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

LFN 2012-10

May 14, 2012

Local Finance Notice

Chris Christie	Kim Guadagno	Richard E. Constable, III	Thomas H. Neff
Governor	*Lt. Governor*	*Acting Commissioner*	*Director*

Contact Information

Director's Office
V. 609.292.6613
F. 609.292.9073

Local Government Research
V. 609.292.6110
F. 609.292.9073

Financial Regulation and Assistance
V. 609.292.4806
F. 609.984.7388

Local Finance Board
V. 609.292.0479
F. 609.633.6243

Local Management Services
V. 609.292.7842
F. 609.633.6243

Authority Regulation
V. 609.984.0132
F. 609.984.7388

Mail and Delivery
101 South Broad St.
PO Box 803
Trenton, New Jersey
08625-0803
Web: www.nj.gov/dca/lgs
E-mail: dlgs@dca.state.nj.us

Distribution
Municipal and Freeholder Clerks
Municipal and County Chief Financial Officers
Authority and Fire District Boards of Commissioners

Using National Cooperative Contracts: Application of P.L. 2011, c.139

Introduction

The recently passed P.L. 2011, c.139 (the "Law" or "Chapter 139") allows local contracting units to utilize national cooperative contracts as a method of procurement. The Division of Local Government Services has consulted with the Division of Law, the Division of Purchase and Property (DPP), and the Office of the State Comptroller in reviewing the Law and its relationship to existing procurement statutes and regulations. This Local Finance Notice provides guidance to contracting units seeking to implement the new national cooperative contracting option.

While the guidance in this Notice has specific application to contracting units subject to the Local Public Contracts Law ("LPCL") and boards of education under the Public School Contracts Law ("PSCL"), it has general application to all local government contracting units. Agencies should review this guidance in context of the new Law and their own procurement laws and regulations to ensure consistency in application.

Contracting units should carefully review this guidance, state laws affecting the agency's contracting authority, and relevant case law affecting the use of national cooperatives. Utilizing national cooperative contracting, in certain circumstances, may make the procurement process more efficient and provide cost savings. Contracting units are advised; however, to not only review this guidance, but also be mindful of New Jersey laws affecting the agency's contracting authority and relevant case law affecting the use of national cooperatives.

This notice covers the following subjects:

A. General Statutory Authority
B. Contracting Unit Policy Considerations
C. Types of National Cooperatives
D. Legal Interpretations Concerning National Cooperative Contracts
E. Legal Requirements to Use a National Cooperative Contract
F. Limitations, Fiscal, and Reporting Requirements
G. Appendix
   A. Model "Notice of Intent to Award Contract under a National Cooperative Purchasing Agreement"
   B. Purchasing Agent's Guide to Using National Cooperative Contracts

A. General Statutory Authority

Chapter 139 added the following language to subsection (b) of N.J.S.A. 52:34-6.2:

> (3) Notwithstanding any other law to the contrary, any contracting unit authorized to purchase goods, or to contract for services, may make purchases and contract for services through the use of a nationally-recognized and accepted cooperative purchasing agreement that has been developed utilizing a competitive bidding process by another contracting unit within the State of New Jersey, or within any other state, when available. Prior to making purchases or contracting for services, the contracting unit shall determine that the use of the cooperative purchasing agreement shall result in cost savings after all factors, including charges for service, material, and delivery, have been considered.
>
> For purposes of this paragraph, "contracting unit" means any county, municipality, special district, school district, fire district or any board, commission, committee, authority or agency, which is not a State board, commission, committee, authority or agency, and which has administrative jurisdiction over any district, included or operating in whole or in part, within the territorial boundaries of any county or municipality which exercises functions which are appropriate for the exercise by one or more units of local government, and which has statutory power to make purchases and enter into contracts awarded by a contracting agent for the provision or performance of goods or services.

The second section makes clear that the Law applies to a wide range of local contracting units. The first section provides the operative language that these agencies must apply to their circumstances.

