

Joint Session: Public Contracts Law and Regulation Update

101st Annual League of Municipalities Conference



Philip James Degnan, State Comptroller

November 17, 2016



Who We Are

- The Office of the State Comptroller was established by statute, *N.J.S.A. 52:15C-1 et seq.*, in 2007
 - An independent office established in the Executive branch of State government
 - Created to bring greater efficiency and transparency to the operation of all levels of New Jersey government
- OSC's Mission
 - Promote the integrity and transparency of government operations by reviewing government contracts and conducting independent audits of government entities and programs throughout New Jersey
 - Investigate mismanagement of public funds
 - Improve the efficiency and integrity of the Medicaid Program



What We Do

The Office of the State Comptroller has four divisions

- **Audit**
 - Conducts audits and reviews the performance of the Executive branch of State government, public institutions of higher education, independent State authorities, local governments and school districts
- **Investigations**
 - Detects and uncovers misconduct, abuse and waste at all levels of New Jersey government by investigating the mismanagement of public funds and the performance of government officers, employees and programs



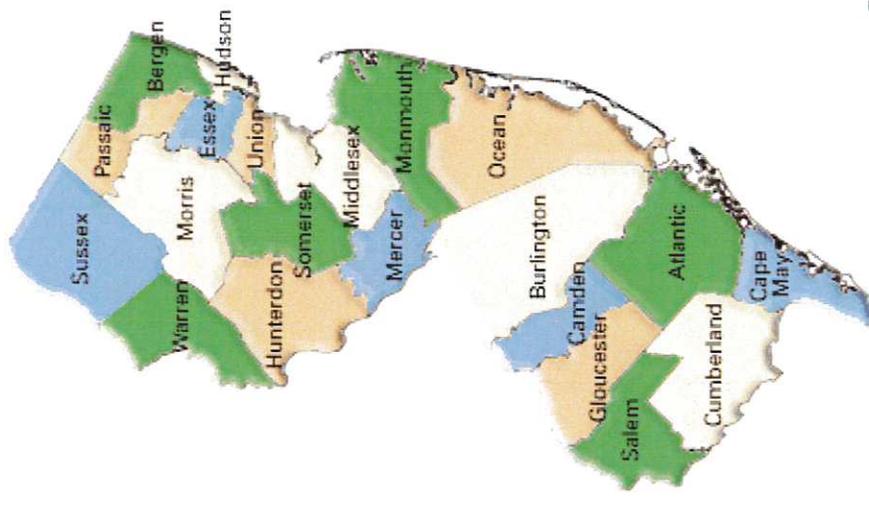
What We Do (continued)

- **Medicaid Fraud**
 - Detects, prevents and investigates waste, fraud and abuse in the Medicaid, New Jersey FamilyCare and Charity Care programs
 - Recovers improperly expended Medicaid funds
 - Reviews the quality of care given to Medicaid recipients
 - Excludes or terminates providers from the Medicaid program when necessary
- **Procurement**
 - Reviews the legality of public contracts of municipalities, school districts, counties, State agencies, State authorities, local authorities and public institutions of higher education

Entities Subject to OSC Contract Oversight

- 616 School Districts
- 565 Municipal Governments
- 216 Local authorities and commissions
- 186 Fire Districts
- 85 Housing Authorities
- 43 State Authorities
- 31 State Departments and other agencies
- 33 Urban Enterprise Zones
- 31 Public Colleges and Universities
- 21 County Governments
- 21 County Tax Boards
- 19 County Park Commissions
- 18 Joint Insurance Fund Commissions
- 17 Workforce Investments Boards

Total: Over 1,900 Public Entities



OSC's Procurement Division

- OSC's Procurement Division has statutory jurisdiction to review and monitor the process of soliciting proposals for and awarding contracts valued at \$2 million or more. N.J.S.A. 52:15C-10
- OSC contract review includes all contracts:
 - Invitations to Bid, Requests for Proposals, Requests for Qualifications
 - Leases, land sales and concession agreements
 - Any other agreement that meets the OSC review threshold
- OSC does not review
 - Collective bargaining agreements
 - certain redevelopment agreements



Procurement Division Review

- Examples of typical reviews include:
 - Construction bids
 - Roads and bridges
 - Professional Services
 - Engineering
 - Legal
 - Insurance
 - Brokerage consulting
 - Coverage
 - Inmate Medical Services
 - Goods
 - Purchase of rock salt





