

**"Bid Bonds, Consent of Surety & Procurement: All You Need to Know"
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Presentation Notes

Mark S. Anderson

This presentation is about bid bonds and consent of surety under the Local Public Contracts Law, N.J.S.A. 40A:11-1 *et seq.*

Not MLUL bonds;

Not bonds for local improvements;

Not payment bonds;

Just bid bonds under the Local Public Contracts Law, N.J.S.A. 40A:11-1 *et seq.* and perhaps some related issues.

Are you subject to the LPCL?

N.J.S.A. 40A:11-2. Definitions.

As used herein the following words have the following definitions, unless the context otherwise indicates:

(1) "Contracting unit" means:

(a) Any county; or

(b) Any municipality; or

(c) Any board, commission, committee, authority or agency, which is not a State board, commission, committee, authority, except as provided pursuant to P.L.2013, c.4, or agency, and which has administrative jurisdiction over any district other than a school district, project, or facility, included or operating in whole or in part, within the territorial boundaries of any county or municipality which exercises functions which are appropriate for the exercise by one or more units of local government, including functions exercised in relation to the administration and oversight of a tourism district located in a municipality in which authorized casino gaming occurs, and which has statutory power to make purchases and enter into contracts awarded by a contracting agent for the provision or performance of goods or services.

Statutory and regulatory references:

New Jersey Local Public Contracts Law and Regulation Reference Manual (Current as of April 1, 2014):

https://www.nj.gov/dca/divisions/dlgs/programs/lpcl_docs/Full%204-14%20LPCL-NJAC%20Reference%20Handbook.pdf

Department of Community Affairs website:

<https://www.state.nj.us/dca/divisions/dlgs/programs/lpcl.html>

Free source of statutes (click through until you get there):

<https://lis.njleg.state.nj.us/nxt/gateway.dll?f=templates&fn=default.htm&vid=Publish:10.1048/Enu>

Regulations (this is to the entire Administrative Code; purchasing regulations are Title 5, Chapter 34):

<http://www.lexisnexis.com/hottopics/njcode>

Four steps in the guarantee process:

1. Bid guarantee, the guarantee that the bidder will enter into a contract if awarded;
2. Consent of surety, the assurance that the surety will provide the bidder with a performance guarantee if the contract is awarded;
3. Performance guarantee, which is beyond our topic here, is the guarantee that performance of the contract will be adequate;
4. Maintenance guarantee, which is also beyond our topic here, provides protection against defects in a completed work for the duration of the guarantee.

1. Bid guarantee, N.J.S.A. 40A:11-21. Bid guarantee is mandatory for construction more than \$100K, optional for other bids:

N.J.S.A. 40A:11-21. Guarantee to be furnished with bid

A person bidding on a contract for the erection, alteration or repair of a public building, structure, facility or other improvement to real property, the total price of which exceeds \$100,000, shall furnish a guarantee as provided for herein. A contracting unit may provide that a person bidding on any other contract, advertised in accordance with law, shall furnish a guarantee as provided for herein. *The guarantee shall be payable to the contracting unit so that if the contract is awarded to the bidder, the bidder will enter into a contract therefor and will furnish any performance bond or other security required as a guarantee or indemnification.* The guarantee shall be in the amount of 10% of the bid, but not in excess of \$20,000.00, except as otherwise provided herein, and may be given, at the option of the bidder, by certified check, cashier's check or bid bond. In the event that any law or regulation of the United States imposes any condition upon the awarding of a monetary grant to any contracting unit, which condition requires the depositing of a guarantee in an amount other

than 10% of the bid or in excess of \$20,000.00 the provisions of this section shall not apply and the requirements of the law or regulation of the United States shall govern.

2. Consent of surety, N.J.S.A. 40A:11-22. Consent of surety is also mandatory for construction more than \$100K, optional for other bids:

N.J.S.A. 40A:11-22. Surety company certificate

a. A person bidding on a contract for the erection, alteration or repair of a building, structure, facility or other improvement to real property, the total price of which exceeds \$100,000, shall furnish a certificate from a surety company, as provided for herein. A contracting unit may provide that a person bidding on any other contract shall furnish a certificate from a surety company, as provided for herein.

b. When a surety company bond is required in the advertisement or specifications for a contract, every contracting unit shall require from any bidder submitting a bid in accordance with plans, specifications and advertisements, as provided for by law, 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.

This certificate shall be obtained for a bond --

(1) For the faithful performance of all provisions of the specifications or for all matters which may be contained in the notice to bidders, relating to the performance of the contract, and

(2) If any be required, for a guarantee bond for the faithful performance of the contract provisions relating to the repair and maintenance of any work, project or facility and its appurtenances and keeping the same in good and serviceable condition during the term of the bond as provided for in the notice to bidders or in the specifications, or

(3) In such other form as may be provided in the notice to bidders or in the specifications.

If a bidder desires to offer the bond of an individual instead of that of a surety company, the bidder shall submit with the bid a certificate signed by such individual similar to that required of a surety company.

The contracting unit may reject any such bid if it is not satisfied with the sufficiency of the individual surety offered.

