

(b) The following disciplinary sanctions may be imposed upon a juvenile subject to Tier 2 internal discipline:

1. Withdrawing a privilege or an individual or group activity, for example, recreation, television, or radio privileges, for no more than five days; withdrawal of meals and snacks provided by the facility are not permitted to be used as a sanction;
2. Requiring a juvenile to pay for repair of damaged property, to repair the damage, or to complete a work task;
3. Restriction to the residential community home until given permission to participate in off-unit activities.
 - i. Restriction to the residential community home shall not exceed 48 hours without approval of the Superintendent or designee.
 - ii. Restriction to the residential community home shall not apply to medical appointments, religious activities, educational obligations, or outside employment, unless reasonable security or therapeutic concerns would restrict these as well;
4. Formal reprimand communicated to a juvenile by the shift coordinator or above; or
5. Up to seven hours of extra work duty to be served within a period of 10 days;

(c) Prior to completion of disciplinary sanctions imposed under this section, designated staff shall counsel the juvenile with respect to the reason for the rules and policies related to his or her violation or violations, and any elements of the his or her behavior or attitude that are in need of improvement.

(d) The Commission prohibits the following from being used as disciplinary measures:

1. Room restriction, isolation, or any other seclusion in a locked or unlocked room;
2. Any type or threat of corporal punishment;
3. Deprivation of meals, snacks, sleep, mail, clothing appropriate to the season or time of day, or verbal communication;
4. Mechanical or chemical restraint;
5. Assignment of overly strenuous physical work or exercise; and
6. Exclusion from any essential program or treatment service, such as education or clinical treatment.

13:103-14.8 Recommendation that a juvenile be judged in violation of probation or be transferred to another residential community home

(a) Subject to approval by the Director of Community Programs or designee, when a juvenile demonstrates an ongoing inability to benefit from the program at the residential community home, the Superintendent may recommend that the juvenile:

1. Be judged to be in violation of his or her conditions of probation;
2. Be transferred to another residential community home; or
3. Be referred to Mental Health Services or to another program or treatment regimen for appropriate care and/or treatment.

OTHER AGENCIES

(a)

NEW JERSEY SCHOOLS DEVELOPMENT AUTHORITY

Procurement of Architectural, Engineering, Land Surveying, and Related Professional Consulting Services

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

Proposed 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

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

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

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

Authorized By: New Jersey Schools Development Authority, Marc Larkins, Chief Executive Officer.
 Authority: P.L. 2007, c. 137, § 4k, N.J.S.A. 52:18A-238k; 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.; and P.L. 1997, c. 399, N.J.S.A. 52:34-9.1 et seq.

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2011-250.

Submit written comments by February 3, 2012 to:

Cecelia Haney, Administrative Practice Officer
 New Jersey Schools Development Authority
 PO Box 991
 Trenton, NJ 08625-0991

The agency proposal follows:

Summary

The New Jersey Schools Development Authority (“Authority” or “SDA”) proposes to readopt with amendments, new rules, and repeals, N.J.A.C. 19:38C. The chapter establishes the requirements, standards, and procedures for the Authority’s procurement of architects, engineers, land surveyors, and other professional services consultants.

Chapter 38C was originally effective on February 7, 2005 by the New Jersey Schools Construction Corporation (SCC). The SCC was created pursuant to the Educational Facilities Construction and Financing Act (EFCFA), P.L. 2000, c. 72 (N.J.S.A. 18A:7G-1 et seq.). The SCC was abolished in 2007 by P.L. 2007, c. 137 (N.J.S.A. 52:18A-235 et seq.), which simultaneously created the Authority to assume all of the functions, powers, and duties of the former SCC.

Chapter 38C was scheduled to expire on February 7, 2010, but was extended by action of Executive Order No. 1 (2010), which “froze” all existing regulations until the completion of the review of administrative regulations and rules by the Red Tape Review Group, and until such time as the extended regulation or rule is readopted pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq.

The Authority has reviewed Chapter 38C and has determined that it remains adequate, reasonable, and necessary for the purposes for which it was originally promulgated, with the addition of the proposed amendments. The rules proposed for readoption with amendments, new rules and repeals:

- (a) comply with N.J.S.A. 52:34-9 et seq., which governs the Authority’s procurement of architects, engineers, and land surveyors;

(b) implement Executive Order No. 37 (2006), which sets guidelines for the procurement of professional services by State authorities; and

(c) provide assurance to vendors and other stakeholders that the SDA procurement process is fair, transparent, and results in the retention of quality professional services consultants at competitive prices.

As the Authority has provided a 60-day comment period on this notice of proposal, this notice is excepted from the rulemaking calendar requirement pursuant to N.J.A.C. 1:30-3.3(a)5.

A section-by-section description of the chapter follows:

The Authority has proposed to change the heading of the chapter from "Procedures for Procurement of Architectural, Engineering, Land Surveying and Related Professional Consultants" to "Procurement of Architects, Engineers, Land Surveyors and Other Professional Services Consultants" to reflect the new definition of "professional services consultants" and the expansion of the rules to cover professional consultant procurements of all types, not just those consultants relating to design and land surveying.

Subchapter 1. General Provisions

N.J.A.C. 19:38C-1.1 Purpose and scope of rules

This section has been proposed for re adoption, with amendments, to provide that, in addition to the original reference to the implementation of P.L. 1997, c. 399 (N.J.S.A. 52:34-9.1 et seq.), the rules also serve to implement 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.). The codification of procedures for the procurement of professional services consultants in Chapter 38C provides the Authority with the regulatory framework to carry out its broad statutory mandate to plan, design, and construct school facilities projects and effectively administer the schools construction program.

N.J.A.C. 19:38C-1.2 Definitions

This section sets forth the meaning of the words and terms used throughout this chapter. Amendments to the section include changes to previously defined terms, the addition of new terms, and the deletion of terms and definitions rendered obsolete by the proposed amendments, as set forth below.

New definitions include:

"Act," which refers to 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.);

"Agreement," which is the title of the contractual document executed by and between the Authority and its professional services consultants, and which replaces the term "contract" when used to denote reference to the contractual document, to comport with the Authority's current practices;

"Appraiser," which has been relocated from Chapter 38D without modification and describes a provider of appraisal services;

"Authority" or "SDA," which reflects the creation of a new governmental entity by P.L. 2007, c. 137 as the successor to the New Jersey Schools Construction Corporation, which was simultaneously abolished in that same legislation. Accordingly, throughout N.J.A.C. 19:38C, references to "Corporation" and "SCC" have been replaced, where appropriate, with references to the "Authority" and "SDA";

"Board" has been replaced to refer to the members of the Authority, rather than referring to the board of directors of the now-abolished SCC;

"Commissioner," which term brings the rules into conformity with N.J.A.C. 6A:26, by recognizing the role of the Commissioner of the Department of Education in the approval of school facilities projects;

"Emergent project" is amended to be defined in accordance with the Department of Education's definition at N.J.A.C. 6A:26-1.2, to mean 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;

"Expert," which term has been relocated from Chapter 38D and modified to refer to the Authority and describes a consultant engaged for litigation support and/or as a trial witness;

"Key team member," which refers to an employee identified in a consultant's response to a request for qualifications (RFQ) or a request for proposals (RFP) as having a responsible role in the successful completion of services sought by the RFQ or RFP;

"Moral integrity review," which refers to the background investigation that each prospective professional services consultant is subject to as a condition of participating in an Authority procurement;

"NJEDA," which refers to the New Jersey Economic Development Authority, and has been added to distinguish that entity, which had previously been referred to in the rules as the "Authority," from the "SDA";

