

IN PRACTICE

CONSTRUCTION

Combating Onerous Pre-Qualification Requirements That Restrict Public Bidding

To protect prospective bidders for public contracts, recourse is available to challenge restrictive qualification requirements, provided that certain deadlines and procedures are followed. Here are the details.

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New Jersey local and state entities draft bid specifications that prospective bidders must comply with. The problem, however, is that they sometimes place onerous qualification requirements on bidders, which significantly narrows the pool of eligible bidders and undercuts the fundamental-fairness policy inherent in the law. To protect prospective bidders, recourse is available to challenge these restrictive qualification requirements, provided that certain deadlines and procedures are followed.

Overly Restrictive Specifications Pursuant to the Local Public Contracts Law

Local public entities, such as municipalities and counties, occasionally mandate onerous specifications that violate New Jersey's Local Public Contracts Law. Often, these restrictive specifications are imposed in good faith to ensure that only those qualified to perform the work submit bids and are awarded the contract. Other times, however, these restrictions may be used to ensure that a favored contractor is awarded the contract.

Unfairly restrictive specifications can take many forms, such as onerous qualifications of

bidders or limiting permitted products to a single name brand. For example, a local public entity may restrict bidding to those entities with a certain number of similar project experiences. Depending on the qualification requirements—and the type of project—this may narrow the list of possible bidders to only one or two entities. Similarly, requiring a brand name product may also unfairly limit bidders if the brand name product is sold by or obtainable by a select few vendors or contractors.

The Local Public Contracts Law is a legislative mandate that can help. Specifically, it provides a procedure for challenging such restrictive specifications, and ensures that specifications are not overly restrictive and the bidding process is fair. For example, no specification may “require any standard, restriction, condition or limitation not directly related to the purpose, function or activity for which the contract is awarded.” N.J.S.A. §40A:11-13(a). Moreover, if a local public entity wishes to set the qualifications of bidders for a project, such qualifications must be approved at a public hearing and then approved by the Director of Local Government Services. N.J.S.A. §40A:11-25. Most importantly, such qualification requirements cannot unnecessarily discourage free competition. *Id.*

In addition, a local public entity generally cannot identify a particular brand name in a specification. N.J.S.A. §40A:11-13(d). Instead, the specifications may require a “brand name or equivalent.” *Id.* An exception to this rule is if the goods or services to be

purchased are proprietary, in which case the resolution authorizing the contract must so indicate and “the special need for such proprietary goods or services is directly related to the performance, completion or undertaking of the purpose for which the contract is awarded.” N.J.S.A. §40A:11-13(d).

Any bidder challenging a specification must submit its challenge in writing to the contracting agent no less than three business days prior to the date set to open the bids. N.J.S.A. §40A:11-13(g). Any challenge to the specifications after that time “shall be considered void and having no impact on the contracting unit or the award of a contract.” *Id.*

If the local public entity fails to meaningfully address the specification challenge or otherwise rules against it, an action in lieu of prerogative writ may be filed in Superior Court pursuant to New Jersey Court Rule 4:69. In such an action, upon or after the complaint is filed, the plaintiff may apply for interim relief by way of stay or restraint. R. 4:69-3. A stay of the award and execution of the contract or any further action to perform work (in the event the contract has been awarded and executed) should be requested as part of the relief sought. This should be requested promptly because (1) it will ensure that another contractor does not perform the work before the court decides on the merits of the application, and (2) any delay in filing the action may materially prejudice the other parties and also weaken the chance of success in challenging the specification at issue.

Ultimately, to overturn a local public entity's decision, the Superior Court must generally find that the public entity acted arbitrarily, capriciously, or unreasonably. See Entech Corp. v. City of Newark, 351 N.J. Super. 440, 456-7 (Law Div. 2002). However, arguments can be made for a lesser standard of review. For example, a lesser standard of review may arguably apply if the local public entity failed to follow the statutory requirements of receiving approval of the qualification requirements at a public hearing and from the Director of Local Government Services. N.J.S.A. §40A:11-25.

