(C)

Melissa Velez-Morales

From: Masser, Michelle
Sent: Friday, August 19, 2016 2:16 PM
To: Harris, Laura; Stachnick, Christie
Cc: Melissa Velez-Morales
Subject: FW: Bid Prequalification under Local Public Contracts Law

Correspondence

Michelle Masser
Township Clerk
Mount Olive Township
PO Box 450
204 Flanders Drakestown Road
Budd Lake, NJ 07828
clerk@mtolivetwp.org
973-691-0900 X7291

-----Original Message-----
From: egg@dca.state.nj.us [mailto:egg@dca.state.nj.us]
Sent: Thursday, August 18, 2016 2:28 PM
To: Masser, Michelle <clerkmichelle@mtolivetwp.org>
Subject: Bid Prequalification under Local Public Contracts Law

Dear Municipal Clerk:

The Director of the Division of Local Government Services must approve all prequalification regulations for contracting units subject to the Local Public Contracts Law. Absent Director approval, bid prequalification regulations are of no force and effect and may not be required as a condition of bid acceptance on any public contract. Local Finance Notice 2016-12 goes into further detail about the process for adopting prequalification regulations. The Notice can be accessed at http://www.nj.gov/dca/divisions/dlgs/lfns/16/2016-12.pdf. An updated standard application for Director approval, along with updated sample prequalification regulations for projects funded by the New Jersey Historic Trust, can be found on our Local Public Contracts Law webpage at http://www.nj.gov/dca/divisions/dlgs/programs/lpcl.html#19 under the Prequalification heading.

THIS NOTICE HAS BEEN SENT TO THE FOLLOWING OFFICIALS: Municipal Clerk, / County Freeholder Board Clerk / Authority Officials / Fire District Officials / Procurement Officials

new jersey department of community affairs
division of local government services
people.places.progress

LFN 2016-12

August 18, 2016

Local Finance Notice

Chris Christie, *Governor* | Kim Guadagno, *Lt. Governor* | Charles A. Richman, *Commissioner* | Timothy J. Cunningham, *Director*

Contact Information

Director's Office
V. 609.292.6613
F. 609.292.9073

Legislative and Regulatory Affairs
V. 609.292.6110
F. 609.292.9073

Financial Regulation and Assistance
V. 609.292.4806
F. 609.984.7388

Local Finance Board
V. 609.292.0479
F. 609.633.6243

Mail and Delivery
101 South Broad St.
PO Box 803
Trenton, New Jersey
08625-0803

Web:
www.nj.gov/dca/divisions/dlgs
E-mail: dlgs@dca.nj.gov

Distribution

Procurement Officials
Municipal and County Freeholder Bd. Clerks
Authority Officials
Fire District Officials
Auditors (RMAs)
Governing Body Members

Local Public Contracts Law Process for Enacting Bidder Prequalification Regulations

The Division of Local Government Services has been made aware that various local units have incorporated prequalification requirements into their public works and construction bid specifications without having first sought approval from the Director as is required pursuant to the Local Public Contracts Law. **This Notice shall serve to remind local units that Director approval is required before any prequalification requirement can be enforced as part of the bid process.**

Prequalification involves the imposition of certain criteria that either can be used as a means to restrict who may receive specifications or restrict which bids may be considered by the contracting unit. See William A. Carey & Co. v. Borough of Fair Lawn, 37 N.J. Super. 159 (App. Div. 1955); A&A Indus. Piping, Inc. v. County of Passaic, 2013 N.J. Super. Unpub. LEXIS 1748; Ferreira Construction Co. v. Board of Chosen Freeholders, 2007 N.J. Super. Unpub. LEXIS 197. N.J.S.A. 40A:11-25 of the Local Public Contracts Law permits LPCL contracting units to establish reasonable prequalification regulations that are pertinent to and reasonably related to the class or category of goods or services to be provided or performed subject to Director approval. Prequalification requirements can be fixed according to experience, financial ability, capital, and equipment.

