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APPLIED LANDSCAPE TECHNOLOGIES, INC.,	)	<b>SUPERIOR COURT OF NEW JERSEY</b>
	)	<b>APPELLATE DIVISION</b>
	)	
Plaintiff/Appellant,	)	<b>DOCKET NO.: A-002030-24</b>
	)	
	)	<i>Civil Action</i>
	)	
v.	)	
	)	<i>On appeal from the Superior Court of New Jersey, Law Division, Middlesex County</i>
COUNTY OF MIDDLESEX and TOMCO CONSTRUCTION,	)	
	)	<i>Sat Below:</i>
	)	<i>Hon. Benjamin Bucca, Jr., J.S.C</i>
	)	
Defendants/Respondents.	)	<b>DOCKET NO. IN COURT BELOW:</b>
	)	<b>MID-L-7337-24</b>
	)	

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BRIEF IN SUPPORT OF PLAINTIFF/APPELLANT’S APPEAL

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**PRELIMINARY STATEMENT**

Plaintiff/Appellant presents this case of first impression concerning the definition of electrical work under the Local Public Contracts Law (“LPCL”) and whether the installation of electrical conduit for branch circuitry can be installed by a non-licensed electrician under the LCPL.

Here, Tomco, the lowest numerical bidder on the Project, admitted that, at the time it submitted its bid to the County, it did not intend to utilize a licensed electrician to furnish and install the electrical conduit and junction boxes needed for branch circuits, including the parking lot lighting, site lighting, and sports lighting. That work is certainly “electrical work” under the LPCL, requiring that all contractors that will be performing such work be identified in the bid submitted to the County. Further, as that work requires an electrical permit, it must be performed by a licensed electrical contractor – which Tomco is not. Even if, arguendo, Tomco could perform that electrical work, Tomco would have had to identify itself as self-performing that work in its bid pursuant to the LPCL. Therefore, the County’s award to Tomco, despite a material deviation in its bid, was arbitrary and capricious and in violation of the LPCL.

Also, if the trial court’s decision is permitted to stand, it would establish that the installation of conduit and junction boxes on all projects governed by the LCPL is not “electrical work” and could be performed by any contractor, whether they are licensed electricians or not. It would further upend the electrical permitting process as it would require electrical permits to be issued to non-electricians for such work, or, in the alternative, permit licensed electricians to “rubber-stamp” permit applications despite knowing that its employees would not be performing that electrical work. It is in the best interests of the public that this Court correct the error and establish that the installation of electrical conduit and junction boxes is electrical work as defined by the LPCL.



## STATEMENT OF FACTS

Applied Landscape Technologies, Inc. (“Plaintiff” or “ALT”) was the second lowest monetary bidder for the construction project known as Athletic Fields in Thomas Edison Park, County Project #EDI8017 (the “Project”), solicited by the Defendant, County of Middlesex (“County” or “Defendant”). (Pa147, Pa266.) The Project is governed by the Local Public Contracts Law (“LPCL”), *N.J.S.A. 40A:11-1 et seq.*, and the solicitation properly advised bidders that the Project would be awarded to the lowest responsible Bidder. (*See* Section 103.01 of the Solicitation Exhibit B To Plaintiff’s Complaint, Pa14.)

The Project included significant electrical work, which was set forth in in the bid specifications in three sections: 1) Division 26- Electrical, specifically section 260533 “raceway and boxes for electrical systems” (Pa322-Pa427); 2) New Jersey Department of Transportation Standard Specifications For Road and Bridge Construction Dated 2019 (“NJDOT Standard Specs”) Division 700- Electrical (incorporated by reference)(Pa428-Pa440); and 3) the County’s Supplementary Specifications to the NJDOT Standard Specs (“Supplementary Specs”). (Pa441.) These sections specifically addressed the installation of conduit and junction boxes for branch and other circuits as part of the Project’s required electrical work.

Potential bidders were instructed to submit with their bids the name or names of all principal subcontractors, including electrical work, in accordance with *N.J.S.A.* 40A:11-16. (*See* Subcontractor Form, Exhibit D to Plaintiff's Complaint, Pa18.) The Subcontractor Form also advised Bidders: "If Bidder is doing any of the above listed in-house, submit company name, license number (if applicable) and evidence of business permit/ certificate of authorization as may be necessary." (*Ibid.*)

The County conducted a public bid opening on December 5, 2024. Tomco Construction ("Tomco" or "Defendant"), the apparent low bidder, submitted a bid in the amount of \$77,985,000.00. (*See* Tomco's Bid Submission, Exhibit G to Plaintiff's Complaint, Pa26.) ALT, the next lowest bidder, submitted a bid in the amount of \$78,147,543.00. (*See* ALT bid, Pa135-Pa147.)

Tomco's bid was materially defective as it failed to identify itself for the electrical work it was going to self-perform. Rather, Tomco only listed Quality Electrical Const. ("Quality") as its electrical subcontractor. (*See* Tomco Subcontractor Form, Pa69.) The record shows that Quality and Tomco had an agreement where Quality was not going to perform all of the electrical work on the Project. (*See* Quality Electric's proposal to Tomco, Pa122, Text

Messages between Quality Electric and Tomco, Pa124-128, and Certification of Thomas Schoonmaker, Pa129-131.)

Quality expressly excluded the installation of underground conduits and junction boxes for items 136 - Electrical Work, 138 -Parking Lot Lighting, 139 -Site Lighting, and 140 -Sports Lighting. (*Ibid.*) Although not indicated on its Subcontractor Form, Tomco intended to self-perform the installation of conduit and junction boxes under Quality’s Electrical Permit. (*See* Text Messages between Quality Electric and Tomco, Pa124-128, and Certification of Thomas Schoonmaker ¶4, 6, Pa129-131). Tomco certified that it was going to self-perform the conduit and junction box work “pursuant to Quality [Electric]’s permit” under Quality’s “supervision or inspection.” (*See* Schoonmaker Certification, ¶3-5, Pa130.) Notably, Tomco is not a licensed electrical contractor.

On December 18, 2024, ALT submitted a letter of protest to the County, protesting, among other things, that Tomco’s bid was non-responsive for failing to properly submit the names and licenses for all electrical subcontractors that will be used on the Project, and that the County should award the Project to ALT as the as the next lowest, responsive and responsible bidder. (*See* ALT Protest Letter, Exhibit H to Plaintiff’s Complaint, Pa90). On December 27, 2024, the County rejected ALT’s letter of protest. (*See* County

Response Letter, Pa117.) Ironically, the County relied in part on the justification by the consulting engineers on the Project, Najarian Associates, who stated: “Tomco stated that they are using Quality Electric for all electrical work for the project on page 51 of the supplemental specifications. No other electrician is allowed to work on this project, this would violate the bid shopping laws.” (See Najarian Associates Letter to County, Pa120.)

Even though Tomco admitted that it always intended to self-perform electrical work including the installation of the conduit and junction boxes under Quality Electric’s permit and supervision, but failed to indicate same in its bid, the County thereafter awarded the contract for the Project to Tomco. (Pa107.)

## **PROCEDURAL HISTORY**

On December 26, 2024, Plaintiff initiated this case by way of filing an application for Order to Show Cause seeking temporary restraints. (Pa1-Pa110.) On January 7, 2025, the trial court entered an Order to Show Cause with Temporary Restraints by Consent (“OTSC”) enjoining the County from proceeding with an award of the Project to Tomco. (Pa111-Pa114.) The OTSC, also awarded Plaintiff pre-answer discovery.<sup>1</sup>

On January 17, 2025, both Tomco and the County filed briefs in opposition. ALT filed a reply brief January 24, 2025, and Defendants filed surreplies January 27, 2025. At oral argument on January 28, 2025, the trial court scheduled a show cause hearing for March 24, 2025.<sup>2</sup> (2T38-20 to 22.) The hearing was rescheduled to March 5, 2025, at the request of Defendants.

On March 5, 2025, the trial court held the show cause hearing on the merits of Plaintiff’s claims.<sup>3</sup> (3T.) The court reserved judgment until March 7, 2025, at which time it entered its opinion on the record.<sup>4</sup> (4T.) The trial court

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<sup>1</sup> John Faccas, the licensed electrician for Quality Electric, was deposed on January 15, 2025 (“1T”).

<sup>2</sup> January 28, 2025 OTSC Hearing (“2T”).

<sup>3</sup> March 5, 2025 OTSC Hearing (“3T”).

<sup>4</sup> March 7, 2025 Oral Decision (“4T”).

found that the installation of conduit and junction boxes was not “electrical work” as defined by the Electrical Contractors Licensing Act and could thus be performed by any contractor. (4T12-12 to 25.) Plaintiff moved for an immediate stay pending appeal. (4T12-15 to 20.) The Court denied Plaintiff’s application. (4T13-123.)

Also on March 7, 2025, Plaintiff filed its Application for Permission to File Emergent Motion shortly after the trial court entered its written order. This Court granted Plaintiff’s Application on the same day.

Plaintiff filed its Motion for a Stay Pending Appeal on March 12, 2025. This Court granted Plaintiff’ Motion by Order dated March 20, 2025, thereby continuing a stay of the award of contract to Tomco and also accelerating the appeal.

## ARGUMENT

### **I. THE COURT SHOULD EMPLOY A DE NOVO STANDARD OF REVIEW IN THE MATTER SUB JUDICE AS IT INVOLVES LEGAL CONCLUSIONS REGARDING INTERPRETATIONS OF THE LOCAL PUBLIC CONTRACTS LAW. (Not raised below)<sup>5</sup>**

The Appellate Court reviews a trial court's “legal conclusions and issues of applicability and interpretation of the public contract and local finance laws de novo.” *Ernest Bock & Sons-Dobco Pennsauken Joint Venture v. Tp. of Pennsauken*, 477 N.J. Super. 254, 263 (App. Div. 2023). In bidding cases, this Court applies a deferential standard of review for governmental decisions. *Ibid.* However, “[t]he standard of review on the matter of whether a bid on a local public contract conforms to specifications . . . is whether the decision was arbitrary, unreasonable[,] or capricious.” *In re Protest of Award of On-Line Games Prod. & Operation Servs. Cont., Bid No. 95-X-20175*, 279 N.J. Super. 566, 590 (App. Div. 1995). In making such determination, this court considers “whether there is insubstantial evidence to support the conclusion” reached by the public agency. *Waste Management of New Jersey, Inc. v. Union County Utilities Authority*, 399 N.J. Super. 508, 525-26 (App. Div. 2008).

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<sup>5</sup> Pursuant to R. 2:6-2(a)(1), this issue was not raised below as it represents the appellate standard of review.

Here, the trial court concluded that the conduit and junction box work that Tomco planned to self-perform is not electrical work under the Local Public Contracts Law, and thus, Tomco's bid was conforming. That legal conclusion is the lynchpin of this matter and should be reviewed employing a *de novo* standard of review.

**II. THE TRIAL COURT ERRED IN FINDING THAT THE INSTALLATION OF CONDUIT AND JUNCTION BOXES IS NOT ELECTRICAL WORK UNDER THE LOCAL PUBLIC CONTRACTS LAW. (4T12-13 to 17)**

The trial court found that “[c]onduit work in and of itself is not electrical work. This work can be performed by a laborer because it does not require any special skill, experience or training.” (4T12:13-17.) Such determination fails to consider the definition of “electrical work” under the Local Public Contracts Law, *N.J.S.A.* 40A:11-1 *et seq.*, which does not establish such differentiation.

**a. THE DEFINITION OF ELECTRICAL WORK UNDER THE LOCAL PUBLIC CONTRACTS LAW IS FAR BROADER THAN THE ELECTRICAL WORK THAT CAN ONLY BE PERFORMED BY A LICENSED ELECTRICIAN UNDER THE ELECTRICAL CONTRACTOR'S LICENSING ACT, AND IT IS THE LPCL THAT CONTROLS HERE**

Under the LPCL, a bidder is required to set forth the names of all subcontractors to whom the general contractor will subcontract “electrical



work, including any electrical power plants, tele-data, fire alarm, or security system.” *N.J.S.A.* 40A:11-16(a). This definition of electrical work is more expansive than that contained in the Electrical Contractors Licensing Act of 1962 (“Licensing Act”), *N.J.S.A.* 45:5A-1 *et seq.*, which defines “electrical contractor” as “a person who engages in the business of contracting to install, erect, repair or alter electrical equipment for the generation, transmission or utilization of electrical energy.” *N.J.S.A.* 45:5A-9(d). On the other hand, the Licensing Act establishes that no person shall “[E]ngage in or work in business as an electrical contractor, unless such person has secured a business permit and . . . an electrical contractor’s license.” *N.J.S.A.* 45:5A-9(a).

However, the Licensing Act exempts certain work from the requirement of securing a business permit under the Licensing Act, including: public utilities; any work with a potential of less than 10 volts; and work performed by an alarm business that is not branch circuit wiring. *N.J.S.A.* 45:5A-18. Despite what the Licensing Act exempts, the LCPL, the controlling statute here, specifically *includes* at least most of the exceptions in the Licensing Act. It provides, in pertinent part: “In the case of a single bid . . . there shall be set forth in the bid the name or names of all subcontractors to whom the general contractor will subcontract [electrical work,]” “including any electrical power plants, tele-data, fire alarm, or security system.” *N.J.S.A.* 40A:11-16(a).

Such distinction is paramount to this case. For example, while under the Licensing Act a person would not need a license or business permit to perform work related to fire alarms, security systems, or data wiring, under the LPCL that work is still considered “electrical work” and any contractor performing such work on a LPCL project must be identified in the bid. Thus, the LPCL’s inclusive definition of “electrical work” required Tomco to list all contractors performing that work in its bid and its failure to do so renders its bid materially defective.

Notably, the LPCL was enacted in 1971, nearly a decade after the Licensing Act. Despite being aware of the language contained in the Licensing Act, the LPCL explicitly included certain work as “electrical work” despite its exclusion from the Licensing Act. Therefore, it is clear that the LPCL establishes “electrical work” to be far broader than that which is defined in the Licensing Act.

- b. THE TRIAL COURT ERRONEOUSLY RELIED UPON In re Final Agency Decision of Bd. of Examiners of Elec. Contractors as To Conduit Installation By J. Fletcher Creamer & Son, Inc., 356 N.J. Super. 42 (App. Div. 2002) IN DETERMINING THAT THE CONDUIT AND JUNCTION BOX WORK TOMCO INTENDED TO SELF-PERFORM WAS NOT ELECTRICAL WORK UNDER THE LPCL

It is precisely the exemptions to licensure in *N.J.S.A. 45:5A-18* that the Court relied on in *In re Final Agency Decision of Bd. of Examiners of Elec.*

*Contractors as To Conduit Installation By J. Fletcher Creamer & Son, Inc.*, 356 N.J. Super. 42 (App. Div. 2002). In *Creamer*, the court found that the installation of conduit specifically meant to carry non-conductive fiber-optic cable was excepted from the business of electrical contracting under the Licensing Act. *Id.* at 50-51. Importantly, the Court noted this exception under the Licensing Act because the contractor’s Turnpike project work installing fiber-optic cable did not involve any electrical energy since that cable did not carry any voltage, but instead, worked on light impulses, and, thus, the contractor was exempt from the requirements of obtaining a business permit for electrical contracting work and having its work overseen by a board-licensed electrical contractor. *Id.* at 47, 49, 51.

