ANSELMI & DECICCO, INC., Plaintiff, -against- J. FLETCHER CREAMER & SON, INC., PASSAIC VALLEY WATER COMMISSION and CARBRO CONSTRUCTORS CORP. Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-387-24 Civil Action On Appeal from the Order Denying Temporary and Preliminary Restraints and Dismissing Crossclaims SUPERIOR COURT OF NEW JERSEY PASSAIC COUNTY | LAW DIVISION DOCKET NO.: PAS-L-2225-24 Sat Below: Hon. Rudolph A. Filko, A.J.S.C.

BRIEF OF THE APPELLANT CARBRO CONSTRUCTORS CORP.

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Date of Submission: October 31, 2024

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PRELIMINARY STATEMENT

The issue on appeal is of great public importance given its unquestionable impact on all public improvement projects and all public improvement procurements in the State of New Jersey. The Legislature enacted a statute requiring all entities performing work on public lands and receiving tax dollars, directly or indirectly through a contractor, be registered so that the New Jersey Department of Labor ("DOL") may ensure that such entities comply with all federal and state laws. Yet, the trial court created a broad judicial exception to the statute that runs afoul of the statutory language, Legislature's intent and the DOL's determination of the statute's scope. Absent appellate intervention, the statute faces repeated future violations

The Public Work Contractors Registration Act, N.J.S.A. 34:11-56.48 et seq. ("PWCRA"), was enacted by the Legislature to oversee all contractors and subcontractors performing work on public projects, to ensure that the DOL may monitor these entities' compliance with existing state and federal labor laws concerning wages, unemployment and temporary disability insurance, workers' compensation insurance, and the payment of payroll taxes. The PWCRA requires that all contractors performing work on public projects and each of their listed subcontractors must be registered with the DOL at the time of bidding.

Here, the Passaic Valley Water Commission ("PVWC") published a request for bids ("Solicitation") for a public project to construct two 2.5 MG prestressed

concrete tanks within the footprint of the existing Levine Reservoir on Grand Street in Paterson, New Jersey ("Project"). Because the Project sits on a site listed in the National Register of Historic Places, the PVWC required all bidders to identify, at the time of bid, the archeological subcontractor to whom they intend to subcontract the archaeological site work. In no uncertain terms, the Solicitation unambiguously referred to the archaeologist as a "subcontractor", defined the archaeologist's work as "labor", and required the archaeologist to perform its work "on-site."

Despite the PWCRA and the requirements of the Solicitation, J. Fletcher Creamer & Son, Inc. ("JFC") submitted a bid to PVWC that identified an archaeologist who was **not PWCRA-registered** at the time of bidding. Carbro, on the other hand, submitted a bid that identified a PWCRA-registered archaeologist in accordance with the mandates of the PWCRA and Solicitation. Yet, PVWC awarded the contract to complete the Project ("Anticipated Contract") to JFC.

Instead of enforcing the strict mandates imposed by the PWCRA and the language of the Solicitation, the trial court improperly countenanced PVWC's wrongful award of the Anticipated Contract to JFC. In doing so, the trial court completely ignored the relevant legislative history of the PWCRA, the unambiguous language of the Solicitation (which all bidders are required to follow) and DOL determinations that clearly obligate all subcontractors (even those that are professionals) to be PWCRA-registered. The trial court's errors include, without

limitation: (i) incorrectly assuming that the archeologists will not perform work on the Project site even though the Solicitation expressly defines the archologists work to include the employment of laborers who will perform work on-site; and (ii) wrongfully holding that professionals (such as archaeologists) are not required to be PWCRA-registered even though the DOL determined that professionals who are subcontractors to contractors performing work on public projects must be PWCRA-registered.

The trial court's decision did not only undermine the Legislative's purpose for enacting the PWCRA and defy the DOL's determination of the breadth of the statutory requirement the DOL is tasked with enforcing, but it also allowed the PVWC to award a public contract to a bidder in violation of the Local Public Contracts Law, N.J.S.A. 40A:11-1 et seq. ("LPCL"). That JFC was permitted to side-step the Solicitation language and requirements with respect to the archaeologist that others were not afforded is precisely the sort of competitive advantage and unlevel playing field that public procurement laws prohibit.

Preservation of the Legislative intent when enacting the PWCRA and the integrity of the public procurement process requires that the trial court's decision be overturned. If it is not, the door governing the award of public contracts – which the New Jersey Supreme Court held must be kept tightly closed – will be left open permitting the erosion to ensue.

STATEMENT OF MATERIAL FACTS

A. The Bid Solicitation and Bid Specifications

In January 2024, the PVWC published the Solicitation for the Project. 0304a. Pursuant to section 0.32 of the Solicitation

> The successful Bidder for each public works contract and **each listed subcontractor shall be registered in accordance with the requirements of the Public Works Contractor Registration Act (N.J.S.A. § 34:11-56.48 et. seq.)**. The successful Bidder and each listed subcontractor shall possess a certificate **at the time the bid proposal is submitted** and shall submit the certificate(s) prior to the award of the Contract.
>
> [0331a (emphasis added).]

The Solicitation identified a list of subcontractors ("Bidder's Proposed Subcontractors Form") who PVWC determined were so critical to the successful completion of the Anticipated Contract that each bidder was required to identify them at the time of bid. 0344a. Specifically, the Bidder's Proposed Subcontractors Form required each bidder to identify the entities who would perform: (i) general construction work; (ii) structural steel and ornamental iron work; (iii) plumbing work; (iv) heating and ventilating work; (v) electrical work; (vi) tank manufacturer; (vii) masonry; and (viii) archeology. Ibid. The Bidder's Proposed Subcontract Form specifically provides, in relevant part:

BIDDER'S PROPOSED SUBCONTRACTORS

WORK CATEGORY	NAMES AND ADDRESSES
General Construction Work:	
Structural Steel and Ornamental Iron Work:	
Plumbing Work(2):	
Heating and Ventilating Work:	
Electrical Work(1):	
Tank Manufacturer:	
Masonry:	
Archeologist:	

Ibid.

That the archeological subcontractor was identified as one that necessitates pre-bid disclosure is no surprise. Indeed, the archaeologist role is significant given that the Project site is listed on the National Register of Historic Places. 0678a, 0688a, 0745a. The Solicitation also specifically identifies the subcontractor's on-site activities and, through an addendum, created a separate schedule of values for certain additional work the archeological subcontractor is to perform on the Project site with laborers. 1334a. Notably, the schedule of values for the archaeological work includes "all costs required to compensate the archaeologist for **labor for on-site services**." Ibid.

B. Anselmi and JFC Submit Non-Responsive, Materially Defective Bids

On May 21, 2024, the PVWC opened the bids in response to the Solicitation. 1336a. Anselmi's bid ($40,255,770) was the lowest, JFC's bid ($41,819,780) was second lowest, and Carbro's bid ($44,732,529) was third lowest. Ibid.

Within Anselmi's proposal ("Anselmi Proposal"), Anselmi identified Richard Grubb and Associates, Inc. ("RGA") as its archeological subcontractor. 0045a. RGA is not registered in accordance with the PWCRA. 0292a.

Within JFC's proposal ("JFC Proposal"), JFC identified Hunter Research, Inc. ("HRI") as its archeological subcontractor. 0106a. HRI is not registered in accordance with the PWCRA. 0292a.

Carbro's proposal in response to the Solicitation ("Carbro Proposal") identified WSP USA Inc. ("WSP") as its archeological subcontractor. 1346. Unlike the archeological subcontractors identified by Anselmi and JFC, WSP is registered in accordance with the PWCRA. 0292a.

C. The PVWC Improperly Awards the Anticipated Contract to JFC

By letter dated May 22, 2024 ("Protest Letter"), Carbro protested the bids submitted by Anselmi and JFC, asserting that each bid must be rejected as non-responsive because they each identified archeological subcontractors who were not registered under the PWCRA at the time the bid proposals were submitted. 193a. By letters dated June 7, 2024 ("Protest Response Letters"), JFC and Anselmi responded

to Carbro's Protest Letter, asserting that their bids should not be rejected by the PVWC, arguing that they were not obligated to identify an archaeological subcontractor registered under the PWCRA (despite the explicit obligation to do so under the Solicitation and PWCRA). 0213a and 0227a.

By letter dated June 10, 2024 ("Reply Letter"), Carbro responded to the Protest Response Letters, refuting each of the arguments made therein. 1398a.

By letter dated July 22, 2024, the PVWC issued a written decision rejecting the bid submitted by Anselmi (for reasons unrelated to its failure to list a PWCRA-registered archeologist) and recommending award of the Anticipated Contract to JFC. 0274a. Thereafter, PVWC passed a resolution awarding the Anticipated Contract to JFC. 0269a.

PROCEDURAL HISTORY

On July 26, 2024, Anselmi & DeCicco, Inc. ("Anselmi")[1] filed a Complaint challenging the PVWC's award of the Anticipated Contract to JFC, however, its Complaint was not accompanied by an Order to Show Cause or application for restraints. 0021a. That same day, Carbro filed an Answer with Counterclaims and Cross-Claims challenging the PVWC's award of the Anticipated Contract to JFC

[1] While Anselmi participated in this matter at the trial level, it has represented, through counsel, that it does not intend to file a Cross-Appeal or take a position with respect to Carbro's Appeal.

along with an Order to Show Cause and application for temporary and preliminary restraints. 0281a.

By Order to Show Cause dated July 31, 2024, the trial court issued temporary restraints enjoining the PVWC and JFC from proceeding with the Anticipated Contract pending a hearing. 001a. By Order dated September 30, 2024 ("Denial Order"), the trial court lifted the temporary restraints previously entered and denied Carbro's application for preliminary restraints and dismissed all claims with prejudice. 007a and 009a. By Order dated October 2, 2024, the trial court denied Carbro's application for a stay pending appeal. 0019a.

On October 3, 2024, Carbro filed an Application for Permission to File Emergent Motion ("Emergent Application") with the Appellate Division. 1561a. By Disposition dated October 3, 2024, the Appellate Division granted Carbro's Emergent Application and temporarily enjoined the PVWC from proceeding under the Anticipated Contract. 1572a.

After the Appellate Division issued its Disposition granting Carbro permission to file this Emergent Application, the parties executed a stipulation under which all parties agreed that the temporary restraints should continue pending the Court's consideration of Carbro's Appeal on an accelerated basis pursuant to Rule 2:9-2. 1574a.

On October 8, 2024, Carbro filed its Notice of Appeal along with a motion seeking to confirm the parties' agreement, noting that such agreement is conditioned upon the Court's agreement that this matter should be docketed as an accelerated Appeal. 1577a. By Order dated October 8, 2024, the Appellate Division granted Carbro's motion for a stay of the Denial Order pending appeal and accelerated its appeal of that order. 1577a. This appeal is scheduled for a hearing to take place on December 17, 2024. 1577a.

As the parties have consented to the entry of preliminary restraints, this brief focuses on the ultimate legal question at issue in this Appeal – that JFC's failure to identify a PWCRA-registered archaeological subcontractor was a material defect requiring that its bid be rejected as non-responsive.

STANDARD OF REVIEW

The standard of review for the appellate court in reviewing this matter is the same as the standard for the trial judge. The Appellate Division owes no deference to the trial court's interpretation or application of the PWCRA to the undisputed facts of this case. Indeed, the New Jersey Supreme Court has held that "a trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference, and, hence, an issue of law is subject to de novo plenary appellate review, regardless of the context." Estate of Hanges v. Metropolitan Property & Cas. Ins. Co., 202, N.J. 369, 382-83 (2010)(internal

citations omitted); see also Giannakopolous v. Mid State Mall, 438 N.J. Super. 595, 599 (App. Div. 2014)(stating "[w]e engage in a de novo review of the trial court's decision . . . on the motion to dismiss").

Moreover, the PVWC is not entitled to any discretion where (as here) its actions violate the PWCRA and LPCL. See Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307 (1994)(holding that a public entity is without discretion to accept a statutorily defective bid); Borough of Princeton v. Bd. of Chosen Freeholders of Mercer, 169 N.J. 135 (2001)(holding local authority has no discretion to violate the statute and demanding "strict compliance with public bidding guidelines").

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRED IN CONCLUDING THAT JFC'S FAILURE TO IDENTIFY A PWCRA-REGISTERED ARCHAEOLOGIST IN ITS BID WAS NOT A STATUTORY MATERIAL DEFECT THAT RENDERED ITS BID NON-RESPONSIVE (0015a-018a)

The trial court entered the Denial Order because of its erroneous conclusions that JFC was not required to identify a PWCRA-registered archaeological subcontractor in its bid, and that JFC's failure to identify a PWCRA-registered archaeologist was not a statutory defect automatically rendering JFC's bid non-responsive.

The PWCRA does not exempt professionals who perform work on a public project site (like the archaeologist here) from its mandatory registration requirements. This fact is made certain by the PWCRA legislative history and case law interpreting the statute. The law is also clear that a contracting unit (like the PVWC) has no authority to waive a statutory violation in a bid (like JFC's failure to identify a PWCRA-registered archaeological subcontractor). The trial court's failure to apply (much less consider) these foundational principles of law requires that the Denial Order be overturned in its entirety.

A. The PWCRA Requires That All Contractors and Each Listed Subcontractor Performing Work on Public Projects be Registered with the DOL at the Time of Bid Opening (0015a-0018a)

The PWCRA indisputably requires all contractors performing work on public projects and each of their subcontractors to be registered with the DOL. This requirement is expressly stated in the PWCRA, N.J.S.A. 34:11-56.51, which provides, in relevant part:

> [n]o contractor or subcontractor, including a subcontractor not listed in the bid proposal, shall engage in the performance of any public work subject to the contract, unless the contractor or subcontractor is registered pursuant to that act.

Further the statute unequivocally requires that any listed Subcontractor be registered at the time the bid is made:

> [n]o contractor shall list a subcontractor in a bid proposal for the contract unless the subcontractor is registered

> pursuant to P.L. 1999, c238 (C.34:11-56.48 et seq.) at the time the bid is made.
>
> [N.J.S.A. 34:11-56.51.]

Consistent with the plain and clear language of the statute, courts have held contractors and subcontractors cannot perform work on a public project without first being registered with the DOL. Ernest Bock & Sons-Dobco Pennsauken Joint Venture v. Township of Pennsauken, 477 N.J. Super 254, 267 (App. Div. 2023).

The reason for the PWCRA's registration requirement is articulated in the statute. The Legislature set forth their findings and declarations as follows:

> a. There is growing concern over the increasing number of construction industry workers on public works projects laboring under conditions which violate State labor laws and regulations concerning wages, unemployment and temporary disability insurance, workers' compensation insurance, and the payment of payroll taxes;
>
> b. Contractors and subcontractors receiving the benefit of public tax dollars for their work should not be allowed to exploit their workers by denying them benefits and pay mandated by law;
>
> c. It is therefore necessary and proper for the Legislature to establish a registration system for contractors and subcontractors engaged in public works projects in order to better enforce existing labor laws and regulations in the public works industry.
>
> [N.J.S.A. 34:11-56.49.]

