. Note that the twenty four month maximum duration is required by N.J.S.A. 40A:11-3b.

4. Petty Cash Purchases

Small purchases under \$ _____ [insert a dollar amount, e.g. \$250.00] which can be satisfied by local sources may be processed through the use of a petty cash account. The Director of Accounting and Finance shall ensure that: the amount is established in an amount sufficient to cover small purchases made during a reasonable period; security is maintained and only authorized individuals have access to the account; the account is periodically reconciled and replenished by submission of a voucher to the PHA finance officer; and, the account is periodically audited by the finance officer or designee to validate

proper use and to verify that the account total equals cash on hand plus the total of accumulated vouchers. The total petty cash maximum account limit is \$ _____. [Insert dollar amount here].

(a) For petty cash purchases only one quotation need be solicited if the price received is considered reasonable. Such purchases must be distributed equitably among qualified sources. If practicable, a quotation shall be solicited from other than the previous source before placing a repeat order.

Source: MPP Sec. III-B-2

Comment: The last line of Section 4 is added as a safeguard to insure that the account is properly administered. The limit inserted should be high enough to allow reasonable use but low enough to require regular review by the finance auditor upon replenishing. Note that these provisions differ from and are more stringent than those that appear in the MPP.

The Training Committee recommends that in order to comply with the spirit of fostering greater economy and encouraging competition mandated by the various procurement laws, it is appropriate to curb the use of single quotations to matters under \$250.00 (or such other reasonable amount) but in no event may the threshold exceed 15% of the bid threshold established by the PHA in Section III.B.1 of this policy in accordance with N.J.S.A. 40A:11-6.1.

5. Telephone or Oral Quotations

Small Purchases Costing Between \$ _____ [the Petty Cash amount from Section 4] and \$ _____ [insert a dollar amount which shall not exceed 15% of the currently applicable N.J. Statutory bid threshold of \$17,500.00 or \$25,000.00 as per N.J.S.A. 40A:11-6.1].

If it is unreasonable or impractical to procure through sealed bids, these purchases may be made by obtaining price or rate quotations from an adequate number of qualified sources which shall not be less than two. Quotations may be oral so long as careful written documentation is

maintained and kept as a public record. The documentation shall detail all relevant factors including at a minimum, the names, addresses, and/or telephone numbers of the offerors and persons contacted, and the date and amount of each quotation. The award shall be made to the offeror providing the lowest acceptable quotation, unless justified in writing based on price and other specified factors, such as for architect-engineer contracts. If non-price factors are used, they shall be disclosed to all those solicited.

Source: Adapted from MPP Sec. III-B- 4, 24 CFR 85.36.

Comment: See Comment to Section 6 below.

6. Written Quotations

Small Purchases Costing Between \$ _____ [Insert Maximum amount from Section 5 above which shall not exceed 15% of the currently applicable N.J. Statutory bid threshold of \$17,500.00 or \$25,000.00 as per N.J.S.A. 40A:11-6.1] and \$17,500.00 [or \$25,000.00, as applicable] and N.J. Statutorily Exempt Purchases Up to \$100,000.00.

This section applies to procurement costing between \$ _____ (the maximum from Section 5 above) and the bid threshold established by the authority in accordance with N.J.S.A. 40A:11-3 which is currently \$17,500 (or \$25,000 if the purchasing agent is qualified pursuant to N.J.S.A. 40A:11-9). It also applies to procurement costing between the bid threshold and \$100,000.00 which are exempt from the New Jersey statutory bidding requirements pursuant to N.J.S.A. 40A:11-5. If it is unreasonable or impractical to procure through sealed bids, these purchases may be made by obtaining price or rate quotations from at least two sources. Under this section quotations must be in writing. Adequate documentation must be made of the procurement. The award shall be made to the offeror providing the lowest acceptable quotation, unless justified in writing based on price and other specified factors, such as for architect engineer contracts. If non-price factors are used, they shall be disclosed to all those solicited.

Source: Adapted from MPP Sec. III-B-3; N.J.S.A. 40A:11-4; and N.J.S.A. 40A:11-5, 40A:11-6.1; Opinion of Brigid Bohan, Esq. Chief Counsel, HUD as contained in 12/11/91 Memo to John P. Delleria

Comment: Note that all of the amounts in Section 4, 5, and 6 are discretionary except the \$17,500.00/\$25,000.00 and \$100,000.00 maximums provided for in Section 6. This model differs from the MPP in that Section 4 limits the use of single source quotations to purchases under 15% of the New Jersey bid threshold.

Note that while N.J.S.A. 40A:11-6.1a requires that a PHA obtain “two competitive quotations, if practicable,” the HUD MPP provides that “three offerors shall be solicited to submit price quotations” but does not provide that you must actually obtain the quotes from those solicited. As such, this provision has been adopted to provide that at least two quotations be obtained before the award is made. Of course, PHAs are encouraged to obtain as many quotes as is feasible under the circumstances.

These provisions further differ from the MPP in that they provide two small purchase thresholds: one for at least two telephone or oral quotes and another for written quotations. PHA's may adopt their own threshold small purchase amounts consistent with the principles of open competition and the PHA's needs and experiences.

Effective with the 1999 revisions to N.J.S.A. 40A:11-6.1 New Jersey now provides for competitive purchasing for all matters (except for professional services) which cost 15% or more of the bid threshold adopted by the agency. This is consistent with the HUD requirement that all procurement be conducted in a manner providing full and open competition. Pursuant to the Federal Act, professional services and other N.J. statutorily exempt matters pursuant to N.J.S.A.40A:11-5 are not exempt from competition, but rather, are subject to either competitive proposals (Section III(D)) when the cost exceeds \$100,000.00 or the small purchase procedures set forth above, as per the specific threshold amounts.

It must be emphasized that the fact that the New Jersey statute exempts a matter (e.g. professional services) from public bidding and the Act provides for small purchase procedures, does not mean that an Authority can use sole source procurement for such purchases. An Authority is obligated to conduct the procurement in a manner providing "full and open competition" (Act 85.36 (c) (1)). The foregoing Small Purchase Procedure sample clauses provide minimal compliance with the principle of open competition. It should also be emphasized that while the Act was amended to permit small purchase procedures up to \$100,000.00 there is nothing to prevent an Authority from imposing a lower threshold where it would be appropriate to insure greater competition and value. Accordingly, even for statutorily exempt matters below \$100,000.00, Authorities should consider using a lower threshold amount and utilizing the competitive proposal system outlined in Section III(D) below.

The HUD memo cited as a source specifically addresses professional services in New Jersey but by analogy applies to all New Jersey statutory bidding exceptions contained in N.J.S.A. 40A:11-5.

C. PUBLICLY ADVERTISED SEALED BIDS

1. Conditions For Use

The method of sealed bids shall be used for all matters which exceed the bid threshold sum of \$17,500.00 (or \$25,000.00 as per N.J.S.A. 40A:11-9 or the amount set in accordance with N.J.S.A. 40A:11-3a.) which are not exempt from bidding under New Jersey law as provided for in N.J.S.A. 40A:11-5, the Emergency purchases and contracts exceptions addressed in N.J.S.A. 40A:11-6 and the optional Competitive Contracting Exceptions set forth in N.J.S.A. 40A:11-4.1 Those matters which are exceptions under those provisions (e.g. professional services, extraordinary unspecifiable services, insurance and emergency procurement) shall be procured through either the competitive proposal method (where they exceed \$100,000.00) as provided for in Section III D of this Statement or the Small Purchase Procedures (for procurement up to \$100,000.00) under Section III B 4

or the Competitive Contracting Provisions of N.J.S.A.40A:11-4.1 and Section III(E) of this Policy.

Source: Act Sec.(d)(2) and MPP Sec.III-C-1; N.J.S.A. 40A:11-4, 11-4.1 & 11-5.

Comment: While the Federal Act permits the PHA to choose between bidding and competitive proposals based upon certain standards, the New Jersey statute does not. It specifically mandates that procurement shall be made by public advertising for bids and bidding except for specific subject matters set forth in N.J.S.A. 40A:11-4.1 and 11-5 and N.J.S.A. 40A:11-6. Since the New Jersey statute is stricter in this regard than the Federal Act, it supersedes the Federal Act. Accordingly, except for those subjects specifically excluded from bidding in N.J.S.A. 40A:11-4.1, 11-5 and 11-6, PHA's must utilize the public bidding procedure for items costing in excess of \$17,500.00 (or \$25,000.00 for qualified purchasing agents.)

2. Advertisement and Solicitation of Bids

a) Invitation For Bids

An invitation for bids shall be issued including specifications and all contractual terms and conditions and documents applicable to the procurement, including a statement that award will be made to the lowest responsible and responsive bidder whose bid meets the requirement of the invitation for bids. The invitation for bids shall state the time and place for both the receipt of bids and public bid opening. Bidders shall be given as much time as possible in which to prepare and submit bids. Wherever practicable they shall be given no less than fifteen days. In no event shall bidders be provided less than ten days to prepare and submit bids.

b) Advertisement

The invitation for bids shall be advertised in a official newspaper sufficiently in advance of the date fixed for receiving the bids to promote competitive bidding, but in no event less than ten (10) days prior to such date. Responses to such

notices shall be honored to the maximum extent possible. Invitations for bids may be mailed to potential vendors where vendor lists are available. However, no vendor shall receive an invitation to bid or the applicable specifications prior to the publication of the invitation in a official newspaper.

c) Amendments to Bid Documents

Amendments to the invitations to bid, advertisement, specification or other bid document must be in writing indicating the number and issue date of the document it amends and be noted in the PHA register or log. For contracts for other than construction work a copy of the amendment shall, no later than five days (excluding weekends and holidays) prior to the bid opening, be published in an official newspaper and shall be provided by certified mail, certified facsimile or by a delivery service with certification of receipt, to each prospective bidder who received the bid package or submitted a bid. For contracts for construction the aforesaid notice period is seven days (excluding weekends and holidays) but the notice need not be published in an official newspaper . If an amendment needs to be issued just before the scheduled bid opening date, the bid opening shall be postponed for an adequate period of time to comply with the aforesaid notice requirements and to permit potential bidders to fully analyze the change and to submit timely bids. Failure of the PHA to comply with this section shall require the re-advertisement of bids.