Quoting *Creamer*, the trial court relied on the following to support its decision: “work relating to the installation of conduit or pipe to carry wire, even that designed to carry electrical wire, is analyzed in these decisions as work of a nature that in itself does not require the skills of workers or supervisors with experience or training in the handling of electrical power, electrical wire, its grounding, or its connections.” *Creamer, supra*, 356 N.J. Super at 54. (4T11-9 to 16.) .

Contrary to *Creamer*, here, the conduit and junction boxes have clearly been established to relate to electrical work — not utility or other exempt

work. Further, *Creamer* did not consider what is meant by “electrical work” under the LPCL. Even further still, the conduit work in *Creamer* did not require an electrical permit.

The court below and Defendants erroneously relied on two unpublished cases in finding the work associated with the conduit and junction boxes not to be electrical work. The first, *Palmer v. Nat’l Elec. Contractors Ass’n*, A-836-65, (App. Div. 1967), was brought by the State Highway Commissioner and the State Highway Department against several unions and posed a question as to what classification of workers could perform that work. (Pa444.) The second, *In re Nat’l Elec. Contractors Ass’n, Northern N.J. Chapter, Inc., and New Jersey State Elec. Workers Ass’n, I.B.E.W., AFL-CIO*, A-3802-90T2, A-3803-90T2, (App. Div. 1993) again involved a labor dispute between electrical unions and a general laborers union. (Pa455.) While both of those cases determined that unskilled laborers could install conduit and junction boxes, those cases did not consider what was meant by “electrical work” under the LPCL. Rather, the highway and utility work being performed in *Palmer* required no electrical permit as it was not governed by the UCC. *Palmer*, slip op. at \*3, \*8. Similarly, in *Nat’l Elec.*, the Court considered whether the installation of conduit is “electrical contracting within the meaning of the Electrical Contractors Licensing Act (“Licensing Act”), *N.J.S.A.* 45:5A-1 to -

22 and whether conduit should be considered “electrical equipment.” *Id.* at slip op. \*2, \*12. Further, it is submitted that the intent of the *Palmer* decision was to permit workers on public projects that are classified as “laborer” on the applicable Prevailing Wage Rate Determination sheet to perform such work as opposed to limiting that work to those designations in the “electrician” craft.<sup>6</sup> Those decisions were not meant to subvert licensing, permitting or other legal requirements associated with the performance of electrical work.

The trial court’s reliance of the above cases was misplaced as none of them interpreted the LPCL as none of the projects in those cases were subject to it. The only question presented in those cases was whether conduit work was work that had to be performed by an electrician. The definition of “electrical work” under the Licensing Act and those cases interpreting it, have has no impact on the definition of “electrical work” under the LPCL. In the matter *sub judice*, only the LPCL’s definition of “electrical work” is relevant. The LPCL requires all of those contractors who are to perform such work on projects governed by the LPCL to be expressly identified in any bid submitted is far more inclusive than the definition of electrical work in the Licensing Act. The conduit and junction box work at issue here is clearly electrical work

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<sup>6</sup> The bid documents specifically reference and fully integrate the applicable “New Jersey Department of Labor and Workforce Development Prevailing Wage Rate Determination” sheet into the contract documents. (Pa275.)

as defined by the LPCL, and thus, Tomco's failure to name itself, even if it were able to perform such work itself, which it cannot, is a material error that cannot be cured. Thus, the trial court erred when relying on the definition of electrical work as set forth in the Licensing Act as controlling over the LPCL.

**III. THE CONDUIT AND JUNCTION BOXES FOR BRANCH CIRCUITS REQUIRES AN ELECTRICAL PERMIT, AND AS TOMCO IS NOT A LICENSED ELECTRICIAN AND DOES NOT HAVE A PUBLIC WORKS CERTIFICATE FOR ELECTRICAL WORK, IT CANNOT SELF-PERFORM THAT WORK; THUS ITS BID IS MATERIALLY DEFECTIVE AS A MATTER OF LAW. (4T12-18 to 22)**

Quality Electric's December 4, 2024, proposal to Tomco specifically *excluded* the installation of underground conduits and junction boxes for items 136 - Electrical Work, 138 -Parking Lot Lighting, 139 -Site Lighting, and 140 -Sports Lighting. (See Quality Electric Proposal to Tomco, Pa122.) Those items correspond to bid items on the bid sheet, which relate to NJDOT Standard Spec Division 700-Electrical, Sections 701- General Items and 703-Highway Lighting, as updated by the Supplementary Specs. Further, the plans and specifications at Division 26-Electrical, included a separate section for "raceway and boxes for electrical systems," clearly advising bidders that this work was to be considered electrical work. (See Division 26 Table of Contents, Pa322.) Therefore, the Project bid specifications clearly classify the

installation of conduit and junction boxes as electrical work.

The Uniform Construction Code (the “UCC”), provides in *N.J.A.C. 5:23-2.15(b)(2)(i)* that an application for an electrical permit must include the name and license number of the contractor and that electrical work “shall not be undertaken except by persons licensed to perform such work pursuant to law . . . .” While a UCC permit does list some specific items under the area where an applicant includes a description of work in Section D. Technical Site Data, including “lighting fixtures,” “switches,” and “alarm devices,” such list is not exhaustive by any means. (Pa443.) For example, it does not list things like switchgear, transformers, etc. Simply because “conduit” is not listed on the application does not mean it is not subject to permitting, inspection, or other requirements established by the UCC.

Because Tomco is not a licensed electrical contractor, it is not eligible to apply for, nor obtain, an electrical permit. Further, because Tomco is not a licensed electrical contractor, it cannot comply with *N.J.A.C. 13:31-3.4*, which requires a licensee to “assume full responsibility for the inspection and supervision of all electrical work . . . to be performed by the business permit holder” and its employees. In the scenario proposed by Tomco, a subcontractor, namely Quality Electric, would be supervising a prime contractor (Tomco), in violation of the Licensing Act

Because installation of conduit and junction boxes on this Project is clearly electrical work within the confines of the bid specifications, the electrical code and the LPCL, Tomco is not permitted to perform such tasks because it cannot obtain an electrical permit.

Further, no party to this case has ever proffered any evidence that the work in question does not require a permit. Rather, Tomco certified that it was going to self-perform the conduit and junction box work “pursuant to Quality [Electric]’s permit” under Quality’s “supervision or inspection.” (*See* Schoonmaker Certification, ¶3-5, Pa130.) Thus, Tomco’s bid is materially defective, and the trial court applied the wrong definition of electrical work in the underlying matter.

**IV. THE TRIAL COURT ERRED IN DISMISSING PLAINTIFF’S COMPLAINT AS TOMCO’S BID MUST BE FOUND NON-RESPONSIVE BECAUSE THE COUNTY HAS KNOWLEDGE THAT TOMCO FAILED TO LIST ITSELF AS AN ELECTRICAL CONTRACTOR, DESPITE TOMCO INTENDING TO SELF-PERFORM ELECTRICAL WORK. (Pa115; 4T13-5 to 7)**

Despite Tomco knowing that it intended to self-perform the electrical conduit and junction box work at the time it submitted its bid, it failed to identify itself as doing so in its bid in violation of the LPCL. The Subcontractor Form including in solicitation clearly advised bidders that, in addition to listing principal subcontractors, if “Bidder is doing any of the



above listed in-house, submit company name, license number (if applicable) and evidence of business permit/ certificate of authorization as may be necessary.” (See Subcontractor Form, Exhibit D to Plaintiff’s Complaint, Pa18.) The Subcontractor Form even went so far as to include a blank line next to “In House” to make it clear that a Bidder was responsible for identifying itself if intending to perform work in one of the four subtrades listed in *N.J.S.A.* 40A:11-16:

**Electrical Work:**

In House \_\_\_\_\_ License Number \_\_\_\_\_  
Subcontractor \_\_\_\_\_ License Number \_\_\_\_\_

(*Ibid.*)

Even though Tomco lacks a license number, as it is not a licensed electrical contractor, such deficiency does not obviate it from having to conform to the LPCL. For example, while under the LPCL a bidder is required to list a subcontractor performing tele-data work, that subcontractor would not have an electrical contractor license number, because such work is specifically excepted under the Licensing Act. *See N.J.S.A.* 40A:11-16(a); *N.J.S.A.* 45:5A-18; *N.J.A.C.* 13:31-4.1. Therefore, Tomco was on notice that it was required to list itself as performing certain Electrical Work in-house. As with a tele-data subcontractor, it should have listed N/A or similar on the license number line. Tomco was also on notice that “failure to submit all of the above information

with the bid will result in rejection of said bid.” (See Subcontractor Form, Exhibit D to Plaintiff’s Complaint, Pa18.)

At no time did Tomco submit a pre-bid question, RFI, or protest questioning the installation of conduit and junction boxes considered to be electrical work. If Tomco did in fact disagree that such work was electrical work, it could have taken advantage of these opportunities to question the bid plans and specifications available to all bidders.

a. A PUBLIC ENTITY’S REVIEW OF A BID ENCOMPASSES MORE THAN THE FOUR CORNERS OF A BID

While a bidder is not required to obtain a proposal from a subcontractor when only listing one subcontractor in a trade specified in *N.J.S.A.* 40A:11-16 in its bid submission, here, Tomco did obtain a proposal from Quality. That proposal clearly shows the work that Quality intended to perform. More importantly, the record clearly shows that it is “not in dispute” that Quality Electric “explicitly excluded” the installation of conduit from its proposal to Tomco. (4T7-13 to 22.) Tomco admits that it intends to self-perform that work that Quality Electric excluded from its proposal. (See Text Messages between Quality Electric and Tomco, Pa124-128, and Certification of Thomas Schoonmaker ¶4, 6, Pa129-131.)

The court in *Stano* found that it was “not in the best interest of the municipality to award a contract to a bidder” when evidence was introduced that showed the bidder named a plumbing and heating subcontractor who was not prequalified to perform plumbing or heating work, was not licensed to do such work, and who had never performed such work. *Stano v. Soldo Constr. Co.*, 187 N.J. Super. 524, 535 (App. Div. 1983). Here, evidence has been introduced that clearly shows that Quality Electric never intended to perform the full scope of electrical work required by the plans and specifications.

- b. EVEN IF TOMCO COULD PERFORM THE ELECTRICAL WORK THAT IT INTENDED TO SELF-PERFORM WHEN IT SUBMITTED ITS BID, ITS BID IS MATERIALLY DEFECTIVE AS IT FAILED TO IDENTIFY ALL CONTRACTORS, INCLUDING ITSELF, THAT WOULD BE PERFORMING ELECTRICAL WORK ON THE PROJECT AND PROVIDE A CERTIFICATION THAT CLEARLY DELINEATED THE WORK AND PRICING IN VIOLATION OF THE LPCL’S BID SHOPPING LAWS.

Since conduit and junction boxes are clearly categorized as electrical work in the bid specifications and under the LPCL, Tomco was required to list all electrical contractors who would perform the electrical work under *N.J.S.A. 40A:11-16 (a)(2)*, including itself. As evidenced by the parties’ communication at the time of bid, Tomco knew that Quality Electric would not be performing all electrical work on the Project. (*See Text Messages,*

Pa124-128.) Despite knowing this, Tomco failed to identify in its bid any additional subcontractors, or itself, that would perform the electrical work, and further failed to describe the work it and quality would each be performing as required by the LPCL.

Tomco has conceded that more than one entity would perform electrical work on the Project, namely itself and Quality. As established by *N.J.S.A.* 40A:11-16 (a)(2), Tomco was required to identify itself and Quality in its bid and further clearly delineate the work that each would be performing and for what price. This requirement has been routinely upheld by the courts as a mechanism to prevent “bid shopping,” after an award of a bid. *See Gaglioti Contracting, Inc. v. City of Hoboken*, 307 N.J. Super 421, 429 (App. Div. 1997); and *see Star of Sea Concrete Corp. v. Lucas Bros., Inc.*, 370 N.J. Super. 60, 69-70 (App. Div. 2004). “[I]t clear that N.J.S.A. 40A:11-16 prohibits the substitution of unnamed subcontractors.” *Clyde N. Lattimer & Son Const. Co. Inc. v. Tp. of Monroe Utilities Authority*, 370 N.J. Super. 130, 138 (App. Div. 2004). As aptly noted by the County in its letter dated December 27, 2024, “No other electrician is allowed to work on this project, this would violate the bid shopping laws.” (Pa120.) Here, Tomco clearly intended to substitute Quality with itself for significant amounts of the Project’s electrical work.

c. BECAUSE OF THE MATERIAL DEFECTS IN TOMCO'S BID, THE COUNTY'S AWARD TO TOMCO IS ARBITRARY AND CAPRICIOUS AND IN VIOLATION OF THE LPCL

Under the LPCL, a contract in excess of the bid threshold must be awarded to the “lowest responsible bidder after public advertising for bids[.]” *N.J.S.A.* 40A:11-4. The “lowest responsible bidder” is defined in *N.J.S.A.* 40A:11-2(27) as the bidder (a) who offers the lowest price and is responsive; and (b) who is responsible. A bid is considered responsive when it conforms with all of the material “terms and conditions, specifications, legal requirements, and other provisions” of the solicitation. *N.J.S.A.* 40A:11-2(33). “The significance of the expression ‘lowest bidder’ is not restricted to the amount of the bid; it means also that the bid conforms with the specifications.” *Hillside Twp. v Sternin*, 25 N.J. 317, 324 (1957)(emphasis added). Such reasoning and finding has been routinely reaffirmed, with the New Jersey Supreme Court interpreting “the requirement to mean that the contract must also be awarded to the lowest bidder that complies with the substantive and procedural requirements in the bid advertisements and specifications.” *Meadowbrook Carting Co. v. Borough of Island Heights*, 138 N.J. 307, 313 (1994).

The purpose of the LPCL is “to curtail the discretion of local authorities by demanding strict compliance with public bidding guidelines.” *L. Pucillo &*

*Sons, Inc. v. Mayor and Council of Twp. of New Milford*, 73 N.J. 349, 356 (1977). It is firmly established in New Jersey that material conditions contained in bid specifications may not be waived by a contracting unit. *Twp. of Hillside v. Sternin*, 25 N.J. 317, 324 (1957). The two-part test for determining materiality as set forth in *River Vale v. Longo Construction Co.*, 127 N.J. Super. 207 (Law Div. 1974) has been upheld by the Supreme Court. See *Meadowbrook Carting Co. v. Borough of Island Heights*, 138 N.J. 307, 315 (1994). “In *River Vale*, Judge Pressler declared that after identifying the existence of a deviation, the issue is ‘whether a specific non-compliance constitutes a substantial [material] and hence non-waivable irregularity.’” *In re Protest of Award of On-Line Games Prod. & Operation Servs. Contract, Bid No. 95-X-20175*, 279 N.J. Super. 566, 594 (App. Div. 1995)(quoting *River Vale, supra*, 127 N.J. Super. at 216).

