

OTHER AGENCIES

(a)

NEW JERSEY SCHOOLS DEVELOPMENT AUTHORITY

Procurement of Architects, Engineers, Land Surveyors, and Other Professional Services Consultants

Readoption with Amendments: N.J.A.C. 19:38C

**Adopted Repeals and New Rules: N.J.A.C. 19:38C-
2.1, 2.7, 2.9, 2.10, 5.1, 5.2, 5.3, 5.5, 5.6, 6.3, 7.1, and
7.2**

Adopted Repeals: N.J.A.C. 19:38C-2.4, 4, 7.3, and 7.4

**Adopted New Rules: N.J.A.C. 19:38C-5.9, 5.10, 8, 9,
10, and 11**

**Adopted Recodification with Amendment: N.J.A.C.
19:38C-5.4 as 2.4**

Proposed: December 5, 2011 at 43 N.J.R. 3153(a).

Adopted: April 4, 2012 by the New Jersey Schools Development
Authority, Marc Larkins, Chief Executive Officer.

Filed: April 4, 2012 as R.2012 d.085, **without change**.

Authority: P.L. 2007, c. 137, § 4k (N.J.S.A. 52:18A-238k)
(rulemaking authority); P.L. 2000, c. 72 (N.J.S.A. 18A:7G-1 et
seq.); P.L. 2007, c. 137 (N.J.S.A. 52:18A-235 et seq.) (enabling
statutes); and P.L. 1997, c. 399 (N.J.S.A. 52:34-9.1 et seq.)
(related authority).

Effective Date: April 4, 2012, Readoption;
May 7, 2012, Amendments, Repeals, New Rules,
and Recodification.

Expiration Date: April 4, 2019.

Summary of Public Comment and Agency Response:

COMMENT: A comment was received from Paul J. St. Onge of the law firm Gibbons, P.C., expressing support of the rule proposal and requesting clarification of the prequalification requirements referred to in the proposed amended language of N.J.A.C. 19:38C-2.2, as they relate to the Authority's prequalification regulations at N.J.A.C. 19:38A-4.1. Mr. St. Onge queried whether a "past debarment of a professional services consultant's right to bid or contract by a state agency (other than the SDA) [would] automatically preclude that firm from being pre-qualified by the SDA" or whether the SDA intends to "afford a professional services consultant an opportunity to demonstrate that it has implemented measures to prevent future violations, as set forth in N.J.A.C. 19:38A-4.1."

RESPONSE: The commenter's query does not concern the substance of the rule proposal at issue, but rather seeks clarification of the Authority's implementation of the prequalification rules at N.J.A.C. 19:38A-4.1. The Authority states in response to the query that the prequalification process depends upon a case-by-case factual analysis of the submissions made by the applicant, and the results of the moral integrity review conducted regarding the applicant. The Authority notes that while prior debarment or violation of law by an applicant firm can justify a denial of prequalification, the Authority's prequalification regulations indicate that certain safeguards and remedial steps may be applied or required which may allow the Authority to permit prequalification of a consultant despite a prior debarment or violation of law. However, the determination to grant prequalification in such circumstances is subject to an analysis of the facts and circumstances of the events disclosed in the application and the results of the moral integrity review of the applicant. Of course, the Authority would strongly urge that an applicant disclose any prior debarment or violation of law in the prequalification application, as failure to disclose the debarment or violation is itself justification for denial of prequalification.

In light of the fact that the commenter's question relates to the interpretation of a separate set of Authority regulations and is therefore

beyond the scope of this adoption, no changes to the rules as proposed will be made in response to this comment.

Federal Standards Statement

The rules readopted with amendments, repeals, new rules, and recodification implement a State statute, specifically P.L. 2007, c. 137 (N.J.S.A. 52:18A-235 et seq.). There are no Federal standards or requirements applicable to these rules. A Federal standards analysis, therefore, is not required.

Full text of the readopted rules can be found in the New Jersey Administrative Code at N.J.A.C. 19:38C.

Full text of the adopted amendments, new rules, and recodification follows:

CHAPTER 38C PROCUREMENT OF ARCHITECTS, ENGINEERS, LAND SURVEYORS, AND OTHER PROFESSIONAL SERVICES CONSULTANTS

SUBCHAPTER 1. GENERAL PROVISIONS

19:38C-1.1 Purpose and scope of rules

This chapter is designed to implement the Educational Facilities Construction and Financing Act, P.L. 2000, c. 72, N.J.S.A. 18A:7G-1 et seq., as amended, and P.L. 2007, c. 137, N.J.S.A. 52:18A-235 et seq., by establishing procedures for the procurement of professional consulting services, so that the Authority may carry out its broad statutory mandate to plan, design and construct school facilities projects and effectively administer the Authority's schools construction program. This chapter is also designed to implement the provisions of P.L. 1997, c. 399, N.J.S.A. 52:34-9.1 et seq., which govern procedures generally applicable to the Authority's award of contracts for professional architectural, engineering, and land surveying services.

19:38C-1.2 Definitions

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise:

"Act" means the "Educational Facilities Construction and Financing Act," P.L. 2000, c. 72, N.J.S.A. 18A:7G-1 et seq., as amended, which mandates the school construction program.

"Agreement" means the written agreement between the Authority and the architectural, engineering, land surveying, or other professional services consultant for the provision of services.

"Appraiser" means a firm that provides an unbiased analysis, opinion, or conclusion on the value of real property.

"Authority" or "SDA" means the New Jersey Schools Development Authority, an entity formed pursuant to P.L. 2007, c. 137, N.J.S.A. 52:18A-235 et seq., as successor to the New Jersey Schools Construction Corporation. The Authority is statutorily charged with undertaking and funding school facilities projects, pursuant to the Act.

"Board" means the governing body of the Authority, consisting of the members of the Authority as outlined in N.J.S.A. 52:18A-237.

"Commissioner" means the Commissioner of the Department of Education.

"Compensation" means the payment(s) due to the professional services consultant for services rendered.

"Corporation" or "SCC" means the New Jersey Schools Construction Corporation, the entity formed pursuant to N.J.S.A. 34:1B-159 and the predecessor to the Authority, which was abolished by P.L. 2007, c. 137.

