ML, INC. Plaintiff-Appellant, -against- EDISON TOWNSHIP BOARD OF EDUCATION and VANAS CONSTRUCTION CO. INC., Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: Civil Action On Appeal from the Order Denying Temporary Restraints SUPERIOR COURT OF NEW JERSEY MIDDLESEX COUNTY | LAW DIVISION DOCKET NO.: MID-L-3854-25 Sat Below: Hon. Benjamin S. Bucca, Jr., J.S.C.
BENARD ASSOCIATES, INC. Plaintiff, -against- EDISON TOWNSHIP BD. OF EDUCATION and VANAS CONSTRUCTION CO., INC. and ML, INC. Defendants,	SUPERIOR COURT OF NEW JERSEY MIDDLESEX COUNTY | LAW DIVISON DOCKET NO.: MID-L-3941-25

BRIEF SUBMITTED ON BEHALF OF ML, INC. IN SUPPORT OF ITS MOTION FOR CONTINUATION OF TEMPORARY RESTRAINTS

TRIF & MODUGNO LLC
89 Headquarters Plaza
North Tower, Suite 1201
Morristown, New Jersey 07960
Telephone: 973-547-3611
Facsimile: 973-554-1220
Attorneys for Plaintiff-Appellant, ML, Inc.

Of Counsel and on the Brief:
Greg Trif, Esq. (013842006)
(gtrif@tm-firm.com)
Kyle H. Cassidy, Esq. (115212014)
(kcassidy@tm-firm.com)

Date of Submission: September 23, 2025

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PRELIMINARY STATEMENT

This appeal arises from the Edison Township Board of Education's ("Board") unlawful rejection of ML, Inc.'s ("ML") bid and the trial court's failure to correct that error. N.J.S.A. 18A:18A-1 et seq. ("Schools Law") mandates that public contracts be awarded to the lowest responsible and responsive bidder. The Board improperly conflated "responsiveness" with "responsibility." ML's bid was fully responsive, yet the Board rejected it on a responsibility issue and denied ML the post-bid responsibility hearing the law requires. The trial court compounded this error by granting the Board discretion it does not possess, permitting rejection of ML's bid without affording ML the mandated responsibility hearing.

ML's bid met every legal requirement. Its subcontractor, Aber Electric ("Aber"), certified – under oath and just days before bid opening – that its DPMC Form 701 was current, its uncompleted work figures were accurate, and its aggregate rating limit was not exceeded. Any technical issue regarding the date on Aber's Form 701 was non-material, fully waivable, and conferred no competitive advantage.

Allowing the award to proceed to Vanas Construction Co., Inc. ("Vanas") while this appeal is pending would render ML's challenge moot, deprive ML of any remedy, and force taxpayers to pay nearly half a million dollars more. Maintaining the injunction is therefore essential to preserve the status quo, uphold settled law, and protect the public's interest in lawful and competitive contracting.

PROCEDURAL HISTORY AND STATEMENT OF MATERIAL FACTS

A. The Bid Solicitation and Bid Specifications

The Board solicited bids ("Solicitation") for the project known as "Additions at James Madison Intermediate School" ("Project"). 013a. The Solicitation required all bidders and their subcontractors to supply a DPMC Form 701 and a form entitled: Contractor Certification of Qualifications and Credentials for Bidder and all Prime Subcontractors ("Certification of Qualifications"). 029a-030a. The Solicitation also required bidders to propose lump sum prices to perform certain alternate scopes of work. 041a-042a. The alternates added to the base scope of work. 041a-042a; 187a-191a.

B. The Board's Receipt of Bids in Response to the Solicitation

Bids in response to the Solicitation were opened on June 10, 2025. 018a. ML, Benard Associates, Inc. ("Benard") and Vanas, among others, submitted bids in response to the Solicitation. 498a. Benard's base bid price ($14,885,000) was the lowest, ML's base bid price ($14,975,000) was second-lowest and Vanas's base bid price ($15,450,000) was third-lowest. 498a.

In accordance with the Solicitation, ML's bid included all mandatory documents, including a DPMC Form 701 and Certification of Qualifications on behalf of itself and its subcontractors. 192a-359a. MLs' bid also included a Bid Proposal which identified lump sum prices for each alternate scope of potential added work. 194a-195a. ML's Bid Proposal inadvertently did not circle either "add", "deduct" or "no change" when

specifying its price for each of the alternates, but the error was obvious on its face given that the alternate significantly increased the scope of work ("Clerical Error"). 194a-195a.

C. The Rejects Benard's and ML's Bids Without Prior Notice

During a Board meeting held on June 17, 2025, the Board rejected the bids submitted by Benard and ML and awarded the Anticipated Contract to Vanas. 423a.

D. ML Files a Lawsuit Challenging The Board's Resolution Awarding the Anticipated Contract to Vanas

On June 25, 2025, ML filed a Verified Complaint and Order to Show Cause seeking to, among other things, temporarily and preliminarily restrain the Board and Vanas from proceeding with the Anticipated Contract. 011a. By Order to Show Cause dated June 27, 2025, the trial court issued temporary restraints, enjoining the Board and Vanas from proceeding with the Anticipated Contract pending a hearing. 001a.

Benard filed a separate lawsuit challenging the Board's rejection of its bid. 441a. Benard's lawsuit was subsequently consolidated with ML's lawsuit. 596a.

On July 18, 2025, the Board filed a letter identifying its bases for rejecting Benard's and ML's bids. 498a. Although the Board properly rejected Benard's bid for having material, non-waivable defects in its consent of surety and bid bond (both of which are mandatory documents), the Board's stated bases for rejecting ML's bid were unlawful. Specifically, the Board stated that it rejected ML's bid because it: (i) included a DPMC Form 701 for Aber that was dated six months prior to the bid submission date; and (ii) lacked a notarized signature on its Form of Proposal. 498a-500a.

On September 5, 2025, the Court placed its decision on the record in open court, denying ML's application for preliminary injunctive. 008a.; 2T.[1] By Order and Final Judgment dated September 15, 2025, the Court denied ML's application for preliminary injunctive relief, lifted the stay previously entered, and dismissed the matter with prejudice for the reasons set forth in its September 5, 2025, decision. 008a.

E. The Appellate Division Granted ML's Application to File an Emergent Motion and Temporarily Stays the Board and Vanas from Proceeding with the Anticipated Contract

On September 15, 2025, ML filed an Application for Permission to File Emergent Motion ("Emergent Application"). 741a. By Disposition dated September 15, 2025, the Appellate Division temporarily enjoined the Anticipated Contract. 755a.

LEGAL ARGUMENT

TEMPORARY RESTRAINTS ARE NECESSARY

Preliminary injunctive relief is appropriate where the moving party demonstrates that: (i) an injunction is "necessary to prevent irreparable harm"; (ii) the applicant has made a "preliminary showing of a reasonable probability of ultimate success on the merits"; and (iii) in balancing the equities, the injury to the moving party in the absence of the injunction outweighs the foreseeable harm to the opposing party. Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982).

[1] The underlying record contains two (2) transcripts. A transcript of the September 2, 2025 Order to Show Cause Hearing shall be referred to as "1T". A transcript of the Court's September 5, 2025 Oral Decision shall be referred to as "2T".

A. Absent Restraints, the Looming Harm Would Be Irreparable

Here, the existence of irreparable harm is clear because ML cannot recover money damages. M.A. Stephens v. Borough of Rumson, 118 N.J. Super. 523 (Law Div. 1972). Indeed, New Jersey Courts consistently enjoin public agencies from awarding or proceeding on a contract during a dispute over the bidding process. Disposmatic Corp. v. Town of Kearny, 162 N.J. Super. 489, 459-96 (Ch. Div. 1978).

