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IN THE MATTER OF PROTEST FILED BY EL SOL CONTRACTING AND CONSTRUCTION CORP., CONTRACT T100.638	:	SUPREME COURT OF NEW JERSEY SUPREME COURT DOCKET NO.: 090076

NEW JERSEY TURNPIKE AUTHORITY'S BRIEF IN OPPOSITION TO THE *AMICUS CURIAE* BRIEF FILED BY THE SURIETY & FIDELITY ASSOCIATION OF AMERICA

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PRELIMINARY STATEMENT

This Court granted the New Jersey Turnpike Authority's ("NJTA") Petition for Certification on February 4, 2025, which seeks to overturn the lower court's decision to vacate NJTA's final agency decision awarding a contract for the rehabilitation of the New Jersey Turnpike's Newark Bay-Hudson County Extension to Joseph M. Sanzari, Inc. ("Sanzari"), the second-lowest bidder and, in NJTA's view, the lowest responsive and responsible bidder. In this appeal, NJTA[1] argues that the lower court erroneously ordered NJTA to award the contract to El Sol Contracting & Construction Corp. ("El Sol"), despite that entity's failure to submit a valid power of attorney with its consent of surety. See Meadowbrook Carting Co. v. Bor. of Island Heights & Consol. Waste Servs., 138 N.J. 307, 316 (1994) (holding that a failure to submit a binding consent of surety at the time of submission of a bid is a material and non-waiveable defect).

The Surety & Fidelity Association of America ("SFAA") has now filed a motion for leave to appear as amicus curiae. While NJTA leaves it to the Court's discretion to determine whether SFAA should be granted leave to appeal, it nonetheless writes to respond to certain contentions in SFAA's merits brief to the

[1] On February 24, 2025, NJTA also filed a motion to stay further implementation of the contract and to accelerate the disposition of this matter, which remains pending.

extent that SFAA raises arguments that differ from those already advanced by El Sol.

First, SFAA argues that if this Court overturns the lower court, that "would set a dangerous position for agencies to arbitrarily reject otherwise qualified bidders out of an unfounded 'concern' that their sureties would not issue the bonds required of them." (SFAA Brief at 9). However, SFAA ignores that it is simply NJTA's position that all bidders for public contracts are required to submit a valid power of attorney with a consent of surety so that all bidders are on the same footing in the bid process. NJTA is actually seeking to remove arbitrariness from the bidding process rather than injecting it, which would be an unfortunate consequence if the decision below is permitted to stand.

Next, SFAA cherry-picks and selectively quotes from the proposal bond to argue that issuance of the same contemplates issuance of the contract bond thereby eliminating the need for a power of attorney to support the consent of surety. See SFAA Brief at 11 (arguing that "[t]he proposal bond expressly contemplates that 'the principal *shall* duly execute the Contract Agreement and *furnish the required Contract Bond*'" (emphasis in original). However, the actual language of the proposal bond does not obligate the principal or its surety to actually deliver the *contract bond*, rather, it simply states that the proposal bond becomes void once the contract bond is delivered.

Additionally, SFAA argues that issuance of a proposal bond automatically requires the surety to also issue the contract bond. (SFAA Brief at 22). This is wrong, defies established law governing the public-bidding process and would seem to imply that the consent of surety requirement should be written out of the law. The three-part process for bid security – proposal or bid bond, consent of surety and performance or contract bond – has an immutable force in public procurement for decades and nothing herein suggests that this Court should abandon, modify or waive its terms.

SFAA further argues that because Liberty Mutual eventually did issue the contract bond on February 5, 2025, that this somehow cures El Sol's failure to submit a valid consent of surety with its initial bid submission. However, this argument flies in the face of decades-long precedent set by this court holding that the failure to submit a valid consent of surety with the bid is a is "a material defect that [could] be neither waived nor cured." Meadowbrook, 138 N.J. at p. 316.

Thus, SFAA advances arguments that would unsettle the level playing field in favor of allowing a class of one surety company – Liberty Mutual – to cure its poorly-drafted and ambiguous power of attorney form. Doing so in this case would lose the forest for the trees and cast aside the greater public interest in ensuring procedural regularity in the realm of public contracting. The Court should accordingly set aside SFAA's arguments as lacking in merit.

