

NEW JERSEY ADMINISTRATIVE CODE
N.J.A.C. 19:38B (2021)

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TITLE 19. OTHER AGENCIES
NEW JERSEY SCHOOLS DEVELOPMENT AUTHORITY
CHAPTER 38B. PROCEDURES FOR PRICE AND OTHER FACTORS PROCUREMENT OF CONSTRUCTION
CONTRACTS FOR NEW SCHOOL FACILITIES PROJECTS

N.J.A.C. 19:38B (2015)

Title 19, Chapter 38B -- Chapter Notes

CHAPTER AUTHORITY:

N.J.S.A. 52:18A-238k.

CHAPTER SOURCE AND EFFECTIVE DATE:

Effective: September 3, 2020.

See: 52 N.J.R. 2129(a).

CHAPTER HISTORICAL NOTE:

Chapter 38B, Procedures for Price and Other Factors Procurement of Construction Contracts for New School Facilities Projects, was adopted as special new rules by R.2011 d.302, effective November 23, 2011. See: *43 N.J.R. 3462(a)*. Chapter 38B, Procedures for Price and Other Factors Procurement of Construction Contracts for New School Facilities Projects, expired on November 23, 2012.

Chapter 38B, Procedures for Price and Other Factors Procurement of Construction Contracts for New School Facilities Projects, was adopted as new rules by R.2013 d.116, effective October 7, 2013. See: 45 N.J.R. 112(a), 45 N.J.R. 2263(b).

Chapter 38B, Procedures for Price and Other Factors Procurement of Construction Contracts for New School Facilities Projects, was readopted, effective September 3, 2020. See: Source and Effective Date.

§ 19:38B-1.1 Purpose and applicability of rules

(a) This chapter is designed to implement the Educational Facilities Construction and Financing Act, P.L. 2000, c. 72 (*N.J.S.A. 18A:7G-1 et seq.*), as amended, and P.L. 2007, c. 137 (*N.J.S.A. 52:18A-235 et seq.*) (the "Act"), by establishing procedures for the procurement of contractors to permit the Authority to carry out its broad statutory mandate to plan, design and construct school facilities projects and effectively administer the Authority's schools construction program. Specifically, these rules are intended to implement the provisions of *N.J.S.A. 52:18A-243*, which authorizes the procurement of contractors through the consideration of "price and other factors."

(b) These rules provide for the Authority to award construction contracts based on the selection of a bidder whose bid proposal, conforming to the invitation to bids, is determined to be "most advantageous" to the SDA, based upon a combination of cost and qualitative factors, with consideration given to price at least equal to the consideration given to all other factors combined, pursuant to the Authority's originating statute at *N.J.S.A. 52:18A-243*. The rules provide for a selection process that includes:

1. The public advertisement of a request for proposals (RFP) that describes the school facilities project, outlines the scope of work for the project, outlines the criteria to be used for selection and the weight that will be given to each of these criteria in the evaluation process;

2. The submission of Project Rating Proposals and the issuance of a Project Rating by the Authority; and

3. The submission of responses to the RFP which include the price proposal and the technical submittal.

(c) These rules further provide for a selection committee, comprised of representatives of the Authority and the SDA school district, to provide technical review and evaluation services, including the evaluation and scoring of technical submittals submitted in response to an RFP.

(d) Notwithstanding any provision of *N.J.A.C. 19:38* to the contrary, these rules are intended to apply to the Authority's procurement of school facilities construction contracts with a construction cost estimated to exceed \$ 5,000,000 and may be applied to other contracts at the option of the Authority. These rules are not required to be applied to the Authority's procurement of construction contracts for "emergent projects." Such "emergent projects" and addition and renovation contracts may continue to be procured pursuant to the Authority's procedures described in *N.J.A.C. 19:38*.

§ 19:38B-1.2 Definitions

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

"Act" means the Educational Facilities Construction and Financing Act, P.L. 2000, c. 72 (*N.J.S.A. 18A:7G-1 et seq.*), as amended, and P.L. 2007, c. 137, which authorizes the school construction program.

"Aggregate rating" means the limit of the outstanding dollar value of all contracts, public and private, which a firm may perform at a given time as assigned by the New Jersey Schools Development Authority's Notice of Prequalification in effect at the time of the contractor's bid which shall be identical to that which is assigned by the New Jersey Department of the Treasury, Division of Property Management and Construction. Should the Division of Property Management and Construction modify a firm's aggregate rating after the Authority has issued a Notice of Prequalification, the aggregate rating issued by the Authority is considered modified to be identical to that of the Division of Property Management and Construction.

"Authority" or "SDA" means the New Jersey Schools Development Authority, an entity formed pursuant to P.L. 2007, c. 137, as successor to the New Jersey Schools Construction Corporation. The Authority is statutorily charged with undertaking and funding school facilities projects pursuant to the Act.

"Best value selection" means a selection process in which consideration is given to both a price proposal and a technical proposal, and the award of the contract is based upon a combination of price and qualitative considerations.

"Bid" means the technical proposal and the price proposal.

"Bidder" or "firm" means a contractor that submits a response to a request for proposals for a construction procurement under this chapter.

"Board" means the governing body of the Authority, consisting of the members of the Authority as outlined in *N.J.S.A. 52:18A-237*.

"Construction documents" means the plans, specifications and other documents which set forth in detail the design for, and other necessary requirements relating to, the construction of the school facilities project.

