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N.J. APPELLATE DIVISION RULES ON MUNICIPALITY'S EXERCISE OF DISCRETION IN BIDDING DISPUTE UNDER LOCAL PUBLIC CONTRACTS LAW

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In a recent unreported decision, Pact Two, LLC v. Township of Hamilton and Quad Construction Company, the N.J. Appellate Division upheld the Trial Court's determination that Hamilton Township had not properly rejected the low bidder for a significant project involving rehabilitation work to a wastewater treatment plant. The decision concerned whether both the first and second lowest bidders had submitted bids with material deviations from the bidding requirements, and, if not, whether the Township had properly exercised its discretion in rejecting the low bid and awarding the contract to the second low bidder. The Court determined that the deviations were not material, but the Township had not properly exercised its discretion in rejecting the low bid.

It is particularly important to note that such decisions are not critical just for the financial difference in contracts, but also for the delay in having important projects initiated and completed. In this case, the bids were opened on July 31, 2019 and awarded on August 20, 2019. The Appellate Division decision was made on April 16, 2020. Accordingly, this project was delayed for essentially a year.

The Trial Court had found that the deviations were not material, but that the Township had improperly exercised its discretion and ordered that their award of the contract be voided and that the contract be awarded to the low bidder. Pact Two had been the low bidder and Quad Construction the second low bidder.

The amount of the contract was approximately \$2,000,000.00, and the difference in the bids was approximately \$100,000.00. Both bidders had submitted bids with deviations. One of the components of the project was a gas holder cover which was an important integral part of the rehabilitation project. The requirements included providing an analysis "using a finite element model with all applied loading" of the cover and also requiring that the analysis be performed using recognized software which was commercially available with verification problems. Pact Two did not provide the analysis and Quad did not provide the information recognizing the software.

After the award, Pact Two filed suit and the Trial Court initially entered an injunction to prevent the project from moving forward and ordered the Township to provide it with detail to determine whether the deviations were material, and if not, the basis for the award to the second lowest bidder. The issue as to material deviation required a determination as to whether (1) the deviation deprived the Township of assurance that the contract would be performed as expected; or (2) placed the low

bidder in the position of advantage over other bidders; or (3) otherwise undermined competitive bidding. The Court also required the Township to consider whether other bid requirements provided the Township with adequate assurance that the contract would be performed as expected if the parties had supplied the missing information after bids had been opened.

The Township responded to the Court that a determination had been made by the business administrator, purchasing agent and director of water pollution control who had met and certified to the Court that all bids received were competitive and there would have been no benefit to the Township to rebid the contract; noted that all bids were within the engineer's cost estimate; and noted that the Township did not want to have to rebid the project. They also provided the Court with information as to the cover's function and importance. They emphasized to the Court the necessity to be assured of complete quality work.

The Court determined that the Township had concluded that the deviations by both parties had not been material. The Court noted that provision of the analysis and the software used to perform such was not required to insure performance of the contract as expected and it did not place either party in a competitive advantage over other bidders or would otherwise undermine the process. The Court noted that the Township then had the discretion to reject bids based on non-material deviations, but noted that such discretion must be exercised in a manner that is not arbitrary. The Court cited the case law that discretion to reject a bid for a non-material omission must be based on valid reasons, must reflect sound business judgment and may not bespeak avoidance of the underlying purposes of the LPCL.

The Court noted the decision had been made by employees who did not vote on the budget and had provided no sound business reason to reject the low bidder's bid and award to the second low bidder. Accordingly, the Court voided the award to the second low bidder and ordered that the contract be awarded to the low bidder. This decision emphasizes the importance of making a determination as to whether a deviation in a bid package is material, and if it is not material, the proper manner to exercise discretion to reject the package.

For more information on this case, the New Jersey Local Public Contracts Law, or other matters relating to local government law, contact: [Paul Rizzo, Esq.](#)