

NEW JERSEY ADMINISTRATIVE CODE  
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\*\*\* New Jersey Register, Vol. 47 No. 4, February 17, 2015 \*\*\*

TITLE 19. OTHER AGENCIES  
NEW JERSEY SCHOOLS DEVELOPMENT AUTHORITY  
CHAPTER 38D. PROCUREMENT OF GOODS AND SERVICES

*N.J.A.C. 19:38D (2015)*

Title 19, Chapter 38D -- Chapter Notes

CHAPTER AUTHORITY:

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

CHAPTER SOURCE AND EFFECTIVE DATE:

R.2012 d.086, effective April 4, 2012.

See: *43 N.J.R. 3168(a)*, *44 N.J.R. 1558(a)*.

CHAPTER EXPIRATION DATE:

Chapter 38D, Procurement of Goods and Services, expires on April 4, 2019.

CHAPTER HISTORICAL NOTE:

Chapter 38D, Procurement of Goods and Services, was adopted by R.2005 d.61, effective February 7, 2005. See: *36 N.J.R. 4096(a)*, *37 N.J.R. 522(a)*.

Pursuant to Executive Order No. 1(2010), the chapter expiration date was extended from February 7, 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.*

Chapter 38D, Procurement of Goods and Services, was readopted as R.2012 d.086, effective April 4, 2012. As a part of R.2012 d.086, Subchapter 4, Category Two Selection Procedures, Subchapter 5, Category Three Selection Procedures, Subchapter 7, Category Five Selection Procedures, Subchapter 8, Category Six Selection Procedures and Subchapter 9, Category Seven Selection Procedures, were repealed; Subchapter 4, Selection Procedures--Agreements Exceeding the State Bid Threshold, as Adjusted, Pursuant To N.J.S.A. 52:34-7b, Subchapter 5, Term Agreements, and Subchapter 7, Protests and Hearing Procedures, were adopted as new rules; Subchapter 3, Category One Selection Procedures, was renamed Selection Procedures--Agreements not Exceeding the State Bid Threshold Pursuant to N.J.S.A. 52:34-7b; and Subchapter 6, Category Four Selection Procedures, was renamed Waiver of Advertising, effective May 7, 2012. See: Source and Effective Date. See, also, section annotations.

§ 19:38D-1.1 Purpose and scope of rules

This chapter is designed to establish the procedures applicable to the award of contracts by the Authority for goods and services required for implementation of the school construction program, excluding services subject to P.L. 1997, c. 399, *N.J.S.A. 52:34-9.1 et seq.*, and *N.J.A.C. 19:38C*.

#### § 19:38D-1.2 Definitions

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

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

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

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

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

"Compensation" means the payment due the vendor pursuant to the agreement.

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

"Department" means the New Jersey Department of Education.

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

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

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

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

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

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

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

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

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

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

"Ranking" means the process of listing responsive vendors 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 solicitation issued by the Authority in connection with the selection of a vendor.

"Request for qualifications" or "RFQ" means the request for statements of qualifications issued by the Authority seeking submissions from vendors 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 vendor.

"Schedule of goods" means the goods required to be provided by a vendor under an agreement.

"School construction program" means the program of school facilities projects and related activities undertaken by the Authority.

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

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

"Scope of services" means the extent of obligations contractually required from a vendor pursuant to an agreement.

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

"Selection committee" means the group(s) responsible for review and evaluation of vendors' responses to RFQs and/or RFPs in connection with a procurement, when the compensation for the engagement is anticipated to exceed the State bid advertisement threshold pursuant to *N.J.S.A. 52:34-7b*.

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

"Services" means the duties and responsibilities to be performed by the vendor pursuant to the agreement, including all other labor, materials and equipment provided or to be provided to fulfill such obligations, except that, for purposes of these policies and procedures, "services" shall not include:

1. Any "architectural, engineering or land surveying services" within the meaning of *N.J.S.A. 52:34-9.2*;
2. Services procured under the procedures established at *N.J.A.C. 19:38C*; and
3. Services subject to the procurement requirements established at *N.J.S.A. 52:18A-243*.

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

"Task order" means a contractual document, containing a scope of work, negotiated costs, and schedule, which the Authority issues to a vendor, pursuant to a term agreement.

"Term agreement" means an agreement whereby the Authority may engage a vendor for a defined period of time, as provided in this chapter.

"Vendor" means a provider of goods and/or services.

#### § 19:38D-2.1 Scope

This subchapter sets forth requirements applicable to procurements of goods and/or services for the Authority.

#### § 19:38D-2.2 Pre-qualification and moral integrity review

(a) For all procurements requiring pre-qualification pursuant to *N.J.A.C. 19:38A*, vendors must be pre-qualified by the Authority at the time of submission of a response to an RFQ and/or an RFP, except if otherwise expressly provided in this chapter.

(b) All vendors seeking to enter into an agreement with 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 vendor's proposal pursuant to *N.J.A.C. 19:38D-2.6*.

