

NEW JERSEY ADMINISTRATIVE CODE  
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TITLE 19. OTHER AGENCIES  
NEW JERSEY SCHOOLS DEVELOPMENT AUTHORITY  
CHAPTER 34A. SECTION 13(A) DELEGATION AGREEMENT

*N.J.A.C. 19:34A (2016)*

Title 19, Chapter 34A -- Chapter Notes

CHAPTER AUTHORITY:

P.L. 2007, c. 137, § 4k (N.J.S.A. 52:18A-238k and 52:18A-240) (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.), and N.J.S.A. 52:34-9.3 (enabling statutes).

CHAPTER SOURCE AND EFFECTIVE DATE:

R.2016 d.074, effective May 26, 2016.

See: 48 *N.J.R.* 198(a), 48 *N.J.R.* 1387(a).

CHAPTER EXPIRATION DATE:

Chapter 34A, Section 13(A) Delegation Agreement, expires on May 26, 2023.

CHAPTER HISTORICAL NOTE:

Chapter 34A, Section 13(A) Delegation Agreement, was adopted as new rules by R.2003 d.299, effective July 21, 2003. See: 35 *N.J.R.* 586(a), 35 *N.J.R.* 3394(a).

Chapter 34A, Section 13(A) Delegation Agreement, was readopted as R.2009 d.14, effective December 8, 2008. As a part of R.2009 d.14, Subchapter 2, Delegation to the District of the Design and Construction or Acquisition and Installation of the School Facilities Project, was renamed Delegation to the District of the Design and Construction or Acquisition and Installation of the Capital Maintenance Project, effective January 5, 2009. See: 40 *N.J.R.* 4735(a), 41 *N.J.R.* 295(a).

In accordance with N.J.S.A. 52:14B-5.1b, Chapter 34A, Section 13(A) Delegation Agreement, was scheduled to expire on December 8, 2015. See: 43 *N.J.R.* 1203(a).

Chapter 34A, Section 13(A) Delegation Agreement, was readopted as R.2016 d.074, effective May 26, 2016. See: Source and Effective Date. See, also, section annotations.

### § 19:34A-1.1 Purpose and applicability of rules

(a) These rules are promulgated by the New Jersey Schools Development Authority (the "Authority"), to implement section 13(a) of the Educational Facilities Construction and Financing Act, P.L. 2000, c. 72 (*N.J.S.A. 18A:7G-13(a)*), as amended, and P.L. 2007, c. 137 (the "Act"). The Act provides for, among other things, the Authority to undertake all of the school facilities projects in the SDA school districts and to undertake and fund certain preconstruction activities, pursuant to *N.J.A.C. 6A:26-3.9* and 19:34. Section 13(a) of the Act provides that in the case of a capital maintenance project, the Authority may, in its discretion, authorize a district to undertake the project and shall enter into a grant agreement with the district for the payment of the State share.

(b) The rules in this chapter implementing section 13(a) of the Act shall apply to SDA school districts.

### § 19:34A-1.2 Definitions

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

"Agreement" or "grant agreement" means the section 13(a) delegation agreement (and all attachments thereto) between the Authority and the SDA school district.

"Amendment" means a written modification to a contract executed between the SDA school district and a consultant.

"Approved costs" means costs of the capital maintenance project which are eligible to be paid from the proceeds of the grant and either have been paid or shall be paid by the SDA school district.

"Authority" or "SDA" means the New Jersey Schools Development Authority, an entity which undertakes and funds school facilities projects under the Act and which is an entity formed pursuant to section 3 of P.L. 2007, c. 137, *N.J.S.A. 52:18A-235 et seq.*, as successor to the New Jersey Schools Construction Corporation. The SDA is statutorily charged with undertaking and funding schools facilities projects pursuant to the Act.

"Authorization-to-proceed" means a notice to the district from the Authority directing the district to commence performance of its responsibilities pursuant to the agreement. There may be separate authorizations-to-proceed as the capital maintenance project progresses and according to the procurement, contract award, or other action authorized.

"Authorized officer" means with respect to the district, any person or persons authorized pursuant to a resolution of the governing body of the district to perform any act or execute any document relating to the grant and the agreement including the school business administrator; and with respect to the Authority, any person or persons authorized to perform any act or execute any document relating to the grant and the agreement.

"Capital maintenance project" means a school facilities project intended to extend the useful life of a school facility, including up-grades and replacements of building systems, such as structure, enclosure, mechanical, plumbing and electrical systems.

"Change order" or "CO" means a written order, directing or authorizing a change in the work, to a construction contract, which is executed by an authorized school district official and the contractor, and includes all adjustments, if any, to the compensation and time warranted by the change in the work. For purposes of this definition, a "change in work" is a change in the capital maintenance project, the work or the contract documents, including, but not limited to, an increase or decrease in the work to be performed by the contractor or an acceleration of time for the performance of such work, or a change in the sequence in which such work is being performed.

"Checklist" means a form to be provided by the Authority and to be completed by the district at a milestone or milestones in the delegation of the capital maintenance project to be submitted to the Authority for review and approval prior to receiving an authorization-to-proceed and/or certain disbursements of the grant.

"Commencement date" means the date on which the agreement has been fully executed by all the parties thereto and the district has delivered, to the satisfaction of the Authority, the documentation required by the agreement.

