

**NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-2370-21

IN RE NEW JERSEY  
DEPARTMENT OF  
TRANSPORTATION  
REJECTION OF THE BID  
PROTESTS OF MOUNT  
CONSTRUCTION CO., INC.,  
AND AUTHORIZING AN  
AWARD OF THE  
MAINTENANCE TIMBER  
AND UNDERWATER  
STRUCTURE REPAIR  
CONTRACTS, NORTH,  
CENTRAL AND SOUTH, TO  
IEW CONSTRUCTION  
GROUP, INC.

---

Submitted September 21, 2022 – Decided March 7, 2023

Before Judge Haas and DeAlmeida.

On appeal from the New Jersey Department of  
Transportation.

Florio Perrucci Steinhardt Cappelli Tipton & Taylor,  
LLC, attorneys for appellant Mount Construction Co.,  
Inc. (Louis Cappelli, Jr. and Nicholas A. Sullivan, of  
counsel and on the briefs).

Matthew J. Platkin, Acting Attorney General, attorney for respondent New Jersey Department of Transportation (Sookie Bae-Park, Assistant Attorney General, of counsel; Ryne A. Spengler, Deputy Attorney General, on the brief).

Fenningham, Dempster & Coval, LLC, attorneys for respondent IEW Construction Group, Inc. (Gerald A. Hughes and Timothy B. Fenningham, on the brief).

## PER CURIAM

Mount Construction Company, Inc. (Mount) appeals from the February 23, 2022 final agency decision of respondent Department of Transportation (DOT) rejecting its protest of the agency's award of three construction contracts to respondent IEW Construction Group, Inc. (IEW). We affirm.

### I.

In 2021, DOT issued advertisements and specifications (advertisements) requesting bids for three construction projects:

Maintenance Timber and Underwater Structural Repair Contract, North - 2022; Various Locations; Bergen, Essex, Hudson, Morris, Passaic, Sussex, Union and Warren (Including and North of Route 57) Counties; DP No. 22434; CE No. 2622783 (North Project);

Maintenance Timber and Underwater Structural Repair Contract, South - 2022; Various Locations; Atlantic, Burlington, Camden, Cape May, Cumberland, Gloucester and Salem Counties; DP No. 22436; CE No. 2622785 (South Project); and

Maintenance Timber and Underwater Structural Repair Contract, Central - 2022; Various Locations; Hunterdon, Mercer, Middlesex, Monmouth, Ocean, Somerset and Warren (South of Route 57) Counties; DP No. 22435; CE No. 2622784 (Central Project).

Each advertisement provides that "[m]inimum wage rates for this project shall be as specified in the 'Prevailing Wage Determination of the New Jersey Department of Labor and Workforce Development' [(DOL)] on file with this Department." Each advertisement also notes that pursuant to the Prevailing Wage Act (PWA), N.J.S.A. 34:11-56.25 to -56.70c, if the DOL Commissioner makes a determination that an employer has violated the PWA "by paying wages at rates less than the rates applicable under" the statute, the Commissioner may issue a stop-work order and civil penalties. The advertisements do not, however, require that bids on the projects must include worker-related costs calculated based on prevailing wage rates (PWR).<sup>1</sup>

IEW was the lowest bidder for each project and Mount was second lowest bidder. IEW bid \$193,634.73 less on the North Project, \$5,944.98 less on the South Project, and \$146,255.98 less on the Central Project than Mount.

---

<sup>1</sup> The parties do not dispute that, pursuant to the PWA, public works projects must pay at least the PWR to their workers. N.J.S.A. 34:11-56.27.

DOT rejected IEW's bids for failing to meet the PWR for "Worker, Type 'A.'" DOT determined the PWR for this category of employee was \$78.73 per hour. However, according to the agency, IEW's bid of approximately \$50.00 per hour on the North Project and South Project, and \$40.00 per hour on the Central Project for this category of worker were non-compliant with the advertisements. Although IEW's bids were otherwise compliant with the advertisements and reasonable, DOT determined IEW's failure to price the costs for "Worker, Type 'A'" at the PWR rendered the bids ineligible. As a result, the agency awarded the three contracts to Mount, the second lowest bidder.

IEW protested the rejection of its bids and requested an informal conference with DOT. At the agency, while acknowledging that it must pay the PWR for any work actually performed on the projects, IEW argued nothing in the PWA or the advertisements requires bidders to submit bid prices at least equal to the PWR on any worker-related item in its bids. In addition, IEW argued a failure to bid at least equal to the PWR on any worker-related item was not a basis for rejection set forth in the DOT's Standard Specifications for Road and Bridge Construction, 2019 (Standard Specifications), and that the agency had a longstanding practice of accepting bids where the worker-related item prices were below the PWR, including bids that listed some costs at a penny.

IEW claimed there was no pre-bid notice that PWR rates would be required as the minimum to bid, and that the PWR rate identified by DOT in its decision was arbitrary because the PWR varied depending on what type of "Type 'A' worker" was being considered.

After considering IEW's arguments, DOT reversed its decision to reject IEW's bids. The agency concluded that while all bidders must comply with the PWA, there was no specific provision in the advertisements requiring a contractor to submit a bid price of at least the PWR for any particular line item. To the extent that IEW bid below the PWR, but ultimately will be required to pay the PWR, it did so at its own risk. Thus, DOT concluded, IEW conformed to the material requirements of the advertisements and its bids for the three projects contained no material defects. The agency awarded the three contracts to IEW.

Mount protested the award of the contracts to IEW. It argued that bidding at the PWR for worker-related items was a material element of the bids and the failure to reflect the actual cost of performing the projects was a material bid defect. It also argued that IEW, by bidding under the PWR, submitted unbalanced bids that undermine competition and should be rejected.