The *River Vale* test for determining whether a deviation is material is as follows:

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

*River Vale, supra*, 127 N.J. Super. at 216. “If the non-compliance is substantial and thus non-waivable, the inquiry is over because the bid is non-conforming, and a non-conforming bid is no bid at all.” *On-Line Games, supra*, 279 N.J. Super. at 595.

Here, as Tomco failed to name all contractors performing electrical work on the Project in its bid and provide the certification describing what work each work perform and what each were to be paid, its bid is materially defective. The waiving of such requirement is clearly not permitted under the *River Vale* test, as the County would be deprived of an assurance that Tomco would enter into a contract according to the specified requirements of the specifications, and such waiver would adversely affect competitive bidding by placing Tomco in a position of advantage over other bidders and would undermine the necessary common standard of competition. *See River Vale, supra*, 127 N.J. Super. at 216.

The LPCL provides, in pertinent part, “If a bidder does not submit a certificate or certificates to the contracting unit, the contracting unit shall award the contract to the next lowest responsible bidder.” *N.J.S.A.* 40A:11-16 (b) (2025). Here, Tomco did not submit the required certificates, yet the County failed to throw out its bid.

Here, the deficiency in Tomco’s bid is material non-waivable as expressly stated by the LPCL. Further the failure list all electrical

subcontractors deprives the County of assurance that “the contract will be entered into, performed and guaranteed according to its specified requirements,” and further, such waiver certainly “adversely affect[s] competitive bidding by placing [Tomco] in a position of advantage over other bidders” and by “undermining the necessary common standard of competition.” *River Vale, supra*, 127 N.J. Super. at 216. *See also L. Pucillo & Sons, Inc. v. Township of Belleville*, 249 N.J. Super. 536, 547 (App. Div.), (*cert. denied*, 127 N.J. 551 (1991)).

“Strict compliance is required, and a municipality generally is without discretion to accept a defective bid.” *Meadowbrook*, 138 N.J. at 314, *quoting, L. Pucillo, supra*, 73 N.J. 356. “The long-standing judicial policy in construing cases governed by the Local Public Contracts Law . . . has been to curtail the discretion of local authorities by demanding strict compliance with the with public bidding guidelines.” *L. Pucillo & Sons, Inc. v. New Milford*, 73 N.J. 349, 356 (1977). “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.” *Ibid.*, *quoting, Hillside, supra*, 25 N.J. at 326.

The evidence unequivocally shows that Quality Electric never intended to perform the full scope of electrical work for Tomco, Tomco failed to name itself



as self-performing and, as Tomco is not licensed, it cannot self-perform the electrical work on the Project. The County, in failing to throw out Tomco's bid has acted arbitrarily and capriciously and inappropriately used its discretion to waive certain statutory bid requirements. It did not hold tightly to the courts' directive that strict compliance to the bid specifications and statutory requirements be observed.

The purpose of the LPCL is to "secure for the public the benefits of unfettered competition." *Terminal Constr. Corp. v. Atlantic County Sewerage Auth.*, 67 N.J. 403, 410 (1975). In accepting Tomco's bid, the County has acted contrary to the LPCL.

d. THE TRIAL COURT'S UPHOLDING OF THE COUNTY'S AWARD TO TOMCO WAS ARBITRARY, UNREASONABLE, AND CAPRICIOUS

The trial court's upholding of the County's award of contract to Tomco was in error, as the County's award to Tomco was arbitrary, unreasonable, and capricious. As the record clearly shows, Tomco intended to self-perform "electrical work" as described and defined by the LPCP. However, while it is Plaintiff's position that Tomco is not qualified to perform such work, even if it were, Tomco failed to list itself as performing this work in its bid. Once this

information came to light, as in *Stano*, this evidence must be used to correctly evaluate the bid. See, *Stano, supra*, 187 N.J. Super. at 535.

**CONCLUSION**

For the reasons set forth herein, Plaintiff respectfully submits that the trial court erred in dismissing its complaint. The work Tomco intends to perform is clearly “electrical work” under the LPCL. By failing to list itself as performing this work, Tomco has violated anti-bid shopping laws and *N.J.S.A.* 40A:11-16. By upholding the County’s award of contract to Tomco, the court affirmed an arbitrary and capricious action, whereby the County ignored and continues to ignore that Tomco’s bid is materially defective and in violation of the LPCL.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "John J. Lavin", written in a cursive style.

John J. Lavin

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APPLIED LANDSCAPE TECHNOLOGIES,

Plaintiff

vs.

COUNTY OF MIDDLESEX and TOMCO  
CONSTRUCTION.

Defendants

SUPERIOR COURT OF NEW  
JERSEY, APPELLATE DIVISION  
DOCKET NO.: A-002030-24

Civil Action

On Appeal from the Superior Court of  
New Jersey, Law Division, Middlesex  
County, Docket No.: MID-L-7337-24

SAT BELOW:

The Honorable Benjamin S. Bucca, Jr.,  
J.S.C.

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BRIEF ON BEHALF OF RESPONDENT, COUNTY OF MIDDLESEX

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**PRELIMINARY STATEMENT**

In this matter, Appellant Applied Landscape Technologies (“Applied” or “ALT”) has appealed the trial court’s decision to affirm the County of Middlesex (“County”) award of a contract to the lowest responsible bidder Tomco Construction (“Tomco”). This Court should affirm as the factors under Crowe weigh heavily in favor of denying ALT’s request for equitable relief.

ALT is unable to succeed on the merits as Tomco’s bid submission was responsive, unambiguous, and fully compliant with the bid specifications and the Local Public Contracts Law. ALT asserts only that the electrical subcontractor named in Tomco’s bid, Quality Electric (“Quality”), is required to excavate and install empty conduit. However, under this Court’s precedent and the guidance of the Board of Examiners of Electrical Contractors, ALT is wrong and a licensed electrician is not required to install empty conduit for the simple reason that there is nothing electrical that pertains to empty conduit. Instead, a licensed electrician is only required once the electrical wiring is installed and the electrician would inspect the conduit beforehand to ensure that it is compliant with building code.

In its latest effort, ALT now seeks to assert that the scope of electrical work required to be performed by a licensed electrician is different under the Local Public Contracts Law when public bidding is involved. This contention again is meritless as the Local Public Contracts Law pertains to public bidding and does not seek to



regulate what does and does not constitute electrical work. That is instead regulated under the Electrical Contractor's Licensing Act.

Further, it should be noted that this matter arises from a challenge to a public bid award. In awarding the contract to the lowest responsible bidder, the County's inquiry was limited to determining whether Tomco, as the lowest responsible bidder, submitted a responsive bid. It is not contested that Tomco's bid on its face was unambiguous and fully compliant with the public bidding laws. Instead ALT seeks to go well beyond the bid documents to challenge the understanding between Tomco and its electrical subcontractor. Such an inquiry would not be appropriate for the County to undertake under the Local Public Contracts Law and accordingly should not be before this Court.

Lastly, even if ALT's position is correct, which we strongly contest, the appropriate remedy under this Court's guidance in Clyde N. Lattimer & Son, would be to award the contract to Tomco and issue a clarifying Order requiring Tomco's electrical subcontractor to excavate and install the empty conduit.

For these reasons, this Court should affirm the trial court's decision and lift the stay in this matter.

**STATEMENT OF FACTS**

The County hereby incorporates by reference the detailed Statement of Facts contained in Tomco's brief.

**PROCEDURAL HISTORY**

The County hereby incorporates by reference the detailed Procedural History contained in Tomco's brief.

**LEGAL ARGUMENT**

**I. THE ABUSE OF DISCRETION STANDARD SHOULD APPLY TO THE TRIAL COURT’S DECISION TO DENY ALT’S REQUEST FOR INJUNCTIVE RELIEF.**

The County joins the assertions set forth by the Respondent Tomco that the applicable standard in this case is the abuse of discretion standard. In this matter ALT appeals the trial court’s decision to deny its request for injunctive relief and its determination that the County’s decision to award a contract to Tomco, the lowest responsible bidder, was not arbitrary, unreasonable, or capricious. It is well settled that such decisions should not be disturbed unless the trial court abused its discretion. Rinaldo v. RLR Inv., LLC, 387 N.J. Super. 387, 395–96 (App. Div. 2006) (citing Horizon Health Ctr. v. Felicissimo, 135 N.J. 126, 137 (1994)).

**II. THE TRIAL COURT CORRECTLY RELIED ON THIS COURT'S PRECEDENT AND THE GUIDANCE FROM THE BOARD OF EXAMINER'S FOR ELECTRICAL CONTRACTORS IN HOLDING THAT THE INSTALLATION OF EMPTY CONDUIT AND JUNCTION BOXES IS NOT ELECTRICAL WORK. (4T)**

As Tomco correctly asserts in its brief, the trial court correctly relied on this Court's decisions in Palmer v. Nat'l Elec. Contractors Ass'n, A-836-65, slip op. at 2 (App. Div. 1967). (Pa446); In re Nat'l Elec. Contractors Ass'n, N. N.J. Chapter, Inc., and New Jersey State Elec. Workers Ass'n, I.B.E.W., AFL-CIO, A-3802-90T2, A-3803-90T2, slip op. at 2 (App. Div. 1993) (Pa456); and In re Final Agency Decision of Bd. of Examiners of Elec. Contractors as To Conduit Installation By J. Fletcher Creamer & Son, Inc., 356 N.J. Super. 42, 53–54 (App. Div. 2002) and the final agency decision of the Board of Examiners of Electrical Contractors that the installation of empty underground conduit and associated junction boxes is not “electrical work” under New Jersey law and therefore does not have to be installed by a licensed electrical contractor.

The key issue in those cases is when does the installation of conduit become electrical work that must be performed by a licensed electrician pursuant to the Electrical Contractor's Licensing Act (“the Act”). Those cases stand for the commonsensical proposition that the installation of empty conduit does not become

electrical work until the actual electrical wiring is installed, which must be performed by a licensed electrician who prior to inserting the electrical wiring would inspect the empty conduit to ensure that it is compliant with building code. Under ALT's interpretation, empty conduit in itself is electrical work and would need to be installed by a licensed electrical subcontractor whether that conduit would be used for a construction project or if it's only intended purpose would be to sit empty as a work of contemporary art. That simply is not the case under the law as set forth in the above-referenced cases and the position of the Board of Examiners of Electrical Contractors, the agency that oversees the licensing of electrical contracting work.

**III. THE LOCAL PUBLIC CONTRACTS LAW DOES NOT GOVERN OR REGULATE WHAT DOES OR DOES NOT CONSTITUTE ELECTRICAL WORK.**

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Apparently conceding that this Court's decisions in Palmer and its progeny<sup>1</sup> are controlling and that the installation of empty conduit does not constitute "electrical work" that must be performed by a licensed electrician under the Act, ALT now asserts that the Palmer line of cases is distinguishable because the Local Public Contracts Law regulates what constitutes electrical work and supersedes the Electrical Contractor's Licensing Act when public bidding is involved. Nonsense.

In its brief, ALT relies on one statutory section pertaining to the naming of subcontractors in public bidding to reach this conclusion. Namely, N.J.S.A. 40A:11-16 provides in pertinent part that a bidder must name a subcontractor that is performing "(3) Electrical work, including any electrical power plants, tele-data, fire alarm, or security system" N.J.S.A. 40A:11-16.

Consistent with the oft-cited dictum that Legislatures do not "hide elephants in mouseholes" it would be peculiar for the Legislature, when it passed the Local Public Contracts Law, to have Legislatively superseded the Electrical Contractor's

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<sup>1</sup> In re Final Agency Decision of Bd. of Examiners of Elec. Contractors as To Conduit Installation By J. Fletcher Creamer & Son, Inc., 356 N.J. Super. 42 (App. Div. 2002); In re Nat'l Elec. Contractors Ass'n, Northern N.J. Chapter, Inc., and New Jersey State Elec. Workers Ass'n, I.B.E.W., AFL-CIO, A-3802-90T2, A-3803-90T2, (App. Div.1993) (Pa455); Palmer v. Nat'l Elec. Contractors Ass'n, A-836-65, (App. Div. 1967) (Pa 446);

Licensing Act and its definition of electrical work to apply a broader definition of electrical work when public bidding is involved without even referencing the Act. See Whitman v. Am Trucking Ass'ns, 531 U.S. 457, 468 (2001) (stating that “Congress ... does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”) More specifically, one would expect some explanation in the legislation why the Legislature deemed it appropriate to change the definition of electrical work under Electrical Contractor’s Licensing Act when public bidding is involved and why such a Legislative amendment would be listed under the Local Public Contracts Law and not the Electrical Contractor’s Licensing Act. Moreover, one would also expect to see some explanation as to how public safety is furthered by applying one standard when electrical work is publicly bid compared to all other “electrical work” that is not subject to a public bidding process.

Moreover, such a requirement would have the absurd result of requiring alarm installation companies who employ alarm installers with a fire alarm, burglar alarm or locksmith license pursuant to N.J.S.A. 45:5A-24 to hire electricians if they seek to bid for public work. That is, under ALT’s preferred construction of the Local Public Contracts Law, only licensed electricians can perform publicly bid “tele-data, fire alarm, or security system” work. N.J.S.A. 40A:11-16. DeLisa v. County of Bergen, 165 N.J. 140, 147 (2000); State v. Wrotny, 221 N.J. Super. 226, 229 (App.



Div. 1987) (stating that that statutory constructions that reach a ridiculous or absurd result are disfavored).

Lastly, even assuming that ALT'S construction of N.J.S.A. 40A:11-16 is correct, a matter that is denied, that would only mean that electricians are required to perform "tele-data, fire alarm, or security system" work. However, that says absolutely nothing about the issue in this case: whether the excavation and installation of empty conduit is "electrical work."

However, there is a more logical construction of N.J.S.A. 40A:11-16 that would not engender such absurd results at odds with common practice in New Jersey. That is, that N.J.S.A. 40A:11-16 only requires a bidder to name a subcontractor that is performing "electrical work" as understood pursuant to the Electrical Contractor's Licensing Act, and that such electrical work could include the branch circuit wiring necessary to connect a branch circuit to an alarm box for a fire alarm or security system for example. See N.J.S.A. 45:5A-18 (excluding work performed by a licensed alarm business provided that it is not "branch circuit wiring" required to be performed by an electrician); see also T2, 64:8-17 (ALT's expert defining what constitutes branch circuit wiring that requires electrical licensure). Such a construction is consistent with the statutory structure which states that it applies to "Electrical work, including" and lists categories of work that could involve electrical work if the alarm or telecommunication system needed to be connected to

branch circuit wiring. Such a construction would also harmonize the Local Public Contracts Law with the Electrical Contractor's Licensing Act and avoid a construction that would create a conflict between these statutory sections or an explicable carve-out when electrical work is publicly bid.

