

**"Bid Bonds, Consent of Surety & Procurement: All You Need to Know"
NJLM Conference, Wednesday November 20, 2019, 3:45 pm**

Case Notes

Mark S. Anderson

L. Pucillo & Sons, Inc. v. New Milford, 73 N.J. 349 (1977)

Several garbage collectors bid for the collection of city garbage. The contract was awarded to defendant despite the fact that he did not submit a bid for a five-year contract as set out in the bidding regulations. Plaintiff, another bidder, filed suit, contending that defendant was not the lowest responsible bidder. The trial court entered judgement for successful bidder and the borough; the Appellate Division affirmed. The Supreme Court reversed.

The specifications requiring bidders to bid on all of the term contracts were mandatory. The specifications contained the term "must" which clearly indicated defendant borough's intent that collectors bid on all contracts. The purpose behind the Local Public Contracts Law is to curtail the discretion of local government and require strict compliance with public bidding guidelines and prevent corruption in bidding. The failure to bid on all the contracts was not a minor defect which could be waived.

Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307 (1994)

When a surety company bond is required in the advertisement or specifications for a contract or agreement, a contracting unit shall require from every bidder a certificate from a surety company stating that it will provide the contractor with a bond in such sum as is required in the advertisement or in the specifications.

A "certificate from a surety company, referred to as a consent of surety, assures the public entity that the surety will provide the performance bond if the contract is awarded to and signed by the bidder. The significance of a consent of surety is that it provides the local government with some assurance at the time of the bid submission that the low bidder will have the capacity to perform the contract and to supply the necessary bonds."

A bidder's "failure to include a consent of surety with its bid proposal is a material defect that can be neither waived nor cured."

"A consent of surety is a direct undertaking by the bonding company, enforceable by the municipality. Its purpose is to provide a guarantee to the municipality, at the time of the submission of bids, that if the bidder were to be awarded the contract, the surety would issue the required performance bond. The Borough's bid specifications required that "[t]he party to whom this contract shall be awarded shall furnish a bond of any indemnity company ... for the full

amount of the bid.' The bid specifications also required, pursuant to N.J.S.A. 40A:11-22, that all bidders include a consent of surety with their submission.

"To permit waiver of the consent-of-surety requirement would undermine the stability of the public-bidding process."

Albanese v. Machetto, 7 N.J. Super. 188 (App Div, 1950)

A low bidder's failure to comply with specifications requiring consent of surety to be submitted with proposal constituted material defect because omission concerned bidder's ability to carry out obligations under contract.

Hanover v. International Fidelity Ins. Co., 122 N.J. Super. 544 (App Div, 1973)

A variance between the bond submitted and the one requested did not preclude a township from recovering on the bid bond when the contractor failed to enter into the awarded contract, because the township was entitled to require the security and to waive any minor or inconsequential variances and technical omissions in the bid.

H&S Constr. & Mech., Inc. v. Westfield Pub. Schs, 2018 N.J. Super. Unpub. LEXIS 1574 (App Div, 2018)

"Suffice it to say, the failure to include in a bid statutorily mandated documents is non-waivable." If not statutorily mandated, the determination of whether the defects are minor or inconsequential and therefore waivable, or material and non-waivable is subject to the two-part test in Township of River Vale v. R.J. Longo Construction Company, 127 N.J. Super. 207 (Law Div, 1974) (discussed below) and adopted by the Supreme Court in Meadowbrook Carting Company v. Borough of Island Heights & Consolidated Waste Services, Inc. (discussed above).

J. Smentkowski, Inc. v. Garfield City, 2018 N.J. Super. Unpub. LEXIS 1064
Petition for certification to Supreme Court denied, 235 N.J. 173 (2018)

Bid requirement was that the "Surety Company ... will become bound as surety and guarantor ... and will execute a Performance Bond in the form annexed hereto". The consent provided by the surety said "will become bound as Surety and will execute standard performance and payment bonds". The court found that the latter "bid submission was non-responsive because the submission failed to adhere to the required consent of surety form, in the language prescribed by the City in its bid specifications."

J. Smentkowski, Inc. v. Lacey Twp., 2015 N.J. Super. Unpub. LEXIS 2531 (App Div, 2015)

Plaintiff alleged that another's bid included a "non-responsive bid bond". The questioned bid bond was in the required amount, and it referenced the Township, the nature of the contract and the original bid date. Plaintiff argued that the bid bond was defective because it provided surety for an April 1 bid, not the later April 22 bid, and the April 22 bid was for a different contract term. Plaintiff argued that, if called to perform, the surety could assert there was no enforceable obligation under the bond. The trial judge found that the surety's obligation had not changed simply because the Township's specifications added an additional month to the contract.