"Completion date" means the date specified by the district for completion of the capital maintenance project which may be changed by the district upon notice to the Authority.

"Construction contract" means the agreement between the SDA school district and the contractor governing the construction, including the procurement of goods and services, of all or a portion of the capital maintenance project, and any documents attached thereto and amendments thereof. There may be one or more construction contracts for the capital maintenance project.

"Construction phase" means that phase of the capital maintenance project in which the capital maintenance project is undertaken by a contractor or contractors or in which the acquisition and installation of the capital maintenance project occurs.

"Consultant" means a consultant, including a design consultant, engaged by the SDA school district for the capital maintenance project providing professional services associated with research, development, design and construction administration, alteration, or renovation of real property, as well as incidental services that members of these professions and those in their employ may logically or justifiably perform. A consultant may provide services including studies, investigations, surveys, evaluations, consultations, planning, programming, conceptual designs, plans and specifications, cost estimates, construction management, inspections, shop drawing reviews, preparation of operating and maintenance manuals, and other related services. There may be one or more consultants engaged by the SDA school district for the capital maintenance project.

"Contract" means any agreement between a contracted party and the SDA school district for the capital maintenance project. The term "contract" includes the design consultant contract, the construction contract and any other agreements between the district and its consultants, the district and its contractors, contractors and their subconsultants and subcontractors, and consultants and their subconsultants and subcontractors.

"Contracted party" means the consultants, contractors, and their subconsultants and subcontractors and any other party providing material or services to the SDA school district in connection with the capital maintenance project.

"Contractor" means those persons or firms engaged by the SDA school district to undertake the construction or the acquisition and installation of the capital maintenance project. There may be either a single "general" contractor who has overall contractual responsibility for delivering all of the construction services needed to complete the capital maintenance project or there may be multiple contractors who have responsibility for delivering particular aspects of the capital maintenance project.

"Current working estimate" or "CWE" means the estimated cost to complete the capital maintenance project and includes the cost of design and construction or the acquisition and installation of the capital maintenance project. The Authority shall establish an initial CWE upon delegation by the Authority of the capital maintenance project to the district. The CWE shall be updated, as needed, throughout the preconstruction phase, the design phase, and the construction phase.

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

"Department" means the New Jersey Department of Education.

"Department rules" means rules issued by the Commissioner and/or the State Board of Education that govern the financing, construction and maintenance of the school facilities project, as may be in effect as of the date of the agreement and thereafter.

"Design consultant" means the architect or engineer or other consultant selected by the district to provide design services and/or construction administration services in connection with the capital maintenance project pursuant to the design consultant contract.

"Design phase" means that phase of the capital maintenance project in which the design of the capital maintenance project is undertaken by the design consultant. The design phase may commence upon issuance by the Department of an approval of preconstruction activities or, as applicable, upon issuance by the Department of the preliminary project report and ends upon commencement of the construction phase.

"Design work" means design work performed by a design consultant to design the capital maintenance project so that it may be bid out for construction. If the delegation by the Authority to the district of the capital maintenance pro-

ject commences upon issuance by the Department of a preconstruction approval, design work shall include approved preconstruction design work.

"Disbursement" means a release of a portion of the grant to the district to pay for approved costs.

"Event of default" means any event specified in *N.J.A.C. 19:34A-1.4*.

"Excess costs" means the additional costs of the school facilities project, if any, which shall be borne by the district.

"Facilities efficiency standards" means the standards developed by the Commissioner pursuant to *N.J.S.A. 18A:7G-4(h)* and published in the New Jersey Register.

"Final completion" means that point in time when all requirements of all contracts for a capital maintenance project have been fully performed, all items on the punch list have been fully performed, all manuals, warranties and as-builts are delivered, all liens have been released and a final certificate of occupancy, continued use or completion has been issued.

"Final eligible costs" means the final approved costs as determined pursuant to *N.J.S.A. 18A:7G-5(h)(2)* and *N.J.A.C. 6A:26-3.5*, and for purposes of the agreement, shall be set forth in the final project report.

"Final grant amount" means the final amount of the grant as determined by *N.J.A.C. 19:34A-3.1(b)*.

"Final project report" means the report prepared by the Department which contains all of the information included in the preliminary project report and, in addition, includes: the final eligible costs, the excess costs, if any, the State share and the local share.

"Grant" means the funds to be provided to the district by the Authority to pay for the approved costs subject to the terms and conditions of the section 13(a) delegation agreement. The estimated grant amount shall be adjusted during the course of the capital maintenance project until such time as the Authority determines the final grant amount.

"Long-range facilities plan" or "LRFP" means the plan required to be submitted to the Commissioner by a district pursuant to *N.J.S.A. 18A:7G-4* and *N.J.A.C. 6A:26-2* and an "approved LRFP" means an LRFP approved by the Commissioner pursuant to *N.J.S.A. 18A:7G-4* and *N.J.A.C. 6A:26-2*.

"NJEDA" means the New Jersey Economic Development Authority established pursuant to P.L. 1974, c. 80 (*N.J.S.A. 34:1B-1 et seq.*).

"Preconstruction approval" means the approval by the Department issued pursuant to *N.J.A.C. 6A:26-3.9* pursuant to which the Department has approved, among other things, undertaking the approved preconstruction design work.

