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EARLE ASPHALT COMPANY *Plaintiff-Respondent* *v.* COUNTY OF GLOUCESTER *Defendant- Respondent* and SOUTH STATE INC. *Defendant- Appellant*	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Appellate Docket: A-638-24 Trial Court Docket: GLO-L-1067-24 Sat Below: Hon. Benjamin C. Telsey, A.J.S.C.

APPELLANT SOUTH STATE INC.'S BRIEF ON THE MERITS

On the Brief:
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Dated: December 16, 2024

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PRELIMINARY STATEMENT

The County of Gloucester (the "County") sought bids for the ENG Project 21-13FA-Resurfacing and Safety Improvements to Berlin-Cross Keys Road in the Townships of Washington and Monroe (the "Project"). Contractors were required to be properly classified by the New Jersey Department of Transportation ("NJDOT") to perform the Project, both in the relevant work areas and in the appropriate monetary amount. As such, the County's solicitation (the "Solicitation") required each bidder to submit its NJDOT Notice of Classification ("NJDOT Notice") with its bid.

Earle Asphalt Company ("Earle") submitted its bid on July 30, 2024, without its NJDOT Notice. On August 7, 2024, the County informed Earle its bid was being rejected for failure to submit the NJDOT Notice. Earle then waited an additional thirteen (13) days to submit the document. The County stood by its rejection, finding the defect to be material, and awarded the Project to South State, Inc. ("South State"). The County did not evaluate whether it would waive the defect if the failure to submit the NJDOT Notice was not material. Earle subsequently filed suit.

In finding that the defect was not material and that the County would have been obligated to waive the defect had it considered the issue, the trial court overlooked or misapplied significant binding case law indicating that: (1)

responsiveness and materiality must be evaluated on the date of bid opening; (2) in evaluating whether a defect impacts the government's assurance of performance and bidder and potential bidder competition, courts must consider possible and potential impacts and not just the circumstances as they actually played out after bid opening; and (3) the government has significant discretion to reject bids that are defective when those defects are not material, so long as there are legitimate business justifications for refusing waiver.

The Court should reverse the judgment of the trial court and find Earle's failure to timely submit the NJDOT Notice to be a material defect. To the extent the Court finds the defect was not material, the Court should reverse the judgment of the trial court and either: (a) remand to the County to determine whether to waive the defect; or (b) direct the dismissal of Earle's Complaint and allow the County to proceed in the ordinary course, based on the guidance provided by the Court.

PROCEDURAL HISTORY

On August 22, 2024, Earle filed a Verified Complaint and application for Order to Show Cause. Da1 On August 23, the trial court executed the Order to Show Cause. Da418. After briefing, a hearing was held on September 13. 1T. At the close of the hearing, the trial court made preliminary findings on the record, including that the defect in Earle's bid was not material and the County

would be obliged to waive it, but did not dispose of the action. See e.g., 1T58-1 – 1T58-21; 1T59-2 – 1T60-6. The trial court's basis for finding the defect immaterial was that Earle eventually provided a NJDOT Notice that was active at the time of its bid and that Earle bound itself to perform when it belatedly submitted that NJDOT Notice. See e.g., Ibid. The trial court did not look to the bid date to determine materiality and did not consider the possible or potential impacts on assurance of performance or competition that arose from Earle's failure to submit the document with its bid. See e.g., Ibid. No written order was issued from the September 13 hearing.

Following a management conference on September 24, the trial court set a schedule for South State to move for reconsideration and Earle to move to enter final judgment. Da424. South State and the County filed Answers to the Verified Complaint on September 25 and 26, respectively. Da391, Da399. The trial court held a motion hearing on October 24. 3T. On that date, the trial court made findings from the bench that largely tracked its findings of September 13. See e.g., 3T32-8 – 3T33-14. On November 1, the trial court entered a final order finding that Earle's bid was not materially defective, directing the County to rescind the award to South State, and directing the County to find that Earle was the lowest responsive and responsible bidder. Da425. The County indicated during the October 24 hearing that it would carry out whatever it was directed

to do by the trial court at the County's next Freeholder Board meeting on November 6, 2024. 3T49-14 – 3T50-1.

While the issue regarding whether the trial court should decide that a discretionary waiver was inappropriate without the County first acting was addressed, the issue was largely addressed as a question of whether to remand, rather than whether Earle should prevail on its claims in the first instance. 3T45-24 – 3T47-21.

On November 1, South State filed a Notice of Appeal and Application for Leave to File an Emergent Motion. Da433, Da439. On November 4, this Court granted South State's Application. Da450. This Court subsequently entered a stay pending the outcome of the appeal and set an expedited schedule.

STATEMENT OF FACTS

On or about July 5, 2024, the County advertised for bids for the Project. Da18. Both South State and Earle submitted bids. Da4. The Solicitation required bidders to be adequately NJDOT classified and repeatedly required bidders to submit their NJDOT Notice. The second page of the Solicitation provided:

> **ATTENTION**
>
> ALL PROSPECTIVE BIDDERS ARE REQUIRED TO BE **PREQUALIFIED** WITH THE NEW JERSEY DEPARTMENT OF TRANSPORTATION FOR THIS PROJECT
>
> NOTICE OF CLASSIFICATION SHALL BE SUBMITTED WITH THE BID

. . . .

> **The work to be completed by the prospective bidder must exceed 50% of the value of the contract and the bidder must have submitted the corresponding proper NJDOT notice of classification for prequalification of any work items to be performed by the bidder.**
>
> [Da16] (emphasis original)

The Solicitation further provided:

> **102.01 QUALIFICATION TO BID**
>
> . . . .
>
> The Bidder is an individual, firm or corporation submitting a bid for the advertised Work. The Department will not accept bids from Bidders who fail to meet all of the following criteria:
>
> 1. The Bidder has been prequalified according to regulations covering the Classification of Prospective Bidders as required by N.J.S.A. 27:7-35.1, *et seq.*
>
> . . . .
>
> 3. At the time the bid is delivered, the Bidder has an effective maximum and project rating of not less than the amount of its bid.
>
> . . . .
>
> The work to be completed by the prospective bidder must exceed 50% of the value of the contract and the bidder must have submitted the corresponding proper NJDOT notice of classification for prequalification of any work items to be performed by the bidder.
>
> . . . .

> **102.10 SUBMISSION OF BIDS**
>
> . . . .
>
> The Bidder shall ensure delivery of its bid with all required components and attachments, including, but not limited to the following:
>
> . . . .
>
> Prospective bidders are required to submit a NJDOT Notice of Classification which demonstrates the Contractor has a current pre-qualification rating of not less than their respective bid. The Notice of Classification must be submitted with the bid documents. Bids submitted without a proper Notice of Classification may be considered non-responsive.
>
> [Da110-11] (emphasis original)

Earle did not submit its NJDOT Notice with its bid. Da357. On July 30, the County opened all bids. Da4. Earle was ostensibly the lowest bidder at $707,513.13, while South State was ostensibly the second lowest bidder at $745,546.15. Da4. On August 7, the County wrote to Earle explaining, "your firm has been rejected for the following reason: Contractor did not provide NJ DOT Prequalification Letter as required in specification[.]" Da350.

On August 19, twelve (12) days after the County's rejection letter and twenty (20) days after bid opening, Earle wrote to the County arguing that the NJDOT Notice was not a required document and, even if it was, the defect was waivable. Da356-57. Earle did not provide its NJDOT Notice with its August

19th letter. Da356-58.

On August 20, thirteen (13) days **after the County's rejection letter** and twenty-one (21) days after bid opening, Earle provided a supplemental letter that included a copy of its NJDOT Notice. Da360-64. The County responded that it considered Earle's failure to provide the NJDOT Notice with its bid a material defect and that it could not be waived or cured. Da366-67. The County provided a reasoned analysis:

> The [NJDOT Notice] is not an immaterial waivable term. It is required in all applicable County bid specifications and this requirement is featured prominently on the title pages. It states very clearly that the pre-qualification must be included. The specifications also cite Section 102 of the standard DOT bid specs that apply to this bid. If a bidder did not have such a confirmed DOT pre-qualification, the firm is not legally authorized to perform the work. That alone, unequivocally, means the term is material. . . In other words, without such a pre-qualification, the bidder's bid cannot be considered and/or must be rejected just as it is with DOT bids awarded by the Commissioner of the DOT. The **River Vale** test which you cite in support of your position is factually distinguishable and not persuasive given the facts of this situation. It can hardly be immaterial and waivable if a bidder isn't qualified by the DOT to perform such work. To deviate from that clear requirement could jeopardize the County's position with DOT and ultimately harm the County and its taxpayers.
>
> Secondly, all such bids in Gloucester County have been required to include DOT pre-qualification. If it were not material and waivable, it would not be a required part of a responsive bid. Accepting your position would uneven the playing field of bidders who complied with the specifications and completed the required steps of providing the pre-qualification with their bid. Waiving this required pre-qualification certification would impermissibly give your client a competitive advantage over other bidders who did submit the

> required pre-qualification, which serves one of the chief purposes of public bidding. I would note that we received your client's DOT pre-qualification today via email, however, as you can surmise by this notification, we don't regard it a cure for the defective bid submission.
>
> The fact is both the DOT and the County consider a **timely** receipt of the pre-qualification as a material term and accordingly the County's position is that it will not be appropriate to waive it and will not be withdrawing its award letter to South State, Inc.
>
> [Da366-67] (emphasis original).

The County did not formally determine whether it would waive the defect if it were not material. Da366-67. On August 21, South State submitted a letter to the County supporting the position that the defect in Earle's bid was material. Da371. On August 21, the County formally awarded to South State. Da6.

LEGAL ARGUMENT

I. Under the applicable standards of review, the Court must review the trial court's determinations *de novo*, the County's interpretation of its specifications for abuse of discretion, and the County's determination of whether to waive a non-material defect for clear abuse of discretion. (1T60-17; 3T46-7)

a. The trial court's determinations must be reviewed *de novo*.

In evaluating the trial court's decision, this Court must review the trial court's "interpretations of the law and the applications of law to facts . . . de novo." Mountain Hill, L.L.C. v. Twp. Comm. of Twp. of Middletown, 403 N.J. Super. 146, 193 (App. Div. 2008); see also Roik v. Roik, 477 N.J. Super. 556,

567 (App. Div. 2024) ("[T]he trial judge's legal conclusions, and the application of those conclusions to the facts, are subject to our plenary review. ... Our review of a trial court's legal conclusions is always de novo.") (internal citations and quotations omitted).

b. The County's determination of whether a bid conforms to the specifications and whether a non-conformity is material must be reviewed for abuse of discretion.

In public bidding cases, our courts must utilize a deferential standard of review to analyze governmental decision making. Ernest Bock & Sons-Dobco Pennsauken Joint Venture v. Twp. of Pennsauken, 477 N.J. Super. 254, 263 (App. Div. 2023).

When evaluating a government body's determination that a bid under the Local Public Contracts Law does not conform to the specifications, "[t]he standard of review . . . is whether the decision was arbitrary, unreasonable or capricious." In re Protest of Award of On-Line Games Prod. & Operation Servs. Contract, Bid No. 95-X-20175, 279 N.J. Super. 566, 590 (App. Div. 1995); see also Barrick v. State, Dep't of Treasury, Div. of Prop. Mgmt. & Const., 218 N.J. 247, 259 (2014) (citing On-Line Games for the same proposition); Ernest Bock, 477 N.J. Super. at 263 (quoting On-Line Games for the same proposition).

Similarly, a government body's determination that a defect is material is reviewed for whether it is "arbitrary, capricious, or unreasonable, or [ ] not

supported by substantial credible evidence in the record as a whole." Barrick, 218 N.J. at 259 (bracket in original); see also On-Line Games, 279 N.J. Super. at 267-68 (finding "there is sufficient credible evidence to support the Township's conclusion that Joint Venture's bid was materially defective"); On-Line Games, (finding "the Treasurer fully analyzed this issue and that his ultimate conclusion that Autotote's bid was non-conforming in a material way was supported by substantial evidence in the record as a whole and accorded with the legislative policies underlying our public bidding laws").

In short, "if a public entity's decision [on conformity and materiality] is grounded rationally in the record and does not violate the applicable law, it should be upheld." Ernest Bock, 477 N.J. Super. at 263.

c. The County's determination of whether to waive a non-material defect must be reviewed for clear abuse of discretion.

The already deferential standard utilized in public bidding cases, ibid., is amplified when a public body refuses to waive a non-material defect. See Palamar Const., Inc. v. Pennsauken Twp., 196 N.J. Super. 241, 250 (App. Div. 1983). In such cases, the public body's decision can only be reversed if there is a "clear abuse of discretion." Ibid. As the Palamar court explained:

> 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[; i]t 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.

[Ibid.]

See also Serenity Contracting Grp., Inc. v. Borough of Fort Lee, 306 N.J. Super. 151, 157-58 (App. Div. 1997) ("Nothing in the Local Public Bidding Law or in the cases decided thereunder suggests a legislative design to supplant all exercises of principled business judgment by the contracting public entity that conform with the express provisions of the Law and its underlying policies. Such exercises are entitled to respectful review under an abuse of discretion standard, especially where they are based upon a bidder's failure to comply strictly with bid specifications, whether substantive or procedural.") (internal citations omitted); Entech Corp. v. City of Newark, 351 N.J. Super. 440, 457 (Law. Div. 2002) ("Further, there must be a clear abuse of discretion by the municipality in order for such a decision to be overturned by a court.").

II. The trial court erred in reversing the County's determination that Earle's bid was materially defective for failing to provide its NJDOT Notice of Classification with the bid where the Specifications required submission of the NJDOT Notice of Classification with the bid, NJDOT Classification is required to perform the work in question, and the information regarding Earle's classification was not included elsewhere in its bid. (1T55-24; 3T31-15)

Two areas where the trial court deviated from established, binding precedent were in: (i) considering August 20th, the date Earle ultimately provided its NJDOT Notice as the critical date for evaluating responsiveness

and materiality, see, e.g., 1T58-1 – 1T58-21[1]; and (ii) refusing to consider the potential and possible impacts on assurance of performance and competition because Earle ultimately provided the NJDOT Notice and did not walk away from its bid, see, e.g., 1T59-2 – 1T60-6, 3T33-4 – 3T33-14. Regarding the date for considering responsiveness and materiality, the trial court stated:

> [M]y analysis here is based upon what happened in this case, which is that ultimately, on August 19th, the plaintiff submitted a letter challenging the bid award to South State and then subsequent to that, on August 20th, they submitted the appropriate documentation showing that they actually have that notice of classification. At that point the County had the authority or the ability, once they received that documentation on August 20th, to determine that they're going to award the bid to the plaintiff and they chose not to do so.
>
> [1T58-2 – 1T58-12]
>
> As of August 20th, . . .the County had its assurances
>
> [1T58-17 – 1T58-18]
>
> It was provided on the 20th. They were fully compliant with the bid.
>
> [1T59-25 – 1T60-1]
>
> The County was, again, provided a fully compliant bid. They were provided this document on the 20th of August that showed that they, being the plaintiffs, could properly perform under this contract.
>
> [1T60-22 – 1T60-25]
>
> The rationale seems to be that they were unsatisfied -- they being

[1] On reconsideration, the trial court acknowledged that the bid opening date, July 30, 2024, was the appropriate date to evaluate responsiveness, but it did not alter its determination on how to evaluate materiality. 3T31-21 – 3T32-17

> the County -- were not happy that they did not receive the appropriate documentation at the bid -- the notice of classification at the bid, but they received it on August 20th.
>
> [1T61-6 – 1T60-10]
>
> Again, we had -- in [Suburban Disposal, Inc. v. Twp. of Aberdeen, A-3176-12T3, 2014 WL 2131662 (N.J. Super. Ct. App. Div. May 23, 2014], there's an expired document. Here, there was no document, which I recognize is an argument that both defendants used to distinguish Suburban from the present case. And it's a fair argument to advance but, ultimately, I don't find that to be a significant and compelling argument because we learned on August 20th, when all of this analysis could still take place, that they had the document. That they knew -- that the plaintiffs had this document and it was valid on the time of the bidding.
>
> [1T62-19 – 1T63-4]

