
LOCAL PUBLIC CONTRACTS LAW AND REGULATION UPDATE

NEW JERSEY LEAGUE OF MUNICIPALITIES
107TH ANNUAL CONFERENCE

STATE OF NEW JERSEY
OFFICE OF THE STATE COMPTROLLER

November 17, 2022



OFFICE OF THE STATE COMPTROLLER PROCUREMENT DIVISION

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NJLM 2022

REFRESHER PROCUREMENT OF INSURANCE AND BROKERS

■ Agenda for today

- Extraordinary unspecifiable services
- Pay to Play basics
- Fair and Open v. Non Fair and Open
- Hiring an Insurance Broker
- Procuring Health Insurance
- Best Practices



DEMYSTIFYING HEALTH INSURANCE PROCUREMENTS: COMMON MISCONCEPTIONS

LPCL doesn't
apply to broker
services because
the local
government is
not paying
commissions to a
broker directly

I don't need to
know the
commission
amount my
broker is
receiving

Hiring a broker
and purchasing
insurance
coverage are the
same
procurement

I don't need to
understand the
assumptions
applied in
comparing health
insurance plan
options

DEMYSTIFYING HEALTH INSURANCE PROCUREMENTS: COMMON MISTAKES

An insurance broker may be hired through the professional services exception to LPCL

- Definition of professional services under the LPCL is narrow and does not include insurance brokers.

Local governments are not properly documenting hiring a broker or purchasing insurance

- If using Extraordinary Unspecifiable services, the required certification was not filed
- The contract award is not published in the newspaper with the name of the broker/insurance carrier, amount, duration and nature of the contract, where the contract is available for public inspection

LESSONS LEARNED: OSC AUDITS THAT ADDRESS HEALTH INSURANCE

A Performance Audit of Selected Fiscal and Operating Practices of the Borough of Roselle, January 27, 2021

- The Borough relied on its health insurance broker's analysis when selecting health insurance carriers without undertaking any critical examination of the premiums used by the broker in the analysis. OSC determined the Borough would have saved \$1.9 million if it had enrolled in the State Health Benefits Program.

Buena Regional School District, A Performance Audit of Selected Fiscal and Operating Practices, July 10, 2020

- The District failed to file certifications with its Board stating that the contract met the EUS exception and the details of those awards were not published in the District's official newspaper as required by Public School Contracts Law.
- The broker failed to notify the District of any commission, service fee, brokerage, carrier incentive offers, or other valuable consideration received.

The Town of Harrison, Selected Fiscal and Operating Practices, March 20, 2014

- Harrison did not perform an analysis of its private insurance compared to joining SHBP. Such analysis could have saved tax payers money.

COMMON MISTAKE – MISUSE OF PROFESSIONAL SERVICES EXCEPTION UNDER LPCL

Professional Services Definition	Services rendered or performed by a person:	Legal Citation
	authorized by law to practice a recognized profession, whose practice is regulated by law	N.J.S.A. 40A:11-2
	and the performance of which services requires knowledge of an advanced type in a field of learning acquired by a prolonged formal course of specialized instruction and study	
	as distinguished from general academic instruction or apprenticeship and training	
	may also mean services rendered in the provision or performance of goods or services that are original and creative in character in a recognized field of artistic endeavor.	
Contract Duration	All contracts for the provision of goods or services shall be awarded for a period not to exceed 24 consecutive months, except that contracts for professional services shall be awarded for a period not to exceed 12 consecutive months	N.J.S.A. 40A:11-15

COMMON MISTAKE: PROFESSIONAL SERVICES EXCEPTION UNDER LPCL

Professional Service	Engineer	Architect	Attorney	Insurance Broker	Inspection services
Authorized by law to practice a recognized profession	✓	✓	✓	✓	✓
Practice is regulated by law	✓	✓	✓	✓	✓
Requires knowledge of an advanced type in a field of learning acquired by a prolonged course of specialized instruction and study	✓	✓	✓	✗	✗
Distinguished from general academic instruction or apprenticeship and training	✓	✓	✓	✗	✗

EXTRAORDINARY UNSPECIFIABLE SERVICES

EUS definition:
N.J.S.A. 40A:11-2

- Services which are specialized and qualitative in nature
- Requiring expertise and extensive training
- Proven reputation in the field of endeavor

Special statutory
designation
N.J.S.A. 40A:11-
5(1)(m)

- Insurance, including the purchase of insurance coverage and consulting services considered EUS by statute

N.J.S.A. 40A:11-6.1

- Obtain at least 2 competitive quotes
- Award to the proposal that is most advantageous, price and other factors considered

Contract Duration –
N.J.S.A. 40A:11-15(6)

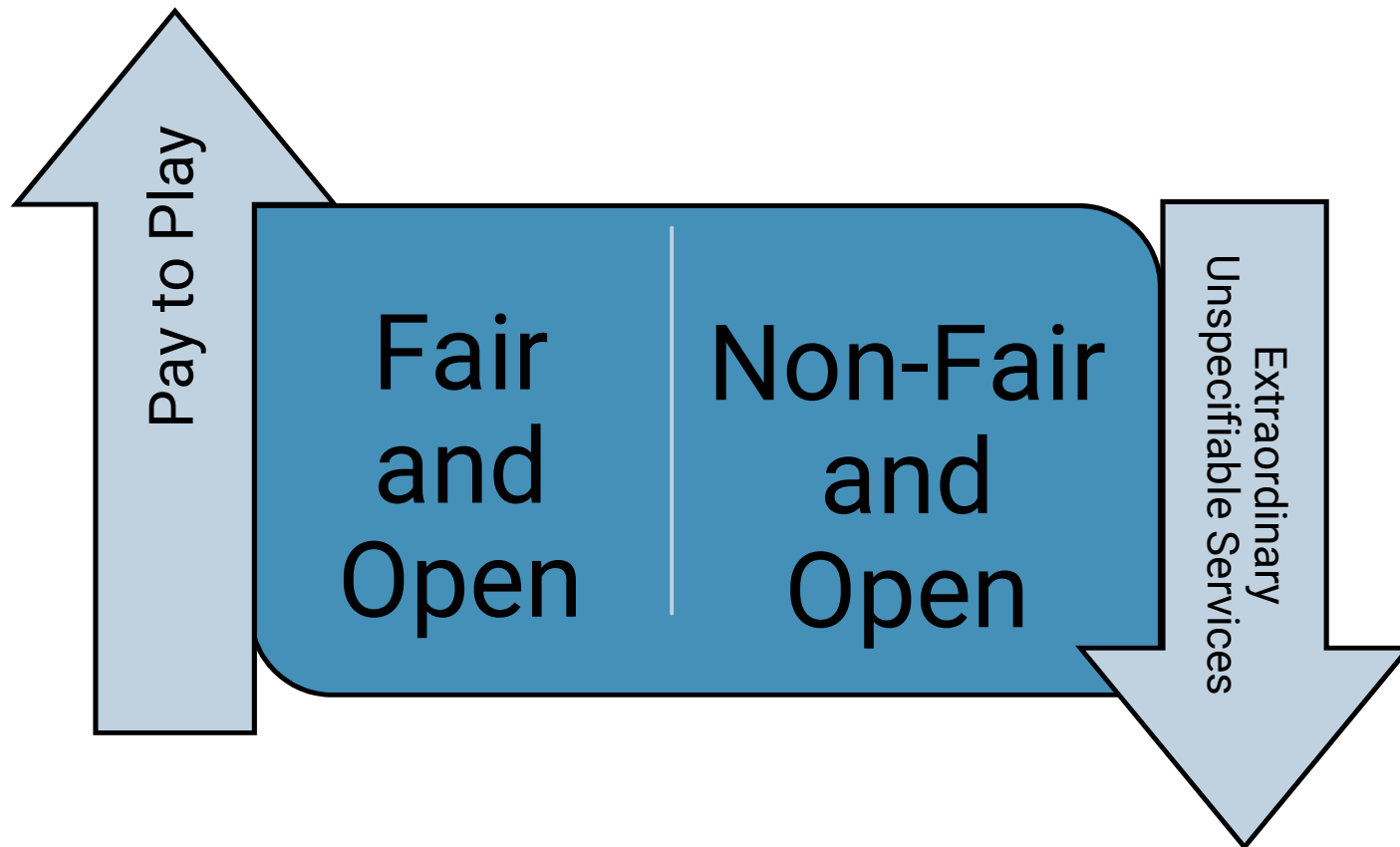
- Initial three years
- May include one 2 year or two 1 year extensions
- Subject to availability and appropriation annually of sufficient funds
- May not exceed 5 years

EUS INSURANCE REQUIREMENTS

LOCAL FINANCE NOTICE AU 2002-2

Requirement	Legal Citation
Local Government makes documented effort by purchasing agent to secure at least two competitive quotations	N.J.S.A . 40A:11-6.1(a)
DLGS finds the solicitation of quotes for insurance purposes is practicable	
Includes insurance coverage, consultant services, administrative services, claims administration services, risk assignment, participation in a JIF or a risk management program	
Prior to awarding the contract, a designated official should file a certificate with governing body which: 1.Clearly describes the nature of the work to be done; 2.States that the law permits insurance to be treated as an EUS pursuant to [see table on right] 3.Describes the informal solicitation of quotations; and 4.Must be on DCA form (see LFN AU 2002-02 for form)	Overall: N.J.A.C . 5:34-2.3(b) Pursuant to: N.J.S.A .40A:11-5(1)(m) and N.J.S.A . 40A:11-5(1)(a)(ii)
The governing body must pass a resolution which states that the contract is being awarded as an EUS pursuant to N.J.S.A.40A:11-5(1)(m) and N.J.S.A. 40A:11-5(1)(a)(ii) along with supporting reasons for awarding under EUS.	N.J.S.A. 40A:11-5(1)(a)(i)
After award, the Local Unit must publish a notice of award in a local newspaper. The notice must include: (1) amount of contract; (2) nature of contract; (3) duration of contract; (4) description of service; and (5) where the contract can be inspected.	N.J.S.A. 40A:11-5(1)(a)(i)

DECISION: FAIR AND OPEN v. NON-FAIR AND OPEN



FAIR AND OPEN v. NON-FAIR AND OPEN: PAY TO PLAY COMPLIANCE

Local Units are required to either follow the Fair and Open process for procurements OR take a series of steps for a Non-Fair and Open procurement.

- Applies to all procurements valued above \$17,500
- Does not hinge upon the procurement thresholds for the Local Unit
- Low Bid and Competitive Contracting procurements, done correctly, automatically satisfy the Fair and Open process.
- Cooperative Purchases and State Contracts, when done correctly, would also automatically satisfy the Fair and Open Process.
- Extraordinary Unspecifiable Services does not!

FAIR AND OPEN v. NON-FAIR AND OPEN

Fair and Open

- In order to have a Fair and Open process the Local Unit MUST:
 1. Issue a written determination that a contract has an anticipated value in excess of \$17,500
 2. Publicly advertise in newspapers or on the Internet website maintained by the public entity in sufficient time to give notice in advance of the contract
 3. Award under a process that provides for public solicitation of proposals or qualifications
 4. Award and disclose under criteria established in writing by the public entity prior to the solicitation of proposals or qualifications
 5. Publicly open and announce when awarded

Non-Fair and Open

- If the Local Unit did NOT use a Fair and Open process then they MUST (before award):
 1. Issue a written determination that a contract has an anticipated value in excess of \$17,500
 2. Receive the Chapter 271 disclosure form certifying that no reportable political contribution was made during the previous year
 3. Include in the contract a requirement prohibiting reportable political contributions from being made during the term of the contract
 4. Have the governing body pass a resolution awarding the contract

THE HISTORY OF PAY TO PLAY – THE PURPOSE BEHIND THE LAW

Intended to:

- Add transparency to the process of awarding contracts not subject to the rigor of the formal bidding process
- Limit the eligibility of a business entity that has contributed to elected officials at the State, county, or municipal level, or to a State, county, or municipal political party committee to obtain a public contract from the corresponding unit of government.
- Avoid constitutionally impermissible restrictions on the ability of individuals and organizations to participate in the political process.