**IV. ALT'S ARGUMENTS WITH REGARD TO THE SCOPE OF WORK TOMCO'S SUBCONTRACTOR WILL PERFORM SHOULD NOT BE CONSIDERED INsofar AS THE ISSUE IS WHETHER THE COUNTY IMPROPERLY AWARDED THE CONTRACT TO TOMCO AND IN DOING SO, THE COUNTY GENERALLY CAN ONLY CONSIDER THE FOUR CORNERS OF THE BID SUBMISSION.**

In this matter, ALT appeals the County's decision to award the contract to Tomco after the County determined that Tomco's bid was responsive and compliant with the bid specifications and the Local Public Contracts Law. It is not disputed that Tomco's bid submission was unambiguous and fully compliant with both the bid specifications and the Local Public Contracts Law. Instead, ALT has improperly asked the trial court and now this Court to go beyond the four corners of the bid submission and litigate how the work will be allocated between Tomco and its electrical subcontractor. Because the County would not be able to undertake such an examination under the Local Public Contracts Law when facing a bid such as Tomco's that was unambiguous, responsive, and fully compliant with the law, it is not appropriate for a reviewing court to do so. That is, this matter is a challenge to a bid award and the proper inquiry is whether the County's decision to award the contract was arbitrary, unreasonable, or capricious. In re Protest of the Award of On-Line Games Prod. & Operation Servs. Contract, Bid No. 95-X-20175, 279 N.J. Super. 566, 589 (App. Div. 1995).

As Tomco correctly argues, when determining whether a bid is responsive, the Legislature gave the County very limited discretion to consider issues beyond the four corners of the bid. N.J.S.A. 40A:11-4 (Every contract “shall be awarded . . . to the lowest responsible bidder”). This is contrary to other public bidding contexts such as public bidding when the State is involved or in determining whether a bidder is responsible. See N.J.S.A. 40A:11-4; In re Jasper Seating Co., Inc., 406 N.J. Super. 213, 222 (App. Div. 2009) (recognizing that State bidding laws grant “broad latitude and discretion” concerning awarding State purchases).

By challenging Tomco’s bid based on matters that go well beyond the four corners of Tomco’s bid when Tomco’s bid was unambiguous and fully compliant, ALT inferentially is asserting that it would be appropriate for the County to do so. If that were the case, and a public body subject to the Local Public Contracts Law could arbitrarily investigate and scrutinize any aspect of a bidder’s submission beyond the four corners of the bid submission, it would open the door to favoritism, improvidence, extravagance or corruption. Pied Piper Ice Cream, Inc. v. Essex Cnty. Park Comm'n, 132 N.J. Super. 480, 484 (App. Div. 1975).

For example, under ALT’s theory, a public entity could demand a disfavored bidder to provide copies of its corporate books because it doubts that it has the financial capability to pay its employees at the prevailing wage rate. Or, in this case, a public entity could demand from a disfavored bidder all documentation evidencing

the scope of work to be performed by each of its subcontractors. Absent ambiguity on the face of a bid or a credible accusation of fraud, it would be wholly inappropriate under the Local Public Contracts Law to permit local government entities the unfettered discretion to selectively request discovery from disfavored bidders as a means to disqualify them in favor of a preferred bidder.

Instead, the only inquiry should be whether Tomco, as the lowest responsible bidder, submitted a responsive bid compliant with the bid specifications and the Local Public Contracts Law. Tomco indisputably did so.

V. **EVEN IF ALT IS CORRECT AND TOMCO'S ELECTRICAL SUBCONTRACTOR IS REQUIRED TO INSTALL EMPTY CONDUITS, UNDER CLYDE N. LATTIMER, THE APPROPRIATE REMEDY WOULD BE TO AWARD THE CONTRACT TO TOMCO WITH THE REQUIREMENT THAT ITS SUBCONTRACTOR PERFORM ALL CONDUIT INSTALLATION WORK.**

Even assuming ALT is correct in its assertion that an electrical subcontractor must install empty conduit, under this Court's guidance in Clyde N. Lattimer & Son, the appropriate remedy is not to disqualify Tomco's bid but to enter a clarifying Order that Tomco's subcontractor must perform such work. Clyde N. Lattimer & Son Const. Co. v. Twp. of Monroe Utilities Auth., 370 N.J. Super. 130 (App. Div. 2004).

In Clyde N. Lattimer & Son, this Court addressed an amendment to N.J.S.A. 40A:11-16 that permitted bidders to name multiple subcontractors in a given specialty and to award a contract to each named subcontractor. Id. at 136. In that amendment, a bidder naming multiple subcontractors for each specialty trade was required to submit to the contracting unit a certificate signed by the bidder listing each subcontractor named in the bid for that category. The certificate should further set forth the scope of work for which the subcontractor has submitted a price quote. Id. The issue in that case was whether that same requirement should apply under N.J.S.A. 40A:11-16 when only a single subcontractor was named for a specialty trade category.

In rejecting the argument that a price quote was required when only a single subcontractor was named under N.J.S.A. 40A:11-16, this Court noted that:

Although plaintiff argues that completion of the project could stall if [the subcontractor] Hamilton charges [the bidding general contractor] MMC a price well beyond that envisioned by MMC for the electrical work, that risk is assumed by MMC who is obliged to use Hamilton for the job. MMC cannot substitute a subcontractor on a post-bid waiver from the Authority if Hamilton insists on a price beyond MMC's estimate of the cost for the electrical work. Stano v. Soldo Construction Co., supra, made it clear that N.J.S.A. 40A:11-16 prohibits the substitution of unnamed subcontractors. 187 N.J. Super. at 535. The concern that the playing field is not level because MMC could substitute an unnamed subcontractor is simply unfounded.

Id. at 137-138 (parentheticals added).

This Court went on to note:

Since the named subcontractor must be used on the project under the “will contract” language of N.J.S.A. 40A:11-16, it would appear the subcontractor, rather than the bidder, enjoys the more favorable bargaining position in adhering to its price despite the fact that it might exceed the contractor's estimate. . . .

Notwithstanding what we have said, we do not disagree with the proposition that a public works contractor should obtain a pre-bid price quote from a prospective subcontractor. We indicate only that our interpretation of the relevant legislation does not require that a pre-bid quote must be obtained from a single subcontractor.

Clyde N. Lattimer, 370 N.J. Super. at 136-39.

Consistent with Clyde N. Lattimer, if Tomco was not even required to obtain a pre-bid quote from its electrical subcontractor, then it certainly can agree to amend the scope of work to be performed by its subcontractor for which it did obtain a price quotation provided that its named subcontractor is the only one performing the work and Tomco does not alter its bid price.

Accordingly, in this case, if this Court were to determine that Tomco's electrical subcontractor must install empty conduit, insofar as Tomco has named that subcontractor to perform all licensed electrical work on the Project, the appropriate remedy would be to clarify that requirement and require Tomco's electrical subcontractor to perform such work. Consistent with Clyde N. Lattimer & Son, Tomco would bear the risk of negotiating with its subcontractor the cost of performing the work to install empty conduit.

Moreover, insofar as this matter is before this Court as a matter arising in equity, such a result would be the more equitable outcome insofar as a bidder like Tomco naturally could have relied on the guidance of the Board of Examiners of Electrical Contractors and this Court in the Palmer line of cases<sup>2</sup> to determine that it

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<sup>2</sup> Palmer v. Nat'l Elec. Contractors Ass'n, A-836-65, slip op. at 2 (App. Div. 1967). (Pa446); In re Nat'l Elec. Contractors Ass'n, N. N.J. Chapter, Inc., and New Jersey State Elec. Workers Ass'n, I.B.E.W., AFL-CIO, A-3802-90T2, A-3803-90T2, slip op. at 2 (App. Div. 1993) (Pa456); and In re Final Agency Decision of Bd. of Examiners of Elec. Contractors as To Conduit Installation By J. Fletcher Creamer & Son, Inc., 356 N.J. Super. 42, 53–54 (App. Div. 2002)



could excavate and install empty conduit provided its electrical subcontractor inspects or supervises such installation to make sure it is consistent with the Local Building Code and performs all the necessary electrical work. To disqualify the lowest responsible bidder to the detriment of the taxpayers of Middlesex County due to a subsequent post-bid change in the law would be the essence of inequitable.

**VI. THE COUNTY AGREES WITH ALL REMAINING  
ARGUMENTS IN TOMCO'S APPELLATE SUBMISSION.**

Further, the County also joins all of Tomco's remaining arguments particularly whether ALT has demonstrated that it is entitled to injunctive relief under Crowe v. De Gioia, 90 N.J. 126 (1982), which it has not.

**CONCLUSION**

Based upon the foregoing reasons, and the reasons set forth in Tomco's submission, the County respectfully requests that this Court affirm the trial court's decision not to disturb the County's award of a contract to and dissolve the stay in this matter.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael S. Williams".

Michael S. Williams  
Deputy County Counsel

Dated: April 11, 2025

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APPLIED LANDSCAPE  
TECHNOLOGIES,

Plaintiff/Appellant,

v.

COUNTY OF MIDDLESEX and TOMCO  
CONSTRUCTION,

Defendants/Respondents

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NUMBER:A-002030-24

On Appeal From:  
SUPERIOR COURT OF NEW JERSEY  
MIDDLESEX COUNTY: LAW  
DIVISION

Docket No.: MID-L-7337-24

Sat Below:

Hon. Bengamin S. Bucca, Jr.

CIVIL ACTION

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DEFENDANT/RESPONDENT TOMCO CONSTRUCTION'S  
BRIEF IN OPPOSITION TO APPLIED LANDSCAPE  
TECHNOLOGIES' APPEAL

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## PRELIMINARY STATEMENT

This case arises from an unsuccessful challenge brought by a disappointed bidder, Applied Landscape Technologies (“ALT”), protesting the proper award of a construction contract by the County of Middlesex (“County”) to Tomco Construction (“Tomco”), the lowest responsible bidder. Specifically, ALT alleges that Tomco’s bid is defective for failing to name all electrical contractors/subcontractors that Tomco would use on the Project to do all of the Project’s “electrical work”.

Tomco identified in its bid Quality Electrical Const. (“Quality”) as its only electrical subcontractor. Tomco is, and at all times has been, committed to having Quality perform all work required to be performed by a licensed electrical contractor. Tomco received a pre-bid quotation from Quality to perform all electrical work on the Project, and Quality stands “ready, willing and able” to perform that work for Tomco. Tomco never intended to self-perform any work that is required to be performed by a licensed electrical contractor. ALT maintains that Quality’s Proposal excluded work required to be performed by a licensed electrical contractor. ALT’s position is contrary to settled New Jersey law.

Importantly, however, under New Jersey law Tomco was not even required to obtain any pre-bid quotation from Quality to perform the work. Rather, Tomco could name any qualified electrical subcontractor and, if awarded the Contract,

Tomco would be required to retain that listed subcontractor to perform all such work. Moreover, Tomco was not required under the Local Public Contracts Law (“LPCL”) or the relevant Solicitation for this Project to identify itself as performing “electrical work” since it was not performing any “electrical work”. And, even if Tomco was required to identify itself pursuant to the Solicitation, such an omission would be waivable.

ALT seeks to get this Court’s attention by claiming the definition of “electrical work” in the LPCL is an issue of first impression and argues that the installation of empty electrical conduit is “electrical work” that: (a) must be performed by a licensed electrical contractor and (b) required Tomco to identify itself in its bid as self-performing “electrical work”. Again, ALT is wrong. The LPCL does not require a bidder to identify the work it intends to self-perform. Moreover, to the extent such a requirement can be found in the Solicitation for this Project, long-standing and settled New Jersey law instructs that installation of empty underground conduit and associated junction boxes is not “electrical work” and need not be performed by a licensed electrical contractor. In actuality, there is nothing novel about any of ALT’s arguments and contrary to ALT’s baseless assertion, the LPCL does not define “electrical work”.

The County’s award of the Contract to Tomco was proper, and the County did not act arbitrarily or capriciously in making such award. ALT sought the aid of the

trial court to invade the discretion of the County to nullify the award of the Contract to Tomco. After full briefing, production of limited documents, a deposition, oral argument, additional briefing and a factual hearing with live testimony, the trial court properly and with sound reasoning rejected ALT's argument, found Tomco's bid not to be defective, denied ALT's application, upheld the County's decision and dismissed ALT's Complaint thereby dissolving the temporary restraints that had previously been issued (with the consent of defendants).

### **PROCEDURAL HISTORY**

On or about December 26, 2024, ALT filed a Verified Complaint, supporting papers and an Order to Show Cause seeking injunctive relief including nullifying the award of the Contract to Tomco and to have the Contract awarded to ALT. (Pa1). Initially, ALT's application was premised on two theories: (1) Tomco failed to identify all electrical subcontractors that will be used on the Project and (2) Tomco failed to include a current New Jersey Landscape Irrigation License with its bid. (See Pa4). The second argument was ultimately withdrawn by ALT and is not part of this application to this Court. (See 3T5-20:6-1).

After extensive briefing and limited discovery, including ALT deposing John Faccas of Quality, on January 28, 2025 Judge Bucca entertained a lengthy oral argument. (See 2T). Judge Bucca did not render a decision upon the conclusion of that oral argument and instead requested a live witness hearing. After the County

requested that the hearing be expedited (Da284 - when referencing “Da” Tomco is relying upon the appendix submitted by the County), that hearing was held on March 5, 2025 and focused on whether the installation of empty underground conduit and associated junction boxes — the scope of work that was excluded from Quality’s Proposal to Tomco — must be installed only by a licensed electrical contractor. (3T6-2:3).

On March 7, 2025, Judge Bucca issued a Decision and Order providing that the County did not act arbitrarily, capriciously or unreasonably in awarding the Contract to Tomco. (Pa115). Specifically, the trial court held that the caselaw in New Jersey is clear and that the work excluded from Quality’s proposal to Tomco is not “electrical work” and therefore does not need to be performed or supervised by a licensed electrical contractor. (See 4T12–12:22). Specifically, Judge Bucca ruled:

However, this Court finds that the law argued by defendant is clear. Conduit work in and of itself is not electrical work.

This work can be performed by a laborer because it does not require any special skill, experience or training.

As a result, this Court agrees with defendants, that the conduit work to be performed by Tomco does not need to be supervised by a licensed electrician because under the case law it is not considered electrical work.

As to the issue of installation of the conduit to this -- to this Court case law is clear. It’s not considered electrical work.

As a result, the Court cannot find that the award of the contract to Comco (sic) -- to Tomco was arbitrary, capricious or unreasonable.

(4T12-12:13-3). Accordingly, Judge Bucca dismissed ALT's Complaint thereby dissolving the temporary restraints that had been issued with the consent of all parties, and also denied ALT's request for a stay pending Appeal. (4T13-4:25).

