



NEW JERSEY LAW REVISION COMMISSION

Revised Tentative Report Regarding Proposed Changes to the Local Lands and Building Law – Acquisition of Real Property pursuant to N.J.S. 40A:12-5 *et seq.*

July 30, 2020

The New Jersey Law Revision Commission is required to “[c]onduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it” and to propose to the Legislature revisions to the statutes to “remedy defects, reconcile conflicting provisions, clarify confusing language and eliminate redundant provisions.” *N.J.S. 1:12A-8.*

This Report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. Comments should be received by the Commission no later than **September 30, 2020.**

The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the Report, please inform the Commission so that your approval can be considered along with other comments. Please send comments concerning this Report or direct any related inquiries, to:

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Executive Summary

The New Jersey Local Lands and Building Law (LLBL) allows a governmental unit to acquire property in a variety of ways.¹ It also permits a governing body to require the seller, or lessor, to construct or repair a capital improvement as a condition of acquisition.² The statute that permits the inclusion of such a condition precedent is silent, however, regarding whether the governing body must adhere to the public bidding requirements set forth in the New Jersey Local Public Contracts Law (LPCL)³ or the Prevailing Wage Act (PWA).⁴

This issue was brought to the Staff's attention by an attorney who practices in both the LLBL and LPCL areas. During a review of the issue, Staff noted a paucity of case law on this subject and the absence of any legislative history.

The pages that follow contain a *revised* recommendation to modify the LLBL, to clarify that *under certain circumstances* a governmental unit must comply with the LPCL and when requiring a seller or, or lessor, to construct or repair a capital improvement as a condition of acquisition the governmental unit must also comply with New Jersey's Prevailing Wage Act (PWA).⁵

Statute

N.J.S. 40A:12-5. Additional Powers.

(a) Any county, by resolution, or any municipality, by ordinance, may provide for the acquisition of any real property, capital improvement, or personal property:

* * *

(3) Whether the acquisition of any real property is by lease, purchase, installment agreement or exchange, the governing body may require the construction or repair of any capital improvement as a condition of acquisition.

* * *

Background

The New Jersey Local Lands and Building Law ("LLBL") permits a county, or a municipality, to acquire real property, a capital improvement, personal property, or any interest or estate whatsoever, including easements, water, water-power or water rights either inside or

¹ See N.J.S. 40A:12-5(a)(1). See *discussion, infra*.

² N.J.S. 40A:12-5(a)(3).

³ N.J.S. 40A:12-5(a)(3); and, see N.J.S. 40A:11-1 *et seq.*

⁴ N.J.S. 34:11-56.25 *et seq.*

⁵ N.J.S. 34:11-56.25 *et seq.*

outside of the county or municipality.^{6,7} Under certain circumstances, a municipal or a county government may even obtain real property located in a foreign state.⁸

A governmental unit may acquire real or personal property in a number of different ways. Pursuant to N.J.S. 40A:12-5(a)(1), both a county and a municipality may obtain property by purchase, gift, devise, lease, exchange, condemnation, or installment purchase agreement.⁹ Not every property that is the subject of governmental acquisition, however, is in turnkey condition. Rather, the property that the governing body wishes to acquire may contain substandard structural conditions or be in a state of disrepair.

If the county or municipality obtains the property by means of a gift, devise, or through condemnation, the LLBL does not authorize the government to demand the construction or repair of any capital improvement as a condition of acquisition.¹⁰ When the property is acquired by way of purchase, lease, exchange, or installment purchase agreement, however, the governing body may require the construction or repair of a capital improvement as a condition of acquisition.¹¹

Although N.J.S. 40A:12-5 *et seq.* authorizes governmental entities to acquire property, the statute is silent regarding whether the construction or repair conditions in these transactions are subject to the public bidding requirements of the LPCL or the Prevailing Wage Act. To determine whether the public bidding requirements must be adhered to, Staff examined the statute in conjunction with the LPCL¹² and the Prevailing Wage Act.¹³

Analysis

• *Local Public Contracts Law*

The purpose of the LPCL is to foster transparency in local government activities.¹⁴ In addition, the LPCL was enacted to “... secure competition, which in turn, works to protect the

⁶ N.J.S. 40A:12-4(a). *See also* N.J.S. 40A:12-5(a).