"Emergent project" means a capital project necessitating expedited review and, if applicable, approval, in order to alleviate a condition that, if not corrected on an expedited basis, would render a building or facility so potentially injurious or hazardous that it causes an imminent peril to the health and safety of students or staff, as defined by N.J.A.C. 6A:26-1.2.

"Expert" means an individual or firm with a high degree of skill or knowledge in a specific subject engaged or to be engaged by the Authority for purposes of litigation support, including, but not limited to, testimony as an expert witness.

“Fee proposal” means the proposal submitted by the professional services consultant in the form and manner provided for in the request for qualifications or request for proposals, which specifies the fees proposed for the provision of services.

“Key team member” means a principal, partner, or officer of the professional services consultant, project executive, senior principal, studio head, project manager, project architect, construction administrator, job captain, or any other title required in the request for qualifications or request for proposals, and represented in a proposal as having a responsible role in the successful completion of services required in the agreement.

“Moral integrity review” means an investigation, performed by the Authority or members of the New Jersey State Police or other investigative body on behalf of the Authority, of a firm that seeks to enter an agreement with the Authority.

“NJEDA” means the New Jersey Economic Development Authority established pursuant to P.L. 1974, c. 80, N.J.S.A. 34:1B-1 et seq., as amended, or any successor thereto.

“Notice of award” means a written notice issued to a professional services consultant by the Authority indicating that the professional services consultant has been selected to perform certain services pursuant to an Authority procurement process and that upon the Authority’s receipt of certain required documentation, the Authority intends to enter an agreement with the professional services consultant for the performance of those services.

“Other facilities” means those facilities that are not school facilities projects as defined by the Act, namely, athletic stadiums, swimming pools, any associated structures or related equipment tied to such facilities including, but not limited to, grandstands and night field lights, greenhouses, facilities used for non-instructional or non-educational purposes, and any structure, building, or facility used solely for school administration.

“Pre-construction activities” means the work that must be undertaken prior to submitting a school facilities project application to the Department for approval and calculation of preliminary eligible costs. Such activities may include:

1. Site analysis;
2. Acquisition of land;
3. Remediation;
4. Site development;
5. Feasibility studies including studies to determine the viability of new construction versus rehabilitation;
6. Design work;
7. Acquisition of and design work for temporary facilities; and
8. Such other activities as may be specified in N.J.S.A. 18A:7G-5 or N.J.A.C. 19:34-1.2 or 6A:26-1.2.

“Pre-qualified” or “pre-qualification” means the approval of a professional services consultant by the Authority pursuant to N.J.A.C. 19:38A.

“Preliminary eligible costs” means the initial eligible costs of a school facilities project as calculated pursuant to the formulas set forth in section 7 of P.L. 2000, c. 72, N.J.S.A. 18A:7G-7 or as otherwise provided pursuant to section 5 of P.L. 2000, c. 72, N.J.S.A. 18A:7G-5 and which shall be deemed to include the costs of construction and other allowable costs.

“Professional services consultant” or “consultant” means the architect, engineer, land surveyor, or other individual or professional firm providing services related to its respective occupation, which require unique professional or technical skills, licenses, or other credentials, associated with research, development, design, construction, construction administration, alteration, or improvement to real property, as well as incidental services that members of these professions and those in their employ may logically or justifiably perform. The professional services consultant may provide services including, but not limited to, studies (including feasibility studies), investigations, surveys, evaluations, consultations, appraisals, planning, programming, conceptual designs, plans, and specifications, cost estimates, construction management, inspections, submittal reviews, testing, commissioning, provision of title insurance, preparation of operating and maintenance manuals, and other related services, and shall include those consultants who provide

“professional architectural, engineering, or land surveying services” within the meaning of N.J.S.A. 52:34-9.2.

“Proposal” means the response submitted by a professional services consultant with respect to a request for qualifications or a request for proposals.

“Protest” means a challenge to a decision, statement, action, or alleged inaction of the Authority.

“Ranking” means the process of listing responsive professional services consultants in order of highest to lowest total scores, based upon selection criteria set forth in the RFQ and/or RFP.

“Request for proposals” or “RFP” means a request for technical proposals and/or fee proposals for the selection of a professional services consultant.

“Request for qualifications” or “RFQ” means a written request issued by the Authority seeking submissions from professional services consultants, including statements of qualifications, experience, and/or organizational information, as well as any additional information deemed necessary by the Authority, in connection with the selection of a professional services consultant for a school facilities project, pre-construction activity, or other type of engagement for the school construction program.

“School construction program” means the program of school facilities projects and related activities undertaken by the Authority pursuant to the Act.

“School facilities project” means the planning, acquisition, demolition, construction, improvement, alteration, modernization, renovation, reconstruction, or capital maintenance of all or any part of a school facility or of any other personal property necessary for, or ancillary to, any school facility, and shall include fixtures, furnishings and equipment, and shall also include, but is not limited to, site acquisition, site development, the services of design professionals, such as engineers and architects, construction management, legal services, financing costs, and administrative costs and expenses incurred in connection with the project.

“School facility” means and includes any structure, building or facility used wholly or in part for educational purposes by a district, and facilities that support such structures, buildings and facilities, such as district wastewater treatment facilities, power generating facilities, and steam generating facilities, but shall exclude other facilities as elsewhere defined in this section.

“SDA school district” means a school district that received education opportunity aid or preschool expansion aid in the 2007-2008 school year, as defined at P.L. 2007, c. 260, § 39, N.J.S.A. 18A:7G-3.

“Selection committee” means the group(s) responsible for review and evaluation of professional services consultants’ responses to RFQs and/or RFPs in connection with a procurement of one or more professional services consultants for an engagement with the Authority when the compensation for the engagement is anticipated to exceed the State bid advertisement threshold pursuant to N.J.S.A. 52:18A-243.

“Selection coordinator” means the administrator of the operations and procedures of the selection process, whose activities shall include, but are not limited to, scheduling of meetings, preparing agendas, recording scores, preparing minutes of selection committee meetings, and other similar administrative duties.

“Services” means the duties and responsibilities to be performed by the professional services consultant pursuant to the agreement, and includes all other labor, materials, and equipment provided or to be provided to fulfill such obligations.