"Construction manager" or "CM" means the person or firm engaged by the Authority to act as the Authority's representative for the school facilities project and to provide construction management services, in connection with construction of the project.

"Contract" means the written, integrated agreement between the Authority and the contractor setting forth the obligations of the parties, including, but not limited to, the performance of work and the basis of payment. The contract includes the construction documents.

"Contract milestones" means the dates identified in the contract by which the contractor must complete certain critical activities to advance the project.

"DCA" means the New Jersey Department of Community Affairs.

"Emergent project" means a capital project necessitating expedited review and, if applicable, approval, in order to alleviate a condition that, if not corrected on an expedited basis, would render a building or facility so potentially injurious or hazardous that it causes an imminent peril to the health and safety of students and staff, as defined by *N.J.A.C. 6A:26-1.2*.

"Key team member" means an individual identified by a bidder in the response to the RFP and made part of the contract as having a responsible role in the successful completion of the school facilities project.

"New Jersey Workers' Compensation Insurance Experience Modification Rate" or "EMR" means the adjustment factor calculated by the New Jersey Compensation Rating and Inspection Bureau (NJCRIB) for each individual employer based upon the record of payrolls expended and losses incurred during a three-year experience period. It provides a method of comparing the injury record of an individual employer with the standard performance of an average employer of the same size and industry type. The EMR is used by insurers for pricing of the employer's workers' compensation insurance and adjusts the premium so as to reward or penalize the employer for the relative success of his efforts to control the frequency and severity of work injuries.

"Notice of Award" means a notice from the Authority to the bidder issued prior to award, setting forth the Authority's intention to enter into a contract with the bidder.

"Notice of Prequalification" means the letter from the Authority notifying a firm that it has secured Authority prequalification for the applicable period.

"Prequalification" means the Authority's approval of a firm to bid on Authority projects, pursuant to *N.J.A.C. 19:38A*.

"Project Rating" or "Project Rating Limit" means the maximum amount a firm may bid on any individual school facilities package based upon the information contained within a firm's Project Rating Proposal.

"Project Rating Proposal" means that part of the bidder's submittal in response to the RFP that provides the information to allow the Authority to calculate a Project Rating for the bidder.

"Protest" means a challenge to a decision, statement, action or omission of the Authority.

"Ranking" means the process of listing responsive bidders in order of highest to lowest total scores, based upon selection criteria set forth in the RFP.

"Request for proposals" or "RFP" means the document issued by the Authority that describes the procurement process and forms the basis for the technical submittals.

"School facilities project" means the planning, acquisition, demolition, construction, improvement, alteration, modernization, renovation, reconstruction, or capital maintenance of all or any part of a school facility or of any other personal property necessary for, or ancillary to, any school facility, and shall include fixtures, furnishings, and equipment, and shall also include, but is not limited to, site acquisition, site development, the services of design professionals, such as engineers and architects, construction management, legal services, financing costs and administrative costs and expenses incurred in connection with the project.

"SDA school district" means a school district that received education opportunity aid or preschool expansion aid in the 2007-2008 school year, as defined at P.L. 2007, c. 260, § 39 (*N.J.S.A. 18A:7G-3*).

"Selection committee" means the group(s) responsible for review and evaluation of bidders' submissions in response to an RFP in connection with a procurement of a contractor for a school facilities project.

"Selection coordinator" means the administrator of the operations and procedures of the selection process, whose activities shall include, but are not limited to, scheduling of meetings, preparing agendas, recording scores, verifying submittal information, preparing minutes of selection committee meetings, and other similar administrative duties.

"Small business enterprise" or "SBE" means a firm that is registered as a "small business" with the New Jersey Department of the Treasury, Division of Minority and Women Business Development pursuant to *N.J.A.C. 17:14-3.1*.

"Specification" means a written description included as part of the construction documents setting forth the detailed technical and functional characteristics of, or the discrete design for, an item of material, equipment or work to be incorporated into the school facilities project, or a requirement of the work to be performed. A specification may include a statement of any of the Authority's requirements and may provide for inspection, testing or the preparation of a construction item before procurement. Specifications shall augment and complement the drawings and plans prepared by the Authority's design consultant.

"Submittal" means the response to a request for proposals, and may include the technical submittal or price proposals, as indicated in the text.

"Substantial completion" means that point in time in the progress of the school facilities project when certain conditions specified by the contract have occurred, including, but not limited to, the issuance of a temporary certificate of occupancy, the creation of a punch list, and the determination that the school facilities project is ready for occupancy in accordance with its intended use.

"Technical submittal" means that portion of a response to a request for proposals which documents the bidder's submission of information to address evaluation factors other than price.

"Weighted criteria process" means a form of best value selection in which a percentage of evaluation weight is pre-established for qualitative factors and for price, and the award of a contract is based upon the highest total points earned by a bidder.

"Work" means the furnishing of all labor, services, materials, equipment, tools, transportation, supplies, and other incidentals to be furnished, provided, or performed by a contractor as required by the contract documents, including all efforts necessary and appropriate to complete the construction, as described in and reasonably inferable from the construction documents and the contract.

§ 19:38B-2.1 Prequalification requirements

(a) Only those firms holding a valid Notice of Prequalification shall be eligible to submit a Project Rating Proposal and response to an RFP under this chapter. In order to be eligible, the firm's prequalification must be valid on the due date for the submission of the Project Rating Proposal, and on the due date for the submission of technical submittals and price proposals.

