

5. The estimated “excess” kilowatt hours, that is, estimated kilowatt hours produced by a community solar facility that were not allocated to a community solar subscriber; and

6. The cumulative totals since the beginning of the Pilot Program. This shall include the total number of community solar interconnection applications received, total number of community solar facilities interconnected, total capacity of community solar facilities interconnected, estimated total kilowatt hours supplied to the distribution system by community solar facilities, estimated total community solar bill credits distributed to community solar subscribers, and estimated total number of community solar subscribers.

(b) The Board must be notified, in writing, of any change to the project developer, owner, or operator in case of sale, transfer, contract modification, or other material change to the parties initially listed in the community solar application. Specifically:

1. Within 30 days of a material change in control of the owner, such new “beneficial owners” are required to notify the Board of their individual and/or corporate names, tax ID, address, contact phone, and percent of ownership of the project.

2. Within 30 days of a material change in the community solar project operator, such new project operator is required to notify the Board of their individual and/or corporate names, tax ID, address, and contact phone.

3. The Board shall be kept apprised of all major project developments and milestones via written notification (e-mail or letter).

(c) Each EDC shall retain a record of the community solar project generation that was applied to each subscriber’s bills for a period of six years.

(d) Each community solar subscriber organization, and any successor, shall retain a record of all subscriber contracts, disclosure forms, LMI proof of eligibility, and generation allocation lists for a period of at least six years from the date of their expiration. Each of these documents must be made available without delay upon request from the Board or Board staff.

## TREASURY—GENERAL

### (a)

#### DIVISION OF PURCHASE AND PROPERTY

##### Division of Purchase and Property: Purchase Bureau and Contract Compliance and Administration Unit; Surplus Property Unit, Computer Distribution Program

##### Proposed Readoption with Amendments: N.J.A.C. 17:12

##### Proposed New Rules: N.J.A.C. 17:12-1A.4, 1A.6, 1B, and 2.9

Authorized By: Elizabeth Maher Muoio, Acting State Treasurer.

Authority: N.J.S.A. 10:5-36(k) and (o); 52:18A-30(d); 52:25-1 et seq., 52:25-16.1, 52:32-17 et seq., 52:34-6 et seq., 52:34-6.2(d), 52:34-10.4, 52:34-10.10, 52:34-12(a), and 52:34-13; and Executive Orders No. 34 (1976) and No. 189 (1988).

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2018-089.

Submit written comments by November 30, 2018, by e-mail in Microsoft Word format, or in a format that can be easily converted to Word, to [DPPRule.Comments@treas.nj.gov](mailto:DPPRule.Comments@treas.nj.gov) or on paper to:

Maurice A. Griffin, Acting Director  
Division of Purchase and Property  
33 West State Street, 8th Floor  
PO Box 039  
Trenton, NJ 08625-0039

The agency proposal follows:

#### Summary

The Division of Purchase and Property (Division), the centralized procurement agency for the State of New Jersey, proposes the re-adoption with amendments and new rules of N.J.A.C. 17:12 to clarify and update the processes related to the award and administration of State contracts. N.J.A.C. 17:12 was scheduled to expire March 9, 2019, pursuant to N.J.S.A. 52:14B-5.1. As the Division filed this notice of proposal prior to the expiration date, that date is extended 180 days to September 5, 2019, pursuant to N.J.A.C. 52:14B-5.1.c(2). The Division of Purchase and Property has determined these rules to be necessary, reasonable, efficient, understandable, and responsive for the purpose for which they were originally promulgated.

The rules proposed for re-adoption with amendments and new rules govern general procurement methodology refines the terminology used to distinguish between two complementary programs, namely, the assistance provided to local governmental entities within the State of New Jersey and out-of-State multi-jurisdiction procurements to which the Division of Purchase and Property is a party. New terminology clarifies the distinctions between the programs, but makes no substantive edits to the scope of either program. An amendment and new rule is proposed clarifying the Director of the Division of Purchase and Property’s authority to solicit and award contracts in which other jurisdictions participate and clarifying the distinction between joining and leading a multi-jurisdiction procurement. Similarly, amendments are proposed to the rule regarding the Director’s authority to extend State contracts to clarify that the Director may open State contracts for local intra-State use and out-of-State governmental entity use.

New Subchapter 1B is proposed, comprised of two rules regarding standard terms and conditions, updates thereto, and prohibited terms. N.J.A.C. 17:12-1B.1 states where the Division’s standard terms and conditions are maintained; reserves the right to update the standard terms and conditions; and reserves the discretion to revise or approve changes to the standard terms and conditions where appropriate and not contrary to law. N.J.A.C. 17:12-1B.2 states that neither the Director, nor anyone negotiating a contract on behalf of the Director, shall approve or agree to enter into any contract that requires the State to indemnify or hold harmless a contractor, or other person or business entity, except where applicable law authorizes the State to agree to indemnify or hold another party harmless. The provision establishes that even where a contract includes such a term, the term is void, but the contract is still otherwise enforceable as if it did not include the term. The proposed new rule reflects the State’s standard position on this issue, but formal promulgation of the position will promote fair competition.

New N.J.A.C. 17:12-2.9, Lowest price, responsive procurements, is based on the approach used by New Jersey local government entities and the Federal government. This proposed new rule codifies an award methodology standard that focuses only on price, in contrast to the Division of Purchase and Property’s standard approach of evaluating “price and other factors.” Notwithstanding the broad grant of discretion, the Division of Purchase and Property has determined that some procurements do not require a detailed evaluation of technical proposals. Namely, commodities and commodity-like trades and general services often require only proof that the good or service proposed is what is being sought. Accordingly, the proposed new rule provides a streamlined procedure for lowest price, responsive procurements whereby proposals that are deemed responsive to the RFP’s mandatory requirements are awarded based on price alone. There would be no bypass of “higher ranked” proposals, although bypass based on a bidder’s poor performance would still be permitted. The proposed new rule would permit clarifications and negotiations, consistent with the Division’s usual practice and procedure.

A summary of the rules as proposed for re-adoption with amendments and new rules follows:

#### Subchapter 1. Description of Organization; Means of Procurement

N.J.A.C. 17:12-1.1 provides the general course and methods of procurement by the Division. Proposed amendments to subsections (a) and (b) serve to clarify the Division’s organizational structure and ensure continuity of terminology used throughout the chapter. The deletion of “a program support unit,” is proposed in subsection (a) as it is no longer

an independent unit within the Division of Purchase and Property. The proposed amendments in subparagraph (c)2ii clarify that political subdivisions of other states and political subdivisions of New Jersey may be potential parties joining in a cooperative agreement with the Division. A cross-reference to proposed new N.J.A.C. 17:12-1A.4 is added, which more clearly addresses the procedure for leading, sponsoring, conducting, soliciting, and awarding cooperative agreements. The rule's reference to the procedure for joining cooperative agreements remains. This provision relies on the Division's authority from N.J.S.A. 52:34-6.2 and 52:25-16.1 and 16.9.

N.J.A.C. 17:12-1.2 provides guidance pertaining to public information, with subsection (a) proposed for amendment to contain updated, corrected Division contact information. Proposed amendments also provide additional or refined definitions of terms used throughout.