“Small business enterprise” or “SBE” means a firm that is registered as a “small business” with the New Jersey Department of the Treasury, Division of Minority and Women Business Development pursuant to N.J.A.C. 17:14-3.1.

“Task order” means a contractual document, containing a scope of work, negotiated costs, and schedule, which the Authority issues to a professional services consultant, pursuant to a term agreement.

“Term agreement” means an agreement whereby the Authority may engage a professional services consultant for a defined period of time.

“Title insurance” means a policy issued by a title insurance company insuring, guaranteeing, or indemnifying owners of real property or others interested therein against loss or damage suffered by reason of liens, encumbrances upon, defects in or the unmarketability of the title of the

subject property and includes searches relating to the title of the subject property.

“Title insurance company” means a title insurance company duly authorized to transact the business of issuing title insurance in the State of New Jersey.

SUBCHAPTER 2. GENERAL REQUIREMENTS

19:38C-2.1 Scope

This subchapter addresses the manner in which SDA shall engage a professional services consultant; provides for the methodologies; identifies the qualitative factors used in evaluating proposals; and provides the process for the rejection of proposals and the approval, execution, and termination of agreements.

19:38C-2.2 Pre-qualification requirement

(a) A professional services consultant seeking to be engaged by the Authority must be pre-qualified by the Authority at the time of submission of a response to an RFQ and/or an RFP, if pre-qualification is required by N.J.A.C. 19:38A, except if otherwise expressly provided in this chapter.

(b) The Authority shall establish pre-qualification requirements as may be necessary in order to ensure competitive proposals, or as may be dictated by the unique or specialized nature of the services to be performed under the agreement.

(c) All professional services consultants that seek to be engaged by the Authority are subject to a moral integrity review, even where Authority pre-qualification is not required. If the results of the moral integrity review are negative or unsatisfactory in that they indicate any circumstance that would justify a revocation of pre-qualification under N.J.A.C. 19:38A-4.1, the Authority shall reject the professional services consultant’s proposal pursuant to N.J.A.C. 19:38C-2.6.

19:38C-2.3 Selection procedures based on type of engagement

The Authority may establish different procedures, as set forth in this chapter, for the selection of professional services consultants based on the type of professional services consultant to be engaged or the contract value.

19:38C-2.4 Advertising

(a) The Authority shall advertise for all procurements in accordance with N.J.S.A. 52:18A-243(h). In addition, such advertising may also be placed:

- 1.-2. (No change.)
3. By use of direct mailings to consultants.

(b) Any advertisement shall be made in the form and in the time required to promote competition and shall describe any specific information that an interested professional services consultant must submit, as well as the date and time of the deadline for submissions.

(c) The advertisement shall specify the evaluation criteria that shall apply to the proposals.

19:38C-2.5 Evaluation

(a) The ranking of professional services consultants shall be performed pursuant to evaluation criteria established by the Authority for each particular engagement, and by the weights established for such criteria. In selecting the most highly qualified professional services consultants, the selection committee shall consider the criteria and relative weights of such criteria, as set forth in the RFP and/or RFQ.

(b) The Authority may require the submission of proposals, requests for clarifying technical and/or organizational information, interviews, site visits, and pre-proposal conferences; however, all such requirements will be set forth in the RFP and/or RFQ.

(c) Nothing in this chapter shall be construed to limit the Authority’s ability to obtain services pursuant to an SBE set-aside procurement under N.J.A.C. 19:39.

19:38C-2.6 Rejection of proposals; cancellation of procurement or award

(a) Proposals received after the submission date and time prescribed in the RFQ and/or RFP shall be rejected.

(b) The Authority may reject any proposal for any reason, in accordance with law, when it is otherwise deemed to be in the public interest to do so. The Authority may reject all proposals and cancel a procurement, for excessive cost, insufficient competition, or any other reason, in accordance with law, that it deems to be in the public interest.

(c) The Authority may cancel an award at any time before the execution of an agreement by all parties.

19:38C-2.7 Approval and execution of agreement

No agreement is valid or binding on the Authority unless and until it is executed by the Authority.

19:38C-2.8 Termination

All agreements executed pursuant to this chapter shall provide for, among other things, termination for the convenience of the Authority and for cause.

19:38C-2.9 Disclosure and publicity

(a) Any and all submissions made in response to an RFQ and/or an RFP are subject to the provisions of the Open Public Records Act, N.J.S.A. 47:1A-1 et seq., including the exceptions from disclosure provided therein.

(b) Consultants shall notify the Authority prior to the issuance of press releases and other public dissemination of information concerning a school facilities project and such shall acknowledge Authority financing and assistance in the undertaking of the school facilities project.

19:38C-2.10 Performance evaluation

(a) The Authority shall have the right to consider the performance of a professional services consultant as a factor in the ranking of the consultant when evaluating proposals.

(b) Performance evaluations may include, but are not limited to, the following factors:

1. Quality of work;
2. Scheduling;
3. Management;
4. Cost control/amendments;
5. Subconsultants;
6. Close out; and
7. Any other factors affecting a consultant’s performance.

SUBCHAPTER 3. SELECTION PROCEDURES—AGREEMENTS NOT EXCEEDING THE STATE BID THRESHOLD PURSUANT TO N.J.S.A. 52:34-7b

19:38C-3.1 Scope

This subchapter sets forth the procedural requirements applicable to the procurement of agreements for professional services consultants where such agreements specify compensation not exceeding the State bid advertisement threshold of \$36,000, as adjusted, pursuant to N.J.S.A. 52:34-7b, except for those procurements in which the Authority, at its sole option, determines to apply the procedures of N.J.A.C. 19:38C-5. This subchapter shall not apply to the procurement of appraisers or title insurance companies.

19:38C-3.2 Solicitation

In accordance with N.J.S.A. 52:34-7, the Authority shall not be required to advertise the procurement of agreements for professional services consultants where such agreements provide for compensation below the State bid threshold. The Authority reserves the right to waive any prequalification requirements for a procurement pursuant to this subchapter.

19:38C-3.3 Evaluation

Proposals shall be evaluated based on fees and/or the evaluation criteria appropriate for the particular procurement. The Authority may request clarifying technical and/or organizational information from any professional services consultant prior to finalizing the evaluation.