On March 7, 2025, ALT submitted its Application for Permission to File an Emergent Motion seeking a stay from this Court. Later that day, the Honorable Lisa Perez Friscia signed an Order granting ALT a limited injunction precluding any work on the Project pending further Order and also setting a briefing schedule. Upon the conclusion of briefing, by Order dated March 20, 2025, the Appellate Division granted a stay pending appeal, accelerated the appeal, set a briefing schedule and scheduled an April 29, 2025 return date.

### **STATEMENT OF FACTS**

#### **A. The Solicitation And Tomco's Bid**

In or about October of 2024, the County solicited bids for the Athletic Fields in Thomas Edison Park, County Project #EDI8017 (the "Project" or "Edison Park"). (Da57 ¶4, Da63). The County's solicitation ("Solicitation") provided that bids were due on or before December 5, 2024. Id.

The Solicitation also set forth various requirements that all bidders were to follow, including the information that must be submitted relating to the identified



“specialty trade subcontractors” (plumbing; steam power plants, steam and hot water heating and ventilating; electrical; and structural steel and ornamental iron work) required to be identified in each bid pursuant to N.J.S.A. 40A:11-16. (Id.). Tomco identified Quality as its only electrical subcontractor for all portions of the Project’s electrical work. (Da59, ¶16; Da126).

On December 5, 2024 the County received five bids. Tomco submitted the lowest bid in the amount of \$77,985,000.00 and ALT submitted the second lowest bid in the amount of \$78,147,543.00. (Pa2, ¶7).

**B. Quality’s Proposal To Tomco Included All Work Required To Be Performed By A Licensed Electrical Subcontractor**

For the electrical portions of the Project, on December 4, 2024 Tomco received Quality’s written Proposal for it to do all portions of the Project’s electrical work. (Da59, ¶14; Pa122). Quality’s Proposal to Tomco excluded “installation of underground conduits and junction boxes” for certain items. (Pa122).

Quality has worked with Tomco many times in the past, and Quality routinely omits the work of installing empty conduit and junction boxes from its proposals because this work does not need to be performed by a licensed electrical contractor. (Pa130, ¶3). Non-electrical contractors installing empty electrical conduit has been the standard practice in the construction industry for years. (Da290-Da299).

Notably, however, Quality’s Proposal to Tomco did not exempt Quality’s supervision/inspection of this work to be performed by Tomco. (Da288, ¶5). In the

past, Quality would supervise/inspect Tomco's work to ensure that installed empty electrical conduit and junction boxes meet required Code requirements and will pass inspection. (Da288, ¶4). Tomco intended Quality to, and Tomco understood Quality would, do the same on this Project because the electrical wiring would be done by Quality pursuant to Quality's permit for the Project. (Da299, ¶6).

Importantly, Mr. John Faccas, senior representative of Quality, was deposed by ALT on January 15, 2025. Mr. Faccas confirmed that Quality's written pre-bid Proposal to Tomco included all work required to be performed by an electrical subcontractor.

Q. Now, the proposals submitted to Tomco and to Applied Landscape Technologies, were those for the complete scope of electrical work for the project?

A. Yes, they were.

(Pa43 at 10:16-20) (emphasis added).

Mr. Faccas has repeatedly confirmed that that Quality's proposal is still valid and that Quality stands "ready, willing and able" to perform all electrical work. (Da59, ¶20; Pa496, 23:16-21; Pa508, 35:18-24; Pa509, 36:2-6).

### **C. ALT's Protest And The County's Response**

On December 18, 2024, ALT, through counsel, submitted a letter of protest to the County, protesting Tomco's bid as non-responsive. (Pa90). The County carefully considered ALT's bid protest letter and rejected ALT's argument. (Pa117).

Specifically, with regard to the electrical subcontractor, the Project engineer concluded:

Tomco stated that they are using Quality Electric for all electrical work for the project on page 51 of the supplemental specifications. No other electrician is allowed to work on this project, this would violate the bid shopping laws. Without documentation from Quality Electric, I would consider this hearsay. As hearsay, the County must uphold the bid documents and Quality Electric shall be the only electrician allowed on the project.

(Pa120).

Ultimately, the Project Engineer concluded that “I don’t believe there is enough merit to reject Tomco’s bid.” (Pa121). After carefully considering both ALT’s protest letter and the Project Engineer’s consideration of and response thereto, on December 19, 2024, the County Board of Commissioners, through Resolution 24-1632-R, properly awarded the contract for the Project to Tomco. (Pa97, Pa107).

By letter dated December 27, 2024, County Counsel wrote to counsel for ALT and advised that its bid protest was rejected and that the Contract was awarded to Tomco. Importantly, County Counsel addressed in detail and rejected the factual and legal arguments made by ALT. (Pa117-Pa119). Specifically, County Counsel wrote in relevant part:

The County further rejects Applied’s claim that Tomco failed to list all electrical subcontractors who will perform

the work on the Project based on speculative statements and hearsay. Tomco identified Quality Electrical Construction as its electrical subcontractor in its Bid submission and completed the itemized bid sheet containing numerous line items for the electrical work to be performed for the Project. Tomco being the lowest, apparent and responsive bidder is bound by its submissions and will be required to uphold its responsibilities in accordance with the Bid Specifications and the LPCL.

(Pa119).

As evidenced above, the County thoughtfully considered ALT's bid protest, found it lacked merit and properly awarded the Contract to Tomco.

**D. ALT's Current Position**

At the trial court level, ALT relied almost exclusively on the Certification and testimony of its expert, Mr. Porcello, for the proposition that installation of empty underground conduit and associated junctions boxes must be performed by a licensed electrical contractor. Mr. Porcello's testimony was, to say the least, conflicting and at odds with settled New Jersey law. Indeed, Mr. Porcello was uninformed about controlling New Jersey law and when presented with the law, simply shrugged it off by stating he disagreed with it. In other words, Mr. Porcello was testifying as to what he wanted New Jersey law to be, rather than what it is.

Specifically:

1. Mr. Porcello initially testified that the National Electric Code ("NEC") and New Jersey's Uniform Construction Code ("UCC") required the installation of the

underground conduit and junction boxes to be performed by a licensed electrician. (Pa634 at 64:22-65:6; Pa651 at 81:25-82:15; Pa254-Pa255, ¶¶6-9). Under cross examination, Mr. Porcello conceded that the NEC and UCC relate to how work is performed, not who does the work. (Pa657 at 87:20-88:14). When presented with controlling caselaw stating that neither the NEC nor UCC dictate what work was to be performed by a licensed electrical contractor, he stated he did not read the law despite being apprised by ALT's counsel of Tomco's briefing on this point. (Pa665 at 95:1-25; Pa669 at 99:19-101:24)<sup>1</sup>. When informed of the law, he also testified that he disagreed with such law (discussed infra). (3/5/25 Tr. at 99:19-101:24).

2. Mr. Porcello testified that installation of empty underground conduit requires skilled labor that must be performed by a licensed electrical contractor. When presented with controlling caselaw that explicitly rejected that argument, Mr. Porcello testified that he disagreed with the analysis (discussed infra). (Pa669-Pa771 at 99:19-101:24).
3. ALT argued that because certain work required by the Project's technical specifications (which were prepared by local architects and engineers and which also incorporate the Department of Transportation's Standard Specifications) was listed in the "electrical" section, this means such work is "electrical work". (Pa641 at 71:5-72:4). However, Mr. Porcello admitted that merely listing work under a heading entitled "electrical" does not mean that work must be performed by a licensed electrical contractor. (Pa642 at 72:5-15). He further conceded that the Electrical Contractors Licensing Act ("Act") - and not the Local Public Contracts Law, NEC, UCC, local

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<sup>1</sup> Remarkably, Mr. Porcello tried to distinguish the three controlling Appellate Division cases, discussed infra, by claiming they dealt with the utility exception in the Act. However, he was completely unaware of the facts of any case or if they dealt with the utility exception. (Pa 666 at 96:1-98:6).

architects and engineers or the Department of Transportation – determines what work requires electrical licensure. (Pa657-Pa662 at 87:20-92:11).

3. Mr. Porcello conceded that he was unaware that “conduit” was removed from the Act because the Governor thought the Act was too broad, but did acknowledge that that he is aware that conduit is not included in the Act as “electrical work”. (Pa663 at 93:9-20).
4. Mr. Porcello testified that the “foundation” to his opinion is that installation of empty electrical conduit is subject to an electrical permit. (Pa646 at 76:25-77:25). However, when presented with the form UCC electrical permit application, he conceded that it does not identify conduit as an area of work subject to an electrical permit. (Pa663 at 93:22-94:11).
5. Mr. Porcello conceded that if installation of empty underground conduit and associated junction boxes is not “electrical work”, then it does not need to be performed or supervised by a licensed electrical contractor. (Pa664 at 94:12-25).

Although not referencing Mr. Porcello by name in its appellate brief, ALT is largely relying upon the same debunked theories proffered by Mr. Porcello.

**E. The Public Interest Will Be Severely Prejudiced If There Is Any Further Delay**

The County, Tomco and the public will be irreparably and significantly harmed if either an injunction is issued or this Project is delayed any further. In order to fund the Project, the County seeks to use federal grant monies from the “Coronavirus State and Local Fiscal Recovery Funds (SLFRF, or Fiscal Recovery Funds).” (Da167 at ¶2). The SLFRF funds were required to have been “obligated”

by December 31, 2024 and the funds must be expended on or before December 31, 2026. (Da167 ¶3-5). A failure to satisfy either of these deadlines could result in the loss of the federal grant funding the County is relying on to fund the Project thereby placing the Project as a whole in peril.

In addition, this matter is already subject to a very aggressive 400-day construction timeline, and any further delay risks placing those funds, which the County is relying upon for a significant portion of the construction costs, in peril. (Da280, Da283).

Further, any additional delay in commencing the construction work could have a domino effect adversely affecting the construction schedule and prospective market inflation of supplies and materials, which may significantly increase the cost of the project, as a whole. (Da284-Da285). Specifically, the prompt start of construction was critical to facilitating the completion of the winter month site work so that the contractors could take advantage of the Spring and Summer to perform work that requires temperate weather to be completed. Further complicating the construction time frame, the Department of Environmental Protection permits prohibit the County from performing construction work near the banks from May 1-July 31st to allow for fish spawning. (Da285). If the County is not able to accomplish the necessary work near all waterways in that time frame, it may hold up the project for an additional three months. (Da285).

Lastly, while the construction work remains pending, the Thomas Edison Park remains closed to the public. (Da285). Given the size of the project, numerous County residents and organized athletic leagues are understandably keen to use the newly furnished athletic fields and are relying upon a Spring 2026 opening. It will not be in the public's interest if they are not able to use the new fields in time to enjoy the park during the warm spring and summer seasons.

## **LEGAL ARGUMENT**

### **POINT I**

#### **ALT APPLIES THE WRONG STANDARD OF APPELLATE REVIEW**

ALT's claim that this Court should perform a de novo review is wrong.

In cases involving public bidding, the trial court must review a public body's determination as to whether a bid was conforming to determine whether its decision was arbitrary, unreasonable, or capricious. In re Protest of the Award of On-Line Games Prod. & Operation Servs. Contract, Bid No. 95-X-20175, 279 N.J. Super. 566, 589 (App. Div. 1995). One legitimate inquiry in reviewing a public body's decision on whether a bid conforms is whether there is substantial evidence in the record to support the conclusion. Waste Mgmt. of New Jersey, Inc. v. Union Cnty. Utils. Auth., 399 N.J. Super. 508, 525–26 (App. Div. 2008).

Here, the trial court permitted discovery and held a live hearing during which the witnesses testified about the very issues addressed in its appeal, including the



meaning of “electrical work”, if permits are required to install empty underground conduit, the definition of “electrical work”, the meaning of the Solicitation/technical specifications, etc. After extensive briefing and this live hearing, the trial court ruled against ALT.

In general, an appellate court gives deference to the factual findings of a trial court, while reviewing the trial court's legal conclusions de novo. D’Agostino v. Maldonado, 216 N.J. 168, 182–83 (2013). A trial court’s fact-finding decisions, as here, are subject to an abuse of discretion standard. As stated in Rova Farms Resort v. Investors Ins. Co., 65 N.J. 474, 483-484 (1974):

Considering first the scope of our appellate review of judgment entered in a non-jury case, as here, we note that our courts have held that the findings on which it is based should not be disturbed unless "they are so wholly insupportable as to result in a denial of justice," and that the appellate court should exercise its original fact finding jurisdiction sparingly and in none but a clear case where there is no doubt about the matter. That the finding reviewed is based on factual determinations in which matters of credibility are involved is not without significance. Findings by the trial judge are considered binding on appeal when supported by adequate, substantial and credible evidence. It has otherwise been stated that "our appellate function is a limited one: we do not disturb the factual findings and legal conclusions of the trial judge unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice," and the appellate court therefore ponders whether, on the contrary, there is substantial evidence in support of the trial judge's findings and conclusions.

(Internal citations omitted). Not surprisingly, ALT completely ignores this appellate standard of review.

Moreover, the primary relief sought by ALT is the issuance of an injunction. The trial court's denial of ALT's requested injunctive relief is reviewed for an abuse of discretion. Rinaldo v. RLR Inv., LLC, 387 N.J. Super. 387, 395 (App. Div. 2006).

A determination to issue an injunctive relief requires an analysis of the factors listed in Crowe v. De Gioia, 90 N.J. 126 (1982). Garden State Equal. v. Dow, 216 N.J. 314, 320 (2013). ALT bears the burden of proving:

- (1) relief is needed to prevent irreparable harm; (2) the applicant's claim rests on settled law and has a reasonable probability of succeeding on the merits; and (3) balancing the "relative hardships to the parties reveals that greater harm would occur if a stay is not granted than if it were."

Id. (quoting McNeil v. Legis. Apportionment Comm'n, 176 N.J. 484, 486 (2003) (LaVecchia, J., dissenting)). ALT has the burden to prove each of the factors by clear and convincing evidence. Brown v. City of Paterson, 424 N.J. Super. 176, 183 (App. Div. 2012) (citation omitted). "When a case presents an issue of 'significant public importance,' a court must consider the public interest in addition to the traditional Crowe factors." Garden State Equal., 216 N.J. at 321 (quoting McNeil, 176 N.J. at 484). "[W]hen the public interest is greatly affected, a court may withhold relief despite a substantial showing of irreparable injury to the applicant." Waste Mgmt., 399 N.J. Super. at 520.

Here, ALT completely ignores the Crowe criteria and the proper appellate standard of review in its appellate briefing. Moreover, as will be demonstrated below, ALT cannot prove by clear and convincing evidence that it has a reasonable probability of succeeding on the merits, relief is needed to prevent irreparable harm, and that the public interest would not be harmed if the relief is granted. There is no factual or legal basis – let alone “settled law” - to conclude any of the following: (a) that the County arbitrarily, capriciously or unreasonably awarded the Contract to Tomco; (b) that the trial court erred in affirming the County’s decision; or (3) that the trial court abused its discretion in denying the injunction.