N.J.A.C. 17:12-1.3 sets forth definitions for use in this chapter. The definition of the term "contract" is proposed for amendment to revise the reference of "notice of acceptance or award" to "notice of intent to award" consistent with defined terminology. All terms regarding the Division of Purchase and Property's dual cooperative programs, including the program for local in-State governments and the program for multi-jurisdiction out-of-State cooperatives have been updated and revised to clarify the distinction between these programs. Terms impacted include "cooperative procurement agreement," "cooperative purchasing program," "procurement agreement," "purchasing agreement," and "using agency." The proposed amendments modify the existing term "cooperative procurement agreement" to "cooperative agreement" without substantive change, but with clarification that subdivisions of states and political subdivisions of New Jersey may be potential parties joining in a cooperative agreement with the Division. The proposed amendments delete the term "cooperative purchasing program" and replace it with the new term "intrastate cooperative purchasing program." The change is intended to clarify the distinct use of the term "cooperative," which was used to refer to the Division of Purchase and Property's in-State local purchasing partners and out-of-State jurisdictions. The proposed new definition for "intrastate cooperative purchasing program" clarifies that the Division of Purchase and Property provides procurement-related assistance to "intrastate cooperative purchasing participants," a proposed new term capturing political subdivisions, volunteer fire departments and first aid squads, independent institutions of higher education, school districts, State and county colleges, quasi-State agencies and independent authorities, and other New Jersey public entities having statutory authority to utilize select State contracts issued by the Division. In contrast, the proposed new term "interstate cooperative purchasing participants" captures another state or states, or political subdivisions thereof, who pursuant to their own laws, are permitted to utilize State contracts issued by the Director. The proposed new term "cooperative purchasing participants" is an umbrella term, capturing both new proposed terms "interstate cooperative purchasing participants" and "intrastate cooperative purchasing participants." The proposed amendments include the deletion of the terms "procurement agreement" and "purchasing agreement" because the distinction made in those terms between agreements joined before or after competitive bidding had no impact on the procedure used to join or initiate such agreements. Accordingly, only the single term "cooperative agreement" is proposed, as discussed above. A new definition is proposed for the term "notice of intent to award," which is a common phrase used throughout this chapter. The definition of the term "protest" is proposed for amendment to capture the newly defined term "notice of intent to award" and the clarification of the independent basis for filing protests as further discussed in N.J.A.C. 17:12-3.1 below. The proposed amendments to the definition of the term "using agency" captures the newly defined term "intrastate cooperative purchasing participant."

N.J.A.C. 17:12-1.4 is amended to update Treasury Circular references.

N.J.A.C. 17:12-1.5, Procurement efficiency program, is readopted without amendment.

### Subchapter 1A. Procurement Methodology

N.J.A.C. 17:12-1A describes various procurement methodologies utilized by the Division.

N.J.A.C. 17:12-1A.1, including the heading thereof, is proposed for amendment to propose non-substantive changes to terminology for clarity and consistency with defined terms discussed above. Subsections (b), (c), and (d) are proposed for amendment to rewrite and simplify each provision, without substantive change.

N.J.A.C. 17:12-1A.2, including the heading thereof, is proposed for amendment to propose non-substantive changes to terminology for clarity and consistency with defined terms discussed above. Reference to the name of the current Central Non-profit Agency (CNA) is proposed for deletion, as the identity and selection of the CNA is at the discretion of the Commissioner of the Department of Human Services pursuant to N.J.S.A. 30:6-28. The proposed amendment will remove the need to amend the rule in the future, in the event the name or identity of the CNA changes. Treasury Circular references are also updated in paragraphs (b)3 and 5 and subsection (c).

The proposed amendment to the heading of N.J.A.C. 17:12-1A.3 clarifies that this section addresses the joining of cooperative agreements, as distinguished from leading cooperative agreements that is discussed in proposed new N.J.A.C. 17:12-1A.4. The proposed amendments to N.J.A.C. 17:12-1A.3 capture terminology updates consistent with new and revised defined terms as discussed above. The text of existing subsection (d) concerning the authority of the Director of the Division of Purchase and Property to solicit and award cooperative agreements is transitioned to and restated in proposed new N.J.A.C. 17:12-1A.4 as part of a new, more detailed statement of the distinct process used when the Director determines that leading, sponsoring, conducting, soliciting, awarding, and administering a cooperative agreement is in the State's best interest.

Proposed new N.J.A.C. 17:12-1A.4 pertains to the Director of the Division of Purchase and Property's authority to lead cooperative procurements. Subsection (a) includes language of existing N.J.A.C. 17:12-1A.3(d) and includes more clarity regarding the types of permissible cooperative actions by adding that the Director may lead, sponsor, conduct, and administer cooperative agreements. Consistent with N.J.S.A. 52:34-6.2(c), N.J.A.C. 17:12-1A.3(d) provided that the Director may "solicit and award" such contracts; the proposed addition of "lead, sponsor, conduct, and administer" are non-substantive, explanatory, clarifying additions to the Director's existing authority and discretion. Proposed new N.J.A.C. 17:12-1A.4(b) explains that where the Division is procuring a cooperative agreement, it must utilize advertised procurement procedures as directed by N.J.S.A. 52:34-6.2(a). Proposed new subsection (c) explains that the procurement documents issued by the Division shall address the combined requirements of the cooperative purchasing participants and includes language from existing N.J.A.C. 17:12-1A.3(d) that requires each jurisdiction to be solely responsible for the payment of the purchase price and cost of purchases it makes under the terms of any resultant contract. Proposed new subsection (d) is added to clarify that the Director may utilize a "master agreement/participating addendum" structure in the context of cooperative agreements. Existing N.J.A.C. 17:12-1A.3(c)3, regarding joining a cooperative agreement, requires the Director to execute an addendum with the contractor or scheduled contract awardee that contains the State's standard terms and conditions and any other terms making the cooperative agreement more favorable to the State. Proposed new N.J.A.C. 17:12-1A.4(d) would expressly enable the Director to utilize the industry's practice of awarding "master agreements" following cooperative procurements, whereby all entities intending to use the awarded master agreement, including the state that awarded the master agreement, execute a participating addendum with the master agreement holder.

N.J.A.C. 17:12-1A.5, pertaining to the use of Federal supply schedule contracts, is proposed for amendment to update Treasury Circular references in subsections (c) and (d).

### Subchapter 1B. Terms and conditions

New Subchapter 1B, Terms and Conditions, is proposed under the authority of N.J.S.A. 52:34-13. Proposed new N.J.A.C. 17:12-1B.1

establishes the central location for the Division's standard terms and conditions on the Division's website. Subsection (b) explains that the standard terms and conditions may be updated from time-to-time and posted on the Division's website. Collectively, subsections (a) and (b) are intended to provide transparency to the public and potential bidders regarding the location of, and revisions to, Division's standard terms and conditions. Subsection (c) provides that the standard terms and conditions may be modified at the Director's discretion, so long as the change is not contrary to applicable law. As proposed, the rule reflects the Division's current practices of managing and modifying its standard terms and conditions.

Proposed new N.J.A.C. 17:12-1B.2 would void any term that requires the State to indemnify or hold harmless a contractor, or other person or business entity, unless otherwise authorized by law. The prohibition on indemnification reflects the inability of the Division to contractually agree to indemnify absent a specific statutory grant of authority to do so. Conversely, some New Jersey agencies, authorities, and institutions are created by the Legislature with the express authority to agree to indemnification. Where the Division is contracting on behalf of one of those entities with the express authority to agree to indemnification, or exercising the contracting authority of an entity with that authorization, the proposed new rule would not prohibit the Director from agreeing to that term, for that contract. The proposed new rule would allow a contract with this void term to be otherwise enforceable, as if the void provision was not included. The proposed new rule reflects the State's standard position on this issue, but formal promulgation of the rule will promote fair competition. The rule's prohibition would apply to all contracts issued by the Division including, but not limited to, contracts issued after advertised procurements and non-advertised contracts like cooperative agreements, contracts issued after a waiver of advertising, and contracts issued pursuant to the Division's delegated purchasing authority program.

