

C

Ryan, Jessica

From: Lashway, Lisa
Sent: Thursday, December 04, 2008 9:45 AM
To: Sohl, Bill; Mayor David Scapicchio; Maniscalco, Sherry
Cc: Ryan, Jessica
Subject: FW: Two New Local Finance Notices Released



LFN 2008-20 ESCO LFN 2008-21 online
and Solar Con... purchasing ...
correspondence

Lisa Lashway
Township Clerk
Township of Mount Olive
P.O. Box 450
Budd Lake, NJ 07828
973-691-0900 Ext. 7290

-----Original Message-----

From: egg@dca.state.nj.us [mailto:egg@dca.state.nj.us]
Sent: Thursday, December 04, 2008 9:37 AM
To: Lashway, Lisa
Subject: Two New Local Finance Notices Released

Dear Municipal Clerk:

The Division of Local Government Services has released two new Local Finance Notices that affect all local government units. Notice 2008-20, "Contracting for Renewable Energy Services - P.L. 2008, c. 83" covers important public contracting and implementation issues of this new law that promotes local government use of solar and related renewable energy activities. It also references the new Local Government Energy Audit program administered by the BPU as a preliminary step to implementing solar programs.

Notice 2008-21 - Online Auctions and Other Procurement Related Issues provides updated information on the use of online auctions for the sale of government personal property. It covers other matters related to the sale of property, including abandoned vehicles and forfeited property, use of classified ad websites, and sale of renewable energy certificates. A second section covers range of local and public school contracting issues including affirmative action rules, adjustments for petroleum price changes, the Local Government Energy Audit Program, limits on membership in national cooperative purchasing programs, and using online legal ads as an affidavit of publication.

Both Notices are included with this e-mail, and are online at www.nj.gov/dca/lgs/lfns/lfnmenu.shtml.

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LFN 2008-20

December 3, 2008

Local Finance Notice

Jon S. Corzine
Governor

Joseph V. Doria
Commissioner

Susan Jacobucci
Director

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Contracting for Renewable Energy Services P.L. 2008, c. 83

The recently enacted P.L. 2008, c. 83 amended provisions of the Local Public Contracts Law, the Public School Contracts Law, and the County College Contracts Law. The amendments grant those contracting units improved procedures to contract: 1) for energy improvements to public facilities (commonly known as "ESCO" contracts); and, 2) for installation of renewable energy programs owned by third parties (renewable); both changes permit contracts for up to 15 years.

The laws also require that whenever either of the projects are executed through a lease, the lease agreement must contain a clause making them subject to the availability and appropriation annually of sufficient funds as may be required to meet the extended obligation, or contain an annual cancellation clause.

Chapter 83 makes similar amendments to the three laws, and in the case of the Local Public and Public School Contracts Laws, permits the use of competitive contracting to enter into the contracts. The changes are as follows:

First, even with the adoption and immediate effective date of the law, **its provisions do not allow immediate action** by any of the covered contracting units. For both ESCO and renewable contracting, the law requires the Board of Public Utilities to promulgate guidelines to implement methodologies for computing the energy savings and generation costs.

Second, the revised the use of ESCO contracts for making energy improvements to public facilities that are paid for by energy savings. The law now permits the process to be used for "energy efficiency equipment or demand response equipment, including combined heat and power facilities."

From the time the proposal was passed by the Legislature and then enacted by the Governor, discussions with the Board of Public Utilities, the Governor's Office, and the Division of Local Government Services considered how the goals of the legislation would best be implemented and the benefits made available to contracting units.

At this time, the following actions are being taken:

1. The Board of Public Utilities is being asked to expedite the promulgation of guidelines that will implement the provisions of authorizing 15 year contracts for the installation of renewable energy production facilities. Commonly known as “power purchase agreements,” it is expected that these guidelines will take 2-3 months to authorize. **Until that time contracting units cannot use the provisions of the new law.** It is also anticipated that by the time the Board promulgates guidelines additional information on contracting for these services will be provided by State agencies.
2. It is expected that the Legislature will soon consider legislation to reform ESCO related laws. The changes should provide an improved process for all contracting units to take advantage of the principle of implementing energy conservation measures and paying for them with the savings from reduced energy use permitted by the improvements. It is hoped that these changes will be made by early next year. If this effort is not successful, regulatory action will be taken to clarify the types of projects that are eligible under the law.

