

NEW JERSEY ADMINISTRATIVE CODE
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TITLE 19. OTHER AGENCIES
NEW JERSEY SCHOOLS DEVELOPMENT AUTHORITY
CHAPTER 36. PROCUREMENT OF DESIGN BUILD CONTRACTS

N.J.A.C. 19:36 (2015)

Title 19, Chapter 36 -- Chapter Notes

CHAPTER AUTHORITY:

P.L. 2007, c. 137, specifically, § 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.*).

CHAPTER SOURCE AND EFFECTIVE DATE:

R.2013 d.053, effective March 4, 2013.

See: *44 N.J.R. 1318(a)*, *45 N.J.R. 752(a)*.

CHAPTER EXPIRATION DATE:

Chapter 36, Procurement of Design Build Contracts, expires on March 4, 2020.

CHAPTER HISTORICAL NOTE:

Chapter 36, P.L. 2000, c.72, Section 5(s) Community Early Childhood Education Facilities, was adopted as R.2003 d.449, effective November 17, 2003. See: *35 N.J.R. 2603(a)*, *35 N.J.R. 5251(b)*. Chapter 36, P.L. 2000, c.72, Section 5(s) Community Early Childhood Education Facilities, expired on November 17, 2008.

Chapter 36, Procedures for Procurement of Design Build Contracts for School Facilities Projects for the Schools Construction Program, was adopted as special new rules by R.2009 d.102, effective February 27, 2009. See: *41 N.J.R. 1513(a)*.

Pursuant to Executive Order No. 1(2010), the chapter expiration date was extended from February 27, 2010 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 was readopted pursuant to the Administrative Procedure Act, *N.J.S.A. 52:14B-1 et seq.* See: *44 N.J.R. 1318(a)*.

Chapter 36, Procedures for Procurement of Design Build Contracts for School Facilities Projects for the Schools Construction Program, was readopted as R.2013 d.053, effective March 4, 2013. As a part of R.2013 d.053, Chapter 36 was renamed Procurement of Design Build Contracts; and Subchapter 9, Performance Evaluations, was adopted as new rules, effective April 1, 2013. See: Source and Effective Date. See, also, section annotations.

§ 19:36-1.1 Purpose and applicability of rules

(a) These rules are adopted by the New Jersey Schools Development Authority (the "Development Authority," "Authority" or "SDA") to establish requirements and procedures for the procurement of design-build contracts. Section 4 of P.L. 2007, c. 137 confers broad powers on the Development Authority to enter into contracts for the "planning, design, construction, reconstruction, improvement, equipping, furnishing, operation, and maintenance" of a school facilities project. This statutory authority includes the procurement of design, construction, and other project-related services in one contract when the Authority determines that a single point of responsibility for a combination of these services is in the best interests of a school facilities project.

(b) These rules allow for the Authority to engage a design professional pursuant to *N.J.A.C. 19:38C*, as a "bridging architect," for the duration of the school facilities project, to prepare a design-build information package, which outlines the conceptual program, schematic design, and performance specifications to be followed by the design-builder, and review the work of the design-builder to ensure that the design meets the requirements of the Authority and the SDA school district. The rules further allow for the engagement of a construction manager (CM) by the Authority to serve as the Authority's representative during the school facilities project and provide such services as project oversight and reporting, value engineering services, and cost estimating.

(c) These rules provide for the Authority to select design-builders according to the proposals that are the most advantageous to the SDA, based upon a "best value selection" process premised on a combination of cost and qualitative factors, with consideration given to price at least equal to the consideration given to all other factors combined. The rules provide for the following two-phase selection process:

1. The public advertisement of a request for qualifications (RFQ) that describes the school facilities project, outlines the scope of work for the project and solicits responses outlining the qualifications of bidders; and

2. The issuance of a request for proposals (RFP) to a "short list" of bidders, selected on the basis of their responses to the RFQ, which outlines the criteria to be used for selection and the weight that will be given to each of these criteria in the evaluation process, and which solicits technical and price proposals.

(d) These rules further provide for a technical evaluation committee, comprised of representatives of the Authority and the SDA school district, to provide technical review and evaluation services, including evaluating and ranking the qualifications of bidders during the RFQ process and evaluating and scoring technical proposals submitted to the Authority in response to an RFP.

(e) Design-build project delivery offers the potential for such benefits as a shorter overall design and construction process, greater cost reliability and reduced risk through enhanced project coordination. In order to achieve such results, these rules provide the Authority with the flexibility to adjust the design-build process, for example, to vary the level of design in the initial design-build information package and/or select and weight the qualitative factors to be addressed in a technical proposal according to the specific needs and complexities of the school facilities project.

§ 19:36-1.2 Definitions

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

"Act" means the Educational Facilities Construction and Financing Act, P.L. 2000, c. 72 (*N.J.S.A. 18A:7G-1 et seq.*), as amended, and P.L. 2007, c. 137, which authorizes the school construction program.

