

Real Estate, Title Insurance & Construction Law

Owners Who Reject All Bids

By Mitchell W. Taraschi and
Meghan B. Barrett

When a local public entity gathers bids for a project, is it compelled to award its project to one of the bidders? The short answer is: no. Under New Jersey's Local Public Contracts Law (LPCL), N.J.S.A. 40A:11-24(a), a local public entity has the express power during the public bidding process to "award the contract or reject all bids." *Penpac, Inc. v. Morris County Mun. Util. Auth.*, 299 N.J. Super. 288, 295 (App. Div. 1997).

This right has been reaffirmed by the New Jersey courts on numerous occasions. A public entity's decision to reject all bids may promote competitive bidding because it "serves as a strong inducement to bidders to keep their bids as low as circumstances permit." *Penpac*, 299 N.J. Super. at 296. What is less clear, however, is the standard that a local public entity must apply when determining to reject all bids, and equally important, the proper standard of review to be used by courts in review-

Taraschi is a partner and Barrett is an associate at Connell Foley in Roseland. Both are members of the firm's construction law practice group.

ing a local public entity's decision to exercise that power.

Local Public Entity's Right to Reject All Bids

It is well-established that, at a minimum, a decision by a public entity to reject all bids must not be "arbitrary or capricious and it must be free from fraud, collusion and bad faith." *Penpac*, 299 N.J. Super. at 296. In rendering a decision to reject all bids, a public entity should offer a statement of reasons why the bids are not acceptable. See e.g., *M.A. Stephen Construction Co. v. Bor. of Rumson*, 117 N.J. Super. 431, 438-39 (App. Div. 1971).

In 2000, the LPCL was amended to codify the reasons why a local public contract unit may reject all bids. N.J.S.A. 40A:11-13.2 provides:

- a. The lowest bid *substantially* exceeds the cost estimates for the goods or services;
- b. The lowest bid *substantially* exceeds the contracting unit's appropriation for the goods or services;
- c. The governing body of the contracting unit decides to abandon the project for provision or performance of the

- goods or services;
- d. The contracting unit wants to *substantially* revise the specifications for the goods or services;
- e. The purposes or provisions or both of P.L.1971, c. 198 (C.40A:11-1 *et seq.*) [the Local Public Contracts Law] are being violated;
- f. The governing body of the contracting unit decides to use the State authorized contract pursuant to section 12 of P.L.1971, c. 198 (C.40A:11-12) [purchases through a State agency].

(Emphasis added.) Although used thrice, the word *substantially* is undefined by the Legislature.

For example, in *Marvec Constr. Corp. v. Township of Belleville*, 254 N.J. Super. 282 (Law Div. 1992), the court approved the rejection of bids where the lowest bid substantially exceeds the municipality's cost estimate or where circumstances arise that may cause the municipality to abandon or revise the project. While the statute categorizes the grounds for rejecting all bids, recent case law has created some ambiguity relating to the standard that a local public entity must meet when rejecting bids. Certain courts have held that where all "bids have already been opened and each bidder's competitive position has been exposed, rejection of

all bids should only occur for *cogent or compelling reasons*.” (Emphasis added.) *Penpac*, 299 N.J. Super. at 296. See also *In the Matter of the Failure to Award to the Lowest Responsible Bidder RFP 09-X-20513 Contract T0002 for Provision of Bottled Water Services*, Superior Court of N.J., App. Div. Docket No. A-2747-08T2 (July 2, 2010) at pp. 6-8.

**The Standard of Judicial Review:
Arbitrary and Capricious vs.
Cogent and Compelling**

A local public entity’s decision to reject all bids is traditionally granted substantial deference by the courts. *Penpac*, 299 N.J. Super. at 297. The decision will generally not be overturned unless the court finds it to be arbitrary, capricious, unreasonable or negligent. To that end, a court should not substitute its judgment for that of the local public entity. *Marvec*, 254 N.J. Super. at 293.

However, courts have also noted that the “discretion of a contracting agency under the Local Public Contracts Law and other bidding statutes to reject all

bids is not unfettered.” *Marvec*, 254 N.J. Super. at 288. The right is a “discretionary privilege” but one “not without limit.” *Penpac*, 299 N.J. Super. at 296. Discretion is not unfettered because courts must guard against corruption and unfairness in the bidding system. According to the court in *Marvec*, “Unlimited discretion [to reject all bids] permits a waiver on purely personal grounds and in response to corrupt overtures. It is precisely this kind of opportunity that our bidding system was designed to avoid.” Moreover, there is no guarantee that rebidding the contract will bring back a lower price.

Certain courts, including the court in *Marvec*, have held that a local public entity’s decision to reject all bids can *only* be overturned if its “actions are shown to be arbitrary, capricious, or abuse of discretion.” Alternatively, other courts have held that if the local public entity must provide “cogent and compelling” reasons for the rejection of all bids, a court’s review of that decision must also determine if there exists “cogent and compelling reasons.” *In the Matter of the Failure to Award*, Superior Court of N.J., App. Div. Docket

No. A-2747-08T2 (July 2, 2010) at p. 6-8. The *Marvec* court held that after bids are opened, rejection of all bids should only occur for cogent or compelling reasons; but it also held that judicial review of that decision is subject to the arbitrary and capricious standard.

While the proper standard of judicial review upon a rejection of all bids is unclear, public entities do have guidance on how to proceed. Notably, the decision to reject all bids is sustainable where motivated by good faith without consideration of eliminating an “unfavored bidder.” *Penpac*, 299 N.J. Super. at 296. In other words, if the local public entity can articulate rational reasons why all bids are rejected, and those reasons do not undermine the integrity of the public bidding scheme, the decision of the local public entity is likely to stand. If the basis of the decision cannot be reasonably articulated and smells of favoritism or corruption (such as repetitive rejections until the “right contractor” comes in low), then a court is likely to overturn the rejection, whatever nomenclature may be employed. ■