

LEXSEE

NOVA CRETE, INC., Plaintiff-Respondent/Cross-Appellant, v. CITY OF ELIZABETH, Defendant-Appellant/Cross-Respondent, and JOGI CONSTRUCTION, INC., Defendant. NOVA CRETE, INC., Plaintiff-Respondent, v. CITY OF ELIZABETH, Defendant, and JOGI CONSTRUCTION, INC., Defendant-Appellant.

DOCKET NO. A-3211-08T3, A-3550-08T3

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

2010 N.J. Super. Unpub. LEXIS 101

October 14, 2009, Argued

January 15, 2010, Decided

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PRIOR HISTORY: [*1]

On appeal from the Superior Court of New Jersey, Law Division, Union County, Docket No. L-4126-08.

COUNSEL: William R. Holzapfel, City Attorney, argued the cause for appellant/cross-respondent, City of Elizabeth (Mr. Holzapfel, attorney; Raymond T. Bolanowski, First Assistant City Attorney, on the brief).

Scott D. Baron argued the cause for appellant, JOGI Construction, Inc. (Baron Samson, LLP, attorneys; Mr. Baron, on the brief).

Richard E. Wenger argued the cause for respondent/cross-appellant, Nova Crete, Inc. (Hedinger & Lawless, attorneys; Mr. Wenger, on the brief).

JUDGES: Before Judges Wefing, Messano and LeWinn.

OPINION

PER CURIAM

These appeals were calendared and argued back-to-back. Because they involve the same core facts and compel the same legal analysis, we have consolidated

them for purposes of this opinion. At issue is a series of orders entered by the Law Division judge after a summary proceeding. The first, dated January 27, 2009, granted plaintiff, Nova Crete, Inc. (Nova Crete), permanent injunctive relief, "restrain[ing] and enjoin[ing]" defendants, the City of Elizabeth (Elizabeth) and JOGI Construction, Inc. (JOGI), from "proceeding with work pursuant to an award of contract" for the Elizabeth [*2] Avenue Streetscape Enhancement Construction Project (the project). On February 20, the judge entered two additional orders: he denied JOGI's motion for reconsideration; and, he ordered Elizabeth to "rescind the award of contract to JOGI." In A-3211-08, Elizabeth appeals, and Nova Crete cross-appeals; in A-3550-08, JOGI appeals.

The salient facts and procedural history are undisputed. Elizabeth publicly solicited bids for the project. Each bidder received a packet of "Information for Bidders" that stated in relevant part:

Each bidder must submit with his bid a certificate from a responsible surety company *stating that the said surety company will provide in the event that he should be the successful bidder, a surety bond* in the amount of one hundred percent (100%) of the contracted price and subject to such conditions as contained in the specifications, said surety bond to be satisfactory to the City Council of the City

of Elizabeth. The surety shall comply with the requirements of [N.J.S.A. 2A:44-143](#) as amended.

[(Emphasis added).]

The bid package also contained a "Document Submission Checklist" advising all bidders that submission of "[a] [c]ertificate from a surety company, pursuant to [*3] [N.J.S.A. 40A:11-22](#)" was mandatory, and that the failure to submit same may be "cause for the bid to be rejected[.]" citing [N.J.S.A. 40A:11-23.2](#).

On October 7, 2008, Elizabeth received nine bids. Nova Crete's bid was the lowest, at \$ 1,388,495.00; JOGI's was the second lowest at \$ 1,626,061.09. On October 20, Elizabeth's Director of Public Works, John F. Papetti, Jr., notified the City Council that Nova Crete's bid "failed to provide an unconditional Consent of Surety which is a material defect[.]" Therefore, Papetti claimed the bid was "non[-] responsive and must be rejected." On October 28, the Council awarded the contract to JOGI.

Specifically, Nova Crete's consent of surety stated:

The Aegis Security Insurance Company as Surety . . . hereby consents and agrees that if the Contract for the Elizabeth Avenue Streetscape . . . be awarded to Nova Crete Inc., as Principal, the undersigned Surety agrees with the said City of Elizabeth, Obligee, to execute the final bond as required by the specifications and to become Surety in the full amount of the contract price, not to exceed (\$ 2,200,000.00) dollars, for the faithful performance of the contract, provided we are requested by the Principal.

