

## **TRANSPORTATION**

### **NEW JERSEY TRANSIT CORPORATION**

#### **New Jersey Transit Procurement Policies and Procedures**

#### **Proposed Readoption with Amendments: N.J.A.C. 16:72**

#### **Proposed New Rules: N.J.A.C. 16:72-1.11, 4, 5.1, and 6**

Authorized By: New Jersey Transit Corporation, Kevin S. Corbett, Executive Director.

Authority: N.J.S.A. 2A:44-143, 27:25-5.e, 27:25-6, and 27:25-11.

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

Proposal Number: PRN 2019-005.

Submit comments by March 8, 2019, to:

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The agency proposal follows:

#### **Summary**

The New Jersey Transit Corporation (NJ TRANSIT) has evaluated the rules at N.J.A.C. 16:72, Procurement Policies and Procedures, scheduled to expire on May 21, 2019, pursuant to N.J.S.A. 52:14B-5.1. As NJ TRANSIT filed this notice of readoption prior to that date, the expiration date is extended 180 days to November 17, 2019, pursuant to N.J.S.A. 52:14B-5.1.c(2). NJ TRANSIT has determined that the rules in Chapter 72 are necessary, adequate, reasonable, efficient, understandable, and responsive to the purposes for which they were

originally promulgated, with the exception of the changes discussed below and, therefore, proposes to readopt the chapter with amendments.

N.J.A.C. 16:72 contains the requirements governing the procurement by NJ TRANSIT of goods and services, as well as the debarment, suspension, and disqualification of persons doing business with NJ TRANSIT. With certain exceptions, the rules require all purchases, whether made as a result of formal advertising or otherwise, to be made on a competitive basis, to the maximum practical extent, and implement the procurement requirements set forth in N.J.S.A. 27:25-1 et seq.

A summative review of each of the subchapters follows:

Subchapter 1, General Provisions, describes the general provisions, applicable to all procurements, including the method of procurement and the means by which the public may secure information about the bidding process conducted by NJ TRANSIT.

Subchapter 2, Bidding Procedures, describes the procedures for public bidding.

Subchapter 3, Requests for Proposals, describes the procedure to be used in the request for proposal (RFP) process.

Subchapter 4, Debarment, Suspension and Disqualification of Persons, describes the process for debarment, suspension, and disqualification.

The proposed amendments and new rules are as follows:

N.J.A.C. 16:72-1.2 sets forth the definitions for the terms used in this chapter. A new definition has been added for “bidder or proposer” to reflect that either may be used to refer to those firms responding to a solicitation issued by NJ TRANSIT. A new definition has been added for “Chief Procurement Officer,” in light of the proposed addition of a complaint procedure in proposed new Subchapter 6 overseen by the “Chief Procurement Officer.” New definitions have been added for “design-build (D/B),” “design-build project,” “design-build-finance-operate and maintain (DBFOM),” and “design-build operate and maintain (DBOM)” to

incorporate NJ TRANSIT's statutory authority to use these project delivery methods. The definition for "line item" is proposed for amendment to delete the reference to an Invitation for Bids and replace it with the general term "solicitation," to include all procurement methods used by NJ TRANSIT. The definition of "procurement" is proposed for amendment to clarify that it includes contracts for "goods" and that it includes all contracts awarded by NJ TRANSIT, whether by advertisement, or other competitive process, and those contracts awarded under N.J.A.C. 16:72-1.5(e), procurement by exception. A new definition has also been added for "procurement-by-exception" although this type of procurement has been included in previous rules. A new definition for "publicly available" has been added in light of the addition of the proposed amendment to these rules at N.J.A.C. 16:72-1.11, addressing requests for bids or proposals through New Jersey's Open Public Records Act.

N.J.A.C. 16:72-1.4 sets forth the threshold requirement that one must be a responsible contractor to be considered in a procurement process or eligible for a contract award and lays out the requirements that one must meet to be a responsible contractor. Paragraph (a)1 is proposed for amendment to delete "if adequate security is not otherwise furnished" and to delete "and reputation" in paragraph (a)4. N.J.A.C. 16:72-1.4(c) is proposed for amendment by changing the mandatory "shall" requirement for deeming a prospective contractor not responsible, based on a previous contract default on the same matter, to the permissive "may." In order to determine if a prospective contractor should be determined to be not responsible based on a previous contract default, the circumstances surrounding the default will be considered. N.J.A.C. 16:72-1.4(e) is proposed for amendment to reflect that prospective contractors must provide the disclosure of ownership required by N.J.S.A. 52:25-24.2.

N.J.A.C. 16:72-1.5 sets forth the methods of procurement utilized by NJ TRANSIT. Subsection (a) is proposed for amendment to reflect that an Invitation for Bid is the type of

solicitation used where an award is made on the basis of cost, no negotiations are necessary, and a firm, fixed-price contract is appropriate.

Subsection (b) is proposed for amendment to reflect that purchases made by NJ TRANSIT in accordance with its delegated purchasing authority shall be made in accordance with the process set forth by the New Jersey Department of the Treasury regarding the number of quotations. Existing paragraphs (b)1, 2, and 3, which are proposed for deletion, reflected the quotation procedure that is no longer applicable. The amended language permits compliance with any future changes in the State of New Jersey Treasury Circular governing delegated purchasing authority procedures.

Subsection (c) is proposed for amendment to delete the specific reference to professional and technical services and expand it to include a request for proposal as the solicitation document for goods and services where the proposals will not be evaluated solely on the basis of cost. The proposed amendment further requires the advertisement of a request for proposal, or, for professional or technical services, the request for proposal may be issued to three vendors, or an alternative procurement method may be used where determined by the Executive Director to be in NJ TRANSIT's best interest.

Proposed new subsection (d) permits an alternate method of advertised procurement to be used when the Executive Director determines that the alternate method is in NJ TRANSIT's best interest.

Recodified subsection (e), Procurement-by-exception, is proposed for amendment to include an additional basis for purchases related to homeland security and domestic preparedness.

Proposed new subsection (f) reflects that the Executive Director, or his or his designee, may negotiate the final terms and conditions of any contract with bidders or proposers and the ability to negotiate should be set forth in the solicitation document. The amendment also sets

forth that bids and proposals will not be publicly available until after negotiations have been completed and the notice of intent to award the contract has been issued.

Recodified subsection (g) is proposed for amendment to reflect that the Executive Director, or “his or her” designee, has the authority for a procurement by exception.

Proposed new subsection (h) permits NJ TRANSIT to make purchases from Federal supply schedules or through or from vendors holding contracts with other states, multistate authorities, or other governmental entities to operate rail or motorbus service.

Proposed new subsection (i) permits participation by NJ TRANSIT in a publicly competed contract, by a public or non-profit entity, to support its operations or capital program.

N.J.A.C. 16:72-1.7 sets forth the procedure for the execution of contracts. It is proposed for amendment to include additional language to clarify that no contract or purchase order can be entered into, unless it meets NJ TRANSIT By-Laws, as well as other laws and this chapter.

N.J.A.C. 16:72-1.8 sets forth the requirements for the drafting of specifications. It is proposed for amendment to delete the specificity of requiring specifications only to meet the actual minimum needs of NJ TRANSIT without reference to brand names and to add language that the specifications must permit full and free competition.

N.J.A.C. 16:72-1.9 sets forth the requirements for a purchase description when it is used where a specification is not feasible. It is proposed for amendment to delete subsections (c) and (d), as being redundant statements regarding the use of “brand name or equal.” Recodified subsection (c) is proposed for amendment to add “bidders” to the statement that if a brand name or equal is used, prospective “bidders” must be given the opportunity to offer other products that meet NJ TRANSIT needs.

N.J.A.C. 16:72-1.10 is proposed for amendment to reflect changes in the entity with which out-of-State vendors need to register and to include firms that may not be corporations.

This section has been updated to replace the Secretary of State with the Division of Revenue and Enterprise Services, as the entity with which out-of-State firms must register. The term “corporation” has been deleted and replaced with “vendors” to recognize that some out-of-State firms may not be corporations, but the firm must still register.

Proposed new N.J.A.C. 16:72-1.11 sets forth the standards for the release of public information in bids or proposals submitted in response to a solicitation.

The heading for Subchapter 2 is proposed for amendment to change the heading of the subchapter to “Procedures for Invitation for Bid (IFB)” to reflect the formal name of the solicitation document.

N.J.A.C. 16:72-2.1 is proposed for amendment to delete the requirement that an advertisement for bids be placed a minimum of 20 calendar days in advance of the bid opening.

N.J.A.C. 16:72-2.2, governing bid bonds, is proposed for amendment to specifically state that the surety company must be licensed by the New Jersey Department of Banking and Insurance and “authorized” by the U.S. Treasury pursuant to U.S. Treasury Circular 570, deleting the existing language that the firm be “listed in” the Circular.

