

ELECTRONIC PROCUREMENT AND YOUR AGENCY: WHAT YOU NEED TO KNOW

*P.L. 2018, c.156 and
N.J.S.A. 40A:11-4.7 thru 4.12
and NJAC 5:34-5*

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Questions and answers from the webinar are on page 27

WHAT WE WILL COVER TODAY

- Overview of E-Procurement
- About the Local Unit Electronic Procurement Act; P.L. 2018, c.156
- How Electronic Bidding Works
- Review of the Rules
- So, Now What?
- If we have time: Why All This Works: Supplier Submission/
Compliance Elements

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RANGE OF E-PROCUREMENT SERVICES

- Different vendors provide services beyond E-Bidding and at different price points:
 - Online bidding: RFB/RFP submission and evaluation, as well as RFI, Quotes, etc.
 - Supplier management/communication
 - Contract management; stores documents, reminders of key dates, renewals, re-procurement
 - Full procurement work-flow
 - Integration with financial systems to manage the entire procurement/budget/payment cycle
 - Really large places: online catalog marketplaces (stores) and direct purchasing from awarded contracts

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HOW AND WHY IT'S DONE

- Online via Software as a Service (SaaS) providers
- There are a handful of them with different business models and approaches to the process. Since it's taken some time for us to allow it, some of the vendors have started to approach contracting units and figure out how to sell to you. They will likely improve with experience.
- Why consider it?
 - Once in place, it can generate cost savings via time and work process improvements at every step of the cycle.
 - Savings to suppliers in time and effort to bid.
 - Reduces risk of bidding/RFP problems; can eliminate incomplete documents and fatal submission issues.

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ABOUT P.L. 2018, c.156
N.J.S.A. 40A:11-4.7 THRU 4.12

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**WHAT IS “ELECTRONIC PROCUREMENT”
UNDER c.156**

The focus is on the bidding and related processes:

- ...the use of computer technology and the Internet for the advertising and submission of public bids,
- providing notice of revisions or addenda to advertisements or bid documents,
- the receipt of proposals and quotations, competitive contracting,
- the use of reverse auctions,
- and related practices to assist in determining the lowest responsible bidder or proposer who is most advantageous, price and other factors considered, as appropriate, for goods and services,
- the sale of personal property,
- and other public procurement-related activities and services as may be determined appropriate by the director.

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ELECTRONIC PURCHASING...

- Allows electronic procurement technology to be used, regardless of threshold, for procurement of:
 - Goods/Commodities
 - Services
 - Public works construction
 - Electricity and natural gas and related services
 - Sale of personal property, subject to provisions of 40A:11-36
 - Real property auctions subject to Local Lands and Buildings Law
- Can be used for competitive bids, competitive contracting, and quotes.

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C. 156 TOOK EFFECT ON OCTOBER 1, 2019

- Allows DLGS to adopt rules that address converting the law, principals, safeguards, and procedures related to sealed bidding to an electronic procurement environment.
- Authorize local units of government to accept commercial standards for electronic forms of bid security.
- Establish minimum standards that must be met by systems and services providing and administering electronic procurement activities.
- Does NOT provide for DLGS approval of vendors.
- AND, is subject to rules that have now been temporarily adopted and will be finalized over the next few months.

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OTHER KEY PROVISIONS

- No change in newspaper “notice advertising bids or RFPs” requirements.
- Requires general authorization of the governing body.
- Covers all LPCL and PSCL units; does not cover county colleges (at least not yet).

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WHAT THIS MEANS:

- This permits the full bid/RFP (even quote) process to be online – documents submitted online in facsimile form, as appropriate to the document.
- While there are many companies that sell e-procurement/ bidding solutions, there are only a handful of vendors that sell services that focus on the public sector.
- Public works contracts will be the most interesting of these.
- We will now see some early adopters take the lead in contracting and figuring out what works best. Others will wait to see how this all plays out.
- But it is something most contracting units, other than the small places will want to consider over the next few years. It is where the future of procurement management lies.