On rehearing, the trial court described some of its prior language regarding the relevant time considerations as "not artful", 3T31-19 – 3T32-7, but continued to rely on August 20, twenty-one (21) days after bid opening, to evaluate materiality:

> Number one, the argument says -- and I'm looking at the motion for reconsideration. The first argument in the motion for reconsideration was that when the bid opening should be evaluated and suggesting that the Court indicated it was evaluating the bid as of August 20th and not on the bid opening date.
>
> And again -- and this may fall into an area where I wasn't artful. It's not in dispute that the responsiveness to the bid needs to be evaluated on the date of the bid opening and I may not have said that clearly because my argument ultimately went to what was done subsequently.
>
> I would also note that the Court specifically found that this

> particular registration document was not material and was waivable and so the case law and the cases cited by the moving party all go to non-waivable and material documents and that's not what we have here based on my rule.
>
> So, again, so as to that issue, I agree that the bid responsiveness as of the date of the bid opening but, ultimately, much of the evaluation went to what was submitted as of August the 20th.
>
> [3T31-21 – 3T32-17]

As to the trial court's refusal to consider possible and potential impacts, the court explained:

> First, my analysis is based upon the facts that are before me and that's important because there's a lot of speculation as to what could have happened, what might have happened, and the legal analysis in this case is hard enough with what did happen. And I think that the appropriate analysis has to be with what did happen, not with what could have happened.
>
> [1T55-24 – 1T56-6]
>
> [M]y analysis here is based upon what happened in this case, which is that ultimately, on August 19th, the plaintiff submitted a letter challenging the bid award to South State and then subsequent to that, on August 20th, they submitted the appropriate documentation showing that they actually have that notice of classification. At that point the County had the authority or the ability, once they received that documentation on August 20th, to determine that they're going to award the bid to the plaintiff and they chose not to do so.
>
> [1T58-2 – 1T58-12]
>
> This was not a situation where they were able to tender a more affordable bid because they didn't have something in place. They had everything.
>
> And so there's no competitive advantage here, unless we look at

> arguably -- and that's where we've gone back and forth a little bit, this walk away provision, which has been artfully argued by both defendants in this case. The general concept is that if the defendants -- strike that. If the plaintiffs didn't like the numbers, they could walk away. They could not choose to proceed with the contract.
>
> But that's speculation and I can only -- that's why I started my finding. I can only deal with the facts that are before me, which is the document was provided. It was provided on the 20th. They were fully compliant with the bid. There's no ability to walk away. It doesn't exist with the fact pattern of this case, and I don't want to get lost in speculation or other fact patterns. The fact is here the document was turned over. It existed at the time of the bid opening and existed on that day.
>
> [1T59-9 – 1T60-6]

The trial court reiterated this position on reconsideration:

> We would have a completely different situation here if that were not the facts and that's why in my analysis I wanted to emphasize that I'm dealing with the facts that were before me. I'm not dealing with non-facts that are before and the fact of the case here is this document was valid on the date of the bid opening.
>
> And I just want to clarify that. It falls in consistency with my initial decision, but that was something that was argued on the motion for reconsideration.
>
> [3T33-4 – 3T33-10]

These are two critical errors, because as discussed in the next sections, analyzing Earle's failure to time submit the NJDOT Notice under the appropriate paradigm demonstrates it was plainly a material defect, that the County's determination of materiality was anything but arbitrary and capricious, and that, at absolute minimum, it was a defect a governing body could properly refuse to

waive.

a. The Local Public Contracts Law is designed to foreclose any activity that may serve as a vehicle for favoritism, improvidence, extravagance or corruption.

In New Jersey, bids for public construction by municipalities are subject to the Local Public Contracts Law, N.J.S.A. 40A:11-1 et seq. (the "LPCL"). The LPCL requires that all construction contracts be awarded to "the lowest responsible bidder…." N.J.S.A. 40A:11-16. The "lowest responsible bidder" is the bidder "(a) whose response to a request for bids offers the lowest price and is responsive; and (b) who is responsible." N.J.S.A. 40A:11-2(27). To be "responsive" a bid must conform "in all material respects to the terms and conditions, specifications, legal requirements, and other provisions of the request" for bids. N.J.S.A. 40A:11-2(33). There is no discretion to waive a material defect, and a defect is material if "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," or "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 Co. v. Borough of Island Heights, 138 N.J. 307, 314-15 (1994) (adopting River Vale Twp. v. R. J. Longo Const. Co., 127 N.J. Super. 207, 216

(Law. Div. 1974)).

New Jersey's public bidding laws "exist for the benefit of taxpayers, not bidders, and should be construed with sole reference to the public good." Dobco, Inc. v. Bergen Cnty. Improvement Auth., 468 N.J. Super. 519, 538 (App. Div. 2021), aff'd, 250 N.J. 396 (2022) (quoting Nat'l Waste Recycling, Inc. v. Middlesex Cnty. Improvement Auth., 150 N.J. 209, 220 (1997)). "The LPCL was created to ensure a fair, public, and competitive bidding process for the taxpayer's benefit." Ernest Bock, 477 N.J. Super. at 264. "The purpose is to secure competition and to guard against favoritism, improvidence, extravagance and corruption." Hillside Twp. v. Sternin, 25 N.J. 317, 322 (1957). "Deviations from material specifications risk transgressing the duty to avoid favoritism, corruption, and the like." Barrick v. State, Dep't of Treasury, Div. of Prop. Mgmt. & Const., 218 N.J. 247, 259 (2014). "Requiring adherence to material specifications maintains a level playing field for all bidders competing for a public contract." Id.; see also, Meadowbrook, 138 N.J. at 313 ("The statutes authorizing competitive bidding accomplish that purpose by promoting competition on an equal footing[.]"); Dugan Const. Co. v. New Jersey Tpk. Auth., 398 N.J. Super. 229, 241 (App. Div. 2008) ("An essential element of the bidding process is a common standard of competition. To that end, the conditions and specifications must apply equally to all prospective

bidders, thus permitting the contractors to prepare their bids on the same basis.") (quoting D'Annunzio Bros. v. New Jersey Transit Corp., 245 N.J. Super. 527, 532-33 (App. Div. 1991)).

When evaluating the deficiencies in a bid and the exercise of government discretion to waive deficiencies, "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." Meadowbrook, 138 N.J. at 314 (quoting Hillside Twp., 25 N.J. at 326).

b. The trial court erred when it failed to evaluate responsiveness and materiality as of the date bids were opened.

The relevant date for considering a bidder's compliance with requirements and the materiality of any non-compliance is the date that all bidder's bids are opened. See, e.g., Barrick, 218 N.J. at 260–61 (2014). As our Supreme Court explained in Barrick, whether a defect exists must be determined as of the bid opening

> With respect to the determination of whether an RFP requirement must be regarded as material and, as a consequence, non-waivable, the threshold step in the analysis is to determine whether there is a deviation. . .That determination necessarily must be made—and made by the Director of the Division responsible for administering the bid proposal, review, and award process—at the time that the bids are opened. The timing requirement assures the bidders of an even playing field and the public of a fair and impartial public contract award process. On review, a court's role is to examine the correctness of the Director's determination based on the information available to the Director at the time bids are opened.

. . .

> The Director relied on the submissions of the bidders as he was required to do . . . Because the moment that bids are opened is decisive for determining whether bids are responsive on all or any part of the RFP requirements, that is the point in time at which the Director's deviation determination should be judged.
>
> [Id. at 260-61]

See also Meadowbrook, 138 N.J. at 322 ("It is an appropriate object of the questionnaire and specifications that the bid furnish assurance of the possession by the bidder **at the time of submission of the bid** of the physical as well as financial resources for performance of the contract, particularly where it is so closely related to the public health and welfare as in the case of garbage collection.") (quoting William A. Carey & Co. v. Borough of Fair Lawn, Bergen Cnty., 37 N.J. Super. 159, 166 (App. Div. 1955)) (emphasis original to Meadowbrook); Suburban Disposal, Inc. v. Twp. of Fairfield, 383 N.J. Super. 484, 492 (App. Div. 2006) ("Fundamentally, bidders and the public entities that solicit bids are bound by the express terms of the bid proposal. Settled principles of public bidding dictate that no material element of a bid may be provided after bids are opened.") (internal quotations and citations omitted). Here, bids were opened on July 30, 2024, Da4, and that is the date by which the Court must determine whether Earle's bid was responsive. The NJDOT Notice was unequivocally a required document, Da16, Da110-111, and there is no dispute that Earle did not submit the NJDOT Notice on July 30, 2024.

The critical date remains July 30, 2024, when evaluating the materiality of the defect and the County's determination whether to waive the defect. As the Appellate Division explained in On-Line Games:

> First, a determination as to materiality must be made. If a deviation is deemed material, a post-opening proffer by a bidder would necessarily be an interdicted modification. Only after a deviation is determined to be non-material can a contract be awarded. In that event, the bidder may be required to supply what was called for in the RFP. This is a far cry from the suggestion that a bid is automatically conforming because the RFP requirements will have to be supplied in any event. If this were the case, it would not matter what a bid contained and the requirement of a non-material deviation in the RFP, the rule and the cases would be utterly meaningless. In short, evidence of what might be required of a bidder after an award, or what might be offered by a bidder after bid opening, may not be considered in a materiality inquiry. Any other view would turn the bidding scheme on its head.
>
> [279 N.J. Super. at 602-03]

See also Serenity, 306 N.J. Super. at 157-59 (upholding municipal decision to reject bid that was not materially defective based on the municipality's evaluation of the state of affairs at the time of bid opening).[2]

In addition to being clearly stated in the case law, the rule that the bid date governs is the necessary corollary of the rule that no material aspect of a bid may be provided after the bid opening. See In re Jasper Seating Co., Inc., 406

[2] South State acknowledges that if the defect is not material, documents supplied after the bid may be considered by the government entity in deciding whether to waive the defect, but circumstances as they existed as of the bid date are still a critical consideration in that respect. See Serenity, 306 N.J. Super. at 157-59.

N.J. Super. 213, 224 (App. Div. 2009) ("Waivers of an RFP deviation which would permit "post-bid ... manipulation of the results have been declared unlawful. Such post-bid manipulations are repugnant to our public bidding laws.") (internal quotations and citations omitted); On-Line Games, 279 N.J. Super. at 596-607 ("A post-opening commitment to supply an essential missing from a bid is not a clarification. It is an impermissible supplementation, change or correction within the meaning of the RFP and it flies in the face of our public bidding scheme."); Suburban Disposal (Fairfield), 383 N.J. Super. at 492 (same). That rule has no practical application if the materiality determination is made in light of what the bidder submitted after the bid opening. If the date by which a bidders' bid is judged extends beyond the bid date to whenever that bidder last supplements its submission, there is no common standard of competition and no equal playing field. Instead, the very notion of competitive bidding based on a single submission date loses its meaning. See N.J.S.A. 40A:11-23(b) ("The advertisement shall designate the manner of submitting and the method of receiving the bids and the time and place at which the bids will be received. If the published specifications provide for receipt of bids by mail, those bids which are mailed to the contracting unit shall be sealed and shall only be opened for examination at such time and place as all bids received are unsealed and announced. At such time and place the contracting agent of the

contracting unit shall publicly receive the bids, and thereupon immediately proceed to unseal them and publicly announce the contents . . . No bids shall be received after the time designated in the advertisement.").

c. The trial court erred when it failed to consider potential and possible impacts of the defect and waiver thereof on assurance of performance and competition.

The trial court's decision to limit its analysis to the specific facts as they existed in this case, and namely placing ultimate emphasis on the facts that Earle was classified and ultimately provided the NJDOT Notice, see, e.g., 1T59-2 – 1T60-6, 3T32-23 – 3T33-14, was analysis is in direct contradiction to more than one hundred (100) years of case law requiring that courts consider not just the immediate facts before them but the possible manipulations that the defect and waiver could engender and the impacts on the public bidding scheme more broadly. See Case v. Inhabitants of Trenton, 76 N.J.L. 696, 700 (1909) ("Nor is the reason for enforcing this rule any the weaker because McGovern remained the only bidder after the exclusion of the Barber Asphalt Paving Company. The ground for enforcing the rule is because no other persons were invited to bid upon the terms upon which the contract was awarded to McGovern. The presence of the condition **may have deterred** others from bidding, **who would have bid, had they known** that these conditions would be waived."); Tufano v. Bor. of Cliffside Park in Bergen Cnty., 110 N.J.L. 370, 373 (Sup. Ct. 1933) (in

evaluating a defect subsequently cured, "It is suggested that there was a 'mere technical irregularity' and not a substantial variance, in the failure of the trucking company to conform to the requirements of the notice. But this is not the case. These provisions were designed to protect the municipality against irresponsible bidders. Their obvious purpose was to compel the bidder to establish, before the award was made, his ability to perform the contract. To permit one bidder to ignore these requirements would give him an advantage over the others, **and to permit him to supply the deficiency later, and after the bids were opened, would open the door to fraud and favoritism, and defeat the statutory purpose of protection to the taxpayer**.") (emphasis added); Terminal Const. Corp. v. Atl. Cnty. Sewerage Auth., 67 N.J. 403, 412 (1975) ("Essentially this distinction between conditions that may or may not be waived stems from a recognition that there 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 affec**t 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.") (emphasis added).

As our Supreme Court explained in Hillside Twp.:

> It must be conceded that the amount of the deposit involved in the present case is not large and that the dispute is only between Sternin and the township. But the statute evinces a clear intention to provide maximum protection for the taxpayer. So the principle at stake looms large in the regulation of practices pertaining to the award of contracts which make necessary the expenditure of public money. **Accordingly, we must think upon the rule to be adopted in relation to the firm and salutary public policy involved**. Frequently the security demanded is in a substantial amount. Manifestly, **if an aspirant for the contract knew that it would not be required of him his competitive position would be improved over those vying with him**. On its face that state of affairs is inimical to the public interest. **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.** Cf. Armitage v. Newark, supra, 86 N.J.L. at page 10, 90 A. 1035; McQuillin, supra, s 29.30. 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.
>
> [25 N.J. at 325-26] (emphasis added)

That notion has continued on with full viability in the modern case law, with decision after decision resting on the possible and theoretical negative impacts on assurance of performance and competition. In Meadowbrook, our

Supreme Court explained:

> We are also persuaded that Consolidated's failure to include a consent of surety with its bid submission **had the capacity to affect the fairness of the bidding process. This is so even though it is evident that in fact there was no corruption or any actual adverse effect upon the bidding process**. . .
>
> Our specific concern is that the requirement of a consent of surety **may have deterred** others from bidding who would have bid **had they known** that [that] condition[ ] would be waived. . .
>
> Other considerations also persuade us that to permit waiver of a consent-of-surety requirement could affect the fairness of the competitive-bidding process. A bidder's ability to perform a project **might improve** between the time the bids are submitted and the time the bids are awarded, with the result that a surety initially unwilling to supply a bond might be willing to do so later. Furthermore, a bidder that is determined to be the low bidder on a project **may be willing to invest additional capital and take other steps necessary to obtain the required consent of surety**, which it would not have done without the assurance that it would then be awarded the contract. Moreover, by permitting a waiver of the consent-of-surety requirement, those bidders with limited bonding capacity would not need to deplete that capacity by obtaining the consent of surety, which would allow them simultaneously to submit bids for other contracts.
>
> . . .
>
> We recognize that to prohibit the waiver of the consent-of-surety requirement occasionally may result in additional cost to the public, **but we have no doubt that the overriding interest in insuring the integrity of the bidding process is more important than the isolated savings at stake**. If an exception were made, its effect would be to encourage bidders not to provide consents of surety, a result contrary to the purpose of the Local Public Contracts Law.
>
> [138 N.J. at 322-25] (emphasis added) (internal citations and quotations omitted)

Similarly, in Muirfield Const. Co. v. Essex Cnty. Improvement Auth., the Appellate Division explained the importance of a bidder's ability to walk away from a project if it decides not to cure, even though the bidder in that case cured two (2) weeks after bid opening:

> In determining whether the 10% disclosure requirement is *curable,* we must apply the second prong of the test to determine whether the bidding defect was of such a nature that its waiver would adversely affect competitive bidding by placing ... [Barham] in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition. While we recognize that the second prong speaks explicitly only of waiver, we apply the same standard to the issue of cure. . .
>
> In [George Harms Const. Co. v. Borough of Lincoln Park, 161 N.J. Super. 367 (Law. Div. 1978)], the judge noted:
>
> > **[i]f,** after opening of the bids, [defendant, the non-conforming lowest bidder] **had decided, for whatever reason (*e.g.,* a change in its business conditions or an unreasonably low bid price), that it did not want the award, it could have refused to forward the stockholder statement**. **At that point the borough would have no choice but to reject [defendant's] bid.** Therefore, the borough was deprived of its assurance that the contract would be entered into, performed and guaranteed according to its specific requirements and the mandate of the Legislature. Furthermore, [defendant] was placed in a position of advantage over the other bidders, which only serves to undermine the necessary common standard of competition. **Had other bidders known in advance that they could avoid timely filing of the disclosure statement or that it would be waived by the borough, one may speculate the possibility of another and lower bid.** As pointed out in Case v. Trenton, 76 *N.J.L.* 696, 700, 74 *A.* 672 (E. & A.1909), "the presence of the condition may have deterred others from bidding, who would have bid had they

known that these conditions would be waived."

