Judy A. Verrone, Esq. (Attorney ID #007091991)
Thomas A. Abbate, Esq. (Attorney ID #015552002)
Jason S. Nunnermacker, Esq. (Attorney ID #034212003)
DECOTIIS, FITZPATRICK, COLE & GIBLIN, LLP
61 South Paramus Road, Suite 250
Paramus, New Jersey 07652
(201) 928-1100
jnunnermacker@decotiislaw.com
Attorneys for Respondent, New Jersey Turnpike Authority

	: SUPERIOR COURT OF NEW JERSEY
IN THE MATTER OF PROTEST	: APPELLATE DIVISION
FILED BY EL SOL CONTRACTING	:
AND CONSTRUCTION CORP.,	: DOCKET NO.: A-00232-24
CONTRACT T100.638	:
	: ON APPEAL FROM A FINAL
	: DECISION FO THE NEW JERSEY
	: TURNPIKE AUTHORITY, DATED
	: SEPTEMBER 17, 2024
	:
	: AGENCY DOCKET NO.: 3952104

RESPONDENT NEW JERSEY TURNPIKE AUTHORITY'S MEMORANDUM OF FACT AND LAW IN OPPOSITION TO PETITIONER EL SOL CONTRACTING AND CONSTRUCTION CORP.'S APPEAL

On the Brief: Judy A. Verrone, Esq.
Thomas A. Abbate, Esq.
Jason S. Nunnermacker, Esq.

Date: October 28, 2024

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

PAGE(S)

Cases

Statutes

Regulations

PRELIMINARY STATEMENT

This matter arises from the New Jersey Turnpike Authority's ("NJTA") rejection of a bid submitted by El Sol Contracting & Construction Corp. ("El Sol") for Contract T100.638 (the "Contract"), entitled "Deck Rehabilitation of Newark Bay – Hudson County Extension (NB-HCE) Bridge Zones 2 and 3"[1] ("Redecking Project"). El Sol submitted the apparent low bid at $70,865,354.00 ("El Sol Bid"). As required by NJTA bid specifications, El Sol submitted NJTA's prescribed form of Consent of Surety with its bid, executed by an individual, Katherine Acosta, purportedly acting on behalf of Liberty Mutual Insurance Company. The Consent of Surety, if valid, would obligate the surety company to issue the required performance bond in favor of NJTA in the amount of 100% of the proposal if El Sol were awarded, and executed the Contract. The performance bond would then remain in effect the entire duration of the Redecking Project until completion and acceptance of the underlying work.

Unfortunately, El Sol failed to submit a power of attorney ("POA") on behalf of Liberty Mutual attesting to the fact that Ms. Acosta was duly authorized to execute the Consent of Surety. Instead, the POA that *was* submitted only authorized Ms.

[1] The NB-HCE is an extension of the New Jersey Turnpike that connects Newark and Jersey City near the Holland Tunnel. There are three (3) zones of the NB-HCE, identified as Zone 1, Zone 2, and Zone 3. Only Zones 2 and 3, as described in the Concise Statement of Facts, are the subject of the Redecking Project.

Acosta to execute the Proposal Bond, which operates to secure the contracting agency in an amount not to exceed 10% of the bid and only until award and execution of the Contract, when the full performance bond in the amount of 100% of the bid is delivered. Absent submission of the surety's legal authorization for Ms. Acosta to sign the Consent of Surety *in addition to* the Proposal Bond, at bid submission the practical effect was tantamount to submitting no Consent of Surety at all.

Thus, NJTA lacked any assurance, at the time of bid submission, that the surety would stand behind the obligation and issue the necessary performance bonds at the time of contract execution. It is black letter law that failure to submit a binding Consent of Surety in proper form, *at the time of submission* of the bid, is a material and non-waiveable defect requiring mandatory rejection of the bid. NJTA was thus without discretion to waive this patent defect and acted accordingly.

As a result of the failure, by Liberty Mutual's attorney-in-fact, Ms. Acosta, to obtain a POA in proper form, NJTA was left with no choice but to award the Redecking Project to the second low bidder, Joseph M. Sanzari, Inc ("Sanzari"), as the lowest responsible bidder at $80,735,000.00. While this is approximately $10M higher than El Sol's bid, Sanzari's bid was still significantly below the NJTA's engineer's pre-bid estimate of $98,696,937.40 and thus, there was no basis to re-bid the project or do anything other than award to the lowest responsible and responsive bidder. Although El Sol accuses NJTA of favoritism or bid shopping, in fact, NJTA

acted in good faith to faithfully uphold the law. NJTA would certainly have preferred to save itself and its patrons from the added expense of the Sanzari bid, however, unfortunately, El Sol or its insurance agent made a mistake and submitted a defective bid that was properly rejected. If there is a grievance to be had by El Sol, it lies elsewhere and not with NJTA.

In a comprehensive final agency decision, NJTA received El Sol's protest and determined that under binding Supreme Court precedent, it was without discretion to waive the irregularity. Further, one additional, beneficial outcome of the hearing process is that it brought to light a historical administrative oversight whereby NJTA's internal bid review process had not identified other, defective consents of surety using the same, or a similar power of attorney form. Consequently, while NJTA cannot rewind history, it is nevertheless obligated to correct those deficiencies that are before it now and to scrupulously follow the law going forward. As El Sol points out in its brief, NJTA has already changed its specifications to ensure that future bidders do not make the same mistake, and personnel have been retrained and are now focused on this issue.

For present purposes, however, and whether the parties like it or not, the decision below is the only result permitted under the case law and it should accordingly be affirmed in all respects.

PROCEDURAL HISTORY

On June 25, 2024, NJTA received the following bids for the Redecking Project:

El Sol Contracting & Construction Corp, Maspeth, NY	$70,865,354.00
Joseph M. Sanzari, Inc., Hackensack, NJ	$80,735,000.00
Ferreira Construction Co. Inc., Branchburg, NJ	$92,269,472.00
IEW Construction Group Inc., Hamilton, NJ	$104,013,587.34
D'Annunzio & Sons, Inc., South Plainfield, NJ	$112,707,000.00

[**A42**].

On August 27, 2024, NJTA awarded the Redecking Project bid to Sanzari **(A41**). El Sol responded by letter, dated August 28, 2024, protesting the rejection of the El Sol Bid and the award to Sanzari ("El Sol Protest") (**A51-61**). El Sol argued that its Bid was lower than Sanzari's and that it satisfied all bidding specifications set forth by NJTA, including submission of a Consent of Surety binding the surety to issue the required performance bonds if awarded the Contract **(Ibid)**.

Pursuant to N.J.A.C. 19:9-2-12(b), Thomas F. Holl, Esq., Director of Law for NJTA, was designated by NJTA's Executive Director as the hearing officer on El Sol's Protest (**A67**). The Executive Director determined that, in accordance with El Sol's request, it was appropriate to decide the Protest upon El Sol's written submissions (**Ibid**).

The hearing officer issued a written recommendation to NJTA's Executive Director to deny El Sol's Protest and uphold the Contract award to Sanzari ("Recommended Decision") (**A64-79**). The Recommended Decision was adopted by the Executive Director as a final agency decision ("Final Agency Decision") on September 17, 2024 (**A63**). On September 18, 2024, NJTA received a request by El Sol's legal counsel seeking a stay of the Notice to Proceed with the Contract pending appeal, and consent to an expedited appeal process (**A80-81**).

On September 20, 2024, NJTA denied El Sol's stay request (**A82-84**). On September 24, 2024, this Court granted El Sol's request to file an emergent stay application during the pendency of its appeal of the Final Agency Decision (**A127-128**). On October 7, 2024, this Court granted El Sol an emergent stay of the Notice to Proceed with the Contract (**A125-126**).

STATEMENT OF FACTS

A. Contract Scope of Work Description

The Contract at issue involves rehabilitation of bridges through the limits of the NB-HCE, Zones 2 and 3 (**A2**). Zone 2 of the NB-HCE extends between Interchanges 14A and 14C on the Turnpike, while Zone 3 extends from Interchange

14C to the eastern terminus of Jersey Avenue in Jersey City approaching the entrance to the Holland Tunnel[2] (**Ibid.**). The Redecking Project includes:

- Bridge deck reconstruction of one ramp bridge in Zone 2 and three adjoining bridges in the eastbound direction (towards the Holland Tunnel) in Zone 3;
- Hydrodemolition and partial depth overlay of one bridge in Zone 2;
- Deck repairs and resurfacing of five bridges in Zone 2;
- Steel repairs and bearing replacements throughout the bridges in both zones;
- Parapet and median barrier replacement;
- Deck joint replacement;
- Structural steel repairs;
- Bearing replacements;
- Drainage and lighting improvements; and
- Substructure spall repairs.

(**A2**)

The primary purpose and focus of the Redecking Project is to rehabilitate the bridge decks (including structural components) within Zones 2 and 3 of the NB-HCE (**Ibid.**).

[2] Zone 1 of the NB-HCE extends between the Turnpike's primary thoroughfare at Interchange 14 in Newark to Interchange 14A. Again, Zone 1 is not impacted by the Contract.

As to Zone 3, the Redecking Project is the third phase of repairs that commenced in 2017, when repairs were made to the westbound roadway (from the Holland Tunnel to Interchange 14). However, no reconstruction or rehabilitation of the bridges in Zone 2 have been performed since original construction of the NB-HCE in 1956 **(Ibid.)**. As anyone who has commuted to work on this section of roadway knows, this infrastructure is functionally obsolete, prone to delays and in significant need of rehabilitation and, ultimately, replacement.

B. Bid Process for Redecking Project

NJTA solicited bids in accordance with the Contract Specifications for work to commence by October 1, 2024 (**Ibid.**). In this instance, NJTA relied upon its Standard Specifications (Seventh Ed. 2016), a lengthy, 881-page volume setting forth in detail all of NJTA's requirements with respect to the procurement, implementation and execution of contracts on its roadways. All bidders and contractors are expected to obtain, review and have familiarity with the terms of the Standard Specifications, which are of longstanding import in NJTA's procurement practices.