LEGAL ARGUMENT

I. ENFORCEMENT OF BRIGHT LINE RULES IN THE REALM OF BID SECURITY ENSURES PREDICTABILITRY AND A LEVEL PLAYING FIELD FOR THE CONTRACTING COMMUNITY

Initially, SFAA argues that if this Court re-instates NJTA's final agency decision, it "would set a dangerous position for agencies to arbitrarily reject otherwise qualified bidders out of an unfounded 'concern' that their sureties would not issue the bonds required of them." (SFAA Brief at 9). SFAA further argues that NJTA's final decision, if upheld, "would inject uncertainty and arbitrariness into the New Jersey public bidding process that could deter sureties from issuing proposal and contract bonds for future New Jersey public projects, thereby harming New Jersey taxpayers." (SFAA Brief at 19). Putting aside this trade organization's rhetoric, in NJTA's experience, the only surety company that has experienced a problem with its powers of attorney is Liberty Mutual, the company that issued the defective power of attorney at issue here, and which subsequently modified its form to NJTA's satisfaction. Given that the rest of the surety industry properly understands the law and knows how to draft clear documents, SFAA's concerns about establishing a "dangerous" precedent is vastly overstated.

Contrary to SFAA's argument, NJTA's intention is exactly opposite of wishing to create ambiguity as it seeks to turn square corners by scrupulously

adhering to this Court's bright line precedents regarding consents of surety. NJTA's position is that a power of attorney evidencing the attorney-in-fact's clear authority to execute a consent of surety is a mandatory item that must be submitted at the time of submission of the bid. Under Meadowbrook, applicable statutory law governing powers of attorney, and the other precedents cited in NJTA's brief, submission of bid security in a public procurement has traditionally been a bright line.

Continuing that bright line and setting clear standards removes any putative concern that contracting agencies will act subjectively to favor or disfavor specific bidders. Indeed, NJTA did not *want* to spend an extra $10M on the subject contract – the bid spread between El Sol and Sanzari – it felt constrained to do so because that is what was required as a matter of law. Setting clear guidelines for prospective bidders and their respective sureties redounds to the public interest because procedural regularity ensures that decisions are made without favoritism, corruption or extravagance. No other surety company besides the surety at issue here, Liberty Mutual, has a problem drafting clear powers of attorney and thus clear, objective standards can be set, and met by the contracting community.

The lower court's decision, to the extent it opens the door to relaxing non-conformities with respect to bid security, will actually lead to less certainty for the contracting community and not more, thus having the opposite effect than that which SFAA purports to want to protect against. It should not be incumbent, as SFAA

clearly suggests, for the NJTA or any public agency to have guess if a consent of surety, or any other required undertaking, is properly supported by a power of attorney.

Additionally, like El Sol in its briefing, SFAA also suggests that there was impropriety at play because NJTA had previously accepted the same ambiguous Liberty Mutual power of attorney. As explained by NJTA at oral argument below, in response to questioning from the Appellate Division, NJTA identified internal deficiencies in its bid review process that allowed the defective powers of attorney to escape notice by staff. Surety documents are not written in plain English and can be difficult for those without legal training or expertise in the realm of surety bonds to decipher. In this case, a mistake was made in those previous occasions where the Liberty Mutual form power of attorney was accepted when that should not have occurred. Had NJTA staff contemporaneously appreciated the import of the Liberty Mutual form power of attorney, it would have been rejected in each and every prior instance. While it is unfortunate for El Sol that the defect was appreciated at the time of that entity's bid submission, NJTA was obligated to follow the law and not continue to accept defective bid security.

While SFAA is quick to cast stones at NJTA over this issue, the fact of the matter is that the agency and its employees can and do attempt at all times to turn square corners and are entitled to that presumption here. See Capital Safety, Inc. v.

State, Div. of Bldgs. and Construction, 369 N.J. Super. 295, 300-301 (citations and internal quotations omitted) (App. Div. 2004) (holding that "the contractor's burden to prove the government acted in bad faith is very weighty. Government officials are presumed to act in good faith, and it requires well-nigh irrefragable proof to induce the court to abandon the presumption of good faith dealing."). There is simply no evidence of misconduct or favoritism here, when the fact of the matter is that honest, hard-working government employees engaged in an inadvertent oversight.

As a last note on this point, no other bidder for the contract at issue had any problem with submitting an appropriate, unambiguous and binding power of attorney. This is a problem that is limited to a poorly-drafted form prepared by Liberty Mutual, and not to any endemic industry-wide problem. Moreover, after NJTA rejected the El Sol bid, Liberty Mutual amended its form to address NJTA's decision. Thus, when the industry is made aware of the specific rules governing the procurement and has bright lines, the surety companies know how to adapt and respond so the sanctity of public bidding is protected. Accordingly, SFAA's argument that NJTA's decision would inject uncertainty and arbitrariness into the procurement process is without merit and should be rejected.