B. There is a Reasonable Probability of Success on the Merits

A party seeking a stay need not show certainty of success. Citizens Coach Co. v. Camden Horse R.R. Co., 29 N.J. Eg. 299 (E. & A. 1878). Rather, a reasonable probability of success on the appeal is sufficient. Zoning Bd. of Adjustment of the Twp. of Sparta v. Service Electric Cable T.V., 198 N.J. Super. 370 (App. Div. 1985). Indeed, mere doubt as to the validity of the claim is not an adequate basis for refusing to maintain the status quo. See Naylor v. Harkins, 11 N.J. 435 (1953).

1. The Trial Court Erred by Affording the Board Limitless Discretion to Reject a Fully Compliant Bid and Depriving ML of its Right to a Responsibility Hearing 2T:10-13

Pursuant to the Schools Law, "every contract for the provision or performance of any goods or services . . . **shall be awarded** . . . to the lowest responsible bidder." N.J.S.A. 18A:18A-4 (emphasis added). The term "lowest responsible bidder" means "the bidder or vendor: (1) whose response to the request for bids offers the lowest price and is responsive; and (2) who is responsible." N.J.S.A. 18A:18A-2(t). Responsive means

"conforming in all material respects to the terms and conditions, specifications, legal requirements, and other provisions of the request." N.J.S.A. 18A:18A-2(y). By contrast, the term "responsible" means "able to complete the contract in accordance with its requirements, including but not limited to . . . operating capacity, financial capacity, credit, and workforce, equipment, and facilities availability." N.J.S.A. 18A:18A-2(x).

Although public entities (like the Board) are afforded discretion in procurement decisions, such discretion is not limitless. As the New Jersey Supreme Court has held, a public entity's decision must be overturned if it violates settled law. Borough of Princeton v. Bd. of Chosen Freeholders of Mercer, 169 N.J. 135 (2001).

Here, the trial court erred by condoning the Board's violation of well-settled legal principles. The Board concluded that ML's submission of an allegedly outdated DPMC Form 701 for its electrical subcontractor rendered its bid non-responsive. That conclusion is incorrect as a matter of law. The alleged defect – relating to the subcontractor's aggregate rating – concerns responsibility, not responsiveness.

Under the Schools Law, responsibility is the bidder's ability "to complete the contract in accordance with its requirements, including but not limited to . . . **operating capacity, financial capacity**, credit, and **workforce, equipment, and facilities availability**." N.J.S.A. 18A:18A-2(x)(emphasis added). Determinations of responsibility (such as whether an award will cause a subcontractor such as Aber to exceed its aggregate rating limit) can be made after bid opening.

The Appellate Division has repeatedly confirmed this principle. In Palamar Constr., Inc. v. Pennsauken, 196 N.J. Super. 241 (App. Div. 1983), the court held that a bidder's late submission of its qualification statement (which addressed the bidder's responsibility) did not warrant rejection of the bidder's bid because the bidder established its responsibility after bid opening.

Where responsibility concerns exist, a bidder must be afforded a post-bid hearing to contest the determination and present evidence supporting its responsibility – for example, its backlog of uncompleted work. Id.; D. Stamato & Co. v. Vernon, 131 N.J. Super. 151, 156 (App. Div. 1974)(stating "[t]he rejection of plaintiff's bid at the township committee meeting . . . without first affording it a hearing on the issue of responsibility was without warrant in law").

Consistent with the settled law, N.J.A.C. 17:19-2.13 explicitly requires that all bids be opened – irrespective of questions about the firm's exceeding its aggregate rating limit – and that any issues related to rating limits be resolved after bid opening. N.J.A.C. 17:19-2.13 (a), (c) – (d).

Matter of Contract for Route 280 Section 7U Exit Project, 179 N.J. Super. 280 (App. Div. 1981), is particularly instructive. There, like here, a public entity rejected a bid because it included an allegedly stale accounting of the bidder's backlog of uncompleted work. The Appellate Division held the rejection improper, holding that the bidder's accounting of its backlog was not a material defect because: (i)

"financial ability is something that may have to be evaluated after the bids are opened"; and (ii) the law permitted the entity to "make further inquiry into a contractor's ability to perform" post-bid opening. Id. at 284-285.

By the same reasoning, ML's inclusion of a DPMC Form 701 for its electrical subcontractor, dated December 18, 2024, does not render its bid non-responsive. Rather, under settled precedent and N.J.S.A. 17:19-2.13, any concerns regarding the electrical subcontractor's aggregate rating limit are questions of responsibility to be addressed through a post-bid hearing or submission. D. Stamato & Co., 131 N.J. Super. at 156 (stating "[t]he rejection of plaintiff's bid at the township committee meeting . . . without first affording it a hearing on the issue of responsibility was without warrant in law"); N.J.A.C. 17:19-2.13 (a), (c) – (d).

By conflating these distinct legal concepts, the Board improperly rejected ML's bid as non-responsive and compounded the error by denying ML the hearing to which it was entitled. Despite recognizing ML's arguments [2T6:10-14], The trial court failed to recognize this fundamental error and incorrectly permitted the Board to violate settled law. 2T:10-13. Such a ruling cannot stand.

2. The Trial Court Wrongfully Upheld the Board's Rejection of ML's Fully Complaint Bid 2T:10-13

N.J.A.C. 17:19-2.13 requires all bidders and their listed subcontractors to supply a certified statement that "that the firm's bid for the subject contract would not cause the firm to exceed its aggregate rating limits." The Solicitation required

each bidder and their subcontractors to submit a DPM Form 701 and Certification of Qualifications. 029a-030a. In the Certification of Qualifications, each bidder and its subcontractors are required to certify:

> The amount of the firm's Bid Proposal and the value of all of its outstanding incomplete contracts does not exceed the firm's existing aggregate rating limit. A completed copy of Department of the Treasury Form DPMC 701 (Uncompleted Contracts Affidavit) or other certified form indicating the amount of the firm's uncompleted work as of the date of bid opening is attached. [063a.]

Aber, ML's electrical subcontractor, complied with the requirements. On June 6, 2025 – just days before bid opening – Aber executed its Certification of Qualifications under oath. In that certification, Aber swore that the DPMC 701 form accompanying ML's bid "indicates the amount of the firm's uncompleted work as of the date of the bid opening." 354a; 358a-359a. Aber further certified that "the amount of the firm's Bid Proposal and value of all of its outstanding incomplete contracts does not exceed the firm's existing aggregate rating limit." 358a-359a.

By making the exact certification required by N.J.A.C. 17:19-2.13 and the Solicitation, and by confirming that its DPMC 701 Form accurately reflected its uncompleted work as of the bid date, ML's bid fully complied with both the Schools Law and the Solicitation – despite the date appearing on Aber's DPMC 701 Form.

Even if ML's bid contained a defect (which it did not), the minor irregularity is non-material and certainly waivable. In River Vale, Judge Pressler adopted a two-prong test for determining whether a bid defect is material and non-waivable:

> [F]irst, whether the effect of a waiver would be to deprive the municipality of its assurances that the contract will be entered into, performed and guaranteed according to its specified requirements, and second, whether it is of such a nature that its waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition. [Id. at 216.]

Aber's DMPC Form 701, dated December 18, 2024, did not deprive the Board of any assurances of performance. Aber's Certification of Qualifications – executed just days before bid opening – confirms that the contents stated in the DPMC Form 701 are accurate as of the date of bid opening. 358a-359a. Nor did ML obtain any competitive advantage by including Aber's DPMC Form 701. ML undertook the same effort every bidder must undertake to secure the completed form from its subcontractor. It neither circumvented the requirements nor gained any unfair benefit compared to its competitors.