For Construction contracts the bidder must submit an acknowledgment by the Bidder of all changes or revisions on a form to be prepared by the PHA. The failure to submit the form with the bid shall render it unresponsive and it shall be rejected. See N.J.S.A. 40A:11-23.1 and Section V.D.3 below.

Source:

Subpara. (a) MPP Sec. III-C-2, Sec. II-B-3 and Sec III-C-2; N.J.S.A. 40A:11-23 (as amended eff. Jan. 1998); Act Sec. (d) (2) (i) (A) and (ii) (A) (B). Subpara. (b) N.J.S.A. 40A:11-23. Subpara. (c) N.J.S.A. 40A:11-23, 11-23.1 and HUD Handbook 7460.8 Rev. 1 Sec. 4-10.

3. Bid Opening and Award

- a) All purchase contracts or agreements requiring public advertisement for bids shall be awarded to the lowest responsible bidder. Bidders may be disqualified in accordance with Section III (C)(4) below.
- b) No bids shall be received after the time designated in the advertised invitation for bids.
- c) All sealed bids shall be opened publicly in the presence of at least one witness. If the published specifications provide for the receipt of bids by mail, those bids which were mailed to the contracting unit shall be sealed and shall only be opened for inspection at such time and place as all bids received are unsealed and announced. The purchasing agent or his designee shall publicly receive all bids, proceed to unseal them, and publicly announce the contents in the presence of any bidders (or their representatives) who are present, and shall also tabulate and record the prices and terms of the bids, and report said tabulation to the Board of Commissioners of the PHA for its action.
- d) All bids received shall be time-stamped, but not opened, and shall be stored in a secure place until the time of bid opening. The time-stamp on each sealed bid shall be dispositive of and prima facie evidence of the time of its receipt by the PHA.
- e) A bidder may, of right and without penalty, withdraw its bid in written or telegraphic form at any time prior to the opening and unsealing of bids, provided that any mailed or telegraphic withdrawal over the bidder's signature is placed in the mail and postmarked prior to the time set for the bid opening.
- f) If equal low bids are received from responsible bidders, award shall be made by drawing lots or similar random method, unless in accordance with New Jersey law, otherwise stated in the invitation for bids. Said awards shall be reviewed by and subject to the opinion of counsel to the PHA, and are further

subject to Bidder's submission of proper evidences of insurance, bonding, etc. If set forth in the bid specifications, where two or more responses offer equal prices and are the lowest responsible bids or proposals, an award may be made to the vendor whose response, in the discretion of the PHA is most advantageous, price and other factors considered. In such a case the award resolution or purchase order documentation shall explain why the vendor selected is the most advantageous.

- g) Contracts arising from the bids shall be awarded by the PHA's Board of Commissioners. Said awards shall be reviewed by and subject to the opinion of counsel to the PHA, and are further subject to Bidder's submission of proper evidences of insurance, bonding, etc.
- h) When required by the bid plans and specifications, the following requirements shall be considered mandatory items to be submitted at the time specified by the PHA for the receipt of bids; the failure to submit any one of the mandatory items shall be deemed a fatal defect that shall render the bid proposal unresponsive and that cannot be cured by the governing body;
- A guarantee to accompany the bid;
 - A consent of surety;
 - A statement of corporate ownership pursuant to Section VI(D) herein and N.J.S.A. 52:25-24.2;
 - A listing of subcontractors pursuant to Section III(C)(4) herein and N.J.S.A. 40A:11-16;
 - A bidder's acknowledgment on the form addressed under Section V(D)(3)a herein, of receipt of any notice, revisions or addenda to the advertisement or bid documents.
 - Any required Contractor's Certification of Registration in accordance with N.J.S.A. 34:11-56.48
- i) The Board of Commissioners of the PHA shall award the contract or reject all bids or take such other action as may be authorized by Federal and State law within such time as may be specified in the invitation to bid, but in no case more than sixty (60) days (except that the bid of any bidders who consent thereto, at the request of the PHA, may be held for consideration for such longer period as may be agreed) in accordance with N.J.S.A. 40A:11-24.

- j) Unsuccessful bidders shall be notified of the contract award within ten (10) days of awarding same.
- k) A PHA may reject all bids for those reasons set forth in Section III(I)(2) below in accordance with N.J.S.A. 40A:11-13.2.

Source:

- Subpara. a) MPP Sec. III-C-2 and N.J.S.A. 40A:11-6.1
- Subpara. b) N.J.S.A. 40A:11-23
- Subpara. c) MPP Sec. III-C-3; N.J.S.A. 40:11:23, and Act Sec. (d)(2)(ii)(C)
- Subpara. d) MPP Sec. III-C-2
- Subpara. e) MPP Sec. III-C-2
- Subpara. f) MPP Sec. III-C-3, N.J.S.A. 40A11-6.1
- Subpara. g) Implicit rather than, explicit in the MPP and the Act
- Subpara. h) N.J.S.A. 40A:11-23.1 & 23.2
- Subpara. i) MPP Sec. II-B-6
- Subpara. k) N.J.S.A. 40A:11-13.2

4. Disqualification of Bidders

In accordance with N.J.S.A. 40A:11-4 and Section IV(A)(2) of this Policy the PHA may, by resolution disqualify a bidder if it finds that it has had prior negative experience (as defined by said statute) with the bidder. In such circumstances, PHA legal counsel shall be consulted before initiating the disqualification process in accordance with N.J.S.A. 40A:11-4.

5. Bidding Requirements For Construction Contracts for Certain Kinds of Work

a) Public Works Contractor Registration Act

PHAs must comply with N.J.S.A. 34:11-56.48 which requires that all contractors, subcontractors and sub-subcontractors register with the Department of Labor prior to bidding or engaging on certain public works contracts that exceed the prevailing wage threshold. The prevailing wage threshold is \$2000.00 for PHA's. Under the statute, "public works projects" are any construction, reconstruction, demolition, alteration, repair or maintenance of a public building regularly open to and used by the general public or a public institution. PHA legal counsel should be consulted to determine if a particular project is subject to these requirements.

Source: N.J.S.A 34:11-56.48 et seq.

b) Construction Contracts which include Certain Kinds of Work

This section pertains only to construction contracts wherein the contract documents contain plans or specifications including the following categories of work:

- (a) plumbing/gas fitting and kindred work;
- (b) steam power plants/steam and hot water heating and ventilating apparatus and kindred work;
- (c) electrical work;
- (d) structural steel and ornamental iron work.

A. In the event work is to be performed on the contract within one or more of the above referenced categories and is to be performed by a subcontractor to the bidder, the bidder must complete the relevant portion of the bid form by specifically identifying (by exact name and address) each subcontractor that will perform work in any of the listed trade categories. In the event that work is to be performed in the listed categories by the bidder's own qualified licensed in-house employees on the bidder's payroll, the bidder shall note "in-house" as to any such category. If the scope of the work under the contract does not involve any of the listed trade categories, the bidder shall note "none" as to any such category.

B. Whenever a bid sets forth more than one subcontractor for any of the specialty trade categories (a) through (d) above, the bidder shall submit to the PHA a certificate signed by the bidder listing each subcontractor named in the bid for that category. The certificate shall set forth the scope of work for which the subcontractor has submitted a price quote and which the bidder has agreed to award. The certificate shall be submitted to the PHA with the list of subcontractors and may take the form of a single certificate listing all subcontractors or, a separate certificate for each subcontractor. If a bidder fails to submit the certificate to the PHA the contract shall be awarded to the next lowest responsible bidder.

- C. The bidder must be prepared to demonstrate that each of the listed and identified subcontractors are qualified to perform the specific work for which they are listed on the bid form; and each such subcontractor shall separately complete and submit a Qualification Questionnaire as to its trade category. A bidder shall not be permitted to change or substitute unlisted unidentified subcontractors for listed identified subcontractors, nor to change or substitute in-house personnel for listed identified subcontractors (or vice versa) after award of contract.
- D. A bidder will be strictly accountable for proper and timely performance of work by its designated listed subcontractors. Separate provisions relating to the bonding of such designated listed subcontractors is provided herein at III-C-8d.
- E. All payments required to be paid under a contract for work and materials to be supplied by one of the listed subcontractors shall, upon certification of the Contractor of the amount due the subcontractor, be paid directly to the subcontractor

Source: N.J.S.A. 40A:11-16 (as revised, effective April, 1998)

Comment: Section 4A, 4B, 4D and 4E are based upon the referenced statute. Section 4C, which requires that all subcontractors must complete a Qualifications Questionnaire is a recommended approach for PHAs to confirm that the subcontractor is qualified to perform the work. The provision is implicit in the statute which provides that "... subcontractors shall be qualified in accordance with this act." The requirement that identified subcontractors may not be substituted after the award of the bid is included to prohibit the bidder from substituting less qualified or less costly subcontractors after the award is made.

Any of the foregoing provisions which are adopted by the Housing Authority must be included in the bid specifications to be completed by the bidder.

6. Mistakes in Bids and Withdrawal of Same

- a) Correction or withdrawal of inadvertently erroneous bids may be permitted, where appropriate, before bid opening by written or telegraphic notice received in the office designated in the invitation for bids prior to the time set for bid opening. After bid opening, corrections in bids shall be permitted only if the bidder can show by clear and convincing evidence that a mistake of a non-judgmental character was made, the nature of the mistake, and the bid price actually intended. A low bidder alleging a non-judgmental mistake may be permitted to withdraw its bid if the mistake is clearly evident on the face of the bid document or the intended bid is unclear, or the bidder submits convincing evidence that a mistake was made.
- b) All decisions to allow correction or withdrawal of bid mistakes shall be supported by a written determination signed by the Contracting Officer. After bid opening, no changes in bid prices or other provisions of bids prejudicial to the interest of the PHA or fair competition shall be permitted.

Source: MPP Sec. III-C-4

Comment: The HUD Handbook 7460.8 Sec. 4-15 should be consulted for specific provisions with respect to corrections to bids.

7. Waivers

- a) **No Waivers In General**
PHA's failure to enforce any term, condition, requirement or provision of any contract shall not be deemed to have created a waiver thereof.
- b) **Waiver of Minor Insubstantial Bid Irregularities**
The Board of Commissioners may, upon recommendation of the Contracting Officer, waive or permit a bidder to cure minor, insubstantial or inconsequential bidding irregularities such as

matters of form rather than substance or matters which do not prejudice other bidders. All irregularities shall be referred to the PHA's legal counsel on a case by case basis for a determination as to whether a waiver or cure is permissible in accordance with applicable laws and regulations.