#### § 19:38D-2.3 Selection procedures based on type of engagement

The Authority may establish different procedures as set forth in this chapter, for the selection of vendors based on the contract type or value of the engagement.

#### § 19:38D-2.4 General evaluation criteria

(a) The ranking of vendors shall be performed pursuant to evaluation criteria established by the Authority for each particular procurement and by the weights established for such criteria. In selecting the most highly qualified vendor, the selection committee shall consider the criteria and relative weights of such criteria, as set forth in the RFP and/or RFQ. Such evaluation criteria may include:

1. The experience of the vendor, and its key personnel, on projects similar in scope, size, complexity;
2. The ability of the vendor and its key personnel, to provide the required goods or services;
3. The approach set forth by the vendor with respect to the provision of the goods or services in its proposal;
4. The proposed staffing, including, but not limited to, the extent to which the ability of the vendor to fulfill the contract may be affected or compromised by the commitment of staff to another contract with the Authority, or to contracts with any other public or private entity;
5. Performance by the vendor of the goods or services on other work undertaken or funded by the Authority;
6. The proximity of the vendor of the goods or services to the site of the school facility at issue;
7. In the case of the provision of goods, the durability, and/or construction of, and related warranty provisions affecting, the goods in question; and/or
8. Such other criteria as the Authority may determine to be appropriate to a specific procurement and which shall be set forth in the pertinent advertisement and request for proposals.

(b) To the extent required by law or by order of a court of competent jurisdiction, the Authority shall abide by the provisions of *N.J.S.A. 52:32-17* et seq., and all applicable regulations, with respect to SBEs. Nothing in this chapter shall be construed to limit the Authority's ability to obtain goods or services pursuant to an SBE set-aside procurement pursuant to *N.J.A.C. 19:39*.

§ 19:38D-2.5 Rejection of proposals; cancellation of procurement or award

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

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

§ 19:38D-2.6 Approval and execution of agreement

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

§ 19:38D-2.7 Termination

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

§ 19:38D-2.8 Disclosure and publicity; records access and retention

(a) Any and all submissions made in response to an RFP and/or an RFQ 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) Vendors 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.

(c) The Authority and any vendor subject to this chapter shall retain all records relating to goods or services provided under the agreement with the Authority for a specified period following expiration or termination of the agreement, as indicated in the agreement and as specified in the Authority's document retention schedule. All such records shall be provided to the Authority upon written demand, at no cost to the Authority. 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 and the provision of such services is commenced prior to expiration or termination of the agreement, such records shall be retained until all litigation, claims, audit findings, document requests, and related appeals, if any, have been resolved with finality.

§ 19:38D-2.9 Advertising

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

1. In pertinent trade publications with distribution in New Jersey;
2. By written notice to New Jersey professional societies or trade organizations; and/or
3. By use of direct mailings to appropriately selected firms.

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

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

#### § 19:38D-3.1 Scope

This subchapter sets forth the procedural requirements applicable to the procurement of agreements for goods and/or services where such agreements specify compensation that does not exceed the State bid 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. 19:38D-4. The Authority reserves the right to waive any pre-qualification requirement for a procurement pursuant to this subchapter.

#### § 19:38D-3.2 Solicitation

In accordance with N.J.S.A. 52:34-7b, the Authority shall not be required to advertise the procurement of agreements for goods and/or services where such agreements provide for compensation below the State bid threshold.

#### § 19:38D-3.3 Evaluation

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

#### § 19:38D-3.4 Selection

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

#### § 19:38D-4.1 Scope

This subchapter sets forth procedures that shall apply to the procurement of agreements for goods and/or services where such agreements specify compensation exceeding the amount set forth in N.J.S.A. 52:34-7b. At the option of the Authority, the procedures specified in this subchapter may apply to an engagement with compensation below the amount set forth in N.J.S.A. 52:34-7b.

#### § 19:38D-4.2 Initiation

A procurement for the provision of goods and/or services under this chapter shall be initiated by the public advertisement of an RFQ, RFP, or both, except in circumstances where a waiver of advertising is permitted under N.J.A.C. 19:38D-6. The RFQ or RFP shall include the schedule of goods or the scope of services sought under the procurement, as well as the form of agreement and other related documents.

#### § 19:38D-4.3 Selection committee

(a) Prior to the receipt of vendor 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 mem-

bers indicate that a conflict or personal interest exists once the identity of the vendors is revealed, that member shall not serve on the selection committee and may be replaced.

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

#### § 19:38D-4.4 Selection evaluation criteria

(a) The selection evaluation criteria may include the criteria listed in *N.J.A.C. 19:38D-2.4*, as well as past project performance, understanding of project needs and project schedule, and budget and cost estimating. Selection evaluation criteria may also include any other criteria 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 procurement of goods and/or services under this chapter 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) The Authority may consider the fee proposal as a qualitative factor upon which firms will be evaluated.

#### § 19:38D-4.5 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 set forth 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 a vendor's responses to requests for additional or clarifying information;
2. Participation in interviews; and
3. Any other components determined, in the sole discretion of the Authority, to be appropriate.