#### **Subchapter 2. Formal, Advertised, Competitive Procurement Procedures**

The proposed amendment to the heading of Subchapter 2 aligns the terminology used in the heading with the defined terminology used throughout the chapter, without substantive change.

N.J.A.C. 17:12-2.1, pertaining to advertising, is proposed for amendment to reflect the Division's ongoing e-procurement and notification services. Specific references are deleted in favor of more general references, so that technological updates, improvements, and name changes do not require subsequent rule amendments.

N.J.A.C. 17:12-2.2, Requirements for bidding and contract award, is proposed for readoption without amendment.

N.J.A.C. 17:12-2.3, pertaining to extensions of contracts for local use, is proposed for amendment to capture definition and terminology adjustments discussed above, including an amendment to the heading reflecting that a contract may be extended for cooperative purchasing participant use, rather than "local use." The existing rule is limited to extending contracts for interstate cooperative purchasing participants as permitted by N.J.S.A. 52:25-16.1. The proposed amendments would permit extension of State contracts to cooperative purchasing participants, the new defined term that captures intrastate cooperative purchasing participants and interstate cooperative purchasing participants. N.J.S.A. 52:34-6.2(b)1, permits the Director to join an already-awarded cooperative agreement when it is the most cost-effective means of procurement. The proposed amendments to N.J.A.C. 17:12-2.3 permit the inverse, allowing other jurisdictions to join the State's contracts after they have been awarded. This proposed amendment is based on the authority granted in N.J.S.A. 52:25-16.1 and 52:34-6.2(d). Other than the terminology change resulting in the above change, the remainder of the proposed amendments in N.J.A.C. 17:12-2.3 are to align the terminology to that defined and discussed above.

N.J.A.C. 17:12-2.4, Bid security, is proposed for readoption without amendment.

N.J.A.C. 17:12-2.5, Performance security, is proposed for readoption without amendment.

Proposed amendments to N.J.A.C. 17:12-2.6, Receipt and public availability of proposals, clarify when documents are publicly available

and the extent to which the Division will apply redactions to files relating to the procurement. The second clause of subsection (e) has been incorporated into a reworded subsection (f), to clarify that files relating to the procurement, including those documents related to negotiations, will be available for review by non-winning bidders and taxpayers considering filing a protest only after the notice of intent to award has been issued. The limitation to non-winning bidders and taxpayers is consistent with New Jersey case law regarding standing to challenge the award of a contract to a successful bidder. See *Jen Elec., Inc. v. County of Essex*, 197 N.J. 627, 644 (2009). The proposed amendments to subsection (f) clarify that files relating to a procurement are not considered public documents under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 et seq., until after the award of the contract(s), although these documents will still be redacted pursuant to applicable law before they are provided to potential protestors. Otherwise, the Division believes bidders would be deterred from providing full, detailed disclosures in proposals out of fear that any proprietary information would be disclosed simply because a bidder requested the document after a notice of intent to award but before the final award of the contract has been made. The Division believes such an interpretation is inappropriate and unintended. Accordingly, the proposed amendments expressly state that all documents provided by the Division after the notice of intent to award has been issued will have material exempt from disclosure under applicable law redacted prior to release. Proposed amendments to subsection (g) are non-substantive revisions intended to more clearly articulate that files related to the procurement are considered public documents following the award of the contract, but that the documents will still be provided with material exempt from disclosure redacted pursuant to OPRA and applicable law. These amendments provide greater transparency to the proposal solicitation process and also provide pertinent information to interested parties pertaining to the submission of protected information or data.

A proposed amendment to the heading of N.J.A.C. 17:12-2.7, Evaluation of proposals for formal, advertised, competitive procurements, uses previously defined terms, without substantive change. An amendment is proposed to subsection (a) to add a cross-reference to N.J.A.C. 17:12-2.9, a proposed new rule permitting lowest price, responsive proposal award methodology. Amendments are proposed to subsection (e) to align terminology to case law and to improve readability.

N.J.A.C. 17:12-2.8, Poor performance as a basis for bypass of low bidder, is proposed for amendment to allow the Division to consider performance records from another state or Federal jurisdiction when assessing a bidder's performance record and to use previously defined terminology for cooperative purchasing participants. The ability of the Division to consider evidence of poor performance from other jurisdictions and/or the Federal government provides the Division with more information with which it can make the best value, most advantageous contract award determination for the State. Accordingly, paragraph (a)2 and subsection (b) are proposed for amendment to add "another state or Federal jurisdiction" and "or jurisdictions," respectively.

New N.J.A.C. 17:12-2.9, Lowest price, responsive procurements, is proposed. Based on the approach used by local New Jersey entities and the Federal government, this proposed new rule introduces an award methodology standard that focuses only on price, in contrast to the Division of Purchase and Property's standard approach of evaluating technical proposals on the basis of "price and other factors." Notwithstanding that broad grant of discretion, the Division of Purchase and Property has determined that some procurements do not require a full evaluation of "other factors." Under certain circumstances, the Director has determined that it is in the State's best interest not to exercise the full discretion permitted under law, and only award a contract(s) to the lowest price, responsive, and responsible proposal(s). Commodities and commodity-like trades and general services may only require the bidder's proposal provide evidence that the good or service being proposed is responsive to the RFP. Accordingly, the proposed rule provides a streamlined evaluation and award procedure for lowest price, responsive procurements, whereby proposals that are deemed responsive to the RFP's mandatory requirements are awarded based on price alone.

As there is no evaluation of technical proposals, there would be no bypass of “higher ranked” proposals, although bypass based on a bidder’s poor performance would still be permitted. The proposed rule would permit clarifications and negotiations, consistent with the Division’s usual practice and procedure.

Proposed subsection (a) establishes the conditions precedent to the Director utilizing this methodology, namely, that it is determined that this approach would result in the best value to the State. Proposed subsection (b) sets forth the boundaries of the lowest price methodology. Paragraph (b)1 requires that the RFP establish what a responsive proposal is and notify bidders that the methodology will be used. As only cost/price factors will be used, paragraph (b)2 requires the Division to date-stamp any formulas, utility models, or market basket methodology that will be used to determine what the “lowest price” is. Ensuring the formulas, utility models, or market baskets are date-stamped ensures the evaluation process is fair to all bidders. This requirement is consistent with substantive “other factors” evaluations conducted by the Division and codified in N.J.A.C. 17:12-2.7(b). Paragraphs (b)3, 4, and 5 are references to other sections of N.J.A.C. 17:12, making clear that, notwithstanding the award methodology, bypass for poor performance, clarifications, and negotiation are still permitted within the bounds of the referenced provisions. Paragraph (b)5 also establishes that where negotiation is anticipated, the pre-established formulas, utility models, or market basket methodologies would not be available until after the notice of intent to award is issued. Otherwise, bidders within the competitive range would have an unfair advantage in subsequent negotiations and the playing field would be unlevelled.

Proposed new subsections (c), (d), (e), and (f) are concepts incorporated from the Division’s standard evaluation methodology rule, N.J.A.C. 17:12-2.7(f), (g), (h), and (i) respectively, with modifications to reflect the more narrow evaluation process and to clarify that the Director does not, in this circumstance, retain the discretion to issue a notice of intent to the responsible bidder whose conforming proposal is most advantageous to the State, price and other factors considered (subsection (d)). Proposed new subsection (f) contains language verbatim from N.J.A.C. 17:12-2.7(i).

N.J.A.C. 17:12-2.10, Tie proposals, is proposed for readoption without amendment.