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HOW E-BIDDING WORKS

E-Bidding is a Subset of E-Procurement Technology

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WHAT VENDORS GENERALLY PROVIDE

- Document management and bid process management
- Electronic lock box for vendor submitted documents and data
- Creates and follows a workflow process
- Experience: most companies are not startups
- Online training plus videos and human support
- Robust cyber security controls

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OTHER ELEMENTS

- Range of different systems of different technology vintages:
 - Pricing models differ.
 - General presentation metaphors vary, e.g., online forms vs. uploaded PDF's.
 - Some systems register and notify bidders of opportunities.
 - Others provide free viewing for anyone.
- Online Q&A systems.
- Who pays? Variety of pricing models.

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MORE SYSTEM FEATURES

- Addendum management
- Systems will prevent incomplete submissions
- Sophisticated RFP evaluation practices
- Creates new options for bid openings: can be private (in-office) or public (projector-based)
- Wide range of result reports

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OTHER VENDOR FEATURES

- Reverse auction models for procuring commodities like electricity, road salt, etc.
- Systems usually permit bidding services to scrape announcements to resell as services.
- Web-based disability access of the system varies
- Vendor's are required test system security regularly and provide assurance to agency

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Note:Text in italics represents opinion or observation

N.J.A.C. 5:34-5 LOCAL UNIT ELECTRONIC PROCUREMENT RULES

Divided into four sections covering: N.J.A.C. 5:34-5

- Goods, services and public works: 5.1 though 5.7
- Sale and leases of public property: 5.8 through 5.12
- Administrative issues: 5.13 – 5.15
- The Other Provisions

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OVERVIEW

- Implements P.L. 2018, c.156, the "Local Unit Electronic Procurement Act" (LUEPA?)
- Based on the EGG Notice of May 26, rules will be formally published in NJ Register on 6/15 and likely be on DLGS Rule and Regulation site.
- Primary rule is Subchapter 5 of NJAC 5:34 and combines LPCL and PSCL provisions.
 - Other amendments made to 5:34-4.1 and 5:34-8.5 for bid opening in public health emergencies.
- Provides details for bids, competitive contracting, reverse auctions, and property sales and leases.

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WHAT HAPPENED TO THE E-PROCUREMENT PILOT?

- The authorizing law, P.L. 2001, c.30, went away on October 1, 2019, 9 months after LUEPA was enacted.
- LFN 2019-15 continued some practices, such as electricity, natural gas, and sale of personal property auction sales, SRECs, which gets superseded by the rules.
 - But they are consistent

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GOODS, SERVICES AND
PUBLIC WORKS:
5:34-8.1 THROUGH 8.7

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5.1 – GENERAL PURPOSE
5.2 – DEFINITIONS

- 5.1 – General Purpose: the electronic purchase of goods, services, and real estate sale/leases, and sale of surplus personal property by **local units** of government and school districts.
- 5.2 – Definitions: most are some general terms that add some specificity:
 - **Electronic Procurement Platform (EPP)**, the software service used to manage e-procurement
 - **Commodity**: products suitable for purchase by reverse auction: gasoline, diesel fuel, snow removal chemicals, public works materials and supplies, including road and roadway construction materials. Director can approve other materials.
 - **Introduces the term offer** and its relatives: offeror, offer package, offer submission, to create a single set of terms when referring to both (competitive) bids and (CC Request for) proposals procedures

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5.3 – EPP FOR GOODS, SERVICES AND PUBLIC WORKS

- Sets out minimum requirements that EPP's must provide; securely upload docs, timestamps, provide a secure lockbox, have identify verification, and handle all forms and requirements online.
- Allows platforms to charge registration fees and fees for plans and specs. (There is a limit, but it comes up later.)
- Allows competitive procurement (bids/RFP) documents to be submitted via an EPP, kept secure until opening time.
- Requires all offerors and prices to be announced in real time when deadline passes.
- Local unit has option to reveal names of offer-takers (bidders who picked up specs) prior to opening.

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5.3 – EPP FOR GOODS, SERVICES AND PUBLIC WORKS (cont.)

- System can all related notices to be sent online, requires online Q&A function, extend time limits, support set-aside programs, secure user accounts, online instructions/training/help/complaint systems; download offer documents.
- Permits bid and performance bonds and surety certificates to be submitted via an electronic verification system. Sets up optional process for paper guarantees along with electronic.
- Permits public works plans with electronic seals by architects and engineers.

