



# Anatomy of a Bid Protest

by Joseph R. Haftek Jr.

Many practitioners have received a frantic call along these lines from a client:

*"Hi, this is Joe."*

*"Joe! It's Jim from XYZ Contracting."*

*"Hey Jim, how have you..."*

*"We lost a bid in Bravos because they said our subcontractor had too much uncompleted work, but they don't! We need to file a bid protest."*

Filing a timely, forceful, and affirmative bid protest can certainly help a bedeviled client attain this goal; however, there are subtle differences and nuances, especially regarding bid protest procedures, across New Jersey's various public bidding statutes.<sup>1</sup> Bid protests are highly technical, fact specific, emergent actions, and failing to properly identify the correct bidding statute applicable to a challenge, understand its particular details, and follow the proscribed challenge procedure can be fatal to a bid protest. While case law applicable to public bidding is generally applicable to all bid protests, statutory differences in pre-bid challenge procedures, initial reviews of protests, and the right to judicial review can vary greatly.

This article will primarily evaluate the procedures and dichotomies of two of New Jersey's primary public bidding statutes: the Local Public Contracts Law<sup>2</sup> (LPCL) and State Pro-

curement Law<sup>3</sup> (SPL). The LPCL governs most public bidding for municipalities, counties and local government authorities and boards. The SPL applies to contracts issued by the Department of the Treasury's Division of Property Management and Construction (DPMC).

## Background

In general, New Jersey's public bidding statutes "are designed to promote competition and guard against extravagance and corruption."<sup>4</sup> "The purpose is to secure competition; they should be construed with sole reference to the public good; and they should be rigidly adhered to by the courts."<sup>5</sup> Public contracts "must be let only after the broadest opportunity for public bidding is given in order to secure competition, and guard against favoritism, improvidence, extravagance and corruption."<sup>6</sup> It is the violation of these premises and the statutes embodying these ideals that engender bid protests.

## Bid Protest Procedures

### *The Pre-Submission Specification Challenge*

The client has calmed down and finally provided the background on how and why it believes it is entitled to challenge a public bid award. What now? The first step in any bid

protest is to determine whether the client's grievance involves a challenge to an allegedly improper bid specification, and whether it was required to challenge the allegedly improper specifications prior to bid opening. This is the first major difference in procedure between the LPCL and SPL.

For example, the practitioner receives a call from a client located 25 miles from the soliciting local public entity, claiming it lost a public bid because the bid specifications stated only bidders within 20 miles of the soliciting public entity would be considered for award of the contract. This is a bid specification that would require a pre-bid challenge, as all bidders were aware of the requirement in advance of submitting bids. In discussing the distinction between challenges made to bid specifications and challenges to contract awards to successful bidders, the New Jersey Supreme Court noted that in the latter, "all interested parties have accepted the specifications as drawn, have bid on those specifications, and, at least as far as the successful bidder is concerned, have a vested interest in the contract award itself."<sup>7</sup>

The LPCL procedure for challenging a bid specification is exceedingly straightforward; specification challenges must be filed with a public entity at least three days prior to bid submission and opening.<sup>8</sup> A LPCL pre-bid specification challenge filed less than three days prior to bid opening "shall be considered void and having no impact on the contracting unit or the award of a contract."<sup>9</sup> Most interestingly, there is no requirement for a public entity to take any action on a timely filed pre-bid specification challenge; local public entities are free to either address the pre-bid challenge formally or informally, or simply ignore it. However, the importance of filing this pre-bid challenge cannot be understated. For an aggrieved public bidder, the filing of a required pre-bid

challenge, even if it is ignored, should act to preserve the right to challenge a public entity's action or inaction on the pre-bid challenge *even after* a contract award.