II. SFAA MIS-INTERPRETS THE ACTUAL LANGUAGE OF THE LIBERTY MUTUAL PROPOSAL BOND

SFAA next engages in selective quotation to argue that the proposal bond contemplates issuance of the contract bond and, since there is contention that El Sol's proposal bond was in proper form, this obviates the need for a power of attorney to support the consent of surety. See SFAA Brief at 11 (arguing that "[t]he proposal bond expressly contemplates that 'the principal *shall* duly execute the Contract Agreement and *furnish the required Contract Bond*'" (emphasis in original). This, however, selectively quotes the material language of the Proposal Bond which, in full context states:

> **If** said Proposal shall be accepted by the New Jersey Turnpike Authority, and the principal shall duly execute the Contract Agreement and furnish the required Contract Bond, with the stipulated time, Then this obligation shall be void, otherwise the same shall remain in force and effect…
>
> **[A24, emphasis added].**

This language does not obligate the principal or its surety to actually deliver the contract bond, rather, it simply states that the proposal bond becomes void once the contract bond is delivered. While, practically, the proposal bond amount would be forfeited in the event of a default, if the Court adopts SFAA's reasoning here, there would not be any point in requiring a consent of surety with any bid submission. This is obviously a radical departure from decades of settled law requiring a consent of surety in this context.

SFAA makes a similarly defective argument that, essentially, it makes bad business sense for the surety that issued the proposal bond to "turn around and then immediately refuse to issue the contract bond on the pretext set forth by the NJTA… No surety would ever conceivably expose itself to that type of unnecessary exposure." (SFAA Brief at 12). First, again, a contracting agency should not have to rely upon, or speculate, as to the business judgment of a surety as a basis to accept bid security.

Second, SFAA argues that, in such a case NJTA would be protected because if the bidder fails to deliver the contract bond or repudiates the award, then "NJTA would immediately call the proposal bond," which here would be for a little over $7M. However, in this instance that would not cover the spread between El Sol's bid of $70,865,354.00 and Sanzari's bid (second-lowest) of $80,735,000.00, and thus NJTA would not be left fully protected.

Moreover, NJTA does not agree with SFAA's contention that a surety would never allow the proposal bond to be called by refusing to deliver the contract bond. In those instances where the bidder has experienced a material adverse change in its business since bid submission, such as a default on another contract, a financial reversal, change in credit worthiness or impairment of the underlying collateral for the contract bond, it may well make sense for a surety to strategically forfeit the proposal bond in order to protect itself from a much larger loss if the contract bond

is issued but the bidder is likely to be unable to perform. In such cases, the surety would certainly act in its own interest and not the public interest, and the contracting agency would be left with a deficiency.

SFAA thus misrepresents the language in the proposal bond at issue here, and obscures the likely business motivations and practices of its members.

III. SFAA ERRONEOUSLY ARGUES THAT ISSUANCE OF A PROPOSAL BOND OBVIATES THE NEED FOR A CONSENT OF SURETY

SFAA next argues that the issuance of a proposal bond automatically requires the surety to also issue the contract bond, stating that:

> Issuing a proposal bond is evidence of the clear, contemporaneous intent of the surety to issue the eventual contract bond, should the contract be awarded to the principal.

(SFAA Brief at 22).

This position starkly defies the established law governing the public-bidding process and would seem to imply that the consent of surety requirement should be written out of the law. First, as this Court is aware, a proposal bond and contract bond are two entirely different undertakings. The proposal bond operates to secure the contracting agency in an amount not to exceed 10% of the bid and only until award and execution of the subject contract. The contract bond secures the contractor's (awarded bidder) full performance under the subject contract for the full amount of the contract. It is the consent of surety, submitted at the time of the

proposal bond, that serves to provide the contracting public agency a level of assurance that if the bid is accepted, the awardee would be able to obtain the contract bond.

Without the consent of surety, certainly, there may be intervening factors between the issuance of a proposal bond and the subsequent issuance of a contract bond that would prohibit a successful bidder from procuring the contract bond such as, perhaps the financial circumstances of the bidder allows it to qualify for a bond in the amount of 10% of the bid, but in the intervening time that same bidder, if successful, cannot qualify for the full contract amount. Generally, surety companies will only issue surety bonds in an amount equal to the value of the collateral that the contractor can pledge through a security or indemnity agreement. If, in the interim, that collateral is impaired or pledged for bonds issued for other contracts won by the contractor, then it is possible that the surety company would repudiate any prior commitment to issue the contract bond.

In that instance, if there is nothing that binds the surety (such as a consent of surety) to unequivocally issue the contract bond, a surety will likely cut its losses by sacrificing its limited proposal bond in favor of not issuing a contract bond that would only put the surety on the hook for 100% of the contract price if the (now financially unstable) successful bidder does not perform the contract. This scenario is precisely what a consent of surety is designed to guard the public agency from.

Indeed, to adopt SFAA's instant reasoning that issuance of a proposal bond automatically binds the surety to a contract bond is therefore absurd and eliminates the need for a consent of surety, which flatly ignores decades worth of binding precedent from this Court. Further, SFAA argues that "NJTA simply chooses to ignore that the power to execute a bond is no different than the power to commit to executing a bond" (SFAA Brief at 19), and that "[i]t has always been understood that the power to *execute* a bond is no different than the power to *commit to executing* a bond." (SFAA Brief at 20).