⁷ Unless otherwise specified, the term “property” shall be used to denote both “personal” and “real” property.” However, *see* N.J.S. 40A:12-2(f) (defining “personal property” as any personal property necessary and incidental to the furnishing, refurbishing or refurbishing of a building and includes office furniture, office equipment, office supplies, computers, computer equipment, telephone equipment, cameras, tractors, lawn mowers, dump trucks, golf carts, modular office trailers, tools, janitorial supplies and farm animals). *See also* N.J.S. 40A:12-2(g) (defining “real property” as including the usual connotations thereof, development rights or easements, or any right, interest or estate in the area extending above any real property, or capital improvement thereon, to such a height or altitude as any title, interest or estate in real property may extend, commonly known as “air rights”).

⁸ N.J.S. 40A:12-12.

⁹ N.J.S. 40A:12-5(a)(1).

¹⁰ N.J.S. 40A:12-5(a)(3).

¹¹ *Id.*

¹² *See Sellitto v. Borough of Spring Lake Heights*, 284 N.J. Super. 277, 287 (App. Div. 1995).

¹³ N.J.S. 34:11-56.25 *et seq.*

¹⁴ *Id.* *See Closter Service Stations, Inc. v. Commissioners of Village of Ridgefield Park*, 99 N.J. Super. 69, 73 (App. Div. 1968) (noting that the Local Public Contracts Law “guard[s] against favoritism, improvidence, extravagance,

public against chicanery and fraud in public office.¹⁵ To achieve the purposes of the Act, the LPCL envisions, with certain exceptions, a system of competitive bidding.¹⁶

N.J.S. 40A:11-4(a) provides, in relevant part:

Every contract¹⁷ awarded by the contracting agent¹⁸ for the provision or performance of any goods or services¹⁹, the cost of which in the aggregate exceeds the bid threshold, shall be awarded only by resolution of the governing body of the contracting unit to the lowest responsible bidder after public advertising for bids and bidding therefor, except as is provided otherwise in this act or specifically by any other law [...] (Emphasis added).

• *Transactions between governmental entities.*

N.J.S. 40A:11-5(2) provides that, “[a]ny contract... may be negotiated and awarded by the governing body without public advertising for bids... and shall be awarded by resolution of the governing body if:... (2) [i]t is made or entered into with the United States of America, the State of New Jersey, county or municipality, or any board, body, officer, agency or authority thereof, or any other subdivision thereof.”²⁰

A county, or municipality, is also authorized to sell real property, capital improvements, or personal property not needed for public use by way of a private sale pursuant to N.J.S. 40A:12-13(b).²¹ A governmental unit may also lease property to another public body for nominal or other consideration.²² When the acquisition of property involves an arrangement between

and corruption.” (citing *Hillside Township v. Sternin*, 25 N.J. 317 (1957)); and see, *Bodies by Lembo, Inc. v. County of Middlesex*, 286 N.J. Super. 298 (App. Div. 1996).

¹⁵ *Closter Service Stations, Inc. v. Commissioners of Village of Ridgefield Park*, 99 N.J. Super. 69, 73 (App. Div. 1968)

¹⁶ https://clerkshq.com/Content/NJClerks-Reference/books/NJ_ClerksC08.htm (last visited May 2, 2019).

¹⁷ See N.J.S. 40A:11-2(21) (defining “contract” as any agreement, including but not limited to a purchase order or a formal agreement, which is a legally binding relationship enforceable by law, between a vendor who agrees to provide or perform goods or services and a contracting unit which agrees to compensate a vendor, as defined by and subject to the terms and conditions of the agreement. A contract also may include an arrangement whereby a vendor compensates a contracting unit for the vendor's right to perform a service, such as, but not limited to, operating a concession).