On February 23, 2022, DOT issued a final agency decision denying Mount's protests and upholding the award of the three contracts to IEW. The agency reiterated its holding that IEW's bids conformed to the material requirements of the advertisements which contained no specific provision requiring bidders to bid equal to or above the PWR for worker-related item. In addition, DOT concluded that even though IEW's bid was potentially lower than the anticipated costs of completing the projects, the agency had previously accepted "penny bids" and did not give IEW notice that this kind of bid was unacceptable.

This appeal followed. Mount argues DOT's decision to award the contracts to IEW was arbitrary, capricious, and unreasonable because the agency ignored the "explicit requirement" of the advertisements to comply with the PWA and submit pricing that meets or exceeds the PWR on worker-related items. In addition, it argues it was denied an opportunity to be heard during IEW's conference at DOT. We stayed DOT's award of the contracts pending appeal.

## II.

We use a deferential standard of review for governmental decisions in bidding cases. In re Protest of Award of On-Line Games Prod. & Operation

Servs. Cont., Bid No. 95-X-20175, 279 N.J. Super. 566, 590 (App. Div. 1995).

"The standard of review on the matter of whether a bid on a local public contract conforms to specifications . . . is whether the decision was arbitrary, unreasonable, or capricious." Ibid. (citing Palamar Constr. v. Twp. of Pennsauken, 196 N.J. Super. 241, 250 (App. Div. 1983); Stano v. Soldo Constr. Co., 187 N.J. Super. 524, 534 (App. Div. 1983)). If a public entity's decision is grounded rationally in the record and does not violate the applicable law, it must be upheld. Ibid.

The DOT Commissioner has the authority to "advertise for bids on the work and materials covered by the plans and specifications for each project," N.J.S.A. 27:7-29, and must "award the contract to the lowest responsible bidder." N.J.S.A. 27:7-30. "The lowest responsible bidder on a local public contract must not only be deemed responsible but must submit the lowest bid which conforms with the contract specifications." On-Line Games, 279 N.J. Super. at 590 (citing Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307, 313 (1994)). The contract specifications apply equally to all bidders, and any material departure from the bid specifications renders bids nonconforming and invalid. Hall Constr. Co. v. N.J. Sports & Exposition Auth., 295 N.J. Super. 629, 635 (App. Div. 1996). Material conditions cannot be

waived by the contracting authority, but minor or inconsequential discrepancies and technical omissions may be waived. Meadowbrook, 138 N.J. at 314.

Thus, when a contracting agency makes a determination regarding a bid's conformity with an advertisement, "[t]he preliminary inquiry is whether the bid deviates from the" advertisement. On-Line Games, 279 N.J. Super. at 594. If there is a deviation, the court then determines whether the deviation is material and can be waived. Ibid.

We have carefully considered the record and find sufficient support for DOT's conclusion that IEW's bids conformed with the advertisements. Although the advertisements indicate that the workers on the projects must be paid the PWR, as provided by statute, they do not specify that bidders must bid each worker-related item at or above the PWR. In addition, a failure to bid at the PWR is not one of the reasons set forth in N.J.A.C. 16:44-7.4 for DOT to reject a bid.

There is also sufficient support in the record for the agency's determination that IEW's pricing of worker-related costs at less than the PWR did not result in a bid so unbalanced as to render it invalid. "Every contractor may apply [their] own business judgment in the preparation of a public bid, and [their] willingness to perform one of the items" for an amount that does not



reflect the actual costs "is but [their] judgmental decision in an effort to underbid [their] competitors." Riverland Constr. Co. v. Lombardo Contracting Co., 154 N.J. Super. 42, 47 (App. Div. 1977). This is because a contractor, backed by a performance bond, is required to complete the work bid on in accordance with the advertised specifications. Ibid. The contractor must complete the work "whether it does so at a profit or loss." Id. at 48. "Reasonable unbalancing is perfectly proper," in the absence of fraud, collusion, unfair restriction of competition, or other substantial irregularity. Id. at 47; see also Frank Stamato & Co. v. City of New Brunswick, 20 N.J. Super. 340, 344 (App. Div. 1952).

We are not persuaded by Mount's argument that legislative intent and public policy require bidding at the PWR for public contracts. A recent amendment to the PWA, effective May 7, 2022, after IEW's bids were opened, contains the Legislature's acknowledgement that bids on projects subject to the PWA may include worker-related costs at an amount below the PWR:

[i]f a person makes the lowest bid for a contract with a public body for public work subject to the provisions of the [PWA] and that bid is ten percent or more lower than the next lowest bid for the contract, the person making the lowest bid shall certify to the public body that the [PWR] required by that act shall be paid. If the bidder does not provide the certification prior to award of the contract, the 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 work.

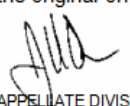
[N.J.S.A. 34:11-56.27a.]

The statutory requirement for a certification would be superfluous if every worker-related item in a winning bid on a public contract was required to be bid at or above the applicable PWR.<sup>2</sup>

To the extent we have not otherwise addressed Mount's remaining arguments, we conclude they lack sufficient merit to discuss in a written opinion. Rule 2:11-3(1)(E).

Affirmed. The May 5, 2022 stay is dissolved.

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

  
CLERK OF THE APPELLATE DIVISION

---

<sup>2</sup> The amendment, if had been applicable at the time the bids were opened, would not apply to IEW. Its bid was 2.47 percent lower than Mount's bid for the North project, 0.22 percent lower for the South project, and 2.33 percent lower for the Central project.