

Local Government & Public Finance Law

State Contract Using Out-of-State Cooperative Program Is Approved by Court

By Adrienne L. Isacoff

In response to the surge of interest in cooperative purchasing at the federal, state and municipal levels, in 2005 the legislature authorized the director of the Division of Purchase and Property (DPP), Department of the Treasury, to purchase goods and services through a contract already awarded by other states or cooperative purchasing groups, so long as those entities utilize a competitive bidding process. N.J.S.A. 52:34-6.2b(2). Two recent cases by the Appellate Division provide a comprehensive review of the state's cooperative purchasing program and, in particular, of what is commonly referred to as a "piggyback option agreement."

In the case captioned *In the Matter of Protest of Award of N.J. State Contract A71188 for Light Duty Automotive Parts*, 2011 N.J. Super. LEXIS 167 (App. Div. June 27, 2011) (approved for publication) (hereinafter "*AutoZone*"), the Court upheld an award based on a national cooperative contract. Not long thereafter,

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the Appellate Division upheld another piggyback option agreement, this one involving a state contract with Staples for office and classroom-related supplies: *In the Matter of the State's Award of Contract to Staples Business Advantage*, decided Aug. 25, 2011 (hereinafter "*Staples*").

Cooperative Purchasing Programs in New Jersey

State contracts for goods and services in excess of the applicable bid threshold generally are required to be awarded only after public advertisement for bids by the state. N.J.S.A. 52:34-6. Purchases of goods and services by municipalities and school districts are subject to similar statutory schemes requiring competitive bidding. N.J.S.A. 40A:11-1 et seq. and N.J.S.A. 18A:18A-1 et seq., respectively.

Certain types of cooperative purchase programs continue to require that the designated lead agency engage in a competitive bid process in full accordance with applicable New Jersey law. For example, N.J.S.A. 40A:11-12 provides for the participation of municipal contracting units in the state's Cooperative Purchasing Program administered by DPP. Under

the program, "[a] cooperative purchasing agreement shall allow the jurisdictions which are parties thereto to standardize and combine their requirements for the purchase of a particular good or service into a single contract solicitation which shall be competitively bid and awarded by one of the jurisdictions on behalf of jurisdictions participating in the contract." N.J.S.A. 52:34-6.2a (emphasis supplied).

The piggyback option expanded the ability to secure the benefits of cooperative purchasing by authorizing the director of the DPP to elect to purchase goods or services through a contract awarded pursuant to a "nationally-recognized and accepted cooperative purchasing agreement that has been developed utilizing a competitive bidding process, in which other states participate, whenever the director determines this to be the most cost-effective method of procurement." N.J.S.A. 52:34-6.2b(2). The director must review and approve the specifications and the proposed terms of the contract prior to entry of a contract awarded in this fashion. As observed by the Court in *AutoZone*, "[w]hen the decision is made to enter into a cooperative purchasing agreement, the director is not required to

comply with the law of this State governing the award of public contracts . . .”

The Master Agreement and Autozone Contract

In the *AutoZone* matter, the appellants — three vendors of automotive supplies and parts who held the previous state contract and their industry association — challenged award of a contract to respondent AutoZone, Inc., based on use of an out-of-state request for proposals (RFP) by the city of Charlotte, N.C., which it had issued on behalf of the U.S. Communities Government Purchasing Alliance (U.S. Communities). Sometime before the expiration of the then-current state contract for auto parts, the DPP director determined to consider utilizing the “Master Purchasing Agreement Contract” (master agreement) which had been awarded by Charlotte to Autozone for a five-year contract to supply auto parts.

The U.S. Communities cooperative requires that lead public entities, like Charlotte, conduct a competitive bidding and selection process and then sign a master purchasing agreement with the winning supplier. Other participating public entities then may piggyback onto the master agreement by awarding a contract to the winning bidder under certain constraints. After reviewing the master agreement and the bidding process used by Charlotte, and having determined that piggybacking onto the master agreement would allow New Jersey to purchase auto supplies at a 20-percent savings, the director entered into a five-year statewide contract with AutoZone.

Among other points, the appellants contended that the AutoZone contract must be set aside because the director exceeded her authority under N.J.S.A. 52:34-6.2 by negotiating a separate contract with AutoZone that did not conform to the terms of the master agreement, and that Charlotte’s procurement process was not the product of competitive bidding. The court rejected these and other substantive arguments made by appellants. First, however, it had to grapple with the issue of standing.