Contracting for Renewable Energy Services, Energy Audits and BPU Grants

With the adoption of these laws and increasing interest in renewable energy, many contracting units are approaching, or may be approached by vendors offering their services to install solar panels or other improvements “at no cost” to the contracting unit. **Contracting officials should know that there is no circumstance under which these contracts can be entered into without a competitive process: competitive contracting or formal public bidding.** The Local Public and Public Schools Contracts Laws already allow competitive contracting for these services.

Officials should also be aware that when it comes to contracting for solar panels under power purchase agreements, there are a myriad of different circumstances, minimum standards, and pricing options that must be considered, as well the use of federal tax credits. Federal tax credits cannot be used by a government agency, but a private company granted a concession to install solar on a government facility, can use them to lower the cost of the installation below the cost that could be obtained if the government pays for the improvement by itself.

Other issues include the fact that the installation of solar panels by the government directly or through a vendor is considered a “public works activity” under state law, and thus requires prevailing wages and other public works related requirements to be followed for their installation. In many cases, the economics of installations may limit their use to facilities that can generate a minimum amount of energy.

Many local units want to implement energy savings practices. In most cases, the most prudent first step will be to conduct an energy audit to identify areas where and how energy can be saved. The BPU recently announced the Local Government Energy Audit Program a financial incentive program to encourage local units to conduct energy audits, including the use of a recently issued State contract for firms to conduct the audits.

Notwithstanding the BPU Local Government Energy Audit Program, local units should be aware that hiring energy audit firms requires competition. Energy audits do not fall under the professional services exception for bidding. Though they may be used, the performance of an energy audit does not require the use of a licensed engineer, architect or other professional that meets the definition of a professional service.

Energy auditing requires individuals with experience and knowledge of energy management, conservation, technology, and economics and, while an engineering license may be useful, the subject does not require the type of skills authorized as a professional service. Thus, while some of these individuals may be qualified by experience and training to conduct audits, energy audit contracts are not exempt from public bidding laws.

Recognizing that experience and expertise counts in contracting for energy audits, the Division is authorizing Competitive Contracting as a way to contract for energy audits under the Local Public Contracts Law and the Public School Contracts Law. Contracting agencies may want to review the State contract for energy audits as a starting point for audits conducted outside of the BPU program.

Consideration of energy conservation contracts must be thoughtful and deliberate. Entering into contracts under unwarranted pressure or an unnecessarily heightened sense of urgency may result in unanticipated long-term costs or unfavorable cost contracts. Over the next few months, local units will see additional initiatives from State government that will recognize and enhance the use of new contracting models and provide the necessary guidance to ensure contract integrity, reduced energy use, and cost savings that accrue from those actions.

Recipients of this Notice are asked to share it with appropriate local officials.

Approved: Susan Jacobucci, Director

Table of Web Links

Page	Shortcut text	Internet Address
1	P.L. 2008, c.83	http://www.njleg.state.nj.us/2008/Bills/PL08/83_.PDF
2	Local Government Energy Audit Program	http://www.njcleanenergy.com/commercial-industrial/programs/local-government-energy-audit/local-government-energy-audit
2	State contract	http://www.state.nj.us/treasury/purchase/noa/contracts/t2545.shtml
3	State contract	http://www.state.nj.us/treasury/purchase/noa/contracts/t2545.shtml

P.L. 2008, c. 83**Changes to the Text of the Laws**

The Chapter Law made identical statutory changes to the Public School Contracts Law, the County College Contracts Law, and the Local Public Contracts Law. Existing sections relating to energy contracting were amended, and a new subsection for renewables was added. All three laws were also amended to add those sections to existing requirements for leasing at the end of each section.