In context of the LPCL and PSCL, the provisions of this notice apply when the aggregate value of the goods or services (see N.J.A.C. 5:34-8.2) exceeds the contracting unit's bid threshold. When the aggregated value of goods and services is below the contracting unit's bid threshold, a national cooperative contract can be used subject to a contracting unit's political contribution disclosure (pay-to-play) requirements when soliciting quotations. Depending on the circumstances, an award under a national cooperative contract may occur without governing body approval.

B. Contracting Unit Policy Considerations

1) Local officials continue to have responsibility to choose vendors in an open and transparent manner to ensure public confidence in the integrity of government spending.

2) Contracting officials should consider that procurement decisions often try to balance a low price (economy) and an efficient and appropriate procurement process. If a national cooperative contract is chosen, the calculation of cost savings must be documented.

3) When using online ordering systems, local officials must put in place appropriate internal controls to ensure quote and bid aggregation thresholds are maintained, encumbrances are established, purchases are documented, and that an audit trail exists.

4) Using a national cooperative contract before an existing contract has expired could constitute a breach of contract, depending on contract terms.

C. Types of National Cooperatives

There are generally two different types of organizations ("national cooperatives") that award "nationally-recognized and accepted cooperative purchasing agreements" ("national cooperative contracts").

The first is an organization (profit or not-for-profit) that coordinates and aggregates contracts from different state and local governments and promotes their use. Such organizations often include a "marketing fee" built into the bid price, which is used to support their marketing efforts and/or provide revenue to the public agency issuing the contract. These types of national cooperatives often have websites enabling contracting units to contact vendors who have contracts, obtain contract terms and conditions, and instructions on joining the organization.

The second type of national cooperative is a state, regional, or single government agency that awards contracts for its own use and is authorized under its own laws to extend those contracts to other government agencies. This is similar to the N.J. Division of Purchase and Property's Cooperative Purchasing Program for New Jersey contracting units. These agencies may also charge a marketing or service fee and have a website, though membership is not usually required.

D. Legal Interpretations Concerning National Cooperative Contracts

Consider the following elements in making decisions to use a national cooperative contract.

1) **General interpretation:** The use of the term "notwithstanding any other law to the contrary" in this statute means that public bidding is not required when using a national cooperative contract. However, national cooperative contracts are still subject to procurement laws and rules that apply to all other contracts awarded by a New Jersey contracting unit.

For example, like all other contracts of a local unit or board of education, governing body approval is required when the value of the contract exceeds the agency's bid threshold. Internal control practices, along with other requirements such as affirmative action compliance, submission of a business registration certificate, statement of corporate ownership, and other routine submission and compliance requirements are not eliminated under the Law and national contractors are obliged to meet these requirements.

Please note that contracting units under the LPCL and PSCL **do not** have authority to negotiate terms and conditions of national cooperative contracts.

2) **National cooperative contract standards:** The following three requirements make a contract part of a national cooperative:

   a. The national cooperative contract must have been awarded through a "competitive bidding process" that complies with the laws covering the issuing entity. In this context, a

"competitive bidding process" requires open competition, or competition among those qualified or pre-qualified, submission of bids, and awarded pursuant to a "lowest responsible", "most advantageous to the public entity, price and other factors considered", or other similar standard employed by a public entity. This excludes contract awards based on unadvertised, "invitation only," negotiated, local preference, or sole source procurement practices.

b. The contract being awarded pursuant to the national cooperative model must have been awarded by a contracting unit as defined in c. 139, and cannot have been awarded by a non-profit or private organization, even if a member of the cooperative. Stated differently, Chapter 139 only permits contracting units to access national cooperative contracts that were solicited by another "contracting unit" as defined by the statute.

c. The original bid must have been advertised as a national cooperative contract (or a regional contract that includes New Jersey in its region) – not as a strictly local contract that is made "national" or "regional" after the receipt of bids. This is required so that vendors that bid on these contracts know the scope of government agencies outside of the issuing agency that could potentially use the contract. Such information can affect pricing and the range of bidders.

E. Legal Requirements to Use a National Cooperative Contract

Depending on the source of the contract (a national organization or a state government), the following New Jersey legal requirements must be met by contracting units planning to use a national contract.

1) **Documentation requirements:** The contracting unit must verify that vendors on a national cooperative contract comply with applicable New Jersey procurement documentation requirements. For example, vendors will need to comply with the following New Jersey laws by submitting the required forms to the New Jersey contracting unit as if the contract was originally awarded by that contracting unit:

   i. New Jersey Business Registration Certificate for the contractor and any sub-contractors (i.e., copy of certificate)

   ii. Statement of Corporate Ownership (an original form prepared for the contracting agency awarding the contract)

   iii. Public Contract EEO Compliance (Employee Information Report form or proof of participation in a federally approved affirmative action program)

   iv. A non-collusion affidavit (only if required by a local unit)

   Purchasing agents should review national cooperative procurements to ensure compliance with any other laws that may apply. Electronic copies are acceptable for forms not requiring an original signature.

"Cost-savings" determination: The Law requires that a contracting unit can use national cooperatives only when the contracting unit determines "that the use of the cooperative purchasing agreement shall result in cost savings after all factors, including charges for service, material, and delivery, have been considered." Considering a Division of Purchase and Property procurement, which applies a similar standard for cooperative contract participation (most cost-effective), a court has agreed that the contracting unit need not do an advertised procurement, in order to compare the prices obtained with the cooperative prices. Nonetheless, the statute still requires "cost savings" be demonstrated in some fashion. Suggested methods of demonstrating cost-savings include.

i. Comparing current State contract pricing, available to other government entities, to that of the proposed national cooperative.
ii. Comparing pricing for comparable goods or services under the contracting unit's current contracts or contracts available to it (i.e., New Jersey government based cooperative purchasing programs) to that of the proposed national cooperative..
iii. Comparing recently procured comparable contracts entered by other public entities to that of the proposed national cooperative.

Other factors that should be considered as part of the analysis of whether there is a cost-savings.

iv. The ability to avoid the cost and time of a separate procurement
v. Lower minimum purchase requirements at a lower price that allows for the public entity to purchase the needed quantities and avoid storage costs.
vi. Additional costs which have been factored in before contract award, such as:
    a. Administrative cost factors required to participate in the cooperative agreement
    b. Shipping costs, if any
    c. Vendor rebates

The contracting unit is ultimately responsible for developing its own procedures for implementing and documenting the due diligence necessary to reach a cost savings determination that survives legal scrutiny. The documentation, which would be reviewed as part of an audit, and which is subject to disclosure under the Open Public Records Act, should be kept on file as part of the award package. Whatever factors the contracting unit uses in determining the cost effectiveness of a national contract, the court cases referred to below in Subsection 4 strongly suggest that documentation of the cost saving determination is a necessary and vital prerequisite to a contracting unit's award of a national cooperative contract under Chapter 139.

Before using a national cooperative contract, the contracting unit should first check with the Division of Purchase and Property to determine if the contract was awarded as a State contract and is open to use by local governments by cooperative partners. In such a situation, the contracting unit is not making an award under Chapter 139.

1) **Political contribution disclosure:** National cooperative contracts are also subject to New Jersey's Pay-to-Play laws. New Jersey contracting units have different rules to apply as follows:

   a) Agencies subject to the Local Public Contracts Law (municipalities, counties, local authorities, etc.) are subject to N.J.S.A. 19:44A-20.4 and 20.5 (pay-to-play laws). These laws require all contracts (over $17,500) to be entered into through a fair and open process, or otherwise be subject to contribution disclosure rules. In this case, the contracting unit awarding the contract must comply with these laws. The contracting unit using the contract must verify that the "competitive bidding process" used by the issuing agency (see D-2 above) met the fair and open definition of N.J.S.A. 19:44A-20.7 (below, formatted for clarity):

      "Fair and open process" means, at a minimum, that the contract shall be:

      i. 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;

      ii. Awarded under a process that provides for public solicitation of proposals or qualifications;

      iii. Awarded and disclosed under criteria established in writing by the public entity prior to the solicitation of proposals or qualifications; and

      iv. Publicly opened and announced when awarded.