¹⁸ See N.J.S. 40A:11-2(3) (defining “Contracting agent” as the governing body of a contracting unit, or appointed membership of a State authority authorized to enter into a cooperative purchasing agreement pursuant to P.L.2013, c. 4, or its authorized designee, which has the power to prepare the advertisements, to advertise for and receive bids and, as permitted by this act, to make awards for the contracting unit in connection with purchases, contracts or agreements). See also N.J.S. 40A:11-2(1)(a) and (b) (defining “contracting unit” to include “any county”; or, “any municipality.”)

¹⁹ See N.J.S. 40A:11-2(24) (defining “goods and services” as any work, labor, commodities, equipment, materials, or supplies of any tangible or intangible nature, except real property or any interest therein, provided or performed through a contract awarded by a contracting agent, including goods and property subject to N.J.S.12A:2-101 *et seq.*)

²⁰ N.J.S. 40A:11-5(2).

²¹ N.J.S. 40A:12-13 *et seq.*

²² N.J.S. 40A:12-14(b) (noting that, “the lease may be upon such terms and conditions and form nominal or other consideration as the governing body of the county or municipality shall approve by ordinance or resolution).

local governmental entities, it appears that the transfer, construction, and repair of a capital improvement can be effectuated without adherence to the competitive aspects of either the LLBL or the LPCL.

It is unclear, however, whether the public bidding requirements of the LPCL must be followed when a political subdivision seeks to acquire property from a private seller pursuant to N.J.S. 40A:12-5(a)(3).

- *Acquisition of property by governmental entities from private persons*

In its present form, the LLBL does not explicitly require a governmental unit to seek public bids on acquisition of real property from private persons.²³ The LPCL may, however, require a governmental unit to use the public bidding process under certain circumstances.

- Hypothetical #1: County “A” seeks to lease office space from a private person for a term of years pursuant to N.J.S. 40A:12-5(a)(3).²⁴ There are several locations that would meet the county’s requirements.

This hypothetical brings to the fore the question of whether a “contract”²⁵ awarded by the “contracting agent”²⁶ (governing body) implicates the LPCL’s bidding requirement; or, whether N.J.S. 40A:12-5(a)(3) serves as an “exemption” to the requirements of the LPCL.

When N.J.S. 40A:12-5(a)(3) is read in conjunction with N.J.S. 40A:11-4(a), practitioners have suggested that the best practice would be for the County to “issue specifications describing the amount and type of space needed and the improvements required.”²⁷ Thereafter, consistent with the LPCL, the lessors would compete for County “A’s” business.²⁸

- *Request to construct or repair a capital improvement*

N.J.S. 40A:12-5(a)(3) is silent regarding the requirements that governmental entity must follow when it requests that the seller, or lessor, construct or repair a capital improvement as a condition of acquisition.

- Hypothetical #2: Municipality “B” seeks to purchase a parcel of real property from a private person. As a condition of acquisition, the

²³ N.J.S. 40A:12-5

²⁴ See 35 N.J. PRAC., LOCAL GOVERNMENT LAW § 14:14 (Michael A. Pane) (4th ed. 2018).

²⁵ See n. 16.

²⁶ See n. 17.

²⁷ *Id.*

²⁸ See proposed modifications in the attached Appendix.

governing body of Municipality “B” requires the seller to construct a “capital improvement” (i.e. a library) on the parcel of land.²⁹

As a preliminary matter, it may be necessary for the governmental entity to issue specifications describing the amount and type of space needed and the improvements required if multiple locations meet its requirements.³⁰ Then, it is necessary to determine whether the capital improvement requested by the governing body is subject to the Prevailing Wage Act.