[161 N.J. Super. at 377]

> The observation is particularly relevant here. **If Barham had chosen for any reason not to proceed with the process after the bids were opened, it need not have forwarded any additional information about the asserted stock transaction, and thus, had the apparent option of simply abandoning its bid. That opportunity, whether real or imagined, was sufficient to give Barham an advantage over conforming bidders**. Although no such analysis was undertaken by the Law Division here, we are satisfied that Barham's failure to provide a timely and accurate disclosure of ownership violates the second prong of River Vale. Accordingly, Barham's bid should have been rejected on that basis alone.
>
> [336 N.J. Super. 126, 136–37 (App. Div. 2000)] (emphasis added) (certain internal quotations and citations omitted)

See also Meadowbrook, 138 N.J. at 322 ("Moreover, that the municipality can retain the amount of the bid bond does not necessarily assure that the low bidder will enter into or perform the contract. **If the low bidder determines** that its bid is too low and that its prospective loss on the contract exceeds the amount of its bid bond, **that low bidder may decide** to forfeit its security rather than incur a greater loss by performing the contract."). Similar cases are legion. See e.g. Statewide Hi-Way Safety, Inc. v. New Jersey Dep't of Transp., 283 N.J. Super. 223, 232 (App. Div. 1995) ("While it is true that minor bid requirements may be waived, those situations are limited to matters **where there is neither the possibility nor the perception** of 'corruption, or favoritism' and involve

requirements which do not go to the heart of the competitive bidding process."); L. Pucillo & Sons, Inc. v. Mayor & Council of Borough of New Milford, 73 N.J. 349, 357-58 (1977) ("**The lower courts**, in holding that Pacio's competitors were not prejudiced by his failure to bid, **ignored the possibility** that the Borough's **requirement may have deterred other potential bidders** from even submitting proposals. The Borough's specifications called for a bid bond in the amount of 10% of the bid price for the five-year contract. This . . . **may have been** beyond the ability of some companies which would have been fully capable of discharging the obligations of a shorter contract. In addition, the increased risk of contracting so far in advance **may also have discouraged** other bidders. . .These same factors lesser bidding expenses (Pacio was not required to deposit a check for the higher five-year estimate) and more limited risks **may also have placed Pacio on a different footing** vis-a-vis Pucillo and Stamato for the three contracts for which he did compete. **It is conceivable** that they would have submitted lower bids on the shorter contracts if they too had been released from the obligation to bid on the five-year contract. **While the disparity between bids may cast doubt on that hypothesis, we are not prepared to rule out the possibility** that more perfect conditions of equality between competitors might have yielded a better economic result to the public." (emphasis added) (internal citations and quotations omitted); Serenity, 306 N.J.

Super. at 160 (upholding municipal rejection of a bid and finding, "In the absence of an adequate showing to the contrary, the municipal decision [to reject a defective bid that is not materially defective] may be seen as a valid effort to discourage bidders from playing fast and loose with public bidding processes and requirements generally, and with published specifications in particular".).

d. The trial court erred when it reversed the decision of the County and determined that Earle's failure to provide the NJDOT Notice of Classification with its bid was not a material defect.

Measuring by the date of the bid opening and considering both the possible and potential losses of assurance and harm to competition, Earle's failure to submit the NJDOT Notice of Classification with its bid was a material defect.

First, work on the Project can only be performed by a contractor that is NJDOT prequalified and classified for the appropriate work and in the appropriate amount**.** Da16, Da110-111; N.J.S.A. 27:7-35.2 (all bidders for "highway" projects must be classified by NJDOT); N.J.S.A. 27:7-1 ("'Highway' means a public right-of-way. . ."); N.J.A.C. 16:44-1.1 (establishing NJDOT's classification scheme); N.J.A.C. 16:44-2.1 (providing expansive definition of NJDOT project). Thus, the failure to provide proof of that prequalification and classification by definition "deprive[d] the [County] of its assurance that the contract will be entered into, performed and guaranteed according to its

specified requirements." See Brockwell & Carrington Contractors, Inc. v. Kearny Bd. of Educ., 420 N.J. Super. 273, 278-79 (App. Div. 2011) (failure to meet requirements for demonstration qualification is a material defect); P & A Const., Inc. v. Twp. of Woodbridge, 365 N.J. Super. 164, 172-73 (App. Div. 2004) (failure to provide documents demonstrating financial ability to perform project is a material defect). It would only be through unlawful post-bid supplementation that the County could obtain the necessary assurance of performance. On-Line Games, 279 N.J. Super. at 598. In other words, as described in both Meadowbrook and Muirfield, not only was the document fundamental to Earle demonstrating its performance ability, Earle's ability to refuse to supplement its bid with the NJDOT Notice gave it the ability walk away. It does not matter that Earle eliminated its ability to walk away by subsequently providing the NJDOT Notice.

Moreover, as the trial court properly found, the County had no obligation to make an independent effort to obtain documents demonstrating Earle was qualified to perform; doing so would place a significant burden on public entities that is properly, both in practice and under the Solicitation, the burden of bidders. 1T63-6 – 1T63-9. While NJDOT maintains a search tool indicating if a contractor is classified as of the time the tool is used, it does not permit you to see when the contractor became classified. Da386. Thus, to determine if a

contractor failing to submit a NJDOT Notice was classified on the bid date, the County would need to check the NJDOT website contemporaneously with the bid opening. Moreover, the search tool does not give detailed information on the work types for which the contractor is classified or the dollar amount of work they are permitted to perform. Da386. In sum, to obtain the timing of classification, details on work type, and amount of qualification (all necessary for determining qualification to perform a project and all present on the NJDOT Notice), the County would need to submit a records request to NJDOT. It cannot be that post-bid supplementation of a material requirement is unlawful but the potential availability of the information to the public entity via record request eliminates that issue. Not only would that undermine a bidder's obligation to comply with statutory and specification requirements and place unnecessary administrative burdens on public entities, it risks creating significant legal and factual issues for judicial determination about the public entity's ability to access the relevant information and at what point the means of access becomes too burdensome.

In short, Earle's arguments below that it could not avoid its bid because it was actually classified by NJDOT is nonsensical, the County could only award to Earle after learning that Earle was qualified to perform the Project, so all Earle had to do to avoid its bid was refuse to provide its NJDOT Notice. The

applicable case law absolutely precludes a ruling that Earle can wait twenty-one (21) days after bid opening, and after its rejection by the County, to finally provide the required document.

Second, allowing Earle to perform the Project despite failing to timely provide its NJDOT Notice provides Earle a competitive advantage. Potential bidders may have refrained from bidding based on the prequalification requirement. See Meadowbrook, 138 N.J. at 323-24. Additionally, Earle gained another advantage over South State and other bidders—the ability to walk away from its bid. See Muirfield and Meadowbrook, supra. Earle gained this advantage in the bidding process by learning that it was the lowest bidder before making any demonstration of compliance with NJDOT prequalification requirement. Had Earle, after examining the competitive positions of other bidders or its other available opportunities, determined its price was too low or other projects were more lucrative, it could have walked away from the Project by refusing to provide the required information concerning its prequalification and classification status. Thus, unlike other bidders, Earle was never actually bound to its bid until it belatedly and unlawfully supplemented. See Ace-Manzo, Inc. v. Tp. of Neptune, 258 N.J. Super. 129, 132–38 (Law. Div. 1992) ("The competitive advantage that inheres in such a situation is obvious, for it would give such a bidder the ***option of waiting until it has had the benefit of knowing***

the other bidders' prices before deciding whether to sign and be bound or not sign and walk away.") (emphasis added). That same advantage could have been used by Earle to submit a lower bid knowing it would have the opportunity to walk away if it ultimately decided not to perform or that another project would be more lucrative. We hasten to reiterate that Earle provided its supplementation twenty-one (21) days after bid opening and thirteen (13) days after its bid was rejected. That was plenty of time for Earle to reevaluate its bid on the Project, wait for other bid openings, or otherwise consider whether it still made business sense to proceed with the Project. Indeed, we think the delay is otherwise inexplicable.

Earle's position below relied primarily on the unreported Appellate Division decision in Suburban Disposal, Inc. v. Twp. of Aberdeen, A-3176-12T3, 2014 WL 2131662 (N.J. Super. Ct. App. Div. May 23, 2014); Da453. There, a bidder, "Future," provided an out-of-date public works contractor registration certificate with its bid and subsequently provided a certificate showing it was registered at the time of bid. Id. at *2 (Da455). Earle asserted below that the case stands for the proposition that a failure to timely provide registration documents is not material so long as the bidder was registered at the time of the bid. That case, which has been cited by courts zero (0) times since it was decided more than ten (10) years ago, cannot carry the day and should not

be persuasive to this Court.

Even if Suburban Disposal (Aberdeen) were not distinguishable, and it is, it provides a total of four (4) sentences of conclusory "analysis" for the proposition that Future's defect was not material. Id. at *7 (Da461). To the extent it stands for the proposition claimed by Earle, it is simply wrong, as it is entirely inconsistent with the plethora of case law discussed supra on how and when to evaluate a defect's materiality.

Moreover, Suburban Disposal (Aberdeen) is distinguishable in a number of critical ways. First, as relevant to the next section and the ultimate outcome of this case if the defect is not material, the court in Suburban Disposal (Aberdeen) upheld municipal discretion to waive a defect, but it did not hold that the defect had to be waived. Ibid. (Da461). Second, as discussed supra, the NJDOT classification at issue in this case is required to perform the Project. Da16, Da110-111; N.J.S.A. 27:7-35.2; N.J.S.A. 27:7-1; N.J.A.C. 16:44-1.1; N.J.A.C. 16:44-2.1. In Suburban Disposal (Aberdeen), the trial court found, and the Appellate Division agreed:

Future's failure to provide a current Certificate would not

> deprive Aberdeen of the assurance that [the bidder] would in fact enter into the contract, or '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,' because the contract in question is not

> a public works contract subject to prevailing wage requirements under N.J.S.A. 34:11–56.51.
>
> In other words, regardless of whether the Certificate was expired, the bidder's projected labor costs would not be affected. Therefore, Aberdeen's acceptance of the bid was not arbitrary, capricious, and unreasonable, despite the absence of a current Certificate. [The trial court] also rejected Suburban's claims on other grounds not relevant to our discussion.
>
> [2014 WL 2131662, at *2-3 (Da456)]

Thus, in Suburban Disposal (Aberdeen) the prequalification at issue did not actually impact the bidder's ability to perform or create a competitive advantage, and that is not true here. Second, while Future's provided registration was out of date, Future at least provided a document with its bid showing it had the referenced qualification at some point in time. Id. at *2 (Da455). Here, Earle provided nothing with its bid to demonstrate that it had the requisite qualification to perform and provided nothing for another twenty-one (21) days. Da357, Da360. Cf. Tec Elec., Inc. v. Franklin Lakes Bd. of Educ., 284 N.J. Super. 480, 486 (Law. Div. 1995) (finding the failure to submit a necessary qualification document not material **where "[t]he information provided on the Prequalification Affidavit simply and essentially duplicates what Tec had already submitted with its bid."**) (emphasis added); Palamar, 196 N.J. Super. at 256-57 (permitting waiver where missing qualification statement was omitted due a to clerical error and **provided one and one-half hours after bid opening**).

Finally, the Suburban Disposal (Aberdeen) court's discussion about Future's bid appears to be superfluous dicta, as the challenging bidder, Suburban, submitted the lowest bid but was rejected for an entirely unrelated material defect. Id. at *2, *6 (Da455; Da460). While the court passingly rejected any standing issue related to the timing of Suburban's challenge, Id. at *7 (Da461-62), a bidder with a materially defective bid has no standing to challenge the treatment of another bidder. See Waszen v. Atl. City, 1 N.J. 272, 276 (1949) (low bidders with non-conforming bids "have no standing to challenge the award of the contract to a rival bidder"); Interstate Waste Removal Co. v. Bd. of Comm'rs of City of Bordentown, 140 N.J. Super. 65, 71 (App. Div. 1976) ("[A]n unsuccessful bidder who would not be entitled to the contract even if the defendant were disqualified" has no standing to challenge an award to the defendant.); Suburban Disposal, Inc. v. City of Paterson, A-0519-23, 2024 WL 1360849, at *3 (N.J. Super. Ct. App. Div. Apr. 1, 2024) (Da467) (same).

In summary, because Earle's failure to timely submit its NJDOT Notice deprived the County, at the time of bid opening, of assurance that Earle could and would perform the Project, and because Earle's failure to submit its NJDOT Notice with its bid gave it a possible or potential advantage over other contractors, Earle's bid was materially defective. The trial court was obliged to uphold the County's determination of materiality unless that determination was

arbitrary and capricious. It was not. The trial court erred in finding that the defect was not material and in reversing the County's decision.

III. The trial court erred in finding that the County was obliged to waive the defect in Earle's bid despite Earle's failure to provide its NJDOT Notice of Classification with its bid where, among other bases, the County has previously enforced the requirement in the same manner, NJDOT Classification is required to perform the work, the relevant information regarding classification was not elsewhere in Earle's bid, and Earle did not provide its NJDOT Notice of Classification until twenty-one days after bid opening and thirteen days after being informed that its bid was being rejected because of the defect. (1T60-11; 3T34-12)

Despite the County never making the discretionary determination whether to waive the defect in Earle's bid, the trial court determined that the County was obliged to waive it. 1T60-11 – 1T61-13. That decision was heavily impacted by the trial court's failure to recognize the bid date as the critical date for evaluating decision making and the trial court's failure to consider possible and potential impacts from the defect and waiver. Ibid. The trial court's decision in that regard also presents an overly cramped view of a government entity's right to exercise business judgment. The trial court explained its perspective:

> Finally, I look at the last issue, which is whether or not the County can reasonably exercise its discretion to still award the bid to South State and not to the plaintiffs in this case.
>
> Legally they absolutely can, assuming that they do for -- do so for sound business purposes. And this Court would have to find that it is arbitrary, capricious, and unreasonable – that their action to award it to South State was arbitrary, capricious, and unreasonable and not based upon sound business purposes.