Source: HUD Handbook 7460.8 Rev. 1 Sec. 4-15, New Jersey Case Law.

Comment: PHA's should refer to Handbook Section 4-15 for specific examples of waivable or curable bid defects.

8. Negotiated Contracts/Award to Single Bidder

In the event the PHA has publicly advertised for bids on two (2) occasions, and (a) has received no bids in response on both occasions, or (b) the bids have on both occasions been rejected by the PHA's Board of Commissioners by reason of the fact that they are not reasonable as to price on the basis of cost estimates prepared by the PHA prior to the advertising therefore, or because they were not independently arrived at, or (c) on one occasion no bids were received pursuant to (a) and on one occasion all bids were rejected pursuant to (b), in whatever sequence; any contract or agreement may then be negotiated and awarded by two-thirds ($\frac{2}{3}$) affirmative vote of the PHA's Board of Commissioners; provided however that:

(i) a reasonable effort is first made by the Contracting Officer to determine that the same or equivalent materials, at a cost lower than the negotiated cost, are not available from any agency or authority of the United States, the State of New Jersey or the county, or any municipality in close proximity to the PHA; and

(ii) the terms/conditions/restrictions/specifications contained in the negotiated contract are not substantially different from those which were the subject of the competitive publicly advertised bidding; and

(iii) any minor amendment or modification of any term, condition, restrictions, or specifications which were the subject of the competitive publicly advertised bidding is stated in the resolution awarding such contract; and

(iv) provided further, that if on the second occasion the bids are rejected as unreasonable as to price, the Contracting Officer shall notify each responsible bidder submitting bids on the second occasion of its intention to negotiate, and afford each such bidder a reasonable opportunity to negotiate, but the PHA's Board of Commissioners shall not award such contract unless the negotiated price is lower than the lowest rejected bid price submitted on the second occasion by a responsible bidder, is the lowest negotiated price offered by any responsible bidder and is a reasonable price for such work, materials, services or goods; and

(v) provided further that in such event a cost or price analysis and HUD approval shall be prepared by the Contract Officer in conformity with Sec. III(G) below.

Source: N.J.S.A. 40A:11-5; MPP Sec. III-G-5; Act Sec. (d)(4)(i) and (ii) and Sec. (f)

Comment: This provision is adopted from N.J.S.A. 40A:11-5 which is similar to but stricter than, the noncompetitive procurement provisions contained in 24 CFR 85.36 (d)(4)(i)(D) as it requires that the PHA make at least two attempts to bid the matter. Since all of the conditions of the Federal requirement must also be present to implement the stricter State provision, the State provision has been adopted. Subpara. (v) is an added requirement of the Federal provision.

9. Bonds

a) Bid Bond/Consent of Surety

Every bid for contracts other than construction contracts which are specifically provided for in Section (c) below, in excess of the bid threshold [Note: PHA may insert its own amount here] to be awarded by the PHA must be accompanied by a bid guaranty payable to the PHA which shall not be less than ten (10%) percent of the amount of the bid (with a maximum cap of \$ 20,000) and may be in the form of a certified or cashier's check payable to the order of the PHA, or a bid bond for a like sum executed by a surety company authorized to do business in the State of New Jersey, which surety company is approved and listed in the Federal Department of Treasury List Circular Number

570, Part II, (hereinafter: "Approved Treasury List") as the same may later be modified and supplemented by the United States Government. Surety companies which do not appear on this list are not acceptable, and the Purchasing Officer may at the time of bid opening reject any bids containing a bid bond or consent of surety issued by a surety company not appearing on said list.

In addition to the above bid guaranty, each bid must be accompanied by an appropriate Consent of Surety (issued by a surety company qualified to do business in the State of New Jersey and appearing on the above referred to Treasury Approved List) binding itself to become surety for the full and faithful performance of the contract in an amount equal to one hundred (100%) percent of the contract price and for the protection of all persons furnishing materials or labor for fulfilling the contract.

Source: MPP Sec. III-C-5; N.J.S.A. 40A:11-21 and 11-22; Act Sec.(h) (i), N.J.S.A. 2A:44-143 &144.

Comment: This section and the one that follows are permissive as neither federal nor state law require bonds for projects costing less than \$100,000.00. Note that N.J.S.A. 40A:11-21 and 22 require that bid guarantees and Certificates of Surety (Consent of Surety) be submitted on all construction contracts over \$100,000.00. With respect to other contracts, since it is in the best interest of a PHA that it protect itself with adequate security, it is strongly suggested that this provision or one like it be adopted. Note that the threshold amount above for which the Authority requires bonds should be determined by balancing the needs for adequate security against the limiting effect that bonding requirements may have on competition to the extent that small or new businesses may lack experience or funds to obtain the bonds.

b) Performance/Payment Bond

A successful low bidder on any contract in excess of Seventeen and Five Hundred (\$ 17,500.00) [Note: PHA may insert its own amount here] will be required to furnish and pay for satisfactory Performance and Payment Bond or Bonds in an amount equal to 100% of the contract price. This requirement shall apply to contracts for purchases of materials, supplies and goods, as well as to contracts for all forms of construction. All bonds must be issued by surety companies on the

Treasury Approved List (See 8(a) above). On each bond, the rate of premium charged, the current power of attorney for the person who signs for any surety company shall be attached to such bond.

Source: N.J.S.A. 40A:11-21 and 22 MPP Sec. III-C-5; Act Sec. (h)(2)(3), N.J.S.A. 2A:44-143 & 144.

Comment: See Comment to Subpara. (a) above.

c) Bonds for Certain Construction Contracts

i. For construction contracts exceeding \$100,000.00 other than those specified in (c) ii and iii below, contractors shall be required to submit the following:

(a) a bid guarantee from each bidder equivalent to 5% of the bid price; and

(b) a performance bond for 100% of the contract price; and

(c) a payment bond for 100% of the contract price.

ii. In the case of construction of conventional development projects funded pursuant to the US Housing Act of 1937, the contractor shall be required to submit the following:

(a) a performance and payment bond for 100% of the contract price; or

(b) a 20% cash escrow; or

(c) a 25% irrevocable letter of credit.

or Capital Funds

iii In the case of construction under the CIAP and Comprehensive Grant Program funded pursuant to the US Housing Act of 1937, for any contract over \$25,000.00, the contractor shall be required to submit the following:

A bid guarantee from each bidder equivalent to 5% of the bid price; and one of the following:

(a) a performance and payment bond for 100% of the contract price; or

- (b) separate performance and payment bonds, each for 50% or more of the contract price; or
- (c) a 20% cash escrow; or
- (d) a 25% irrevocable letter of credit

Source: MPP Sec. III-C-5

d) Performance/Payment Bonds for Construction Sub-Contracts of Certain Kinds of Work

This section pertains only to construction contracts wherein the contract documents contain plans or specifications for the following categories of work:

- plumbing/gas fitting and kindred work;
- steam power plants/steam and hot water heating and ventilating apparatus and kindred work;
- electrical work;
- structural steel and ornamental iron work

In the event work to be performed under the contract fall within one or more of the above referenced categories and is to be performed by a subcontractor of the bidder, a Performance Bond shall be furnished to the PHA from a surety company on the Treasury Approved List by the bidder on the behalf of himself and/or all of the subcontractors, or by each respective subcontractor, or by any combination thereof which results in performance security equaling, but not exceeding the total amount bid. In the event the work to be performed in the above designated trade categories is to be performed by the bidder's own in-house employees, then the Performance and Payment bonds need only be furnished by the bidder in the total amount of the Contract.

Source: N.J.S.A. 40A:11-16

D. COMPETITIVE PROPOSALS PURSUANT TO FEDERAL REGULATIONS

1. Conditions for Use

- a) This method applies only to situations where the PHA has first determined that conditions are not appropriate for sealed bids such as: the necessity of evaluating technical criteria; where detailed specifications cannot be drawn; or for professional services contracts where the PHA will consider factors other than cost. [Note that this method differs from the optional New Jersey Competitive Contracting provisions pursuant to N.J.S.A. 40A:11-4.1 set forth below in Section III(E) below.] Once such a determination has been made the Competitive Proposal method is limited to procurement of the following goods and services:
- (i) Items costing more than \$100,000.00 in the aggregate (or such lower threshold as may be set by the Authority) which are exempt from public bidding and bidding requirements by virtue of N.J.S.A. 40A:11-5 such as professional services, extraordinary unspecifiable services, insurance and certain equipment repair; or
 - (ii) Emergency Services and Contracts pursuant to N.J.S.A. 40A:11-6 unless the provisions for Non-competitive Proposals contained in Sec. E apply; or
 - (iii) Turnkey projects.

Where the conditions above do not apply, the Sealed Bids, optional New Jersey Competitive Contracting method or Non-competitive Procurement method as appropriate, will be used.

- b) Procurement of goods and services which cost more than the New Jersey bid threshold (N.J.S.A. 40A:11-3) and less than \$100,000.00 which are exempt from the Statutory bidding requirement by virtue of N.J.S.A. 40A:11-5 may be made in accordance with the Small Purchase procedure contained in Section III B 4 above or in accordance with the optional New

Jersey Competitive Contracting method set forth in Section E below.

Source: N.J.S.A. 40A:11-5 Act (d)(3)
Opinion of HUD Chief Counsel Brigid Bohan in 12/11/91 Memo to John P. Delleria

Comment: This provision incorporates Federal and New Jersey law. The discretion which is given PHAs in the Act to utilize the Competitive Proposal method of procurement is restricted by N.J.S.A. 40A:11-4 which requires public bidding for all procurement exceeding the statutory bid threshold except for those subjects specifically exempted pursuant to N.J.S.A. 40A:11-5 and 6. Since the "stricter rule applies" the Statute takes precedence and limits the competitive proposal method to those statutorily exempt situations. The effect on the process is not as limiting as it may appear because the subjects which are statutorily exempt from bidding would also be appropriate for the competitive or non-competitive methods contained in the Act.

It should be noted that PHAs are not prohibited from bidding those purchases which are statutorily exempt from bidding, and in some cases, a public bid may be the best way to ensure open and adequate competition as required by federal law. Accordingly, where it is feasible to bid exempt purchases, the PHA should do so.