- *The Prevailing Wage Act*

In 1963, New Jersey enacted the Prevailing Wage Act³¹ which provides, in part, that:

Every contract in excess of the prevailing wage contract threshold amount for any public work to which any public body is a party or for public work to be done on property or premises owned by a public body or leased or to be leased by a public body shall contain a provision stating the prevailing wage rate which can be paid (as shall be designated by the commissioner) to the workers employed in the performance of the contract and the contract shall contain a stipulation that such workers shall be paid not less than such prevailing wage rate....³²

The remedial purpose of the Act is to “safeguard the well-being of employees and protect complying employers from underbidding by nonunion contractors.”³³ The Act establishes minimum wages that contractors must pay “workers” engaged in “public works” contracts.³⁴ The PWA extends to “[e]very contract for public work [...]” and must therefore be considered by governing bodies that acquire property under the LLBL.

The requirements of the PWA must be considered when a governing body requires the construction or repair of any capital improvement as a condition of acquisition of land from a private person. As used in the PWA, a “public body” means, “the State of New Jersey, any of its political subdivisions, any authority created by the Legislature of the State of New Jersey and any instrumentality or agency of the State of New Jersey or of any of its political subdivisions.”³⁵ In the context of this Act, a “public work” includes the “...construction, reconstruction, demolition, alteration, custom fabrication or repair work, or maintenance work,

²⁹ This hypothetical is based, in part, upon discussions with the interested stakeholder in an attempt to facilitate an understanding of the scope of the instant inquiry.

³⁰ See discussion “Acquisition of property by governmental entities from private persons” *supra*.

³¹ N.J.S. 34:11-56.25 *et seq.*

³² N.J.S. 34:11-56.27.

³³ *Id.*

³⁴ See 41 N.J. PRAC., CONSTRUCTION LAW § 19:17 (Robert S. Peckar) (Nov. 2019 Update).

³⁵ N.J.S. 34:11-56.26(4).

including painting and decorating, done under contract and paid for in whole or in part out of the funds of a public body....”³⁶

In Hypothetical #2 above, the governing entity – a political subdivision of the State of New Jersey - meets the PWA’s definition of a “public body”.³⁷ This same provision would apply when a governing body leased or intended to lease the property and requested a capital improvement to the premises.³⁸ When a governing body is a party to a contract and has requested the construction of a capital improvement, the PWA requires that the contract contain a provision stating the prevailing wage rate which can be paid to the workers employed in the performance of the contract.³⁹ A reference to the PWA has been added to the proposed statutory modification set forth in the Appendix.⁴⁰

Prior Outreach

In connection with the Commission’s February 20, 2020 Tentative Report, Staff sought comments from several knowledgeable individuals and organizations, including: the New Jersey League of Municipalities; the New Jersey Association of Counties; the Land Use section of the New Jersey State Bar Association; the New Jersey Institute of Local Government Attorneys; each of the twenty-one County Counsel offices; the New Brunswick Municipal Attorney; and, several private practitioners.

• *No objection*

To the extent that the proposed modifications would clarify in the Local Lands Buildings Law, one stakeholder noted “...no objection with respect to the clarification.”⁴¹

• *Objection*

The requirements of public bidding under the Local Public Contracts Law can be onerous.⁴² There is no disagreement that “[t]he current provisions of the Local Lands and Buildings Law are silent as to whether public bidding is required...” when a public entity is “...looking to acquire real property, and where as a condition of the acquisition the governmental entity requires construction or repair of any capital improvement.”⁴³ The governmental entities

³⁶ N.J.S. 34:11-56.26(5). See N.J.S. 34:11-56.26(3) for a definition of “maintenance work”.

³⁷ N.J.S. 34:11-56.26(4).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ See Appendix, Option #3.

⁴¹ E-mail from Theodore Baker, Cumberland County Counsel to Samuel M. Silver, Deputy Director, New Jersey Law Revision Commission (Mar. 30, 2020, 10:42:21 AM EDT) (on file with the NJLRC).

