

COOPERATIVE PURCHASING AND COMPLIANCE WITH LOCAL FINANCE NOTICE 2012-10

UNDERSTANDING THE REQUIREMENTS
OF THE LFN WHEN CONSIDERING
UTILIZING COOPERATIVE PURCHASING
PROGRAMS

ABOUT THE PRESENTER



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He also served as a councilman in the Borough of Metuchen from 2001-2002 and was on the Board of the Metuchen Parking Authority from 1999-2000.

About Today's Presentation:

Today's presentation is intended to provide an overview of what needs to be done when considering cooperative purchasing so as to be compliant with the Local Finance Notice 2012-10 (LFN 2012-10).

This is not intended to cover all types of cooperative programs, but to provide a general “road map” for a municipality to utilize to help work their way through the decision making process.

Even before we start

Two caveats to start with:

- 1) All purchases should be done in compliance with the municipalities written procurement provisions.
- 2) The use of cooperative purchasing programs under the LFN 2012-10 applies to contracts for “goods and services” ONLY. It does NOT apply to “public works” or construction contracts.

What constitutes a “Public Work”

A “Public Work” is defined under NJSA 34:11-56.26 as:

- 1) Construction, reconstruction, demolition, alteration, custom fabrication, or repair work, or maintenance work, including painting and decorating, done under contract and paid for in whole or in part out of the funds of a public body, except work performed under a rehabilitation program.
 - 2) It shall also mean construction, reconstruction, demolition, alteration, custom fabrication, or repair work, done on any property or premises, whether or not the work is paid for from public funds, **if, at the time of the entering into of the contract** the property or premises is owned by the public body **or**:
 - (a) Not less than 55% of the property or premises is leased by a public body, or is subject to an agreement to be subsequently leased by the public body; and
 - (b) The portion of the property or premises that is leased or subject to an agreement to be subsequently leased by the public body measures more than 20,000 square feet.
- Furthermore under the statute, “maintenance work” is defined as “the repair of existing facilities when the size, type or extent of such facilities is not thereby changed or increased. ‘Maintenance work’ also means any work on a maintenance-related project that exceeds the scope of work and capabilities of in-house maintenance personnel, requires the solicitation of bids, and has an aggregate value exceeding \$50,000.”

FIRST THINGS FIRST: WHAT IS A COOPERATIVE?

And what kinds of cooperative are there?

What is a Cooperative?

- A Cooperative can take several different forms, but it is defined by the Model Procurement Code as: “procurement conducted by, or on behalf of one or more [p]ublic [p]rocurement units.”¹
- “By combining requirements from multiple procurement units, cooperative purchasing permits lower prices through pooling demand and leveraging economies of scales. Cooperative purchasing is particularly advantageous for local procurement units with limited procurement resources... programs can provide these localities with higher quality products and services at more affordable prices by utilizing larger government agencies with more procurement experience and access to better products... [and] may greatly decrease administrative costs because the costs are spread across the participating units.”²

• 1 Model Procurement Code for State & Local Gov'ts (Am. Bar Ass'n 2000) Section 10-101(1)

• 2 “No Compete Contracting in Cooperative Purchasing? Proposed Solutions to Resolve Gaps in Competition, Transparency, and Socioeconomic Policy at the State and Local Level” *Public Contract Law Journal*, Vol. 46, No. 4, Summer 2017, page 757.

What kinds of Cooperatives are there?

- There are two basic kinds of cooperatives, and sometimes they have aspects that overlap.
 - A single governmental entity issues, reviews and awards contracts for its own use and is authorized under its own laws to extend those contracts to other governmental agencies (NJ State Contracts, Houston-Galveston Area Council). Sometimes interlocal agreements are required some charge administrative fees.
 - An organization that coordinates and aggregates contracts from different state and local governments and promotes their use. Sometimes organizations have general interest, or very focused interests in the contracts offered (NASPO, NPPGov). Often times there fees associated with these types of organizations – sometimes there are multiple layers of fees.

Cooperatives (con't)

- Cooperatives can be of two general formats:
 - One-stop shop kinds of organizations that offer all kinds of products and services that can range from consumer goods to durable goods.
 - Organizations that specialize in a particular arena, or specialty – such as a health care, or fire rescue, or focusing on complex apparatus that require a technical knowledge most people would be without.

LFN 2012-10

Why do we have it?