> The Count was, again, provided a fully compliant bid. They were provided this document on the 20th of August that showed that they, being the plaintiffs, could properly perform under this contract.
>
> I don't see anything that would suggest valid, sound business judgment by paying whatever -- we used $50,000, I know that's an estimate -- by paying $50,000 more.
>
> The rationale seems to be that they were unsatisfied they being the County -- were not happy that they did not receive the appropriate documentation at the bid -- the notice of classification at the bid, buy they received it August 20th. So it is arbitrary, capricious, and unreasonable to walk away from plaintiffs and entering into a contract with them.
>
> [1T60-11 – 1T61-13]

That determination was not consistent with binding precedent on those issues. As discussed below, government entities have very broad discretion to refuse waiver of bid defects for a variety of reasons, and two important, though not exclusive, factors to evaluate are the circumstances on the bid date and the possible and potential impacts on performance certainty and competition that would result from waiver.

a. A public body may refuse to waive a non-material defect so long as such determination is not a pretext for frustrating the purposes of the Local Public Contracts Law.

Even if a bid is not materially defective, the public body retains the discretion to refuse waiver of the defect. Serenity, 306 N.J. Super. at 157-60. As address supra, that discretion is significant. Id. at 157-58; Palamar, 196 N.J.

Super. at 250.

A public entity has the right, as an exercise of business judgment, to require strict conformance to bidding requirements to prevent bidder from playing "fast and loose," as the Serenity court explained:

> In the circumstances before us, we need not decide whether the defects in this bid were material and, hence, non-waivable; or non-material and therefore waivable. If the defects were material, the municipality was obliged to reject the bid. If the defects were non-material, the municipality could waive them or, in a valid exercise of sound business judgment that kept faith with the policies underlying our public bidding laws, reject the bid nevertheless.
>
> **Here, the municipality determined to invoke the conformity standard with some degree of strictness, and not to award the contract to the non-conforming bidder.** In the circumstances, especially in the light of the nature of the alterations made and the sections of the bid proposal involved**, we do not regard that decision to have been attended by arbitrariness, unreason or caprice; nor has plaintiff met its burden of proving that the decision made was motivated by the types of considerations the Local Public Contract Law was enacted to prevent,** i.e., frustrating the policies of "securing [the] most economical result by inviting competition in which all bidders are placed on equal basis ... [and] promoting competition on an equal footing and guarding against 'favoritism, improvidence, extravagance and corruption.' An unsupported allegation of favoritism to a local bidder does not suffice to establish that an abuse of discretion occurred.
>
> **In the absence of an adequate showing to the contrary, the municipal decision at issue here may be seen as a valid effort to discourage bidders from playing fast and loose with public bidding processes and requirements generally, and with published specifications in particular. E**ven though we view this matter as bearing upon bidder responsiveness, and not involving bidder responsibility as the trial court saw it, we reach the same result because, to the extent the municipality was empowered either

> to accept or reject the bid, our review of that determination is governed, as well, by abuse of discretion standards.
>
> [306 N.J. Super. at 159-60] (emphasis added) (internal quotations and citations omitted)

See also Dobco, Inc. v. Brockwell & Carrington Contractors, Inc., 441 N.J. Super. 148, 159 (Law. Div. 2015) "(On the other hand, a public entity is not required to accept a bid containing defects even when those defects are not material. The public entity has discretion to accept or reject, for valid reasons, bids that fail, in a non-material manner, to conform to the specifications. In order for a reason to reject a bid with a non-material defect to be considered valid, it must be 'non-pretextual [,] ... reflect sound business judgment' and may not contradict the 'underlying purposes of public bidding requirements.'") (quoting Serenity, 306 N.J. Super. at 156). In other words, the scope of acceptable business judgment is broad. It includes a public entity's decision to ensure that the purposes of the LPCL are met by demanding strict conformance specification and preventing any hint of gamesmanship. Ibid. In ensuring equal footing, it must similarly cover a public entity's decision to maintain standards and practices across different bid solicitations; doing otherwise would justify accusations of "favoritism, improvidence, extravagance and corruption." See Muirfield, 336 N.J. Super. at 137-38 ("Both the public interest and the public's perception that the bidding process is fair, competitive and trustworthy are

critical components and objectives of our public bidding statutes"). Moreover, it cannot be that "sound business judgment" requires the entity facing an unsubmitted document to either (a) wait indefinitely for a potential cure; or (b) take on the additional administrative burden of obtaining necessary information from third parties for the benefit neglectful bidders.

Additionally, emphasizing the expenditure of additional funds on a particular project to mandate waiver, as the trial court did here, risks swallowing the granted discretion. Limiting the factors considered to those that guide whether a defect is material, as the trial court also did here, would have the same effect. If a bid defect must be waived where the defect is not material and non-waiver will result in additional expenditure, there is no discretion to waive non-material defects. That is clearly not the law. See Star of the Sea Concrete Corp. v. Lucas Bros., 370 N.J. Super. 60, 72 (App. Div. 2004) ("Finally, the County argues that its award of the contract to Lucas Brothers was in the public interest [due to the monetary savings]. The purpose of competitive bidding for local public contracts is not the protection of the individual interests of the bidders but rather the advancement of the public interest in securing the most economical result by inviting competition in which all bidders are placed on an equal basis.") (internal quotation omitted); Meadowbrook, 138 N.J. at 325 ("We recognize that to prohibit the waiver of [a] requirement occasionally may result

in additional cost to the public, but we have no doubt that the overriding interest in insuring the integrity of the bidding process is more important than the isolated savings at stake.").

The burden is on the party challenging government action to demonstrate "that the decision was motivated by the types of considerations the Local Public Contract Law was enacted to prevent, i.e., frustrating the policies of "securing [the] most economical result by inviting competition in which all bidders are placed on equal basis ... [and] promoting competition on an equal footing and guarding against favoritism, improvidence, extravagance and corruption." Serenity, 306 N.J. Super. at 159. In other words, the challenging party must clearly demonstrate that the decision was "pretextual" and not an exercise of "sound business judgment." Id. at 157.

Assuming Earle's bid was not materially defective, the trial court failed to properly analyze whether the County could refuse waiver of the defect. Under the circumstances presented, the County would have been well within the bounds of sound business judgment to do so.

b. The trial court erred in determining that a discretionary rejection of Earle's bid by the County would be an abuse of discretion.

The trial court erred in finding that there would be no appropriate basis for rejecting Earle's bid if the defect was not material. On the contrary, the County would have had significant and varied justification for rejecting Earle's

bid even if the defect was not material.[3]

First, as discussed extensively above, the Court's only bases for finding that the County could not, in the exercise of sound business judgment, reject Earle's bid, was the price difference between South State and Earle's bids and the Court's insistence of measuring the circumstances as of August 20, 2024, and not considering the possible and potential issues as they existed on July 30, 2024. However, even if the Court properly determined that the cure rendered the defect immaterial because Earle was always qualified, it is not proper to discount the initial infirmity or the period of uncertainty. For twenty-one (21) days, including thirteen (13) days after rejection of Earle's bid, the County did not know whether the ostensible lowest bidder was qualified to perform the Project. That information was not located elsewhere in the bid. Da212-348; cf. Tec Elec., 284 N.J. Super. at 486, 488 (trial court finding waiver mandatory where "all tenets of the public bidding process were effectively met" and "[t]he information provided on the Prequalification Affidavit simply and essentially duplicates what Tec had already submitted with its bid."). Our public bidding paradigm dictates that public entities should have assurance of performance **on the bid date**; indeed, a contrary rule is inconsistent with the notion of having a single

[3] South State submits that a refusal to reject in this circumstance would arise to the level of a clear abuse of discretion, but the Court need not decide that.

bid date to begin with. See Meadowbrook, 138 N.J. at 322 ("It is an appropriate object of the questionnaire and specifications that the bid furnish assurance of the possession by the bidder at the time of submission of the bid of the physical as well as financial resources for performance of the contract[.]"); N.J.S.A. 40A:11-23(b) ("The advertisement shall designate the manner of submitting and the method of receiving the bids and **the time** and place at which the bids will be received. If the published specifications provide for receipt of bids by mail, those bids which are mailed to the contracting unit **shall be sealed and shall only be opened for examination at such time** and place **as all bids received are unsealed and announced**. **At such time** and place the contracting agent of the contracting unit **shall publicly receive the bids**, **and thereupon immediately proceed to unseal them** and publicly announce the contents . . . **No bids shall be received after the time designated in the advertisement**.") (emphasis added). For that reason alone, a discretionary refusal to waive by the County would be proper.

Second, evaluation of the potential and possible impacts on competition would, to the extent it does not render the defect material, still provides another sufficient justification for discretionary rejection. While Earle ultimately supplemented its bid, it simply could have refused to do so. As previously discussed, that creates a competitive advantage. Earle can underbid and walk

away if it ultimately does not want to perform, it can walk away if a more profitable opportunity comes along, and it can walk away after seeing the bids of its competitors. See Muirfield, 336 N.J. Super. at 136–37; cf. Palamar, 196 N.J. Super. at 256-57 (permitting waiver where missing qualification statement was omitted due a to clerical error and provided just **one and one-half hours after** bid opening, limiting[4] any competitive advantage).

Third, as Serenity makes clear, the government entity's desire to hold bidders to strict compliance is itself a sufficient basis to refuse waiver, particularly where the defect might indicate gamesmanship or a bidder playing "fast and loose." 306 N.J. Super. at 159-60. For the reasons discussed above, Earle's failure to submit the NJDOT Notice with its bid (not to mention the extremely delayed supplementation, even after being on notice) could be seen as an attempt at gamesmanship or playing fast and lose. Thus, the County could properly refuse to waive the defect.

Fourth, the County has made clear that it risks its standing with NJDOT if it awards relevant projects to contractors without the appropriate demonstration of qualification or without the timely submission of the NJDOT

[4] The Palamar court determined that there was no competitive advantage based on the limited passage of time. South State does not accept that proposition, but the case nonetheless distinguishes between a speedy supplementation and an extended on.

Notice. Da366-67. This is another sufficient basis for a discretionary refusal to waive the defect.

Finally, the County has made clear that it consistently holds bidders to the NJDOT Notice requirement on relevant projects. Da366-67. Consistent treatment of bidders in similar circumstances is critical to the public's perception of fairness in government contracting. Muirfield, 336 N.J. Super. at 137-38. This is another sufficient basis for discretionary refusal to waive the defect.

In sum, under the facts of this case and the applicable law, the County absolutely had the right to refuse waiver of Earle's failure to timely supply its NJDOT Notice.

IV. If Earle's bid was defective, but not materially so, the trial court erred in directing the County to find that Earle was the lowest responsive and responsible bidder despite the County never exercising its discretion to evaluate whether to waive or not waive the defect. (3T45-24)

In deciding that the County was obliged to waive the defect if it was not material, the trial court bypassed the County's responsibility to engage in the relevant exercise of discretion. Palamar, 196 N.J. Super. at 250 (local government has discretion to waive, subject to review for a "clear abuse of discretion"). The term "waiver" implies an affirmative action on the government entity's part. See Marmo & Sons Gen. Contracting, LLC v. Biagi Farms, LLC,

478 N.J. Super. 593 (App. Div. 2024) ("Waiver is defined as the voluntary and intentional relinquishment of a known right.") (internal citations and quotations omitted); WAIVER, Black's Law Dictionary (12th ed. 2024) ("The voluntary relinquishment or abandonment — express or implied — of a legal right or advantage[.]"). That seems particularly apt where a bidder's bid is indisputably defective, and the government must decide whether to forego its right to reject the bid. The County never made the relevant waiver decision, Da366-67, a decision plainly within its purview as an original matter. Palamar, 196 N.J. Super. at 250.

In its initial determination, the trial court failed to give any account for the fact that the County had not actually exercised discretion one way or the other to the extent the defect was not material. 1T60-11 – 1T61-13. Despite recognizing that the trial court should be reviewing the County's action for whether it was arbitrary, capricious, or unreasonable, and that refusal to waive would have been appropriate if it was an exercise of sound business judgment, the trial court did not discuss the failure of the County to act on that issue at all. 1T60-11 – 1T61-13.

On reconsideration, the trial court reviewed the matter as one of whether to remand for an evaluation by the County prior to entering a final order. 3T45-24 – 3T47-19. But that perspective misses the bigger picture. First, it is part of

Earle's affirmative claim to demonstrate that County clearly abused its discretion, but the County had, in fact, never utilized its discretion. Da6-10; Da366-67. In other words, that demonstration is not merely the mode of proper judicial analysis, it is the actual claim being made by Earle, and Earle has the burden of proving it. Serenity, 306 N.J. Super. at 159.

Second, the trial court already made very clear that an exercise of the County's discretion would be an act of futility because the trial court already determined that the exercise would be arbitrary, capricious, and unreasonable unless the County decided to waive the defect. 1T60-11 – 1T61-13. Indeed, on reconsideration the trial court essential described the exercise as a waste of time:

> Practically, it feels to me that this is just a delay of the inevitable, barring there being something in the record that would suggest that the County may have some legitimate basis to use its discretion to reject Earle's bid.
>
> And I don't know if [the County's attorney] is even in a position to speak to that and I don't want to deny his client the potential right to address this, unless [Earle's counsel] convinces me otherwise. But I also don't want to delay an important project just over legal ramblings that aren't going to get us anywhere.
>
> [3T34-15 – 3T34-25]

In response to the trial court's discussion during the reconsideration hearing, the County indicated it was not prepared to substantively respond to that discretionary issue because it had never acted on it but did not want to waste time on additional process that would not be of value to the court. [3T36-13 –

3T37-15]; [3T43-5 – 3T43-15]. South State appreciates that the County was essentially in between a rock and a hard place, but taking the affirmative step of waiving the defect in Earle's bid, or deciding not to waive it, was a responsibility of the County through its citizen's elected representatives. Serenity, 306 N.J. Super. at 157-60.

Without the County exercising discretion in the first instance, Earle simply could not fully prevail on its claims. In the absence of a remand, and assuming the correctness of the trial court's determination that the defect was not material, the trial court should have entered final judgment overruling the County's finding of materiality and the award to South State, but it should not have directed an award to Earle. At that point, the County would have had to exercise its discretion whether to waive the defect in Earle's bid, subject to later challenge by South State or Earle.

Therefore, the trial court's entrance of judgment directing award to Earle was in error.

CONCLUSION

Evaluated under the appropriate case law, Earle's failure to provide the NJDOT Notice with its bid deprived the County of assurance of performance at the time of bid opening and provided Earle a competitive advantage over other bidders and potential bidders. The defect in Earle's bid is thus material, and not

waivable. The County properly determined the same and awarded the Project to South State.

To the extent the defect was not material, significant and varied business justifications exist, consistent with our public bidding laws, to allow the County to refuse waiver of the defect. In such case, the County must be provided an opportunity to determine how to exercise its discretion.

The Court should reverse the judgment of the trial court and find Earle's failure to timely submit the NJDOT Notice to be a material defect. To the extent the Court finds the defect was not material, the Court should reverse the judgment of the trial court and either: (a) remand to the County to determine whether to waive the defect; or (b) direct the dismissal of Earle's Complaint and allow the County to proceed in the ordinary course, based on the guidance provided by the Court.

Respectfully Submitted,

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/s/ *Evan M. Labov*
Evan M. Labov, Esq.
John F. Palladino, Esq.

Dated: December 16, 2024

EARLE ASPHALT COMPANY Plaintiff-Respondent, -against- COUNTY OF GLOUCESTER, Defendant-Respondent and SOUTH STATE INC., Defendants-Appellant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-000638-24 Civil Action SUPERIOR COURT OF NEW JERSEY GLOUCESTER COUNTY | LAW DIVISION DOCKET NO.: GLO-L-1067-24 Sat Below: Hon. Benjamin C. Telsey, A.J.S.C.

BRIEF OF RESPONDENT, EARLE ASPHALT COMPANY

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Dated January 7, 2025

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PRELIMINARY STATEMENT

In this Appeal, Appellant-Defendant, South State Inc. ("SSI"), asks this Court to overturn the trial court's well-reasoned and correct decisions, holding that: (i) the alleged trivial defect in Earle Asphalt Company's ("EAC") bid (failing to include a copy of its existing and publicly available NJDOT Notice of Classification) was non-material and waivable; and (ii) the County of Gloucester's ("County") failure to waive EAC's immaterial defect was arbitrary, capricious and unreasonable because it was entirely unsupported, let alone supported by a sound business judgment.

