

IN PRACTICE

PUBLIC CONTRACT LAW

Recent Developments in NJ Public Bidding Statutes

This article focuses on two 2021 statutory developments in the field of public bidding: the use of electronic bidding procedures to solicit and receive bids, and an alternate “design-build” form of procurement.

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“In a class with motherhood and apple pie, the mandate that governmental contracts be subject to public bidding is almost sacrosanct.” *N.E.R.I. v. New Jersey Highway Authority*, 147 N.J., 223, 245 (1996) (Stein, J., dissenting)

“Deals work best when each side gets something it wants from the other.” Donald J. Trump, *The Art of the Deal* (1987 Ballantine Books), at pg. 181.

The real world of public bidding operates between the idealized vision expressed by Justice Stein in *N.E.R.I.* and the quid pro quo nature of private business transactions characterized by former President Trump. Nevertheless, it is that very tension between the unnatural commercial construct involved in public bidding and our common experience that highlights recent developments in public bidding statutes. As relevant legislative history illustrates, most of the bargaining takes place in that governmental branch’s arena, and we must live with the consequences.

This article focuses on two 2021 statutory developments in the field of public

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bidding. The first statute concerns the use of electronic bidding procedures to solicit and receive bids. The second statute grants broad authority for governmental bodies to employ an alternate, “design-build” form of procurement.

Next week, we will examine a significant reported Appellate Division decision, rendered July 8, which stopped counties from utilizing the Local Redevelopment and Housing Law, in conjunction with the County Improvement Authorities Law, as a means to bypass the Local Public Contract Law’s restrictions. *Dobco, Inc. v. Bergen County Improvement Authority*, 2021 N.J. Super. LEXIS 93 (App. Div. 2021).

The Electronic Construction Procurement Act

“Many local units throughout the State have requested the right to receive sealed bids through the mail. They feel that this power would result in substantial savings to the local units and promote the fullest and freest competition possible.” Preliminary Draft Local Contracts Law, Report of the County and Municipal Law Revision Commission, Nov. 7, 1960.

Although anachronistic to the 21st century reader, accepting mailed bid proposals represented, in 1960, another leap of faith from the previous stricture that all bids be hand-delivered and opened at the appointed time and place, in public. After all, sealed envelopes could be opened, re-

sealed, and the information relayed by compromised officials. In the end, allowing bidders who couldn’t attend bid openings to mail in bids outweighed the risk, and the measure passed.

Paradoxically, we now view the submission of proposals by mail as the vestige of a bygone era. Whatever can be accomplished electronically is most often done so. Although P.L. 2020, c. 59 became effective on July 16, 2020, implementing regulations weren’t adopted until April 5, 2021. N.J.S. 52:34A-1 to -9; N.J.A.C. 5:34-5.1 to 5.15 (See 53 N.J. Register 501). The act mandates that all State contracting units “shall use an electronic construction procurement process for public works construction contracts” whenever public advertising is required. N.J.S. 52:34A-9. However, because local contracting units are not as familiar or well-equipped with internet bidding systems, the act is permissive as to construction projects undertaken by local contracting units, including schools, county colleges and LPCL entities. Additionally, local contracting agencies are allowed to supplement electronic bid submissions by accepting paper-based bids, so that all bidders need not spend the time and money involved in subscribing to and learning an electronic format. N.J.A.C. 5:34-5.2.

The regulations include minimum requirements for “electronic procurement platforms,” including time-stamping and logging of all local unit and offeror actions on the platform, the ability to post questions

and answers on the website and to upload documents and sealed drawings, and of course requisite platform security and password protections. N.J.A.C. 5:34-5.3.

Web-based bidding has been in use for decades. The New Jersey Department of Transportation first adopted it in 2004-2005. Like many public transportation agencies, NJDOT utilizes the Bid Express© software platform for bidders. Interestingly, surety bonds are submitted through another software platform, InSure Vision Technologies' Surepath. One of the major advantages of electronic bidding is that it prevents certain bidding errors by automatically checking calculations and precluding manual changes to prescribed bid forms. Mathematical errors between unit prices and extended prices for particular bid items are eliminated. *Public Constructors v. New Jersey Expressway Authority*, 43 N.J. 545 (1965); *Cardell v. Township of Madison*, 54 N.J. 151 (1969).

Another fertile ground for bid protest litigation stems from bid bonds and consents of surety that contain qualified, conditional promises to supply the required bid security or bonds. *Meadowbrook Carting Company v. Borough of Island Heights*, 138 N.J. 307, 316 (1994). These cases, too, will disappear under electronic bidding because the software documents have restricted fields which contain language that bidders and sureties cannot alter. Finally, challenges to brief extensions granted of the time to open bids, in order to accommodate a bidder who is delayed en route by inclement weather, don't arise where bids are submitted electronically. *Kingston Bituminous Products Co. v. New Jersey Turnpike Authority*, 80 N.J. Super. 25 (App. Div. 1963), (permitted governing body to extend the receipt of bids for a brief period).

In short, the benefits of remote, uninterrupted access to the bid documents, addenda, and requests for information, the ability to resubmit a bid before the due date, the fail-safe mechanisms built into the software that avoid common clerical and arithmetic mistakes, the security of restricted electronic access with time-stamp identifications whenever the documents are viewed, along with conquering most of Mother Nature's challenges (as well as infamous New

Jersey traffic jams), all point to the eventual state-wide adoption of electronic bidding for all construction projects.

The Design-Build Construction Services Procurement Act

Of necessity, this article can only highlight some of the challenges presented to our system of public bidding with the enactment of P.L. 2021, c. 71, on April 30, 2021. Traditional public bidding proceeds with the public owner issuing plans and specifications, along with the prescribed form of contract documents, to prospective bidders, and the awarding of a contract to "the lowest responsible bidder" whose bid materially conforms to the solicitation. N.J.S. 40A:11-4(a). There are, of course, exceptions. "Competitive contracting" (N.J.S.A. 40A:11-4.1 through 4.5, and 11-5) and certain State procurements are governed by a "price and other factors" standard. In those cases, the award should be made to the lowest responsible bidder whose proposal conforms to the request for proposals and whose bid is most advantageous to the public entity, "price and other factors considered." In the *Matter of Protest of the Award of the On-line Games Production and Operation Services Contract*, 279 N.J. Super. 566, 590 (App. Div. 1995).

Once you enter the subjective realm of "other factors" in a public procurement, two things happen: the opportunity for favoritism, corruption, and chicanery increases, and the scope of judicial review decreases. Courts review discretionary governmental actions under the "arbitrary or capricious" standard. Public officials argue that they need the "flexibility" afforded by such procurement methods in order to obtain the best product or service at the best price. Who could argue with such an objective?

"Design-build" delivery of a construction project through a public procurement is a variation on the "price and other factors" theme. Simply stated, this method shifts responsibility for the engineering and architectural design of a project, as well as its construction, onto the contractor. Chapter 71 is the first state-wide statutory authorization for employing the design-build method, meaning that state government entities (title 52:35B), school districts and county colleges (title 18A:chs,

18A and 64A), and local public contracting agencies (title 40A:11) may all take advantage of this approach. First, the governmental body must determine that pursuit of a particular project through the D/B process better meets its needs than designing the project itself and sending it out to bid. Usually, that means the agency has concluded it's better to shift the cost and potential liability arising from the design portion of a project from itself onto the D/B contractor. This is especially true where unique or difficult engineering challenges may be confronted during the design phase. For LPCL projects, the cost must exceed \$5 million to qualify, and the public body must "make a determination based on the timeliness of the project" that going D/B is "in the best interest of the public." N.J.S. 40A:11-54.a.(3).

The procurement then proceeds through two stages: the Request for Qualifications (RFQ) phase, where interested bidders are given "performance criteria and a scope of work" along with "evaluation factor criteria and preliminary design documents, general budget parameters, and general schedule or delivery requirements." N.J.S. 40A:11-54.a.(2). Responses to the RFQ are then passed upon by a Technical Review Committee, which selects the "most highly qualified" number of firms that is included in the RFQ. Those "short-listed" contractors proceed to submit sealed bids in response to a Request for Proposals (RFP). The same committee reviews the proposals, evaluates them according to pre-announced criteria that list each criterion's weight, "including a minimum of 50 percent consideration based on the cost of the bid," and makes an award recommendation. N.J.S. 40A:11-55(f).

If the process ended at that second stage, it would more closely resemble "price and other factors" procurements. But it need not. N.J.S. 40A:11-58.d states that the proposal may be "accepted without change" or "the maximum cost in the proposal may be converted to fixed prices by negotiated agreement between the contracting unit and the design-builder." (Emphasis added). Granted, this language is somewhat ambiguous, and may be clarified once implementing regulations are adopted. Nevertheless, it's conceivable that an award will be made to a firm that not only had the highest technical score, but also the highest proposed price. *Sayer v. Minnesota Dept. of Transportation*, 769 N.W.2d 305 (Minn. Ct.

App. 2009), *aff'd*, 790 N.W.2d 151 (Minn. 2010). As one noted commentator explained, the Minnesota DOT's technical review committee "had broad discretion to evaluate proposals to obtain the best value for the public, and its discretion would not be interfered with where not proven to be arbitrary, capricious, or unsupported by its substantial evidence." 1 Bruner & O'Connor on Construction Law, §2.17, at pg. 129 (2016 ed.)