"Preliminary eligible costs" means the initial approved costs of the capital maintenance project determined pursuant to the formulas set forth in *N.J.S.A. 18A:7G-7* which shall be deemed to include the costs of construction and other allowable costs and for the purposes of the agreement, shall be set forth in the preliminary project report.

"Preliminary project report" means the report that the Department prepares for the Authority after approving a capital maintenance project application containing the preliminary eligible costs and other project information, pursuant to *N.J.A.C. 6A:26-3.5(c)*.

"PSCL" means the Public School Contracts Law, *N.J.S.A. 18A:18A-1 et seq.*, together with all applicable rules and guidance issued by DCA and the Department in connection therewith.

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

"School facilities project" means the planning, acquisition, 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 include, but is not limited to, 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. The capital maintenance project which the district is undertaking is described in the preconstruction approval if the delega-

tion occurs at this point in the design phase or in the preliminary project report if the delegation occurs later in the design phase.

"School facilities project application" means the form provided by the Commissioner of the Department to be submitted to the Department for approval of a school facilities project, pursuant to *N.J.A.C. 6A:26-3.2*.

"SDA school district" is 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.

"Section 13(a) delegation agreement" means the grant agreement between the Authority and an SDA school district by which the Authority funds the State share, including the costs of preconstruction activities in connection with a proposed capital maintenance project delegated by the Authority to be undertaken by an SDA school district, pursuant to section 13(a) of the Act and this chapter.

"State Comptroller" means the Office of State Comptroller, created pursuant to P.L. 2007, c. 52, in, but not of, the State Department of the Treasury, which is responsible for financial auditing; performance and management reviews; and reviewing the contract procurement process of the Executive branch of State government, independent State Authorities, public institutions of higher education, units of local government and boards of education.

"State share" means the State's proportionate share of the final eligible costs. For the SDA school districts, this equals 100 percent of the final eligible costs of a capital maintenance project.

"Termination" means the cancellation of the section 13(a) delegation agreement by the Authority as a result of an event of default or other noncompliance or by mutual consent of the parties.

"Total costs" means the actual total amount spent on the capital maintenance project. The estimated amount of the total costs upon the commencement date shall be set forth in the agreement and shall be adjusted to reflect the actual total amount spent on the capital maintenance project upon final completion.

(b) Words and terms implementing the Act but not defined in this chapter shall have the meanings defined in *N.J.A.C. 6A:26-1.2* and in 19:34-1.2.

#### § 19:34A-1.3 Administration and performance of grant agreements

The district is responsible for the administration and success of the capital maintenance project, and the provision of the grant by the Authority shall not in any way be deemed to imply that the Authority shall have any responsibility for the administration or success of the capital maintenance project. Although districts are encouraged to seek the advice and opinion of the Authority on problems that may arise regarding the capital maintenance project, the giving of such advice by the Authority shall not shift the responsibility for final decisions from the district to the Authority, nor render the Authority responsible for such advice. Moneys awarded pursuant to this chapter shall be used in conformance with the Act, this chapter and the provisions of the grant agreement to achieve the grant objectives and to insure that the purposes set forth in the Act are fully executed.

#### § 19:34A-1.4 Noncompliance

(a) Any of the following events shall constitute an event of default under the agreement and noncompliance with this chapter:

1. Failure by the district to observe and perform any duty, covenant, condition or agreement on its part to be observed or performed under the grant agreement, which failure shall continue for a period of 30 days after receipt of written notice specifying such failure and requesting that it be remedied is given to the district by the Authority, unless the Authority shall agree in writing to any extension of such time prior to its expiration, provided, however, that if the failure stated in such notice is correctable but cannot be corrected within the applicable period, the Authority may not unreasonably withhold its consent to an extension of such time up to 120 days from delivery of the written notice referred to above or if corrective action is instituted by the district within the applicable period and diligently pursued until the event of default is corrected;

2. Any representation made by or on behalf of the district contained in the agreement, or in any instruction furnished in compliance with or with reference to the section 13(a) delegation agreement or the grant, is false or misleading in any material respect;
3. A determination is made by the Authority that:
  - i. The grant was obtained by fraud; or
  - ii. Gross abuse or corrupt practices have occurred in the administration of the capital maintenance project by the district;
4. Subject to unavoidable delays (for example, delays due to weather, strikes, acts of God or other causes similarly beyond the control of the district), the construction or the acquisition and installation of the capital maintenance project has not commenced within 18 months after the commencement date;
5. Subject to unavoidable delays, the construction or the acquisition and installation of the capital maintenance project has not reached final completion on or before the completion date;
6. The district has utilized grant moneys for costs that are not approved costs;
7. Work on the capital maintenance project has ceased without good cause as agreed to by the Authority. The term "good cause" shall include, but not be limited to, circumstances beyond the control of the district or any of the contracted parties such as fire, flood, riot or strike;
8. The district has contracted with a contractor, subcontractor, consultant or subconsultant who has not been pre-qualified by the Authority, if such prequalification would be required for the performance of similar work on an Authority managed school facilities project;
9. The district has disbursed grant monies to a firm which is debarred, suspended or disqualified from State or Authority contracting or to a firm which has not been pre-qualified; or
10. The district fails to permit the Authority, DCA, or the State Comptroller immediate entry or inspection.

(b) In addition to (a) above, other non-compliance may include any failure on the part of the district to comply with any provision of the Act, this chapter, or any law, regulation, or rule applicable to the agreement.

