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# The Quarterly Challenge

## Do Not Lose a Bid that you Won Fair and Square

You have invested time, money and your company's resources to bid on a public project. You are the lowest responsible bidder, but the public body has decided to reject all bids and re-bid the project. Your company just lost the project, you might as well have been the highest bidder. In fact, you would probably be better off if you were the highest bidder because if you were, then everyone else would not know your best price and be aiming to beat it on the re-bid. The public school board or municipality is only permitted to reject all bids, including your winning bid, in certain

situations. Those situations are as follows:

A. The lowest bid substantially exceeds the cost estimates for the goods or services;

B. The lowest bid substantially exceeds the board of education's appropriation for the goods or services;

C. The board of education decides to abandon the project for provision or performance of the goods or services;

D. The board of education wants to substantially revise the specifications for the goods or services;

E. The purposes or provisions or both of [the bidding statutes] are being violated; and

F. The board of education decides to use the State authorized contract pursuant to [statute permitting the use of State pre-approved vendors].

The next time your company is the lowest bidder, but the public body tells you that they are rejecting all bids and rebidding, ask them why. You may be able to make them award the project to your company.

### In New Jersey Inquiring Minds Have the Right to Know

Have you ever wanted to inspect and copy the apparent low bidder's bid? In the State of New Jersey, every citizen has the right to inspect and copy any document that is maintained or kept in accordance with law, with certain exceptions of course. This right is codified in the right to know Act, N.J.S.A. 47:1A-1 et seq. One may be required to arrive at the office of the custodian of the records during regular business hours and demand

the right to inspect and copy the bids that were submitted in response to a particular advertisement. A citizen may also request to inspect and copy the budget that the public body submitted to the State of New Jersey. For instance, any public Board of Education that intends to perform a construction project on a public school must submit its budget to the Commissioner of Education pursuant to N.J.S.A. 18A:7G-1 et seq. Be-

cause the budget is "maintained or kept" pursuant to statute, every citizen has the right to inspect and copy such a document pursuant to the Right to Know Act. In light of the relatively new single prime legislation, your right to know (inspect and copy) information contained in particular documents have never have been more important!

#### DISCLAIMER

These materials are intended to provide general information about the subject matter and are presented with the understanding that neither these materials nor the authors have, nor intend to, render any legal or other professional service or opinions. Anyone dealing with a specific legal matter should research any and all matters described generally herein and should not act upon this information without seeking professional counsel. Do not send us confidential information until you speak with one of our attorneys and get authorization to send that information.



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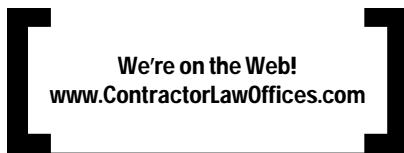
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***A Practice with a concentration in  
Public Bid Contracting***

*The Steven A. Berkowitz & Associates, P.C. counsels contractors that pay their employees a proper wage and benefits as mandated by law. We strive to maintain a level field upon which contractors can fairly compete for public work. Once the project is secured we work to improve the contractor's cash flow by compelling timely payments from the Owner.*

*Contact Steven A. Berkowitz to discuss any legal construction issues at 856-751-1860, ext 1.*

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## Public Bodies are not Permitted to Take Advantage of a Contractor's Mistake in his Bid

The day has come...You are ready to submit your bid. You have gathered your material prices. Your subcontractors have given you their prices five minutes before the bids are due. You add it all up and you submit your bid...You are low!...REAL LOW...You made a mistake. Now what?!? What about your bid bond? What about the clause in the bid documents that says that you can not withdraw your bid?

The law in New Jersey is that a public body should not be permitted to take advantage of a contractor's mistake if the contractor notifies the public body of its mistake in a timely manner. Some contractors will engage themselves in a contract even if they know, before the bid is awarded that they may not make their usual profit because they fear that they will lose their bid bond. After all isn't the purpose of the bid bond to bind your surety to pay a penalty if you fail to enter into a con-

tract with the public body in accordance with your bid? The answer is yes, but (there is always a "but")...as between a contractor that made an honest mistake and a public body that is trying to take advantage of said mistake, equity will operate to relieve the contractor from the contract if certain conditions are full filled. The essential conditions to such relief are (1) the mistake must be of so great a consequence that to enforce the contract as actually made would be unconscionable; (2) the matter as to which the mistake was made must relate to the material feature of the contract; (3) the mistake must have occurred notwithstanding the exercise of reasonable care by the party making the mistake, and (4) it must be able to get relief by way of rescission without serious prejudice to the other party, except for loss of his bargain. "[The law is] strongly in favor of relief for the erring contractor in situations where a mistake is promptly

discovered and called to the attention of the public body before the execution of a formal contract and there is no substantial disadvantage to the solicitor of the bids other than loss of a bargain based on the bidder's error." Conduit & Foundation Corporation v. Atlantic City, 110 N.J.Super. 414, 423 (Ch. Div.1949)

Unfortunately, items 1 through 4 are facts upon which a dispute may arise between the public body and you the bidder. It may be advisable to contact a lawyer to check whether you can prove the fact necessary to relieve yourself of your obligations. However, most importantly, if you want out of the bid, alert the public body of the mistake contained in your bid as soon as possible, before the award is made. After the award is made, your bid bond is in serious jeopardy and the criteria listed above may not apply.