The legislative history is consistent with the Legislature's findings and declarations. When the Legislature amended the PWCRA in 1999, the Assembly

Appropriations Committee emphasized the importance for the statute to govern all entities performing public work (without qualification):

> Assembly Bill No. 2161 (1R) requires certain contractors and subcontractors who perform public works contracts to register with the Department of Labor. The registration system will better enable the department to enforce existing State and federal labor laws concerning wages, unemployment and temporary disability insurance, workers' compensation insurance, and the payment of payroll taxes.
>
> * * *
>
> Under the bill, the Commissioner of Labor may sanction a contractor by requiring the contractor, as a condition of initial or continued registration, to provide a surety bond payable to the State for the benefit of workers damaged by any failure of the contractor to pay wages or benefits or otherwise comply with applicable labor laws.
>
> [1420a]

Senator Kyrillos reiterated this point, stating:

> The purpose of the registration system is to enable the department to better enforce existing State and federal labor laws concerning wages, unemployment and temporary disability insurance, workers' compensation insurance, and the payment of payroll taxes.
>
> [1423a].

It is also settled that registration with the DOL must occur before the time of bid opening and cannot be cured once bids are opened. Specifically, the Legislature, in response to the Appellate Division's decision in R.C.G. Const. Co., Inc. v. Mayor

and Council of Bor. Of Keyport, 346 N.J. Super. 58 (App. Div. 2001), amended the PWCRA to provide, in relevant part, that, "[n]o contractor shall list a subcontractor in a bid proposal for a contract unless the subcontractor is registered pursuant to P.L. 1999, c238 **at the time the bid is made**." N.J.S.A. 34:11-56.51 (emphasis added).

When amending the PWCRA, the Legislature inserted the following statement of intent:

> The bill prohibits a contractor from listing in a bid proposal any subcontractor who is not registered pursuant to the act, requires the contractor to submit, prior to the awarding of a contract, the certificates of registration as a substitute for a certificate of registration. It prohibits any subcontractor, even one that is not listed in a bid proposal, from engaging in a contract for public work unless the subcontractor is registered. It requires that the certificates of registration at all times be maintained at each worksite of the public works project and made available for inspection by representatives of the Department of Labor.
>
> [1435a.]

Thus, in making the amendment and rendering its statement (neither of which qualifies the statute's scope by classification of work or otherwise), the Legislature reiterated the importance that all contractors performing work on public projects and each of their listed subcontractors be registered at the time of bidding so that the DOL may monitor their compliance with federal/State labor and wage laws, tax obligations and insurance mandates. Notably, the trial court did not consider or even reference any of the PWCRA's legislative history in its Denial Order. 0015a-0018a.

B. Archeological Subcontractors are Subcontractors Subject to the PWCRA Registration Requirement (0015a-0018a)

The term "subcontractor" is utilized by the PWCRA but is undefined. Under such circumstances, courts routinely look to other statutes that contain a definition for the undefined term. Figueroa v. Allstate Ins. Co., 209 N.J. Super. 586, 589 (Sup. Ct. 1985)(referring to other statute to define "municipality", which is an undefined term in the relevant statute).

Within the New Jersey Municipal Mechanic's Lien Law, N.J.S.A. 2A:44-126 ("MLL") – a statute that applies exclusively to public project – the term "subcontractor" is defined as "a person having a contract under a contractor for the performance of the same work, or any specified part thereof, and also a person having such a contract with a subcontractor, for the performance of the same work or any specified part thereof." Similarly, within the New Jersey Construction Lien Law, N.J.S.A. 2A:44A-2 ("CLL"), the term "subcontractor" is defined as "any person providing work or services in connection with the improvement of real property pursuant to a contract with a contractor or pursuant to a contract with a subcontractor in direct privity of contract with a contractor." From both definitions, the term "subcontractor" is defined in terms of contractual privity/contractual relationship, rather than by classification or type of work performed.

In a matter decided initially by the New Jersey Department of Labor, the Commissioner interpreted the language of the PWCRA and held (consistent with the

referenced definitions) that the term "subcontractor" is derived from contractual relationship rather than classification of work. New Jersey Department of Labor and Workforce Development v. TAD Associates, LLC, d/b/a DeMuro Associates, James DeMuro and Teresa DeMuro, 2010 N.J. Agen LEXIS 826 (N.J. DOL May 6, 2010). Given the language of the statute and its stated purpose, the DOL Commissioner held that licensed professionals (like archaeologists) are subcontractors as contemplated by the statute and are, therefore, required to be registered when working on a public project. Ibid.

In TAD Associates, LLC, the NJDOT assessed penalties and fines against a surveyor after the surveyor performed work on several public projects without, among other things, being registered under the PWCRA. Id. at *3. The surveyor argued that it was not obligated to be registered because it was a licensed professional to whom the PWCRA did not apply. Id. at *9. When the assessment of fines and penalties was considered by an Administrative Law Judge, the Judge stated as follows:

> Regarding the duty to register pursuant to the Public Workers Contractor Registration Act, N.J.S.A. 34:11-56.51 sets forth very succinctly, in pertinent part: 'No contractor or subcontractor, including a subcontractor not listed in the bid proposal, shall engage in the performance of any public work subject to the contract, unless the contractor or subcontractor is registered pursuant to the act' The requirement to register derives from the nature of the project being a public work and the identification of the company as a subcontractor. **The Registration Act**

> **makes no distinction among the varying types of subcontractors and whether they are licensed professionals.**
>
> [Id. at * 10 (emphasis added).]

On appeal before the DOL Commissioner, the Commissioner affirmed the Administrative Law Judge's finding that the licensed surveyor was obligated to be registered under the PWCRA. Id. at *15. (stating "I hereby accept the ALJ's conclusion that respondents violated the CRA . . . and that respondents are, therefore, liable for penalties assessed by the Department for those violations. I also accept the ALJ's findings of fact upon which she based her conclusion that respondents violated the CRA"). Notably, while the Court is not bound by the NJDOL's interpretation of the PWCRA, courts have recognized that the DOL's interpretation of the PWCRA should be given deference. R.C.G. Const. Co., Inc., 346 N.J. Super. at 66.

In its Denial Order, the trial court completely disregarded the DOL's determination in TAD Associates, and wrongfully accepted Respondents' prior argument that archaeologists are professionals and thereby somehow exempt from the PWCRA registration requirement even though they are in fact a subcontractor to a contractor performing a public project. Because the Denial Order flies in the face of the Legislative history and the DOL's own determination in TAD Associates,

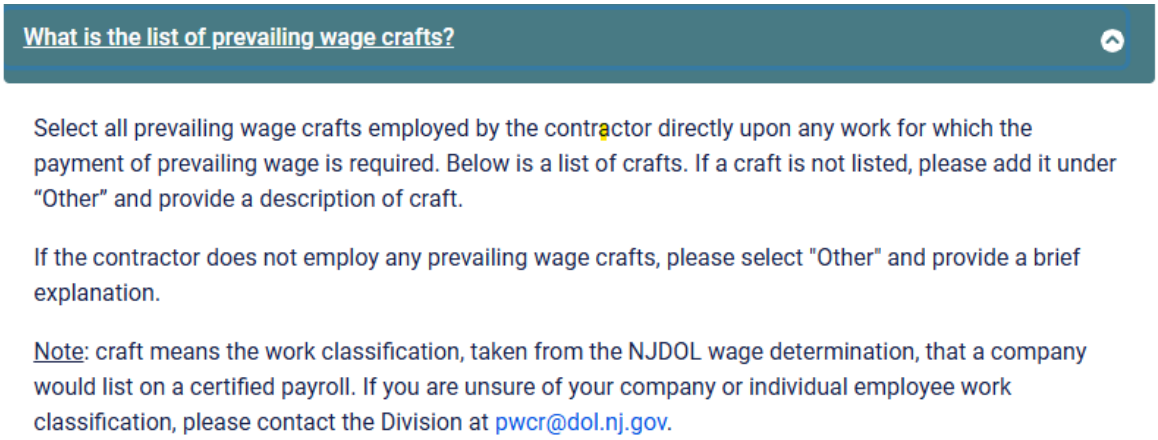
LLC (both of which the trial court completely ignored), it cannot stand on appeal and should be overturned.

Respondents' prior attempts to distinguish the DOL's determination in TAD Associates are without merit. Specifically, Respondents' previously argued that the DOL's decision "reinforces the conclusion that registration is directly tied to the payment of prevailing wages." Respondents' argument is simply untrue. While the DOL in TAD Associates separately held that the particular professional was also obligated to pay prevailing wages, that conclusion did not in any way inform its determination that the professional was also required to be PWCRA-registered. Rather, the DOL's conclusion was limited to its analysis of the PWCRA and conclusion that the PWCRA does not draw distinctions among the types of subcontractors required to be registered, regardless of whether they are professionals or not.

Moreover, Respondents' prior argument that archeologists are not "licensed" professionals like land surveyors (the professional at issue in TAD Associates), is a distinction without a difference. The DOL's determination in TAD Associates was not dependent upon (nor did it discuss) the fact that the land surveyor was licensed. Rather, the DOL broadly rejected any attempt to distinguish between professional and non-professional subcontractors with respect to the obligation to register under

the PWCRA, and determined that any subcontractor performing work on a public project must be registered.

Likewise, Respondents' prior argument that registration is "directly tied to the payment of prevailing wages" is undermined by the stated purpose of the statute (e.g., monitor and enforce payroll taxes) and, again, contrary to DOL's published guidance. Indeed, on its website, the DOL advises that the PWCRA registration requirement is not limited to only employing a prevailing wage craft:



What is the list of prevailing wage crafts?

Select all prevailing wage crafts employed by the contractor directly upon any work for which the payment of prevailing wage is required. Below is a list of crafts. If a craft is not listed, please add it under "Other" and provide a description of craft.

If the contractor does not employ any prevailing wage crafts, please select "Other" and provide a brief explanation.

Note: craft means the work classification, taken from the NJDOL wage determination, that a company would list on a certified payroll. If you are unsure of your company or individual employee work classification, please contact the Division at pwcr@dol.nj.gov.

1579a.

The DOL's published guidance also negates Respondents' other argument that archeologists are not required to be registered because they are not a listed craft. As indicted by the DOL, archeologists fall under the category of "other" (like Carbro's listed archeological subcontractor, WSP.

In TAD Associates, the DOL also interprets the term "subcontractor" (a term undefined by the PWCRA) in the same manner as that term is defined under the

MLL and CLL. Specifically, consistent with the MLL and CLL, the DOL defined the term "subcontractor" in terms of contractual privity/contractual relationship, rather than by classification or type of work performed. This is because the PWCRA does not exist solely to enforce payment of prevailing wages from those involved in public projects. Rather, the PWCRA exists to permit the DOL to monitor compliance of and enforce all existing employment laws including, without limitation, unemployment and temporary disability insurance and payroll taxes. With this purpose in mind, the DOL Commissioner interpreted the language of the PWCRA and held professionals (like archaeologists) are subcontractors as contemplated by the statute and are, therefore, required to be registered when working on a public project. TAD Associates, LLC, 2010 N.J. Agen LEXIS 826.

Perhaps most importantly, the Solicitation, consistent with the DOL's interpretation of the term "Subcontractor", expressly defined the archaeologist to be a subcontractor. A fact that the trial court also ignored.

Even though the law and Solicitation define the archaeologist as a subcontractor, the trial court wrongfully accepted Respondents' argument, that the archeological subcontractor was not required to be registered pursuant to N.J.S.A. 34:11-56.51a solely because of the false belief that the archaeologist is not "performing work at any construction site."

Clearly, the Project is "subject to the PWCRA" as it involves "construction . . . done under a contract and paid for in whole or in part out of funds of a public body." N.J.S.A. 34:11-56.26; see also N.J.S.A. 34:11-56.51 (defining "public work" as defined in N.J.S.A. 34:11-56.26). Equally clear is that the Solicitation plainly and explicitly requires the archeological subcontractor to perform "work at [the] construction site" as contemplated by the PWCRA. Indeed, the Solicitation unambiguously identifies the archeological subcontractor's on-site activities and makes clear that such activities are considered "**labor for on-site services**." 1334a.

The trial court's characterization of the archaeologists' on-site activities as something other than "work" is belied by the requirements of the Solicitation and the DOL's determination in TAD Associates. In Tad Associates, the DOL determined that similar inspection and reporting services (performed by a land surveyor) fall within the PWCRA registration requirements. TAD Associates, LLC, 2010 N.J. Agen LEXIS 826. Without question, the type of work performed by a surveyor (*e.g.*, inspect, survey, identify, measure and report) are virtually identical to the work the archaeologist is required to perform on the Project (*e.g.*, inspect the site, survey the site for artifacts and potential locations of artifacts, identify artifacts, measure artifacts and surrounding area, and report conclusions and recommendations). In addition, unlike the surveyor, the archaeological subcontractor is responsible for sifting through excavated materials and, if

necessary, utilize laborers to hand-excavate in areas where potential historic artifacts may exist. That the archaeologist is required to perform work on site cannot be credibly disputed.

Similarly, the trial court's reliance on the Prevailing Wage Statute's definition of "public work" [N.J.S.A. 34:11-56.26(5)], is inapposite and belied by the DOL's decision in TAD Associates. Indeed, the PWCRA only refers to the Prevailing Wage Statute's definition of "public work" to identify those projects governed by the PWCRA – which this Project clearly is. N.J.S.A. 34:11-56.51. No where in the PWCRA does it limit the registration requirement to only those who perform prevailing wage work.

The trial court's reliance on the term "worker" as defined by the PWCRA was also improper. That term is not used to define a subcontractor and, as illustrated in N.J.S.A. 34:11-56.51, there is a clear distinction between a contractor and subcontractor with each having distinct obligations. Even if that term is applicable to subcontractors (which it plainly is not), the term "worker" includes "labor" performed by "skilled or semi-skilled" labor "regardless of whether their work becomes a component part" of the project. N.J.S.A. 34:11-56.50. Pursuant to the Solicitation, and consistent with the referenced definition, the archeological subcontractor's work is described as "labor for on-site services." 1334a. Without limiting its role, the archaeological subcontractor is responsible for sifting through

excavated materials and, if necessary, hand excavate in areas where potential historic artifacts may exist. Thus, based on this definition, the archeological subcontractor is a "worker" performing work on the Project.

Respondents' prior argument the DOL's decision in TAD Associates would have been decided differently if it was made after the PWCRA was amended to include N.J.S.A. 34:11-56.51a is nonsensical and unsupportable. While the DOL Commissioner in TAD Associates made its decision before the Legislature created this exception, the exception (if applied) would have had no impact on the DOL's determination because the exception only applies if the subcontractor is not working on site. 1334a. Therefore, when the subcontractor is performing work on site – as is the case here – the exception does not apply. Moreover, given that the type of work performed by the land surveyor is substantially similar to the work to be performed by the archeological subcontractor, there is no basis to guess that the DOL would now reach a different conclusion.

C. JFC's Failure to Identify a PWCRA-Registered Archeological Subcontractor is a Statutory Violation that Require Automatic Rejection of its Bid (0015a-0018a)

New Jersey law is well-settled that the failure to include an item in a bid that is statutorily mandated is a non-waivable defect requiring automatic rejection of the bid. See P&A Constr., Inc. v. Twp. of Woodbridge, 365 N.J. Super. 164, 177 (App. Div. 2004).

Without question, the PWCRA prohibits contractors or subcontractors from performing public work unless they are registered pursuant to the PWCRA. N.J.S.A. 34:11-56.51. Consistent with the PWCRA, the Solicitation required all bidders and their subcontractors to be registered in accordance with the requirements of the PWCRA at the time of bid opening. Specifically, section 0.32 of the Solicitation provides:

> The successful Bidder for each public works contract and each listed subcontractor shall be **registered in accordance with the requirements of the Public Works Contractor Registration Act (N.J.S.A. § 34:11-56.48 et. seq.)**. The successful Bidder and each listed subcontractor shall possess a certificate **at the time the bid proposal is submitted** and shall submit the certificate(s) prior to the award of the Contract.
>
> [0331a.]

The Bidder's Proposed Subcontractors Form within the Solicitation identified a list of subcontractors who PVWC determined were so critical to the successful completion of the Anticipated Contract that each bidder was required to identify them at the time of bid. 0344a. Among other subcontractors, the Bidder's Proposed Subcontractors Form specifically identified the archaeological subcontractor. Ibid.

Yet, despite the clear language of the Solicitation and the PWCRA, JFC did not identify a PWRCA-registered archaeologist in its bids. This failure is fatal and renders its bid materially defective as a matter of law. See Ernest Bock & Sons-Dobco Pennsauken Joint Venture, 477 N.J. Super at 267 (recognizing that the

"legislature amended N.J.S.A. 34:11-56.51 to explicitly provide that 'no contractor or subcontractor . . . shall engage in the performance of any public work subject to the contract, unless the contractor or subcontractor is registered pursuant to that act'"). The trial court's failure to recognize this statutory failure in JFC's bid, requiring automatic rejection, requires that the Denial Order be overturned in its entirety.

POINT II

THE TRIAL COURT ERRED IN CONCLUDING THAT JFC'S FAILURE TO IDENTIFY A PWCRA-REGISTERED ARCHAEOLOGIST IN ITS BID WAS NON-MATERIAL AND WAIVABLE

Even if JFC's bid did not contain a statutory defect (although it clearly did violate the PWCRA), the Solicitation expressly identified the archaeologist as a subcontractor and the PWCRA mandates that all subcontractors identified in a bid be registered pre-bid. JFC's failure to comply with the PWCRA, as defined by the Solicitation, constitutes a material defect that cannot be waived.

In Township of River Vale v. R.J. Longo Constr. Co., 127 NJ. Super. 207,216 (Law Div. 1974), Judge Pressler adopted an often followed two-prong test for determining whether a bid defect is material and non-waivable:

> [F]irst, whether the effect of a waiver would be to deprive the municipality of its assurances that the contract will be entered into, performed and guaranteed according to its specified requirements, and second, whether it is of such a nature that its waiver would adversely affect competitive

> bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition.

Applying the River Vale test, if the PVWC were to ignore the PWCRA, section 0.32 of the Solicitation and the Bidder's Proposed Subcontractor's Form and waive the admitted defect in JFC's bid, it would undoubtedly be deprived of the required assurance that JFC could perform all work in accordance with the Anticipated Contract and provide JFC an unlawful competitive advantage.

Here, JFC did not identify an archeologist subcontractor capable of performing the critical work on the Project in accordance with the requirements of the Solicitation and the PWCRA. Indeed, JFC's identified archaeological subcontractor is not permitted to perform on-site activities. This, in and of itself, deprives PVWC of adequate assurance that the Anticipated Contract will be performed in accordance with its terms if awarded to JFC.

Even if a non-PWCRA registered archaeologist is permitted to perform the on-site work for the Project because it is not a subcontractor under PWCRA (although it clearly is), there is no question that PVWC's post-bid modification that the archaeologist is no longer a subcontractor (despite the clear language of the Solicitation indicating otherwise) constitutes an impermissible waiver that effectively gave JFC a competitive advantage over other bidders and prospective bidders. Indeed, unlike Carbro, who sought, identified and secured an agreement

from an archeologist subcontractor registered in accordance with the PWCRA in accordance with the Solicitation's definitions, JFC is allowed to skirt that requirement. Moreover, other bidders may have declined to submit bids in response to the Solicitation because of their inability to identify and secure an archeological subcontractor registered in accordance with the PWCRA and the Solicitation's definitions. Thus, a post-bid waiver of the definition of the archaeologist (which imposed the requirement to identify an archeologist subcontractor registered in accordance with the PWCRA) chills the competitive process and flies squarely against the LPCL.

The trial court wrongfully determined that Carbro will not be disadvantaged if PVWC waived the Solicitaiton's definition and resulting requirement that the archaeologist be PWCRA-registered. Indeed, it is undisputed that the cost of Carbro's proposed PWCRA-registered archaeologist was approximately double the hourly cost of the non-registered archaeologists identified by JFC. 0276a. This cost difference alone, in a low-bid solicitation where a penny difference in bid prices can differentiate between the winning and second lowest bidder, is enough to confer a competitive advantage to those (like JFC) who skirted the rules and utilized un-registered and cheaper archaeologists.

The trail court's conclusion that this cost difference did not solely cause Carbro's bid to be higher than JFC's bids overlooks the fundamental purpose of

public procurement laws. Indeed, the New Jersey Supreme Court declared that it is "[t]he long-standing judicial policy in construing cases governed by the [LPCL] and its predecessors, . . . to curtail the discretion of local authorities by demanding strict compliance with public bidding guidelines." L. Pucillo & Sons, Inc. v. New Milford, 73 N.J. 349, 356 (1977). In Hillside Twp. v. Sternin, the New Jersey Supreme Court articulated the importance of bidding laws and the perils that may ensue if public agencies are even given the slightest flexibility around the statute.

> **The fact that the waiver is attended by good faith on both sides and is not harmful in the particular situation is not sufficient to justify it**. If erosion of the policy is to be avoided, even in such a state of affairs, the municipality cannot be permitted to breathe validity into an invalid bid by waiver. **In this field it is better to leave the door tightly closed than to permit it to be ajar**, thus necessitating forevermore in such cases speculation as to whether or not it was purposely left that way. . . . Only by this approach can the desirable protection be afforded to the taxpayers; only in this way can perfect equality be maintained among bidders. The fundamental principle, as well as the evil to be avoided, remain the same whatever the status of the person who challenges the action.
>
> [Hillside, 25 N.J. at 325-26(emphasis added)

Thus, the trial court was wrongful when it examined the bid results, post-bid opening, and assessed the severity of the defect based on the impact such mistake had on the bidding results. Doing so violated the well-established rule set forth by the Supreme Court in Hillside and opened the door to evils of corruption, fraud and favoritism that the public bidding laws are intended to prevent. In other words, by

leaving the proverbial door open, the trial court effectively approved the erosion to the integrity of public procurement.

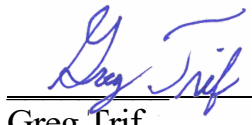
Thus, even if JFC's failure to list a PWCRA-registered archeological subcontractor is not a statutory violation (though it is), such defect could not be waived because doing so would create an unlevel playing field and provided JFC with an unfair advantage over other bidders and prospective bidders.

CONCLUSION

For these reasons, Carbro respectfully requests that this Court overturn the trial court's Denial Order.

Dated: October 31, 2024

TRIF & MODUGNO LLC
Attorneys for Defendant-Appellant,
Carbro Constructors Corp.



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Anselmi & DeCicco, Inc., Plaintiff, vs. J. Fletcher Creamer & Son, Inc., Passaic Valley Water Commission, Defendants-Respondents and Carbro Constructors Corp., Defendant-Appellant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-387-24T02 Civil Action On Appeal from an Order Denying Restraints and Dismissing Appellant's Crossclaims Arising from a Bid Protest Governed by the Local Public Contracts Law SUPERIOR COURT OF NEW JERSEY PASSAIC COUNTY—LAW DIVISION Docket No. : PAS-L-2225-24 Sat below: Hon. Rudolph A. Filko, A.J.S.C.

BRIEF
of the Respondent, Passaic Valley Water Commission

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Date of Submission: November 12, 2024

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Preliminary Statement

We respectfully submit that the Honorable Rudolph A. Filko, A.J.S.C., carefully considered all of the arguments made by the Parties in their written submissions and in Court for the Hearing that took place on September 17, 2024 before finding in favor of the Respondents, Passaic Valley Water Commission ("PVWC") and J. Fletcher Creamer & Son Inc. ("Creamer"). In his Decision, Judge Filko adhered to the deferential standard of review for bid protest cases, holding that "[t]he PVWC's finding that Creamer's bid did not contain a material defect was not arbitrary, capricious, or unreasonable, and it should therefore not be overturned." 0015a.

We respectfully note that Defendant-Appellant, Carbro Constructors Corp ("Carbro") has no binding, legal precedent to support its central contention that all professionals including archaeologists are required by law to register under the Public Works Contractor Registration Act ("PWCRA"). One might think otherwise, given the forcefulness with which it argues in favor thereof, both below and again in this appeal. However, Carbro's contention is merely an argument, not without flaws, especially the way it hinges almost entirely on an administrative opinion from 2010 which, we respectfully submit, was effectively superseded by amendments to the PWCRA in 2022 and is factually distinguishable from our case.

In contrast, the Respondents, PVWC and Creamer, along with Judge Filko, believe that registered archaeologists are not required to register under the PWCRA if they do not perform "work" as defined by the companion legislation—the Prevailing Wage Act. Moreover, the Respondents and Judge Filko along with the Plaintiff Anselmi and the two highest bidders on this solicitation all understood that a "registered archaeologist" meant one registered by the Register of Professional Archaeologists, which allows for registrants to become credentialed either as a "Registered Archaeologist (RA)" or a "Registered Professional Archaeologist (RPA)".

The PVWC, guided by the Local Public Contracts Law, reviewed other factors as well before finding that Creamer was the "lowest responsible bidder". As part of that effort, the PVWC performed an analysis using an extreme hypothetical to determine whether Carbro's bid could have come in lower than Creamer if Creamer had been forced to use a PWCRA-registered subcontractor. The result showed that the difference in extra cost to Creamer under the hypothetical would have maxed out at $750,400, not nearly enough to close the gap between Creamer's bid of $41,819.780 and Carbro's bid of $44,732,529 (almost $3 million higher than Creamer). Judge Filko cited to this analysis with approval, stating that "the additional cost incurred by Carbro from obtaining a

PWCRA-registered archaeologist has no meaningful impact on the result of the bidding." 0017a.

In conclusion, as found by Judge Filko, we respectfully submit that the PVWC did not abuse its discretion, and the PVWC's reasons for awarding the contract to Creamer were not arbitrary, capricious, or unreasonable.

Concise Counter Statement of Facts

This appeal is brought by the third-lowest bidder, Defendant-Appellant Carbro Constructors Corp. ("Carbro"), from the Order and Decision issued below by the Honorable Rudolph A. Filko, A.J.S.C. ("Judge Filko") on September 30, 2024 affirming the findings and actions taken by the Defendant-Respondent, Passaic Valley Water Commission ("PVWC") in awarding a publicly-bid contract to the second-lowest bidder, Defendant-Respondent, J. Fletcher Creamer & Son, Inc. ("Creamer"). *See* 0009a-0018a.

On March 13, 2024, the PVWC invited contractors to bid on a Project referred to as Contract 24-B-5—Water Storage Improvements Phase 1, Levine Water Tanks, Loan #1605002-014 (hereinafter "Contract" or "Project"). *See* 0287a, 1495a. On May 21, 2024, the PVWC received and publicly opened bids submitted in response. *See* 1336a. The results were as follows:

1. Anselmi & DeCicco, Inc. ("Anselmi") $40,255,770
2. J. Fletcher Creamer & Son, Inc. ("Creamer") $41,819,780
3. Carbro Constructors Corp. ("Carbro") $44,732,529
4. Railroad Construction Company ("Railroad") $49,123,608
5. Rencor, Inc. ("Rencor") $50,565,551

See 1336a.

On May 22, 2024, Carbro filed a bid challenge demanding that the PVWC disqualify the two lowest bids for alleged material, non-waivable, and non-

curable defects and award the contract to Carbro on the grounds that their bids failed to identify in their respective bids an archaeologist registered under the Public Works Contractor Registration Act, N.J.S.A. § 34:11-56.48 *et. seq.* ("PWCRA"). *See* 0194a-0197a. On May 30, 2024, Carbo submitted a supplement to its bid challenge noting two other alleged defects in the bids of the two apparent lowest bidders, however, neither of these supplemental challenges are relevant to this Appeal. *See* 0208a-0211a.

On June 7, 2024, Anselmi and Creamer submitted their written responses to Carbro's bid challenge. *See* 0214a-0218a, 0228a-0234a, 0293a. On June 10-11, 2024, the PVWC received all Parties' consent to proceed with the bid challenge on the papers, without the need for a hearing. *See* 1513a-1514a.

In July of 2024, the PVWC's officers determined that: (1) Anselmi's bid contained a material defect requiring disqualification, (2) Creamer's bid complied in all material respects with the bid documents, and (3) Carbro's objections to Creamer's bid were not sufficient to warrant disqualification of Creamer's bid. *See* 0274a-0277a, 0010a. On July 22, 2024, PVWC General Counsel, Yaacov Brisman, Esq., set forth the findings of the PVWC's officers and recommendation of award to Creamer in a letter to Danielle Green of iBank, the lenders for the Project (hereinafter "PVWC's Recommendation"). *See* 0274a-0277a, 0010a. On July 24, 2024 the Commissioners of the PVWC ratified

the PVWC's Recommendation as the PVWC's official act (hereinafter "PVWC's Decision"). *See* 0270a-0279a.

On July 31, 2024, the PVWC voluntarily restrained itself from proceeding with the Project to allow the bid protestors, Anselmi and Carbro, to make their case before the Superior Court without delay. *See* 0001a-0006a.

On September 17, 2024 the Parties appeared in Court before the Honorable Rudolph A. Filko, A.J.S.C. to argue their respective positions. *See* 0007a. On September 30, 2024, Judge Filko issued an Order and Decision finding in favor of the PVWC. *See* 0007a-0018a.

Following Judge Filko's Decision and Carbro's intention to file a motion and appeal, the PVWC once again voluntarily consented to a stay of the award to Creamer pending this Court's determination of this Appeal so that Carbro would not have to file a motion before this Court seeking same and the Court would not be burdened with motion practice. 1574a-1578a.