"Best value selection" means a selection process in which consideration is given to both a price proposal and a technical proposal, and the award of the design-build contract is based upon a combination of price and qualitative considerations.

"Bidder" means any legal entity classified by the Department of the Treasury, Division of Property Management and Construction, and prequalified by the Authority, that may submit an offer in response to a request for qualifications or request for proposals for an award of a design-build contract.

"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*.

"Bridging architect" means the firm employing persons duly licensed and registered in the State of New Jersey to practice architecture or engineering, which firm may be engaged by the Authority to develop preliminary design work and performance criteria, as well as provide other services, such as construction administration services, in connection with the design and construction of the school facilities project.

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

"Compensation" means payment(s) due to the design-builder for services rendered or work performed or pursuant to the design-build contract.

"Construction documents" means the plans, specifications and other documents prepared by the design-builder that set forth in detail the design for, and other necessary requirements relating to, the construction of the school facilities project, based on the requirements set forth in the design-build information package.

"Construction manager" or "CM" means the firm that may be engaged by the Authority to act as the Authority's representative for the school facilities project and to provide construction management services, in connection with construction of the project.

"Contract milestones" means the dates identified in the school facilities project schedule by which the design-builder must complete certain critical activities to advance the project.

"DCA" means the New Jersey Department of Community Affairs.

"Deliverables" means any documents required to be produced by, or work product generated by the design-builder, pursuant to the design-build contract.

"Department" means the New Jersey Department of Education.

"Design-build contract" means the written, integrated agreement between the Authority and the design-builder setting forth the obligations of the parties, including, but not limited to, the performance of work and services and the basis for payment.

"Design-build information package" means the package of information that is included in the RFP, which sets forth the minimum design requirements, performance specifications, and other project requirements, for the purpose of furnishing sufficient information so that bidders may prepare technical and price proposals.

"Design-build project delivery" means a project delivery method that combines all or some portions of the design and construction phases of a school facilities project into a single contract, including, without limitation, design, regulatory permit approvals, and utility relocation and construction.

"Design-builder" means the entity contractually responsible for delivering the design and construction and, if applicable, other services for the school facilities project in accordance with the design-build contract.

"Development Authority," "Authority" or "SDA" means the New Jersey Schools Development Authority, an entity which is statutorily charged with undertaking and funding school facilities projects under the Act and which is the entity formed pursuant to P.L. 2007, c. 137, as successor to the New Jersey Schools Construction Corporation.

"Guaranteed maximum price" or "GMP" means a method of compensation for the design-builder, including, but not limited to, the design-builder's fee, the costs of all work, and any other prices, as set forth in accordance with the design-build contract, which is the maximum price the Authority shall pay the design-builder.

"Key team member" means an individual identified as having a responsible role in the successful completion of the design-build contract, in the bidder's response to the Authority's RFQ or RFP, which response is made part of the contract.

"Legal requirements" means all applicable Federal, State and local laws, acts, statutes, ordinances, codes, executive orders, rules and regulations in effect or hereinafter promulgated that apply to the design-builder's performance of services or work under the agreement, including, but not limited to, the current versions of the Building Design Services Act, the New Jersey Uniform Construction Code, the DCA Homeland Security Best Practices Standards for Schools under Construction or Being Planned for Construction, the Occupational Safety and Health Act of 1970, the Soil, Erosion and Sediment Control Act, as well as any requirements of local or national authorities having jurisdiction over the project, as applicable.

"Notice of award" or "NOA" means a written notice from the Authority to the bidder prior to award, setting forth the Authority's intention to enter into a design-build contract with the bidder.

"Notice to proceed" means a written notice from the Authority setting the commencement date on which the design-builder is authorized to commence performing services and work pursuant to the design-build contract.

"Performance specifications" means a document provided in the design-build information package, setting forth a description of an end result, objective or standard of performance that the design-builder is expected to achieve in designing and constructing the project.

"Prequalification" means the approval of a bidder by the Authority, pursuant to *N.J.A.C. 19:38A*, for the submission of a statement of qualifications and proposals for a design-build contract. The prequalification process is separate from short listing as elsewhere provided in this chapter.

"Prescriptive specifications" means a document provided in the design-build information package that contains a description of the materials to be employed and/or the manner in which the work is to be performed that the design-builder is required to follow.

"Price proposal" means the price submitted by the bidder to provide the required design and construction and other services described in the RFP, which may be submitted in the form of a GMP, if so required by the RFP.