⁴² Letter from James F. Ferguson, County Counsel, Atlantic County Department of Law, to Samuel M. Silver, Deputy Director, New Jersey Law Revision Commission *1 (Mar. 04, 2020) (on file with the NJLRC).

⁴³ *Id.*

“precondition” for the proposed purchase is seen by some as the obligation of the private entity and thus not subject to the LPCL.⁴⁴

While not wishing to add additional obligations to such transactions, it has been acknowledged that “...public bidding might result in the private entity incurring a lower cost to complete the capital construct/repair which theoretically could affect the overall purchase price....”⁴⁵ Conversely, “[a] private entity might complete the project more quickly and efficiently without resort to the bid process.”⁴⁶

Despite the objection, the stakeholder “applaud[ed] the Commission for tackling this subject matter which is currently vague and perhaps in need of clarification.”⁴⁷

- *Initial Modifications*

The Appendix to the February 20, 2020 Report, set forth that under certain circumstances, the construction or repair required pursuant to N.J.S. 40A:12-5(a)(3) would subject the transaction to the LPCL and the PWA.⁴⁸ A third perspective emerged from a response received by a stakeholder.⁴⁹

It has been suggested that the LPCL “...should **only** apply where any number of generic, real property locations would meet the governmental entity’s needs.”⁵⁰ The LPCL would not apply “...to construction or repair in an acquisition scenario where the condition to construct or repair is attendant to the acquisition of a **unique** parcel of real property targeted for acquisition under that subsection.”⁵¹ The rationale for permitting this exception to the LPCL would rest on the location, proximity, history, aesthetics, or utility of the real property in interest and would be memorialized in either a resolution or an ordinance.⁵²

- *Additional Modifications*

At the May 21, 2020, meeting of the New Jersey Law Revision Commission, Staff was asked to examine the Prevailing Wage Act and its potential use to address the concerns

⁴⁴ *Id.*

⁴⁵ *Id.* at *2.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Tentative Report from Samuel M. Silver, Regarding Proposed Changes to the Local Land and Building Law – Acquisition of Real Property pursuant to N.J.S. 40A:12-14 et seq. *1 (Feb. 20, 2020) (on file with the Commission).

⁴⁹ E-mail from Ted Del Guercio, III, Esq., McManimon, Scotland & Baumann, LLC to Samuel M. Silver, Deputy Director, New Jersey Law Revision Commission (Apr. 08, 2020, 11:17:30 AM EDT) (on file with the NJLRC).

⁵⁰ *Id.* Emphasis original.

⁵¹ *Id.* Emphasis original.

⁵² E-mail from Ted Del Guercio, III, Esq., McManimon, Scotland & Baumann, LLC to Samuel M. Silver, Deputy Director, New Jersey Law Revision Commission (Apr. 08, 2020, 1:14:56 PM EDT) (on file with the NJLRC).

underlying this project since the acquired property would be owned, or leased, by a public entity.⁵³ The modifications based on a review of the PWA are set forth in the Appendix.

Conclusion

The proposed revisions, contained in the attached Appendix, are designed to clarify the requirements of the LLBL and reflect the legislative purpose of both the LPCL and the PWA. The modifications are also intended to eliminate the ambiguity regarding whether the bidding process contained in the LPCL and the PWA applies to government contracts with private persons that require the construction or repair of capital improvements as a condition of acquisition.

⁵³ NEW JERSEY LAW REVISION COMMISSION (2020) 'Revised Draft Tentative Report Regarding Proposed Changes to the Local Land and Building Law – Acquisition of Real Property Pursuant to N.J.S. 40A:12-5 *et seq.*' *Minutes of NJLRC meeting 21 May 2020, (via video conference) Newark, New Jersey.*

Appendix

For Reference

N.J.S. 40A:11-4. Contracts and agreements required to be advertised

a. Every contract awarded by the contracting agent for the provision or performance of any goods or services, the cost of which in the aggregate exceeds the bid threshold, shall be awarded only by resolution of the governing body of the contracting unit to the lowest responsible bidder after public advertising for bids and bidding therefor, except as is provided otherwise in this act or specifically by any other law. The governing body of a contracting unit may, by resolution approved by a majority of the governing body and subject to subsections b. and c. of this section, disqualify a bidder who would otherwise be determined to be the lowest responsible bidder, if the governing body finds that it has had prior negative experience with the bidder [...]