Procedural History

The PVWC agrees with Carbro's Procedural History appearing in Carb7-Carb9, with the exception of Carbro's final statement characterizing the "ultimate legal question at issue in this Appeal".

Standard of Review

The standard of review in bid protest appeals under the Local Public Contracts Law, N.J.S.A. § 40A:11-1 *et seq*. ("LPCL") is deferential. *Ernest Bock & Sons-Dobco Pennsauken Joint Venture v. Twp. of Pennsauken*, 477 N.J. Super. 254, 263 (App. Div. 2023) (**"We use a deferential standard of review for governmental decisions in bidding cases."**) (emphasis added).

> A reviewing court cannot overturn the decision of a municipal body unless it finds that the decision was arbitrary, capricious and unreasonable. *Kramer v. Sea Girt Bd. of Adj.*, 45 N.J. 268, 296–296, 212 A.2d 153 (1965). "**Even when doubt is entertained as to the wisdom of the action, or as to some part of it, there can be no judicial declaration of invalidity in the absence of clear abuse of discretion by the public agencies involved**." *Ibid*.[;] *In re Meadowlands Communications Systems, Inc.*, 175 N.J. Super. 53, 64, 417 A.2d 575 (App.Div.1980).

Palamar Const., Inc. v. Pennsauken Twp., 196 N.J. Super. 241, 250 (App. Div. 1983) (emphasis added).

Unlike anything suggested by the Appellant to the contrary, we respectfully submit that the deferential standard of review applies to the entire record below, including any reasonable conclusions of law reached by the PVWC, whether this Court necessarily agrees with them entirely or not, provided that the PVWC did not abuse its discretion. *See id.* at 250 ("It is not the function of a reviewing court to substitute its judgment for that of the municipality's governing body **and it is bound by the record before the**

governing body.") (emphasis added); *see also* 0011a-0013a, 0015a. The cases cited by Carbro to the contrary are either not bid protest cases, or they relate to whether a form required by law can be waived or cured when missing at bid opening, therefore they are of limited probative value. *See* Carb9-Carb10. Furthermore, even if this Court can review Judge Filko's Decision *de novo*, it is respectfully submitted that this Court should continue to apply the deferential standard set forth above when examining the conduct of the PVWC. *See Ernest Bock & Sons-Dobco Pennsauken Joint Venture*, 477 N.J. Super. at 263.

As this brief demonstrates, the PVWC took multiple factors into account, not merely legal, before arriving at the decision to award the Contract to Creamer. *See* 0274a-0277a, 0010a. Thus, we respectfully submit that there is no reason in this case for the Court to diverge from the deferential standard of review normally applied to bid protest appeals.

Argument

I. JUDGE FILKO CORRECTLY DETERMINED THAT THE PVWC DID NOT ABUSE ITS DISCRETION IN FINDING IN FAVOR OF RESPONDENT J FLETCHER CREAMER & SON INC. (0013a-0018a)

As the Court is aware, the PVWC found that the second-lowest bidder, Creamer, was the "lowest responsible bidder". The main issue raised by Carbro's bid challenge was whether the Bidding Documents required the bidders to name archaeologist subcontractors who are registered under the Public Works Contractor Registration Act, N.J.S.A. § 34:11-56.48 *et. seq*. ("PWCRA"). *See* 0009a-0010a, 0015a. Rather than being registered under the PWCRA, Creamer's archaeologist, Hunter Research Inc., is registered under the Register of Professional Archaeologists, a nationally recognized professional organization. *See* 0106a, 0232a.

The Bid Instructions required that:

> The successful Bidder for each public works contract and each listed subcontractor shall be registered **in accordance with the requirements** of the Public Works Contractor Registration Act (N.J.S.A. § 34:11-56.48 et. seq.). The successful Bidder and each listed subcontractor shall possess a certificate at the time the bid proposal is submitted and shall submit the certificate(s) prior to the award of the Contract.

See 0331a, 0015a. Thus, we respectfully submit that the PWCRA registration was only required if the PWCRA specified it, otherwise, PWCRA registration was not required. *See* 0015a-0016a ("Contrary to Carbo's position … the bid

instructions do not state that the archaeologist **must** be registered under the PWCRA.") (emphasis added).

The Bid documents required bidders to designate "a qualified Registered Archaeologist (RA)". *See* 0344a, 0912a § 3.09A. The RA would be responsible for monitoring "all excavation activities, construction, staging, and other ground disturbance," and once the reservoir was dewatered, the RA would "evaluate the potential of the pond bed for containing archaeological resources." *See* 0912a § 3.09C-D. At the end of the monitoring activities, "the RA shall prepare a summary monitoring report which meets the standards for such report established by the NJSHPO [New Jersey State Historic Preservation Office]." *See* 0913a § 3.09 F. The RA was to be a professional individual who would be monitoring and writing reports on the demolition and excavation activities of the Project. *See* 0912a-0913a, 0016a.

During the bid protest and before litigation ensued, the PVWC analyzed this issue among others and weighed a variety of legal and factual points before exercising its authority to award the Contract to Respondent Creamer. The PVWC identified six factors that played a part in its Recommendation to award to Creamer:

a. No archaeologist or archaeology practice is required to register under the PWCRA.

b. Of the five bids received, four of them named a proposed archaeology subcontractor that was not registered under the PWCRA.

c. The reasonable meaning of "registered archaeologist" is an archaeologist that is registered with the Register of Professional Archaeologists, a nationally-renown professional organization. *See* rpanet.org.

d. It is believed that a large construction entity that has among its various departments an archaeology practice (*e.g.*, WSP USA, Inc.—the Appellant's proposed "archaeologist"), might be able to apply for and register under the PWCRA, but that does not make the entire entity, or the archaeology section thereof, a "registered archaeologist" under the PWCRA.

e. Any "defect" here was not the result of an error or omission by Creamer or failure by Creamer to construe the true intent of the PVWC's bid instructions.

f. The difference in cost between retaining an archeologist from a PWCRA-registered construction entity versus an archaeologist without this registration is probably negligible and would not have given Creamer an advantage in bidding over Carbro.

See 0274a-0277a, 0010a. These factors, and other points, are explored below in greater detail.

A. NO ARCHAEOLOGIST OR ARCHAEOLOGY PRACTICE IS REQUIRED TO REGISTER UNDER THE PWCRA (0015a-0016a).

We respectfully submit that only trades or crafts are required to register under the PWCRA, not professionals such as archaeologists. *See generally* N.J.S.A. § 34:11-56.51a (providing an exception to the general registration rule for certain subcontractors who do not perform "work" as defined by the Prevailing Wage Act); N.J.S.A. § 34:11-56.26(5) (defining "public work" in the Prevailing Wage Act); *see also* 0015a-0017a. The registered archaeologist required for this Contract is a professional who would be monitoring and writing reports on the demolition and excavation activities of the Project. *See* 0912a-0913a § 3.09A, D, E. Therefore, as a professional, the archaeologist would not need to be registered under the PWCRA.

Starting in January of 2022, the PWCRA was amended to include an exception from this registration requirement, stating: "Subcontractors of a contractor registered pursuant to [the PWCRA] are **not required** to register under that act **if they do not perform work at any construction site subject to that act**." N.J.S.A. 34:11-56.51a (January 18, 2022) (emphasis added). The types of "work" that are "subject to the act [PWCRA]" are visible in the Act's registration requirement, which applies to contractors bidding on "public work as defined in the [Prevailing Wage Act, N.J.S.A. § 34:11-56.25 *et seq*.

("Prevailing Wage Act")]." *See* N.J.S.A. 34:11-56.51 (referencing N.J.S.A. § 34:11-56.26, "or for which payment of the prevailing wage is required by any other provision of law."); *see also* 0016a-0017a.

N.J.S.A. 34:11-56.26(5) defines "public work" in relevant part as follows:

> "Public work" means construction, reconstruction, demolition, alteration, custom fabrication, duct cleaning, or repair work, or maintenance work, including painting, and decorating, done under contract and paid for in whole or in part out of the funds of a public body, except work performed under a rehabilitation program.

The Prevailing Wage Act applies the prevailing wage level "for workmen engaged in public works." N.J.S.A. § 34:11-56.25. The Prevailing Wage Act defines "workman" or "worker" as follows:

> "Workman" or "worker" includes laborer, mechanic, skilled or semi-skilled, laborer and apprentices or helpers employed by any contractor or subcontractor and engaged in the performance of services directly upon a public work, regardless of whether their work becomes a component part thereof, but does not include material suppliers or their employees who do not perform services at the job site. For the purpose of P.L.1963, c. 150 (C.34:11-56.25 et seq.), contractors or subcontractors engaged in custom fabrication shall not be regarded as material suppliers.

N.J.S.A. 34:11-56.26(7); *see also* N.J.A.C. § 12:62-1.2 (applying same definition for "worker" from the Prevailing Wage Act to the PWCRA); *see also* N.J.S.A. § 34:11-56.25 (tying the purposes of the PWCRA and Prevailing Wage Act together as follows: "It is declared to be the public policy of this State to establish **a prevailing wage** level for workmen engaged in public works in order

to safeguard their efficiency and general well being and to protect them as well as their employers from the effects of serious and unfair competition resulting from wage levels detrimental to efficiency and well-being.") (emphasis added).

Under the Prevailing Wage Act, the Commissioner of Labor and Workforce Development is required to "determine the prevailing wage rate and . . . establish the prevailing wage in the locality in which the public work is to be performed for each craft or trade or classification of all workmen needed to perform public work contracts." N.J.S.A. 34:11-56.30. This list of wages and crafts/trades, as applicable to Passaic County at the time of the bid, is available at lwdwebpt.dol.state.nj.us/archivewages/150122207-passaic-5-29-24.pdf (hereinafter "List of Wages Passaic County"). "Archaeologist" or "archaeology" is not among them.

To summarize, if a subcontractor will not be performing "construction, reconstruction, demolition, alteration, custom fabrication, duct cleaning, or repair work, or maintenance work," N.J.S.A. § 34:11-56.26(5), or if the subcontractor's craft or trade is not identified as one for which the prevailing wage must be paid—then that subcontractor's work is not subject to the PWCRA, which means that the subcontractor is exempt from the PWCRA's registration requirement. N.J.S.A. § 34:11-56.51a.

In the instant case, per the Technical Specifications for the Project, the archaeologist will not be performing any construction, reconstruction, demolition, alteration, custom fabrication, duct cleaning, or repair work, or maintenance work. *See* 0912a-0913a § 3.09. The archaeologist would, instead, be monitoring "all excavation activities" and preparing "monitoring report[s]". *See id*. Furthermore, "archaeologist" is not identified on the list of crafts and trades subject to the Prevailing Wage Act. *See* List of Wages Passaic County. As such, there is no basis upon which it is possible to conclude that the work of the archaeologist (as described in the Bidding Documents) is subject to the PWCRA.

1. The TAD Associates Case Has Been Effectively Superseded by the 2022 Amendment to the PWCRA (0015a-0016a).

Carbro claims that subcontractors, including professionals such as archaeologists, are required to register under the PWCRA. *See* Carb15-Carb23. However, Carbro's only legal support for this statement is a 2010 administrative case which was based on the law before the 2022 exception was enacted. *See* Carb15-Carb23 (citing to *New Jersey Department of Labor and Workforce Development v. TAD Associates, LLC et al.*, 2010 N.J. Agen LEXIS 826, 2010 WL 442326 (N.J. DOL May 6, 2010)). For that reason alone, *TAD Associates*

and Carbro's characterization of its applicability to this case should be questioned.

In *TAD Associates* the Commissioner made observations about the PWCRA, which serve to highlight the differences between the 2010 and 2024 versions of the PWCRA. The Commissioner noted:

> Regarding the duty to register pursuant to the Public Workers Contractor Registration Act, N.J.S.A. 34:11-56.51 **sets forth very succinctly**, in pertinent part: "No contractor or subcontractor, including a subcontractor not listed in the bid proposal, shall engage in the performance of any public work subject to the contract, unless the contractor or subcontractor is registered pursuant to that act."

1407a (emphasis added). The Commissioner noted that the wording of the PWCRA in effect in 2010 had no exceptions to it. See 1406a, 1408a ("There are no terms in the Prevailing Wage Act that exempt licensed professionals."). The PVWC is confident that had the Commissioner been working with the 2024 version of the statute, the Commissioner's analysis would have come out differently. N.J.S.A. 34:11-56.51a (January 18, 2022) ("Subcontractors of a contractor registered pursuant to [the PWCRA] are not required to register under that act if they do not perform work at any construction site subject to that act.").

2. The Facts of *TAD Associates* Suggests that Registered Archaeologists Who Monitor and Write Reports Would Not Have to Register under the PWCRA (not raised previously).

Even if the Court wished to harmonize *TAD Associates* with the rest of the legal authority on this topic, notwithstanding being outdated, we respectfully submit that the facts of *TAD Associates* are so distinguishable from this case that it can only support the Respondents' position. The licensed land surveyor in *TAD Associates* was required to pay prevailing wages, and thus register under the PWCRA, because his business employed non-professional workers who were clearly required to be paid prevailing wages, and were not. *See* 1405a-1406a, 1408a-1409a. Although the principal of TAD Associates, James DeMuro, claimed to be a licensed land surveyor, his employees were not and they occupied positions that are identified as crafts under prevailing wage determinations made at the outset of the project such as party chief, instrument operator, and rod man. *See* 1408a-1409a. As explained by the Commissioner,

> Thus, even if Mr. DeMuro is a licensed land surveyor and even if the work of a licensed land surveyor is not covered under the collective bargaining agreement of the International Union of Operating Engineers, respondents [DeMuro] are still under a statutory obligation on a public works project to pay their, party chief, instrument operator and rod man the prevailing wage rates posted by the Commissioner for those classifications of work.

See 1409a. Accordingly, the Commissioner found Mr. DeMuro's firm, TAD Associates, guilty of having failed to pay prevailing wages to his non-

professional staff and of failing to register his firm under the PWCRA. *See* 1409a-1410a.

In contrast, the registered archaeologist in this case is not expected to do more than monitor excavation on site and prepare reports as far as work is concerned, and not expected to need to hire a crew of craftsmen or tradesmen. *See* 0912a-0913a § 3.09. In fact, the only "work" upon the Project that the registered archaeologist is expected to perform is to "request that work be temporarily stopped to allow sufficient time for investigation, recordation, and data recovery." *See* 0912a § 3.09C. The words used in the bid documents to describe the registered archaeologist's activities are: monitor, identify, inspect, consult, investigate, record, recover data, be "on call", retrieve, photograph, report, and deliver. *See* 0912a-0913 § 3.09. Furthermore, the technical specifications refer to the registered archaeologist as "he/she", and not as an entity, contractor, subcontractor, business, etc. *See* 0912a-0913 § 3.09D.

We believe that it would be more appropriate to characterize the thrust of *TAD Associates* as follows: "licensed professionals must pay prevailing wages and register under the PWCRA when they employ craftsmen or tradesmen to perform work on the public project." Thus, *TAD Associates* is distinguishable from our case and tends to support the Respondents' position.

B. THE REASONABLE MEANING OF "REGISTERED ARCHAEOLOGIST" IS ONE REGISTERED WITH THE REGISTER OF PROFESSIONAL ARCHAEOLOGISTS (0016a-0017a).

The PVWC respectfully submits that the reasonable meaning of "registered archaeologist" is an archaeologist that is registered with the Register of Professional Archaeologists, a nationally-renown professional organization (rpanet.org).

During bidding, Carbro seems to have assumed that the term "registered archaeologist" must mean "PWCRA-registered". Carb2, Carb10-15. However, it should be noted that, although the Bid Instructions required bidders to identify "a qualified Registered Archaeologist (RA)," (*see* 0912a § 3.09), there is no indication in the Specifications that "Registered Archaeologist" was intended to refer to an archaeologist registered under the PWCRA. *See* 0015a-0016a. Additionally, there are no provisions under the PWCRA and its related regulations that apply specifically to archaeologists, or that require archaeologists to receive an "RA" distinction. If anything, the Bid Documents' use of "Registered Archaeologist (RA)" appears to be intended to refer to an archaeologist that has registered with the Register of Professional Archaeologists, a professional organization with a website at: rpanet.org. *See* 0015a-0017a. The Register of Professional Archaeologists allows for registrants to become credentialed either as a "Registered Archaeologist (RA)"

or a "Registered Professional Archaeologist (RPA)." *See* rpanet.org/faq. Unlike the PWCRA, which establishes no standards applicable to archaeologists, the RA/RPA distinction bestowed by the Register of Professional Archaeologists requires that an individual possess certain qualifications and experience. *Id.*; *see also* 0017a ("Creamer selected an archaeologist that was registered with the National Register of Professional Archaeologists, which in fact has higher standards for awarding credentials than the PWCRA"). Some jurisdictions and entities require individuals to be certified as an RA/RPA (or to meet those standards) in order to be employed as an archaeologist. *See* rpanet.org/where-is-registration-required.

In support of this point, we respectfully note that all of the archaeologists or archaeology firms listed by the five bidders for this Contract are registered with this organization. *See* 0276a ¶2. Also, of the five bidders who participated in this bid, four of them (excluding Carbro), named a proposed archaeology subcontractor that was not registered under the PWCRA. *See* 0276a ¶2. Those proposed archaeologists were Richard Grubb and Associates, Inc., Hunter Research Inc. (named by two bidders including Creamer), and Acme Heritage Consultants LLC. *See* 0276a ¶2a.

C. THE EXTRA COST OF RETAINING AN ARCHAEOLOGIST FROM A PWCRA-REGISTERED CONSTRUCTION ENTITY VERSUS AN ARCHAEOLOGIST WITHOUT THIS REGISTRATION IS INCONSEQUENTIAL TO THE RESULTS (0017a).

The relatively minor difference in cost between retaining an archaeologist from a PWCRA-registered construction entity versus an archaeologist without this registration is inconsequential to the bid results primarily because the price differential between Creamer's bid ($41,819,780) and Carbro's bid ($44,732,529) is so large. The PVWC analyzed the figures under an extreme hypothetical most favorable to Carbro to test Carbro's claim for the sake of argument, and the most extreme "advantage" that Creamer could have received over Carbro for not using a PWCRA-registered archaeologist was just over $750,400.00. This hypothetical, perceived "advantage" would have narrowed the gap, but the margin between Creamer's and Carbro's would still be quite significant—over $2 million.

Although Carbro argues that Anselmi and Creamer were able to submit their bids "at a significant discount," (*see* Carb27), the bid submissions themselves show otherwise. The bids do not specify the exact amount allocated to the designated archaeologist subcontractor across the entire Project (which is combined with other contract work under Item L5), however, they indicate under Item U22 the rate at which the archaeologist subcontractor will be paid for any additional work required, with Anselmi providing $175 per hour ($2,800 for 16

hours), Creamer providing $160 per hour ($2,560 for 16 hours), and Carbro providing $300 per hour ($4,800 for 16 hours). *Compare* items U22 for Anselmi, Creamer, and Carbro at 0037a, 0101a, and 1342a.

1. Extreme Hypothetical—Archaeologist Works Every Day, Every Hour of the Project—Creamer Still Wins (0017a).

The PVWC believed that the monitoring and reporting of excavation activities expected from the archaeologist on this Project was minor in scope and would not impact the bid results depending on whether the archaeologist was PWCRA-registered or not. To test this theory, the PVWC considered the following extreme hypothetical whereby the archaeologist would work every day, all day for the entire project, whether demolition or excavation work was being performed or not and whether its services were needed or not. The Total Project duration for this Contract is set at 670 days. *See* 0367a Art. II(b) at C-1. Total work hours are 8 hours per day. The cost comparison is as follows:

Comparison in Costs between Archaeologists			
	Creamer	Carbro	Difference
Total Project Days	670	670	
Hours /day	8	8	
Total Project Hours	5360	5360	
Hourly Rate	$ 160.00	$ 300.00	
Cost of Archaeologist	$ 857,600.00	$1,608,000.00	$ (750,400.00)

Using the analysis above, the following adjustments show that the bid result would not change:

	Creamer	Carbro	Difference
Bid	$41,819,780	$44,732,529	$ (2,912,749.00)
Adjustment for Full-Time, PWCRA-Registered Archeologist (Hypo)	$750,400		
Adjusted Bid Prices and Result	$42,570,180	$44,732,529	$ (2,162,349.00)
Result: Creamer's bid is still lower than Carbro's.			

Therefore, with the aid of the above, extreme hypothetical most favorable to Carbro, we respectfully submit that the PVWC has ruled out Carbro's claim. The PVWC believes that Creamer's position as the successful bidder had nothing to do with its archaeologist's status under the PWCRA versus that of Carbro's.

2. The Negligible Impact of an Alleged Defect on the Results Is a Permissible Consideration for Waiver or Cure (0017a).

Under the law, the PVWC is permitted to take into consideration whether the disputed defect in question is consequential or not for purposes of determining whether a potential defect is waivable or curable. *Terminal Const. Corp. v. Atl. Cnty. Sewerage Auth.*, 67 N.J. 403, 411 (1975); *Mountain Home Contractors v. United States*, 425 F.2d 1260, 1264 (Ct. Cl. 1970) (noting that the fact that a disputed contract item arising from ambiguity in the bid

specifications was less than 0.5% of the total contract price was illustrative of its insignificance). As the Supreme Court explained:

> **Public contracting units may resolve problems arising from such conditions in a sensible or practical way….**
>
> **[T]here are certain requirements often incorporated in bidding specifications which by their nature may be relinquished without there being any possible frustration of the policies underlying competitive bidding**. In sharp contrast, advertised conditions whose waiver is capable of becoming a vehicle for corruption or favoritism, or capable of encouraging improvidence or extravagance, or likely to affect the amount of any bid or to influence any potential bidder to refrain from bidding, or which are capable of affecting the ability of the contracting unit to make bid comparisons, are the kind of conditions which may not under any circumstances be waived.

Terminal Const. Corp., 67 N.J. at 411-12 (emphasis added).

As demonstrated in Part I.C.1, *supra*, the difference between the costs allocated by each bidder to their designated archaeologist are inconsequential in comparison to the overall bid amounts. It may be true that Carbro's interpretation of the bid specifications contributed to its submission of a mathematically higher bid price, however, given the degree of the apparent increase compared with the overall bid amounts, there is no adverse impact on competitive bidding by awarding to Creamer. Thus, we respectfully submit that the archaeologist issue is waivable under the law.

D. CARBRO BEARS THE ADVERSE CONSEQUENCES OF NOT HAVING SOUGHT A CLARIFICATION FROM THE PVWC ON THE MEANING OF THE BID INSTRUCTIONS WITH RESPECT TO ARCHAEOLOGY SUBCONTRACTORS (0018a).

We respectfully submit that Carbro should have known that naming a PWCRA-registered subcontractor for archaeology services would have been an unusual condition, going beyond what was required by law. *See* Part I.A & B, *supra*. Furthermore, Carbro considered the role of the archaeologist to be "significant" under this Contract (*see* Carb5). We respectfully submit that, under the circumstances, Carbro should have sought a clarification from the PVWC before bids were due. The Bid Instructions contain a section requiring bidders to avail themselves of asking questions about the Bidding Documents before submitting a bid, to avoid this type of misunderstanding:

> 0.18 QUESTIONS REGARDING BIDDING DOCUMENTS
>
> Before submitting a Bid Submission, the Bidder shall bring to the attention of the Commission's Representative any questions or issues for clarification or interpretation including but not limited to: (i) any conflicting information between two or more portions of the Bidding Documents; **(ii) any doubt that the Bidder may have as to the meaning, intent, or interpretation of any provision(s) found within the Bidding Documents**; and/or (iii) any apparent ambiguity, inconsistency, error, discrepancy, or omission in the Bidding Documents. Any failure to bring such matters to the attention of the Commission as provided for herein shall bar the successful Bidder from later making a claim for additional compensation from the Commission based on an alleged conflicting provisions, ambiguities, inconsistencies, errors, discrepancies, or omissions in the Bidding Documents. Furthermore, if clarifications to the

> Bidding Documents are not requested before bidding as provided for herein, the Bidder shall be responsible to do such work, and furnish such materials as necessary to comply with whichever interpretation of the Bidding Documents that the Commission and/or Engineer, during construction, judges to be proper. **Moreover, any Bidder whose bid is rejected for failing to comply with bid requirements shall have no right to challenge the Commission's finding and interpretation of the requirements of its Bidding Documents after Bid Opening, if the Bidder failed to bring the alleged ambiguity relating to bid requirements to the Commission's attention for clarification before submitting the Bid.**

0323a-0324a. The bidders availed themselves of the above-referenced instruction for other topics as was noted in Response to Bidder Questions, Clarifications #1 and #2 (inadvertently omitted from the Appellant's Appendix). However, Carbro did not seek clarification of what Section 0.32 of the Instructions meant, or what a "registered archaeologist" meant, or whether the term "registered" referred to the PWCRA or to the Register of Professional Archaeologists. By performing this simple step, Carbro could have avoided this litigation. As the Instructions above warn, a bidder who proceeds without asking questions first bears the risk that its assumptions about the meaning of the Bid Instructions and Specifications were not shared by the PVWC, including losing the bid as a result.

E. EVEN IF THE BID INSTRUCTIONS REQUIRED THE ARCHAEOLOGY SUBCONTRACTOR TO BE REGISTERED UNDER THE PWCRA, THIS REQUIREMENT IS WAIVABLE OR CURABLE UNDER THE *RIVER VALE* TEST (0017a-0018a).

Even if the Solicitation did require archaeologist subcontractors to be registered under the PWCRA, which it did not, this requirement would be immaterial and waivable under the *River Vale* test. The *River Vale* test is a "two-part test for determining whether a specific noncompliance constitutes a substantial and hence nonwaivable irregularity." *Meadowbrook Carting Co. v. Borough of Island Heights*, 138 N.J. 307, 315 (1994) (commonly referred to as the *River Vale* test, citing to *River Vale Twp. v. R. J. Longo Const. Co.*, 127 N.J. Super. 207, 216 (L. Div. 1974)). The *River Vale* test requires a determination of:

> first, whether the effect of a waiver would be to deprive the municipality of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements, and second, whether it is of such a nature that its waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition.

Meadowbrook Carting, 138 N.J. at 315.

With respect to the first part of the *River Vale* test, an archaeologist's registration status under the PWCRA provides no assurance that they will perform their monitoring and reporting responsibilities in accordance with the

specifications. PWCRA-registration relates primarily to the payment of prevailing wages to "workmen" under the Prevailing Wage Act, none of which applies to the archaeology profession or scope of work. Therefore, waiving the PWCRA-registration "requirement" (if there is one) does not deprive the PVWC of any benefit or any assurance that the archaeologist will provide all of the services contemplated by the Contract.

Regarding the second part of the *River Vale* test, waiving a requirement that an archaeologist be registered under the PWCRA does not undermine the necessary standard of competition. *See* Part I.C, *supra*. To the contrary, enforcement of such a requirement would adversely affect competitive bidding by rewarding Carbro for declining to seek clarification on its interpretation of the Solicitation and adding $2.9 million to the cost of the Project. *See* Part I.C&D, *supra*.

F. A PWCRA-Registered Entity with an Archaeology Department Is Not Necessarily a PWCRA-Registered Archaeologist (0017a-0018a).

We respectfully submit that a construction entity that has among its various departments an archaeology practice (*e.g.*, WSP USA, Inc.—Carbro's proposed "archaeologist"), might be able to apply for and register under the PWCRA, but that does not make the entire entity, or the archaeology section thereof, a "registered archaeologist" under the PWCRA. WSP USA, Inc.

appears to be a very large business located in New York City with at least 109 different services, only one of which relates to archaeology. *See* wsp.com/en-us/services. Carbro did not submit any information showing that this sizable entity's registration under the PWCRA had anything to do with archaeology. As such the PVWC does not concede that Carbro's archaeologist is PWCRA-registered or that its bid is without defects.

G. THE PVWC DOES NOT BELIEVE THAT CREAMER MADE AN ERROR BY ITS CHOICE OF ARCHAEOLOGIST (0017a-0018a).

Any "defect" here was not the result of an error or omission by Creamer or failure by Creamer to construe the true intent of PVWC's bid instructions. As mentioned above, although the specifications failed to define the meaning of "a qualified Registered Archaeologist (RA)" under Specification "Demolition" 02 41 00 – 9 § 3.09A, there is certainly no indication anywhere in the bidding documents that the term "Registered Archaeologist" was intended to mean a PWCRA-registered archaeologist. *See* 0912a-0913a § 3.09. This position is supported by the fact that, as mentioned *infra,* four of the five bidders named a proposed archaeology subcontractor that was not registered under the PWCRA. *See* 0276a ¶2.

II. RESPONSES TO MATTERS NOT ADDRESSED BELOW (not addressed in the Decision).

The PVWC respectfully submits the following additional points in response to arguments not covered or brought before the Court below.

A. "OTHER" DOES NOT REFER TO PROFESSIONALS (not addressed in the Decision).

There is no reason to believe that the Department of Labor and Workforce Development's ("DOLWD") miscellaneous craft classification of "other" is proof that professionals like archaeologists are required to register under the PWCRA. We respectfully submit that this contention has no legal or logical basis.

Carbro rests this contention on a print-out of the DOLWD's frequently asked questions on the subject of PWCRA registration, in which the DOLWD lists 39 trades who must register under the PWCRA, and an instruction that states as follows:

> Below is a list of **crafts**. If a **craft** is not listed, please add **it** under "Other" and provide the description of the **craft**." If the contractor does not employ any prevailing wage crafts, please select "Other" and provide a brief explanation.