      The decision of a public entity as to what constitutes a fair and open process shall be final.

      In most cases this standard would be met by obtaining information from the issuing agency or national cooperative administrator about the bidding process that was used. If the bidding process did not meet the above definition of a "fair and open" process, the vendor would have to submit a Business Entity Disclosure Certificate (BED-C) and Political Contribution Disclosure (PCD) form to the contracting unit as required by pay-to-pay laws. Otherwise, a contract cannot be executed.

      Similarly, a contracting unit that desires to use a national contract for "window contracts," those contracts that are between $17,500 and the contracting unit's bid threshold, can treat a national contract like any other window contract procurement. A national contract can be used if it is found to be "most advantageous, price and other factor considered" and that the contract was awarded in a fair and open process by the issuing agency as described above.

   b) Boards of education under the Public School Contracts Law are not subject to the provisions of N.J.S.A. 19:44A-20.5; they must, however, follow the requirements of N.J.A.C. 6A:23A-6.3. Among other matters, this rule requires boards of education to comply with N.J.S.A. 19:44A-20.26. Also required in N.J.A.C. 6A:23A-6.3 is submission of political contribution lists by all contractors awarded contracts,

including those that are publicly bid. This will likely require the contractor to submit supplemental documents to the contracting unit. Without the documentation the contract cannot be executed. These requirements also apply to charter schools.

2) **Legal advertising requirements:** While not referenced in Chapter 139, recent case law involving the use of national contracts by the Division of Purchase and Property ("DPP") strongly suggests that a contracting unit must provide public notice to current contract holders and prospective bidders of their decision to utilize a national cooperative purchasing agreement that would otherwise require public bidding[1].

Given the similarities in the statute reviewed by the courts and Chapter 139, a contracting unit is advised to employ notice practices similar to those in the formal bidding process before passing a resolution to award a national cooperative contract above the contracting unit's bid threshold.

A contracting unit that employs notice practices different than provided herein should check with its attorney to ensure that notice practices utilized will survive judicial scrutiny. There is no need for such notices when a contracting unit joins or uses another authorized New Jersey cooperative contract.

The advised notice practices include the contracting unit providing notice of its intent to utilize a national cooperative contract with a sufficient time period for a vendor to offer alternative approaches. This notice should be treated like any other procurement legal notice and must be printed in an official newspaper (similar to advertisements to receive bids) with at least 10 days' notice before the next action is taken. The Division suggests a public notice template that contains the following elements (a sample is included as Appendix "A" of this Notice):

"Notice of Intent to Award a Contract under a National Cooperative Purchasing Agreement":

i. Name of the entity that awarded the contract
ii. Title of contract (description of the contract, i.e., office supplies)
iii. A web link to where the contract can be viewed online
iv. Length of contract (must be consistent with length of public contracts law regulating the contracting unit)
v. A statement naming the vendor to whom the contracting unit intends to award the contract
vi. A statement of the authority under which the contract is being awarded; generally this will be N.J.S.A. 52:34-6.2(b)(3)
vii. A notice of when the comment period ends

[1] In the Matter of Protest of Award of N.J. State Contract A71188 for Light Duty Automotive Parts, 422 N.J. Super. 275 (App. Div. 2011); In the Matter of Challenge of the State's Award of Contract to Staples Business Advantage, decided Aug. 25, 2011 (Appellate Division, unpublished; Docket # A-0476-09T2).

Once the notice is published, the contracting unit should also post the notice on its local website. At this stage, the contracting unit should have prepared the appropriate documentation to support the award (as described in section E of this Notice).