N.J.A.C. 16:72-2.3 governing performance and payment bonds is proposed for amendment with changes to subsection (a) and (c), deleting the ability of the waiver of a bond if the contract is for a sum not exceeding \$200,000, and replacing it with a waiver “consistent with N.J.S.A. 2A:44-143” to maintain continuity with any future statutory changes. Subsection (c) is proposed for amendment to replace the term “State” with “NJ TRANSIT,” as the entity evaluating the risk in waiving the bond requirement. Subsection (e) is proposed for amendment to include the requirement that the surety company must also be licensed by the New Jersey Department of Banking and Insurance and “authorized” by the U.S. Treasury

pursuant to U.S. Treasury Circular 570, deleting the previous language that the firm be “listed in” the Circular.

N.J.A.C. 16:72-2.5 governs amendments to the Invitation for Bids solicitation documents. The section is proposed for amendment at paragraph (a)1 to include the option of making amendments “available online.” Subsection (b) is proposed for amendment to delete the language concerning the type of information that must be included in an amendment to require that any information given to a prospective bidder be furnished in an amendment to all other prospective bidders or made available online.

N.J.A.C. 16:72-2.6 provides for the cancellation of IFBs before opening. Subsection (a) is proposed for amendment to reference NJ TRANSIT’s “best” interest as the basis for cancellation of bids and the deletion of specific examples, as the current list does not represent an exhaustive list of reasons for which cancellation may be appropriate. Subsection (b) is proposed for amendment to include the option of making the notice of cancellation available online.

N.J.A.C. 16:72-2.7 provides for the time of bid submission. It is proposed for amendment to delete the requirement that bids must be timely submitted “in the office or by the electronic portal” and state that bids must be submitted “as designated” in the IFB.

N.J.A.C. 16:72:2.8 provides for the receipt and safeguarding of bids. Subsection (a) is proposed for amendment to change the reference to a bidder withdrawing “his” bid to a bidder withdrawing “a” bid.

N.J.A.C. 16:72-2.12 provides for the rejection of all bids. It is proposed for amendment to change the heading of this section from “Rejection of all bids” to “Cancellation of bids after opening” to more accurately reflect the standards set forth in the section. Paragraph (a)7 is proposed for amendment to change “best interests” to “best interest.”

N.J.A.C. 16:72-2.14 provides for the by-pass of low bidders. It is proposed for amendment to specifically state that if a low bidder is bypassed, the letter explaining that decision will be forwarded to that “low” bidder. The existing language did not indicate that the decision was forwarded to the “low bidder,” just that it would be sent to the “bidder.”

N.J.A.C. 16:72-2.15 provides for mathematical calculations in bids. Subsection (a) is proposed for amendment to delete the language about a bid being “read” after opening.

N.J.A.C. 16:72-2.16 provides for the initialing of price changes in bids. It is proposed for amendment to include the option of an electronic signature for a price change, as well as the initialing of the change.

N.J.A.C. 16:72-2.17 provides for the waiver of minor informalities or irregularities in bids. Paragraphs (a)1 and 2 are proposed for deletion, in an attempt to summarize the state of the law on waiver of bid irregularities. The main statement remains and can accommodate any evolution or update in case law or statutory requirements regarding bid irregularities.

N.J.A.C. 16:72-2.18 governs tie bids. It is proposed for amendment to add “and” between paragraphs (a)1 and 2 to clarify that it is an inclusive list and, at subsection (b), with the elimination of a coin toss to decide a tie bid in favor of a reference to the tie-breaking criteria listed in the solicitation document.

N.J.A.C. 16:72-2.19 governs bid errors. It is proposed for amendment to delete the language allowing “additions” to the bid in paragraph (a)1 and to delete paragraph (a)2, which allowed correction of material mistakes of fact. Paragraph (a)4 is proposed for deletion since it did not clearly state the permissibility of clarification of a bid.

N.J.A.C. 16:72-2.20 provides for the award of the contract to a bidder. It is proposed for amendment to reorganize the subsections, to result in existing subsection (a) to become new subsection (b) and current subsection (b) to become new subsection (a). Recodified subsection (a) is proposed for amendment to add design-build project language and replace



language concerning minority and other equal opportunity and affirmative action programs with the current program names of “Disadvantaged Business Enterprise or Small Business Enterprise” programs.

The heading of Subchapter 3, Requests for Proposals, is proposed for amendment to add the acronym “RFP.”

N.J.A.C. 16:72-3.1 provides for the solicitation of proposals. It is proposed for amendment to delete limiting proposals for “professional and technical” services and including solicitation of proposals for goods and services to comport with the proposed amendment to N.J.A.C. 16:72-1.5(c).

N.J.A.C. 16:72-3.3 governs the amendment of requests for proposals. It is proposed for amendment to add the acronym “RFP,” where appropriate, and to add the option, at subsection (a), for the RFP amendment to “be made available online.” The proposed amendment to subsection (a) also deletes the requirement that the RFP amendment be sent to everyone to whom an RFP has been furnished, instead requiring that it only be provided to those furnished the RFP by NJ TRANSIT, since NJ TRANSIT cannot know if the RFP was forwarded by recipients to other firms. The proposed amendment to subsection (b) deletes the phrase limiting an RFP amendment to certain types of information and makes any information provided to a proposer to be included in an RFP amendment furnished to all other prospective proposers and adds the option that RFP amendment be made available online.

N.J.A.C. 16:72-3.4 governs the cancellation of requests before opening. It is proposed for amendment to clarify that the cancellation needs to be in NJ TRANSIT’s “best” interest and to add the option to permit the notice of cancellation to be made available online. The proposed amendment deletes the specific examples of reasons for cancellation and clarifies that the notice will be sent to those to whom the RFP was furnished and not “issued.”

N.J.A.C. 16:72-3.10 provides for the rejection of individual proposals. Subsection (a) is proposed for replacement to clarify that a proposal that fails to meet a mandatory material requirement shall be deemed non-responsive and subsection (b) is proposed for amendment to clarify that proposals received from any firm determined to be not responsible shall be removed from consideration for award.

N.J.A.C. 16:72-3.12 provides for the award of an RFP. It is proposed for amendment to delete the award criteria of “in the best interest of NJ TRANSIT” to reflect the statutory award criteria of “the most advantageous to the State, price and other factors considered, and/or provides the best value pursuant to the governing law applicable to the RFP.”

Proposed new Subchapter 4 governs design-build projects.

Proposed new N.J.A.C. 16:72-4.1 governs the solicitation of design-build projects. Subsection (a) permits design-build projects to be solicited by the issuance of an Invitation for Bid or a request for proposal. Subsection (b) includes permissible language governing the solicitation of design-build projects, including essential project requirements, evaluation criteria, contract award, and the process to modify or substitute design-build team members. Subsection (c) permits NJ TRANSIT to offer stipends to certain unsuccessful bidders/proposers in a two-step design-build evaluation process to, among other things, encourage participation and offset some of the costs for developing preliminary designs. Subsection (d) indicates that a special prequalification process may also be used by NJ TRANSIT in a two-step evaluation process.

Proposed new N.J.A.C. 16:72-4.2 governs the evaluation of design-build projects. The proposed new section sets forth two options for evaluation of design-build projects: a one-step evaluation process or a two-step evaluation process to be set forth in design-build solicitations and permits a special prequalification process.

Recodified Subchapter 5 governs debarment, suspension, and disqualification.

Proposed new N.J.A.C. 16:72-5.1 clarifies that Subchapter 5 applies to all contracts awarded by NJ TRANSIT.

Recodified N.J.A.C. 16:72-5.2 provides for the causes for debarment of a person(s). The reference to the Executive Commission on Ethical Standards has been replaced with the current entity, the State Ethics Commission at paragraphs (a)15 and 16. Language has been added to paragraph (a)16 replacing “the undertaking” with more specific language regarding the “failure of a vendor to report in writing forthwith or failure to obtain a waiver from the State Ethics Commission, who may undertake” any business relationship with a State officer. References to “his” official capacity in paragraphs (a)17 and 18 have been replaced with “his or her” official capacity and the conjunction “or” has been added after the penultimate paragraph (a)17 to indicate that any of the grounds included in this subchapter can be the basis for a debarment.

Subsection (b) is proposed for amendment to reflect that the causes for debarment in paragraphs (a)14 through 18 do not have to be reproduced in all the IFBs or RFPs issued by NJ TRANSIT but can be referenced therein.

Recodified N.J.A.C. 16:72-5.3 delineates the conditions affecting the debarment of a person(s). Paragraph (a)1 is proposed for amendment to add “his or her designee” of the Executive Director as the person who can approve the debarment of a person. Paragraph (a)2 is proposed for amendment to replace the best interests of the “State” with those of NJ TRANSIT.