(b) The Authority may establish appropriate and special prequalification requirements as may be necessary in order to ensure competitive technical submittals and price proposals, or as may be dictated by the unique or specialized nature of the work to be performed under the agreement.

§ 19:38B-2.2 Advertising

(a) Advertising shall be performed in accordance with *N.J.S.A. 52:18A-243(h)*. In addition, such advertising may also be placed:

1. In design and construction publications and trade journals covering the construction industry in New Jersey;
2. By written notice to New Jersey trade groups or professional societies; or
3. By use of direct mailings to contractors.

(b) Any advertisement shall be made in the form and in the time required to promote competition and shall describe any specific information that a bidder must submit by the date and time specified in the advertisement. The advertisement shall include or describe the evaluation criteria, other than price, that shall be applied in the selection process for determining the winning bidder.

§ 19:38B-2.3 Rejection of submittals; cancellation of procurement or award

(a) Submittals received after the submission date and time prescribed in the advertisement and RFP shall be rejected.

(b) The Authority may reject any submittal for any reason, in accordance with law, when it is otherwise deemed to be in the public interest to do so. The Authority may reject all submittals and cancel a procurement for excessive cost, insufficient competition, insufficient funds, or any other reason, in accordance with law, that it deems to be in the public interest.

(c) The Authority may cancel a Notice of Award at any time prior to execution of an agreement by the Authority, if the Authority deems it advisable to do so in the interest of the State or the public interest.

§ 19:38B-2.4 Validity and execution of agreement

No agreement is valid or binding on the Authority unless and until it is executed by an appropriately authorized representative of the Authority.

§ 19:38B-2.5 Termination

All agreements executed pursuant to this chapter shall provide for, among other things, termination for the convenience of the Authority and for cause.

§ 19:38B-2.6 Disclosure and publicity

(a) Any and all submissions made in response to an RFP are subject to the provisions of the Open Public Records Act, P.L. 2001, c. 404, *N.J.S.A. 47:1A-1* et seq., and the exceptions from disclosure provided therein.

(b) Contractors shall notify the Authority prior to the issuance of press releases and other public dissemination of information concerning a school facilities project, and such shall acknowledge Authority financing and assistance in the undertaking of the school facilities project.

§ 19:38B-2.7 Access and record retention

(a) The contractor shall keep and maintain, and shall require all subcontracted parties to keep and maintain, those records and accounts for school facilities project activities as necessary in order to evidence compliance with the Act and all applicable regulations and contractual requirements. Such records shall be retained by the contractor for 10 years following substantial completion of a school facilities project, and any additional period required for the resolution of litigation, claims or audit findings, and shall thereafter be transferred to the Authority, unless the Authority, in its sole discretion, requests an earlier transfer of such records from the contractor to the Authority or another designated entity. At any time, upon request of the Authority, the contractor shall make records relating to the project available to the Authority, within four business days of the request for documents, and at no cost to the Authority.

(b) In the event that any litigation, claim, audit or request pursuant to the Open Public Records Act, *N.J.S.A. 47:1A-1* et seq., relating to the procurement or the performance of work under the agreement is commenced prior to expiration or termination of the agreement, all records relating to the procurement and the contract shall be retained until all litigation, claims, audit findings, document requests, and related appeals, if any, have been resolved with finality.

(c) The contractor shall provide the State Comptroller and the State Auditor all records and accounts pertaining to school facilities projects to aid the State Comptroller and the State Auditor in their investigations, examinations and inspections of the activities related to the financing and construction of school facilities projects. The contractor shall cooperate, upon request, in sharing information with other state or Federal entities.

§ 19:38B-2.8 Fraudulent statements

Any firm or individual who makes, or causes to be made, a false, deceptive, or fraudulent statement in its submittal in response to the RFP or in its Project Rating Proposal or in the course of any hearing under this chapter may be disqualified from bidding, suspended and/or debarred and may be subject to prosecution pursuant to applicable law.

§ 19:38B-2.9 Deletion or substitution of key team members

(a) No substitutions or deletions of key team members may be made during the selection process or after award of the contract, without prior written approval from the Authority.

(b) Unauthorized changes to a bidder's key team members who were specifically identified in the response to the RFP at any time during the selection process may result in the elimination of the bidder from further consideration.

§ 19:38B-3.1 Initiation

A procurement under this chapter shall be initiated by the public advertisement of a request for proposals (RFP). The advertisement shall specify the dates for submission of responses to the RFP, including the submission of a Project Rating Proposal which shall precede the date for submission of technical submittals in response to the RFP.

§ 19:38B-3.2 Submission of Project Rating Proposal

(a) A firm must submit a Project Rating Proposal and receive a Project Rating from the Authority in order to submit a technical submittal in response to an RFP under this chapter.

(b) The Project Rating Proposal shall be delivered by the firm to the Authority at the hour, date and place specified in the bid advertisement as may be modified by addendum. Project Rating Proposals will be accepted only from firms currently prequalified with the Authority in accordance with *N.J.A.C. 19:38A*. A firm may not submit a Project Rating Proposal prior to the effective date of the firm's prequalification.

(c) The Authority shall examine the Project Rating Proposal and all documents required to be submitted with the Project Rating Proposal for completeness and conformity with bidding requirements. If the Authority determines that a Project Rating Proposal received for a school facility package must be rejected as nonresponsive, it shall notify the firm in writing of the rejection of its Project Rating Proposal and the reason for the rejection within 10 business days of the receipt of the Project Rating Proposal unless there are circumstances that require additional time.