Notice Requirement

- Pursuant to N.J.S.A. 52:15C-10, all government units are required to provide notice to OSC as follows:
 - Pre-Advertisement review required for contracts greater than \$10 million at least 30 days prior to advertisement
 - Includes contract amendments valued at \$10 million or greater
 - Post-Award review required for contracts greater than \$2 million no later than 20 business days after award
 - Includes contract amendments valued at \$2 million or greater
 - Post-Award review required for “emergency” contracts greater than \$2 million no later than 30 business days after award



Valuing a Contract for OSC Review

- What will the contracting unit spend?
 - For construction contracts, estimate the costs of the engineering and/or construction work
- If the exact value of the contract is uncertain, estimate the contract value in good faith using professional judgment as follows:
 - Base the value on prior procurements for similar goods and services
 - Estimate a price increase or decrease to reflect market changes
- For multi-year contracts, multiply the length of the contract by the yearly contract amount
 - Do not include optional contract extensions
- See N.J.A.C. 17:44-3.2



Valuing a Contract for OSC Review

- What is the potential value of the contract to the vendor?
 - "**Concession**" means the granting of a license or right to act for or on behalf of the contracting unit, or to provide a service requiring the approval or endorsement of the contracting unit, and which may or may not involve a payment or exchange, or provision of services by or to the contracting unit. N.J.S.A. 40A:11-2(37)
 - The total estimated value of a concession shall include all revenue that may be expected to be received by the concessionaire, including the value of all payments, goods and services received by the contracting entity. N.J.A.C. 5:34-9.4
- **Examples:**
 - Agreement for the operation, maintenance and management of a water utility authority;
 - Advertisement/Naming rights on a public building



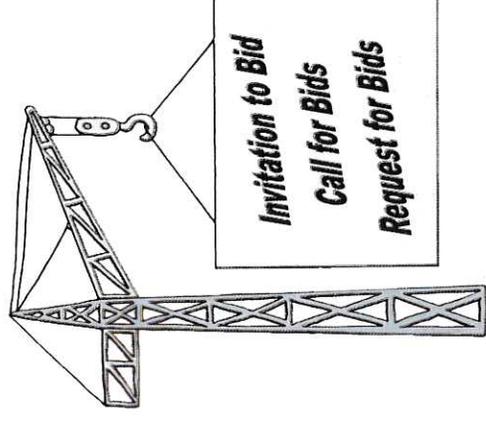
OSC Submission Process

- OSC Notification Forms are available on website www.osc.nj.gov
- Electronic submission is preferred
- Email completed appropriate OSC Notification Form and required documents to contracts@osc.nj.gov
- A Procurement Staff Attorney will be assigned to review your procurement or contract

Pre-Advertisement Review

Pre-Advertisement review required for contracts valued at more than \$10 million

- OSC has 30 days to review contracts before they can be advertised
- OSC's review period should be considered in bid planning
- Submit the entire bid package, including:
 - Invitation to Bid or Request for Proposal
 - Specifications
 - Scope of work
 - Bidder forms
- Do not send plans or drawings
- OSC may request additional information and/or documentation





Pre-Advertisement Review

For any “2 step” procurement process which involves:

- A Request for Qualifications to create a pool of bidders;
- Followed by a Request for Proposals or other solicitation issued to the pool of bidders selected;
- Contracting entities must submit both the RFQ and RFP to OSC for review for approval before advertisement of the RFQ for contracts valued at \$10 million or more



Pre-Advertisement Review

- Staff attorneys look for compliance with applicable laws and ensure:
 - Proper statutory processes are being followed
 - Bidder instructions are clear
 - Legal requirements are accurate
 - Proprietary items contained in the specifications are justified
 - The scope of the work is clear and concise
 - The scope of work does not show favoritism toward one bidder over another
 - Evaluation criteria (if applicable) are fair and reasonable
- Reviewing attorney sends written comments and interacts with the contracting entity
- Reviewing attorney provides approval as to whether contracting entity may proceed with advertisement or contract