Recodified N.J.A.C. 16:72-5.4 provides the procedures, period of debarment, and scope. Paragraph (a)1 is proposed for amendment to change the pronoun from “his” affiliates to “his or her” affiliates for those entities that may be included in the debarment of a person. Paragraph (a)4 is proposed for amendment to add the pronouns “her” and the subject “she” to the masculine “he” and “his,” respectively.

Recodified N.J.A.C. 16:72-5.5 provides the causes for suspension of a person(s). It is proposed for amendment to change the basis for suspension from “reasonable suspicion” to “adequate evidence” to reflect the standard in N.J.A.C. 16:72-5.6(a)3.

Recodified N.J.A.C. 16:72-5.6 governs the conditions for suspension of a person(s). Paragraph (a)2 is proposed for amendment to change suspension being rendered in the best interest of the “State” to reflect suspension in the best interest of NJ TRANSIT and paragraph (a)3 is proposed for amendment to delete language that permitted a suspension to be based upon evidence adequate to create a reasonable suspicion that a cause for suspension exists.

Recodified N.J.A.C. 16:72-5.7 governs procedures, period of suspension, and scope of suspension affecting the suspension of a person(s). Paragraph (a)1 is proposed for amendment to change the reference to a person or “his” affiliates to reflect a person or “his or her” affiliates. Paragraph (a)3 is proposed for amendment to add the pronoun “or her” to the language concerning imputing the performance to a person with whom “he” is affiliated and adding “or she” as a subject to the masculine “he.”

Recodified N.J.A.C. 16:72-5.9 governs the extent of debarment, suspension, or disqualification. It is proposed for amendment to clarify that the timing of the filing of a copy of the exception from NJ TRANSIT contracting must be filed with the Attorney General.

Proposed new Subchapter 6 establishes a procedure for NJ TRANSIT contract users to file complaints against contractors for poor performance of NJ TRANSIT contracts.

Proposed new N.J.A.C. 16:72-6.1 sets forth the purpose and scope of the new contractor complaint procedure in Subchapter 6.

Proposed new N.J.A.C. 16:72-6.2 describes the general purpose of new Subchapter 6 as setting forth a process for the filing of a complaint by NJ TRANSIT contract users against a contractor for poor performance and a process for prompt action upon that complaint.

Proposed new N.J.A.C. 16:72-6.3 requires complaints to be filed in writing and set forth examples of contract breaches that may be reported. It further provides that if the underlying contract has specific performance standards, such as liquidated damages, complaints are not required.

Proposed new N.J.A.C. 16:72-6.4 sets forth the time frames and procedure that follow the filing of a complaint. It requires written notice to the contractor, a 10-business-day contractor response time, and the opportunity for cure or a corrective action plan from the contractor during the 10-day period, which may be taken into consideration in resolving the complaint. NJ TRANSIT may respond to the contractor's reply and an initial determination will be issued to the contractor, which he or she may appeal to the Chief Procurement Officer's designee.

Proposed new N.J.A.C. 16:72-6.5 sets forth the actions to be taken by the Chief Procurement Officer (Chief), or designee, upon the filing of an appeal by the contractor. Specifically, in an informal hearing, the Chief will review the written record and any applicable administrative rules, statutes, and case law and may permit an in-person presentation. The determination rendered thereafter by the Chief will constitute a final agency decision for purposes of the Administrative Procedure Act, but will not preclude NJ TRANSIT from pursuing any other remedies for the contract breach.

Proposed new N.J.A.C. 16:72-6.6 permits NJ TRANSIT to reject goods or services that are substantially defective, notwithstanding any of the proposed new provisions in Subchapter 6.

Proposed new N.J.A.C. 16:72-6.7 governs emergency situations wherein NJ TRANSIT can immediately seek to obtain full contractor compliance where its non-compliance affects health or safety or jeopardizes NJ TRANSIT assets, and, if there is no resolution, NJ TRANSIT

can engage another contractor for those goods or services and charge any additional costs to the original contractor.

Proposed new N.J.A.C. 16:72-6.8(a) permits NJ TRANSIT to terminate the contract and secure goods and services from a substitute contractor with any additional costs charged to the non-complying contractor. Proposed new subsection (b) permits NJ TRANSIT to suspend or debar a contractor for continued, or willful, failure to perform.

Proposed new N.J.A.C. 16:72-6.9 sets forth the discovery procedures applicable upon the filing of a complaint. It requires the contractor to promptly provide any requested records and documents to NJ TRANSIT free of charge upon request by NJ TRANSIT. If the contractor fails to comply with the request, the complaint may be resolved against it and/or be used to prove non-compliance and such non-compliance may be the basis for NJ TRANSIT to seek further contract remedies.

Proposed new N.J.A.C. 16:72-6.10 requires complaints against a Disadvantaged Business Enterprise in a Federally funded procurement to follow an alternate procedure consistent with 49 CFR Part 26.

As NJ TRANSIT has provided 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 continue to affect NJ TRANSIT's ability to provide Statewide transit services to the public on a daily basis and to continue NJ TRANSIT's capital improvement program, resulting in a better quality of services to the public and the improvement and maintenance of the infrastructure for the

public's use in the future. The procedures delineated in the rules provide protection of the interests of the general public and of the individual bidders.

### **Economic Impact**

The continued utilization of a competitive bidding system can be expected to provide economies to the State that are not available without such a system. Bonding is required of certain bidders, based upon the specific contract. Although the cost of a bond may be included by a bidder in its bid price, the protection offered to the State from bid bonds, performance bonds, and payment bonds is outweighed in a potential higher bid price. The costs of preparing a bid or proposal would vary, depending upon the specifications of the individual request for proposals and upon the specific contract. These rules are designed to endorse and promote high quality and efficient public transportation, thereby supporting employment of New Jersey residents by assisting with travel to and from places of employment.

### **Federal Standards Statement**

A Federal standards analysis is not required because the rules proposed for readoption with amendments and new rules are governed by N.J.S.A. 27:25-11 and are not subject to any Federal procurement regulations or standards. To the extent that a complaint is filed against a Disadvantaged Business Enterprise in a Federally funded procurement, an alternate procedure consistent with the Federal regulations is required.

### **Job Impact**

NJ TRANSIT anticipates only favorable impact on the workforce in the State by the rules proposed for readoption with amendments and new rules. NJ TRANSIT will continue to provide opportunities for vendors to compete for goods and services contracts and such

contracts will enable businesses to employ New Jersey citizens to perform the contract requirements.

### **Agriculture Industry Impact**

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

### **Regulatory Flexibility Analysis**

The rules proposed for readoption with amendments and new rules apply to all entities who want to do business with NJ TRANSIT, some of which may be small businesses, as the term is defined in the New Jersey Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The rules require that bids be submitted in a specified manner, accompanied by bonds in certain cases, and that debarment occur in specified situations. Provisions in the rules allow for amendment and negotiation of bids, but no preferential treatment has been specifically provided for small businesses. In accordance with New Jersey's Small Business Set Aside Program, NJ TRANSIT sets goals and creates set-asides for Small Business Enterprises (SBEs) certified by the State, as set forth in N.J.A.C. 17:13 and/or 14. Whether an SBE goal or set-aside is created, whether the business is large or small, the rules provide for equal treatment of businesses in the bidding process in the interest of high quality goods and services and fairness to all bidders. The professional services required to complete the bidding process are those services ordinarily required for the completion of any capital project, for example, engineering and design services. Other professional services would vary, depending upon the specifications of the individual request for proposals. The costs of professional services will vary, depending upon the specifications of the individual request for proposals. The costs of complying with the rules are discussed in the Economic Impact statement.



## **Housing Affordability Impact Analysis**

NJ TRANSIT does not anticipate any impact on the affordability of housing in New Jersey or on the average costs of housing as result of the rules proposed for readoption with amendments and new rules because the rules pertain to an efficient and robust procurement process for the bidding community. However, NJ TRANSIT provides bus, rail, light rail, and Access Link services throughout the State, which allows residents flexibility of choice for their place of residence.

## **Smart Growth Development Impact Analysis**

The rules proposed for readoption with amendments and new rules will have no impact on the achievement of smart growth or on housing production within Planning Areas 1 and 2, or within designated centers, under the State Development and Redevelopment Plan because the procurement rules affected herein are limited to ensuring a competitive bid process for the bidding community.

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

NJ TRANSIT 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. 16:72.

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

## SUBCHAPTER 1. GENERAL PROVISIONS

### 16:72-1.2 Definitions

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

...

**“Bidder” or “proposer” means any person, firm, corporation, or other entity that provides, or offers or proposes to provide, goods or services to, or performs, any contract for NJ TRANSIT.**

**“Chief Procurement Officer” means the person responsible for the management and administration of the procurement, purchasing, materials management, and central intake for NJ TRANSIT.**

...

