



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
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AMY F. DAVIS, ESQ.
Acting Director

September 9, 2026

Via Electronic Mail Only to maeve.cannon @stevenslee.com

Maeve E. Cannon, Esq.
Stevens & Lee
510 Carnegie Center Drive
Suite 400
Princeton, NJ 08540

Re: I/M/O Bid Solicitation #25DPP01189 Need A Can LLC
Protest of the Revised Notice of Intent to Award
T2634 – Scrap Metal Collection and Recycling/Disposal – Statewide

Dear Ms. Cannon:

This final agency decision is in response to your protest application on behalf of Need A Can LLC (“Need A Can”) received by the Division of Purchase and Property’s (“Division”) Hearing Unit on August 25, 2026 (“Protest”). In that application, Need A Can protests the Division’s Procurement Bureau (“Bureau”) August 18, 2026 Revised Notice of Intent to Award (“Revised NOI”) and Revised Recommendation Report dated July 21, 2026 (“Revised Rec Report”) rescinding the Notice of Intent to Award (“NOI”) dated April 17, 2026, and attendant Recommendation Report (“Recommendation Report”) dated March 11, 2026. In their Protest, Need A Can argues that Yaros’ bid should have been found non-responsive; that the Director failed to exercise reasonable business judgment, and the award to Need A Can should be reinstated, or in the alternative all bids should be rejected and the procurement be rebid. Finally, Need A Can requests a stay if the Division decides to neither reinstate the award to Need A Can or cancel this procurement and rebid it.

By way of background, on August 26, 2025, the Bureau issued Bid Solicitation 25DPP01189 - T2634 – Scrap Metal Collection and Recycling/Disposal – Statewide (“Bid Solicitation”) on behalf of the State of New Jersey and its Cooperative Purchasing Program Participants. The purpose of the Bid Solicitation was to solicit Quotes for the recycling and disposal of light iron, steel, aluminum, copper, stainless steel, brass, lead, lead acid batteries, crushed steel drums, and other surplus scrap metal through a rebate program. Bid Solicitation Section 1.1, *Purpose and Intent*. It is the intent of the State to award Contracts to those responsible Bidders whose Quotes, conforming to the Bid Solicitation are most advantageous to the State of New Jersey, price and other factors considered. Id.

In accordance with Bid Solicitation Section 2.1, *Electronic Question and Answer Period*, an electronic portal enabling the Bureau to receive questions electronically was available to all potential Bidders until 2:00 P.M. Eastern Time on September 15, 2025. One (1) Bid Amendment was issued for this Bid Solicitation, which provided revisions to Attachment two (2) of the Bid Solicitation, responses to

questions received from potential Bidders, and extended the Quote Submission Due Date to October 21, 2025.

On October 21, 2025, the Division's Proposal Review Unit ("PRU") opened three (3) Quotes which were received by the submission deadline of 2:00pm Eastern Time. After conducting an initial review of the Quotes received for compliance with mandatory Quote submission requirement, the Division's PRU forwarded the three (3) Quotes to the Bureau for further review and evaluation consistent with the requirements of the Bid Solicitation.

As set forth in the Recommendation Report, the Bureau rejected John Blewett Inc.'s ("John Blewett") Quote because John Blewett provided conflicting information regarding their ownership. As set forth in the Recommendation Report, the Bureau recommended that a contract be awarded to Need A Can.

On April 22, 2026, John Blewett submitted a Protest of the rejection of their Quote and protested the Bureau's contract award to Need A Can. On April 29, 2026, the Division's Hearing Unit issued a Final Agency Decision ("Blewett FAD") which upheld the Division's non-responsive determination for John Blewett, and after conducting a *de novo* review of Need A Can's Quote based upon arguments contained in John Blewett's protest, the Hearing Unit found that Need A Can's Quote was also non-responsive for failing to properly disclose their ownership prior to Quote opening.