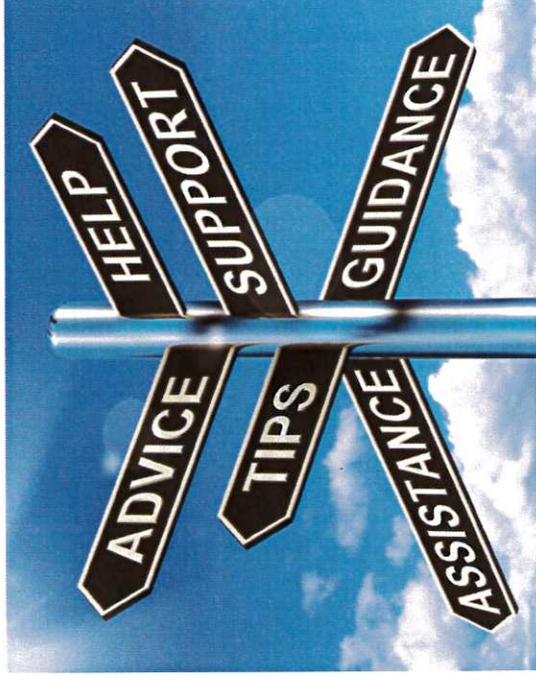


Post-Award Review

- Post-Award review required for contracts that are:
 - More than \$2 million
 - Emergency contracts greater than \$2 million
- Contracting entities may be asked to submit:
 - Final Request for Proposal
 - Successful bidder's proposal
 - Bid tabulation or evaluation report
 - Resolution of governing body awarding the contract
 - Documents related to any bid protest and resulting decisional documents
 - For waivers from bidding/competition, identify the statutory exception and justification (e.g. – sole source or public exigency)

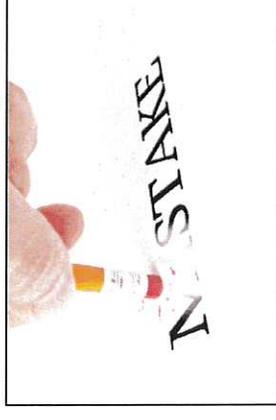
Purpose of Post-Award Review

- Ensure that bidding process was legally compliant
- Review evaluation process
- Ensure that the correct award process was followed
- Provide guidance for future procurements



Common Mistakes

- Failure to include OSC document retention language
- Misstatement of the:
 - Business Registration Certificate requirement
 - Public Works Contractor Registration Act requirement
- Incomplete Statement of Corporate Ownership
- Improper use of brand name items
- Improper use of the extraordinary
unspecifiable use exception (EUS)





Regulatory Compliance

Include OSC document retention language in all contracts:

- Contractor/Vendor shall maintain all documentation for a period of five years from the date of final payment. Such records shall be made available to the New Jersey Office of the State Comptroller upon request.
- N.J.A.C. 17:44-2.2



Statutory Compliance:

Business Registration Certificate Requirement

- 2009 amendment removed the mandatory requirements that businesses submit their Business Registration Certificate with their bid and that contractors must provide written notice to subcontractors of the Business Registration Certificate requirement
- As amended, *N.J.S.A. 52:32-44 (b)* states: A contractor shall provide the contracting agency with the business registration of the contractor and that of any named subcontractor ***prior to the time a contract, purchase order, or other contracting document is awarded or authorized***



Statutory Compliance:

Business Registration Certificate Requirement

- The law **does not** require bidders to have a business registration certificate at the time of bid
- No longer have to reject a bid for failure to submit the Business Registration Certificate

Best Practice: Regularly update advertisement, instructions to bidders and bidder's checklist



Statutory Compliance:

Public Works Contractor Registration Act (N.J.S.A. 34:11-56.48 et seq.)

- Prohibits contractors and subcontractors who are not registered pursuant to the Act from bidding on – or being listed in – a bid proposal for any contract for public work
- Contractors are not required to include proof of registration with their bid
- Many bid instructions incorrectly require the submission of the Public Works Registration Certificate
 - Bids should not be rejected for failure to include the registration certificate
 - Proper bidder registration can be checked on the Department of Labor and Workforce Development website
- **Best Practice:** Regularly update advertisement, instructions to bidders and bidder's checklist



Statement of Corporate Ownership

- N.J.S.A. 52:25-24.2 was amended as of August 31, 2016 by P.L. 2016, c. 43.
 - Adds disclosure requirement for owners of limited liability companies
 - For publicly traded companies, if there is an entity or individual that holds a 10% or greater beneficial interest, disclosure may be made using the last annual SEC filing



Statutory Compliance:

Statement of Corporate Ownership (N.J.S.A. 52:25-24.2)

Prior to the receipt of a bid or accompanying a bid, all bidders must:

- Complete a statement identifying the names and addresses of all stockholders in the corporation, partnership or limited liability company who own at least 10% of its stock, of any class or of all individual partners in the partnership who own at least a 10% interest
- If one or more such stockholder, partner or member is a corporation, partnership or limited liability company, the stockholders, individual partners or members owning at least 10 percent interest in that entity, must also be listed
- The disclosure must be continued until the names and addresses of every non-corporate stockholder, individual partner and member exceeding the 10% ownership criteria established in this act, have been listed