Plaintiff further claimed that the consent of surety was materially defective because it was conditioned upon Meadowbrook's bid being accepted. The trial judge noted that the bid specifications required the Township to award the contract or reject all bids within sixty days, timeframes set forth in N.J.S.A. 40A:11-24(a), and reasoned that the bond was conditioned only upon the requirements cited in N.J.S.A. 40A:11-24.

The trial court's decision was affirmed by the Appellate Division in this unreported case.

Blue Diamond Disposal, Inc. v. City of Vineland, 2010 N.J. Super. Unpub. LEXIS 2108 (App Div, 2010)

The consent of surety said that the surety would "execute the final bond as required by specifications or to become co-sureties with others in the full amount of the contract price for the faithful performance of the contract."

We do not view [the] bid as suffering from any of the fatal defects identified in Meadowbrook Carting, Albanese, DeSapio or L. Pucillo. Unlike the bidders in Meadowbrook Carting and Albanese, [the bidder] did provide a consent of surety. And unlike the bidder in DeSapio, whose surety lamely promised only that it did "not anticipate any difficulty providing bonds on the . . . project," [citation omitted], [the bidder's] surety expressly and unconditionally agreed to "execute the final bid bond" either individually or as a co-surety. Nor did [the surety] reserve the right to refuse to renew the bid, which was the case in L. Pucillo, [citation omitted].

Nova Crete, Inc. v. City of Elizabeth, 2010 N.J. Super. Unpub. LEXIS 101 (App Div, 2010)

Consent of surety said that surety would "execute the final bond as required by the specifications and to become Surety ... provided we are requested by the Principal".

"[T]he question posed here is ... whether the consent of surety ... thwarts the purposes of N.J.S.A. 40A:11-22(b) because it conditioned the obligation to issue the performance bonds upon a 'request[] by' the bidder to do so. The surety "agreed to supply the performance bond only if and when [the bidder] requested it to do so. Thus, the consent of surety did not comply with the express terms of the specifications."

McElwee Group, LLC v. Atlantic County Utils. Auth., 2009 N.J. Super. Unpub. LEXIS 3144 (App Div, 2009)

The bidder made errors in its bid and sought to withdraw it. The Authority awarded to the second lowest bidder and sought to enforce the bid bond.

The trial judge said that "there are four basic circumstances that are necessary before [rescission] would be permitted. First, that the mistake is of great consequence so that the enforcement of the contract would be unconscionable. Second, that the mistake goes to a material feature of the contract. [Third], that the mistake [was made] notwithstanding the exercise of reasonable care. And fourth, that there's no serious prejudice to the other party aside from the loss of the bargain."

The trial judge found that the essential conditions for rescission were met, and determined that McElwee was entitled to withdraw its bid and to the return of its bid deposit. Affirmed by the Appellate Division,

Star of the Sea Concrete Corp. v. Lucas Bros., Inc., 370 N.J. Super. 60 (App Div, 2004)

The intent of N.J.S.A. 40A:11-23.2 was to "circumscribe[] the authority of local contracting agencies to waive bid defects by designating five kinds of defects that cannot be waived under any circumstances." (quoting from P & A Constr., Inc. v. Twp. of Woodbridge, 365 N.J. Super. 164, 176-77 (App Div, 2004).

Waste Disposal, Inc. v. Roselle Park, 145 N.J. Super. 217 (App Div, 1976)

The advertised notice for bids mandated "A certified check for 10% of the bid" as opposed to "10% of the bid, but not in excess of \$ 20,000.00". This was one reason that the court found that "Certain of the provisions of the published notice for bids were clearly not in harmony with either the letter or the spirit of the applicable statute." The specifications were disapproved and re-bidding was required.

William M. Young & Co. v. West Orange Redeveloping Agency, 125 N.J. Super. 440 (App Div, 1973)

Court permitted opening of bids to be delayed two minutes because a bidder (later determined to be the low bidder) called and advised it was delayed by snow and rain.

DeSapio Const., Inc. v. Township of Clinton, 276 N.J. Super. 216 (Law Div, 1994)

The court found that a letter stating that the surety "did not anticipate any difficulty" providing bonds on the project did not conform to the requirements of the statute.

River Vale v. R. J. Constr. Co., 127 N.J. Super. 207 (Law Div, 1974)

River Vale advertised for bids, requiring that each bid be accompanied by a certified or cashier's check and saying that bid bonds would not be accepted, but it also reserved the right to waive minor defects. The low bid was accompanied by a bid bond. The court found that a waiver of the check requirement would neither deprive the municipality of its assurance that the contract would be performed according to its requirements, nor adversely affect competitive bidding by placing a bidder in a position of advantage. The court concluded that the irregularity was insubstantial and therefore waivable.

The court also commented on a bid bond limited to the difference between the amount of the principal's bid and the next lowest bid. "A bid bond in such form does not necessarily constitute the same extent of security as a 10% certified check and further, in such form, would not accord with the requirements of N.J.S.A. 40A:11-21 and might well not be within the municipal discretion to accept."