Subsection (a) of N.J.A.C. 17:12-2.11, Proposal errors, is proposed for amendment to distinguish between procedures required to withdraw proposals before proposal opening that are submitted electronically and proposals that are submitted in hard copy. Proposals submitted electronically via the Division’s current e-procurement system do not require the Division’s consent to be withdrawn prior to proposal opening. The e-procurement system allows bidders to submit, withdraw, amend, and resubmit proposals as each bidder sees fit up until proposal opening. However, hard copy proposals submitted before proposal opening will still require a written request to withdraw. A amendment is proposed in subsection (c) to remove the existing requirement that a response regarding an obvious pricing error discovered by the Division be confirmed by the bidder within five business days. The Division provides as much notice to bidders as is possible under the circumstances of the procurement. The Division believes the amendment will be more business friendly, as it will not have to reject otherwise valid proposals as a result of a procedural defect. The remainder of the section is unchanged.

N.J.A.C. 17:12-2.12, Registration of corporations and other business entities, is proposed for amendment to correct citations to the correct subsections of N.J.S.A. 52:32-44.

N.J.A.C. 17:12-2.13, Preference laws; out-of-State vendors, is proposed for amendment at subsection (e) to correct the reference to the term “bid” with “proposal.” Otherwise, the section remains unchanged.

N.J.A.C. 17:12-2.14, Mutual cancellation of contract, is proposed for readoption without change.

### Subchapter 3. Protest Procedures

The heading of N.J.A.C. 17:12-3.1, Informal hearings; subject matter, is proposed for amendment to the more simple “Protests,” which is a term defined in the chapter. The purpose of this section is to establish the procedures applicable to written challenges to action of the Director

related to advertised procurements. The language in subsection (a) is proposed for amendment to include defined terms to simplify the rule. Proposed new paragraph (a)2 captures written challenges to a proposal rejection made under N.J.A.C. 17:12-2.2, consistent with the Division’s current practice of accepting protests regarding these rejections and the defined term “protest.” Recodified paragraph (a)3 is proposed for amendment to reflect defined terminology. New paragraph (a)4 is proposed to capture written challenges to the Director’s cancellation of an RFP after the opening of proposals, consistent with the Division’s current practice of accepting these written challenges as protests.

N.J.A.C. 17:12-3.2, Protest procedures; challenges to a specification, is proposed for amendment to recodify paragraphs (d)1 and 2 as subsections (e) and (f).

The heading of N.J.A.C. 17:12-3.3, Protest procedures; challenge to a contract award decision, is proposed for amendment to “Protest procedures; challenges to proposal rejection, notice of intent to award, or RFP cancellation.” This change is intended to accurately capture the scope of this section, which addresses written protests to rejections and written protests following the Director’s issuance of a notice of intent to award or cancellation of an RFP. Paragraph (a)2 is proposed for amendment to reflect newly defined terminology, without substantive change. Proposed new paragraph (a)3 states that written protests to the cancellation of an RFP after proposals have been opened are subject to the procedural requirements defined in this section. Subsection (b) and paragraphs (b)1 and 3 are proposed for amendment to clarify that the provisions apply to written protests of proposal rejections and written protests of a notice of intent to award. Proposed new paragraph (b)4 establishes that the Director has the authority to request other bidders to file a response to a protest received by the Division. Such requests are at the Director’s discretion and any unsolicited response or reply may be disregarded. Often, an intended contract awardee is invited to respond to a protest, as the intended awardee may provide insight into why the award decision should be upheld, contrary to the protestor’s assertions. Paragraphs (d)1 and 2 are recodified as subsections (e) and (f).

N.J.A.C. 17:12-3.4, Discovery procedures, is readopted without amendment.

### Subchapter 4. Complaint and Audit Procedures

N.J.A.C. 17:12-4 outlines complaint and audit procedures for the Division’s Contract Compliance and Audit Unit.

N.J.A.C. 17:12-4.1, Purpose and scope of subchapter, is readopted without amendment. N.J.A.C. 17:12-4.2, General, is readopted without amendment.

N.J.A.C. 17:12-4.3, Filing of complaints; subject matter, is proposed for amendment at subsection (a) to update the name of the Form PB-36 to the current CC-36.

N.J.A.C. 17:12-4.4, Time frames, is readopted without amendment.

N.J.A.C. 17:12-4.5, Resolution of complaints, is readopted without amendment. N.J.A.C. 17:12-4.6, Rejection of goods and/or services, is readopted without amendment.

N.J.A.C. 17:12-4.7, Emergency situations, is readopted without amendment.

N.J.A.C. 17:12-4.8, Effect of contractor non-compliance with contract provisions, is readopted without amendment.

N.J.A.C. 17:12-4.9, Audit and complaint discovery procedures, is readopted without amendment.

### Subchapter 5. Political Contribution Compliance Review Process

Subchapter 5, Political Contribution Compliance Review Process, is readopted without amendment.

### Subchapter 6. Debarment, Suspension and Disqualification of a Person(s)

Subchapter 6, Debarment, Suspension and Disqualification of a Person(s), is readopted without amendment.

Subchapters 7 and 8 remain reserved.

### Subchapter 9. Distribution and Support Services Unit, Surplus Computer Distribution Program

Subchapter 9, Distribution and Support Services Unit, Surplus Computer Distribution Program, is readopted without amendment.

As the Division has provided for a 60-day comment period on this notice of proposal, this notice is excepted from the rulemaking calendar requirement pursuant to N.J.A.C. 1:30-3.3(a)5.

**Social Impact**

The rules proposed for readoption with amendments and new rules will have a beneficial social impact as they aim to streamline the State procurement process and reduce burdens placed on potential bidders. The rules proposed for readoption with amendments and new rules will continue the Division’s ongoing efforts to conduct competitive bidding wherever possible and to award contracts that provide the most advantage to the State, price and other factors considered, while providing for new opportunities to secure best pricing through leveraged procurements. In appropriate circumstances, the amendments, and new rules will result in improved pricing due to faster procurement cycle times where lowest price, responsive proposal methodology is used. In all of the procurement processes, the Division guards against favoritism, improvidence, extravagance, and corruption, while providing for fair and equal treatment of the goods and services providers as both bidders and contractors.

The rules proposed for readoption with amendments and new rules position the State to contribute to the interstate cooperative purchasing practices that have become so present in government contracting. The Division has the clear authority to solicit and award cooperative agreements, but the rules have been amended to clarify this authority and to clarify that the Director may use the now popular master agreement/participating addendum structure at initial award. Similarly, while the Division has historically been able to leverage out-of-State contracts, where certain standards were met, due to the narrow scope of the Division’s existing rule being limited to intrastate cooperative purchasing partners, the Division often had no ability to allow interstate jurisdictions to leverage the Division’s contracts. Overall, the rules proposed for readoption with amendments and new rules will position the Division to continue as a source for procurement excellence both within New Jersey, and throughout the United States.

**Economic Impact**

The rules proposed for readoption with amendments and new rules will continue the ongoing efforts to ensure that the State and general public benefit from the cost and performance advantages achieved by competitive bidding and leveraged procurement to meet the operational needs of State government and the political subdivisions that choose to utilize State contracts.

The Division’s ability to provide procurement services for the agencies of the State has had a positive impact on State and local government budgets, as well as the State’s overall economic condition. The rules proposed for readoption with amendments and new rules impose no requirements on local government budgets and, thus, do not generate a State mandate/State pay issue.

**Federal Standards Statement**

A Federal standards analysis is not required because the rules proposed for readoption with amendments and new rules are not subject to any Federal requirements or standards.