On July 24, 2026, Need A Can submitted a protest ("First Protest") protesting the determination in the Blewett FAD that Need A Can was non-responsive and protesting the rescission of Need A Can's intended award as set forth in the Recission. On August 3, 2026, the Division's Hearing Unit issued a Final Agency Decision ("Need A Can FAD") which upheld the Division's non-responsive determination for Need A Can that they failed to properly disclose their ownership prior to Quote opening and denied Need A Can's request for a stay.

On August 25, 2026, Need A Can filed their Protest of the Revised NOI. Need A Can's arguments in the Protest are broken up into different sections, which are outlined briefly here:

- Section I titled "**LEGAL ARGUMENT**" states that "**THE DIVISION'S AWARD TO YAROS IS ARBITRIARY, CAPRICIOUS, AND UNREASONABLE.**" Emphasis in the original. Within that section are the following subsections:
- Subsection A titled "**Yaros's Bid Should have Been Rejected as Non-Responsive**" generally argues that Yaros was not a responsible bidder and "failed to provide adequate assurance of successful statewide performance or to demonstrate the understanding and ability to perform required by the RFP". Protest, page 8 (emphasis in the original). This Protest point centers on Yaros' ability to complete the requirements under the Bid Solicitation and their pricing.
- Subsection B is titled "**The Director Failed to Exercise Reasonable Business Judgment.**" argues that Yaros' proposal offered "rebates far below the range produced by the solicitation, lacked experience with comparable contracts, received a lower technical rating, and failed to demonstrate adequate resources for statewide performance", Protest, page 15, and awarding to Yaros "defies sound business judgment and fiscal prudence". Protest, page 17 (emphasis in the original).
- Subsection C is titled "**The Appropriate Remedy is Reinstatement of Need A Can or, Alternatively, Rejection of All Bids and Rebid of the Procurement**" states that "[t]he appropriate remedy here is reinstatement of Need A Can as the intended awardee." Protest, page 18 (emphasis in the original). Alternatively Need A Can states that "[i]f the Division concludes that

its August 3, 2026 Final Agency Decision precludes reinstatement, it should reject all proposals and rebid the procurement.” Protest, page 19.

- Section II titled “**A STAY OF AWARD IS WARRANTED**” outlines Need A Can’s request for a stay (and attendant arguments) of the contract award and implementation should the Hearing Unit deny Need A Can’s protest. Emphasis in the original.

Although Need A Can requested an in-person presentation is permitted by N.J.A.C. 17:12-3.3(e), it should be noted that “[t]he Director has sole discretion to determine if an in-person presentation by the protester is necessary to reach an informed decision on the matter(s) of the protest. In-person presentations are fact-finding for the benefit of the Director.” Further, “[i]n cases where no in-person presentation is held, such review of the written record shall, in and of itself, constitute an informal hearing.” N.J.A.C. 17:12-3.3(d). I have reviewed the record of this procurement, including the Bid Solicitation, the Quotes received, the relevant statutes, regulations, case law, and the protest submitted by Need A Can. The issues raised in the protest were sufficiently clear such that a review of the record of this procurement has provided me with the information necessary to determine the facts of this matter and to render an informed final agency decision on the merits of the protest submitted by Need A Can on the written record, as such an in-person hearing is not warranted. I set forth herein the Division’s Final Agency Decision.

DISCUSSION

The New Jersey Courts have long recognized that the purpose of the public bidding process is to “secure for the public the benefits of unfettered competition.” Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307, 313 (1994). To that end, the “public bidding statutes exist for the benefit of the taxpayers, not bidders, and should be construed with sole reference to the public good.” Borough of Princeton v. Board of Chosen Freeholders, 169 N.J. 135, 159-60 (1997). The objective of New Jersey’s statutory procurement scheme is “to guard against favoritism, improvidence, extravagance and corruption; their aim is to secure for the public the benefits of unfettered competition.” Barrick v. State of New Jersey, 218 N.J. 247, 258 (2014) (citing Keyes Martin & Co. v. Dir. of Div. of Purchase and Prop., 99 N.J. 244, 256 (1985)).