#### § 19:34A-1.5 Remedies for events of default and noncompliance

(a) In addition to any other remedies as may be provided by law or by the section 13(a) delegation agreement, in the event of noncompliance with any provisions of the Act, any condition of the section 13(a) delegation agreement, an event of default, or any requirement of this chapter, the Authority, after taking the action in (a)1 below, may take any of the actions or combinations thereof set forth in (a)2 through 4 below:

1. Issue a notice of noncompliance in writing to the district stating that if corrective action is not taken within the requisite time period specified or if the action is inadequate as determined by the Authority, the Authority may take any of the actions or combinations contained in *N.J.A.C. 19:34A-1.5(a)2* through 5;
2. Withhold, upon written notice to the district, grant disbursements or any portion thereof;
3. Suspend, upon written notice to the district, the section 13(a) delegation agreement and withhold further payments thereunder and prohibit the district from incurring additional obligations of grant funds pending corrective action by the district;
4. Terminate, upon written notice to the district, the section 13(a) delegation agreement or rescind the grant moneys.
  - i. The Authority shall promptly notify the district, in writing, of its determination to terminate the grant agreement and the reasons for the termination, together with the date on which the termination shall take effect.
  - ii. Upon termination of the grant agreement, the Authority may demand that an amount equal to the grant received by the district be immediately returned to the Authority and the district shall waive payment by the Authority of the undistributed balance, and upon notice to the district, the amount of the grant disbursed by the

Authority shall be immediately due and payable by the district together with any costs to the Authority resulting from an event of default by the district; and/or

5. In addition to any withholding, suspension or termination action, the Authority retains the right to pursue any and all other remedies as may be available under State law as warranted.

(b) At the option of the Authority, in its sole discretion, the Authority may, without prejudice to any other rights or remedies, take an assignment of any of the contracts in order to complete the capital maintenance project, and the district shall take whatever actions are necessary in order to ensure the proper assignment to the Authority of such contracts.

(c) The district shall on demand pay to the Authority the reasonable fees and expenses of attorneys and other reasonable expenses (including without limitation the reasonably allocated costs of in-house counsel and legal staff) incurred by the Authority in the collection of the repayment of the grant or in the enforcement of performance or observation of any other duties, covenants, obligations or agreements, of the district upon an event of default or non-compliance with this chapter.

#### § 19:34A-1.6 (Reserved)

#### § 19:34A-1.7 Termination by mutual agreement

The Authority and the district may terminate the section 13(a) delegation agreement when both parties agree that the continuation of the capital maintenance project would not produce beneficial results commensurate with the further expenditure of funds. The Authority and the district shall agree upon the conditions for termination including the date on which the termination shall take effect. The closeout provisions specified in *N.J.A.C. 19:34A-3.4* shall apply.

#### § 19:34A-1.8 Waiver

Any district desiring a waiver or release from the express provisions of any of the rules in this chapter may submit a written request to the Authority. Waivers may be granted by the Authority, only when the Authority determines that such a waiver would not contravene the provisions of the Act and upon a finding that, in granting the waiver, the Authority will be promoting the statutory purposes expressed in the Act.

#### § 19:34A-1.9 Appeals

(a) Appeals arising from decisions of the Authority may be requested in writing, and an opportunity given for any informal hearing on the papers, in person or via telephone with Authority staff. Such written request for an informal hearing must be made within 30 days of the receipt of the Authority's decision.

(b) In the event of an adverse decision after an informal hearing under (a) above, or if a district determines not to seek an informal hearing, and providing further, that the dispute or controversy is a contested case, as defined in *N.J.S.A. 52:14B-2(b)*, a district may request, within 90 days of the written decision resulting from the informal hearing or the determination of the Authority if an informal hearing is not sought, a formal hearing.

(c) Upon filing of the initial pleading in a contested case, the Authority shall 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 Procedures Rules, *N.J.A.C. 1:1*.

(d) Every determination of a dispute or controversy arising from this chapter by the Authority, constituting final agency action by the Board, shall be embodied in a written decision which shall set forth findings of fact and conclusions of law pursuant to the applicable rules of the Office of Administrative Law.

### § 19:34A-2.1 Applicability

This subchapter establishes the Authority's procedures and requirements governing the conditions and eligibility criteria for delegation under *N.J.S.A. 18A:7G-13(a)* as well as the circumstances ending the delegation.

### § 19:34A-2.2 Eligibility criteria for delegation

(a) The following criteria shall apply regarding eligibility for delegation when determined upon issuance by the Department of a preconstruction approval of the preconstruction design work:

1. The district has obtained approval of the district's long-range facilities plan pursuant to *N.J.A.C. 6A:26-2.3*;
2. There are no preconstruction activities related to land acquisition or special circumstances such as site development or remediation;
3. The Department has approved the undertaking of preconstruction design work pursuant to *N.J.A.C. 6A:26-3.9*; and
4. The delegation, as determined by the Authority, is in the best interests of the capital maintenance project.

(b) If eligibility is determined upon issuance by the Department of a preliminary project report (that is, later in the design phase of the capital maintenance project or prior to the construction phase for capital maintenance projects without a design phase), the criteria shall be the following:

1. The district has obtained approval of the district's long-range facilities plan pursuant to *N.J.A.C. 6A:26-2.3*;
2. The Department has approved the capital maintenance project and issued a preliminary project report to the Authority pursuant to *N.J.S.A. 18A:7G-5* and *N.J.A.C. 6A:26-3.3*; and
3. The delegation, as determined by the Authority, is in the best interests of the capital maintenance project.

