

# RE-VISITING THE FORGOTTEN “RESPONSIBLE” PIER

Local Public Contract Law  
N.J.S.A. 40A:11-1 *et seq.*

*presented by*

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## PUBLIC CONTRACT AWARD

Every contract awarded by the contracting agent for the provision of any goods or services **shall be awarded** by resolution of the governing body **to the lowest responsible bidder.** [N.J.S.A. 40A:11-2\(27\)](#)

## LOWEST RESPONSIBLE BIDDER

(a) Whose response to a request for bids offers the lowest price and is **responsive**;

*and*

(b) Who is **responsible**

[N.J.S.A. 40A:11-2\(27\)](#)

The policy of the State is to guard against favoritism and unfair competition by demanding integrity of the bidding process **through strict construction of bidding standards.**

[George Harms Const. Co. v. Bor. of Lincoln Pk. 161 N.J. Super. 367 \(1978\)](#)

“Contracts are not to be awarded ‘simply to the lowest bidder, but rather the lowest bidder that complies with the substantive and procedural requirements in the bid advertisements and specifications.’”

[Star of the Sea Concrete Corp., v. Lucas Brothers, Inc.](#) 370 N.J. Super. 60, 72 (App. Div. 2004) quoting [Meadowbrook Carting Co., Inc. v. Borough of Island Heights](#), 138 N.J. 307, 313 (1994).



Low Bid ✓  
Substantive Requirements ✗  
Procedural Requirements ✗



Low Bid ✓  
Substantive Requirements ✓  
Procedural Requirements ✓

# Distinction between "Responsiveness" and "Responsible"

[Serenity Contracting Group, Inc. v. The Borough of Fort Lee, et al.](#) N.J. Super. (App. Div. 1997)



# RESPONSIVE

*Conforming in all material respects to the terms and conditions, specifications, legal requirements, and other provisions of the request.*

- ✓ Certificate of Surety
- ✓ Statement of Corporate Ownership
- ✓ Non-Collusion Affidavit, etc.

*but also*

# RESPONSIBLE

*Able to complete the contract in accordance with its requirements, including but not limited to requirements pertaining to:*

- |                      |  |
|----------------------|--|
| ✓ Experience         | ✓ Credit   |
| ✓ Moral integrity    | ✓ Workforce, equipment and facilities availability, etc. |
| ✓ Operating capacity |  |
| ✓ Financial capacity |  |

**Confusion can arise from a reading of the statute**  
**N.J.S.A. 40A:11-4. Contracts required to be advertised,**  
***disqualification of bidder.***

The governing body of a contracting unit may, by resolution approved by a majority of the governing body **disqualify a bidder who would otherwise be determined to be the lowest responsible bidder**, if the governing body finds **that it has had prior negative experience with the bidder.**

**Lowest Bid**  
✓ *Responsive*

**Lowest Bid**  
✓ *Responsible*

*May be  
disqualified  
by*

**Prior  
Negative  
Experience**



## THE OFTEN FORGOTTEN (MANDATORY) “RESPONSIBLE” PIER OF A PUBLIC CONTRACT AWARD

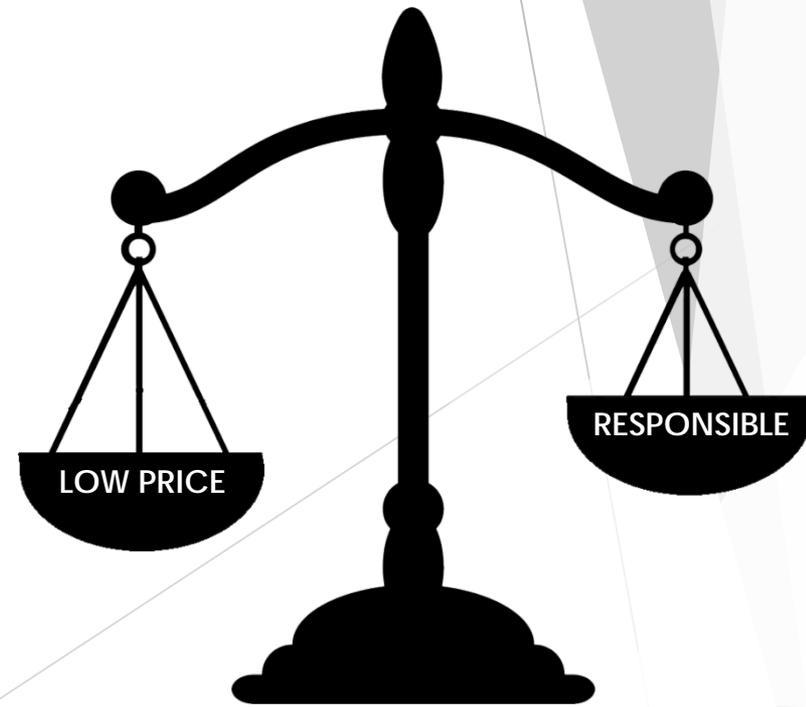
“Responsible” = able to complete the contract in accordance with its requirements, *including but not limited to requirements* pertaining to:

- ✓ Experience
- ✓ Moral integrity
- ✓ Operating capacity
- ✓ Financial capacity
- ✓ Credit
- ✓ Workforce, equipment & facilities availability

[N.J.S.A. 40A:11-2\(32\)](#)

New Jersey Supreme Court: “The *responsibility of a bidder* is not merely a prerequisite to the award of a contract to the lowest bidder, **it carries equal, if not more weight**. Indeed, there are many instances where the ‘lowest bidders’ will not receive the contract because they are not the most ‘responsible bidder.’”