In this case, Section 102.07, entitled "Proposal Guaranty" requires bidders to provide a proposal or bid bond "in the sum of not less than ten percent (10%) of the total price of the Proposal"(**A1**). The purpose of the Proposal Guaranty is to "provide the Authority with liquidated damages in an amount by which the Contract covering

the Proposal, properly and lawfully executed by the Authority, exceeds the total price bid by the successful Bidder, if the successful Bidder shall fail or refuse to execute the Contract within the stipulated time." (**A1**). In other words, the Proposal Bond covers any increase in price between the low bidder and the second lowest responsive and responsible bidder, if the low bidder were to refuse to proceed with the subject contract. Once the Contract is awarded and executed by the successful bidder, under Section 102.12 of the Standard Specifications, the Proposal Bond is then returned to the bidder and voided (**Ra 5**).

Simultaneously with the release of the Proposal Bond, at the time of execution of the Contract, the successful bidder is required to furnish a Contract Bond. As defined in Section 101.02 of the Standard Specifications, the Contract Bond is "the approved form of security furnished by the Contractor guaranteeing the faithful performance of the Contract by the Contractor" (**Ra 3**). More particularly, in Section 103.02 of the Standard Specifications, entitled "Execution of Contract," it is explained that the Contract Bond "shall be in a sum of not less than the *total amount bid* for the Project and shall be maintained by the Contractor until the final payment is made" (**Ra 1-2** [emphasis added]).

Thus, here, El Sol was required to provide a Proposal Guaranty in an amount of no less than 10% of its $70,865,354.00 bid, and, accordingly, the Proposal Guaranty must contain a minimum penal sum of at least $7.08M to secure NJTA

against its increased costs if it awarded the contract to El Sol, but the company refused to perform. If that occurred, then it would become necessary for NJTA to award the contract to the second lowest bidder, in this case, Sanzari, with a bid of $80,735,000.00. The penal sum of the Proposal Bond would thus secure NJTA against the cost increase.

However, because it is otherwise expensive to procure and increases the bidder's costs, the Contract Bond, in the full amount of 100% of the bid, in this case $70,865,354.00, is not required to be obtained, executed and delivered until the time of contract execution. In addition to the cost of purchasing the Contract Bond, construction contractors generally have a limited total bonding capacity based upon the surety's assessment of their assets and ability to perform the work if selected. Thus, delaying issuance of the Contract Bond until execution provides a benefit to the contractors in that it preserves their bonding capacity and ability to bid on other projects in the interim, and in turn this results in increased competition and lower prices.

However, given the importance of the Contract Bond – essentially, the surety company's guarantee that the work will be performed – NJTA also requires an additional document, the "Consent of Surety" as evidence that the surety company will, in fact, issue the Contract Bond at the time of execution of the contract if the bid is accepted. The Consent of Surety thus spans the limited duration from bid

opening, to ratification of the award by the Board, to transmittal of the certified minutes to the Governor, through expiration of the ten-day veto period and, ultimately, until the time of execution when the Contract Bond is furnished.

NJTA's specifications detail how the agency requires continuous security in this three-phase process, from Proposal Guaranty to Consent of Surety and, finally, to Contract Bond. As explained in Section 102.08 of the Standard Specifications:

> ***The Proposal Bond or Letter of Surety shall be accompanied by a Power of Attorney and a Consent of Surety, each in a form acceptable to the Authority, which shall be executed by the surety company***. The Power of Attorney shall set forth the authority of the attorney-in-fact who has signed the Proposal Bond or Letter of Surety on behalf of the surety company and shall further certify that such power is in full force and effect as of the date of the Proposal Bond or Letter of Surety. The Consent of Surety shall set forth the surety company's obligation to provide the Contract Bond upon award of the Contract to the Bidder.
>
> [**A1** (emphasis added)].

NJTA received five responses on June 25, 2024, as listed above (**A42**). Pursuant to the Contract Specifications, bidders were to submit a proposal bond (or letter of surety) accompanied by a POA and Consent of Surety, "each in a form acceptable to the Authority, which shall be executed by the surety company" (**A1**). As explained above, NJTA anticipates and expects as a matter of custom and practice that the same surety company representative will execute both the Proposal Bond and the Consent of Surety and that sufficient evidence, in the form of a POA, will be provided to demonstrate that the individual executing the documents has the

surety company's authority to do so. Indeed, NJTA's prescribed form of Consent of Surety has a space for the bidder to identify the surety company, a signature line for the "attorney-in-fact" and a signature line for a witness to the attorney-in-fact's signature. It cannot be gainsaid that an undertaking of a surety company must contain indicia that the individual executing the instrument has the legal authority to do so.

Here, El Sol's Bid included a Proposal Bond, a POA, and a purported Consent of Surety, all of which bore the name of Liberty Mutual Insurance Company ("Liberty") (**A3, 4 and 6**). The Proposal Bond and Consent of Surety were both executed by the same surety company representative, Katherine Acosta, identified as the "attorney-in-fact" (**A4 and 6**). Unfortunately, however, the surety company issued a limiting POA form that expressly restricts the attorney-in-fact's authority to issuing the specific surety bond identified by the reference "SNJ0530362021," that is, the Proposal Bond. The POA provides no authority for Ms. Acosta to bind Liberty to the undertaking required under the Consent of Surety **(Ibid).**

Specifically, the header to the POA form expressly limits Ms. Acosta's authority to executing the Proposal Bond only, stating: "This Power of Attorney limits the acts of those named herein, and **they have no authority to bind the Company** except in the manner and to the extent herein stated." [emphasis added]. The operative POA language then evidences the notarized signature of David M.

Carey, Assistant Secretary of Liberty Mutual, as having appointed Ms. Acosta as attorney-in-fact "with full power and authority hereby conferred to sign, execute and acknowledge the following **surety bond**: Principal Name: El Sol Contracting & Construction Corp.; Obligee Name: New Jersey Turnpike Authority; Surety Bond Number: SNJ0530362021." (**A3** [emphasis added]).

However, beneath the POA language is an excerpt of a signed and sealed corporate resolution of the surety company. In the section of the corporate resolution entitled, "Certificate of Designation," authority is granted by the President of Liberty Mutual, to Mr. Carey to appoint attorneys-in-fact as follows:

> The President of the Company, acting pursuant to the bylaws of the Company authorizes David M. Carey Assistant Secretary to appoint such attorneys-in-fact as may be necessary to act on behalf of the Company to make, execute, seal, acknowledge and deliver as surety **any and all undertakings, bonds, recognizances and other surety obligations**.
>
> (**Ibid**.)

In construing the overall intent and import of this document, NJTA reviewed the limiting language imprinted on the header of the POA form stating that Ms. Acosta has "no authority to bind the Company except in the manner and to the extent stated" together with her specific appointment to "sign, execute and acknowledge the following **surety bond**:… SNJ053036202" that is, the identification number assigned to the Proposal Bond. Contrasting this with the full extent of Mr. Carey's more expansive authority to appoint attorneys-in-fact to deliver "any and all

undertakings, bonds, recognizances and other surety obligations" it is obvious that the attorney-in-fact's authority was circumscribed and limited only to the issuance of the specifically referenced Proposal Bond (**A3**).

This is the only rational reading of the document because the Liberty Mutual corporate resolution itself distinguishes between a "surety bond" or "bonds," on the one hand, and "undertakings, recognizances and other surety obligations" (**Ibid**.). A Proposal Bond is a surety bond, but a Consent of Surety is *not*, rather, as explained above, a Consent of Surety is an undertaking by the surety to issue a second bond, the Contract Bond, at a later date and at the time of contract execution. Accordingly, NJTA concluded that to the extent Ms. Acosta executed NJTA's prescribed Consent of Surety form, no evidence was presented that she had been granted the authority by Liberty Mutual to do so and, in fact, the limited scope of the POA suggests otherwise.

Accordingly, while El Sol may have been the apparent lowest bidder, its bid submission was devoid of any evidence that Acosta had authority to bind Liberty to issue the performance bonds, rendering the Consent of Surety an empty promise and thus materially and fatally defective. Consequently, NJTA's sole recourse under the circumstances was to reject El Sol's Bid and award the Contract to the second lowest bidder, Sanzari **(A40, 43, 48, 62-79)**.

C. <u>The Decision Below</u>

On September 17, 2024, NJTA rendered a comprehensive final agency decision sustaining the rejection of El Sol's bid and overruling its protest. As explained by the hearing officer, NJTA rejected El Sol's bid because: "the POA…specifically limits Acosta's authority to executing only the proposal bond, thus binding Liberty solely to the obligations contained therein. The POA, therefore, provides no actual authority for Acosta to bind Liberty to the obligations contained in the consent of surety…Accordingly, while El Sol may have been the lowest bidder, given the limited POA that authorized Liberty's attorney-in-fact to bind the surety solely to the proposal bond, NJTA lacked any assurance that Liberty would stand behind its obligations contained in the consent of surety and actually issue the Contract Bond required by the Contract Specifications.." (**A65**).

Citing the Supreme Court's decision in Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307, 313 (1994), the hearing officer noted the Court's observation that "a consent of surety is a direct undertaking by the bonding company, enforceable by [the public entity]. Its purpose is to provide a guarantee to [the public entity], at the time of submission of the bids, that if the bidder were to be awarded the contract, the surety would issue the required performance bond." (A69). The hearing officer further noted the central holding in Meadowbrook, that is, "without a performance bond, the bidder cannot be required to enter into and perform the

contract" and, therefore, "the failure to submit a consent of surety with the bid is a material defect that could neither be waived nor cured." (**A69**).

In so finding, the hearing officer rejected El Sol's argument that a power of attorney was not necessary to attest to the validity of the purported attorney-in-fact's signature on the Consent of Surety. Noting that the POA at issue here was limited on its face to the proffered Proposal Guaranty, the hearing officer found it self-evident that a Consent of Surety "can only be verified as binding on the surety if it is accompanied by a lawfully executed POA attesting to that fact" and, lacking same, El Sol's bid was fatally defective. (**A71**).

The hearing officer also found of no moment NJTA's subsequent revisions to the subject specifications, noting that the question was not the applicability of those amended specifications or the decision to do so after the underlying protest but, rather, El Sol's compliance with the specifications in effect and as written, at the time of submission of the bid. (**A71**).