19:38C-3.4 Selection

The Authority shall select the proposal that is in the best interest of the school construction program, based on fees and/or the evaluation criteria established for the selection.

SUBCHAPTER 4. (RESERVED)

SUBCHAPTER 5. SELECTION PROCEDURES—AGREEMENTS EXCEEDING THE STATE BID THRESHOLD, AS ADJUSTED, PURSUANT TO N.J.S.A. 52:34-7b

19:38C-5.1 Scope and applicability

This subchapter sets forth the procurement procedures that shall apply to agreements for professional services consultants with compensation exceeding the amount set forth in N.J.S.A. 52:34-7b. At the option of the Authority, the procedures specified in this subchapter may apply to an engagement with compensation below the amount set forth in N.J.S.A. 52:34-7b. This subchapter shall not apply to the procurement of appraisers or title insurance companies.

19:38C-5.2 Initiation

The procurement of a professional services consultant shall be initiated by the public advertisement of a request for qualifications, a request for proposals, or both, except in circumstances where a waiver of advertising is permitted under N.J.A.C. 19:38C-6.

19:38C-5.3 Selection committee

(a) Prior to the receipt of proposals, the Authority shall establish a selection committee or committees to review and evaluate the proposals. Each member of the selection committee shall have the relevant experience necessary to evaluate the proposals. Each member of a selection committee shall be responsible for independently evaluating and scoring the proposals.

(b) Once the responses are received and the identity of the vendors is ascertained and communicated to the members of the selection committee, each member of the selection committee, prior to the evaluation of any proposal, shall execute a certification that he or she has no personal interest, financial or familial, in any of the vendors to be evaluated, or the principals, subsidiaries, or parent companies thereof. Furthermore, should any of the selection committee members indicate that a conflict or personal interest exists once the identity of the vendors is revealed, that member shall not serve on the selection committee and may be replaced.

(c) The names of the members of the selection committee shall be made public once the contract is awarded, pursuant to N.J.S.A. 52:34-10.3(c).

19:38C-5.4 Selection evaluation criteria

(a) The selection evaluation criteria may include the following: the firm's experience on projects of a similar size and nature; project team experience; past project performance; project approach; understanding of project needs and project schedule; and budget and cost estimating. Selection evaluation criteria may also include any other criteria as determined to be appropriate in the sole discretion of the Authority.

(b) The selection evaluation criteria and the specific weight assigned to each criterion for each professional services consultant procurement shall be established by the Authority prior to advertisement and the criteria and weights shall be incorporated into the RFQ and/or RFP for the procurement.

(c) When the procurement is for professional services consultants other than architects, engineers, and/or land surveyors, the Authority may provide that a fee proposal shall be one of the qualitative factors upon which professional services consultants will be evaluated.

19:38C-5.5 Selection evaluation process

(a) The members of the selection committee will evaluate the submissions and other information comprising the evaluation process and shall assign scores based upon the evaluation criteria stated in the RFQ and/or RFP.

(b) In addition to the review of responses to an RFQ and/or RFP the evaluation process may include:

1. Review of responses to requests for additional or clarifying information;
2. Participation in interviews; and/or
3. Any other components determined, in the sole discretion of the Authority, to be appropriate.

(c) Site visits, pre-proposal conferences, and interviews may be scheduled. Attendance shall be mandatory when so stipulated in the RFP or RFQ.

(d) The selection coordinator shall compile the evaluation scores of the committee members, as well as any points assigned in the consideration of a fee proposal in accordance with N.J.A.C. 19:38C-5.7(a), if applicable, and shall prepare a ranking in accordance with the procedures specified in the RFQ and/or RFP, which shall be deemed a final ranking if no shortlisting process, as set forth in this section, is called for in the RFQ.

(e) If a shortlisting process is specified by the selection procedures described in the RFQ, the selection coordinator shall review the ranking and identify the short list of firms.

1. Once the short list is determined, the Authority shall publish the short list on the Authority's website and/or provide written notification to all firms that supplied responses to the RFQ of the names of the firms selected for the short list.

2. If additional information is required, the Authority shall request such information from all of the shortlisted firms prior to the final ranking. The members of the selection committee shall review and evaluate the additional information provided by the shortlisted firms, in accordance with the procedures specified in the RFQ and/or RFP, and shall assign scores based upon the evaluation criteria stated in the RFQ and/or RFP, as applicable. At the sole discretion of the Authority, interviews may be held with the shortlisted firms prior to the determination of the final ranking. The members of the selection committee shall evaluate the additional information, and interviews, if any, and shall assign scores to each. The selection coordinator shall combine all evaluation scores in accordance with the procedures outlined in the RFQ and/or RFP, and prepare a final ranking.

19:38C-5.6 Submission of fee proposals

A fee proposal shall be submitted in accordance with the process set forth in either an RFQ or RFP. A fee proposal shall be submitted in a separate sealed envelope. The envelope shall indicate clearly that it is the fee proposal and shall identify the firm's name, project number, and any other information required by the RFQ or RFP. The fee proposals shall remain sealed until such time as provided in N.J.A.C. 19:38C-5.7(a) or (b), as applicable.

19:38C-5.7 Consideration of fee proposals

(a) In the event the fee proposal is one of the qualitative factors for the evaluation of the proposals, the Authority shall open the sealed fee proposals and assign the maximum points to the lowest total fee proposal. All other proposals shall be scored based upon the percentage that each proposal exceeds the lowest proposal. The scores of the fee proposals shall then be utilized to finalize the ranking undertaken by the selection committee, pursuant to N.J.A.C. 19:38C-5.5(d).

(b) In the event the fee proposal is not a qualitative factor for the evaluation of the proposal, the Authority shall open the sealed fee proposals at a predetermined date and time after the final ranking has been prepared. Using the fee proposals as a guide, the Authority shall negotiate an agreement with the highest-ranked consultant at a fee determined by the Authority to be fair and reasonable. Should the Authority be unable to negotiate a satisfactory fee with the highest-ranked consultant, the Authority shall terminate negotiations with the highest-ranked consultant, and may then terminate the procurement or may then undertake negotiations with the second-highest ranked consultant. Failing accord with the second highest-ranked consultant, the Authority shall terminate negotiations with the second highest-ranked consultant and may then terminate the procurement or may undertake negotiations with the third highest-ranked consultant. In the event that the Authority is unable to agree to a satisfactory fee with any of the three highest-ranked firms, the Authority may select additional consultants in the order of their ranking and continue negotiations, until either an agreement is reached or the procurement is canceled or terminated.