"Notice of award," which refers to the written document indicating a professional services consultant has been selected to enter an agreement with the Authority;

"Other facilities," a definition taken from the Act, which refers to types of facilities excluded from the definition of "school facilities" under the Act;

"Preliminary eligible costs," which means the initial eligible costs of a school facilities project as defined in N.J.S.A. 18A:7G-5 or 18A:7G-7;

"Protest," which means a challenge or objection to an Authority decision or action;

"Ranking," which describes the process of listing responsive professional services consultants in order of their evaluation scores with respect to the selection criteria for a given procurement for engagement of professional services consultants by the Authority;

"SDA school district," which definition corresponds with the School Funding Reform Act of 2008, P.L. 2007, c. 260 (N.J.S.A. 18A:7G-3), as that legislation replaced the term "Abbott district" with the term "SDA school district";

"Services," which references the duties and responsibilities of a professional services consultant, pursuant to the Agreement;

"Task order," which is the contractual document issued by the Authority to a professional services consultant that defines and authorizes specified services and payment therefor, pursuant to a term agreement;

"Title insurance," which term has been adopted without modification from Chapter 38D and describes a type of insurance procured by the Authority; and

"Title insurance company," which term has been adopted without modification from Chapter 38D and describes a provider of title insurance.

The following definitions have been amended:

"Compensation" is amended to clarify that payment is for services rendered by a professional services consultant in accordance with the Agreement, and to eliminate reference to "allowances";

"Corporation" is amended to reflect the abolition of the former New Jersey Schools Construction Corporation and the Authority's status as a successor entity to the NJSCC;

"Fee proposal" has been amended to specify that the fee proposal is to be submitted in the form and manner provided by the RFQ or RFP, and to reflect the deletion of the term "Request for fee proposal";

"Pre-development activities" is amended to replace the term "pre-development" with "preconstruction," in conformity with the reference to "preconstruction activities" in N.J.S.A. 18A:7G-5 and N.J.A.C. 19:34. In addition, the list of examples in the definition of such types of activities, which included land acquisition, feasibility studies, remediation, and site development, has been amended to reference N.J.S.A. 18A:7G-5;

"Pre-qualified" is amended to reflect the codification of the Authority's rules governing the prequalification of professional services consultants at N.J.A.C. 19:38A;

"Professional services consultant" is amended to emphasize the unique technical skills, licenses, or credentials that may be held by such consultants, to expand the enumerated categories of professional services to include feasibility studies, appraisals, and the provision of title insurance, to replace the reference to "shop drawings" with the more general term "submittals," to indicate that a design consultant is required to review documents that may include more than just shop drawings, and to reflect the deletion of "project management firms";

“Proposal” has been amended to mean the submission of a professional services consultant in response to an RFQ or RFP, and to eliminate distinctions regarding technical or fee proposals;

“Request for proposals” is amended to streamline the definition to eliminate reference to the deleted term “pre-development activity” and to further delete the enumeration of types of contracts for which a professional consultant may be sought, as unnecessarily limiting, and to eliminate references to the Corporation;

“Request for qualifications” is amended to reflect the deletion of the term “preliminary proposal,” as discussed below, and to describe the information that may be requested therein;

“School construction program” is amended to delete a superfluous reference to the Act and to replace the reference to “Corporation” with “Authority”;

“School facilities project” is amended in conformity with N.J.S.A. 52:18A-236 to include planning activities associated with a school facilities project, to clarify that maintenance activities that come within the definition are confined to capital maintenance projects, and to delete from the definition the “repair” of a school facility;

“School facility” is amended to bring the term into conformity with its statutory definition pursuant to P.L. 2007, c. 137 (N.J.S.A. 18A:7G-3) by adding references to facilities that “support educational buildings and structures,” such as district wastewater treatment facilities, power generating facilities, and steam generating facilities, and to include to the statutory distinction of “other facilities,” which are defined as structures or improvements that do not constitute school facilities and which are elsewhere defined to include 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;

“Selection committee” is amended to recognize that such committee’s role in evaluation of proposals is limited to proposed contracts with compensation in excess of the State bid threshold;

“Selection coordinator” is amended to delete reference to responsibilities for “day-to-day” activities, which reference was deemed ambiguous as the selection coordinator’s role is not intended to be a permanent one with daily activities; and also to delete specific reference to “advertising” activities, as advertising of a procurement may be facilitated by other Authority staff within the Authority’s procurement division;

“Small business enterprise” is amended to reflect the change in the name of the governmental entity for small business registration and to refer to the recodified rules for registration; and

“Term contract” is amended to replace “contract,” with “agreement” as the contractual document governing the terms of engagement between the Authority and professional services consultants; and to replace the reference to the “Corporation” with the “Authority.”

The following terms are proposed for deletion:

“Allowance” is proposed for deletion, as the term was referenced in the former rules only to define an “allowance” as an exception to the contract value limit of \$2 million for the now-obsolete “category two contract.” As the rules have now been revised to eliminate the system of numerical categories for contracts, defined by contract type, or value, the reference to an “allowance” is no longer necessary;

“Category one contract,” “category two contract,” “category three contract,” “category four contract,” and “category five contract,” each of which classified certain types of professional services by numerical categories, have been proposed for deletion throughout Chapter 38C. In lieu of these numerical categories, the Authority has proposed rules categorizing agreements according to the type of professional services engagement they entail, or whether the engagements referenced therein contemplate compensation above or below the State threshold pursuant to N.J.S.A. 52:34-7b;

“Client school district” is proposed for deletion and replacement with the term “SDA district” in conformance to the terminology used in the School Funding Reform Act of 2008, P.L. 2007, c. 260 (N.J.S.A. 18A:7G-3);

The definition of “early childhood education facilities project,” has been deleted to reflect the deletion of N.J.S.A. 18A:7G-5s, pursuant to P.L. 2007, c. 137 (N.J.S.A. 52:18A-235 et seq.);

The term “Educational Facilities Construction and Financing Act” has been subsumed within the definition of the Act and the reference is amended to reflect that the statutory parameters for the schools construction program encompass 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.)

“Member,” referring to a member of the Selection Committee, has been deleted as superfluous;

The term “pre-development approval” has been deleted as the regulatory references to the term have been deleted;

The term “project management firm,” has been deleted, as its reference in the definition of “professional services consultant” has likewise been deleted, in light of the Authority’s trend toward engagement of “construction managers,” rather than “project management firms,” to perform construction administration services;

“Preliminary project report (PPR)” has been deleted to reflect the operational effect of the Commissioner’s approval, which precedes the PPR, pursuant to N.J.A.C. 6A:26;

“Preliminary proposal” has been deleted as the regulatory reference to the term has been deleted;

The terms “request for fee proposals” and “request for technical proposals” have been deleted and subsumed within the more general term “request for proposals”;

“Scope of services” has been deleted as the regulatory references to the term have been deleted;

“Technical proposal” has been deleted in favor of the more general “proposal”; and

“Waiver,” referring to the Authority’s grant of a waiver of advertising, has been deleted as superfluous.

Subchapter 2. General Requirements

N.J.A.C. 19:38C-2.1 Scope

This section has been repealed and replaced with language defining the scope of Subchapter 2, which sets forth the general requirements that are applicable to the Authority’s procurement of professional services consultants, including the various methodologies for procurement and the types of qualitative factors used in evaluating proposals, as well as describing the process for the rejection of proposals, the selection of consultants and the approval and execution of agreements with such consultants, as well as requirements for termination of such agreements.