To like effect, while taking note of the fact that NJTA had previously accepted consents of surety suffering from the same defect as that at issue here, upon discovering this administrative oversight, NJTA was obligated to follow the holding in Meadowbrook, fully implement its statutory mission and ensure that adequate performance security was provided by bidders on a going-forward basis. To suggest that past oversights would thereafter estop NJTA from enforcing a consent of surety

requirement for some indeterminate amount of time in the future would lead to an absurd result. (**A72**).

Finally, the hearing officer rejected El Sol's efforts to supplement the record after bid opening with a letter from an in-house counsel at Liberty. As explained in the decision, the relevant bright line consideration under Meadowbrook is the status of the bid security at the time the proposals are opened. Given that "El Sol failure to provide that assurance at the time it submitted its bid with a consent of surety that lacked any verification, via a POA, that the surety would stand behind the consent of surety…El Sol cannot now cure that deficiency." (**A72-73**).

The decision below was eminently reasonable, faithfully adhered to the law and was not arbitrary and capricious and, as such, it should be affirmed in all respects.

LEGAL ARGUMENT

NJTA SCRUPULOUSLY ADHERED TO BINDING DECISIONAL LAW AND ITS OWN SPECIFICATIONS AND ACCORDINGLY IT PROPERLY REJECTED EL SOL'S INCOMPLETE AND UNAUTHORIZED CONSENT OF SURETY (A 62)

In its appeal, El Sol raises three principal contentions in support of its argument for reversal of the decision below. First, El Sol argues that the contract specifications neither required, nor is it generally necessary for a consent of surety to include a POA in order to be binding upon the surety company. Second, El Sol

argues that consent of surety was, in fact binding and NJTA erroneously concluded otherwise. Lastly, El Sol argues that even if a POA was required to support the consent of surety at issue here, NJTA's prior pattern and practice of accepting similarly defective POAs estops it from now enforcing its own specifications on a going forward basis.

As explained below, each of these contentions is without merit. NJTA is entitled to a wide berth in promulgating and interpreting its own specifications. Applying basic principles of construction, NJTA's long-standing Standard Specifications clearly require a consent of surety supported by a POA. At no time prior to submission of a bid did El Sol challenge the validity or meaning of those specifications and, indeed, it is both intuitively obvious and consistent with industry practice that any surety document submitted with a bid must be supported by a POA granting the surety representative authority to execute the undertaking.

Further, the POA form at issue here is expressly limited to the Proposal Bond and by implication prohibits the attorney-in-fact from signing other undertakings. Under binding precedents of this Court and the Supreme Court, NJTA is not permitted to accept or consider after the fact explanations submitted by El Sol and its surety company that were not otherwise included at the of submission of the bid. Lastly, El Sol's contention that NJTA is estopped from rejecting its defective consent of surety because it mistakenly accepted similar forms in the past is

nonsensical and would lead to absurd results. Having discovered this defect, NJTA is obligated to follow decisional law governing this very issue and to suggest otherwise would be to undermine fundamental, and well-settled principles governing public bidding. Each of El Sol's argument should be rejected in turn.

A. Standard of Review

As this Court is aware, the scope of appellate review of a final agency decision is limited. Aqua Beach Condo. Ass'n v. Dep't of Cmty. Affairs, 186 N.J. 5, 15–16 (2006). Appellate courts do not ordinarily overturn such a decision "in the absence of a showing that it was arbitrary, capricious or unreasonable, or that it lacked fair support in the evidence." Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963). In Matter of On-Line Games Production and Operation Services Contract, 279 N.J. Super. 566, 590-92 (App. Div. 1995), this Court set forth the standard of review applicable to bid conformity decisions by state agencies, and summarized it as follows:

> Courts have only a limited role to play in reviewing the actions of other branches of government [and] … can intervene only in those rare circumstances in which an agency action is clearly inconsistent with its statutory mission or with other State policy. Although sometimes phrased in terms of a search for arbitrary or unreasonable agency action, the judicial role 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 that could not reasonably have been made on a showing of

> the relevant factors. [279 N.J. Super. at 593; quoting George Harms Construction v. NJTA, 137 N.J. 8, 27 (1994).]

See also Palamar Construction v. Township of Pennsauken, 196 N.J. Super. 241, 250 (App. Div. 1983) (setting forth the standard of review applicable to bid conformity decisions by local agencies, which is whether the decision was arbitrary, unreasonable or capricious).

Thus, if NJTA's decision was rationally grounded in the record and does not violate applicable law, its decision must be sustained. On-Line Games, supra; see generally Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 587 (1988) (judicial review of state agency decisions "is a limited one," which asks only "whether there is sufficient credible competent evidence in the record to support the agency head's conclusions"); Williams v. Dep't of Human Services, 116 N.J. 102, 107 (1989) (the "fundamental consideration" in reviewing agency actions "is that a court may not substitute its judgment for the expertise of an agency so long as that action is statutorily authorized and not otherwise defective because arbitrary or unreasonable.").

Moreover, in reviewing agency actions, "[a]ppellate courts must defer to an agency's expertise and superior knowledge of a particular field." Greenwood v. State Police Training Ctr., 127 N.J. 500, 513 (1992). A reviewing court must "defer to an agency's technical expertise, its superior knowledge of its subject matter area, and its fact-finding role." Futterman v. Bd. of Review, Dep't of Labor, 421 N.J.

Super. 281, 287 (App. Div. 2011). Specifically, NJTA's, "interpretation of statutes and regulations within its implementing and enforcing responsibility is ordinarily entitled to deference." E.S. v. Div. of Med. Assistance & Health Servs., 412 N.J. Super. 340, 355 (App. Div. 2010).

Here, where appellant is challenging NJTA's decision with respect to its compliance with the technical specifications of the procurement documents, judicial deference is at its zenith. This Court has historically taken a deferential view towards NJTA's interpretation of its specifications, and this case provides no exception to the rule. See, e.g., Stohrer Brothers, Inc. v. New Jersey Turnpike Authority, 2007 WL 1362733 (App. Div. 2007 ("We defer to the Authority's expertise" with regard to its application of the experience requirements of the towing services prequalification specifications) (**Ra 23-26**); I/M/O Protest of Nick's Towing Service, Inc., 2010 WL 5186013 (App. Div. 2010) (upholding NJTA's decision to deny prequalification to contractor that lacked relevant subject matter experience)(**Ra 13-17**); I/M/O John's Main Auto Body, 2011 WL 51578 (App. Div. 2011) (**Ra 6-12**); Michael Risoldi Auto Repair, Inc. v. New Jersey Turnpike Authority, 2008 WL 926581 (App. Div. 2008) (upholding NJTA final agency decision disqualifying towing contractor from procurement)(**Ra 18-22**).

Although an appellate court is "in no way bound by the agency's interpretation of a statute or its determination of a strictly legal

issue," Mayflower Sec. Co. v. Bureau of Sec., 64 N.J. 85, 93 (1973), if substantial evidence supports the agency's decision, "a court may not substitute its own judgment for the agency's even though the court might have reached a different result," Greenwood, supra, 127 N.J. at 513. "The burden of demonstrating that the agency's action was arbitrary, capricious or unreasonable rests upon the person challenging the administrative decision." In re Arenas, 385 N.J. Super. 440, 443-44 (App. Div. 2006).

Here, El Sol cannot overcome the substantial deference owed NJTA in issuing its final agency decision as well as the weight of controlling legal authority and the decision below should be affirmed.

B. Notwithstanding El Sol's Belated Challenge to the Specifications, NJTA Appropriately Required Submission of a Power of Attorney to Accompany its Consent of Surety Form (A 62)

In its submission, El Sol accuses NJTA of disqualifying the company based upon a "fabricated defect" in its consent of surety, and thereby disputes that the Standard Specifications required a POA to support that undertaking and further argues that the Consent of Surety at issue was, in fact binding. Each of these contentions lacks merit.

As an initial matter, NJTA's lengthy and long-standing Standard Specifications and the procurement practices memorialized thereunder are well known and understood within the highway construction community. If El Sol had a

dispute with the meaning or interpretation of the specification, then it was required to bring that challenge to NJTA prior to bid submission. It is a well-settled principle of public contracting that unsuccessful bidders who bid on a contract without first objecting to the specifications lack standing to later attack those specifications as illegal or unenforceable. Entech Corp. v. City of Newark, 351 N.J. Super. 440, 459 (Law Div. 2002). "The rationale of such a holding is that one cannot endeavor to take advantage of a contract to be awarded under illegal specifications and then, if unsuccessful, seek to have the contract set aside." Waszen v. City of Atlantic City, 1 N.J. 272, 276 (1949); see also N.J.S.A. 40A:11-13 (requiring prospective bidders under the Local Public Contracts Law to challenge bid specifications prior to the opening of bids).

Therefore, even if El Sol was unaware that a POA was required to be submitted with its bid to support the Consent of Surety, did not understand the specifications or was operating under a clear misapprehension, it certainly cannot be heard to complain that its proposal was rejected after the bids have been opened and the contract awarded. The negative consequence of allowing such challenges is clear, as it would allow contractors to pick and choose their battles, unlevel the playing field, and, if the specifications are found to be fatally flawed, lead to the disfavored outcome of re-procuring goods or services after the bids have already been opened. Marvec Construction Corp. v. Township of Belleville, 254 N.J. Super.

282, 291 (Law Div. 1992) ("rebidding the contract is fraught with certain dangers…because the low bidder who may have given his best possible price may drop out of the bidding or other bidders may by reason of insight gained through revelation of their competition's bidding strategy may seek the weaknesses in their own bids.").

Here, however, the specifications at issue were clear. Section 102.07 of the Standard Specifications, entitled "Proposal Guaranty" requires bidders to provide a Proposal Bond in an amount not less than 10% of the bid, to cover as liquidated damages the bid spread between the proposal and the next lowest-ranked bidder if the selected contractor repudiates the award and the agency is required to then award to the next bidder (**A1**). Once the contract is awarded and executed, under Sections 102.12 and 103.02 of the Standard Specifications, the Proposal Bond is returned by NJTA and exchanged for the Contract Bond, which obligates the surety to cover 100% of the cost of the contractor's work in the event of a default, non-performance or termination.