19:38C-5.8 Recommendation

Based on the process set forth in this subchapter, the selection coordinator shall recommend the most technically qualified consultant at final compensation determined to be fair and reasonable. If the

recommendation is approved, the Authority will issue a written notice of award to the successful professional services consultant.

19:38C-5.9 Execution of agreement

Upon the successful professional services consultant's submission of any required documentation or materials as specified in the notice of award, and the Authority's acceptance of such documents, the Authority will execute the agreement and provide the successful professional services consultant with a fully-executed agreement.

19:38C-5.10 Confidentiality

The selection evaluations, rankings, negotiations, and fee proposals of all firms, as well as all discussions and correspondence, relating to the selection of a professional services consultant shall remain confidential and exempt from production under the Open Public Records Act, N.J.S.A. 47:1-1 et seq., until a notice of award has been issued.

SUBCHAPTER 6. WAIVER OF ADVERTISING

19:38C-6.1 Scope

This subchapter shall govern the procurement of an agreement through the Authority's grant of a waiver of advertising pursuant to N.J.S.A. 52:34-10. While the Authority shall normally procure professional services consultants through a competitive selection process initiated by advertising, in those limited situations where it is not possible, feasible or prudent to advertise, this subchapter shall apply to the procurement of professional services consultant agreements.

19:38C-6.2 Circumstances justifying waiver of advertising; pre-qualification

(a) The Authority may grant a waiver of public advertisement in the following limited circumstances:

1. The engagement to be made is with the Federal government, or any State government or any agency or political subdivision thereof;
2. A public exigency exists in which professional services must be purchased immediately and are necessary to mitigate an emergency situation;
3. Only one professional services consultant is capable of or available to provide the services at the time they are required; or
4. When the services required are available through participation in an existing contract between a vendor and any department, division, office, agency, bureau, or section of the United States, or any authority or instrumentality created or chartered thereby and any department, division, office, agency, bureau, or section of New Jersey or any state of the United States other than New Jersey, or any political subdivision thereof including, but not limited to, municipalities, or any other authority or instrumentality created or chartered thereby, provided that:
 - i. The existing contract was the result of a competitive selection process;
 - ii. The terms of the existing contract permit such Authority participation;
 - iii. The price of the services being procured is no greater than the price offered to the original governmental unit party to the existing contract;
 - iv. The Authority receives the benefit of any price reductions mandated by the original governmental unit party during the term of the existing contract and is protected from price increases during that time; and
 - v. The price of services being procured is no greater than the price of the same or equivalent goods or services under any existing New Jersey State contract.

(b) At the option of the Authority, the Authority may waive pre-qualification of a professional services consultant procured pursuant to public exigency under (a)2 above.

(c) At the option of the Authority, the Authority may waive pre-qualification of a professional services consultant procured pursuant to public exigency under (a)2 above.

19:38C-6.3 Solicitation

(a) With respect to a circumstance arising under N.J.A.C. 19:38C-6.2, whenever practical, the Authority will undertake a competitive selection process for agreements of this type to the extent it is feasible and economical to do so. This less formal process may include obtaining at least three telephonic quotations or obtaining written quotations from at least three separate professional services consultants.

1. Proposals shall be evaluated based on proposed fees and the evaluation criteria appropriate for the particular procurement. The Authority may request clarifying technical and/or organizational information from any entity submitting a proposal, prior to finalizing the evaluation.

2. The Authority shall select the proposal that is in the best interest of the Authority and the school construction program, based on proposed fees and the evaluation criteria established for the selection.

3. The competitive selection process used shall be memorialized in the recommendation of award.

SUBCHAPTER 7. SELECTION PROCEDURES—TERM AGREEMENTS

19:38C-7.1 Scope

This subchapter provides for the use of term agreements by the Authority to serve a variety of consultant needs in accordance with its statutory responsibilities to administer the schools construction program. This subchapter further provides for the issuance of task orders, in accordance with a term agreement.

19:38C-7.2 General requirements

(a) A term agreement is an agreement whereby the Authority may engage a professional services consultant or consultants for a defined period of time, rather than for a defined project or projects.

(b) Term agreements may be used by the Authority to retain professional services consultants when:

1. There is a need to expedite emergent projects or emergent project requirements;
2. There is a need to accomplish any study, evaluation, review, assessment, or other professional services relating to a school facilities projects on an "on call" basis; or
3. There is a need to address the program-wide requirements of the Authority.

(c) Procurement of a term agreement shall be in accordance with the selection procedures set forth at N.J.A.C. 19:38C-5, except that fee proposals may be based upon hourly or daily rates and/or other methods for determining costs over a specific time period.

(d) Term agreements shall be for a specific time period and maximum contract value, which shall be set forth in the term agreement. The Authority shall set forth a budget and schedule for each proposed task order under a term agreement prior to its assignment to a professional services consultant. The time in which services are to be performed under a task order may extend past the expiration date of a term agreement, as long as the task order was executed prior to the expiration date.

(e) The Authority may enter into a term agreement with any consultant engaged pursuant to the provisions of this chapter for a term, not to exceed three years, unless a longer time period is expressly authorized by law, and for a value that shall not exceed a ceiling stated in the agreement.

(f) Notwithstanding the foregoing, term agreements for provision of professional services in litigation matters shall be for a term not to exceed two years, pursuant to Executive Order No. 37 (2006).

SUBCHAPTER 8. ENGAGEMENT OF TITLE INSURANCE COMPANIES

19:38C-8.1 Scope

This subchapter, exclusively, shall govern the Authority's engagement of title insurance companies.

19:38C-8.2 Master list

The Authority shall establish and maintain a master list of title insurance companies, which are on the list of title insurance companies authorized to write title insurance policies in New Jersey as compiled by the New Jersey Department of Banking and Insurance and rated "A" or higher by a major credit rating agency. The master list shall be updated by the Authority on a quarterly basis.