### § 19:34A-2.3 Execution and other conditions for delegation

(a) After the Authority has determined that a capital maintenance project has satisfied the eligibility criteria for a section 13(a) delegation agreement, it shall transmit the section 13(a) delegation agreement to the district for execution. The Authority may transmit along with the agreement, a scope of work that shall serve as the basis for any further design work undertaken by the district's consultant.

(b) The district shall execute the section 13(a) delegation agreement within such period of time and pursuant to such terms and conditions as the Authority may determine in its sole discretion, and return the section 13(a) agreement together with all applicable attachments to the Authority for execution by the Authority. Such terms and conditions shall include:

1. Delivery by the district to the Authority of a certified copy of a resolution of the district board authorizing the execution and delivery of the agreement and proof of the district board's delegation of authority to the school business administrator or other authorized officer for supervision of the capital maintenance project; and
2. Delivery by the district to the Authority of a certificate executed by the school business administrator or other authorized officer as to the following:
  - i. All adoptions and approvals required to be given by the district or by any other governmental entity with respect to the agreement have been obtained;
  - ii. The district has full legal right, power and authority to enter into the agreement to consummate the transactions contemplated thereby; and
  - iii. The agreement has been duly authorized, executed and delivered by the district, and constitutes a valid and binding agreement of the district enforceable in accordance with its terms.

(c) Upon determining that all conditions precedent to the execution of the section 13(a) delegation agreement have been satisfied, the Authority shall execute the agreement.

(d) Upon execution of the agreement, the Authority shall transmit to the district the section 13(a) delegation agreement as well as a sign to the extent permitted by zoning laws indicating that financing was made available to the district through the Authority.

#### § 19:34A-2.4 Initiation of delegation and engagement of the design consultant

(a) If delegation occurs upon issuance by the Department of a preconstruction approval:

1. Upon execution of the agreement by the district and the Authority pursuant to *N.J.A.C. 19:34A-2.3*, the district shall proceed to engage a design consultant and shall submit to the Authority an executed consultant certification in the form attached to the agreement and acceptable documentation of insurance coverage.
2. Disbursement for any services performed by the design consultant prior to the execution of the agreement by the district and the Authority pursuant to *N.J.A.C. 19:34A-2.3* shall be at the risk of the district.
3. The design consultant shall prepare the design documents required for submission by the district to the Department of a school facilities project application, pursuant to *N.J.A.C. 6A:26-3.3*.
4. Upon approval by the Department of the school facilities project application and issuance of the preliminary project report, the district may proceed further in the design phase.

(b) If delegation occurs upon Department issuance of a preliminary project report, and, therefore, later in the design phase:

1. Upon execution of the agreement by the district and the Authority pursuant to *N.J.A.C. 19:34A-2.3*, the district shall proceed to engage a design consultant or may continue to engage a design consultant and shall submit to the Authority an executed consultant certification in the form attached to the agreement and acceptable documentation of insurance coverage.
2. Disbursement for any services performed by the design consultant prior to the execution of the agreement between the district and the Authority pursuant to *N.J.A.C. 19:34A-2.3* shall be at the risk of the district.

(c) If delegation occurs for capital maintenance projects that do not have a design phase:

1. The delegation shall occur after the issuance by the Department of the preliminary project report and prior to the construction phase.

2. Upon execution of the agreement by the district and the Authority pursuant to *N.J.A.C. 19:34A-2.3*, the district shall have final eligible costs of the capital maintenance project determined by the Department, pursuant to *N.J.A.C. 6A:26-3.5*, and comply with the provisions governing approval of local share, if applicable, in this chapter, before the Authority issues an authorization-to-proceed with the construction phase, pursuant to *N.J.A.C. 19:34A-2.6*.

(d) Any design consultant engaged by the district for the capital maintenance project shall be engaged pursuant to the PSCL and must be prequalified by the Authority.

#### § 19:34A-2.5 Design of the capital maintenance project

(a) The design consultant shall design the capital maintenance project in accordance with the preliminary project report.

(b) When the detailed plans and specifications are completed, the district shall submit them to the Authority with an updated CWE, to review for consistency with the initial scope of work provided pursuant to *N.J.A.C. 19:34A-2.3(a)*, if applicable, and for the Authority to make a final eligible cost recommendation for the capital maintenance project to the Department, pursuant to *N.J.A.C. 6A:26-3.5*. At the same time, or before or after the determination by the Department of final eligible costs, pursuant to *N.J.A.C. 6A:26-3.5*, the district shall submit the detailed plans and specifications to the Department for approval of final educational adequacy, if applicable, pursuant to *N.J.A.C. 6A:26-5.4*.

