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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2010-20**

GAETA RECYCLING CO., INC.,

Plaintiff-Appellant,

v.

**BOROUGH OF HAWTHORNE,
and RECYCLE TRACK
SYSTEMS NJ, LLC,**

Defendants-Respondents,

and

B AND B DISPOSALS LLC,

Defendant.

Argued May 24, 2022 – Decided March 10, 2023

Before Judges Currier, DeAlmeida and Smith.

On appeal from the Superior Court of New Jersey, Law
Division, Passaic County, Docket No. L-0742-21.

Adam D. Wolper argued the cause for appellant
(Wolper Law Group, LLC, attorneys; Adam D. Wolper,
on the briefs).

Michael D. Pasquale argued the cause for respondent Borough of Hawthorne.

Stuart M. Lederman argued the cause for respondent Recycle Track Systems NJ, LLC (Riker Danzig Scherer Hyland & Perretti LLP and Chiaia & Associates LLC, attorneys; Stuart M. Lederman and John F. Chiaia, of counsel and on the brief; Diane N. Hickey and Matthew Karmel, on the brief).

The opinion of the court was delivered by
DeALMEIDA, J.A.D.

Plaintiff Gaeta Recycling Co., Inc. (Gaeta) appeals from the March 29, 2021 order of the Law Division dismissing its verified complaint in lieu of prerogative writs challenging the award by defendant Borough of Hawthorne of a contract for solid waste and recycling hauling services to defendant Recycle Track Systems NJ, LLC (RTS). We affirm.

I.

In December 2020, the borough released a notice for an open bid with specifications for solid waste, recycling waste, and yard waste hauling services for a five-year period commencing April 1, 2021. The specifications permitted bids with an aggregate price for all of the services or with prices for hauling the individual categories of solid waste. The borough received two bids. Gaeta, a solid waste and recycling hauler, submitted a bid with prices for the solid waste

and recycling hauling services components that were higher than those in the bid of RTS, a solid waste transportation broker. Although RTS is a solid waste transportation broker, it also has a solid waste hauling license and a certificate of public convenience and necessity (CPCN) to engage in solid waste hauling.¹ However, at the time it submitted its bid, RTS had never provided solid waste hauling services. It did not own or lease any garbage trucks or containers and had never deposited solid waste at a licensed disposal facility.

In its bid, RTS stated that if awarded the contract, it intended to subcontract defendant B and B Disposals, LLC (B&B) to perform the contract. B&B, a solid waste and recycling hauler, was under contract with the borough from 2016 to 2021 to provide solid waste and recycling hauling. In an addendum to its bid, RTS stated:

RTS is a licensed broker and a licensed hauler in the State of New Jersey. As part of our business model, RTS subcontracts to locally based haulers – equipping them with our in-truck tracking technology and service team – to carry out all trash and recycling removal services for our clients. Our local subcontractor [for] the Borough of Hawthorne will be [B&B]. B&B is

¹ The Solid Waste Utility Control Act, N.J.S.A. 48:13A-6(a), provides that, "[n]o person shall engage, or be permitted to engage, in the business of solid waste collection or solid waste disposal until found by the Department of Environmental Protection [(DEP)] to be qualified by experience, training or education to engage in such business, is able to furnish proof of financial responsibility, and unless that person holds a [CPCN] issued by the [DEP]."

based in Hillside, New Jersey and has over fifteen years of experience serving municipal and commercial clients in North Jersey. Based on our prior work with them, we are confident in their ability to provide outstanding service to your community. And, at the end of the day, we at RTS of course own all our contracts and take full responsibility for their successful completion We also own the performance bond, all customer service functions, and are your primary point of contact.

RTS specified that B&B would use its equipment to perform the contract and that the equipment was detailed in an attached list. The list, however, was not attached to the RTS bid. RTS subsequently remedied that omission by submitting a list of B&B's equipment that would be used to perform the contract.

Because the bid specifications did not contain a process for designation of a subcontractor, RTS's bid did not include a copy of its subcontract with B&B or any additional financial information about B&B. The bid also did not include a consent of surety from B&B or an insurance certification for B&B.