The trial court was correct in both of its decisions. As the trial court found twice, the County's solicitation did not identify the Notice of Classification as a mandatory document. To the contrary, it expressly gave the County the option to waive the defect if a bidder failed to include it. The trial court also properly applied the two-part test articulated in Township of River Vale v. R.J. Longo Constr. Co., in the same manner as the Appellate Division applied the test in the uniquely similar case of Suburban Disposal, Inc. v. Township of Aberdeen. Specifically, like in Suburban Disposal, the trial court concluded that the failure to include a copy of a qualification document that unquestionably existed at the time of bid opening and could not be altered by the bidder is a waivable defect because: (i) the bidder was in fact prequalified and capable of performing the project; and (ii) by actually having

the requisite qualification status at the time of bid, the bidder did not obtain any competitive advantage over other bidders.

SSI does not (because it cannot) offer any explanation, let alone a sound business one, for the County to needlessly expend more tax dollars to complete the project. Before the trial court, the County was given an opportunity to proffer such reasoning and declined to do so, instead indicating its intent to comply with the trial court's order. Since no such arguments were raised below, and because SSI does not have standing to raise such arguments (which are exclusively those belonging to the County), the record is entirely devoid of any evidence indicating that the County's refusal to waive EAC's trivial omission was supported by sound business judgment.

In spite of its numerous prior representations (that it would abide the trial court's rulings) and in violation of the Court Rules, the County now attempts (for the first time) to appeal the trial court's decisions under the veil of a "Respondent's Brief." The County's arguments must be rejected out of hand because such arguments are untimely and unsupported by a Notice of Appeal or Notice of Cross-Appeal. Since the County failed to file a Notice of Appeal or Cross-Appeal within the allotted time, the Court lacks jurisdiction to consider these arguments. Even if the Court considers the County's untimely arguments (though it should not), such duplicative arguments should be rejected for the same reasons that SSI's Appeal must be denied.

For these, and additional reasons set forth herein, the Court should affirm the trial court's decisions in their entirety and deny SSI's Appeal.

COUNTERSTATEMENT OF FACTS

The County solicited bids ("Solicitation") for a contract ("Anticipated Contract") to complete the project known as "ENG Project 21-13FA-Resurfacing and Safety Improvements to Berlin-Cross Keys Road in the Townships of Washington and Monroe" ("Project"). Da15. The Solicitation included a "Construction Bidders Checklist" that identified certain "mandatory" documents that, if omitted from a bid, would require the bid to be automatically rejected. Da21.

The Notice of Classification was not identified on the "Construction Bidders Checklist." Da21. Instead, the Solicitation provided that "prospective bidders are required to submit a NJDOT Notice of Classification" with their bid documents. Da111. Notably, however, section 102.10 of the Specifications provided that "[b]ids submitted without a proper Notice of Classification **may** be considered non-responsive." Da111 (emphasis added). The Solicitation further provided that the County "reserves the right to . . . waive any irregularities and to award the contract to the bidder whose proposal is best suited to the County's requirements." Da019.

On July 30, 2024, bids were opened and EAC's bid was identified as the lowest bid. Da004. The bid submitted by EAC in response to the Solicitation ("EAC Bid Proposal") included all documents deemed mandatory in the Construction

Bidders Checklist, but did not include a copy of its existing and publicly available NJDOT Notice of Classification. Da004.

By letter dated August 7, 2024, but received on August 16, 2024 ("Rejection Letter"), the County advised EAC that its bid was rejected because it "did not provide NJDOT [Notice of Classification] Letter as required." Da350.

EAC was prequalified with the NJDOT and possessed a Notice of Classification Letter: (i) before submitting the EAC Bid Proposal; (ii) at the time of submitting the EAC Bid Proposal; and (iii) after submitting the EAC Bid Proposal. Da362. In addition, NJDOT maintains a website that identifies all contractors who are prequalified by it and, at the time EAC submitted its bid in response to the Solicitation, EAC was identified as a prequalified contractor. Pa001.

In response to the Rejection Letter, EAC protested the rejection of its bid ("Protest Letter"). Da356. By letter dated August 20, 2024, EAC submitted to the County a copy of a letter from NJDOT, dated February 15, 2024, entitled "Notice of Classification", which provided EAC's pre-qualification rating ("Supplemental Protest Letter"). Da360. Pursuant to the Notice of Classification within the Supplemental Protest Letter, EAC's classification was effective on February 29, 2024, and will expire on March 31, 2025. Da362.

By letter dated August 20, 2024, the County wrote to EAC advising that it was rejecting EAC's protest and would be awarding the Anticipated Contract to SSI

("Protest Response"). Da366. During a meeting on August 21, 2024, the County passed a resolution awarding the Anticipated Contract to SSI. Da006.

PROCEDURAL HISTORY

On August 22, 2024, EAC initiated this bid protest action by filing a Verified Complaint and Order to Show Cause. Da001. By Order to Show Cause dated August 23, 2024, the trial court temporarily restrained the County from proceeding with the award of the Anticipated Contract to SSI, pending a hearing. Da418.

After argument, the trial court rendered a thorough and well-reasoned oral decision ("First Decision"), granting EAC's application for preliminary restraints. See 1T:55-68. In its Decision, the trial court correctly determined that: (i) the Notice of Classification was not a mandatory document and, therefore, was potentially waivable if it satisfies the two-part test articulated in Township of River Vale v. R.J. Longo Constr. Co., 127 NJ. Super. 207, 216 (Law Div. 1974); (ii) upon performing the River Vale test, and for the same reasons articulated in the nearly identical case, Suburban Disposal, Inc. v. Township of Aberdeen, 2014 N.J. Super. LEXIS 1186 (App. Div. May 23, 2014), EAC's omission of the Notice of Classification was non-material and waivable by the County; and (iii) the County's failure to waive EAC's omission of the Notice of Classification was improper because it deprived the County taxpayers of more than $35,000 in savings without any sound business reason for doing so. Ibid.

After issuing the Decision, the trial court held a conference with the parties. See 2T. During the conference, SSI expressed its desire to file a motion for reconsideration and EAC expressed its intent to cross-move for final judgment. Ibid. The conference concluded with all parties agreeing that the matter would be finally resolved after these respective motions are decided. 2T15-2 -22.

SSI filed a motion for reconsideration of the Decision and EAC filed a cross-motion for judgment. 3T. Notably, the County did not oppose EAC's cross-motion and did not take any position with respect to SSI's motion for reconsideration. See ibid. During argument, the County explicitly represented that it would award the Anticipated Contract in a manner consistent with the trial court's decision on the motions. 3T49-14-23. By Order dated November 1, 2024 ("Judgment"), the trial court denied SSI's motion for reconsideration and granted EAC's cross-motion for judgment, ordering that "the bid submitted by EAC in response to the County's Solicitation for the Project shall be declared the lowest responsive bid." Da425. The trial court also denied SSI's verbal application for a stay pending appeal. Ibid.

On November 1, 2024, SSI filed a Notice of Appeal with a request to file an emergent motion for a stay pending appeal. Da433. The Court granted SSI permission to file an Emergent Motion. Da450. On November 6, 2024, SSI filed an Emergent Motion for a Stay and Partial Summary Disposition seeking: (i) a stay pending its Appeal; and (ii) a limited remand to the County. On November 7, 2024,

the County filed a letter indicating that it "takes no position in connection with the [Emergent Motion]."

By Order dated November 13, 2024, the Court granted SSI's motion for a stay pending the disposition of this Appeal and denied SSI's request for a summary disposition and limited remand to the County. On January 3, 2025, without having previously filed a Notice of Appeal or Notice of Cross-Appeal, the County filed a Respondent's Brief challenging the trial court's Decision and Judgment.

LEGAL ARGUMENTS

POINT I

THE TRIAL COURT PROPERLY DETERMINED THAT THE COUNTY'S REJECTION OF EAC'S BID WAS IMPROPER AND THAT THE ANTICIPATED CONTRACT SHOULD HAVE BEEN AWARDED TO EAC AS LOWEST RESPONSIVE BIDDER (1T55-68); 3T30-34;45-52)

The trial court correctly determined that the County's rejection of EAC's bid was improper and that the Anticipated Contract should have been awarded to EAC as the lowest responsive bidder. In reaching this conclusion, the trial court correctly found (on two separate occasions) that: (i) the Notice of Classification is non-mandatory; (ii) EAC's trivial omission of the Notice of Classification from its bid is non-material and waivable; and (iii) the County's failure to waive EAC's immaterial omission of the Notice of Classification was improper because it deprived the taxpayers of thousands of dollars in savings without a sound business reason for

doing so. Because the trial court's decisions were correctly made and well-supported by law, they should be affirmed and SSI's Appeal should be denied.

A. The Trial Court Correctly Determined that the Notice of Classification is Non-Mandatory (1T55:24-57:12)

The trial court correctly determined that the Notice of Classification is not a mandatory document. The Solicitation's Construction Bidders Checklist identifies the mandatory documents that must be included in every bid for the bid to be responsive. The Construction Bidders Checklist specifically cautions bidders that a "failure to submit the following documents with this bid is mandatory cause for the bid to be rejected." Da21. The Notice of Classification is not identified in the Construction Bidders Checklist. Da21

In contrast to the clear language in the Construction Bidders Checklist, the Solicitation provides that "[b]ids submitted without a proper Notice of Classification **may** be considered non-responsive." Da111 (emphasis added). Because the Notice of Classification is not included within the Construction Bidders Checklist and the County expressly provided itself with the option to accept bids that failed to include a Notice of Classification, the trial court correctly concluded that the Notice of Classification cannot be regarded as a mandatory document. 1T56:7-57:22.

Since the alleged trivial defect – failure to include a copy of an existing and publicly available NJDOT Notice of Classification – pertains to a non-mandatory document, such immaterial omission is not a basis to automatically reject a bid. In

re Bid Solicitation No. 10-X-21024, 2012 N.J. Super. LEXIS 102 (App. Div. Jan 17, 2012). Instead, as the trial court correctly found, the immaterial defect is waivable if the omission satisfies the River Vale test. See Palamar Constr., Inc. v. Pennsauken, 196 N.J. Super. 241 (App. Div. 1983)(holding that bidder's failure to submit qualification statement at time of bid opening was a waivable defect).

SSI's reliance on P & A Constr., Inc. v. Twp. of Woodbridge, 365 N.J. Super. 164 (App. Div. 2004), to argue that the Notice of Classification is mandatory, is misplaced. There, unlike here, the omitted document was specifically included in the bidder's checklist and was identified as a document that was required to be submitted with the bid. Id. at 170. In addition, although the omitted document appeared in column B of the checklist which identified documents that "may" be a cause for the bid to be rejected, column B also included documents that were statutorily mandated and therefore non-waivable. Id. Given that column B of the checklist included documents mandated by statute, the court found that the documents identified in column B were obviously not subject to waiver. Id. at 171.

Unlike P & A Constr., the Notice of Classification does not appear in the Construction Bidders Checklist and is not identified with any other statutorily mandated documents. Da21. Accordingly, the permissive and flexible language in the Solicitation cannot be ignored, thereby rendering the Notice of Classification non-mandatory.

B. The Trial Court Correctly Determined that EAC's Omission of the Notice of Classification is Non-Material and Waivable (1T57:23-60:10; 3T33:15-20)

SSI argument that "the trial court erred when it failed to evaluate responsiveness and materiality as of the date bids were opened", is factually and legally wrong. The trial court evaluated the responsiveness and materiality of EAC's bid as of the moment of bid opening.

Since the Notice of Classification is not a mandatory document, EAC's omission of a copy of its existing Notice of Classification from its bid is, at worst, subject to waiver under the River Vale test. See Palamar Constr., Inc., 196 N.J. Super. at 241 (holding that bidder's failure to submit mandatory qualification statement at time of bid opening was a waivable defect); Thassian Mech. Contr., Inc. v. East Brunswick Bd. of Educ., 2020 N.J. Super. Unpub. LEXIS 27 at *5 (App. Div. Jan. 6, 2020)(holding that a public agency should have waived a defect even though the defect pertained to a mandatory document in the bid specifications).

In Township of River Vale, 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.

> [Township of River Vale v. R.J. Constr. Co., 127 N.J. Super. 207, 216 (Law Div. 1974).]

When applying this test, the trial court correctly consulted the extraordinarily similar decision in Suburban Disposal, Inc., to conclude that the EAC's omission of a copy of its existing Notice of Classification was immaterial and waivable.

In Suburban Disposal, the court held that a bidder's failure to include a valid public works registration certification (a document required to be submitted in response to the Solicitation) was a non-material and waivable defect. There, like here, there was no dispute that the bidder was registered at the time of bidding, and that the only "error" was failing to supply a copy of the up-to-date certification confirming same. Suburban Disposal, Inc., 2014 N.J. Super. LEXIS 1186 at *4-5. After applying the River Vale test, the court held that the alleged error was non-material, waivable and **could not** serve as a basis for rejecting the bid. Id. at *16-17. In rendering its decision, the court reasoned that the bidder's genuine registration status at the time of bidding rendered its failure to submit the up-to-date certification a "technical omission" that alone does not (and could not) justify rejection of the bid. Ibid. The court stated, in relevant part:

> [the bidder] was **unquestionably registered throughout the biding process**, although it failed to include proof to [the public entity] by way of the current Certificate. We agree with the trial court that **this was a minor discrepancy or technical omission that was properly subject of a waiver**.

> The first prong of the materiality test examines '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. **That [the bidder] was validly registered but had not provided an up-to-date Certificate did not deprive [the public entity] of assurance that the contract would be entered into, performed, and guaranteed**.
>
> The second prong of the test concerns whether the omission is one that defeats the purpose of competitive bidding by placing one bidder over another. **In light of the fact that [the bidder] was properly registered, nothing about [the bidder's] failure to provide an up-to-date Certificate placed it above the other bidders or in any fashion gave it an advantage over other bidders**.
>
> [Ibid. (emphasis added).]

Guided by the sound reasoning in Suburban Disposal, the trial court correctly analogized that nearly identical case to the facts in this matter and held that EAC's failure to include a copy of its existing Notice of Classification was non-material and waivable for the same reasons articulated in Suburban Disposal. 1T61:14-67:21.

Here, like in Suburban Disposal, EAC's omission of a copy of its existing Notice of Classification is waivable under River Vale because EAC's prequalification status undisputably existed at all times and could not be altered post-bid. Da362. Indeed, EAC's Notice of Classification was issued by NJDOT on February 15, 2024, was effective on February 29, 2024, and will expire on March 31, 2025. Ibid. This information was published and readily available on NJDOT's website. Pa001. Not only did this fact exist at the time of bidding and was verifiable

through publicly available information, EAC's inclusion or non-inclusion of a copy of its existing Notice of Classification with its bid could not alter the fact that it currently is, and was classified at the time of bid opening.

Rather than applying the River Vale test in accordance with the court's reasoning in Suburban Disposal (which would result in the conclusion that the omission of a copy of an existing Notice of Classification is waivable), SSI falsely pretends that EAC may not have been classified by the NJDOT to perform the work on the Project at the time of bidding. Because EAC was (and is still) undisputably prequalified, the County is not deprived of the assurance that the Anticipated Contract will be entered into, performed and guaranteed according to its specified requirements.

Likewise, EAC had no competitive advantage because it could not "walk away" from its bid because it was undisputably pre-qualified by NJDOT. Like the circumstances in Suburban Disposal, EAC's omission of a copy of its existing Notice of Classification could not under any circumstance change the objective fact that EAC was prequalified by NJDOT. Thus, unlike the cases cited by SSI, EAC's omission of the Notice of Classification could not have relieved it of its ability to perform the work on the Project or provide it with a competitive advantage.