N.J.A.C. 19:38C-2.2 Pre-qualification requirement

This section has been amended to provide that, whenever Authority pre-qualification is required for a particular procurement by statute or rule, any proposed professional services consultant seeking to be engaged by the Authority with respect to such procurement must have Authority pre-qualification as of the time of submission of a response to either an RFQ or RFP, whichever is earlier. Previously, this section provided that pre-qualification requirements would be as specified throughout Chapter 38C. This section has also been amended to propose a new subsection (b), which provides that the Authority shall establish appropriate pre-qualification requirements as may be necessary in order to ensure competitive technical and fee proposals or as may be dictated by the unique or specialized nature of the scope of services. The section is further amended to add new subsection (c), which specifies that all prospective professional services consultants seeking to be engaged by the Authority are subject to a moral integrity review, even in the absence of a pre-qualification requirement, and that the results of the moral integrity review, if negative or unsatisfactory in a manner that would justify revocation of pre-qualification for a pre-qualified firm, may result in rejection of the firm’s proposal.

N.J.A.C. 19:38C-2.3 Selection procedures based on type of engagement

This section has been amended to provide that the procedures applicable to a particular procurement vary depending on the nature of services or contract value of a particular consultant engagement. The changes in this section reflect the elimination of the former structure of

Chapter 38C, which assigned a numerical designation to each type of contract for professional services consultants, (for example, former categories one through five). Instead, the rules categorize agreements based on the type of professional services they entail. For example, unique procedures are authorized if the engagement is for appraisers or title insurance companies as contrasted with other professional services consultants, and procurement methods vary depending on whether the specified compensation either falls within, or exceeds, the statutory bid threshold set by the State Treasurer (currently \$36,000), pursuant to N.J.S.A. 52:34-7b.

N.J.A.C. 19:38C-2.4 Advertising

Existing N.J.A.C. 19:38C-2.4, Contract term; term contracts, is proposed for repeal, because new rules have been proposed in new Subchapter 7, which establish the parameters for the procurement of term agreements and the issuance of task orders. The language proposed at N.J.A.C. 19:38C-2.4, Advertising, is recodified from N.J.A.C. 19:38C-5.4, and requires advertising to be performed in accordance with N.J.S.A. 52:18A-243(h), which includes electronic means and/or newspapers, design and construction publications, and trade journals covering the construction industry in New Jersey; by written notice to New Jersey professional societies, or by use of direct mailings. This section further requires that any such advertisement must promote competitive bidding and also describe any specific information that a consultant must submit, provide the date and time for the receipt of submissions, as well as the evaluation criteria that will be applied to proposals. Amendments to subsection (a) delete the requirement that direct mailings are limited only to prequalified firms. Under the amended regulation, direct mailings may be sent to non-prequalified firms, in the hope that interested firms will seek prequalification and increase competition for Authority engagements. Additionally, the proposed amendment deletes existing subsection (d), which specified that in the case of a one-step procurement process, "the advertisement and request for proposals shall provide that consultants must be appropriately pre-qualified at the time of submission of a technical proposal in order to be eligible for an award." This language, which was improperly located in the "advertising" section, rather than the prequalification section, is now embodied correctly in the prequalification language of N.J.A.C. 19:38C-2.2, which specifies that a consultant interested in competing for an Authority engagement must have Authority prequalification as of the time of submission of a response to either an RFQ or RFP, whichever is earlier.

N.J.A.C. 19:38C-2.5 Evaluation

This section is amended to delete a specific list of evaluation criteria for professional services consultants, and provide that the criteria that the selection committee may use to evaluate proposals and the weights of such criteria that may be used to rank professional services consultants shall be specified in the RFQ and/or RFP. In addition, language pertaining to the Authority's compliance with other State laws has been deleted as redundant. The language providing that nothing in Chapter 38C shall be construed to limit the Authority's adherence to its small business set aside rules remains, although the cross-reference has been updated to account for the recodification of the small business set-aside rules, now located at N.J.A.C. 19:39.

N.J.A.C. 19:38C-2.6 Rejection of proposals; cancellation of procurement or award

In this amended section, the Authority makes provision for the rejection of individual proposals that are submitted late or that are deemed non-responsive and provides that an award may be cancelled at any time before the execution of an agreement by all parties. The section is amended to streamline the process for rejection of proposals, providing that the Authority may reject all proposals for any reason when otherwise in the public interest to do so.

N.J.A.C. 19:38C-2.7 Approval and execution of Agreement

This section is repealed and replaced to specify that a proposed agreement with the Authority is not valid until executed by the Authority. The section is further amended to replace references to "contract" with "agreement," and to delete references to the "Corporation."

N.J.A.C. 19:38C-2.8 Termination

This section, which requires that all agreements entered into by the Authority pursuant to this chapter be terminable for convenience or cause, is amended to replace references to the "Corporation" with "Authority."

N.J.A.C. 19:38C-2.9 Disclosure and publicity

This section is proposed for repeal and replacement to acknowledge that all submissions made in response to an RFQ or RFP are subject to the provisions of the Open Public Records Act (OPRA), N.J.S.A. 47:1-1 et seq., including the exceptions from disclosure as provided within OPRA. The language contained in the former version of the rule, specifying records access by governmental bodies, and retention periods for documents, has been repealed as records access and retention requirements have been inserted into the Authority's standard forms of agreement for professional services consultants. Subsection (b) of the rule provides that consultants shall seek the permission of the SDA prior to their issuance of press releases concerning a school facilities project, and that such releases shall acknowledge Authority financing and assistance in undertaking the project.

N.J.A.C. 19:38C-2.10 Performance evaluation

Existing N.J.A.C. 19:38C-2.10, Appeals, is proposed for repeal, because the appeals process has been proposed as new rules in proposed new Subchapter 11. The proposed new section, "performance evaluations," codifies the right of the Authority to evaluate the performance of consultants and to use these evaluations in the ranking of consultants. The proposed new section further provides that such performance evaluations are to be based on qualitative factors including, but not limited to quality of work, scheduling, management, cost control/amendments, management of subconsultants, closeout, and any other factors affecting the consultant's performance.

Subchapter 3. Selection Procedures – Agreements Not Exceeding the State Bid Threshold Pursuant to N.J.S.A. 52:34-7b

Existing Subchapter 3, Selection Procedures–Category One Contracts, has been proposed for re-adoption, with amendments, to delete reference to the obsolete term "category one contracts" and to include the replacement of "Corporation" with "Authority," as stated above. Accordingly, the reference to "category one contracts" in the heading of Subchapter 3 is deleted and replaced with a descriptive reference of the type of agreements addressed in Subchapter 3; namely, agreements that individually do not exceed the public bid threshold, as established by N.J.S.A. 52:34-7b, and other contracts at the option of the Authority. The subchapter is further amended to reflect the increase in the State bid threshold from \$25,000 to \$36,000, and to provide that with respect to agreements under this chapter, public advertising is not required, and the Authority may waive any prequalification requirements for professional services consultants under such agreements. Finally, N.J.A.C. 19:38C-3.1 specifies that this subchapter does not govern the procurement of appraisers or title insurance companies.

Subchapter 4. Selection Procedures – Category Two Contracts

Existing Subchapter 4 is proposed for repeal, but the subchapter will be reserved to preserve the codification of the remaining rules. Subchapter 4 outlined a process pursuant to which the Authority could randomly select a predetermined number of prequalified professional services consultants to receive an RFP for a proposed "category two contract," which was a contract with compensation not exceeding \$2,000,000. The Authority has determined, consistent with Executive Order No. 37 (2006) that all interested professional services consultants shall receive notice of and a fair opportunity to submit proposals and be considered for the award of professional services agreements when compensation for a proposed agreement exceeds the State bid threshold. Because the Authority no longer employs a random selection process for agreements with compensation not exceeding \$2,000,000, Subchapter 4 is rendered obsolete.