§ 19:38B-3.3 Prior Project Rating

If, in the prior 24-month period, a firm has been assigned a Project Rating, the firm may so indicate on the signed Project Rating Proposal submitted for each project and may request that the Authority apply the prior Project Rating to the current bid, provided that the firm certifies that there has been no change regarding safety, prevailing wage record, or its Authority Project Evaluation Record since the prior Project Rating was assigned.

§ 19:38B-3.4 Calculation of the Project Rating

(a) Firms shall supply the information required for the calculation of a Project Rating in the trade for which the firm is seeking a Project Rating. The Project Rating shall be based on the following factors:

1. A check of references supplied by the firm on projects completed by the firm in the past seven years. This includes information regarding the firm's performance on other school facilities projects;

2. Information regarding the firm's safety record;

3. Information regarding the firm's prevailing wage record; and
4. Other information deemed relevant by the Authority.

§ 19:38B-3.5 Determination of Project Rating

(a) A firm's Project Rating for a particular trade shall be determined in accordance with the following formula:

$$A \text{ [times] } (100\% + B + C + D)$$

where:

A = the firm's largest completed project in a specific trade listed in the Project Rating Proposal;

B = the sum of the Reference Adjustment calculated pursuant to this chapter;

C = the Safety Adjustment calculated pursuant to this chapter; and

D = the Prevailing Wage Adjustment calculated pursuant to this chapter.

(b) The Project Rating assigned for procurements under this chapter shall not include consideration of the firm's prior Authority Project Evaluations, or calculation of a Performance Evaluation Multiplier.

(c) A firm's Project Rating for a trade cannot exceed the firm's Aggregate Rating and cannot exceed 170 percent of the firm's largest listed completed project.

§ 19:38B-3.6 Reference adjustment calculation

(a) A firm will be required to list in its Project Rating Proposal a minimum of two projects completed within the past seven years. The firm shall also provide project contacts for those projects. The Authority shall select, at its discretion, two projects to be confirmed and shall contact the owner's contact identified by the firm. If the Authority cannot contact an owner's contact, the Authority will contact the firm so that the firm may identify another owner's contact for that project. If the firm is unable to provide an additional owner's contact, or if the Authority is unable to contact the additional owner's contact provided by the firm, the Authority will not use that project in the determination of the firm's Project Rating.

(b) The Authority will confirm the firm's performance on each project referenced and assign a percentage value to the responses received. Project contacts will be asked if the performance in each of the following seven categories "exceeded expectations," "met expectations," or fell "below expectations" and the Authority will assign to the response the percentage adjustment listed below:

EXPECTATIONS	Exceeded Expectations	Met Expectations	Below Expectations
Safety	+5 percent	+3 percent	-5 percent
Quality of the construction.	+5 percent	+2 percent	-5 percent
Timeliness of the work performed.	+2 percent	+1 percent	-2 percent
Efficiency of the firm's contract administration.	+2 percent	+1 percent	-2 percent
Supervision of subcontractors.	+2 percent	+1 percent	-2 percent
Firm's level of cooperation during construction.	+2 percent	+1 percent	-2 percent
Timeliness and efficiency of punch list work corrections.	+2 percent	+1 percent	-2 percent

1. If an owner's contact rates a firm "below expectations" in either safety or quality of construction, or if the project reference adjustment is -5 or lower, the Authority will not use that project in the determination of the firm's Project Rating.

2. The Authority will total the project reference adjustments together and the sum shall be the reference adjustment. This reference adjustment shall be used as "B" in the calculation of the firm's Project Rating in *N.J.A.C. 19:38B-3.5*.

§ 19:38B-3.7 Safety adjustment calculation

(a) Bidders shall provide mandatory safety information as follows:

1. The firm will be required to list its most recent New Jersey Workers Compensation Insurance Experience Modification Rate (NJEMR) on its Project Rating Proposal. For any firm that has not performed work in New Jersey prior to the submission of this Project Rating Proposal, or for which the NJEMR has not been calculated, the firm will be required to submit its most recent Experience Modification Rate (EMR) for all other states for which it has performed work. The Authority will then calculate the average of the other states' EMRs. Where appropriate, the firm's NJEMR or its average EMR as calculated by the Authority will be assigned a percentage value as listed below:

EMR is less than or equal to .80	+30 percent
EMR is greater than .80 but less than or equal to .90	+20 percent
EMR is greater than .90 but less than or equal to 1.00	+10 percent
EMR is greater than 1.00 but less than or equal to 1.10	-10 percent
EMR is greater than 1.10 but less than or equal to 1.20	-20 percent
EMR is greater than 1.20	-40 percent

2. The firm shall be required to list safety information in its Project Rating Proposal. The safety information supplied will be assigned a percentage value as listed below:

	Yes	No
Employee of the firm completed an OSHA 500 or OSHA 502 course in last four years.	+2 percent	0 percent
Employee of the firm completed Council on Certification of Health, Environmental and Safety Technologists (CCHEST) "Safety Trained Supervisor in Construction" course.	+2 percent	0 percent
Employee of the firm completed Associated General Contractors of America (AGCA) "Safety Management Training Course."	+2 percent	0 percent

The percentage value for the EMR and the percentage value for the safety information shall be added together and this total shall be the safety adjustment. The safety adjustment shall be used as "C" in the calculation of the firm's Project Rating in *N.J.A.C. 19:38B-3.5*.