**“Design-build (DB)” means a design-build project in which one single entity performs the design and construction for the project. The design-build firm may be a single firm, a joint venture, a general contractor, or a joint venture and an architect/engineer team.**

**“Design-build-finance-operate and maintain (DBFOM)” means a design-build project in which one single entity provides the financing, or a part thereof, for the project and performs the design and construction of a project, operates the project, and maintains the project for a specified period of time, all under one contract. The DBFOM**

may be a single firm, a joint venture, or a general contractor, or a joint venture and an architect/engineer team.

**“Design-build project” means:**

**1. A project under which NJ TRANSIT enters into a contract with a seller, firm, or consortium of firms to design and build a public transportation system or an operable segment of such system; and**

**2. May include an option to finance, or operate and maintain for a period of time, the system or segment or any combination of designing, building, operating, or maintaining such system or segment.**

**In addition, “design-build project” also means a construction project under which NJ TRANSIT enters into a contract with a firm, or consortium of firms, both to design and construct a public transportation facility that is the subject of the project.**

**“Design-build-operate and maintain (DBOM)” means a design-build project in which one single entity performs the design and construction of a project, operates the project, and maintains the project for a specified period of time all under one contract. The DBOM may be a single firm, a joint venture, a general contractor, or a joint venture and an architect/engineer team.**

...

**"Line item" means a procurement item specified in the [Invitation for Bids] solicitation for which the bidder is asked to give individual pricing information.**

...

**"Procurement" means the awarding of contracts for construction, alterations, supplies, equipment, repairs or maintenance, goods, or for rendering any services to NJ TRANSIT.**

**“Procurement” shall include contracts that are awarded after advertisement, or other**

competitive process, as well as contracts that are awarded pursuant to N.J.A.C. 16:72-1.5(e) (procurement-by-exception).

“Procurement-by-exception” means a form of procurement in which the subject matter is excepted from the requirement of public advertisement.

“Publicly available,” with respect to any procurement, either in printed or electronic format, means access to the record of any particular procurement or contract for review and/or copying, with the exception of any materials deemed by NJ TRANSIT to be proprietary, confidential, or subject to any privilege, or exclusion under the Open Public Records Act, N.J.S.A. 47:1A-1 et seq., the common law, and/or U.S. copyright law.

...

#### 16:72-1.4 Responsible contractors

(a) Procurements shall be made from, and contracts shall be awarded to, responsible contractors only. A responsible contractor is one who meets the following standards:

1. Has adequate financial resources, or the presently demonstrable ability to obtain such resources, as required during the performance of the contract[, if adequate security is not otherwise furnished];

2.-3. (No change.)

4. Has a satisfactory record [and reputation] of integrity;

5.-7. (No change.)

(b) (No change.)

(c) A prospective contractor [shall] **may** be deemed not responsible with respect to a specific matter for which bids are solicited when NJ TRANSIT has previously held it in default on a contract for that matter. **In order to determine if a prospective contractor**

**should be determined to be not responsible based on a previous contract default, the circumstances surrounding the default will be considered.**

(d) (No change.)

(e) Disclosure shall be made by all prospective contractors **consistent with, and pursuant to, N.J.S.A. 52:25-24.2** of names and addresses of all **owners, members**, stockholders, and/or partners holding 10 percent or more interest in the firm.

#### 16:72-1.5 Methods of procurement

(a) Invitation for [bid] **Bid**: Except as provided in (c) and (d) below, the formal advertising procedures contained in N.J.A.C. 16:72-2 shall be followed for all purchases or contracts in excess of the amounts determined pursuant to Section 2 of P.L. 1954, [c.48] **c. 48** (N.J.S.A. 52:34-7) **in which an award is made on the basis of cost, no negotiations are necessary with the bidders, and a firm-fixed priced contract is appropriate.**

(b) Quotation: [Except as provided in (c) and (d) below, purchases] **Purchases** or contracts not in excess of the amounts determined pursuant to Section 2 of P.L. 1954, [c.48] **c. 48** (N.J.S.A. 52:34-7) shall be made[:] **in accordance with the process published by the New Jersey Department of the Treasury, Circular No. 16-02-DPP, as amended and supplemented.**

[1. For purchases up to and including \$5,000-minimum of one quote;

2. For purchases from \$5,001 up to and including \$15,000-minimum of two verbal quotes; and

3. For purchases from \$15,001 up to the amount determined in (a) above-minimum of two written quotes.]

(c) Request for [proposals/negotiations] **proposals**: The procurement of [professional] **goods** and [technical] services in excess of the amounts determined pursuant to Section 2 of P.L. 1954, [c.48] **c. 48** (N.J.S.A. 52:34-7), **which will not be evaluated based solely on cost**, shall be accomplished through the issuance of [a] **an advertised** request for proposal **or, for professional and technical services**, to a minimum of three vendors [and subsequent negotiation except], **or** where determined by the Executive Director, or his or her designee, in writing, that an alternative method of procurement is in NJ TRANSIT's best interest.

**(d) An alternate method of advertised procurement may be used when the Executive Director, or his or her designee, determines in writing, that the alternative method is in NJ TRANSIT's best interest.**

[(d)] **(e)** Procurement-by-exception: The requirements of (a), (b), and (c) above may be waived under the following circumstances and the purchase or contract made in such manner as the Executive Director, or his or her designee, may determine is in the best interest of NJ TRANSIT:

1.-12. (No change.)

13. The procurement of services to be performed by the contractor personally under the supervision of the Executive Director, or his or her designee, and paid for on a [time] **timely** basis; [and]

14. To acquire or overhaul motorbuses, light rail vehicles, rail cars, locomotives, signal systems, or fare collection systems[.]; **and**

**15. To acquire goods or services related to homeland security and domestic preparedness, that is paid for or reimbursed by Federal funds awarded by the U.S. Department of Homeland Security or other Federal agency, from vendors that:**

**i. Are holders of a current State contract for the equipment, goods, or services sought;**

**ii. Are participating in a Federal procurement program established by a Federal department or agency; or**

**iii. Have been approved by the State Treasurer in consultation with the New Jersey Domestic Security Preparedness Task Force.**

**(f) For any procurement, for which negotiation is authorized, the Executive Director, or his or her designee, may negotiate with bidders or proposers, the final terms and conditions of any contract, including price. Such ability to so negotiate shall be expressly set forth in the applicable request for proposal, or other solicitation, and submitted proposals or bids shall not be publicly accessible until after negotiations have been completed and the notice of intent to award the contract has been issued.**

**[(e)] (g) Authority for procurement-by-exception:** The authority for procurement under the circumstances listed in **(e)** above rests with the Executive Director, or **his or her** designee, for procurement transactions not in excess of the amounts determined pursuant to Section 2 of P.L. 1954, c. 48 (N.J.S.A. 52:34-7). Transactions in excess of the amounts determined pursuant to Section 2 of P.L. 1954, c. 48 (N.J.S.A. 52:34-7) will require approval as may be set forth in the By-Laws of NJ TRANSIT.

**(h) NJ TRANSIT may purchase through, or from, a Federal supply schedule or through other Federal procurement programs, including, but not limited to, online ordering systems, or through, or from, vendors who hold contracts with other states, or multistate authorities, or other governmental entities to operate:**

- 1. Rail passenger service or portions or functions thereof; or**
- 2. Motorbus regular route, paratransit, or motorbus charter services or portions or functions thereof.**

**(i) NJ TRANSIT may participate in cooperative purchasing to support its operations or capital program by purchasing from a contract that was publicly competed by a public or non-profit entity.**

[(f)] **(j)** (No change in text.)

#### 16:72-1.7 Execution of contracts

Any contract or instrument shall be deemed properly executed when signed by the Executive Director [of NJ TRANSIT], or his or her designee. No contract or purchase order shall be entered into unless all applicable requirements of law, [and] this chapter, **and NJ TRANSIT's By-Laws** have been met, and the approval of the Board of NJ TRANSIT obtained, when required.

#### 16:72-1.8 Specifications

Plans, drawings, or specifications shall [state only the actual minimum needs of NJ TRANSIT and describe the work to be performed in a manner which encourages maximum competition and eliminates, insofar as possible, any restrictive features which might limit acceptable offers to a relatively few bidders] **permit full and free competition describing the work to be performed.** Specifications, plans, and drawings [without reference to brand names or items manufactured by a single company] shall be used to the maximum extent possible.

#### 16:72-1.9 Purchase descriptions

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

[(c)] Purchase descriptions shall not be written so as to specify a product, or a particular feature of a product, peculiar to one manufacturer, unless it is determined that the particular feature is essential to NJ TRANSIT's requirements, and that similar products of other



companies lacking the particular feature would not meet the minimum requirements for the item.

