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RULE ADOPTIONS

OTHER AGENCIES

FORT MONMOUTH ECONOMIC REVITALIZATION AUTHORITY

44 N.J.R. 515(a)

Adopted New Rules: N.J.A.C. 19:31C-2

Sale of Real and Personal Property

Proposed: October 3, 2011 at *43 N.J.R. 2575(a)*.

Adopted: January 20, 2012 by the Fort Monmouth Economic Revitalization Authority, Bruce Steadman, Director.

Filed: January 20, 2012 as R.2012 d.040, **without change**.

Authority: *N.J.S.A. 52:27I-18* et seq., specifically *N.J.S.A. 52:27I-26kk*.

Effective Date: February 21, 2012.

Expiration Date: February 21, 2019.

Summary of Public Comments and Agency Responses:

Phil Welch, Jr., Past Co-Chair, Monmouth Advocacy Team

N.J.A.C. 19:31C-2.5(a) Offer to purchase process

COMMENT: If a party approaches FMERA with an offer for a parcel, before or after the advertising of that parcel, FMERA should not consider the offer without advertising the parcel's availability and proceeding through its prescribed bidding process.

RESPONSE: While the referenced subsection speaks to the valuation of the purchase price, N.J.A.C. 19:31C-2.5(b) requires FMERA to advertise an offer opportunity prior to evaluating any such offer.

COMMENT: If this is not done, it will subvert the prescribed bidding process.

RESPONSE: See the Response to first Comment above.

N.J.A.C. 19:31C-2.14(a) Evaluation

COMMENT: All relevant impacts, including environmental, economic, housing, and fiscal impacts, on the surrounding communities and Monmouth County should be part of evaluation. Recommend changing wording of vii. to: *impacts on host community, surrounding communities and Monmouth County, including environmental, economic and fiscal impacts, as well as the impact on the need for and supply of affordable housing.*

RESPONSE: Although FMERA's mission and obligations are confined to the geographic boundaries of the Reuse Plan and/or Fort Monmouth property, the Board and the Real Estate Committee may consider the impact, including, but not limited to, affordable housing per the Fort Monmouth Reuse and Redevelopment Plan or as required by New Jersey law, and FMERA's intent to meet its homeless accommodation obligation that any project may have on neighboring communities, as well as Monmouth County. Such capacity is even more enhanced with the FMERA representation of the county freeholder who serves as a voting member on the Board and each mayor of the three host municipalities who also serve as voting members of the Board. In addition, the language in N.J.A.C. 19:31C-2.14(a) is not meant to be exhaustive but merely representative of the material elements set forth in a solicitation or notice of availability; criteria that respond to a specific sale or lease would not be precluded and may be incorporated in the solicitation or notice, as necessary.

COMMENT: There should be some indication of the relative weighting of the eight factors listed, and/or an indication of whether some of them are simply pass or fail.

RESPONSE: Recognizing that each potential parcel for sale by FMERA maybe of a variety of uses (commercial, retail, residential, etc.) and in order to better evaluate the impact a project may have to host communities FMERA will reserve the right to develop weight scales any time prior to the opening of bids, either at the bid or offer to purchase due date. Additionally, the evaluation criteria for each bid or offer to purchase will be included in the advertisement.

N.J.A.C. 19:31C-2.14(b) Evaluation

COMMENT: This states that FMERA will compare a proposed purchase price with a professional appraisal. When will this appraisal be available to the public? At the latest, it should be available when FMERA announces which offer to purchase has been selected.

RESPONSE: In response to the comment, the appraisal will be available in accordance with the Open Public Records Act, *N.J.S.A. 47:1A-1* et seq.

N.J.A.C. 19:31C-2.16(a) Exclusive negotiating period

COMMENT: It appears that the exclusive negotiating period could be entered into without first going through an evaluation. For reasons of fairness, consideration should not be given to entering into an exclusive negotiating period until an evaluation has determined which purchaser(s) have provided the best potential offer.

RESPONSE: As required by N.J.A.C. 19:31C-2.14(a) and (b), FMERA will evaluate each proposal prior to entering into an exclusive negotiating period.

COMMENT: At the very least, there should be provision for the Board to approve an exclusive negotiating period.

RESPONSE: Given that no contract will be awarded without Board approval, the Board has determined that it has sufficient oversight of this process without separately approving the exclusive negotiation period.

N.J.A.C. 19:31C-2.18(a) Challenges

COMMENT: Why are challenges limited to unsuccessful bidders or parties who submitted an offer to purchase? Recommend allowing any interested party to submit challenges. This would open challenges beyond those parties which might be hesitant to challenge, because of impacts on future bids or offers.