§ 19:38B-3.8 Prevailing wage adjustment calculation

(a) The firm will be required to list in its Project Rating Proposal its prevailing wage violations issued by the New Jersey Department of Labor and Workforce Development for the previous five years.

(b) The Authority will calculate a prevailing wage adjustment by applying the following percentage values in accordance with whether the firm has been adjudicated as having committed one or more prevailing wage rate violations during the past five years:

None	0 percent
One	-10 percent
More than one	-20 percent

This percentage value shall be the prevailing wage adjustment. The prevailing wage adjustment shall be used as "D" in the calculation of the firm's Project Rating in *N.J.A.C. 19:38B-3.5*.

§ 19:38B-4.1 Request for proposals

(a) The RFP shall include, but shall not be limited to:

1. A general description of the school facilities project;
2. The scope of work;
3. The minimum qualification requirements for bidders, including, but not limited to, the appropriate classifications and aggregate rating limits assigned by the New Jersey Department of the Treasury, Division of Property Management and Construction;
4. The plans and specifications for the project;
5. Technical submittal and price proposal forms;
6. The form of contract;
7. The instructions and requirements for preparing a response to the RFP;
8. The criteria for evaluation of submittals and price proposals and the relative weight of each criterion;
9. Budget limits for the project;
10. Requirements for bid bonds, performance bonds, payment bonds and insurance;
11. Schedule requirements in the form of major contract milestones to be achieved; and
12. The documents required to be submitted upon the notice of award, pursuant to (b) below.

(b) The RFP shall require the initial submission of a Project Rating Proposal, followed by the concurrent submission of a technical submittal and a separate price proposal. The technical submittal and price proposal shall be evaluated separately, in accordance with the evaluation factors and process set forth in the RFP.

(c) The RFP shall specify the date, place, and time for the submission of the Project Rating Proposal, the technical submittal, and price proposal to the Authority.

(d) The Authority may provide for a pre-proposal conference at which bidders may ask questions and seek clarification of the information, data or documents contained within the RFP. The RFP will provide the date, time, and location for all conferences, and shall indicate if the conference is mandatory for all bidders.

(e) Site visits and interviews may be scheduled as part of the evaluation process. The RFP shall indicate if a site visit and/or interview is mandatory.

(f) A bidder's submission of a technical submittal and price proposal evidences the bidder's complete review of the RFP and all associated documents and full understanding of, and agreement with, all of the requirements, terms, and conditions set forth therein.

§ 19:38B-4.2 RFP evaluation criteria

(a) The RFP phase of the procurement process may include, without limitation, consideration of the following factors, in addition to the consideration of price:

1. The bidder's experience on identified projects of similar size, scope and complexity;
2. The experience of the bidder's key team members on projects of similar size, scope and complexity;
3. The bidder's prior performance on projects for the Authority, as evidenced by performance evaluations as specified in the RFP;
4. The bidder's concurrent commitment of staff and resources to other projects, and the bidder's ability to fulfill the contract as affected by the commitment of staff and resources to another contract with the Authority, or to contracts with any other public or private entity;
5. The prior affirmative action experience of the prospective bidder;
6. Consideration of the bidder's aggregate rating from the Department of the Treasury, Division of Property Management and Construction, which is affected by prior affirmative action experience;
7. Consideration of the bidder's staffing capabilities, such as the bidder's plan for staffing the project (distinguishing between self-performed and subcontracted work), including recruitment methods and proposed sources of supply for skilled labor;
8. The bidder's history and experience with respect to conformance to project schedules on similar projects, including timely completion of punch list items;
9. The bidder's project safety record including Occupational Safety and Health Administration (OSHA) violations and/or penalties;
10. The bidder's history of or experience with assertion of claims or requests for adjustment of compensation on similar projects, and the results of such claims or requests;
11. The bidder's history of cure notices on projects of similar size or complexity;
12. The bidder's experience with payment of, or liability for, liquidated damages on projects of similar size and complexity;
13. The bidder's history with respect to timely payment of subcontractors; and
14. Any other pertinent information necessary to establish the qualifications of the prospective bidder to undertake the contract.

§ 19:38B-5.1 Selection coordinator

Prior to the advertisement of the RFP, the Authority will select a member of staff to serve as selection coordinator for the procurement, who shall be responsible for scheduling of meetings, preparing agendas, recording scores, verifying submittal information, preparing minutes of selection committee meetings, and other similar administrative duties.

§ 19:38B-5.2 Composition and responsibilities of selection committee

(a) Prior to the receipt of responses to the RFP, the Authority shall establish a selection committee to review and evaluate submissions received in response to a procurement under this chapter. Each member of a selection committee shall have the relevant experience as set forth in *N.J.S.A. 52:34-10.3(c)*, necessary to evaluate the submissions.

(b) The members of the selection committee shall consist of a majority of Authority representatives and, if the SDA school district in which the school facilities project is located elects to participate in the selection process, a representative of the SDA school district, pursuant to N.J.S.A. 52:18A-243g.

(c) Each member of the selection committee shall be responsible for evaluating and scoring the technical submittals in accordance with the weighted criteria process set forth in the RFP.

(d) Once the responses are received and the identity of the bidders is ascertained, the members of the selection committee will be notified of the identity of all firms that submitted a bid. Each member of the selection committee, prior to the evaluation of any submission, shall execute a certification that he or she has no personal interest, financial or familial, in any of the bidders to be evaluated, or the principals, subsidiaries or parent companies thereof. Furthermore, should any of the selection committee members indicate that a conflict or personal interest exists once the identity of the bidders is revealed, that member shall not serve on the selection committee and may be replaced.

(e) The names of the members of the selection committee shall be made public once the contract is awarded, pursuant to *N.J.S.A. 52:34-10.3(c)*.

§ 19:38B-5.3 Evaluation of additional materials or additional considerations

(a) In addition to the selection committee's review of written responses to the RFP, the selection evaluation process may include:

1. Evaluation of bidders' participation in interviews; and
2. Evaluation of any other components of the evaluation process determined, in the sole discretion of the Authority, to be appropriate.

(b) The Authority shall examine all submittals for completeness and conformity with the requirements of the RFP. If the Authority determines that a submittal must be rejected as non-responsive, it shall notify the bidder in writing of the rejection of its submittal and the reason for the rejection within 10 business days of receipt of the submittal, unless there are circumstances that require additional time.

(c) The members of the selection committee shall individually and independently evaluate each bidder's technical submittal, and performance and participation in interviews and other specified elements of the technical submission. Each member of the selection committee shall assign scores to the submittals, in accordance with the evaluation criteria and relative weights specified for each criterion, as set forth in the RFP. The members of the selection committee shall then submit their scores for each technical submittal to the selection coordinator.

(d) The selection coordinator shall compile the evaluation scores of the committee members for the technical submittals in accordance with the procedures outlined in the RFP.

§ 19:38B-6.1 Submission of price proposal

(a) The price proposal shall be submitted with the technical submittal in a separate sealed envelope and shall document the bidder's price for construction of the school facilities project, in accordance with the requirements of the RFP. The envelope shall indicate clearly that it is the price proposal and shall identify the bidder's name, project number, and any other information required by the RFP. The price proposals shall remain sealed throughout the technical submittal evaluation process until the time for opening of price proposals as indicated in the RFP, and as modified by addendum.

(b) Each price proposal shall be accompanied by an Uncompleted Contracts Form, executed by the bidder, which is a statement of the current value and status of the bidder's backlog of uncompleted construction work as of the price proposal due date, and which includes a certification that, if the bidder is awarded the contract for the construction of the schools facility project that is the subject of the procurement, the award will not cause the bidder to exceed its aggregate rating. The backlog of uncompleted construction work shall be the total contract value of unbilled work, as evidenced by the most recent approved invoice (or other similar documentation) received by the firm before the date of the submission of the price proposal. A bidder shall not submit a price proposal that causes the total outstanding amount of all of its existing contracts, both public and private as described in the Uncompleted Contracts Form, to exceed its aggregate rating. A bidder shall not be awarded a school facilities package which, when added to the backlog of uncom-

pleted construction work as defined in and shown on the executed Authority backlog form, would exceed the bidder's aggregate rating. Nor may a bidder submit, or the Authority award a contract based on, a price proposal that names a subcontractor whose aggregate rating would exceed the subcontractor's aggregate rating, if the subcontractor's contract for the school facilities package at issue were added to the subcontractor's existing backlog of uncompleted work. The same bidder may submit multiple bids to the Authority for several procurements, meaning bids for consideration on separate projects being procured concurrently, when the sum of the outstanding bids exceeds the firm's aggregate rating; however, a firm may not enter into any contracts in excess of its aggregate rating as set forth on the Authority's Uncompleted Contracts Form submitted with the price proposal. Upon receipt of multiple bids from a bidder, the Authority, at its sole discretion, shall determine which contract or contracts are to be awarded to such firm within the firm's aggregate rating. If a firm successfully bids for two or more school facilities packages, which, either in combination with each other or in combination with the bidder's backlog of uncompleted construction work on other currently held contracts, would exceed the bidder's aggregate rating, the firm shall be awarded only those school facilities packages which in combination fall within the firm's aggregate rating as set forth in *N.J.A.C. 19:38-3.9*.

(c) Each price proposal shall be accompanied by a bid bond in the form and amount specified in the RFP. Bid bonds shall comply with the requirements of this chapter and with relevant State statutes.

1. Each bid bond shall reference the procurement package to which it applies.
2. Bid bonds covering Authority procurement packages shall be issued only in accordance with *N.J.S.A. 2A:44-143* through 147.
3. Bid bonds shall be issued to the contractor, and shall indicate aggregate bonding limits.
4. Bid bonds shall be issued by companies listed in the current United States Treasury Department Circular 570, which Circular will establish the underwriting limitation for any one risk.
5. Bid bonds shall be issued only by companies authorized to transact business in the State of New Jersey.

§ 19:38B-6.2 Evaluation of price proposal and selection of awardee

(a) Prior to the advertisement of the RFP, the Authority shall establish the maximum point score for the lowest responsive price proposal. All other price proposals greater than the lowest responsive price proposal will be assigned scores based upon the percentage that the proposal exceeds the lowest responsive price proposal.

(b) The price proposals shall be opened and examined for completeness and conformity with the requirements of the RFP. The bidder shall show all bid amounts in both words and figures. In the event of a discrepancy between the words and figures, the amount shown in words shall govern. A price proposal deemed non-responsive will be rejected and the bidder will be notified in writing of the rejection within five business days of the opening of price proposals, unless there are circumstances that require additional time.

1. Where unit prices are requested, in the event of a discrepancy between the unit price bid for any scheduled bid item and the extension shown for that item under the column of the Price Proposal Form designated "Bid Amount," the unit price is to govern. Where a unit price is bid, but no extension is provided, the SDA will provide the extension based on the unit price bid and the estimated quantity for the bid item.