The trial court nevertheless concluded that Aber's submission of a DPMC Form 701, dated December 18, 2024, deprived the Board of adequate assurances because, in its view, the Board could not confirm whether Aber would exceed its aggregate rating limit at bid opening. 2T11:6-13:3. That reasoning fails for two independent reasons.

First, the trial court overlooked Aber's sworn Certification of Qualifications, which confirmed – just days before bid opening – that Aber's uncompleted work figures as set forth in its Form 701 were current as of the bid date. 358a-359a. Second, Aber was not required to (and did not) provide its subcontract price to perform the work. Clyde N. Lattimer & Son Const. Co. Inc. v. Tp. of Monroe Util. Auth., 370 N.J. Super. 130, 139

(App. Div. 2004)(holding that "pre-bid" quote from subcontractor is not required for listing subcontractor in bid). Consequently, neither the Board nor any bidder could have determined at bid opening whether Aber would exceed its aggregate rating limit, because the value of Aber's subcontract was unknown at that stage. The regulatory framework anticipates that such determinations will occur post-bid opening, not beforehand.

ML's bid satisfied every substantive requirement imposed by the Solicitation and the Schools Law. Aber's Certification of Qualifications and attached DPMC Form 701 provided the Board with all assurances necessary to confirm compliance. 358a-359a. Even if any technical irregularity existed, it was non-material under the River Vale standard and was readily waivable without undermining competition or assurances of performance. The trial court's failure to recognize these points led it to an incorrect conclusion and an improper validation of the Board's rejection of ML's bid. 2T:10-13.

3. The Trial Court Properly Held that ML's Submission of an Un-Notarized Bid Proposal Was Not Required or Was Immaterial and Waivable 2T:8-10

Aside from a reference to notarization in the Proposal Checklist, the Solicitation does not contain any requirement that the Bid Proposal be notarized. Indeed, unlike a litany of other documents in the Solicitation (which require notarization), the Bid Proposal does not contain a notary block. 040a-044a. Rather, the Bid Proposal includes an attestation by a witness, which ML signed with a witness. 040a-044a.

If there are concerns about the validity of the attestation without a notary, ML satisfied these concerns by executing, with notarization, other documents in its bid confirming ML's execution of the Proposal. Thassian Mech. Contr., Inc., v. East Brunswick Bd. of Educ., 2020 N.J. Super. LEXIS 27 at *4 (App. Div. Jan. 6, 2020) (finding defect to be immaterial where allegedly missing information was "independently verifiable and supported by additional documents submitted in the bid"). Specifically, ML notarized: (i) the Certification of Qualifications, wherein ML's President swore to executing the Proposal [224a]; and (ii) Certificate of Bidder Showing Ability to Perform Contract, wherein ML certified to "making the proposal" and "executing said proposal with full authority to do so." 250a.

ML's submission of an un-notarized Bid Proposal is also an immaterial waivable defect under River Vale. ML did not deprive the Board of assurances of performance by submitting an un-notarized Proposal because ML separately swore under oath, with notarization, that ML's President executed the Proposal. 224a; 250a. Where, as here, such alleged defect is resolved and/or verifiable through other documents in the bid submission, the alleged defect is cured or, at the very least, deemed immaterial. Thassian Mech. Contr., Inc., 2020 N.J. Super. LEXIS 27 at *4. It is equally clear that ML's submission of an un-notarized Form of Bid Proposal did not provide ML with any competitive advantage.

The Solicitation did not require notarization of the Bid Proposal itself, and ML complied with the express requirements by signing before a witness. Even if the absence of a notary were considered a defect, any such defect is immaterial, waivable, and provides no basis to reject ML's otherwise compliant bid.

4. The Trial Court Properly Held that the Clerical Error in ML's Bid Proposal Was Immaterial and Waivable 2T:15

New Jersey law is well-settled that obvious mistakes in bids are subject to waiver – even if such mistakes relate to articulation of bid price. For example, Spina Asphalt Paving Excavating Contractors, Inc. v. Bor. of Fairview, 304 N.J. Super. 425 (App. Div. 1997), the Appellate Division upheld a public entity's award of a contract to a bidder even though the bidder's bid contained two (2) different unit prices to perform certain specified work. Specifically, the bidder inserted a unit price of $400 per square yard to complete the work but, when it calculated the total cost for this item, it utilized a cost of $4 per square yard. Id. at 427. Ultimately, the court held that the bidder's unit price (expressed as $4 per square yard) was representative of the bidder's intent because the $400 unit price was "grossly exorbitant" and "an error so obvious that the true intent of the bidder was clear beyond any reasonable doubt." Id. at 430; see also Thomas P. Carney Inc. v. City of Trenton, 235 N.J. Super. 372 (App. Div. 1988)(holding that a bid containing two different expressions of a bid price was an "obvious error" that could be waived by the public entity).

ML's Clerical Error is equally obvious because the alternate prices ML submitted related only to additional work, not to any reduction of the base bid scope. 041a-042a; 187a-191a. Indeed, each alternate scope of work added to the base bid; none removed or reduced any portion of the original scope. Id. Under these circumstances, the trial court correctly concluded that it was "obvious" ML's alternate price proposals were never intended to reduce its base bid price. Spina Asphalt Paving Excavating Contractors, Inc., 304 N.J. Super. at 430 (permitting bidder to correct unit price in bid where error was "so obvious that the true intent of the bidder was clear beyond any reasonable doubt").

In addition, the trial court properly followed Appellate Division precedent by holding that the Clerical Error was immaterial and waivable. 2T:15. For the same reason the court held in Carney, ML's Clerical Error did not confer a competitive advantage because regardless of whether the alternate bid prices were identified as an "add" or "deduct", ML's bid price was always lower than the price submitted by Vanas (including alternates). Thomas P. Carney Inc., 235 N.J. Super. at 381 (stating "[The second lowest bidder's] bid was higher than [the first lowest bid] whether the latter was expressed in words or numbers. It was obvious that [the lowest bidder] had simply made an error . . . Under the circumstances we conclude that the error in the bid was not a material one and could be waived by the City").

Because ML's Clerical Error meets every element of the River Vale standard, and because the nature of the alternates plainly demonstrates ML's true intent, the trial court acted properly in treating the error as non-existent, immaterial and waivable. 2T:15.

C. The Public Interest Will be Substantially Harmed if the Board is Allowed to Continue with an Unlawful Award of the Anticipated Contract to Vanas

The final test in considering the entry of an injunction is the relative hardship to the parties in granting or denying relief. See Crowe, 90 N.J. at 132. The Court must balance the equities involved to determine whether the possible harm to the non-movant resulting from the issuance of an injunction is outweighed by the harm threatening the movant should the injunction not be issued. Zon. Bd. of Adj. of Sparta Tp v. Serv. Ele. Cable, 198 N.J. Super. 370 (App. Div. 1985). Here, the combined hardships that will be endured by taxpayers and the integrity of the public solicitation process if a stay is not issued will be severe and irreparable.

CONCLUSION

For these reasons, ML respectfully requests that this Court continue the injunction pending the conclusion of this matter.

Dated: September 23, 2025

TRIF & MODUGNO LLC
Attorneys for Plaintiff-Appellant, ML, Inc.

Greg Trif
89 Headquarters Plaza
North Tower, Suite 1201
Morristown, New Jersey 07960

Matthew Lakind, Esq. -031382006
TESSER & COHEN, P.C.
946 Main Street
Hackensack, New Jersey 07601
(201) 343-1100
Attorneys for Cross Appellant, Benard Associates, Inc.