Subchapter 5. Selection Procedures – Agreements Exceeding the State Bid Threshold, as Adjusted, Pursuant to N.J.S.A. 52:34-7b

Subchapter 5, Selection Procedures – Category Three Contracts, has been proposed for readoption with amendments. The heading has been amended to delete the reference to “category three contracts” and replace the numerical reference with a descriptive reference to agreements for professional services consultants with compensation exceeding the State bid threshold (currently \$36,000, as adjusted by the State Treasurer), pursuant to N.J.S.A. 52:34-7b.

N.J.A.C. 19:38C-5.1 Scope and applicability

This section is proposed for repeal and replacement to specify that Subchapter 5 applies to agreements for professional services consultants with compensation exceeding the State bid threshold, but also applies to other engagements at the option of the Authority. This section also specifies that Subchapter 5 does not apply to the procurement of appraisers or title insurance companies.

N.J.A.C. 19:38C-5.2 Initiation

Existing N.J.A.C. 19:38C-5.2, which provided generally for the initiation of a procurement for a professional services consultant after receipt of preconstruction approval for a school facilities project from the Commissioner and the selection of either a one- or two-step procurement process, has been proposed for repeal. The proposed new rule deletes the former section’s reference to preconstruction approval from the Commissioner, in recognition that such approval may not be applicable to program-wide procurements not tied to a specific school facilities project. The new section provides that the procurement of a professional services consultant may be initiated by public advertisement of an RFQ or RFP, except in circumstances justifying a waiver of advertising, pursuant to proposed Subchapter 6.

N.J.A.C. 19:38C-5.3 Selection committee

Existing N.J.A.C. 19:38C-5.3, “Two-step process; request for qualifications” has been proposed for repeal and replacement. The new section establishes the role and responsibilities of the selection committee(s) as including review, evaluation, and scoring of proposals submitted in response to RFQs and RFPs. This section requires that the selection committee be established prior to the receipt of proposals. This section further requires that the selection committee members have relevant experience necessary to evaluate proposals, and specifies that the names of selection committee members will be made public after award, pursuant to N.J.S.A. 52:34-10.3(c).

N.J.A.C. 19:38C-5.4 Selection Evaluation Criteria

Existing N.J.A.C. 19:38C-5.4, One step selection process, has been proposed for repeal and replacement. The proposed new section provides that the selection criteria to be utilized for a particular professional services consultant procurement shall be established prior to advertisement and shall be disclosed in the RFQ or RFP for the procurement. This section enumerates the types of selection criteria that may be considered and indicates that in the case of professional services consultants other than architects, engineers or land surveyors, a fee proposal may be considered as part of the evaluation criteria.

N.J.A.C. 19:38C-5.5 Selection Evaluation Process

Existing N.J.A.C. 19:38C-5.5, Request for proposals, has been proposed for repeal and replacement. This proposed new section identifies various components of a professional services consultant evaluation, including the responses to the RFQ and/or RFP, responses to requests for additional information, participation in interviews, and other components at the discretion of the Authority. The section describes the role of the selection committee members in evaluating and scoring candidates for a professional services consultant engagement, and the role of the selection committee coordinator in compiling the scores and preparing a ranking, as well as the procedures for preparing a short list, if one is specified in the RFQ or RFP for a given procurement.

N.J.A.C. 19:38C-5.6 Submission of Fee Proposals

Existing N.J.A.C. 19:38C-5.6, Ranking of technical proposals, has been proposed for repeal and replacement. This new section provides the procedure for the submission of fee proposals.

N.J.A.C. 19:38C-5.7 Consideration of fee proposals

This section is readopted with amendments. New subsection (a) specifies the treatment of fee proposals if they are a criterion in the evaluation, as in the case of a procurement of professional services consultants other than architects, engineers, and land surveyors. Subsection (a) provides that the Authority shall open the fee proposals and assign the maximum points to the lowest total fee proposal. Each higher fee proposal will be scored according to the percentage that each exceeds the lowest fee proposal. Subsection (b), which describes the process of utilizing the fee proposals as a guide in negotiating an agreement with the highest-ranking consultant, has been amended to incorporate minor modifications into the language of the original section, to clarify that the Authority may terminate the procurement during the negotiation process and to eliminate references to the “Corporation.”

N.J.A.C. 19:38C-5.8 Recommendation

This section is readopted with amendments to specify that the Authority’s selection coordinator shall recommend the most technically qualified professional services consultant, at fair and reasonable compensation, for the approval and execution of the professional services agreement. If the recommendation is approved, the Authority will issue the successful firm a notice of award.

N.J.A.C. 19:38C-5.9 Execution of Agreement

This proposed new section provides that upon acceptance by the SDA of any documents or materials submitted by the winning professional services consultant as required in the notice of award, the Authority will execute the agreement and provide a fully-executed agreement to the winning professional services consultant.

N.J.A.C. 19:38C-5.10 Confidentiality

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

Subchapter 6. Waiver of Advertising

N.J.A.C. 19:38C-6.1 Scope

Existing Subchapter 6, Selection Procedures – Category Four Contracts, has been proposed for readoption, with amendments, to reflect the proposed deletion of the definition, “category four contracts.” Accordingly, the reference to “category four contracts” in the heading of Subchapter 6 is deleted and replaced with a descriptive reference of the types of agreements addressed; namely, agreements procured through the Authority’s grant of a waiver of advertising. Proposed amendments to N.J.A.C. 19:39C-6.1 include reference to the statutory justification for waiver of advertising for certain procurements, replacement of references to the “Corporation” with references to the “Authority,” and utilization of the term “agreement” rather than “contract.”

N.J.A.C. 19:38C-6.2 Circumstances justifying waiver of advertising; prequalification

This section, formerly headed “categories; pre-qualification” is readopted with amendments. The section heading has been amended to better describe the content. The section has been amended to clarify the nature of a public exigency as one in which professional services must be purchased immediately and are necessary to mitigate an emergency situation. Further amendments are proposed to streamline the language of the section, provide that the time for performance of the services is a factor in the Authority’s determination that only one consultant is capable or available, and to specify that the Authority may waive prequalification requirements for procurements under the public exigency exception to advertising. Finally, language has been added from the list of circumstances justifying the waiver of advertising in Chapter 38D, which

exempts an existing government contract from advertising if it meets certain criteria. That language has been adopted from the original N.J.A.C. 19:38D-6.2(a)5 with minor amendments to reflect the change from “Corporation” to “Authority” and to eliminate references to “goods” for purposes of this chapter.

N.J.A.C. 19:38C-6.3 Solicitation

This proposed new section replaces existing N.J.A.C. 19:38C-6.3, Initiation of request. The new section specifies that proposals are to be evaluated based on proposed fees and on evaluation criteria appropriate for the particular procurement; that whenever practical, the Authority will undertake a competitive selection process using a less formal process, which may include obtaining at least three telephonic quotations or obtaining written quotations from at least three separate professional services consultants; and that the Authority may request clarifying technical and/or organizational information from any entity submitting a proposal prior to finalizing the scoring of the proposals. Lastly, the new section specifies that the method of the selection process shall be memorialized in the recommendation of award.

Subchapter 7. Selection Procedures – Term Agreements

Existing Subchapter 7, Selection Procedures – Category Five Contracts, is proposed for repeal. It addressed the circumstances in which the former SCC could assume an SDA school district’s existing agreement for professional architectural services for the design of a school facility project, if those services had been procured by an SDA school district prior to the enactment of the Act, and if the terms of the agreement did not prohibit an assignment of the contract. Since the time of the original promulgation of Subchapter 7, the need for assumption of an existing school district contract for design services has been obviated, and thus there is no further need for existing subchapter 7.