PAY TO PLAY – BASICS

Pay to Play laws
can be found
primarily in three
locations:

P.L. 2004,
Chapter 19

P.L. 2005,
Chapter 51

P.L. 2005,
Chapter 271

The laws are
applicable as
follows:

Chapter 51 –
ONLY applies
to State Entities

Chapter 19 &
Chapter 271,
Sections 1 and
2 – apply to
Local Units

Chapter 271,
Section 2 &
N.J.A.C. 6A:23A
– apply to
Schools

A BRIEF THE HISTORY OF PAY TO PLAY

On June 17, 2004, Governor McGreevey signed into law P.L. 2004, Chapter 19, effective January 1, 2006. This Pay to Play law was applicable to the Executive and Legislative branches of the State, and to counties and municipalities.

September 22, 2004 Governor McGreevey signed Executive Order 134 making Chapter 19 applicable to State agencies and authorities, and independent agencies and authorities.

In 2005, E.O. 134 (McGreevey) was codified, along with other technical amendments to Chapter 19, by P.L. 2005, c.51

Chapter 19 and Chapter 51 are now codified at *N.J.S.A. 19:44A-20.4 et seq.*, within the New Jersey Campaign Contributions and Expenditures Reporting Act (*N.J.S.A. 19:44A-1 et seq.*), which is administered by the New Jersey Election Law Enforcement Commission (ELEC)

On January 5, 2006, Governor Corzine signed P.L. 2005, c.271, which took effect immediately. This law updated Pay to Play to (1) incorporate the option for Local Units to create their own Pay to Play ordinances, (2) require the c.271 disclosure for certain Local Unit contract awards, and (3) require an annual contribution disclosure submission by certain business entities to ELEC.

PAY TO PLAY: THE BASICS

LOCAL GOVERNMENTS: MUNICIPALITIES AND COUNTIES

Prohibited from entering into a contract valued over \$17,500	If during the preceding one-year period the vendor has made a reportable contribution
	Unless the local government has engaged in a “fair and open process”
	<i>N.J.S.A. 19:44A-20.4 (counties) & N.J.S.A. 19:44A-20.5 (municipalities)</i>
Reportable Contribution	A contribution in excess of \$300 during the preceding one-year period to a municipal/county committee of a political party in that municipality/county if a member of that political party is serving in an elective public office of that municipality/county when the contract is awarded or to any candidate committee of any person serving in an elective public office of that municipality/county when the contract is awarded

CH. 271 – AN OVERVIEW

Section 1: Provides Local Units with the authority to enact local Pay to Play laws. *N.J.S.A. 40A:11-51*

Section 2: Requires a contribution disclosure form for any contract award above \$17,500 that is not publicly advertised for bid. *N.J.S.A. 19:44A-20.26*

- Submit with bid or price quote, but not later than 10 days prior to entering the contract
- List of reportable political contributions

Section 3: Requires business entities with public contracts in excess of \$50,000 per year to file an annual contribution disclosure statement with ELEC. *N.J.S.A. 19:44-20.27.*

LOCAL UNIT REQUIREMENTS

C.271 DISCLOSURE & NON-FAIR AND OPEN

Pay to Play Chapter 271 disclosure requirements apply to Local Units in two situations:

- If the Local Unit has an ordinance or code requiring the Pay to Play Chapter 271 disclosure form to be obtained for any particular contracts above and beyond those required by the State laws.
- If the Local Unit chooses to procure a good or service without using a fair and open process.
 - Referred to as “non-fair and open.”
 - It is okay to choose to use non-fair and open, BUT you MUST take certain steps, including, but not limited to, obtaining a Chapter 271 disclosure form.

FAIR AND OPEN v. BIDDING EXCEPTIONS

Unlike low bids and competitive contracting, N.J.S.A. 40A:11-5 bidding exceptions do not automatically satisfy the Fair and Open process

- Includes EUS!

Local Unit using a bidding exception will have to take the additional steps required to satisfy the Fair and Open process for contracts above \$17,500

If the Local Unit does not take the additional steps for a Fair and Open process, then they must follow the steps required of the Non-Fair and Open method.

EXTRAORDINARY UNSPECIFIABLE SERVICES NON FAIR AND OPEN

The Non-Fair and Open process lacks the elements of transparency required by the Fair and Open process.