Gaeta submitted objections to the borough, arguing that there were several infirmities in the RTS bid. The borough's governing body subsequently adopted resolutions rejecting Gaeta's objections and awarding the solid waste and recycling hauling contract to RTS. The governing body found that RTS submitted a conforming bid and was the lowest responsible bidder for solid waste and recycling hauling services. In reaching that conclusion, the governing

body adopted the opinion of its counsel that RTS was not precluded by law from bidding on the contract because of its status as a solid waste transportation broker nor barred from subcontracting the services to B&B. In addition, the governing body concluded that the omission by RTS of the list of B&B's equipment was not a material defect in its bid because it was quickly remedied and the borough was aware that B&B, as the current vendor, had sufficient equipment to perform the contract.

Gaeta filed a complaint in lieu of prerogative writs in the Law Division challenging the award of the contract to RTS. Gaeta alleged RTS was not a responsible bidder because it had no experience performing solid waste hauling services and did not own the equipment necessary to perform the contract. In addition, Gaeta alleged, even if RTS was a responsible bidder, B&B was not a responsible bidder and, as a result, RTS could not subcontract with B&B to perform the contract. According to Gaeta, B&B was in dire financial condition and had not paid tipping fees, insurance policy premiums, insurance premium financing, and workers' compensation premiums. In light of B&B's financial situation, Gaeta contended, B&B should be disqualified from bidding on solid waste hauling contracts through RTS as a nominal bidder.

Gaeta also argued the RTS bid was materially defective because it: (1) improperly delegated responsibility for the services to B&B; (2) subcontracted the services to B&B; (3) did not provide any insurance or ownership information for B&B; (4) failed to list the equipment to be used to perform the contract because it submitted a list of B&B's equipment without proof that the equipment was available to RTS; (5) filed an inaccurate vehicle dedication affidavit because it did not own collection vehicles; and (6) filed a false non-collusion affidavit which did not note the contemplated subcontract with B&B.

Gaeta sought an order invalidating the award of the contract to RTS and either awarding the contract to Gaeta or ordering the borough to rebid the contract. RTS, the borough, and B&B opposed Gaeta's request for relief.

On March 29, 2021, the trial court issued an oral opinion dismissing Gaeta's complaint and upholding the resolutions awarding the contract to RTS. The court concluded there is no statute barring solid waste transportation brokers from bidding on a public contract to haul solid waste and subcontracting the contract. Nor is there, the court found, a statutory or regulatory requirement that RTS own the equipment to be used to perform the contract, provided the equipment is available to the subcontractor. In addition, the court found that RTS is a responsible bidder, given its experience acting as a solid waste

transportation broker performing contracts through subcontractors for other public entities and its ability to secure a performance bond for the Hawthorne contract. The court also noted that the RTS bid gives the borough enhanced assurance that the contract will be performed because if B&B fails to perform, RTS will be responsible for finding another entity to fulfill the contract.

On March 29, 2021, the trial court entered an order denying the relief sought by Gaeta and dismissing its complaint with prejudice.

This appeal followed. Gaeta argues the trial court erred when it held: (1) solid waste transportation brokers are not prohibited, as a matter of law, from bidding on municipal solid waste hauling contracts to be performed by a subcontractor; (2) RTS was a responsible bidder; and (3) RTS's bid was not materially defective.²

II.

"A reviewing court cannot overturn the decision of a municipal body unless it finds that the decision was arbitrary, capricious and unreasonable." Palamar Constr., Inc. v. Twp. of Pennsauken, 196 N.J. Super. 241, 250 (App. Div. 1983). A municipality's abuse of discretion must be clear "in order for such

² Shortly after Gaeta filed its notice of appeal, we denied its application to file an emergent motion for a stay of the award of the contract to RTS.

a decision to be overturned by a court." Entech Corp. v. City of Newark, 351 N.J. Super. 440, 457 (Law Div. 2002). However, we review de novo decisions of the trial court on questions of law. Rowe v. Bell & Gossett Co., 239 N.J. 531, 552 (2019).

