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Local Public Contracts Law Amendment Withdrawal of Bids for Public Works Contracts

This Local Finance Notice provides guidance on the application and implementation of P.L. 2010, c.108. The law, enacted on January 4, 2011, took effect on March 4, 2011, applies to all contracting units covered by the Local Public Contracts Law (LPCL).

The amendment at N.J.S.A. 40A:11-23.3, authorizes bidders on public works projects to request withdrawal of a bid due to a "mistake" on the part of the bidder after the receipt and public opening of the bids. This is a new provision that applies **only to public works projects** as defined by N.J.S.A. 40A:11-2(34). The relevant statutory text of the law is shown in Appendix A of this Notice.

Mistakes vs. Clerical Errors

Under this new law, a "mistake" means: "for a public works project, 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." [N.J.S.A. 40A:11-2(42)]

Alternatively, under certain circumstances, some contracting units find it appropriate to "correct" certain types of clerical errors in bids. For example, if the quantity needed or the standard unit of measurement used, times the unit price, is incorrectly calculated in reaching a total or final price, some contracting units will correct the computational mistake. These types of mistakes are not covered nor intended to be affected by the new law. Contracting units that desire to correct miscalculated unit price extensions in bids received should ensure that appropriate and authorizing language is included in their bid specifications.

Application of "Mistake" and Withdrawal Provisions

If a bidder concludes that their bid includes a mistake that meets the definition under the law, a bidder can make a request to withdraw the bid. To do so a bidder shall submit the withdrawal request in writing by certified or registered mail to the proper name and title of the local official at the complete address to which the bid was submitted.

The bidder shall request withdrawal of a bid within five business days after the opening of the bids. Since the bid withdrawal request shall be effective as of the postmark of the certified or registered mailing, if a contracting unit plans to award a public works contract before the five-day time period expires, the appropriate local official should contact the apparent lowest responsible bidder prior to the contract award to ascertain if the bidder is going to request a bid withdrawal. If the bidder indicates a plan to withdrawal, plans for award should be held off pending receipt of the request.

N.J.S.A. 40A:11-23.3(b) requires that a bidder's request to withdraw the bid shall contain evidence, including any pertinent documents, demonstrating that a mistake was made. Such documents and relevant written information shall be reviewed and evaluated by the public owner's designated staff.

Key elements of the law are the four criteria provided that must be met in order for a bid to be withdrawn. These criteria were carefully worded to reflect a history of case law in New Jersey as well as criteria used in similar circumstances from around the country. All of the following criteria must be met for a bid to be withdrawn:

1. The enforcement of the contract, if actually made, would be unconscionable;
2. The mistake relates to a material feature of the bid;
3. The mistake occurred notwithstanding the fact that the bidder exercised reasonable care in preparation of the bid; and
4. The bidder making the mistake is able to get relief by way of withdrawing the bid without serious prejudice to the contracting unit, except for the loss of the bargain to the contracting unit.

The contracting unit's qualified purchasing agent, legal counsel, or chief administrative officer shall review the request for a bid withdrawal. Other appropriate staff of the contracting unit should also be consulted to ensure that the bidder's evidence (documents and relevant written information) satisfies the four statutory criteria to substantiate the bidder's claim for a bid withdrawal.

The qualified purchasing agent, legal counsel, or chief administrative officer responsible for reviewing the request shall act in good faith in the conduct of such a review, and in presenting to the governing body a recommendation concerning the disposition of the

request to withdraw a bid. No later than the next meeting of the governing body following the receipt of the bid withdrawal request, the qualified purchasing agent, legal counsel, or chief administrative officer shall make a recommendation, preferably in writing, to the governing body concerning the disposition of the request.

The governing body shall act to accept or reject the recommendation regarding the bid withdrawal request no later than at its next regular meeting. This could include workshop meetings, or the first regular meeting following the receipt of the bid withdrawal request. Depending on the time involved in the review, the presentation of the recommendation and the official action of the governing body could both take place at the first regular meeting following the receipt of the bid withdrawal request.

A governing body's approval of a bidder's request to withdraw a bid shall ensure that the bid guarantee is returned to the bidder. The contracting unit may then continue the award process with the remaining bids, or if no bids remain, act appropriately pursuant to the LPCL.

If a bidder is granted a bid withdrawal, the bidder shall be disqualified from future bidding on the same project, including whenever all bids are rejected pursuant to N.J.S.A. 40A:11-13.2.

Contracting units and their elected and appointed officials should view a request for a bid withdrawal as being in their own best interest if such a request meets, and the evidence supports, the statutory definition of the term "mistake." Pressing forward with a contract or forcing a potential contractor into a bad contractual situation by ignoring a mistake in an underpriced bid could result in litigation on the application of the withdrawal law. Litigation can also result from attempting to penalize a bidder by claiming the bid deposit. Finally, a contract under these circumstances could also create a contentious contractual relationship, accompanied by the frequent submission of change orders.

Contracting units should not consider using change orders as a means to correct the statutorily defined "mistake" in N.J.S.A. 40A:11-2(42), or as the method to avoid the bid withdrawal request process. The application of change orders should be used pursuant to the regulatory process of N.J.A.C. 5:30-11.3, generally, and N.J.A.C. 5:30-11.8 specifically.

Appendix B provides sample language for inclusion in the General Instructions Section of public works' bid specifications. The Division recommends that each contracting unit's legal counsel review and approve the sample language **before** using it in their own public works specifications.

The law took effect on March 4, 2011. Contracting units and their elected and appointed officials should act immediately to review the law and this Local Finance Notice.

Thomas H. Neff, Director

Appendix A

N.J.S.A. 40A:11-2 - Definitions

...

(34) "Public works" means building, altering, repairing, improving or demolishing any public structure or facility constructed or acquired by a contracting unit to house local government functions or provide water, waste disposal, power, transportation, and other public infrastructures.

...

(42) "Mistake" means, for a public works project, 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.

N.J.S.A. 40A:11-23.3 Withdrawal of public works bid

a. In the case of a bidding process for a public works contract, a bidder may request withdrawal of a bid, due to a mistake on the part of the bidder, within five business days after a bid opening. As used in this section, "mistake" shall have the same meaning as provided in paragraph 42 of section 2 of P.L.1971, c.198 (C.40A:11-2).

b. To request the withdrawal of a public works bid, a bidder shall submit a request for withdrawal in writing by certified or registered mail to the address to which the bid was submitted. The request shall be effective upon mailing. The request shall include evidence, including any pertinent documents, demonstrating that a mistake was made and was of so great a consequence that:

- (1) the enforcement of the contract, if actually made, would be unconscionable;
- (2) the mistake relates to a material feature of the bid;
- (3) the mistake occurred notwithstanding the fact that the bidder exercised reasonable care in preparation of the bid; and
- (4) the bidder making the mistake is able to get relief by way of withdrawing the bid without serious prejudice to the contracting unit, except for the loss of the bargain to the contracting unit.

c. A purchasing agent qualified pursuant to subsection b. of section 9 of P.L.1971, c.198 (C.40A:11-9), or legal counsel for the contracting unit, or the chief administrative officer of the contracting unit, shall review the request for bid withdrawal. No later than the next meeting of the governing body of the contracting unit following receipt of the withdrawal request, the individual responsible for reviewing the request shall make a recommendation to the governing body of the contracting unit concerning the disposition of the request. The governing body of the contracting unit shall act upon the request to withdraw the bid no later than at its next regular meeting.

d. The purchasing agent, legal counsel, or chief administrative officer responsible for reviewing the request pursuant to subsection b. of this section, shall act in good faith in reviewing the request and in making a recommendation to the governing body concerning the disposition of a request to withdraw a bid.

e. A contracting unit whose governing body grants a request to withdraw a bid shall return the bid guarantee to the bidder. Once the decision to approve the withdrawal is made, the contracting unit shall continue the award process with the remaining bids.

f. If a bidder withdraws a bid, the bidder shall be disqualified from future bidding on the same project, including whenever all bids are rejected pursuant to section 21 of P.L.1999, c.440 (C.40A:11-13.2).

Appendix B
Model Public Works Bid Specification Language
Withdrawal of Bid
(N.J.S.A. 40A:11-23.3)

Permission for Bidder to Withdraw a Bid Due to a Mistake in Certain Circumstances

N.J.S.A. 40A:11-23.3 authorizes a bidder to request withdrawal of a public works bid due to a mistake on the part of the bidder. A mistake is defined by N.J.S.A. 40A:11-2(42) 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.**

A bidder claiming a mistake under N.J.S.A. 40A:11-23.3 must submit a request for withdrawal, **in writing**, by certified or registered mail to (*name and title of the local official at the complete address to which the bid was submitted.*) The bidder must request withdrawal of a bid due to a mistake, as defined by the law, within five business days after the receipt and opening of the bids. Since the bid withdrawal request shall be effective as of the postmark of the certified or registered mailing, (*the name and title of the local official*) may contact all bidders, after bids are opened, to ascertain if any bidders wish to, or already have exercised a request to withdraw their bid pursuant to N.J.S.A. 40A:11-23.3.

A bidder's request to withdraw the bid **shall** contain evidence, including any pertinent documents, demonstrating that a mistake was made. Such documents and relevant written information shall be reviewed and evaluated by the public owner's designated staff pursuant to the statutory criteria of N.J.S.A. 40A:11-23.3.

The public owner will not consider any written request for a bid withdrawal for a mistake, as defined by N.J.S.A. 40A:11-2(42), by a bidder in the preparation of a bid proposal unless the postmark of the certified or registered mailing is within the five business days following the opening of bids.