This position, simply, defies basic logic. Simply because one has the "power to commit" to something, does not necessarily, and certainly not automatically, give one the "power" to do something, nor does it require the surety to do so. For instance, one has the "power to commit" to running a marathon and may even desire to do so, but that does not give a person "the power" to do so.

IV. LIBERTY'S AFTER-THE-FACT SUBMISSIONS AND CONTRACT BOND ISSUANCE ARE OF NO CONSEQUENCE

SFAA argues that this Court should ignore its own precedent set forth in Meadowbrook because Liberty Mutual ultimately ended up issuing the contract bond on February 5, 2025. (SFAA Brief at 25). Notably, this is argument is akin to El Sol's arguments below that Liberty Mutual's post-award correspondence clarifying

its defective power of attorney should have been considered by NJTA at the time of award.

However, the failure to submit a consent of surety **with the bid** is "a material defect that [could] be neither waived nor cured." Meadowbrook, 138 N.J. at p. 316. As the Meadowbrook Court held, "to permit waiver of the consent-of-surety requirement would undermine the stability of the public-bidding process." Id. at 321. "For example, if a low bidder that had failed to submit a Consent of Surety" later decided it no longer wished to perform the contract because its bid was too low, "that bidder could decline to obtain the Consent of Surety and the performance bond." Ibid.

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

> Even before the effective date of [N.J.S.A. 40A:11-23.2], a certificate of surety and a performance bond in amounts substantially below the contract price were material and non-waivable deviations from the specifications that rendered the contract voidable. … These defects not only undermine competitive bidding, … but they also deprive the public of protection from a possible breach on the part of the contractor. [Id. at 496.]

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

It makes no difference under this Court's precedents that Liberty Mutual may have issued the contract bond on February 5th. Additionally, any contract bond issued by Liberty Mutual is not properly considered in this matter as it was not part of the record below. R. 2:5-4(a).

V. SFAA IMPROPERLY EXPANDS THE RECORD OF THIS MATTER BY ADVANCING FACTS NEVER INTRODUCED BELOW IN VIOLATION R. 2:5-4(a)

While we recognize that the traditional role of *amici* are to bring different perspectives before the Court that are not advanced by the litigants, SFAA nevertheless makes arguments that are replete with unsupported facts and arguments that were never advanced by El Sol below, contrary to R. 2:5-4.

First, on page 2 of its brief, SFAA advances that "[i]t is SFAA's understanding that its members have submitted POAs with language similar to which NJTA arbitrarily and capriciously rejected as defective in the instant matter." There has been no proof adduced below as to: (1) any of SFAA's members; (2) any SFAA

"understanding"; and (3) what "language" may have been "similar" to any of the defective language submitted by SFAA's member here, Liberty Mutual, with the subject consent of surety.

Next, on page 6 of its brief, SFAA makes reference to the fact that Liberty Mutual has submitted powers of attorney with identical or substantially similar language in over 225 bids to multiple New Jersey public agencies, referencing an October 31, 2024, letter provided by Liberty Mutual to EL Sol's counsel. SFAA makes a similar factual statement on page 18 of its brief.

However, the Appellate Division specifically prohibited El Sol from using this October 31, 2024, letter as part of the record on appeal as it was never part of the agency proceeding below (*See* Appellate Decision at Petitioner's Petition Appendix 17, fn. 1). NJTA has no idea what powers of attorney have been submitted to other agencies; it is only aware of the Liberty Mutual power of attorney at issue in this case, and which formed a part of the administrative record.

El Sol never filed the appropriate motion under R. 2:5-5 to expand the record of this appeal to include this letter as part of the record of this appeal. It is therefore improper for SFAA to now go through the back door here when the Appellate Division already closed the front door on El Sol as to this October 31, 2024 letter.

Additionally, it remains irrelevant that Liberty Mutual may have (or may not have) submitted other forms of powers of attorneys with defective identical or

similar language as it did here. The lone question, under Meadowbrook, is whether the consent of surety with the infirm power of attorney was defective at the time of the award. What other contracting agencies have, or have not done in their own practice is of no moment to the integrity of NJTA's exercise of its independent judgment.

CONCLUSION

For the reasons set forth above, and for all other reasons advanced in the extensive briefing submitted by the NJTA in this matter now before the Court, the arguments raised by SFAA are of no moment and this Court should overturn the decision of the lower court, and thereby re-instate the final agency decision issued by NJTA to award the subject contract to Sanzari.

Respectfully submitted,

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By: */s* Jason S. Nunnermacker

Dated: February 28, 2025