RESPONSE: N.J.A.C. 19:31C-2.18(a) does not limit who may submit a challenge to a notice of intent to award a purchase agreement. N.J.A.C. 19:31C-2.18(a) grants to unsuccessful bidders and parties who submitted an offer to purchase a limited ability to review portions of FMERA's files relative to the particular property. N.J.A.C. 19:31C-2.18(a) also recognizes that unsuccessful bidders and parties who submitted an offer to purchase have standing to challenge an award of a particular purchase contract.

Tom Mahedy, Wall, NJ

COMMENT: Mr. Mahedy, a member of the general public, submitted lengthy comments relating to myriad issues including the process for appointment of board of directors in base closing communities, the overall award of contracts for base closings, and ". . . legislation and regulation used to circumvent public involvement and oversight and lead to

blatant conflict of interest"; and questioning whether the proposed new rules ". . . will lead to more fraud, corruption, and conflict of interest."

RESPONSE: The proposed new rules are intended to provide transparency to the public and stakeholders in the sale of real and personal property at Fort Monmouth, and, therefore, the comments, which largely do not address the language in the rules, are rejected. In addition, a legal process exists on both the Federal and State levels by which a member of the public may address concerns relating to the base closing process and/or FMERA operations and should be utilized, rather than through the rulemaking process, for such purposes.

Federal Standards Statement

The adopted rules are not subject to any Federal standards or requirements; therefore, a Federal standards analysis is not required.

Full text of the adoption follows:

CHAPTER 31C FORT MONMOUTH ECONOMIC REVITALIZATION AUTHORITY

SUBCHAPTER 1. (RESERVED)

SUBCHAPTER 2. SALE OF REAL AND PERSONAL PROPERTY

19:31C-2.1 Applicability and scope

The Fort Monmouth Economic Revitalization Authority is promulgating these rules to govern the sale of real property and accompanying personal property as part of its mission in planning and implementing the redevelopment and reuse of Fort Monmouth and pursuant to authorization under P.L. 2010, c. 51 (*N.J.S.A. 52:27I-18 et seq.*). The Authority intends to execute the aforementioned task through the two processes set forth in these rules--the sealed bid process and the offer to purchase process when real and personal property have been advertised for sale.

19:31C-2.2 Definitions

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

"Authority" means the Fort Monmouth Economic Revitalization Authority.

"Board" means the Board of the Fort Monmouth Economic Revitalization Authority.

"Director" means the Director of the Fort Monmouth Economic Revitalization Authority.

"FMERA" means the staff responsible for carrying out the policies, mission and purpose of the Fort Monmouth Economic Revitalization Authority.

"Offer to purchase process" means an invitation to submit an offer to purchase a particular parcel that has been advertised as being available for sale through the offer to purchase process with the offer period remaining open until the date specified in the advertisement.

"Plan" means the Fort Monmouth Reuse and Redevelopment Plan prepared and adopted by the Authority's predecessor authority.

"Sealed bid process" means a solicitation for competitive sealed bids to purchase a particular parcel that has been advertised as being available for sale through the sealed bid process with a requirement that sealed bids be received by the advertised bid due date.

19:31C-2.3 Sealed bid process

(a) For any real property and accompanying personal property to be sold through the sealed bid process, FMERA shall advertise a notice of each solicitation for sealed bids on the Authority's website and on the New Jersey State business portal and shall place an advertisement for same in the "Public/Legal Notice" section of the Star Ledger, the Asbury Park Press and if FMERA deems it appropriate, in other regional newspaper(s) or other publications. Advertisements on the Authority's website and the New Jersey State business portal shall be maintained until the close of the bidding period.

(b) In addition, FMERA may contact potential purchaser(s) directly to seek to increase the number of sealed bids received in response to an advertised solicitation to purchase.

19:31C-2.4 Sealed bid requests

(a) The notice of solicitation for sealed bids shall request sealed bids for the purchase of a particular parcel of real property and accompanying personal property and shall include the time, date and format in which the sealed bids are to be submitted. The notice shall also include a name and phone number or other contact information potential purchaser(s) can use to obtain additional information about the solicitation.

(b) Each solicitation to purchase through the sealed bid process shall specify material terms of the sale that are to be proposed by bidders and material terms of sale that are required for the particular sale and not subject to bid which shall be specified either through the solicitation to purchase, a specimen form of purchase agreement, or on the Authority's website.

(c) Sealed bids will be opened on the date specified in the solicitation. After sealed bids have been publicly opened, FMERA may seek best and final sealed bids from one or more bidders that timely submitted a responsive bid for the particular real property and accompanying personal property.