Finally, to the extent there is any defect with Tomco’s bid – which is expressly denied – the appellate standard of review is the same as the trial court, namely whether the decision by the County to waive the defect and award the Contract to Tomco was arbitrary, unreasonable or capricious. Palamar Constr., Inc. v. Twp. of Pennsauken, 196 N.J. Super. 241, 250 (App. Div. 1983).

## POINT II

### **ALT CANNOT ESTABLISH A LIKELIHOOD OF SUCCESS ON THE MERITS OF ITS CLAIMS**

#### **A. To Overturn The County’s Decision To Award The Contract To Tomco, The Court Must Find That The County’s Decision Was Arbitrary, Capricious And Unreasonable**

To overturn the County’s decision this Court must conclude that the County’s decision to award the contract to Tomco was arbitrary, capricious, and unreasonable—a very high burden. See Id. (when reviewing decision to reject a bid under the LPCL, “[a] reviewing court cannot overturn the decision of a municipal body unless it finds that the decision is arbitrary, capricious, and unreasonable”).

Action considered arbitrary and capricious is “willful and unreasoning action... without consideration and in disregard of circumstances. Where there is room for two opinions, action is [valid] when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached.” Worthington v. Fauver, 88 N.J. 183, 204–205 (1982). Therefore, a presumption of validity exists that the County properly exercised its discretion. Harvard Enters., Inc. v. Bd. of Adjustment of Madison, 56 N.J. 362, 368 (1970). “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.” Palamar Constr., Inc., 196 N.J. Super. at 250 (quoting In Re Meadowlands Communications Systems, Inc., 175 N.J. Super.

53, 64 (App. Div. 1980)). New Jersey courts have repeatedly stressed that they will not interfere with a public agency's exercise of business judgment in awarding a contract absent a showing of bad faith, corruption, fraud or gross abuse of discretion. See Com. Cleaning Corp. v. Sullivan, 47 N.J. 539, 549 (1966) (holding courts cannot substitute their discretion for that of the contracting authority).

The County's decision to adhere to the LPCL and award a contract to the lowest responsible bidder is anything but arbitrary, unreasonable, or capricious.

**B. The County Was Not Required To Look Beyond The Four Corners Of Tomco's Bid**

ALT argues that the County was required to look beyond the four corners of Tomco's bid and investigate the scope of work identified in Quality's Proposal. ALT is wrong and references no legal citation in support of this proposition.<sup>2</sup> (Pb20).

In reviewing a bid submission under the LCPL for responsiveness, the Legislature gave the County no discretion to consider issues beyond the four corners of the bid. N.J.S.A. 40A:11-4 (Every contract "shall be awarded . . . to the lowest responsible bidder"). ALT does not object to the four corners of Tomco's bid but, rather, wanted the County (and then the trial court) to conduct an investigation into

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<sup>2</sup> ALT references Stano v. Soldo Constr. Co., 187 N.J. Super. 524, 535 (App. Div. 1983) for the proposition that naming an unqualified subcontractor can be cause for rejection of a bid. However, here there is no dispute that Quality is qualified as ALT named Quality as its electrical subcontractor as well. Further, as discussed, *infra*, installation of empty underground conduit is not required to be performed by a licensed electrical contractor so Tomco's self-performing this work is permitted.

an underlying Proposal by Quality to determine if Quality will perform all electrical work required on the Project (See Pa93).

In other public bidding statutes, the Legislature has demonstrated that it knows how to authorize a public body to consider factors beyond the bid documents and to give a public body discretion in doing so. For example, in the LPCL itself, public bodies have been accorded some discretion in considering whether to disqualify a bidder for prior negative experience or lack of responsibility where they may hold a hearing to explore the bidder's qualifications or prior negative performance. See N.J.S.A. 40A:11-4. Moreover, in the context of State contracts and Requests for Proposals, the Legislature has authorized bidders to consider more than price. See In re Jasper Seating Co., Inc., 406 N.J. Super. 213, 222 (App. Div. 2009) (recognizing that State bidding laws grant "broad latitude and discretion" concerning awarding State purchases). Indeed, in Com. Cleaning Corp. v. Sullivan, the Supreme Court noted the Legislature "consciously and designedly" accorded subordinate public governmental units less discretion as compared to the State as these entities were required to award the contract to "the lowest responsible bidder" whereas the State's authority was couched in less restrictive terms. 47 N.J. 539, 547-49 (1966).

If, as ALT apparently argues, a public body could arbitrarily investigate and subject to scrutiny any aspect of a bidder's submission beyond the four corners of the bid submission, it would open the door to favoritism, improvidence,

extravagance or corruption. Pied Piper Ice Cream, Inc. v. Essex Cnty. Park Comm'n, 132 N.J. Super. 480, 484 (App. Div. 1975).

Here, Tomco named Quality in its bid as the sole subcontractor that would perform all electrical work on the Project. (Pa69). This submission was unambiguous and fully complied with the LPCL. The County had no discretion or authority to investigate beyond the four corners of that submission, particularly in the face of subsequent testimony from Quality reiterating its intention to perform all electrical work. See Clyde N. Lattimer & Son Const. Co. v. Twp. of Monroe Utilities Auth., 370 N.J. Super. 130, 137–39 (App. Div. 2004) (nowhere in the LPCL is a bidder who seeks to only use one subcontractor “required to obtain price quotes from their subcontractors prior to submitting their bids” nor is the bidder “precluded from seeking to negotiate a lower price with the subcontractor” but the only requirement is that when a subcontractor is named a bidder like Tomco “will contract” with the named subcontractor). To this end, the County has made it very clear that Tomco must contract with Quality to perform all electrical work. (Pa120).

**C. Tomco Fully Complied With The Solicitation And New Jersey Law By Identifying Quality As Its Electrical Subcontractor**

It is self-evident that where no deviation from the Solicitation exists, there is no defect. See Suburban Disposal, Inc. v. City of Camden, 2017 N.J. Super. Unpub. LEXIS 1890, at \*10 (App. Div. July 26, 2017) (the question of materiality of a defect "arises only after it is determined that a bid deviates from the bid specifications.").

(Da15). Here, Tomco’s bid fully complied with the Solicitation and New Jersey law by listing Quality as its sole electrical subcontractor. N.J.S.A. 40A:11-16.

**D. Settled New Jersey Law States That Tomco Was Under No Requirement To Obtain Any Pre-Bid Proposal From Quality**

ALT’s entire case rests on the theory that Quality’s Proposal to Tomco was required to have included in its scope all “electrical work” for the Project. ALT is mistaken. Tomco was under no obligation to even obtain a proposal from Quality in the first instance. See Clyde N. Lattimer & Son Constr. Co., Inc. v. Twp. of Monroe Utils. Auth., 370 N.J. Super. 130 (App. Div. 2004) (when a bidder names a single subcontractor for any given trade the bidder need not have any pre-bid communication (price proposal, quote, scope of work or otherwise) from the subcontractor). See also Dobco, Inc. v. Brockwell & Carrington Contractors, Inc., 441 N.J. Super. 148, 160 (Law Div. 2015) (“[I]t was conceded that pre-bid price quotes and cost amounts were not required by the bid specifications, nor are they required under New Jersey law.”); T.N. Ward, Inc. v. S. Jersey Transp. Auth., 2010 N.J. Super. Unpub. LEXIS 2591, at \*24 (App. Div. Oct. 26, 2010) (“[W]here a single subcontractor is named in a particular category there is no requirement for the general contractor to submit a certificate setting forth the scope of work based upon a price quote for the subcontractor within a category”). (Da32).<sup>3</sup> Consequently, even

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<sup>3</sup> Even if the Solicitation required pricing or scope of work information from the electrical subcontractor, failure to provide it would not be a material defect. See



if ALT is correct (which it is not) that: (a) installation of empty underground conduit is electrical work; (b) that this work must be performed by a licensed electrical subcontractor; and/or (c) that Tomco should have identified itself in its bid as self-performing this work; none of this matters because then Tomco must then contract with Quality to perform this work. In other words, there is still no basis to reject Tomco's bid.<sup>4</sup>

The opinion in Clyde N. Lattimer & Son Construction Co., Inc. v. Township of Monroe Utilities Authority, 370 N.J. Super. 130 (App. Div. 2004) is strikingly similar and instructive. There, the second low bidder asserted that the low bidder's bid should have been rejected because it failed to obtain a pre-bid price quote from its named electrical subcontractor. Id. at 132. The second low bidder claimed that the failure to obtain the pre-bid quote violated New Jersey's public bidding laws. Id. The trial court ruled that the LPCL did not contain a requirement for a pre-bid quote from the subcontractor. Id. at 133. The trial court held that nothing required that a single named subcontractor submit a pre-bid price quote. Id.

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Epic Mgmt. v. Borough of Ship Bottom, 2022 N.J. Super. Unpub. LEXIS 577, at \*6 (App. Div. Apr. 12, 2022) (Lack of the required pricing information for identified subcontractor, even where required by the solicitation, was a non-material and waivable defect) (Da37).

<sup>4</sup> We already know that Quality is willing to perform this scope of work because it agreed to do so in its proposal to ALT. Pa122–23.

This Court in Clyde N. Latimer & Son agreed and made clear that when a bidder names a single subcontractor for any given trade the bidder need not have any pre-bid communication (price proposal, quote, scope of work or otherwise) from the subcontractor. Id. at 137-139. It is sufficient for a bidder to list a qualified subcontractor in its bid. If the bidder turns out to be the low bidder, then of course it must negotiate a subcontract with the named subcontractor entity. Id. In this way, a general contractor can do its own estimating of the subcontract work, name a familiar subcontractor and then negotiate the price, terms and scope of work after submission of the bids.

Specifically, the Appellate Division explicitly held:

Nowhere in the language of N.J.S.A. 40A:11-16 are bidders expressly required to obtain price quotes from their subcontractors prior to submitting their bids. The 1998 amendment to N.J.S.A. 40A:11-16 modified the contractor's obligation by adding the price quote requirement when multiple subcontractors are named in each trade. If the Legislature desired to require the contractor to obtain a pre-bid price quote where a single subcontractor is used in a trade, the Legislature could easily have said so.

Although plaintiff argues that completion of the project could stall if Hamilton charges MMC a price well beyond that envisioned by MMC for the electrical work, that risk is assumed by MMC who is obliged to use Hamilton for the job.

Id. at 137.

Here, as in Clyde N. Lattimer & Son Construction Co., Inc., Tomco named a single electrical subcontractor in its bid. (Pa69). Tomco must contract with Quality to ensure all work required to be performed by an electrical subcontractor is performed by Quality. To the extent Tomco does not have a signed, sealed agreement for a specific price or a specific scope of work, Tomco (not the County) bears that risk financially, but it does not invalidate its bid. In sum, the scope and price of Quality's proposal is irrelevant, and even if Tomco and Quality continued to negotiate the scope of work and price post-bid, this is neither improper nor constitutes illegal bid shopping. Clyde Lattimer, 370 N.J. Super. at 138 (“Even where a pre-bid price quote has been submitted, the successful contractor is not precluded from seeking to negotiate a lower price with the subcontractor”).

**E. Settled New Jersey Law States That Excavation Of Empty Conduits And Junction Boxes Do Not Need To Be Performed Or Supervised By A Licensed Electrical Contractor Because It Is Not “Electrical Work”**

ALT repeatedly claims that excavating and installing empty conduit and junction boxes is “electrical work” and therefore: (a) can only be performed by a licensed electrical contractor and (b) Tomco was required to identify itself as performing this work. ALT is wrong. (See, e.g., Pb10–16).

A licensed electrical subcontractor is not required to perform or supervise the installation of empty conduit and junction boxes because it is not “electrical work” pursuant to the Electrical Contractors Licensing Act (the “Act”). N.J.S.A. 45:5A-1

et. seq. The Board of Examiners of Electrical Contractors (the “Board”), the Attorney General’s Office (who is head of the Board) as well as this Court have repeatedly and explicitly rejected ALT’s arguments and expressly held that installation of empty conduit and junction boxes is not electrical work and therefore does not need to be performed or supervised by a licensed electrical contractor.

In Palmer v. Nat’l Elec. Contractors Ass’n, this Court considered whether “laying pipes under highways to accommodate electrical wiring, and through which electrical wiring is generally run at some time after’ constitutes electrical contracting work within the meaning of the Electrical Contractors Licensing Act.” A-836-65, slip op. at 2 (App. Div. 1967). (Pa446). This Court ruled that installation of empty conduit and junction boxes to later accommodate electrical wires is not electrical work because no skill or technical knowledge in electrical work is required to complete the work. Id. at 8. (Pa453). In its analysis, this Court also noted and considered that this work had historically been done by general laborers, not licensed electrical contractors. Id. at 7–8. (Pa452–53). Further, this Court noted that the Act originally included within the definition of “electrical contractor” work “moldings, ducts, raceways or *conduits* for the reception or protection of such wires,” but this language was excluded from the final version of the Act because the Governor was concerned that the original scope of the Act was too broad. Id. at 8–9 (emphasis added). (Pa453–54). Consequently, this Court held that installation of empty conduit

and junction boxes “does not come within the scope of the electrical contracting work as defined in the Act.” Id. at 9. (Pa454).

Similarly, in In re Nat'l Elec. Contractors Ass'n, N. N.J. Chapter, Inc., and New Jersey State Elec. Workers Ass'n, I.B.E.W., AFL-CIO, this Court, following Palmer, affirmed the ruling of the Attorney General that installation of electrical conduit is not “electrical contracting work” within the meaning of the Act. A-3802-90T2, A-3803-90T2, slip op. at 2 (App. Div. 1993). (Pa456). There, the Deputy Attorney General (“DAG”) concluded that conduit work “is not statutorily reserved to licensed electrical contractors and, therefore, may be performed by general or utility contractors employing general laborers.” Id. at 5. (Pa459). The DAG further observed that “[t]he work involved ... requires the digging of a hole, the placing of conduit therein, properly supported, the joining of sections together and to terminating points and the refilling of the excavated area,” and found that general laborers had historically performed the work. Id. at 5. (Pa 459). The DAG further deemed it “analytically significant” that conduit installation “does not in any way implicate the handling or connection of the wires or lines which transmit electrical energy.” Id. at 5–6. (Pa459–60). The DAG further rejected the premise (proffered by ALT and its expert Mr. Porcello to the trial court) that all work referenced in the National Electrical Code must be performed by licensed electrical contractors. Id. at 6. (Pa460).

The DAG then notified the Department of Community Affairs (“DCA”) of his opinion, and the DCA noticed the public and local code and subcode officials that installation of electrical conduits, exterior to the building and without handling of either energized or non-energized electrical conductors, is not electrical contracting work under the Act. Id. (Pa460).

On appeal, this Court considered the issue and concluded “[w]e agree with the DAG that installation of empty conduit does not require licensure under the Act.” Id. at 12. (Pa466). Relying on Palmer, this Court held that because the conduit is installed without current-carrying or non-energized wires and non-licensed electricians do not handle electrical wiring, the Act’s central purpose—ensuring the competency of electrical work—is not implicated. Id. at 13. (Pa467).