However, at the time of bid opening, public agencies like NJTA also require bidders to provide evidence that if awarded the contract, the bidder's surety will, in fact deliver the Contract Bond at the time of execution. Thus, the Consent of Surety is an undertaking or representation of the surety that bridges the gap between the 10% Proposal Bond and delivery of the 100% Contract Bond. In this case, NJTA

has drafted its own form of Consent of Surety that must be executed by the surety and returned at the time of bid submission. In this regard, Section 102.08 of the Standard Specifications provides as follows:

> ***The Proposal Bond or Letter of Surety shall be accompanied by a Power of Attorney and a Consent of Surety, each in a form acceptable to the Authority, which shall be executed by the surety company***. The Power of Attorney shall set forth the authority of the attorney-in-fact who has signed the Proposal Bond or Letter of Surety on behalf of the surety company and shall further certify that such power is in full force and effect as of the date of the Proposal Bond or Letter of Surety. The Consent of Surety shall set forth the surety company's obligation to provide the Contract Bond upon award of the Contract to the Bidder.
>
> (**Ra 4 [emphasis added]).**

Under the foregoing specification, NJTA requires bidders to submit a Proposal Bond *and* a Consent of Surety backed by a licensed and admitted surety approved by the Department of Banking and Insurance, executed by a duly authorized attorney-in-fact supported by a valid POA. In NJTA's experience, the overwhelming majority of the time, the *same* individual and the *same* surety issues the Proposal Bond and the Consent of Surety, supported by the *same* POA, and thus the specifications refer to the POA requirement collectively, as applied to both. In other words, it is not necessary for a bidder to submit separate POA forms for each document because, generally, a single, properly-drafted POA can be made to apply to both.

Further, even if there was confusion on this point, NJTA's prescribed form of Consent of Surety has a space for the bidder to identify the surety company, a signature line for the "attorney-in-fact" and a signature line for a witness to the attorney-in-fact's signature. It cannot be gainsaid that an undertaking of a surety company must contain indicia that the individual executing the instrument has the legal authority to do so. If NJTA did not wish for the surety representative's signature to be supported by a POA, it obviously would not have included a signature line for an attorney-in-fact on the Consent of Surety form with a space for a witness attestation.

To this extent, "a power of attorney is a written instrument by which an individual known as the principal authorizes another individual ... known as the attorney-in-fact, to perform specified acts on behalf of the principal as the principal's agent." N.J.S.A. 46:2B-8.2(a); D.D.B. Interior Contr., Inc. v. Trends Urban Renewal Ass'n, Ltd., 176 N.J. 164, 168 (2003). "Its primary purpose is not to define the authority conferred on the agent by the principal, but to serve as evidence to third persons of agency authority. It should be construed in accordance with the rules for interpreting written instruments generally." Kisselbach v. Cnty. of Camden, 271 N.J. Super. 558, 564 (App.Div.1994). "A power of attorney must be in writing, duly signed and acknowledged in the manner set forth in N.J.S.A. 46:14-2.1." N.J.S.A. 46:2B-8.9.

In this case, if it was not already intuitively obvious from the specifications and the form Consent of Surety itself, common sense and settled practice in the construction industry compels the conclusion that a POA is necessary to support a Consent of Surety. In the absence of a POA, the alternative is that any random person, with vague or unclear standing, could sign a Consent of Surety, leaving the contracting entity to determine later whether that person actually had the power to bind the surety to issue the Contract Bond.

To the contrary, the fundamental purpose of this three-party surety process – Proposal Bond, Consent of Surety and, finally, Contract Bond – is to provide the contracting public entity with clear and unequivocal assurance that the bid price will be held, the services delivered and the work completed. Allowing otherwise would promote irregularities in the procurement process and undermine the principle of vigorous competition, on a level playing field. The agency below thus appropriately concluded that a POA was required to substantiate the submission of the Consent of Surety at issue here.

C. Contrary to the Standard Specifications and Binding Decisional Law, El Sol Failed to Submit a POA Evidencing the Attorney-in-Fact's Authority to Bind the Surety to the Obligations in the Consent of Surety (A62)

Next, El Sol argues that its POA did comply with the Standard Specifications and provided sufficient indicia of the surety's undertaking to deliver the Contract

Bond at the time of execution. To support its argument, El Sol submits an after the fact and self-serving letter from the surety's in-house attorney belatedly expressing the position that the company authorized execution of the Consent of Surety. The answer to this argument, however, is textually driven by reference to the Standard Specification and the terms of El Sol's bid. Under governing decisional law, the agency's review was limited to the record in existence at the time of bid submission and thus the surety's after the fact rationalizations are of no moment. As explained below, El Sol's arguments are easily refuted.

There can be no dispute that El Sol submitted a POA with its bid submission that failed to provide any authority to the attorney-in-fact to bind the surety to the obligations contained in the Consent of Surety. The POA submitted with El Sol's Bid and bearing the logo, "Liberty Mutual Surety," contained the following bolded statement at the very top of the POA:

> **This Power of Attorney <u>limits</u> the acts of those named herein, and they have no authority to bind the Company except in the manner and to the extent herein stated. [emphasis added]**

Thus, the POA on its face limits the attorney-in-fact and only grants her that authority which is expressly stated in the document. The body of the POA then states that:

> [Liberty][3]…, pursuant to and by authority herein set forth, does hereby name, constitute and appoint, ***Katherine Acosta,*** of the city of *Uniondale*, state of *New York* its true and lawful attorney-in-fact, with full power and authority hereby conferred to sign, execute and acknowledge the following surety bond [emphasis added]:
>
> Principal Name: *El Sol Contracting & Construction Corp.*
> Obligee Name: *New Jersey Turnpike Authority*
> Surety Bond Number: *SNJ0530362021*
> Bond Amount: *See Bond Form*
>
> [**A3**]

Therefore, the POA expressly restricts the attorney-in-fact's authority to issuing the specific surety bond identified by the reference "SNJ0530362021," that is, the Proposal Bond. The POA provides no authority for Ms. Acosta to bind Liberty to the undertaking required under the Consent of Surety.

Furthermore, beneath the POA language is an excerpt of a signed and sealed corporate resolution of the surety company. In the section of the corporate resolution entitled, "Certificate of Designation," authority is granted by the President of Liberty Mutual, to its Assistant Secretary, David M. Carey, to appoint attorneys-in-fact as follows:

> The President of the Company, acting pursuant to the bylaws of the Company authorizes David M. Carey Assistant Secretary to appoint such attorneys-in-fact as may be necessary to act on behalf of the Company to make, execute, seal, acknowledge and deliver as surety **any and all undertakings, bonds, recognizances and other surety obligations**.

[3] [Footnote 1 of the POA reads: Affiliates, Ohio Casualty Insurance Company and West American Insurance Company, are also named in the POA.

In construing the overall intent and import of this document, NJTA reviewed the limiting language imprinted on the header of the POA form stating that Ms. Acosta has "no authority to bind the Company except in the manner and to the extent stated" together with her specific appointment to "sign, execute and acknowledge the following **surety bond**:… SNJ053036202" that is, the identification number assigned to the Proposal Bond. Contrasting this with the full extent of Mr. Carey's more expansive authority to appoint attorneys-in-fact to deliver the more expansive categories of "any and all undertakings, bonds, recognizances and other surety obligations" it is obvious that the attorney-in-fact's authority was circumscribed and limited only to the issuance of the specifically referenced Proposal Bond.

In construing language in a contract or legal instrument, the ordinary rules of contract interpretation apply. As our courts have often recognized, "[I]t is not the function of the court to make a better contract for the parties, or to supply terms that have not been agreed upon." Graziano v. Grant, 326 N.J. Super. 328, 342 (App. Div. 1999); see also Temple v. Clinton Trust Co., 1 N.J. 219, 225 (1948) ("It is beyond the province of equity to substitute terms for those made by the parties to a contract, or to supply terms that have not been agreed upon"); Bar on the Pier, Inc. v. Bassbinder, 358 N.J. Super. 473, 483 (App. Div. 2003) (party to contract "did not bear the risk of anything except as specifically bargained for by the parties and as set forth in the agreement.").

A court will "only enforce the contracts which the parties themselves have made." Kampf v. Franklin Life Ins. Co., 33 N.J. 36, 43 (1960); see also Liqui-Box Corp. v. Estate of Elkman, 238 N.J.Super. 588, 600 (App. Div. 1990); Schor v. FMS Financial Corp., 357 N.J. Super. 185, 191 (App. Div. 2002) ("[w]here the terms of a contract are clear and unambiguous there is no room for interpretation or construction and the courts must enforce those terms as written."); Cedar Ridge Trailer Sales, Inc. v. Nat'l Community Bank of New Jersey, 312 N.J. Super. 51, 62-63 (App. Div. 1998) ("[T]he construction and effect of that agreement is a matter of law which must be resolved by the court and not the jury.").

"The polestar of contract construction is to discover the intention of the parties as revealed by the language used by them. The interpretation, moreover, should accord with justice and common sense." Borough of Princeton v. Board of Chosen Freeholders of County of Mercer, 333 N.J. Super. 310, 325 (App. Div. 2000), aff'd, 169 N.J. 135 (2001) (internal citations and quotations omitted). Furthermore, "the document…must be read as a whole, without artificial emphasis on one section, with a consequent disregard for others. Literalism must give way to context." Id. A contract should not be interpreted so as to render one of its terms meaningless or superfluous. See Cumberland County Improvement Authority v. GSP Recycling Co., Inc., 358 N.J. Super. 484, 497 (App. Div.), certif. denied, 177 N.J. 222 (2003).

Giving effect to all of the provisions in the POA and accompanying corporate resolution of the surety, the only rational reading of the document is that the operative POA language excludes by implication authority to execute the Consent of Surety. This is because the Liberty Mutual corporate resolution itself distinguishes between a "surety bond" or "bonds," on the one hand, and "undertakings, recognizances and other surety obligations." A Proposal Bond is a surety bond, but a Consent of Surety is *not*, rather, as explained above, a Consent of Surety is an undertaking by the surety to issue a second bond, the Contract Bond, at a later date and at the time of contract execution. Accordingly, NJTA correctly concluded that to the extent Ms. Acosta executed NJTA's prescribed Consent of Surety form, no evidence was presented that she had been granted the authority by Liberty Mutual to do so and, in fact, the limited scope of the POA suggests otherwise.