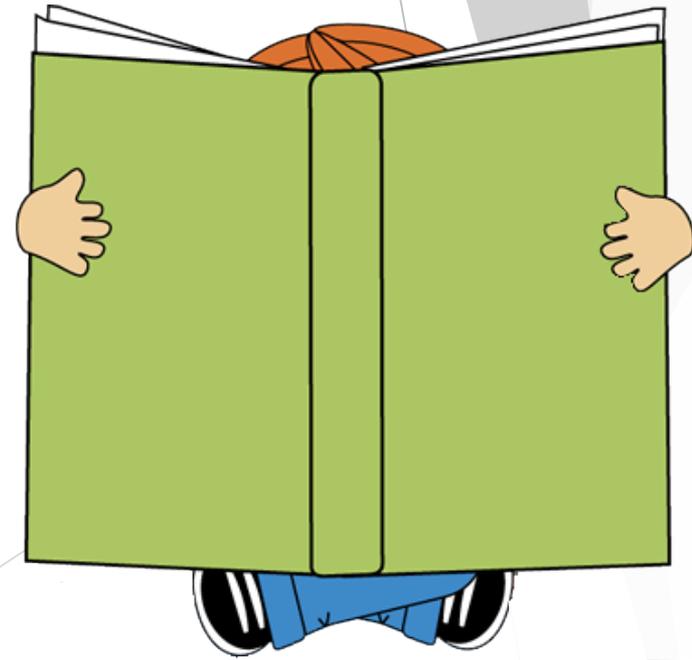
[Emphasis added] [NERI Corp. v. New Jersey Highway Authority](#), 147 N.J. 223 (1996).



## SAMPLE LANGUAGE FOUND IN PUBLIC BID DOCUMENTS –

### NOT DEEMED APPROPRIATE

- The Owner *may make such investigation* as deemed necessary to determine the ability of the bidder.
- The Owner reserves the right to reject any bid if the evidence submitted by the bidder *upon request or Owner's investigation of such bidder* fails to satisfy the Owner that the bidder is properly qualified and / or financially capable to carry out the obligations of the contract and to complete the work.
- A bidder shall be deemed technically qualified if he has satisfactorily performed a minimum of *three projects of similar type* and magnitude in this state.
- A bidder shall be deemed financially qualified if it has sufficient *net worth* available for the *initial 30 days of construction activity*.



## WHAT IS THE STANDARD?

- To reject the lowest bidder there must be evidence of such character concerning the responsibility of the bidder as would cause fair-minded and reasonable men to believe it was not in the best interest of the municipality to award the contract to the lowest bidder.

*Automatic Laundries v. Bayonne Housing Authority*, 45 N.J. Super, 26-270 (Law Div. 1957).

- “Responsible” – Refers to the bidder’s quality, fitness and capacity to satisfactorily perform the proposed work.

*NERI Corp. v. New Jersey Highway Authority*, 147 N.J. 223 (1996).

- “Responsible” – Also means the “moral integrity” of the bidder.

*Arthur Venneri Co. v. Paterson Housing Authority*, 29 N.J. 392 (1959).

**“The moral responsibility of a corporation is one and the same with the moral responsibility of the individuals who give it direction.”**

*Trap Rock Industries, Inc. v. Kohl*, 59 N.J. 471 (1971)



# VANAS CONSTRUCTION CO., INC. V CITY OF JERSEY CITY

(Consolidated cases, unpublished opinion), Nos. A-1649-10T2., A-1650-10T2, A-1804-10T2 (Dec. 2010)

- Bid Specifications required completion and submission of:
  - Certificate of Experience and Plant and Equipment Questionnaire by General Contractor, and
  - Certificate of Experience and Questionnaire by each subcontractor required to be named pursuant to N.J.S.A. 40A:11-16.
- Low Bidders did not include Certifications
- Court held that a waiver of the bid specification certificates would deprive the municipality of its assurance that the contract would be performed and guaranteed according to its specified requirements.

## IF GOVERNING BODY BELIEVES THAT LOW BIDDER IS NOT RESPONSIBLE – NEXT STEPS

- Public Hearing - The requirement of a hearing derives from the basic policy of the bidding laws (i.e., encouragement of competition, etc.).  
Arthur Venneri Co. v. Paterson Housing Authority, 29 N.J. 392 (1959).
- Testimony and documentary evidence as to a Contractor's "Responsibility" is a fact issue for resolution by the Governing Body.  
Palamar Const., Inc. v. Tp. of Pennsauken, 196 N.J. Super. 241 (App. Div. 1983).
- "The determination of the question of who is the lowest responsible bidder does not rest in the exercise of arbitrary and unlimited discretion, but upon a bona fide judgment, based upon facts tending to support the determination."  
D. Stamato & Co., Inc. v. Township of Vernon, 131 N.J. Super. 151 (App. Div. 1974) *quoting* 10 McQuillin, *Municipal Corporations* (3 ed. 1966), § 29.73 at 425-426.
- Public entity must expressly set forth the reasons for finding that a low bidder is not responsible.  
D. Stamato, Co., Inc. v. Township of Vernon, 131 N.J. Super. 151 (App. Div. 1974).
- Appeal of Governing Body is to the Superior Court.

## LESSONS LEARNED

- “Responsible” ≠ Bidder Submission of Mandatory Documents
- “Responsible” is a Separate, Standalone Prong to be Assessed
- Inclusion of “Responsible” Prong in a Bid is Mandatory.
- There is Discretion as to what Criteria the Public Agency can put into the Bid Specifications to Assess if a Contractor is “Responsible”
- The “Responsible” Prong is a Subjective Analysis -- Based on the Criteria Listed in the Bid Specifications.
- Recommendation of Award should include:
  - Price;
  - Bidder Responsiveness (i.e. Mandatory Document Submission, as required by Bid specifications; and
  - Subjective Assessment of the “Responsible” Criteria.