[(Emphasis [*4] added).]

By contrast, JOGI's consent of surety stated:

Developers Surety and Indemnity Company . . . hereby agrees that if [JOGI] is the successful Bidder for Elizabeth Avenue Streetscape[,] it as surety, will provide the Bidder with bonds in such sum as are required in the advertisement or in the specifications.

[(Emphasis added).]

On December 12, 2008, Nova Crete filed a Verified Complaint and Order to Show Cause seeking temporary injunctive relief and an order awarding it the contract. The judge entered the temporary restraints and set the matter down for a hearing. In lieu of filing an answer, Elizabeth moved to dismiss; JOGI joined in that request.

On the return date, after considering the briefs and oral argument of counsel, the judge reserved decision. On January 27, the judge entered an order permanently enjoining Elizabeth and JOGI from proceeding under the contract; he denied Nova Crete's request to rescind the contract award to JOGI and to award it the contract.

JOGI sought reconsideration; Nova Crete opposed that request and filed a cross-motion seeking an order directing the City to award it the contract. On February 20, 2009, the judge denied the motion for reconsideration. [*5] As to the cross-motion, he ordered the contract award to JOGI be rescinded, but, without explanation, the judge deleted from Nova Crete's proposed order a provision directing the City to award the contract to Nova Crete "as the lowest responsible bidder." In his brief letter opinion, however, the judge indicated that he was granting Nova Crete's cross-motion "to award it" the contract. These appeals followed.

The arguments raised by Elizabeth and JOGI may be distilled to a single point: Nova Crete's consent of surety was not unconditional, thus making the bid unresponsive; that defect could not be waived or cured. As a result, Elizabeth properly awarded the contract to JOGI and the judge erred in rescinding the award. In opposition, Nova Crete argues that the judge properly determined that the consent of surety was "acceptable[.]" that its bid was fully responsive, and that it was the lowest responsible bidder. Thus, in its cross-appeal, Nova Crete contends that the judge erred in not ordering Elizabeth to award it the contract.

We have considered these arguments in light of the record and applicable legal standards. We reverse.

"The competitive-bidding process is incorporated in the [*6] Local Public Contracts Law "The purpose of [which] . . . is to 'secure for the public the benefits of unfettered competition.'" [Meadowbrook Carting Co. v. Borough of Island Heights](#), 138 N.J. 307, 313, 650 A.2d

748 (1994) (quoting *Terminal Constr. Corp. v. Atl. County Sewerage Auth.*, 67 N.J. 403, 410, 341 A.2d 327 (1975)). To that end, "publicly advertised contracts must be awarded to 'the lowest responsible bidder[.]" *N.J.S.A. 40A:11-6.1*["], which "has [been] interpreted . . . to mean . . . the contract must be awarded not simply to the lowest bidder, but rather to the lowest bidder that complies with the substantive and procedural requirements in the bid advertisements and specifications." *Meadowbrook Carting, supra*, 138 N.J. at 313 (citing *Twp. of Hillside v. Sternin*, 25 N.J. 317, 324, 136 A.2d 265 (1957)). "[A]ll bids must comply with the terms imposed, and any material departure invalidates a nonconforming bid as well as any contract based upon it." *Meadowbrook Carting, supra*, 138 N.J. at 314.

N.J.S.A. 40A:11-22(b) states in pertinent part:

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 [*7] 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

The certificate is frequently "referred to as a consent of surety" *Meadowbrook Carting, supra*, 138 N.J. at 316. The consent of surety is one of five items listed in *N.J.S.A. 40A:11-23.2*, which was enacted by the Legislature in 1999. "When required by the bid plans and specifications," any of these five items, "shall be considered mandatory" and "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" *Ibid.* We have said that "[t]he 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 [*8] that cannot be waived under any circumstances.'" *Star of Sea Concrete Corp. v. Lucas Bros., Inc.*, 370 N.J. Super. 60, 68, 850 A.2d 559 (App. Div. 2004) (quoting *P&A Constr., Inc. v. Twp. of Woodbridge*, 365 N.J. Super. 164, 176-77, 838 A.2d 520 (App. Div. 2004)).¹

1 In this regard, *N.J.S.A. 40A:11-23.2* essentially codifies existing case law regarding the consent of surety. See *Meadowbrook, supra*, 138 N.J. at 320 (holding the failure to submit a consent of surety with the bid was "a material defect that [could] be neither waived nor cured").

