When Even A Low Bid Isn’t Enough
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New Jersey probably has the most expansive and comprehensive body of law in the country on public bidding, and the principles underlying the competitive bidding process embody an important aspect of public policy in this State. The system, however, is not without its glitches, and one of them arises when bids on a project are received and rejected on two occasions. In that situation, public owners have the right to negotiate a contract award, and that possibility presents a host of potential problems.

This was recently illustrated on a water job in a municipality in Essex County, where the Township Engineer advised all plan holders that the owner had rejected proposals twice where bids exceeded the engineering estimates and funds available for the project, and indicated the Township’s intention to “negotiate” a contract with those entities who showed an interest in being considered for award. The plan holders were invited to advise the Engineer of their willingness to negotiate and submit a quotation for the job, ostensibly in accordance with the section of the Local Public Bidding Law (“LPCL”) allowing such a procedure.

Although sixteen firms picked up Bid Documents for the Project, only one bidder submitted a proposal on the initial round of bids and only three firms tendered proposals upon the re-bid. The low bid price of $2,954,300 on the second round of bidding was rejected because it apparently exceeded the engineering estimate and/or available funding for the job, which estimate was not publicly released.

N.J.S.A. 40A:11-5(3)(b) of the LPCL authorizes a public entity to award a contract by negotiation in circumstances where bids are solicited and rejected on at least two occasions, and provides in pertinent part as follows:

Any contract the amount of which exceeds the bid threshold, may be negotiated and awarded by the governing body without public advertising for bids and bidding therefor and shall be awarded by resolution of the governing body if:

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(3) Bids have been advertised * * * on two occasions and (a) no bids have been received on both occasions in response to the advertisement, or (b) the governing body has rejected such bids on two occasions because it has determined that they are not reasonable as to price, on the basis of cost estimates prepared for or by the contracting agent prior to the advertising therefor, or have not been independently arrived at in open competition, or (c) on one occasion no bids were received pursuant to (a) and on one occasion all bids were rejected pursuant to (b), in whatever
sequence; any such contract may then be negotiated and may be awarded * * * by a two-thirds affirmative vote of the authorized membership of the governing body * * * provided, however, that:

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(ii) The terms, conditions, restrictions and specifications set forth in the negotiated contract are not substantially different from those which were the subject of competitive bidding * * *; and

(iii) Any minor amendment or modification of any of the terms, conditions, restrictions and specifications, which were the subject of competitive bidding * * * shall be stated in the resolution awarding such contract; provided further, however, that if on the second occasion the bids received are rejected as unreasonable as to price, the contracting agent shall notify each responsible bidder submitting bids on the second occasion of its intention to negotiate, and afford each bidder a reasonable opportunity to negotiate, but the governing body shall not award such contract unless the negotiated price is lower than the lowest rejected bid price submitted on the second occasion by a responsible bidder.

In response to an assertion on behalf of the low bidder on the second go-round that it would be unfair to open up the negotiating process to all sixteen plan holders and not just the three firms that actually bid on the Project in light of the fact that the bidders’ prices were publicly known, the Township attorney rejected that position based upon the fact that the highlighted language of the statute does not expressly limit the participants in the negotiation process. Counsel also refused to release the Engineer’s estimate for the job and, to add insult to injury, the municipality tried to add additional items to the work notwithstanding the limitation in the LPCL that “the negotiated price is lower than the lowest rejected bid price submitted on the second occasion by a responsible bidder.”

Procedurally, the Township attempted to have all the firms that opted into the process submit proposals so that it could then negotiate with the three low “bidders,” but ultimately it was determined that the project would be re-advertised when the New Jersey Department of Environmental Protection concluded that the award process ran afoul of applicable state funding guidelines. Even though the attempt to award by negotiation did not succeed, this case illustrates a glaring deficiency in the public bidding laws which needs correction by the Legislature. Sometimes, even having the low bid isn’t enough to get the job.