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Electronic Municipal Tax Lien Sales: Adoption of N.J.A.C. 5:33-1.1

This Notice discusses the recent [adoption of N.J.A.C. 5:33-1.1](#), which creates a regulatory framework for internet-based sales of delinquent property taxes and municipal charges (hereinafter "online tax sales"). To facilitate transition from the long-standing pilot program to the new rules, municipalities who had previously received Division approval to conduct online tax sales under the pilot program may rely on that prior approval to conduct one more tax sale (and one more water/sewer lien sale if the municipality conducts such sales separately) under the pilot program so long as the tax sale is held on a date no later than June 30, 2018. All online tax sales held from July 1, 2018 on forward shall be conducted pursuant to the new rules. Any municipality that had not participated in the pilot program must hold an online tax sale pursuant to the new rules regardless of the date the tax sale is to be held.

[N.J.A.C. 5:33-1.1](#) establishes requirements for publication of notice, issuance of notice to the property owner, bidder registration, conducting the online tax lien sale, as well as the receipt and processing of payments. Procurement of a vendor, limitations on vendor fees, and standard contractual provisions are also addressed, in addition to minimum technological, cybersecurity, and internal control standards. The requirements for conducting an online tax sale under the new rule, which differ in certain respects from the former pilot program guidelines, are discussed in further detail below.

Notice and Advertising

When a municipality conducts an online tax sale, the tax collector shall continue to prepare the tax lien sale notice required pursuant to [N.J.S.A. 54:5-25](#). In addition to the statutorily required content, the notice of sale shall also contain a statement that the tax sale is being held through an online auction and that bidders should submit their bids no later than the date and time of the sale set forth in the notice, along with a full link to the website where bidder instructions and registration can be accessed.

The municipality must continue to physically post copies of the tax sale notice, prepared as set forth above, in at least five of the most public places in the municipality. For municipalities with their own websites, a copy of the tax sale notice shall be posted on the website until the online sale concludes on the date of sale; it is recommended that tax collectors submit a copy of the tax sale notice to the webmaster for posting simultaneous to physically posting the five notices. The tax collector's "Affidavit of Mailing, Advertising, and Posting of Tax Sale Notice" should list what date the tax sale notice was first posted on the municipal website. Please note that the municipality does not have an obligation to continuously update the tax sale notice as line items come off. As with live sales, a copy of the tax sale notice shall be mailed at least once to the property owner pursuant to N.J.S.A. 54:5-27.

With respect to newspaper advertisement of the sale, a municipality may publish a display ad in lieu of the current legal notice required for a live sale under N.J.S.A. 54:5-26. The display ad must be no less than two inches x three inches (2" x 3") with a bold black border and contain the following information:

- A statement that the municipality is announcing the sale of delinquent taxes and delinquent municipal charges;
- A statement that the sale shall be conducted through an online auction;
- A statement that the listing of all parcels and delinquencies and costs, along with bidding instructions, are available online for viewing at no cost;
- The date and time of the sale; and
- The full website link where the tax sale line items may be viewed.

As with the legal notice, the display ad must be published in the municipality's official newspaper at least once a week for four weeks prior to the week of the online tax sale, except that a copy of the tax sale notice may be mailed (regular or certified) to the property owner and to any others entitled to notice of foreclosure pursuant to N.J.S.A. 54:5-104.8 in lieu of up to two publications. Municipalities conducting online sales are permitted to add up to \$25 per mailing to the cost of sale (maximum of two in lieu mailings). The costs for in lieu mailings should be reflected in the municipality's fee ordinance. Unlike the former pilot program, the regulations do not require three individual mailings in addition to the display ad publication.

If the tax collector publishes the legal notice instead of availing themselves of the display ad, please note that the additional information required for the physical tax sale notice must also be featured in the published legal notice.

Requirements for the Online Bidding Process

The tax lien sale line items shall be publicly available on the vendor's website free-of-charge without requiring registration or membership prior to viewing. Bidding shall open no earlier than upon publication of the newspaper advertisement. Bidder registration shall be online and

completed prior to submitting a bid, although the municipality shall have the discretion to permit bidders to register in-person at the tax collector's office.