In fact, El Sol's argument has already been flatly rejected by this Court when it addressed the very issue of enforceability of an instrument by a purported "attorney-in-fact" in the absence of a POA. See Tyler at First Street, LLC v. Yengo, 2023 WL 2590392, *6 (App. Div. March 22, 2023)(**Ra 27-33**). In Yengo, Angel Lynch ("Lynch"), an attorney, purportedly signed a real estate contract on behalf of Tyler Homes, Inc. ("Tyler Homes"). However, Lynch testified that "she did not have power of attorney to sign on behalf of [Tyler Home's owner] or Tyler Homes."

Id. at *3. When Yengo filed a breach of contract action, the trial court found that the document "failed to constitute a valid and enforceable contract" for several reasons, including the lack of "any document granting legal authority to Lynch to sign as 'attorney-in-fact' on behalf of [Tyler Homes]." Id. at *6. This Court affirmed the lower court's decision, including the finding that the contract was unenforceable, and found that "there was a complete absence of any evidence that Lynch had the authority to act as power of attorney for Tyler Homes." Id. at *7.

El Sol ignores the fact that, absent a POA granting Acosta the authority to bind the surety to the obligations under the Consent of Surety, that instrument, by operation of law, is invalid and unenforceable. See Yengo, supra at *6; see, also N.J.S.A. 46:2B-8.2(a).

Rather, El Sol improperly focuses upon the language of the Local Public Contracts Law ("LCPL") at N.J.S.A. 40A:11-22,[4] arguing that such statute does not specifically require a power of attorney to be submitted with a Consent of Surety. In the first instance, the LPCL applies only to local government entities and not state agencies, which are generally granted greater leeway and discretion to structure their procurement. However, even if Section 22 of the LPCL is considered, it is axiomatic and indeed basic common sense, as held in Yengo, that to have legally binding effect,

[4] While NJTA is governed by its own bidding statute, courts have consistently acknowledged that the underlying operation and policy of [the Local Public Contracts Law] are identical to that of NJTA's bidding statute, N.J.S.A. 27:23-6.1(a). George Harms Construction vs. New Jersey Turnpike Authority, 137 N.J. 8 (1994).

a Consent of Surety (or any document) signed by an attorney-in-fact must be done so pursuant to a properly executed POA granting such authority to the attorney-in-fact. El Sol's argument to the contrary would open the doors to havoc (and fraud) that would ensue if documents signed by an attorney-in-fact but absent a POA were legally enforceable against a principal who had no knowledge of, or inclination to be legally bound by, a document signed by another purportedly on their behalf.

As discussed above, and no matter how El Sol attempts to slice it, a Consent of Surety, executed by an "attorney in fact," can only be verified as binding and enforceable against the surety if it is accompanied by a lawfully-executed POA attesting to that fact. Yet, absent such POA, El Sol asked NJTA to accept, on faith, that El Sol's Consent of Surety is an unqualified promise of the surety. It is not. At bottom, El Sol's position is reduced to "trust me" – to the tune of some $70.8 million. The agency below properly declined to blindly assume that the surety would issue the Contract Bond and, in fact, the foundational principles of public contract can yield no other rational result other that rejection of the bid.

D. El Sol's Failure to Provide a POA Evidencing that the Consent of Surety is Binding on and Enforceable Against Liberty Renders the Consent of Surety Materially Defective and Incapable of Being Cured (A 62)

El Sol further argues that NJTA should have accepted its after the fact explanations and supplementary documents in support of the proposition that the Consent of Surety was intended to bind the surety company. However, the relevant

time period within which to measure the validity of the Consent of Surety is by what was in the record at the time of bid submission. NJTA is prohibited by controlling authority from considering amendments or corrections to the Consent of Surety after the fact and, in this case, failure to contemporaneously submit a POA that binds the surety is tantamount to submitting no Consent of Surety at all. The agency decision rejecting the bid was thus correct as a matter of law.

The Supreme Court's decision in Meadowbrook Carting Co. v. Bor. of Island Heights &Consol. Waste Servs., 138 N.J. 307, 313 (1994), is the seminal case on the materiality of a Consent of Surety when one is required by public bidding contract specifications, as is the case with the Redecking Project. The import of the Consent of Surety was explained by the Court:

> 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 [citation omitted]. The significance of a Consent of Surety is that it provides the [public entity] 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.
>
> Id. at 316.

As further articulated by the Court,

> A Consent of Surety is a direct undertaking by the bonding company, enforceable by the [public entity]. Its purpose is to provide a guarantee to the [public entity], 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.
>
> Id. at 321.

Indeed, without a performance bond, "the bidder cannot be required to enter into and perform the contract." Ibid. Therefore, the failure to submit a Consent of Surety with the bid is "a material defect that [could] be neither waived nor cured." Meadowbrook, 138 N.J. at p. 316. As the Meadowbrook Court held, "to permit waiver of the consent-of-surety requirement would undermine the stability of the public-bidding process." Id. at 321. "For example, if a low bidder that had failed to submit a Consent of Surety" later decided it no longer wished to perform the contract because its bid was too low, "that bidder could decline to obtain the Consent of Surety and the performance bond." Ibid.

In numerous other cases and in an unbroken line of authority in the ensuing 30 years since Meadowbrook was decided, our courts have held that a consent of surety, to be valid, must be clear on its face, and must unconditionally bind the surety to provide the required performance bond at the time of contract award. In Mayo, Lynch & Associates, Inc. v. Pollack, 351 N.J. Super. 486 (App. Div. 2002), for example, the court stated:

> Even before the effective date of [N.J.S.A. 40A:11-23.2], a certificate of surety and a performance bond in amounts substantially below the contract price were material and non-waivable deviations from the specifications that rendered the contract voidable. … These defects not only undermine competitive bidding, … but they also deprive the public

of protection from a possible breach on the part of the contractor. [Id. at 496.]

In Mayo, Lynch, as in Meadowbrook Carting, the Court made clear that a defective consent of surety cannot be cured after the opening of bids, as this would destroy the level playing field that our public bidding laws are designed to ensure. Id. at 497 (letter from surety submitted after bid opening could not cure defective bid bond and consent of surety).

Similarly, in DeSapio Construction, Inc. v. Township of Clinton, 276 N.J.Super. 216 (Law Div. 1994), a low bidder's proposal was found to be nonconforming and deficient when the bidder submitted a consent of surety containing equivocal language, which merely stated that the surety "would not anticipate any difficulty in providing bonds on the above-captioned project." Id. at 220. The court held that such a noncommittal undertaking did not meet the requirements of the bid specifications, and could not be cured after the bid opening:

> If DeSapio is permitted to "cure" his defective bond the taxpayers will have the benefit of the lowest bid. Surely a savings of tax dollars can be considered to be a public good. But the greater public policy good is in insuring the integrity of the bidding process. Strict standards must be maintained so that there is no opportunity for unfettered discretion or favoritism in the public bidding process. [Id. at 222.]

See also L. Pucillo & Sons, Inc. v. Township of Belleville, 249 N.J. Super. 536 (App. Div. 1991) (bidder's submission of a consent of surety that limited the surety's obligation to delivery of a performance bond for a fractional amount of the

contract was a material, nonwaivable defect); Marvec Construction Corp. v. Township of Belleville, 254 N.J. Super. 282, 285 (Law Div. 1992) (bidder's failure to include bid bond or consent of surety was a material and nonwaivable defect even though a representative of the bidder ran into the municipal clerk's office 20 minutes after the bid opening with the conforming documents).

El Sol "shrugs off" Meadowbrook and its progeny by arguing in conclusory fashion, on page 47 of its brief, that its "impact" it is not relevant to this matter as "El Sol did in fact submit a fully compliant Consent of Surety." Without repeating the immediately preceding point, strain as it might to avoid controlling, adverse authority, El Sol did not submit a "compliant Consent of Surety" because it was signed by a purported attorney-in-fact without any evidence – via a POA – that the consent was valid and enforceable at the time it was submitted with El Sol's Bid. See Yengo, supra, 2023 WL 2590392, *6. El Sol's eleventh hour attempts to cure that failure were too little and late. As determined in Meadowbrook, supra, failure to submit a valid Consent of Surety at the time of submission of a bid is not subject to cure but, rather, requires the public entity to reject the bid.

As a last note on this point, El Sol attempts to sidestep the limiting language in the POA by arguing that the Proposal Bond and Consent of Surety are a "singular instrument" and therefore only one POA was needed for both (El Sol's Brief, p. 32).

However, New Jersey law and the Contract Specifications instruct otherwise. As quoted above, Meadowbrook describes a Consent of Surety as:

> …[A] direct undertaking by the bonding company, enforceable by the [public entity]. Its purpose is to provide a guarantee to the [public entity], 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. Id. at 321.

Here, Section 103.02 of Contract Specifications required a performance bond be issued in the amount of one hundred percent of the bidders' proposal if that bidder were awarded the contract (**Ra 01-02**[5]). Thus, based on El Sol's proposal, if a contract were awarded to El Sol, a performance bond would have been required in the amount of $70,865,354. Conversely, the Contract Specifications at Section 102.07 of the 2016 Standard Specifications required a Proposal Bond of "not less than ten percent of the bidder's proposal or, in the case of El Sol, $7,086,535.40 **(A1).**

Consequently, the Consent of Surety and Proposal Bond are two separate and legally distinct undertakings and cannot be considered a "singular instrument." In many instances, insurance companies and sureties grant different individuals within the company varying levels of monetary authority. Further, construction companies are typically granted a finite amount of bonding capacity. It is not a given, then, that

[5] Section 103.02 of the Contract Specifications was Exhibit 12 to NJTA's Recommended Decision, and thus part of the record below. **See A68.** However, Section 103.02 is not part of El Sol's appendix.

the attorney-in-fact appointed to execute the Proposal Bond would have the necessary authority to issue a Contract Bond that is ten times higher in exposure for the company. Not only is El Sol precluded from its after-the-fact attempt to cure its materially defective bid, its attempt to do so, substantively, is woefully inadequate.