**Jobs Impact**

The Division does not believe that the rules proposed for readoption with amendments and new rules will increase or decrease jobs in the State.

**Agriculture Industry Impact**

The rules proposed for readoption with amendments and new rules will have no impact on the agriculture industry in the State.

**Regulatory Flexibility Analysis**

The rules proposed for readoption with amendments and new rules will apply to all persons and entities that seek awards of the State’s goods and/or services contracts issued by the Division of Purchase and Property. Many such persons and entities are small businesses as defined under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. No reporting, recordkeeping, or compliance requirements are imposed on small businesses by the rules proposed for readoption with amendments and new rules, beyond those requirements applicable to every business

entity submitting a proposal in response to bidding opportunities offered by the Division as discussed in the Summary above. Additionally, the engagement of professional services is not necessary to fulfill these requirements. The proposed new rule regarding lowest price, responsive proposal award methodology may benefit bidders for such commodities, trades, and general services contracts, eliminating the time and expense of preparing a full technical proposal. Often, bidders on these contracts are small businesses, so costs may be avoided through the more streamlined procurement methodology. The procurement procedures and requirements are necessary to ensure fair, competitive methodologies to establish contracts for use by State agencies and other using agencies, including local governmental entities. The rules impose no capital costs upon small businesses, beyond those normally incurred by all bidders on State contracts.

**Housing Affordability Impact Analysis**

The Division does not anticipate that the rules proposed for readoption with amendments and new rules will cause any increase or decrease in the average cost of housing or the affordability of housing in the State, as the rules concern the processes and procedures governing the Division’s procurement- and contract-related programs and services.

**Smart Growth Development Impact Analysis**

The Division does not anticipate that the rules proposed for readoption with amendments and new rules will have an insignificant impact on smart growth and there is an extreme unlikelihood that the rules would evoke a change in housing production within Planning Areas 1 or 2, or within designated centers, under the State Development and Redevelopment Act, as the rules concern the processes and procedures governing the Division’s procurement- and contract-related programs and services.

**Racial and Ethnic Community Criminal Justice and Public Safety Impact**

The Division has evaluated this rulemaking and determined that it will not have an impact on pretrial detention, sentencing, probation, or parole policies concerning adults and juveniles in the State. Accordingly, no further analysis is required.

**Full text** of the rules proposed for readoption may be found in the New Jersey Administrative Code at N.J.A.C. 17:12.

**Full text** of the proposed amendments and new rules follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

SUBCHAPTER 1. DESCRIPTION OF ORGANIZATION; MEANS OF PROCUREMENT

17:12-1.1 General course and method of operation

(a) The Division of Purchase and Property (**Division**), in and of the New Jersey Department of the Treasury, provides centralized procurement and related services to agencies of the Executive Branch of State government. Within its statutory framework, the primary mission of the Division is to procure, in a timely and effective manner, contracts for the goods and services necessary for the daily operation of State government. [In addition to a program support unit, the] **The** Division includes the Procurement Bureau, the Contract Compliance and Audit Unit, and the Distribution and Support Services Unit. This chapter sets forth the rules that apply to the Division, State agencies and other public entities, and vendors participating in the State’s procurement and contracting processes.

(b) The Director of the Division of Purchase and Property [(Division)] (**Director**) is charged with the responsibility for establishing contracts and issuing purchase orders, the cost of which is to be paid with State funds or funds in the State’s custody and control, and occasionally those contracts involving no cost to the State or those generating revenue for the State. If the aggregate amount involved does not exceed the threshold established pursuant to N.J.S.A. 52:34-7, any procurement or contract may be made, negotiated, or awarded by the Director without advertising, in any manner the Director may deem effective and practicable to permit full and free competition.

(c) When the aggregate amount exceeds the threshold established pursuant to N.J.S.A. 52:34-7, the Division shall, as prescribed and/or practicable, use one of the following methods to procure the needed goods and/or services:

1. (No change.)

2. A non-advertised procurement process in accordance with applicable statutes and with the requirements and restrictions expressly set forth in this chapter, specifically pertaining to contracting pursuant to:

i. (No change.)

ii. N.J.S.A. 52:34-6.2, by participating in cooperative [procurement] agreements formed with or by another state or states, or a political subdivision thereof or a **political subdivision** of New Jersey, or with or by a nationally recognized and accepted cooperative [procurement entity] **purchasing participant** with which other states participate, as described at N.J.A.C. 17:12-1A.3 and **1A.4**;

iii.-v. (No change.)

(d)-(e) (No change.)

17:12-1.2 Public information

(a) The public is encouraged to obtain information concerning the State procurement program and **request for proposals** (RFPs) by accessing the Division’s Internet site at [[www.state.nj.us/treasury/purchase](http://www.state.nj.us/treasury/purchase)] [www.nj.gov/treasury/purchase](http://www.nj.gov/treasury/purchase). If the information being sought is not available on the Division’s website, the public can request information by posing questions via the Division’s website, by writing to the Director of the Division of Purchase and Property, PO Box 039, Trenton, New Jersey 08625-0039, or by visiting the Division’s reception area at 33 West State Street, 9th Floor.

(b)-(c) (No change.)

17:12-1.3 Definitions

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

“Contract” means a mutually binding legal relationship obligating the contractor to furnish goods and/or services and the purchaser to pay for them, subject to appropriation where the using agency derives its annual budget by means of appropriation from the State Legislature. For publicly advertised contracts, the contract typically consists of the Division’s standard terms and conditions, the RFP, the responsive proposal, the notice of [acceptance or] **intent to award**, any subsequent written document memorializing the agreement, any amendments or modifications to any of these documents and any attachments, addenda or other supporting documents, or other writings agreed to by the State and the contractor describing the work to be performed.

“Cooperative [procurement] agreement” refers to a contractual relationship in which the Division, pursuant to the provisions of N.J.S.A. 52:34-6.2, joins with, or is joined by, another state or states or political divisions thereof or **political subdivisions** of New Jersey, or with a nationally recognized and accepted cooperative procurement entity in which other states participate, for the acquisition of goods and/or services that have been, or are to be, procured through competitive bidding.

[“Cooperative Purchasing Program” refers to the Division’s intrastate program that provides procurement-related assistance to local New Jersey governmental entities and boards of education, State and county colleges and other public entities having statutory authority to utilize select State contracts issued by the Division, pursuant to the provisions of N.J.S.A. 52:25-16.1 et seq.]

“**Cooperative purchasing participants**” refers, collectively, to **interstate cooperative purchasing participants and intrastate cooperative purchasing participants**.

“**Interstate cooperative purchasing participants**” refers to **another state or states, or political divisions thereof, that pursuant to its own laws and regulations are permitted to utilize contracts awarded by the Director**.

“**Intrastate cooperative purchasing participants**” refers to **political subdivisions, volunteer fire departments and first aid**

**squads, and independent institutions of higher education and school districts pursuant to N.J.S.A. 52:25-16.1 et seq., State and county colleges pursuant to N.J.S.A. 18A:64-60 and 18A:64A-25.9, quasi-State agencies and independent authorities pursuant to N.J.S.A. 52:27B-56.1, and other New Jersey public entities having statutory authority to utilize select State contracts issued by the Division.**

“**Intrastate cooperative purchasing program**” refers to the **Division’s program that provides procurement-related assistance to intrastate cooperative purchasing participants**.

“**Notice of intent to award**” refers to the **Director’s notification to all bidders identifying the intended contract awardee(s) following an advertised procurement**.

[“Procurement agreement” refers to a contractual relationship that is contemplated or created under the Division’s prerogatives established by N.J.S.A. 52:34-6.2, concerning cooperative agreements, when the relationship is initiated prior to or during the competitive bidding process.]