N.J.S.A. 40A:11-22 does not use the word "unconditional" in describing the requirements of the consent of surety. Therefore, we must consider those cases that have construed the statute in light of the general purposes fostered by the requirement that a successful bidder supply an appropriate consent of surety.

The consent of surety "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." *Meadowbrook Carting, supra*, 138 N.J. at 316; see *Albanese v. Machetto*, 7 N.J. Super. 188, 191, 72 A.2d 521 (App. Div. 1950); see also *DeSapio Constr., Inc. v. Twp. of Clinton*, 276 N.J. Super. 216, 221, 647 A.2d 878 (Law Div. 1994). [*9] The "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." *Meadowbrook Carting, supra*, 138 N.J. at 316; see *L. Pucillo & Sons, Inc. v. Mayor of New Milford*, 73 N.J. 349, 353, 375 A.2d 602 (1977)).

However, the legal consequences that flow from the surety's issuance of a certificate pursuant to *N.J.S.A. 40A:11-22* arise without regard to whether the bidder actually executes the contract. As the Court has said, "[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.*" *Meadowbrook Carting, supra*, 138 N.J. at 321 (emphasis added). Thus, even prior to the 1999 amendments to the Local Public Contract Law, *N.J.S.A. 40A:11-1 to -50*, a bid specification requiring the

submission of a consent of surety in conformance with those specifications was not waivable.

To permit waiver of the consent-of-surety requirement would undermine the stability of the public-bidding process. [*10] For example, *if a low bidder that had failed to submit a consent of surety decided it no longer sought the contract because it had determined that its bid was too low, that bidder could decline to obtain the consent of surety and the performance bond.* Without a performance bond, the bidder cannot be required to enter into and perform the contract. In *DeSapio* . . . the court noted that the low bidder that had failed to include an unconditional consent of surety with its bid proposal had acquired a competitive advantage because even if it were awarded the contract, it "could unilaterally 'cancel' the award by failing to obtain" the consent of surety. [276 N.J. Super. at 222](#). Moreover, that the municipality can retain the amount of the bid bond does not necessarily assure that the low bidder will enter into or perform the contract. If the low bidder determines that its bid is too low and that its prospective loss on the contract exceeds the amount of its bid bond, that low bidder may decide to forfeit its security rather than incur a greater loss by performing the contract.

[[Meadowbrook Carting, supra, 138 N.J. at 321](#) (internal citation omitted) (emphasis added).]

The issue confronted by [*11] the Court in [Meadowbrook Carting, supra](#), was limited to whether the failure to supply the consent of surety was waivable or curable. [138 N.J. at 320](#) Similarly, in [Albanese, supra](#), the bid was challenged, in part, because it failed to include a consent of surety. [7 N.J. Super. at 190](#). That, of course, is not the issue that confronts us, since Nova Crete did submit its consent of surety from Aegis. Rather, the question posed here is more subtle -- whether the consent of surety issued by Aegis 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" Nova Crete to do so?

As to that particular question, there is little guidance to be gleaned from precedent, though the issue was squarely presented in [DeSapio](#). There, the plaintiff, low-bidder on a municipal improvements project, sought declaratory relief challenging the municipality's conclusion that its consent of surety presented "a material, non-waivable deviation from the" bid specifications and [N.J.S.A. 40A:11-22](#). [DeSapio, supra, 276 N.J. Super. at 217-19](#). The plaintiff's consent of surety provided:

Should DeSapio Construction Inc., be successful low bidder [*12] on the project, *we would not anticipate any difficulty providing bonds on the above captioned project*, subject to execution of a contract satisfactory to DeSapio and [the surety]. In addition, provisions of such bonds would also be subject to satisfactory evidence of financing in our normal underwriting requirements at the time of such request from our principal.