19:38C-8.3 Procurement by competitive bidding for individual engagement

(a) When the Authority deems it in the best interest of a school facilities project or the school construction program to make use of an individual competitive procurement to secure title insurance, it shall solicit proposals for title insurance by means of a request for proposals presented to at least three separate title insurance companies randomly selected from the master list. Authority staff shall prepare a memorandum indicating the number of entities contacted and the number of proposals received, including prices.

(b) The proposals shall be evaluated by the Authority based on price and the title insurance company's experience with the property or area comprising and surrounding the site for the particular school facility at issue. The Authority may request clarifying technical and/or organizational information from those entities submitting proposals prior to determining the final ranking.

19:38C-8.4 Procurement through term agreements specifying fixed rates

(a) In the event that the Authority determines that it would be in the best interest of the school construction program to make use of a term agreement approach to the procurement of title insurance, it may extend an offer to all title insurance companies on the master list to enter into an agreement that may extend for a term not to exceed three years. The compensation paid under any such term agreement shall be in accordance with a fixed schedule of rates and charges, and the contract value shall not exceed a stated ceiling during its term. The Authority may extend such term agreement offers at such frequency as it determines is in the best interest of the school construction program, provided that no title insurance company may be engaged under more than one such term agreement at a time. All term agreements with title insurance companies shall provide for, among other things, termination for the convenience of the Authority and termination for cause.

(b) During the term of such an agreement, the Authority may assign to a title insurance company one or more task orders identifying specific properties or sites for which to provide title insurance for purposes of one or more school facilities projects based upon the following criteria:

1. The title insurance company's experience with the property or area comprising and surrounding the site for the particular school facility at issue;
2. Present capacity of the firm to provide the required services; and
3. Equitable allocation of task order assignments among all title insurance companies engaged by the Authority under a term agreement.

SUBCHAPTER 9. ENGAGEMENT OF APPRAISERS

19:38C-9.1 Scope

This subchapter, exclusively, shall govern the engagement of appraisers.

19:38C-9.2 Master list

(a) The Authority shall establish and maintain and update on a quarterly basis, a master list of appraisers. The master list shall be created based upon the list of appraisers maintained by the New Jersey Department of Transportation and the list of appraisers previously engaged by the Authority. Firms may apply for inclusion on the master list by submitting to the Authority a statement of qualifications, which shall include, but not limited to, the following:

1. A resume;
2. Experience with condemnation projects carried out by governmental entities and a full description of same; and
3. Experience with other governmental entities.

(b) Authority staff shall evaluate the statement of qualifications submitted by a firm seeking inclusion in the master list-based criteria including:

1. The firm's experience with condemnation projects carried out by governmental entities; and
2. The firm's compliance with the Uniform Standards of Professional Appraisal Practice, as published annually by the Appraisal Standards Board of the Appraisal Standards Foundation, 1029 Vermont Avenue, NW, Suite 900, Washington, DC 20005.

19:38C-9.3 Procurement by competitive bidding for individual engagement

(a) When the Authority deems it is in the best interest of a school facilities project or the school construction program to make use of an individual competitive procurement to engage an appraiser, it shall solicit proposals for appraisal services by means of a request for proposals presented to at least three separate appraisers chosen from the master list based upon the following:

1. Geographic proximity to the school facilities project; and
2. If applicable, the need for a particular specialty.

(b) The Authority shall prepare a memorandum indicating the number of entities contacted and of proposals received, including prices.

(c) The proposals will be evaluated by the Authority based on price and the following evaluative criteria:

1. Licensing status;
2. Professional designations;
3. Previous experience on similar projects;
4. Geographic proximity to the school facilities project; and
5. Present capacity of a firm to complete solicited services.

(d) The Authority may request clarifying technical and/or organizational information from those entities submitting proposals prior to determining the final ranking.

19:38C-9.4 Procurements through term agreements specifying fixed rates

(a) In the event that the Authority determines that it would be in the best interest of the school construction program to make use of a term agreement approach to the procurement of appraisal services, it may extend an offer to all firms on the master list to enter into an agreement that may extend for a term not to exceed three years. The compensation paid under any such term agreement shall be in accordance with a fixed schedule of rates and charges and the contract value shall not exceed a stated ceiling during its term. The Authority may extend such term agreement offers at such frequency as it determines is in the best interest of the school construction program, provided that no appraiser may be engaged under more than one such term agreement at a time. All term agreements with appraisers shall provide for, among other things, termination for the convenience of the Authority and termination for cause.

(b) During the term of such an agreement, the Authority may assign to an appraiser a task order identifying specific sites to appraise for purposes of one or more school facilities projects based upon the following criteria:

1. Licensing status;
2. Professional designations;
3. Previous experience on similar projects;
4. Geographic proximity to the school facilities project or projects;
5. Present capacity of the firm to complete the required services; and
6. Equitable allocation of task order assignments among all appraisers engaged by the Authority under a term agreement.

SUBCHAPTER 10. ENGAGEMENT OF EXPERTS

19:38C-10.1 General requirements

Experts for litigation support or real estate transaction support may be retained through outside counsel on behalf of the Authority, or procured directly by the Authority, using any of the procurement methods set forth in this chapter.

SUBCHAPTER 11. PROTESTS AND HEARING PROCEDURES

19:38C-11.1 Scope and purpose

(a) This subchapter sets forth the procedures that govern protests and administrative hearings regarding the Authority's conduct of procurements for professional services consultants, including protests challenging:

1. The form of advertisements for procurement;
2. The form of the RFQ or the RFP for a given procurement;
3. The scoring of proposals or the ranking of firms;
4. The selection of professional services consultants for unadvertised procurements under N.J.A.C. 19:38C-3 or 6;

5. The issuance of a task order under a term agreement under N.J.A.C. 19:38C-7.4; and

6. Performance evaluations for professional services consultants.

(b) For purposes of this subchapter, protests of the type described in (a) above are not contested cases subject to the requirements of the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq.

