

40A:11-23.3

LEGISLATIVE HISTORY CHECKLIST

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LAWS OF: 2010 **CHAPTER:** 108

NJSA: 40A:11-23.3 (Permits bid for public works contract to be withdrawn due to mistake in certain circumstances)

BILL NO: S514 (Substituted for A1592)

SPONSOR(S) Girgenti and others

DATE INTRODUCED: January 12, 2010

COMMITTEE: **ASSEMBLY:** Housing and Local Government
 SENATE: State Government, Wagering, Tourism & Historic Preservation

AMENDED DURING PASSAGE: No

DATE OF PASSAGE: **ASSEMBLY:** November 22, 2010
 SENATE: October 18, 2010

DATE OF APPROVAL: January 4, 2011

FOLLOWING ARE ATTACHED IF AVAILABLE:

FINAL TEXT OF BILL (Senate Committee Substitute enacted)

S514

SPONSOR'S STATEMENT: (Begins on page 3 of introduced bill) Yes

COMMITTEE STATEMENT: **ASSEMBLY:** Yes

SENATE: Yes

(Audio archived recordings of the committee meetings, corresponding to the date of the committee statement, *may possibly* be found at www.njleg.state.nj.us)

FLOOR AMENDMENT STATEMENT: No

LEGISLATIVE FISCAL ESTIMATE: No

A1592

SPONSOR'S STATEMENT: (Begins on page 3 of introduced bill) Yes

TECHNICAL REVIEW OF PREFILED BILL: Yes

COMMITTEE STATEMENT: **ASSEMBLY:** Yes 6-10-10

SENATE: No 11-8-10

FLOOR AMENDMENT STATEMENT: No

LEGISLATIVE FISCAL ESTIMATE: No

(continued)

VETO MESSAGE: No

GOVERNOR'S PRESS RELEASE ON SIGNING: No

FOLLOWING WERE PRINTED:

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LAW/RWH

SENATE COMMITTEE SUBSTITUTE FOR
SENATE, No. 514

STATE OF NEW JERSEY
214th LEGISLATURE

ADOPTED OCTOBER 14, 2010

Sponsored by:

Senator JOHN A. GIRGENTI

District 35 (Bergen and Passaic)

Senator SHIRLEY K. TURNER

District 15 (Mercer)

Assemblyman FREDERICK SCALERA

District 36 (Bergen, Essex and Passaic)

Assemblywoman MILA M. JASEY

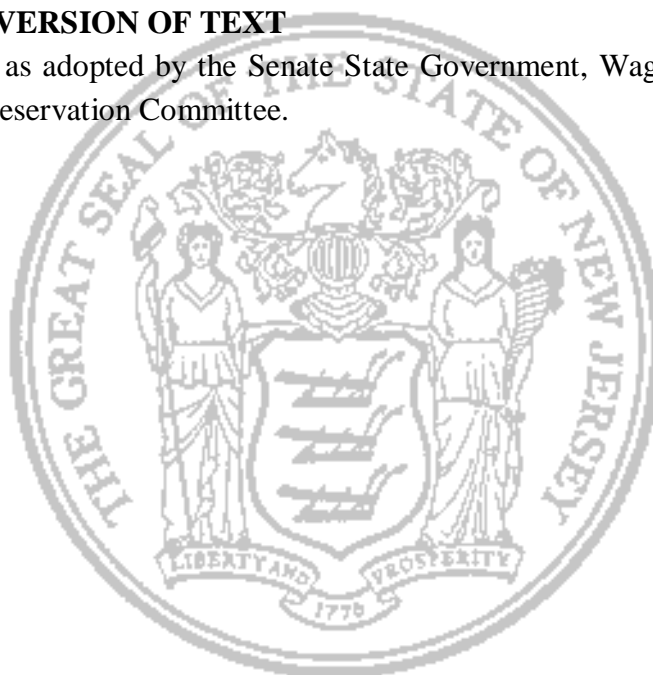
District 27 (Essex)

SYNOPSIS

Permits bid for public works contract to be withdrawn due to mistake in certain circumstances.

CURRENT VERSION OF TEXT

Substitute as adopted by the Senate State Government, Wagering, Tourism & Historic Preservation Committee.



(Sponsorship Updated As Of: 11/23/2010)

1 **AN ACT** concerning the bidding process for certain local public
2 contracts, amending P.L.1997, c.371, and amending and
3 supplementing P.L.1971, c.198.

4
5 **BE IT ENACTED** by the Senate and General Assembly of the State
6 of New Jersey:

7
8 1. Section 2 of P.L.1971, c.198 (C.40A:11-2) is amended to
9 read as follows:

10 2. As used herein the following words have the following
11 definitions, unless the context otherwise indicates:

12 (1) "Contracting unit" means:

13 (a) Any county; or

14 (b) Any municipality; or

15 (c) Any board, commission, committee, authority or agency,
16 which is not a State board, commission, committee, authority or
17 agency, and which has administrative jurisdiction over any district
18 other than a school district, project, or facility, included or
19 operating in whole or in part, within the territorial boundaries of
20 any county or municipality which exercises functions which are
21 appropriate for the exercise by one or more units of local
22 government, and which has statutory power to make purchases and
23 enter into contracts awarded by a contracting agent for the provision
24 or performance of goods or services.

25 The term shall not include a private firm that has entered into a
26 contract with a public entity for the provision of water supply
27 services pursuant to P.L.1995, c.101 (C.58:26-19 et al.).

28 "Contracting unit" shall not include a private firm or public
29 authority that has entered into a contract with a public entity for the
30 provision of wastewater treatment services pursuant to P.L.1995,
31 c.216 (C.58:27-19 et al.).

32 "Contracting unit" shall not include a duly incorporated nonprofit
33 association that has entered into a contract with the governing body
34 of a city of the first class for the provision of water supply services
35 or wastewater treatment services pursuant to section 2 of P.L.2002,
36 c.47 (C.40A:11-5.1).

37 "Contracting unit" shall not include a duly incorporated nonprofit
38 entity that has entered into a contract for management and operation
39 services with a municipal hospital authority established pursuant to
40 P.L.2006, c.46 (C.30:9-23.15 et al.).

41 (2) "Governing body" means:

42 (a) The governing body of the county, when the purchase is to
43 be made or the contract or agreement is to be entered into by, or in
44 behalf of, a county; or

EXPLANATION – Matter enclosed in bold-faced brackets **[thus]** in the above bill is
not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

- 1 (b) The governing body of the municipality, when the purchase
2 is to be made or the contract or agreement is to be entered into by,
3 or on behalf of, a municipality; or
- 4 (c) Any board, commission, committee, authority or agency of
5 the character described in subsection (1) (c) of this section.
- 6 (3) "Contracting agent" means the governing body of a
7 contracting unit, or its authorized designee, which has the power to
8 prepare the advertisements, to advertise for and receive bids and, as
9 permitted by this act, to make awards for the contracting unit in
10 connection with purchases, contracts or agreements.
- 11 (4) "Purchase" means a transaction, for a valuable consideration,
12 creating or acquiring an interest in goods, services and property,
13 except real property or any interest therein.
- 14 (5) (Deleted by amendment, P.L.1999, c.440.)
- 15 (6) "Professional services" means services rendered or
16 performed by a person authorized by law to practice a recognized
17 profession, whose practice is regulated by law, and the performance
18 of which services requires knowledge of an advanced type in a field
19 of learning acquired by a prolonged formal course of specialized
20 instruction and study as distinguished from general academic
21 instruction or apprenticeship and training. Professional services
22 may also mean services rendered in the provision or performance of
23 goods or services that are original and creative in character in a
24 recognized field of artistic endeavor.
- 25 (7) "Extraordinary unspecifiable services" means services which
26 are specialized and qualitative in nature requiring expertise,
27 extensive training and proven reputation in the field of endeavor.
- 28 (8) (Deleted by amendment, P.L.1999, c.440.)
- 29 (9) "Work" includes services and any other activity of a tangible
30 or intangible nature performed or assumed pursuant to a contract or
31 agreement with a contracting unit.
- 32 (10) "Homemaker--home health services" means at home
33 personal care and home management provided to an individual or
34 members of the individual's family who reside with the individual,
35 or both, necessitated by the individual's illness or incapacity.
36 "Homemaker--home health services" includes, but is not limited to,
37 the services of a trained homemaker.
- 38 (11) "Recyclable material" means those materials which would
39 otherwise become municipal solid waste, and which may be
40 collected, separated or processed and returned to the economic
41 mainstream in the form of raw materials or products.
- 42 (12) "Recycling" means any process by which materials which
43 would otherwise become solid waste are collected, separated or
44 processed and returned to the economic mainstream in the form of
45 raw materials or products.
- 46 (13) "Marketing" means the sale, disposition, assignment, or
47 placement of designated recyclable materials with, or the granting

1 of a concession to, a reseller, processor, materials recovery facility,
2 or end-user of recyclable material, in accordance with a district
3 solid waste management plan adopted pursuant to P.L.1970, c.39
4 (C.13:1E-1 et seq.) and shall not include the collection of such
5 recyclable material when collected through a system of routes by
6 local government unit employees or under a contract administered
7 by a local government unit.

8 (14) "Municipal solid waste" means, as appropriate to the
9 circumstances, all residential, commercial and institutional solid
10 waste generated within the boundaries of a municipality; or the
11 formal collection of such solid wastes or recyclable material in any
12 combination thereof when collected through a system of routes by
13 local government unit employees or under a contract administered
14 by a local government unit.

15 (15) "Distribution" (when used in relation to electricity) means
16 the process of conveying electricity from a contracting unit that is a
17 generator of electricity or a wholesale purchaser of electricity to
18 retail customers or other end users of electricity.

19 (16) "Transmission" (when used in relation to electricity) means
20 the conveyance of electricity from its point of generation to a
21 contracting unit that purchases it on a wholesale basis for resale.

22 (17) "Disposition" means the transportation, placement, reuse,
23 sale, donation, transfer or temporary storage of recyclable materials
24 for all possible uses except for disposal as municipal solid waste.

25 (18) "Cooperative marketing" means the joint marketing by two
26 or more contracting units of the source separated recyclable
27 materials designated in a district recycling plan required pursuant to
28 section 3 of P.L.1987, c.102 (C.13:1E-99.13) pursuant to a written
29 cooperative agreement entered into by the participating contracting
30 units thereof.

31 (19) "Aggregate" means the sums expended or to be expended
32 for the provision or performance of any goods or services in
33 connection with the same immediate purpose or task, or the
34 furnishing of similar goods or services, during the same contract
35 year through a contract awarded by a contracting agent.

36 (20) "Bid threshold" means the dollar amount set in section 3 of
37 P.L.1971, c.198 (C.40A:11-3), above which a contracting unit shall
38 advertise for and receive sealed bids in accordance with procedures
39 set forth in P.L.1999, c.440 (C.40A:11-4.1 et al.).

40 (21) "Contract" means any agreement, including but not limited
41 to a purchase order or a formal agreement, which is a legally
42 binding relationship enforceable by law, between a vendor who
43 agrees to provide or perform goods or services and a contracting
44 unit which agrees to compensate a vendor, as defined by and subject
45 to the terms and conditions of the agreement. A contract also may
46 include an arrangement whereby a vendor compensates a

1 contracting unit for the vendor's right to perform a service, such as,
2 but not limited to, operating a concession.

3 (22) "Contract year" means the period of 12 consecutive months
4 following the award of a contract.

5 (23) "Competitive contracting" means the method described in
6 sections 1 through 5 of P.L.1999, c.440 (C.40A:11-4.1 thru 40A:11-
7 4.5) of contracting for specialized goods and services in which
8 formal proposals are solicited from vendors; formal proposals are
9 evaluated by the purchasing agent or counsel or administrator; and
10 the governing body awards a contract to a vendor or vendors from
11 among the formal proposals received.

12 (24) "Goods and services" or "goods or services" means any
13 work, labor, commodities, equipment, materials, or supplies of any
14 tangible or intangible nature, except real property or any interest
15 therein, provided or performed through a contract awarded by a
16 contracting agent, including goods and property subject to
17 N.J.S.12A:2-101 et seq.

18 (25) "Library and educational goods and services" means
19 textbooks, copyrighted materials, student produced publications and
20 services incidental thereto, including but not limited to books,
21 periodicals, newspapers, documents, pamphlets, photographs,
22 reproductions, microfilms, pictorial or graphic works, musical
23 scores, maps, charts, globes, sound recordings, slides, films,
24 filmstrips, video and magnetic tapes, other printed or published
25 matter and audiovisual and other materials of a similar nature,
26 necessary binding or rebinding of library materials, and specialized
27 computer software used as a supplement or in lieu of textbooks or
28 reference material.

29 (26) "Lowest price" means the least possible amount that meets
30 all requirements of the request of a contracting agent.

31 (27) "Lowest responsible bidder or vendor" means the bidder or
32 vendor: (a) whose response to a request for bids offers the lowest
33 price and is responsive; and (b) who is responsible.

34 (28) "Official newspaper" means any newspaper designated by
35 the contracting unit pursuant to R.S.35:1-1 et seq.

36 (29) "Purchase order" means a document issued by the
37 contracting agent authorizing a purchase transaction with a vendor
38 to provide or perform goods or services to the contracting unit,
39 which, when fulfilled in accordance with the terms and conditions
40 of a request of a contracting agent and other provisions and
41 procedures that may be established by the contracting unit, will
42 result in payment by the contracting unit.

43 (30) "Purchasing agent" means the individual duly assigned the
44 authority, responsibility, and accountability for the purchasing
45 activity of the contracting unit, and who has such duties as are
46 defined by an authority appropriate to the form and structure of the

1 contracting unit, pursuant to P.L.1971, c.198 (C.40A:11-1 et seq.)
2 and who possesses a qualified purchasing agent certificate.

3 (31) "Quotation" means the response to a formal or informal
4 request made by a contracting agent by a vendor for provision or
5 performance of goods or services, when the aggregate cost is less
6 than the bid threshold. Quotations may be in writing, or taken
7 verbally if a record is kept by the contracting agent.

8 (32) "Responsible" means able to complete the contract in
9 accordance with its requirements, including but not limited to
10 requirements pertaining to experience, moral integrity, operating
11 capacity, financial capacity, credit, and workforce, equipment, and
12 facilities availability.

13 (33) "Responsive" means conforming in all material respects to
14 the terms and conditions, specifications, legal requirements, and
15 other provisions of the request.

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

21 (35) "Director" means the Director of the Division of Local
22 Government Services in the Department of Community Affairs.

23 (36) "Administrator" means a municipal administrator appointed
24 pursuant to N.J.S.40A:9-136 and N.J.S.40A:9-137; a business
25 administrator, a municipal manager or a municipal administrator
26 appointed pursuant to the "Optional Municipal Charter Law,"
27 P.L.1950, c.210 (C.40:69A-1 et seq.); a municipal manager
28 appointed pursuant to "the municipal manager form of government
29 law," R.S.40:79-1 et seq.; or the person holding responsibility for
30 the overall operations of an authority that falls under the "Local
31 Authorities Fiscal Control Law," P.L.1983, c.313 (C.40A:5A-1 et
32 seq.).

33 (37) "Concession" means the granting of a license or right to act
34 for or on behalf of the contracting unit, or to provide a service
35 requiring the approval or endorsement of the contracting unit, and
36 which may or may not involve a payment or exchange, or provision
37 of services by or to the contracting unit.

38 (38) "Index rate" means the rate of annual percentage increase,
39 rounded to the nearest half-percent, in the Implicit Price Deflator
40 for State and Local Government Purchases of Goods and Services,
41 computed and published quarterly by the United States Department
42 of Commerce, Bureau of Economic Analysis.

43 (39) "Proprietary" means goods or services of a specialized
44 nature, that may be made or marketed by a person or persons having
45 the exclusive right to make or sell them, when the need for such
46 goods or services has been certified in writing by the governing

1 body of the contracting unit to be necessary for the conduct of its
2 affairs.

3 (40) "Service or services" means the performance of work, or the
4 furnishing of labor, time, or effort, or any combination thereof, not
5 involving or connected to the delivery or ownership of a specified
6 end product or goods or a manufacturing process. Service or
7 services may also include an arrangement in which a vendor
8 compensates the contracting unit for the vendor's right to operate a
9 concession.

10 (41) "Qualified purchasing agent certificate" means a certificate
11 granted by the director pursuant to section 9 of P.L.1971, c.198
12 (C.40A:11-9).

13 (42) "Mistake" means, for a public works project, a clerical error
14 that is an unintentional and substantial computational error or an
15 unintentional omission of a substantial quantity of labor, material,
16 or both, from the final bid computation.

17 (cf: P.L.2009, c.166, s.1)

18

19 2. Section 1 of P.L.1997, c.371 (C.40A:11-50) is amended to
20 read as follows:

21 1. All construction contract documents entered into in
22 accordance with the provisions of P.L.1971, c.198 (C.40A:11-1 et
23 seq.) after the effective date of P.L.1997, c.371 (C.40A:11-50) shall
24 provide that disputes arising under the contract shall be submitted to
25 a process of resolution pursuant to alternative dispute resolution
26 practices, such as mediation, binding arbitration or non-binding
27 arbitration pursuant to industry standards, prior to being submitted
28 to a court for adjudication. Nothing in this section shall prevent the
29 contracting unit from seeking injunctive or declaratory relief in
30 court at any time. The alternative dispute resolution practices
31 required by this section shall not apply to disputes concerning the
32 bid solicitation or award process, bid withdrawal, or to the
33 formation of contracts or subcontracts to be entered into pursuant to
34 P.L.1971, c.198 (C.40A:11-1 et seq.).

35 Notwithstanding industry rules or any provision of law to the
36 contrary, whenever a dispute concerns more than one contract, such
37 as when a dispute in a contract involving construction relates to a
38 contract involving design, architecture, engineering or management,
39 upon the demand of a contracting party, other interested parties to
40 the dispute shall be joined unless the arbitrator or person appointed
41 to resolve the dispute determines that such joinder is inappropriate.
42 Notwithstanding industry rules or any provision of law to the
43 contrary, whenever more than one dispute of a similar nature arises
44 under a construction contract, or related construction contracts,
45 upon the demand of a contracting party, the disputes shall be joined
46 unless the arbitrator or person appointed to resolve the dispute
47 determines that the disputes are inappropriate for joinder.

1 For the purposes of this section, the term "construction contract"
2 means a contract involving construction, or a contract related
3 thereto concerning architecture, engineering or construction
4 management.

5 (cf: P.L1997, c.371, s.1)

6
7 3. (New section) a. In the case of a bidding process for a
8 public works contract, a bidder may request withdrawal of a bid,
9 due to a mistake on the part of the bidder, within five business days
10 after a bid opening. As used in this section, "mistake" shall have the
11 same meaning as provided in paragraph 42 of section 2 of P.L.1971,
12 c.198 (C.40A:11-2).

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

19 (1) the enforcement of the contract, if actually made, would be
20 unconscionable;

21 (2) the mistake relates to a material feature of the bid;

22 (3) the mistake occurred notwithstanding the fact that the bidder
23 exercised reasonable care in preparation of the bid; and

24 (4) the bidder making the mistake is able to get relief by way of
25 withdrawing the bid without serious prejudice to the contracting
26 unit, except for the loss of the bargain to the contracting unit.

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

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

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

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

5

6 4. This act shall take effect on the 60th day following the day
7 of enactment.

SENATE, No. 514

STATE OF NEW JERSEY 214th LEGISLATURE

PRE-FILED FOR INTRODUCTION IN THE 2010 SESSION

Sponsored by:

Senator JOHN A. GIRGENTI
District 35 (Bergen and Passaic)

SYNOPSIS

Permits bid for public works contract to be withdrawn due to error in certain circumstances; permits contracting unit to require financial statement from bidders.

CURRENT VERSION OF TEXT

Introduced Pending Technical Review by Legislative Counsel



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2

1 AN ACT concerning the bidding process for certain local public
2 contracts, amending P.L.1999, c.39, and supplementing
3 P.L.1971, c.198 (C.40A:11-1 et seq.).
4

5 **BE IT ENACTED** by the Senate and General Assembly of the State
6 of New Jersey:
7

8 1. (New section) a. In the case of a bidding process for a
9 public works contract, a bid may be withdrawn at any time prior to
10 the time specified for receipt of bids, or within five business days
11 after either a bid opening or a scheduled pre-award meeting,
12 whichever comes later, due to an error on the part of the bidder.
13 The request must be submitted via certified or registered mail to the
14 address to which the bid was directed, and shall be effective upon
15 mailing.

16 b. A request for withdrawal of a bid made after the specified
17 number of days allowed shall result in automatic forfeiture of the
18 bid security, pursuant to subsection a. of this section.

19 c. The contractor shall submit credible evidence, including
20 original documents, that support the claim of an error for the
21 withdrawal of a bid, setting forth the following grounds for
22 withdrawal:

23 (1) An error, clerical as opposed to judgmental in nature and
24 verifiable by written evidence, occurred in the computation of the
25 bid;

26 (2) The error constitutes either an unintentional and substantial
27 computational error or an unintentional omission of a substantial
28 quantity of labor, material, or both, from the final bid computation;
29 and

30 (3) There was an absence of gross negligence in the preparation
31 of the bid.

32 For the purposes of this paragraph, gross negligence may
33 include:

34 (a) the failure of a bidder to account for two or more categories
35 of work, or one of the five types of work set forth in section 16 of
36 P.L.1971, c.198 (C.40A:11-16);

37 (b) the use of multiple erroneous quotations from subcontractors
38 or suppliers; or

39 (c) the submission to the contracting unit of a bid withdrawal
40 request, within the preceding six months.

41 d. Following an approval of a timely request for withdrawal of
42 a bid, the bid guarantee shall be returned. If the bidder fails to meet
43 its burden of proof and fails to execute the contract, the request to
44 withdraw shall be denied and the bid guarantee is forfeited and

EXPLANATION – Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

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1 becomes the property of the contracting unit. The decision of the
2 governing body shall be final.

3 e. Once the decision to approve the withdrawal is made, the
4 contracting unit shall continue the award process with the remaining
5 bids.

6 f. If a bidder withdraws a bid in accordance with this section,
7 that bidder shall be disqualified from future bidding on the same
8 project, including when all bids are rejected, the project
9 specifications are modified, and the project is rebid.

10

11 2. Section 2 of P.L.1999, c.39 (C.40A:11-23.2) is amended to
12 read as follows:

13 2. When required by the bid plans and specifications, the
14 following requirements shall be considered mandatory items to be
15 submitted at the time specified by the contracting unit for the
16 receipt of the bids; the failure to submit any one of the mandatory
17 items shall be deemed a fatal defect that shall render the bid
18 proposal unresponsive and that cannot be cured by the governing
19 body:

20 a. A guarantee to accompany the bid pursuant to section 21 of
21 P.L.1971, c.198 (C.40A:11-21);

22 b. A certificate from a surety company pursuant to section 22
23 of P.L.1971, c.198 (C.40A:11-22);

24 c. A statement of corporate ownership pursuant to section 1 of
25 P.L.1977, c.33 (C.52:25-24.2);

26 d. A listing of subcontractors pursuant to section 16 of
27 P.L.1971, c.198 (C.40A:11-16);

28 e. A document provided by the contracting agent in the bid
29 plans, specifications, or bid proposal documents for the bidder to
30 acknowledge the bidder's receipt of any notice or revisions or
31 addenda to the advertisement or bid documents; and

32 f. A copy of the contractor's, and subcontractors' listed
33 pursuant to subsection d. of this section, business registration as
34 required pursuant to section 1 of P.L.2001, c.134 (C.52:32-44).

35 In addition, the contracting unit may require financial statements
36 from all bidders after the receipt of the bids but before the awarding
37 of the contract.

38 (cf: P.L.2004, c.57, s.1)

39

40 3. This act shall take effect immediately.

41

42

43

STATEMENT

44

45 This bill provides that in the case of a bidding process for a
46 public works contract, a bid may be withdrawn at any time prior to
47 the time specified for receipt of bids, or within five business days

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1 after either a bid opening or a scheduled pre-award meeting,
2 whichever comes later, due to an error on the part of the bidder.
3 The request must be submitted via certified or registered mail to the
4 address to which the bid was directed, and shall be effective upon
5 mailing. A request for withdrawal of a bid made after the specified
6 number of days allowed shall result in automatic forfeiture of the
7 bid security.

8 The contractor who wishes to withdraw a bid shall submit
9 credible evidence, including original documents, that support the
10 claim of an error for the withdrawal, setting forth the following
11 grounds for withdrawal:

12 (1) An error, clerical as opposed to judgmental in nature and
13 verifiable by written evidence, occurred in the computation of the
14 bid;

15 (2) The error constitutes either an unintentional and substantial
16 computational error or an unintentional omission of a substantial
17 quantity of labor, material, or both, from the final bid computation;
18 and

19 (3) There was an absence of gross negligence in the preparation
20 of the bid.

21 For the purposes of this bill, gross negligence may include:

22 (1) the failure of a bidder to account for two or more categories
23 of work, or one of the five types of work set forth in section 16 of
24 P.L.1971, c.198 (C.40A:11-16);

25 (2) the use of multiple erroneous quotations from subcontractors
26 or suppliers; or

27 (3) the submission to the contracting unit of a bid withdrawal
28 request, within the preceding six months.

29 Following an approval of a timely request for withdrawal of a
30 bid, the bid guarantee shall be returned. If the bidder fails to meet
31 its burden of proof, and fails to execute the contract, the request to
32 withdraw shall be denied and the bid guarantee is forfeited and
33 becomes the property of the contracting unit. The decision of the
34 governing body shall be final. Once the decision to approve the
35 withdrawal is made, the contracting unit shall continue the award
36 process with the remaining bids. If a bidder withdraws a bid in
37 accordance with this bill, that bidder shall be disqualified from
38 future bidding on the same project, including when all bids are
39 rejected, the project specifications are modified, and the project is
40 rebid.

41 The bill also provides that the contracting unit may require
42 financial statements from all bidders after the receipt of the bids but
43 before the awarding of the contract.

SENATE STATE GOVERNMENT, WAGERING, TOURISM &
HISTORIC PRESERVATION COMMITTEE

STATEMENT TO

SENATE COMMITTEE SUBSTITUTE FOR
SENATE, No. 514

STATE OF NEW JERSEY

DATED: OCTOBER 14, 2010

The Senate State Government, Wagering, Tourism & Historic Preservation Committee reports favorably a Senate Committee Substitute for Senate Bill No. 514.

This substitute would allow a bidder for a local contract to withdraw a bid proposal because of a mistake. This substitute provides that a bid may be withdrawn within five business days after a bid opening, due to a unilateral, non-negligent clerical error on the part of the bidder.

A contractor who wishes to withdraw a bid shall submit a request to the contracting unit. This legislation requires a good-faith review by an agent of the contracting unit, who makes a recommendation to the governing body of the contracting unit prior to the next meeting thereof. The contracting unit may approve the withdrawal if the bidder demonstrates 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..

The "Local Public Contracts Law," N.J.S.A.40A:11-1 et seq. is intended to protect the public from the misuse of public funds. This legislation, which facially protects a bidder for a public works contract, serves the public interest by providing that a clerical error will not necessarily be financially ruinous to an otherwise qualified bidder. As a result, contractors may have a greater incentive to participate in the bidding process, stimulating competition in a manner consistent with sound fiscal practices.

ASSEMBLY HOUSING AND LOCAL GOVERNMENT
COMMITTEE

STATEMENT TO

SENATE COMMITTEE SUBSTITUTE FOR
SENATE, No. 514

STATE OF NEW JERSEY

DATED: NOVEMBER 8, 2010

The Assembly Housing and Local Government Committee reports favorably Senate Committee Substitute for Senate Bill No. 514.

This substitute would allow a bidder for a local contract to withdraw a bid proposal because of a mistake. This substitute provides that a bid may be withdrawn within five business days after a bid opening, due to a unilateral, non-negligent clerical error on the part of the bidder.

A contractor who wishes to withdraw a bid shall submit a request to the contracting unit. This legislation requires a good-faith review by an agent of the contracting unit, who makes a recommendation to the governing body of the contracting unit prior to the next meeting thereof. The contracting unit may approve the withdrawal if the bidder demonstrates 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.

The "Local Public Contracts Law," N.J.S.A.40A:11-1 et seq. is intended to protect the public from the misuse of public funds. This legislation, which facially protects a bidder for a public works contract, serves the public interest by providing that a clerical error will not necessarily be financially ruinous to an otherwise qualified bidder. As a result, contractors may have a greater incentive to participate in the bidding process, stimulating competition in a manner consistent with sound fiscal practices.

ASSEMBLY, No. 1592

STATE OF NEW JERSEY 214th LEGISLATURE

PRE-FILED FOR INTRODUCTION IN THE 2010 SESSION

Sponsored by:

Assemblyman FREDERICK SCALERA

District 36 (Bergen, Essex and Passaic)

Assemblywoman MILA M. JASEY

District 27 (Essex)

SYNOPSIS

Permits bid for public works contract to be withdrawn due to error in certain circumstances; permits contracting unit to require financial statement from bidders.

CURRENT VERSION OF TEXT

Introduced Pending Technical Review by Legislative Counsel



1 AN ACT concerning the bidding process for certain local public
2 contracts, amending P.L.1999, c.39, and supplementing
3 P.L.1971, c.198 (C.40A:11-1 et seq.).
4

5 **BE IT ENACTED** by the Senate and General Assembly of the State
6 of New Jersey:
7

8 1. (New section) a. In the case of a bidding process for a public
9 works contract, a bid may be withdrawn at any time prior to the
10 time specified for receipt of bids, or within five business days after
11 either a bid opening or a scheduled pre-award meeting, whichever
12 comes later, due to an error on the part of the bidder. The request
13 must be submitted via certified or registered mail to the address to
14 which the bid was directed, and shall be effective upon mailing.

15 b. A request for withdrawal of a bid made after the specified
16 number of days allowed shall result in automatic forfeiture of the
17 bid security, pursuant to subsection a. of this section.

18 c. The contractor shall submit credible evidence, including
19 original documents, that support the claim of an error for the
20 withdrawal of a bid, setting forth the following grounds for
21 withdrawal:

22 (1) An error, clerical as opposed to judgmental in nature and
23 verifiable by written evidence, occurred in the computation of the
24 bid;

25 (2) The error constitutes either an unintentional and substantial
26 computational error or an unintentional omission of a substantial
27 quantity of labor, material, or both, from the final bid computation;
28 and

29 (3) There was an absence of gross negligence in the preparation
30 of the bid.

31 For the purposes of this paragraph, gross negligence may
32 include:

33 (a) the failure of a bidder to account for two or more categories
34 of work, or one of the five types of work set forth in section 16 of
35 P.L.1971, c.198 (C.40A:11-16);

36 (b) the use of multiple erroneous quotations from subcontractors
37 or suppliers; or

38 (c) the submission to the contracting unit of a bid withdrawal
39 request, within the preceding six months.

40 d. Following an approval of a timely request for withdrawal of a
41 bid, the bid guarantee shall be returned. If the bidder fails to meet
42 its burden of proof and fails to execute the contract, the request to
43 withdraw shall be denied and the bid guarantee is forfeited and
44 becomes the property of the contracting unit. The decision of the
45 governing body shall be final.

EXPLANATION – Matter enclosed in bold-faced brackets **[thus]** in the above bill is not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

1 e. Once the decision to approve the withdrawal is made, the
2 contracting unit shall continue the award process with the remaining
3 bids.

4 f. If a bidder withdraws a bid in accordance with this section,
5 that bidder shall be disqualified from future bidding on the same
6 project, including when all bids are rejected, the project
7 specifications are modified, and the project is rebid.

8
9 2. Section 2 of P.L.1999, c.39 (C.40A:11-23.2) is amended to
10 read as follows:

11 2. When required by the bid plans and specifications, the
12 following requirements shall be considered mandatory items to be
13 submitted at the time specified by the contracting unit for the
14 receipt of the bids; the failure to submit any one of the mandatory
15 items shall be deemed a fatal defect that shall render the bid
16 proposal unresponsive and that cannot be cured by the governing
17 body:

18 a. A guarantee to accompany the bid pursuant to section 21 of
19 P.L.1971, c.198 (C.40A:11-21);

20 b. A certificate from a surety company pursuant to section 22
21 of P.L.1971, c.198 (C.40A:11-22);

22 c. A statement of corporate ownership pursuant to section 1 of
23 P.L.1977, c.33 (C.52:25-24.2);

24 d. A listing of subcontractors pursuant to section 16 of
25 P.L.1971, c.198 (C.40A:11-16);

26 e. A document provided by the contracting agent in the bid
27 plans, specifications, or bid proposal documents for the bidder to
28 acknowledge the bidder's receipt of any notice or revisions or
29 addenda to the advertisement or bid documents; and

30 f. A copy of the contractor's, and subcontractors' listed
31 pursuant to subsection d. of this section, business registration as
32 required pursuant to section 1 of P.L.2001, c.134 (C.52:32-44).

33 In addition, the contracting unit may require financial statements
34 from all bidders after the receipt of the bids but before the awarding
35 of the contract.

36 (cf: P.L.2004, c.57, s.1)

37
38 3. This act shall take effect immediately.
39
40

41 STATEMENT
42

43 This bill provides that in the case of a bidding process for a
44 public works contract, a bid may be withdrawn at any time prior to
45 the time specified for receipt of bids, or within five business days
46 after either a bid opening or a scheduled pre-award meeting,
47 whichever comes later, due to an error on the part of the bidder.

1 The request must be submitted via certified or registered mail to the
2 address to which the bid was directed, and shall be effective upon
3 mailing. A request for withdrawal of a bid made after the specified
4 number of days allowed shall result in automatic forfeiture of the
5 bid security.

6 The contractor who wishes to withdraw a bid shall submit
7 credible evidence, including original documents, that support the
8 claim of an error for the withdrawal, setting forth the following
9 grounds for withdrawal:

10 (1) An error, clerical as opposed to judgmental in nature and
11 verifiable by written evidence, occurred in the computation of the
12 bid;

13 (2) The error constitutes either an unintentional and substantial
14 computational error or an unintentional omission of a substantial
15 quantity of labor, material, or both, from the final bid computation;
16 and

17 (3) There was an absence of gross negligence in the preparation
18 of the bid.

19 For the purposes of this bill, gross negligence may include:

20 (1) the failure of a bidder to account for two or more categories
21 of work, or one of the five types of work set forth in section 16 of
22 P.L.1971, c.198 (C.40A:11-16);

23 (2) the use of multiple erroneous quotations from subcontractors
24 or suppliers; or

25 (3) the submission to the contracting unit of a bid withdrawal
26 request, within the preceding six months.

27 Following an approval of a timely request for withdrawal of a
28 bid, the bid guarantee shall be returned. If the bidder fails to meet
29 its burden of proof, and fails to execute the contract, the request to
30 withdraw shall be denied and the bid guarantee is forfeited and
31 becomes the property of the contracting unit. The decision of the
32 governing body shall be final. Once the decision to approve the
33 withdrawal is made, the contracting unit shall continue the award
34 process with the remaining bids. If a bidder withdraws a bid in
35 accordance with this bill, that bidder shall be disqualified from
36 future bidding on the same project, including when all bids are
37 rejected, the project specifications are modified, and the project is
38 rebid.

39 The bill also provides that the contracting unit may require
40 financial statements from all bidders after the receipt of the bids but
41 before the awarding of the contract.

ASSEMBLY, No. 1592

STATE OF NEW JERSEY 214th LEGISLATURE

PRE-FILED FOR INTRODUCTION IN THE 2010 SESSION

Sponsored by:

Assemblyman FREDERICK SCALERA

District 36 (Bergen, Essex and Passaic)

Assemblywoman MILA M. JASEY

District 27 (Essex)

SYNOPSIS

Permits bid for public works contract to be withdrawn due to error in certain circumstances; permits contracting unit to require financial statement from bidders.

CURRENT VERSION OF TEXT

As reported by the Assembly Housing and Local Government Committee with technical review.



1 AN ACT concerning the bidding process for certain local public
2 contracts, amending P.L.1999, c.39, and supplementing
3 P.L.1971, c.198 (C.40A:11-1 et seq.).
4

5 **BE IT ENACTED** by the Senate and General Assembly of the State
6 of New Jersey:
7

8 1. (New section) a. In the case of a bidding process for a
9 public works contract, a bid may be withdrawn at any time prior to
10 the time specified for receipt of bids, or within five business days
11 after either a bid opening or a scheduled pre-award meeting,
12 whichever comes later, due to an error on the part of the bidder.
13 The request must be submitted via certified or registered mail to the
14 address to which the bid was directed, and shall be effective upon
15 mailing.

16 b. A request for withdrawal of a bid made after the specified
17 number of days allowed shall result in automatic forfeiture of the
18 bid security, pursuant to subsection a. of this section.

19 c. The contractor shall submit credible evidence, including
20 original documents, that support the claim of an error for the
21 withdrawal of a bid, setting forth the following grounds for
22 withdrawal:

23 (1) An error, clerical as opposed to judgmental in nature and
24 verifiable by written evidence, occurred in the computation of the
25 bid;

26 (2) The error constitutes either an unintentional and substantial
27 computational error or an unintentional omission of a substantial
28 quantity of labor, material, or both, from the final bid computation;
29 and

30 (3) There was an absence of gross negligence in the preparation
31 of the bid.

32 For the purposes of this paragraph, gross negligence may
33 include:

34 (a) the failure of a bidder to account for two or more categories
35 of work, or one of the five types of work set forth in section 16 of
36 P.L.1971, c.198 (C.40A:11-16);

37 (b) the use of multiple erroneous quotations from subcontractors
38 or suppliers; or

39 (c) the submission to the contracting unit of a bid withdrawal
40 request, within the preceding six months.

41 d. Following an approval of a timely request for withdrawal of
42 a bid, the bid guarantee shall be returned. If the bidder fails to meet
43 its burden of proof and fails to execute the contract, the request to
44 withdraw shall be denied and the bid guarantee is forfeited and

EXPLANATION – Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

1 becomes the property of the contracting unit. The decision of the
2 governing body shall be final.

3 e. Once the decision to approve the withdrawal is made, the
4 contracting unit shall continue the award process with the remaining
5 bids.

6 f. If a bidder withdraws a bid in accordance with this section,
7 that bidder shall be disqualified from future bidding on the same
8 project, including when all bids are rejected, the project
9 specifications are modified, and the project is rebid.

10

11 2. Section 2 of P.L.1999, c.39 (C.40A:11-23.2) is amended to
12 read as follows:

13 2. When required by the bid plans and specifications, the
14 following requirements shall be considered mandatory items to be
15 submitted at the time specified by the contracting unit for the
16 receipt of the bids; the failure to submit any one of the mandatory
17 items shall be deemed a fatal defect that shall render the bid
18 proposal unresponsive and that cannot be cured by the governing
19 body:

20 a. A guarantee to accompany the bid pursuant to section 21 of
21 P.L.1971, c.198 (C.40A:11-21);

22 b. A certificate from a surety company pursuant to section 22
23 of P.L.1971, c.198 (C.40A:11-22);

24 c. A statement of corporate ownership pursuant to section 1 of
25 P.L.1977, c.33 (C.52:25-24.2);

26 d. A listing of subcontractors pursuant to section 16 of
27 P.L.1971, c.198 (C.40A:11-16);

28 e. A document provided by the contracting agent in the bid
29 plans, specifications, or bid proposal documents for the bidder to
30 acknowledge the bidder's receipt of any notice or revisions or
31 addenda to the advertisement or bid documents; and

32 f. (Deleted by amendment, P.L.2009, c.315.)

33 In addition, the contracting unit may require financial statements
34 from all bidders after the receipt of the bids but before the awarding
35 of the contract.

36 (cf: P.L.2009, c.315, s.1)

37

38 3. This act shall take effect immediately.

ASSEMBLY HOUSING AND LOCAL GOVERNMENT
COMMITTEE

STATEMENT TO

ASSEMBLY, No. 1592

STATE OF NEW JERSEY

DATED: JUNE 10, 2010

The Assembly Housing and Local Government Committee reports favorably Assembly Bill No. 1592.

This bill provides that, during the bidding process for a public works contract, a bid may be withdrawn due to an error on the part of the bidder. The legislation provides that a contractor may submit a request for withdrawal at any time prior to the time specified for receipt of bids, or within five business days after either a bid opening or a scheduled pre-award meeting, whichever comes later. The request must be submitted via certified or registered mail to the address to which the bid was directed, and shall be effective upon mailing. A request for withdrawal of a bid made after the specified number of days allowed shall result in automatic forfeiture of the bid security.

The contractor who wishes to withdraw a bid shall submit credible evidence, including original documents, that support the claim of an error for the withdrawal, setting forth the following grounds for withdrawal:

(1) An error, clerical as opposed to judgmental in nature and verifiable by written evidence, occurred in the computation of the bid;

(2) The error constitutes either an unintentional and substantial computational error or an unintentional omission of a substantial quantity of labor, material, or both, from the final bid computation; and

(3) There was an absence of gross negligence in the preparation of the bid.

For the purposes of this bill, gross negligence includes the failure of a bidder to account for two or more categories of work, or one of the five types of work set forth in section 16 of P.L.1971, c.198 (C.40A:11-16), the use of more than one erroneous quotation from subcontractors or suppliers, or a prior bid withdrawal request, submitted within the preceding six months.

Following an approval of a timely request for withdrawal of a bid, the bid guarantee shall be returned. If the bidder fails to meet its burden of proof, and fails to execute the contract, the request to withdraw shall be denied and the bid guarantee is forfeited and becomes the property of the contracting unit. The decision of the

governing body shall be final. Once the decision to approve the withdrawal is made, the contracting unit shall continue the award process with the remaining bids. If a bidder withdraws a bid in accordance with this bill, that bidder shall be disqualified from future bidding on the same project, including when all bids are rejected, the project specifications are modified, and the project is rebid.

The bill also provides that the contracting unit may require financial statements from all bidders after the receipt of the bids but before the awarding of the contract.

This bill was pre-filed for introduction in the 2010-2011 session pending technical review. As reported, the bill includes the changes required by technical review, which has been preformed.

ASSEMBLY HOUSING AND LOCAL GOVERNMENT
COMMITTEE

STATEMENT TO

ASSEMBLY COMMITTEE SUBSTITUTE FOR
ASSEMBLY, No. 1592

STATE OF NEW JERSEY

DATED: NOVEMBER 8, 2010

The Assembly Housing and Local Government Committee reports favorably Assembly Committee Substitute for Assembly Bill No 1592.

This substitute would allow a bidder for a local contract to withdraw a bid proposal because of a mistake. This substitute provides that a bid may be withdrawn within five business days after a bid opening, due to a unilateral, non-negligent clerical error on the part of the bidder.

A contractor who wishes to withdraw a bid shall submit a request to the contracting unit. This legislation requires a good-faith review by an agent of the contracting unit, who makes a recommendation to the governing body of the contracting unit prior to the next meeting thereof. The contracting unit may approve the withdrawal if the bidder demonstrates 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..

The "Local Public Contracts Law," N.J.S.A.40A:11-1 et seq. is intended to protect the public from the misuse of public funds. This legislation, which facially protects a bidder for a public works contract, serves the public interest by providing that a clerical error will not necessarily be financially ruinous to an otherwise qualified bidder. As a result, contractors may have a greater incentive to participate in the bidding process, stimulating competition in a manner consistent with sound fiscal practices.

The substitute makes this bill identical to Senate Bill No. 514 (SCS).