Subpara. (b) addresses procurement actions which are exempt from bidding pursuant to the Statute but which are to be made by small purchase procedures under the Act. See Comment to Statement Section II B 4 above.

2. Solicitation

Solicitation shall be from an adequate number of sources but not less than three. The request for proposals (RFP) shall clearly identify the relative importance of price and other evaluation factors and subfactors, including the weight given to each technical factor and subfactor. A mechanism for fairly and thoroughly evaluating the technical and price proposals shall be established before the solicitation is issued. Proposals shall be handled so as to prevent disclosure of the number of offerors, identity of the offerors, and the contents of their proposals. The proposals shall be evaluated only on the criteria stated in the request for proposals.

3. Evaluation Criteria

The PHA shall evaluate the proposals consistent with the evaluation criteria set forth in the RFP and the written plan for evaluating technical and cost proposals and the review process established prior to the issuance of the RFP. The evaluation criteria should be unique to the type of procurement sought and may include the following: demonstrated understanding of the requirement; appropriateness of the technical approach in the proposal; quality of the work plan; technical capabilities; management plan and demonstrated experience in performing similar work. Evaluations of the technical proposal shall be documented in an evaluation report which ranks the offerors by technical merit, using point scores or similar methodology. A narrative must also accompany the scores to explain how they were arrived at. Evaluations should comply with the guidelines provided in HUD Handbook 7460.8 Sec. 4-20.

4. Negotiations

Negotiations for fair and reasonable compensation, shall be conducted with offerors (only on contracts which are qualification based and price is not a selection factor) who submit proposals determined to have a reasonable chance of being selected for award, based on evaluation against the technical and price factors as specified in the RFP. Such offerors shall be accorded fair and equal treatment with respect to any opportunity for negotiation and revision of proposals. The purpose of negotiations shall be to seek clarification with regard to and advise offerors of the deficiencies in both the technical and price aspects of their proposals so as to assure full understanding of and conformance to the solicitation requirements. No offeror shall be provided information about any other offeror's proposal, and no offeror shall be assisted in bringing its proposal up to the level of any other proposal. Offerors shall not be directed to reduce their proposed price to a specific amount in order to be considered for award. A common deadline shall be established for receipt of proposal revisions based on negotiations.

Alternatively, the PHA may utilize a proposal procedure where price is a selection factor, in which event price negotiations between the PHA and the offeror shall not be utilized.

The specific provisions of HUD Notice PIH 90-47 (PHA) dated September 25, 1990, (as it may later be modified amended or

supplemented) shall govern with regard to procurement of A/E and legal services.

5. Award

After evaluation of any proposal revisions, the contract shall be awarded to the responsible firm whose qualifications, price and other factors considered are the most advantageous to the PHA.

Source: MPP Sec. III-d; Act Sec. (D)(3); HUD Notice 90-47.

6. Notice Requirements

In the case of contracts awarded for professional service, extraordinary unspecifiable services [hereinafter EUS] insurance or certain repair service contracts under the exception to the bidding requirements contained in N.J.S.A. 40A:11-5, the PHA shall adopt a resolution stating the supporting reasons for the procurement without competitive bid. It shall also cause to be printed once in a newspaper authorized by law to publish its legal advertisements a brief notice stating the nature, duration, service and amount of the contract and that the contract and the resolution are available for public inspection at the PHA's offices.

Source: N.J.S.A. 40A:11-5

7. Extraordinary Unspecifiable Services [EUS]

This New Jersey statutory exception to the bidding requirements shall be narrowly construed in favor of open competition. These services are defined as specialized and qualitative in nature requiring expertise and extensive training and a proven reputation in the field of endeavor. To utilize this exception the need for such training and reputation must be critical to the undertaking and not merely the desire to have a reliable job performed. The services must be of such a qualitative nature that the performance of the services cannot be reasonably described by written specification. To utilize this exception, the contracting officer must file a certificate with the Board of Commissioners stating the necessity of procuring without bidding and shall also confirm that all of the requirements and conditions set forth in N.J.S.A. 40A:11-5 and N.J.A.C. 5:34-2 et seq. have been met.

Source: N.J.S.A. 40A:11-5; N.J.A.C. 5:34-2 et seq.

Comment: PHA's should consult N.J.A.C. 5:34-2.4 for acceptable and unacceptable EUS exceptions. Pursuant to the 1999 revisions to N.J.S.A. 40A:11-4, certain matters no longer qualify as extraordinary unspecifiable services.

8. Emergency Purchases and Contracts

Prior to procuring any goods or services pursuant to the competitive or non-competitive proposal methods as exceptions to the bidding requirements contained in N.J.S.A. 40A:11-6, the Contracting Officer shall confirm that all of the conditions contained in the N.J.A.C. 5:34-6.1 et seq. have been met.

Source: N.J.A.C. 5:34-6 et seq.

Comment: See Sec. III(F)(1) (b) for definition of acceptable Emergency.

9. Architectural/Engineering (A/E) Services

- a) Architect/engineer services in excess of \$100,000.00 may be obtained by either a competitive proposal method or qualifications-based selection procedure. Sealed bidding shall not be used to obtain architect/engineer services. Under qualifications-based selection procedures, competitors' qualifications are evaluated and the most qualified competitor is selected, subject to the negotiation of fair and reasonable compensation; price is not used as a selection factor under this method. Qualifications-based selection procedures (where price is not a selection factor) shall not be used to purchase other types of services even though A/E firms are potential sources of the services (e.g. services that may also be offered by non-licensed architects or engineers, such as: construction inspection, construction management, C.P.M. preparation or progress report reviews, etc.).
- b) For contracts under One Hundred Thousand (\$100,000), publicly advertised RFP's are not required, but at least three (3) qualified A/E firms must be contacted.
- c) For contracts in excess of One Hundred Thousand (\$100,000), public advertisement of RFP is required.

- d) In all cases, the provisions of HUD Notice PIH 90-47 (PHA) (dated September 25, 1990) and HUD Handbook 7460.8 REV 1 (Section 4-26) (dated January 1993) as said Notice and Handbook may be modified, amended or supplemented shall govern A/E procurement.

Source: MPP Sec. II-D-5, HUD Notice PIH 90-47 (PHA); Act Sec. (d) (3)(v); N.J.S.A. 40A:11-5, HUD Handbook 7460.8 REV. 1.

Comment: Subpara. (c) is recommended to encourage competition.

10. Professional Services Other Than A/E

Procurement of all professional services other than A/E Services (e.g., legal, audit or technical assistance services) shall be strictly governed according to the procedures and provisions set forth above in subsection III(D) and in HUD Handbook 7460.8 Rev. 1 dated January 1, 1993 as modified, amended or supplemented and Notice PIH 90-47(PHA) dated September 25, 1990. If both qualifications and price are utilized as the selection factors, such contracts shall be awarded to the responsible offeror whose proposal is most advantageous to the program, with price and other factors considered. The contract shall not exceed one year in duration except as provided for in N.J.S.A. 40A:11-15. Procurement of Legal Service Contracts shall comply with the standards of the HUD Litigation Handbook.

Source: Notice 90-47; N.J.S.A. 40A:11-5 and 11-15; Handbook 7460.8

E. NEW JERSEY COMPETITIVE CONTRACTING PROCEDURE

1. Conditions for Use

As an alternative to sealed bidding, where the cost exceeds the New Jersey bid threshold, this optional procurement method is available for those matters set forth herein. Where the cost does not exceed the sealed bidding threshold the matters may also be obtained by small purchase procedures, but where they do exceed the bid threshold, unless otherwise exempt from bidding pursuant to N.J.S.A. 40A:11-5(e.g. Professional Services), they must be obtained by sealed bid, or pursuant to this New Jersey Competitive Contracting procedure as they do not constitute extraordinary unspecifiable services:

- a) Purchase or licensing of proprietary computer software designed for PHA purposes, which may include hardware intended for use with the proprietary software. This subsection shall not be used for acquiring general purpose computer software or hardware;
- b) The hiring of a for-profit or a not for profit entity incorporated under N.J.S.A. 15A et seq. for those purposes set forth at N.J.S.A. 40A:11-4.1(b)
- c) Services performed by an energy services company, including the design, measurement, financing and maintenance of energy savings equipment or renovations, which result in payment derived, in whole or in part, from the sale of verified energy savings over the term of an agreement with a public utility or subsidiary, but not the provision or performance of the physical improvements that result in energy savings, provided that such savings are calculated pursuant to guidelines promulgated by the Board of Public Utilities and further provided that the Local Finance Board shall find that the terms and conditions of any financing agreement are reasonable;
- d. Homemaker-home health services;
- e. Laboratory testing services;
- f. Emergency medical services;
- g. Contracted food services;
- h. Performance of patient care services by contracted medical staff at county hospitals, correctional facilities and long-term care facilities;

- i. Any good or service that is exempt from bidding pursuant to N.J.S.A. 40A:11-5:
- j. Concessions;
- k. The operation, management or administration of other services, with the approval of the Director of the Division of Local Government Services.

Source: N.J.S.A. 40A:11-4.1

2. Initiation of Process by Resolution and Administration

The governing body shall first pass a resolution authorizing the use of competitive contracting as a method of procurement. If the desired goods or services have previously been contracted for using competitive contracting then the original resolution shall suffice.

The process shall be administered by a purchasing agent qualified pursuant to N.J.S.A. 40A:11-9 or by legal counsel or an administrator of the PHA. Contracts must be awarded by resolution.

Source: N.J.S.A. 40A:11-4.3

3. Request for Proposal

Request for Proposal documentation shall include: all requirements deemed appropriate and necessary to allow for full and free competition between vendors; information necessary for potential vendors to submit a proposal; and a methodology by which the contracting unit will evaluate and rank proposals received from vendors.

Award shall be based on an evaluation and ranking which shall include technical, management and cost related criteria and may include a weighting of criteria, all developed to meet the specific needs of the PHA. The criteria shall not unfairly or illegally discriminate against or exclude otherwise capable vendors. When an evaluation criteria includes weighting of criteria, the PHA has the option of disclosing the weighting to be accorded each criterion to vendors prior to receipt of proposals. The methodology for awarding contracts

shall comply with rules and regulations adopted by the Director of the Division of Local Government Services.

During the proposal solicitation process no information, shall be relayed to any vendor which could confer an unfair advantage upon that vendor. Changes to proposal documentation shall be in writing and provided to all potential vendors who received the original proposal documentation.