3) **Miscellaneous requirements:**

   a. National cooperative membership: Often the contracting unit may be required to join or become a member of the entity. If a contracting unit is using a national cooperative contract, it must follow the national organization's instructions for joining or becoming a member prior to using a contract awarded by the organization. Under all circumstances, a copy of that documentation should be kept on file for audit trail purposes.

      Depending on the degree of authority given to a contracting unit's purchasing agent, the governing body of said unit may need to approve membership in the national cooperative. Authorization to join a national cooperative can be included in the same resolution as that awarding a national cooperative contract.

   b. Time limits: The contracting unit should be aware that its agreements with vendors under a national cooperative contract will expire when the original issuing agency's contract expires. Unless the national organization or sponsoring contracting unit extends the contract, the contracting unit will have to rebid or otherwise make alternative arrangements for procuring the goods or services.

   c. Both the contractor and the contracting unit must meet the requirements of any other laws that may cover a given contract, including, for example, "Buy American" requirements and length-of- contract limitations.

   d. Pricing must be for a known period, and contracts with prepayments or down-payments are not permitted (unless otherwise permitted by New Jersey law).

   e. The contracting unit is responsible for determining what documents are needed for a given procurement.

F. Limitations, Fiscal, and Reporting Requirements

1) **Not applicable to public works/construction contracts:** The use of national cooperative contracts only applies to contracts for goods and services; it does not apply to "public works" or construction contracts.

   This prohibition may affect a contracting unit that plans to construct or install turf and synthetic turf fields, masonry, fencing, roofing, or indoor carpet flooring projects. There are several national cooperative contracts offering time and material contracts for work that may fall under New Jersey public works or construction laws. Before using such a time and material national contract, the contracting unit should review the project to be sure the work is not covered under New Jersey's public works contracting laws.

2) **Limits on GSA/FSS and other New Jersey agency contracts:** The Law does not apply to contracts issued by federal agencies, particularly General Services Administration/Federal Supply Schedule (GSA/FSS) contracts. These contracts continue to be subject to the Division of Purchase and Property authorizing them as State contracts, and cannot be used unless authorized by DPP. Note that vendors who are on GSA schedules may also have been awarded contracts through a national cooperative procurement in which case, Chapter 139 allows the contracting unit to participate in the national cooperative contract.

   Contracting units remain able to utilize only those State contracts that are authorized for local use by the Division of Purchase and Property pursuant to N.J.S.A. 52:16.1, and may use only those local cooperative contracts that are authorized by the Division of Local Government Services pursuant to N.J.A.C. 5:34-7.

3) **Vendor Payments:** Some national cooperative contracts require online payment as vendors may not accept purchase orders or vouchers. Currently, local government units that fall under the provisions of the Local Fiscal Affairs Law (N.J.S.A. 40A:5-16 and rules at N.J.A.C. 5:30-9A) can take advantage of using "Procurement Cards" (P-cards) as means of meeting statutory requirements that vendors certify in writing that their goods or services were delivered. Current rules limit the use of P-cards in online transactions to 15% of the contracting unit's bid threshold. The Local Finance Board is proposing amendments that will eliminate this limit. Please note that boards of education do not currently have authority to use P-cards.

   Until the P-Card transaction limit threshold is eliminated, the contracting unit must take into account its applicable laws and rules when choosing a national cooperative to ensure that vendor payments are made consistent with law.

4) **Reporting to the Office of the State Comptroller (OSC)**: N.J.S.A. 52:15C-10 requires contracts exceeding $2,000,000 but below $10,000,000 to be reported to the OSC within twenty (20) days after award, and that proposed contracts exceeding $10,000,000 must be approved by the OSC prior to awarding the contract. Contracts awarded under a national cooperative agreement are subject to these requirements. In addition, the OSC may audit or review contracts of any amount or type and may audit or review the records of the vendor as well.

   Consequently, the OSC has adopted a regulation, N.J.A.C. 17:44-2.2, that requires contracting units to insert the following language into all contracts: "The vendor shall maintain all documentation related to products, transactions or services under this contract 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." This language should be included in any national cooperative contract or purchase order issued to a national cooperative.