SSI's attempt to distinguish the Suburban Disposal decision, by arguing that "the prequalification at issue [in Suburban Disposal] did not actually impact the

bidder's ability to perform", is simply untrue. Indeed, the Suburban Disposal decision plainly cites the relevant registration statute, N.J.S.A. 34:11-56.51, which requires all public works contractors to be registered to submit a bid. Suburban Disposal, Inc., 2014 N.J. Super. LEXIS 1186 at *15. After citing this statute, the court applied the River Vale test and determined that the bidder's submission of the expired registration certificate did not deprive the public entity of adequate assurances because the bidder was unquestionably registered at the time of bidding (like EAC was unquestionably prequalified by NJDOT here). Id. at *16. Importantly, despite SSI's contention, the Suburban Disposal court did not hold that the registration certificate was unnecessary for the bidder to bid on or perform the relevant work. Id. at *15-17.

SSI's argument that the Suburban Disposal court "did not hold that the defect had to be waived" is wrong. Indeed, the court plainly held that the bidder's failure to include a valid public works registration certification (a document required to be submitted in response to the Solicitation) was "a minor discrepancy or technical omission that was **properly the subject of a wavier**." Id. at *16.

SSI's argument that the bidder's submission of an expired registration certificate (in Suburban Disposal) is somehow different than submitting no certificate (as EAC did here), was appropriately rejected by the trial court. Indeed, nowhere in Suburban Disposal did the court consider the bidder's submission of an

expired certificate a prerequisite to the bidder's ability to cure its defect (as SSI argues). Rather, the court relied solely upon the bidder's undisputed active registration status at the time of bid submission and that, in light of this status (which could not be altered post-bid opening), the bidder's failure to supply an active registration certificate did not deprive the public owner of assurances that it could perform the work and did not obtain any competitive advantage over the other bidders. Suburban Disposal, Inc., 2014 N.J. Super LEXIS 1186 at *15.

SSI's attempts to disparage the relevant portions of the Suburban Disposal decision as being "superfluous dicta" or "simply wrong", is predicated on a misunderstanding of the law and misreading of the case. Indeed, the Suburban Disposal court was confronted with two (2) separate issues: (i) whether the bid submitted by the lowest bidder (Suburban Disposal) was defective for reasons unrelated to this Appeal; and (ii) whether the bid submitted by the second lowest bidder (Future Sanitation) was defective for failing to submit an up-to-date registration certificate Id. *2-17. The court ultimately held that the lowest bidder's (Suburban Disposal) bid was defective. Id. at *8-15. To determine whether the public entity's award to the second lowest bidder (Future Sanitation) was proper, the court needed to consider whether that bidder's bid was defective. Id. *15-17. Ultimately, after careful analysis, the court upheld the award to the second lowest bidder, finding that the alleged defect (failing to submit an up-to-date registration

certificate) was waivable. Ibid. Given that the court could not uphold the award to the second lowest bidder (Future) without finding that its bid was not materially defective, such conclusion is clearly not "dicta" because it was "necessary" to uphold the award. Bandler v. Melillo, 443 N.J. Super. 203, 210 (App. Div. 2015)(defining "dictum" as "a statement by a judge not necessary to the decision then being made"). Even if such holding is dicta (though it is not), such thoughtful analysis is entitled to great weight. Herschberg. v. Director, Division of Taxation, 2 N.J. Tax 121, 129 (Tax. Ct. 1981)(holding that dictum is "entitled to great weight"). Moreover, for the reasons set forth herein, the Suburban Disposal decision is entirely consistent with the law and should be followed by the Court in this nearly identical circumstance (as the trial court repeatedly did when rendering its thoughtful decisions).

Equally unavailing is SSI's argument that the trial court should not have considered EAC's post bid submission. Settled New Jersey law expressly allows a bidder to cure non-material defects through post-bid submissions. In other words, immaterial defects (like EAC's trivial omission of a copy of its existing Notice of Classification) can be cured after bid opening because the defect is immaterial. Suburban Disposal, Inc., 2014 N.J. Super LEXIS 1186 at *15. Palamar Constr., Inc., 196 N.J. Super. at 241 (holding that bidder's failure to submit mandatory qualification statement at time of bid opening was a waivable defect); Thassian

Mech. Contr., Inc., 2020 N.J. Super. Unpub. LEXIS 27 at *5 (App. Div. Jan. 6, 2020)(holding public agency should have waived a defect even though the defect pertained to a mandatory document in the bid specifications).

The ability to cure immaterial defects through post-bid submission is particularly appropriate where, as here, the omitted information pertained to facts existing at the time of bid opening that could not be altered, irrespective of whether the omitted document was originally submitted. Tec Elec., Inc. v. Franklin Lakes Bd. of Educ., 284 N.J. Super. 480, 486 (Law Div. 1995)(holding that bidder's failure to submit prequalification affidavit was curable after bidding, stating "[t]he truth or falsity of the [omitted document] would have had the same consequences if given concurrently with, or after, the bids were opened, but in no event could the [omitted document] alter the facts that existed on the day the bid was opened"). Therefore, the Court correctly held that EAC's submission of its Notice of Classification (which was valid months before bidding) was valid and effectively cured its technical omission of the document from its initial bid submission.

SSI's argument that EAC improperly submitted its Notice of Classification after bid opening is not only wrong, but it also ignores the critical distinction between responsiveness and responsibility. Responsibility is defined as being "able to complete the contract in accordance with its requirements, including but not limited to requirements pertaining to experience, moral integrity, operating capacity,

financial capacity, credit, and workforce, equipment and facilities availability." N.J.S.A. 40A:11-2(32). Without question, EAC's prequalification status with NJDOT is an issue of responsibility. Determinations of responsibility (such as EAC's prequalification status) can be made after bid opening. Palamar Constr., Inc., 196 N.J. Super. at 241. Moreover, where a bid is rejected on the basis of responsibility, the bidder is entitled to a post-bid hearing so that it may challenge the determination and present evidence in support of its responsibility (such as a prequalification certificate). Id. If SSI is correct that post-bid submissions related to the responsibility of a bidder impermissibly extend a competitive advantage to one bidder, then responsibility hearings would be forbidden. They are not. To the contrary, responsibility hearings and presentation of evidence are mandatory where a bidder's bid is rejected on the basis of responsibility. Id.

SSI's argument that the trial court evaluated EAC's bid as of August 20, 2024, and not the bid opening date, is wrong. In its decision denying SSI's motion for reconsideration, the trial court explained that it made its determination (that EAC's omission of the Notice of Classification was an immaterial and waivable defect) by examining the facts as they existed at bid opening and determined the omission to be immaterial and waivable. 3T31:15-32:17. Indeed, there is no dispute that, on the date of bid opening, EAC was registered and possessed a valid Notice of Classification. Da362. It is also undisputed that EAC cured its trivial omission, by

supplying a copy of its existing and publicly available Notice of Classification (which could not be altered), as permitted by law. Da360; Suburban Disposal, Inc., 2014 N.J. Super LEXIS 1186 at *15. Palamar Constr., Inc., 196 N.J. Super. at 241; Thassian Mech. Contr., Inc., 2020 N.J. Super. Unpub. LEXIS 27 at *5.

SSI seemingly concedes (as it must) that the inadvertent omission of a mandatory document from a bid is a non-material and waivable defect if it satisfies the test prescribed by Township of River Vale, 127 N.J. Super.at 216. Yet, SSI maintains that a non-material and waivable document (such as the NJDOT Notice of Classification) cannot be furnished after bid opening. SSI is wrong. Case law is clear that the omission of a non-material and waivable document can be furnished after bid opening because the omission is non-material and waivable. Palamar Constr., Inc., 196 N.J. Super. at 241 (holding that bidder's failure to submit mandatory qualification statement at time of bid opening was a waivable defect); Thassian Mech. Contr., Inc., 2020 N.J. Super. Unpub. LEXIS 27 at *5 (holding that a public agency should have waived a defect even though the defect pertained to a mandatory document in the bid specifications). This is particularly so where, as here, the omitted information pertained to facts that existed at the time of bid opening and could not be altered, irrespective of whether the omitted document was submitted. Tec Elec., Inc., 284 N.J. Super. at 486 (holding that bidder's failure to submit prequalification affidavit was curable after bidding, stating "[t]he truth or falsity of

the [omitted document] would have had the same consequences if given concurrently with, or after, the bids were opened, but in no event could the [omitted document] alter the facts that existed on the day the bid was opened"). If the law was as SSI argues (*i.e.*, that a document deemed non-material and waivable cannot be furnished after bid opening) then the River Vale would effectively be meaningless.

SSI's reliance on Matter of Protest of Award of On-Line Games Production and Operation Services Contract, Bid No. 95-X-21075, 279 N.J. Super 566 (App. Div. 1995), is entirely misplaced and is illustrative of the flaws in SSI's arguments. There, unlike here, the post-bid modification related to representations that were not objectively discernable and could be (and, in fact, were) altered after bid-opening. Specifically, the Solicitation in that matter required that all bidders supply video lottery machines with displays that were visible from fifteen (15) feet. Id. at 587. The low bidder's initial bid proposed to use a type of machine that was not visible from fifteen (15) feet and, after bids were opened, identified a different machine that was readable at a minimum distance of fifteen (15) feet. Id. at 597-98. The court concluded that this post-bid modification was improper because it completely changed the bidder's pre-bid representations. Id. at 598-99. In contrast, it is impossible for EAC to change its representations about its NJDOT pre-qualification

status because EAC was objectively prequalified months before bid opening and this fact could not be altered after bid opening.

SSI's reliance on In re Jasper Seating Co. Inc., 406 N.J. Super. 213 (App. Div. 2009), is similarly misplaced. Like On-Line Games, but unlike here, the bidder in In re Jasper Seating Co., Inc., included a reservation in its bid permitting it to modify its bid price post bid opening. Id. at 226. Because price is clearly a material item that the bidder could manipulate to serve its own interests (via the reservation language), the Court found that such reservation language was impermissible. Ibid. Unlike there, EAC did not (and could not possibly) manipulate or change its representations about its NJDOT classification status (either pre or post bid).

SSI's reliance on Ace-Manzo, Inc. v. Twp. of Neptune, 258 N.J. Super. 129 (Law Div. 1992), is equally unavailing. There, unlike here, the bidder failed to execute the bid form which contained a provision providing that the bidder would forfeit its bid bond as liquidated damages if the bidder was awarded the contract and failed to execute same. Thus, non-execution of the bid form gave the bidder an unfair advantage because it could wait until after the bid opening, examine all other bids, and decide whether to sign the bid form or, alternatively, escape the bid without the public entity having recourse against the bid bond as liquidated damages. Id. at 137.

Here, unlike in Ace-Manzo, it is undisputed that EAC provided a valid and enforceable bid bond. see also H&S Constr. & Mech., Inc. v. Westfield Pub. Schs.,

2018 N.J. Super. LEXIS 1574 (App. Div. July 5, 2018)(rejecting argument that bidder's failure to supply certificate gave rise to right to abandon project because the "bidder's obligation to enter a contract was secured through a bid bond"). Moreover, unlike the circumstances here, the bidder's signature on the bid form in Ace-Manzo did not exist pre-bid and could only be ascertained through a post-bid submission by the bidder itself, assuming the bidder wished to do so. In this case, EAC could not create or delete its Notice of Classification after bid opening – it is given to it by NJDOT and is publicly available.

SSI's argument that EAC waited thirteen days from the date it received the County's bid rejection to supply a copy of its existing and publicly available Notice of Classification completely ignores that EAC's classification status existed at the time of bid opening and was always objectively discernible and publicly available. Indeed, EAC promptly supplied the County with a copy of EAC's existing and publicly available Notice of Classification in response to the County's Rejection Letter. Moreover, because EAC's classification status could not be changed, the date that EAC provided the Notice of Classification to the County is of no moment. Tec Elec., Inc., 284 N.J. Super. at 486 (stating "[t]he truth or falsity of the [omitted document] would have had the same consequences if given concurrently with, or after, the bids were opened, but in no event could the [omitted document] alter the facts that existed on the day the bid was opened"). The critical point is that EAC

was classified at the time of bid opening and that fact is independently verifiable, objectively true and could not be changed.

SSI's argument that the trial court "erred in refusing to consider the potential negative effects on assurance of performance and competition" that would follow EAC's hypothetical refusal to provide its Notice of Classification misses the point. Specifically, EAC could not have refused to confirm its prequalification status because it was objectively classified at the time of bidding and EAC could do nothing to change this fact. Indeed, the omission of the Notice of Classification from its bid does not render EAC unclassified. EAC was (and is still) classified. Tec Elec., Inc., 284 N.J. Super. at 486 (holding that bidder's failure to submit prequalification affidavit was curable after bidding, stating "[t]he truth or falsity of the [omitted document] would have had the same consequences if given concurrently with, or after, the bids were opened, but in no event could the [omitted document] alter the facts that existed on the day the bid was opened").

Moreover, all bidders (regardless of whether their bids included alleged defects) may seek to withdraw their bids if their bids include a mistake. N.J.S.A. 40A:11-23.3. Accordingly, because SSI's hypothetical "walk away" option is predicated on a mistake in a bid, that option is available to all bidders. Similar to the holding in Suburban Disposal, EAC received no competitive advantage. Even so, the omission of the Notice of Classification does not provide EAC with a "walk

away" option because the hypothetical does not exist. EAC is, in fact, classified. Thus, if the County awarded the Anticipated Contract to EAC (as it should have done), EAC would have been obligated to perform (with or without the inclusion of the Notice of Classification form in its bid) because it was unquestionably classified.

SSI's reliance on Case v. Trenton, 76 N.J.L. 696 (1909), Tufano v. Cliffside Park, 110 N.J.L. 370 (1933), Terminal Constr. Corp. v. Atlantic County Sewerage Authority, 67 N.J. 403 (1975), and Muirfield Const. Co. v. Essex Cnty. Improvement Auth., 336 N.J. Super. 126 (App. Div. 2000), is entirely misplaced because the information omitted by the bidders in those matters was not objectively discernible and/or would impact assurances of performance if it was refused by the bidder. See Case, 76 N.J.L. 696 (where bidder failed to supply mandatory asphalt material sample), Tufano, 110 N.J.L. 370 (where bidder failed to obtain mandatory proof of ownership or a lease of adequate dumping grounds); Terminal Constr. Corp., 67 N.J. 403 (where bidder was required, but failed to have prior federal approval); Muirfield Cost. Co., 336 N.J. Super 126 (where bidder was prohibited from curing ownership disclosure information). Here, unlike a bidders' failure to: (i) supply mandatory material samples; (ii) obtain ownership or a lease of dumping grounds; (iii) obtain federal approval; or (iv) supply accurate ownership information, the existence of EAC's prequalification status was objectively discernible and could not be altered by EAC's refusal to provide the County with its Notice of Classification form.

C. The Trial Court Correctly Determined that the County's Failure to Waive EAC's Omission of the Notice of Classification was Improper (1T61:2-13)

The trial court rightfully held that the County's failure to waive EAC's technical and immaterial omission of the Notice of Classification was improper because it deprived the County taxpayers of more than $35,000 in savings without any sound business reason for doing so.

A public entity (like the County) may only refuse to waive a non-material defect if its refusal is for valid reasons, non-pretextual, is grounded in sound business judgment and does not contradict the underlying purposes of public bidding requirements. Dobco, Inc. v. Brockwell & Carrington Contractors, Inc., 441 N.J. Super. 148, 159 (Law Div. 2015). A primary purpose of public bidding laws is to benefit the taxpayer. Borough of Princeton v. Bd. of Chosen Freeholders of Mercer, 169 N.J. 135, 159-160 (2001)(stating "[w]e have noted that '[p]ublic bidding statutes exist for the benefit of taxpayers, not bidders, and should be construed with sole reference to the public good'")(internal citation omitted). Consequently, courts have held that a public entity's refusal to waive a non-material mistake, when doing so would yield $47,000 in taxpayer savings, is an abuse of discretion and requires that the public entity's decision be set aside. Tec Elec., Inc., 284 N.J. Super. at 488.

Here, given that EAC's omission of a copy of its existing Notice of Classification is a non-material and waivable defect, the County must provide the

Court with a legitimate reason for declining to waive the alleged non-material defect that would provide a significant cost savings to the taxpayers. Tec Elec., Inc., 284 N.J. Super. at 488. In its Decision and Judgment, the trial court correctly held that no such legitimate reason was given by the County. The reason is obvious – none exists.