El Sol also attempts to seize upon the term "concern" used in the decision below to posit that a mere "concern" is not a valid basis to reject an otherwise qualified low-bid (see El Sol's Brief, p. 42). El Sol then boot-straps that semantical posture by attempting to stretch and morph the holding of Greenwood v. State Police Training Center, 127 N.J. 500 (1992) to fit its baseless narrative arguing that a "concern" serving the basis for an agency's decision is arbitrary, capricious and unreasonable.

Initially, the term "concern" is used once in the decision below to simply describe what El Sol became aware of regarding the NJTA's finding that its bid was materially defective (**A65**). Contrary to its argument, the decision below was premised upon the undisputed fact that El Sol did not present a valid Consent of Surety as there was nothing evidencing the attorney-in-fact's authority to bind Liberty to its undertaking, in violation of New Jersey law. Yengo, supra at *6 and N.J.S.A. 46:2B-8.2(a).

El Sol's reliance upon Greenwood in this regard is simply misplaced as that Court was quite clear that its decision was within the confines of "the employment

context." Greenwood, supra, 127 N.J. at 509. That issue and the legal authority used by the Court to make its findings had nothing to do with public bidding and absolutely nothing to do with the enforceability of a Consent of Surety (or any other document) signed by an attorney-in-fact without a POA. The Court analyzed several employment-context precedent and anti-discrimination statutes such as New Jersey's Law Against Discrimination. Indeed, the Court need look no further than Greenwood's actual holding to conclude that El Sol's reliance upon same is erroneous:

> We hold that an employer does not have good cause to terminate a public employee on the basis of a physical limitation unless there is substantial evidence that the limitation either prevents the employee from adequately performing the job or creates a substantial risk of serious injury to the employee or others. **We draw support for our holding not only from the general principles underlying the good-cause standard but from New Jersey's strong public policy against discrimination based on physical handicap**.

[Greenwood, supra 127 N.J. at 512 (emphasis added)].

However, even when straining to analyze the Greenwood decision in the prism in the case at bar, we still find that El Sol's reliance upon Greenwood is baseless. In Greenwood, the Court found that the "concerns" and "possible consequences" of an injured eye could not serve as good cause for that trainee's termination as "[t]he uncontradicted evidence in the record indicates that he had performed successfully during his six-week stay at the Academy…" Id., at 513-514 (see also El Sol's Brief, p. 44).

Contrariwise, here, a valid Consent of Surety properly executed and binding upon Liberty was required to provide assurance to NJTA that if El Sol were awarded the Contract, a performance bond in the amount of over $70 million would be issued by the surety to NJTA. Quite simply, whether El Sol (as the plaintiff in Greenwood) previously "performed successfully" is of no consequence to its obligation to currently procure a performance bond if awarded this Redecking Project. This was not a six-week training course. This is a significant multi-year construction project involving rehabilitation of several bridges in one of Northern New Jersey's most traveled highways. El Sol seeks to compare "apples to oranges" and its arguments are accordingly without merit.

E. NJTA's Mistaken Acceptance of a Similar Form POA in the Past Does Not Require it to Now Accept a Deficient Consent of Surety (A 62)

El Sol also argues that simply because NJTA "accepted" in the past the form of POA used by El Sol and Liberty in the subject El Sol Bid, NJTA was somehow required to accept the materially defective POA now and, apparently in the future. While, much like El Sol's other positions, no legal authority is presented as to this argument, El Sol appears to argue that prior acceptance of a materially defective POA "estops" NJTA from now requiring the submission of a valid POA specifically identifying that the attorney-in-fact has authority to bind the surety to the undertakings set forth in the Consent of Surety.

This argument, if accepted for El Sol, would open a pandora's box whereby NJTA would be deprived of the assurances to which it is entitled with regard to the delivery of bid security. As a general premise, estoppel against a government entity is disfavored. See Cipriano v. Department of Civil Service of State of N.J., 151 N.J. Super. 86, 91 (App. Div. 1977) (Courts are generally reluctant to apply estoppel theories against governmental agencies.) This is especially true when estoppel would "interfere with essential governmental functions." Vogt v. Borough of Belmar, 14 N.J. 195, 205 (1954).

It cannot be denied that part of NJTA's essential governmental function is to provide for the improvement, repair and maintenance of its roadways. See, N.J.S.A. 27:23-3 ("[T]he … improvement, repair and maintenance of transportation projects [by NJTA] … shall be deemed and held to be an essential governmental function of the State"). In carrying out that function, NJTA procures contractors through its public bidding process, which includes the issuance of specifications requiring, in pertinent part, consents of surety. As set forth above, a consent of surety, signed by a purported attorney-in-fact but without any verification via a POA that the attorney-in-fact actually has the power to bind the surety to the promises contained therein, is an empty promise rendering the Consent of Surety materially deficient.

Applying estoppel against NJTA because it may have missed the defect in prior solicitations would place NJTA in the untenable position of having to waive a

material deficiency that is beyond its authority to waive. See Meadowbrook, supra, 138 N.J. at 325 ("…[W]e find that the [public entity's] waiver of the consent-of-surety requirement was beyond its authority). Surely, such a result would interfere with NJTA's ability to carry out its essential governmental functions in a manner consistent with law.

In an ideal world, NJTA would have identified the defective POA/Consent of Surety at the time of the first defective submission. If it had, the Court can rest assured that each and every bid would have been rejected, just as El Sol's was, and, furthermore, just as each and every defective Consent of Surety will be rejected going forward. While El Sol is content to cast stones at NJTA and accuse it of misconduct, the fact of the matter is that the agency and its employees can and do attempt at all times to turn square corners and are entitled to that presumption here. See Capital Safety, Inc. v. State, Div. of Bldgs. and Construction, 369 N.J. Super. 295, 300-301 (citations and internal quotations omitted) (App. Div. 2004) (holding that "the contractor's burden to prove the government acted in bad faith is very weighty. Government officials are presumed to act in good faith, and it requires well-nigh irrefragable proof to induce the court to abandon the presumption of good faith dealing.")

Having identified the defect, NJTA is now obligated to rigorously adhere to the case law and governing principles. To do otherwise would be forevermore

accept deficient bid security, which would obviously undermine the public interest and the agency's interest in ensuring that construction projects are delivered on time, on target and at the lowest possible cost to the public.

El Sol anemically "brushes off" this Court's holding in Cipriano quickly pivoting to the doctrine of *contra proferentum* in the hopes it will find rescue there. El Sol does not. Initially, and indicative of El Sol's desperate grasping at straws, *contra proferentum* is considered "a doctrine of last resort" as to contract interpretation. Estate of Albanese v. Lolio, 393 N.J. Super. 355, 336 (App. Div. 2007). Additionally, as here, where "both parties are equally 'worldly-wise' and sophisticated, *contra proferentem* is inappropriate." Id., at p. 337.

El Sol is a commercial construction company sophisticated enough to bid public contracts upwards of $70 million. Any moderately experienced construction contractor, and certainly all of the heavy highway construction contractors that regularly appear before NJTA seeking contracts know and intuitively understand what needs to occur with a POA and Consent of Surety. El Sol, purporting to be such a contractor, certainly was fully capable of understanding New Jersey statutory and common law requiring that, when an attorney-in-fact executes a document on behalf of a principal, here a surety, a written power of attorney needs to granted by the principal conveying that authority to the agent/attorney-in-fact, here Acosta. See Yengo, supra at *6; see, also N.J.S.A. 46:2B-8.2(a). El Sol cannot now employ the

"doctrine of last resort" simply because it and its surety, Liberty, were purportedly unaware that a written power of attorney is required when an attorney-in-fact is signing on behalf of a third-party. That argument simply defies credibility and should be rejected.

F. NJTA's Subsequent Amendments to its Standard Specifications are Irrelevant to the Issues in Dispute (A 62)

Lastly, El Sol argues that NJTA's subsequent amendment to the Standard Specifications, which sought to clarify the Consent of Surety/POA requirement, is inapplicable to the Redecking Project and, by extension, tries to seek a negative inference that this was not the case prior to the amendment. NJTA certainly agrees that the amendment became effective after receipt of bids for the Redecking Project. However, the timing of that amendment, and whether or not it applies to the Redecking Project, is not dispositive of the issue here. El Sol's argument to the contrary is akin to improperly seeking admission into evidence at trial of an alleged tortfeasor's initiation of subsequent remedial measures. The fact that NJTA is trying in good conscience to ensure that the defect here never occurs again is not properly considered as evidence of its error below.

The only relevant consideration is the Standard Specifications as they existed at the time of bid submission and the contents of El Sol's bid. That is, the sole basis for decision is whether El Sol's Consent of Surety, lacking any verification that the surety is bound by the promise contained therein to issue the performance bonds if

El Sol were awarded the contract, is materially deficient, rendering El Sol's bid non-responsive. And, as set forth herein, the answer to that question is "yes."

At the end of the day, it is unfortunate that El Sol's bid was necessarily rejected. However, public entities are expected to turn square corners in their dealings with the public, and that is particularly so in the field of public procurement. Township of Hillside v. Sternin, 25 N.J. 317, 325-26 (1957) (cautioning that contracting agencies should not succumb to the temptation to waive material defects in order to secure a low bid; "In this field it is better to leave the door tightly closed than to permit it to be ajar, thus necessitating … speculation as to whether or not it was purposely left that way"); Meadowbrook, supra, 138 N.J. at 325 (a refusal to waive deviations "occasionally may result in additional cost to the public, but we have no doubt that the overriding interest in insuring the integrity of the bidding process is more important than the isolated savings at stake").

The decision below, while causing a loss of business to El Sol, advanced the larger principle of upholding the foundational principles of public bidding and, ultimately, the public's trust in the process. The decision below should accordingly be affirmed.

CONCLUSION

The decision below was neither arbitrary and capricious nor was it contrary to law. It should accordingly be affirmed in all respects.