Director Approval required for all Prequalification Regulations

The Director of the Division of Local Government Services must approve all prequalification regulations enacted by contracting units subject to the Local Public Contracts Law. **Absent Director approval, bid prequalification regulations are of no force and effect and may not be required as a condition of bid acceptance on any public contract.** Prequalification regulations may be limited to a specific project. The statute sets forth certain restrictions on the kinds of regulations that may be promulgated, and sets forth the process a contracting unit must follow before such regulations are enforceable.

Approvals must be granted on a prospective basis. Depending on the nature of the prequalification requirements at issue, approval will be granted either for a set number of years or only for the duration of a specific project. Under no circumstances will the duration of an approval exceed five years or be granted retroactively.

The Director may disapprove an application for approval of prequalification requirements upon finding that the regulations:

- are written in a manner that will unnecessarily discourage full, free and open competition; or
- unnecessarily restrict the participation of small businesses in the public bidding process; or
- create undue preferences; or
- violate the Local Public Contracts Law or any other law.

Please note that the Director has recently disapproved prequalification criteria that would have restricted eligible bidders on public works and construction projects to those participating in a registered apprenticeship program, and whose craft labor had completed either an "OSHA 10-hour" or "OSHA 30-hour" training course. These standards were found to be unnecessarily restrictive in that they restrict competition and preclude full access by small businesses.

All prequalification regulations should contain clearly stated objective standards. Such standards should be crafted in a fashion that will allow prospective bidders to understand the threshold criteria for bid eligibility. Further, all applicants must be prepared to demonstrate that the proposed prequalification regulations are **narrowly tailored**, with the restrictive criteria not going beyond that which is pertinent to and reasonably related to the class or category of goods or services.

No qualification rating of any bidder shall be influenced by a bidder's race, religion, sex, national origin, nationality, or place of residence or business.

Process for Adopting Bidder Prequalification Criteria

Before prequalification regulations can be submitted for Director approval, the contracting unit must comply with the public notice and hearing requirements set forth in N.J.S.A. 40A:11-25.

- A public hearing must be held on the proposed regulations. The hearing may be held during a regular public meeting of the governing body.

- Adequate public notice of the hearing, including a general description of the subject matter of the regulations to be adopted, must be published in no fewer than two newspapers circulating in the county or municipality in which the contracting unit is located.

  Even if the hearing on the proposed prequalification regulations is held during a regular public meeting of the governing body, said hearing must be noticed individually. The Division also recommends that the hearing notice be prominently posted on the contracting unit's website.

- Public notice of the hearing must be published at least twenty days in advance of the date set in the notice for the hearing.

- During the course of the hearing, the clerk or secretary of the governing body must keep a record of the proceedings at the hearing and of the testimony of any citizen or prospective bidder. A true and sealed copy of the public hearing transcript must be certified by the governing body's clerk or secretary and submitted along with the application.

The contracting unit's application for approval of the adopted prequalification regulations must be submitted in hard copy to the Division within 10 days after hearing completion. Detailed below are the documents that must be submitted to the Director as part of the application for approval:

- Adopted prequalification regulations
- Copies of the two (2) newspaper legal advertisements, and any other advertisements, for the public hearing
- Certified and sealed copy of the governing body's resolution (by the governing body's clerk or secretary) adopting the regulations
- A true, certified and sealed copy of the transcript of the public hearing held pursuant to N.J.S.A. 40A:11-25. The transcript shall be certified by the governing body's clerk or secretary.
- A completed, certified and sealed (by the governing body's clerk or secretary) Standard Certification Form. Please note that the Certification Form has been updated to require additional information and shall be utilized in lieu of the prior form.

All prequalification regulations shall be submitted to:

Director, Division of Local Government Services
Bid Prequalification Regulations
101 South Broad Street
P.O. Box 803
Trenton, New Jersey 08648

If the Director fails to approve or disapprove the regulations within 30 days of receiving a hard copy of the application, the prequalification regulations shall automatically take effect. Any appeal of the Director's decision shall be heard by the Local Finance Board. Prospective bidders wishing to challenge refusal of bids or being denied plans or specifications must seek relief in the Superior Court.

