

To: New Jersey Law Revision Commission
From: Samuel M. Silver
Re: Local Land and Building Law - Acquisition of Real Property and Public Bidding
Date: September 09, 2019

MEMORANDUM

Executive Summary

The New Jersey Local Lands and Buildings Law (“LLBL”) allows a governmental unit to acquire property in a variety of ways.¹ The LLBL permits a governing body to require the seller, or lessor, to construct or repair a capital improvement as a condition of acquisition.² The principal statute that permits the inclusion of such a condition precedent is silent, however, regarding whether this method of acquisition requires the governing body to adhere to the public bidding requirements set forth in the New Jersey Local Public Contracts Law (“LPCL”).³

This issue was brought to the Staff’s attention by an attorney who practices in both the LLBL and LPCL areas, and during a review of this issue, Staff noted a paucity of case law on this subject and the absence of any legislative history.

Statute

N.J.S. 40A:12-5. Additional Powers.

(a) Any county, by resolution, or any municipality, by ordinance, may provide for the acquisition of any real property, capital improvement, or personal property:

[...]

(3) Whether the acquisition of any real property is by lease, purchase, installment agreement or exchange, the governing body may require the construction or repair of any capital improvement as a condition of acquisition.

[***]

Background

The New Jersey Local Lands and Buildings Law (“LLBL”) permits any county, or any municipality, to acquire any real property, capital improvement, personal property, or any interest or estate whatsoever, including easements, water, water power or water rights either

¹ See N.J.S. 40A:12-5(a)(1). See discussion, *infra*.

² N.J.S. 40A:12-5(a)(3).

³ N.J.S. 40A:11-1 *et seq.*

inside or outside of the county or municipality.^{4,5} Under certain circumstances, a municipal or a county government may even procure real property located in a foreign state.⁶

A governmental unit may acquire real or personal property in a number of different ways. Pursuant to N.J.S. 40A:12-5(a)(1), both a county and a municipality may obtain property by purchase, gift, devise, lease, exchange, condemnation, or installment purchase agreement.⁷ Not every property that is the subject of governmental acquisition, however, is in turnkey condition. Rather, the property that the governing body wishes to acquire may contain substandard structural conditions or even be in a state of disrepair.

If the county or municipality obtains the property by means of a gift, devise, or through condemnation, the LLBL does not authorize the government to demand the construction or repair of any capital improvement as a condition of acquisition.⁸ When the property is procured by way of purchase, lease, exchange, or installment purchase agreement, however, the governing body may require the construction or repair of any capital improvement as a condition of acquisition.⁹

Although N.J.S. 40A:12-5 *et seq.* authorizes governmental entities to acquire property, the statute is silent regarding whether the construction or repair conditions in these transactions are subject to the public bidding requirements of the LPCL. To determine whether a statutory provision of the LLBL must adhere to public bidding requirements, it is appropriate to examine the statute in conjunction with the LPCL.¹⁰

Analysis

• *Local Public Contracts Law*

The underlying purpose of the LPCL is to foster transparency in local government activities.¹¹ In addition, the LPCL was enacted to "... secure competition, which in turn, works

⁴ N.J.S. 40A:12-4(a). *See also* N.J.S. 40A:12-5(a).

⁵ Unless otherwise specified, the term "property" shall be used to denote both "personal" and "real" property." However, *see* N.J.S. 40A:12-2(f) (defining "personal property" as any personal property necessary and incidental to the furnishing, refurnishing or refurbishing of a building and includes office furniture, office equipment, office supplies, computers, computer equipment, telephone equipment, cameras, tractors, lawn mowers, dump trucks, golf carts, modular office trailers, tools, janitorial supplies and farm animals). *See also* N.J.S. 40A:12-2(g) (defining "real property" as including the usual connotations thereof, development rights or easements, or any right, interest or estate in the area extending above any real property, or capital improvement thereon, to such a height or altitude as any title, interest or estate in real property may extend, commonly known as "air rights").

⁶ N.J.S. 40A:12-12.

⁷ N.J.S. 40A:12-5(a)(1).

⁸ N.J.S. 40A:12-5(a)(3).

⁹ *Id.*

¹⁰ *See Sellitto v. Borough of Spring Lake Heights*, 284 N.J. Super. 277, 287 (App. Div. 1995).

¹¹ *Id.* *See Closter Service Stations, Inc. v. Commissioners of Village of Ridgefield Park*, 99 N.J. Super. 69, 73 (App. Div. 1968) (noting that the Local Public Contracts Law "guard[s] against favoritism, improvidence, extravagance, and corruption." (*citing Hillside Township v. Sternin*, 25 N.J. 317 (1957))); and *see, Bodies by Lembo, Inc. v. County of Middlesex*, 286 N.J. Super. 298 (App. Div. 1996).

to protect the public against chicanery and fraud in public office.¹² In order to achieve the purposes of the Act, the LPCL envisions, with certain exceptions, a system of competitive bidding.¹³

N.J.S. 40A:11-4(a) provides, in relevant part:

Every contract¹⁴ awarded by the contracting agent¹⁵ for the provision or performance of any goods or services¹⁶, the cost of which in the aggregate exceeds the bid threshold, shall be awarded only by resolution of the governing body of the contracting unit to the lowest responsible bidder after public advertising for bids and bidding therefor, except as is provided otherwise in this act or specifically by any other law [...] (Emphasis added).

The statute relating to public bidding is drafted in absolute and mandatory terms – “*every contract*” and “*shall be awarded only.*” An exception to the mandatory language set forth in the statute may only be found within the Act, or “specifically by any other law.” The requirements of the statute necessitate an examination of the possible actors involved in a given transaction.

