May 30, 2014

Local Public Contracts Law Error Causes Company to Lose $25 Million Contract

In two decisions released the same day (May 23), the New Jersey Appellate Division affirmed rejection of two bids under the Local Public Contracts Law (LPCL) for failure to comply with the bid requirements. In both cases, companies lost out on potentially lucrative contracts because errors in bid responses rendered them non-compliant with the LPCL.

In the first case, C&H Industries v. City of Vineland, the Appellate Division affirmed that Infrastructure and Industrial Energy LLC (IIE), the low bidder on the contract, was disqualified from the award to construct a $24.7 million simple cycle power plant due to errors on its Ownership Disclosure Statement, as required by N.J.S.A. 52:25-24.2. That statute requires that a statement setting forth the names and addresses of all stockholders with a 10 percent or more ownership interest be submitted as part of bids on all public contracts. Pursuant to that statute, the failure to submit the corporate ownership statement "shall be deemed a fatal defect that shall render the bid proposal unresponsive and that cannot be cured by the governing body."

IIE completed its Corporate Ownership Statement listing a private equity firm as its majority owner. IIE was apparently unaware at the time it submitted its bid that two public pension funds own at least 10 percent of that private equity firm. Due to this error, the trial court ordered that the contract be awarded to the second bidder, C&H.

The Appellate Division analyzed IIE's error using the familiar two-part standard set forth in Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J.307, 314 (1994). Non-compliance with a bidding requirement is analyzed as to materiality: whether its waiver 1) would "deprive" the contracting authority of its "assurance" that the contract will be entered into and performed; or 2) would "adversely affect competitive bidding." The court found IIE's failure to disclose all of its 10 percent owners could delay the project and increase its costs, satisfying the first prong of the test of materiality. As to the second prong, the court concluded that IIE's failure placed other bidders at a competitive disadvantage. Had IIE, as the lowest bidder, decided for any reason it did not want the bid award, it could simply refuse to complete an Ownership Disclosure Statement, rendering the contracting authority unable to enter into the contract, thereby providing IIE with an "out" not available to the other, compliant bidders. The court analyzed the policy considerations underlying both the Local Public Contracts Law and Ownership Disclosure Statute in affirming the award of the contract to C&H.

In the second case, Suburban Disposal v. Township of Aberdeen, the Appellate Division affirmed dismissal of a complaint brought by the low bidder on a solid waste hauling contract. Suburban Disposal's failure to acknowledge a revision to the bid documents constituted a material, non-waivable defect. The Appellate Division agreed with the Trial Court's determination that the revision acknowledgement was made a "mandatory bid document" by the contracting authority pursuant to N.J.S.A. 40A:11-23.2(e). Therefore, the contracting authority's rejection of the bid was not "arbitrary, capricious or unreasonable."

The above decisions highlight that bid requirements under NJ's LPCL are to be carefully scrutinized to avoid errors that would render a bid non-responsive?- and a potentially lucrative contract a lost opportunity. Attorneys in Day Pitney's Commercial Litigation Practice routinely counsel clients on issues regarding compliance with NJ's LPCL and Pay-to-Play regulations.