2. Where an extension is provided in the "Bid Amount" column, but no unit price appears in the "Unit Price" column of the Price Proposal Form, the SDA will provide the unit price by dividing their "Bid Amount" figure provided by the bidder by the estimated quantity.

(c) The selection coordinator shall assign the maximum price points to the lowest responsive total dollar proposal. All other responsive proposals shall be scored based upon the percentage that each proposal exceeds the lowest proposal.

(d) The selection coordinator shall determine the combined scores for each bidder based on their technical and price proposals, with consideration of price at least equal to the consideration given to all other factors. The bidder with the highest overall score shall be recommended to the Board of the Authority for an award. All recommendations for award are subject to the approval of the Board. Following Board approval, the Authority will issue a written notice of award to the successful bidder.

§ 19:38B-6.3 Withdrawal of price proposal

A bidder may withdraw a price proposal or substitute a price proposal with another by submitting a letter to the Authority prior to the deadline for submission of price proposals. The withdrawal or substitution shall include the bidder's name, the date and time of the submission of the original price proposal, the name of a principal of the firm responsible for the withdrawal or substitution, and the requested action to be taken.

§ 19:38B-7.1 Contract approval and execution

(a) Upon approval of a recommendation for award by the Board, the Authority shall issue a Notice of Award letter to the bidder. The Notice of Award is not binding on the Authority until the Authority has executed the contract, and the Notice of Award does not authorize the commencement of work under the contract. No person shall perform any work in furtherance of the contract unless and until the Authority executes the contract and issues a Notice to Proceed.

(b) The Notice of Award letter shall contain a list of the additional documents required to be submitted by the bidder with the executed contract, including the requirements for payment and performance bonds. The Notice of Award will specify the time within which the bidder must submit to the Authority the executed contract and other documents required by the Notice of Award. Within the time period specified in the Notice of Award, the bidder shall properly and duly execute the contract and deliver to the Authority the executed contract, as well as performance and payment bonds and all other documents required by the RFP or the Notice of Award letter.

(c) Each payment and each performance bond must be in an amount at least equal to the total contract price.

1. All bonds shall comply with the requirements of this chapter and relevant State statutes. All bonds submitted by the bidder shall be issued only to the bidder, and shall conform to the provisions of *N.J.S.A. 2A:44-143* through 147 and shall indicate aggregate bonding limits.

2. Bonds shall be issued only by companies authorized to transact business in the State of New Jersey.

(d) If the bidder fails to return the required documents within the time specified by the Authority, the Authority may take whatever action is appropriate and authorized by law including, but not limited to, withdrawing or cancelling the notice of award to the delinquent bidder and awarding the contract to the next-highest ranked bidder, cancelling the procurement or proceeding to recover under the bid bond submitted.

(e) Upon the successful contractor's submission of any required documentation or materials as specified in the notice of award, and the Authority's acceptance of such documents, the Authority will execute the agreement and provide the successful contractor with a fully-executed agreement.

§ 19:38B-8.1 Applicability and effect

(a) Notwithstanding any provisions of *N.J.A.C. 19:38* to the contrary, the following provisions will apply to the process and consideration of performance evaluations for contracts procured under this chapter.

1. Every contractor awarded a construction contract procured pursuant to this chapter will be subject to evaluation in accordance with *N.J.S.A. 18A:7G-36*. The performance evaluation will consider the contractor's performance in the following categories: quality of work; scheduling; management; cost control and change orders; safety and industrial hygiene; small business goals; and close-out.

2. The contractor's performance will be evaluated periodically during the progress of the project. The evaluation will be performed by a reviewer with direct involvement in the management or supervision for the project.

3. The contractor's performance evaluations will be used by the Authority in evaluating and scoring bidders as to their prior experience on Authority projects, in accordance with the provisions of this chapter or *N.J.A.C. 19:38*.

§ 19:38B-8.2 Evaluation rating values

(a) Notwithstanding any provisions of *N.J.A.C. 19:38* to the contrary, contractors shall be evaluated with respect to the various evaluation categories using the following evaluation ratings:

1. Outstanding (O) or 100 percent--far exceeds the contract requirements by consistently exhibiting excellent performance. Always meets, and almost always exceeds the contract requirements;

2. Very Good (VG) or 90 percent--often exceeds the contract requirements and frequently provides a high level of performance. Typically meets and often exceeds the contract requirements;

3. Satisfactory (S) or 80 percent--provides an acceptable level of performance consistently meeting the contract requirements;

4. Marginal (M) or 70 percent--performs slightly below the requirements of the contract, meeting the contract requirements on an intermittent basis; and

5. Unsatisfactory (U) or 60 percent--fails to meet important contract requirements, resulting in a negative impact on the entire project.

(b) The numerical scores in (a) above may be subject to special adjustment factors for certain categories deemed by the Authority to be particularly critical to contractor performance. The numerical ratings for each category shall be tabulated to arrive at an overall numerical evaluation score for each performance evaluation.

§ 19:38B-8.3 Consideration of performance evaluations

(a) For contracts procured pursuant to the provisions of *N.J.A.C. 19:38*, performance evaluations shall be considered in accordance with that chapter.