The new sections read as follow:

N.J.S.A. 18A:18A-42(j); 18A:64A-25.28(i); and 40A:11-15(12):

The provision or performance of goods or services for the purpose of conserving energy through energy efficiency equipment or demand response equipment, including combined heat and power facilities, in, at, or adjacent to, buildings owned by any local board of education, the entire price of which shall be established as a percentage of the resultant savings in energy costs, for a term not to exceed 15 years; except that these contracts shall be entered into only subject to and in accordance with guidelines promulgated by the Board of Public Utilities establishing a methodology for computing energy cost savings. As used in this subsection, "combined heat and power facilities" means facilities designed to produce both heat and electricity from a single heat source;

The following sub-paragraph was added as 18A:18A-42(o); 18A:64A-25.28(q); and 40A:11-15(45)

The provision or performance of goods or services for the purpose of producing class I renewable energy {for LPCL only: "and class II renewable energy"}, as that term is defined in section 3 of P.L.1999, c.23 (C.48:3-51), at, or adjacent to, buildings owned by any local board of education, the entire price of which is to be established as a percentage of the resultant savings in energy costs, for a term not to exceed 15 years; provided, however, that these contracts shall be entered into only subject to and in accordance with guidelines promulgated by the Board of Public Utilities establishing a methodology for computing energy cost savings and energy generation costs.

LFN 2008-21

December 3, 2008

Contact Information

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Director

Online Auctions and Other Procurement Related Issues

Over the last few months, significant interest in the use of online auctions for the sale of local unit surplus personal property, and related procurement issues have led to the implementation of new policies in several areas of local unit procurement practices. This Local Finance Notice addresses these issues. Agencies covered under this Notice are those covered by the Local Public Contracts Law and the Public School Contracts Law. Recipients of this Notice are asked to ensure that procurement officials in the organization receive copies of this Notice.

This Notice covers the following issues;

A. Sale of Property Issues

1. Use of Online Auction Sites
2. Funds Held by Vendors for Disbursement to Local Units
3. Use of Craigslist.com and Similar Websites
4. Sale of Abandoned/Confiscated/Forfeited Property Online
5. Auctions of Abandoned or Confiscated Motor Vehicles
6. Sale of Renewable Energy Certificates

B. Other Contract Practice Updates

1. Contract Compliance and Affirmative Action for Public Contracts
2. Adjusting Public Contracts for Petroleum Price Changes
3. T-2545, Notice of Award, Municipal/Local Government Energy Audit Program
4. Local Unit Membership in National Cooperative Purchasing Systems
5. Affidavits of Publication – Use of Electronic Legal Ads

A. Sale of Property Issues

1. Use of Online Auction Sites

In Local Finance Notice 2008-9, the Division of Local Government Services (Division) authorized the use of four different vendors, for local contracting units and boards of education (together, "local units") to contract with for the purposes of selling surplus personal property (surplus property) online without having to first obtain Division approval, as long as certain procedures are followed. With this Notice, the Division is adding PublicSurplus.com, as an additional vendor with whom local units may contract with for selling surplus property online.

The “approved” list of vendors includes:

1. eBay.com
2. GovDeals.com
3. PropertyRoom.com
4. [Auction Liquidation Services](http://AuctionLiquidationServices.com)
5. PublicSurplus.com

Local units that contract with one of the approved vendors are reminded to forward to the Division copies of resolutions approving the sale of surplus property, except that those contracting with GovDeals.com are not required to forward such resolutions. Currently, GovDeals.com is the only vendor that has a State contract to offer these services, and who regularly reports sales information to the Division. Use of vendors other than those on the approved list for selling surplus property online must first be approved by the Division. Applications for approval and a sample resolution for selling surplus property online may be downloaded from the [Division's website](#).

2. Funds Held by Vendors for Disbursement to Local Units

In most cases, when using a vendor on the approved list for the sale of personal property online, local units have been receiving the monies from the successful bidder and then disbursing an agreed upon commission to the vendor from the proceeds of the sale. Recently, however, the Division has received an inquiry as to whether vendors may collect the monies from the sale of an item, deduct the agreed upon commission they are owed, and then disburse the balance of the proceeds of the sale to the local unit.

Generally, this practice is only permissible as long as the procedure is clearly outlined in the contract with the vendor, and the vendor holds the proper bonds and insurance to cover the possible loss of such funds. Examples of proper coverage could include an auctioneer's bond, fidelity bond, general liability insurance, etc.

Based on the inquiry, the Division has verified that the five approved vendors noted above do have the proper coverage and thus can be used to receive the monies and then disburse them to local units.

3. Use of Craigslist.com and Similar Websites

Recently, the Division received inquiries asking if local units may use the website craigslist.com for purposes of selling surplus property online. Craigslist.com and similar websites are essentially the web-based equivalent of classified ads that would be placed in a newspaper and not as an auction site.