1. If the updated CWE provided by the design consultant is less than or equal to the preliminary eligible costs, the final eligible costs shall equal the updated CWE.
  2. If the updated CWE is greater than the preliminary eligible costs:
    - i. The Authority shall, in consultation with the district and the Department, determine whether changes can be made in the scope of the capital maintenance project to reduce costs but not impact the facilities efficiency standards and, if such changes can be made, the CWE shall be adjusted accordingly and the final eligible costs shall equal such adjusted CWE.
    - ii. If the Authority determines that it is not possible to make changes in the capital maintenance project either because the additional costs are the result of factors outside the control of the district or the additional costs are required to meet the facilities efficiency standards, the Authority shall recommend to the Department to accept the updated CWE as the final eligible costs.
    - iii. If the Authority determines that the additional costs are the result of factors that are within the control of the district or are the result of design factors that are not required to meet the facilities efficiency standards, the district shall either make the appropriate changes to reduce costs or agree to pay such additional costs.
- (c) After the Authority receives a final project report evidencing final eligible costs, the Authority shall issue an authorization-to-proceed with the construction phase, whereupon the district shall proceed with the procurement of contractors for the construction or the acquisition and installation of the capital maintenance project.

§ 19:34A-2.6 Construction or acquisition and installation of the capital maintenance project

- (a) Upon receipt of an authorization-to-proceed with the construction phase, the district shall proceed to bid for contractors, if applicable, or for goods and services, in accordance with the PSCL. All contractors engaged by the district shall be pre-qualified by the Authority.
- (b) The district shall forward to the Authority for review and approval:
1. The construction phase checklist attached to the agreement;
  2. A contractor certification in the form attached to the agreement;
  3. Acceptable documentation of insurance coverage; and
  4. A CWE which has been adjusted to take into account the award of the construction contract(s).
- (c) Upon approval by the Authority of the documents required in (b) above, the district shall proceed with the construction phase and the contractor may proceed to undertake the work.
- (d) Disbursement for any services performed by the contractor prior to such approval shall be at the risk of the district.
- (e) If, during the design and construction of the capital maintenance project, a district determines that an amendment or a change in the work of the design consultant, any other consultant and/or the contractor(s) is required, as applicable, the following shall apply:
1. Any change order, or amendment regardless of the amount, which affects the number, configuration, size, location, or use of the educational spaces, shall be submitted by the district to the Department for approval;
  2. Any change order or amendment which exceeds five percent of the grant amount, in the singular or aggregate, shall be submitted by the district to the Authority for approval;
  3. If required to be approved and if approval is obtained pursuant to (e)1 or 2 above, upon receipt of an authorization-to-proceed, the district may authorize the design consultant, other consultant and/or the contractor(s) to proceed with the work specified in the request for change order or amendment, as applicable; and
  4. After receipt by the Authority of the final project report, the district shall be responsible for the costs associated with changes to the scope of the capital maintenance project, unless the district provides evidence satisfactory to

the Authority that the change order is necessitated by either an emergency consistent with *N.J.S.A. 18A:18A-7* or unforeseeable physical conditions.

(f) The capital maintenance project shall be constructed in conformity with the New Jersey Uniform Construction Code, *N.J.A.C. 5:23*, and the educational facility planning standards, *N.J.A.C. 6A:26-6.2*.

#### § 19:34A-3.1 Grant amount

(a) Since the delegation to the district of the capital maintenance project shall commence prior to the determination of final eligible costs, the Authority shall provide funding to the district in an amount equal to 100 percent of the costs for approved preconstruction design work and design work required to be performed to prepare the detailed plans and specifications. Any amounts paid by the Authority shall upon determination of final eligible costs be applied to the State share.

(b) The grant shall be used only to pay for approved costs. Approved costs shall be reasonable, as determined by the Authority, pursuant to policies and procedures to be established and updated from time to time.

(c) The grant amount shall equal the State share of the final eligible costs of a capital maintenance project, as adjusted. The CWE and grant amount shall be adjusted by the Authority at the following time points: when the Authority receives the preliminary project report (if the delegation occurred at the preconstruction phase), after the Authority receives the final project report, upon award of the construction contract(s), and upon any change orders.

(d) Upon final completion, the CWE shall be adjusted to reflect the final approved costs of the capital maintenance project and the final grant amount shall equal the State share plus the costs of any change orders for which the district is not responsible.

#### § 19:34A-3.2 Disbursement schedule

(a) Disbursement of grant funds shall be made at intervals as work progresses and expenses are incurred by the district and approved by the Authority for payments.

(b) Total disbursements shall not exceed the grant amount.

#### § 19:34A-3.3 Disbursement documentation and procedures

(a) No disbursement of grant funds for expenses incurred by the district shall be made until the Authority receives all the documentation required for that disbursement.

(b) Disbursement documentation under (a) above shall include:

1. An invoice with a complete description of the costs incurred;
2. A payment voucher signed by an authorized officer of the district;
3. Submission of acceptable documentation of required insurance coverages; and
4. Completion to the satisfaction of the Authority of certifications or checklists as applicable.

(c) Upon receipt and approval by the Authority of a request for disbursement, the Authority shall disburse the amount set forth in such request for disbursement less the retainage specified in *N.J.S.A. 18A:18A-40.3*.

(d) Upon final completion, the district shall prepare and submit to the Authority, for review and approval, a request for disbursement together with the final completion checklist in the form attached to the agreement. Upon approval, the Authority shall disburse an amount equal to such request for disbursement together with any retainage previously withheld by the Authority pursuant to (b) above, and, thereupon, the Authority shall be released from any further responsibility to make any disbursements.