Where they are required or requested, bid guarantee and consent of surety are mandatory items, N.J.S.A. 40A:11-23.2:

N.J.S.A. 40A:11-23.2. Mandatory items for bid plans, specifications

When required by the bid plans and specifications, the following requirements shall be considered mandatory items to be submitted at the time specified by the contracting unit for the receipt of the bids; the failure to submit any one of the mandatory items shall be deemed a fatal defect that shall render the bid proposal unresponsive and that cannot be cured by the governing body:

- a. A guarantee to accompany the bid pursuant to section 21 of P.L.1971, c.198 (C.40A:11-21);
- b. A certificate from a surety company pursuant to section 22 of P.L.1971, c.198 (C.40A:11-22);
- c. A statement of corporate ownership pursuant to section 1 of P.L.1977, c.33 (C.52:25-24.2);
- d. A listing of subcontractors pursuant to section 16 of P.L.1971, c.198 (C.40A:11-16);
- e. A document provided by the contracting agent in the bid plans, specifications, or bid proposal documents for the bidder to acknowledge the bidder's receipt of any notice or revisions or addenda to the advertisement or bid documents.

The contract must be in writing, but the forms for guarantees is up to the governing body, N.J.S.A. 40A:11-14:

N.J.S.A. 40A:11-14. Form of contracts

All contracts for the provision or performance of goods or services shall be in writing. The governing body of any contracting unit may, subject to the requirements of law, prescribe the form and manner in which contracts shall be made and executed, and the form and manner of execution and approval of all guarantee, indemnity, fidelity and other bonds.

Bid guarantee and consent of surety for non-construction bids, for example, goods and services. Sections 21 and 22 clearly state that a contracting unit "may provide that a person bidding on any other contract ... shall furnish" a bid bond or consent of surety.

Letter of Credit instead of bond:

For construction over \$100K, sections 21 and 22 clearly say "shall furnish a guarantee as provided for herein." Case law (see Aponte-Correa v. Allstate Ins. Co., 162 N.J. 318, 325 (2000)) says that "Under the 'plain meaning' rule of statutory construction, the word 'may' ordinarily is permissive and the word 'shall' generally is mandatory." Therefore, for \$100K+ construction cases, "bond" means "bond".

If your bid spec says "bond", that should also be taken as "bond".

The question whether you can specify a letter of credit where a bond is not required is more difficult. Sections 21 and 22 say "A contracting unit may provide that a person bidding on any other contract, advertised in accordance with law, shall furnish a guarantee as provided for herein". The "may" is permissive, and sections 21 and 22 do not say that a bid spec cannot allow another form of bid guarantee. Nevertheless, I would stick to what the statute clearly says can be required, a bond.

A few practical questions and answers:

1. Who collects on the bid bond if the bidder defaults, and how much?

The public entity gets the money. The amount is "10% of the bid, but not in excess of \$20,000.00" because that is what the statute says.

2. What happens if you make a claim against a bond?

Making a claim against a bond is both a powerful and a risky step. It is powerful because it will get the surety's attention, and the surety will get the bidder's attention. It is risky because it will probably terminate the bidder's ability to get future bonding, and that could put a bidder out of business. Why is this your problem? Because if the bidder is fighting for its business life, it will probably fight tooth and nail.

You will have to deal thereafter with the surety, which will be primarily concerned with protecting its assets, not the swift completion of your project. Dealing with the surety does not mean that you will no longer be dealing with the bidder; the first thing the surety may do is to put the bidder back on the job.

So, use the threat of calling a bond carefully. Get everything you can with the threat, and call the bond as a last resort.

3. What happens if a bidder sues over a bid award?

When we get into the cases in a few moments, you will see that almost all involve really big-deal contracts, many being trash hauling contracts. There is a reason for this: most reported cases, even "unofficially reported", are appellate cases. It can easily take years to get through the appellate courts. The cost of litigating a bidding case can exceed the amount of the bid, and certainly exceed the difference between competing bids. Other than in big-deal cases, no one can afford the time and the expense of litigating for long.

The result is that cases are usually over after the initial trial court decision. Someone asks the court to impose an immediate, temporary order, for example, requiring a bid to be accepted,

or dismissing a bidder's case. That temporary order might theoretically change after a full trial, or after an appeal, but no one has the time or money to see it through.

If a bidder sues, or if a public entity sues, the first, temporary decision is likely to be the last. Be prepared for that. Make your best case immediately. Be prepared to accept the temporary decision as final.

Case law summary.

The cases to be discussed, and others that we may not get to, are on the case list, with citations and brief summaries of the bid bond issues decided. The selection of cases, and the summaries, focus on bid bond issues specifically, not Local Public Contracts cases generally.

A word about "unpublished cases". Not all cases that have written opinions, not even all Appellate Division cases with written decisions, are "published", that is, "officially published". Only officially published cases are found in the official New Jersey Superior Court Reporter, otherwise known as "NJ Super". Technically, only officially published cases establish precedent, meaning that the decisions are binding on lower courts.

But unofficial decisions have been circulated for generations and used by those who had them in the hope that they would be persuasive to other judges. Now, with the internet, "published" and "unpublished" cases are about equally available.

The majority of cases that I will touch on are "unpublished", but they give you an idea of how courts have dealt with legal issues before. Lawyers rely more and more on "unpublished" cases, to the point where the distinction may no longer be very important.