SSI's attempt to offer sound business reasons for the County's rejection of EAC's bid is entirely improper. This is because "a litigant may not claim standing to assert the rights of third parties." Jakson v. Dep't of Corr., 335 N.J. Super. 227 (App. Div. 2000). Because the County did not articulate any reasons (let alone sound business reasons) for rejecting EAC's bid, SSI cannot manufacture such reasons on the County's behalf. See Dobco, Inc., 441 N.J. Super. at 159 (stating "a public entity is not required to accept a bid containing defects even when those defects are not material . . . . In order for a reason to reject a bid with a non-material defect to be considered valid, it must be non-pretextual, reflect sound business judgment and may not contradict the underlying purposes of public bidding requirements"). Moreover, since these reasons were not argued before the trial court (because the County did not raise them), it is entirely improper to consider these newly articulated reasons for the first time in this Appeal. Pfannenstein v. Surrey, 475 N.J. Super. 83, 99 (App. Div. 2023)(stating "[w]e will not consider an issue that is raised for the

first time on appeal unless the issue pertains to the trial court's jurisdiction or concerns a matter of great public interest").

SSI's argument, that sound business judgment reasons exist for the County's rejection of EAC's bid, is further undermined by the County's actions before the trial court. Indeed, before the trial court, the County indicated that it accepted the initial decision and would award the Anticipated Contract to EAC as a result of the trial court's Decision and Judgment. 3T49-14-23. Moreover, although the County challenges the trial court's Decision and Judgment in its procedurally improper Respondent's Brief, it does not (because it cannot) articulate a sound business reason for refusing to waive the trivial omission from EAC's bid. Given that the County has chosen not to articulate a sound business reason for rejecting EAC's bid and has previously indicated its intent to adhere to the trial court's decision, the issue is moot.

SSI's reliance on Serenity Contracting Group, Inc. v. Borough of Fort Lee, 306 N.J. Super. 151 (App. Div. 1997), is misplaced. In Serenity, the bidder's bid contained numerous alterations (cross-outs, hand-written additions, white-outs, etc.) without any explanation, as required by the solicitation. Serenity Contracting Group, Inc., 306 N.J. Super. at 154. While the court held that the numerous cross-outs, hand-written additions and white-outs were themselves waivable, it also found that the ambiguities created by these alterations (which were not objectively discernable and

could be altered) created a sound business reason for the public entity's refusal to waive these alterations and ultimate rejection of the bid. Id. at 158.

Here, unlike Serenity, EAC's omission of a copy of its existing Notice of Classification did not (and could not) alter the objectively discernable fact that EAC was prequalified by NJDOT at the time of bidding. Moreover, the argument was never made by the County. Indeed, the sole stated reason for the County's rejection of EAC's bid was its belief, albeit wrong, that it was required to reject it. Da366. Therefore, the sound business reason for Serenity court's refusal to waive the alterations (preventing bidders from making unexplained notations in its bid that could be utilized, post-bid, to modify its bid to its advantage) is entirely inapplicable here.

In addition, SSI's argument, that it is EAC's burden to show that no sound business reason existed for the County's rejection of its fully-complaint bid, is unsupported. Unlike here, in Serenity, the public owner proffered a sound business reason for rejecting the bidder's bid (preventing bidders from making unexplained notations in its bid that could be utilized, post-bid, to modify its bid to its advantage). Thus, the burden shifted to the bidder to rebut the public owner's position and show that its decision was pretextual or undermines the fundamental purposes of public bidding requirements. Here, however, the County did not (because it cannot) offer a

sound business reason for rejecting EAC's bid. Because there is no sound business reason for rejecting EAC's bid, the Court's decision must remain.

SSI's argument that the Court must "utilize a deferential standard of review" when considering the County's decision to reject EAC's bid is misguided because the County did not make a decision for which this Court can defer. Indeed, settled law requires a sound business reason for rejecting a bid with a non-material defect (like EAC's bid here). There is also no dispute that the County did not articulate any sound business reason for rejecting EAC's bid. Since a sound business reason was required to reject EAC's bid and no such reason was given by the County, the Court cannot possibly give deference to that unlawful decision. Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307 (1994)(holding that public entity is without discretion to violate bidding laws); Borough of Princeton v. Bd. of Chosen Freeholders of Mercer, 169 N.J. 135 (2001)(same).

SSI's argument that the County did not have "assurance of performance on the bid date" misses the point made by this court in Suburban Disposal. There, like here, the bidder failed to submit a valid certification even though, at the time of bid opening, the bidder was validly certified. Suburban Disposal, Inc., 2014 N.J. Super. LEXIS 1186 at *4-5. In determining that the defect was non-material and waivable, the court considered that the bidder was unquestionably certified at the time of biding and determined such omission was not material. Id. at *16-17 (stating "[the bidder]

was unquestionably registered throughout the biding process, although it failed to include proof to [the public entity] by way of the current Certificate. We agree with the trial court that this was a minor discrepancy or technical omission that was properly subject of a waiver.").

Guided by the Suburban Disposal court's reasoning, the County was not without "assurance of performance on the bid date" because EAC was "unquestionably registered throughout the bidding process" and this fact could not be altered. Accordingly, unlike the litany of decisions cited by SSI (where the omitted facts were not objectively discernable and could be altered after bid opening), EAC's assurance of its classification status was objectively discernable, publicly available and could not be altered, irrespective of whether the omitted copy of the existing Notice of Classification was originally submitted. As the court held in Suburban Disposal, such omission is a "minor discrepancy or technical omission that was properly subject of a waiver." Ibid.

D. The County Has Already Determined that it Will Abide the Trial Court's Ruling and Award the Anticipated Contract to EAC (3T49-14-23)

The law is well-settled that "appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such presentation is available." Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973).

Before the trial court, the County never requested a remand back to its Board of Freeholders to exercise its discretion to waive or refuse to waive EAC's omission

of the Notice of Classification. Rather, the County did just the opposite as it represented that it would abide the trial court's ruling and award the Anticipated Contract in a manner consistent with the Judgment. 3T49-14-23. Because the County did not request a remand, no such relief is warranted here. Moreover, since such request can only be made the County, SSI lacks standing to make such a request on the County's behalf. Jackson, 335 N.J. Super. at 231 ("a litigant may not claim standing to assert the rights of third parties").

POINT II

THE COUNTY'S UNTIMELY APPEALLATE ARGUMENTS SHOULD NOT BE CONSIDERED AND LACKS MERIT (1T49:11-21; Raised for first time on Appeal)

Despite repeatedly representing that it would abide the trial court's decisions, the County filed a "Respondent's Brief" wherein it asks the Court to overturn the Decision and Judgment. The County's appellate arguments should not be considered because they are untimely, procedurally defective (not supported by a Notice of Appeal) and duplicative of those raised by SSI. Even if the Court considers these arguments (though it should not), the County's arguments fly in the face of public bidding law (which is intended to benefit the taxpayers) because they seek to overturn decisions that would save its taxpayers tens of thousands of dollars without any sound business reason for doing so.

A. The County's Appellate Arguments are Untimely Raised and Should Not be Considered (Raised for first time on Appeal)

Pursuant to Rule 2:4-1(a), "appeals from final judgments of courts . . . shall be filed within 45 days of their entry." Rule 2:4-2 also provides that "[c]ross appeals from final judgments, orders administrative decisions or actions . . . may be taken by serving and filing a notice of cross appeal . . . within 15 days after the service of the notice of appeal." Where, as here, a party fails to timely file a notice of appeal or notice of cross-appeal, it is precluded from appealing the lower court's decision. Ridge at Back Brok, LLC v. Klenert, 437 N.J. Super. 90, 97 n4 (App. Div. 2014)(stating "[w]here the appeal is untimely, [we lack] jurisdiction to decide the merits of the appeal").

Here, the Decision and Judgment were issued by the trial court on November 1, 2024, meaning that the County had forty-five (45) days (until December 16, 2024) to file a Notice of Appeal appealing same. Rule 2:4-1(a). Moreover, on November 1, 2024, SSI filed its Notice of Appeal in this matter, providing the County fifteen (15) days (until November 16, 2024), to file a Notice of Cross-Appeal. Rule 2:4-2.

In blatant violation of the Court Rules, the County filed a "Respondent's Brief" which challenges the trial court's Decision and Judgment. Because the County's arguments are not supported by a Notice of Appeal or Notice of Cross-Appeal, the Court lacks jurisdiction to consider same. Ridge at Back Brok, LLC, 437 N.J. Super. at 97 n4 (stating "[w]here the appeal is untimely, [we lack]

jurisdiction to decide the merits of the appeal"); see also State v. Lefante, 14 N.J. 584, 589-90 (1954)(stating "[a] respondent who is merely seeking to maintain his judgment may brief and argue on the appeal any points that will sustain his judgment and if he does not brief and argue such points he will be taken to have waived them. Only when the respondent in certification is not relying on his judgment below but is seeking affirmatively to overrule or modify it must he cross-petition for certification); Chimes v. Oritani Motor Hotel, Inc., 195 N.J. Super. 435, 443 (App. Div. 1984)(stating "appeals are taken from judgments, not opinions, and, without having filed a cross-appeal, a respondent can argue any point on the appeal to sustain the trial court's judgment").

B. Even if the Court Considers the County's Untimely Appellate Arguments, they Should be Rejected as Duplicative and Meritless (1T49:11-21)

The vast majority of the County's Respondent's Brief makes the very same arguments raised by SSI in support of its Appeal. As set forth at length above, these arguments should be rejected because: (i) the Notice of Classification is non-mandatory; (ii) EAC's trivial omission of the Notice of Classification from its bid is non-material and waivable; and (iii) the County's failure to waive EAC's immaterial omission of the Notice of Classification was improper because it deprived the taxpayers of thousands of dollars in savings without a sound business reason for doing so.

The only unique argument raised by the County is that "[t]his litigation and the associated delay with commencing the project could have been avoided if EAC merely sought clarification regarding the Specifications." This argument is meritless and was appropriately rejected by the trial court.

It is undisputed that the Notice of Classification is not a statutorily required document. Accordingly, EAC's omission of a copy of its existing Notice of Classification from its bid is, at worst, subject to waiver under the River Vale test. Palamar Constr., Inc., 196 N.J. Super. 241 ; Thassian Mech. Contr., Inc., 2020 N.J. Super. Unpub. LEXIS 27 at *5. This remains true regardless of whether the Solicitation deems the Notice of Classification mandatory or not. Ibid.

Moreover, for the reasons set forth in Point I supra, EAC reasonably interpreted that the Notice of Classification was not mandatory and, to the extent there is any ambiguity, such ambiguity is construed against the County as the drafter. M.J. Paquet v. N.J. DOT., 171 N.J. 378, 395 (2002)(construing ambiguity in NJDOT specifications against public owner).

In any event, EAC did not challenge the requirements of the Solicitation. Rather, EAC challenged the County's rejection of EAC's fully responsive bid. Therefore, EAC was not required to file a pre-bid challenge to the Specifications and its decision to refrain from doing so is of no moment (since all parties agree that the

River Vale test must be performed, regardless of the interpretation of the language in the Solicitation).

C. The County's About-Face Refusal to Accept the Trial Court's Decisions is a Blatant Violation of the Public Bidding Laws (1T61:2-13)

Despite repeatedly representing that it would abide the trial court's decisions, the County now argues that the Decision and Judgment should be overturned. Putting aside the procedural and substantive defects in the County's arguments, the County's position flies in the face of public bidding law which is intended to benefit the taxpayer. Borough of Princeton, 169 N.J. at 159-160 (stating "[w]e have noted that '[p]ublic bidding statutes exist for the benefit of taxpayers, not bidders, and should be construed with sole reference to the public good'")(internal citation omitted). Consequently, courts have held that a public entity's refusal to waive a non-material mistake, when doing so would yield $47,000 in taxpayer savings, is an abuse of discretion and requires that the public entity's decision be set aside. Tec Elec., Inc., 284 N.J. Super. at 488.

Indeed, based on the trial court's decisions, the County has been permitted to award the Anticipated Contract to EAC at a discount of tens of thousands of dollars to the taxpayers. Rather than accept the significant savings, the County is shockingly challenging this decision so that it can pay more to complete the Project. Given that the County has not (and cannot) articulate a sound reason for depriving its taxpayers of this benefit, its refusal to waive the immaterial defect in EAC's bid cannot stand.

Dobco, Inc., 441 N.J. Super. at 159 (holding that a public entity (like the County) may only refuse to waive a non-material defect if its refusal is for valid reasons, non-pretextual, is grounded in sound business judgment and does not contradict the underlying purposes of public bidding requirements); Tec Elec., Inc., 284 N.J. Super. at 488 (holding that a public entity's refusal to waive a non-material mistake, when doing so would yield $47,000 in taxpayer savings, is an abuse of discretion and requires that the public entity's decision be set aside).

CONCLUSION

For these reasons, EAC respectfully requests that this Court affirm the trial court's Decision and Judgment and deny this Appeal in its entirety.

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EARLE ASPHALT COMPANY *Plaintiff-Respondent* *v.* COUNTY OF GLOUCESTER *Defendant- Respondent* and SOUTH STATE INC. *Defendant- Appellant*	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Appellate Docket: A-638-24 Trial Court Docket: GLO-L-1067-24 Sat Below: Hon. Benjamin C. Telsey, A.J.S.C.

APPELLANT SOUTH STATE INC.'S REPLY BRIEF ON THE MERITS

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Dated: January 14, 2025

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OTHER

PRELIMINARY STATEMENT

Earle's arguments for affirmance come down to a single proposition: if a public entity requires bidders to submit a document with their bid to demonstrate the existence of a fact about the bidder, and the public entity could theoretically obtain the same information after bid opening by making a request to another public entity, a bidder's failure to submit the document cannot be a material defect and the public entity retains no discretion to reject the bid. There is no case in this state, let alone binding precedent, which supports that proposition.

Indeed, the proposition turns basic precepts of public bidding on their head. When a solicitation requires a bidder to submit information showing its legal qualification to perform, and the bidder fails to supply it, the public body has three choices: (1) make the award without any assurance the bidder is legally qualified to perform, which is definitionally arbitrary and capricious and in violation of River Vale; (2) send out a public records request and wait to see if the bidder is actually allowed to perform, which defeats the purpose of asking for the information with the bid, unnecessarily delays an award, and imposes a burden even the trial court thought was inappropriate; or (3) politely, because it has no means of enforcement, ask the bidder to provide the information post bid, which violates well-established precedent against post-bid cures and subjects the government and competitors to the whims of the non-compliant bidder. If

the government chooses the third option, and the non-complaint bidder does not provide the information because, after seeing the other bids, it is dissatisfied with its own bid or it sees a better opportunity elsewhere, the government is stuck with the patently absurd first or second choices. Viewing this case from that simple but accurate paradigm, the materiality of supplying the information with the bid is obvious. Respectfully, even if that were to be ignored, it is folly to suggest the County would be acting arbitrarily or capriciously for choosing not to waive the requirement, particularly where Earle was almost certainly weighing its options in the thirteen (13) days that passed between Earle being informed of the defect and Earle providing its NJDOT Notice.

To obscure that reality, Earle, among other things, ignores clear language in the Solicitation requiring bidders to submit their NJDOT Notice; conflates document submission requirements with responsibility determinations; references a bidder's right to request bid withdrawal in very limited, unrelated circumstances; and relies on a highly distinguishable, ten-year-old, unreported decision that has never been cited by another court, features essentially no reasoning, and, to the extent it actually stands for the proposition alleged by Earle, is entirely inconsistent with a century of reported, binding case law.

Also telling is Earle's lack of focus on the extraordinarily late submission of its NJDOT Notice. Under Earle's theory of the case, it ***never*** had to submit

the NJDOT Notice. All that matters to Earle is that it was qualified at the time of bid and that the County could have obtained that information after bid opening from NJDOT. Hence Earle's insistence that it could not walk away "from its bid because it was undisputably pre-qualified by NJDOT."