Moreover, this Court explicitly rejected ALT’s and its expert’s position that reference to conduit and junction boxes in the National Electric Code (“NEC”) and the New Jersey Uniform Construction Code (“UCC”) means such work must be performed by a licensed electrical contractor. Id. at 16. (Pa470). Specifically, this Court explicitly stated:

[M]ere reference to conduit work in the NEC does not mean that a licensed contractor must perform the work. Nothing in the NEC or the UCC either expressly or impliedly, suggests such a reading. It is the fundamental nature of the work involved, even if controlled by NEC standards, that dictates whether licensure is mandated. That issue ultimately must be resolved by interpretation of the applicable licensing law, here N.J.S.A. 45:5A-2(d).

Stated differently, the NEC and UCC define the manner by which the work shall be performed; the legal interpretation of the Act decides whether the work requires licensure. Any other conclusion would undermine the regulatory reach of the Act.

Id. (Pa470).

Finally, in In re Final Agency Decision of Bd. of Examiners of Elec. Contractors as To Conduit Installation By J. Fletcher Creamer & Son, Inc., this Court affirmed the Board's decision that installation of conduit containing fiber-optic cable (not empty conduit) to implement high speed data performed by a contractor on a New Jersey Turnpike project was not electrical work and, therefore, no electrical permit was required and the work ***did not have to be performed or supervised by a licensed electrical contractor.*** 356 N.J. Super. 42, 53–54 (App. Div. 2002) (emphasis added). In affirming the Board's decision, this Court again rejected the same argument made by ALT and its expert — that the NEC determines if the work is required to be performed by a licensed electrical contractor. Specifically, the court stated:

IBEW's argument that the conduit must be installed by a licensed electrical contractor because it has the potential of carrying electric wire in the future is flawed. Whether the conduit has the capacity to hold electrical wire has no bearing on the issue ...

IBEW also argued that because the conduit was bonded and grounded, apparently in conformity with the *N.E.C.* § 300-10, *infra* p. 9, a license was required to perform the conduit installation under N.J.S.A. 45:5A-9. In the first place, the N.E.C. is an industry wide standard-setting

technical code. It does not purport to, nor can it, usurp the right of the states to determine what licenses or permits authorize particular kinds of work.

Id. at 51–52.

This Court then discussed with approval and relied upon the decisions and rationale of the 1967 Palmer opinion and the 1993 Nat’l Elec. Contractors Ass’n. opinion. Id. at 52–53. Ultimately, this Court found that installation of empty conduit, even if it will carry electrical wire in the future, **need not be performed or supervised by a licensed electrical contractor.** Specifically, this Court stated:

Nevertheless, work relating to the installation of conduit or pipe to carry wire, even that designed to carry electrical wire, is analyzed in these decisions as work of a nature that in itself **does not require the skills of workers or supervisors with experience or training in the handling of electrical power, electrical wire, its grounding or its connections.**

Id. at 54 (emphasis added). Notably, in reaching its decision, this Court made no distinction between indoor and outdoor conduit or conduit installed on public or private property. Id. at 53–54.

In sum, the trial court found that the above cases are directly on point and that installation of empty conduit and junction boxes is not “electrical work” and does not need to be performed or supervised by a licensed electrical subcontractor. (4T12-12:14). Consequently, ALT’s entire argument that: (a) Quality’s proposal exempts work that either needs to be performed or supervised by an electrical subcontractor;



and (b) Tomco was required to identify itself in its bid as self-performing “electrical work,” lacks merit.<sup>5</sup>

**F. The LPCL Does Not Define “Electrical Work” And “Electrical Work” Does Not Include Installation of Empty Underground Conduit And Associated Junction Boxes**

Nearly every section of ALT’s brief is replete with references to its argument that the definition of “electrical work” in the LPCL is broader than the one contained in the Act and includes installation of empty underground conduit and associated junction boxes. (Pb10–12). ALT’s argument is specious because the LPCL does not define “electrical work.” Indeed, N.J.S.A. 40A:11-2, entitled “Definitions”, contains the definitions in the LPCL, and “electrical work” is not listed. Rather, N.J.S.A. 40A:11-16(a)(3), referenced by ALT, merely states “Electrical work, including any electrical power plants, tele-data, fire alarm, or security system” but does not define “electrical work.” Moreover, ALT’s own expert testified that only the Act, not the LPCL, can define electrical work and regulate what work is required to be performed by a licensed electrical contractor. (3T87-20:92-11). Even if ALT’s

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<sup>5</sup> ALT previously attempted to distinguish these cases by claiming they deal with the utility or other exception under the Act. (Pb at 13). However, the utility exception was not discussed or analyzed in any of the three cases because the utility exception is inapplicable. For example, public roads are not included within the definition of public utilities and thus the exemption does not apply in Palmer. See N.J.S.A. 45:5A-18 et. seq. Similarly, in Nat’l Elec. Contractors Ass’n, the opinion related to underground conduit on private property ... having nothing at all to do with the utility exception.

argument is accepted that the LPCL defines “electrical work” and that definition is broader than the definition contained in the Act, the “definition” of “electrical work” contained in N.J.S.A. 40A:11-16(a) still does not include installation of empty underground conduit and associated junction boxes which, as stated supra, New Jersey law clearly does not consider to be “electrical work.”

Finally, N.J.S.A. 40A:11-16 applies only to select specialty trade subcontractors because this is highly specialized work. This is why N.J.S.A. 40A:11-16 requires not only that these specialty trade subcontractors be identified, but also that each be qualified to perform the work. Unlike installation of empty conduit that can be performed by unskilled laborers (discussed supra), the added categories of electrical power plants, tele-data, fire alarm, or security system are all highly specialized work. For example, the Fire Alarm, Burglar Alarm and Locksmith Advisory Committee, a unit within the Board of Examiners of Electrical Contractors, was established in 1997 through amendments to the Electrical Contractors' Licensing Act of 1962. The Advisory Committee governs the licensing and practice of security system and fire alarm installers. The Advisory Committee issues licenses (different from electrician licenses) to qualified individuals who seek to install, service or monitor security and fire alarm systems. The Advisory Committee also issues separate licenses (different from electrical contractor licenses) to security and alarm businesses. See, e.g. N.J.S.A. 45:5A-23 and the

following link from New Jersey's Division of Consumer Affairs [www.njconsumeraffairs.gov/fbl/Pages/default.aspx](http://www.njconsumeraffairs.gov/fbl/Pages/default.aspx).

**G. No Electrical Permit Is Required To Install Empty Electrical Conduit and Junction Boxes**

ALT argues that an electrical permit is required to install empty conduit and because Tomco is not a licensed electrical contractor it cannot self-perform this work or apply for an electrical permit to perform this work. (Pb16-18). ALT fails to reference any authority for its conclusory premise that an electrical permit is required to install empty junction boxes and conduit or that this work must be performed by a licensed electrical subcontractor.

Indeed, the UCC electrical permit application form referenced by ALT identifies extensive areas requiring an electrical permit, and conduit and junction boxes are not identified on the form. (Pa443; 3T93-22:94-11). Moreover, Mr. Schoonmaker of Tomco testified that no electrical permit was required to perform this work. (3T39-22:40-1; 40-15:41-16). Rather, Mr. Schoonmaker stated that Quality would supervise Tomco's work to ensure it meets code and pass inspection because later, when the electrical wires are ultimately pulled through the conduit by Quality as a licensed electrical contractor, this later work would be performed by Quality under Quality's electrical permit. (Pa130-131; 3T40-15:41-16).

Finally, ALT appears to argue that the technical specifications of the Solicitation can determine what "electrical work" is. (Pb16-18). Specifically, ALT

argues that merely listing work or materials under a heading entitled “electrical” in the technical specifications of the Solicitation means this is “electrical work” requiring whoever performs any aspect of that work must be identified in the bid. (Pb17). ALT is wrong.

First, nothing in the technical specifications states who is to perform any work. (Pa34–45). Second, ALT’s own expert testified that listing work under a heading entitled “electrical” in the technical specifications of the Solicitation does not mean that work must be performed by a licensed electrical contractor. (3T72-5:15). Third, under ALT’s theory naming everyone performing any work identified in the electrical section of the technical specifications would lead to the absurd result that anyone screwing in a lightbulb would have to be identified on the “LISTING OF SUBCONTRACTORS PER N.J.S.A. 40A:11-16” form. Finally, the Solicitation only requires licensed electrical contractors to be identified. This is why the form not only requires that the electrical contractor be listed but also mandates that the license number be provided for each identified electrical contractor. (Pa47, Pa69).

**H. Tomco Was Not Required To Identify Itself In Its Bid As Self-Performing The Excavation and Installation of Empty Underground Conduit and Associated Junction Boxes**

ALT repeatedly throughout its brief claims that Tomco violated the LPCL by failing to identify itself in its bid as self-performing the excavation and installation of empty underground conduit and associated junction boxes. ALT is wrong.

N.J.S.A. 40A:11-16 requires only that a bidder identify its specialty trade subcontractors. Nothing in N.J.S.A. 40A:11-16, or anywhere else in the LPCL, requires a bidder to identify itself as self-performing any of this work. See A&A Indus. Piping v. County of Passaic, 2012 N.J. Super. Unpub. Lexis 919 at \*7, 12-13 (App. Div. April 25, 2012) (N.J.S.A. 40A:11-16, on its face, applies to subcontractors and not to bidders intending to self-perform the work) (Da306-310).<sup>6</sup>

Further, the “BID DOCUMENT SUBMISSION CHECKLIST” does not require Tomco to identify itself as self-performing this work. Rather, the “BID

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<sup>6</sup> Moreover, ALT’s argument that Tomco failed to comply with N.J.S.A. 40A:11-16(b) by failing to provide a certificate advising of the scope of work of each identified subcontractor (Pb16) is baseless because that provision only applies when multiple specialty trade subcontractors for the same trade are identified in the bid. T.N. Ward, Inc. v. S. Jersey Transp. Auth., 2010 N.J. Super. Unpub. LEXIS 2591, at \*24 (App. Div. Oct. 26, 2010) (“[W]here a single subcontractor is named in a particular category there is no requirement for the general contractor to submit a certificate setting forth the scope of work based upon a price quote for the subcontractor within a category”). (Da32). Here, Tomco identified Quality as its sole electrical subcontractor.

DOCUMENT SUBMISSION CHECKLIST” mandates that only those subcontractors be listed that are required by N.J.S.A. 40A:11-16 to be identified.

**A listing of subcontractors** with license numbers for each applicable trade, as required by N.J.S.A. 40A:11-16 as follows;

1. Plumbing and gas fitting, and all kindred work.
2. Steam power plants, steam and hot water heating and ventilating
3. Electrical work.
4. Structural steel and ornamental iron work.

(Pa47).

Also, the “LISTING OF SUBCONTRACTORS PER N.J.S.A. 40A:11-16” form by its very name, as well as the text in the body of the document, states that only those subcontractors required by N.J.S.A. 40A:11-16 must be identified.

N.J.S.A. 40A:11-16 Local Public Contracts Law. Bidder shall submit with its bid the name or names of all subcontractors to whom the bidder will subcontract and furnish services, materials and all kindred work for: (1) plumbing and gas fitting, (2) electrical work, (3) structural steel and ornamental iron work, and (4) heating, ventilation and air conditioning. Each subcontractor shall be qualified to provide said services/materials in accordance with this act. (Attach additional pages if necessary).

(Pa69).

The “LISTING OF SUBCONTRACTORS PER N.J.S.A. 40A:11-16” form does require that bidder’s identify themselves if they are performing specialty trade work “in-house”. However, it is clear that a bidder need only identify itself as performing work “in-house” if this work otherwise is required to be performed by one of the specialty trade subcontractors – this is why a license number is required even for bidders that intend to perform the work “in-house”.

ALL subcontractors for this project are listed as follows:

**Plumbing:**

In House \_\_\_\_\_ License Number \_\_\_\_\_

Subcontractor \_\_\_\_\_ License Number \_\_\_\_\_

**Steam Power Plants, Steam and Hot Water Heating and Ventilating:**

In House \_\_\_\_\_ License Number \_\_\_\_\_

Subcontractor \_\_\_\_\_ License Number \_\_\_\_\_

**Electrical Work:**

In House \_\_\_\_\_ License Number \_\_\_\_\_

Subcontractor \_\_\_\_\_ License Number \_\_\_\_\_

**Structural Steel & Ornamental Iron Work**

In House \_\_\_\_\_

Subcontractor \_\_\_\_\_

(Pa69). The first three specialty trade subcontractors (plumbing, electrical and steam power/HVAC) are all licensed contractors by the state of New Jersey. Structural steel contractors are not licensed. This is why license numbers are required for the first three categories but are not required for the structural steel category.

Since Tomco was not performing “electrical work” and the work it was performing was not required to be performed by a licensed electrical contractor, Tomco was not required to identify itself as performing electrical work “in-house” on the “LISTING OF SUBCONTRACTORS PER N.J.S.A. 40A:11-16” form.

Finally, to the extent there is any ambiguity to the meaning of the Solicitation, the County’s interpretation (not ALT’s) must control. Ernest Bock & Sons-Dobco

Pennsauken Joint Venture v. Twp. of Pennsauken, 477 N.J. Super. 254, 263 (2023)

(the standard of review on the matter of whether a bid on a local public contract conforms to specifications is whether the decision was arbitrary, unreasonable, or capricious).

**I. To The Extent Any Defect Does Exist, It Is Waivable And Was Properly Waived**

Even if Tomco's failure to identify itself as performing the installation of empty underground conduit and associated junction boxes could somehow be considered defects, it is immaterial and therefore waivable.

***1. The River Vale Criteria***

The Court must utilize the Twp. of River Vale v. R.J. Longo Constr. Co., 127 N.J. Super. 207, 216 (Law Div. 1974), criteria to determine whether a bid defect is immaterial and hence subject to waiver. See P & A Constr., Inc. v. Twp. Of Woodbridge, 365 N.J. Super. 164, 171 (App. Div. 2004); Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307, 315 (1994)). The River Vale criteria considered to determine whether a bid defect is material or not is a two part test: (1) whether a waiver of the defect would "deprive the [public body] of its assurance that the contract will be entered into, performed and guaranteed according to its specific requirements" and (2) whether the defect is "of such a nature that its waiver would adversely affect competitive bidding by placing a bidder in a position of advantage." River Vale, 127 N.J. Super. at 216.



The Supreme Court has recognized that competitive bidding provisions should be construed and administered in a manner so as not to thwart the primary purpose of achieving economy. Waivable conditions "by their nature may be relinquished without there being any possible frustration of the policies underlying competitive bidding." Terminal Constr. Corp. v. Atl. Sewerage Auth., 67 N.J. 403, 412 (1975). Indeed, public contracting units may resolve problems arising from such conditions in a sensible or practical way. Id. at 411. As such, immaterial deficiencies in bids can be waived under New Jersey law. Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307, 314-315 (1994).