19:38C-11.2 Subject matter, time limitations, and who may request hearings

(a) Administrative hearings before the Authority may include the following subject matter and may be requested by the following entities:

1. RFQ process or documents. A consultant that has submitted or intends to submit a proposal in response to an RFQ, may request an informal hearing before the Authority to protest the RFQ process or documents by submitting a written protest to the Authority at least five business days prior to the date and time scheduled for receipt of proposals, setting forth in detail the grounds for such protest. The protest must contain all legal and factual arguments, materials, or other documents that support the protestor's position, and must indicate whether the protestor requests an informal hearing. The Authority may deny any protest that is filed less than five business days prior to the date and time scheduled for receipt of proposals, or that fails to provide the specific reasons for, and arguments supporting, the protest;

2. RFP process or documents. A consultant that has submitted or intends to submit a proposal in response to an RFP, may request an informal hearing before the Authority to protest the RFP process or documents, by submitting a written protest to the Authority setting forth in detail the grounds for such protest, at least five business days prior to the date and time scheduled for receipt of the proposals. The protest must contain all factual and legal arguments, materials, or other documents that support the protestor's position, and must indicate whether the protestor requests an informal hearing. The Authority may deny any protest that is filed less than five business days prior to the date and time scheduled for receipt of proposals, or that fails to provide the specific reasons for and arguments supporting the protest;

3. Short list. A consultant protesting its failure to be included in a short list, or protesting the inclusion of another consultant on a short list, may request an informal hearing before the Authority to protest the selection of the short list, by submitting to the Authority a written protest setting forth the specific grounds for challenging the short list, within five business days of the public announcement of the short list. The protest must contain all factual and legal arguments, materials, or other documents that support the protestor's position and a statement as to whether the protestor requests an informal hearing. The Authority may deny any protest that is filed more than five business days after the public announcement of the short list, or any protest that fails to provide the specific reasons for and arguments supporting the protest;

4. Master list. An appraiser or title insurance firm protesting its failure to be included in a master list may request an informal hearing before the Authority to protest the composition of the master list by submitting to the Authority a written protest setting forth the specific grounds for challenging the composition of the master list, within five business days of notification of the firm's failure to be included on the master list. The protest must contain all factual and legal arguments, materials, or other documents that support the protestor's position and a statement as to whether the protestor requests an informal hearing. The Authority may deny any protest that is filed more than five business days after notification of the firm's failure to be included on the master list, or any protest that fails to provide the specific reasons for and arguments supporting the protest;

5. Award of contract. A consultant that has submitted a proposal in response to an RFQ or RFP may request an informal hearing before the Authority to protest the award of a contract to another professional services consultant by submitting to the Authority a written protest, setting forth the specific grounds for challenging such award, within five business days of the public announcement of the award. The protest must contain all factual and legal arguments, materials, or other documents that support the protestor's position and a statement as to whether the protestor requests an informal hearing. The Authority may deny any protest that is filed more than five business days after the public

announcement of the award, or any protest that fails to provide the specific reasons for and arguments supporting the protest;

6. Unadvertised contracts. A professional services consultant may request an informal hearing before the Authority to protest the award of a contract to another professional services consultant by submitting to the Authority a written protest setting forth the specific grounds for such protest, within five business days of the public announcement of the award of the contract. The protest must contain all factual and legal arguments, materials, or other documents that support the protestor's position and a statement as to whether the protestor requests an informal hearing. The Authority may deny any protest that is filed more than five business days after the public announcement of the award, or any protest that fails to provide the specific reasons for and arguments supporting the protest;

7. Task order assignment. A professional services consultant that has received an award under a term agreement procurement may request an informal hearing before the Authority to protest the award or assignment of a task order to another professional services consultant, by submitting to the Authority a written protest setting forth the specific grounds for such protest, within five business days of the public announcement of the award or assignment of the task order. The protest must contain all factual and legal arguments, materials, or other documents that support the protestor's position and a statement as to whether the protestor requests an informal hearing. The Authority may deny any protest that is filed more than five business days after the public announcement of the award or assignment of the task order, or any protest that fails to provide the specific reasons for and arguments supporting the protest; or

8. Performance evaluation. A professional services consultant that is dissatisfied with its performance evaluation on an Authority project may request an informal hearing before the Authority by submitting to the Authority a written protest setting forth the specific grounds for such protest, within 15 calendar days after the date of receipt of written notification of the performance evaluation. The protest must contain all factual and legal arguments, materials, or other documents that support the protestor's position and a statement as to whether the protestor requests an informal hearing. The Authority may deny any protest that is filed more than 15 calendar days after the consultant's receipt of written notification of the performance evaluation, or any protest that fails to provide the specific reasons for and arguments supporting the protest.

19:38C-11.3 Hearing procedures

(a) Hearing procedures shall be as follows:

1. The Authority, in its sole discretion, shall determine whether to grant an informal hearing regarding any protest. Informal hearings are for fact-finding purposes for the benefit of the Authority and the Authority shall have the sole discretion as to whether to hold an informal hearing. Alternatively, the Authority may determine that sufficient information already exists in the record, so that a decision may be made without a hearing, and the Authority may issue a final agency decision accordingly. In the event that the Authority determines that a hearing is not necessary, a written decision will be issued by the Authority within five business days of receipt of all documents related to the protest.

2. Informal hearings will be held, where feasible, within 14 business days of the receipt of the request. Hearings will be heard, where practicable, by a hearing officer designated by the Chief Executive Officer. The hearing officer shall issue a final written decision within 30 calendar days of the conclusion of the hearing unless, due to the circumstances of the hearing, a greater time is required. For all protests of the RFQ or RFP processes and documents, the written decision will issue prior to the opening of proposals. If a decision based upon a protest results in a modification of the aforesaid process or documents, such decision shall be conveyed by addendum to all consultants eligible for the procurement at issue.

3. In an informal hearing, the Authority may, in instances where public exigency exists or where there is potential for substantial savings to the State, modify or amend the time frames or any other requirements provided in this subchapter. In these instances, the Authority shall document, for the record, the rationale for such amendment and give adequate notice to the parties involved.

4. For matters of dispute that may occur relative to the activities of the Authority, if formal hearings are warranted, such hearings will be held by the Chief Executive Officer or his or her designee, or by an Administrative Law Judge pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. and 52:14F-1 et seq., as applicable.

