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## Owners of Public Works Projects, Beware: Implications of New York's Latest Court Decision on Public Bidding Laws

The legal landscape surrounding the competitive bidding and award of public works contracts has always been complicated, but may have become even more so for New York public owners in the wake of a recent decision of New York's highest court.

### The Facts

In the case of *AAA Carting and Rubbish Removal, Inc. v. Town of Southeast, et al*, decided on June 11, 2011 ("AAA Carting"), the Court of Appeals was called upon to determine whether the Town of Southeast had complied with §103 of the General Municipal Law ("GML §103"), which requires municipalities to award competitively bid contracts to the "lowest responsible bidder." Most public owners are generally familiar with the requirements of GML §103, and historically have enjoyed a degree of deference from courts in determining whether a low bidder on a given public contract meets the standard of being "responsible." In assessing contract awards in Article 78 challenges, New York courts may not substitute their judgment for that of a public owner in this regard, and may only disturb an award where an owner acts in an "arbitrary and capricious" or otherwise unlawful manner. Unfortunately, *AAA Carting* appears to limit the degree of deference to which public owners are entitled in making determinations of a bidder's responsibility under GML §103.

In *AAA Carting*, the Town of Southeast sought bids for a refuse collection contract and received three bids, the highest of which was from its then present contractor. Town council members thus visited the operations of the lowest (AAA Carting) and next-lowest (Suburban) bidders. A council member's visit to AAA yielded a report opining that AAA Carting had the requisite experience and equipment to perform the obligations of the contract and, therefore, appeared to be a "responsible" bidder. However, a subsequent visit to Suburban revealed a more experienced and professional staff with better training and safety programs, as well as a newer fleet of vehicles, prompting Town council members to find Suburban "superior" in all respects to AAA Carting. By a split vote, the Town passed a resolution awarding the contract to Suburban, citing qualitative factors indicating that the Town expected it would receive a higher overall level of service from Suburban than from AAA Carting.

### The Outcome

AAA Carting commenced an Article 78 proceeding protesting the award. It won at the trial level and was reversed at the appellate division, bringing the matter to the Court of Appeals – New York's highest court. Ultimately, a majority of the Court of Appeals agreed with the trial court, holding that the Town had in fact violated GML §103. The majority's rationale was that §103 precluded the Town from choosing the higher bidder "merely because it subjectively believes that a higher bidder is more preferable and more responsible than a lower bidder based on criteria not set forth in the bidding proposal." After the Town councilmembers investigated and found that AAA Carting was able to perform the contract as specified, the Town's interjection of other criteria was contrary to the competitive bid process and therefore, violated the law.

The Court of Appeals majority indicated that the Town, had it wished to consider other qualitative factors in its decision, could have rejected *all* bids and started the bidding process anew, "incorporating whatever reasonable and nonrestrictive requirements it wishes to consider into the bid solicitation." In a dissenting opinion, the minority argued that not every significant factor with which to evaluate prospective bidders is imminently obvious to a public owner when crafting its bid specifications.



The dissent also noted that, “[o]nly by exercising its sound business judgment on the question whether a bidder is financially and technically responsible can a municipal agency ensure that the best work consistent with a low price is obtained – as opposed to merely adequate work that costs less in the short term, but may cost public money in the future.” However, the majority’s opinion prevailed and is now the supreme law of the state, giving cause for greater trepidation amongst municipal bodies engaged in the public bidding process.

## The Lesson

This majority in *AAA Carting* applied the same principles as courts have used historically in assessing public bid disputes, albeit reached a result that limited the public owner’s exercise of discretion. So what does this mean for public owners going forward with the bidding process?

First, as the majority hinted, be diligent in crafting your bid specifications to capture all of the technical, qualitative, and experiential factors you will consider in assessing whether a low bidder is, in fact, “responsible.” As long as the specifications serve a legitimate public interest and are not unduly onerous, a public owner can demand that bidders strictly comply with the criteria specified. A significant problem for the Town in *AAA Carting* was that its council member had already found the lowest bidder to be “responsible” before it applied qualitative factors not identified to potential bidders to determine that the next-lowest bidder was a superior choice. As the majority duly noted, the standard set forth in GML §103 requires an award go to the “lowest responsible” bidder – not the *more* or *most* responsible bidder.

Second, reserve your right to reject all bids. The majority also noted that the Town could have simply exercised its option to reject all bids and then re-drafted its specifications to include the qualifications it deemed important in its considerations of which bidders are “responsible.” However, take caution if using this approach to avoid adding criteria that is too onerous or unduly limiting to competition – especially where the criteria could only be satisfied by a single bidder. The creative styling of specifications so as to circumvent public bidding laws is not permitted by law and thus, specifying criteria that give the appearance of this practice is likely to result in a bid protest.

Finally, build an adequate record of your decision-making process. In *AAA Carting*, the majority alluded to other alleged reasons offered by the Town for its rejection of the low bid, including AAA Carting’s failure to complete a bid questionnaire, lack of county licensure, and insufficient equipment. However, these reasons were raised on the record only after the decision to award to Suburban was made, and thus, could not properly be considered by the court. In addition, a Town councilman had already opined in his report that the low bidder was “responsible” given its apparent ability to sufficiently perform the contract. When the low bid was passed over, AAA Carting requested an explanation why its bid was not considered responsible, and received no response. Thus, nothing was ever put on record to indicate AAA Carting was not a “responsible” bidder until much too late. The Town would have been better served by fully evaluating the two lowest bidders before making a statement as to either’s responsibility. The Town further should have noted on record the other alleged deficiencies in AAA Carting’s bid to have a better chance at supporting its decision and surviving judicial scrutiny when challenged.

If you have any questions regarding this LEGALcurrents, please do not hesitate to contact any member of our firm’s Litigation Practice at (585) 232-6500. ■



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