Historic Preservation Projects

All prequalification regulations for projects funded by the New Jersey Historic Trust (Trust) shall be submitted to the Trust concurrently with the Division. The Division will consult with the Trust before making a determination on the proposed regulations.

Contracting units soliciting bids for work on historic preservation projects that receive funding through the Trust are required to incorporate the following prequalification regulation into its bidding process (subject to Director approval).

- Each potential bidder acting as general contractor and their proposed project superintendent/manager will be required to demonstrate verifiable, successful experience for at least two (2) projects involving separate historic buildings or sites of similar scope as the subject work, completed in compliance with the Secretary of the Interior's Standards for the Treatment of Historic Properties (revised 1995) within the past five years preceding the date of the execution of the prequalification statement. At least one of the projects should have been reviewed by the State Historic Preservation Office, or the New Jersey Historic Trust, or the historic review body of a county or municipal authority.

The Trust must also approve the qualifications of any subcontractors who will be used on the project. A successful prequalified bidder must submit with the bid the name or names of all subcontractors to whom the bidder will subcontract, and evidence of performance security for all subcontractors. The Trust may also require potential bidders to demonstrate verifiable, successful experience in the specific application of certain conservation treatments applied to historic building materials.

A sample prequalification regulation package for projects funded by the New Jersey Historic Trust can be accessed on our website; the sample package may also be suitable for other historic preservation projects not funded by the Trust.

Other Recommended Elements for Prequalification Regulations

The Division strongly recommends that the following elements be incorporated into a contracting unit's prequalification regulation package as applicable:

(a) Project Fact Sheet and Statement of General Notice (if regulations are for single project)

The Statement of General Notice serves to notify all prospective bidders of information such as the name of the project, project features, source of project funds and contact person. A "Project Fact Sheet" summarizes basic project information.

For projects funded by the New Jersey Historic Trust, the following paragraph should be included in any Statement of General Notice

> The project building or site is listed or is certified eligible for listing on the State and/or National Registers for Historic Places or the building or site is listed as contributing to the significance of an historic district listed on the State and/or National Registers for Historic Places. The work done on the project is subject to the review and approval for compliance with the Secretary of Interior's Standards for the Treatment of Historic Properties (revised 1995) by the Trust and the State Historic Preservation Officer.

(b) Statement of Bidder Qualifications

This statement details the criteria used for evaluating prequalification questionnaire responses. Prospective bidders should be advised of any supporting documentation required to be submitted.

(c) Standardized Bidder Prequalification Questionnaire

In many instances, bidders will need to provide the contracting unit with specific responses concerning whether and how they meet the prequalification criteria. All questions should be clear, concise and directly correlated to the criteria set forth in the contracting unit's prequalification regulations. Responses to all questions should be evaluated based only upon the adopted prequalification regulations. Prospective bidders should not be disqualified based on factors outside of the established criteria.

Technical Guidance Provided by Division

Contracting units are strongly encouraged to seek informal review and input from the Division before scheduling the public hearing. Although not required, this non-statutory step can identify potential issues with proposed regulations ahead of time. Requests for assistance may be submitted via email to lpcl@dca.nj.gov. Please note that any preliminary input shall constitute technical guidance only, and shall not serve to bind the Director's final decision.

Approved: Timothy J. Cunningham, Director

Document	Internet Address
Standard Certification for Application to Director	http://www.nj.gov/dca/divisions/dlgs/programs/lpcl_docs/Standard%20Certification%20for%20Prequal%20Applications.doc
NJ Historic Trust Website	http://www.njht.org/dca/njht/
Sec. of Interior Standards for Historic Properties	https://www.nps.gov/history/local-law/arch_stnds_8_2.htm
Sample Prequalification Regulations – NJ Historic Trust	http://www.nj.gov/dca/divisions/dlgs/programs/lpcl_docs/Sample%20Prequal%20Regulations%20-%20NJ%20Historic%20Trust.doc

Appendix A

40A:11-25 General power to provide qualification for bidders.