N.J.S. 34:11-56.26. Definitions

* * *

(4) “Public body” means the State of New Jersey, any of its political subdivisions, any authority created by the Legislature of the State of New Jersey and any instrumentality or agency of the State of New Jersey or of any of its political subdivisions.

(5) “Public work” means 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. “Public work” 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.

* * *

Option #1⁵⁴

The proposed modifications to **N.J.S. 40A:12-5, Additional powers**, (shown with ~~strikethrough~~, or underlining), follow:

(a) Any county, by resolution, or any municipality, by ordinance, may provide for the acquisition of any real property, capital improvement, or personal property:

* * *

(3) Whether the acquisition of any real property is by lease, purchase, installment purchase agreement or exchange, the governing body may require the construction or repair of any capital improvement as a condition of acquisition. Construction or repair required pursuant to this subsection is subject to the provisions of the “Local Public Contracts Law,” N.J.S. 40A:11-1 et seq.

* * *

Option #2⁵⁵

(a) Any county, by resolution, or any municipality, by ordinance, may provide for the acquisition of any real property, capital improvement, or personal property:

* * *

(3) Whether the acquisition of any real property is by lease, purchase, installment purchase agreement or exchange, the governing body may require the construction or repair of any capital improvement as a condition of acquisition.

(A) Construction or repair required pursuant to this subsection is subject to the provisions of the “Local Public Contracts Law,” N.J.S. 40A:11-1 et seq. except where the agreement involves the acquisition of real property that is unique to the county or municipality by virtue of the property’s characteristics including its aesthetics, history, location, proximity, or utility.

~~(B) The basis for acquisitions made pursuant to subsection (a)(3)(A) shall be set forth in a resolution, in the case of a county, or in an ordinance the case of a municipality.~~

* * *

⁵⁴ Option #1 is the language set forth in the Tentative Report from Samuel M. Silver, Regarding Proposed Changes to the Local Land and Building Law – Acquisition of Real Property pursuant to N.J.S. 40A:12-5 et seq. *7 (Feb. 20, 2020) (on file with the Commission).

⁵⁵ Option #2 is the language set forth in the Revised Tentative Report from Samuel M. Silver, Regarding Proposed Changes to the Local Land and Building Law – Acquisition of Real Property pursuant to N.J.S. 40A:12-5 et seq. *7 (May 11, 2020) (on file with the Commission).

Option #3

(a) Any county, by resolution, or any municipality, by ordinance, may provide for the acquisition of any real property, capital improvement, or personal property:

* * *

(3) Whether the acquisition of any real property is by lease, purchase, installment purchase agreement or exchange, the governing body may require the construction or repair of any capital improvement as a condition of acquisition.

(A) Where more than one location meets the requirements of the public body, the acquisition of real property pursuant to this section shall be subject to the Local Public Contracts Law, N.J.S. 40A:11-1 et seq.

(B) Any construction or repair required pursuant to this subsection is subject to the provisions of the “New Jersey Prevailing Wage Act”, N.J.S. 34:11-56.25 et seq.