- The local unit may award a contract up to the bid limit for goods and services required to be bid, or for any amount for insurance and insurance related services that are exempt from bidding under *N.J.S.A. 40A:11-5(1)(m)* subject to Chapter 271 vendor contribution reporting requirements and certification
- A bidder receiving a non-fair and open contract **cannot** have contributed more than \$300 to a political party or candidate committee of a member of the governing body in the year prior to the award of the contract and cannot contribute during the life of the contract.

EXTRAORDINARY UNSPECIFIABLE SERVICES – REQUIREMENTS

Documented effort to secure at least 2 competitive quotes

Award made to firm/carrier whose proposal is most advantageous, price and other factors considered

Certification by purchasing agent/designated official declaring EUS (use DCA form attached to LFN 2002 AU-02)

- #1 Describe the nature of the work
- #2 Why it meets the EUS requirements: Permissible under *N.J.S.A. 40A:11-5(1)(m)* as an insurance contract
- #3 Why the services cannot reasonably be described by written specifications: Not applicable. See #2
- #4 Describe the informal solicitation of quotes: brokers contacted, prices and terms provided

EXTRAORDINARY UNSPECIFIABLE SERVICES – REQUEST FOR QUOTES - NON FAIR AND OPEN

Request for Quotes: Insurance Brokers

- Qualifications desired
- Scope of work/deliverables
 - Each plan option should identify assumptions relied upon
 - Reassess plan options and assumptions annually during term of contract
- Require Fee/Commission/Customary compensation
 - *N.J.S.A. 17:22A-44.1* Insurance Producer disclosure for health insurance
 - Compliance with “No Surprises Act”
- Disclosure of any conflicts of interest
- Contract duration
- Statutory requirements, forms and disclosures

NOTIFICATION OF COMMISSION OR OTHER FEES FROM BROKER FOR HEALTH INSURANCE

N.J.S.A.
17:22A-41.1

Dept. of
Banking and
Insurance
NJ Bulletin No.
2008-16

- Disclosure by broker to insurance purchaser:
 - Of any valuable consideration, including but not limited to commissions or service fees
 - Consideration must be disclosed even if amount cannot be calculated or estimated
 - Must be made at the time of proposal for insurance, but no later than the effective date of the contract
 - USE DOBI form

**DISCLOSURE OF A FINANCIAL INTEREST
IN THE SALE OF HEALTH INSURANCE POLICIES**

New Jersey law (N.J.S.A. 17:22A-41.1) requires disclosure of the compensation a licensed agent or broker (producer) receives from your purchase or renewal of health coverage. Compensation may be in the form of a commission, fee(s), or possibly other valuable consideration, or a combination of all three.

The per employee dollar amount(s) or percentage(s) of premium are in the table below. All amounts and/or percentages are additive. If something does not apply, it is marked "None" or "NA". If there is compensation, whether or not in addition to the compensation shown, whose amount cannot be determined, enter "CBD" (cannot be determined) on the appropriate line. Use the "Other" line for all other compensation, whether or not the amount is determinable.

	Agent/Producer	
	Percentage (%)	Amount in Dollars (\$) (per employee basis)
Commission of Issuing Agent		
Commission of General Agent		
Consultant Fee		
Brokerage Fee		
Other:		

PRODUCER INFORMATION

Agent Name: _____

General Agent Name: _____

CARRIER INFORMATION

Company Name: _____

Date

[_____
Agent/Producer Signature]¹

¹Carriers: omit this signature block if sending the disclosure form directly to the purchaser.

FEDERAL DISCLOSURE REQUIREMENT

“No Surprises” Act

Consolidated Appropriations
Act, 2021 Pub. L. No 116-260,
134 Stat. 1182 (2020)

- Federal law
- Effective January 1, 2022
- Requires carriers to disclose to enrollees any direct or indirect compensation to be paid to an agent or broker PRIOR to plan selection
- Disclosure must be included on enrollment documentation
- See Bulletin No. 21-14, New Jersey Department of Banking and Insurance



New

EXTRAORDINARY UNSPECIFIABLE SERVICES – REQUEST FOR QUOTES - NON FAIR AND OPEN

Request for Quotes: Insurance Carriers

- Obtain plan options from at least three insurance carriers
- Involve union representatives early in the process to account for collective bargaining agreement requirements
- Compliance with “No Surprises Act”
- Contract duration: consider short term with annual reevaluation
- Statutory requirements, forms and disclosures
- Ask broker for a comparison to SHBP
 - Make an “apples to apples” comparison of private plans v. SHBP

CH. 271 – NON FAIR AND OPEN FORMS

Use DCA's standard Chapter 271 disclosure template form

Include the contractor instruction section when provided to potential contractors.