"Professional services consultants" or "consultants" means the architect, engineer, land surveyor, or other individual or professional firm providing services related to its respective occupation, which require unique professional or technical skills, licenses, or other credentials, which services are associated with research, development, design, construction, construction administration, alteration, or improvement to real property, as well as incidental services that members of these professions and those in their employ may logically or justifiably perform. These professional services consultants may provide services including, but not limited to, studies (including feasibility studies), investigations, surveys, evaluations, consultations, appraisals, planning, programming, conceptual designs, plans and specifications, cost estimates, construction management, inspections, submittal reviews, testing, commissioning, provision of insurance, preparation of operating and maintenance manuals, and other related services, and shall include those consultants who provide "professional architectural, engineering, or land surveying services" within the meaning of *N.J.S.A. 52:34-9.2*.

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

"Punchlist" means the list of incomplete or defective work, including work that does not comply with applicable code or legal requirements, to be performed or remedied by the design-builder. Punchlist(s) shall be prepared by the bridging architect in conjunction with the Authority and CM prior to the issuance of the certificate of substantial completion.

"Ranking" means the process of listing responsive bidders 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 document issued by the Authority in the second phase of a two-phase selection process that describes the procurement process and forms the basis for the design-build proposals.

"Request for qualifications" or "RFQ" means the document advertised by the Authority in the first phase of the two-phase selection process that describes the school facilities project in enough detail to allow potential bidders to determine if they wish to compete for a design-build contract and that requests information from bidders regarding the qualifications, experience, and organizational structure of the bidder's proposed design-build team, which information can be used by the Authority to select a short list of bidders to compete for a design-build contract.

"Schedule" means the schedule prepared and submitted by the bidder in its technical proposal to the Authority, wherein the bidder identifies all critical, and certain non-critical, activities, contract milestones and the projected and actual time periods for completing such activities and contract milestones.

"School facilities project" means the planning, acquisition, demolition, construction, improvement, alteration, modernization, renovation, reconstruction, or capital maintenance of all or any part of a school facility or of any other personal property necessary for, or ancillary to, any school facility, and shall include fixtures, furnishings, and equipment, and shall also include, but is not limited to, site acquisition, site development, the services of design profession-

als, such as engineers and architects, construction management, legal services, financing costs and administrative costs and expenses incurred in connection with the project.

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

"Short listing" or "short-listed" means the narrowing of the field of bidders through the selection of bidders who are evaluated on qualification factors other than price, as indicated in the RFQ, and whose proposals are judged most advantageous to the Authority in terms of qualifications other than price.

"Specification" means a written description included as part of the construction documents, which sets forth the detailed technical and functional characteristics of, or the discrete design for, an item of material, equipment, or work to be incorporated into the school facilities project, or a requirement of the work to be performed. A specification may include a statement of any of the Authority's requirements and may provide for inspection, testing, or the preparation of a construction item before procurement. Specifications shall augment and complement the drawings and plans prepared by the design-builder.

"Statement of qualifications" or "SOQ" means the document(s) submitted by bidders in response to an RFQ that describes the qualifications and capabilities of the bidder and its key team members to perform the scope of services to be included in a design-build contract.

"Stipend" means a monetary amount which may be paid to unsuccessful bidders.

"Substantial completion" means that point in time in the progress of the school facilities project when certain conditions specified by the design-build contract have occurred, including, but not limited to, the issuance of a temporary certificate of occupancy, the creation of a punchlist, and the determination that the school facilities project is ready for occupancy in accordance with its intended use.

"Technical evaluation committee" means a selection committee comprised of a majority of Authority representatives and an SDA school district representative(s) who are responsible for reviewing and evaluating responses by bidders to an RFQ and RFP.

"Technical proposal" means that portion of a design-build proposal which contains design solutions and other qualitative factors that are provided in response to an RFP.

"Two-phase selection process" means a procurement process in which the first phase consists of short listing, based on qualifications submitted in response to an RFQ, and the second phase consists of the submission of price and technical proposals in response to an RFP.

"Uniform Construction Code" means the New Jersey Uniform Construction Code, as set forth in *N.J.A.C. 5:23*, and all applicable subcodes, as such codes are amended from time to time.

"Weighted criteria process" means a form of best value selection in which a percentage of evaluation weight is pre-established for qualitative factors and for price, and the award of a design-build contract is based upon the highest total points awarded to a bidder.

"Work" means all design and construction services performed by the design-builder and its team, including providing all material, equipment, tools and labor, necessary to complete the construction, as described in and reasonably inferable from the construction documents and the design-build contract.

§ 19:36-1.3 Disclosure and publicity

(a) Any and all submissions made in response to any RFQ and any RFP are subject to the provisions of the Open Public Records Act, P.L. 2001, c. 404, *N.J.S.A. 47:1A-1* et seq., and the exceptions from disclosure provided therein.

(b) The design-builder 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.

§ 19:36-1.4 Access and record retention

(a) The design-builder shall make available records and accounts pertaining to school facilities projects to the State Comptroller and the State Auditor in their investigations, examinations and inspections of the activities related to the financing and undertaking of school facilities projects. The design-builder shall also cooperate, upon request, in sharing information with other State or Federal entities.