Statutory Compliance:

Statement of Corporate Ownership

Owner #1

John Smith
27 Broad Street
Bloomfield, NJ 07003
51% Ownership

Owner #2

Acme Consultants, Inc.
72 Broad Street
Bloomfield, NJ 07003
49% Ownership

- In post-award reviews, OSC often finds the disclosure stops at the first level of ownership
- In this example, Owner #2 must disclose the owners/stockholders of Acme Consultants, Inc.
- The ownership disclosure must continue for each level of ownership until individual names are listed or there is no ownership interest that exceeds 10%

Statutory Compliance:

Brand Names and Proprietary Items



- Specifications must be drafted in a manner that encourages free, open and competitive bidding under the Local Public Contracts Law and Public School Contracts Law
 - Specifications must always indicate “brand name or equivalent” items
- Suggested language to include in bid specifications:
 - Pursuant to N.J.A.C. 5:34-9.2(c), “when a specification uses ‘brand name or equivalent’, the listed brand name shall serve as a reference or point of comparison for the functional or operational characteristic desired for the good or service being requested. Where a bidder submits an equivalent, it shall be the responsibility of the bidder to document the equivalence claim. Failure to submit such documentation shall be grounds for rejection of the claim of equivalence.”

Regulatory Compliance:

Brand Names and Proprietary Items

- If the bid or contract requires proprietary items, then:
 - Prior to advertising, the purchasing agent must certify in writing why the goods or services are of a specialized nature and necessary
 - Resolution awarding the contract shall also describe why the goods or services are of a specialized nature and necessary
 - See *N.J.A.C. 5:34-9.1*
- If your bid/contract requires proprietary items, provide above documentation to OSC when submitting a contract for review.





Statutory Compliance:

Exception to advertisement Insurance Brokers and Insurance

N.J.S.A. 40A:11-5(m) and *18A:18A-5(a)(2)* states:

Any contract that exceeds the bid threshold may be negotiated and awarded by the governing body without public advertising for bids and bidding therefor and shall be awarded by resolution of the governing body if:

- The subject matter thereof consists of insurance, including the purchase of insurance coverage and consultant services, which exception shall be in accordance with the requirements for extraordinary unspecifiable services (EUS)



Regulatory Compliance:

Insurance Brokers and Insurance (*N.J.A.C. 5:34-2.3*)

- The EUS exception requires the solicitation of competitive quotes
- The resolution awarding the contract for insurance brokers and insurance must state that the law permits insurance to be considered an EUS
- Publication of a notice of the contract in the official newspaper stating the nature, duration, type of service and amount of the contract
- Contract should be on file and available for public inspection
- See Local Finance Notice AU-2002-2 for further guidance

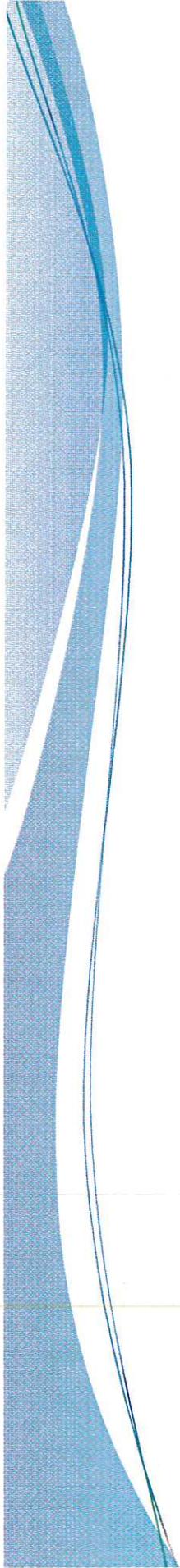


Regulatory Compliance:

Extraordinary Unspecifiable Services

Exception is construed narrowly in favor of open competitive bidding.

