

SPECIFICATIONS GONE WRONG

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What is the difference between a Purchasing Agent and a Prize Fighter?

- A. Purchasing Agent spends more time in training.**
- B. Prize Fighter has only one opponent at a time.**
- C. Prize Fighter gets to hit back.**
- D. Sometimes a Prize Fighter wins.**
- E. All of the above.**

INTRODUCTION OF THE TOPIC:

“Specifications Gone Wrong”

Back to Basics

Results matter.

**A good spec means you are not getting
what you don't need!**

Specifications Statutes part A

N.J.S.A. 40A:11-13 (a) through (c). Specifications

Any specifications for the provision or performance of goods or services under this act shall be drafted in a manner to encourage free, open and competitive bidding. In particular, **no specifications under this act may:**

- (a) **Require any standard, restriction, condition or limitation not directly related to the purpose, function or activity for which the contract is awarded;** or
- (b) **Require that any bidder be a resident** of, or that the bidder's place of business be located in, the county or municipality in which the contract will be awarded or performed, **unless the physical proximity of the bidder is requisite to the efficient and economical performance of the contract;** except that **no specification for a contract for the collection and disposal of municipal solid waste shall require any bidder to be a resident** of, or that the bidder's place of business be located in, the county or municipality in which the contract will be performed; or
- (c) **Discriminate on the basis of race, religion, sex, national origin, creed, color,** ancestry, age, marital status, affectional or sexual orientation, familial status, liability for service in the Armed Forces of the United States, or nationality; or

Specifications Statutes part B

N.J.S.A. 40A:11-13 (d) through (f). Specifications

- (d) **Require**, with regard to any contract, the furnishing of **any "brand name," but may in all cases require "brand name or equivalent," except that if the goods or services to be provided or performed are proprietary**, such goods or services may be purchased by stipulating the proprietary goods or services in the bid specification in any case in which the resolution authorizing the contract so indicates, and the special need for such proprietary goods or services is directly related to the performance, completion or undertaking of the purpose for which the contract is awarded;
or
- (e) **Fail to include any option for renewal, extension, or release** which the contracting unit may intend to exercise or require; or any terms and conditions necessary for the performance of any extra work; or fail to disclose any matter necessary to the substantial performance of the contract;
or
- (f) **Require that any bidder submit a financial statement if either a guarantee, by certified check, cashier's check or bid bond, or a surety company certificate is also required** to be furnished by the bidder, unless any law or regulation of the United States imposes a condition upon the awarding of a monetary grant to be used for the purchase, contract or agreement, which condition requires that a financial statement be submitted.

Specifications Statutes part C

N.J.S.A. 40A:11-13 (the balance). Specifications

Any specification which knowingly excludes prospective bidders by reason of the impossibility of performance, bidding or qualification by any but one bidder, except as provided herein, shall be null and void and of no effect and shall be readvertised for receipt of new bids, and the original contract shall be set aside by the governing body.

Any specification for a contract for the collection and disposal of municipal solid waste shall conform to the uniform bid specifications for municipal solid waste collection contracts established pursuant to N.J.S.A. 48:13A-7.22.

Any specification may include an item for the cost, which shall be paid by the contractor, of creating a file to maintain the notices of the delivery of labor or materials required by N.J.S.A. 2A:44-128.

Any prospective bidder who wishes to challenge a bid specification shall file such challenges in writing with the contracting agent no less than three business days prior to the opening of the bids. Challenges filed after that time shall be considered void and having no impact on the contracting unit or the award of a contract.

Exception: Gifts

N.J.S.A. 40A:11-13.1 Payment from bequest, legacy or gift; conditions

Goods or services, the payment for which utilizes only funds received by a contracting unit from a bequest, legacy or gift, shall be subject to the provisions of N.J.S.A. 40A:11-1 et seq., except that if such bequest, legacy or gift contains written instructions as to the specifications, manufacturer or vendor, or source of supply of the goods or services to be provided or performed, such instructions shall be honored, provided that the bequest, legacy or gift is used in a manner consistent with N.J.S.A. 40A:5-29.

Competitive Contracting: DCA Approval

N.J.S.A. 40A:11-4.1. Purposes for which competitive contracting may be used by local units

k. The operation, management or administration of other services, with the approval of the Director of the Division of Local Government Services.

Professional, EUS Exceptions

N.J.S.A. 40A:11-5. Exceptions

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

(1) The subject matter thereof consists of:

(a) (i) **Professional services**. The governing body shall in each instance state supporting reasons for its action in the resolution awarding each contract and shall forthwith cause to be printed once, in the official newspaper, a brief notice stating the nature, duration, service and amount of the contract, and that the resolution and contract are on file and available for public inspection in the office of the clerk of the county or municipality, or, in the case of a contracting unit created by more than one county or municipality, of the counties or municipalities creating such contracting unit; or

(ii) **Extraordinary unspecifiable services**. The application of this exception shall be construed narrowly in favor of open competitive bidding, whenever possible, and the Division of Local Government Services is authorized to adopt and promulgate rules and regulations after consultation with the Commissioner of Education limiting the use of this exception in accordance with the intention herein expressed. The governing body shall in each instance state supporting reasons for its action in the resolution awarding each contract and shall forthwith cause to be printed, in the manner set forth in subsection (1) (a) (i) of this section, a brief notice of the award of such contract;

Definitions: Professional, EUS, Proprietary

N.J.S.A. 40A:11-2. Definitions

(6) "Professional services" means services rendered or performed by a person authorized by law to practice a recognized profession, whose practice is regulated by law, and the performance of which services requires knowledge of an advanced type in a field of learning acquired by a prolonged formal course of specialized instruction and study as distinguished from general academic instruction or apprenticeship and training. Professional services may also mean services rendered in the provision or performance of goods or services that are original and creative in character in a recognized field of artistic endeavor.

(7) "Extraordinary unspecifiable services" means services which are specialized and qualitative in nature requiring expertise, extensive training and proven reputation in the field of endeavor.

(39) "Proprietary" means goods or services of a specialized nature, that may be made or marketed by a person or persons having the exclusive right to make or sell them, when the need for such goods or services has been certified in writing by the governing body of the contracting unit to be necessary for the conduct of its affairs.

Rejection of Bids

N.J.S.A. 40A:11-13.2 Rejection of bids; reasons

A contracting unit may reject all bids for any of the following reasons:

- a. The lowest bid substantially exceeds the cost estimates for the goods or services;
- b. The lowest bid substantially exceeds the contracting unit's appropriation for the goods or services;
- c. The governing body of the contracting unit decides to abandon the project for provision or performance of the goods or services;
- d. The contracting unit wants to substantially revise the specifications for the goods or services;
- e. The purposes or provisions or both of N.J.S.A. C.40A:11-1 et seq. are being violated;
- f. The governing body of the contracting unit decides to use the State authorized contract pursuant to section 12 of N.J.S.A. 40A:11-12.

Use These Resources

USE THE DCA WEBSITE:

www.state.nj.us/dca/divisions/dlgs/programs/lpcl.html

and

The LPCL Reference Manual on the DCA site

Use Google “Advanced Search”, limiting site to “state.nj.us”

**Be careful what you ask for because you just
might get it.**

Sometimes it Works:

THE BRANCBURG AMBULANCE EXPERIENCE

How a good specification worked

Q & A

THESE POWERPOINT SLIDES ARE NOW
AVAILABLE ON THE WEB AT:

www.WoolsonLaw.com