(b) The design-builder, shall be responsible to keep and maintain all of those records and accounts, including records and accounts of subcontractors and subconsultants, for school facilities project activities as necessary in order to evidence compliance with the Act and all applicable regulations and contractual requirements. Such records shall be retained by the design-builder for 10 years following substantial completion of a school facilities project, and any additional period required for the resolution of litigation, claims, or audit findings. Thereafter, those records shall be transferred to the Authority, unless the Authority, in its sole discretion, requests an earlier transfer of such records from the design-builder to the Authority or another designated entity. At any time, upon request of the Authority, the design-builder shall make records relating to the design-build project available to the Authority, within four business days of the request for documents, at no cost to the Authority.

(c) In the event that any litigation, claim, audit, or request pursuant to the Open Public Records Act, *N.J.S.A. 47:1A-1 et seq.*, relating to the procurement or the performance of work under the design-build contract is commenced prior to expiration or termination of the design-build contract, all records relating to the procurement and the contract shall be retained until all litigation, claims, audit findings, document requests, and related appeals, if any, have been resolved with finality.

§ 19:36-1.5 Fraudulent statements

Any firm or individual who makes, or causes to be made, a false, deceptive, or fraudulent statement in its submittal in response to the RFQ or RFP or in the course of any hearing, litigation, mediation, or other proceeding may be disqualified from bidding, suspended, and/or debarred, and may be subject to prosecution pursuant to applicable law.

§ 19:36-2.1 Applicability

This subchapter establishes the technical evaluation committee and outlines its responsibilities for the evaluation and scoring of the qualifications of bidders that have submitted responses to an RFQ, and the evaluation and scoring of the technical proposals of bidders that have submitted proposals in response to an RFP.

§ 19:36-2.2 Composition and responsibilities of technical evaluation committee

(a) When the design and construction of a school facilities project will be undertaken pursuant to this chapter, the Authority will designate a technical evaluation committee to review and evaluate responses by bidders to an RFQ and RFP, and will designate a selection coordinator to administer the selection process. The members of the technical evaluation committee shall consist of a majority of Authority representatives and a representative of the SDA school district in which the school facilities project is located, if such district elects to participate. Each member of the technical evaluation committee shall have the relevant experience as set forth in *N.J.S.A. 52:34-10.3(c)*, necessary to evaluate the submissions.

(b) Each member of the technical evaluation committee shall be responsible for:

1. Independently evaluating and scoring the statements of qualifications submitted by bidders in response to an RFQ; and

2. Evaluating and scoring, in consultation with the other members of the technical evaluation committee, the technical proposals submitted by bidders in accordance with the weighted criteria process set forth in an RFP.

(c) Once the responses are received and the identity of the bidders is ascertained, the members of the technical evaluation committee will be given a list of all firms that submitted a bid. Each member of the technical evaluation committee, prior to the evaluation of any submission, shall execute a certification that he or she has no personal interest, financial or familial, in any of the bidders to be evaluated, any of the named subcontractors or subconsultants to the bidders, or any of the principals, subsidiaries, or parent companies of such bidders. Furthermore, should any of the technical evaluation committee members indicate that a conflict or personal interest exists once the identity of the bidders is revealed, that member shall not serve on the technical evaluation committee. In the event that an evaluation committee member is discovered to have a conflict, such evaluation committee member will be removed from the selection committee by the Authority. At the discretion of the Authority, the conflicted committee member may be replaced, if replacement with a new member is feasible at the time of removal of the conflicted committee member, and such replacement will not have an adverse impact on either the evaluation process or the procurement schedule or process generally.

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

§ 19:36-3.1 Applicability

This subchapter provides for the retention by the Authority of professional consultants to act in the SDA's interests during the school facilities project; namely, a bridging architect to develop minimum design requirements, performance specifications and other project requirements and a construction manager to provide management and technical support during the school facilities project.

§ 19:36-3.2 Engagement of bridging architect

The Authority may retain a bridging architect, pursuant to the provisions of *N.J.A.C. 19:38C*, for the duration of the school facilities project, to prepare a design-build information package, review the documents prepared by design-builders and provide other professional services on behalf of the Authority.

§ 19:36-3.3 Design-build information package

(a) A design-build information package shall be prepared by the Authority, using a design professional either on staff of the Authority and/or the bridging architect.

(b) As a prerequisite to the completion of the design-build information package, the schematic design for the school facilities project must have been approved by the SDA school district, the Authority and the Department, in accordance with the requirements of *N.J.A.C. 6A:26*, and the Department shall have issued the preliminary project report approving the school facilities project, pursuant to *N.J.S.A. 18A:7G-5(h)(2)*.