See Carb19; *see also* 1579a-1581a. For context, these instructions appear in a thread that begins with "How do I register". Therefore, the referenced instructions are most likely meant to help a contractor register when their crafts

are not already listed. We respectfully submit that the word "it" highlighted above should be read as "craft", and not as anything broader than that such as "professional". We respectfully submit that professionals do not suddenly become "crafts" just because the instructions on "how to register" are trying to make it easier for contractors to complete the registration form.

We respectfully submit that the 39 listed crafts may be the most commonly found, but there are other crafts not listed, which would fall under the "other" category during the application process. An example of a possible "other" is a striper whose craft is to paint the lines on roads. Their wages are not the same as the general "painter" craft, therefore, a striping contractor might use "other" during the application process to describe the trade under which he is registering. *Compare* different terms between 0550a (Striping), 0512a (Commercial Painter), 0533a (Industrial Painter—Bridges). Another example of a potential "other" craft is Test Boring, which appears to have its own classification and does not necessarily fall within another trade. *See* 0602a.

When a contractor's staff is comprised of some crafts and some non-crafts, the contractor might add to the "other" category administrative support and company owners whose work consists only of oversight as opposed to "hand-on" work.

Conversely, conspicuously absent from the list of 39 crafts is any professional such as a "Licensed Land Surveryor", "Archaeologist", "Architect", or "Professional Engineer". We respectfully submit that the answer is obvious—because these professionals are not "crafts", and the "other" category is only meant to facilitate filling out the application for registration, nothing more.

B. THE ARCHAEOLOGIST IS NOT EXPECTED TO HIRE A CREW OF LABORERS (not addressed in the Decision).

Carbro suggests that the registered archaeologist might be called upon to perform work "with laborers". Carb5. Carbro's support is a reference to Addendum No 1 to the bid documents, Item U22 at 1334a, which Carbro claims "created a separate schedule of values for certain additional work the archeological subcontractor **is to perform on the Project site with laborers**." Carb5 (emphasis added). Carbro avoids stating that the archaeologist would or could employ said laborers, however, that seems to be what Carbro is insinuating. Carb5.

We respectfully submit that there is nothing in this record that suggests that the archaeologist may need to employ laborers (a prevailing wage classification). For clarity, the complete description of the subject item U22 is as follows:

> Item U22 – Additional Time for Services of Registered Archaeologist: For the unit price bid for Item U22 the Contractor shall provide services of **a registered archaeologist** above the schedule of values to be provided by the contractor. The additional hours may arise from additional excavation needs, or requests from the Owner. **The unit price bid shall include all costs required to compensate the archaeologist for labor for on-site services including expenses** and all Contractor markups included. No separate payment will be made for these items.

1334a (emphasis added). We respectfully submit that the term "labor" referred to above is a reference to the archaeologists' own efforts, and neither a requirement, expectation, or direction for the archaeologist to hire its own laborers as employees.

Conclusion

Therefore, for the reasons set forth above, the PVWC respectfully requests dismissal of the Appeal and a release of any restraints on the PVWC's ability to proceed with Creamer on the Contract.

Dated: November 13, 2024

WEBER DOWD LAW, LLC
Attorney for Defendant-Respondent, Passaic Valley Water Commission

Guido S Weber

Guido S. Weber, Esq.

Superior Court of New Jersey

Appellate Division

Docket No. A-000387-24T2

ANSELMI & DECICCO, INC., *Plaintiff,* vs. J. FLETCHER CREAMER & SON, INC., PASSAIC VALLEY WATER COMMISSION, *Defendants-Respondents*, CARBRO CONSTRUCTORS CORP., *Defendant-Appellant.*	:	CIVIL ACTION ON APPEAL FROM THE ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, PASSAIC COUNTY DOCKET NO.: PAS-L-2225-24 Sat Below: HON. RUDOLPH A. FILKO, A.J.S.C.

BRIEF FOR RESPONDENT
J. FLETCHER CREAMER & SON, INC.

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Date Submitted: November 12, 2024

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PRELIMINARY STATEMENT

Defendant-Appellant Carbro Construction Corp. ("Carbro" or "Appellant") predicates its appeal on the misplaced arguments that the Honorable Rudolph A. Filko, A.J.S.C. erred by finding:

A.) That archaeologists hired to perform the services on the subject Public project detailed in the PVWC's bid specifications are not "subcontractors" within the scope of the Public Works Contractor Registration Act, N.J.S.A. 34:11-56.48 et. seq.("PWCRA"); and, therefore,

B.) Those archaeologists designated by the bidders for the subject Project need not be registered under the PWCRA.

For the reasons set forth herein, Judge Filko correctly ruled that an archaeologist's services consisting of "monitoring excavation, construction, staging and ground disturbance activities, evaluat[ing] the potential of the pond bed for containing archaeological resources," and preparing "a summary monitoring report" was clearly not the type of "Public work" contemplated by the PWCRA. Consistent therewith, the bid specifications issued by the Passaic Valley Water Commission ("PVWC" or the "Commission") did not require the bidders' archaeologists to be registered under the PWCRA.

Judge Filko also did not err in finding that even if such archaeological professionals were required to register under the PWCRA, the Commission's

conclusion that "Creamer's selection of an archaeologist that was not registered under the PWCRA is not a material, non-waivable defect" and, "[t]herefore, Creamer, as the lowest responsive bidder was correctly awarded the Project".

PROCEDURAL HISTORY

The PVWC received and opened bids for PVWC Contract No. 24-B-05 (the "Levine Project" or the "Contract") on May 21, 2024. The amount of the bid submitted by Anselmi & DeCicco, Inc. ("Anselmi") was $40,255,770.00, the bid submitted by Creamer was $41,819,780.00, and the bid of Carbro was $44,732,529.00. (0274a.) Carbro challenged the bid results, seeking to disqualify the Anselmi and Creamer bids for allegedly material, non-waivable and non-curable defects. (0193a.) Subsequently, the three low bidders submitted position papers to the PVWC defending their respective bid submissions. (0213a, 0227a.)

By letter dated July 22, 2024, the PVWC provided its factual and legal analysis in support of its recommendation to award the Contract to Creamer as the "lowest responsive bidder" pursuant to the Local Public Contracts Law, N.J.S.A. 40A:11-1 et. seq. 0274a-277a. The Commission determined that Anselmi's bid contained a "fatal defect that required disqualification", specifically finding that Anselmi's cost proposal for "L1 Mobilization" exceeded the maximum amount permitted by the bid solicitation. 01275a.

Further, the PVWC rejected Carbro's challenge to Creamer's bid upon finding that (a) any differences between Creamer's AIA bid bond and the form of bid bond contained in the bid specifications were "inconsequential" and therefor waivable (0277a), and (b) the archaeologist proposed by Creamer was not required to be registered under the Prevailing Wage Contractor Registration Act, N.J.S.A. 34:11-56.48 et seq. (the "PWCRA") 0275a-0276a.

Carbro filed an Order to Show Cause in the Superior Court of New Jersey, Passaic County seeking to disqualify Creamer as the lowest responsible bidder for the Project claiming that the archaeologist listed in Creamer's bid must be registered under the PWCRA. 0281a. In the same action, Anselmi filed a verified complaint seeking summary relief awarding it the Contract as the lowest responsive bidder. 0021a.

After considering the written submissions of all parties and hearing oral argument, the Honorable Rudolph A. Filko, A.J.S.C. issued an order and opinion dated September 30, 2024, and filed on October 1, 2024. 0007a-0018a. In summary, Judge Filko denied the relief sought by Anselmi and Carbro after a thorough examination of :

A. The standard of review for bid appeals under the Local Public Contracts law, N.J.S.A. 40A:11-1 et seq.; 0011a.

B. The legal standard for determining whether a bid defect is "material" or whether it is "waivable;" 0011a-0013a.

C. An analysis of Anselmi's bid, finding that it contained a non-waivable material defect; and 0013a-0015a.

D. An analysis of Creamer's bid, finding that utilizing the services of an archaeologist who was not registered under the PWCRA was a non-material, waivable defect. 0015a.

Carbro now appeals Judge Filko's ruling that (1) "the law itself does not require that the archaeologist subcontractor be registered under the PWCRA", (0015a-0016a) or (2), even if archaeologists were required to be registered, it was not "arbitrary, capricious, or unreasonable" for the PVWC to conclude that Creamer's designation of an unregistered archaeologist was not a "material defect" and therefore waivable under the Local Public Contracts Law. N.J.S.A. 40A:11-1 et seq. 0016a.

Anselmi did not appeal Judge Filko's ruling.

CREAMER'S STATEMENT OF MATERIAL FACTS

The archaeologist's scope of services for the Levine Project are contained in its entirety in section 3.09 of the Bid Specifications under the heading "ARCHAEOLOGICAL MONITORING/ARTIFACT RETRIEVAL" 1527a-

1528a. On May 21, 2024, the PVWC received and opened bids for the Levine Project. The three lowest bids are as follows:

a. Anselmi & DeCicco, Inc. - $40,255.770

b. J. Fletcher Creamer & Son, Inc. - $41,819,780

c. Carbro Constructors Corp. - $50,565,551 (0274a).

By letter dated July 22, 2024, the PVWC "disqualified" Anselmi as the lowest responsive bidder and determined that Creamer "should not be disqualified" because any alleged defects in its bid "were minor and either waivable or curable under the Local Public Contracts Law §40A:11-1 et seq." for the reasons set forth in that letter. 0274a-0277a. The Honorable Rudolph A. Filko, A.J.S.C. "denied and dismissed with prejudice" the relief sought by Anselmi and Carbro "in their respective Orders to Show Cause and Verified Complaints" in his September 30, 2024 order "for the reasons set forth in the accompanying opinion". 0007a. In his accompanying September 30, 2024 opinion, Judge Filko determined that the PVWC correctly awarded the Project to Creamer as the lowest responsive bidder for the reasons set forth in that opinion. 0009a-0018a.

Creamer's selected archaeologist, Hunter, is registered with the "National Register of Professional Archaeologists." (1555a), as confirmed by Judge Filko in his September 30, 2024 opinion. (0017a). Carbro has provided no evidence to

date that its selected archaeologist WSP USA Inc. was registered with the "National Register of Professional Archaeologists" as required under the Bid Specifications. It is also noteworthy that Carbro's selected archaeologist, WSP USA Inc., is not registered on the "New Jersey Public Works Contractors" list as an archaeologist. 1551a-1553a.

LEGAL ARGUMENT

STANDARD OF REVIEW

As found by Judge Filko in the context of bid protest appeals under the Local Public Contracts Law, the reviewing court may overturn the final decision of a public body only if said decision was "arbitrary capricious, or unreasonable", citing Kramer v. Sea Girt Bd. Of Adj., 45 N.J. 268, 296; In re Application of Meadowlands Communications System, 175 N.J. Super. 53, (1980). Similarly, in Palamar Construction v. Twp. Of Pennasauken, 196 N.J. Super. 241, 250 (App Div. 1983) the Appellate Division determined that a "reviewing Court cannot overturn the decision of the municipal body unless it finds that the decision was arbitrary, capricious and unreasonable." (citing Kramer v. Sea Girt Bd. Of Adj., 45 N.J. 268, 296 (1965)). Based thereon, the law is clear that bid disputes are to be given a deferential standard of review. In

re Protest of Award of On-Line Games, 279 N.J. Super 566, 590 (App. Div. 1995).

Appellant's reliance on Hanges v. Metropolitan Property & Cas. Ins. Co. 202 N.J. 369 (2010) as the standard for appellate review in the instant case is misplaced and readily distinguishable. First and foremost, the Hanges case did not involve a bid protest appeal under the Local Public Contracts Law, N.J.S.A. 40A:11-1 et sec. Rather, the Hanges court assessed the standard for review as to whether a decedent's statements to the police were inadmissible under N.J.R.E. 804(b)(6) and whether the trial court properly exercised its discretion on excluding those hearsay statements on summary judgement.[1]

Accordingly, the decision of the PVWC to award the Contract to Creamer as the lowest responsive bidder must stand barring a finding by this Court that said award was "arbitrary, capricious or unreasonable".

[1]Appellant misquotes the language from the Hanges decision at pages 382-383, either intentionally or inadvertently, stringing together two separate quotes from two separate cases, neither of which are bid dispute cases. Manalapan Realty v. Twp. Committee of Manalapan 140 NJ 366, 378 (1995) involves amendments to a township's zoning ordinances and City of Atlantic City v. Trupos 201 N.J. 447, 463 (2010) involves the issue of disqualification of legal counsel.

POINT I
ARCHAEOLOGISTS DO NOT FALL WITHIN THE AMBIT OF THE PUBLIC WORKS CONTRACTOR REGISTRATION ACT (N.J.S.A. 34:11-56.48, ET SEQ.) AND THEREFORE ARE NOT SUBJECT TO PREVAILING WAGE LAWS ON A PUBLICLY FUNDED PROJECT.

A. Scope of the PWCRA

The Legislative intent of the PWCRA is set forth as follows:

> There is growing concern over the increasing number of construction industry workers on public works projects laboring under conditions which violate State labor laws and regulations concerning wages, unemployment and temporary disability insurance, workers' compensation insurance, and the payment of payroll taxes.
> N.J.S.A. 34:11-56.49.

The intent and purpose of the PWCRA is further delineated by its express definition of "Worker" to be protected thereby:

> "Worker" includes laborer, mechanic, skilled or semi-skilled laborer and apprentices or helpers employed by any contractor or subcontractor and engaged in the performance of services directly upon a public work, who have completed or are actively participating in a registered apprenticeship program, regardless of whether their work becomes a component part thereof, but does not include material suppliers or their employees who do not perform services at the job site.
>
> N.J.S.A. 34:11-56.50. (emphasis added)

There can be no dispute that those employed by an archaeological firm are not "construction industry workers" as defined under the PWCRA or that the Legislature sought to protect thereunder.

Nevertheless, Carbro contends that all contractors and subcontractors "performing work on public projects", no matter what type or category of work they perform, must be registered with the DOL pursuant to the PWCRA. This argument made by Carbro is not based upon any language in the PWCRA. Rather, Carbro attempts to somehow connect the New Jersey Municipal Mechanics Lien Law, N.J.S.A. 2A:44-125 et seq. (the "Municipal Lien Law") and the New Jersey Construction Lien Law N.J.S.A. 2A:44A-1 et seq. (the "Construction Lien Law") in support of this argument. This "bootstrapping" of the Lien Laws onto the arguments now before this Court is misguided.

With respect to the Municipal Lien Law, Carbro points to the statute's narrow definition of "subcontractor" as a party in "contractual privity" with a contractor. Carbro's flawed analysis is laid bare by its overt failure to provide a full recitation and analysis of the Municipal Lien Law. Section 2A:44-128(a) of the Municipal Lien Law further defines a lien claimant as a "laborer, mechanic, materialman, merchant, a trader, or subcontractor" which "performs any labor or furnishes any materials, including the furnishing of oil, gasoline or lubricants and vehicle use." Therefore, the full definition of the term "subcontractor" in the Municipal Lien Law includes a "party in privity" with the contractor that provides the above referenced "labor" and "materials" to the

public project. Certainly, an archaeologist cannot be included in that definition of a "subcontractor".