New Subchapter 7, Selection Procedures – Term Agreements, governs the circumstances and the process for the Authority’s procurement of term agreements and the issuance of task orders.

N.J.A.C. 19:38C-7.1 Scope

The proposed new section provides that the scope of the subchapter includes the circumstances for the use of term agreements and the process for their procurement, as well as the issuance of individual task orders.

N.J.A.C. 19:38C-7.2 General requirements

This proposed new section provides that term agreements may be used by the Authority to engage a professional services consultant for a defined period of time, rather than for a defined project or projects. The new section further specifies, in subsection (b), that term agreements may be used to serve a variety of consultant needs either for school facilities projects, or for program-wide services required by the Authority. More specifically, term agreements may be procured to expedite emergent projects or emergent project requirements, or when there exists a need to accomplish any study, evaluation, assessment, or other professional services on an “on call” basis; or for professional services consultants in order to address the program-wide requirements of the Authority. Proposed new subsection (c) provides that the procurement process for a term agreement must be in accordance with the selection procedures outlined in N.J.A.C. 19:38C-5, except that fees may be based upon hourly daily rates and/or other methods for determining costs over a specific time period. Proposed new subsection (d) provides that term agreements shall be for a specific time period and maximum contract value, which shall be set forth in the agreement. This subsection further provides that a budget and schedule shall be established for each task order prior to its assignment to a professional services consultant and that work performed under a task order may extend past the expiration date, as long as the task order was executed prior to the expiration date. Proposed new subsection (e) provides a three-year limit for professional consultant term agreements, unless otherwise authorized by law, and specifies that term agreements may specify a maximum contract value. Proposed new subsection (f) indicates that a term agreement for litigation services is subject to a two-year term, pursuant to Executive Order No. 37 (2006).

N.J.A.C. 19:38C-7.3 and 7.4

Existing N.J.A.C. 19:38C-7.3, Initiation, and 7.4, Limitations, are proposed for repeal.

Subchapter 8. Engagement of Title Insurance Companies

Proposed new Subchapter 8 recodifies the procedures for the procurement of title insurance companies previously located at N.J.A.C. 19:38D-7. No substantive changes were made to the existing Chapter 38D rule text. The text has been amended to replace references to the “Corporation” with the “Authority” throughout the subchapter.

N.J.A.C. 19:38C-8.1 Scope

This section specifies that Subchapter 8 defines the exclusive process for retention of title insurance companies.

N.J.A.C. 19:38C-8.2 Master list

No substantive changes were made from the existing Chapter 38D rule text, which addresses the establishment and quarterly updating of a list of title insurance companies authorized by to write title insurance policies in New Jersey by the New Jersey Department of Banking and Insurance and having a credit rating of “A” or better.

N.J.A.C. 19:38C-8.3 Procurement by competitive bidding for individual engagement

This section, previously headed “competitive bidding” under Chapter 38D, has been renamed to clarify the process in question. The previous reference to “the property or area subject to the school program procurement” has been changed to “the property or area comprising and surrounding the site for the particular school facility at issue,” in order to eliminate the reference to the undefined term “school program procurement,” which seems to blur the line between project-specific procurements and program-wide initiatives of the Authority.

N.J.A.C. 19:38C-8.4 Procurement through term agreements specifying fixed rates

This section previously headed “term contracts” has been renamed to conform with the Authority’s use of “term agreements” to refer to such contracts for a specified duration, and to clarify the process in question. The previous reference to “the property or area subject to the school program procurement” has been changed to “the property or area comprising and surrounding the site for the particular school facility at issue” in an effort to eliminate the reference to the undefined term “school program procurement.” References to “task orders” have been inserted in the discussion of “assignments” under term agreements, in acknowledgment of the mechanism used to assign individual tasks under term agreements.

Subchapter 9. Engagement of Appraisers

Proposed new Subchapter 9 recodifies the procedures for the procurement of appraisers previously located at N.J.A.C. 19:38D-8. No substantive changes from existing Chapter 38D rule text are proposed. The text has been amended to replace references to the “Corporation” with the “Authority” throughout the subchapter.

N.J.A.C. 19:38C-9.1 Scope

This section specifies that Subchapter 9 defines the exclusive process for retention of appraisers.

N.J.A.C. 19:38C-9.2 Master list

This section maintains the language from existing Chapter 38D text, but is amended in intent to recognize that the former reference in the description of the creation of the “Master List” of appraisers to the list of appraisers previously engaged by the Authority” had initially referred to the list of appraisers maintained by the NJEDA, (which was defined as “the Authority” in existing Chapter 38D). The language is now consistent with other amendments in Chapter 38C, to recognize that the term “Authority” now refers to the SDA, and the list in question is meant to capture the list of appraisers previously engaged by the SDA, in recognition that, at this point in the Authority’s management of the school construction program, the Authority has a sufficient history of engagement of appraisers to dispense with a reliance on NJEDA’s former appraisal engagements. The statement of qualifications criteria has been

amended to replace “references from other governmental entities” with “experience with other governmental entities” to relieve such entities from the burden of providing a formal “reference.”

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

This section previously headed competitive bidding under Chapter 38D has been renamed to clarify the process in question. The section has been amended to delete from the evaluative criteria the formal criterion of recommendation or advice from Authority condemnation counsel, in order to preserve privilege.

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

This section previously headed term contracts under Chapter 38D has been renamed to conform with the Authority’s use of “term agreements” to refer to such contracts for a specified duration, and to clarify the process in question. References to “task orders” have been inserted in the discussion of “assignments” under term agreements, in acknowledgment of the mechanism used to assign individual tasks under term agreements. The section has been amended to delete from the evaluative criteria the formal criterion of recommendation or advice from Authority condemnation counsel, in order to preserve privilege.

Subchapter 10. Engagement of Experts

19:38C-10.1 General requirements

This section, previously located at N.J.A.C. 19:38D-9, has been amended to streamline the procedures for engagement of experts for litigation support and real estate transaction support. Existing Chapter 38D language was tailored to the retention of experts in condemnation actions and specified that the SCC would coordinate the procurement of experts after consultation with “special counsel engaged to handle the relevant real estate transactions, if any, and with the Attorney General’s Office.” The reference to consultation with the Attorney General’s office has been deleted, and the new language has been broadened to extend to all litigations and real estate transactions and specifies that experts may be retained through outside counsel on behalf of the Authority, or procured directly by the Authority, using any of the procurement methods of this chapter.

Subchapter 11. Protests and Hearing Procedures

N.J.A.C. 19:38C-11.1 Scope and purpose

Proposed new Subchapter 11 sets forth the procedures that govern challenges to the form of the RFQ or the RFP, the ranking of firms during the RFQ phase, and the scoring of proposals. This section is modeled on the hearing procedures promulgated by Department of the Treasury, Division of Property Management and Construction at N.J.A.C. 17:19-5.1 and 5.2. This subchapter further provides that protest of the type described are not contested cases subject to the requirements of the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq.

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

This proposed new section outlines the procedures and requirements for challenging the actions of the Authority undertaken pursuant to this chapter, such as the RFQ process or documents; the RFP process or documents; the failure of a firm to be short listed or the short listing of another firm; the inclusion of a firm in, or omission of a firm from, the master list of appraisers or title insurers; the award of contracts, whether subject to public advertisement or not; the award of a task order assignment; and the conduct of performance evaluations.