(c) The design-build information package may include, but need not be limited to, the following:

1. A description of the school facilities project, including:
 - i. Building type and size;
 - ii. Site development requirements, such as, parking and site requirements and playground equipment;
 - iii. Description of physical relationships between building spaces and between buildings and other site elements;
 and
 - iv. Specific architectural style or concept;
2. Educational specifications and schematic design documents for the school facilities project;

3. Performance specifications and prescriptive specifications regarding materials, systems, performance criteria, energy efficiency, life cycle costs and environmental issues;
4. Assignment of responsibility for obtaining required approvals and permits;
5. Engineering, architectural and/or environmental reports (for example, geotechnical evaluations, building evaluations and/or environmental preliminary assessment); and
6. The terms and conditions for the payment of a stipend, if a stipend is offered.

§ 19:36-3.4 Engagement of construction manager

(a) The Authority may retain a construction manager, pursuant to the provisions of *N.J.A.C. 19:38C*, for the duration of the school facilities project.

(b) The services of the construction manager may include, but need not be limited to, technical support in the area of scheduling, cost estimating, document control and inspection of construction during all phases of the school facilities project.

§ 19:36-3.5 Conflicts of interest

Professional consultants who assist the Authority in the preparation of an RFQ or an RFP will not be permitted to participate as a bidder or subconsultant to a bidder submitting a statement of qualifications in response to the RFQ or a proposal in response to the RFP.

§ 19:36-4.1 Applicability

This subchapter establishes the Authority's criteria and procedures for the use of a two-phase design-build selection process. In the first phase, the Authority initially ranks bidders based on statements of qualifications and then selects a short list of bidders to receive the RFP based on the ranking. In the second phase, the Authority receives the submission of price and technical proposals in response to the RFP and awards the design-build contract to the bidder whose proposal receives the highest overall score.

§ 19:36-4.2 Necessity for prequalification

(a) Only those bidders holding a valid notice of prequalification, issued by the Authority, in accordance with the procedures in *N.J.A.C. 19:38A*, in such trade(s) or discipline(s) as specified by the RFQ, shall be eligible to submit a statement of qualifications in response to an RFQ or proposals in response to an RFP. The prequalification of a bidder must be valid on the due date for the submission of a statement of qualifications and on the due date for the submission of technical and price proposals.

(b) The Authority may establish appropriate and special prequalification requirements as may be necessary in order to ensure competitive technical and price proposals, or as may be dictated by the unique or specialized nature of the work to be performed under the design-build contract.

§ 19:36-4.3 Request for qualifications

(a) The Authority shall publicly advertise an RFQ. The RFQ shall contain the following information:

1. A general description of the school facilities project;
2. The scope of work;

3. The minimum qualification requirements for bidders, including, but not limited to, the appropriate classifications and aggregate rating limits assigned by the New Jersey Department of Treasury, Division of Property Management and Construction;

4. A request for the submission of a statement of qualifications which will describe the qualifications of prospective bidders;

5. The phase one evaluation factors to be used in the determination of a short list of bidders;

6. The technical evaluation factors to be utilized in the second phase of the selection process;

7. A statement of the number of bidders to be selected for the short list; and

8. Any other requirements, as determined in the sole discretion of the Authority.

(b) Bidders desiring to submit technical and price proposals shall submit a statement of qualifications and an organizational chart of the bidder and its key team members and the other information required by the RFQ.

§ 19:36-4.4 Short listing of bidders

(a) The technical evaluation committee shall review and evaluate the responsive submissions of bidders and determine the relative ability of each such bidder to perform the work under the design-build contract. The evaluation of the qualifications of each bidder may include, but need not be limited to, consideration of the following factors:

1. Experience of the prospective bidder and proposed design-build team on projects of similar size, scope, and complexity;

2. Experience of key team members on projects of similar size, scope and complexity;

3. Experience of the prospective bidder and proposed design-build team on design-build projects of similar size, scope, and complexity;

4. Experience of the key team members on design-build projects of similar size, scope and complexity;

5. Experience of the prospective bidder or its key team members on projects for the Authority, as evidenced by performance evaluations as specified in the RFP;

6. The prior affirmative action experience of the prospective bidder and the design-build team;

7. Consideration of the bidder's aggregate rating from the Department of Treasury, Division of Property Management and Contracts, which is affected by prior affirmative action experience; and

8. Any other pertinent information necessary to establish the qualifications of the prospective bidder and proposed design-build team to undertake the design-build contract.

(b) At the conclusion of the first phase of the selection process, the technical evaluation committee shall develop a short list of the bidders whose qualifications are deemed most advantageous to the Authority in terms of qualification factors other than price, as indicated in the RFQ. The bidders selected for the short list shall be invited to participate in the second phase of the process. The short list will be published on the Authority's website at www.njsda.gov and all bidders that supplied submissions will be notified in writing of the bidders selected for the short list.

§ 19:36-4.5 Request for proposals

(a) Only bidders that have been short listed during the RFQ process will be permitted to submit a proposal in response to an RFP.