What was the purpose of LFN 2012-10

- The purpose of this Finance Notice was to interpret and offer guidance to purchasing agencies regarding a change in the New Jersey statutes (NJSA 52:34-6.2) that: “allows local contracting units to utilize national cooperative contracts as a method of procurement.”
 - It was developed after consultation with Division of Local Government Services, Division of Law, Division of Purchase and Property, and the Office of Comptroller to review its impact with other rules and regulations concerning procurement.
 - Offers a general breakdown of the requirements of the statute along with re-affirming general principles of procurement policy that need to be considered when utilizing cooperative purchasing.

The Statute:

- The Statute (NJSA 52:34-6.2) reads:
 - “Notwithstanding any other law to the contrary, any contracting unit authorized to purchase goods, or to contract for services, may make purchases and contract for services through the use of a nationally-recognized and accepted cooperative purchasing agreement that has been developed utilizing a competitive bidding process by another contracting unit within the State of New Jersey, or within any other state, when available. Prior to making purchases or contracting for services, the contracting unit shall determine that the use of the cooperative purchasing agreement shall result in cost savings after all factors, including charges for service, material, and delivery, have been considered.
 - The second paragraph then extends the right to use to all forms of local contracting units. It is the 1st paragraph that has the key elements of the law.

The “problem” with LFN 2012-10

- In its defense the LFN offers a great deal of information in a concise format. However, it is due to that very fact that they have unintentionally created some confusion as to the meaning of the Notice.
- In many areas, it leaves the purchasing entity with the instructions that it must do its own due diligence, without providing a framework for what things it should look for when doing its review.

WHAT DOES THE LAW REALLY SAY?

And how does this apply to the LFN?

What does the law “really” say?

“However, national cooperatives contracts are still subject to procurement laws that apply to all other contracts awarded by a New Jersey contracting unit.”

What does this MEAN?

- It means: If the bid amount exceeds the bidding threshold, than the governing body needs to approve the purchase. It also means that the vendors selected need to comply with NJ regulations, which they need to comply with if they were going to bid in NJ anyway (see more later)

What does the law “really” say? (con’t)

What does this NOT MEAN?

- It does NOT mean that the cooperative program has to comply in ALL aspects of the NJ bidding laws. It only has to comply with the bidding regulations of the state from which it originated.

Using the Statute as guide, the LFN defines the 3 requirements of a cooperative:

1. The National Cooperative contract must have been awarded through a “competitive bidding process” that complies with the laws covering the issuing entity. This means it requires open competition, or competition among those who are deemed qualified, submission of bids, and awarded pursuant to a “lowest responsible” or similar standard employed by the public entity. This excludes awards based on “invitation only” negotiated, local preference or sole source procurement practices.
2. Contract being awarded must have been awarded by a contracting unit as defined in NJSA 52:34-6.2. This means they need to be a legal political entity under the laws of their state.
3. The original bid must have been bid as a “national cooperative contract” and not a local contract opened up after the fact.

OTHER REQUIREMENTS UNDER LFN 2012-10

Documentation requirements:

Certain New Jersey Legal requirements must be complied with by the **VENDOR** that the purchasing authority wishes to use off the cooperative program (not the cooperative program itself). These documents include:

- New Jersey Business Registration Certificate for the contractor and any sub-contractors.
- Statement of Corporate Ownership (an original form prepared for the purchasing agency)
- Public Contract EEO Compliance – either the New Jersey Employee Information Report certificate, or proof of participation in federally approved affirmative action program.
- A non-collusion affidavit.
- “Pay to Play” or Political Contributions certification

While not listed in FLN 2012-10, often also included are:

- “Iranian Banking” certification

Cost savings determination – the Tricky Part:

The law requires that: “the contracting unit shall determine that the use of the cooperative purchasing agreement shall result in cost savings after all factors, including charges for service, material, and delivery, have been considered.”

- The courts have determined this does not mean they need to advertise to get comparative prices. However they must show “cost savings” in some fashion. There is no definition or standard by what or how much is deemed a “savings.”
- Some suggested methods:
 - 1. Comparing State contract pricing versus that of the proposed cooperative purchase.
 - 2. Comparing pricing for comparable goods/services under the purchasing agencies existing contracts to that of the proposed cooperative purchase.
 - 3. Comparing recently procured comparable contracts entered into by other public entities to that of the proposed national cooperative. (Please note that this does not say bid results, but contracts entered, so can use State Contract pricing of similar units as option).
- Other factors that can be used:
 - 4. Ability to avoid cost and time of separate procurement (Hearings, publishing of notices, printing, attorney’s fees, etc.)
 - 5. Lower minimum purchase requirements
 - 6. Additional costs which have been factored prior to award (such as , administrative costs of participating in cooperative program; shipping costs, if any; or vendor rebates.)