(d) Generally, the minimum acceptable purchase description is the identification of a requirement by use of a brand name followed by the words "or equal."]

[1.] **(c)** Where a "brand name or equal" purchase description is used, prospective [contractors] **bidders** must be given the opportunity to offer products other than those specifically referenced by brand name, if such other products will meet the needs of NJ TRANSIT in essentially the same manner as those referenced.

#### 16:72-1.10 Out-of-State vendors

All out-of-State [corporations] **vendors** that wish to do business with NJ TRANSIT shall be afforded 10 working days to register with the [Secretary of] State of New Jersey, after notification by NJ TRANSIT of the intent to award that out-of-State firm a contract. Failure to provide either certification or notification of filing with the [Secretary of State] **Division of Revenue and Enterprise Services** within the 10 working-day period may constitute cause for rejection of that firm's bid or proposal.

#### 16:72-1.11 Public information

**(a)** After a contract is executed, all information submitted in response to a solicitation of proposals or bids is considered public information, notwithstanding any disclaimers to the contrary submitted by a proposer or bidder, except when a request for proposals (RFP) contains a negotiation component or as may be exempted from public disclosure by the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 et seq., and/or the common law. As a part of its proposal, each proposer or bidder may identify any data or materials it asserts are exempt from public disclosure under OPRA and/or

**the common law, explaining the basis for such assertion. Assertions that the entire bid or proposal, and/or prices contained therein, are exempt from public disclosure under OPRA, the common law, or the U.S. Copyright Act are overbroad and will not be honored by NJ TRANSIT. In the event that a public request is made for materials that the proposer or bidder has identified as confidential, NJ TRANSIT shall have the final authority to determine whether the materials are exempt from public disclosure under OPRA and shall take action as required by applicable law. The proposer or bidder may elect to defend its assertion of exemption from the public disclosure requirements of OPRA or the common law, but in doing so, all costs and expenses associated therewith shall be the responsibility of the bidder or contractor. NJ TRANSIT assumes no such responsibility or liability.**

**(b) When a solicitation permits negotiation with proposers or bidders after the submission of proposals or bids, the proposals or bids shall be made publicly available only after a contract is executed.**

## **SUBCHAPTER 2. [BIDDING] PROCEDURES FOR INVITATION FOR BID (IFB)**

### **16:72-2.1 Advertising of bids**

The advertisement for bids shall be placed in such newspaper or newspapers selected by NJ TRANSIT that will give best notice thereof to bidders and will be posted on NJ TRANSIT's website. Advertisements shall be made [a minimum of 20 calendar days] in advance of the bid opening. The advertisement shall designate the time and place, when and where sealed bids shall be received and publicly opened and read, or whether bids shall be received electronically, and such other terms as NJ TRANSIT may deem proper.

### **16:72-2.2 Bid bonds**

A bid bond or a deposit consisting of a cashier's check, certified check, or irrevocable letter of credit drawn to the order of NJ TRANSIT in an amount to be determined by NJ TRANSIT, but not exceeding 10 percent of the bid, shall accompany all bids to serve as a guarantee that the bidder will, upon acceptance of its bid, execute such contractual documents as may be required within 10 working days after issuance of a notice of intent to award. Any bonds submitted pursuant to this section must be executed by surety companies licensed to do business in the State of New Jersey **and licensed by the New Jersey Department of Banking and Insurance, in compliance with the New Jersey Producer Licensing Act of 2001, P.L. 2001, c. 210, as amended,** and [listed in] **authorized by the U.S. Department of the Treasury, pursuant to** Circular 570 as of the date of receipt of bids. Any letters of credit shall be issued by Federally insured financial institutions.

#### 16:72-2.3 Performance and payment bonds

(a) In accordance with N.J.S.A. 2A:44-143 [as amended], a performance bond not to exceed 100 percent of the contract price shall be required of the successful bidder when a contract for public buildings, or other public works or improvements is awarded to secure fulfillment of the contractor's obligations specified in the contract. The bond percentage required, based upon NJ TRANSIT's assessment of the risks presented to the State by the type of contract and other relevant factors, shall be identified in the bid documents prior to the contract bidding date. NJ TRANSIT may waive the bond requirement [entirely if the contract is for a sum not exceeding \$200,000] **consistent with N.J.S.A. 2A:44-143.** In determining whether to waive the bond requirement, NJ TRANSIT shall consider the following:

1.-3. (No change.)

(b) (No change.)

(c) In accordance with N.J.S.A. 2A:44-143 [as amended], a payment bond not to exceed 100 percent of the contract price shall be required of the successful bidder when a contract for public buildings, or other public works or improvements is awarded to protect firms or persons supplying labor or materials to the contractor/subcontractor for the performance of work provided for in the contract. The bond percentage required, based upon NJ TRANSIT's assessment of the risks presented to [the State] **NJ TRANSIT** by the type of contract and other relevant factors, shall be identified in the bid documents prior to the contract bidding date. NJ TRANSIT may waive the bond requirement [entirely if the contract is for a sum not exceeding \$200,000] **consistent with N.J.S.A. 2A:44-143**. In determining whether to waive the bond requirement, NJ TRANSIT shall consider the following:

1.-3. (No change.)

(d) (No change.)

(e) Performance and payment bonds must be executed by surety companies licensed to do business in the State of New Jersey **and licensed by the New Jersey Department of Banking and Insurance, in compliance with the New Jersey Producer Licensing Act of 2001, P.L. 2001, c. 210, as amended**, and [listed in] **authorized by the U.S. Department of the Treasury [Department] pursuant to Circular 570**.

#### 16:72-2.5 Amendment of Invitation for Bids

(a) If, after issuance of an Invitation for Bids, but before the time for bid opening, it becomes necessary to make changes in quantity, specifications, delivery schedules, opening dates, etc., or to correct a defective or ambiguous Invitation **for Bid**, such changes shall be accomplished by issuance of an amendment to the Invitation for Bids.

1. The amendment shall be sent to everyone to whom Invitations **for Bids** have been furnished **or made available online**.

2. (No change.)

(b) Any information given to a prospective bidder concerning an Invitation for Bids shall be furnished promptly [to all other prospective bidders, as an amendment to the Invitation, if such information is necessary to the bidders in submitting bids on the Invitation or if the lack of such information would be prejudicial to uninformed bidders] **as an amendment to the Invitation for Bids to all other prospective bidders or made available online.**

16:72-2.6 Cancellation of Invitations **for Bids** before opening

(a) Invitations for Bids should not be cancelled, unless cancellation is in NJ TRANSIT's **best** interest[, such as where there is no longer a requirement for the supplies or services or where amendments to the Invitation would be of such magnitude that a new Invitation is desirable].

(b) Where an Invitation **for Bid** is cancelled, bids [which] **that** have been received shall be returned, unopened, to the bidders and a notice of cancellation shall be sent to all prospective bidders to whom Invitations for Bids were issued **or made available online.**

16:72-2.7 Time of bid submission

Bids shall be submitted, so as to be received [in the office or by the electronic portal] **as** designated in the Invitation for Bids not later than the exact time set for opening of bids.

16:72-2.8 Receipt and safeguarding of bids

(a) All bids received prior to the time of opening shall be kept secure, and, except as provided in (b) below, unopened. If an Invitation for Bids is cancelled, or if a bidder effectively withdraws [his] **a** bid prior to the time set for opening of bids, all bids, or the withdrawn bid, as the case may be, shall be returned to the bidders.

(b) (No change.)

16:72-2.12 [Rejection] **Cancellation** of [all] bids **after opening**

(a) Invitations for Bids may be cancelled after opening but prior to award and all bids rejected, where NJ TRANSIT determines that:

1.-6. (No change.)

7. For other reasons, cancellation is in the best interest[s] of NJ TRANSIT.

(b) (No change.)

16:72-2.14 By-pass of low bidders

If the low bidder is by-passed, a memorandum stating the justification shall be prepared for the file and a letter explaining the decision shall be forwarded to the **low** bidder.

16:72-2.15 Mathematical calculations

(a) After the bids are opened [and read], they shall be compared on the basis of the correctly determined summation of the correctly determined products of all the quantities for contract line items shown in the bid multiplied by the unit prices bid. The results of such comparisons shall be made available to the public. Award shall be made on the basis of the correct total contract price.

(b) (No change.)

16:72-2.16 Initialing of price changes

Price changes in bids shall be initialed **or signed electronically** by the vendor in the bid submitted to NJ TRANSIT.

16:72-2.17 Waiver of minor informalities or irregularities in bids

[(a)] NJ TRANSIT reserves the right to waive any minor informalities or irregularities in a bid not in compliance with the specifications, terms, and conditions of the Invitation for Bids.

