

IN PRACTICE

PUBLIC CONTRACTS

'Dobco' and the Future of Public Bidding in New Jersey

The 'Dobco' decision stopped counties from using a loophole to bypass the restrictions of the Local Public Contract Law.

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Last week we discussed two 2021 statutory developments in the field of public bidding: the Electronic Construction Procurement Act, which concerns the use of electronic bidding procedures to solicit and receive bids; and the Design-Build Construction Services Procurement Act, which grants broad authority for governmental bodies to employ an alternate, “design-build” form of procurement.

Today we look at the Appellate Division’s decision in *Dobco, Inc. v. Bergen County Improvement Authority*, 2021 N.J. Super. LEXIS 93 (App. Div., July 8, 2021). The *Dobco* decision stopped counties from utilizing the Local Redevelopment and Housing Law, in conjunction with the County Improvement Authorities Law, as a means to bypass the restrictions of the Local Public Contract Law (LPCL).

If a contractor submits a bid that is not subject to price negotiation, it’s axiomatic that the number in round one reflects the bidder’s best and final offer, assuming the contractor actually wants the job. In contrast, bid proposals in response to alternate bidding schemes that allow or anticipate price negotiations must leave room for the later rounds. This is particularly true where the procurement

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statute, like the New Jersey Design-Build Act, gives such heavy weight to the price component. No prudent contractor would enter into a price negotiation without previously formulating such a strategy.

To think that the existence of corrupt public officials, and dishonest contractors willing to bribe them, ended in, say 1983, would indeed invite ridicule. See, *United States v. Harrison A. Williams*, 705 F.2d 603 (2d Cir. 1983); *State v. Coruzzi*, 189 N.J. Super. 273 (App. Div. 1983). Opportunities for influence-peddling and money to steer public contracts to a particular contractor have always existed. The submission of sealed bids was built upon “the democratic ideal of affording all citizens an equal right to compete for contracts under fair and open competition.” 1 Bruner & O’Connor, §2:31, at pg. 173. Preserving public confidence in the integrity of the public bidding system in the coming decades presents a significant challenge. The strictest public bidding statutes could never be entirely “computer-administered,” even in the computer age. At a minimum, though, courts will need to delve deeper into the procurement process than in the past, and not hesitate to vindicate the public interest. The citizenry also has the right to rely upon law enforcement to assure that the legal discretion given public officials isn’t exercised for their personal gain.

The ‘Dobco’ Decision

Suffice to state that some counties have utilized their county improvement

authorities to negotiate public construction projects, notably including county courthouse improvements, with private construction contractors (dubbed “redevelopers”). The process found increasing favor among various county procurement officials over the past several years, and their actions were upheld by several Law Division judges—until it was upended by the Appellate Division in *Dobco*.

In 2011, Hackensack declared part of its downtown, including the County Courthouse property, as a redevelopment area. Eight years later, in 2019, the County of Bergen and the Bergen County Improvement Authority (BCIA) entered into a lease, whereby the BCIA would pay nominal rent, accept responsibility to construct improvements to the Courthouse, lease the property to the County and, at the end of the lease, convey the property back to the County. One year later, in 2020, the City of Hackensack designated the BCIA as the “redevelopment entity” for the Project site. Acting under the cloak of the Local Redevelopment Housing Law (LRHL), the BCIA then sought to name and contract with an entity (the “redeveloper”), who would “provide general contracting for the [r]ehabilitation of the Justice Center.” (Slip Op. at 9).

The BCIA issued a request for qualifications (RFQ) for prospective general contractors who sought to qualify and thereafter submit proposals. Nine companies responded, four were chosen. One of the companies “cut” was the plaintiff *Dobco*. At that point,

Dobco and its individual officer/shareholder (as a taxpayer) filed a Law Division action challenging the propriety of the County's methodology, specifically claiming that it violated the LPCL.