N.J.A.C. 19:38C-11.3 Hearing procedures

This proposed new section outlines the procedures for requesting, and the time frames for undertaking, informal hearings conducted by the Authority. This section provides that the Authority may grant an informal hearing regarding a protest, which will result in a written decision. This section further provides that 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 or his or her designee. The hearing officer shall issue a final written decision within 30 calendar days of the conclusion of

the hearing unless a greater time is required, due to the circumstances of the hearing. This section also addresses the adjustment of time frames within the rules, the procedures for formal hearings, if warranted, and the role of the Board of the Authority in determining the existence of contested cases and in retaining or referring such contested cases for hearing.

Social Impact

The rules proposed for readoption with amendments, repeals, new rules, and recodification should establish confidence in the Authority’s ability to ensure that the public’s interest in the Authority’s selection of professional services consultants is adequately protected and that the Authority fairly obtains the services of the most qualified professional services consultants. The rules will affect all private architects, engineers, and land surveyors, and other professional service consultants, such as construction management firms, appraisers, and title insurance companies, that desire to bid on school facilities projects constructed under the Act, as amended, in that the rules specify the requirements of advertisement of proposals, selection procedures, proposal evaluation, and contract approval and execution.

Economic Impact

The economic impact of the rules proposed for readoption with amendments, repeals, new rules, and recodification is limited; the rules outline the process that will be used by the Authority in the selection of professional services consultants. This information should be beneficial to all private firms wishing to provide architectural, engineering, land surveying, construction management, and other professional services to the Authority. The rules establish a bidding process that entails certain incidental costs associated with the preparation and submission of bids. Such costs may include professional staff time associated with preliminary planning, as well as the costs associated with the production and reproduction of proposals. The professional consulting activities are to be funded with the State share of the eligible costs of a school facilities project, which may be funded with State contract bonds issued by the NJEDA pursuant to section 25 of the Act, the payment of which is conditioned on appropriations being made by the Legislature. Additional activity in the planning, architecture, and engineering professions may directly result from the rules, providing Statewide economic benefits in the short term.

The Authority will incur direct and indirect costs for bid advertisements and the staff and administrative expense arising from the preparation of bid requests, the evaluation of the bids received, and the award of contracts and agreements. However, the rules contain amendments designed to streamline the Authority’s procurement processes, which should permit some cost savings in staff time.

Federal Standards Statement

The rules proposed for readoption 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 the rules. A Federal standards analysis, therefore, is not required.

Jobs Impact

The rules proposed for readoption with amendments, repeals, new rules, and recodification modify the Authority’s process for procurement of professional services, and thus to the extent the rules have an effect on jobs, it will be to create jobs in New Jersey, primarily in the consulting and service sectors, rather than eliminate positions. Moreover, the rules are likely to support job growth to the extent that they may foster participation in the school construction program by a broader class of professional services consultants.

Agriculture Industry Impact

The rules proposed for readoption with amendments, repeals, new rules, and recodification will have no direct impact on the agriculture industry. However, implementation of the rules will be coordinated with the Farmland Preservation Program for the acquisition of sites for new schools.

Regulatory Flexibility Analysis

The rules proposed for readoption with amendments, repeals, new rules, and recodification impose some compliance requirements on small businesses as the term is defined by the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., but only for those small businesses that choose to seek to do business with the Authority. Inasmuch as the rules outline the criteria and procedures the Authority will consider for the selection of professional services consultants, the rules, at N.J.A.C. 19:38C-2.2, specify that professional consultants be prequalified by the Authority, a requirement that is imposed by public contracting provisions set forth in N.J.S.A. 52:34-9.1 et seq. As implemented by the Authority, all firms seeking prequalification will be required to submit audited financial statements, a cost which these firms might not otherwise need to incur. In the interests of financial probity, however, no exemption for small businesses would be warranted. In addition, the rules eliminate some regulatory burdens on potential consultants, in that the proposed rules eliminate the 10-year recordkeeping requirement imposed on winning bidders by the prior version of the rules, in favor of a more flexible recordkeeping requirement that varies according to the nature of the agreements and documents at issue, in compliance with the Authority's standard document retention policy. Thus, it is unlikely that a small business would have to employ professional services to comply with the records retention requirements of a contract under the rules.

Housing Affordability Impact Analysis

The rules proposed for readoption with amendments, repeals, new rules, and recodification address the requirements and the process for the procurement of professional service consultants and, therefore, will not have an impact on affordable housing or evoke a change in the average cost of housing in the State of New Jersey.

Smart Growth Development Impact Analysis

The rules proposed for readoption with amendments, repeals, new rules, and recodification govern the process by which the Authority procures professional services, and thus the rules will have no impact on smart growth development because the scope of the rules is minimal, and because it is extremely unlikely that the rules would evoke a change in the average price or availability of housing in the State of New Jersey, and it is unlikely that the rules proposed for readoption with amendments, repeals, new rules, and recodification would in any way affect new construction in Planning Areas 1 or 2, or within designated centers, under the State Development and Redevelopment Plan.

Full text of the rules proposed for readoption may be found in the New Jersey Administrative Code at N.J.A.C. 19:38C.

Full text of the rules proposed for repeal may be found in the New Jersey Administrative Code at N.J.A.C. 19:38C-2.1, 2.4, 2.7, 2.9, 2.10, 4, 5.1, 5.2, 5.3, 5.5, 5.6, 6.3, and 7.

Full text of the proposed amendments, new rules, and recodification follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

CHAPTER 38C

PROCUREMENT OF [ARCHITECTURAL, ENGINEERING, LAND SURVEYING AND RELATED] ARCHITECTS, ENGINEERS, LAND SURVEYORS, AND OTHER PROFESSIONAL [CONSULTANT] 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] c. 399, N.J.S.A. 52:34-9.1 et seq., which govern procedures generally applicable to the [Corporation's]**

Authority's award of contracts for professional architectural, engineering, and land surveying services[, and is also intended to establish procedures for the Corporation's procurement of related services, in its implementation of the school construction program].

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:

["Allowance" means a fee allowance established by the Corporation to address a specific design, construction administration, testing, or monitoring service when the exact cost of any such service cannot be known by the Corporation at the time of a request for proposals or by the consultant at the time of submission of proposals. The exact cost or fee will be determined during administration of the contract, and will draw upon the allowance previously established by the Corporation. The amount of allowances may be excluded from the total amount of compensation, in accordance with provisions of this chapter.

"Authority" means the New Jersey Economic Development Authority, as established pursuant to the New Jersey Economic Development Authority Act, P.L. 1974, c.80, as amended.

"Board" means the board of directors of the Corporation.

"Category one contract" means an engagement between the Corporation and a professional services consultant that is procured pursuant to N.J.A.C. 19:38C-3.

"Category two contract" means an engagement between the Corporation and a professional services consultant that is procured pursuant to N.J.A.C. 19:38C-4.

"Category three contract" means an engagement between the Corporation and a professional services consultant that is procured pursuant to N.J.A.C. 19:38C-5.

"Category four contract" means an engagement between the Corporation and a professional services consultant that is procured pursuant to N.J.A.C. 19:38C-6.

"Category five contract" means an engagement between the Corporation and a professional services consultant that is procured pursuant to N.J.A.C. 19:38C-7.

"Client school district" means the school district in which services are provided.]

"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 [estimated amount of fees] **payment(s) due to [be paid to a] the professional services consultant [in connection with a school facilities project or pre-development activity or an engagement for the school construction program, but may exclude allowances where so provided by this chapter] for services rendered.**

"Corporation" or "SCC" means the New Jersey Schools Construction Corporation, [which is] the entity formed pursuant to N.J.S.A. 34:1B-159 [as a subsidiary of the Authority for the purpose of implementing provisions of the Act. The Corporation is authorized to exercise all powers granted to the Authority under the Act, except the power to incur indebtedness] **and the predecessor to the Authority, which was abolished by P.L. 2007, c. 137.**

...