(e) The Authority shall not be under any obligation to make disbursements of the grant unless:

1. The agreement has been duly executed and delivered by the parties thereto;
2. No event of default or noncompliance, nor any event which with the passage of time or service of notice would constitute an event of default or noncompliance, shall have occurred and shall be continuing at the time of the request for disbursement; and
3. All of the conditions precedent contained within the agreement to the request for disbursement have been discharged completely and to the full satisfaction of the Authority.

#### § 19:34A-3.4 Closeout procedures

(a) Closeout shall occur when all applicable administrative actions and all required work have been completed by the district. This process shall include the steps enumerated below:

1. In the event there are any grant proceeds which have not been expended on approved costs, such unexpended grant proceeds shall be released to the Authority and the amount of the grant shall be reduced by the amount of the unexpended proceeds.
2. (Reserved)
3. The district shall refund to the Authority any grant funds spent on any costs which were disallowed by the Authority as not being approved costs. Such refund shall be made within 30 days of the request by the Authority.
4. If a final audit has not been performed on behalf of the district prior to closeout of the capital maintenance project, the Authority retains the right to recover any appropriate amount after full consideration of any recommendation on disallowed costs resulting from the final audit.
5. The Authority may require additional information from the district or its consultants and contractors and/or retain any grant amount not disbursed until closeout is completed.

#### § 19:34A-4.1 General provisions

(a) The district shall design and construct the capital maintenance project pursuant to the plans and specifications and as approved by the Department pursuant to N.J.S.A. 18A:7G-5. Any changes in the capital maintenance project which may impact educational adequacy (the number, size, configuration, location or use of educational spaces) shall be reviewed and approved by the Department as required under *N.J.A.C. 6A:26-4.9* and this chapter prior to such changes being made.

(b) The district shall, with all due diligence, proceed to construct or acquire and install the capital maintenance project in accordance with the plans and specifications, as applicable. If during the construction or acquisition and installation of the capital maintenance project, the district determines that a change in a construction contract is required, it shall comply with any and all requirements for approval of a request for a change order pursuant to *N.J.A.C. 6A:26-4.9*, any other applicable Department regulations, and this chapter.

(c) The district shall promptly notify the Authority in writing of events or proposed changes in the scope of the capital maintenance project, and schedule for completion and/or any other significant changed conditions concerning the capital maintenance project.

#### § 19:34A-4.2 Contract award and compliance

(a) The district shall continually monitor the performance of the capital maintenance project and preconstruction activities, if applicable, to assume that time schedules are being met and that the completion of the capital maintenance project will occur in a timely, efficient and effective manner.

(b) In the event of default of any contracted party under any contract, or in the event of a breach of warranty with respect to any contract, the district shall reasonably exhaust the remedies against the defaulted contracted party and against each such surety for the performance of such contracts.

(c) The district shall obtain and maintain all licenses, certifications, authorizations, or any documents required by all governmental authorities whenever necessary. The district shall promptly notify the Authority and the State Comptroller in writing of any disciplinary action against itself, or, if it has knowledge of, against any contracted party or any change in the status of any license, permit, or other authorization required for the capital maintenance project.

(d) The district shall award all contracts for the capital maintenance project in accordance with *N.J.S.A. 52:15C-10* and the PSCL and the rules issued pursuant thereto. The district shall award a contract for design work on the capital maintenance project only to a design consultant that has been pre-qualified by the Authority and has the pre-qualification classification required for the engagement.

(e) All consultants and contractors with whom the district contracts, and their subconsultants and subcontractors, must be prequalified by the Authority if such prequalification would be required for the performance of similar work on a Authority managed school facilities project.

(f) All construction contracts shall contain provisions that the contractor and the subcontractor, as applicable, shall comply with the New Jersey Prevailing Wage Act, *N.J.S.A. 34:11-56.25* et seq. The district shall not hire any contractor or subcontractor to perform any work for the district who is listed or is on record in the Office of the Commissioner, Department of Labor, as having failed to pay prevailing wages in accordance with the provisions of the New Jersey Prevailing Wage Act.

(g) All contracts shall provide that the contracted party shall comply with the anti-discrimination provisions of *N.J.S.A. 10:2-1* et seq., the New Jersey Law Against Discrimination, *N.J.S.A. 10:5-1* et seq., *N.J.A.C. 17:27* and *N.J.A.C. 6:4-1.6*. The district and its contracted parties shall in addition agree by contract and guarantee to afford equal opportunity in the performance of the contracts in accordance with an affirmative action program approved by the State Treasurer.

(h) No official or employee of the district who is authorized in his or her official capacity to negotiate, make, accept or approve or to participate in such decision regarding a contract in connection with the preconstruction activity shall have any financial or other personal interest in any such contract. The School Ethics Law, *N.J.S.A. 18A:12-21* et seq., and *N.J.A.C. 6A:28* shall by reference be incorporated as part of the applicable agreement.

(i) The district shall submit proof to the Authority and it and any contracted party shall comply with all insurance requirements of the section 13(a) delegation agreement and, when appropriate, shall certify that the insurance is in full force and effect and that the premiums have been paid.

(j) The district shall not take any action or omit to take any action that would result in the loss of the exclusion of the interest on any NJEDA bonds from Federal gross income for Federal income tax purposes under Section 103 of the Internal Revenue Code of 1986, as amended.