Court Orders Director to Provide Notice of Possible Cooperative Purchasing Procurement

The director of the DPP and AutoZone contended that the appeal should be dismissed because the appellants lacked standing to challenge the AutoZone contract, inasmuch as none of them had participated in the RFP process conducted by Charlotte. Moreover, the director emphasized that appellants were not eligible to bid on the RFP because they are local suppliers unable to participate in a national cooperative procurement scheme. The court, citing *Jen Electric, Inc. v. County of Essex*, 197 N.J. 627, 644 (2009), found that appellants had standing since, as current vendors on the state auto supply list, they “had a direct financial interest in the procurement process used by the State to meet its purchasing needs and raised significant issues concerning the integrity of our public bidding process.”

In the process used by the director to award the AutoZone contract, the DPP did not provide any notice to current contract holders and prospective bidders that it was considering the use of a cooperative purchasing arrangement. In light of its determination on the standing of current vendors to challenge awards of a piggyback contract, the court directed that, in the future, the DPP must provide prompt notice to current and prospective vendors when it is considering utilizing any cooperative purchasing program, in order to provide an opportunity to timely challenge the RFP and/or award of contract. Presumably, to reflect this directive, the state will adopt regulations that will flesh out the current protocol for cooperative purchasing agreements which, at present, is silent concerning notice requirements. N.J.A.C. 17:12-1A.3.

The AutoZone Contract Did Not Violate State Law

Substantively, the court did not find the issues raised on appeal had any merit. The court found that certain deviations or modifications are permissible under the terms of the master purchasing agreement and New Jersey law. Citing *Palamar Construction, Inc. v. Tp. of Pennsauken*, 196 N.J. Super. 241, 250 (App. Div. 1983), the *AutoZone* opinion noted that even in traditional bidding cases, post-bid modifications to an awarded public contract may be permitted when the public entity negotiates more favorable

terms. The appellants also contended that Charlotte’s procurement procedures violated New Jersey’s standards for fair and open competition, as set forth in N.J.S.A. 52:34-12, since only four suppliers were directly invited to bid, in contrast to the 135 vendors that had bid on and/or held New Jersey’s previous auto parts contract. They further contended that the method of advertising — in a local newspaper and on the Internet — was inconsistent with New Jersey bid protocol. The court rejected these complaints, finding that advertising on the Internet and on the website of U.S. Communities was sufficient to ensure open competition and is consistent with practice in this state.

In sum, the court determined to uphold the director’s decision to award the AutoZone contract based on a “piggyback agreement” to the Charlotte procurement, without any solicitation for public bids by the state and without any prior notice to the then-holders of the state auto supplies contract, relying entirely on the bid and award process undertaken by an out-of-state entity.

The Staples Contract

The incumbent vendors of current state contracts for office supplies made similar arguments to those raised in *AutoZone* in appealing the award of by the DPP director of a contract to Staples, based on a procurement through the National Joint Powers Association (NJPA), a national cooperative purchasing alliance operating under Minnesota law. The NJPA had awarded a contract to Staples pursuant to an Invitation for Bid (IFB) published in a Minnesota newspaper.

The appellate panel largely affirmed the decision of the director, finding, inter alia, that she did not exceed her authority by negotiating a more favorable contract, which included new discount pricing terms not found in the NJPA contract; the record contained sufficient relevant information which indicated that the director reviewed and approved of the IFB, as required by N.J.S.A. 52:34-6.2(b); traditional competitive bidding is not required under the applicable statute; and advertisement of the IFB in NJPA’s known source of publication, the *Minneapolis Star Tribune*, was sufficient to meet publication requirements under N.J.S.A. 52:34-12a.

Of greatest significance to the incumbents was the determination that the IFB's specification requiring that the pool of bidders have a national distribution network is *not* anticompetitive. The court in *Staples* emphasized this point, stating that "the nature of a nationally-recognized cooperative agreement, in which our legislature encouraged the state to join by the passage of N.J.S.A. 52:34-6.2b(2), necessarily restricts the pool of qualified bidders." In essence, the court found that, whatever the effect may be on regional businesses of the piggyback cooperative contracting model, it is the new reality,

promoted by the state in order to secure the lowest price for certain goods and services.

Effect on Local Vendors

With the issuance of these decisions, vendors are put on notice that cooperative purchasing agreements utilizing out-of-state master agreements have the full approval of our courts. Since it appears that the DPP will henceforth be required to alert current and prospective bidders on state contracts that a piggyback contract may be awarded based on a master purchasing agreement awarded by another

state or national cooperative, vendors must be on the look-out to review those notices if they want to preserve the opportunity to challenge the RFP, the master agreement or the state contract prior to award.

However, vendors whose business is restricted to regional sales may not be able to compete in a nationally-recognized cooperative agreement. Piggyback option agreements will likely reduce the costs of goods and services for the public. The price to be paid for that benefit is a dampening of the ability of local businesses to secure public contracts. ■