(b) The RFP shall include, without limitation:

1. The design-build information package;

2. Technical and price proposal forms;

3. The design-build contract;
4. Instructions to bidders;
5. The criteria for evaluation of proposals and their relative weight;
6. A description of the drawings, specifications, or other submittals to be submitted with the technical proposal, with guidance as to the form and level of completeness of the drawings, specifications or submittals that will be acceptable;
7. Budget limits for the work;
8. Requirements for bid bonds, performance bonds, payment bonds, and insurance;
9. Schedule requirements, as set forth in the RFQ;
10. Amount of the stipend, if any; and
11. The documents required to be submitted upon the notice of award, pursuant to *N.J.A.C. 19:36-6.1(c)*.

§ 19:36-4.6 Selection process

(a) The Authority shall issue an RFP for the school facilities project to the bidders who were short listed in the phase one RFQ process.

(b) The Authority may provide for a pre-proposal conference at a designated date, time, and location at which bidders that have been short listed may ask questions and seek clarification concerning any of the information, data, or documents contained within the RFP. Pre-proposal conferences may be mandatory or optional, as stated in the RFP.

(c) The RFP shall require the submission of a proposal in two separate parts: a technical proposal and a price proposal. The technical and price proposals shall be evaluated separately, in accordance with the evaluation factors and process set forth in the RFP. The evaluation factors may include, but need not be limited to, design concepts, management approach, proposed technical solutions, and the other factors listed at *N.J.S.A. 52:18A-243(d)*, as applicable.

(d) The technical proposal shall include preliminary design drawings, outline specifications, technical reports, calculations, permit requirements, a management plan, schedule and other information and/or data requested in the RFP.

(e) The price proposal shall be submitted in a separate sealed envelope and shall provide a price for all design services and construction work required to complete construction of the school facilities project. If required by the RFP, the price shall be submitted in the form of a guaranteed maximum price for all design and construction of the school facilities project. The envelope containing the price proposal shall indicate clearly that it is the price proposal and shall identify the bidder's name, project number, and any other information required by the RFP. The price proposals shall remain sealed until such time as provided in (g) below.

1. Each price proposal shall be accompanied by a bid bond as specified in the RFP.

2. The Authority shall examine all documents required to be submitted with the technical proposal for completeness and conformity with the requirements of the RFP. If the Authority determines that a technical proposal received must be rejected as non-responsive, it shall notify the bidder in writing of the rejection of its proposal and the reason for the rejection within 10 business days of its receipt, unless there are circumstances that require additional time.

3. The submission of technical and price proposals is conclusive evidence that the bidder has completely reviewed the RFP and the design-build contract and fully understands and agrees to all of the requirements, terms, and conditions set forth therein.

(f) The technical evaluation committee may conduct interviews with each bidder prior to ranking the bidders. The technical evaluation committee shall evaluate each technical proposal in accordance with the evaluation criteria and the weight assigned to each, as set forth in the RFP. The technical review committee shall then total and submit the scores for each technical proposal to the selection coordinator.

(g) After the technical proposals have been reviewed and scores are submitted, Authority staff shall open the price proposals and assign the maximum price points to the lowest total dollar proposal. All other responsive proposals shall be scored based upon the percentage that each proposal exceeds the lowest proposal.

1. The Authority shall examine all documents required to be submitted with the price proposal for completeness and conformity with the requirements of the RFP.

2. The bidder shall show all amounts in words and figures. In the event of a discrepancy between the words and figures, the amount shown in words shall govern.

3. If the Authority determines that a price proposal received must be rejected as being non-responsive, it shall notify the bidder in writing of the rejection of its proposal as being non-responsive and the reason for the rejection within five business days of the opening of price proposals, unless there are circumstances that require additional time.

(h) The selection coordinator shall determine the combined scores for each bidder based on their technical and price proposals, with consideration of price at least equal to the consideration given to all other factors. The bidder with the highest overall score shall be recommended to the Board of the Authority for an award of the design-build contract. If the recommendation is approved, the Authority will notify the successful design-builder.

§ 19:36-4.7 Rejection of proposals

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

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

(c) The Authority may cancel a notice of award at any time before the execution of the design-build contract by the Authority, if the Authority deems it advisable to do so in the interest of the State or the public interest.

§ 19:36-5.1 Criteria for payment of stipend

(a) At the discretion of the Authority, a stipend may be paid to eligible bidders who submit responsive but unsuccessful proposals in response to the RFP. The decision to do so shall be based on the Authority's analysis of the estimated proposal development costs, the complexity of the school facilities project, and the anticipated degree of competition during the procurement process. The purpose of the stipend is to encourage competition by offering to compensate responsive, but unsuccessful bidders, for a portion of the estimated proposal development costs.

(b) The terms and conditions for the payment of a stipend shall be included in the RFP.