(b) For contracts procured pursuant to this chapter, the process for evaluating a contractor's prior performance on Authority projects in a selection process shall be specified in the RFP. Such process may consist of:

1. A mathematical tabulation and averaging of the scores of all prior performance evaluations within a relevant time period;

2. Consideration of particularly favorable or unfavorable evaluations individually and with reference to other evaluations;

3. Consideration of multiple evaluations over the course of a given project, to show consistency of performance, deterioration of performance or efforts at improvement and recovery; or

4. A combination of the methodologies in (b)1 through 3 above.

§ 19:38B-9.1 Scope and purpose

(a) This subchapter sets forth the procedures that govern protests of the Authority's decisions with respect to procurements under this chapter, including challenges to the form of the RFP, the evaluation and scoring of bidders' technical proposals, and the award of contracts.

(b) For purposes of this subchapter, protests of the type described in (a) above are not contested cases subject to the requirements of the Administrative Procedure Act, *N.J.S.A. 52:14B-1* et seq.

§ 19:38B-9.2 Protests, hearing procedures, and time limitations

(a) A challenge to the following actions of the Authority shall be made as follows:

1. Project Rating limit: A bidder that has submitted or that intends to submit a Project Rating Proposal, and that objects to the Project Rating process or documents, must submit a written protest to the Authority, setting forth in detail

the grounds for such protest, within five business days of receipt of notification of the Authority's assignment of a Project Rating or notification of rejection of the bidder's Project Rating Proposal. The protest must contain all factual and legal arguments, materials or other documents that support the protestor's position, and must indicate whether the protestor requests an informal hearing. The Authority may deny any protest that is filed more than five business days after notification of assignment of the Project Rating or notification of rejection of the Project Rating Proposal, or that fails to provide the specific reasons for and arguments supporting the protest.

2. RFP process or documents: A bidder that has submitted or that intends to submit proposals in response to the RFP, and that objects to the RFP process or documents, must submit a written protest to the Authority at least three business days prior to the opening of the technical proposals, setting forth in detail the grounds for such protest. The protest must contain all factual and legal arguments, materials or other documents that support the protestor's position, and must indicate whether the protestor requests an informal hearing. The Authority may deny any protest that is filed less than three business days prior to the scheduled opening of technical proposals, or that fails to provide the specific reasons for and arguments supporting the protest.

3. Technical and price proposal scoring: A bidder protesting the scoring of its technical and/or price proposals, or those of another bidder, must submit a written protest to the Authority setting forth the specific grounds for challenging such scorings. The protest must contain all factual and legal arguments, materials or other documents that support the protestor's position and must indicate whether the protestor requests an informal hearing. The protest must be submitted in writing, within five business days of the public advertisement of the bidders' scores. The Authority may deny any such protest that is filed more than five business days after the public advertisement of the bidder's scores, or that fails to provide the specific reasons for and arguments supporting the protest.

4. Performance evaluation: A contractor that is dissatisfied with its performance evaluation on an Authority project may request an informal hearing before the Authority by submitting to the Authority a written protest setting forth the specific grounds for such protest, within 15 calendar days after the date of receipt of written notification of the performance evaluation. The protest must contain all factual and legal arguments, materials or other documents that support the protestor's position and must indicate whether the protestor requests an informal hearing. The Authority may deny any protest that is filed more than 15 calendar days after the contractor's receipt of written notification of the performance evaluation, or any protest that fails to provide the specific reasons for and arguments supporting the protest.

§ 19:38B-9.3 Hearing procedures

(a) Hearing procedures shall be as follows:

1. The Authority, in its sole discretion, shall determine whether to grant the opportunity for an informal hearing regarding a protest. Informal hearings are for fact-finding purposes for the benefit of the Authority and the Authority shall have the sole discretion whether to hold an informal hearing. Alternatively, the Authority may determine that sufficient information already exists in the record so that a decision may be made without a hearing, and the Authority may waive the hearing and issue a final agency decision accordingly. In the event that the Authority determines that a hearing is not necessary, a written decision will be issued by the Authority within five business days of receipt of all documents related to the protest.

2. Informal hearings will be held, where feasible, within 14 business days of the receipt of the request. Hearings will be heard, where practicable, by a hearing officer designated by the Chief Executive Officer. The hearing officer shall issue a final written decision within 30 calendar days of the conclusion of the hearing unless, due to the circumstances of the hearing, a greater time period is required. For all protests of the RFP processes and documents, the written decision will issue prior to the opening of statements of qualification or proposals, respectively. If a decision based upon a protest results in a modification of the aforesaid process or documents, such decision shall be conveyed to all eligible bidders by addendum.

3. In an informal hearing, the Authority may, in instances where public exigency exists or where there is potential for substantial savings to the State, modify or amend the time frames or any other requirements provided in this section. In these instances, the Authority shall document, for the record, the rationale for such amendment and give adequate notice to the parties involved.

4. For matters of dispute that may occur relative to the activities of the Authority, if formal hearings are warranted, such hearings will be held by the Chief Executive Officer or his or her designee, or by an Administrative Law Judge

pursuant to 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*, as applicable.

5. The Board of the Authority, or the Chief Executive Officer, as its designee, shall determine whether a matter constitutes a contested case and shall retain or refer any such matter for hearing pursuant to the Administrative Procedure Act, *N.J.S.A. 52:14B-1* et seq., and *52:14F-1* et seq. Upon filing of the initial pleading in a contested case, the Board of the Authority may by resolution either retain the matter for hearing directly or transmit the matter for hearing before the Office of Administrative Law. Such hearings shall be governed by the provisions 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*.