19:31C-2.5 Offer to purchase process

(a) Before advertising a particular parcel of real property and accompanying personal property as being available for sale through the offer to purchase process, the Board shall review and approve a recommendation of the Director and FMERA to offer the property for sale through the offer to purchase process. In its determination to use the offer to purchase process, the Board also may consider various factors including, but not limited to, purchase price, jobs to be created and timing, to determine whether the offer to purchase process will enhance the economic value to FMERA or Fort Monmouth. If a party has approached the FMERA with an offer, in its determination to use the offer to purchase process, the Board also may consider the proposed purchase price as compared to a valuation of the real and/or personal property established by an appraisal report prepared by a professional licensed appraiser.

(b) For any real property and accompanying personal property to be sold through the offer to purchase process, FMERA shall advertise a notice of the availability of the property for sale through the offer to purchase process on the Authority's website, on the New Jersey State business portal and shall place an advertisement for same in the "Public/Legal Notice" section of the Star Ledger, the Asbury Park Press and if FMERA deems it appropriate, in possibly other regional newspaper(s) or publications.

(c) Each notice of availability for sale through the offer to purchase process shall specify the period of time for submitting an offer to purchase the particular property which period for submitting offers to purchase shall not be less than 30 days.

(d) In addition, FMERA may contact potential purchaser(s) directly to seek to increase the number of offers to purchase received in response to an advertised solicitation.

19:31C-2.6 Submission of sealed bids

(a) All sealed bids shall be submitted on or before the specified time and date required by the public notice and contain all information requested by FMERA. Unless otherwise specified in the notice, a sealed bid shall not be submitted by telephone, facsimile, or other electronic means.

(b) All sealed bids shall include a certified, cashiers or bank check made payable to the Authority in the amount of 10 percent of the bid price, which shall be held by the Authority as a deposit and applied to the purchase price at closing for the accepted bid, and returned to all others.

(c) Deposit checks shall be deposited by FMERA into an interest bearing account with interest accruing to the benefit of the bidder. Deposits paid by unsuccessful bidders, with accrued interest, shall be returned when FMERA issues its notice of intent to award a purchase contract in accordance with N.J.A.C. 19:31C-2.17(e).

(d) Sealed bids received by FMERA shall be held unopened until the close of the bidding period, at which time all bids received shall be publicly opened and the identities of the bidders, but not the substance of the bids, will be read.

19:31C-2.7 Submission of offers to purchase

(a) The time for submitting an offer to purchase shall remain open until the date specified in the advertisement. Unless otherwise specified in the notice, an offer to purchase shall not be submitted by telephone, facsimile, or other electronic means.

(b) All offers to purchase shall include a certified, cashiers or bank check made payable to the Authority in the amount of five percent of the offer price, which shall be held as an initial deposit. An additional deposit of 10 percent of the offer price shall be payable to the Authority on the earlier of:

1. FMERA and the potential purchaser entering into an exclusive negotiating period in accordance with N.J.A.C. 19:31C-2.16; or

2. A purchase agreement being fully negotiated and signed by the purchaser. The initial deposit and the additional deposit shall be applied to the purchase price at closing.

(c) Deposit checks shall be deposited by FMERA into an interest bearing account with interest accruing to the benefit of the party who submitted the offer to purchase. In the event an offer to purchase cannot be negotiated into an acceptable offer, deposits paid by the party that submitted the offer, with accrued interest, shall be returned when the Board determines to terminate negotiations regarding the particular offer to purchase.

19:31C-2.8 Extension of time to submit sealed bids

The Director may extend the time for opening sealed bids at the request of a potential purchaser who notifies FMERA that he or she intends to submit a sealed bid and gives valid reasons why he or she will not meet the formal opening date. The potential purchaser making this request shall do so in writing and specify the length of additional time requested. The written request must be received by FMERA no later than one week prior to the close of the bid submission period. If granted, extensions of time for opening of sealed bid(s) shall be applicable to all potential purchaser(s) and shall be posted only on the Authority's website. All sealed bid(s) shall be held and remain sealed until the expiration of the time extension granted by the Director.

19:31C-2.9 Sealed bid prices

(a) A sealed bid shall include all material information required by the solicitation. Prices shall be typewritten, photocopied, or written in ink or some other indelible substance.

(b) Unless the solicitation states otherwise, the prices submitted with a sealed bid shall remain effective for 90 days after the opening date, subject to any negotiations conducted in accordance with N.J.A.C. 19:31C-2.15(a).