Further, the Construction Lien Law defines a "subcontractor" as "any person or entity providing work or services to improve real property under a contract with a contractor or another subcontractor." N.J.S.A. 2A:44A-2 (emphasis added). The term "work" is defined in the Construction Lien Law as an "activity that improves real property". Also, the term "services" under the Construction Lien Law means "professional services" performed by a "licensed architect, engineer, land surveyor or certified landscape architect." Id.

Accordingly, Carbro's reliance on both the Municipal and Construction Lien Laws' definitions of a subcontractor in support of its misguided argument that privity of contract is the only factor in deciding who must register under the PWCRA leads the Court down an errant path. Clearly, both lien laws consider the type of work performed by a "subcontractor" in determining the applicability of the lien law in question.

With that said, the scope of services provided by an archaeologist do not include any work included in the Municipal Lien Law or any work "that improves real property" pursuant to the Construction Lien Law. Nor is the archaeologist included in the list of licensed professionals under the Construction Lien Law. Rather, the archaeologist's scope of services on this

Project, as referenced in Section 3.09 of the Bid Solicitation, includes activities described as "monitor(ing)", "identify and inspect", "evaluate", "report", "photograph" and "recordation and data recovery", and preparing a summary monitoring report that meets the standards for such report established by the NJSPHO (New Jersey Historic Preservation Office)" 1527a -1528a. The bottom line is that the archaeologist's scope of services set forth in the Bid Solicitation do not include any "work or services" as contemplated by this State's lien laws.

Secondly, Carbro's reliance upon the Department of Labor Commissioner's decision in New Jersey Department of Labor and Workforce Development v. TAD Associates, LLC, d/b/a DeMuro Associates, James DeMuro and Teresa DeMuro, 2010 N.J. Agen LEXIS 826 (N.J. DOL May 6, 2010) ("TAD") to advance its contention that "licensed professionals (like archaeologists) are subcontractors" is similarly misplaced.

Carbro claims that based upon the TAD decision issued in 2010, an archaeologist should be regarded as a "licensed professional", similar to a licensed land surveyor or architect, and therefore is subject to the registration requirements of the PWCRA. The flaw in this argument is that an archaeologist, unlike a land surveyor or an architect, is not required to be "licensed" by the

State of New Jersey and therefore, not correctly grouped in with "licensed professionals" in this context.

Moreover, Carbro maintains that the TAD decision stands for the proposition that the PWCRA does not draw a distinction among various types of subcontractors. More specifically, Carbro argues that a "subcontractor" is derived from the contractual relationship with the Contractor, rather than the classification of work performed. This argument is based on Carbro's reliance on the DOL Commissioner's assessment of N.J.S.A. 34:11-56.51 in TAD that:

> [T]he requirement to register derives from the nature of the Project being a public work and the identification of the company as a subcontractor. The Registration Act makes no distinction among the varying types of subcontractors and whether they are licensed professionals.
>
> Id. at *10

What Carbro conveniently ignores is that the PWCRA was amended effective January 18, 2022 by N.J.S.A. 34:11-56.51 (a), which states that:

> [S]ubcontractors of a contractor registered pursuant to (N.J.SA. 34:11-56.48 et seq) are not required to register under that act if they do not perform work at any construction site subject to that act. (emphasis provided)

As such, the PWCRA clearly does distinguish among the varying types of subcontractors, specifically exempting subcontractors who do not perform "work" on the site from the registration requirements of the PWCRA.

The definition of "Public work" set forth in N.J.S.A. 34:11-56.26(5) includes "construction, reconstruction, demolition, alteration, custom fabrication, duct work cleaning, or repair work, or maintenance work, including painting or decorating..." Certainly, the archaeological services previously stated and detailed in the subject Project's bid specifications do not fall within the above cited categories of "Public work." As stated by Judge Filko, "because the archaeologist is clearly not performing work as defined within the Prevailing Wage Act, the archaeologist falls within the exception to the PWCRA's registration requirement." N.J.S.A. 34:11-56.51a. (0016a)

Finally, it must be underscored that the DOL Commissioner's May 6, 2010, decision in TAD preceded the enactment of N.J.S.A. 34:11-56.51(a) effective on January 18, 2022. That undeniable fact, coupled with the definition of "Public work" set forth in N.J.S.A. 34:11-56.26(5), renders the TAD decision inapposite to the debate now before this Court.

POINT II
CREAMER'S BID COMPLIES IN ALL RESPECTS WITH THE BID SPECIFICATIONS. ANY ALLEGED DEFECT IN CREAMER'S BID IS NOT MATERIAL AND IS THEREFORE WAIVABLE.

A. Creamer's Selected Archaeologist Meets the Requirements of the Bid Specifications for the Project.

Carbro contends that because the PVWC's bid package included "Archaeologist" in its list of "Bidders Proposed Subcontractors", any archaeologist retained by Creamer was required to be registered under the PWCRA. Therefore, Carbro contends that Creamer's bid is defective since its archaeologist, Hunter Research Inc ("Hunter"), was not registered under the PWCRA at the time of its bid.

What Carbro does not acknowledge is that the Bid Solicitation at section 3:09 states that the project site "shall be monitored by a qualified Registered Archaeologist (RA)" since the site is listed on the National Register of Historic Places. 1527a The aforementioned Bid Solicitation further states that the archaeologist is expected to record, photograph, monitor and at the end of its monitoring services, prepare "a summary monitoring report" that meets the standards of the New Jersey State Historical Preservation Office. 1528a As stated previously, the subject Project's Bid Solicitation clearly delineated the archaeological consulting services to be conducted by a qualified archaeologist

who was to be listed under the "Register of Professional Archaeologists", not registered under the PWCRA.

As set forth by the PVWC in its bid determination letter dated July 22, 2024, the term "Registered Archaeologists (RA)" as referenced in the Bid Solicitation required any proposed archaeologist to be registered with the Register of Professional Archaeologists (RPA), a national professional organization. In accordance therewith, Creamer's selected archaeological firm Hunter has a number of members registered with the RPA, including its president and principal archaeologist, Richard W. Hunter, Ph.D., thereby satisfying the "registration" requirement called for in the bid specification. 1555a.

Consistent therewith, Judge Filko, along with the PVWC in its July 22, 2024 letter, determined that per the bid specifications, any archaeologists to be selected to work on the Project were to be registered with the RPA, not under the PWCRA. Based thereon, Judge Filko determined that Creamer's selected archaeologist Hunter satisfied the requirements under the PVWC's bid specifications.[2] 0017a.

[2] It is also noteworthy that Carbro has yet to present any evidence that its chosen archaeologists, WSP USA Inc., is registered with the "National Register of Professional Archaeologists."

B. Any Alleged Defect in Creamer's Bid is Not a Material Defect and therefore Waivable.

Carbro also argued before Judge Filko that the additional cost of obtaining a PWCRA-registered archaeologist put it at a competitive disadvantage in the bidding process. Carbro's argument is that the archaeologist must be registered under the PWCRA simply because the bid specifications reference archaeologists as a "subcontractor."

Judge Filko rejected Carbro's argument and ruled that "the PVWC's finding that Creamer's bid did not contain a material defect was not arbitrary, capricious, or unreasonable, and should therefore not be overturned." 0015a. Also, Judge Filko applied the two-prong test promulgated in Township of River Vale v. R. J. Longo Construction Co., 127 N.J. Super. 207 (Law Div. 1974), to a "hypothetical situation where the bid instructions required the archaeologists to be registered under the PWCRA" 0017a and determined that:

1. Applying the first prong of the test, "PWCRA registration does not provide any guarantee that the archaeologists would carry out its duties in accordance with the Project's specifications" 0017a and,

2. With respect to the second prong, "PVWC's waiver of the supposed PWCRA registration requirement does not harm the competitive bidding process." 0018a.

In fact, if Carbro was uncertain as to what registration the bid instructions required of its selected archaeologist, Carbro was on express notice pursuant to the bid instructions that if it "failed to bring [any] alleged ambiguity relating to the bid requirements to the Commission's attention for clarification before the bid", it would run the risk of the consequences of its misunderstanding of the bid specifications. 0018a.

C. WSP USA Inc's Claimed Registration As An Archeaologist Under the PWCRA

As previously stated, Carbro contends that it should be awarded the Project merely because it was the only bidder who designated an archaeologist "registered" under the PWCRA. However, Carbro has yet to produce the actual "registration" document of its archaeologist despite the fact that this omission was raised below before Judge Filko.

Finally, the New Jersey Dept. of Labor and Workforce Development maintains a running list of all registered public works contractors compliant with the PWCRA, as well as their crafts. A search of that list reveals that Carbro's archaeologist WSP USA, Inc. ("WSP") is registered but not as an archaeologist. 1552a-1553a. The description of WSP's scope of services on that list states that

WSP "performs professional services and environmental consulting. WSP USA, Inc. does not perform any craft services." 1553a. Based thereon, WSP did not register as an archaeologist under the PWCRA.

CONCLUSION

For the reasons set forth herein, Respondent Creamer submits that there is no reversible error made by Honorable Rudolph A. Filko, A.J.S.C., and, therefore, His Honor's Order should be affirmed.

Dated: November 12, 2024

Blick Law LLC
Attorneys for Defendant-Respondent
J. Fletcher Creamer & Son, Inc.

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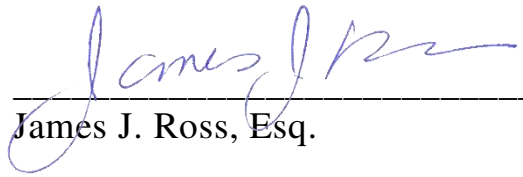

James J. Ross, Esq.

ANSELMI & DECICCO, INC., Plaintiff, -against- J. FLETCHER CREAMER & SON, INC., PASSAIC VALLEY WATER COMMISSION and CARBRO CONSTRUCTORS CORP. Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-387-24 Civil Action On Appeal from the Order Denying Temporary and Preliminary Restraints and Dismissing Crossclaims SUPERIOR COURT OF NEW JERSEY PASSAIC COUNTY | LAW DIVISION DOCKET NO.: PAS-L-2225-24 Sat Below: Hon. Rudolph A. Filko, A.J.S.C.

REPLY BRIEF OF THE APPELLANT CARBRO CONSTRUCTORS CORP.

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Date of Submission: November 18, 2024

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PRELIMINARY STATEMENT

Passaic Valley Water Commission ("PVWC") and J. Fletcher Creamer & Son, Inc.'s ("JFC", together with PVWC, "Respondents") admit (because they must) that: (i) the Public Work Contractors Registration Act, N.J.S.A. 34:11-56.48 et seq. ("PWCRA"), requires all contractors performing public projects and each of their subcontractors who perform work on site be registered with the Department of Labor ("DOL"); (ii) the purpose for the registration is to permit the DOL to monitor and enforce compliance with existing state and federal labor laws concerning wages, unemployment and temporary disability insurance, workers' compensation insurance, and the payment of payroll taxes; (iii) the Solicitation published by PVWC identified the archaeologist as a subcontractor who is required to perform work at the construction site; (iv) JFC did not identify a PWCRA-registered archaeologist in its bid; and (v) Carbro Constructors Corp. ("Carbro") identified a PWCRA-registered archaeologist in its bid.

Instead of acknowledging the settled consequences of violating the PWCRA, the Respondents argue that the trial court properly allowed PVWC to award the Anticipated Contract to JFC even though that decision runs afoul of the statutory language and legislative history, as well as caselaw and DOL decisions interpreting the PWCRA, all of which confirm that the archeological subcontractor – who was

explicitly identified as a subcontractor in the Solicitation and is required to perform work on Project site – was required to be PWCRA-registered at the time of bidding.

Respondents primary arguments are that: (i) archeologists do not perform work on the Project (even though the Solicitation requires the archologists to perform work on site); (ii) archeologists are professionals who are exempt from the PWCRA (even though the DOL determined that professionals who work on public projects must also be PWCRA-registered); and (iii) archeologists are not listed trades or crafts (even though the PWCRA is not limited to trades or crafts and applies equally to all subcontractors who perform work on public projects).

Ultimately, for these and the additional reasons set forth herein, the Legislature's stated purpose and intent when enacting the PWCRA must be safeguarded and enforced. To do so, the trial court's decision must be overturned.

LEGAL ARGUMENT

POINT I

THE PVWC AND TRIAL COURT'S LEGAL ANALYSES ARE NOT ENTITLED TO DEFERENCE

The Appellate Division owes no deference to the trial court's flawed interpretation of the Public Work Contractors Registration Act, N.J.S.A. 34:11-56.48 et seq. ("PWCRA"). This is because "a trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference, and, hence, an issue of law is subject to de novo plenary appellate

review, regardless of the context." Estate of Hanges v. Metropolitan Property & Cas. Ins. Co., 202 N.J. 369, 382-83 (2010)(internal citations omitted).[1]

Likewise, the PVWC is not entitled to any discretion or deference where (as here) its actions violate the PWCRA and the Local Public Contracts Law, N.J.S.A. 40A:11-1 et seq. ("LPCL"). See Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307 (1994).

Respondents' argument that the trial court's legal conclusions are entitled to deference is wrong. Indeed, in Ernest Bock & Sons-Dobco Pennsauken JV v. Township of Pennsauken, 477 N.J. Super. 254, 263 (App. Div. 2023), a case cited by Respondents, the Appellate Division confirmed that the trial court's legal conclusions and interpretations (like PVWC's interpretation of the PWCRA) must be reviewed de novo. In the only other case cited by Respondents, Palamar Constr., Inc. v. Pennsauken, 196 N.J. Super. 241 (App. Div. 1983), the court was not tasked with interpreting a statute (like the Court is here).

POINT II

ARCHAEOLOGICAL SUBCONTRACTORS ARE NOT EXEMPT FROM THE PWCRA

Archeological subcontractors are not exempt from the PWCRA's strict mandate that all contractors and subcontractors performing work on public projects be registered

[1] Carbro did not "misquote" Estate of Hanges. This exact quote appears within the text of the decision. In addition, the statement of law applies to all matters on appeal, regardless of whether they are public bidding cases or not. See Ernest Bock & Sons, 477 N.J. Super. at 263.

with the Department of Labor ("DOL") at the time of bid opening. N.J.S.A. 34:11-56.51, provides, without qualification, that:

> [N]o contractor shall list a subcontractor in a bid proposal for the contract unless the subcontractor is registered pursuant to P.L. 1999, c.238 (C.34:11-56.48 et seq.) at the time the bid is made. No contractor or subcontractor, including a subcontractor not listed in the bid proposal, shall engage in the performance of any public work subject to the contract, unless the contractor or subcontractor is registered pursuant to that act.

Given the clear statutory language, courts have held that contractors and subcontractors cannot perform work on a public project without being registered. See Ernest Bock & Sons-Dobco Pennsauken JV, 477 N.J. Super. at 267.