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5.4 – PERMITS PARALLEL PAPER PROCESS
5.5 – ADVERTISEMENT/TIME FOR RESPONSE

- 5.4 – Local unit can offer paper-based system at any time – not locked in to always using electronic.
- 5.5 - Required notices must still be published in newspapers even using online. If procurement is being done electronically, ad must contain:
 - That it is electronic
 - Name and web address of platform (*should be specific to the location of agency's activity or item*)
 - If using online and paper, that must appear in the ad
 - Submission deadline is the same across both
 - If an EPP fee, where to obtain a paper copy
 - Usual time limits apply to EPP (e.g., minimum 10 or 20 days from ad to open)
- If the platform requires a fee to view, ad must include notice that the specs can be obtained at office, plus address and hours. *This may be a public access problem.*

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5.6 – REVERSE AUCTION GENERALLY
5.7 – ENERGY AUCTIONS

- Only for energy and commodities.
- Notice must be published locally as of paper and include when bids are accepted and how to do it. *Does not require notice that is it online or the website where the auction to be printed – this needs to be clarified.*
- Required documents must be uploaded prior to start of auction.
- Names of auction bidders **cannot** be displayed while in play.
- DLGS can establish a pilot plan for this for other goods and services contracts.
- Energy auctions: replicates the current model of notice, use of registered energy agents and suppliers, resolution in advance. EPP vendors who do goods, services and public works, will not likely to energy, at least not right away.

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ONLINE SALE OF PERSONAL PROPERTY, AND SALE AND LEASE OF REAL ESTATE

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5.8 – SALE OF PERSONAL PROPERTY

- General authority: permits sale of property (40A:11-36 and 18A:18A-45) to be done through online action, or other equivalent to sealed bids.
- Minimum platform requirements parallel 5:34-5.3 requirements, and tailored to auctions: e.g., must have instructions, registration/identification of bidders, user accounts, online Q&A, and other platform related requirements.
- Establishes details of governing body resolution and advertisements for sale, paralleling existing sale requirements.
- Create process for “buy-it-now” if no bidders.
- Permits platforms to accept payments; requires platform to have post security.

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LOCAL GOVERNMENT
5.9 – SALE OF REAL ESTATE (40A:12-13)
5.10 – LEASE OF REAL PROPERTY (40A:12-14)
BOARD OF EDUCATION
5.11 – SALE OF REAL PROPERTY (18A:20-6 AND 7)
5.12 – LEASE OF REAL PROPERTY (18A:20-8.2)

- Generally follows 5:34-5.8 provisions but tailors and limits them to the specific circumstances of land and building sales and lease.
- Keep in mind that the Local Land and Building Law (40A:11-12) is not the most thorough or comprehensively written laws. Likely that 18A:20 has similar issues.
- Best advice; read then consult with your attorney.

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GENERAL ADMINISTRATION

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5.13(a-c) FEES FOR EPP SERVICES

- An EPP **shall not** charge an offeror more than:
 - \$50/offeror submission
 - \$50 to access documents and information (excludes platform registration fee)
 - Percent of winning offer
 - Separate fees for accessing documents or information and submitting
- Energy reverse auctions – fee may be based on volume of electricity or gas purchased.
- Set-aside contracts: EPP shall either waive fees to access information or submit offer or be refunded by the local unit.

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5.13(d-h) PROCUREMENT OF EPP SERVICES

- Normal process: when local unit cost or estimated fees over the life of the contract exceed bid threshold; use bid or competitive contract (approved)
 - No exceptions to bidding apply, unless no bids are received or it's an emergency
 - Spec/RFP must specify the fee model for proposals: fees, free, or both
 - If fee based: make a good faith estimate based on number of bids and offerors; award is based on lowest aggregate fee. That represents the quantity for the spec.
- Other usual approaches:
 - Cooperative purchasing via a lead agency acquisition and extension. *Clarity needed on co-op use of Competitive Contracting*
 - State DPP contract extended to co-op program
 - GSA contract promulgates by DPP
 - Competitively procured national co-op; local unit shall determine and document that contract use will result in cost savings considering all applicable factors

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5.14 – CYBER SECURITY AND DATA OWNERSHIP