For this reason, local units are advised that they may not utilize craigslist.com or similar sites for the purposes of selling surplus property online, except if an item's value is below 15% of the local unit's bid threshold. In cases in which an item's value is below 15% of the bid threshold, the statutes allow for the private sale of such surplus property, including [craigslist](http://craigslist.com) or other similar online or print media options.

Local units are, however, permitted to use craigslist.com and similar websites to *advertise* the auction sale (online or live) of surplus property regardless of the value of such property. Items that exceed 15% of the bid threshold must also be advertised in the official newspaper of the local unit [[N.J.S.A. 40A:11-36\(3\)](#)].

4. Sale of Abandoned/Confiscated/Forfeited Property Online

Another inquiry recently received by the Division is whether municipalities and counties are permitted to sell, in the same way surplus personal property is sold, property that was abandoned, confiscated, or

forfeited and obtained by the local unit through law enforcement action. The Division contacted the Attorney General's Office regarding this matter. They advise that local units should have standard operating procedures (SOPs) in place to address disposal of such property, including provision for adherence to applicable statutes, such as N.J.S.A. 2C:64-1 and N.J.S.A. 40A:14-157. Once these SOPs have been met, local units may sell such property online through use of the vendors on the approved list.

5. Auctions of Abandoned or Confiscated Motor Vehicles

Municipalities and counties are reminded that the requirements of N.J.S.A. 39:10A-1 must be met in regard to the disposal (auctioning) of abandoned, unclaimed motor vehicles. Once these requirements have been met and a CO-88, certificate of ownership, has been received from the State Motor Vehicle Commission, such vehicles then become the personal property of the local unit.

Auctioning such vehicles is then subject to the provisions of N.J.S.A. 40A:11-36 with regard to the notice of sale, time frame for the advertisement, etc. The notice of sale must also include information as to where such vehicles will be on display for potential bidders. As an example, this could include either the municipal public works facility or at the towing vendor's property.

Please also be advised that, unless a towing vendor possesses an automobile dealership license, any vehicles not sold by the local contracting unit that are turned over to such vendors may only be titled as junk vehicles.

Most importantly however, is a recent court case (Harvey v. Township of Deptford, A-3187-06T1, Appellate Division) emphasizing State law that limits towing vendors to a maximum reimbursement of \$400 in storage fees per vehicle. Enforcement of this limit emphasizes the importance of police agencies to actively pursue the issuance of a junk title and the prompt sale of the vehicles. Police agencies should carefully review their internal practices and consult with their attorneys to ensure that their practices are in compliance with State law.

6. Sale of Renewable Energy Certificates (RECs)

An increasing number of local units have installed renewable energy facilities (solar, wind, etc.) that have resulted in the issuance of "Renewal Energy Certificates" or, in the case of solar installations, "Solar Renewable Energy Certifications," commonly known as RECs and S-RECs. The certificates authorized by the NJ Board of Public Utilities and represent the amount of renewable energy generated by a renewable energy facility. These certificates are generally sold to electric suppliers, or to marketers or aggregator that eventually sell them to the electric suppliers, who use them to document compliance with their renewable energy portfolio standard requirements set by the BPU or other BPU authorized programs.

Both forms of RECs are personal property for local units. Their sale must follow the local unit's procedures for the sale of personal property, that is, public notice and an auction sale if the value exceeds 15 percent of the local unit's bid threshold. The sale process is simplified as the BPU provides an online bulletin board for the sale of RECs and S-RECs. The Division is approving this process under the Division's pilot program that permits online auction sales of personal property. After registration on the BPU system and following the instructions, the governing body must pass a resolution authorizing sales and publish an advertisement in an official newspaper directing the public to the BPU website.

Details about S-RECs and how to sell them are available on the Board of Public Utilities website.

B. Other Contract Practice Updates

1. Contract Compliance and Affirmative Action for Public Contracts

The State Department of Treasury, Division of Contract Compliance and Equal Employment Opportunity in Public Contracts (DCC) published rules in the New Jersey Register on June 16, 2008, including amendments necessary to implement the provisions of the FY 09 Appropriations Act.

The State's FY 09 Appropriations Act created an on-going pool of funding for NJ Build, the construction trades training program for minorities and women in the construction trades, through the Department of Labor. Since the funding of NJ Build will now be exclusively provided by State government agencies, the requirements for the ½ of 1% Training Fund Allocation **only** applies to State agencies. This means that **local units are no longer required to include the ½ of 1% training allocation for their construction projects.**

Although local units are no longer required to make a funding commitment, they are still subject to Equal Employment Opportunity in public contracting requirements and may voluntarily contribute to the construction trades training program. Please see [Local Finance Notice 2008-15](#) for further information, or contact the DCC at 609-292-5473.