Conversely, the SPL procedures for challenging a specification can require a multi-level process that commences during the mandated request for proposal (RFP) question period, and must be formally initiated "in sufficient time to permit a review of the merits of the protest and to take appropriate action as may be necessary, prior to the scheduled deadline for proposal submission."<sup>10</sup> However, specification protests submitted less than seven days before submissions are due may be disregarded.<sup>11</sup> A SPL pre-bid specification is a more intensive and formal procedure, and requires a formal written disposition of the challenge.<sup>12</sup>

In light of the foregoing, it is, therefore, extremely important that the practitioner evaluate whether a client has a right to protest a bid award, but also understand the procedures for pre-bid challenges to advise clients on how to timely address specification issues.

### ***Bidder Qualifications***

Many of New Jersey's primary bidding statutes, including those governing state contracts<sup>13</sup> and school construction,<sup>14</sup> contain bidder qualification requirements.<sup>15</sup> More often than not, prospective bidders are required to be pre-qualified and classified by the DPMC regarding type and amount of work. It is clear in most state bidding statutes and regulations that the failure to obtain or maintain proper DPMC pre-qualification and classification prevents contractors from bidding on projects, and will result in rejection of otherwise conforming bids from bidders lacking proper pre-qualification and classification.<sup>16</sup> Once again, the LPCL varies greatly from the SPL by requiring little in the way of formal prequalification of bidders.

Local government entities that solicit

bids in accordance with the LPCL and wish to adopt qualifications for bidders have to follow statutory protocols, including submitting the proposed regulations to a public hearing with notice of the hearing provided in at least two newspapers circulating in the county.<sup>17</sup> Thereafter, if the proposed qualifications are approved at the public hearing, they must be submitted to the director of the Division of Local Government Services for the director's approval.<sup>18</sup> The director may disapprove of the proposed regulations if specific criteria are not met.<sup>19</sup>

The legal intent of the LPCL makes sense; it was designed not to burden local public entities with repressive bidder qualification requirements, especially for smaller jobs. However, it also creates confusion regarding the qualifications required to bid for LPCL projects and leaves the door open to bidders that are potentially unqualified to perform the work for which they are bidding. While it is clear that public bidding statutes have created a more level playing field for bidders in certain contexts, the subject of bidder qualification is still a proverbial gray area, particularly with respect to local government bidding.

Further confusion arises from another section of the LPCL regarding subcontractors, which requires LPCL bidders to name subcontractors "qualified with this act."<sup>20</sup> But what does that mean? At first glance, this would seemingly require DPMC prequalification and classification for subcontractors on LPCL projects, but that is not the case. The New Jersey Appellate Division has determined sufficient cause for rejection of a bid where the low monetary bidder names a subcontractor that is not qualified to perform specialty work specified in bid documents, was not licensed to do such work, and there is a lack of evidence that it had ever done such work.<sup>21</sup> That case presents a somewhat extreme set of facts, leaving no clear definition of "qualification."<sup>22</sup>

The practice point here is in recognizing that while qualification challenges may carry the day under the SPL, and many of New Jersey's other public bidding statutes, it may not do so under the oft-used LPCL.<sup>23</sup>

### Post-Award Challenges

The formal protest procedures differ under the LPCL and SPL. Procedure is incredibly important to a successful bid challenge, and prior to initiating a challenge the practitioner must check both the applicable statute and bid specifications requirements on how to initiate a bid protest. In general, aggrieved bidders may run directly to the courthouse for LPCL challenges, but must first pursue administrative remedies before obtaining judicial relief under the SPL.<sup>24</sup> Aggrieved bidders having standing to file a bid protest include taxpayers, bidders, and prospective bidders.<sup>25</sup>

Contracts let under the LPCL must be awarded by resolution of the public entity to the "lowest responsible bidder," often referred to as the lowest *responsive, responsible* bidder.<sup>26</sup> "The contract must be awarded not simply to the lowest bidder, but rather to the lowest bidder that complies with the substantive and procedural requirements in the bid advertisements and specifications."<sup>27</sup> Strict compliance with bidding statutes is required, as local public entities are generally without discretion to award public contracts. However, the legislative intent behind public bidding laws was not to supplant all exercises of principled business judgment by contracting public entities that conform to bidding laws and underlying policies.<sup>28</sup>

LPCL challenges are brought via an action in lieu of prerogative writ pursuant to New Jersey Court Rule 4:69, which requires the filing of an order to show cause, verified complaint and brief. The action must be filed within 45 days of the "accrual of the right to the review," most often the date of bid

award.<sup>29</sup> Every protest application should include a request for temporary restraints preventing award and/or performance of the contract during the pendency of the action and a claim for awarding and/or rescinding the award of the contract.<sup>30</sup> The trial court will also determine what discovery, if any, is required, and many of these protests are adjudicated without discovery or testimony following oral argument.<sup>31</sup>

LPCL bid protests are evaluated using an "abuse of discretion" standard: "[U]nless it is established, which it has not been here, the Borough as the contracting agent acted in *bad faith* or *abused its discretion* in rejecting these bids, unless that is proven, *the court could not substitute its judgment for that of the agency.*"<sup>32</sup> The court must determine whether the challenged award was "arbitrary, capricious and unreasonable."<sup>33</sup> Challenged bid awards may be determined to be an abuse of discretion for a variety of reasons, often with the analysis coming down to whether an alleged defect is material or immaterial.<sup>34</sup> Material requirements in bid specifications *may not* be waived.<sup>35</sup> The test of whether a defect is material or immaterial is set forth in a two-part test first established in the trial court, and subsequently affirmed by the New Jersey Supreme Court:<sup>36</sup>

- **First Part:** "[W]hether the effect of a waiver would be to deprive the municipality of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements"<sup>37</sup>; and,
- **Second Part:** "[W]hether it is of such a nature that its waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition."<sup>38</sup>

Despite the summary nature of these

actions, they can result in a pyrrhic victory: Based upon timing and a court's sympathy to the public entity, one can obtain a ruling that it is entitled to a contract, but lose out on the award due to substantial performance of the contract during adjudication.<sup>39</sup> Timing is everything.

Conversely, the SPL requires a formal, written challenge first be lodged with the awarding state agency.<sup>40</sup> There is a different standard for awarding contracts under the SPL than the LPCL. The SPL permits agency directors more latitude: "All material factors, including price, must be considered in the ultimate determination of the most advantageous bid."<sup>41</sup> Agency directors are afforded significant discretion and latitude in rejecting and awarding contracts under the SPL.<sup>42</sup> More specifically, the New Jersey Supreme Court held that agency directors awarding a contract pursuant to the SPL have greater independence than public entities awarding contracts under the LPCL.<sup>43</sup>

Two types of protests may be brought under the SPL: 1) challenging the rejection of a proposal;<sup>44</sup> and, 2) disputing the award of a contract.<sup>45</sup> All protests *must* be filed within 10 days of notice of rejection or award;<sup>46</sup> there are also specific requirements regarding what must be included in an initial protest in order to continue to prosecute a challenge, and an agency director is permitted to disregard protests that do not comply with all initial filing requirements.<sup>47</sup> The agency director, or a designee, has discretion whether to hold an in-person hearing and determine the scope and breadth of such a hearing.<sup>48</sup> Following either the director's/designee's review and/or in person hearing, the agency director or director's designee must issue a written decision providing the basis for its ruling, which is a final agency decision.<sup>49</sup> Once again, as with the LPCL, timing and procedure are at the

forefront of protest procedure under the SPL.