- Requires EPP systems to use US FedRamp “Moderate Impact Level Authorized” servers or cloud. That’s good, and the rule includes other appropriate technical requirements.
 - *Require them in your spec and require a certification that they will comply.*
- Rule compliance requires they submit various proofs, including:
 - Notifying you of any data compromise incidents
 - Provide you an annual report (get the latest as a spec requirement) of satisfactory cyber security controls. You can require a SOC2 or other evidence of security status.
- All offeror data collected by the platform is yours, and they must be able to submit it in a “universal format” (PDF). *We may need some more clarity on this.*
- EPP cannot be used as a permanent records repository and records need to be provided to you in some way. *This may require additional clarity as well.*

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5.15 – CONTRACTS WITH EPP VENDORS

- All contracts shall be reviewed by legal counsel, QPA (if none, CFO or =, or SBA).
- Awarded by the governing body, regardless of value or how procured, except if emergency used.
- Include provisions for compensation of loss based on EPP vendor or employee misbehavior. This warrants review by your risk/insurance manager. It also needs to be in any specs.
- Not enforceable in a contract are; terms requiring the local unit to indemnify a platform vendor or employees; or requiring binding arbitration as means of dispute resolution.
- All disputes between parties and contract must be in writing and by registered/ certified mail. NJ Law applies. Contract needs provisions for process of service.
- All contracts in writing with termination provisions.
- EPP contracts are not considered data processing contracts for length of contract purposes

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THE LAST PROVISIONS

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PURCHASING DURING TIMES OF PUBLIC HEALTH EMERGENCIES

- They provide direction on how to open competitive contracting and bid submissions when the public can't attend the opening.
 - 5:34-4.3(c) for competitive contracting submissions
 - 5:34-8.5 for competitive bids

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5:34-8.5
BID OPENING DURING PUBLIC HEALTH EMERGENCY

- Ratifies what you've generally been doing; they are consistent with the emergency guidance issued by DLGS on public meetings.
- Applies to bid openings during a public health emergency declared by the governor. It permits contracting units to prohibit offerors and public from physical attendance if they open them online.
- Bid ads must be explicit in explaining why, and how public can remotely attend.
- Must use web conference or live streaming tech with video and audio so people can see that only bids timely received are opened.
- Paper bids must be displayed back and front of package before opening, and content read, including prices and noting documents submitted (like a normal opening).
- After close, apparent low bidder submission must be scanned and posted online; if more than one apparent one, scan and post all. Tell all bidders where posting can be found.
- Does not address EPP-based openings

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5:34-4.3
OPENING AND AWARDED COMPETITIVE CONTRACTS

- New section (c) is consistent with 5:34-8.5 for bids, except that *bid* is replaced with proposals, and bidder is replaced with vendor.
- *But there is no requirement for posting RFP's online right away since they must go through an evaluation process. The issue is not addressed.*

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SO, NOW WHAT?

It's all about managing risks

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PREVIOUS COMMENTS ON ISSUES DLGS NEEDED TO ADDRESS

(Strike outs were addressed, highlights need attention)

- ~~Vendor/Supplier restrictions/access/costs~~
 - ~~Need to ensure anyone can view for free~~
 - ~~Who pays: agency or supplier? Winner only?~~
 - ~~Fixed amounts or percent awarded contract?~~
 - ~~If suppliers for fee — any limits on fees?~~
 - ~~Some oversight agencies have banned supplier pays~~
 - ~~When suppliers join, company owns the data and can resell it.~~
 - ~~Permitting paper submissions or not~~
- ~~Bid Bond and Notary management~~
 - ~~Specifically allow online submissions that verify validity of bonds~~

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- ~~Optional Display of Bid Takers~~
 - ~~Reinforce doctrine of local option on displaying names of bid “takers”~~
- ~~Bid addendum notifications~~
 - ~~Waive a separate form if notices if system provides email, or acknowledge online as check off item?~~
- Addendums vs Q&A?
 - While the Q&A has value, it may create additional blurring of clarifications, explanations, addendums, changes.
 - Provide clarity of when a Q&A response needs to be issued as an addendum.

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- ~~Forms and Signatures~~
 - ~~Authorize conversion of paper forms to online texts and check offs; e.g., Ownership, Equipment ownership, Addendum, Document Checklist, Iran, etc. for all purposes (signature, fatal)~~
 - ~~You can't submit a bid without meeting the requirement~~
 - ~~Online systems integrate the statutory intent of those provisions~~
- Bid “Opening” Process
 - Does there need to be language modifying requirement to open bids “in presence of any parties...” to reflect that they are opened online?
 - What does “public” mean when open online and in real time that anyone can see?
 - Consider if there should be a minimum standard for “opening bids in public.” Display of actual bid for those who want to see them - what will it look like?

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- **OPRA and Docs Available Online**
 - Consider asserting the bid documents posted online can be used for OPRA purposes
 - Clarify that online RFP evaluation documents are ACD, or not.
- ~~Understand impact on “fatal” (mandatory) provisions~~
 - ~~Provide clarity in rule if necessary because specific documents may not be required~~
- ~~Cybersecurity risks~~
 - ~~Rely on industry success/3rd party validation as opposed to technical standards~~

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THINGS LOCAL UNITS NEED TO KNOW

- Systems work differently; there will be some diligence needs to determine what will work best for you.
 - Some price modules separately – you can buy only what you need
 - Different approaches to document completion
- If you take this on, the goal is to integrate it with your current workflow or adjust your workflow to this new tool. This will take some time and attention.
- You will be spending time and attention to get it started and converting your workflow and forms to the online system
- There may be the potential for cooperative purchasing of e-bidding services. It may not produce savings but will simplify the procurement process

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HOW TO GET STARTED

- Watch for the forthcoming Local Finance Notice on this. It may include additional guidance.
- Review the rules – See if DLGS will resolve the open issues for the LFN or an amendment
- Due some diligence with vendors; demos, website reviews, maybe partner with peers (Association or county demo days?)
 - Understand differences between vendors
 - Understand integration or changes to your practices
- Consider what level of services you want, or to phase into
- Decide on PDF forms vs. system-based online forms or both as needed
- Construction bidding: some specialized vendors that focus on this space are around as well.
- Find vendors who have set up NJ-based templates for common forms

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AGENCY CONSIDERATIONS

- Decide payment model: suppliers via site membership or per bid fees vs. agency seats
 - Latter forces all suppliers to include the cost in their bid
 - How its done may be a differentiator between suppliers
- Decide how to proceed and follow procurement requirements
 - Threshold calculation based on expected usage and costs drive the decision. Bid or Competitive Contracting or below threshold?
 - **How do you want to procure? Be an early adopter, or wait and see how the early ones work out; wait for a co-op, or procure on your own?**

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IN REAL LIFE...

- On your own (or partner with others)
 - Research your options and costs to decide how to procure a system
 - Develop an implementation plan
 - Procure and implement a system
 - Prepare a specification
 - Release the RFB/RFP!
 - Open at the appointed time
- Or, watch and learn from your early adopting peers
- And learn from vendor experience

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And, we are done.

But, much more to come.

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HOW THIS ALL WORKS: SUPPLIER SUBMISSION AND COMPLIANCE ELEMENTS

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SIGNATURES

- Applies to: Proposal pages, Ownership Disclosure, Iran, etc.
- Digital vs. Electronic Signatures
- Acrobat-type forms and “digital” signature
 - It’s a little complicated and not necessary for bidding
- UETA permits written signatures to be submitted electronically.
 - Live signatures not required
 - Checking the box with a certification
 - One check box can cover many forms
 - Non-Collusion Affidavit: notary not required
- Signed forms can be scanned

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BID DEPOSITS AND SURETY (BID) BONDS

- Electronic bond verification system available to contractors from two vendors via their bonding agency.
- Bidder submits an assigned bond number with an embedded weblink to an online bonding service; allows agency to verify the bond
- Resolves the issue of back dated or copied bonds
- Requires bidders to use an electronic process

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BID BOND ALTERNATIVE

- Alternative: permit bidder to submit PDF of paper bond – agency will then have to verify it as it traditionally does with the issuer. A raised seal cannot be determined.
- What about other forms?
- Alternative to the Alternative: permit bonds/security to be submitted traditionally; sealed envelope delivered prior to opening containing bond or other guarantee instrument.
- Adds complication and risk to the process
- So you may want to use online and provide guidance to bidders on how to use online bonds