“Protest” means a timely filed **written** challenge to a specification in an advertised RFP, to a rejection of a proposal declared non-responsive, [or] to a [contract award decision made] **notice of intent to award** issued by the Director, **or to the cancellation of an RFP after the opening of proposals**.

[“Purchasing agreement” refers to a contractual relationship that is contemplated or created under the Division’s prerogatives established by N.J.S.A. 52:34-6.2, concerning cooperative agreements, when the relationship is initiated after the competitive bidding has been conducted.]

“Using agency” refers to a State department or agency, a quasi-State governmental entity, or [a Cooperative Purchasing Program] **an intrastate cooperative purchasing** participant authorized to purchase products and/or services under a specific contract procured by the Division.

17:12-1.4 Application of rules

Except as otherwise provided in this chapter, these rules shall apply to all advertised and non-advertised contracts awarded by the Division or under the authority of the Division, including all Delegated Purchasing Authority contracts as set forth in Department of the Treasury Circular [11-10-DPP], Delegated Purchasing Authority (**DPA**), as amended or re-designated, and accessible at [[http://www.nj.gov/infobank/circular/circ\\_idx.htm](http://www.nj.gov/infobank/circular/circ_idx.htm)] **the Department of the Treasury’s website**.

SUBCHAPTER 1A. PROCUREMENT METHODOLOGY

17:12-1A.1 [Formal, advertised, competitive] **Advertised procurements**

(a) Except as provided in this subchapter, all procurements shall be effected through [formal,] advertised[, competitive bidding] **procurement** procedures [requiring timely submission of sealed proposals].

(b) The Director shall structure RFPs [for formal, advertised, competitive procurements] to provide for a single contract award to a single bidder, unless contract awards to multiple bidders are permitted as hereinafter provided in this subchapter.

(c) The Director may structure an RFP [for formal, advertised, sealed bidding] to include multiple lines encompassing more than one commodity, group of commodities, service or group of services, with separate contract awards for each price line or grouping of price lines.

(d) Pursuant to the provisions of N.J.S.A. 52:34-12.1, the Director may structure an RFP [for formal, advertised, sealed bidding] to [be awarded] **provide for awards** to multiple bidders to meet the anticipated needs of State agencies and, if the State contracts are to be extended to [Cooperative Purchasing Program] **cooperative purchasing** participants pursuant to N.J.A.C. 17:12-2.3, the anticipated needs of [Cooperative

Purchasing Program] **cooperative purchasing** participants, based upon one or more of the following criteria:

- 1.-7. (No change.)
- (e)-(f) (No change.)

17:12-1A.2 Exceptions to [formal,] advertised[, competitive] procurement **procedures**

(a) All contracts issued by the Division shall be [formally advertised and competitively procured with requirements for the submission of sealed proposals] **effected through advertised procurement procedures**, except for the following types of contracts:

- 1.-3. (No change.)
- 4. Cooperative [procurement] agreements with one or more other states, or political subdivisions thereof or of New Jersey, or with a nationally recognized and accepted cooperative procurement entity in which other states participate, pursuant to the provisions of N.J.A.C. 17:12-1A.3; or
- 5. (No change.)
- (b) Delegated Purchasing Authority purchases. State using agencies may make purchases pursuant to their assigned Delegated Purchasing Authority under the conditions set forth in (b)1 through 6 below, with provision for exception as set forth in (b)7 below. Records of all Delegated Purchasing Authority purchases shall be maintained by State agencies pursuant to each agency's record retention schedule.

- 1.-2. (No change.)

3. The purchase is one that cannot be made through a State contract, the State Distribution and Support Services Unit, the Department of Corrections' Bureau of State Use Industries/DEPTCOR, or the Central Non-profit Agency (CNA)[, ACCSES NJ, Inc].

- 4. (No change.)

5. The purchase is compliant with the Delegated Purchasing Authority procedures set forth in the Department of the Treasury Circular [11-10-DPP], Delegated Purchasing Authority (DPA), as amended or re-designated, and accessible at [<http://www.nj.gov/info/bank/circular/circindx.htm>] **the Department of the Treasury's website**.

- 6.-7. (No change.)

(c) Waiver of Advertising procurements. In accordance with the provisions of N.J.S.A. 52:34-8, contracting for goods and/or services in excess of the competitive bidding threshold established at N.J.S.A. 52:34-7, or the adjusted amount established under the provisions of N.J.S.A. 52:34-7.1, without public advertising, requires prior approval by the State Treasurer or the Treasurer's designee. Awards of waiver of advertising contracts shall be made in accordance with the procedures set forth in the Department of the Treasury Circular [11-14-DPP], Requests for Waivers of Advertising, as amended or re-designated, and may occur when the following conditions have been met:

- 1.-3. (No change.)

17:12-1A.3 [Cooperative] **Joining cooperative** agreements

- (a)-(b) (No change.)

(c) Prior to entering into any [purchasing agreement or procurement] **cooperative** agreement, the Director shall:

- 1.-2. (No change.)

3. Require the contractor or scheduled contract awardee to execute an addendum containing the State contracting terms and conditions and any other terms making the [procurement] **cooperative** agreement more favorable to the State, as determined by the Director.

[(d) The Director may solicit and award such contracts, provided that the cooperative agreement specifies that each party to the agreement is solely responsible for purchases made by such entity under the terms of any resultant contract.]

17:12-1A.4 [(Reserved)] **Leading a cooperative agreement**

(a) **The Director may lead, sponsor, conduct, solicit, award, and administer cooperative agreements.**

(b) **Cooperative agreements shall be procured through advertised procurement procedures.**

(c) **The procurement documents shall set forth the combined requirements of the cooperative purchasing participants and specify that each jurisdiction participating in a contract is solely responsible**

**for the payment of the purchase price and cost of purchases made by it under the terms of any resultant contract.**

(d) **Where the Director procures contracts on behalf of a nationally recognized and accepted cooperative procurement entity, the Director may utilize a master agreement/participating addendum structure, whereby the Director awards the contractor(s) or scheduled contract awardee(s) a master agreement and all participating entities join via execution of a participating addendum.**

17:12-1A.5 Use of Federal supply schedule contracts

- (a)-(b) (No change.)

(c) A using agency intending to purchase a good and/or service from a vendor based upon that vendor's Federal supply schedule contract shall comply with all provisions and procedures detailed in the Department of the Treasury Circular [12-07-DPP], Purchases from Federal Supply Schedules or Schedules of Other Federal Procurement Programs, as amended or re-designated, that sets forth essential procedural and documentary requirements.

(d) A vendor offering a good and/or service to State agencies referencing a Federal supply schedule contract must meet the specific eligibility criteria and procedural provisions set forth and standardized in the Department of the Treasury Circular [12-07-DPP], Purchases from Federal Supply Schedules or Schedules of Other Federal Procurement Programs, as amended or re-designated, which is a condition to be communicated to the vendor by the using agency contemplating such purchase activity. The circular is accessible at [<http://www.nj.gov/info/bank/circular/circindx.htm>] **the Department of the Treasury's website**.