* * *

Comments for Options #1 & #2

• *Subject to the Local Public Contracts Law*

The language “[...] *subject to the provisions of the Local Public Contracts Law*,” is not uncommon in the New Jersey Statutes. Presently, 30 statutes contain that language.⁵⁶

⁵⁶ N.J.S. 40:9D-3(e)-(f) (Local unit duties and obligations; impact on local services; rates; allocation of costs; books and records; annual report); N.J.S. 40:11A-6(4)(l) (Powers and purposes of authority); N.J.S. 40:14A-7(13) (Sewerage authority a public body corporate; powers); N.J.S. 40:14A-40(c) (Requirements and obligations of the sewerage authority); N.J.S. 40:14B-20(14) (Powers); N.J.S. 40:14B-73(c) (Requirements and obligations of the municipal authority); N.J.S. 40:37A-55(t) (Body politic and corporate; powers and duties); N.J.S. 40:37B-12(n) (Body politic and corporate; powers and duties); N.J.S. 40:54C-2(d) (Organization; quorum; open meetings; compliance with local government ethics and public contracts law; public access to information and records); N.J.S. 40:54D-22 (Purchases, contracts, and agreements subject to Local Public Contracts Law); N.J.S. 40:55D-53(d) (Guarantees required; surety; release); N.J.S. 40:66-9 (Collection or disposal of solid waste within district to be provided by municipal contract or service); N.J.S. 40:66A-7(11) (Incinerator authority or environmental services authority as political subdivision; powers); N.J.S. 40:66A-31.4(6) (Powers of county); N.J.S. 40:66A-38(11) (Solid waste management authority as political subdivision; powers); N.J.S. 40:68A-7(11) (Port authority as political subdivision; powers); N.J.S. 40:68A-40(12) (Municipal port authority as political subdivision; powers); N.J.S. 40A:11-2.1(a) (Certification on bid or proposal as to investment activities in Iran; false certifications); N.J.S. 40A:11-4.11 (Local unit, joint purchasing unit, or cooperative pricing system authorization to use electronic procurement practices; purposes); N.J.S. 40A:11-5.2 (Expenditure of funds derived from public moneys for capital improvements to, or construction of, water supply facilities); N.J.S. 40A:11-23.1a (Plans, specifications and bid proposal documents for certain real property contracts; projects with no suspected soil contamination or allowance for soil testing; reimbursement for subsequent discovery of contamination); N.J.S. 40A:11-52 (Public-private partnership agreements; assumption of full financial and administrative responsibility for a project; procurement and contracting requirements; contents; definitions) N.J.S. 48:3-51 (Definitions); N.J.S. 48:3-91.1(a) (Authority of Division of Purchase and Property to enter into a written contract for electric generation services and gas supply services for certain state agencies, local government units, and government aggregators); N.J.S. 48:5A-64(a)

Conversely, 10 New Jersey statutes contain provisions that expressly provide that these statutes are “*not subject to the provisions of the requirements of the Local Public Contract Law.*”⁵⁷

- *Unique Property*

The second option contemplates a situation in which a governmental entity wishes to acquire real property whose location, proximity, history, aesthetics or utility make it desirable to the vicinage. For example, a governmental entity may wish to acquire the real property adjacent to its municipal building to build an emergency communications and dispatch center. In this hypothetical situation, the “unique” characteristic of this real property is its proximity to the municipal building. It is logical, to allow the governmental entity to condition the sale on the development of the sought capital improvements by the seller – the owner of the uniquely situated parcel. A “turnkey” project under such circumstances should be exempt from the requirements of the Local Public Contracts Law.⁵⁸

- *Exemption from normal property taxation based on uniqueness of property*

In the context of the Municipal Stabilization and Recovery Act, the New Jersey Legislature has recognized the distinctiveness of certain properties, such as casinos, thus making their assessment especially difficult. That Act provides that, “[t]he accurate assessment of casino gaming properties is especially difficult because they are **unique properties**...”⁵⁹ Additionally, the statute recognizes that “[c]asino gaming properties represent a **unique** classification of property that can be exempt from normal property taxation by general law...”⁶⁰