- Must demonstrate compliance with *N.J.A.C. 5:34-2.1 et seq.*
- Cannot simply assert that service is a sole source
- The need for expertise, extensive training and proven reputation must be critical and essential
- Presumption that services are not EUS if services have been previously bid or characterized as being of an on-going nature
- The services cannot reasonably be described by written specifications
- If estimated cost exceeds 15 percent of bid threshold, must get quotes whenever practicable
- Government official must file a certification
 - Clearly describing the nature of the work
 - Asserting it is not reasonably possible to draft specifications
 - Describing informal quotation process
 - Describing why the contract complies with regulations
- Governing body must place a notice of the contract in its official newspaper



Extraordinary Unspecifiable Services

Union County Alliance, Investigative Report, January 22, 2015

- Union County relied upon EUS exception in contracting with Union County Alliance to produce a newsletter publicizing programs, services and accomplishments of the County and host two conferences
- The certification in support of the EUS services did not sufficiently detail the services as required by *N.J.A.C. 5:34-2.3*
- The services provided by Union County Alliance did not appear to require any specialized knowledge
- OSC concluded that services could have been competitively bid

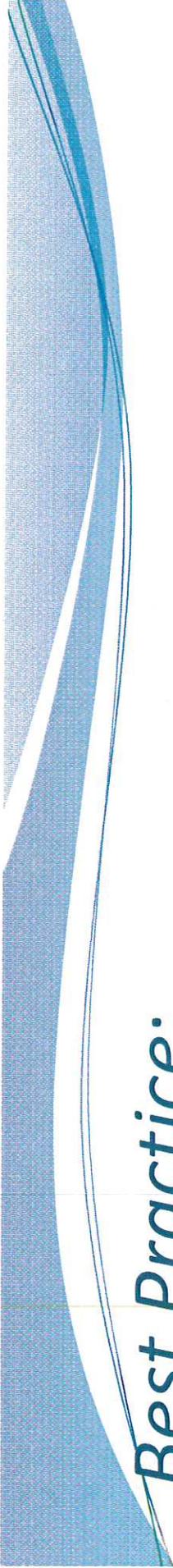
Best practice: If it is possible to write specifications, then use of the exception is not appropriate. Explore using Competitive Contracting



Best Practice:

Engaging and Managing Legal Counsel

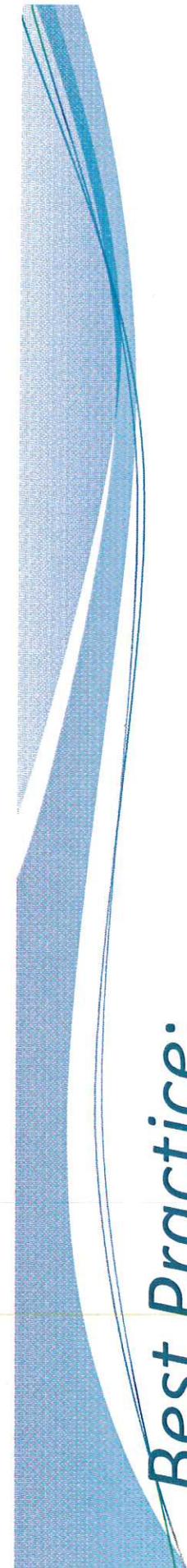
- N.J.S.A. 40A:11-5(1)(a) authorizes the negotiation and award of professional services contracts without public advertising as long as the local government :
 - passes a resolution awarding the contract with supporting reasons
 - Publishes a notice in its official newspaper stating the nature, duration and amount of the contract
 - Limits the contract to 12 months
- If contract exceeds \$17,500, must comply with Pay-to-Play (N.J.S.A. 19:44A-20.4 & 19:44A-20.5)



Best Practice:

Engaging and Managing Legal Counsel

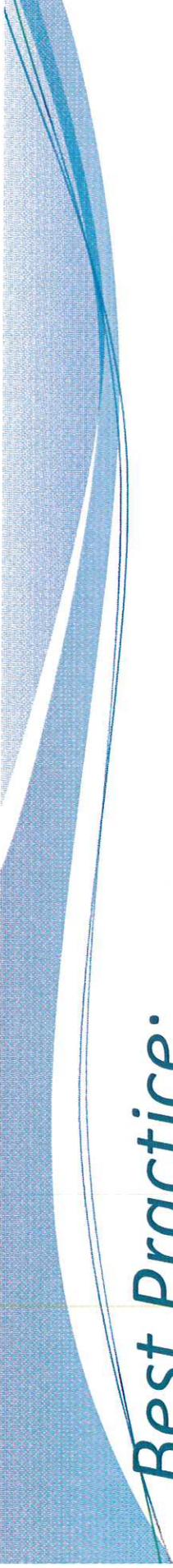
- Engage in some type of competition:
 - Fair and Open solicitation
 - as defined in N.J.S.A. 19:44A-20.7
 - RFP pursuant to Competitive Contracting
 - N.J.S.A. 40A:11-4.1 et seq.
 - Competition promotes lower costs
 - Transparency promotes confidence in the contracting process