The Local Public Contracts Law (LPCL), N.J.S.A. 40A:11-1 to -60, was created to ensure a fair, public, and competitive bidding process for the taxpayer's benefit. Indeed, "[t]he statutes authorizing competitive bidding accomplish that purpose by promoting competition on an equal footing and guarding against 'favoritism, improvidence, extravagance and corruption.'" Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307, 313 (1994) (quoting Twp. of Hillside v. Sternin, 25 N.J. 317, 322 (1957)). A public contract must be awarded "not simply to the lowest bidder, but rather to the lowest bidder that complies with the substantive and procedural requirements in the bid advertisements and specifications." Ibid. If the bid does not satisfy the law, a public entity does not have the discretion to waive the defect. Id. at 314.

The LPCL is understood "to curtail the discretion of local authorities by demanding strict compliance with public bidding guidelines." L. Pucillo & Sons, Inc. v. Mayor and Council of Twp. of New Milford, 73 N.J. 349, 356 (1977). Certain non-material defects, however, may be cured or waived by the

solicitor of the bid. Meadowbrook, 138 N.J. at 314-15. We apply a two-prong test to determine whether alleged defects in a bid are substantial and therefore non-waivable. Id. at 315. The first is whether waiver would deprive the municipality of its assurances the awarded contract will be adhered to, performed, and guaranteed to meet the specifications. Twp. of River Vale v. R.J. Longo Constr. Co., 127 N.J. Super. 207, 216 (Law Div. 1974). Secondly, we consider whether waiver of a bid defect would adversely affect competitive bidding by placing the bidder in a position of advantage over other bidders or otherwise negatively affect competitive bidding. Ibid.

We have carefully reviewed the record and find no basis on which to reverse the trial court's decision. We agree that there is no statutory or regulatory bar to a solid waste transportation broker bidding on a public solid waste hauling contract and naming in its bid a solid waste hauler to perform the contract as a subcontractor.

N.J.S.A. 40:66-4(a) provides that a

governing body may, if it deem it more advantageous, contract with any person for . . . the collection or disposal of solid waste. Before making any such contract or contracts the governing body shall first adopt specifications for the doing of the work in a sanitary and inoffensive manner. . . .

Any specifications adopted by the governing body for the collection or disposal of solid waste shall conform to the uniform bid specifications [(UBS)] for municipal solid waste collection contracts established pursuant to [N.J.S.A. 48:13A-7.22]. Any such contract or contracts, the total amount of which exceeds [a monetary threshold applicable here] shall be entered into and made only after bids shall have been advertised therefor, and awarded in the manner provided in the [LPCL].

The UBS "establish[es] uniform bidding practices for municipal solid waste collection contracts in order to promote competition among solid waste collectors, protect the interests of consumers and to enhance the [DEP's] ability to adequately supervise the existence of effective competition." N.J.A.C. 7:26H-6.1. The UBS applies to "municipal solid waste collection contracts which are required to be publicly advertised pursuant to" the LPCL. N.J.A.C. 7:26H-6.2. The UBS requires all municipal waste hauling bids to meet certain requirements under N.J.A.C. 7:26H-6.5 and failure to conform to the requirements results in disqualification of the nonconforming bid. N.J.A.C. 7:26h-6.5(a). No regulation in the UBS prohibits a solid waste transportation broker from bidding on a public contract for solid waste hauling that will be carried out by a subcontractor who is a licensed solid waste hauler.

Nor is there a statutory bar to a solid waste transportation broker bidding on such a contract. A broker is "a person who for direct or indirect compensation

arranges agreements between a business concern and its customers for the collection, transportation, treatment, storage, processing, transfer or disposal of solid waste" N.J.S.A. 13:1E-127(n).³ We found no statutory provision, and none was identified by Gaeta, providing that a solid waste transportation broker may not secure such an agreement through bidding on a municipal contract to be carried out by a subcontractor.