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NOTARY ENDORSEMENTS

- Not an issue in NJ. Sealed documents not required. Most notaries use a stamp. Stamped documents can be scanned and uploaded
- And it turns out, there are few if any bid documents that require a notary endorsement.
- Certifications are the alternative: “I certify that the foregoing is true and I am aware if any of the foregoing is willfully false then I am subject to punishment and penalty” or words to that effect.
- About the Non-Collusion Affidavit

Questions and Answers from the Webinar

Question	Response
<p>Does the software have the ability to verify validity of BRC or completeness of Corporate Ownership form.</p>	<p>Not that I've seen. To verify a BRC, the vendor would have to connect to the state's database. That could happen and could be suggested to them, but I do not know if the folks that run the system would permit that. The systems can be designed to require the Ownership Statement to be properly filled out, but cannot assure the data is correct. Thus there is still a need for a human to review the submission of the apparent successful offeror to make sure the forms are filled out properly.</p>
<p>Would the contract term for the SaaS firm be applicable to 40A:11-15 (5) seven years for data processing? For specifications and contracts that have to reviewed and/or approved by the State Comptroller's Office, will it have the ability to retrieve the documents from the EPP?</p>	<p>No. The rules make it explicit that it is not applicable. 5:34-5.15</p>
<p>Marc please include a list of "some of the vendors" providing this service - thanks</p>	<p>Interesting question. It could only happen if you grant OSC access to your system with appropriate credentials. That would not be recommended from a security standpoint. You'll still have to send it to them. Companies I've had contact with that have some interest in NJ (or did the last time we spoke): I have no business or interest in any of these companies. Bonfire Ian Roberts, Account Executive 514-652-4889 iroberts@gobonfire.com GoBonfire.com Ionwave Dek Prentice, Sales Executive 417-818-6390 3653 South Ave., Springfield MO 65807 dprentice@ionwave.net www.ionwave.net Bid Express - Construction (road bidding) www.bidexpress.com https://www.infotechfi.com/bid_express</p>
<p>You said bid can't be filed without BRC. I thought current rules said BRC must be filed before award of contract</p>	<p>Procure Now Thao Hill, Nicole Alvarez</p>
<p>Marc - just want to confirm you said we can get the IRAN form before award vs at time of bid. Were there others we can get later beside BRC? Thanks Angel - great job!</p>	<p>You are correct, but the system should be designed to permit the submission, but remind the offeror that it will be needed.</p>
<p>Do you have to have bid specs posted online in full or just the posting giving them instructions on where to get the specs.</p>	<p>The issue of "fatality" of the Iran disclosure is still unsettled. There have been reported decisions that go both ways. I would go with requiring it up front. There's nothing that stops an offeror from competing it, other than carelessness.</p>
<p>Is this differemt for online auctions</p>	<p>I'm not sure I understand the question. Pat, please followup with a note explaining the question better.</p>
<p>Does it require a Resolution from the Governing Body to be able to utilize this process?</p>	<p>The process for online auctions is virtually the same as you have been doing, except DLGS doesn't approve them in advance, and hiring the company is subejct to competition and bid threshold issues.</p>
<p>Vendors supplying this service--do they have to be an approved vendor of the State of NJ?</p>	<p>Yes - a resolution, or if you have a purchasing ordinance or policy adopted by the governing body, a governing body change to is as appropriate. If you mean approved the Division of Purchase and Property, no. If you mean approved to do business in NJ (e.g., that have a BRC), yes. If you mean something else, send me a note.</p>
<p>You make reference to a small community, some of these services are cost prohibitive. Unfortunately, for the small municipality, this would help to streamline the process. It is the cost that is prohibitive.</p>	<p>Yes, that might be the case. I think some counties may be looking at setting something up to faciliate their municipalities using their system at a lower cost. You should ask them about that. Also, give it some time and some other solutions for small places may pop up.</p>
<p>Are there options in pricing models that would accommodate a cost-effective alternative for small municipalities?</p>	<p>Maybe, but it will evolve. See my previous answer.</p>
<p>Would there be any advantage to using permits parallel to paper process? I agree it would create problems.</p>	<p>I'm not sure what you mean about "using permits parallel to paper..." Drop me an email to explain.</p>