[[Id. at 219.](#)]

The judge noted that [N.J.S.A. 40A:11-22](#) "require[d] the surety company to guaranty that *it will* provide the bonds for the project." [DeSapio, supra, 276 N.J. Super. at 220](#). She concluded, therefore, that the consent was "defective" because under its terms, the surety "[wa]s not unconditionally undertaking an obligation to provide the bond. [The surety's] commitment letter d[id] not bind [it] to do anything." *Ibid.*

In [Mayo, Lynch & Associates, Inc. v. Pollack, 351 N.J. Super. 486, 497, 799 A.2d 12 \(App. Div. 2002\)](#), we said that "[a] consent of surety that did not bind the surety *to supply the required bonds when the contract was awarded* constituted a material, non-waivable defect in the bid." (Citing [DeSapio, supra, 276 N.J. Super. at 220-22](#)) (emphasis added). In a somewhat different vein, in [L. Pucillo & Sons v. Township of Belleville, 249 N.J. Super. 536, 548, 592 A.2d 1218 \(App. Div.\), \[*13\] certif. denied, 127 N.J. 551, 606 A.2d 364 \(1991\)](#), we determined that the consent of surety accompanying a bid for a five-year public contract failed to comply with the

bid specifications because "renewability was at the surety's option."

Returning to the case before us, we note that the consent of surety issued by Aegis did not comply with the bid specifications. Those specifications required "[e]ach bidder [to] submit with his bid" a consent of surety "stating that the . . . surety company w[ould] provide in the event that he should be the successful bidder, a surety bond" The Aegis certificate imposed a different obligation upon the surety; it agreed to supply the performance bond only if and when Nova Crete requested it to do so. Thus, the consent of surety did not comply with the express terms of the specifications.

Elizabeth and JOGI further argue that the conditional nature of the consent of surety -- Aegis's obligation would only arise if Nova Crete asked for the bonds -- opened the door to all the potential vices cited by the *Meadowbrook Carting* Court. Since the underlying condition could only be satisfied by Nova Crete, the result was, at the least, an unfair competitive advantage [*14] to Nova Crete. See [Meadowbrook Carting, supra, 138 N.J. at 322-23](#). Elizabeth posits another potential dire consequence. Nova Crete might decide that it had "low-balled" the contract and simply refuse to execute an agreement with Elizabeth to perform the work. As a result, the public might be forced to pay more money to have the contract performed. This could necessitate litigation to recover potential consequential damages suffered by the municipality. See, e.g., [Highland, supra, 25 N.J. at 321](#).

Indeed, in our minds, the condition attached to Aegis's consent of surety seems a virtual invitation to further litigation. We can envision a plausible scenario where even if Nova Crete did not "walk away from the

job," litigation would be required to resolve whether Nova Crete properly "request[ed]" the issuance of the performance bond from Aegis. Clearly, the issuance of an unconditional consent of surety is designed to foreclose such a possibility from ever occurring.

Nova Crete argues, and the trial judge agreed, that the statutory scheme of the Local Public Contracts Law compels forfeiture of the bid bond or alternate security, [N.J.S.A. 40A:11-21](#), if the low bidder decides not to execute [*15] the awarded contract. It contends this is the sole source of compensation for the financial consequences suffered by the public entity when a successful bidder simply refuses to perform. However, we think it is clear, based upon the language cited from *Meadowbrook Carting*, that the bid bond/alternate security is not the public agency's sole source of recovery in such circumstances. [Meadowbrook Carting, supra, 138 N.J. at 321](#).

In conclusion, the consent of surety submitted by Nova Crete did not comply with the bid specifications because its issuance was conditioned on an event other than the award of the contract to Nova Crete, and it therefore did not comply with [N.J.S.A. 40A:11-22](#). This defect was material and could not be cured or waived. See [N.J.S.A. 40A:11-23.2](#). As a result, Elizabeth correctly determined that Nova Crete was not the lowest responsible bidder on the project, [N.J.S.A. 40A:11-6.1](#), and properly awarded the contract to JOGI.

The trial court's orders rescinding the award of the contract to JOGI and restraining Elizabeth and JOGI from proceeding with work on the project are reversed and the cross-appeal is dismissed as moot.