



# Local Public Contracts Law

## Am I a qualified bidder?

New Jersey's public bidding statutes "are designed to promote competition and guard against extravagance and corruption."<sup>1</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>2</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>3</sup>

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.

Public bidding for construction contracts in New Jersey is governed by a variety of statutes.<sup>4</sup> Many of New Jersey's primary bidding statutes, including those governing state contracts<sup>5</sup> and school construction<sup>6</sup>, contain bidder qualification requirements.<sup>7,8</sup>

More often than not, prospective bidders are required to be pre-qualified and classified by the Department of the Treasury's Division of Property Management and Construction ("DPMC") as to type and amount of work. It is clear in most state bidding statutes and regulations that the failure to obtain or have 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>9</sup>

However, one of the most well-known and often utilized public bidding statutes is an exception to the rule of clear bidder qualification requirements: The Local Public Contracts Law<sup>10</sup> (the "LPCL").

The LPCL governs most public bidding for municipalities, counties and local government authorities and boards. 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 said hearing provided in at least two newspapers circulating in the county.<sup>11</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>12</sup> The Director may disapprove of the proposed regulations if specific criteria are not met.<sup>13</sup>

The legal intent of the statute 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 as to 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.

Further confusion arises from another section of the LPCL regarding subcontractors, which requires LPCL bidders to name subcontractors "qualified with this act."<sup>14</sup>

But what does that mean?

At first glance, this would seemingly require DPMC pre-qualification 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. That case presents a somewhat extreme set of facts, leaving us with no clear definition of "qualification."<sup>15</sup>

Governor 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.<sup>16</sup>

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 that 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."<sup>17</sup>

### Sources:

<sup>1</sup> Terminal Construction Corp. v. Atlantic City Sewage Authority, 67 N.J. 403 (1975).

<sup>2</sup> Hillside Twp. v. Sternin, 25 N.J. 317, 322 (1957).

<sup>3</sup> D'Annunzio Bros. v. Transit Corp., 245 N.J. Super. 527, 531-532 (App. Div. 1991).

<sup>4</sup> 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); N.J.S.A. 27:23-6.1, et seq. (New Jersey Turnpike Authority)

<sup>5</sup> N.J.S.A. 54:34-6.

<sup>6</sup> Public Schools Contracts Law, N.J.S.A. 18A:18A-1, et seq.

<sup>7</sup> N.J.S.A. 52:35-3.

<sup>8</sup> N.J.S.A. 18A:18A-26-33.

<sup>9</sup> N.J.S.A. 52:35-3 and N.J.S.A. 18A:18A-26.

<sup>10</sup> N.J.S.A. 40A:11-1, et seq.

<sup>11</sup> 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>).

<sup>12</sup> N.J.S.A. 40A:11-25.

<sup>13</sup> Id.

<sup>14</sup> N.J.S.A. 40A:11-16.

<sup>15</sup> See Stano v. Soldo Constr. Co., 187 N.J. Super. 524, 529-530 (App. Div. 1983).

<sup>16</sup> Reforming N.J.'s Public Bidding System, New Jersey Law Journal, March 18, 2013.

<sup>17</sup> Id.



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