All proposals and contract shall be subject to the provisions of N.J.S.A. 52:25-24.2 requiring submission of a statement of corporate ownership and the provisions of N.J.S.A. 10:5-31 concerning equal employment opportunity and affirmative action.

Source: N.J.S.A. 40A:11-4.4

4. Solicitation and Award

- a) At least twenty days prior to the date established for the receipt of proposals, a notice of the availability of the request for proposal documentation shall be published in the official newspaper of the PHA. The PHA shall promptly reply to any request by an interested vendor by providing a copy of the request for proposals and may charge a fee not to exceed the greater of the cost of reproducing the documentation or \$50.00.
- b) Proposals must include all the information required by the request for proposal. Failure to meet the requirements of the request for proposal may result in the disqualification of the vendor from further consideration. The provisions of the proposal **shall not** be subject to negotiation by the contracting unit.
- c) If at the time of solicitation, the PHA uses its own employees to provide the goods or services sought, the PHA shall comply with those provisions set forth in N.J.S.A. 40A:11-4.5
- d) Proposals shall be evaluated in accordance with the methodology set forth in the request for proposals. A report shall be prepared which evaluates the proposals and recommends award. The report shall list the names of all potential vendors who submitted a proposal and shall summarize the proposals of each vendor and rank vendors in order of evaluation, shall recommend the selection of a vendor or vendors, as appropriate, for a contract, shall be clear in the reasons why the vendor or vendors have been selected among others considered, and shall

detail the terms, conditions, scope of services, fees and other matters to be incorporated into a contract. The report shall 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 governing body shall have the right to reject all proposals for any reasons set forth in N.J.S.A. 40A:11-13.2. The report shall become part of the public record and reflect the final action of the Board of Commissioners.

- e) Award shall be made by Resolution within 60 days of the date fixed for receipt of proposals, except that proposals of any vendors who consent thereto, may, at the request of the PHA, be held for consideration for such longer period as may be agreed. Contracts shall be executed in accordance with N.J.S.A. 40A:11-14.

Source: N.J.S.A. 40A:11-4.5

5. Notice

The PHA shall publish a notice in the official newspaper summarizing the award of contract, which shall include but not be limited to, the nature, duration and amount of the contract, the name of the vendor and a statement that the resolution and the contract are on file and available for public inspection in the office of the PHA.

Source: N.J.S.A. 40A:11-4.5(g)

6. Duration of Contracts

Unless an exception is provided for under N.J.S.A. 40A:11-15 permitting a longer contract duration, contracts awarded by under this section by competitive contracting (pursuant to N.J.S.A. 40A:11-4.5) may be for a term not to exceed five years, but shall be subject to the rules concerning availability of funds pursuant to N.J.S.A. 40A:11-3 and 15.

Source: N.J.S.A. 40A:11-4.2 and 11-4.5(h)

F. NONCOMPETITIVE PROPOSALS

1. Conditions for Use

Procurement shall be conducted competitively to the maximum extent possible. Procurement by noncompetitive proposals may be used only when the award of a contract is not feasible using small purchase procedures, sealed bids, or competitive proposals, and one of the following applies:

- a) The item is available only from a single source, based on a good faith review of available sources; or
- b) An actual or imminent emergency exists that seriously threatens the public health, welfare, or safety, or endangers property, or would otherwise cause serious injury to the PHA, as may arise by reason of a flood, earthquake, epidemic, riot, equipment failure, or similar event. In such cases, there must be an immediate and serious need for supplies, services or construction such that the need cannot be met through any other procurement methods, and the emergency procurement shall be limited to those supplies, services, or construction necessary to meet the emergency. The standard for emergency procurement under this and the competitive proposal method as an exception to bidding is not that which is acceptable for Emergency funding pursuant to CIAP Handbook 7485.1 but rather, must comply with the foregoing as well as conditions imposed by N.J.S.A. 40A:11-6 and N.J.A.C. 5:34-6.1 et seq. The contract may not be multiyear and must be of such limited duration as to meet only the immediate needs of the emergency; or
- c) HUD authorizes the use of noncompetitive proposals; or,
- d) After solicitation of a number of sources, competition is determined inadequate. For contracts which would otherwise be subject to the sealed bid requirement competition may only be determined inadequate in accordance with N.J.S.A. 40A:11-5(3)

2. Justification

Each procurement based on noncompetitive proposals shall be supported by a written justification for using such procedures. The justification shall be approved in writing by the Contracting Officer.

In addition, procurement pursuant to subparagraph (a) shall comply with N.J.A.C. 5:34-3.1 et seq. Procurement pursuant to subparagraph (b) shall comply with N.J.A.C. 5:34-6 et seq. Procurement in accordance with subparagraph (d) shall fully comply with the requirements of N.J.S.A. 40A:11-5(3).

3. Price Reasonableness

The reasonableness of the price for all procurement based on noncompetitive proposals shall be determined by performing a cost analysis, as described in paragraph III H below.

Source: MPP Sec. III-E; Act Sec. (d)(4); N.J.S.A. 40A:11-5; N.J.A.C. 5:34-6 et seq.

Comment: As set forth in 40A:11-6.1 the 1999 revisions to the Local Public Contracts Law permits award of Extraordinary Unspecifiable Services contract without competitive quotations where after a documented effort to secure competitive quotations, the contracting agent determines in writing that solicitation of competitive quotations is impracticable. This corresponds to the existing HUD provisions set forth herein.

G. PROCUREMENT UNDER STATE CONTRACT

1. Conditions for Use

This section may be used where the PHA has solicited and received at least three quotations on materials, supplies or equipment for which a State contract has been issued pursuant to N.J.S.A. 40A:11-12 and the lowest responsible quotation is at least 10% less than the price the contracting unit would be charged for the identical materials, supplies or equipment, in the same quantities, under the state contract.

2. Board Approval and Filing Requirements

Prior to awarding a contract under this method, the PHA Board of Commissioners must adopt a resolution approving same by affirmative vote of two-thirds of the Board. A copy of the purchase order, the

requisition for purchase order, if applicable, and documentation identifying the price of materials, supplies or equipment under the State contract and the State contract number shall be filed with the Director of the Division of Local Government Services in the Department of Community Affairs (the "Director") within five working days of the award. The PHA shall provide any additional material requested by the Director in accordance with N.J.S.A. 40A:11-5(4).

Source: N.J.S.A. 40A:11-5(4)

Comment: This provision was adopted as part of the 1999 revision to the Local Public Contracts Law. Note that the statute contains a provision which requires that the Director of the Division of Local Government Services determine the impact of such contracts on the State procurement process and that the Director may adopt rules to limit the use of this process after considering the impact on State and local contracting and considering the extent to which this process is consistent with the purposes of the public contracting laws.

H. COST AND PRICE ANALYSIS

1. **General**

A cost or price analysis shall be performed for all procurement actions, including contract modifications and change orders. The method of analysis shall be determined as follows. The degree of analysis shall depend on the facts surrounding each procurement.

2. **Submission of Cost or Pricing Information**

If the procurement is based on noncompetitive proposals, or when only one offer is received or for other procurement as deemed necessary by the PHA (e.g. when contracting for professional, consulting, or architect/engineer services) the offeror shall be required to submit:

- a) a cost breakdown showing projected costs and profit; or
- b) commercial pricing and sales information sufficient to enable the PHA to verify the reasonableness of the proposed price as a catalog or market price of a commercial product sold in substantial quantities to the general public; or
- c) documentation showing that the offered price is set by law or regulation.

3. Cost Analysis

A Cost Analysis is required when a bidder/offeror is required to submit a cost breakdown as part of its proposal such as in the following cases:

- a) The competitive method of contracting is used and the PHA requests cost proposals broken down by element of cost (e.g. acquisition of professional, consulting, architect/engineer services); or
- b) The PHA is negotiating a contract pursuant to the Non-competitive Procurement method as provided in Section III E of this Statement. The PHA must request a complete cost breakdown and use cost principles to establish a fair and reasonable price or established cost;
- c) The PHA negotiates a modification to any contract which changes the scope of work previously authorized and substantially impacts the price or estimated cost upwards or downwards. The PHA must request a cost breakdown of the contractor's proposed cost. Note: Modifications which change the work beyond the scope of the contract must be justified as a noncompetitive action in compliance with the Non-Competitive Procurement provisions contained in Section III F of this statement and N.J.A.C. 5:30-11.1 et. seq.

When a cost breakdown is submitted the PHA shall conduct a cost analysis of the individual cost elements in accordance with HUD Handbook 7460.8 Rev. 1 Section 4-35 et seq. and HUD Handbook 2210.18 which provides cost principles. The PHA shall have a right to audit the contractors books and records pertinent to such costs, and profit shall be analyzed separately. Costs shall be allowable only to the extent that they are consistent with applicable Federal cost principles (see 24 CFR 85.22) (for commercial firms, Subpart 31.2 of the Federal Acquisition Regulation, 48 CFR Chapter 1). In establishing a fair and reasonable profit, the PHA shall consider factors such as the complexity and risk of the work involved, the contractor's investment and productivity, the amount of subcontracting, the quality of past performance, and industry profit rates in the area for similar work.

A cost analysis is necessary for all sole source procurement or, if adequate price competition is lacking. Otherwise a price analysis may be used.

4. Price Analysis

A comparison of prices to determine the reasonableness of a bidder's price shall be used in all cases other than those described in III H 3 above (where cost analysis is mandated).

Source: MPP Sec. III-E; Act Sec. (d)(4) and (f); HUD Handbook 7460.8 Rev. 1 (1/93) Chapter 4.

I. CANCELLATION OF SOLICITATIONS

1. An invitation for bids, request for proposals, or other solicitation may be canceled before offers are due if: the PHA no longer requires the supplies, services or construction; the PHA can no longer reasonably expect to fund the procurement; proposed amendments to the solicitation would be of such magnitude that a new solicitation would be desirable; or similar reasons.
2. A solicitation may be canceled and all bids or proposals that have already been received may be rejected if: the goods or services are no longer required; ambiguous or otherwise inadequate specifications were part of the solicitation; the solicitation did not provide for consideration of all factors of significance to the PHA; the PHA wants to substantially revise the specifications; the lowest bid substantially exceeds the PHA's cost estimates or appropriation for the goods or services; the purposes or provisions or both of N.J.S.A. 40A:11-1 et seq. are being violated or the PHA decides to use the State authorized contract pursuant to N.J.S.A. 40A:11-12.
3. The reasons for cancellation shall be documented in the procurement file and the reasons for cancellation and/or rejection shall be provided upon request to any offeror solicited.
4. A notice of cancellation shall be sent to all offerors solicited and, if appropriate, shall explain that they will be given an opportunity to compete on any re-solicitation or future procurement of similar items.
5. If the Authority has determined that bids are unreasonable as to price based upon independent cost estimates then the Authority may cancel the bid in accordance with Section III C 8 of this Statement.