[1. A minor informality or irregularity is one which is merely a matter of form or is some immaterial variation from the exact requirements of the Invitation for Bids, having no effect on quality, quantity or delivery of the supplies or performance of work being procured, and the correction or waiver of which would not affect the relative standing of, or be otherwise prejudicial to, other bidders.

2. NJ TRANSIT may give the bidder the opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid, or may waive any such deficiency where it is to the advantage of NJ TRANSIT.]

#### 16:72-2.18 Tie bids

(a) In the event that the correct total contract prices submitted by two or more vendors are identical, NJ TRANSIT shall award the contract based on a relative comparison of the following factors:

1. Delivery advantage, considering time, distance, convenience, and facilities of vendor;

**and**

2. (No change.)

(b) When none of the distinguishable characteristics in (a) above are available, NJ TRANSIT shall, if practicable, provide for contract award by splitting the award. If splitting the award is not practicable, **the** award will be made [by a single toss of a coin] **according to the tie-breaking criteria in the solicitation document.**

#### 16:72-2.19 Bid errors

(a) While bidders normally shall be expected to be bound by their bids, circumstances exist where correction or withdrawal of bids is permitted.

1. A bidder shall not be permitted to correct a bid mistake after bid opening that would cause the bidder to have the low bid, unless the mistake is clearly evident from examining the bid document, [e.g.] **for example**, clerical errors in extensions [and additions].

[2. The apparent low bidder shall be permitted to correct a material mistake of fact in its bid, including price, when the intended bid is obvious from the bid document. Such bidder shall not be permitted to correct a bid for mistakes or errors in judgment.]

[3.] **2.** (No change in text.)

[4. An otherwise low bidder shall not be permitted to withdraw material exceptions to the bid conditions or specifications; however, such bidder may be permitted the opportunity to furnish other information called for by the Invitation for Bids and not supplied due to oversight, so long as it does not affect responsiveness.]

[5.] **3.** (No change in text.)

#### 16:72-2.20 Award

[(a) Unless all bids are rejected, award shall be made by NJ TRANSIT within the time for acceptance specified in the bid or extension thereof, to that responsible bidder whose bid, conforming to the Invitation for Bids, will be most advantageous to NJ TRANSIT, price and other factors considered, for contracts other than contracts for the construction or improvement of capital facilities.]

[(b)] **(a)** Unless all bids are rejected, award shall be made by NJ TRANSIT within the time for acceptance specified in the bid or extension thereof, to the lowest responsible bidder for contracts for the construction or improvement of capital facilities. This provision shall not apply to **any design-build project, including** design, build or design, build, maintain and operate,



**or design, build, maintain, operate, and finance** projects, or affect NJ TRANSIT's [minority and women business enterprise, equal employment opportunity or affirmative action] **Disadvantaged Business Enterprise or Small Business Enterprise** programs or limit NJ TRANSIT's right to extend, add, or resume work on any project.

**(b) Unless all bids are rejected, award shall be made by NJ TRANSIT within the time for acceptance specified in the bid, or extension thereof, to that responsible bidder whose bid, conforming to the Invitation for Bids, will be most advantageous to NJ TRANSIT, price and other factors considered, for contracts other than contracts for the construction or improvement of capital facilities to which (a) above applies.**

(c) (No change.)

### SUBCHAPTER 3. REQUESTS FOR PROPOSALS (RFPs)

#### 16:72-3.1 Solicitation of proposals

Proposals for [professional] **goods** and [technical] services shall be solicited in a manner [which] **that** maximizes the opportunity for competition, unless otherwise provided in N.J.A.C. 16:72-1.5(c).

#### 16:72-3.3 Amendment of request for proposals

(a) If after issuance of a request for proposals (**RFP**), but before the time of receipt, it becomes necessary to make changes in scope, delivery deadline, closing dates, or any other part of the [proposal] **RFP**, or to correct a defective or ambiguous RFP, such changes shall be accomplished by issuance of an amendment of the RFP. The amendment shall be **made available online or** sent to everyone to whom [RFPs have been] **NJ TRANSIT has** furnished the RFP.

(b) Any information given to a prospective proposer concerning an RFP shall be furnished promptly to all other prospective proposers as an amendment to the RFP [if such information is necessary to the proposers in submitting proposals on the RFP or if the lack of such information would be prejudicial to uninformed proposers] **or made available online or sent to everyone to whom NJ TRANSIT has furnished the RFP.**

#### 16:72-3.4 Cancellation of requests before opening

[(a)] Requests for [Proposals] **proposals (RFPs)** should not be cancelled, unless cancellation is in NJ TRANSIT's **best** interest[, such as where there is no longer a requirement for the services or where amendments to the RFP would be of such magnitude that a new RFP is desirable]. [1.] Where **an** RFP is cancelled, proposals [which] **that** have been received shall be returned unopened to the proposers and a notice of cancellation shall be sent to all prospective proposers to whom RFPs were [issued] **furnished by NJ TRANSIT or be made available online.** The notice of cancellation shall identify the RFP and briefly explain the reason the RFP is being cancelled.

#### 16:72-3.10 Rejection of individual proposals

(a) Any proposal [which materially] **that** fails to [conform to the] **meet a mandatory material** requirement[s] of the RFP['s] shall be [rejected] **deemed non-responsive.**

(b) [Proposals] **Any proposal** received from **a** firm[s] determined to be not responsible shall be [rejected] **removed from consideration for award.**

#### 16:72-3.12 Award

Unless all proposals are rejected, award shall be made to that responsible proposer whose proposal, conforming to the [Request for Proposals] **request for proposals,** is [in the

best interest of NJ TRANSIT] the most advantageous to the State, price and other factors considered, and/or provides the best value pursuant to the governing law applicable to the RFP.

#### **SUBCHAPTER 4. DESIGN-BUILD PROJECTS**

##### **16:72-4.1 Solicitation of design-build projects**

**(a) The solicitation of design-build projects may be by the issuance of an Invitation for Bid or a request for proposal, depending on the requirements of the specific project.**

**(b) As part of the solicitation for design-build projects, NJ TRANSIT may prescribe:**

**1. In the solicitation documents, essential project requirements in performance terms;**

**2. Criteria by which proposals will be evaluated by NJ TRANSIT;**

**3. The process that leads to contract award for design and construction services and, where applicable, maintenance and operation and finance of a project based on a firm schedule required by NJ TRANSIT; and**

**4. That members of a design-build team presented by the firm selected for award may be modified or substituted after the evaluation procedure is completed, but new or substituted members must be submitted to NJ TRANSIT prior to the execution of the contract, with supporting information as required by NJ TRANSIT. A prospective contractor will not be permitted to execute the contract with NJ TRANSIT until NJ TRANSIT deems the new or substituted member qualified. No modifications or substitutions to the design-build team will be permitted beyond execution of the contract for work and completion of design, except for exigent circumstances beyond the control of the contractor within the discretion of NJ TRANSIT.**

**(c) NJ TRANSIT may, within its discretion, depending upon the complexity and size of the project, prescribe payment of a lump sum stipend to those bidders/proposers, with satisfactory qualifications and a demonstrated technically satisfactory approach deemed to be within the competitive range of a two-step procurement process in order to:**

**1. Encourage quality teams to participate;**

**2. Provide some modicum of financial relief to offset costs of developing a preliminary design;**

**3. Motivate firms to achieve innovations and adequately develop designs and a competitive bid price;**

**4. Any bidder/proposer that accepts a stipend shall transfer all ownership and rights in the bidder's/proposer's design to NJ TRANSIT for use in this project. No stipend shall be paid to the firm that is awarded and executes a contract for the project. In order for a bidder/proposer to receive payment of a stipend, the bidder/proposer must have submitted a responsive and responsible complete proposal, including price. The NJ TRANSIT Board of Directors may prescribe limits as to the amount of the stipend to be paid to each bidder/proposer qualified to participate in the second stage, depending upon the size and complexity of the project and may limit the number of stipends to be paid per design-build contract.**

**(d) Notwithstanding the two-step solicitation process, NJ TRANSIT may also utilize a special prequalification process before the first step begins.**

#### **16:72-4.2 Evaluation for design-build projects**

**(a) NJ TRANSIT may solicit bids/proposals for design-build projects and set forth the selection criteria in the solicitation documents, which may include either a one-step or two-step evaluation process depending on the size and complexity of the project.**

**(b) A one-step process for procuring a particular design-build project will solicit separate qualification and pricing packages and can be awarded, as described in the solicitation, based on either:**

**1. An award to the lowest priced proposal from a firm meeting the technical qualification requirements of the solicitation; or**

**2. An award to that firm whose proposal represents the best value, as determined based on a pre-determined combination of technical merit and price elements, which may include price, schedule, and technical approach.**

**(c) A two-step evaluation process may be stated in the solicitation documents for a particular design-build project that separates the review of the technical proposal from the price as follows:**

**1. During the first step, the bidders'/proposers' technical qualifications and overall technical approach to the project will be evaluated to determine those firms that fall within the competitive range of satisfactory qualifications and a demonstrated technically satisfactory approach. Those firms in the competitive range will be invited to proceed to the next step; and**

**2. During the second step, complete technical proposals and price proposals for the project will be solicited and evaluated.**

## **SUBCHAPTER [4.] 5. DEBARMENT, SUSPENSION, AND DISQUALIFICATION OF PERSONS**

### **16:72-5.1 Purpose and scope**

The purpose of this subchapter is to set forth the procedures that apply to debarment, suspension, and disqualification of a person or persons from public contracting with NJ TRANSIT. Hearings arising as a result of this subchapter are contested cases subject to the requirements of the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and 52:14F-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1.