Recognizing the differences in initial LCPL and SPL bid protest procedures is paramount to a client's potential success on the merits. Fortunately, when it comes to appellate procedure, the procedure under both statutes is nearly identical. LPCL challenges are filed as an appeal of a trial court's decision pursuant to Rule 2:2-3(a)(1), and as an appeal of a final agency decision under Rule 2:2-3(a)(2). Any appeal of a bid protest action also should include an application for an emergent stay.<sup>50</sup> The New Jersey Supreme Court recently confirmed that failure to seek an emergent stay is just as fatal on an appeal as it is at the trial level:

In light of our decision finding error in the

Appellate Division's reversal of the Division's award to RMD, we need not address the parties' arguments in favor of a bright-line rule in favor of mootness when an unsuccessful bidder fails to seek a stay in order to appeal a bid award. We note only that the parties' arguments highlight that an unsuccessful bidder, who does not promptly seek a stay of a lease bid award under Rule 2:9-8 when appealing an award determination, acts at his, her, or its peril.<sup>51</sup>

### Conclusion

Again, the requirement of quick, affirmative action and understanding the procedure for filing a bid protest cannot be understated. To reinforce the importance of timely and properly filing bid protest actions, monetary damages are not permitted in bid protest actions.

The failure to do so can not only result in a client losing out on a public contract it was entitled to, it can leave it without any options for recovery.<sup>52</sup> ☞

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### ENDNOTES

1. A sampling of public bidding statutes—N.J.S.A. 18A:64-52, *et seq.* (State College Contracts Law); 18A:64A-25.1, *et seq.* (County College Contracts Law); N.J.S.A. 18A:39-1, *et seq.* (School Transportation); N.J.S.A. 27:2-1, *et seq.* (State, County and Municipal roads contracts); and, N.J.S.A. 27:23-6.1, *et seq.*