- *Transactions between governmental entities.*

A governmental entity may negotiate a contract with the federal or state government without public advertising for bids which shall be awarded by resolution of the governing body.¹⁷ Specifically, N.J.S. 40A:11-5(2) provides that, “[a]ny contract... may be negotiated and awarded by the governing body without public advertising for bids... and shall be awarded by resolution of the governing body if:... (2) [i]t is made or entered into with the United States of America, the State of New Jersey, county or municipality, or any board, body, officer, agency or

¹² *Closter Service Stations, Inc. v. Commissioners of Village of Ridgefield Park*, 99 N.J. Super. 69, 73 (App. Div. 1968)

¹³ https://clerkshq.com/Content/NJClerks-Reference/books/NJ_ClerksC08.htm (last visited May 2, 2019).

¹⁴ See N.J.S. 40A:11-2(21) (defining “contract” as any agreement, including but not limited to a purchase order or a formal agreement, which is a legally binding relationship enforceable by law, between a vendor who agrees to provide or perform goods or services and a contracting unit which agrees to compensate a vendor, as defined by and subject to the terms and conditions of the agreement. A contract also may include an arrangement whereby a vendor compensates a contracting unit for the vendor’s right to perform a service, such as, but not limited to, operating a concession).

¹⁵ See N.J.S. 40A:11-2(3) (defining “Contracting agent” as the governing body of a contracting unit, or appointed membership of a State authority authorized to enter into a cooperative purchasing agreement pursuant to P.L.2013, c. 4, or its authorized designee, which has the power to prepare the advertisements, to advertise for and receive bids and, as permitted by this act, to make awards for the contracting unit in connection with purchases, contracts or agreements). See also N.J.S. 40A:11-2(1)(a) and (b) (defining “contracting unit” to include “any county”; or, “any municipality.”)

¹⁶ See N.J.S. 40A:11-2(24) (defining “goods and services” as any work, labor, commodities, equipment, materials, or supplies of any tangible or intangible nature, except real property or any interest therein, provided or performed through a contract awarded by a contracting agent, including goods and property subject to N.J.S.12A:2-101 *et seq.*)

¹⁷ N.J.S. 40A:11-5(2).

authority thereof, or any other subdivision thereof [***].” The language of this statute clearly permits governmental units to deal with one another without the necessity of public bidding.

A county, or municipality, is also authorized to sell real property, capital improvements, or personal property not needed for public use at a private sale, provided that the sale is to another governmental unit.¹⁸ A governmental unit may also lease property to another public body for nominal or other consideration.¹⁹ Thus, when the acquisition of property involves an arrangement between local governmental entities, it appears that such a procurement, construction and repair of any capital improvement can, by statutory mandate, be effectuated without adherence to the competitive aspects of either the LLBL or the LPCL because such transactions are statutorily permitted.

It is unclear, however, whether the public bidding requirements of the LPCL must be followed when a political subdivision seeks to acquire property from a private seller pursuant to N.J.S. 40A:12-5(a)(3).

- *Transactions between governmental entities and private persons.*

In its present form, the LLBL does not explicitly require a governmental unit to seek public bids on acquisition of real property.²⁰ The LPCL may, however, require a governmental unit to use the public bidding process under certain circumstances.

- Hypothetical 1: County “A” seeks to lease office space from a private person for a term of years pursuant to N.J.S. 40A:12-5(a)(3).²¹ There are several locations that would meet the county’s requirements.

When N.J.S. 40A:12-5(a)(3) is read in conjunction with N.J.S. 40A:11-4(a), practitioners suggest that the best practice would be for the County to “issue specifications describing the amount and type of space needed and the improvements required.”²² Thereafter, consistent with the LPCL, the lessors would compete for County “A’s” business.

It is unclear from the plain language of N.J.S. 40A:12-5(a)(3) whether a governmental unit must solicit public bidding, pursuant to the LPCL, when it requires the seller, or lessor, to construct or repair a capital improvement as a condition of acquisition.

- Hypothetical 2: Municipality “B” seeks to purchase a parcel of real property from a private person. As a condition of acquisition, the

¹⁸ N.J.S. 40A:12-13(b)(1).

¹⁹ N.J.S. 40A:12-14(b) (noting that, “the lease may be upon such terms and conditions and form nominal or other consideration as the governing body of the county or municipality shall approve by ordinance or resolution).

²⁰ N.J.S. 40A:12-5

²¹ See 35 N.J. PRAC., LOCAL GOVERNMENT LAW § 14:14 (Michael A. Pane)(4th ed. 2018).

²² *Id.*

governing body of Municipality “B” requires the seller to construct a “capital improvement” (i.e. a library) on the parcel of land.²³

This hypothetical brings to the fore the question of whether a “contract”²⁴ awarded by the “contracting agent”²⁵ (governing body) requiring the construction (provision of “goods and services”²⁶) of a capital improvement²⁷, implicates the LPCL’s bidding requirement; or, whether N.J.S. 40A:12-5(a)(3) serves as an “exemption” to the requirements of the LPCL.

Conclusion

In the absence of Legislative guidance regarding the application of the LPCL to the LLBL, Staff seeks authorization to conduct additional research and outreach to ascertain whether the LPCL bidding process applies to government contracts with private persons that require the construction or repair of capital improvements as a condition of acquisition, pursuant to N.J.S. 40A:12-5(a)(3) and, if so, whether some modification to the statute might be appropriate.

²³ This hypothetical is based, in part, upon discussions with the interested stakeholder in an attempt to facilitate an understanding of the scope of the instant inquiry.

²⁴ See n. 13.

²⁵ See n. 14.

²⁶ See n. 15.

²⁷ See N.J.S. 40A:12-2(c) (defining “capital improvements” to include buildings and any structures, improvements, ingress or egress, grounds or plazas, necessary and incidental to the purpose of the building and the safety, comfort and well-being of its occupants).