The Division’s administrative regulations that govern the advertised procurement process establish certain requirements that must be met in order for a Quote to be accepted. Those regulations provide in relevant part that:

- (a) In order to be eligible for consideration for award of contract, the bidder’s proposal **shall** conform to the following requirements or be subject to designation as a non-responsive proposal for non-compliance:

...

4. Contain all RFP-required certifications, forms, and attachments, completed and signed as required. An RFP may designate certain forms and/or certifications that need not be included in the bidder’s proposal but that **must** be provided by a successful bidder upon request prior to an award of contract;

[N.J.A.C. 17:12-2.2(a), emphasis added.]

If the requirements of N.J.A.C. 17:12-2.2 are not met, a Quote must be rejected. This regulation mandates stringent enforcement to maintain the equal footing of all Bidders and to ensure the integrity of the State's bidding process.

The term "must" denotes a mandatory requirement as further set forth in the Bid Solicitation's glossary:

Must – Denotes that which is a mandatory requirement.

[Bid Solicitation Section 9, *GLOSSARY*.]

The term "shall" also denotes that which is a mandatory requirement as further set forth in the Bid Solicitation's glossary:

Shall – Denotes that which is a mandatory requirement.

[Bid Solicitation Section 9, *GLOSSARY*.]

With respect to Need A Can's first argument that "Yaros's Bid Should Have Been Rejected as Non-Responsive", this contention by Need A Can was addressed in the Need A Can FAD. Protest, page 7. To briefly reiterate here, Yaros' bid was responsive to all mandatory requirements of the Bid Solicitation. See Need A Can FAD, pages 6-7.

Need A Can states that "[t]he State must select the responsible bidder offering the greatest economic value unless the record provides a reasoned basis for selecting another bidder." Protest, page 8. In this case, there was no option of "selecting another bidder" as Yaros was the only responsive bidder. Need A Can's claim that "Yaros failed to provide adequate assurance of successful statewide performance or to demonstrate the understanding and ability to perform required by the RFP", Protest, page 8, is not supported by the record. As set forth on page 6 of the Recommendation Report, the Bureau found Yaros Quote to be in the range of "Good", and the information submitted by Yaros in their Technical Quote was sufficient. As stated on page 6 of the Recommendation Report, "the Bureau is satisfied with Yaros Company's ability to successfully complete the Scope of Work based upon its Technical Quote."

Need A Can argued in their First Protest, and again in this Protest, that Yaros does not have experience with contracts of similar size and scope. While this may be true, experience with contracts of a similar size and scope is not a mandatory requirement under the Bid Solicitation as the Bureau stated on page 6 of the Recommendation Report, and as outlined on Page 8 in the Need A Can FAD. Need A Can also asserts that Yaros' pricing submission creates an "extraordinary disparity [which] raises substantial doubt about whether Yaros understood the Contract's requirements and underlying economics." Protest, page 8. As stated on page 3 of the Amended Rec Report, the Division's Pricing Analyst reviewed Yaros' submitted pricing and found it was "reasonable for award". Furthermore, it is not for the Bureau to speculate on the reasoning behind a Bidder's submitted pricing. Yaros was the only responsive bidder for this Bid Solicitation and was found by the Bureau after analysis to also be a responsible bidder.

Need A Can's reliance on "[p]ublically available information concerning Yaros's operations", Protest, page 9, is irrelevant as the Bureau can only evaluate information submitted by a bidder with their Quote to determine responsiveness, and eligibility for award.

Finally, Need A Can states that "Yaros's anomalously low projected return was plainly outside the range reflected in the proposals submitted in this procurement and cannot reasonably be attributed to ordinary differences in business judgment, profit margin, or pricing strategy." Protest, page 11. Need A

Can cites to Gannett Outdoor Co. v. City of Atlantic City, 249 N.J. Super. 217, 221-22 (App. Div. 1991), to bolster their argument that the Division should have “reject[ed] of all bids based in part on the disparity in bid prices and the lack of competition following one bidder’s disqualification”. However, the case is not persuasive in this matter. Gannett dealt with the question of whether Atlantic City acted within its authority in not conducting a hearing on why bids were rejected. The Gannett Court affirmed Atlantic City’s actions noting that at the time Atlantic City advertised for bids for the procurement, they reserved the right to reject all bids. The municipality was not required to reject all bids, but rather had the right to do so.

The more persuasive case involves one of the Division’s past procurements. In In re Failure to Award to the Lowest Responsible Bidder RFP 09-X-20513 Contract T0002 for Provision of Bottled Water Servs., No. A-2747-08T2, 2010 N.J. Super. Unpub. LEXIS 1641 (Super. Ct. App. Div. July 2, 2010), the Division made an award to one of the parties that was protested as being non-responsive by the other responsive bidder. The Director agreed and issued a notice canceling the bid to issue a new one. The remaining responsive bidder protested by stating that the contract should be reawarded to them as the remaining responsive bidder. The court disagreed and stated that

We have specifically addressed the standard-of-proof question in a situation, such as exists here, where the contracting authority has rejected all bids after opening and publicizing them. In that circumstance, we have held that “once the bids have . . . been opened and each bidder's competitive position has been exposed, rejection of all bids should only occur for cogent or compelling reasons.”

We are aware that these particular cases arose under the Local Public Contracts Law, N.J.S.A. 40A:11-1 to -51 and not under the State bidding laws, N.J.S.A. 52:34-6 to -25. However, we discern no reason why the same principle should not apply under the circumstances. In Bodies by Lembo, supra, we noted the “cogent rationale for allowing a contracting entity to rebid a project only when it acts in good faith and for a very good reason[,]” as follows:

“Rebidding a contract is fraught with certain dangers. While it is true that in some instances rebidding will benefit the public through achieving a lower price, the converse result of a higher contract price is also a factor to be considered. This is because the low bidder who may have given his best possible price may drop out of the bidding or other bidders by reason of insight gained through revelation of the competition's bidding strategy may see the weaknesses in their own bids. One cannot presume that rebidding will . . . bring a lower price.”

[In re Failure to Award RFP 09-X-20513 Contract T0002, supra, 2010 N.J. Super. Unpub. LEXIS 1641 at 7-8 (internal cites removed).]

As noted above, and in the multiple protests filed by the awarded and unawarded parties, there remains one awarded, responsive and responsible bidder. That bidder, Yaros, provided pricing that has been deemed reasonable by the Division’s Pricing Analyst. Were the Division to rebid the procurement as Need A Can requests, there is no way to predict which firms would bid on the new bid solicitation, what their submitted pricing would be, nor which bidders would be responsive. These services are needed by numerous State Agencies, and the delay in not awarding to a qualified bidder because there is a possibility that the State “might” receive a better rebate at some point in the future is not sufficient justification to

rebid this procurement. As stated on pages 7-8 in the first Need A Can FAD, “[t]he Court in In re Failure to Award, supra, found that financial reasons alone, without a material flaw in the bid solicitation does not reach the cogent and compelling reasons required for cancellation and rebid of a contract where there is a responsive bidder whose bid does not exceed the estimate.” Because Yaros submitted a conforming Quote with reasonable pricing, there are no cogent reasons in this matter to support canceling the procurement with an eye toward a new bid.

In their second argument, Need A Can cites statutory language that an award shall be made to “that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the State, price and other factors considered”. N.J.S.A. 52:34-12a(g). A key point in this portion of the statute is that only bidders whose bid conformed to requirements of the Bid Solicitation can be considered for award. For the reasons set forth in the Need A Can FAD, Need A Can was non-responsive to the requirements of the Bid Solicitation, and therefore ineligible for consideration for award regardless of their pricing. Throughout their argument, Need A Can refers to “responsive proposals” and “conforming proposal”, which is a necessary component of any Quote to be considered of award. Here, both Need A Can and Blewett were found to be non-responsive to mandatory elements of the Bid Solicitation leaving Yaros as the only responsible and responsive bidder with reasonable pricing, and making an award to Yaros will be most advantageous to the States.