Cost savings determination – Durable Goods:

As stated earlier, there is no definition of what you can use to consider in your evaluation of cost savings.

When purchasing durable goods that will be servicing you community for many years to come, other intangible considerations may, and have been considered in the cost savings analysis.

- Consistency in fleet operations and costs of inventory for maintenance
- Cost of training on new product versus similar products already in fleet.
- Long term cost of ownership
 - What may not be the least expensive option initially; may be the least expensive over anticipated life of the product.
 - For example – Town wants to buy a garbage truck with an anticipate life for the town of 15 years. There are two brands being considered and there is a price difference of \$10,000 between them. The Public Works Director from past experience with both brands can show that the brand that is \$10,000 less expensive tends to start having more “wear and tear” issues starting with year 12 and on average has increased repair and maintenance costs of \$5000/year, and that the other brand doesn’t have these issues. This kind of analysis can be used in the determination.

Cost savings determination - Fees:

One area that you need to be very aware of is the fees that may be associated with a cooperative program that you are considering. As stated earlier, most programs have some sort of administrative fee for use of the program.

- It may be a fixed or flat fee
 - It may be a scalable fee depending on price levels of the product(s) offered.
 - It may be a percentage fee based on the dollar amount of the product(s) purchased.
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- WARNING: Some programs have **multiple layers of fees!** This will happen sometimes with the aggregator type programs, where there is a national organization promoting several member contracts. The national organization may charge a fee for going through their program AND the state that has the initial contract that you are utilizing may have their own fee. So you may wind up paying two separate fees for the privilege of using a program, so you **MUST** do your homework.

Cooperatives and Fees:

- **PRACTICAL PRACTICE TIP:** When you are considering a cooperative find out the fee structure. Find out if the fee is borne by the purchaser or the vendor (as there are some where the Vendors are charged a fee per contract – some vendors will pass that along to the purchaser, some will absorb it as a cost of doing business).
- Things to think about with fees: Seriously consider what you are buying and how much it costs and what the fee structure is like.
 - If buying lower cost consumable goods like cases of copy paper or cases of pens, a percentage fee may be the better way to go. It may not make sense to pay a \$500 flat fee on a \$500 purchase of paper, where a .075% administrative fee would only cost \$37.50.
 - However, if buying a large ticket durable good the opposite may be true. For example, if a fire engine cost \$500,000. Under the above scenario, a \$500 flat fee would be much better than the .075% administrative fee that would come to \$37,500.

Other items: Legal advertising

While not required by the statute itself, there has been case law involving use of national contracts by the State that strongly suggest a contracting unit must provide public notice to “current contract holders and prospective bidders” of the intent to use a national cooperative program that would otherwise require public bidding. (Note: these cases involved the breaking of existing contracts to pursue cooperative purchasing)

Purpose of intent notice:

To offer opportunities for a vendor to offer alternative approaches to cooperative program.

It is **NOT** to have someone come in and say they can quote through same program at lower price.

OTHER CONCERNS WE'VE HEARD ABOUT THE PROCESS:

“I don't know what I don't know...”

Use of Cooperatives versus State Contracts

- Many people point to the LFN to argue that if there is a similar State contract option available that they **MUST** use that instead of the cooperative.
 - They rely on the last paragraph on page 5 of the LFN:

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

- This paragraph does **NOT** say you must use a State Contract if available, it just says that you are **NOT** making an award under the statute governing cooperative purchases, so you do not need to do the cost savings determination, etc. that the FLN requires.

What may also be of concern?

State hasn't endorsed:

- ❖ The state doesn't endorse any national or regional cooperative program. They may join some programs, or utilize them themselves, but it is not an indication of validity. In fact, representatives of the Division of Local Government Services and the Division of Purchase and Property have both stated that the cooperative programs can be a viable alternative to bidding and State Contract purchases.

Other concerns (con't):

Most Cooperatives will not say that they comply with NJ requirements or not:

- ❖ Many are utilized in several states and they can not expend the resources to be continuously reviewing modifications to state statutes to ensure they continue to comply and continue to manage the programs they offer.
- ❖ For the most part, they do provide enough data on their websites, for most questions to be answered about whether they conform to a certain state's requirements. Many even provide the enabling statutes for each state as a reference.
- ❖ In most instances, staff are very helpful and will try and offer any assistance possible.

QUESTIONS?

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