**SUBCHAPTER 1B. TERMS AND CONDITIONS**

**17:12-1B.1 Terms and conditions; generally**

(a) Pursuant to N.J.S.A. 52:34-13, **the Division has developed standard terms and conditions for incorporation into contracts, available on the Division's website.**

(b) **The standard terms and conditions in (a) above may be updated from time-to-time and made available on the Division's website.**

(c) **Where not contrary to applicable law, the Director or his or her designee, at his or her discretion, may:**

- 1. **Include revised term(s) in an RFP that supersedes some or all of the standard terms and conditions; or**
- 2. **Otherwise approve a change to one or more of the standard terms and conditions.**

**17:12-1B.2 Terms and conditions; prohibited terms**

(a) **The Director shall not approve or agree to enter into any contract that requires the State to indemnify or hold harmless a contractor, or other person or business entity, except as otherwise authorized by law.**

(b) **Where a prohibited indemnification or hold harmless provision is included in a contract, it shall be void from the outset; except that the contract containing that term or condition shall otherwise be enforceable as if it did not contain such term or condition.**

(c) **The prohibition in (a) above shall apply to all persons negotiating a contract on behalf of the Director and all contracts issued under the authority of the Director.**

**SUBCHAPTER 2. [FORMAL,] ADVERTISED[, COMPETITIVE] PROCUREMENT PROCEDURES**

17:12-2.1 Advertising

- (a)-(c) (No change.)

(d) As a service to vendors interested in competing for State contracts to be awarded by the Division and to any other parties seeking information about bidding opportunities available via the Division's competitive contract procurement program, the Division provides an on-line self-registration service [known as the e-RFP Notification Service] **on its website**. Vendors and other interested parties can register to receive direct e-mail notices pertaining to the Division's procurements for goods or services based upon specific commodity classes or codes.

As this is a self-registration process, it does not create an entitlement for any party to receive notice of any particular solicitation of proposals, and the Division and the State shall not be liable for any losses, claims, or damages of any kind if a vendor or other party, for any reason, is not registered or does not receive an e-mail notice. It is the responsibility at all times for [e-RFP Notification Service] registrants to exercise due diligence in reviewing the notices on the Division's website to assure their awareness of State bidding opportunities announced by the Division.

17:12-2.3 Extension of contracts for [local] **cooperative purchasing participant** use

(a) The Director may, through provision in an RFP, extend a State contract for use by [New Jersey's local governments; volunteer fire departments and first-aid or rescue squads; school districts; county colleges; State colleges; quasi-State agencies; independent authorities; and independent institutions of higher education] **cooperative purchasing participants**.

(b) If after award of a contract, either the Director or the contractor seeks to extend a contract for use by the [Cooperative Purchasing Program] **cooperative purchasing** participants, the Director and contractor may agree to such arrangement, provided the contractor agrees in writing to extend the contract to all [Cooperative Purchasing Program] **cooperative purchasing** participants on the same terms and conditions as set forth in the underlying State contract.

(c) In the event a contract permits extension for use by the [Cooperative Purchasing Program] **cooperative purchasing** participants, such use shall be limited to the goods and services that are the subject of the contract and shall be subject to the terms and conditions of the contract, as appropriate.

17:12-2.6 Receipt and public availability of proposals

(a)-(d) (No change.)

(e) For RFPs having a negotiation component, only the names and addresses of the bidders will be publicly announced at the proposal opening. [Files relating to such procurements will be available for public review, upon request and upon scheduling by the Director, only after issuance of a notice of intent to award by the Division.]

(f) [If an RFP has a negotiation component, the proposals and documentation relating to negotiations shall not be available for public inspection until after a notice of intent to award has been issued by the Division.] After the notice of intent to award has been issued, [each proposal] **files relating to the procurement** and, if applicable, documentation relating to any negotiations, **shall not be considered public documents according to the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 et seq., and will only be made available [for public inspection in accordance with governing] to the non-winning bidders and to any taxpayer considering filing a protest of the notice of intent to award upon request. All files relating to the procurement made available pursuant to this subsection shall be redacted pursuant to applicable law.**

(g) After award of contract(s), all [proposals] **files relating to the procurement** shall be considered public documents under OPRA [unless an OPRA exemption is] **and shall be redacted pursuant to OPRA and applicable law.** The following provisions shall apply for all procurements:

1.-3. (No change.)

17:12-2.7 Evaluation of proposals for [formal,] advertised[, competitive] procurements

(a) [Proposals] **Except as otherwise provided in N.J.A.C. 17:12-2.9, proposals** shall be evaluated in either of two ways, with a recommendation for proposed award(s) made to the Director upon conclusion of the evaluation. All recommendations, whether prepared by an evaluation committee or by a Division staff member assigned to conduct the procurement, are advisory in nature and not binding upon the Director. The evaluation methods are:

1.-2. (No change.)

(b)-(d) (No change.)

(e) The evaluation committee or the assigned Division staff member may, by written request, ask a bidder to clarify, in writing, its proposal in

order to determine whether a proposal should be further considered for award. The process of clarification is not an opportunity for a bidder to [revise] **supplement, change,** or [modify] **correct** its proposal[, and any]. **Any** response or portion of a response by a bidder to the Division's written request for clarification that attempts to [revise] **supplement, change,** or [modify] **correct** its proposal shall be given no effect.

(f)-(j) (No change.)

17:12-2.8 Poor performance as a basis for bypass of low bidder

(a) A record of poor performance on prior and/or current State contracts by a bidder submitting a lower priced proposal is sufficient basis for bypassing its proposal. In determining whether a bidder's poor performance warrants the bypass of its proposal, the Director shall take into consideration the frequency and seriousness of the bidder's poor performance as a contractor. Poor contract performance is evidenced by:

1. (No change.)

2. Other information contained in the Division's vendor performance records, **contained in** a using agency's records, or obtained from audits or investigations of the bidder's prior work experience completed by the Division, a using agency, **another state or Federal jurisdiction,** a [Cooperative Purchasing Program] **cooperative purchasing** participant, or, its current licensure, registration, or certification status and relevant prior licensure, registration, or certification history, or its status or rating with established business/financial reporting services, as applicable.

(b) The Director may, in those instances where there is evidence of a record of poor performance by a bidder with customers **or jurisdictions** other than the State, request additional information beyond that in the bidder's proposal from the bidder in question regarding the bidder's present capability to perform adequately under the terms of the contract in question. If the bidder's response to the Division's request, in the Director's discretion, fails to demonstrate its current ability to perform adequately, the Director may bypass that bidder's proposal.

(c)-(e) (No change.)

17:12-2.9 [(Reserved)] **Lowest price, responsive procurements**

(a) **The Director may structure a procurement to award contract(s) to the bidder(s) submitting the lowest price proposal when it is determined that the best value is expected to result therefrom.**

(b) **When using the lowest price process, the following apply:**

1. **The factors and significant subfactors that establish the requirements of responsiveness shall be set forth in the RFP. The RFP shall specify that award will be made on the basis of the lowest calculated price of proposals meeting the factors and significant subfactors in the RFP.**

2. **Proposals are evaluated for responsiveness and ranked using only cost/price factors. Where pricing is calculated or ranked using formulas, utility models, or market baskets, the assigned Division staff member shall, prior to the opening of proposals, determine, document, and date-stamp such formulas, utility models, or market basket methodologies.**

3. **Bypass is not permitted, except on the basis of poor performance pursuant to N.J.A.C. 17:12-2.8.**

4. **Clarifications may occur pursuant to N.J.A.C. 17:12-2.7(e).**

5. **Negotiation is permitted pursuant to N.J.A.C. 17:12-2.7(j). For RFPs not having a negotiation component, pre-set formulas, utility models, or market basket methodologies, if applicable, shall be available to the public at the proposal opening event.**

(c) **The Division shall, upon conclusion of the evaluation of the proposals, prepare a written report with a recommendation for award for the Director's consideration.**

(d) **The Director shall review the award recommendation and documentation presented and may accept it, modify it, reject it, or refer the modified award recommendation and documentation back to the Division for additional consideration.**

(e) **The Director shall issue the notice of intent to award to all participating bidders. The notice of intent to award document sent to the scheduled contract awardee(s) shall include the identification of certification(s) and/or other essential documents that were not required to be included with the proposal but are required for contract award and a designated date when the required**



certifications and/or documents are due. A scheduled awardee's failure to comply within the time afforded shall constitute grounds for the Director's rescission of the notice of intent to award to the non-responding scheduled awardee. If the requested materials are not timely submitted, the Director may refer the matter back to the Division for consideration as to whether the scheduled award should proceed, with reconsideration of all pertinent factors, including the issue of assessment of costs incurred by the State as a result of the scheduled awardee's delay by, or the non-award of the contract to, the named awardee.