(c) Whether or not a stipend is provided to an unsuccessful bidder, submission of a technical proposal by a bidder shall indicate the bidder's agreement and consent that the work produced within that bidder's technical proposal shall be provided to the Authority for its use in connection with the design-build contract awarded, or in connection with a subsequent procurement, without obligation to pay any additional compensation to the unsuccessful bidder.

(d) Bidders submitting a response to the RFP which is determined by the Authority in its sole discretion to be non-responsive or irregular, pursuant to *N.J.A.C. 19:36-4.7*, will not be entitled to a stipend.

§ 19:36-6.1 Contract approval and execution

(a) Except as may otherwise be specifically provided in this chapter, the engagement of a design-builder shall be subject to approval by the Board of the Authority and may only be executed in accordance with Authority procedures.

(b) Prior to the execution of a design-build contract, the bidder that was provided a notice of award shall exist in the legal status in which it will perform its responsibilities pursuant to the design-build contract.

(c) The Authority will send the successful design-builder a notice of award letter. The notice of award letter shall contain a list of the additional documents required to be submitted by the design-builder with the executed contract. The notice of award will specify the time within which the executed contract and required documents must be returned.

(d) Each payment and each performance bond must be in an amount at least equal to the total contract price.

1. All bonds shall comply with the requirements of this chapter and relevant State statutes. All bonds submitted by the design-builder shall be issued only in accordance with *N.J.S.A. 2A:44-143* through 147 to the design-builder and shall indicate aggregate bonding limits.

2. Bonds shall be issued only by companies authorized to transact business in the State of New Jersey.

(e) If the design-builder fails to return the executed contract and performance and payment bonds and other required documents within the time specified by the Authority, the Authority may take whatever action is appropriate and authorized by law including, but not limited to, withdrawing or canceling the notice of award to the delinquent bidder and awarding the contract to the next-highest ranked bidder; cancelling the procurement; or proceeding to recover under the bid bond submitted with the price proposal in accordance with *N.J.A.C. 19:36-4.6(e)*.

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

(g) No agreement is valid or binding on the Authority unless and until it is executed by an appropriately authorized representative of the Authority. Any work performed prior to the execution of the contract by the Authority is voluntary, and represents a gift to the Authority. In the event the notice of award is cancelled or withdrawn, the bidder is not entitled to any remuneration for any work performed prior to the execution of the contract.

(h) Upon the successful bidder's submission of all required documentation or materials as specified in the NOA, and the Authority's acceptance of such documentation, the Authority will execute the design-build contract and provide the successful bidder with the fully-executed design-build contract.

§ 19:36-7.1 Scope and purpose

(a) This subchapter sets forth the procedures that govern protests and administrative hearings regarding design-build procurements, including protests challenging the form of the RFQ or the RFP, the ranking of bidders during the RFQ phase, and the scoring of technical proposals of bidders.

(b) For purposes of this subchapter, protests 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.

§ 19:36-7.2 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 bidder that intends to submit or has submitted a statement of qualifications for the first phase of the design-build procurement, 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 opening of the statements of qualifications, 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 scheduled opening of statements of qualifications, or that fails to provide the specific reasons for and arguments supporting the protest.

2. RFP process or documents: A bidder that intends to submit or has submitted proposals for the second phase of the design-build procurement, may request an informal hearing before the Authority to protest the RFP process or documents by submitting a written protest to the Authority at least five business days prior to the date and time scheduled for opening of the technical 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 scheduled opening of technical proposals, or that fails to provide the specific reasons for and arguments supporting the protest.

3. Short listing: A bidder protesting its failure to be short listed, or the short listing of another bidder may request an informal hearing before the Authority to protest the selection of the short list by submitting a written protest to the Authority setting forth the specific grounds for challenging the short listing. 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. A bidder protesting the short list must submit a written protest within five business days of the public announcement of the short list on the Authority's website, www.njsda.gov. 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. Technical and price proposal scoring: A bidder protesting the scoring of its technical and/or price proposals, or those of another bidder, may request an informal hearing before the Authority to protest the scoring of technical and/or price proposals, by submitting a written protest to the Authority setting forth the specific grounds for challenging such scorings. 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 the opportunity for an informal hearing. The protestor must submit a written protest within five business days of the public announcement of the bidders' scores. The Authority may deny any such protest that is filed more than five business days after the public announcement of the bidder's scores, or any protest that fails to provide the specific reasons for and arguments supporting the protest.

5. Award of contract: A bidder 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 bidder 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. Performance evaluation: A firm 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 must indicate whether the protestor requests an informal hearing. The Authority may deny any protest that is filed more than 15 calendar days after the firm'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.

§ 19:36-7.3 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 waive the hearing and issue a final agency decision accordingly. In the event that the Authority determines that a hearing is not necessary, a written decision will be issued by the Authority within five business days of receipt of all documents related to the protest.