Appendix A

Model "Notice of Intent to Award Contract under a National Cooperative Purchasing Agreement"

Notice of Intent to Award Contract under a National Cooperative Purchasing Agreement - <name of contract>

The *<name of contracting unit>* intends to participate in the *<name of agency issuing contract>* contract for *<name/purpose and number (if applicable) of contract name>* to purchase *<goods or services being purchased>*.

Information regarding the contract may be found at the *<name of the location where information is available>* during regular business hours, as well as on the *<name of agency issuing contract>* website at: *<website link>*.

The *<name of contracting unit>* anticipates joining the *<name of agency issuing contract>* contract on *<date of award>*. The *<name of agency issuing contract>* contract term is *<provide start and end date>*.

Contract Period: *<contracting beginning and ending period>*

It is the intent of the *<title of contracting agent>* to make a contract award to *<name of vendor>* pursuant to the proposal submitted in response to the *<name of agency issuing contract> <type of award, i.e., Request for Proposals, Request for Bid(s) as appropriate>*.

The *<name of contracting unit>* is permitted to join national cooperative purchasing agreements under the authority of N.J.S.A. 52:34-6.2(b)(3).

Comment period ends *<date comment period ends>*.

Appendix B

Purchasing Agent's Guide to Using National Cooperative Contracts

Once a decision is reached to utilize a national cooperative contract where the amount is over the contracting unit's bid threshold, the purchasing agent should take the following steps: (Refer to Local Finance Notice 2012-10 for guidance and forms).

1. Conduct due diligence on a national contract to determine if the contract will result in cost savings after all factors, including charges for service, material and delivery, have been considered. Ensure there is documentation backing up this determination.

   Considerations to use a national contract can include:

   - Economy versus efficiency
   - Comparison of the national contract pricing to the current State contract price, to other national cooperative contracts, to comparable goods in other cooperatives, and any existing contracting unit contract
   - Savings of time in avoiding the time and cost of a separate procurement
   - Any record of satisfactory vendor performance
   - Administrative cost factors required to participate in the national cooperative agreement
   - Other factors such as rebates offered and unique needs to a particular situation

2. Review any national contract under consideration to determine if it meets New Jersey standards:

   - That the contract was based on a publicly advertised request for bids (or proposals) that stated that the contract would be made available to other government agencies that would have included New Jersey contracting units.
   - It was awarded under a competitive bidding process that met NJ "fair and open" criteria
   - Obtain the statutorily required forms or determine related compliance matters as necessary, including but not limited to:

     ✓ New Jersey Business Registration Certificate

     ✓ Statement of Corporate Ownership disclosure statement (Chapter 33)

     ✓ Proof of New Jersey Public Contract EEO compliance

     ✓ Compliance with Political Contribution Disclosure Laws (Pay-to-Play)

     ✓ Non-collusion Affidavit (if required)

     ✓ New Jersey's "Buy American" Law

     ✓ Americans with Disabilities requirements

- ✓ If the contract to be issued by the contracting unit is over $10 million, report the proposed award to the Office of the State Comptroller thirty days prior to the anticipated award date

3. Publish a "Notice of Intent to Award Contract under a National Cooperative Purchasing Agreement" in the official newspaper, on your official website, and on "Bulletin NJ" when available.

    - Allow a minimum of ten days between the advertisement and award for affected providers to protest the award.
    - Consider comments received prior to the award and act accordingly.

4. Prepare a contract and related documents (i.e., Certificate of Availability of Funds, etc.) for governing body action. Include the State Comptroller's language requiring the vendor to maintain records for five years in the contract document.

5. Execute contract pursuant to routine practices. If the contract is above two million dollars but below ten million dollars, report the contract to the Office of the Comptroller within twenty business days of award.

6. Keep documentation of award on file for audit purposes, as with any other contract award.