Finally, while not a recommended strategy, if a bidder fails to provide a challenge to the specifications at least three days in advance of the opening of the bids, a taxpayer has standing to challenge the specifications after the contract award even without lodging a protest in advance of the submission of bids. *MDK Development v. City of Hoboken*, No. A-5942-07T1, 2009 N.J. Super. Unpub. LEXIS 2072, at *1 (App. Div. Aug. 3, 2009). Moreover, a potential supplier of material to a bidder also has standing to challenge the specifications, although it is not entirely clear if such a potential supplier must comply with the three-day notice requirement contained in N.J.S.A. §40A:11-13(g). See, *Jen Electric v. County of Essex*, 197 N.J. 627 (2008).

Overly Restrictive Specifications Pursuant to the State Contracting Units

State agencies, just like local public entities, can curtail competition by inserting onerous qualification requirements in specifications. However, state agencies are not bound by the Local Public Contracts Law and can more freely insist upon pre-qualifications. It is standard for state agencies to reference and require the Treasury's Division of Property Management and Construction pre-qualifications. Additional qualifications may also be specified that substantially narrow the bevy of bidders. While local public entities have little discretion when awarding a contract (they must award the contract to the lowest responsible bidder), state contracting units have significantly more discretion. *Keyes Martin & Co. v. Director, Division of Purchase and Property, Department of Treasury*, 99 N.J. 244, 252 (1985).

As with the Local Public Contracts Law, any challenge to a state contracting unit's specifications should be made prior to bidding. State procurement laws generally require challenges be made in sufficient time to permit a review of the merits of the protest and to take

appropriate action prior to the deadline for proposal submissions. See N.J.A.C. §17:12-3.2(b). With the Treasury Department, any challenge submitted less than seven business days before submissions are due may be disregarded. N.J.A.C. §17:12-3.2(b)(3). The state contracting entity must provide a written decision on the specification challenge prior to the public opening and reading of the proposals. N.J.A.C. §17:12-3.2(c)-(d).

Prior to running to court, any challenger to a state administrative agency action is first required to exhaust the administrative appeals process. R. 4:69-5; see also, *Infinity Broadcasting v. N.J. Meadowlands Commission*, 187 N.J. 212, 223 (2006). If unsuccessful, and a final decision is rendered, the next step is to appeal directly to the Appellate Division. R. 2:2-3(a)(2). Final agency decisions will be upheld unless the decision is "arbitrary, capricious, or unreasonable," or "not supported by substantial credible evidence in the record as a whole." *In re Stallworth*, 208 N.J. 182, 194 (2011) (quoting, *Henry v. Rahway State Prison*, 81 N.J. 571, 579-80 (1980)). A reviewing court will not substitute its own judgment for the agency's "when the issue under review is directed to the agency's special 'expertise and superior knowledge of a particular field.'" *Stallworth*, 208 N.J. at 195 (quoting, *In re Herrmann*, 192 N.J. 19, 28 (2007)).

As discussed above, taxpayers, bidders and prospective bidders have standing to seek redress. A grievant has 45 days to file an appeal beginning from the date of service or notice of the final state agency decision. R. 2:4-1(b). However, "[w]hen a party seeks review of the award of construction contracts for projects, the attack must be made with the 'utmost promptitude.'" *Richardson Engineering Co. v. Rutgers, The State University*, 51 N.J. 207, 219 (1968) (quoting, *Bullwinkel v. City of East Orange*, 4 N.J. Misc. 593 (Sup. Ct. 1926)). Thus, "[w]henver public money is to be expended or if the successful bidder has made substantial preparations for the work, incurred considerable expenses and obligated himself still further in undertaking to carry out the contract, ordinarily, review of the award will be denied unless sought promptly." *Id.* (citations omitted).

Conclusion

As evidenced above, familiarity with a bidder's rights and the governing procedures of the contracting entity are paramount to successfully challenging a local public entity's or state agency's bid specifications. While

recourse is available, dilatory litigation tactics may leave a bidder without a remedy. ■