

ADDITIONAL PUBLIC BID PROPOSAL REQUIREMENTS HANDLING ALTERNATES

Effective May 1, 2010, the legislature has required that public entities operating under the Local Public Contracts Law (N.J.S.A. 40A:11-1 et seq.) advertising for bids on construction projects must include additional materials and information in their bidding packages with respect to bid alternates. Over the years the size of bid packages has grown incrementally as each legislative requirement or judicial interpretation has added disclosures to bidding contractors and more forms to be included in bid responses from those contractors. The most recent legislation both adds to the disclosure and response packages and attempts to provide for simplification of the bid package. This represents an effort to assure that the element of favoritism is removed from the process.

Over the past few years the bid package within the advertisement has been required to include as additional components, a sign off sheet and a check off page. Each one is intended to reduce an element of confusion on the part of a bidding contractor. N.J.S.A. 40A:11-23.1 requires that the public entity include within the bid forms an addendum sign off sheet for bidding contractors. This sheet is to serve as an acknowledgement by the bidder that it has received notices of revisions or addenda and reduces the potential that a contractor's bid may – for better or worse – fail to account for changes in the plans or specifications. Second, the public entity must now include a “check-off page(s)” specifically identifying each form or document that the bidder is required to include within its bid. That sheet must itself be initialed by the bidder and returned with the bid. While this added yet another piece of paper to be returned with the bid, it also provided a reminder to the bidder of the various required documents are in fact being returned with the bid proposal.

In addition, the statute has required that the bid instructions and package must now specifically identify the extent to which a bidder will be expected to provide uniformed traffic control officers and must provide for a line-item allowance for such costs.

Of even greater significance is the new requirement within N.J.S.A. 40A:11-23.1 effective May 1, pertaining to Bid Alternates. In the 2003 decision by the Appellate Division in *Seacoast Builders v. Jackson Township BOE* (363 N.J. Super. 373), and similar cases the courts have determined that public bodies otherwise subject to award of contracts to the “lowest responsible bidder” can potentially use their discretionary powers over award of alternates to skew the bid tabulation totals. N.J.S.A. 40A:11-23.1 now requires that a public body that has included more than 1 alternate in its bid advertisement, must include **“in the bid specification the criteria or ranked order by which the specified alternate proposals shall be selected and included in**

the award of the contract by the governing body...”. In other words, the specifications must identify that the governing body will assess alternates in a particular order of preference or based on certain criteria such as aggregate price or another objective or quantifiable basis. There is an exception where the estimate for the base project and specified alternates does not exceed \$500,000. Further, the aggregate value of the accepted specified alternates cannot be greater than 50% of the base proposal.

The legislature has also added some limited “teeth” to the new requirements pertaining to alternates. If a governing body is found to have chosen alternate proposals “in a manner intended to award a contract to a specific vendor”, upon challenge, the bids will be rejected, the project re-bid and a successful challenging bidder shall be entitled to counsel fees and costs. **Notably, however, the statute does not provide that a challenging bidder shall be entitled to an award of the contract, but rather that the project will be re-bid.**

This newly effective enactment is limited to public projects advertised under the Local Public Contracting Law. Therefore, it applies to municipalities, counties and identified authorities, but does not apply to public school construction projects.

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