["Early childhood education facilities project" means a school facilities project consisting of rehabilitation of or addition to existing facilities in which early childhood education programs are provided to three or four year old children under contract with an early childhood program aid district, as defined at N.J.A.C. 19:36-1.3, but which programs are owned and operated by a community provider, as defined at N.J.S.A. 18A:7G-3.

"Educational Facilities Construction and Financing Act" or the "Act" means P.L. 2000, c. 72, which mandates the school construction program.]

"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 [response to] the form and manner provided for in the request for qualifications or request for [fee] proposals, which specifies the fees proposed for the provision of services.

"Member" means an individual appointed to serve on a selection committee.]

"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-development] **Pre-construction activities**" means the [activities] work that must be undertaken prior to submitting a school facilities project application to the Department for approval and calculation of preliminary eligible costs[, as defined at N.J.S.A. 18A:7G-3]. 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 [and] or 6A:26-1.2.

["Pre-development approval" means an approval issued by the Department specifying pre-development activities that may be undertaken with respect to a proposed school facilities project.

"Preliminary project report" means the document prepared by the Department transmitting to the Corporation a school facilities project to be undertaken by the Corporation. In the case of an engagement of a professional services consultant to perform program-wide activities relating to the school construction program, any references in this chapter to a preliminary project report shall refer to the memorandum prepared by Corporation staff setting forth the need for and description of the engagement.

"Preliminary proposal" means a short-form proposal in the format prescribed by the Corporation submitted in response to an advertisement soliciting such proposals as the first of two steps in the selection of a professional services consultant, as set forth in N.J.A.C. 19:38C-5.3.]

"Pre-qualified" or "pre-qualification" means [pre-qualified] the approval of a professional services consultant by the [Corporation in accordance with provisions set forth in rules adopted by the Corporation] 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[s]" or "consultant[s]" means [consultants] the architect, engineer, land surveyor, or other individual or professional firm providing [professional] services related to its respective occupation, which require unique professional or technical skills, licenses, or other credentials, associated with research, development, design, [and] construction, construction administration, alteration, or [renovation in connection with school facilities projects or pre-development activities or the school construction program] improvement to real property, as well as incidental services that members of these professions and those in their employ may logically or justifiably perform. [These] **The professional services consultant[s]** 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, [shop drawing] submittal reviews, testing, commissioning, provision of title insurance, preparation of operating and maintenance manuals, and other related services, [. Notwithstanding anything to the contrary, "professional services consultants" for the purposes of this chapter shall mean] **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], and shall also include project management firms].

["Project management firm" means a firm engaged by the Corporation, at its sole option, to provide overall construction management services, oversight, direction, coordination, and reporting in connection with the school construction program.]

"Proposal" means the [technical proposal or fee proposal, or both as the case may be,] **response** submitted by a **professional services consultant [provider of goods or services in response] with respect to a request for qualifications or a request for proposals.**

["Request for fee proposals" means the request for fee proposals issued by the Corporation in connection with the selection of a professional services consultant for a school facilities project, pre-development activity or other type of engagement for the school construction program, as the case may be.]

"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 [the] a request for technical proposals and/or fee proposals [issued by the Corporation in connection with] **for** the selection of a professional services consultant [for a school

facilities project, pre-development activity or other type of engagement for the school construction program, as the case may be.]

“Request for qualifications” or **“RFQ”** means [the] a **written request** [for preliminary proposals (preceding the Corporation’s issuance of a request for proposals)] issued by the [Corporation] **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-development] **pre-construction** activity, or other type of engagement for the school construction program[, as the case may be].

[“Request for technical proposals” means the request for technical proposals issued by the Corporation in connection with the selection of a professional services consultant for a school facilities project, pre-development activity or other type of engagement for the school construction program, as the case may be.]

“School construction program” means the program of school facilities projects and related [activity mandated by the Act, and] **activities** undertaken by the [Corporation] **Authority pursuant to the Act**.

“School facilities project” means the **planning**, acquisition, demolition, construction, improvement, [repair,] 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 [academic] **educational** purposes by a [client school] 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 [athletic stadiums, grandstands, and any structure, building or facility used solely for school administration] **other facilities as elsewhere defined in this section**.

[“Scope of services” means the scope of the services required from a professional services consultant for a particular school facilities project, pre-development activity or other type of engagement for the school construction program, as the case may be.]

“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 [body] **group(s)** responsible for [the] review[,] and evaluation [and recommendation] of [a] professional services consultants’ [for a specific school facilities project, for a group of school facilities projects, pre-development activities or other type of] **responses to RFQs and/or RFPs in connection with a procurement of one or more professional services consultants for an engagement with the Authority** [for the school construction program, as the case may be,] when **the compensation for the engagement is anticipated to exceed[s] \$25,000] the State bid advertisement threshold pursuant to N.J.S.A. 52:18A-243**.

“Selection coordinator” means the administrator of the [day-to-day] operations and procedures of the selection process, whose activities shall include, but are not limited to, [advertising,] 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 [such] a **“small business”** with the New Jersey [Commerce and Economic Growth Commission] **Department of the Treasury, Division of Minority and Women Business Development pursuant to N.J.A.C. 17:14-3.1**.

[“Technical proposal” means the proposal submitted by a professional services consultant in response to the request for technical proposals.]

“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 [contract] agreement” means [a contract] **an agreement** whereby the [Corporation] **Authority** may engage a professional services consultant for a defined period of time[, as provided in this chapter].

[“Waiver” means a wavier of advertising, as authorized pursuant to N.J.A.C. 19:38C-6.]

“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) [Any] A professional services consultant [that wishes] **seeking** to be engaged by the [Corporation] **Authority** must be pre-qualified [as of] **by the Authority** at the time [established in this chapter except that pre-qualification shall not be necessary for engagement pursuant to the category one contract procedures set forth in N.J.A.C. 19:38C-3] **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

[There] **The Authority** may [be] **establish** different procedures, **as set forth in this chapter**, for the selection of professional services consultants [deciding whether the engagement is for a category one contract (N.J.A.C. 19:38C-3), category two contract (N.J.A.C. 19:38C-4), category three contract (N.J.A.C. 19:38C-5), category four contract (N.J.A.C. 19:38C-6), or category five contract (N.J.A.C. 19:38C-7)] **based on the type of professional services consultant to be engaged or the contract value**.

19:38C-[5.4]2.4 Advertising

(a) [Advertising shall be performed in accordance with N.J.S.A. 52:34-12(a) and (b), in newspapers and/or by electronic means.] **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 [appropriately pre-qualified firms] **consultants**.

(b) Any [such] advertisement shall be made in the form and in the time required to promote [competitive bidding] **competition** and shall describe any specific information that [a] **an interested professional services**

consultant must submit, [by] **as well as** the date and time [specified in the advertisement] **of the deadline for submissions**.

(c) The advertisement shall specify the evaluation criteria that shall apply to [preliminary] **the proposals** [or to proposals, as the case may be].

(d) When the Corporation has elected to follow a one-step procurement process, the advertisement and request for proposals shall provide that consultants must be appropriately pre-qualified at the time of submission of a technical proposal in order to be eligible for an award.]

19:38C-2.5 Evaluation

(a) The ranking of [technical proposals] **professional services consultants** shall be performed pursuant to evaluation criteria [developed] **established by** [Corporation staff] **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 [and Corporation staff] shall consider the [following] criteria[, where applicable:] **and relative weights of such criteria, as set forth in the RFP and/or RFQ**.

