

## Real Estate Title Insurance & Construction Law

### Beyond Prospective Bidders

Potential challengers to bid specifications has expanded

By **Steven Cohen** and **Gary Strong**

On March 4, in *Jen Electric, Inc. v. County of Essex*, the New Jersey Supreme Court reversed a unanimous Appellate Division opinion and held that a potential vendor, who is neither a taxpayer nor a prospective bidder, had standing to challenge the propriety of a public project's bid specifications under New Jersey's Local Public Contracts Law ("LPCL Statute"). This decision greatly expands the potential challengers to bid specifications well beyond the limit of prospective bidders, a limit which the Appellate Division has set.

When Essex County solicited bids and issued specifications for traffic signal operations in Newark, plaintiff Jen Electric, Inc., a vendor of traffic control systems, objected to the specifications because they identified a specific brand of traffic control equipment, Econolite, which is distributed exclusively by a single vendor, Signal Control Products. Prior to bid, Jen Electric asked the

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county to amend the specifications to allow bids that include equal but alternative traffic control systems. The county reluctantly issued addenda to the specifications which allowed for bids using equal, alternate products, provided that certain conditions were met. Those conditions, while ostensibly allowing "or equal" products, continued to effectively limit Jen Electric's ability to bid.

Two days before the bids were to be opened, Jen Electric filed a complaint in lieu of prerogative writs, claiming that the county violated the LPCL statute and its implementing regulations by using a brand name in the specifications without first considering the use of a generic specification, and by requiring the pre-approval of an equivalent product. Jen Electric sought an order declaring the bidding specifications null and void, requiring the county to issue compliant specifications, and preventing the award of any contract until the specifications were revised.

The issue presented to the trial court was not whether this was a "sole source" bid, but whether a vendor, who was not a prospective bidder, has standing to challenge bid specifications. N.J.S.A.

40A:11-13(e) provides:

[a]ny prospective bidder who wishes to challenge a bid specification shall file such challenges in writing with the contracting agent no less than three business days prior to the opening of the bids. Challenges filed after that time shall be considered void and having no impact on the contracting unit or the award of a contract.

The trial court determined that N.J.S.A. 40A:11-13(e) allows only a prospective bidder to challenge a bid specification. The trial court analyzed the language in N.J.S.A. 40A:11-13 of the LPCL statute, amended as of 2000, which provided that "[a]ny prospective bidder who wishes to challenge a bid specification" must do so in writing at least three business days before the bids are to be opened. According to the trial court the statute at issue only refers to prospective bidders and not to anyone else who is dissatisfied with the bidding process.

It explained that "to be a prospective bidder, to have standing under a law dealing with public bids, you've got to be the person making the public bid or a prospective maker of a public bid." It

reasoned that “[t]here is no way [plaintiff] is going to be making a bid to a public agency. [Plaintiff is], at best, going to be making a bid to a contractor who will then be making a bid to a public agency.” And, because plaintiff could never be a bidder, the trial court concluded that “if you’re not a prospective bidder of a public contract, you have no standing.” Because Jen Electric was not a prospective bidder on the project, the court found that Jen Electric had no standing and dismissed the complaint.

#### **Appellate Division Decision**

Examining Jen Electric’s role in this bidding process, the Appellate Division accurately defined plaintiff as a vendor that proposed to provide equipment to either a bidder or a “prospective bidder.” It reasoned that “[b]ecause plaintiff is not a taxpayer in Essex County, did not submit a direct bid on the contract, and never intended to submit a direct bid in response to the specifications, plaintiff does not have standing under our case law to maintain this action.” It thus concluded that “an entity that proposes to furnish equipment to a direct bidder on a public contract should not be considered a ‘bidder’ or ‘prospective bidder’ under our case law or N.J.S.A. 40A:11-13(e). A contrary

conclusion would be at variance with the ordinary meaning of the term ‘bidder.’”

#### **Supreme Court Decision**

The Supreme Court reversed the lower court decisions on two grounds.

First, the LPCL Statute does not limit standing to prospective bidders. The purpose of the amendatory language to Section 13 of the LPCL Statute is to define what actions must occur before a bid specification challenge will be time-barred and not a restriction upon who has standing to challenge a bid specification. In reaching that determination, the court distinguished between a challenge to a contract award where the parties have accepted the specifications as drawn and a challenge to a specification where they have not. Those differences dictate that the determination of who may challenge a bid specification must be gauged differently than the determination of who may challenge a contract award.

Second, the right to challenge bid specifications should be viewed under settled rules governing standing, which provide that “[e]ntitlement to sue requires a sufficient stake and real adverseness with respect to the subject matter of the litigation [and a] substantial likelihood of some harm visited upon the plaintiff in the

event of an unfavorable decision ...”. A non-bidder can challenge a bid specification but the nonbidder has the burden to show it has suffered and will be affected adversely by the bid award.

#### **Impact of Supreme Court Decision**

While the intent of the Supreme Court’s ruling on the LPCL Statute is clearly to allow interested parties to challenge bid specifications, Justice Hoens’ dissent is cautionary, stating that “there is nothing in the majority’s analysis that limits the right of any potential supplier, however large or small, to commence a challenge to the bid specifications.” Allowing parties one, two or three steps removed from the actual bid to challenge specifications, pre- or post-bid, “creates the very real possibility of significant delay in public contracting and threatens to interfere with the orderly system that the Legislature envisioned and that the statute seeks to impose.” Indeed, public projects may potentially be delayed due to suits from potential subcontractors, vendors and suppliers. Time will tell whether that potential burden is outweighed by the public interest in providing interested parties with the right to challenge improprieties in bid specifications. ■