Respectfully Submitted,

DeCotiis, FitzPatrick, Cole & Giblin, LLC

Jason S. Nunnermacker

_____

Jason S. Nunnermacker, Esq.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-000232-24T04

EL SOL CONTRACTING AND CONSTRUCTION CORP. **Plaintiff-Appellant,** **v.** **NEW JERSEY TURNPIKE AUTHORITY** **Defendant-Respondent.**	:	**Civil Action** **IN THE MATTER OF PROTEST FILED BY EL SOL CONTRACTING AND CONSTRUCTION CORP., CONTRACT T100.638** **Sat Below: Thomas Holl, Director of Law, New Jerey Turnpike Authority**

REPLY BRIEF AND SUPPLEMENTAL APPENDIX FOR APPELLANT EL SOL CONTRACTING AND CONSTRUCTION

COHEN SEGLIAS PALLAS
GREENHALL & FURMAN, P.C.
BY: MICHAEL F. MCKENNA, ESQ., ID No. 029351980
TIMOTHY R. RYAN, ESQ., ID No. 904482012
One Newark Center, 1085 Raymond Boulevard, 21st Floor
Newark, NJ 07102
973-474-5003
Attorneys for Plaintiff-Appellant, El Sol Contracting and Construction Corp.

Dated: November 4, 2024

By: _____
Michael F. McKenna, Esq.

TABLE OF CONTENTS

SUPPLEMENTAL APPENDIX TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

PRELIMINARY STATEMENT

Arbitrary, capricious, and unreasonable - El Sol Contracting & Construction Corp. ("El Sol") respectfully submits that New Jersey Turnpike Authority ("NJTA") has acted in all three ways. NJTA seeks to have this Court ignore that over a two-plus year period, thirteen times NJTA agreed that the Bid Documents submitted by Liberty Mutual were in a form acceptable to NJTA. Thirteen times NJTA awarded hundreds of millions of dollars of projects and Liberty Mutual gave the required bonds. There was no issue.

Strangely, NJTA has not shared with this Court or with El Sol the birth of what can only be called a "concern" as to the applicability of the Power of Attorney to the Consent of Surety. NJTA then used this concern to do an about face. NJTA decided that what it found on thirteen prior occasions to be forms acceptable, was suddenly no longer acceptable. Based on that concern, NJTA would throw out El Sol's low bid and instead spend about $10,000,000 more in taxpayer/tolls to get someone else to perform the exact same scope of work.

NJTA has effectively come up with a legal theory that it believes that Liberty Mutual could have put forth in this matter as a basis for Liberty Mutual to not go ahead and give NJTA the required bond. Respectfully, if this Appeal was Liberty Mutual proffering NJTA's legal theory as a basis to renege on producing the required bond after it had done so on 13 previous times, we believe that Liberty Mutual would be laughed out of court. We would be saying,

"How can you take that position that the Power of Attorney with same Bond number only applied to one, but not both documents?"

You really must question why NJTA is advancing its concern as a possible basis for Liberty Mutual to walk out? Liberty Mutual is not looking for an exit. Why would NJTA advance this concern and then use it as a basis to spend about $10,000,000 more on another contractor.

Going forward, due to NJTA's concern, if NJTA wants to address it and to change its requirements, it is free to do so. NJTA can alleviate the concern by having Sureties submit two Power of Attorneys. El Sol is not debating that right. Indeed, as this Court will recognize, NJTA has already made changes to its Specifications to implement that process. What El Sol objects to is NJTA effectively retroactively applying that new Specification requirement in contravention of a long history of what was found on thirteen prior occasions to be NJTA acceptable and then using that as a basis to throw out its low bid.

Ironically, El Sol is actually arguing on behalf of NJTA, while NJTA argues against its own self-interests. The backwards nature of NJTA's argument in and of itself proves its arbitrary and capricious nature. NJTA's assertion that it lacked any assurances that Liberty Mutual would honor the Consent of Surety is not founded on any fact. Indeed, right from the start NJTA was assured by Liberty Mutual that it would provide the required Bonds - as it had done on thirteen prior occasions. NJTA was assured that **if** Liberty Mutual refused to

provide the Contract Bonds it had strong legal grounds to compel Liberty Mutual to do based on equitable estoppel, detrimental reliance, and potentially even fraud in the inducement.

No one challenged the Consent of Surety; no one challenged NJTA's ability to enforce the Consent of Surety. Not El Sol, not Liberty Mutual (the obligor), not even Joseph M. Sanzari, Inc. ("Sanzari") – the one with the most to gain from El Sol's disqualification. NJTA unilaterally and without reason chose to take its concern and then use that concern against its own interests and spend about $10,000,000 more in the process.

NJTA's fearmongering about the potential for rampant corruption and fraud if El Sol's bid is upheld ignores key and salient facts. Principally, Liberty Mutual is (as it intended to be) bound by the Consent of Surety. This is not a matter of curing or waiving defects. It simply seeks to have this Court allow the parties to proceed in the same manner as they have done on at least thirteen occasions over the last two-plus years.

In total, this all demonstrates that NJTA's disqualification of El Sol's Bid was arbitrary, capricious and unreasonable. NJTA fabricated a defect then used it to disqualify El Sol's Bid. For these reasons, NJTA's decision respectfully must be overturned.

LEGAL ARGUMENT

I. The Thirteen Prior Projects Work To NJTA's Benefit As Much As El Sol's

NJTA buries its response to NJTA's admitted historical record of accepting bids using the exact same Libety Mutual's Bid Bond Documents and Liberty Mutual issuing bonds to the end of its Brief. We suspect this was done to marginalize its impact. The historical record demonstrates that El Sol's Bid Bond Documents were in "a form acceptable to the Authority." It further shows the concern is unwarranted because in each instance Liberty Mutual has always issued the bonds.

Within its Opposition Brief, NJTA argues:

> *NJTA lacked any assurance, at the time of bid submission, that the surety would stand behind the obligation and issue the necessary performance bonds at the time of contract execution.*

(P. 2)

NJTA had assurance in that on thirteen previous occasions. Liberty Mutual had never declined or failed to issue the contract bonds.

Indeed, if on this fourteenth time Liberty Mutual had made such an attempt, NJTA would have very strong legal grounds to compel them to do so. NJTA could meritoriously and equitably estop Liberty Mutual from doing so.[1]

[1] It should not be lost or discounted that El Sol is now forced to present and prove a hypothetical claim for equitable estoppel on behalf of NJTA against its own surety, Liberty Mutual.

As set forth in Lesniewski v. W.B. Furze Corp., 308 N.J. Super. 270, 286 (App. Div. 1998), equitable estoppel provides for the proposition that a contracting party who made a mistake can be estopped from denying the enforceability of the contract or a relevant clause if the other party relied on the conduct or representation to their detriment. The key consideration is "whether there was a course of conduct that, in its cumulative impact, was tantamount to representation made by one party with expectation that other persons would rely on this conduct. Id.; see also Hirsch v. Amper Financial Services, LLC, 215 N.J. 174 (2013) ("the party seeking to invoke equitable estoppel must demonstrate that the opposing party engaged in conduct, either intentionally or under circumstances that induced reliance, and that the relying party acted or changed their position to their detriment.").

As it had on thirteen prior occasions, Liberty Mutual prepared the Power of Attorney and filled out the Consent of Surety with the knowledge that its customer contractor would submit same to NJTA, and that NJTA would rely upon that Consent of Surety to award the project. Liberty Mutual would be estopped based on its prior conduct and NJTA's reliance on same.

To get around this, NJTA mischaracterizes several key points. First, Liberty Mutual's August 27, 2024, and August 29, 2024 letters were not attempts to "cure" a defect. There was no defect to cure. It was simply an effort by Liberty Mutual to reassure NJTA that as it had on thirteen prior occasions that Liberty

Mutual intended to be and indeed would be bound by the Consent of Surety. Second, NJTA misdirects the Court by attempting to make the issue about waiving a defect – this reframing is intended to distract the Court from the true issue - there is no defect in El Sol's Bid.

NJTA misrepresents to the Court that its sole and rational option was to disqualify El Sol's Bid. As demonstrated above, disqualification of El Sol's Bid was neither NJTA's sole option nor was it a rational option. NJTA improperly implemented a "concern" to artificially create a problem. NJTA's most rational option would have been to award the Project to El Sol, and save $10,000,000 in the process.

II. Industry Standards And "Settled Practice In The Construction Industry" Do Not Support NJTA's Position

NJTA cherry picks its reliance on industry standards and "settled practice in the construction industry" to falsely allege El Sol and/or Liberty Mutual knew or should have known the Consent of Surety and Power of Attorney were defective. NJTA inaccurately presents the true industry standards and seeks to have this Court ignore NJTA's own undisputed bidding practices.

Industry standard is in El Sol's favor, not NJTA's. In the last two-plus years Liberty Mutual submitted the very same Power of Attorney and Consent of Surety on over 225 bids to other New Jersey state agencies, including the New Jersey Department of Transportation, NJ Transit, and the New Jersey

Department of Treasury – none of those Bid Documents were rejected. In fact, in each of those 225 bids, Liberty Mutual issued the required Contract Bonds on behalf of the low bidder. NJTA's position is neither supported by its own course of conduct nor the industry standard.

On Page 23 of its Opposition Brief, NJTA asserts that *"…at the time of bid opening, public agencies like NJTA also require bidders to provide evidence that if awarded the contract, the bidder's surety will, in fact deliver the Contract Bond at the time of execution.*" Then on Page 26, NJTA argues that *"…if it was not already intuitively obvious from the specifications and the form Consent of Surety itself, common sense and settled practice in the construction industry compels the conclusion that a POA is necessary to support a Consent of Surety*." NJTA makes these arguments to suggest that industry standard justifies its position, and that both El Sol and Liberty Mutual knew or should have known Power of Attorney and Consent of Surety were defective. However, as mentioned above, the actual facts and historical record within the construction industry say otherwise.