19:31C-2.10 Withdrawal of sealed bid

(a) Prior to the opening of the sealed bid(s), a potential purchaser may, for any reason, request the withdrawal of his or her sealed bid. The request shall be made in writing to FMERA and shall be signed by a person authorized to submit the sealed bid (such as the owner or owner's designated representative, or an attorney or real estate broker with written permission to negotiate and act as attorney in fact for owner). Proof of authorization shall accompany the request.

(b) After the opening of the sealed bid(s), if either the potential purchaser(s) or FMERA discover a material error in a sealed bid, the potential purchaser(s) may request the withdrawal of the sealed bid. If the error is discovered by FMERA, the potential purchaser(s) will be notified in writing, and the potential purchaser will have five business days from receipt of the notice to request withdrawal of the sealed bid. Any request to withdraw from the potential purchaser(s) shall be addressed to FMERA which will return the sealed bid if the potential purchaser(s) can demonstrate that he or she exercised reasonable care in preparing and submitting the sealed bid, and that it would be unconscionable for FMERA to enforce the proposed purchase agreement. The decision to grant or deny any such request shall be at the sole discretion of the Director.

19:31C-2.11 Correction of pricing error

FMERA shall correct a pricing error in a sealed bid under the following circumstance: Unless the solicitation states otherwise, or the result would be unconscionable, where a sealed bid price contains a discrepancy between a unit price and a total price based on those units, the unit price shall govern. Where the sealed bid price contains any other price discrepancy, FMERA shall determine the price if the sealed bid contains clear evidence of the intended price.

19:31C-2.12 Verification of sealed bid or offer to purchase

FMERA may seek information outside of the sealed bid or offer to purchase to verify the accuracy and responsiveness of the sealed bid or offer to purchase, and whether the potential purchaser(s) is responsible. FMERA may request such information from the potential purchaser(s), from public records, or from others familiar with the potential purchaser(s). Such information may clarify, but not modify, a sealed bid or offer to purchase. Such investigation may include, but shall not be limited to, contacting the potential purchaser surety companies, financial institutions, and review of corporate or personal financial records, reports and statements.

19:31C-2.13 Rejection of all sealed bids or offers to purchase, re-advertisement and termination

The Authority reserves the right to reject all sealed bid(s) and offer(s) to purchase and to either re-advertise or terminate an advertised solicitation if the Authority determines that insufficient competition results from the initial advertisement, the price is unfavorable in the current market, or for any other reason in the best interests of the Authority or the redevelopment plans for Fort Monmouth as determined by the Authority.

19:31C-2.14 Evaluation

(a) FMERA shall evaluate each sealed bid and offer to purchase received in accordance with this subchapter and shall identify the sealed bid(s) or offer(s) to purchase determined to be responsive to all material elements set forth in the solicitation or notice of availability, respectively, which may include, but not be limited to:

1. The purchase price;
2. The estimated jobs to be created at or relocated to the parcel;
3. The purchase term including due diligence period as well as payment for such period;
4. The proposed project capital investment;
5. The potential purchaser's financial capacity to meet the proposed terms of purchase and project completion;
6. The future use of the property;

7. The impact to the host municipality; and

8. Confirmation that the potential purchaser's proposed use is consistent with the Plan.

(b) Evaluation of sealed bids and offers to purchase will be made based on the best interests of the Authority and the redevelopment plans for Fort Monmouth, price and other factors considered. In evaluating purchase price, FMERA will consider purchase price as compared to a valuation of the real and/or personal property established by an appraisal report prepared by a professional licensed appraiser. FMERA may accept a lower purchase price from a governmental purchaser or public/private partnership if the proposal is based upon a significant creation of jobs or investment in the technology sector.

19:31C-2.15 Negotiations

(a) When the sealed bid process is used to sell property, FMERA may negotiate with one or more bidders that has submitted advantageous sealed bid(s) terms that are in the best interests of the Authority and the redevelopment plans for Fort Monmouth, price and other factors considered, in accordance with the evaluation criteria in N.J.A.C. 19:31C-2.14. FMERA reserves the right to negotiate with some but not all potential purchasers who submitted a sealed bid based on initial submissions.

(b) When the offer to purchase process is used to sell property, from time to time as offers are received, FMERA may negotiate terms of sale that are in the best interests of the Authority and the redevelopment plans for Fort Monmouth, price and other factors considered, in accordance with the evaluation criteria in N.J.A.C. 19:31C-2.14. Negotiating with a potential purchaser will not preclude FMERA from negotiating with other potential purchasers unless FMERA has entered into an exclusive negotiating period with a potential purchaser in accordance with N.J.A.C. 19:31C-2.16.