- *Unique property characteristics as basis for zoning waiver*

The unique characteristics of the property may also serve as a request for a waiver before the Zoning Board of Adjustment. N.J.S. 40:55D-70 provides that a variance from the strict application of a zoning regulation may be granted so as to relieve difficulties or hardship caused by “...reason of exceptional narrowness, shallowness or shape of a specific property, or ... by reason of an extraordinary and exceptional situation **uniquely** affecting a specific piece of property or structures lawfully existing thereon...”⁶¹

- *Proposed modification stricken*

(Private aggregators, contracts and registration); N.J.S. 52:14-15.9a1 (Deductions for group long term care insurance premiums); N.J.S. 52:18-11.2(a) (Long term care insurance plan for local contracting units); N.J.S. 52:25-16.1 (Contract provisions relating to counties, municipalities or school districts); N.J.S. 52:27D-124.3 (Private agency proposal to provide inspection or plan review services subject to “Local Public Contracts Law”; other requirements); and, N.J.S. 54:5-133 (Application of other law to joint municipal lien pools).

⁵⁷ N.J.S. 13:8C-27.1(c) (Design and construction of completely inclusive playgrounds; use of Green Acre funds; definitions); N.J.S. 40:12-15.10(c) (Agreement between local government units and nonprofit organizations; acquisition and preservation of land and other property; exemption from local public contracts law); N.J.S. 40:12-28(b) (Construction of act; exemption from local public contracts law); N.J.S. 40:12-30 (Construction and maintenance of a completely inclusive playground upon receipt of State funds); N.J.S. 40:43-66.53(d) (Budget; apportionment among municipalities; acceptance of aid; facilities and employees; audit); N.J.S. 40:54A-5(m) (General powers); N.J.S. 40A:5-15.1(f) (Securities which may be purchased by local units); N.J.S. 40A:12A-78(g) (Responsibilities of land bank entity; terms and conditions for the acquisitions of property; land bank agreement requirements); N.J.S. 44:10-75(h) (Implementation of electronic benefit distribution system in all counties); N.J.S. 49:2-5 (Contracts regarding servicing of obligations).

⁵⁸ E-mail from Ted Del Guercio, III, Esq., McManimon, Scotland & Baumann, LLC to Samuel M. Silver, Deputy Director, New Jersey Law Revision Commission (Apr. 08, 2020, 11:17:30 AM EDT) (on file with the NJLRC).

⁵⁹ N.J.S. 52:27BBBB-19(g); (emphasis added).

⁶⁰ *Id.* (emphasis added).

⁶¹ N.J.S. 40:55D-70; (emphasis added). *See Jacoby v. Zoning Bd. of Adj. of Borough of Englewood Cliffs*, 442 N.J. Super. 450 (App. Div. 2015).

The language proposed in subsection a.(3)(B) is superfluous and would only serve to add to confusion in interpreting the statute.

Comments for Option #3

Subsection a.(3)(A) represents an attempt to clarify the language in the statute and sets forth the requirement that where multiple properties may meet the public body's requirements, the acquisition of real property must comply with the Local Public Contracts Law, N.J.S. 40A:11-1 et seq. This modification is consistent with the best practices recommended by practitioners who practice in this area of law.⁶²

The Commission asked that Staff address the impact of the New Jersey Prevailing Wage Act, N.J.S. 34:11-56.25 et seq. on a public body's requirement that a private seller, or lessor, construct or repair a capital improvement as a condition of acquisition.

The addition of the language set forth in subsection a.(3)(C) reflects the intent of the Prevailing Wage Act that, "[e]very contract [...] for any public work to which any public body is a party or for public work to be done on property or premises owned by a public body or leased or to be leased by a public body shall contain a provision stating the prevailing wage rate which can be paid [...] to the workers employed in the performance of the contract [...]" Where the statute was previously silent on this issue, this subsection would make it clear that the Prevailing Wage Act applies to these types of governmental contracts.

⁶² See 35 N.J. PRAC., LOCAL GOVERNMENT LAW § 14:14 (Michael A. Pane) (4th ed. 2018).