(f) In the event that the Director determines it is in the public interest or the State's interest to reject all proposals, the Director shall so notify all bidders.

17:12-2.11 Proposal errors

(a) Prior to the opening of proposals[, any bidder may request that its proposal be withdrawn. Such requests must be made to the Director in writing.]:

**1. Proposals submitted electronically may be withdrawn at any time. The bidder may submit another proposal, as long as the replacement proposal is received prior to the announced date and time for proposal opening and at the place specified.**

**2. Proposals submitted in hard copy may be withdrawn upon written request to the Director.** [If the request is granted, the] The bidder may submit another proposal, as long as the replacement proposal is received prior to the announced date and time for proposal opening and at the place specified.

(b) (No change.)

(c) If, during a proposal evaluation process, an obvious pricing error made by a bidder deemed to be a potential contract awardee is found, the Director shall issue written notice to that bidder. [The bidder will have five business days after receipt of the notice to confirm its pricing.] If the bidder fails to respond, its proposal shall be considered withdrawn, and no further consideration shall be given to it.

(d)-(e) (No change.)

17:12-2.12 Registration of corporations and other business entities

(a) In accordance with the provisions of N.J.S.A. 52:32-[44.1.b.]**44.b.**, business organizations seeking to do business with the State of New Jersey must be business-registered with the New Jersey Department of the Treasury's Division of Revenue prior to the time a contract or purchase order is awarded or authorized. Proof of such registration must be provided by an intended contract or purchase order awardee upon request by the Division or using agency.

(b) In accordance with N.J.S.A. 52:32-[44.1.c.]**44.c.**, subcontractors that are business organizations must be registered with the New Jersey Department of the Treasury's Division of Revenue and provide evidence thereof to the prime contractor before being permitted by the prime contractor to sign a subcontract under a State contract.

(c) (No change.)

17:12-2.13 Preference laws; out-of-State vendors

(a)-(d) (No change.)

(e) The Director shall also apply in-State preference in the evaluation of proposals whenever a proposal is received from an out-of-State bidder where residential preference statutes, rules, regulations, or practices exist in political sub-divisions of a state. It shall be the responsibility of the bidder or bidders for a specific procurement to provide written evidence to the Director of the existence of such local government preference rules, regulations, ordinances, charters, or practices either with the bidder's proposal or within five business days after the deadline for proposal submission. Written evidence that is not provided to the Director within five business days of the public [bid] **proposal** opening may not be considered in the evaluation of that procurement, but may be retained and considered in the evaluation of subsequent procurements.

(f)-(l) (No change.)

SUBCHAPTER 3. PROTEST PROCEDURES

17:12-3.1 [Informal hearings; subject matter] **Protests**

(a) The purpose of this subchapter is to provide the procedures that govern [the] **written** challenges [of] to an action of the Director [in the

issuance of an] **related to** advertised [RFP or the award of a contract or contracts resulting from an advertised RFP as described at N.J.A.C. 17:12-2] **procurements**. A protest is defined as follows:

1. A timely filed **written** challenge to a term, condition, or requirement of a specification contained within an advertised RFP; [or]

**2. A timely filed written challenge related to the rejection of a proposal for failure to comply with any of the prerequisites set forth in N.J.A.C. 17:12-2.2;**

[2.] **3. A timely filed written** challenge to a [contract award decision made] **notice of intent to award issued** by the Director[.]; **or**

**4. A timely filed written challenge to the Director's cancellation of an RFP after the opening of proposals.**

(b) (No change.)

17:12-3.2 Protest procedures; challenges to a specification

(a)-(c) (No change.)

(d) The Director may resolve a protest of a specification by amending the RFP and extending the deadline for proposal submission, by canceling the procurement, or by any other appropriate means.

Recodify existing 1.-2. as (e)-(f) (No change in text.)

17:12-3.3 Protest procedures; challenge to [a contract award decision] **proposal rejection, notice of intent to award, or RFP cancellation**

(a) A bidder, having submitted a proposal in response to an advertised RFP administered pursuant to N.J.S.A. 52:34-6 et seq., may submit a written protest to the Director concerning the [following]:

1. Rejection of its proposal, or a portion thereof, when such rejection arises as a consequence of failure to comply with any of the prerequisites set forth in N.J.A.C. 17:12-2.2, Requirements for bidding and contract award. Such a protest may not challenge the existence of the prerequisite(s) cited as cause for the rejection but may assert that the facts of a particular case are sufficient to satisfy or conform to the cited prerequisite(s); [and/or]

2. Notice of [award of contract(s) or of] intent to award contract(s) pertaining to the subject procurement[.]; **and/or**

**3. Cancellation of an RFP after the opening of proposals.**

(b) A bidder, having submitted a proposal in response to an advertised RFP and finding cause to protest [the award decision] pursuant to (a)[1 or 2] above, shall make a written request to the Director, setting forth, in detail, the specific grounds for challenging the rejection of its proposal or for challenging the scheduled contract award, as applicable. The protest shall be filed within 10 business days following the bidder's receipt of written notification that its proposal is non-responsive or of notice of the intent to award, as applicable, or, pursuant to (e) below, prior to the deadline specified in the Division's notice of intent to award communication to the bidder, whichever date is earlier.

1. A protest [regarding the Director's decision to award a contract] shall contain the following items:

i. (No change.)

ii. The specific grounds for challenging the [intended contract] **proposal rejection, the notice of intent to award, or the cancellation**, including all arguments, materials, and/or other documentation that may support the protester's position [that the contract award should be overturned]; and

iii. (No change.)

2. (No change.)

3. The Director may disregard any protest [of award] filed after the [10 day protest period] **10-day-protest period** and proceed with the award of contract(s).

**4. The Director may request that a bidder file a response to a protest. Responses and replies are at the Director's discretion; the Director may disregard any unsolicited response or reply.**

(c) (No change.)

(d) The protest accepted by the Director shall be resolved by written decision on the basis of the Director's review of the written record including, but not limited to, the written protest, the terms, conditions and requirements of the RFP, the proposals submitted in response to the RFP, the evaluation committee report and/or the award recommendation document, pertinent administrative rules, statutes, and case law, and any associated documentation the Director deems appropriate. In cases

where no in-person presentation is held, such review of the written record shall, in and of itself, constitute an informal hearing.

Recodify existing 1.-2. as **(e)-(f)** (No change in text.)  
[(e)] **(g)** (No change in text.)

SUBCHAPTER 4. COMPLAINT AND AUDIT PROCEDURES

17:12-4.3 Filing of complaints; subject matter

(a) Using agencies shall promptly initiate and file a formal complaint of any failure by a contractor to comply with the provisions, terms, and conditions of a State contract. The complaint shall be in writing and on

Form [PB-36] **CC-36** or the equivalent and be submitted to the CCAU. Complaints are not required where a contract contains specific performance standards including, but not limited to, liquidated damages. In such cases, the using agency may consult with CCAU prior to imposing the contract standards.

(b) (No change.)

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