Source: MPP Sec. II-G-1 through 4.
Subpara. A: N.J.S.A. 40A:11-13.2 and MPP Sec. II-G-1 through 4.

J. COOPERATIVE PURCHASING

The PHA may enter into State and local intergovernmental agreements to purchase or use common goods and services without public bidding. The decision to use an intergovernmental agreement or conduct a direct procurement shall be based on economy and efficiency. If used, the intergovernmental agreement shall stipulate who is authorized to purchase on behalf of the participating parties and shall specify inspection, acceptance, termination, payment, and other relevant terms and conditions. PHAs are encouraged to use Federal or State excess and surplus property instead of purchasing new equipment and property whenever such use is feasible and reduces project costs.

The PHA may, without advertising for bids, purchase materials, supplies or equipment under contracts entered into on behalf of the State Division of Purchase and Property in the Department of Treasury.

Source: MPP Sec. II-H; Act Sec (B) (5) & (6) N.J.S.A. 40A:11-12 et seq. & 40A:11-11(5) & (6).

K. INSURANCE PROCUREMENT

1. Insurance costing less than the bid threshold (currently \$17,500 or \$25,000.00)in the aggregate in a single fiscal year shall be purchased in accordance with the small purchase procedures provided for in this Statement.
2. Insurance in excess of the bid threshold shall be purchased by sealed bids unless the PHA complies with all of the conditions of extraordinary unspecifiable services as provided in N.J.S.A. 40A:11-5(1)(m) and N.J.A.C. 5:34-2.1 et seq. in which case insurance may be acquired through the competitive proposal method. In each of the following cases exceptions apply to the bidding requirement:
 - a) At the option of the PHA general liability/fire/extended, Fidelity Bond and risk coverage may be purchased on a sole source, non-competitive basis if the carrier is one of those non-profit exempt entities (e.g. HARRG; HSP1, HAI) for which HUD has from

time to time waived the competitive bidding ACC (Sec. 305) requirement;

- b) Bidding is not required for flood insurance purchases through the National Flood Insurance Program;
- c) Bidding is not required for worker's compensation since rating is not competitive in New Jersey.

Source: N.J.S.A. 40A:11-5; N.J.A.C. 5:34-2.1 et seq.

Subpara. (a) HUD Notice PIH 88-2 (PHA) (issued 1/13/88);
Undated letter from General Deputy Asst. Dir.
Baugh (HUD) to HARRG; ACC Sec. 19.

Subpara. (b) and (c) HUD Handbook 7401.5 Chapter 12

Comment: New Jersey statute exempts Insurance from bidding only to the extent that the Extraordinary Unspecifiable Services exemption (N.J.S.A. 40A:11-5) applies. However, HUD has specifically exempted the above referenced exceptions as noted.

IV. CONTRACTOR QUALIFICATIONS AND DUTIES

A. CONTRACTOR RESPONSIBILITY/RESPONSIBILITY HEARING

1. Procurement shall be conducted only with responsible contractors, i.e., those who have the technical and financial competence to perform and who have a satisfactory record of integrity. Before awarding a contract, the PHA shall review the proposed contractor's ability to perform the contract successfully, considering factors such as the contractor's integrity (including a review of the List of Parties Excluded from Federal Procurement and Nonprocurement Programs published by the U.S. General Services Administration), compliance with public policy, record of past performance (including contacting previous clients of the contractor, such as other PHA's) and financial and technical resources.
2. A low bidder may be disqualified based upon the PHA's "prior negative experience" only in accordance with N.J.S.A. 40A:11-4.

No other low bidder deemed unqualified or non-responsible may be denied the award of a contract without first having had the opportunity to have a hearing on that issue. In the event the Contracting Officer in consultation with the PHA legal counsel, determines that the low bidder is or may not be qualified or responsible, he shall schedule a hearing of those issues before an open public meeting of the PHA's Board of Commissioners. The bidder shall be given written notice of the Contracting Officer's intentions and of the time and place of said hearing. Said notice shall be given to the bidders no less than the ten (10) days in advance of the hearing dates. Said notice shall advise the bidder that it shall be entitled to present witnesses and evidence in its behalf, to be represented by counsel of its choice and that the bidder may be examined by the PHA's counsel. The decision of the PHA's Board of Commissioners shall be embodied in a written Resolution which shall recite the factual and legal basis for its decision, which said decision shall be final and binding upon the bidder. A written copy of the Resolution memorializing the PHA Board's decision shall be given to the bidder promptly upon its completion.

Source: Act Sec. (b) (8); MPP Sec. IV-A; N.J.S.A. 40A:11-4 and New Jersey case law.

B. SUSPENSION AND DEBARMENT

Contracts shall not be awarded to debarred, suspended or ineligible contractors. Contractors may be suspended, debarred, or determined ineligible by HUD in accordance with HUD regulations (24 CFR Part 24) when necessary to protect the PHA in its business dealings, or pursuant to the debarment provisions of the New Jersey Statutes.

Source: MPP Sec. IV-B; See 24 CFR 85.35

C. NEW JERSEY PUBLIC WORKS CONTRACTOR REGISTRATION ACT

1. General

N.J.S.A. 34:11-56.48 et seq. requires that all contractors, sub-contractors and sub-subcontractors register with the Department of Labor prior to bidding or engaging on certain public works contract that exceed the prevailing wage threshold which is \$2000.00 for PHAs. Public works projects are any construction, reconstruction, demolition, alteration, repair or maintenance of a public building regularly open to and used by the general public or a public institution. The test of whether a building is regularly open to and used by the general public is whether the public has access to such buildings. General legal counsel should be consulted to determine if a particular building is a "public building" under the statute and specifications must include appropriate language with respect to same.

2. For all applicable projects a copy of the contractor registration must be submitted with the receipt of public bids. Failure to submit the mandatory form is a fatal defect which cannot be waived or cured and renders the bid proposal unresponsive

D. QUALIFIED BIDDERS' LISTS

Interested businesses shall be given an opportunity to be included on any pre-qualified bidder's lists that may be maintained by the PHA. Any lists of persons, firms, or products which are used in the procurement of supplies and services shall be kept

current and shall include enough qualified sources to ensure competition. Firms shall not be precluded from qualifying during the solicitation period. Solicitation mailing lists of potential contractors shall include, but not be limited to pre-qualified suppliers. The PHA shall not be required to maintain or utilize a "pre-qualification" policy.

Source: MPP Sec. IV-C, Act Sec.(C) (4).

Comment: This provision preempts N.J.S.A. 40A:11-25 & 26.

V. DURATION AND TYPES OF CONTRACTS, CONTRACT CLAUSES, AND CONTRACT ADMINISTRATION

A. DURATION OF CONTRACTS

All contracts for performing work or furnishing materials, supplies or services shall be in writing. Contracts for professional services pursuant to N.J.S.A. 40A:11-5 may be awarded for a period not exceeding 12 consecutive months. Contracts awarded pursuant to N.J.S.A. 40A:11-4.1 (N.J. Competitive Contracting) shall be awarded for up to five years unless 40A:11-15 permits a longer contract duration. All other purchases, contracts and agreements shall be made for a period not to exceed twenty four (24) consecutive months with the exception of those matters listed in N.J.S.A. 40A:11-15. The contract shall be signed by all parties within the time limit set forth therein which shall not exceed twenty-one (21) days (Sunday/Holidays excepted) after making the award, except that said parties may agree to extend the time limit set forth in the specifications beyond said twenty-one (21) day period.

Source: N.J.S.A. 40A:11-3(b) as amended, 1996, N.J.S.A. 40A:11-4.1 and 40A:11-15.

B. CONTRACT TYPES

Any type of contract consistent with applicable New Jersey and federal law which is appropriate to the procurement and which will promote the best interests of the PHA may be used provided that the cost-plus-a-percentage-of-cost and percentage of construction cost methods of contracts are prohibited. All procurement shall include the clauses and provisions necessary to define the rights and responsibilities of the parties. A cost reimbursement contract shall not be used unless it is likely to be less costly or it is impracticable to satisfy the PHA's needs otherwise, and the proposed contractor's accounting system is adequate to allocate cost in accordance with applicable cost principles (for commercial firms, Subpart 31.2 of the Federal Acquisition Regulation (FAR), found in 48 CFR chapter 1). A time and material

contract may be used only if a written determination is made that no other contract type is suitable, and this contract includes a ceiling price that the contractor exceeds at its own risk.

C. OPTIONS

Options for additional quantities or performance periods may be included in contracts, provided that: (i) the option is contained in the solicitation, (ii) the option is a unilateral right of the PHA; (iii) the contract states a limit on the additional quantities and the overall term of the contract; (iv) the options are evaluated as part of the initial competition; (v) the contract states the period within which the options may be exercised; (vi) the options may be exercised only at the price specified in or reasonably determinable from the contract; and (vii) the options may be exercised only if determined to be more advantageous to the PHA than conducting a new procurement.

Source: N. J. S. A. 40A:11-14; 40A:11-15; 40A:11-24 Subpara. B and C; MPP Sec. V. A. and B; Act Sec (b) (10); Sec.(f)(3) and (4)

Comment: See HUD Handbook 7460.8 Sec. 6-4 for guidelines in implementing options.

D. CONTRACT CLAUSES

In addition to containing a clause identifying the contract type, all contracts shall include any clauses required by Federal statutes, executive orders and their implementing regulations as well as New Jersey Laws, (however to the extent that such federal and state laws are in conflict the federal law shall prevail) such as the following:

1. Federal Provisions

- a. Termination for convenience,
- b. Termination for default,
- c. Equal Employment Opportunity Compliance,
- d. Anti-kickback Act (18 U.S. Code 874 as supplemented)
- e. Davis-Bacon provision of the United States Housing Act of 1937,
- f. Contract Work Hours and Safety Standards Act, reporting requirements (40 U.S. Code Sec. 327 to 330 as supplemented),
- g. Patent rights,

- h. Rights in data and copyrights,
- i. Examination of records by Comptroller General, retention of records for three years after closeout,
- j. Clean Air and Water Acts compliance,
- k. Energy efficiency standards compliance,
- l. Bid protests and contract claims.
- m. Value Engineering, and
- n. Payment of funds to influence certain Federal transactions (Byrd Lobby Act).