For more than one hundred years, a public entity requiring qualification information from a bidder must receive that information from the bidder at the time of bid. Whether the bidder complied, and whether non-compliance is material, is measured as of the bid opening. A bidder's non-compliance is material and not waivable if it possibly, potentially, or actually deprives the government of assurance of performance or negatively impacts competition. Earle failed to timely provide its NJDOT Notice. Therefore, the County lacked assurance that Earle was legally classified to perform the Project, and waiver of the requirement would have given Earle an advantage over compliant bidders who lacked a similar opportunity to avoid their bids.

The Court should find Earle's bid materially defective. If the Court finds the defect was not material, the Court should remand to the County or dismiss the Complaint and allow the County to proceed in the ordinary course.

PROCEDURAL HISTORY

Earle argues that the County could not file a brief because the County "represented that it would abide the trial court's ruling and award the

Anticipated Contract in a manner consistent with the Judgment." Pb31. However, the statements cited by Earle were the County's response to the trial court's refusal to remand. 3T47-13 – 3T50-5. As discussed in SSI's brief on the merits (the "SSI Brief"), the trial court had already ruled, wrongly in SSI's view, that there was no basis for a discretionary refusal to waive, and the trial court and County considered remand a waste of time under the circumstances. Db48[1]. Despite that, the County expressly preserved its right to argue that the trial court erred on appeal. 3T20-18 –3T21-6.

The County also informed this Court of its intention to argue that Earle's bid was materially defective in its November 7, 2024, letter brief, Dra1, filed in response to SSI's Motion for Emergent Relief. That letter brief was followed by this Court's Orders of November 13 and 14, 2024, granting SSI's Motion in part and setting a schedule "for the submission of briefs, including from Gloucester County." GLOa2; Dra3. Thereafter, the County submitted a Civil Case Information Statement again asserting that the trial court erred. Dra6.

STATEMENT OF FACTS

Earle engages in significant discussion of a document submission checklist included with the Solicitation. Pb3, Pb8-9. However, Earle neglects to point out that the checklist does not purport to be all inclusive or to exclude

[1] References to "Db" are to the SSI Brief.

submissions required elsewhere in the Solicitation. Da21.

Earle also attempts to minimize the NJDOT Notice requirement by referencing only one section of the Solicitation. Pb3. However, as set forth in the SSI Brief, Db4-6, the requirement was set forth in three separate locations, including on the second page of the Solicitation. Da16, Da110-11.

LEGAL ARGUMENT

I. Earle does not contest the standards of review and does not defend how the trial court applied those standards. (1T60-17; 3T46-7)

The SSI Brief identifies the applicable standards of review the trial court was required to utilize. Db9-11. To reiterate, a governing body's decisions concerning whether a bid is defective and whether a defect is material are both judged for whether the determination was "arbitrary, unreasonable or capricious." Barrick v. State, Dep't of Treasury, Div. of Prop. Mgmt. & Const., 218 N.J. 247, 259 (2014). Where a defect is not material, the governing body's decision whether to waive such a defect is subject to even greater deference, permitting reversal only where there is a "clear abuse of discretion." Palamar Const., Inc. v. Pennsauken Twp., 196 N.J. Super. 241, 250 (App. Div. 1983).

Here, Earle fails to challenge the applicable standards of review and fails to explain how the trial court applied those standards.

II. A bidder's failure to provide a required document demonstrating its legal qualification to perform does not become immaterial merely because the information is objectively factual and might be learned

from a post-bid opening public records request. (1T63-6 – 1T63-9)

Earle argues that the failure to submit the NJDOT Notice is not material because: (1) Earle was classified by NJDOT at the time of the bid; and (2) that information was publicly available. Pb12-13. Earle's support for that argument is centered on Suburban Disposal, Inc. v. Twp. of Aberdeen, A-3176-12T3, 2014 WL 2131662 (N.J. Super. Ct. App. Div. May 23, 2014) (Da453) and overstating the public availability of information about NJDOT classification. Pb12-15.

a. Earle's efforts to prop up Suburban Disposal (Aberdeen) must fail.

Suburban Disposal (Aberdeen) was extensively discussed in the SSI Brief. Db33-36. In addition to being an unreported, ten-year-old, never-cited decision, it does not stand for the proposition asserted, and it does not even purport to address a public entity's ability to waive a non-material defect.[2] Below, SSI reiterates and expands upon certain critical points.

First, unlike NJDOT classification, and despite Earle's assertions to the contrary, Pb13-14, the public works registration in Suburban Disposal

[2] Earle argues that because the court in Suburban Disposal (Aberdeen) said the defect was "properly the subject of a waiver," the court held that the township had no discretion to refuse waiver. Pb14. However, the court never discussed whether waiver was mandated, and describing something as "properly the subject of a waiver," after noting "'minor or inconsequential discrepancies and technical omissions can be the subject of waiver" says no more than that the defect is waivable. 2014 WL 2131662, *6-7 (quoting Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307, 314 (1994)) (Da461).

(Aberdeen) was not a legal requirement for performing the contract in question. 2014 WL 2131662, at *2-3 (Da456). That case related to a solid waste hauling contract. Id. at *1 (Da453). Public works contractor registration is only required for "public works" or where "payment of the prevailing wage is required" by other statute. N.J.S.A. 34:11-56.51. Public works do not include solid waste hauling, as they are defined as "construction, reconstruction, demolition, alteration, custom fabrication, duct cleaning, or repair work, or maintenance work, including painting, and decorating[.]" See N.J.S.A. 34:11-56.26(5). Prevailing wage is only required for "public works" and certain other specified trades. N.J.S.A. 34:11-56.25 ("It is . . . the public policy of this State to establish a prevailing wage level for workmen engaged in public works[.]"); N.J.S.A. 34:11-56.40 (requiring "workman" to be paid prevailing wage) N.J.S.A. 34:11-56.26(7) (defining "workman" as being, among other requirements, "engaged in the performance of services directly upon a public work[.]"); N.J.S.A. 34:11-56.78 (providing prevailing wage for longshoreman). By contrast, no statute or regulation provides for prevailing wage for solid waste haulers. Moreover, despite Earle's contention, the trial court in Suburban Disposal (Aberdeen) pointed that fact out and appears to have been credited by the appellate panel. 2014 WL 2131662, at *2-3 (Da456).

Second, the relevant bidder in Suburban Disposal (Aberdeen) provided a registration document that was out of date but at least referenced its qualification at some point in time. Id. at *2 (Da455). Here, Earle provided ***no documentation*** showing that it was NJDOT classified, let alone sufficiently classified.

Third, public works contractor registration is an all or nothing proposition. You either are or are not registered at the time of the bid. N.J.S.A. 34:11-56.54; Da273. By contrast, NJDOT classification includes the categories in which classification is held and the project rating (dollar limit) of the classification for each category. N.J.A.C. 16:44-3.6(a); Da362-64. The qualification of a bidder to perform a particular project cannot be known without those pieces of information. Da16 (solicitation requirement to submit "proper NJDOT notice of classification for prequalification of any work items to be performed by the bidder"); Da110-11 (sections 102.01 and 102.10 requiring bidder to demonstrate the appropriate project rating and work classifications).

Even if Suburban Disposal (Aberdeen) does stand for the proposition offered by Earle, it should be disregarded. While Earle repeatedly trumpets the "sound reasoning" and "thoughtful analysis," Pb12, the "reasoning" and "analysis" consisted of two, entirely conclusory sentences that merely restate the River Vale test. 2014 WL 2131662, at *7 (Da456); Pb12. Additionally, that reasoning is inconsistent with the binding case law indicating that a bidder's

refusal to provide required information about its qualification is a material defect that cannot be cured. See, e.g., Muirfield Const. Co. v. Essex Cnty. Improvement Auth. 336 N.J. Super. 126, 136–37 (App. Div. 2000); P & A Const., Inc. v. Twp. of Woodbridge, 365 N.J. Super. 164, 172-73 (App. Div. 2004); Brockwell & Carrington Contractors, Inc. v. Kearny Bd. of Educ., 420 N.J. Super. 273, 278-79, 283 (App. Div. 2011); Tufano v. Bor. of Cliffside Park in Bergen Cnty., 110 N.J.L. 370, 372-73 (Sup. Ct. 1933).

Finally, the relevant aspects of Suburban Disposal (Aberdeen) are dicta. Earle more or less accurately describes the facts of the case, Pb15-16, but misses the point. Once the court determined that the lowest bidder (Suburban Disposal) submitted a materially defective bid, there was no party with proper standing left to challenge the award to the second lowest bidder (Future Sanitation). 2014 WL 2131662, at *2, *6 (Da455, Da460). In other words, the court should not have been "determin[ing] whether the public entity's award to the second lowest bidder (Future Sanitation) was proper" because it had already determined that the plaintiff, Suburban Disposal's, bid was materially defective. Pb15; Waszen v. Atl. City, 1 N.J. 272, 276 (1949) (low bidders with non-conforming bids "have no standing to challenge the award of the contract to a rival bidder").

b. The public availability of Earle's NJDOT classification information is irrelevant, but, even if it were relevant, Earle's depiction is misleading.

The trial court properly found that the County had no obligation to seek

out Earle's classification information. 1T63-6 – 1T63-9. A contrary rule flies in the face of well-established precepts of public bidding. First, a government body can require bidders to provide documentation demonstrating their qualification so that qualification and responsibility can be determined. See, e.g., Meadowbrook, 138 N.J. at 322 (noting authority to request information on financial capacity, describing financial capacity as a material part of identifying the lowest responsible bidder, and explaining the provision of information related to the same "should be understood to enhance the municipality's ability to determine the lowest responsible bidder, thereby minimizing the risk of default by the successful bidder."); Terminal Const. Corp. v. Atl. Cnty. Sewerage Auth., 67 N.J. 403, 412 (1975) ("[T]he delivery of certificate demonstrating a present ability to perform, [has] been found to be so material as to not be the subject of waiver.") (internal citations and quotations omitted). Second, "[c]ourts should not casually transform the mandatory requirement in . . . specifications. . . into a polite request." Meadowbrook, 138 N.J. at 324 (internal quotation omitted). In short, the bidder is responsible for providing responsive documents demonstrating its qualification; it is ***not*** the government body's obligation to independently investigate that qualification.

If a government body had to go out and seek qualification information for each low bidder on all of its contracting, the administrative burden would be

enormous. Just a few examples of information that would need to be sought out in addition to NJDOT classification information are: trade licensing, Muirfield, 336 N.J. Super. at 135-36; bidder debarment, N.J.S.A. 34:11-56.85; Division of Property Management and Construction qualification, Advance Elec. Co. v. Montgomery Twp. Bd. of Educ., 351 N.J. Super. 160, 171-72 (App. Div. 2002); and authorization for sureties issuing bid bonds and consents of surety, Meadowbrook, 138 N.J. at 310-11. That would add expense, delay, and uncertainty to the public bidding process as government bodies would need to submit records requests to other agencies, wait for responses, and follow up when there is a delay, all the while not knowing if the low bidder is qualified.

Even if the public availability of information should be considered, Earle wrongly suggests that all required information was available through NJDOT's website. Pb4, Pb12. That is false. NJDOT's website only shows that a given contractor is classified in a given work type at the time the website is viewed. Da386, Pa1. It does not show when the contractor became classified. Ibid. It also does not show the contractor's project rating for each work type. Ibid. Thus, even if the County were obliged to seek out the information, and even if the County checked NJDOT's website the moment bids were opened, the County would ***still*** not know whether Earle was qualified for this Project.

III. Earle conflates responsiveness and responsibility, makes illogical assertions regarding its ability to walk away, and overstates a statute

authorizing bidders to *seek* withdrawal of bids. (1T55-24; 3T31-15)

Earle's conflation of responsiveness and responsibility, Pb17-18, is flawed. The issue in this case is not whether Earle is responsible; the issue is whether Earle timely submitted the documents necessary to be responsive. As discussed above on page 10, a government body may require, and bidders must provide, information regarding the bidder's capacity to perform. Bidder responsiveness is determined by the information submitted at the time of bid, not the universe of facts known to others. That is, even if the information sought relates to responsibility, the proper submission of that information is a question of responsiveness. Additionally, there is no support for the proposition that a responsibility hearing is necessary where a bidder fails to demonstrate it has the necessary ***legal qualifications*** for performing. See, e.g., Muirfield, 336 N.J. Super. at 135-36 (discussing disqualification for failure to have proper licensing); Advance Elec., 351 N.J. Super. at 171-72 (discussing disqualification for naming subcontractors without required NJDPC prequalification).

Earle indicates that it could not walk away from its bid because it was NJDOT classified. Pb13, 24. That argument begs the question. What matters here is whether Earle timely demonstrated that it was sufficiently NJDOT classified. If Earle did not do so, and the County was not required to seek out that information itself, the County would never know if Earle was sufficiently

classified and never have assurance of performance. Earle refused to do so until twenty-one (21) days after bid opening, and, if it did not want the Project anymore or was concerned about its bid, could have instead continued to refuse.

Earle also argues that all bidders can withdraw bids if they make a mistake, and thus no competitive advantage arises for Earle. Pb23. First, that ignores the case law, including binding case law, expressly holding that a bidder's ability to walk away results in rejection under River Vale. Db26-27, 32. Moreover, the statute cited by Earle only permits the bidder to "request" withdrawal in a five-business-day window for "a clerical error that is an unintentional and substantial computational error or an unintentional omission of a substantial quantity of labor, material, or both, from the final bid computation" where requiring performance would be "unconscionable" and the bidder "exercised reasonable care[.]" N.J.S.A. 40A:11-23.3; N.J.S.A. 40A:11-2 (defining "mistake"). The statute provides specific review procedures and does not mandate relief. N.J.S.A. 40A:11-23.3. Finally, Earle's advantage extends past avoiding mistakes; it also includes, among other things, the ability to pursue more lucrative work and to bid more aggressively on this Project. Db32. [3]

[3] Earle also makes some distinction between "mandatory" and "non-mandatory" documents. Pb8-9. This is not a relevant distinction. The document was required to be submitted with the bid, it was not submitted, and all parties agree that the River Vale test applies to determine whether that defect was material. Pb9,

IV. SSI has standing to argue that the trial court should not decide on the appropriateness of a discretionary refusal to waive, and the County is not precluded from substantively participating on appeal. (Not Raised Below)

Earle argues in passing that SSI has no standing "to offer sound business reasons for the County's rejection" in the event the defect is not material. Pb26. It is of course true that SSI cannot bind the County to reject a non-material defect based on the reasons offered by SSI, but that is not what SSI has argued. Instead, SSI argues that there are appropriate reasons to reject Earle's bid even if the defect was not material and that it was improper for the trial court to determine that issue without the County doing so first. Db38-49. Those are simply components of SSI's defense of the County's award to SSI and Earle's failure to prove its claims.

Earle also argues that the County should not be permitted to participate in this appeal and that it affirmatively accepted the trial court's decision. Pb31-36. As set forth on page 4, Earle's characterization of the County's position is inaccurate, ignores the County's plain statements below and to this Court, and ignores this Court's direction that the County be included in the briefing schedule. Even if it were necessary for the County to file a Notice of Appeal under the circumstances, there is no prejudice to Earle and justice requires

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Db16, GLOb12. If it was not material, SSI contends that the County still had authority to refuse waiver of the defect. Db37.

consideration of the County's submissions. See N.J.R. 1:1-2(a) ("Unless otherwise stated, any rule may be relaxed or dispensed with by the court in which the action is pending if adherence to it would result in an injustice.")

CONCLUSION

For the reasons set forth above, in the SSI Brief, and in the County Brief, the Court should reverse the judgment of the trial court and find Earle's failure to timely submit the NJDOT Notice to be a material defect. To the extent the Court finds the defect was not material, the Court should reverse the judgment of the trial court and either: (a) remand to the County to determine whether to waive the defect; or (b) direct the dismissal of Earle's Complaint and allow the County to proceed in the ordinary course, based on the guidance provided by the Court.

Respectfully Submitted,

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