2. Adjusting Public Contracts for Petroleum Price Changes

Due to recent fluctuations in the price of petroleum, the matter of vendors adding fuel surcharges was recently raised. Recent behavior in the petroleum markets that have resulted in price decreases also warrants attention to these details, Please refer to [Local Finance Notice 2005-24](#) for guidance in regard to this matter.

The Notice highlights that in regard to the purchase of actual petroleum products, change orders may be authorized pursuant to the following stipulations:

1. There has been a determination by the local attorney that the price adjustment is allowable and does not undermine the integrity of the contract or create an undue financial burden for the local unit. Often, documentation of the financial impact on the supplier is warranted.
2. The original bidding specifications and contract authorize the price adjustment.
3. An objective price benchmark not under the direct control of the supplier is utilized to establish the price changes, and the changes are not for the purpose of correcting asserted bidding errors. Use of a benchmark will also result in the local unit receiving the benefit of price decreases.
4. Adequate funds have been certified as being available.

3. T-2545, Notice of Award, Local Government Energy Audit Program

The 2007 program and budgets approved by the Board of Public Utilities include funding for the [Local Government Energy Audit Program](#). The purpose is to allow local units to engage an energy audit firm to evaluate the energy efficiency of their facilities and receive recommendations on ways to improve such efficiency.

Under [State Contract T-2545](#), the Division of Purchase and Property awarded contracts to the following five vendors to conduct such audits: Camp, Dresser & McKee; Clough Harbour & Associates; Concord Engineering Group; Dome Tech, Inc., and; Steven Winter Associates. Local units may use these vendors through the State contract to conduct energy efficiency audits.

The contract requires the local unit to competitively solicit prices from all the vendors prior to awarding a contract to one of them. There are, however, exceptions. An example of an exception to receiving prices from all five is if a particular vendor has a conflict of interest in submitting a proposal and notifies both the Division of Purchase and Property and the local unit of such conflict of interest.

4. Local Unit Membership in National Cooperative Purchasing Systems

It has come to the attention of the Division that several local units, specifically boards of education, have become members of a national cooperative purchasing network. All local units are reminded State law does **not authorize local units to join national or out-of-state** cooperative purchasing systems as a basis to award contracts in excess of their bid threshold.

Use of out-of-state cooperatives is only permitted through the State Cooperative Purchasing System promulgated by the Division of Purchase and Property, Department of Treasury. The use of any cooperative contract that has not been authorized as a State contract for local unit purchases in excess of a local unit's bid threshold is a violation of State procurement law. Local units may use the national cooperative vendors for purchases below their bid threshold.

5. Affidavits of Publication – Use of Electronic Legal Ads

The New Jersey Press Association maintains a website, www.publicnoticeads.com/nj, which contains copies of legal advertisements published in most of the State's official newspapers. If a local unit's legal ads are posted on the website, in the absence of another affidavit, a legal advertisement may be downloaded, printed out and, when certified by the Municipal Clerk and notarized, serve as an affidavit of publication.

Approved: Susan Jacobucci, Director

Table of Web Links

Page	Shortcut text	Internet Address
2	Division's website	http://www.nj.gov/dca/lgs/lpcl/index.shtml#EProcForms
3	(Harvey v. Township of Deptford, A-3187-06T1,	http://lawlibrary.rutgers.edu/courts/appellate/a3187-06.opn.html
3	Board of Public Utilities website.	www.njcleanenergy.com/renewable-energy/programs/solar-renewable-energy-certificates-srec/new-jersey-solar-renewable-energy
4	Local Finance Notice 2008-15	http://www.nj.gov/dca/lgs/lfns/08lfns/2008-15.doc
4	Local Finance Notice 2005-24	http://www.nj.gov/dca/lgs/lfns/05lfns/2005-24.doc
4	Local Government Energy Audit Program	http://www.njcleanenergy.com/commercial-industrial/programs/local-government-energy-audit/local-government-energy-audit
4	State Contract T-2545	http://www.state.nj.us/treasury/purchase/nea/contracts/t2545.shtml