16:72-[4.1]5.2 Causes for debarment of a person(s)

(a) In the public interest, NJ TRANSIT shall debar a person for any of the following causes:

1.-3. (No change.)

4. Violations of any of the laws governing the conduct of elections of the Federal government, **the** State of New Jersey, or of its political subdivisions;

5. Violation of the ["Law Against Discrimination" (P.L.1945), **P.L. 1945**, [c.169] **c. 169, as amended** (N.J.S.A. 10:5-1 et seq., as supplemented by P.L. 1975, c.127)], or of the act banning discrimination in public works employment (N.J.S.A. 10:2-1 et seq.) or of the act prohibiting discrimination by industries engaged in defense work in the employment of persons therein (P.L. 1942, [c.114] **c. 114**, N.J.S.A. 10:1-10 et seq.);

6.-14. (No change.)

15. Failure by a vendor to report to the Attorney General and to the [Executive Commission on Ethical Standards] **State Ethics Commission** in writing forthwith the solicitation of any fee, commission, compensation, gift, gratuity, or other thing of value by any State officer or employee or special State officer or employee;

16. [The undertaking,] **Failure by a vendor to report in writing forthwith or failure to obtain a waiver from the State Ethics Commission, who may undertake**, directly or indirectly, of any private business, commercial or entrepreneurial relationship with, whether or

not pursuant to employment, contract, or other agreement, express or implied, or sale, directly or indirectly of any interest in such vendor to, any State officer or employee or special State officer or employee or special State officer or employee having any duties or responsibilities in connection with the purchase, acquisition, or sale of any property or services by, or to, any State agency or any instrumentality thereof, or with any person, firm, or entity with which he **or she** is employed or associated or in which he **or she** has an interest within the meaning of N.J.S.A. 52:13D-[13g]**13.g**. Any relationship subject to this [provision] **paragraph** shall be reported in writing forthwith to the [executive Commission on Ethical Standards] **State Ethics Commission**, which may grant a waiver of this restriction upon application of the State officer or employee or special State officer or employee upon a finding that the present or proposed relationship does not present the potential, actuality, or appearance of a conflict of interest;

17. Influence, or attempt to influence or cause to be influenced, any State officer or employee or special State officer or employee in his **or her** official capacity in any manner [which] **that** might tend to impair the objectivity or independence of judgment of said officer or employee; **or**

18. Cause or influence, or attempt to cause or influence, any State officer or employee or special State officer or employee to use, or attempt to use, his **or her** official position to secure unwarranted privileges or advantages for the vendor or any other person.

(b) The provisions set forth in [N.J.A.C. 16:72-4.1(a)14] **(a)14** through 18 above shall be [included] **referenced** in all Invitations for Bids and RFPs issued by or on behalf of NJ TRANSIT.

16:72-[4.2]**5.3** Conditions affecting the debarment of a person(s)

(a) The following conditions shall apply concerning debarment:

1. Debarment shall be made only upon approval of the Executive Director, **or his or her designee**, except as otherwise provided by law.

2. The existence of any of the causes set forth in N.J.A.C. 16:72-[4.1]5.2 shall not necessarily require that a person be debarred. In each instance, the decision to debar shall be made within the discretion of the Executive Director, unless otherwise required by law, and shall be rendered in the best interest[s] of [the State] **NJ TRANSIT**.

3. (No change.)

4. The existence of a cause set forth in N.J.A.C. 16:72-[4.1(a)1]5.2(a)1 through 8 shall be established upon the rendering of a final judgment or conviction, including a guilty plea or a plea of nolo contendere by a court of competent jurisdiction or by an administrative agency empowered to render such judgment. In the event an appeal taken from such judgment or conviction results in reversal thereof, the debarment shall be removed upon the request of the debarred person unless other cause for debarment exists.

5. The existence of a cause set forth in N.J.A.C. 16:72-[4.1(a)9]5.2(a)9 through 18 shall be established by evidence [which] **that** NJ TRANSIT determines to be clear and convincing in nature.

6. Debarment for the cause set forth in N.J.A.C. 16:72-[4.1(a)13]5.2(a)13 shall be proper, provided that one of the causes set forth in N.J.A.C. 16:72-[4.1(a)1]5.2(a)1 through 18 was the basis for debarment by the original debarring agency. Such debarment may be based entirely on the record of facts obtained by the original debarring agency, or upon a combination of such facts and additional facts.

16:72-[4.3]5.4 Procedures, period of debarment, and scope

(a) The procedures, the period of debarment, and the scope of debarment to be followed by NJ TRANSIT are explained below:



1. NJ TRANSIT, when seeking to debar a person or his **or her** affiliates, shall furnish such party with a written notice stating that debarment is being considered, setting forth the reasons for the proposed debarment, and indicating that such party will be afforded an opportunity for a hearing if [he so] **the person** requests **one** within a stated period of time. All such hearings shall be conducted in accordance with the provisions of the Administrative Procedure[s] Act. However, where another department or agency has imposed debarment upon a party, NJ TRANSIT may also impose a similar debarment without affording an opportunity for a hearing, provided that NJ TRANSIT furnishes notice of the proposed similar debarment to that party, and affords that party an opportunity to present information in its behalf to explain why the proposed similar debarment should not be imposed in whole or in part.

2.-3. (No change.)

4. A debarment may include all known affiliates of a person, provided that each decision to include an affiliate is made on a [case by case] **case-by-case** basis after giving due regard to all relevant facts and circumstances. The offense, failure, or inadequacy of performance of an individual may be imputed to a person with whom he **or she** is affiliated, where such conduct was accomplished within the course of his **or her** official duty or was affected by him **or her** with the knowledge or approval of such person.

#### 16:72-[4.4]5.5 Causes for suspension of a person(s)

In the public interest, NJ TRANSIT shall suspend a person for any cause specified in N.J.A.C. 16:72-[4.1]5.2 or upon [reasonable suspicion] **adequate evidence** that such cause exists.

#### 16:72-[4.5]5.6 Conditions for suspension of a person(s)

(a) The following conditions concerning suspension are to be adhered to:

1. (No change.)

2. The existence of any cause for suspension shall not require that a suspension be imposed, and a decision to suspend shall be made at the discretion of the Executive Director and of the Attorney General, and shall be rendered in the best interest of [the State] **NJ TRANSIT**.

3. Suspension shall not be based upon unsupported accusation, but upon adequate evidence that cause exists [or upon evidence adequate to create a reasonable suspicion that cause exists].

4. (No change.)

5. Reasonable suspicion of the existence of a cause described in N.J.A.C. 16:72-[4.1(a)1]**5.2(a)1** through 8 may be established by the rendering of a final judgment or conviction by a court or administrative agency of competent jurisdiction, by grand jury indictment, or by evidence that such violations of civil or criminal law did in fact occur.

6. A suspension invoked by another agency for any of the causes described in N.J.A.C. 16:72-[4.1]**5.2** may be the basis for the imposition of a concurrent suspension by NJ TRANSIT, which may impose such suspension without the approval of the Attorney General.

16:72-[4.6]**5.7** Procedures, period of suspension, and scope of suspension affecting the suspension of a person(s)

(a) The following provisions regarding procedures, period of suspension, and scope of suspension shall be adhered to by NJ TRANSIT.

1. NJ TRANSIT may suspend a person or his **or her** affiliates, provided that within 10 days after the effective date of the suspension, NJ TRANSIT provides such party with a written notice stating that a suspension has been imposed and its effective date; setting forth the

reasons for the suspension to the extent that the Attorney General determines that such reasons may be properly disclosed; stating that the suspension is for a temporary period pending the completion of an investigation and such legal proceedings as may ensue; and indicating that, if such legal proceedings are not commenced or the suspension removed within 60 days of the date of such notice, the party will be given either a statement of the reasons for the suspension and an opportunity for an informal hearing if [he so] **the person** requests, or a statement declining to give such reasons and setting forth NJ TRANSIT's position regarding the continuation of the suspension. Where a suspension by another agency has been the basis for suspension by NJ TRANSIT, the latter shall note that fact as a reason for its suspension.