Need A Can’s third Protest point states that the original award to Need A Can should be reinstated or in the alternate that all bids should be rejected and the procurement rebid. Need A Can’s original award cannot be reinstated as Need A Can was non-responsive for failure to properly disclose their ownership as required pursuant to Bid Solicitation Section 3.13.2, *Ownership Disclosure Form*, and therefore was not eligible for award. This point was fully addressed in the Need A Can FAD. Rejecting all bids and rebidding the procurement has been addressed above.

Section II of Need A Can’s Protest requests a Stay of the Award should the Division not grant the relief requested in Need A Can’s Protest. Need A Can also requested a stay in their First Protest. Need A Can did not provide in their Protest any new or additional basis for which a stay should be granted. Need A Can’s arguments for a stay were addressed in the Need A Can FAD, and will not be rehashed here as no facts have changed warranting discussion.

Although the State has broad discretion to select among qualified and responsive Bidders in public contracting matters, the discretion afforded to the Director, “is not limitless.” See, In re Request for Proposals #17DPP00144, 454 N.J. Super. 527, 559 (App Div. 2018). “In line with the policy goal of thwarting favoritism, improvidence, extravagance, and corruption, the Division may not award a contract to a bidder whose proposal deviates materially from the [RFQ’s] requirements.” Ibid., quoting, Barrick v. State, 218 N.J. 247, 258-59 (2014)). For that reason, the Division’s governing regulations mandate stringent enforcement to maintain the equal footing of all Bidders and to ensure the integrity of the State’s bidding process. Notably, “a proposal that is not...responsive to the material requirements of the [RFQ] shall not be eligible for further consideration for award of contract, and the bidder offering said proposal shall receive notice of the rejection of its proposal.” N.J.A.C. 17:12-2.7(c). As Need A Can’s Quote was not responsive to the material requirements of the Bid Solicitation, it is ineligible for evaluation and award.

New Jersey procurement law requires that “specifications and invitations for bids shall permit such full and free competition as is consistent with the procurement of supplies and services necessary to meet the requirements of the using agency. . . .” N.J.S.A. 52:34-12. This principle is based on the long-recognized “policy behind the competitive bidding statutes, i.e., assurance against favoritism, improvidence, extravagance and corruption in the bidding process.” Palamar Constr., Inc. v. Pennsauken, 196 N.J. Super. 241, 251 (App. Div. 1983) (citing Terminal Construction Co. v. Atlantic City Sewerage Auth., 67 N.J. 403, 410 (1975)). “These policies, in turn, are meant to ensure that all bidders are equally

situated in their competition for the public contract.” Palamar, supra, 196 N.J. Super. at 251 (citing Hillside Twp. v. Sternin, 25 N.J. 317, 322 (1957)). “The conditions and specifications must apply equally to all prospective bidders. Otherwise, there is no common standard of competition.” Id. Allowing Need A Can’s Quote to proceed in light of its failure to adhere to the requirements of the Bid Solicitation would place both Bidders in a superior position among bidders under this Bid Solicitation.

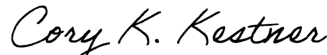
CONCLUSION

In light of the findings set forth above, I sustain the Bureau’s Revised NOI dated August 18, 2026. Additionally, Need A Can failed to establish the necessary Crowe factors to grant a stay of the contract award.

Thank you for your company’s interest in doing business with the State of New Jersey. I encourage you to log into [NJSTART](#) to select any and all commodity codes for procurements you may be interested in submitting a Quote for so that you may receive notification of future bidding opportunities.

This is the Division’s final agency decision. Pursuant to N.J.A.C. 17:12-3.1, this determination is appealable to the Appellate Division of the Superior Court in accordance with the New Jersey Court Rules (R. 2:4-1) which provide a party 45 days to appeal this final agency decision.