Why didn't the County simply issue plans and specifications for the construction project, publicly advertise, receive bids, and award to the lowest responsible bidder? Because doing so would have invoked the LPCL's restrictions. Since redevelopment entities under the LRHL are not bound by the LPCL, contracting with a redevelopment entity afforded the County the "flexibility" it sought to negotiate the Project's agreement. From the County's perspective, it followed the procedures required by the LRHL and the County Improvement Authorities Law (CIAL). All the i's were dotted and the t's were crossed.

The issue of significance presented, however, was whether the admitted circumvention of the LPCL's statutory mandate was legal and valid. The Appellate Division, in an opinion authored by P.J. Messano, held that the Legislature did not intend "to allow a public agency to use public funds to pay a general contractor without complying with the LPCL simply by denominating the contractor as a 'redeveloper.'" (Slip op. at 31).

Distilled to its essence, the opinion distinguishes redevelopment agreements with private entities from agreements with public entities, such as the County and the BCIA. Redevelopment agreements between public entities, which are subject to the LPCL, and private entities, to build public construction projects that would normally be subject to the LPCL, weren't merely atypical or benign anomalies. Rather, the court held they violated those provisions in the LPCL and the CIAL which prescribe public bidding for all construction projects undertaken by counties and county improvement authorities. Papering and running the project through the LRHL with only public agency participation (until the actual construction contract) may be perfectly proper in form, but in substance it crossed the line that separates a valid exercise of governmental discretion and the public policy behind enforcement of the public

bidding laws. The court then set aside BCIA's process and permanently enjoined it from proceeding with the procurement based upon the RFQ.

Most of the Dobco opinion (putting to one side the standing discussion) is devoted to an examination of the LRHL's and CIAL's legislative histories. Additionally, the opinion recites case law developed over the past 29 years of the LRHL's existence to illustrate that disputes generally arose between public redevelopment agencies and private redevelopment entities.

There is one citation, however, in the court's opinion which provides the backdrop to a very interesting contrast between the outcome in Dobco and in another reported Appellate Division matter, *Clean Earth Dredging Techs. v. Hudson County Improvement Authority*, 379 N.J. Super. 261 (App. Div. 2005) (slip op. at 22). It is a lesson in comparative history that occurred when one governor, as politically wise and savvy as this state has probably ever seen, resolved the tension between the practical and the ideal, by deciding not to use his political capital to extend the protections of a public bidding law to county improvement authorities. The "loophole" remains, over 50 years later.

The LPCL does not apply to interests in real property. N.J.S. 40A:11-2(24). In fact, there is a different statute, the Local Lands and Buildings Law (LLBL) [N.J.S. 40A:12-1, et. seq.], which governs sales or leases of local public property to private persons or entities. If a county wishes to lease property for private purposes, it must follow bid procedures that resemble the LPCL's requirements, with the exception of course that the award shall be "to the highest bidder by open public bidding at auction or by submission of sealed bids." N.J.S. 40A:12-14(a). But while counties are subject to the LLBL, county improvement authorities are not. Hence, a county may quite easily circumvent the LLBL by conveying its property to its CIA.

That fact did not escape the attention of Richard J. Hughes in 1969. Both the LPCL (L. 1971, c. 198) and the LLBL (L. 1971, c. 199) were undergoing revision. Governor Hughes addressed the absence of county improvement authorities from the

LLBL's constraints in his Nov. 17, 1969, Veto Message to Senate Bill No. 283. He noted that the LLBL "governs the manner in which counties and municipalities buy and sell interests in lands and buildings." As such, they "deal with the very bases of the day-to-day operations of the government." (at pg. 1). He hoped that "standards can be established which ensure that the public will receive its money's worth and that favoritism on the part of public officials is limited or eliminated." In the end, he exhorted the Legislature by reminding it that "there is no reason apparent to me why park commissions, county or municipal authorities and similar agencies should not be made subject either to the terms of this act [LLBL] or to similar provisions." (at pg. 4).

One final ironic postscript in the Dobco case. Review is being sought via Petition for Certification by the Supreme Court. If the opinion remains undisturbed, the intervening adoption of the design/build law provides the County and the BCIA with a new alternative procurement methodology. Perhaps that will generate the first test-case under the D/B statute?