2. (No change.)

3. A suspension may include all known affiliates of a person, provided that each decision to include an affiliate is made on a case-by-case basis after giving due regard to all relevant facts and circumstances. The offense, failure, or inadequacy of performance of an individual may be imputed to a person with whom he **or she** is affiliated, where such conduct was accomplished within the course of his **or her** official duty or was effectuated by him **or her** with the knowledge or approval of such person.

#### 16:72-[4.7]**5.8** Disqualification of a person(s)

The disqualification of a person shall conform to N.J.S.A. 27:25-1 et seq., and [N.J.A.C. 16:72-1.1 et seq] **this chapter**.

#### 16:72-[4.8]**5.9** Extent of debarment, suspension, or disqualification

The exclusion from NJ TRANSIT contracting by virtue of debarment, suspension, or disqualification shall extend to all contracting and subcontracting within the control or

jurisdiction of NJ TRANSIT, including any contracts [which] **that** utilize State funds. When it is determined by the Executive Director to be essential to the public interest, [and upon filing of a finding thereof with the Attorney General,] an exception from total exclusion may be made with respect to a particular NJ TRANSIT contract. **A copy of said exception shall be filed with the Attorney General.**

Recodify existing N.J.A.C. 16:72-4.9, 4.10, and 4.11 as **5.10, 5.11, and 5.12** (No change in text.)

## **SUBCHAPTER 6. COMPLAINTS**

### **16:72-6.1 Purpose and scope**

**The purpose of this subchapter is to set forth the procedure for NJ TRANSIT contract users to file complaints related to contracts arising as a result of procurements conducted under the provisions of N.J.S.A. 27:25-11 et seq. If this complaint process is not used, NJ TRANSIT does not waive any of its rights or remedies available at law or in equity.**

### **16:72-6.2 Applicability**

**The provisions of this subchapter deal specifically with means of assuring prompt action in cases where an NJ TRANSIT employee, by filing a formal complaint, claims that an NJ TRANSIT contractor's performance fails to meet contract requirements, and by establishing a record that documents a contractor's poor performance in cases where a contractor's performance fails to meet contract requirements. NJ TRANSIT may refrain from doing business with any contractor for repeated or excessive breaches of NJ TRANSIT contract terms, including, as necessary,**

to protect NJ TRANSIT's best interests. NJ TRANSIT may also use a record of contractor poor performance to bypass that contractor as low bidder on an Invitation for Bid or as an evaluation factor in a request for proposal solicitation.

#### **16:72-6.3 Filing of complaints; subject matter**

(a) A complaint shall be in writing. Complaints are not required where a contract contains specific performance standards including, but not limited to, liquidated damages. Alleged breaches of contract provisions that may be reported include, but are not limited to:

1. Failure by the contractor to deliver goods or services at the time and place or in the manner, quantity, or quality specified;
2. Demand for prices other than those specified in the contract;
3. Delivery of unauthorized substitutes or ungraded material where grading is required;
4. Sale of goods that are not authorized by the contract;
5. Failure to install goods or improper installation;
6. Any other failure to comply with contract specifications or failure to achieve a satisfactory rating for the service provided under the contract if quality assurance surveys are performed;
7. A conflict of interest; and
8. Failure to comply with any relevant legal or contractual requirement.

#### **16:72-6.4 Time frames**

As soon as possible after receipt of the complaint, the Chief Procurement Officer, or his or her designee, will provide written notice to the contractor against which the

complaint was filed. Once notified, the contractor must reply to the complaint within 10 business days of the contractor's receipt thereof, or prior to the deadline specified in the notice of complaint, whichever date is earlier. The contractor may cure or submit a corrective action plan for any defects during that period. A cure or corrective action plan may be taken into consideration by the Chief Procurement Officer's designee in determining whether a complaint is to be resolved against the contractor. The contractor shall notify the assigned designee of any cure or corrective action plan effectuated by the contractor. However, such a cure or corrective action plan shall not serve as cause for automatic invalidation of a meritorious complaint. The using department may file a response to the submission of the contractor and provide a copy of the using department's response to the contractor. As soon as practicable after receipt of the response provided, the Chief Procurement Officer's designee shall issue an initial determination to the contractor and using department regarding the merits of the complaint. The contractor or using department may file an appeal to the Chief Procurement Officer within 10 business days of receipt of NJ TRANSIT's initial determination or, prior to the deadline specified in the initial determination, whichever date is earlier. If the Chief Procurement Officer finds that a complaint against a contractor is valid, the contractor shall be notified of the time by which corrections are to be made. Any time frame specified in this subchapter may be shortened or extended by the Chief Procurement Officer for good cause. In such instances, the Chief Procurement Officer shall give adequate notice to the parties involved. A pending complaint or an initial determination shall not prevent NJ TRANSIT from exercising any other right or seeking any remedy available at law or in equity.

#### **16:72-6.5 Resolution of complaints**

**(a) A complaint appealed to the Chief Procurement Officer, or his or her designee, shall be resolved by written decision on the basis of the Chief Procurement Officer's review of the written record including, but not limited to, the complaint and any attachments, the terms, conditions, and requirements of the contract that includes the proposal submitted by the contractor, pertinent administrative rules, statutes, and case law, and any associated documentation the Chief Procurement Officer deems appropriate. Such review of the written record shall, in and of itself, constitute an informal hearing.**

**(b) At the discretion of the Chief Procurement Officer, the using department and/or respondent may be required to make an in-person presentation, which may include an opportunity to submit additional documentation relevant to the issues set forth in the original complaint.**

**(c) The Chief Procurement Officer, or his or her designee, may perform a review of the written record or conduct an in-person presentation directly. A determination by the Chief Procurement Officer, or his or her designee, shall be a final agency decision, which shall be appealable to the Appellate Division of the Superior Court.**

**(d) Hearings arising under this subchapter are not contested cases subject to the requirements of the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and 52:14F-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1. The period during which a complaint is being handled administratively shall not toll the running of any limitations period in the New Jersey Contractual Liability Act, N.J.S.A. 59:13-1 et seq.**

**(e) An initial decision pending an appeal before the Chief Procurement Officer, or his or her designee, or a final determination by the Chief Procurement Officer, or his or her designee, shall not prevent NJ TRANSIT from exercising any other right or seeking any other remedy available at law or in equity.**

#### **16:72-6.6 Rejection of goods and/or services**

Nothing in this subchapter shall preclude NJ TRANSIT from rejecting the goods or services in question if, upon delivery, defects are substantial and not curable by the contractor within a reasonable time.

#### **16:72-6.7 Emergency situations**

When, in the discretion of the Chief Procurement Officer, or his or her designee, the non-compliance by the contractor affects or may affect health, safety, or jeopardize the assets of NJ TRANSIT, the Chief Procurement Officer, or his or her designee, shall immediately contact the contractor and attempt to obtain full compliance. If no resolution is immediately forthcoming, the Chief Procurement Officer may, without delay, engage a substitute contractor and charge the non-complying contractor any additional costs NJ TRANSIT incurs as a result of the substitution.

#### **16:72-6.8 Effect of contractor non-compliance with contract provisions**

(a) The Chief Procurement Officer may, in the following circumstances, terminate a contract with a non-complying contractor and immediately purchase goods or obtain services from another source and charge the defaulting contractor the difference in price, if any:

1. Refusal of a non-complying contractor to bring goods or services into compliance in the time or manner specified by the Chief Procurement Officer; or

2 Refusal of a contractor to answer inquiries by NJ TRANSIT or failure of a contractor to respond to a formal complaint within 10 business days of receipt or prior to the deadline specified in the notice of complaint.



**(b) The Chief Procurement Officer may, upon continued or willful failure to perform, suspend or debar the contractor subject to the debarment, suspension, and disqualification procedures set forth in N.J.A.C. 16:72-5.**

#### **16:72-6.9 Complaint discovery procedures**

**(a) NJ TRANSIT, either as part of discovery in connection with a complaint filed under this subchapter, or for any other reason, is entitled to request, receive, review, and audit copies of any and all records and documents related to a NJ TRANSIT contract at any time. Upon receipt of the request, the contractor shall promptly provide the requested records and documents free of charge in the time, place, and manner specified. Failure of the contractor to comply with the requirements of this section may, at the reasonable discretion of the Chief Procurement Officer:**

**1. Constitute sufficient basis to resolve the issue(s) in the complaint against the non-compliant contractor; and/or**

**2. Be used by NJ TRANSIT to prove contract non-compliance and may be the basis for NJ TRANSIT to take any action or seek any remedy available under the contract, at law, or in equity.**

#### **16:72-6.10 Complaint against disadvantaged business enterprise**

**Complaints filed against a disadvantaged business enterprise in a Federally funded procurement shall follow an alternate procedure consistent with 49 CFR Part 26.**