Within its August 27, 2024 Letter (**A46**), Liberty Mutual stated that it is "the largest writer of surety business in New Jersey, and is also the largest global surety company in the world." In the two-plus years prior to El Sol's Bid, Liberty Mutual identified not only thirteen prior projects whereby NJTA itself accepted

low bids using Liberty Mutual's identical Bid Bond Documents and Liberty Mutual issued the Contract Bonds, but over 225 prior projects across multiple

New Jersey public agencies including the New Jersey Department of Transportation, NJ Transit, and New Jersey Department of Treasury. (**SA1**)[2]. In the past year alone, Liberty Mutual identified the following six projects (which serves as a small sample of the more than 225 prior projects):

Creamer Ruberton, A JV	SNJ0604969037	Bond #190056350	NJDOT Contract SW1228000
Creamer Ruberton, A JV	SNJ0524654070	Bond #190056331	NJDOT 24459
Della Pello Paving, Inc.	SNJ0402353060	Bond #015222216	NJDOT Contract N215
Daidone Electric, Inc.	SNJ0216990047	Bond #015211013	NJDOT 22411
Clean Earth Matters LLC	SNJ0827670048	Bond #015225149	NJDOT 0287365
Schiavone Construction	SNJ11157345	Bond #015223698	NJ Transit IFB 22-048X

Id. None of these bids were rejected based on there being only one Power of Attorney. Further, Liberty Mutual issued the Contract Bonds on each. Plainly, NJTA's assertion that industry standards are on its side is unsupported - it is a fabricated justification.

NJTA makes claims that if El Sol's Bid is upheld it will lead to "absurd results" (P. 17-18), "promote irregularities in the procurement process and undermine the principle of vigorous competition, on a level playing field" (P. 26), and "open the doors to havoc (and fraud) …" (P. 33). This is hyperbole at

[2] El Sol is required to supplement its Appendix with the referenced letter to refute NJTA's argument that "industry standard" and "well-settled construction practices" support its position. This assertion has not been presented before, and thus, respectfully, El Sol should be permitted to supplement the record accordingly.

best. NJTA cannot point to a single instance of fraud, irregularity, absurdity, or havoc within the construction industry in the last two years. On the contrary, the last two years and more than 225 projects involving Liberty Mutual's same Power of Attorney and Consent of Surety demonstrate an understood order of things: contractor and Liberty Mutual submitted the lowest bid with Liberty Mutual's Bid Bond Documents, the New Jersey public agency awarded the project to the contractor, and Liberty Mutual issued the required Contract Bonds.

Based upon the foregoing reasons, NJTA's reliance on industry standard and well-settled construction practice is meritless and should be rejected.

III. El Sol And Liberty Mutual Did Not Have Any Reason to Object or Challenge The Standard Specifications as They Stood at The Time of Bid

One of NJTA's primary arguments is that El Sol did not object to the Standard Specifications prior to submitting its Bid. NJTA's logic is that this now precludes El Sol or Liberty Mutual from doing so after-the-fact. When bid, El Sol and Liberty Mutual fully understood how the Specifications were interpreted. Neither El Sol nor Liberty Mutual had any reason to challenge or request clarification of the Specifications. Experience on thirteen prior projects was proof of their interpretation.

El Sol is not challenging the Standard Specifications. El Sol satisfied the Standard Specifications by submitting a Proposal Bond, a Power of Attorney,

and a Consent of Surety in a form that was previously found acceptable on thirteen prior occasions. Further, if NJTA Specifications require what NJTA now claims, why would NJTA find the need to modify/change the Specifications to address their concern. NJTA's argument is irrelevant, and not at all probative of the issue.

IV. NJTA's Case Law is Inapplicable

NJTA relies solely on Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307 (1994) and its progeny in support of its disqualification of El Sol's Bid. It is an argument that starts with the false premise that there was something defective in El Sol's Bid, which there is not. NJTA misses: (1) El Sol did not fail to submit a Consent of Surety or submited an ambiguous Consent of Surety; (2) the issue at hand is not about curing or waiving a defect; and (3) these decisions do not require this Court to defer to NJTA or provide a "wide berth."

Meadowbrook involves a contractor who failed to submit a Consent of Surety. That is not what happened here, as El Sol unquestionably did submit a Consent of Surety. El Sol agrees it is required to submit a Consent of Surety – which it did. NJTA concocts an issue by asserting El Sol's Bid without two Powers of Attorney is akin to submitting a bid without a Consent of Surety. That is not what happened. Meadowbrook is inapplicable.

The same holds true for its progeny. In Mayo, Lynch & Associates, Inc. v. Pollack, 351 N.J. Super. 486 (App. Div. 2002)of bid-rigging, bribery, and racketeering, the contractor submitted a blank bid so that a public official could write in an amount lower than any other bidder. The contractor did not submit a consent of surety, and its bid bond was also blank. Then the contractor submitted a consent of surety from a surety that was neither licensed in New Jersey nor listed on the Treasury Circular. The facts within Mayo, Lynch are grossly inapplicable.

In De Sapio Construction, Inc. v. Township of Clinton, 276 N.J. Super. 216 (Law. Div. 1994) the letter from the surety did not unequivocally state that the surety would provide the contract bonds if the contractor was low bidder. The surety's letter of consent contained qualifications as to the surety's ability or willingness to provide the contract bonds. This is not the issue in this case. El Sol's Consent of Surety unequivocally and without qualifications affirmed that Liberty Mutual would issue the necessary Contract Bonds if El Sol was the low-bidder.

Lastly, in L. Pucillo & Sons, Inc. v. Township of Belleville, 249 N.J. Super. 536 (App. Div. 1991) the contractor submitted three alternate bids, one for a one-year contract, another for a three-year contract, and a third for a five-year contract. However, they submitted a single certificate of surety, and it was for an amount that would cover only the one-year contract bid. The contractor

was awarded the five-year contract and produced a performance bond that was nearly $3 million less than the contract value. Id. The certificate of surety properly was deemed deficient because it was not issued for an amount equaling the contract value. This is not an issue in this case. Liberty Mutual's Consent of Surety obligated it and guaranteed without qualifications that it would provide Contract Bonds for the full value of the contract.

This Court's ruling in Blue Diamond Disposal, Inc. v. City of Vineland, 2010 WL 3419192 (App. Div. 2010) is more probative. In Blue Diamond, the second lowest-bidder, Blue Diamond Disposal, Inc.[3] ("Blue Diamond") challenged the City of Vineland's award to the low bidder, South Jersey Sanitation Company ("SJSC"). The challenge was on the grounds that SJSC's consent of surety was defective. Within SJSC's consent of surety, the surety stated:

> *To execute the final bond as required by the specifications or to become co-sureties with others in the full amount of the contract price for the faithful performance of the contract.*

Id.

[3] Notably, in Blue Diamond, the second-lowest bidder initiated the challenge **not** the public agency. This is the typical manner in which challenges to bids and project awards are handled, which is fundamentally different than the instant case where the second lowest-bidder, Sanzari, has not challenged El Sol's Bid. This further highlights how odd and out-of-turn NJTA's unprompted disqualification is.

Blue Diamond argued this language inserted an improper qualification to the surety's obligation to provide contract bonds in the full amount of the contract. In opposition, the surety attested that becoming a co-surety with another surety company and including this particular language is "a generally recognized procedure in the bonding industry," and "one which he had used 'hundreds' of times on [the surety's behalf] '**without any complaint or objection from any public authority**.'" Id. (Emphasis added). Like NJTA, Blue Diamond cited to Meadowbrook, DeSapio, and L. Pucillo.

In rejecting each of those comparisons, this Court held:

> *We do not view SJSC's 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, SJSC did provide a consent of surety. And unlike the bidder in DeSapio, whose surety lamely promised only that it did not "anticipate any difficulty in provide bonds on…the project," supra, 276 N.J. Super. At 219, SJSC's surety expressly and unconditionally agreed to "execute the final bid bond" either individually or as a co-surety. Nor did SJSC's surety, Hudson, reserve the right to refuse to renew the bid, which was the case in L. Pucillo, supra, 249 N.J.Super. at 548.*

Id. at *6.

Importantly, SJSC's consent of surety did not contain a power of attorney and was signed by one of the surety's regional managers, who was designated as "attorney-in-fact." Id. Nonetheless, this Court affirmed the City of Vineland's awarding of the project to SJSC stating that the surety's "consent of surety satisfied the requirements imposed by N.J.S.A. 40A:11-22(b) and Meadowbrook

. Blue Diamond's contentions lack sufficient merit to warrant discussion in a written opinion

SJSC and the surety submitted an executed consent of surety form that was submitted "hundreds" of times and never once rejected by any public agencies. The same holds true in this Appeal. Liberty Mutual submitted the same Power of Attorney and Consent of Surety on over 225 prior projects where its customer contractor was the lowest bidder. Blue Diamond sought reversal of the City of Vineland's decision based on a purported defect within the language of the consent of surety, just like NJTA is now attempting to "re-interpret" Liberty Mutual's Consent of Surety and Power of Attorney. The Blue Diamond Court properly held that Meadowbrook, DeSapio, and L. Pucillo were inapplicable. And finally, SJSC and its surety submitted a consent of surety with a limited power of attorney. Nonetheless, this Court upheld SJSC's bid and its consent of surety specifically ruling that "Blue Diamond's remaining contentions lack sufficient merit to warrant discussion in a written opinion." Id.

In short, Blue Diamond's contention that SJSC's consent of surety was invalid because it submitted a limited power of attorney was so meritless that the Court did not even render a written opinion. This is further juxtaposed where El Sol did indeed submit a Consent of Surety and Power of Attorney fully binding and obligating Liberty Mutual to issue the Contract Bonds at the full contract value.

V. This Matter Involves a Purely Legal Question

This Court is not obligated to defer to NJTA's "expertise" or to give it a "wide berth." The issue is purely a legal question, which this Court is more than qualified to analyze. In fact, all of the cases referenced by NJTA on Page 20 of its Opposition Brief speak to the Court's deference to NJTA where the matter involves decisions as to a contractor's qualifications. In each, NJTA disqualified a contractor in the prequalification phase because it felt the contractor did not have the requisite experience. This is a fundamentally different analysis than the issues at hand and is wholly inapplicable.

El Sol relies upon the legal arguments and case law cited within this Brief in support of this Court's authority and qualifications to make its own determination of this legal question.

CONCLUSION

Based upon the foregoing reasons, NJTA's decision to disqualify El Sol's Bid was arbitrary and capricious, and respectfully should be overturned. NJTA should be compelled to award the Project to El Sol as it should have done at the July 2024 NJTA Commission Meeting.