(k) The district shall require all contracted parties to enter into certifications at the times and in the manner specified by the Authority in the applicable agreement. Such certifications may include a certification by a consultant or a contractor upon award of contract; certifications by the school business administrator upon either award of a contract or final completion of the preconstruction activity or both; and tax certifications by the district as may be required by the Authority or the NJEDA to ensure the tax-exempt status of NJEDA bonds.

(l) The district shall require the provision of performance bonds or other security pursuant to *N.J.S.A. 18A:18A-25*.

(m) The following concern contracts:

1. The district shall include the following statements in each contract awarded by the district in connection with the preconstruction activity and capital maintenance project: "This contract or subcontract is or may be funded in part with funds from the New Jersey Schools Development Authority. Neither the State, the New Jersey Schools Development Authority, the New Jersey Economic Development Authority, nor any of their departments, agencies, board members or employees is or will be a party to this contract or subcontract or any lower tier contract or subcontract. This contract or subcontract is subject to the requirements contained in *N.J.A.C. 19:34A* and the contractor (subcontractor) (consultant) (subconsultant) agrees to comply with those requirements."
2. The district shall include a provision in each contract awarded by the district in connection with the capital maintenance project which states that the contract is assignable to the Authority.

(n) The district shall comply with the requirements of *N.J.S.A. 52:15C-10* concerning the notices to the State Comptroller and the timing of the procurement process relative to the award of contracts.

(o) The Authority and/or the NJEDA may impose such other conditions as may be necessary and appropriate to implement the laws of the State and effectuate the purpose and intent of the Act.

#### § 19:34A-4.3 Fraud and other unlawful or corrupt practices

(a) The district shall administer moneys pursuant to this chapter, the section 13(a) delegation agreement and any contracts entered into in connection with an approved preconstruction activity and a capital maintenance project free from bribery, graft and corrupt practices. The district has the primary responsibility for the prevention, detection and cooperation in the prosecution of any such conduct. The Authority shall have the right to pursue administrative or other legally available remedies in the event it suspects the occurrence of such conduct.

(b) The district shall diligently pursue judicial and administrative remedies and take any other appropriate remedial action with respect to any allegations or evidence of such illegality or corrupt practices. The district shall immediately notify the Authority in writing when any such allegation or evidence comes to its attention and shall periodically advise the Authority and the State Comptroller in writing of the status and ultimate disposition of any related matter.

#### § 19:34A-4.4 Debarment

(a) The district and its consultants or contractors shall not enter into a contract for work or an approved preconstruction activity or capital maintenance project with any person or firm that has been debarred, suspended, or disqualified from State, NJEDA, Authority or Federal government contracting.

(b) The district shall insert in all contracts with all contracted parties, and all contractors and consultants shall insert into all of their contracts with all subconsultants and subcontractors, a clause stating that the contracted party, its subconsultants or subcontractors may be debarred, suspended or disqualified from contracting and/or working on the approved preconstruction activity or capital maintenance project if the contracted party commits any of the acts listed in N.J.A.C. 17:19-3 or any applicable regulation issued by the Authority or the NJEDA.

(c) The district's bid specification for any work on an approved preconstruction activity or a capital maintenance project shall require all bidders to submit a sworn statement by the bidder, or an officer or partner of the bidder, indicating whether or not the bidder is, at the time of the bid, included on the State Treasurer's, the NJEDA's, the Authority's, or the Federal government's list of debarred, suspended or disqualified bidders as a result of action taken by any State or Federal agency, as the case may be. Bid specifications for the approved preconstruction activity or capital maintenance project shall state that the district shall immediately notify the State, the Authority and the NJEDA in writing whenever it appears that a bidder is on the Treasurer's, the Authority's, the NJEDA's or the Federal government's list. The State, the Authority, and the NJEDA reserve the right in such circumstances to immediately suspend such bidder from contracting and/or engaging in work on the approved preconstruction activities or capital maintenance project and to take such other action as it deems appropriate pursuant to N.J.A.C. 17:19-3 or any applicable regulation issued by the Authority.

#### § 19:34A-4.5 (Reserved)

#### § 19:34A-4.6 Disclosure and publicity

(a) Submissions received by the Authority under this chapter which are government records as defined in the Open Public Records Act, P.L. 2001, c. 404, shall be made available to persons who request their release as provided by State law.

(b) Press releases and other public dissemination of information by the school district concerning the capital maintenance project shall acknowledge Department approval and Authority financial assistance when such assistance is provided.

§ 19:34A-4.7 Access and record retention

(a) The Authority shall make available records and accounts pertaining to the capital maintenance project undertaken by the Authority to the State Comptroller, and the State Auditor in their investigations, examinations and inspections of the activities related to the financing and undertaking of preconstruction activities. The Authority shall also cooperate, upon request, in sharing information with other entities.

(b) The school district shall keep these records and accounts for the capital maintenance activities as necessary in order to evidence compliance with the Act and all applicable regulations and requirements. Such records shall be retained for 10 years following substantial completion of the school facilities project and any additional period required for the resolution of litigation, claims or audit findings.

(c) The Authority shall keep those records and accounts and shall require all contracted parties to keep those records and accounts for the capital maintenance project as necessary in order to evidence compliance with the Act and all applicable regulations and requirements. Such records shall be retained for 10 years following completion of the capital maintenance project and any additional period required for the resolution of litigation, claims or audit findings.