The governing body of any contracting unit may establish reasonable regulations appropriate for controlling the qualifications of prospective bidders upon contracts to be awarded on behalf of the contracting unit, by the class or category of goods or services to be provided or performed, which may fix the qualifications required according to the financial ability and experience of the bidders and the capital and equipment available to them pertinent to and reasonably related to the class or category of goods or services to be provided or performed in the performance of any such contract, and may require each bidder to furnish a statement thereof; and if such governing body is not satisfied with the qualifications of any bidder as founded upon such statement, it may refuse to furnish the bidder with any plans or specifications for any public contract or consider any bid made by the bidder for any contract.

Prior to the adoption of any such regulations, a contracting unit shall submit them to a public hearing. Notice of the hearing and a general description of the subject matter of the regulations to be adopted shall be published in not less than two newspapers circulating in the county or municipality in which the contracting unit is located. Publication shall precede by at least 20 days the date set in the notice for the hearing. The clerk or secretary of the governing body of the contracting unit shall keep a record of the proceedings and of the testimony of any citizen or prospective bidder. Within 10 days after the completion of the hearings, the proposed regulations and a true copy of the hearings shall be forwarded to the Director of the Division of Local Government Services for the director's approval. This approval shall be indicated by a letter from the director to the governing body of the contracting unit. If the director fails to approve or disapprove the regulations within 30 days of their receipt by the director, they shall take effect without the director's approval. The director may disapprove such proposed regulations only if the director finds that:

(a) They are written in a manner which will unnecessarily discourage full, free and open competition; or
(b) They unnecessarily restrict the participation of small businesses in the public bidding process; or
(c) They create undue preferences; or
(d) They violate any other provision of this act, or any other law.

If the director disapproves such proposed regulations within the 30-day period prescribed, they shall be of no force and effect and may not be required as a condition to the acceptance of a bid on any public contract by the contracting unit. Any appeal from a decision of the director to the Local Finance Board shall be subject to the provisions of the "Local Government Supervision Act (1947)", P.L.1947, c.151 (C.52:27BB-1 et seq.).

No qualification rating of any bidder shall be influenced by the bidder's race, religion, sex, national origin, nationality or place of residence or business.

Nothing contained in this act shall limit the right of any court to review a refusal to furnish any such plans or specifications or to consider any bid on any contract advertised.

Any such governing body may adopt a standard form of statement or questionnaire for bidders on public works contracts, and in such case their action shall be governed as provided herein.

L.1971, c.198, s.25; amended 1999, c.440, s.32

Appendix B

Prequalification Process Flowchart

Grantee consults on informal basis with Division of Local Government Services (and NJ Historic Trust if necessary) when developing the prequalification regulations and questionnaire

Grantee schedules public hearing to announce/adopt project and approve prequalification regulations. Publishes notice of hearing at least 20 days prior to the hearing date in no less than two newspapers circulating in the county or municipality in which the public entity is located.

Public hearing is held on proposed regulations.

After hearing, submit adopted regulations to DLGS for approval (copy to NJ Historic Trust if applicable).

Receive a letter of approval from Director or, if necessary, a request for additional information or clarification of submission. If applicable, submit copy of approval letter to the New Jersey Historic Trust.

Appendix C

Additional Steps for Projects Funded by New Jersey Historic Trust

Distribute prequalification questionnaire to prospective bidders and/or advertise for prequalification in newspaper or trade journal.

Completed questionnaires are reviewed by the grantee, the architect, and the Trust, and prequalified prospective bidders are selected (allow two weeks).

The prequalified prospective bidders receive bid documents.

Two to four weeks later, bids are received.

The lowest responsible bidder is determined and a contract is awarded.