Sincerely,



Cory K. Kestner
Chief Hearing Officer

CKK:CMD

Enc.

c: C. Clarke
K. Aponte

***In re Failure to Award to the Lowest Responsible Bidder RFP 09-X-20513
Contract T0002 for Provision of Bottled Water Servs.***

Superior Court of New Jersey, Appellate Division

January 12, 2010, Argued; July 2, 2010, Decided

DOCKET NO. A-2747-08T2

Reporter

2010 N.J. Super. Unpub. LEXIS 1641 *; 2010 WL 2795369

IN THE MATTER OF THE FAILURE TO AWARD TO THE LOWEST RESPONSIBLE BIDDER RFP 09-X-20513
CONTRACT T0002 FOR PROVISION OF BOTTLED WATER SERVICES

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

Prior History: [*1] On appeal from the Division of Purchase and Property, Department of Treasury.

Counsel: Jeffrey M. Garrod argued the cause for appellant Nestle Waters North America, Inc. (Orloff, Lowenbach, Stifelman & Siegel, P.A., attorneys; Mr. Garrod and Matthew T. Aslanian, on the brief).

Cynthia Hackett, Deputy Attorney General, argued the cause for respondent State of New Jersey (Anne Milgram, Attorney General, attorney (Lewis A. Scheindlin, Assistant Attorney General, of counsel; Ms. Hackett, on the brief).

Judges: Before Judges Wefing, Messano and LeWinn.

Opinion

PER CURIAM

In 2005, the Director of the New Jersey Division of Purchase and Property awarded plaintiff, Nestle Waters North America, Inc. (Nestle), a contract to sell and deliver its Deer Park brand of bottled water to State agencies located in fifteen counties for the period from January 1, 2006 through December 31, 2008. In October 2008, the Division issued a Request for Proposals, No. RFP 09-X-20513, for a three-year contract to provide bottled water (five-gallon bottles, referred to as "demijohns," and dispensers) statewide. Only Nestle and its competitor, DS Waters of America, Inc. (DS Waters) submitted bids.

Nestle bid \$ 2.09 for delivery of each demijohn, [*2] no rental charge for unrefrigerated water coolers, and \$ 7.96 per month for each refrigerated water cooler. Nestle charged no deposit on the demijohns. Its bid was for fifteen of the State's twenty-one counties.

DS Waters also bid \$ 2.09 for delivery of each demijohn and no rental charge for non-refrigerated water coolers. However, it bid \$ 5.99 per month for refrigerated water coolers and included a \$ 6 deposit for each demijohn which was fully refundable upon return.

On December 5, 2008, the Director gave public notice of her intent to award the contract to DS Waters, and simultaneously made both bids public pursuant to *N.J.S.A. 52:34-12(a)*. Nestle filed a protest which asserted, in part, that DS Waters' bid was deficient for "fail[ing] to indicate the manufacturer, brand, model name and model number on all specified equipment for all counties[.]" and that pursuant to the RFP, the "[f]ailure to submit all information required will result in the bid being considered non[-]responsive."

In re Failure to Award to the Lowest Responsible Bidder RFP 09-X-20513 Contract T0002 for Provision of Bottled Water Servs.

The Director agreed with this assertion and, in a letter decision issued on December 24, 2008, rescinded the notice of intent to award the contract to DS Waters. The Director "instruct[ed] the [Division] [*3] to consider re-bidding [sic] the entire . . . contract with textual and format changes to the RFP to facilitate the bidders' understanding and accomplishment of the requirements for effective bidding."

In a letter to the Director on January 8, 2009, Nestle protested the decision to rebid the entire contract. It asserted that "the proper course of action is to award the contract to this company as the lowest qualified bidder which submitted a responsive bid which met all of the RFP's requirements."

On January 12, 2009, the Director issued a final decision denying Nestle's protest, noting her statutory authority to reject "[a]ny or all bids . . . when the . . . Director . . . determines that it is in the public interest so to do[.]" under N.J.S.A. 52:34-12, and adding:

I determined that, in light of the . . . results of the . . . bidding effort and the scrutinized review of the RFP provisions and configuration, it was apparent that various aspects of the . . . RFP were in need of modification to achieve the level of clarity and consistency that is essential for effective head-to-head competition among bidders, which would, in turn, enhance the likelihood that more favorable pricing could [*4] be achieved. . . . [T]o allow the award of a contract for water and water dispensers in 15 counties to [Nestle] while I am firmly convinced that competition under a more sound RFP and contract will produce a better contract and more favorable pricing for the State would, of course, serve [Nestle's] best interests, but would not, in my judgment, serve the best interests of the State and its citizens. Also, [the] determination to re-bid the entire contract was in recognition of and buttressed by the State's ongoing efforts to identify and implement stringent austerity measures in light of the budgetary concerns that the State is addressing on a daily basis as it seeks every opportunity to eliminate or curtail expenditures. Thus, I remain convinced that the rebidding [of] all 21 segments of the contract, with improvements to the RFP that include the elimination of provisions and price lines for deposits [sic] charges for demijohns, will produce results that will serve the State's best interests.

Simultaneously with filing its notice of appeal from this decision, Nestle moved before the Division for a stay. The Director denied the stay request and, by order of March 9, 2009, we affirmed [*5] that denial. On that same date, the Division issued a second RFP for all twenty-one counties, leading Nestle to seek a stay of bidding "on the fifteen counties for which [it] submitted the lowest bid that was most advantageous to the State." On April 7, 2009, we issued an order staying bidding under the second RFP for those fifteen counties.

The second RFP deleted price lines for deposits and credits; refrigerated coolers were also eliminated as a bid item. The RFP also contained a notice that "[d]ue to the State's fiscal constraints, the use of this contract will be limited to those State Agency locations that do not have potable water" On April 8, 2009, however, the Division cancelled this RFP and noted that "a new RFP will be reposted shortly[] . . . [which] will encourage Using Agencies to voluntarily restrict the use of this contract."

On April 20, 2009, the Division issued a third RFP. This RFP encouraged the "Using Agencies" to "reduc[e] purchases by 50%" under the contract because of "fiscal constraints," and stated further that the State was "not obligated to order any maximum or minimum amount. Actual quantities will be determined as needed by the using agencies [sic]." [*6] In an addendum issued three days later, the RFP eliminated water coolers with hot taps from the price sheets.

On appeal, Nestle contends that the Director "disserved" the "public interest" by "failing to award [the] contract . . . to [it] after making all bids public." Nestle further asserts that the Director must demonstrate "a [c]ompelling [j]ustification" for its decision to rebid the contract. The Division counters that the Director's decision is subject to "the arbitrary and capricious standard," and should be upheld under that standard.

We concur with Nestle with respect to the pertinent standard of proof. We are, furthermore, satisfied that the Director failed to meet this standard and, therefore, we reverse.

Our role in reviewing decisions of administrative agencies

In re Failure to Award to the Lowest Responsible Bidder RFP 09-X-20513 Contract T0002 for Provision of Bottled Water Servs.

is restricted to four inquiries: (1) whether the agency's decision offends the State or Federal Constitution; (2) whether the agency's action violates express or implied legislative policies; (3) whether the record contains substantial evidence to support the findings on which the agency based its action; and (4) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion [*7] that could not reasonably have been made on a showing of the relevant factors.

[George Harms Constr. Co. v. N.J. Tpk. Auth., 137 N.J. 8, 27, 644 A.2d 76 (1994).]

We are here concerned primarily with the third factor, whether the Director's decision is supported by substantial evidence in the record. For the reasons that follow, we conclude it is not.