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- (New Jersey Turnpike Authority).
2. N.J.S.A. 40A:11-1, *et seq.*
  3. N.J.S.A. 52:34-6 *et seq.* and N.J.S.A. 52:32-2.
  4. *Terminal Construction Corp. v. Atlantic City Sewage Authority*, 67 N.J. 403 (1975).
  5. *Hillside Twp. v. Sternin*, 25 N.J. 317, 322 (1957).
  6. *D'Annunzio Bros. v. Transit Corp.*, 245 N.J. Super. 527, 531-532 (App. Div. 1991).
  7. *Jen Elec., Inc. v. County of Essex*, 197 N.J. 627, 644 (2009).
  8. N.J.S.A. 40A:11-13.
  9. *Id.*
  10. N.J.A.C. 17:12-3.2(b).
  11. N.J.A.C. 17:12-3.2(b)(3).
  12. N.J.A.C. 17:12-3.2(c)-(d).
  13. N.J.S.A. 54:34-6.
  14. Public Schools Contracts Law, N.J.S.A. 18A:18A-1, *et seq.*
  15. N.J.S.A. 52:35-3; N.J.S.A. 18A:18A-26-33.
  16. N.J.S.A. 52:35-3 and N.J.S.A. 18A:18A-26 .
  17. N.J.S.A. 40A:11-25; The county of Union has adopted DPMC requirement for all bidders for its LPCL contracts (Administrative Code Chapter 28, <http://ucnj.org/PDF/Laws-of-Union-County.pdf>).
  18. N.J.S.A. 40A:11-25.
  19. *Id.*
  20. N.J.S.A. 40A:11-16.
  21. *See Stano v. Soldo Constr. Co.*, 187 N.J. Super. 524, 529-530 (App. Div. 1983).
  22. *Id.*
  23. Governor Chris Christie recognized that the variety of public bidding statutes in New Jersey led to legally flawed awards, and ordered a comprehensive review of these statutes in 2012. Reforming N.J.'s Public Bidding System, *New Jersey Law Journal*, March 18, 2013. While this review can give bidders hope for uniformity in the future, there have been no demonstrable results from this comprehensive review process. Therefore, until the state Legislature announces legislation that creates uniformity for New Jersey's bidding statutes, bidders must take great care to ensure they are qualified for the public work they propose to perform. As it was succinctly stated following Governor Christie's comprehensive review announcement, "Those that fail to do so expose themselves to the potential for lost business opportunities and protracted litigation." *Id.*
  24. "The overarching rule in New Jersey has long been that every proceeding to review the action or inaction of a local administrative agency is by complaint in the Law Division, and that every proceeding to review the action or inaction of a state administrative agency [is] by appealing to the Appellate Division." *Infinity Broadcasting v. N.J. Meadowlands Commission*, 187 N.J. 212, 223 (2006). Failure to exhaust administrative remedies required by R. 4:69-5 should be asserted as a defense to any action under the SPL filed in the superior court.
  25. *Jen Elec, Inc.*, 197 N.J. at 636.
  26. N.J.S.A. 40A:11-4.
  27. *Meadowbrook Carting Co. v. Borough of Island Heights*, 138 N.J. 307, 313-314 (1994).
  28. *Serenity Contracting Group, Inc. v. Borough of Fort Lee*, 360 N.J. Super. 151 (App. Div. 1997).
  29. R. 4:69-6(a).
  30. *Waste Management of New Jersey, Inc. v. Morris County Mun. Utilities Authority*, 433 N.J. Super. 445 (App.Div. 2013); Requests for temporary restraints are evaluated under *Crowe v. DeGioia*, 90 N.J. 126, 132-135 (1982).
  31. R. 4:69-4.
  32. *PENPAC, Inc. v. Morris County Municipal Utilities Authority*, 299 N.J. Super. 288, 297 (App. Div. 1997), *cert. denied*, 150 N.J. 28.
  33. *Marvec Constr. Corp. v. Township of Belleville*, 254 N.J. Super. 282, 288 (Law Div. 1992).
  34. Examples of material defects: Failure to submit a specified bid alternate (*Hall Const. Co., Inc. v. New Jersey Sports & Exposition Authority*, 295 N.J. Super. 629, 638 (App. Div. 1996)); A named subcontractor exceeding its aggregate rating limit (*Brockwell & Carrington Contrs., Inc. v. Kearny Bd. of Educ.*, 420 N.J. Super. 273 (App. Div. 2011)); and, failure to submit a certified financial statement (*P & A Constr., Inc. v. Township of Woodbridge*, 365 N.J. Super. 164, 172 (App. Div. 2004)).
  35. *Terminal Construction Corp. v. Atlantic City Sewage Authority*, 67 N.J. 403, 411 (1975).
  36. *Township of River Vale v. R.J. Longo Constr. Co.*, 127 N.J. Super. 207, 215-216 (Law Div. 1974), *aff'd Meadowbrook Carting Co. v. Borough of Island Heights*, 138 N.J. 307 (1994).
  37. *Id.*
  38. *Id.*
  39. *Statewide Hi-Way Safety, Inc. v. New Jersey Department of Transportation*, 283 N.J. Super. 223 (App. Div. 1995).
  40. N.J.A.C. 17:12-3.3(b).
  41. *Keyes Martin & Co. v. Director, Division of Purchase and Property, Department of Treasury*, 99 N.J. 244, 252 (1985).
  42. *Id.*
  43. *Id.* at 253.
  44. N.J.A.C. 17:12-3.3(a)(1).
  45. N.J.A.C. 17:12-3.3(a)(2).
  46. N.J.A.C. 17:12-3.3(c).
  47. N.J.A.C. 17:12-3.3(b).
  48. N.J.A.C. 17:12-3.3(d)(1)-(2). It must be noted that such hearings have been determined to differ from a traditional court hearing under the LPCL. *See Commercial Cleaning Corp. v. Sullivan*, 47 N.J. 539 (1966); *See also George Harms Constr. Co. v. N.J. Turnpike Authority*, 137 N.J. 8 (1994).
  49. N.J.A.C. 17:12-3.3(d).
  50. R. 2:9-8.
  51. *Barrick v. State*, 218 N.J. 247, 263-264 (2014).
  52. *M.A. Stephen Constr. Co. v. Rumson*, 125 N.J. Super. 67 (App. Div. 1973).