1. The experience of the consultant and the key personnel on projects similar in scope, size and complexity;

2. The qualifications of the consultant and the key personnel to provide the required services for the school facilities project, pre-development activities or other type of engagement for the school construction program, as the case may be;

3. The approach set forth by the consultant to the school facilities project, pre-development activity or other type of engagement for the school construction program, as the case may be;

4. The proposed staffing, including, but not limited to, the extent to which the commitment of any proposed staffing under any other contract with the Corporation, or with any other public or private entity, may compromise the consultant's capacity to provide the services addressed in the technical proposal;

5. The consultant's performance on other work undertaken or funded by the Corporation;

6. The consultant's proximity to the site of the school facilities project, pre-development activity or other type of engagement for the school construction program, as the case may be; and/or

7. Such other criteria as the Corporation may determine to be appropriate to a specific procurement and which shall be set forth in the pertinent advertisement and request for proposals.

(b) Corporation staff shall establish weights for the evaluation criteria based on particular requirements of each school facilities project or pre-development activity, or the characteristics of the engagement required for the school construction program, as the case may be.]

(c) (b) The [evaluation process] **Authority** may [include] **require** the submission of [preliminary proposals, submission of technical] 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**.

(d) (c) [To the extent required by law or by order of a court of competent jurisdiction, the Corporation shall abide by the provisions of N.J.S.A. 52:32-17 et seq., N.J.A.C. 12:10A, and all other applicable regulations, with respect to SBEs.] Nothing in this chapter shall be construed to limit the [Corporation's] **Authority's** ability to obtain services pursuant to [a] **an SBE set-aside procurement** under N.J.A.C. [19:32] **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 [advertisement and request for proposals] **RFQ and/or RFP** shall be rejected[, except where the Corporation, in its sole discretion, finds good cause].

(b) The [Corporation] **Authority** may reject any proposal for [lack of responsiveness or responsibility or] **any reason, in accordance with law**, when it is otherwise deemed to be in the public interest to do so. The [Corporation] **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 [Corporation] **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 [contracts] **agreements** executed pursuant to this chapter shall provide for, among other things, termination for the convenience of the [Corporation] **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—[CATEGORY ONE CONTRACTS] **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 [category one contracts, which are contracts with] **agreements for professional services consultants where such agreements specify compensation not exceeding [\$25,000.] 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

[The Corporation] **In accordance with N.J.S.A. 52:34-7, the Authority** shall not be required to advertise [a category one] **the procurement**]. Wherever practicable, a competitive selection process shall be used.] **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 [price] **fees and/or** the evaluation criteria appropriate for the particular procurement. The [Corporation] **Authority** may request clarifying technical and/or organizational information from any [entity submitting a proposal] **professional services consultant** prior to finalizing the evaluation.

19:38C-3.4 Selection

The [Corporation] **Authority** shall select the proposal that is in the best interest of the [Corporation and the] school construction program,

based on [price] fees and/or the evaluation criteria established for the selection.

SUBCHAPTER 4. (RESERVED)

SUBCHAPTER 5. SELECTION PROCEDURES—[CATEGORY THREE CONTRACTS] 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 [may, at the option of the Corporation, apply to any engagement, but that] shall apply to [all category three contracts. A category three contract is an engagement] agreements for professional services consultants with compensation exceeding [\$2,000,000, exclusive of allowances.] 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).

(Agency Note: The text of N.J.A.C. 19:38C-5.4 is proposed for recodification with amendments as N.J.A.C. 19:38C-2.4.)

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 RFQ 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 [Evaluation] 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) [Fee proposals shall be opened and evaluated by Corporation staff.] 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, [Corporation staff] the Authority shall negotiate [a contract] an agreement with the highest-ranked consultant [ranked highest pursuant to N.J.A.C. 19:38C-5.6.] at a fee determined by [Corporation staff] the Authority to be fair and reasonable. Should [Corporation staff] the Authority be unable to negotiate a satisfactory fee with the highest-ranked consultant,

[Corporation staff] **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, [Corporation staff] **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 [Corporation staff] **the Authority** is unable to agree to a satisfactory fee with any of the three highest-ranked firms, [Corporation staff] **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, [a recommendation shall be made as to] **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. [SELECTION PROCEDURES—CATEGORY FOUR CONTRACTS] WAIVER OF ADVERTISING

19:38C-6.1 Scope

This subchapter shall govern the procurement of [a contract] **an agreement** through the [Corporation's] **Authority's** grant of a waiver of advertising pursuant to N.J.S.A. 52:34-10. While the [Corporation] **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 [category four contracts] **professional services consultant agreements.**

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

(a) The [Corporation] **Authority** may grant a waiver [when the engagement to be awarded falls into one of the] **of public advertisement in the following [categories] 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. [Public] **A public exigency exists in which professional services must be purchased immediately and are necessary to mitigate an emergency situation; [or]**

3. Only one [source of supply is] **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) [A] **At the option of the Authority, the Authority may waive pre-qualification of a professional services consultant procured pursuant to [this subchapter must be pre-qualified prior to the Corporation's execution of the resulting contract, except that pre-qualification shall not be necessary for an engagement 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—[CATEGORY FIVE CONTRACTS] 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 held, 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

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

Proposed 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

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

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

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

Authorized By: New Jersey Schools Development Authority, Marc Larkins, Chief Executive Officer.

Authority: P.L. 2007, c. 137, § 4k, N.J.S.A. 52:18A-238k; P.L. 2000, c. 72, N.J.S.A. 18A:7G-1 et seq.; and P.L. 2007, c. 137, N.J.S.A. 52:18A-235 et seq.

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2011-251.

Submit written comments by February 3, 2012 to:

Cecelia Haney, Administrative Practice Officer
New Jersey Schools Development Authority
PO Box 991
Trenton, NJ 08625-0991

The agency proposal follows:

Summary

The New Jersey Schools Development Authority ("Authority" or "SDA") proposes to readopt with amendments, new rules and repeals, N.J.A.C. 19:38D. The rules establish the requirements, standards, and procedures for the Authority's procurement of goods and services.

Chapter 38D was originally adopted on February 7, 2005 by the New Jersey Schools Construction Corporation (SCC). The SCC was created pursuant to the Educational Facilities Construction and Financing Act (EFCFA), P.L. 2000, c. 72, N.J.S.A. 18A:7G-1 et seq. The SCC was abolished in 2007 by P.L. 2007, c. 137, N.J.S.A. 52:18A-235 et seq., which simultaneously created the Authority to assume all of the functions, powers, and duties of the former SCC.

Chapter 38D was scheduled to expire on February 7, 2010, but was extended by action of Executive Order No. 1 (2010), which "froze" all existing regulations until the completion of the review of administrative regulations and rules by the Red Tape Review Group, and until such time as the extended regulation or rule is readopted pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq.

The Authority has reviewed Chapter 38D and has determined that it remains adequate, reasonable, and necessary for the purposes for which it was originally promulgated, with the addition of the proposed amendments, new rules, repeals and recodification. The rules proposed for readoption with amendments, new rules, repeals and readoption:

(a) implement Executive Order No. 37 (2006), which sets guidelines for the procurement of goods and services by State Authorities; and

(b) provide assurance to vendors and other stakeholders that the SDA procurement process is fair, transparent, and results in the procurement of goods and services at competitive prices.

As the Authority has provided a 60-day comment period on this notice of proposal, this notice is excepted from the rulemaking calendar requirement pursuant to N.J.A.C. 1:30-3.3(a)5.

A section-by-section description of the rules proposed for readoption with amendments, repeals, new rules, and recodification follows: