

106th New Jersey League of Municipalities Conference
Public Contracts Law and Regulation Update
November 18, 2021 at 9:00 a.m.

Summary of Cases

A. Bid Rejection for Material Deviation

1. Pact Two, LLC v. Township of Hamilton

- April 20, 2020 **Unpublished Opinion** of the NJ Appellate Division
 - Pact Two, LLC v. Twp. of Hamilton, No. A-1762-19T3, 2020 N.J. Super. Unpub. LEXIS 701, 2020 WL 1908512 (App. Div. Apr. 20, 2020)
 - Invitation to Bid (Low Bid) for the rehabilitation of the gravity thickener collector mechanism and existing digester floating cover at wastewater treatment plant.
- Parties:
 - Low bidder: Pact Two LLC (plaintiff);
 - Contracting Unit: Hamilton Township (defendant)
 - Second Lowest bidder: Quad Construction Corp (defendant)

B. Unbalanced Bids

1. Montana Construction Corporation v. Jersey City Municipal Utilities Authority & Spiniello Infrastructure Worldwide

- April 15, 2021 **Unpublished Opinion** of the NJ Appellate Division
 - Mont. Constr. v. Jersey City Mun. Utils. Auth. & Spiniello Infrastructure Worldwide, Nos. A-3730-19, A-3754-19, 2021 N.J. Super. Unpub. LEXIS 626, 2021 WL 1424067 (App. Div. Apr. 15, 2021).
 - Invitation to Bid (Low Bid) for repairs and improvements to Jersey City's sewer and water lines.
- Parties:
 - Low Bidder: Montana Construction Corp. (plaintiff)
 - Contracting Unit: Jersey City Municipal Utilities Authority (JCMUA) (defendant)
 - Second Lowest Bidder: Spiniello Infrastructure Worldwide (defendant)

2. Tomar Construction v. Passaic Valley Sewerage Commission

- May 25, 2021 **Unpublished Opinion** of the NJ Appellate Division
 - Tomar Constr. v. Passaic Valley Sewerage Comm'n, No. A-1217-20, 2021 N.J. Super. Unpub. LEXIS 994, 2021 WL 2100367 (App. Div. May 25, 2021).
 - Invitation to Bid (Low Bid) for Decant Facility Rehabilitation Project to replace sludge decant tank and make other replacements and upgrades to sludge treatment process.
- Parties:
 - Low bidder: Tomar Construction, LLC (plaintiff)
 - Contracting Unit: Passaic Valley Sewerage Commission's (PVSC) (defendant)
 - Second Lowest Bidder: Stone Hill Contracting Co. (defendant)

C. Compliance with the Prevailing Wage Act

1. Sal Electric Company v. Lombardo Contracting Company

- November 25, 2020 **Unpublished Opinion** of the NJ Appellate Division
 - Sal Elec. Co. v. Plainfield Bd. of Educ., No. A-1236-19T3, 2020 N.J. Super. Unpub. LEXIS 2283, 2020 WL 6938155 (Super. Ct. App. Div. Nov. 25, 2020).
 - Invitation to Bid (Low Bid) for electrical service and repair for the 2019 to 2020 school year
- Parties:
 - Low Bidder: Sal Electric Company (plaintiff)
 - Contracting Unit: Plainfield Board of Education (defendant)
 - Second Lowest Bidder: Magic Touch Construction, Inc. (defendant)

D. Appropriate Procurement Method

1. Dobco Inc. v. Bergen County Improvement Authority

- July 8, 2021 **Published Opinion** of the NJ Appellate Division
 - Dobco, Inc. v. Bergen Cty. Improvement Auth., Nos. A-2201-20, A-2202-20, 2021 N.J. Super. LEXIS 93, 2021 WL 2832890 (App. Div. July 8, 2021) [published citation from N.J. Super. forthcoming].
 - New Jersey Supreme Court granted certification on October 22, 2021 and is reviewing this case.
 - Request for Qualifications for Redevelopment/Rehabilitation Services for the Substantial Rehabilitation of the Bergen County Justice Complex.
- Parties:
 - Unsuccessful Proposer: Dobco, Inc. (plaintiff)
 - Taxpayer/VP of Dobco: Hossam Ibrahim (plaintiff)
 - Contracting Units: Bergen County Improvement Authority (BCIA) (defendant); County of Bergen (Bergen) (defendant)