Standard template form should be amended to account for the appropriate legislative districts and elected officials applicable to your contracting unit.

The completed form must be received from the contractor and on file at least 10 days prior to award of the contract. Resolutions of award should reflect that the disclosure has been received and is on file.

The standard template form can be found on the DLGS Pay to Play website

EUS REQUEST FOR QUOTES – NON FAIR AND OPEN STATUTORY REQUIREMENTS

Include in the RFP/RFQ	References
OSC Record Retention Language	<i>N.J.A.C. 17:44-2.2.; N.J.S.A. 52:15C-14(d)</i>
Mandatory EEO/AA language "Exhibit A"	<i>N.J.S.A. 10:5-31 et seq.; N.J.A.C. 17:27</i>
Anti-Discrimination Provisions	<i>N.J.S.A. 10:2-1</i>
Annual Political Contribution Disclosure	<i>N.J.S.A. 19:44A-20.27</i>
Broker contracts: Notification of commission or other fees broker will receive	<i>N.J.S.A. 17:22A-41.1</i>
No Surprises Act	Consolidated Appropriations Act, Pub. L. No 116-260 (2020)

EUS REQUEST FOR QUOTES – NON FAIR AND OPEN STATUTORY FORMS

Required Forms	References	When Forms Are Due
Ownership Disclosure Form	<i>N.J.S.A. 52:25-24.2</i>	With Quote Submission
Business Registration Certificate	<i>N.J.S.A. 52:32-44</i>	Prior to Contract Award
Disclosure of Investment Activities in Iran Certification	<i>N.J.S.A. 40A:11-2.1; N.J.S.A. 52:32-58</i>	Prior to Contract Award
Prohibited Activities in Russia-Belarus Certification	<i>N.J.S.A. 52:32-60.1</i>	Prior to Contract Award
Ch. 271 Compliance - Pay to Play	<i>N.J.S.A. 19:44A-20.26</i>	Not later than 10 days prior to entering into contract
EEO/AA Form AA-302 or Letter of Federal Approval or Certificate of Employee Information Report	<i>N.J.S.A. 10:5-32; N.J.A.C. 17:27-3.1; N.J.A.C. 17:27-4.2</i>	After Notice of Award, Prior to Signing Contract
Permissive Form		
Non-Collusion Affidavit		

EXTRAORDINARY UNSPECIFIABLE SERVICES

NON FAIR AND OPEN

Standard of award:

- Most advantageous to the local unit, price and other factors considered
- Document the evaluation process

Governing body resolution must state:

- Awarded pursuant to EUS with supporting reasons
- Remember this is not a professional services contract

Notice of award published in official newspaper - Must include:

- Nature of the contract
- Duration
- Description of the service
- Amount of the contract
- Where the contract can be inspected by the public

PAY TO PLAY: THE BASICS

LOCAL GOVERNMENTS – FAIR AND OPEN

Fair and Open Process *means, at a minimum*, the contract shall be:

- Publicly advertised in newspapers OR on the Internet website maintained by the public entity
- In sufficient time to give notice in advance of the contract
- Awarded under a process that provides for public solicitation of proposals or qualifications
- Awarded and disclosed under criteria established in writing prior to the solicitation of proposals or qualifications
- Publicly opened and announced when awarded.
- N.J.S.A. 19:44A-20.7

EUS & FAIR AND OPEN

Fair and Open & Other Statutory Requirements	References
Notice to Proposers	<i>N.J.S.A. 19:44A-20.7</i>
Include in the RFP/RFQ	
OSC Record Retention Language	<i>N.J.A.C. 17:44-2.2; N.J.S.A. 52:15C-14(d)</i>
Evaluation Criteria	<i>N.J.S.A. 19:44A-20.7</i>
Mandatory EEO/AA language "Exhibit A"	<i>N.J.S.A. 10:5-31 et seq.; N.J.A.C. 17:27</i>
Anti-Discrimination Provisions	<i>N.J.S.A. 10:2-1</i>
Annual Political Contribution Disclosure	<i>N.J.S.A. 19:44A-20.27</i>
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Standard of award:

- Most advantageous to the local unit, price and other factors considered
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Governing body resolution must state:

- Awarded pursuant to EUS with supporting reasons
- Remember this is not a professional services contract

Notice of award published in official newspaper - Must include:

- Nature of the contract
- Duration
- Description of the service
- Amount of the contract
- Where the contract can be inspected by the public

FAIR AND OPEN v. NON-FAIR AND OPEN

Fair and Open

- In order to have a Fair and Open process the Local Unit MUST:
 1. Issue a written determination that a contract has an anticipated value in excess of \$17,500
 2. Publicly advertise in newspapers or on the Internet website maintained by the public entity in sufficient time to give notice in advance of the contract
 3. Award under a process that provides for public solicitation of proposals or qualifications
 4. Award and disclose under criteria established in writing by the public entity prior to the solicitation of proposals or qualifications
 5. Publicly open and announce when awarded

Non-Fair and Open

- If the Local Unit did NOT use a Fair and Open process then they MUST (before award):
 1. Issue a written determination that a contract has an anticipated value in excess of \$17,500
 2. Receive the Chapter 271 disclosure form certifying that no reportable political contribution was made during the previous year
 3. Include in the contract a requirement prohibiting reportable political contributions from being made during the term of the contract
 4. QPA or other designated official must file a certificate with the governing body describing why the contract satisfies EUS (for insurance need only state that insurance contracts satisfy EUS exception.)
 5. Have the governing body pass a resolution awarding the contract

BEST PRACTICES FOR HEALTH INSURANCE PROCUREMENTS

- Solicit proposals for broker services by following Fair and Open or Competitive Contracting to enhance transparency and competition.
- When soliciting broker services, compare a flat fee to percentage based commissions to minimize conflicts of interest and make sure any commission is disclosed before the insurance coverage is selected.
- Require a disclosure of any conflicts of interest from your broker.
- If using a broker to solicit insurance quotes, stay involved in every step of the process.
- Ask your broker to include a comparison to the SHBP and quotes from at least 3 other insurance carriers.
- Ask questions to ensure that the plan and rate comparisons are “apples to apples” and make sure you understand the assumptions applied when making comparisons.
- When considering plan options, involve union representation as early as possible to account for ‘equal or better’ collective bargaining agreement requirements.

OSC THRESHOLDS AND SUBMISSION REQUIREMENTS: SUBMISSION RESOURCES AND FORMS

OSC Homepage: <https://nj.gov/comptroller/>

Pre-advertisement Notification for contracts valued at \$12.5 million or more (Forms B1 and B2)

Form B1: Due At least 30 days before advertisement
Form B2: Due Within 20 days after award

Pre-Advertisement Notification (Form B1)

https://www.nj.gov/comptroller/about/work/procurement/docs/osc_compliance_form_12_5b1_pre.pdf

Post-Award Notification (Form B2)

https://www.nj.gov/comptroller/about/work/procurement/docs/osc_compliance_form_12_5b2_post.pdf

Post-award Notification for contracts valued at \$2.5 million or more but less than \$12.5 million (Form A)

Due Within 20 business days after award

https://www.nj.gov/comptroller/about/work/procurement/docs/osc_compliance_forma_2_5m.pdf

Post-award Notification for emergency contracts valued at \$2.5 million or more (Form D)

Due: Within 30 business days of award

https://www.nj.gov/comptroller/about/work/procurement/docs/osc_compliance_formd_emergency.pdf



QUESTIONS?



REPORTING FRAUD, WASTE, AND ABUSE

If you have any information about the fraud, waste, or abuse contact the New Jersey Office of the State Comptroller through:

- Online complaint form found at **www.nj.gov/comptroller**
- By email at **ComptrollerTips@osc.nj.gov**
- By calling the toll-free hotline, **1-855-OSC-TIPS**



KEEP IN TOUCH



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