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

(d) The selection coordinator shall compile the evaluation scores of the committee members, as well as any points assigned in the consideration of a fee proposal in accordance with *N.J.A.C. 19:38D-4.7(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 shall identify the short list of vendors.

1. Once the short list is determined in accordance with subsection (e) above, 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. 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.

#### § 19:38D-4.6 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 vendor's name, the project or procurement number and any other information required by the RFQ and/or RFP. The fee proposals shall remain sealed until such time as provided in *N.J.A.C. 19:38D-4.7(a)* or (b) below.

#### § 19:38D-4.7 Consideration of fee proposals

(a) In the event the fee proposal is one of the qualitative factors for the evaluation of the proposals, the Authority shall open the sealed fee proposals and assign the maximum points to the lowest total fee proposal. All other proposals shall be scored based upon the percentage that each proposal exceeds the lowest proposal. The scores of the fee proposals shall then be utilized to finalize the ranking undertaken by the selection committee, pursuant to *N.J.A.C. 19:38D-4.5(d)*.

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

#### § 19:38D-4.8 Recommendation

Based on the process set forth in this subchapter, the selection coordinator shall recommend the most technically qualified vendor 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 vendor.

#### § 19:38D-4.9 Execution of agreement

Upon the successful vendor'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 vendor with a fully-executed agreement.

#### § 19:38D-4.10 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 vendor 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 issued.

#### § 19:38D-5.1 Scope

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

### § 19:38D-5.2 General requirements

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

(b) Term agreements may be used by the Authority to procure goods and/or services when there is a need to:

1. Expedite emergent projects or emergent project requirements;
2. Procure goods or services for a school facilities project on an "on call" basis; or
3. Address the program-wide requirements of the Authority.

(c) Procurement of a term agreement shall be in accordance with the selection procedures pursuant to N.J.A.C. 19:38D-3 or 4, depending on whether the value of the term agreement exceeds the statutory threshold of N.J.S.A. 52:34-7b, except that fee proposals submitted under those procedures may be based upon hourly or daily rates and/or other methods of determining costs over a specific time period.

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

(e) Under this subchapter, the Authority may enter into a term agreement with any vendor engaged pursuant to the provisions of this chapter for:

1. A value that shall not exceed a ceiling stated in the agreement; or
2. An initial term not to exceed three years, with an option to renew for one additional year, unless a longer time period is expressly authorized by law; or
3. A combination of both a stated value and a stated time period.

### § 19:38D-6.1 Scope

This subchapter shall apply when the Authority determines to procure goods and/or services by means of an exemption from advertising pursuant to *N.J.S.A. 52:34-10*, having found that the requirements of one of the exemption types in *N.J.A.C. 19:38D-6.2* have been satisfied, and when the Authority has established that such exemption is in the best interest of the Authority and the school construction program.

### § 19:38D-6.2 Exemption types and requirements

(a) The circumstances providing a basis for an exemption are as follows:

1. Sole source: when only one vendor is capable of or available to provide the goods or services at the time they are required.

2. Continuity: when, as a result of the vendor's previous satisfactory engagement by the Authority, a significant need arises to maintain continuity through updated or additional goods or services from the same source.

3. Governmental agreement: when the goods or services required are available from the Federal or any state government or any agency or political subdivision thereof.

4. Public exigency: when public exigency requires the immediate delivery of the goods or services. Public exigency may be found if:

- i. A health or safety hazard exists, which precludes the lead time for advertisement of a procurement for goods and/or services to rectify such condition, or renders the competitive bidding for such a procurement impractical or impossible;

- ii. A critical agency mandate, statutory or operational requirement can only be fulfilled by the sole source; or
- iii. A health or safety emergency precludes the lead time required to develop a competitive schedule of goods or scope of services.

5. Existing contract: when the goods or 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 goods or 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 goods or services being procured is no greater than the price of the same or equivalent goods or services under any existing New Jersey State contract.

#### § 19:38D-7.1 Scope and purpose

(a) This subchapter sets forth the procedures that govern protests regarding the Authority's procurements of goods and services, 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 vendors for unadvertised procurements under N.J.A.C. 19:38D-3 or 6; and
5. The issuance of a task order under a term agreement under N.J.A.C. 19:38D-5.4.

(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.

#### § 19:38D-7.2 Subject matter, hearing procedures, time limitations

(a) A protest shall be made as follows:

1. RFQ process or documents. A vendor 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 vendor that has submitted or intends to submit proposals 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 vendor protesting its failure to be included in a short list, or protesting the inclusion of another vendor 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. Award of contract. A vendor 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 vendor, 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;

5. Unadvertised contracts. A vendor may request an informal hearing before the Authority to protest the award of an unadvertised contract to another vendor, 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; or

6. Task order assignment. A vendor 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 vendor, 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.

#### § 19:38D-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. 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 final agency 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 agency 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 final agency 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, the modifications relating to such decision shall be conveyed by addendum to all vendors 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 sub-

chapter. 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*.