Procurement Checklists – Local Public Contracts Law

State Statutory Requirements – All Contract Types

Requirements	References
OSC Record Retention Language	<i>N.J.A.C. 17:44-2.2</i>
Statement of Corporate Ownership	<i>N.J.S.A. 52:25-24.2</i>
Business Registration Certificate	<i>N.J.S.A. 52:32-44</i>
Affirmative Action and Equal Employment Opportunity: Include “Exhibit A” in all goods & services contracts.	<i>N.J.S.A. 10:5-31;</i> <i>N.J.A.C. 17:27</i>
Disclosure of Investment Activities in Iran	<i>N.J.S.A. 52:32-55 et seq.;</i> <i>N.J.S.A. 40A:11-2.1</i>
Annual Political Contribution Disclosure	<i>N.J.S.A. 19:44A-20.27</i>
Prompt Payment Act – Goods and Services	<i>N.J.S.A. 40A:11-19.1</i>
Acknowledgement of Addenda	<i>N.J.S.A. 40A:11- 23.1</i>
Set-Aside Contracts, if applicable, must be in the advertisement	<i>N.J.S.A. 40A:11-41 to 49</i>
Buy American	<i>N.J.S.A. 40A:11-18</i>

State Statutory Requirements – Public Works Contracts

Requirements	References
Prompt Payment Act	<i>N.J.S.A. 2A:30A- 1 et seq.</i>
Public Works Contractor Registration Act	<i>N.J.S.A. 34:11-56.48 et seq.</i>
N.J. Prevailing Wage Act	<i>N.J.S.A. 34:11-56.25 et seq.</i>
Prevailing Wage Rates Certification – Effective May 7, 2022*	<i>P.L. 2021, c. 301 (A4869 & S2414)</i>
Affirmative Action and Equal Employment Opportunity: Include “Exhibit B” in all construction contracts.	<i>N.J.S.A. 10:5-31;</i> <i>N.J.A.C. 17:27</i>
Mandatory Anti-Discrimination Language	<i>N.J.S.A. 10:2-1</i>
Federal Debarment Certification	<i>N.J.S.A. 52:32-44.1</i>
Bid Guarantee	<i>N.J.S.A. 40A:11-21</i>
Consent of Surety	<i>N.J.S.A. 40:11-22</i>
*For asterisk see LPCL – Common Mistakes and Explanations, #4.	

Local Public Contract Law Required Forms and When They're Due

Required Forms	References	When Forms Are Due	Type of Procurement
Ownership Disclosure Form	<i>N.J.S.A. 52:25-24.2 N.J.S.A. 40A:11-23.2(c)</i>	With Bid Submission	All Procurements
Acknowledgement of Addenda	<i>N.J.S.A. 40A:11-23.1(a) N.J.S.A. 40A:11-23.2(e)</i>	With Bid Submission	All Procurements
Bidders Checklist	<i>N.J.S.A. 40A:11-23.1(b)</i>	With Bid Submission	Construction
Bid Guarantee	<i>N.J.S.A. 40A:11-21 N.J.S.A. 40A:11-23.2(a)</i>	With Bid Submission	Construction and Goods or services (if required by contracting unit)
Consent of Surety	<i>N.J.S.A. 40A:11-22 N.J.S.A. 40A:11-23.2(b)</i>	With Bid Submission	Construction
Named Subcontractors in Bid for Listed Specialty Trades	<i>N.J.S.A. 40A:11-16 N.J.S.A. 40A:11-23.2(d)</i>	With Bid Submission	Construction (Does Not Apply to Road Work)
Federal Debarment Certification	<i>N.J.S.A. 52:32-44.1</i>	Prior to Contract Award	Construction
Business Registration Certificate ¹	<i>N.J.S.A. 52:32-44</i>	Prior to Contract Award	All Procurements
Public Works Contractor Registration Certificate ²	<i>N.J.S.A. 34:11-56.48 et seq.</i>	Prior to Contract Award	Construction
Disclosure of Investment Activities in Iran Certification ³	<i>N.J.S.A. 40A:11-2.1; N.J.S.A. 52:32-58</i>	Prior to Contract Award	All Procurements
Prevailing Wage Rates Certification ⁴	<i>P.L. 2021, c. 301; A4869 & S2414 Effective May 7, 2022</i>	Prior to Contract Award	Construction
EEO/AA Form AA-201	<i>N.J.S.A. 10:5-32; N.J.A.C. 17:27-3.1 N.J.A.C. 17:27-6.2</i>	After Notice of Award, Prior to Signing Contract	Construction
EEO/AA Form AA-302 or Letter of Federal Approval or Certificate of Employee Information Report	<i>N.J.S.A. 10:5-32; N.J.A.C. 17:27-3.1 N.J.A.C. 17:27-4.2</i>	After Notice of Award, Prior to Signing Contract	Goods & Services
*For footnotes 1-4 see LPCL – Common Mistakes and Explanations.			

LPCL – Common Mistakes and Explanations:

1: Requiring the Business Registration Certification (BRC) with the bid:

A 2009 amendment to *N.J.S.A. 52:32-44* extended the time for BRC submission until prior to contract award. The BRC was also removed from the list of mandatory bid items in *N.J.S.A. 40A:11-23.2*. Don't reject a bid for failure to submit the BRC with the bid.

2: Requiring the Public Works Contractor Registration Certification with the bid:

The Public Works Contractor Registration Act provides that the bidder and any named subcontractors must be registered before submitting the bid, but does not specifically require submission of proof of registration with the bid. The winning bidder must submit copies of its subs' registrations prior to the award of the contract (see *N.J.S.A. 34:11-56.55*).

3: Amendment to Certification and Disclosure Regarding Investment Activities in Iran:

On January 29, 2021, Governor Murphy signed Assembly bill A4528. Among other things, the bill, now P.L. 2021, c. 4, amended *N.J.S.A. 52:32-58*, making the investment activities in Iran disclosure now due prior to the time a contract is awarded and at the time the contract is renewed. The change was effective on January 29, 2021.

As a result of the amendment, a bid no longer has to be rejected if the certification is omitted with the bid; it can be submitted prior to contract award. Contracting units should immediately update their bidder checklists to reflect the change in the law. The signed version of Assembly bill A4528 can be found here: https://www.njleg.state.nj.us/2020/Bills/PL21/4_.PDF

4: Recent Legislation Regarding Certification of Prevailing Wage Rate Payment:

On November 8, 2021, Governor Murphy signed Assembly bill A4869/S2414. This bill, now P.L. 2021, c. 301, amended and supplemented the "New Jersey Prevailing Wage Act," (PWA) P.L. 1963, c. 150. The effective date of the law is May 7, 2022. As a result of the amendment, the PWA now requires the following:

1. If the lowest bidder is 10% or more lower than the next lowest bid, the low bidder must provide a certification that the prevailing wage rates shall be paid. This certification is due prior to contract award;
2. If the lowest bidder does **not** provide this certification, the public body **shall** award the contract to the next lowest responsible and responsive bidder.

According to the amendment, the Commissioner of Labor and Workforce Development, in consultation with Division of Local Government Services, will promulgate rules.

OSC Forms & Additional Resources:

Office of the State Comptroller Submission Forms

OSC Homepage: https://nj.gov/comptroller/	
Pre-advertisement Notification for contracts valued at \$12.5 million or more (Forms B1 and B2)	Pre-Advertisement Notification (Form B1) https://www.nj.gov/comptroller/about/work/procurement/docs/osc_compliance_form_12_5b1_pre.pdf
	Post-Award Notification (Form B2) https://www.nj.gov/comptroller/about/work/procurement/docs/osc_compliance_form_12_5b2_post.pdf
Post-award Notification for contracts valued at \$2.5 million or more but less than \$12.5 million (Form A)	https://www.nj.gov/comptroller/about/work/procurement/docs/osc_compliance_forma_2_5m.pdf
Post-award Notification for emergency contracts valued at \$2.5 million or more (Form D)	https://www.nj.gov/comptroller/about/work/procurement/docs/osc_compliance_formd_emergency.pdf

Department of the Treasury

Standard Contract Language for the Business Registration Certificate

BUSINESS REGISTRATION

Pursuant to N.J.S.A. 52:32-44, _____ (“Contracting Agency”) is prohibited from entering into a contract with an entity unless the bidder/proposer/contractor, and each subcontractor that is required by law to be named in a bid/proposal/contract has a valid Business Registration Certificate on file with the Division of Revenue and Enterprise Services within the Department of the Treasury.

Prior to contract award or authorization, the contractor shall provide the Contracting Agency with its proof of business registration and that of any named subcontractor(s).

Subcontractors named in a bid or other proposal shall provide proof of business registration to the bidder, who in turn, shall provide it to the Contracting Agency prior to the time a contract, purchase order, or other contracting document is awarded or authorized.

During the course of contract performance:

- (1) the contractor shall not enter into a contract with a subcontractor unless the subcontractor first provides the contractor with a valid proof of business registration.
- (2) the contractor shall maintain and submit to the Contracting Agency a list of subcontractors and their addresses that may be updated from time to time.
- (3) the contractor and any subcontractor providing goods or performing services under the contract, and each of their affiliates, shall collect and remit to the Director of the Division of Taxation in the Department of the Treasury, the use tax due pursuant to the Sales and Use Tax Act, (N.J.S.A. 54:32B-1 et seq.) on all sales of tangible personal property delivered into the State. Any questions in this regard can be directed to the Division of Taxation at (609)292-6400. Form NJ-REG can be filed online at <http://www.state.nj.us/treasury/revenue/busregcert.shtml>.

Before final payment is made under the contract, the contractor shall submit to the Contracting Agency a complete and accurate list of all subcontractors used and their addresses.

Pursuant to N.J.S.A. 54:49-4.1, a business organization that fails to provide a copy of a business registration as required, or that provides false business registration information, shall be liable for a penalty of \$25 for each day of violation, not to exceed \$50,000, for each proof of business registration not properly provided under a contract with a contracting agency.

Emergency Purchases or Contracts

For purchases of an emergent nature, the contractor shall provide its Business Registration Certificate within two weeks from the date of purchase or execution of the contract or prior to payment for goods or services, whichever is earlier.

**2021 Legislation Regarding the Certification of
Prevailing Wage Rate, *Effective May 7, 2022:***

[Second Reprint]

**ASSEMBLY, No. 4869
STATE OF NEW JERSEY
219th LEGISLATURE**

INTRODUCED OCTOBER 22, 2020

Sponsored by:

Assemblyman HAROLD "HAL" J. WIRTHS

District 24 (Morris, Sussex and Warren)

Assemblyman ANTHONY S. VERRELLI

District 15 (Hunterdon and Mercer)

Assemblyman PARKER SPACE

District 24 (Morris, Sussex and Warren)

Senator TROY SINGLETON

District 7 (Burlington)

Senator FRED H. MADDEN, JR.

District 4 (Camden and Gloucester)

Co-Sponsored by:

Assemblymen Houghtaling, Freiman, Egan, Assemblywoman Lampitt, Senators Oroho and Pou

SYNOPSIS

Requires certain bidders for prevailing wage public work to provide proof that prevailing wage will be paid.

CURRENT VERSION OF TEXT

As amended by the General Assembly on June 21, 2021.

EXPLANATION – Matter enclosed in bold-faced brackets [thus] in the below bill is not enacted and is intended to be omitted in the law. Matter underlined thus is new matter. Matter enclosed in superscript numerals has been adopted as follows:

¹Assembly ALA committee amendments adopted December 14, 2020.

²Assembly floor amendments adopted June 21, 2021.

AN ACT concerning certain contracts for public work and amending and supplementing P.L.1963, c.150.

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

1. (New section) 1a.¹ If a person makes the lowest bid for a contract with a public body for public work subject to the provisions of the “New Jersey Prevailing Wage Act,” P.L.1963, c.150 (C.34:11-56.25 et seq.) and that bid is ten percent or more lower than the next lowest bid for the contract, the person making the lowest bid shall 2[provide proof to the satisfaction of] certify to² the public body that the prevailing wage rates required by that act shall be paid. If the bidder does not provide the 2[proof] certification prior to award of the contract², the 2[bid shall be rejected] public body shall award the contract to the next lowest responsible and responsive bidder. This certification shall be required only when a public body is engaging in competitive bidding for public work² .

2[1b. Proof in accordance with subsection a. of this section may include, but shall not be limited to, employment contracts or agreements with workers stating the rate of wages that the person contracts or agrees to pay the employees or workers for the contract, documentation of the costs of supplies required to complete the contract, documentation as to the number of employees or workers whose services will be engaged for the contract, the estimated number of hours or days to complete the project, and any additional documentation as may be permitted by the Commissioner of Labor and Workforce Development.]¹

b. The Commissioner of Labor and Workforce Development, in consultation with the Division of Local Government Services in the Department of Community Affairs, shall promulgate rules and regulations concerning the standardization of the certification necessary to effectuate the provisions of this section.²

2. Section 3 of P.L.1963, c.150 (C.34:11-56.27) is amended to read as follows:

3. a. Every contract in excess of the prevailing wage contract threshold amount for any public work to which any public body is a party or for public work to be done on property or premises owned by a public body or leased or to be leased by a public body shall contain a [provision] 2[certification] provision² stating the prevailing wage rate which can be paid (as shall be designated by the commissioner) to the workers employed in the performance of the contract and [the contract shall contain a stipulation that] 2the contract shall contain a stipulation that² such workers shall be paid not less than such

prevailing wage rate. Such ~~[contract]~~ ²~~[certification]~~ ~~contract~~² shall also contain a provision that in the event it is found that any worker, employed by the contractor or any subcontractor covered by said contract, has been paid a rate of wages less than the prevailing wage required to be paid by such contract, the public body, the lessee to whom the public body is leasing a property or premises or the lessor from whom the public body is leasing or will be leasing a property or premises may terminate the contractor's or subcontractor's right to proceed with the work, or such part of the work as to which there has been a failure to pay required wages and to prosecute the work to completion or otherwise. The contractor and his sureties shall be liable for any excess costs occasioned thereby to the public body, any lessee to whom the public body is leasing a property or premises or any lessor from whom the public body is leasing or will be leasing a property or premises.

b. The Commissioner of Labor and Workforce Development, in consultation with the Division of Local Government Services, shall promulgate rules and regulations concerning the standardization of the ²~~[certification]~~ contractual language² necessary to effectuate the provisions of ²~~[P.L. , c. (C.) (pending before the Legislature as this bill)] this section~~².
(cf: P.L.2007, c.68, s.2)

3. This act shall take effect ²~~[immediately]~~ 180 days from the date of enactment, except that the Commissioner of Labor and Workforce Development make take any anticipatory action in advance thereof as may be necessary for the implementation of this act².