19:31C-2.16 Exclusive negotiating period

(a) When the offer to purchase process is used to sell property and upon the request of a party who has made an offer to purchase a particular parcel of real property and accompanying personal property, FMERA may agree that it will not negotiate with any other party for that particular property provided that the following conditions are met:

1. The time for submitting offers to purchase that particular property has expired;
2. FMERA determines there is a reasonable likelihood that the exclusive negotiating period will lead to an offer to purchase that will be acceptable to the Authority;
3. Subject to extensions pursuant to (b) and (c) below, an exclusive negotiating period shall not exceed 45 days;
4. The prospective purchaser makes an addition deposit of 10 percent of the purchase price; and
5. The prospective purchaser agrees in writing to negotiate exclusively with FMERA during the exclusive negotiating period and terminate negotiations and discussions with other parties who seek to sell or lease competing real property.

(b) The Director may extend an exclusive negotiating period for an additional 30 days.

(c) The Board may extend an exclusive negotiating period for such period of time and upon such terms and conditions as the Board determines to be in the best interests of the Authority and the redevelopment plans for Fort Monmouth considering price and other factors.

19:31C-2.17 Recommendation, review and award

(a) The Director and FMERA shall recommend to the Board bids and offers to purchase, which may have been modified through negotiations, that will provide purchase agreements which are in the best interests of the Authority and the redevelopment plans for Fort Monmouth considering price and other factors. Any recommendation to accept a bid or

offer to purchase shall also identify competing bids or offers to purchase that will be rejected by awarding a purchase agreement to the selected purchaser.

(b) For sales conducted through the sealed bid process, the Director and FMERA may recommend to the Board that all bids should be rejected and no notice of intent to award a purchase agreement be made and that the real property and accompanying personal property be re-advertised for bids or any other appropriate action.

(c) For sales conducted through the offer to purchase process, the Director and FMERA may recommend to the Board that negotiations regarding a particular offer to purchase should terminate and the potential purchaser's deposit, with accrued interest, be returned.

(d) The Board shall determine whether to issue a notice of intent to award a purchase agreement and reject competing bids and offers to purchase; to reject all bids; to terminate negotiations regarding a particular offer to purchase; to issue a new notice of availability of property for sale; or to take other appropriate action.

(e) Upon approval by the Board of an award of a purchase contract, FMERA shall issue a notice of intent to award a purchase agreement and send it to all bidders or parties who submitted an offer to purchase. The notice of intent to award a purchase agreement shall set forth all of the material terms of the purchase agreement. FMERA shall finalize the purchase agreement which shall be executed by the Director.

19:31C-2.18 Challenges

(a) After the date of the notice of intent to award a particular purchase agreement, unsuccessful bidders or parties who submitted an offer to purchase for the particular property, as applicable, will have 10 business days from the date of the notice to review:

1. The sealed bids or offers to purchase submitted by other potential purchasers;
2. FMERA's comparative summary of sealed bids or offers to purchase received;
3. The records of the negotiations, if any; and
4. Any supporting documents to (a)1, 2 and 3 above.

(b) Challenges to the notice of intent to award a particular purchase agreement shall be submitted in writing to the Director within 10 business days from the date of the letter giving notice of intent to award and shall state with specificity all arguments, materials and/or other documents that may support the challenger's position that the proposed award should be overturned. The Director may extend the time for reviewing documents or submitting a challenge on good grounds shown to the satisfaction of the Director in his or her sole discretion.

(c) If a challenge is timely received, the Director shall assign a hearing officer to review the challenge and make a final recommendation to the Board. The Director, in consultation with the hearing officer, has sole discretion to determine if an oral presentation by the challenger is necessary to reach an informed decision on the merits of the challenge. Challenges of the type described in this subchapter, for the purpose of this chapter, are not contested cases subject to the requirements of the Administrative Procedure Act, *N.J.S.A. 52:14B-1* et seq., and the Uniform Administrative Procedure Rules, *N.J.A.C. 1:1*.

19:31C-2.19 Documents considered public information

(a) For sales conducted through the sealed bid process, after FMERA's issuance of notice of intent to award a purchase agreement, sealed bids and other documents submitted by potential purchasers (excluding those items exempt from public access pursuant to *N.J.S.A. 47:1A-1* et seq.) shall be considered public information, notwithstanding any disclaimers submitted by the potential purchaser(s) to the contrary.

(b) For sales conducted through the offer to purchase process, after a purchase agreement has been signed by the Authority and a purchaser, documents submitted by potential purchasers (excluding those items exempt from public access pursuant to *N.J.S.A. 47:1A-1* et seq.) shall be considered public information, notwithstanding any disclaimers submitted by the potential purchaser(s) to the contrary.