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

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 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*.

§ 19:36-8.1 Design and construction

(a) The design-builder shall employ or contract with the architect of record and shall be responsible for the technical integrity of final project design, constructability, extensions of the design, and operability and maintainability, pursuant to the design-build information package and/or in the design-build contract.

(b) The role of the design-builder may include, but need not be limited to, the management and control of quality, cost and the integrated schedule for design, permit applications, material and equipment acquisition, construction, training for operation and maintenance, inspection and close out of the school facilities project.

(c) The Authority's review and acceptance of interim design submissions and/or construction documents is for the purpose of mutually establishing a conformed set of contract documents compatible with the requirements of the work. Neither the Authority's nor the construction manager's review and acceptance of interim design submissions or construction documents shall be deemed to transfer design liability from the design-builder to the Authority.

(d) Once the plans and specifications are complete, and have been accepted by the Authority, the design-builder shall submit the completed plans and specifications for the school facilities project to the Department for approval of final educational adequacy, pursuant to *N.J.A.C. 6A:26-5.4*. Upon the approval of the plans and specifications by the Commissioner, the design-builder shall submit them to the DCA for review and approval in accordance with *N.J.A.C. 5:23-4.24*.

§ 19:36-8.2 Costs in excess of guaranteed maximum price

If a design-build contract is procured as a GMP contract, the design-builder shall be responsible for cost overruns in excess of the GMP, as properly adjusted, pursuant to the terms of the design-build contract. If the design-builder's cost of work and fee are less than the GMP as properly adjusted, the cost savings shall accrue to the Authority, but may be shared by the design-builder and the Authority in accordance with the terms of the design-build contract.

§ 19:36-8.3 Deletion or substitution of key team members

(a) No substitutions or deletions of key team members may be made during the selection process or after award of the contract, without prior written approval from the Authority.

(b) Unauthorized changes to a bidder's key team members who were specifically identified in the response to the RFP at any time during the selection process may result in the elimination of the bidder from further consideration.

§ 19:36-9.1 Applicability and effect

(a) Notwithstanding any provisions of *N.J.A.C. 19:38* to the contrary, the following provisions will apply to the process and consideration of performance evaluations for contracts procured under this chapter.

1. Every design-builder awarded a design build contract procured pursuant to this chapter will be subject to evaluation in accordance with *N.J.S.A. 18A:7G-36*. The performance evaluation will consider the design-builder's performance as a contractor in the following categories: quality of work; scheduling; management; cost control and change orders; safety and industrial hygiene; small business goals; and close-out.

2. The design-builder's performance will be evaluated periodically during the progress of the project. The evaluation will be performed by a reviewer with direct involvement in the management or supervision for the project.

3. The design-builder's performance evaluations will be used by the Authority in evaluating and scoring bidders as to their prior experience on Authority projects, in accordance with the provisions of this chapter, *N.J.A.C. 19:38*, or *19:38B*.

§ 19:36-9.2 Evaluation rating values

(a) Notwithstanding any provisions of *N.J.A.C. 19:38* to the contrary, design-builders shall be evaluated on their construction performance with respect to the various evaluation categories using the following evaluation ratings:

1. Outstanding (O) or 100 percent--far exceeds the contract requirements by consistently exhibiting excellent performance. Always meets, and almost always exceeds the contract requirements;

2. Very Good (VG) or 90 percent--often exceeds the contract requirements and frequently provides a high level of performance. Typically meets and often exceeds the contract requirements;

3. Satisfactory (S) or 80 percent--provides an acceptable level of performance consistently meeting the contract requirements;

4. Marginal (M) or 70 percent--performs slightly below the requirements of the contract, meeting the contract requirements on an intermittent basis; and

5. Unsatisfactory (U) or 60 percent--fails to meet important contract requirements, resulting in a negative impact on the entire project.

(b) These numerical scores may be subject to special adjustment factors for certain categories deemed by the Authority to be particularly critical to contractor performance. The numerical ratings for each category shall be tabulated to arrive at an overall numerical evaluation score for each performance evaluation.

§ 19:36-9.3 Consideration of performance evaluations

(a) For contracts procured pursuant to the provisions of *N.J.A.C. 19:38*, performance evaluations shall be considered in accordance with that chapter.

(b) For contracts procured pursuant to this chapter or *N.J.A.C. 19:38B*, the process for evaluating a firm's prior performance on Authority projects in a selection process shall be specified in the RFP. Such process shall consist of:

1. A mathematical tabulation and averaging of the scores of all prior performance evaluations within a relevant time period;

2. Consideration of particularly favorable or unfavorable evaluations individually and with reference to other evaluations;

3. Consideration of multiple evaluations over the course of a given project, to show consistency of performance, deterioration of performance or efforts at improvement and recovery; or

4. A combination of the above methodologies.