

New Jersey Supreme Court Expands Standing to Challenge Public Bid Specifications

Jen Electric, Inc. v. County of Essex

by Mitchell W. Taraschi

On March 4, 2009, in *Jen Electric, Inc. v. County of Essex*, the New Jersey Supreme Court, in a split decision, reversed a unanimous Appellate Division opinion and held that a *potential* subcontractor, vendor and supplier that is neither a taxpayer nor a bidder had standing to challenge a public project's bid specifications under New Jersey's Local Public Contracts Law (LPCL). The Supreme Court opted not to decide a second issue: whether a disappointed bidder that did not object to the specifications in advance of the bid, and has taxpayer status within the jurisdiction of the public owner, may bring a post-bid challenge to a public project's bid specifications.

A POTENTIAL SUBCONTRACTOR, VENDOR AND SUPPLIER MAY HAVE STANDING TO CHALLENGE PUBLIC BID SPECIFICATIONS

Jen Electric (JEI) sued Essex County, claiming certain specifications for a road safety reconstruction project were illegal because they allegedly sole-sourced certain of the products. The county disputed JEI's claim of "illegal" specifications, and asserted that JEI lacked standing to bring suit.

JEI is not a taxpayer in Essex County, did not submit a bid on the project, and admitted it never intended to submit a bid. Rather, JEI claimed to be a "prospective bidder" that should have standing because it had a direct financial interest in ensuring the specifica-

tions do not illegally sole-source certain products. JEI wanted its products to be considered as meeting the bid specifications' technical requirements. JEI also claimed to be the vanguard for the public good: By ensuring that specifications do not sole-source required products, the taxpayers will reap the financial savings that come with increased competition.

The trial court concluded JEI did not have standing to challenge the specifications because it is not a taxpayer, bidder or prospective bidder. The Appellate Division affirmed the trial court's dismissal, also finding JEI lacked standing to sue.

In reversing the Appellate Division, the Supreme Court narrowly defined the issue as: whether the 2000 amendment to N.J.S.A. 40A:11-13(e) limits standing of those who wish to challenge a bid specification in a public contract. Ultimately, the Supreme Court concluded nothing in N.J.S.A. 40A:11-13(e) limits traditional notions of standing. The Supreme Court then held that JEI had standing to challenge the bid specifications prior to the award of the public contract under traditional standing principles because JEI had "demonstrated a substantial likelihood of harm if its challenge is rejected." Indeed, standing is generally conferred upon anyone with a financial interest.

Notably, the Supreme Court referenced with approval the well-established doctrine that only taxpayers, bidders, and prospective bidders may challenge the award of

a contract to a successful bidder.¹ In doing so, the Supreme Court noted that the dynamics applicable to contract award challenges are "fundamentally different" from those related to pre-award bid specification challenges and thus, "the determination of who may challenge a bid specification must be gauged differently than the determination of who may challenge a contract award."

The Supreme Court, however, failed to explain why "traditional notions of standing" grant entities like JEI standing in pre-bid cases but not in post-bid contract award cases. Indeed, it would appear that traditional notions of standing would apply irrespective of whether a challenge is pre-bid or post-bid. Moreover, JEI's standing under traditional notions of standing is questionable because JEI did not intend to contract directly with the county and cannot satisfy traditional third-party beneficiary standing principles.² Also, the Supreme Court departed from analogous federal law, which holds that prospective bidders, suppliers and vendors such as JEI do not have standing to challenge bid specifications.³

The Supreme Court's decision also appears to produce an anomaly within the LPCL, which requires prospective bidders to notify public owners at least three days prior to the opening of the bids of an alleged defect in the bid specifications but does not require those very prospective bidders' suppliers to satisfy the three-day test.⁴ The

three-day notice requirement was intended to provide the public entity an opportunity to review and respond to any claim that the bid specifications were illegal or defective. By expanding standing to prospective subcontractors, vendors and suppliers, the Supreme Court is essentially depriving public owners of the ability to review and respond to such objections, and providing third parties greater rights to challenge bid specifications than the prospective bidders themselves. In light of the Supreme Court's ruling, the Legislature may wish to consider amending N.J.S.A. 40A:11-13(e) to compel entities like JEI to comply with the three-day notice requirement.

The practical impact of the Supreme Court's ruling on the LPCL is uncertain. While the Supreme Court itself stated that its holding is "very limited," Justice Helen Hoens recognized in her dissent that "there is nothing in the majority's analysis that limits the right of any potential supplier, however large or small, to commence a challenge to the bid specifications." Allowing parties one, two or three steps removed from the actual bid to challenge specifications, pre- or post-bid, "creates the very real possibility of significant delay in public contracting and threatens to interfere with the orderly system that the Legislature envisioned and that the statute seeks to impose." Indeed, public projects may now be delayed due to suits from *potential* subcontractors, vendors and suppliers that want their products or services to be used by *actual* bidders.

Most specifications are drawn by design professionals, upon whom local governmental officials rely in drafting specifications that encourage competition and meet the demands of the LPCL. Through dialogue with those engineers and architects, local governments can ensure projects within their borders serve the general welfare and safety of their citizens, while providing efficient and manageable

specifications. Considerations of the design professionals are not limited to lowest cost, but also involve other considerations such as durability and safety.

Legal challenges to specifications by numerous third parties looking to sell their products or services may pose insurmountable problems in drafting specifications for a public project. For example, if a public entity wants to build a garage out of steel, various concrete suppliers may bring such court challenges, as did JEI. Only time will tell if the county's and Justice Hoens' concerns are warranted, and if public contracts become bogged down by a litany of challenges by potential subcontractors, vendors and suppliers. If such problems do arise, the Legislature may need to consider revising the LPCL to explicitly limit standing.

MUST A BIDDER THAT IS ALSO A TAXPAYER COMPLY WITH N.J.S.A. 40A:11-13(E)?

It has long been the law in New Jersey that unsuccessful bidders who bid on local public contracts without first objecting to the specifications lack standing to challenge the award of the contract to a rival bidder or to attack allegedly illegal specifications.⁵ The idea is that a bidder cannot sit back and wait until it sees the bid results (*i.e.*, whether it was the successful low bidder) before asserting that there is a defect in the bid specifications in an effort to get a second bite at the apple. This longstanding common-law doctrine was codified in N.J.S.A. 40A:11-13(e), which requires bidders to notify public owners of an alleged defect at least three days prior to the opening of the bids.

JEI sought to add Daidone Electric, an actual bidder on the project, as a plaintiff, arguing that Daidone Electric had standing to challenge the specifications because, not only was it a bidder, Daidone Electric was also an Essex County taxpayer, giving it a "dual status." Taxpayers

are generally not subject to the three-day rule of N.J.S.A. 40A:11-13(e). According to JEI, Daidone's taxpayer rights should enhance, not be limited by, its status as a bidder.

The trial court refused to hear this motion because Daidone Electric's alleged dual status as a taxpayer and a bidder was not timely or properly presented to the trial court. However, the Appellate Division heard the issue on the merits and rejected JEI's argument, concluding the dual status argument was an "end-run" around the time limitations imposed by N.J.S.A. 40A:11-13(e). The Appellate Division also found that JEI's proposed construction of N.J.S.A. 40A:11-13(e) would lead to "absurd or unreasonable results." Indeed, if Daidone Electric was to have standing based upon its taxpayer status, the gamesmanship the Legislature sought to avoid by barring prospective bidders from challenging bid specifications after submitting a bid may be circumvented. In other words, if a bidder that is also a taxpayer could wait until the bids are opened, see if it is the apparent low bidder, and if it is not, then claim the specifications are invalid under its taxpayer cloak, the salutary purpose of the bidding law is lost. The Supreme Court declined to rule on this issue and it is unclear how it may rule if and when this issue is presented again in the future. ■

ENDNOTES

1. See, e.g., *Band's Refuse Removal, Inc. v. Borough of Fair Lawn*, 62 N.J. Super. 522, 539 (App. Div. 1960) (plaintiff who was not and never had been a resident or taxpayer of city and who was not a bidder or prospective bidder for the contract had no standing to attack contract awarded to successful bidder).
2. See, e.g., *GE Capital Mortgage Services, Inc. v. Privetera*, 346 N.J. Super. 424, 434 (App. Div. 2002) (the test for determining whether a third party has an actionable right under contract

is whether contracting parties intended that a third party should receive a benefit which might be enforced in the court; the contractual intent to recognize a right to performance in the third person is the key, and if that intent does not exist, then the third person is only an incidental beneficiary, having

no contractual standing).

3. *See, e.g., Eagle Design & Management, Inc. v. U.S.*, 62 Fed. Cl. 106 (2004) (subcontractor providing a significant portion of the labor or material on the project was not itself an actual or prospective bidder and not an interested party with standing).
4. N.J.S.A. 40A:11-13(e).

5. *Waszen v. Atlantic City*, 1 N.J. 272, 276 (1949) (unsuccessful bidders for city garbage disposal contract had no standing to challenge award of contract to rival bidder or to attack allegedly illegal specifications).

Mitchell W. Taraschi is a partner at Connell Foley LLP.