In this instance, the "business concern" identified in N.J.S.A. 13:1E-127(n), on whose behalf RTS acted, is B&B and the "customer" is the borough. Under a strict reading of the statute, RTS did not "arrange" an "agreement" between those entities. The contract awarded is between RTS and the borough. However, the parties agree that RTS bid on the contracts in its role as a licensed solid waste transportation broker who openly stated that it intended to fulfill the contract through an identified subcontractor. We are convinced that this arrangement falls within the intent of the Legislature when enacting N.J.S.A. 13:1E-127(n). An unnecessarily wooden interpretation of the statute to exclude

³ The definition of "broker" was added to the statute through enactment of L. 2019, c. 397, §3, effective June 21, 2020. A regulation last amended in 2002 defines "broker" as "any person, not registered with the [DEP], who for compensation (e.g., a commission or fee) arranges for the transportation or disposal of solid waste . . . other than waste generated by that person." N.J.A.C. 7:26-16.2. The statutory definition controls because it postdates the regulation and was enacted by the Legislature.

the subcontract at issue here would frustrate the legislative intent to permit solid waste transportation brokers to facilitate the award of solid waste hauling contracts. In addition, we see nothing in this record suggesting that the award of a contract under circumstances presented here would be arbitrary, capricious, or unreasonable. To the contrary, RTS's bid provides the municipality with an enhanced assurance that the contract will be performed. RTS acknowledged in its bid that if B&B failed to perform, RTS would be responsible for ensuring that the services are provided to the municipality.

We also find sufficient support in the record for the trial court's conclusion that the governing body acted within its discretion when it determined that RTS was a responsible bidder.

A responsible bidder is one who at the time of the bid submission:

1. Conforms to all requirements of the bid specifications;
2. Has a tariff on file with the [DEP];⁴
3. Has experience in the type of work to be performed;
4. Has the equipment necessary to perform the work described in the bid specifications; and

⁴ Gaeta does not dispute that RTS or B&B have tariffs on file with the DEP.

5. Has the financial ability to perform the work.

[N.J.A.C. 7:26H-6.8(b).]

There is sufficient support in the record for the governing body's determination that RTS complied with the bid specifications. Gaeta argues that RTS's bid was defective because it was not accompanied by a list of equipment owned by RTS to perform the contract. The governing body acted within its discretion when it determined that while RTS did not initially submit a list of equipment, it cured that defect shortly after the bids were opened by submitting a list of equipment owned by B&B that would be used to perform the contract. The borough was familiar with that equipment, which had been used by B&B to successfully perform the current contract over almost five years. If the initial omission of the list is viewed as a material defect, which we doubt to be the case, the borough's waiver of that defect did not deprive it of the assurance that the contract would be performed. The delay in submission of the list was short and, although RTS did not submit proof that the equipment was available to it, the list indicates that the equipment is owned by B&B, which would use the equipment to perform the contract.

Nor do we see proof that waiver of the defect had an adverse effect on competitive bidding. P & A Constr., Inc. v. Twp. of Woodbridge, 365 N.J.

Super. 164, 173 (App. Div. 2004). All bidders were required to identify the equipment that would be used to perform the contract. The fact that RTS was permitted to correct its oversight of failing to attach the list identified in its bid did not give it an undue competitive advantage over Gaeta.

There is also sufficient support in the record for the governing body's determination that RTS has the experience necessary to perform the contract. RTS has successfully acted as a broker of solid waste hauling contracts performed by subcontractors for other public entities. Importantly, RTS, which is also a licensed solid waste transporter, has a CPCN issued by DEP after a finding that RTS is "qualified by experience, training, or education to engage in such a business." N.J.S.A. 48:13A-6(a). In addition, RTS secured a performance bond for the contract and acknowledged it will be responsible for ensuring that the borough is provided with solid waste hauling services in the event of a default by B&B. Finally, as discussed above, RTS has the equipment available to perform the contract through its subcontractor.

To the extent we have not specifically addressed any of Gaeta's remaining claims, we conclude they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION