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NEW JERSEY TURNPIKE AUTHORITY'S PETITION FOR CERTIFICATION

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PRELIMINARY STATEMENT

Thirty years ago, this Court held in Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307, 313 (1994), that when required as an incident of a public procurement, a bidder's failure to submit a binding and unequivocal consent of surety at the time of submission of the bid is a fatal and non-waivable defect. The New Jersey Turnpike Authority ("NJTA") faithfully applied that principle when it rejected the consent of surety offered by a bidder, El Sol Contracting & Construction Corp. ("El Sol") that was endorsed by a purported attorney-in-fact who, according to the surety's own power of attorney, did not actually possess the authority to execute the same, and contrary to NJTA's Standard Specifications.

The Appellate Division's unpublished decision reversing NJTA's final agency decision is in error in three ways. First, notwithstanding the holding in Meadowbrook that a consent of surety must be binding and unequivocal at the time of bid submission, the lower court found that it is not necessary for the surety to expressly authorize the attorney-in-fact to sign the consent of surety through a power of attorney unless the contracting agency explicitly requires such proof at bid submission. This holding is inconsistent with this Court's holding in Meadowbrook and its progeny.

Second, the Appellate Division improperly departed from the deferential standard of review afforded to a state agency's interpretation of its own

specifications and instead substituted its own judgment for that of the agency. NJTA has promulgated Section 102.08 of its Standard Specifications which, read in conjunction with its prescribed form of consent of surety, requires that undertaking to be executed by an attorney-in-fact of the surety, as evidenced by a power of attorney. The Appellate Division ignored NJTA's form of consent of surety and instead reached a negative inference that Section 102.08 excluded the need for a power of attorney by implication. This finding inverts the ordinary standard of review governing agency deference.

Finally, the Appellate Division committed plain error by misreading the form of power of attorney submitted by the surety. In fact, the power of attorney at issue expressly disclaimed authority for the surety's attorney-in-fact to vouch for anything other than the separate proposal bond required for the procurement. The lower court erroneously misperceived that an excerpt of a corporate resolution of the surety appended to the power of attorney specifying the extent of the surety's *potential* delegation of authority to the signatory was a delegation of *actual* authority to sign the consent of surety. This holding contravenes the plain language of the surety's limited commitment.

For each of the foregoing reasons, individually or in combination, the Appellate Division's judgment should be reversed. NJTA now brings this Petition for Certification to seek correction of the errors below and, on behalf of

the contracting community, for resolution of the state of the law governing surety undertakings as first announced by this Court in Meadowbrook, supra.

STATEMENT OF THE MATTER INVOLVED

A. NJTA's Procurement of the Relevant Construction Contract

This matter arises from NJTA's rejection of a bid submitted by El Sol for Contract T100.638, entitled "Deck Rehabilitation of Newark Bay – Hudson County Extension (NB-HCE) Bridge Zones 2 and 3." On June 25, 2024, NJTA received bids for the project from the two lowest putative bidders, as follows:

El Sol Contracting & Construction Corp, Maspeth, NY	$70,865,354.00
Joseph M. Sanzari, Inc., Hackensack, NJ	$80,735,000.00

[El Sol's Appellate Appendix ("A") 42].

As the apparent low bidder, El Sol submitted NJTA's prescribed form of Consent of Surety ("COS"), executed by an individual, Katherine Acosta, purportedly acting on behalf of El Sol's surety, Liberty Mutual Insurance Company ("Liberty Mutual"). The purpose of the COS was to obligate the surety company to issue the required performance bond in favor of NJTA in the amount of 100% of the proposal if El Sol were awarded, and executed the contract **(A4)**. The performance bond would then remain in effect the entire duration of the contract until completion and acceptance of the underlying work.

NJTA requires bidders to complete the agency's form of COS, which contains a signature line for the attorney-in-fact and a witness (**A4**). In this case, although Ms. Acosta executed the COS on the signature line for the attorney-in-fact, El Sol failed to submit a power of attorney ("POA") on behalf of Liberty Mutual attesting that Ms. Acosta was actually authorized to execute the COS (**Ibid**). The POA that El Sol submitted only authorized Ms. Acosta to execute the Proposal Bond, that is, the initial 10% bond due at bid submission to secure execution of the contract until delivery of the 100% performance bond promptly after award (**A3**). The COS bridges the gap between the proposal and performance bonds.

The POA form submitted here was actually two legal instruments – the top half of the document is the specific, and expressly limited grant of legal authority for Ms. Acosta to only sign the "surety bond" numbered "SNJ0530362021" that is, the Proposal Bond (**A3**). The bottom half of the document is a certified copy of a corporate resolution of the surety granting a corporate officer, David M. Carey, Assistant Secretary, to, in turn, generally appoint attorneys-in-fact to execute "all undertakings, bonds, recognizances and other surety obligations" on behalf of the company (**A3**). While Mr. Carey has been delegated authority by the surety to appoint an attorney-in-fact with broader power to sign "undertakings" and "other surety obligations," here the operative language in the top half of the POA form only appointed Ms. Acosta to sign the Proposal Bond. In fact, in bold language at the top

of the form, it is stated that "this power of attorney limits the acts of those named herein, and they have no authority to bind the Company except in the manner and to the extent stated" (**Ibid**.)

Thus, because Ms. Acosta had not been specifically delegated authority to sign the COS, and, given the further express disclaimer language in the POA form, her execution as the purported attorney-in-fact on the signature line of the COS was invalid. NJTA determined that this omission was tantamount to submitting no COS at all and, accordingly, on August 27, 2024, NJTA's governing body rejected El Sol's bid and awarded the contract to the second-lowest bidder, Sanzari. With respect to Sanzari, that entity submitted a properly executed COS signed by its surety's attorney-in-fact, accompanied by an unequivocal POA. It is undisputed that Sanzari's bid was in proper form and responsive.

B. NJTA's Final Agency Decision

El Sol timely filed a protest of the award to Sanzari. (**A51-61**). On September 17, 2024, the hearing officer issued a written recommendation to NJTA's Executive Director to deny El Sol's Protest and uphold the award to Sanzari which was subsequently adopted as NJTA's final agency decision. (**A63-79**).

As explained by the hearing officer, NJTA rejected El Sol's bid because: "the POA…specifically limits Acosta's authority to executing only the proposal bond, thus binding Liberty solely to the obligations contained therein. The POA, therefore,

provides no actual authority for Acosta to bind Liberty to the obligations contained in the consent of surety…Accordingly, while El Sol may have been the lowest bidder, given the limited POA that authorized Liberty's attorney-in-fact to bind the surety solely to the proposal bond, as well as the COS form itself, which was not endorsed by the attorney-in-fact, NJTA lacked any assurance that Liberty would stand behind its obligations contained in the consent of surety and actually issue the Contract Bond required by the Contract Specifications.." (**A65**).

Citing the Supreme Court's decision in Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307, 313 (1994), the hearing officer noted this Court's observation that "a consent of surety is a direct undertaking by the bonding company, enforceable by [the public entity]. Its purpose is to provide a guarantee to [the public entity], at the time of submission of the bids, that if the bidder were to be awarded the contract, the surety would issue the required performance bond" (**A69**). The hearing officer further noted the central holding in Meadowbrook, that is, "without a performance bond, the bidder cannot be required to enter into and perform the contract" and, therefore, "the failure to submit a consent of surety with the bid is a material defect that could neither be waived nor cured" (**A69**).

In so finding, the hearing officer rejected El Sol's argument that a POA was not necessary to attest to the validity of the purported attorney-in-fact's signature on the COS. Noting that the POA at issue here was limited on its face to the Proposal

Bond, the hearing officer found it self-evident that a COS "can only be verified as binding on the surety if it is accompanied by a lawfully executed POA attesting to that fact" and, lacking same, El Sol's bid was fatally defective **(A71)**.

C. The Decision Below

On November 27, 2024, the Appellate Division issued an opinion reversing the final agency decision **(Petitioner Appendix for Notice of Petition for Certification ["RPA"] 1-18)**. First, while recognizing that, under Meadowbrook, a failure to contemporaneously submit a COS at the time of bid submission is a fatal defect, the Appellate Division parted ways with NJTA with respect to the sufficiency of the POA at issue here. The lower court noted that while the operative language in the surety's POA was limited to the Proposal Bond, the document also contained the aforementioned excerpted corporate resolution with generalized language granting a corporate officer to appoint an attorney-in-fact to "have the power to act on behalf of Liberty in signing and executing 'any and all undertakings, bonds, recognizances and other surety obligations,' subject to any limitations that may be set forth in the POA." The court thus apparently considered the language in the proffered POA form and corporate resolution to be sufficient to cover both the Proposal Bond and COS **(PPA 13-14)**.

Second, the Appellate Division disagreed with NJTA's reading of the agency's own specifications. Contrary to NJTA's conclusion that Section 102.08 of

its Standard Specifications required a POA to authorize the surety's attorney-in-fact to sign the COS, the lower court found that "the requirements of the POA were tethered only to the Proposal Bond, not the COS" and, further, that the "POA requirements in Section 102.08 do not reference the COS in any way, nor does the COS language reference a POA" (**PPA 15**).

The specification in question states, in relevant part, that "the Proposal Bond…shall be accompanied by a Power of Attorney and Consent of Surety, each in a form acceptable to the Authority, which shall be executed by the surety company" (**A1-Section 102.08**). However, the Appellate Division found that the second sentence of this specification, as follows, excluded by implication the need for the POA to also extend authority to the attorney-in-fact to execute the COS: "[t]he Power of Attorney shall set forth the authority of the attorney-in-fact who has signed the Proposal Bond…on behalf of the surety company and shall further certify that such power is in force and effect as of the date of the Proposal Bond…"

In other words, the Appellate Division read a negative inference into the absence, in this second sentence, of language expressly reinforcing the need for the POA to authorize the attorney-in-fact to sign the COS. In the absence of such express language, the court below found that a POA is optional and not a mandatory feature of a binding COS. (**PPA 16**) ("the Bid Specifications inform whether a COS is mandatory and shall contain any and all requirements for the submission of that

document…recognizing such an implied requirement might allow unfettered discretion to reject bids for failure to provide a POA for other documents…").

NJTA respectfully submits that the Appellate Division: (1) contrary to the principles set forth in Meadowbrook, found that a POA is not necessary to substantiate the binding and unequivocal nature of a COS; (2) erroneously disregarded NJTA's interpretation of its own specifications to read a negative inference against the requirement for the POA at issue here; and (3) misread the POA form and, specifically, the general corporate resolution section of the document, to grant authority to the attorney-in-fact to sign the COS when no such authority had been granted. This Petition for Certification follows to correct and reverse the errors below.

QUESTIONS PRESENTED

1. Whether the Appellate Division erred when it found, notwithstanding this Court's holding in Meadowbrook that a consent of surety must be binding and unequivocal at the time of bid submission, that it is not necessary for a surety to expressly authorize its attorney-in-fact to sign a consent of surety through a power of attorney unless the contracting agency explicitly requires such proof at bid submission?

2. Whether the Appellate Division improperly substituted its judgment for that of the agency below when it overruled NJTA's interpretation of its own

specifications and thereby read a negative inference into Section 102.08 of the Standard Specifications sufficient to exclude by implication the need for the POA at issue here?

3. Whether the Appellate Division committed plain error by misreading the general language in the corporate resolution appended to the surety's power of attorney form to enable a corporate officer to appoint an attorney-in-fact to exercise plenary authority to sign, among other things, a consent of surety when, in fact, the operative language in the power of attorney instrument only granted limited authority to sign the proposal bond?

ERRORS OF THE APPELLATE DIVISION AND REASONS THAT FAVOR CERTIFICATION

As this Court is well aware, R. 2:12-4 sets forth the standard for a successful petition for certification:

> Certification will be granted only if the appeal presents a question of general public importance which has not been but should be settled by the Supreme Court……if the decision under review is in conflict with any other decision of the same or a higher court or calls for an exercise of the Supreme Court's supervision and in other matters if the interest of justice requires.

"Typically, a case for certification encompasses several of the relevant factors controlling the exercise of the Court's discretionary appellate jurisdiction." Mahony v. Danis, 95 N.J. 50, 53 (1983) (Handler, J. concurring). As explained below, the

issues presented in this Petition satisfy the above-cited standards outlined in R. 2:12-4.

I. Certification Should Be Granted To Clarify Or Extend This Court's Holding In Meadowbrook To Require The Submission Of An Unequivocal Power Of Attorney To Accompany A Consent Of Surety

It is firmly established as a bedrock principle of public contracting that the failure to submit a binding and unequivocal COS at the time of submission of a bid is "a material defect that [could] be neither waived nor cured." Meadowbrook, 138 N.J. at 316. In Mayo, Lynch & Assocs. v. Pollack, 351 N.J. Super. 486, 497 (App. Div. 2002), the Appellate Division made clear that a defective COS 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.

In reliance upon these decades-old precedents, NJTA has viewed the concept of bid security as an immutable principle of public procurement law for which there has long been a bright line standard. See Township of Hillside v. Sternin, 25 N.J. 317, 325-26 (1957) (cautioning that contracting agencies should not succumb to the temptation to waive material defects in order to secure a low bid; "In this field it is better to leave the door tightly closed than to permit it to be ajar, thus necessitating … speculation as to whether or not it was purposely left that way"); Meadowbrook, supra, 138 N.J. at 325 (a refusal to waive deviations "occasionally may result in additional cost to the public, but we have no doubt that the overriding interest in

insuring the integrity of the bidding process is more important than the isolated savings at stake").

However, in this case the Appellate Division upended what NJTA understood to be settled law, and held that "we are unconvinced that common sense and settled practice in the construction industry compels the conclusion that a POA is necessary to support a COS where the bid specifications do not require it." (Op. at 16). As explained in Points II, infra, NJTA submits that the Appellate Division misapprehended the specifications, which did, in fact require a POA to support the COS at issue. Putting that aside, however, the Appellate Division went on to more generally hold that: "NJTA has not proffered any binding precedent supporting its position that the POA was impliedly required to authorize the COS such that its absence constitutes a material, non-waivable defect. Recognizing such an implied requirement might allow unfettered discretion to reject bids for failure to provide a POA for other bid documents, without bidders having notice of the requirement through the Bid Specifications." (Ibid.).

The Appellate Division, respectfully, got it backwards. First of all, NJTA has interpreted Meadowbrook and Mayo to require submission of a POA to authorize the surety's attorney-in-fact to sign the COS at the time of bid submission. This is a rational reading of the case law because failure to submit a binding and unequivocal COS at the time of bid submission is non-waivable. That is, the

contracting agency cannot conduct an after the fact investigation to ensure the COS is binding and it must rely upon the contemporaneous record at the time of bid submission.

Submitting a POA is precisely what is needed to offer the contracting agency contemporaneous proof that the surety has authorized issuance of the COS through a duly appointed attorney-in-fact. To take an extreme hypothetical, in the absence of the same, then a bidder could have any random person sign the COS and the public entity would be estopped from conducting an after the fact inquiry to determine the veracity of that person's authority. It is *that* scenario which actually gives rise to the lower court's fear of opening the door to unfettered discretion to reject or accept bids. Thus, to the extent the Appellate Division found no case law or implied right to insist upon submission of a POA to support a COS at bid submission, it decided wrongly. But, even if this Court agrees with the lower court with respect to the state of the decisional law, this is a matter of substantial public importance and, given the policy issues at stake, the holdings in Meadowbrook and Mayo should now be extended to require submission of a binding POA to authorize execution of the COS at the time of bid submission.

II. The Appellate Division Improperly Substituted its Judgment for that of the Agency Below by Overruling NJTA's Interpretation of its own Specifications

As this Court is aware, the scope of appellate review of a final agency decision is limited and deferential. Aqua Beach Condo. Ass'n v. Dep't of Cmty. Affairs, 186 N.J. 5, 15–16 (2006). Appellate courts do not ordinarily overturn such a decision "in the absence of a showing that it was arbitrary, capricious or unreasonable, or that it lacked fair support in the evidence." Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963). Thus, judicial intervention is limited to "those rare circumstances in which it is clear that the agency action is inconsistent with its mandate." In re Petitions for Rulemaking, 117 N.J. 311, 325 (1989); Matter of On-Line Games Production and Operation Services Contract, 279 N.J. Super. 566, 590-92 (App. Div. 1995).

Although an appellate court is "in no way bound by the agency's interpretation of a statute or its determination of a strictly legal issue," Mayflower Sec. Co. v. Bureau of Sec., 64 N.J. 85, 93 (1973), if substantial evidence supports the agency's decision, "a court may not substitute its own judgment for the agency's even though the court might have reached a different result," Greenwood v. State Police Training Center, 127 N.J. 500, 513 (1992). With respect to a state agency's interpretation of its contract specifications, judicial deference is typically at its zenith and that has certainly held true for NJTA. See, e.g., Stohrer Brothers, Inc. v. New Jersey

Turnpike Authority, 2007 WL 1362733 (App. Div. 2007 ("We defer to the Authority's expertise" with regard to its application of the experience requirements of the towing services prequalification specifications) (**NJTA Appellate Division Appendix ("Ra") Ra 23-26**); I/M/O Protest of Nick's Towing Service, Inc., 2010 WL 5186013 (App. Div. 2010) (upholding NJTA's decision to deny prequalification to contractor that lacked relevant subject matter experience)(**Ra 13-17**); I/M/O John's Main Auto Body, 2011 WL 51578 (App. Div. 2011) (**Ra 6-12**); Michael Risoldi Auto Repair, Inc. v. New Jersey Turnpike Authority, 2008 WL 926581 (App. Div. 2008) (upholding NJTA final agency decision disqualifying towing contractor from procurement)(**Ra 18-22**).

Here, Section 102.08 of NJTA's Standard Specifications provide, in relevant part:

> The Proposal Bond…shall be accompanied by a Power of Attorney and a Consent of Surety, each in a form acceptable to the Authority, which shall be executed by the surety company. The Power of Attorney shall set forth the authority of the attorney-in-fact who has signed the Proposal Bond…on behalf of the surety company and shall further certify that such power is in full force and effect as of the date of the Proposal Bond…
> (**A1**).

The first sentence of the foregoing specification clearly requires a bidder to submit three documents at bid submission: (1) Proposal Bond; (2) Power of Attorney; and (3) Consent of Surety. Nothing in the first sentence states that the POA is to be limited in scope to the obligations covered in the Proposal Bond and,

in fact, discretion to determine whether the POA is "in a form acceptable to the Authority" is expressly reserved to the agency.

To reinforce the notion that the POA must also apply to the COS, NJTA promulgated its own form of COS that all bidders had to complete (**A4**). NJTA's required COS form contained a line for the bidder to state the identity of the surety and for the surety's representative to sign (with a witness) as "attorney-in-fact". In this context, there can be no other meaning to the title "attorney-in-fact" other than a representative of the surety who has been duly appointed to sign through a POA.

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

The Appellate Division ignored this language on the COS form itself, declined to read that form in *pari materia* with the first sentence of Section 102.08 and instead focused seemingly in isolation upon the second sentence in the specification. The second sentence contains an express requirement for the POA to set forth the authority of the attorney-in-fact to sign the Proposal Bond. The Appellate Division found that by implication, because this sentence does not also expressly require the POA to set forth the authority to sign the COS, then NJTA must not have so intended.

This conclusion, however, entirely ignores NJTA's inclusion of a signature line for the attorney-in-fact on the prescribed COS form and the fact that the same surety representative signing the Proposal Bond would also likely be signing the COS. Most importantly, because a contracting agency can only evaluate the integrity of the bid security at the time of bid submission, common sense dictates that in the absence of an effective POA, NJTA would not otherwise have a basis to confirm that the individual signing the COS had the actual authority to do so.

Indeed, no other surety company has been confused about this issue other than the company at issue here and the POA submitted by the next lowest-bidder, Sanzari, suffered from no such defect or ambiguity. If El Sol or its surety were confused by this language, it could have, but did not, make a pre-bid inquiry or challenge. See Entech Corp. v. City of Newark, 351 N.J. Super. 440, 459 (Law Div. 2002) (holding

that a challenge to contract specifications must be made prior to bid submission); Waszen v. City of Atlantic City, 1 N.J. 272, 276 (1949) (same).

The relevant question here is not whether NJTA could have drafted this language more precisely or more artfully or, as the lower court noted, whether it had refined it at a later date as part of a good faith effort at preventing the interpretive dispute at issue in this case from ever recurring. The only legally relevant inquiry is, in consideration of the deferential standard of review, whether NJTA interpreted its own specifications of long-standing import in a rational and non-arbitrary way. That inquiry must unqualifiedly be answered in the affirmative and to the extent the Appellate Division substituted its judgment for that of a state agency applying its technical expertise, the judgment below should be reversed.

III. The Appellate Division Committed Plain Error in Misreading the Surety's Corporate Resolution Appended to the Operative Power of Attorney Language in El Sol's Bid Submission

The Appellate Division also misapprehended the import of the POA document that was submitted by El Sol's surety in this case and, contrary to its plain language, suggested that the POA was sufficient to authorize the attorney-in-fact to execute the COS. To this extent, the lower court initially, correctly noted that "the POA expressly stated that Acosta, the attorney-in-fact, was given authority 'to sign, execute and acknowledge the following surety bond,' referencing the Proposal Bond." (**PPA 13-14**). However, the court went on to state that "the POA contained

generalized language that an appointed attorney-in-fact would have the power to act on behalf of Liberty in signing and executing 'any and all undertakings, bonds, recognizances and other surety obligations,' subject to any limitations that may be set forth in the POA." (**PPA 14**).

Respectfully, the lower court's observation is circular and wrong, and it thereby raises the prospect that the court erroneously thought that the POA form submitted here was sufficient to authorize Ms. Acosta to sign the COS, when it did not. In fact, the single-page POA form in the record (**A3**) is two separate legal instruments. The bottom half of the form is not a power of attorney, it is an excerpt of a corporate resolution of the surety which generally appoints a corporate officer, David M. Carey, Assistant Secretary, "to appoint such attorneys-in-fact as may be necessary to act on behalf of the company to make, execute, seal, acknowledge and deliver as surety any and all undertakings, bonds, recognizances and other surety obligations." (**A3**).

It is only the top half of the form which contains the specific and limited appointment of Ms. Acosta as attorney-in-fact, by Mr. Carey, to execute the Proposal Bond for the bid at issue, as POA for the surety. That section of the form states, in bold print: "[t]his Power of Attorney limits the acts of those named herein, and they have no authority to bind the Company except in the manner and to the extent stated" **(A3)**. Thus, reading these separate legal instruments together, the excerpt of the

corporate resolution at the bottom of the page authorizes Mr. Carey to broadly appoint an attorney-in-fact to sign a broad range of surety bonds, undertakings and obligations, but in the operative power of attorney language in the first half of the page, he *only* granted Ms. Acosta the limited authority to sign the Proposal Bond and no other document. No other surety bond submitted in this procurement contained such limiting language. The Appellate Division's observation in the opinion below seems to have conflated the distinct components of the two separate legal instruments that were printed on the same page. To this extent, the lower court misapprehended and mis-interpreted the POA at issue in a clearly erroneous way.

CONCLUSION

For the foregoing reasons, NJTA respectfully submits that this Petition for Certification should be granted.

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Dated: December 17, 2024