Source: MPP Sec. V C.; Act Sec. (i)

2. Alternative Dispute Resolution (ADR) for Construction Contracts

All contracts involving construction or contracts related thereto concerning architecture, engineering or construction management shall include a clause which requires that disputes arising under the contract shall be submitted to a process of alternative dispute resolution (ADR) such as mediation, binding arbitration or non-binding arbitration pursuant to industry standards, prior to being submitted to a court for adjudication. This does not prevent the PHA from seeking injunctive or declaratory relief in court at any time. These ADR practices shall not apply to disputes concerning the bid solicitation or award process, or to the formation of contracts or subcontracts. The PHA shall comply with N.J.S.A. 40A:11-50 with respect to joinder of other parties and matters in disputes which involve more than one contract such as design, engineering, architecture or management.

Source: N.J.S.A. 40A:11-50.

Comment: The contract should specify the particular ADR practice (e.g. mediation or binding/non-binding arbitration) to be used rather than merely stating that any of the three methods may be used.

3. Acknowledgment by Bidder and Bid Document Checklist

All plans, specifications and bid proposal documents for the erection, alteration, or repair of a building, structure or other improvement to real property, the total price of which exceeds \$17,500 (or as amended as per 40A:11-3) shall include:

a. a document for the bidder to acknowledge receipt of any notice or revisions or addenda to the advertisement or bid documents; and

b. a form listing those documentary and informational forms, certifications and other documents that the contracting agent requires each bidder to submit with the bid. The form shall list each of the items to be submitted with the bid proposal and a place for the bidder to indicate by initialing each entry, that the bidder has included those required items with the completed bid proposal. Each bidder shall complete this form and submit it with the bid proposal in addition to those documentary and informational forms, certifications, and other documents that are listed on the form. In accordance with Section III(C)(3)(h) the failure to submit the required form shall render the bid unresponsive and it shall be rejected.

Source: N.J.S.A. 40A:11-23.1 and 23.2

4. Periodic Payments to Contractor for Work

In any contract involving the construction, reconstruction, alteration, repair, or maintenance of any building/structure/facility/ or other improvement to real property, the contract shall provide for partial payments to be made at least once monthly as the work progresses.

Source: HUD General Conditions Form 5370; N.J.S.A. 40A:11-16.2, 16.3.

5. Periodic Payments to Contractor for Materials

Construction contracts entered into by the PHA may also provide for partial payments, at least once each month, with respect to all materials placed along or upon the site, or stored at secured locations, which are suitable for use in the execution of the contract, if the person providing the materials furnished releases of liens for the materials at the time each estimate of work is submitted for payment. The total of all partial payments shall not exceed the cost of the materials.

Source: HUD General Conditions; N.J.S.A. 40A:11-16.4.

6. Contracts for Disposal of Solid Waste

Any PHA contract for the removal/disposal of solid waste may be renegotiated by the contractor as a matter of right, to reflect any increase in solid waste disposal costs whenever:

- (a) the increase occurred as the result of compliance with an order issued by the New Jersey Department of Environmental Protection in conjunction with the Board of Public Utilities, directing solid waste be disposed at a solid waste facility other than the one previously utilized by the contractor; or
- (b) the increase in solid waste disposal costs occurred as a result of lawful increases in the rates, fees or charges imposed on the disposal of solid waste at the solid waste facility utilized by the contractor.

Source: N.J.S.A. 40A:11-16.5

7. Number of Working Days/Liquidated Damages

- (a) For contracts for public works the contract specifications shall specify the number of days allotted for the completion of the contract work and/or a proposed contract completion date, and shall provide for a deduction from the contractor's contract price for any wages paid by the PHA to its inspection employees necessarily required to be employed on the work for any days in excess of the number allowed in the specifications for contract completion.
- (b) Any contract for construction shall include liquidated damages for the violation of or failure to perform any of the terms and conditions thereof.

Source: N.J.S.A. 40A:11-17; 11-19.

8. Notice to Proceed

Award of Contract is not the equivalent of a Notice to Proceed (with the work) under the Contract. The contract shall specify its term, duration and commencement date. The PHA will issue a Notice to Proceed to the contractor commensurate with the contractor's completion of all its contract award preconditions and requirements and with the commencement date specified in the contract. The contractor may make a written request to the PHA for the issuance of a Proceed Notice on the date fixed for work commencement by the terms of the contract, and in the event such written request is made, the PHA must, within seven (7) days of its receipt thereof issue said Notice to Proceed.

Source: N.J.S.A. 40A:11-24;

E. CONTRACT ADMINISTRATION

A contract administration system designed to insure that contractors perform in accordance with their contracts shall be maintained. The system shall comply with HUD Handbook 7460.8 Sections 6-5 through and 6-9.

The operational procedures required by Section I.A. above, shall contain guidelines for inspection of supplies, services, or construction as well as monitoring contractor performance, status reporting on construction contracts, and similar matters. For cost reimbursement contracts with commercial firms, costs are allowable only to the extent that they are consistent with the cost principles in FAR subpart 31.2.

Source: MPP Sec. V-D; Act Sec. (b) (1) and (2)

F. CONTRACT MODIFICATIONS/CHANGE ORDERS

The PHA shall adopt procedures for changes and modifications to contracts which comply with the provisions contained in HUD Handbook 7460.8 Rev. 1 Sec. 6-10 to the extent they comply with the provisions provided herein:

1. Quantities of items or work shall not be changed so as to nullify the competitive determination of the lowest responsible price if, at the time of the award changes could have reasonably been foreseen. Change orders shall not be used to change quality or character of a contract inasmuch as such would have been a determining factor in the original bidding. Change orders must comply with the provisions of N.J.A.C. 5:30-11.1 et seq.
2. Contract modifications or changes which extend the scope of work, services or supplies beyond the scope of the contract are strongly discouraged. Where absolutely necessary such changes must be justified as a non-competitive action pursuant to 24 CFR 85.36(d)(4) and Section III (E) of this statement. For such cases, a cost analysis must be prepared in accordance with Section III (F)(3) of this statement. In accordance with N.J.A.C. 5:30-11.1 such changes shall be approved only by resolution of the Board of Commissioners. Where the total value of change orders exceeds 20% of the original contract price the PHA must comply with the specific rules provided in N.J.A.C. 5:30-11.1. In the event the total price of the change order exceeds \$25,000.00 (or such other sum specifically authorized by HUD), the

action may require prior HUD approval in accordance with 24 CFR 85.36(g)(2)(v).

3. All PHA contracts shall contain a Changes clause, such as that on Forms HUD 5370 (construction) and HUD 5370-A (non-construction).

Source: Act Sec. (f) (1) (2) (3); MPP Sec. III- E and III-F; N.J.A.C. 5:30-11.1 et seq.; HUD Handbook 7460.8 Rev. Sections 6-10, 4-35 (3)(d) and 11-1(e)

Comment: See N.J.A.C. 5:30-11.1 et seq. for specific guidelines for changes for construction, emergency and professional services contracts.

G. HUD PROCUREMENT REVIEW

The Contracting Officer must on request make available for HUD review and approval procurement documents such as invitations for bids, requests for proposals, independent cost estimates, etc. in the event:

1. The PHA's procurement procedures or operation fails to comply with the procurement standards contained in 24 CFR 85.36 et seq.
2. The procurement is expected to exceed \$100,000.00 and is to be awarded without competition or only one bid or offer is received in response to solicitation; or
3. The procurement which is expected to exceed \$100,000.00 specifies a brand name product; or
4. The proposed award over \$100,000.00 is to be awarded to other than the apparent low bidder under a sealed bid procurement; or
5. A proposed contract modification changes the scope of the contract or increases the contract amount by more than \$100,000.00.00.

This requirement for HUD review and approval shall not, however, apply if HUD determines that the PHA's procurement policy complies with 24 CFR 85.36

Source: Act Sec. (g)(2) and (3) as amended effective May 19, 1995.

VI. SPECIFICATIONS

A. GENERAL

All specifications shall be drafted so as to promote overall economy for the purposes intended and to encourage competition in satisfying the PHA's needs. Specifications shall be reviewed prior to solicitation to ensure that they are not unduly restrictive or represent unnecessary or duplicative items. Functional or performance specifications are preferred. Detailed product specifications shall be avoided whenever possible. Consideration shall be given to consolidating or breaking out procurement to obtain a more economical purchase (but see VIII below). For equipment purchases, a lease versus purchase analysis should be performed to determine the most economical form of procurement.

B. LIMITATIONS

1. **Prohibited Specifications**

The following specification limitations shall be avoided: geographic restrictions not mandated or encouraged by applicable Federal law (except for architect-engineer contracts, which may include geographic location as a selection factor if adequate competition is available); unnecessary bonding or experience requirements; standards, restrictions conditions or limitations not directly related to the purpose, function or activity for which the contract is awarded. Nothing in this procurement policy shall preempt any State licensing laws. Specifications shall be scrutinized to ensure that organizational conflicts of interest do not occur (for example, having a consultant perform a study of the PHA's computer needs and then allowing that consultant to compete for the subsequent contract for the computers).

2. **Pre-Bid Conferences**

Attendance at a pre-bid conference should not be mandatory and lack of attendance should not be the basis for rejecting a bid as nonresponsive. To impose a requirement to attend a pre-bid/proposal conference could unnecessarily limit competition and is not recommended.

C. "BRAND NAME OR EQUAL" LIMITATIONS

1. No specifications may require the furnishing of any "brand name" but may in all cases require "brand name or equivalent," except that if goods or services to be provided or performed are proprietary, such goods or services may be purchased by stipulating the proprietary goods or services in the bid specification in any case in which the resolution so indicates, and the special need for such proprietary goods or services is directly related to the performance, completion or undertaking of the purpose for which the contract was awarded.
2. A clear and accurate description of the technical requirements for the material/product/service to be procured shall be utilized, but such description shall not in competitive procurement, contain detailed product specifications or features which unduly restrict competition. The description may include a statement of the qualitative nature of the material/product/service and shall set forth those minimum essential characteristics and standards to which it must conform in order to satisfy its intended use.
3. When it is impractical or uneconomical to make a clear and accurate description of the product requirements, a "brand name or equal" description may be used as a means to define the performance of the salient requirements. The specific features of the named brand and other salient requirements and factors which must be met by bidders shall be clearly stated.