## ***2. New Jersey's Policy Of Waiving Immaterial Defects***

New Jersey has a policy of waiving immaterial defects. Indeed, the right to waive a non-material defect is particularly necessary to promote the public interest.

The purpose of competitive bidding for local public contracts is, as has been frequently reiterated, 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, thereby guarding against favoritism, improvidence, extravagance and corruption. While this policy dictates that only bids which comply with the specifications and instructions are acceptable, it also dictates, lest the primary purpose of achieving economy be unnecessarily frustrated, that minor irregularities and immaterial variances in the form of the bid not be permitted to result in its invalidation, particularly where the municipality has, as here, expressly reserved the right to waive such defects and there is no

suggestion of any fraud, bad faith or collusion surrounding the transaction.

River Vale, 127 N.J. Super. at 215-216; accord P. Michelotti & Sons, Inc. v. Fair Lawn, 56 N.J. Super. 199, 202 (App. Div. 1959). "The statute was not meant to cost public bodies many thousands of dollars by requiring acceptance of higher bids for mere technical violations." Schlumberger Indus. v. Borough of Avalon, 252 N.J. Super. 202, 212 (App. Div. 1991), certif. denied, 130 N.J. 8 (1992). See also Bryan Constr. Co. v. Bd. of Trs., 31 N.J. Super. 200, 206 (App. Div. 1954) ("Mere irregularity of a bid will not justify its rejection by a municipal body charged with a duty of awarding a contract to the lowest bidder. . . . [F]ailure to technically comply with the form required will not defeat the right of the lowest bidder, to have the contract, if, after the bids are opened, it appears there has been a substantial compliance with the requirements.").

**3. *To The Extent Any Defect Exist, It is Immaterial and Should be Waived***

**a. This is Not A Bid Shopping Case**

N.J.S.A. 40A:11-16 is commonly known as the "Anti-Bid Shopping Statute". Clyde N. Lattimer & Son Construction Co., Inc., 370 N.J. Super. at 133. ALT references multiple cases relating to bidders failing to name subcontractors in the bid and the prohibitions against bid shopping. (Pb25–26). These cases have no relevance here. For example, Gaglioti Contracting, Inc. v. City of Hoboken, 307 N.J. Super. 421 (App. Div. 1997) and Star of the Sea Concrete Corp. v. Lucas Bros.,

Inc., 370 N.J. Super. 60 (App. Div. 2004) stand for the principle that the failure of a bidder to identify subcontractors required to be identified by the solicitation is a fatal, non-waivable defect. Tomco does not disagree. However, these cases have no applicability relating to naming the electrical subcontractor because Tomco named its one and only electrical subcontractor in its bid.

**b. Tomco's Failure To Identify The Work It Would Perform "In-House" is Waivable**

Even if Tomco was required to identify itself as self-performing "electrical work", its failure to do so is a waivable defect.

Epic Mgmt. v. Borough of Ship Bottom, 2022 N.J. Super. Unpub. LEXIS 577, (App. Div. Apr. 12, 2022) (Da35–37) is persuasive on this issue. There, the Borough issued an advertisement for bids for the construction of a new municipal court building. Id. at \*2. (Da35). The instructions accompanying the advertisement instructed bidders to fill in all the blank spaces on the bid form and cautioned that any omissions may cause bids to be rejected as non-compliant with the law or bidding instructions. Id. (Da35). Additionally, the Borough required each bidder to submit a "mandatory list of subcontractor" form. Id. (Da35). That form stated "[e]ach bidder shall complete and submit this form with its bid in accordance with N.J.S.A. 40A:11-16." Id. (Da35). The form provided blank spaces for the names, addresses, and telephone numbers of subcontractors. Id. (Da35). It also had blank spaces for subcontractor pricing information. Id. (Da35). Epic, the second low bidder, alleged

that Williams', the low bidder, bid violated LPCL and was materially defective because it failed to include the electrical subcontractor's: 1) full name, 2) address and telephone number, and 3) pricing information. Id. (Da35). Both the trial court and the Appellate Division rejected Epic's argument, holding that "[b]ecause these were additional standards imposed by the Borough, the defect was not material and was waivable." Id. at \*6. (Da37).

Here, N.J.S.A. 40A:11-16 does not require that a bidder identify the work it intends to self-perform on the "LISTING OF SUBCONTRACTORS PER N.J.S.A. 40A:11-16" form. Pursuant to Epic Mgmt., the Solicitation's requirement that Tomco identify itself is "an added standard" and the failure to comply is therefore "not material" and is "waivable". Id. (Da37).

Finally, in Benjamin R. Harvey Co. v. Bd. Of Educ., Spring Lake Heights Sch. Dist., 358 N.J. Super. 383 (Law Div. 2002), plaintiff contractor filed an order to show cause as to why defendants, a board of education and another contractor, should not be prohibited from performing a contract which had been awarded by the board to defendant contractor. There, the board solicited bids for construction on an elementary school. Id. at 386. One requirement of the bids was that the bidder's own work force had to perform at least 35 percent of the work. Id. The board accepted defendant contractor's bid. Id. at 387. Plaintiff contended that Defendant's bid was materially deficient because it had indicated that it was going to perform 100 percent

of the work with its own forces, which was not accurate. Id. The court held that such a pledge did not rise to the level of a material deficiency that could not be waived because it did not affect the assurance to the municipality that the contract would be performed according to its specifications. Id. at 394.

Benjamin R. Harvey Co., Inc. stands for the proposition that misstating the work a bidder intends to self-perform in its bid (when this information is required by the solicitation) is a waivable defect. Here, to the extent Tomco was required to identify itself as self-performing the installation of the empty underground conduit and associated junction boxes, Tomco's failure to identify itself in its bid is similarly a waivable defect.

Based on the above, to the extent any defect does exist, such defect was properly waived. Tomco listed Quality as its sole electrical subcontractor and any requirement that Tomco identify itself to excavate and install empty underground conduit and associated junction boxes is a very minor issue that does not undermine the integrity of the LPCL. See Bryan Constr. Co. v. Bd. of Trs., 31 N.J. Super. 200, 206 (App. Div. 1954) ("Mere irregularity of a bid will not justify its rejection by a municipal body charged with a duty of awarding a contract to the lowest bidder. . . . [F]ailure to technically comply with the form required will not defeat the right of the lowest bidder, to have the contract, if, after the bids are opened, it appears there has

been a substantial compliance with the requirements.")(quoting Faist v. City of Hoboken, 72 N.J.L. 361 (Sup. Ct. 1905)).

As Judge Pressler has suggested, "where the irregularity is not substantial, it may well be the duty as well as the right of the municipality to waive it." River Vale, 127 N.J. Super. at 222. Tomco has achieved no advantage over any other bidder and the County has all necessary assurances that the work will be completed pursuant to the terms of the Contract. River Vale, 127 N.J. Super. at 216. Finally, there is no basis whatsoever to suggest that the County acted arbitrarily or capriciously by accepting Tomco's bid. See, e.g., Palamar Constr., Inc. v. Twp. of Pennsauken, 196 N.J. Super. 241, 250 (App. Div. 1983).

### POINT III

#### **IRREPARABLE HARM AND THE BALANCING OF THE EQUITIES HEAVILY FAVOR THE COUNTY, THE PUBLIC AND TOMCO**

There is no irreparable harm to ALT because it has not and cannot show a reasonable likelihood of success. Matter of N.J. Transit, 473 N.J. Super. 261 (App. Div. 2022 (in stay pending appeal context, there is no irreparable harm to a disappointed bidder in not staying the award of a contract the bidder cannot show a reasonable likelihood of having been entitled to win)).

In addition to ALT's failure to demonstrate a probability of success on the merits, ALT's request for injunctive relief should also be denied because it would

harm the public interest. Matter of City of Newark, 469 N.J. Super. 366, 388 (App. Div. 2021) (rejecting a request for preliminary relief despite a showing of irreparable harm where the denial of relief would further the public interest). As this Court has recognized, when the public interest is greatly affected, a court may withhold relief despite a substantial showing of irreparable injury to the applicant. Waste Mgmt. of New Jersey, Inc. v. Union Cnty. Utilities Auth., 399 N.J. Super. 508, 520–21 (App. Div. 2008) (citing Yakus v. United States, 321 U.S. 414, 440, 64 S.Ct. 660, 675, 88 L.Ed. 834, 857 (1944)). Indeed, “courts, in the exercise of their equitable powers, ‘may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.’” Id. (internal citations omitted).

In Coopersmith Bros. Inc. v. Twp. of Kingwood, 2005 WL 1421320 (App. Div. Jun. 14, 2005), plaintiff claimed that a public contract for the construction of a new garage should not have been awarded and sought an injunction to prohibit performance of the public contract.<sup>7</sup> Plaintiff, Coopersmith, argued that the public interest would not be harmed by the granting of an injunction. Id. at \*3. (Da53). The Court rejected that argument and instead deferred to the public entity. Id. (Da53). Specifically, the Court stated:

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<sup>7</sup> (Da51–55).

Coopersmith's denigration of the need for speed in this contract is not well taken. Clearly Kingwood Township wished to have a public works garage during this construction season. It had submitted two bid packages towards that end. It is an overreaching to say that a few months delay using an old facility would adequately serve the public interests. Kingwood has determined otherwise, and its decision in this regard is not shown to be irrational.

(Id. at \*4). (Da54).

In In Matter of City of Newark, 469 N.J. Super 366 (App. Div 2021) this Court recognized that employees subject to a vaccine mandate would be irreparably harmed, but denied preliminary relief citing that employee contact with unvaccinated people places these employees at greater risk and is a harm the City has a right to protect against. Id. at 388. Stated otherwise, “[t]he basic applicable principle is that no stay is to be granted unless no hardship, prejudice or inconvenience would result to the one against whom the stay is sought.” Ins. Co. of N. Am. v. Allied Crude Vegetable Oil Ref. Corp., 89 N.J. Super. 518, 541 (Ch. Div. 1965).

Here, as in Coopersmith and Matter of City of Newark, ALT cannot credibly claim that injunctive relief is in the public’s interest. The continued delay of this Project clearly is not in the public interest. Notably, where the public interest would be greatly affected, as here, injunctive relief may be withheld despite the applicant’s showing of irreparable injury. Waste Mgmt., 399 N.J. Super. at 519-520. See also Ins. Co. of N. America, 89 N.J. Super. at 541 (“The basic applicable principle is that



no stay is to be granted unless no hardship, prejudice or inconvenience would result to the one against whom the stay is sought.”).

In this case, the continued delay will greatly affect the public interest as it will prolong the closure of a public park, have a domino effect on construction delays if the winter-month site work is not completed in time to take advantage of the Spring and Summer months to perform work requiring temperate weather, and further delay could place in peril the Federal and State monies the County is relying upon to fund the construction.

As the County submitted before the trial court, delays could have a domino effect setting forth a chain reaction of further delays, specifically, the County asserted that:

This matter is already subject to a very aggressive 400-day construction timeline, and any further delay risks placing those funds, which the County is relying upon for a significant portion of the construction costs, in peril.

The project is expected to cost approximately \$80,000,000.00. The delay in commencing the construction work will have a domino effect adversely affecting the construction schedule and prospective market inflation of supplies and materials, which may significantly increase the cost of the project, as a whole. Specifically, the prompt start of construction was critical to facilitating the completion of the winter month site work so that the contractors could take advantage of the Spring and Summer to perform work that requires temperate weather to be completed. Further complicating the construction time frame, the Department of Environmental Protection permits prohibit the County

from performing construction work near the banks from May 1- July 31st to allow for fish spawning. If the County is not able to accomplish the necessary work near all waterways in that time frame, it may hold up the project for an additional three months. This delay is likely to adversely affect the contractors' ability to obtain the best and most reasonable price for supplies and materials. Further delay may also cause the County and its taxpayers to cover additional costs due to the imminent market increases of supplies and materials, given the current economic climate.

Lastly, while the construction work remains pending, the Thomas Edison Park remains closed to the public. Construction delays will only prolong the closure. Initially, the County targeted for the park to reopen in time for Spring, 2026. Given the size of the project, numerous County residents and organized athletic leagues are understandably keen to use the newly furnished athletic fields and are relying upon a Spring 2026 opening. It will not be in the public's interest if they are not able to use the new fields in time to enjoy the park during the warm spring and summer seasons.

(Da284-286).

Moreover, continued delays may also place the project as a whole in peril if the County is not able to satisfy conditions set forth to receive State and Federal grant monies. In order to fund the Project, the County seeks to use federal grant monies from the "Coronavirus State and Local Fiscal Recovery Funds (SLFRF, or Fiscal Recovery Funds)." (Da167). Time is of the essence with regard to the Project as the SLFRF funds come with a number of deadlines. (Da167 at ¶3). Specifically, the SLFRF funds were required to have been "obligated" by December 31, 2024. That is,

an enforceable contract obligating the funds was required to be in place by that time. (Da167). Next, the funds must be expended on or before December 31, 2026. (Da168). If continued delays from a stay result in additional delays due to the need to complete work in temperate weather or outside of fish spawning season, this could prevent the County from expending the funds consistent with the grant terms and conditions which could imperil the project as a whole. Moreover, every day that construction is delayed will result in another day that the public in general and sports leagues in particular seeking to use the athletic fields would be denied the opportunity to do so.

In other words, (1) a failure to satisfy either of these deadlines could result in the loss of the federal grant funding the County is relying on to fund the Project thereby placing the Project as a whole in peril; (2) any additional delay may result in additional delays due to the inability to complete the planned winter-month site preparation work as well as a three-month delay due to the fish spawning, further putting the entire Project at risk; (3) additional delay is likely to cause significant increases in the cost of the Project to the County taxpayers; and (4) the public will continue to be deprived use of both the existing Park as well as the planned improvements.

Finally, the public interest is also harmed by the unnecessary additional cost of approximately \$175,000 to the County taxpayers if the Contract were to be awarded to ALT. Terminal Constr. Corp., 67 N.J. at 409-410.

In sum, ALT has not clearly and convincingly established that its interests outweigh the interests of the County, the public or Tomco, or that it has a reasonable likelihood of success on the merits. Instead, it is clear the public would face significant hardship if the injunction is granted. Given the significant public interests involved, Tomco respectfully requests that this matter be recognized as an instance where the Court goes farther in the exercise of its equitable powers to withhold relief in furtherance of the public interest. Waste Mgmt. of New Jersey, Inc., 399 N.J. Super. at 520–21. Accordingly, ALT’s application must be denied.

### **CONCLUSION**

Based on the above, Tomco respectfully requests that: (1) the relief sought by ALT be denied in its entirety; (2) this Court not disturb the County’s decision to award the Contract to Tomco; (3) the trial court’s Order be affirmed; and (4) that the stay be lifted so this Project may proceed.

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By: /s Mitchell W. Taraschi  
Mitchell W. Taraschi

Date: April 11, 2025