Prior to placing a bid, each bidder must post a forfeitable deposit of a percentage or amount set by the tax collector; a successful bidder who fails to make payment on a lien certificate shall forfeit the deposit amount to the municipality. The deposit must be held in the municipality's account and not that of the vendor, with any unused portion of the deposit promptly returned to the bidder after conclusion of the tax sale. Deposits may also be submitted in person at the tax collector's discretion.

Any vendor's online tax sale platform shall also provide, at minimum, the following:

- Detailed online instructions on how to utilize the website;
- The ability to obtain and electronically submit forms (e.g. W-9s, bidder information sheets);
- A help desk for tax collectors and bidders through the internet, e-mail, and at least one toll-free telephone number;
- A dedicated telephone hotline available for use by tax collectors until the sale's completion;
- Web-based training, including online tutorials, for both bidders and municipal officials responsible for administering the sale;
- A method by which bidders can practice bidding on the website;
- Available in-person training for municipalities, including a working demonstration of the website and overall system;
- Online display of winning bids immediately upon the auction's completion;
- Notification to winning bidders by e-mail at the bidder's registered e-mail address;
- Provision of the electronic transfer of information and data to and from the municipality, including access for the tax collector to remove and update the tax lien sale list in real time;
- A transaction log for the tax collector to review all bid submissions and results, along with a detailed history of all funds transferred; and
- A standard complaint procedure for both the municipality and bidders, with a complaint log maintained by the vendor and available for the municipality's inspection.

The tax collector shall have the discretion to select either direct bidding or proxy bidding for an online tax sale. In a direct bid auction, participants enter a bid for an item at either a specific rate of interest (0% up to 18%) or a specific dollar amount the bidder is willing to pay as a premium,

with the successful bidder awarded the lien at the bid entered. By contrast, participants in a proxy bid auction enter their lowest acceptable interest rate or highest acceptable premium for an item. The auction system monitors all other bids and enters competitive bids on the bidder's behalf at an interest rate increment lower than what would become the next lowest bid. If the interest rate is bid down to zero, and the bidder has entered a maximum premium amount, the system will enter competitive bids on the bidder's behalf at the next increment higher. The system stops entering bids on the bidder's behalf when the bidder either wins the auction or reaches the minimum interest rate bid or maximum premium bid.

All liens shall be auctioned individually, such that a bid will be placed on each lien with a winning bidder determined for each lien; bulk sale of liens is prohibited. Bid amounts shall not be visible to the public or to the municipality while the auction is in progress. No officer, employee, or independent contractor of the vendor may participate in the auction. All bid information and participant financial data is deemed property of the municipality.

The online tax sale platform shall enable the tax collector to accept and process ACH and wire transfer payments as well as certified check or cash. If the tax collector accepts in-person cash payment, the tax collector must immediately input data into the online tax sale system to reflect any such payment. Successful bidders must make full payment for liens within 24 hours after bidding closes. ACH transfers must be initiated within 24 hours after bidding closes and settled within 72 hours of the close of sale, unless a longer period of time has been agreed upon in writing between the municipality and the vendor.

The vendor shall notify all registered bidders of any properties that become available again for bidding due to non-payment by a successful bidder. If the parcel is resold, interest shall be recalculated to the new sale date.

The vendor's fee for conducting the sale shall not exceed the fee collected by the vendor under N.J.S.A. 54:5-38. A vendor shall only charge fees to the municipality and not to bidders or lien purchasers. Tax collectors shall not collect any additional fees for the cost of sale in addition to those authorized pursuant to law.

Procuring a Third-Party Online Tax Sale Vendor

In order to contract with a third-party online tax sale vendor, that vendor shall:

- Be presently conducting online tax sales in at least two states; or
- Have conducted online tax sales in the past two years that have included bidders from more than one state; or
- Be affirmatively marketing in more than one state a system for performing online tax sales.

Procurement of an online tax sale vendor is subject to the Local Public Contracts Law (LPCL), N.J.S.A. 40A:11-1 et seq., and does not fall under one of the LPCL statutory exceptions to public

bidding. This means that if the contract award will exceed the municipality's bid threshold (up to \$17,500 without a Qualified Purchasing Agent (QPA) or up to \$40,000 with a QPA) the municipality must publicly advertise for the receipt of bids.