D. STATEMENT OF OWNERSHIP OF CORPORATIONS OR PARTNERSHIPS

All specifications shall require that prior to the receipt of the bid or accompanying the bid or proposal of a corporation or partnership there is submitted a statement setting forth the names and addresses of all stockholders in the corporation or partnership who own 10% or more of its stock of any class or, of all individual partners in the partnership who own a 10% or greater interest therein, as the case may be. If one or more such stockholder or partner is itself a corporation or partnership, the stockholders holding 10% or more of that corporation's stock, or the individual partners owning 10% or greater interest in that partnership, as the case may be, shall be listed. The disclosure shall be continued until names and addresses of every noncorporate

stockholder and individual partner exceeding the 10% ownership criteria established herein has been listed.

E. REQUIRED PROVISIONS

Specifications must include any option for renewal, extension or release which the PHA may intend to exercise or require; all terms and conditions necessary for the performance of any extra work; and disclose all matters necessary to the substantial performance of the contract.

Source: MPP Sec. VI; Act Sec. (b) (4) and (C) (1) (vi) and (c) (3) and (2); N.J.S.A. 40A:11-13, 13.2.

Subpara. B 2: HUD Handbook 7460.8 Sec. 4-11

Subpara. C 1: N.J.S.A. 40A:11-13(d)

Subpara. D: N.J.S.A. 52:25-24.2 and N.J.S.A. 40A:11-4.4, 4.5

Subpara. E: N.J.S.A. 40A:11-13.2(e)

VII. APPEALS AND REMEDIES

A. GENERAL

It is the PHA's policy to resolve all contractual issues informally at the PHA level, without litigation. When appropriate, the PHA may consider the use of informal discussions between the parties by individuals who did not participate in the matter in dispute to help resolve the differences. Where such disputes cannot be resolved amicably, jurisdiction properly lies with the New Jersey Superior Court.

B. BID PROTESTS

Any actual or prospective contractor or vendor may protest the solicitation or award of a contract for serious violations of the principles of this Statement. Any protest against a solicitation or specification must be in writing, filed with the contracting agent no less than three days prior to the opening of bids. Challenges filed after that time shall be considered void and having no impact on the contracting unit or the award of the contract.

Source: MPP Sec. and N.J.S.A. 40A:11-13(e)

Any protest against the award of a contract must be received within _____ calendar days after opening of the sealed bids or within _____ days of notice of selection of

a competitive proposal, or the protest will not be considered. All bid protests shall be in writing, submitted to the Contracting Officer or designee, who shall issue a written decision on the matter. The Contracting Officer may, at his or her discretion, suspend the procurement pending resolution of the protest, if warranted by the facts presented.

Source: MPP Sec. VII. B.

Comment: This provision differs from the model in that it omits the ten day time limitation for protests to be filed. In many cases, where procurement areas involve much technical review it is inappropriate to allow a bidder ten days to protest a bid after award. Most contracts are not officially awarded until a board resolution is adopted. Allowing such a lengthy protest period could seriously hamper the efficient operation of the Authority. Accordingly, PHA's are directed to insert a reasonable time period based on their own needs and experiences.

C. CONTRACT CLAIMS

All claims by a contractor or vendor relating to performance of a contract shall be submitted in writing to the Contracting Officer or designee for a written decision. The contractor may request a conference on the claim. Where appropriate, the Contracting Officer's decision shall inform the contractor of its appeal rights to a higher level in the PHA, such as the Executive Director or Board of Commissioners.

Source: MPP Sec. VII

VIII. ASSISTANCE TO SMALL AND OTHER BUSINESSES

A. REQUIRED EFFORTS

1. Consistent with Presidential Executive Orders 11625, 12138 and 12432, and Section 3 of the HUD Act of 1968, the PHA shall make efforts to ensure that small and minority-owned businesses, women's business enterprises, labor surplus area businesses, and individuals or firms located in or owned in substantial part by persons residing in the area of a PHA project are used when possible. Such efforts shall include, but shall not be limited to:

- a) Including such firms, when qualified, on solicitation mailing lists;
- b) Encouraging their participation through direct solicitation of bids or proposals whenever they are potential sources;
- c) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by such firms;
- d) Establishing delivery schedules, where the requirement permits, which encourages participation by such firms;
- e) Using the services and assistance of the Small Business Administration and the Minority Business Development Agency of the Department of Commerce;
- f) Including in contracts a clause requiring contractors, to the greatest extent feasible to provide opportunities for training and employment for lower income residents of the project area and to award subcontracts for work in connection with the project to business concerns which are located in, or owned in substantial part by persons residing in the area of the project, as described in 24 CFR 135.
- g) Requiring prime contractors, when subcontracting is anticipated, to take the positive steps listed in A1(a) through A1(f) above.

- 2. Goals may be established periodically by the PHA for participation in the PHA's prime contracts and subcontracting opportunities by small businesses, minority-owned businesses, women's business enterprises, labor surplus area businesses, and business concerns which are located in, or owned in substantial part by persons residing in the are of the project.

B. DEFINITIONS

- 1. A small business is defined as a business which is independently owned; not dominant in its field of operation, and not an affiliate or subsidiary of a business dominant in its field of operation. The size of standards of 13 CFR 121 shall be used, unless the PHA determines that their use is inappropriate.
- 2. A minority-owned business is defined as a business which is at least 51% owned by one or more minority group members; or in the case of

a publicly owned business, one in which at least 51% of its voting stock is owned by one or more minority group members, and whose management and daily business operations are controlled by one or more such individuals. Minority group members include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, Asian Pacific American and Asian Indian Americans and Hasidic Jewish Americans.

3. A women's business enterprise is defined as a business that is at least 51% owned by a woman or women who are U.S. citizens and who also control or operate the business.
4. A labor surplus area business is defined as a business which, together with its immediate subcontractors, will incur more than 50% of the cost of performing the contract in an area of concentrated unemployment or underemployment, as defined by the U.S. Department of Labor in 20 CFR 654, Subpart A, and in lists of labor surplus areas published by the Employment and Training Administration.
5. A business concern located in the area of the project is defined as an individual or firm located within the relevant Section 3 covered project area, as determined pursuant to 24 CFR 135.15, listed on HUD's registry of eligible business concerns, and meeting the definition of small business above. A business concern owned in substantial part by persons residing in the area of the project is defined as a business concern which is 51% or more owned by persons residing within the Section 3 covered project, owned by persons considered by the U.S. Small Business Administration to be socially or economically disadvantaged, listed on HUD's registry of eligible business concerns, and meeting the definition of small business above.

Source: MPP Sec. VIII; Act Sec.(e);

IX. ETHICS IN PUBLIC CONTRACTING

A. GENERAL

The PHA shall adhere to the following code of conduct the New Jersey Local Government Ethics Law N.J.S.A. 40A:9-22.1 et. seq. and the Truth in Contracting Law N.J.S.A. 2C:21-33.

B. CONFLICTS OF INTEREST

The PHA shall comply with all provisions of **Section 19** of the HUD Annual Contributions Contract which severely restricts the interest of members, officers or employees of the PHA in any project of the PHA. **Section 19 of the ACC** must be consulted with respect to contracts for all PHA Projects as it also applies to other public officials of the municipality.

No employee, officer or agent of this PHA shall participate directly or indirectly in the selection or in the award or administration of any contract if a conflict, real or apparent, would be involved. Such conflict would arise when a financial or other interest in a firm selected for award is held by:

1. Any employee, officer or agent involved in making the award;
2. His/her relative (including father, mother, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, husband, wife, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, or half sister);
3. His/her partner; or
4. An organization which employs, is negotiating to employ, or has an arrangement concerning prospective employment of any of the above.

The PHA shall comply with the following provision and include it in all contracts and require that it be included in all subcontracts:

"No member, officer or employee of the PHA and no member of the governing body of the locality in which the PHA or its project is situated, and no other public official of such locality who exercises any functions or responsibilities with respect to the Project, during his tenure or for one year thereafter, shall have any interest, direct or indirect, in this contract or the proceeds thereof."

C. LOCAL GOVERNMENT ETHICS LAW

The provisions of the Local Government Ethics Law as set forth in N.J.S.A. 40A:9-22.1 et seq. are incorporated herein by reference such as they apply to procurement of goods and services.

D. GRATUITIES, KICKBACKS, AND USE OF CONFIDENTIAL INFORMATION

PHA officers, employees or agents shall not solicit or accept gratuities, favors, or anything of monetary value from contractors, potential contractors, or parties to subcontracts, and shall not knowingly use confidential information for actual or anticipated personal gain.

E. PROHIBITION AGAINST CONTINGENT FEES

Contractors shall not retain a person to solicit or secure a PHA contract for a commission, percentage, brokerage, or contingent fee, except for bona fide employees or bona fide established commercial selling agencies.

Source: MPP Sec. IX; Act Sec (b) (3); New Jersey Local Government Ethics Law N.J.S.A. 40A:9-22.1 et seq.
Sections 19 & 20 of the HUD Annual Contributions Contract

X. DISPOSITION POLICY

Disposition operations will be conducted in conformance with N.J.S.A. 40A:11-36, as amended.

1. Personal Property shall not be sold or exchanged for less than its fair value.
2. All personal property exceeding 15% of the applicable bid threshold established by N.J.S.A. 40A:11-3 shall be sold at public sale in accordance with N.J.S.A. 40A:11-36 to the highest bidder. Items valued at less than 15% of the bid threshold may be sold without public sale if the PHA determines that it would be impractical to do so.
3. **Sales to Government Bodies.** Sales to the United States government, the State of New Jersey and other governmental agencies shall not be made for less than fair value but do not require public sale.
4. Notwithstanding the provisions of this section, by resolution of the Board of Commissioners, a contracting agent may include the sale of personal property

Source: N.J.S.A. 40A:11-36

This provision does not cover the sale of real property, buildings or lands as same will be disposed of in accordance with other applicable HUD Provisions.

