

December 7, 2023

New Jersey Appellate Division Decides in Public Contract Bid Rules Case

Kenneth F. Oettle, Esq.

In a case of first impression, the New Jersey Appellate Division upheld a trial court's decision that a joint venture formed for the sole purpose of bidding on a public contract is required to be registered under the state's Public Works Contractor Registration Act at the time of bidding. If a joint venture has not registered before bidding, its bid will be deemed materially non-conforming and thus invalid.

Summary of Opinion

Two contractors formed a joint venture to bid on a contract for a new public library and municipal complex in Pennsauken Township, New Jersey. The bid was conducted under the Local Public Contracts Law ("LPCL"). The Township rejected the joint venture's \$27 million low bid, upholding the protest of the second low bidder, because the joint venture had not registered with the New Jersey Department of Labor and Workforce Development ("DOL") under the Public Works Contractor Registration Act ("PWCRA"), N.J.S.A. 34:11-56.48 to - 56.57, prior to submitting a bid.

The PWCRA looks to enforce, among other things, prevailing wage requirements on public works. It provides that contractors seeking public work must register under the PWCRA prior to submitting a bid:

No contractor shall bid on any contract for public work as defined in section 2 of P.L. 1963, c.150 (C.34:11-56.26), or for which payment of the prevailing wage is required by any other provision of law, unless the contractor is registered pursuant to this act.

N.J.S.A. 34:11-56.51.

The specifications for the Township's contract echoed this requirement, *i.e.*, registration under the PWCRA prior to bidding. "No contractor shall bid" is strong language, and it seems to have dictated the result in Ernest Bock & Sons-Dobco Pennsauken Joint Venture v. Twp. of Pennsauken, Docket No. A-3684-22, decided November 30, 2023.



Kenneth F. Oettle, Esq.

Senior Counsel
Sills Cummis & Gross P.C.
koettle@sillscummis.com
(973) 643-5462

Though each of the contractors in the joint venture was registered individually under the PWCRA, the trial court held, and the Appellate Division affirmed in what will be a reported opinion, that the joint venture's bid was materially deficient because the joint venture – an entity akin to a partnership and distinct from the two entities that formed it – had not registered with the DOL prior to submitting a bid. Because it had not registered, the joint venture could not submit a certificate of registration with its bid, and thus its bid was nonconforming.

The Court acknowledged that the central issue (“the crux of this appeal”) was whether the joint venture's bid deviated materially from the Township's bid specifications, but the Court did not perform a traditional Meadowbrook materiality analysis (Meadowbrook Carting Co. v. Bor. of Island Heights & Consol. Waste Servs., 138 N.J. 307 (1994)). Under the Meadowbrook test, a court examines whether the deviation from the bid specifications could disadvantage either competing bidders or the public entity. If it could, then the deviation is material.

The Court seems to have assumed materiality simply from the PWCRA's requiring registration prior to bidding. The Court did not address whether the purposes of the PWCRA were served – and no one disadvantaged – by the individual joint venturers' each having registered separately with the DOL, or whether the purposes of the PWCRA would be served – and no one disadvantaged – were the joint venture to register with the DOL prior to being awarded the contract. If neither other bidders nor the Township would be disadvantaged, the deviation from the specifications would not be material.

The LPCL does not include PWCRA registration among the five mandatory items for bid submission (e.g., consent of surety, list of subcontractors; N.J.S.A. 40A:11-23.2). Nevertheless, the Court seems to have deemed the omission material *per se*. The Court stated explicitly that it was not addressing whether the PWCRA imposes a mandatory registration requirement on the LPCL, and it did not propose to read the two statutes *in pari materia*.

In other words, the Court did not hold that registration prior to bid was required under the LPCL because the PWCRA calls for it. However, it found “**sufficient credible evidence** to support the Township's conclusion that Joint Venture's bid was materially defective and therefore, non-conforming and nonresponsive.” (Slip Op. at 14; emphasis added). The “sufficient credible evidence” seems to be that the PWCRA expresses a clear legislative directive that contractors register with the DOL before bidding. The reasoning appears to be that if the Legislature deems registration with the DOL before bidding to be important enough to warrant a statutory mandate, then failing to register as required by a bid specification must constitute a material deviation from a specification requiring such registration. The Court did not say this, but that appears to be its unstated rationale. The Court did not hypothesize whether the result would be the same if the bid specifications did not require pre-bid registration.

Conclusion

The Appellate Division's opinion in the Ernest Bock & Sons case functionally adds a sixth mandatory bidding requirement to the LPCL, that is, that bidders must register with the DOL before bidding, at least when the specifications require it. If they don't register, their bid will be rejected. Because the opinion relies on the PWCRA statutory language, not a traditional Meadowbrook materiality analysis, the opinion is *sui generis*.