In lieu of the statutory bidding process, N.J.A.C. 5:33-1.1(c)(1) permits a municipal governing body to authorize by resolution the use of competitive contracting [a request for proposals (RFP) process governed pursuant to N.J.S.A. 40A:11-4.1 through 4.5 and N.J.A.C. 5:34-4.1 et seq.] to obtain an online tax sale vendor without requiring prior Director approval. The competitive contracting process allows a municipality to select a vendor based on technical, management, and cost-related criteria (i.e. price and other factors). The criteria may address elements such as, but not necessarily limited to, the technology utilized, history and experience in performing the work, and qualification and experience of personnel. See N.J.A.C. 5:34-4.2 for model competitive contracting evaluation criteria. In-person demonstration of a vendor system may be incorporated into the evaluation process. The methodology for awarding a competitive contract shall be based on an objective valuation and ranking of the stated criteria, but cannot be crafted in such a manner as to unfairly exclude otherwise capable vendors. Competitive contracting must be administered by either a duly-appointed QPA, legal counsel, or the municipality's administrator or manager.

Laws pertaining to items such as Ownership Disclosure and the Business Registration Certificate (BRC) apply to online tax sale vendors as they would any other vendor. Please keep in mind that State "Pay-to-Play" laws and any local "Pay-to-Play" ordinances would also apply.

Awarding the Contract; Standard Contract Terms

Any contract with an online tax sale vendor, regardless of the cost, must be awarded by the municipality's governing body. Under no circumstances may the duration of the contract extend beyond one year or 12 consecutive months. Before the contract is awarded, the tax collector must review the contract as to its terms and be satisfied that the contract contains the standard terms required by regulation; such review should be done in consultation with legal counsel.

All contracts with an online tax sale vendor shall be in writing, executed by all parties, and contain the following:

- Language making the vendor responsible for the errors and omissions of its employees and agents;
- Adequate provisions to indemnify the municipality against any losses incurred as a result of the actions or inactions of the vendor;
- Provisions for contract termination including, but not limited to, termination for failure to perform on the part of the vendor;
- Procedures for dispute resolution between the parties, including language making any dispute subject to New Jersey law, and service of process (notice of legal action) to the vendor; and

- A provision permitting the municipality to allow an independent auditor to examine the vendor's internal controls, which may require the municipality to assume the cost of the audit.

New Jersey law shall govern the contract and the relationship between the municipality and the vendor. All disputes between the parties shall be documented in writing, with any correspondence concerning same forwarded to the other party via registered or certified mail.

Vendor Cybersecurity and Internal Controls

Subsection (r) of N.J.A.C. 5:33-1.1 sets forth a cybersecurity framework that must be followed by an online tax sale vendor. Elements addressed include:

- System hosting;
- Encryption;
- Password policy and staff security education;
- Risk assessment and security updates;
- Background checks for staff with access to financial and personal identifying information;
- Limitations on the maintenance of personal identifying information (e.g. prohibiting the use of Social Security numbers as identifiers);
- Information backup, information disposal, and disaster recovery plans; and
- Having a cybersecurity incident response plan and response team (CSIRT) with notification to the municipality of any incident experienced by the vendor

Online tax sale vendors shall provide to the tax collector and the chief finance officer on an annual basis evidence of satisfactory internal controls. Such evidence must be in the form of an unqualified Service Organization Control (SOC) 2 auditor's report that tests and reports on the design effectiveness and operating effectiveness of vendor operational controls including those relating to cybersecurity. The SOC2 report can be produced either at the beginning of the contract term or during the contract term. In order to provide sufficient time for vendor compliance, the SOC 2 report requirement shall commence in 2019.

Approved: Timothy J. Cunningham, Director

Document	Internet Address
5:33-1.1 Notice of Adoption	http://www.nj.gov/dca/divisions/dlgs/resources/rules_reg.html
<u>N.J.A.C. 5:33-1</u>	http://www.nj.gov/dca/divisions/dlgs/resources/rules_docs/5_33/njac_5331.pdf
<u>N.J.A.C. 5:34-4</u>	http://www.nj.gov/dca/divisions/dlgs/resources/rules_docs/5_34/njac_5344.pdf