



# State of New Jersey

**PHILIP D. MURPHY**  
*Governor*

**SHEILA Y. OLIVER**  
*Lt. Governor*

OFFICE OF THE STATE COMPTROLLER  
P.O. BOX 024  
TRENTON, NJ 08625-0024  
(609) 984-2888

**KEVIN D. WALSH**  
*Acting State Comptroller*

April 6, 2023

**Via U.S. Mail and Electronic Mail**

Chad Bruner, County Administrator  
County of Gloucester  
Gloucester County Administration Building  
2 South Broad Street  
P.O. Box 337  
Woodbury, NJ 08096  
cbruner@co.gloucester.nj.us

Re: OSC# 20-564 – Resurfacing and Safety Improvements for Blackwood-Barnsboro Road (CR 603) and Woodbury-Turnersville Road (CR 621) in the Townships of Washington and Deptford; Specification No. ENGRG. 17-02

Dear Mr. Bruner:

On May 22, 2020, Gloucester County (County) submitted documents for post-award review, pursuant to N.J.S.A. 52:15C-10(a), to the Office of the State Comptroller (OSC) pertaining to a \$4,978,338.00 contract, with an effective date of April 15, 2020, relating to the Resurfacing and Safety Improvements for Blackwood-Barnsboro Road (CR 603) and Woodbury-Turnersville Road (CR 621) in the Townships of Washington and Deptford, described as Specification No. ENGRG. 17-02 (the Project). Following a review of documents related to that procurement and interviews of County staff involved, this letter sets forth OSC's findings regarding the County's violations of public bidding laws.

For the reasons set forth below, we find that the County improperly utilized the emergency exception to public bidding and advertising when it relied on the County's COVID-19 emergency declaration to award a paving contract without publicly advertising for bids and that the County did not comply with the Local Public Contracts Law (LPCL), N.J.S.A. 40A:11-6, in awarding an emergency contract. We also find that the County failed to comply with the withdrawal procedures set forth in the bid specifications and the LPCL when it accepted the apparent low bidder's request to withdraw its bid without proper notice or evidence demonstrating a mistake. In addition, County

officials failed to adequately notify and seek approval of the Board of County Commissioners (Commissioners)<sup>1</sup> prior to accepting the withdrawal request. Furthermore, we find that the solicitation and award of this contract lacked the transparency required by the LPCL because instead of notifying the Commissioners and the public that the contract was awarded under the emergency exception, the resolution awarding the contract incorrectly stated that the contract was advertised, that bids were publicly received and opened, that the contract was awarded “after following proper public bidding procedure,” and failed to make any reference to the apparent low bidder’s withdrawal.

OSC shared a version of this letter with the County to provide it with an opportunity for comment. OSC considered the County’s response and modified this letter as appropriate in response to those comments.

## **Background**

On March 9, 2020, Governor Murphy issued Executive Order 103 declaring both a public health emergency and state of emergency in response to the spread of the Novel Coronavirus disease of 2019 (COVID-19). On March 13, 2020, the President of the United States declared a nation-wide emergency in response to COVID-19. A few days later, on March 17, 2020, the County declared a “county-wide disaster/emergency exists . . . by reason of the related conditions resulting from Novel Coronavirus Pandemic being referred to as COVID-19 . . . for which those conditions presently exist or threaten Gloucester County, and which may affect the health, safety, and welfare” of the County residents. Governor Murphy issued Executive Order 107 on March 21, 2020, directing that “[a]ll New Jersey residents shall remain home or at their place of residence,” except in specified express circumstances defined in Executive Order 107.

The declarations of emergency came years after the County’s Project was first conceived. Through interviews with County staff, OSC learned that the Project was initiated in 2017, as evidenced by the bid specification number, 17-02. The Project was in the design stage for at least two years and “shelved.” The County Engineer explained that it was a complex project that involved the realignment of a municipal road away from a jug-handle, widening of the road, and the addition of a traffic light. County staff said that the Project was revisited in 2020 because there was a reduction of traffic volume on County roadways due to the COVID-19 pandemic. The County Engineer, in a request sent to the County’s Qualified Purchasing Agent (QPA) and County Administrator, contended that the County should take advantage of the decrease in traffic to allow

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<sup>1</sup> Pursuant to N.J.S.A. 40:20-1, effective January 1, 2021, any reference to the “Board of Chosen Freeholders” shall be substituted with the “Board of County Commissioners.” Thus, any reference in underlying documents or interviews to “Freeholders” was replaced with “Commissioners.”

the work to be safely completed and to reduce the impact of the Project on the public and local businesses.

The QPA described the procurement method used for the Project as “hybrid,” because it was prepared similar to the normal bid process in an attempt to obtain a competitive price, but designated as an emergency purchase to allow for a shortened timeline for selecting a contractor. The County Engineer told OSC he was concerned that the normal advertising period would extend beyond the emergency COVID-19 declaration and he wanted to undertake this complex road realignment Project while there were fewer cars on the road.

The QPA acknowledged that the County has a Purchasing Procedures Manual (County Manual) that specifically addresses “Emergency Purchases.” She explained that normally there are no quotes or solicitations because a contractor needs to be procured quickly in order to address the emergency. She was not aware of any pipe bursting or other specific emergent need with regard to this Project. Although there was no natural disaster that damaged the intersection or roadway, the County Engineer said he was proceeding as if “a tornado had struck the area.”

The bid package was prepared by the Engineering Department. The QPA said that under the normal public bidding process, the Project would have been advertised in the newspaper at least 15 days prior to the advertised bid opening date. Here, however, the bid solicitation was not advertised and the QPA told OSC that “everything was closed.” The County selected three road-paving contractors to receive the bid package because they had previously performed similar work for the County and the County Engineer believed these companies could do the work correctly and quickly. To that end, bid solicitation letters were sent to the three contractors on April 1, 2020. In this letter, the three contractors are referred to as Bidders A, B, and C. The specifications for the Project accompanied the letters. Bid responses were due by 10:00 a.m. on April 7, 2020. The solicitation letters indicated that the Project was for emergency road construction to commence six days after bid responses were due, on April 13, 2020, and the specifications required completion in 160 calendar days.

On April 7, 2020, the three companies submitted bids as follows: \$4,308,037.50 Bidder A; \$4,978,338.00 Bidder B; and \$5,351,800.00 Bidder C. The following day at approximately 10:40 a.m., the apparent low bidder, Bidder A, sent an email to the Engineering Department and, in referencing a prior verbal communication, stated that it wanted to withdraw its bid due to a mathematical error. Bidder A did not submit any documentation to support its bid withdrawal request. That same day, the Engineering Department confirmed, by email, that Bidder A’s bid was withdrawn.

The County sent a letter to Bidder B, dated April 8, 2020, indicating that the Engineering Department was recommending to the Commissioners that Bidder B be awarded the contract for the Project.

Contemporaneously, the Engineering Department sent correspondence to County Counsel requesting that a resolution authorizing a contract between Bidder B and the County for the Project be presented at the Commissioners' meeting on April 15, 2020. Although Bidder A's bid had already been withdrawn, by letters dated April 8, 2020, the County informed Bidders A and C that they had not been selected for the Project.

On April 14, 2020, the County Engineer, as Department Head, completed the "Certification of Request for Emergency Purchases" form<sup>2</sup> (Certification), referenced in the County Manual. The Certification stated that the "emergency" occurred on March 17, 2020, and described the nature of the emergency as "Reconstruction of Blackwood Barnsboro Rd CR603. Emergency work while shut down is in effect. Safety to public, workers, and businesses." The QPA signed the Certification and the County Administrator approved it.

The Project Manager notified the successful bidder, Bidder B, by letter on April 14, 2020, that Bidder B was authorized to proceed on April 13, 2020. The letter included a completion date of September 19, 2020. The Commissioners awarded the contract by resolution adopted on April 15, 2020. The resolution stated that Bidder B was the lowest responsive bidder and awarded a contract to Bidder B in the amount of \$4,978,338, with a start date of April 15, 2020. The contract for the Project between Bidder B and the County for \$4,978,338 had an effective date of April 15, 2020. The resolution did not include any description of Bidder A's request for withdrawal or recitation of the circumstances underlying the withdrawn bid, and the Commissioners did not take formal action to accept Bidder A's withdrawal as required by N.J.S.A. 40A:11-23.3(c). In its response to OSC, the County asserts that the Commissioners were adequately notified of the bid withdrawal because attached to the resolution presented to the Commissioners was a bid summary document, which noted on the fifth page that Bidder A "voluntarily withdrew bid due to mathematical error." OSC notes that the quoted language regarding the bid withdrawal is included, as a footnote, on the last page of the five-page bid tabulation summary, which can be found 15 pages after the proposed resolution that is included in the 188-page Board agenda packet.

The resolution also incorrectly stated that the County "advertised for the receipt of public bids" and that bids were "publicly received" by the County "following proper public bidding procedure." County Counsel failed to recognize that the Project was not advertised or that it was proceeding as an emergency purchase. Although the County Engineer's correspondence to County Counsel referenced the emergency, the resolution, agenda request, and other bid documents were prepared consistent with the County's normal non-emergency bid process without any language indicating the emergency exception was used. The QPA agreed that the resolution was incorrect and claimed it was a clerical error because it failed to disclose that the Project was not advertised.

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<sup>2</sup> The form was completed and/or approved on April 14, 2020, which was after the bid solicitation and bid opening.

## Findings

### **A. The County was required to publicly bid and advertise the Project because the COVID-19 pandemic did not cause an emergency need to pave County roads.**

Pursuant to N.J.S.A. 40A:11-6, a contract can be awarded without public advertising and bidding, even if it exceeds the bid threshold, when an emergency affecting the public health, safety or welfare requires the immediate delivery of goods or the performance of services. N.J.S.A. 40A:11-6.

An emergency contract may be awarded when: (1) there is an actual or imminent emergency requiring the immediate delivery of the goods or the performance of the service; (2) the purchasing agent or a representative designated by the governing body is notified of the emergency; (3) the need for the goods or services could not have been reasonably foreseen; (4) the contract is of such limited duration as to meet only the immediate needs of the emergency; and (5) the emergency purchase does not involve a multi-year contract. N.J.S.A. 40A:11-6(a); N.J.A.C. 5:34-6.1(a).

Further, as set forth in N.J.A.C. 5:34-6.1(b), local governments are required to adopt local rules and regulations to ensure a procedure for determining and confirming the existence of an emergency. To that end, the Emergency Purchases section of the County Manual requires that “emergency purchases are to be initiated only when property, equipment, or life is endangered through unexpected circumstances.” Emergency purchases may be authorized by the director of the department involved in responding to the emergency and documented and approved through the Certification form.

In response to OSC’s draft letter to the County regarding this procurement, the County contends that, in good faith, it relied on Executive Order 103, which Governor Murphy issued to declare a public health emergency and state of emergency, to award this road-paving contract. The County also argues that its actions are supported by Local Finance Notice 2020-06, issued by the Division of Local Government Services within the Department of Community Affairs, (LFN 2020-06), to award this contract without public advertising and bidding, by quoting the following section:

Contractors awarded public works contracts under emergency procedures must be notified of applicable Public Works Contractor Registration (PWCR) and prevailing wage requirements at the time of award. The contracting unit shall confirm compliance prior to making payment for the completed work.

However, the County’s reliance on the above is misplaced. That section of LFN 2020-06 simply reminds local governments that they must continue to comply with the PWCR and prevailing wage

laws *if* awarding a public works contract under the emergency exception to public bidding. LFN 2020-06 additionally provides guidance regarding the acceptance of bids and the conduct of public bid openings in light of COVID-19 social distancing protocols. In fact, the LFN states that “[i]n cases of bid openings for time-sensitive projects (e.g. summer roadwork), the Division recommends establishing a protocol for hand delivery of bids that limits exposure to pathogens; the contracting unit should affirmatively communicate this protocol to prospective bidders.” Also, the LFN provides examples of measures contracting units can take when conducting public bid openings to provide adequate social distancing and offer bidders and the public the ability to witness the bid opening through an online livestream. The LFN did not relax the requirements of the relevant statutes and regulations when invoking the emergency exception to the public bidding requirements. Contrary to the County’s assertion, the LFN’s reference to summer roadwork and guidance on how to conduct public bid openings in light of the pandemic, support OSC’s conclusion that the County should have publicly bid and advertised the Project.

OSC’s findings are consistent with *Scatuorchio v. Jersey City Incinerator Authority*,<sup>3</sup> 14 N.J. 72 (1953). In that case, the New Jersey Supreme Court described the nature of a true emergency that would permit the award of a contract without public advertising and bidding. Employing a fact-specific analysis, the Supreme Court found that there must be an imminent danger to public health caused by a “sudden or unexpected occurrence or condition calling for immediate action.” See also *Newark v. Essex County Bd. of Chosen Freeholders*, 221 N.J. Super 558, 571-72 (1987) (relying on *Scatuorchio*).

OSC finds that the County did not comply with its own policies, applicable regulations, or the LPCL because the COVID-19 pandemic did not lead to a need to pave roads. This is demonstrated by the fact that the County Engineer told OSC that he proceeded in the same manner the County would have if a natural disaster struck the area - even though there was no natural disaster that caused the physical destruction of the roads in the Project area. The QPA acknowledged that there was no emergent work that was needed. The Project was not unforeseen, but rather was initiated in 2017 and was in the design stage for at least two years prior to being “shelved.” OSC recognizes that the COVID-19 pandemic was unprecedented and created a great deal of uncertainty. However,

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<sup>3</sup> In *Scatuorchio*, the Court considered the emergency provision under N.J.S.A. 40:50-1. That statute was superseded and repealed as a result of the enactment of the Local Public Contracts Law, N.J.S.A. 40A:11-1 et seq. See *Capasso v. L. Pucillo & Sons, Inc.*, 132 N.J. Super. 542, 547 (1974).

reinitiating the Project opportunistically based on an unrelated emergency, in the absence of an actual emergency involving the roads, constituted a violation of New Jersey's public bidding laws.<sup>4</sup>

### **B. The County improperly approved a request by a bidder to withdraw its bid.**

The bid specifications for the Project allow a bidder to request withdrawal due to mistake. The Project's bid specifications define the term mistake as "a clerical error that is an unintentional and substantial computational error or an unintentional omission of a substantial quantity of labor, material, or both, from the final bid computation." See also N.J.S.A. 40A:11-2(42).

Under the specifications, for a bidder to withdraw its bid, it must submit a request in writing, by certified or registered mail to the QPA. The request must be made within five business days after the receipt and opening of the bids. The bid specifications state that the Purchasing Department may contact all bidders after bids are opened to ascertain if any bidders wish to exercise a request to withdraw their bid pursuant to N.J.S.A. 40A:11-23.3. Further, the request to withdraw must include evidence, such as relevant documents, that a mistake was made. The request and evidence are to be reviewed and evaluated by the County's designated staff, and then formally approved by the Commissioners.

The statutory criteria, which were incorporated into the Project's bid specifications, require the bidder to demonstrate that the mistake was of so great a consequence that enforcement would be unconscionable; the mistake related to a material feature of bid; the mistake occurred notwithstanding reasonable care in preparation of the bid; and the bidder is able to get relief without substantial prejudice to the contracting unit. Pursuant to the LPCL, the County's designated staff must present a recommendation for the withdrawal request to the Commissioners. The LPCL requires that the Commissioners must decide whether to grant the withdrawal no later than the next regular meeting. N.J.S.A. 40A:11-23.3.

Here, Bidder A's request to withdraw its bid was made via email by a representative of Bidder A to the Engineering Department. The email acknowledged a prior telephone conversation and desire to withdraw its bid "due to a mathematical error" without any specificity as to the error. None of the County employees interviewed could provide additional insight into the mathematical error or

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<sup>4</sup> OSC's finding is consistent with guidance provided by the Division of Local Government Services within the Department of Community Affairs, which reminds local governments that permissible action in response to an emergency shall only address the immediate needs of the emergency. Local Finance Notice 2021-15 (LFN) provides an example that tree debris removal from public rights of way and removal of hazards may be procured on an emergency basis; however, the emergency contract exception cannot be utilized for other tree debris removal that is not an urgent matter of public safety.

the line item(s) associated with the mistake.<sup>5</sup> Further, the interviews with County employees supported a finding that the request was not sent by certified or regular mail, and was not sent to the QPA, as required by the bid specifications. Likewise, the request failed to include any evidentiary support for the claimed mistake. There did not appear to be any analysis conducted as to whether the request satisfied the bid specifications' criteria or the statutory requirements. Thus, the County failed to comply with its own specification requirements for this Project, as well as the LPCL, by allowing Bidder A to withdraw its bid. Further guidance regarding withdrawal of bids for public works projects can be found in LFN 2011-12.

**C. The public and Commissioners were not notified of the procurement of the Project as an emergency contract or adequately notified of the apparent low bidder's withdrawal, in violation of the LPCL.**

As discussed above, the County should have publicly bid and advertised the Project because it was not properly designated as an emergency purchase. That unlawful act was compounded by the lack of transparency caused when the resolution awarding the contract incorrectly stated that the County advertised for the receipt of public bids and publicly opened and awarded the contract consistent with the LPCL. Here, the bid process and competition were limited to three County-selected bidders. The Commissioners, other potential bidders, and the public were entitled to know that this Project was awarded under the emergency exception pursuant to N.J.S.A. 40A:11-6, and awarded without open competition.

An important opportunity for transparency and checks and balances was also lost when the County failed to follow proper procedures regarding the apparent low bidder's request to withdraw its bid. Among those failures was the fact that the County did not mention the withdrawal request in the resolution or formally seek the Commissioners' approval of the withdrawal. The Commissioners were not adequately informed of the withdrawal request or the facts underlying the alleged mistake, and were not given the opportunity to take action on it at the next regularly scheduled meeting. The Commissioners were entitled to consider rejecting the request to withdraw the bid. Furthermore, the public was not properly notified of the withdrawal of a bid because the resolution of the Commissioners failed to include notice of this fact.

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<sup>5</sup> OSC interviewed a representative from Bidder A, who explained that the "Estimating Team" discovered a \$250,000 cost omission the day after the bid was submitted, which would not have supported their "business model." He, however, acknowledged that Bidder A did not submit any documentation to support the withdrawal of its bid.



## Conclusion

OSC finds that the County's actions with regard to this procurement violated the LPCL by improperly relying on the COVID-19 pandemic to complete a previously planned road paving and realignment project. In addition, County staff allowed the apparent low bidder to withdraw its bid without documenting its mistake or otherwise complying with the specification procedures or the LPCL requirements for withdrawal of a bid.

Moreover, County residents were misinformed about the nature of the contract. The resolution awarding the contract incorrectly stated that the County advertised for bids and that bids were publicly received and awarded, even though the County directly solicited three bidders and did not conduct a public bid opening. The resolution also failed to inform the Commissioners or the public that the apparent low bidder had withdrawn its bid, provide any evidence of the underlying mistake resulting in the withdrawal, or seek approval of the Commissioners for the withdrawal as required by the LPCL.

Compliance with all applicable statutory requirements is vital to protecting taxpayer funds, encouraging free and fair competition, and ensuring government efficiency and transparency. New Jersey's public bidding laws exist to "secure competition and to guard against favoritism, improvidence, extravagance and corruption." *Twp. of Hillside v. Sternin*, 25 N.J. 317, 322 (1957). The public bidding laws were enacted to benefit New Jersey taxpayers and instill trust that public officials are making well-reasoned and unbiased decisions that serve the public good. Disregarding important public bidding requirements, as here, threatens to erode confidence in the public bidding laws and their use by local officials.

Through this letter, OSC advises the public, the County, and other local governments that because emergency contracts are not subject to public advertisement and full competition, they must:

- (1) be narrow in scope and only address the immediate needs of the emergency; and
- (2) be limited in duration to address the emergency circumstances while they exist.

Local governments should fully document the nature of the emergency and how the acquisition of the goods or services will address the threat to public health and safety. After awarding an emergency contract, local governments should immediately begin the process of competitively procuring similar goods and services to transition to competitively procured contracts as soon as the emergency circumstances cease to exist.

In addition, the County and other local governments should review the bid withdrawal procedures for public works contracts and ensure that both bidders and local government officials are aware of the required procedures, as explained above.

Thank you,

KEVIN D. WALSH  
ACTING STATE COMPTROLLER

By: *Barbara D. Geary*  
Barbara D. Geary  
Director, Procurement Division

c: Kimberly Larter, Qualified Purchasing Agent (via electronic mail)  
Barry C. Beckett, P.E., County Engineer (via electronic mail)