5. The Board of the Authority, or the Chief Executive Officer, as its designee, shall determine whether a matter constitutes a contested case and shall retain or refer any such matter for hearing pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. and 52:14F-1 et seq. Upon filing of the initial pleading in a contested case, the Board of the Authority may by resolution either retain the matter for hearing directly or transmit the matter for hearing before the Office of Administrative Law. Such hearings shall be governed by the provisions of the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. and 52:14F-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1.

(a)

**NEW JERSEY SCHOOLS DEVELOPMENT
AUTHORITY**

Procurement of Goods and Services

Readoption with Amendments: N.J.A.C. 19:38D

**Adopted Repeals and New Rules: N.J.A.C. 19:38D-
2.2, 2.3, 2.6, 4.1, 4.2, 4.3, 4.5, 4.6, 4.7, 5.1, 5.2, 7.1,
7.2, and 7.3**

**Adopted Repeals: N.J.A.C. 19:38D-2.9, 5.3, 5.4, 5.5,
5.6, 7.4, 8, and 9**

**Adopted New Rules: N.J.A.C. 19:38D-4.8, 4.9, and
4.10**

**Adopted Recodification with Amendments: N.J.A.C.
19:38D-4.4 as 2.9**

Proposed: December 5, 2011 at 43 N.J.R. 3168(a).

Adopted: April 4, 2012 by the New Jersey Schools Development Authority, Marc Larkins, Chief Executive Officer.

Filed: April 4, 2012 as R.2012 d.086, **without change**.

Authority: P.L. 2007, c. 137, § 4k (N.J.S.A. 52:18A-238k) (rulemaking authority); P.L. 2000, c. 72 (N.J.S.A. 18A:7G-1 et seq.); P.L. 2007, c. 137, (N.J.S.A. 52:18A-235 et seq.) (enabling statutes); and P.L. 1997, c. 399 (N.J.S.A. 52:34-9.1 et seq.) (related authority).

Effective Date: April 4, 2012, Readoption;
May 7, 2012, Amendments, Repeals, New Rules,
and Recodification.

Expiration Date: April 4, 2019.

Summary of Public Comment and Agency Response:

No comments were received regarding this proposal.

Federal Standards Statement

The rules readopted with amendments, repeals, new rules, and recodification implement a State statute, specifically P.L. 2007, c. 137 (N.J.S.A. 52:18A-235 et seq.). There are no Federal standards or requirements applicable to these rules. A Federal standards analysis, therefore, is not required.

Full text of the readopted rules can be found in the New Jersey Administrative Code at N.J.A.C. 19:38D.

Full text of the adopted amendments, new rules, and recodification follows:

SUBCHAPTER 1. GENERAL PROVISIONS

19:38D-1.1 Purpose and scope of rules

This chapter is designed to establish the procedures applicable to the award of contracts by the Authority for goods and services required for

implementation of the school construction program, excluding services subject to P.L. 1997, c. 399, N.J.S.A. 52:34-9.1 et seq., and N.J.A.C. 19:38C.

19:38D-1.2 Definitions

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise:

“Act” means the “Educational Facilities Construction and Financing Act,” P.L. 2000, c. 72 (N.J.S.A. 18A:7G-1 et seq.) as amended, which mandates the school construction program.

“Agreement” means the written agreement between the Authority and the vendor for the provision of goods and/or services.

“Authority” or “SDA” means the New Jersey Schools Development Authority, an entity formed pursuant to P.L. 2007, c. 137, N.J.S.A. 52:18A-235 et seq., as successor to the New Jersey Schools Construction Corporation. The Authority is statutorily charged with undertaking and funding school facilities projects, pursuant to the Act.

“Board” means the governing body of the Authority, consisting of members of the Authority as outlined in N.J.S.A. 52:18A-237.

“Compensation” means the payment due the vendor pursuant to the agreement.

“Corporation” or “SCC” means the New Jersey Schools Construction Corporation, the entity formed pursuant to N.J.S.A. 34:1B-159 and the predecessor to the Authority, which was abolished by P.L. 2007, c. 137.

“Emergent project” means a capital project necessitating expedited review and, if applicable, approval, in order to alleviate a condition that, if not corrected on an expedited basis, would render a building or facility so potentially injurious or hazardous that it causes an imminent peril to the health and safety of students or staff, as defined by N.J.A.C. 6A:26-1.2.

“Fee proposal” means the proposal submitted by a vendor, in the form and manner provided in the request for qualifications or request for proposals, which specifies the fees proposed for the provision of goods and/or services.

“Goods” means fixtures, furnishings, equipment, technology and any other items the procurement of which the Authority deems necessary for the school construction program. For purposes of this chapter, “goods” shall not include materials to be provided in connection with the provision of services pursuant to an agreement entered into by the Authority pursuant to N.J.A.C. 19:38C or N.J.S.A. 52:18A-243.

“Key personnel” means those persons named by a vendor in response to a requirement in an RFQ or RFP for specific identification of employees or personnel having a responsible role in the successful delivery of goods or services proposed by a vendor.

“Moral integrity review” means an investigation, performed by the Authority or members of the New Jersey State Police or other investigative body on behalf of the Authority, of a vendor that seeks to enter an agreement with the Authority.

“Notice of award” means a written notice issued to a vendor by the Authority indicating that the vendor has been selected to provide certain goods or services pursuant to an Authority procurement process, and that upon the Authority’s receipt of certain required documentation, the Authority intends to enter an agreement with the vendor for the provision of those goods and/or the performance of those services.

“Other facilities” means those facilities that are not school facilities projects as defined by the Act, namely, athletic stadiums, swimming pools, any associated structures or related equipment tied to such facilities including, but not limited to, grandstands and night field lights, greenhouses, facilities used for non-instructional or non-educational purposes, and any structure, building, or facility used solely for school administration.

“Pre-qualified” or “pre-qualification” means the approval of a vendor by the Authority pursuant to N.J.A.C. 19:38A.

“Proposal” means the response submitted by a firm with respect to a request for qualifications or a request for proposals.

“Protest” means a challenge to a decision, statement, action, or alleged inaction of the Authority.