Best Practice:

Engaging and Managing Legal Counsel

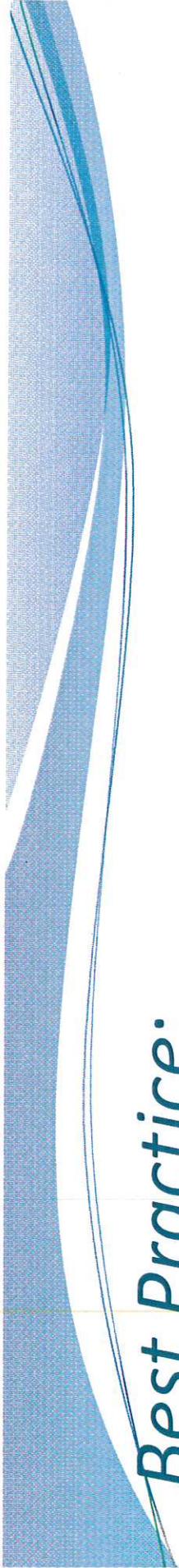
- Step 1: Develop Internal Policies and Procedures for procuring legal counsel
 - Procurement of legal services:
 - Identify staff responsible for development of RFQ
 - Evaluative criteria that will be used and scoring
 - Develop clearly defined job descriptions and duties for in-house counsel
 - Determine responsibility for delegation of work to outside counsel
 - Establish a process for staff to request legal advice
 - Periodically review internal policy and procedures



Best Practice:

Engaging and Managing Legal Counsel

- Step 2: Conduct a competitive procurement
 - Ensure the pool of potential bidders is as expansive as possible through advertisement in newspapers, websites and other available media
 - Draft clear and unambiguous scope of work
 - Evaluate proposals based on pre-determined, merit-based criteria and include in the RFP or RFQ
 - Establish a qualified evaluation committee
 - Use a scoring process understandable to evaluators and vendors and retain documentation related to the evaluation



Best Practice:

Engaging and Managing Legal Counsel

- Step 3: Use Formal Written Contracts with Legal Counsel
 - Services/retainer agreement should mirror scope of work included in the RFP or RFQ
 - Contract should address the following:
 - Billing rate for attorneys
 - Is travel time billable?
 - Administrative and secretarial services should not be billed at an hourly rate
 - Staffing expectations



Best Practice:

Engaging and Managing Legal Counsel

- Step 4: Managing Legal Counsel Contracts
 - Designate one employee to have primary responsibility for reviewing legal bills
 - Periodically review legal counsel arrangements to determine whether cost savings can be achieved
 - Monitor spending for legal services if a cap has been set for legal costs

See OSC report: *An Analysis of Legal Fees Paid by New Jersey Local Governments*, June 25, 2015



Trustee of Public Funds

- Purchasing Agents must maintain independence
 - Act in the public interest
 - Local Government Ethics Law (*N.J.S.A. 40A:9-22.1 et seq.*)
 - Do not take gifts from vendors or potential vendors
 - Avoid socializing with vendors or potential vendors
- Maintain confidentiality of bids and requests for proposals before issuance
- Do not allow a potential bidder to prepare specifications
- All bidders should be treated fairly and kept on equal footing
- Establish systems for contract management and oversight



Promote Transparency

- Limit Post-Award contract amendments
 - Scope of work and specifications should be drafted at the onset to limit post-award amendments
 - Tasks or work outside of the initial scope of work may be deemed “no-bid” contracts
- Competitive Contracting
 - Evaluation criteria should be tailored to scope of work and stated clearly in the RFP
- Perform conflicts of interest check for members of evaluation committee
 - Maintain documentation on file

Combating Waste, Fraud & Abuse

- Purchasing agents are in a unique position to spot
 - Bid-rigging schemes, such as rotating bids
 - Price-fixing
 - Vendor agreements regarding territories or market allocation

If you see something, say something: 1 (855) OSC TIPS



Combating Fraud, Waste & Abuse

- Assist your departments in planning for procurements
 - Hurried bids often lead to waste
 - Emergency contracts must meet exception requirements
 - Encourage and assist in market research
- Engage experts/consultants as necessary
- Consult with legal counsel
- Regularly update bid templates



How to Contact OSC

- Contracts should be submitted electronically to contracts@osc.nj.gov
- For more information, go to <http://www.nj.gov/comptroller/>