The legislative history (which the trial court completely ignored) explains the reasoning behind PWCRA's broad application. Specifically, the PWCRA "registration system" was intended to "enforce existing State and federal labor laws concerning wages, unemployment and temporary disability insurance, workers' compensation insurance, and the payment of payroll taxes" and "enable the [DOL] to better enforce" these existing State and federal statutes. N.J.S.A. 34:11-56.49. To be certain, the PWCRA applies to much more than the obligations imposed by the Prevailing Wage Act, N.J.S.A. 34:11-56.26 ("Prevailing Wage Act").

Despite the broad language of the PWCRA and its clear legislative history and purpose, Respondents argue that archeological subcontractors are excused from the PWCRA because the registration requirement is limited to only trades and crafts.

Not so. Respondents' wishful interpretation runs afoul of the legislative history and stated purpose of the PWCRA. As the broad statutory language and legislative history make certain, the PWCRA is not intended to ensure payment of only prevailing wages. Rather, a critical component of the registration requirement is to permit the DOL to monitor compliance of and enforce existing laws concerning unemployment and temporary disability insurance and payroll taxes. N.J.S.A. 34:11-56.49. Professionals, including archaeologists, are certainly not exempt from these laws nor can they be allowed to avoid DOL scrutiny.

Not only is Respondents' novel argument belied by the language and purpose of the PWCRA, but it was also soundly and correctly rebuffed by the DOL Commissioner in a decision that is entitled to deference.[2] When considering the Respondents' exact argument, the DOL Commissioner interpreted the language of the PWCRA and held professionals (like archaeologists) are subcontractors as contemplated by the statute and are, therefore, required to be registered when working on a public project. N.J. Dept. of Labor and Workforce Dev. v. TAD Assoc., LLC, d/b/a DeMuro Assoc., James DeMuro and Teresa DeMuro, 2010 N.J. Agen LEXIS 826 (N.J. DOL May 6, 2010). In making this determination, the DOL Commissioner held that the PWCRA "makes no distinction among the varying types

[2] R.C.G. Const. Co., Inc. v. Mayor and Council of Bor. Of Keyport, 346 N.J. Super. 58, 66 (App. Div. 2001)(providing that DOL decisions should be given deference from courts).

of subcontractors and whether they are licensed professionals." Id. at * 10. Rather, the inquiry is limited to whether the entity is a subcontractor to a contractor engaged in public works and whether that entity is performing its work on site.

Like the surveyor in TAD Assoc., the archaeologist subcontractor here is required to perform its work on site and it is identified as a subcontractor to the contractor in privity with PVWC. These two undisputed facts, in and of themselves, require the archaeologist subcontractor be registered in accordance with PWCRA.

Notably, although the type of work a subcontractor performs is irrelevant to whether the PWCRA applies, the type of work performed by the archaeologist (*e.g.*, inspect the site, survey the site for artifacts and potential locations of artifacts, identify artifacts, measure artifacts and surrounding area, and report conclusions and recommendations) is virtually identical to the type of work performed by the surveyor (*e.g.*, inspect, survey, identify, measure and report) in TAD Associates.

Moreover, Respondents' argument that archeologists are not "licensed" professionals like land surveyors is a distinction without a difference. The DOL's determination in TAD Associates was not dependent upon (nor did it discuss) the fact that the land surveyor was licensed. Rather, the DOL broadly rejected the attempt to distinguish professionals from non-professional subcontractors with respect to the obligation to register under the PWCRA. The obligation to register

under the PWCRA applies to all subcontractors who perform work on site, regardless of their activity and irrespective of their trade.

Respondents' argument, that the DOL's decision in TAD Associates would have been decided differently if it was made after the PWCRA was amended to include N.J.S.A. 34:11-56.51a, is baseless. N.J.S.A. 34:11-56.51a does not, as Respondents suggest, exempt those who do not perform certain work. Rather, N.J.S.A. 34:11-56.51a exempts only those subcontractors who "do not perform work **at any construction site**." Id. [Emphasis added.] For instance, fabricators, suppliers and professionals **who perform no work on the construction site** are exempt from the PWCRA. Conversely, those same subcontractors who perform work on the construction site fall squarely within the PWCRA registration requirements. That the registration requirement is contingent upon on-site activities is consistent with the Legislature's intent when enacting the PWCRA. 1436a (noting that the Legislative intent of the PWCRA is to require "certificates of registration at all times be maintained at each worksite of the public works project and made available for inspection by representatives of the Department of Labor.")

Since the archaeological subcontractor in this case (like the surveyor in TAD Associates) is required to perform work on site as a subcontractor to the general contractor, there can be no dispute that it must be PWCRA-registered.

The Prevailing Wage Act's definition of "public work" does not justify Respondents erroneous emphasis of the word "work", as used in N.J.S.A. 34:11-56.51a, while simultaneously ignoring the phrase "at any construction site" that immediately follows. This is particularly so when considering that the Prevailing Wage Act utilizes the term "public work" in a descriptive sense to identify general classes of work (construction, reconstruction, demolition, etc.) that fall within its purview. In contrast, N.J.S.A. 34:11-56.51a uses the term "perform work" in a more active sense to excuse only those who are not performing work on site.

Moreover, the PWCRA uses the Prevailing Wage Act to define the type of projects to which it applies. Specifically, N.J.S.A. 34:11-56.51 provides that "no contractor shall bid on any contract for public work as defined in section 2 of P.L. 1963, c. 150 (C.34:11-56.26), or for which payment of the prevailing wage is required by any other provision of law." After defining the categories of projects for which the PWCRA applies and imposing the registration requirement on the contractor performing those projects, the PWCRA then mandates that all subcontractors performing work on site under the contractor be registered regardless of the work they perform. Id. Moreover, unlike N.J.S.A. 34:11-56.51 (which expressly defines the phrase "public work" in accordance with the Prevailing Wage Act), N.J.S.A. 34:11-56.51a does not do so.

Even if the Prevailing Wage Act's definitions apply to limit the breadth of the PWCRA (which it does not), the term "worker" includes "labor" performed by "skilled or semi-skilled" labor "regardless of whether their work becomes a component part" of the project. See N.J.S.A. 34:11-56.26(7); N.J.S.A. 34:11-56.50. Pursuant to the Solicitation, the archeological subcontractor's work includes "labor for on-site services." 1334a. Without limiting its role, the archaeological subcontractor is responsible for sifting through excavated materials and, if necessary, hand excavate in areas where potential historic artifacts may exist. Thus, the archeological subcontractor certainly falls within the definition of "worker."

Respondents' argument that registration is tied to payment of prevailing wages is undermined by the stated purpose of the statute (e.g., monitor and enforce payroll taxes) and, contrary to DOL's published guidance. Indeed, the DOL advises that the PWCRA registration requirement is not limited to employing a prevailing wage craft, and that all unlisted entities can be added as "other." 1579a.

That the archaeologist is a subcontractor as contemplated by the PWCRA cannot credibly be disputed. See TAD Associates, supra (defining subcontractors in terms of contractual privity). Consistent with the DOL's interpretation as set forth in TAD Associates, the Solicitation expressly defined the archaeologist to be a subcontractor on its Bidder's Proposed Subcontractor's Form. 0344a. In doing so, the archaeological subcontractor was listed along with the other subcontractors

(plumbing, electrical, structural steel, and HVAC) required to be identified in all bids by the LPCL. N.J.S.A. 40A:11-16. Given that the LPCL defines "subcontractor" in terms of privity (N.J.S.A. 40A:11-16), and that the Solicitation identified the archaeologist as a "subcontractor", it is clear that the term "subcontractor" is defined in terms of privity, as it was in TAD Associates, and that the archaeologist here is a subcontractor as contemplated by PWCRA.

Respondents' argument that "[t]he facts of TAD Associates suggests that registered archaeologist who monitor and write reports would not have to register under the PWCRA" was not previously raised and, therefore, should not be considered. State v. Legette, 227 N.J. 460, n.1 (2017)(declining to consider an argument raised "for the first time on appeal"). Even if this argument is considered, it must be rejected because: (i) it completely ignores the PWCRA's legislative history (which does not limit the PWCRA registration requirement to prevailing wages); and (ii) cites exclusively to portions of the TAD Associates decision relating to whether a surveyor is required to pay prevailing wages. Notably, the DOL Commissioner did not consider (much less mention) the surveyor's prevailing wage obligations when holding that the surveyor was required to be PWCRA-registered.

Respondents' argument that "the reasonable meaning of 'registered archaeologist' is an archaeologist that is registered with the Register of Professional Archaeologists" is undisputed and was never challenged by Carbro. Indeed,

nowhere has Carbro argued that the Solicitation's use of the term "registered archaeologist" referred to the PWCRA or its registration requirement. Rather, the PWCRA registration obligation is predicated on the unambiguous language and legislative history of the PWCRA, DOL's decision and other case law interpreting the PWCRA, and the explicit requirements of the Solicitation, all of which support the following conclusions: (i) all listed subcontractors are required to be registered under the PWCRA at the time the bid is made; (ii) all subcontractors performing work on public projects are required to be PWCRA-registered to allow the DOL to monitor the subcontractor's compliance with federal and State statutes (payroll taxes, insurance obligations, etc.); and (iii) the archaeological subcontractor is identified by the Solicitation as a "subcontractor" and it is required to perform work on the construction site. Based on these unambiguous and undisputed facts, it is clear that the archaeological subcontractor must be PWCRA-registered.

Respondents' argument that Carbro was required to file a pre-bid challenge to the Specifications is misguided. As set forth at length herein, the Solicitation, statutory language, legislative history and DOL decisions all support Carbro's conclusion that bidders were required to identify a PWCRA-registered archaeological subcontractor in its bid. To the extent there is any ambiguity (as Respondents suggest), such ambiguity should be construed against the PVWC as the drafter of the Solicitation. M.J. Paquet v. N.J. DOT., 171 N.J. 378, 395

(2002)(construing ambiguity in NJDOT specifications against public owner). In any event, Carbro is not challenging the requirements of the Solicitation. Rather, Carbro is challenging the PVWC's unlawful award of the Anticipated Contract to JFC, even though JFC failed to identify a PWCRA-registered archaeological subcontractor in its bid as required.

POINT III

JFC'S FAILURE TO IDENTIFY A PWCRA-REGISTERED ARCHAEOLOGIST IS A STATUTORY VIOLATION REQUIRING AUTOMATIC REJECTION OF JFC'S BID

There is no dispute that the failure to include an item in a bid that is statutorily mandated is a non-waivable defect requiring automatic rejection of the bid. See P&A Constr., Inc. v. Twp. of Woodbridge, 365 N.J. Super. 164, 177 (App. Div. 2004). There is similarly no dispute that JFC failed to identify a PWCRA-registered archaeological subcontractor in its bid. Because JFC was required to identify a PWCRA-registered archaeological subcontractor in its bid (see Point II supra), JFC's bid must be rejected and the trial court's Denial Order must be overturned.

POINT IV

JFC'S FAILURE TO IDENTIFY A PWCRA-REGISTERED ARCHAEOLOGIST IN ITS BID WAS A MATERIAL NON-WAIVABLE DEFECT

Even if JFC's bid does not contain a statutory defect (although it clearly did), JFC's failure to identify a PWCRA-registered archaeologist in its bid is a material

defect that is not waivable. In Township of River Vale v. R.J. Longo Constr. Co., 127 NJ. Super. 207,216 (Law Div. 1974), Judge Pressler adopted an often followed two-prong test for determining whether a bid defect is material and non-waivable:

> [F]irst, whether the effect of a waiver would be to deprive the municipality of its assurances that the contract will be entered into, performed and guaranteed according to its specified requirements, and second, whether it is of such a nature that its waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition.

Applying the River Vale test, section 0.32 of the Solicitation and Bidder's Proposed Subcontractor's Form expressly identified the archaeologist as a subcontractor [0344a], and the PWCRA mandates that all subcontractors be registered pre-bid. N.J.S.A. 34:11-56.51. JFC would absolutely have an unlawful competitive advantage if it (unlike others) is permitted to ignore the PWCRA, section 0.32 of the Solicitation and the Bidder's Proposed Subcontractor's Form. Indeed, unlike Carbro, who sought, identified and secured an agreement from an archeologist subcontractor registered in accordance with the PWCRA pursuant to the Solicitation's definitions, JFC did not do so. Moreover, other bidders may have declined to submit bids in response to the Solicitation because of their inability to identify an archeological subcontractor registered in accordance with the PWCRA and the Solicitation's definitions. Thus, a post-bid waiver of the Solicitation's

description of the archaeologist as a subcontractor (which drives the PWCRA registration requirement) chills the competitive process and violates the LPCL.

It is also undisputed that the cost of Carbro's proposed PWCRA-registered archaeologist is nearly double the hourly cost of a non-registered archaeologist. 0276a. This cost difference alone, in a low-bid solicitation where a penny difference in bid prices can differentiate between the winning and second lowest bidder, creates a competitive advantage to those (like JFC) who violate the PWCRA and Solicitation and utilize un-registered and cheaper archaeological subcontractors.

Respondents' argument that "[t]he relatively minor difference in cost" between a PWCRA-registered and non-PWCRA registered archaeologist "is inconsequential to the bid results . . . because the price differential between Craemer's bid ($41,819,780) and Carbro's bid ($44,732,529) is so large" ignores settled public bidding law. Indeed, the Supreme Court declared that it is "[t]he long-standing judicial policy in construing cases governed by the [LPCL] and its predecessors, . . . to curtail the discretion of local authorities by demanding strict compliance with public bidding guidelines." L. Pucillo & Sons, Inc. v. New Milford, 73 N.J. 349, 356 (1977). Thus, the Court cannot examine the bid results, post-bid opening, and assess the severity of the defect based on the impact such mistake had on the results (as Respondents argue). Doing so would violate the well-established

rule set forth by the Supreme Court in Hillside and open the door to evils of corruption, fraud and favoritism that the public bidding laws are intended to prevent.

Respondents' reliance on Terminal Constr. Corp. v. Atlantic County Sewerage Auth., 67 N.J. 403 (1975), is misguided because the case does not stand for the proposition that it is cited. Nowhere in that case did the court permit a public entity to consider the impact of an alleged defect on bid price when considering whether it is waivable or not. Rather, the court simply restated the public bidding principles prohibiting waiver of a material defect where doing so would become a vehicle for corruption, favoritism or "affect the amount of any bid." Id. at 412. Since there is no dispute that JFC's designation of a non-PWCRA registered archaeologist "affected its bid" by reducing its cost, there is similarly no question that waiving this requirement (that use a PWCRA-registered archaeologist) is anticompetitive.[3]

CONCLUSION

For these reasons, Carbro respectfully requests that this Court overturn the trial court's Denial Order.

Dated: November 18, 2024

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[3] Respondents' reliance on Mountain Home Contractors v. United States, 425 F.2d 1260 (Ct. Cl. 1970) is inapposite because it applies federal bidding law, which is neither binding nor persuasive in this New Jersey public bidding case.