

Appellate Division Gives New Meaning to Sticker Shock in Public Bidding Context

In re Jasper Seating Co., Inc.

by Asbling A. Ehrhardt

On April 2, 2009, the Appellate Division decided *In re Jasper Seating Co., Inc.*,¹ a case involving a bid protest on a public bid. At the heart of the case was whether a deviation from the requirements for a bid proposal could be waived by the public owner. In this economy, when contractors are struggling with the lack of private work and more contractors are bidding public work, this decision is a good reminder of the importance of reading the bid documents and all addenda carefully in order to submit a conforming bid.

FACTUAL BACKGROUND

In 2006, New Jersey's Division of Purchase and Property issued a request for proposals (RFP) for office furniture for the state, its using agencies and cooperative partners. The RFP was significant because the contract award was not just for the initial procurement of furniture, but also for all re-orders over the next 18 months.

The RFP contained two material provisions regarding pricing. The first was that "the price list submitted must remain firm for the first 18 months of the contract." The second provision stated that "the price list submitted must not contain any sticker increases."²

During the question and answer period, bidders asked two questions regarding submissions that included furniture catalogs with

price escalation stickers on the cover. The questions and answers were as follows:

Question 1: If a manufacturer does not have a new published price list at the 18 month price update, will a 'sticker' price label be acceptable?

Answer: No. There will be no adjustments to originally submitted discounts. Only the most updated manufacturer's preprinted price lists will be acceptable.

Question 2: Our current price list has a date of February 2005 but we have a sticker on the front of our price list stating that there is a 6% upcharge effective January 3, 2006. Will our price list with the 6% upcharge that became effective January 3, 2006, be accepted as our current price list?

Answer: The price list submitted must not contain any sticker increases, upcharges etc. The discount being bid will be taken directly from the price list submitted without any additional calculation. The bidder should adjust its bid accordingly.³

Fifty-six bidders responded to the RFP, one of which was Jasper Seating Co., Inc. Jasper submitted two bids, one for each of its furniture divisions. In its bids, Jasper included pre-printed price catalogs from its vendor with stickers on the covers indicating that prices would increase by four percent in January

2007. Three other bidders also submitted bids with price increase stickers on their vendors' preprinted catalogs. The division rejected these bids containing the price increase stickers as nonconforming.

Jasper protested the division's rejection of its bids, arguing that in spite of the stickers, no increase was to apply. In fact, Jasper crossed out the stickers and resubmitted its price lists to the division, a move the division rejected due to the fact that the bids were already opened.

The division issued a final agency determination rejecting Jasper's bids as nonconforming. In its decision, the division relied upon the principles governing public contract deviations first articulated in *River Vale v. R.J. Construction Co.*,⁴ adopted by the Supreme Court in *Meadowbrook Carting Co. v. Borough of Island Heights*,⁵ and applied by the Appellate Division in *In re Protest of the Award of On-Line Games Production and Operation Services Contract*.⁶ The division correctly noted in its decision that once a deviation in a bid has been identified, the issue is whether the deviation is substantial and therefore nonwaivable. Specifically, the materiality test is as follows:

[F]irst, whether the effect of a waiver would be to deprive the municipality of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements, and second, whether it is of

such a nature that its waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition.

The division held that the sticker price increases constituted a non-waivable, material deviation from the RFP and, as such, the division rejected the nonconforming bids in their entirety.⁷ After unsuccessfully filing further protests with the division, Jasper filed an appeal with the Appellate Division.

THE APPELLATE DIVISION'S STANDARD OF REVIEW FOR AN AGENCY DETERMINATION

Absent bad faith, corruption, fraud or gross abuse of discretion, courts generally will not interfere with a final agency determination regarding contract awards or the rejection of a bid or bidders. Indeed, it is well established that "the grant of broad latitude and discretion to the [public owner] under the State bidding laws necessarily serves to limit the scope of judicial review when a decision of the [public owner] is challenged on appeal."⁸ While determinations "as to responsibility of the bidder and bid conformity are to be tested by the ordinary standards governing administrative action," even under this elevated scrutiny, "judicial capacity to review administrative actions is severely limited" in light of the executive function of administrative agencies.⁹

THE APPELLATE DIVISION'S DECISION AND REASONING

The Appellate Division agreed that the division properly rejected Jasper's bids as nonconforming, and affirmed the division's final agency determination. By submitting bids with price increase stickers on the vendors' preprinted catalogs, the rejected bids contained two alternative interpretations regarding the pricing and the contract terms. Therefore, the Appellate Division

agreed that the division could not waive these material deviations without giving an unfair advantage.

In rendering its decision, the Appellate Division relied upon the uniformity in the bids that were submitted as a determinative factor. Here, 93 percent of bidders, or 52 out of 56, submitted bids that complied with the RFP. This uniformity confirmed that the language of the RFP was clear. As a result, the Appellate Division rejected Jasper's argument that the RFP was so unclear and confusing that there should be a re-bid.

The Appellate Division also rejected Jasper's argument that the deviation should be waived under the materiality test, noting that a waiver would deprive the state "of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements."¹⁰

The RFP clearly specified that the pricing for the furniture was to remain firm for the entire length of the contract. Moreover, a waiver "would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition."¹¹ Allowing Jasper to choose one of the two interpretations of its pricing after all of the bids were opened would give Jasper an unfair advantage over the other bidders, violating the policy at the heart of public bidding.

BEST PRACTICES

Competition for public work is at an all-time high, with contractors submitting bids with a low or zero margin in order to get work. In light of this, the *Jasper Seating* decision reinforces the importance that contractors read all of the bid documents and all addenda carefully to submit a conforming bid. Counsel should encourage contractors bidding public work to read the bid documents early so if there is an ambiguity, the contractor will have time to seek guidance during the

question and answer period. Moreover, it is imperative that the contractor leave enough time before submitting a bid to review it and make sure it conforms to all of the requirements set forth in the bid documents. ■

ENDNOTES

1. 406 N.J. Super. 213 (App. Div. 2009).
2. *Id.* at 224.
3. *Id.* at 218.
4. 127 N.J. Super. 207 (Law Div. 1974).
5. 138 N.J. 307 (1994).
6. 279 N.J. Super. 566, 597 (App. Div. 1995).
7. *Jasper, supra*, 406 N.J. Super. at 220.
8. *Id.* at 222 (citing *Commercial Cleaning Corp. v. Sullivan*, 47 N.J. 539, 548 (1966)).
9. *Id.* at 222-23 (citations omitted).
10. *Id.* at 225-226 (citing *Meadowbrook, supra*, 138 N.J. at 315).
11. *Ibid.*

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