We have specifically addressed the standard-of-proof question in a situation, such as exists here, where the contracting authority has rejected all bids after opening and publicizing them. In that circumstance, we have held that "once the bids have . . . been opened and each bidder's competitive position has been exposed, rejection of all bids should only occur for cogent or compelling reasons." Bodies by Lembo v. Middlesex County, 286 N.J. Super. 298, 309, 669 A.2d 254 (App. Div. 1996) (quoting Marvec Constr. Corp. v. Twp. of Belleville, 254 N.J. Super. 282, 288, 603 A.2d 184 (Law Div. 1992) (quoting Cushman & Doyle, Construction Bidding Law § 1.7 at 9 (1990)) (internal quotation marks omitted). See also, PENPAC, Inc. v. Morris County Mun. Utils. Auth., 299 N.J. Super. 288, 296, 690 A.2d 1094 (App. Div.), cert. denied, 150 N.J. 28, 695 A.2d 670 (1997).

We are aware that these particular cases arose under the [*8] Local Public Contracts Law, N.J.S.A. 40A:11-1 to -51 and not under the State bidding laws, N.J.S.A. 52:34-6 to -25. However, we discern no reason why the same principle should not apply under the circumstances. In Bodies by Lembo, supra, we noted the "cogent rationale for allowing a contracting entity to rebid a project only when it acts in good faith and for a very good reason[.]" as follows:

"Rebidding a contract is fraught with certain dangers. While it is true that in some instances rebidding will benefit the public through achieving a lower price, the converse result of a higher contract price is also a factor to be considered. This is because the low bidder who may have given his best possible price may drop out of the bidding or other bidders by reason of insight gained through revelation of the competition's bidding strategy may see the weaknesses in their own bids. One cannot presume that rebidding will . . . bring a lower price."

[286 N.J. Super. at 307 (emphasis added) (quoting Marvec Constr. Corp., supra, 254 N.J. Super. at 291).]

Our review of the record leads us to conclude that the Director lacked cogent or compelling reasons to reject all bids and order rebidding of the [*9] RFP. In her December 24, 2008 letter, the Director agreed with Nestle's protest that DS Waters' failure to provide the manufacturer, brand, model name and number of the equipment it offered, constituted a "non-remedial flaw" rendering its bid "non-responsive" Nestle had asserted numerous grounds for invalidating the contract award to DS Waters, including DS Waters' failure to comply with other RFP requirements such as mandatory ownership disclosure requirements. Nonetheless, the only ground with which the Director agreed was the failure to provide mandatory manufacturer information regarding the proposed equipment. Notwithstanding this narrow basis for disqualifying DS Waters, the Director called for rebidding the entire contract "with textual and format changes to the RFP to facilitate the bidders' understanding and accomplishment of the requirements for effective bidding."

In her January 12, 2009 letter rejecting Nestle's challenge to the decision to rebid the entire contract, the Director for the first time cited financial considerations as a basis for that decision. The Director also noted that the "improvements to the RFP" would "include the elimination of provisions and [*10] price lines for deposits [sic] charges for demijohns," which would "produce results that will serve the State's best interests." These "improvements" are in no way related to the RFP requirement that a bidder provide certain manufacturer information regarding its proposed equipment, which, as noted, was the sole basis on which the Director rescinded the award to DS Waters.

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In short, we regard the Director's proffered reasons for rejecting Nestle's bid and rebidding the entire contract to be after-the-fact considerations that were in no way responsive to the "non-remedial flaw" in DS Waters' bid. Compare PENPAC, supra, 299 N.J. Super. at 297, in which the contracting authority's decision to reject all bids and rebid the contract after the bids had been opened and made public, was based on the authority's conclusion that "all the bids substantially exceeded . . . [its] estimated bid." We concluded that such a decision had been made "in good faith" and in conformance with the "principle[]" that "'cogent or compelling reasons'" must exist in such circumstances. Id. at 296-97 (quoting Marvec, supra, 254 N.J. Super. at 288).

In sum, we conclude that the lack of cogent or compelling reasons [*11] for her decision prevents the Director from demonstrating "substantial evidence to support the finding[s] on which" that decision is based. George Harms, supra, 137 N.J. at 27. Therefore, we are constrained to reverse the Director's decision of January 12, 2009, and remand with instructions to award the contract at issue to Nestle.

Reversed.

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