ML, INC., Plaintiff, vs. EDISON TOWNSHIP BD. OF EDUCATION and VANAS CONSTRUCTION CO., INC. and ML, INC., Defendant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION APP DIV. Docket No.: A-00179-25 TRIAL COURT DOCKET NO.: MID-L-3854-25 (Consolidated under this Docket Number) SAT BELOW: Hon. Benjamin S. Bucca, Jr. JSC.
BENARD ASSOCIATES, INC., Plaintiff, vs. EDISON TOWNSHIP BD. OF EDUCATION and VANAS CONSTRUCTION CO., INC. and ML, INC., Defendant.	Companion Case Docket No.: MID-L-3941-25 (Consolidated with MID-L-3854-25)

BENARD ASSOCIATES, INC.'S BRIEF IN SUPPORT OF ITS CROSS APPEAL

On the Brief:
Matthew Lakind, Esq.
Lee Tesser, Esq.

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PRELIMINARY STATEMENT

It is a rare day that a public entity (Edison) awards a contract to a 3rd low bidder (Vanas), at a loss to its taxpayers of roughly $575,000 in savings. Perhaps even more rare is that this arbitrary decision was upheld by a Trial Court even though 1) Benard Associates, Inc.'s ("Benard") low bid was free from material defects; 2) the public entity completely "missed" and ignored a material defect in the 2nd low bid (ML, Inc.); 3) the public entity rejected the bid of Benard based on an alleged defect that also existed in the bid of the presumptive awardee, Vanas; and 4) the public entity performed no due diligence before rending its award. Benard therefore asks this Appellate Court to reverse a public entity whose actions were arbitrary, and whose actions favored one bidder over all others.

Cross Appellant, Benard,[1] was the lowest responsive and responsible bidder for a public schools Project known as the "Additions at James Madison Intermediate School. (the "Project") Benard submitted a fully conforming bid and its price was lower than that of Respondent, Vanas Construction Co,. Inc. ("Vanas") by $574,500, the presumptive awardee. Appellant, ML, Inc. ("ML") was the 2nd lowest bidder.

Edison rejected Benard's bid because its bid bond and consent of surety were dated May 13, 2025, the date of the original bid opening, not the unilaterally

[1] Cross Appellant, Benard Associates, Inc. was the Plaintiff in the matter MID-L-3941-25. Appellant, ML, Inc., was the Plaintiff in the companion and consolidated matter, MID-L-3854-25.

rescheduled bid opening of June 10, 2025. Indisputably, Benard's bid bond and consent of surety are fully enforceable as is, and with respect to the consent of surety, Edison did not require that it be dated a date certain. In error, the Trial Court found that this was a material defect incapable of waiver, essentially ignoring case law that directly contradicted both the Court's and Edison's positions.

Edison also rejected Benard's bid because its Certification of Uncompleted Work (DPMC Form 701) was dated roughly 1 month before the rescheduled bid opening. Both Edison and the Trial Court ignored the fact that the bid advertisement required only that the DPMC Form 701 be accurate as of the bid opening, not dated the same day as the bid opening. Nobody has called into question the accuracy of Benard's DPMC Form 701. Edison also rejected Benard's bid because, while it signed its bid proposal, one form was not notarized. The Trial Court correctly found that this was not a defect because the bid proposal form itself did not require notarization.

None of these issues rose to the level of a material defect. What is more, while Edison rejected Benard's bid because its DPMC Form 701 pre-dated the bid opening, Edison ignored this same alleged defect in Vanas' bid. Edison's disparate treatment favoring Vanas was improperly ignored by the Trial Court.

With respect to Appellant ML, it was the 2nd lowest bidder. ML's bid was materially defective because, in contravention of the bid advertisement and

applicable law, it failed to specify whether its alternates were going to add or deduct from its base bid price. The Trial Court erred in finding this defect immaterial, ignoring long settled law holding that defects affecting a bidder's price are material, and cannot be waived.

In sum, Edison's bid process and the Trial Court's ruling were rife with reversible errors. The Trial Court committed reversible error by upholding Edison's wholly unreasonable decision to award the Contract for this Project to Vanas.

FACTUAL BACKGROUND

Benard relies upon the facts set forth in its Verified Complaint before the Trial Court. (**441a)** In addition, Benard adds that ML, the 2nd low bidder, failed to identify whether its alternates would add or deduct from its bid price, this being a material requirement of the bid advertisement. (**194a-195a**) Edison did not even discover this material defect until it was raised by Benard and Vanas before the Trial Court. Edison's lack of due diligence was confirmed by its counsel who stated that Edison "missed" this material defect, even though it would consider it material in hindsight. (**Arg. TR68:4-70:3)**

PROCUDURAL HISTORY

With the exception of ML's characterization of Benard's bid as being properly rejected, and its characterization of ML's bid as fully conforming to Edison's bid advertisement and applicable law, Benard concurs with the procedural history as

stated in ML's motion. Benard repeats that it only concurs insofar as ML's factual accounting of the procedural process of this matter, and does not adopt or concur with any subjective statements or characterizations as to the conformity (or lack thereof) of Benard's or ML's bid.

LEGAL ARGUMENT

I. EDISON'S BASIS FOR REJECTING BENARD'S BID WAS ARBITRARY, CAPRICIOUS, AND UNREASONABLE.

Edison rejected Benard's bid because: 1) Benard's bid bond and Consent of Surety were not dated the same date as the bid opening, 2) Edison claimed that Benard's Certification of Uncompleted Work (DPMC Form 701) must bear the date of the bid opening, and 3) Benard failed to notarize its bid proposal. The Trial Court found that Edison had discretion to reject Benard's bid for the first 2 reasons but erred in rejecting Benard's bid for failing to notarize the bid proposal. Benard appeals the Trial Court's decision as related to Benard's Bid Bond, Consent of Surety, and DPMC Form 701.

A. A public entity may not reject a fully conforming bid, nor may it reject a bid containing a minor, non-material defect at the expense of the taxpayers' best interests.

The purpose of New Jersey's public bidding laws is to "secure for the public the benefits of unfettered competition." Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307, 313 (1994). In that regard, a public entity's discretion

is not limitless. Barrick v. State, 218 N.J. 247, 258 (2014). Its discretion to reject a low bidder is limited to an analysis of whether the bidder "materially" deviated from the bid specifications. Id. If the public agency's determination is arbitrary, capricious, or unreasonable (as is the case here), then it must be overturned. Id.

While a public entity cannot waive a defect in a bid that concerns a **material** condition, "minor or inconsequential discrepancies and technical omissions can be the subject of waiver." Id. at 314. On Edison's best day, the faults it claims with Benard's bid are nothing more than incredibly "minor or inconsequential discrepancies and technical omissions." To that end, the seminal case on evaluating alleged bid defects holds that "it may well be the duty as well as the right of the municipality to waive [an inconsequential/immaterial defect]". River Vale v. R. J. Constr. Co., 127 N.J. Super. 207, 222 (Law. Div. 1974).

"Essentially this distinction between conditions that may or may not be waived stems from a recognition that there are certain requirements often incorporated in bidding specifications which by their nature may be relinquished without there being any possible frustration of the policies underlying competitive bidding." Terminal Constr. Corp. v. Atlantic County Sewerage Authority, 67 N.J. 403, 412 (App. Div. 1975). Public bidding statutes were "**not meant to cost public bodies many thousands of dollars by requiring acceptance of higher bids for**

mere technical violations." Schlumberger Industries, Inc. v. Borough of Avalon, 252 N.J. Super. 202, 212 (App. Div. 1991).

Simply put, Edison did not have the discretionary authority to reject Benard's low bid. Not only was Edison's decision, and the Court's upholding of that decision, in contravention of all applicable law, the rejection of Benard's bid was not in the best interest of the taxpayers. There is absolutely no credible argument that if Edison accepted Benard's bid as is, it would have deprived Edison of assurance that the Contract would be performed as required, or that Benard would have been given an unfair advantage over other bidders. River Vale, supra. Rather, there are no material defects in Benard's bid, and the only bidder who received favorable treatment from Edison was Vanas.

B. Benard's bid bond and consent of surety are not defective, and even if they were, the claimed defect is so minor and inconsequential that Edison's rejection of Benard's bid was arbitrary, capricious, and unreasonable.

In compliance with N.J.S.A. 18A:18A-24 ("Security to Accompany Bid"), Benard submitted with its bid a bid bond (bid security) in the amount of $20,000. (**469a**) The bid bond is dated May 13, 2025, the exact date of the originally scheduled bid opening for this Project. (**Id.**) Edison rescheduled the bid opening twice, first to May 20, 2025, and then to June 10, 2025. Benard, having a valid bid bond based on its unchanged bid price, did not need to acquire a new one, and thus submitted this valid, effective and enforceable bid bond with its bid.

Edison never claimed, nor could it, that the date of the bid bond affected its validity. Benard is bound to enter into the Contract if it is awarded, and if Benard fails to do so then it will forfeit its bid bond in the amount of $20,000, all consistent with N.J.S.A. 18A:18A-24. There is no risk that the date of Benard's bid bond negates Edison's assurance that Benard will enter into and perform the contract, nor does the date of Benard's bid bond in any way affect or implicate the overall fairness and competitive nature of the bidding process. Meadowbrook, supra. This much was confirmed and certified by Jay Forlenza, AFSB, the bond broker who procured the bid bond and consent of surety on behalf of Benard. .[2] (**496a-497a)**

To that end, the New Jersey Supreme Court has explicitly held that "while the submission of a security with a bid is material and may not be waived, the form in which that security is submitted may vary slightly from that set forth in the specifications." Terminal, supra. at 411 citing P. Michelotti & Sons, Inc. v. Borough of Fair Lawn, 56 N.J. Super. 199 (App. Div. 1959) (*uncertified check which was later certified*); Township of River Vale v. R.J. Longo Constr. Co., Inc., 127 N.J. Super. 207 (Law Div. 1974) (*bid bond in lieu of certified check*); Hornung v. Town of West New York, 82 N.J.L. 266 (Sup. Ct. 1911) (*cashier's check instead of certified check*). Township of Hanover v. International Fidelity Ins. Co., 122 N.J.

[2] The Certification of Jay Forlenza was submitted solely to clarify for Edison that the bonding documents are valid and enforceable. The Certification does nothing to change or amend Benard's bid as ML disingenuously claims. The validity and enforceability of the bonding documents is clear on their face.

Super. 544 (App. Div. 1973) (*Holding that a bid bond in an amount slightly less than that required was minor and inconsequential*). Like Township of Hanover, "there is not even a suggestion of an intent to ignore the bid bond requirements of the specifications." Tp. of Hanover, supra. at 551.

A nearly identical situation was addressed by the Appellate Court in 2020. In Thassian Mec. Contr., Inc. v. East Brunswick Bd. of Educ., infra., East Brunswick Bd. of Educ. originally advertised for bids in April of 2019. Thassian Mech. Contr., Inc. v. East Brunswick Bd. of Educ., 2020 N.J. Super. Unpub. LEXIS 27, *2, 2020 WL 53888 (**433a**) On May 22, 2019, East Brunswick rejected all bids and chose to split up the scope of its project and re-bid it. Id. East Brunswick then issued the new solicitation for bids on June 4, 2019. Id. Upon receipt of all bids, East Brunswick rejected the low bidder claiming that it failed to provide a Sworn Contractor Certification as required. Id. The low bidder had apparently used its Sworn Contractor Certification that it submitted for the original May 19, 2019 bid opening, and submitted that same document again at the June 4, 2019 bid opening. Id. 4. At the Trial Court in Middlesex County, Judge Rivas rejected East Brunswick's "argument that plaintiff's use of subcontractors' sworn certifications from a prior bid invalidates the current bid under the statute." Id. Judge Rivas found that use of the prior Certifications "did not in any way influence plaintiff's bid." Id. Judge Rivas further found that there was "*no evidence that the waiving of the subcontractor*

sworn certification requirements would place bidders on uneven footing." Id. at 4-5. Judge Rivas ruled that the defect was minor and waivable, and held that East Brunswick's failure to waive the minor defect was "arbitrary, capricious, or unreasonable." Id.

The Appellate Court affirmed Judge Rivas' decision in whole finding that his "determination that the minor defect in the bid was not material, and the rejection of the lowest bid in these circumstances was an abuse of the Board's [East Brunswick's] wide discretion." Id. at 6.

Thassian is directly on point. Benard submitted a bid bond dated May 13, 2025 (the original bid date), just as the low bidder did for its sworn contractor certification in Thassian. Like Thassian, there is no evidence that the date of Benard's bid bond in any way influenced its bid, and no evidence that the date of the bid bond placed bidders on uneven footing. Clearly, Edison's rejection of Benard's bid because of the date of its bid bond was arbitrary, capricious and unreasonable.

The same is true with respect to the date of Benard's Consent of Surety. First, **Edison's bid advertisement did not require that the Consent of Surety bears the date of the bid opening.** The bid advertisement speaks only to the date of the bid

bond, not the consent of surety. Thus, both the Trial Court and Edison committed reversible error in rejecting Benard's bid for this reason.[3]

Neither the Trial Court, Edison, Vanas, or ML can point to any specific language in Benard's bid bond, consent of surety, or even the form performance and payment bonds to be issued, that makes them conditional on any time frame. In fact, Edison required that the consent of surety be "unconditional" at Section 2(B)(3). **(029a)** There is no language in the bid bond or consent of surety that sets a time limit for their applicability, and there is no language, or other legal source that indicates that a bid bond, consent of surety, performance bond, or payment bond may not be enforceable based solely on the date they are signed.

In anticipation of arguments to be made by ML in its Reply Brief, the Court should be aware that the bid bond and consent of surety are monetary instruments calling for bonding in specific monetary sums, without regard to what may be included in a contractual scope of work, and without regard to when they are signed. Benard's bid bond is fully compliant with the Public Schools Contracts Law, which simply requires that the bid bond be in the amount of 10% of the bid price not to exceed $20,000. N.J.S.A. 18A:18A-24. The purpose of the consent of surety is to give the public entity assurance that if Benard is awarded the Contract, the surety

[3] The Trial Court's statement that "all parties agree that the solicitation required each bidder to submit a bid bond and consent of surety bearing the same date as the form of proposal" was wholly inaccurate. **(Dec. TR13:17-21)**

will provide the requisite performance and payment bonds "in such **sum** as is required in the advertisement or in the specifications." N.J.S.A. 18A:18A-25. The scope of work of the Contract (whether revised before or after the bid opening), and the date of the bid bond/consent of surety, are irrelevant to their enforceability. Rather, as is clear on the face of the documents submitted, they are applicable to this Project and their amounts are based solely on Benard's bid price, nothing more. (**469a, 471a)** There is nothing in the language of Edison's bid advertisement, the language of Benard's bid bond, or any N.J. Statute, that in any way conditions its enforceability on a specific scope of work, or on some timeline for the bid opening or award of the Contract. (**Id.)**

Furthermore, the form performance and payment Bonds to be issued by the surety further confirm that they are purely financial instruments that are not conditioned on the scope of work of the Contract. Edison's Bid Advertisement specifically requires that the performance and payment bonds (as guaranteed by the Consent of Surety) be issued "in the amount of one hundred percent (100%) of the contract sum." (**029a).** The performance and payment bonds are not conditioned on some fixed scope of work or any date. They apply simply to the Project at issue in the monetary amount required by Edison and the Public Schools Contracts Law.

For these reasons, Edison's rejection of Benard's bid based solely on the date of its bid bond and consent of surety was an abuse of its discretion, and the Trial Court committed reversible error by upholding Edison's arbitrary decision.

C. Benard's Certification of Uncompleted Work (DPMC Form 701) is not defective, and Edison's rejection of Benard's bid based solely on the date of that Certification was arbitrary, capricious, and unreasonable.

As required by N.J.A.C. 17:19-2.13, Benard submitted with its bid a Certification of Uncompleted Work dated May 6, 2025, demonstrating that the award of the Contract for this Project will not cause Benard to exceed its aggregate limit. (**476a-477a)** Edison based its rejection on Section 2(B)(19) of the bid advertisement which simply required bidders to submit the required Certification of Uncompleted Work (DPMC Form 701) "indicating the amount of uncompleted contracts as of the date of the bid opening." (**030a)** The plain language of Edison's bid advertisement does not require that the form be signed on a specific date. Rather, it simply requires that the information contained in the form be accurate as of the bid opening. While Benard's Certification is dated May 6, 2025, it accurately reflects the amount of uncompleted work that Benard had on hand as of the June 10, 2025 bid opening. And more importantly, in compliance with N.J.A.C. 17:19-2.13, Benard's Certification shows that if it receives the award of the Contract it will remain some **$80,000,000 below its aggregate limit,** because Benard's aggregate limit is $100,000,000. **(095a**) The fact is that Benard's Certification of Uncompleted

Work is in full conformance with the applicable Administrative Code (N.J.A.C. 17:19-2.13) and Edison's bid advertisement.

Benard also agrees with ML's arguments regarding its own DPMC Form 701 Certification that formed, in part, Edison's basis for also rejecting ML's bid. The issue raised by Edison regarding these forms goes to responsibility, not responsiveness. If Edison had acted with due diligence, and with some reasonable business purpose to ensure the best interests of its taxpayers were being served, then it should have conducted a responsibility hearing or at least some form of minimal due diligence. In failing to take such necessary action, Edison's rejection of Benard's bid based purely on the signatory date of its DPMC Form 701 was arbitrary, capricious, and unreasonable.

Suffice it to say, there is no evidence, and indeed none exists, that the date of Benard's Certification in any way influenced its bid or deprived Edison of its assurance that Benard will enter into and perform the Contract. There is also no evidence that the date of the Certification placed bidders on uneven footing. Edison's rejection of Benard's bid for that reason was arbitrary, capricious, and unreasonable.

D. The Trial Court ignored clear and convincing evidence that Edison gave Vanas favorable treatment by rejecting the bids of Benard and ML based on the dates of their DPMC Form 701s, while ignoring this very same alleged defect in ML's bid.

Section 2(B)(19) required all bidders to submit DPMC Form 701 indicating the amount of uncompleted contracts as *"of the date of the bid opening for Bidder and all Prime Subcontractors (Steel, HVAC, Plumbing, Electric)".* (**030a)** Benard maintains that it fully complied with this requirement in accordance with the plain language of the bid advertisement, because its DPMC Form 701 was accurate as of the bid opening. However, Edison disagreed and took the position that Section 2(b)(19) required all bidders and their prime subcontractors to submit a DMPC Form 701 that bore the exact date of the bid opening. Thus, while Edison rejected Benard's bid because it submitted a DPMC Form 701 that pre-dated the bid opening, Edison completely ignored this same alleged defect in Vanas' bid. In fact, Edison did not even consider Vanas' DPMC Form 701s as defective prior to the litigation, but instead claimed that Vanas' bid was "without defect." **(498a)** As a result, this issue cannot be analyzed in the context of whether Edison exercised its discretion to waive an alleged defect in Vanas' bid because Edison never actually gave Vanas a waiver. Instead, (and irrespective of whether the alleged defect is material or not) Edison took the position that the pre-dating of the DPMC Form 701 constituted a defect in Benard's bid, but not in Vanas' bid. This type of disparate treatment must be rejected.

The Trial Court correctly found that Vanas' bid included multiple DPMC Form 701s that pre-dated the bid opening. (**Dec. TR13:4-16)** While Benard submts

that the signatory date of the DPMC Forms 701 is immaterial so long as the information contained on the form is accurate as of the bid opening (as was the case with Benard), Edison clearly applied two different standards to this issue by rejecting the bids of Benard and ML, while completely ignoring this issue when it came to Vanas. Thus, the Trial Court erred in finding that Edison had discretion to reject Benard's and ML's bids for an alleged defect, while ignoring that same defect in Vanas' bid.

This principle was squarely applied in Pact Two, LLC v. Twp. of Hamilton, 2020 N.J. Super. Unpub. LEXIS 701 (App. Div. Apr. 20, 2020) (**attached hereto)**. In Pact Two, the public entity rejected the low bidder due to an immaterial defect but waived that same immaterial defect in favor of a higher priced bid. Id. Hamilton's Bid Advertisement included a technical requirement at Part 2.3(G). Id. at 2-4. Neither the low bidder (plaintiff) nor the 2nd low bidder complied in full with Part 2.3(G). Despite this, the public entity rejected plaintiff's bid while waiving that same immaterial defect in favor of the 2nd low bidder. Id. at 3.

The Appellate Court upheld the trial court's finding that the public entity abused its discretion. The Appellate Court agreed with the trial court that there was no sound business rationale for the Twp. of Hamilton to waive an admittedly immaterial defect in favor of one bidder, while rejecting the low bidder based on the same immaterial defect. Id. at 10-11. The discretion afforded to public entities to

reject bids containing immaterial defects does "not provide it with carte blanche to reject any and all bids that it wants to when there is a non-material defect." Id. at 9-10. Rather, a public entity's decision must be based on sound business rationale. Id.

The Appellate Court in Pact Two agreed that the public entity's refusal to waive the non-material defect in plaintiff's bid, while waiving that same defect in favor of another bidder (at an additional cost of $100,000,), was not based on any sound business judgment and was an abuse of the public entity's discretion. Id. at 17.

The evidence that Edison gave preferrable treatment to Vanas cannot be disputed. Moreover, the Court should reject any argument by Edison that it had discretion to waive this alleged defect for Vanas because the record is clear that Edison did not in fact waive the defect in Vanas' bid. Rather, Edison's position at the time it rejected Benard's bid and awarded to Vanas was that Vanas' bid was "complete without defect". (**498a)** For these reasons, Edison's rejection of Benard's bid because of the signatory date of its DPMC Form 701 was arbitrary, capricious, unreasonable, and clear evidence of Edison's favorable treatment towards Vanas.

II. ML, INC'S BID CONTAINS A MATERIAL AND NON-WAIVABLE DEFECT BECAUSE IT FAILED TO INDICATE WHETHER ITS PRICES FOR ALTERNATES WERE "ADDS" OR "DEDUCTS".

ML failed to identify whether its prices for Alternates 1, 2 and 3 were add or deduct alternates, thereby leaving Edison and all other bidders to guess at the

intended price of ML's bid. (**194a-195a)** Section C of the Form of Proposal stated that "Every bidder must indicate whether EACH Alternate is an Add, Deduct, or No Change to its particular contract." (**Id.**) ML admits that it failed to comply with this requirement. The Trial Court ignored the fact that Edison missed this defect in ML's bid and erred in finding that this level of defect was waivable. Indeed, ML's failure to identify whether its alternates were adds or deducts is perhaps the only material defect at issue in this entire litigation.

ML's bid leaves open the question of whether its Alternates increase or decrease its base bid price by over $800,000. While the Trial Court stated that it was obvious that these were "add" alternates (**Dec. TR15:9-21)**, such is not the case. For example, Alternate #3 calls for providing folding partitions **in lieu of** a rollup gum divider curtain. (**195a)** Neither the Trial Court nor Edison could possibly know whether this is an add or deduct alternate because the alternate calls for the substitution of certain materials/equipment. Undoubtedly, a defect such as this, which directly calls into question the intended price of ML's bid, must be deemed material and non-waivable.

Perhaps most shocking is Edison's conduct regarding this material defect. During the oral argument, Edison's counsel candidly stated that Edison simply "missed it". (**Arg. TR69:2-70:8)** Edison's lack of due diligence was so significant that it failed to identify what is perhaps the lone material defect in all the bids at

issue. What is more, Edison took the position that if they had discovered this defect, "*that would not be a waivable defect."* (**Id.**) The Trial Court ignored that this admission was further evidence of Edison's lack of due diligence and arbitrary conduct, and it ignored Edison's position that ML's bid was materially defective for failing to identify whether the alternates were adds or deducts.

Suburban Disposal, Inc. v. Twp. of Fairfield, infra., addresses this very issue. There, Waste Management indicated "No Bid" for one of the Alternates, Alternate E. Suburban Disposal, Inc.. v. Township of Fairfield**,** 383 N.J. Super. 484, 491 **(**App. Div. 2006). The Court found that the phrase "No Bid" was a clear and unambiguous signal that Waste Management intended not to bid on Alternate E. Id. Waste Management had argued that its "No Bid" meant that the price of Alternate E was included in its base bid. Id.

The Appellate Court found that this gave "Waste Management a decided unfair advantage over other bidders. It had the option, after all bids were opened, to decline the contract if the Township insisted on including Alternate E, or to sweeten its bid by adding Alternate E if it wanted to accept the award. Other bidders were not given a similar opportunity. Nor should they have been. Such post-bid manipulations are repugnant to our public bidding laws." Id. at 493-494.

The same is true here for ML. It can choose, post bid, to decide whether its Alternates are "Adds", thereby increasing the price of its bid, or "Deducts", thereby

lowering the price of its bid. A bid condition that is likely to affect the amount of any bid is material and non-waivable. Id. at 493 citing Terminal Constr. Corp. v. Atl. County Sewerage Auth., 67 N.J. 403, 412 (1975). "Allowing a bidder to modify its choice after all bids are opened is at the heart of the evil proscribed by *Terminal Construction."* Id.

In Terminal, the Supreme Court described the differences between a material and immaterial defect in clear terms. "An immaterial defect, such as a bid bond that contains a slight variation, is a minor and inconsequential defect that should be waived. Terminal, supra. at 411. "On the other hand, conditions requiring detailed descriptions of materials, ***or specific amounts of additions or decreases in price if alternate products are used,*** […] have all been found to be so material as not to be subject of waiver. Id. at 411-412 citing Remsco Associates, Inc. v. Raritan Township Municipal Util. Authority, 115 N.J. Super. 326, 333-34 (App. Div. 1971) (***emphasis added***).

Remsco dealt with a nearly identical situation to the one presented here with ML's bid. The Appellate Court held: "*Here the instructions to bidders required the bidder affirmatively to indicate the amount of the additions or decreases in price if the alternate products it proposed to use were accepted by the Authority, and also the names of the subcontractors it proposed to employ. The requirements are reasonable. There was no warrant for Remsco's ignoring them as it did by leaving*

blank the spaces calling for the differences in price and by answering "not known" to the question asking for the names of its proposed subcontractors. Those material departures from the specifications may not be disregarded." Remsco, supra. at 334.

Since ML failed admittedly failed to comply with Edison's requirement that it indicate whether its Alternates pricing increased or decreased its bid price, ML's bid is fatally defective and it cannot be awarded the Contract for this Project.

CONCLUSION

For all the foregoing reasons, the Edison's award of the Contract for this Project to Vanas should be vacated and the Edison should be compelled to award the Contract for this Project to Benard. Also, since the Court has decided that it will make a full ruling on the merits based on submissions and arguments made in connection with ML's motion for a stay of the Trial Court's decision, Benard has not briefed the issue of a stay here. Suffice it to say, Benard joins in ML's request to stay the Trial Court's ruling if that motion is heard.

Dated: September 25, 2025

TESSER & COHEN, P.C.
Counsel for Plaintiff, Benard Associates, Inc.

By:_____
Lee Tesser, Esq.

ML, INC. Plaintiff-Appellant, -against- EDISON TOWNSHIP BOARD OF EDUCATION and VANAS CONSTRUCTION CO. INC., Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-000179-25 Civil Action On Appeal from the Order Denying Temporary Restraints SUPERIOR COURT OF NEW JERSEY MIDDLESEX COUNTY | LAW DIVISION DOCKET NO.: MID-L-3854-25 Sat Below: Hon. Benjamin S. Bucca, Jr., J.S.C.
BENARD ASSOCIATES, INC. Plaintiff, -against- EDISON TOWNSHIP BD. OF EDUCATION and VANAS CONSTRUCTION CO., INC. and ML, INC. Defendants,	SUPERIOR COURT OF NEW JERSEY MIDDLESEX COUNTY | LAW DIVISON DOCKET NO.: MID-L-3941-25

BRIEF SUBMITTED ON BEHALF OF ML, INC. IN FURTHER SUPPORT OF ITS MOTION FOR CONTINUATION OF TEMPORARY RESTRAINTS

TRIF & MODUGNO LLC
89 Headquarters Plaza
North Tower, Suite 1201
Morristown, New Jersey 07960
Telephone: 973-547-3611
Facsimile: 973-554-1220
Attorneys for Plaintiff-Appellant, ML, Inc.

Of Counsel and on the Brief:
Greg Trif, Esq. (013842006)
(gtrif@tm-firm.com)
Kyle H. Cassidy, Esq. (115212014)
(kcassidy@tm-firm.com)

Date of Submission: September 29, 2025

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REPLY ARGUMENTS

A. ML Faces Irreparable Harm if a Stay is Not Granted

Vanas's claim that "ML will not suffer irreparable harm absent a stay" is contradicted by the very case it cites. In Trap Rock Industries v. Kohl, 59 N.J. 471 (1994), the court granted a stay pending appeal, recognizing that irreparable harm exists in bid protest cases.

B. There is a Reasonable Probability of Success on the Merits

1. The Trial Court Erred by Affording the Board Limitless Discretion and Depriving ML of a Responsibility Hearing (2T:10-13)

The trial court erred in upholding the Board's refusal to provide ML with the responsibility hearing it is entitled to by law, effectively granting the Board unchecked discretion. Established precedent makes clear that a public entity's decision must be overturned when, as here, it violates settled legal principles. Boro. of Princeton v. Bd. of Chosen Freeholders of Mercer, 169 N.J. 135 (2001). Because the trial court's ruling rests on a legal error, this Court's review is de novo. Nocholas v. Mynster, 213 N.J. 463 (2013).

The Board's argument that ML was not entitled to a responsibility hearing is misguided. At the outset, ML does not claim entitlement to a responsibility hearing based on N.J.S.A. 18A:18A-4 or a rejection based on "prior negative experience." Rather, ML was entitled to a responsibility hearing because the basis for the Board's rejection of its bid – an allegedly outdated Certification of Uncompleted Work from a subcontractor — concerns the contractor's responsibility, not the responsiveness of the bid.

Responsibility is the bidder's ability "to complete the contract in accordance with its requirements, including but not limited to . . . **operating capacity, financial capacity**, credit, and **workforce, equipment, and facilities availability**." N.J.S.A. 18A:18A-2(x)(emphasis added). The allegedly outdated Certification of Uncompleted Work is an issue of responsibility because it relates to the contractor's aggregate limit – i.e. financial/operating capacity. See N.J.A.C. 17:19-2.13(c). Where questions exist about exceeding aggregate limits, the regulations require that the bid be opened and that post-bid submissions be considered to resolve the questions. N.J.A.C. 17:19-2.13 (a), (c) – (d). The allowance of post-bid submissions clearly indicates that the issue at hand concerns responsibility, not responsiveness.

The distinction between responsibility and responsiveness is well-established: matters of responsibility may be addressed through post-bid submissions, whereas issues of responsiveness cannot be cured after bids are opened. See Palamar Constr., Inc. v. Pennsauken, 196 N.J. Super. 241 (App. Div. 1983) (holding that bidder responsibility may be resolved post-bid); Muirfield Constr. Co., Inc. v. Essex County Imp. Auth., 336 N.J. Super. 126, 134 (App. Div. 2000) (same).

The Board's reliance on Suburban Restoration Co., Inc. v. Jersey City Housing Authority, 179 N.J. Super. 479 (App. Div. 1981), is unavailing. When that case was issued, the term "responsibility" had not been defined by statute. The Local Public Contracts Law, N.J.S.A. 40A:11-1 ("LPCL"), was amended 18 years later to

define "responsibility" as, among other things "operating capacity" and "financial capacity."[1] Thus, the Suburban court's definition of "responsibility" was superseded by the Legislature's amendment to the applicable statutes.

In addition, in Suburban, the public entity afforded the aggrieved bidder the requisite responsibility hearing. Since no such hearing was provided to ML, the Board's (and trial court's) decision must be overturned. D. Stamato & Co. v. Vernon, 131 N.J. Super. 151, 156 (App. Div. 1974)(stating "[t]he rejection of plaintiff's bid at the township committee meeting . . . without first affording it a hearing on the issue of responsibility was without warrant in law").

Vanas's reliance on In re Protest Filed by El Sol Contracting & Construction Corp., 260 N.J. 362 (2025), is misplaced. In El Sol, the bid was properly rejected because the bidder failed to submit a statutorily required form signed by an authorized individual, rendering the document unenforceable and the bid non-responsive. Here, ML fully complied with N.J.S.A. 17:19-2.13 as it submitted two separate documents (one dated July 6, 2025, and one dated December 18, 2024), both of which certified that its electrical subcontractor, Aber Electric ("Aber"), would not exceed its aggregate rating limit by performing work under the Anticipated Contract. 354a; 359a-359a. Moreover, to the extent the Board

[1] The Schools Law was also amended in 1999 to include the same definition for the term "responsible" as was added to the LPCL.

questioned these representations, the law requires that these issues of "responsibility" be resolved by opening the bids and conducting a responsibility hearing/post-bid submission.

Vanas' argument that the trail court properly applied the River Vale test is fundamentally flawed for two reasons. First, the River Vale test is only applicable to questions of responsiveness – not responsibility. Township of River Vale v. R.J. Longo Constr. Co., 127 NJ. Super. 207 (Law Div. 1974)(adopting test to determine whether bid is non-responsive). Second, Vanas' argument presupposes that submission of a "current" Certification of Qualifications would have allowed the Board to determine whether "ML's subcontractor met the financial and bonding thresholds as of the bid date." This is not so, however, because Aber was not required to (and did not) provide its subcontract price to perform the work. Clyde N. Lattimer & Son Const. Co. Inc. v. Tp. of Monroe Util. Auth., 370 N.J. Super. 130, 139 (App. Div. 2004)(holding that "pre-bid" quote from subcontractor is not required for listing subcontractor in bid). Consequently, neither the Board nor any bidder could have determined at bid opening whether Aber would exceed its aggregate rating limit, because the value of Aber's subcontract was unknown at that stage. The regulatory framework anticipates that such determinations will occur post-bid opening, not beforehand.

Even if the River Vale test applies, Aber's DMPC Form 701, dated December 18, 2024, did not deprive the Board of any assurances of performance. Aber's Certification

of Qualifications – executed just days before bid opening – confirms that the contents stated in the DPMC Form 701 are accurate as of the date of bid opening. 358a-359a. Nor did ML obtain any competitive advantage by including Aber's DPMC Form 701. ML undertook the same effort every bidder must undertake. It neither circumvented the requirements nor gained any unfair benefit compared to its competitors.

2. The Trial Court Properly Upheld the Board's Rejection of Benard's Bid

Benard does not — and cannot — dispute that it was required to submit a valid bid bond and consent of surety. Both the Schools Law and the Solicitation documents expressly mandated their inclusion. The Solicitation also required that the bid bond "bear the same date as the Form of Proposal."

The failure to submit a compliant bid bond and consent of surety is a material, non-waivable defect requiring bid rejection. See L. Pucillo & Sons v. Belleville, 249 N.J. Super. 536 (App. Div. 1991); DeSapio Constr., Inc. v. Twp. of Clinton, 276 N.J. Super. 216 (Law Div. 1994). Benard's bid failed to meet these requirements. The bid bond and consent of surety (1) were not dated the same as the Form of Proposal, and (2) were issued before Addendum #4 to the Solicitation — an addendum that materially altered the Project scope of work and price. As a result, the Board had no assurance at bid opening that Benard's surety had guaranteed the modified Project.

As reaffirmed by the Supreme Court in Barrick v. State, 218 N.J. 247, 260–61 (2014), responsiveness must be determinable at the time of bid opening. Here,

the validity of Benard's consent of surety and bid bond was not readily apparent. Due to Benard's submission of an outdated bid bond and consent of surety (executed before issuance of Addendum #4), the Board could not possibly know at the time of bid opening that these documents were effective and, in turn, that Benard's bid was responsive. This is because Addendum #4 introduced substantive changes, and the surety did not (because it could not) account for these modifications when it issued its guarantees for the "bid" and "contract" in the bid bond and consent of surety.

This situation mirrors the Supreme Court's recent decision in El Sol Const. Corp, 260 N.J. 362, where a bid was properly rejected because the consent of surety was improperly executed. Like El Sol, Benard's documents raised unresolved questions, justifying rejection.

Benard's post-bid submission of the Forlenza Certification further confirms this uncertainty. Had the bid documents been compliant and effective on their face, no certification would have been necessary. Moreover, New Jersey courts have consistently barred post-bid modifications to correct an issue of responsiveness, recognizing the risk of manipulation and unfair advantage. See In re Jasper Seating Co., 406 N.J. Super. 213, 224 (App. Div. 2009). As Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307 (1994), explains, allowing a bidder to cure defects post-bid effectively gives that bidder a unilateral and unfair option: accept the contract if it suits them or walk away if it does not.

Even if the Court assesses the materiality of Benard's error (though it need not), the defect is clearly material under the River Vale test. Because the bid bond and consent of surety predated Addendum #4, the Board lacked assurance that the surety stood behind the modified contract. And if Benard were allowed to rely on post-bid submissions to cure the defect, it would gain a prohibited opportunity to evaluate whether to proceed based on competitors' bids. See Monmouth Constr., LLC v. Boro. of Red Bank, 2007 N.J. Super. LEXIS 2513 (App. Div. Apr. 4, 2007).

Benard's continued reliance on Thassian Mech. Contr., Inc. v. East Brunswick Bd. of Educ., 2020 N.J. Super. LEXIS 27 (App. Div. Jan. 6, 2020), is misplaced. In that case, unlike here, the alleged defect involved the low bidder re-submitting the same sworn subcontractor certifications in its re-bid that it had included in its original bid three weeks earlier. Id. at *2. Also, there, unlike here: (i) there were no intervening events (during the three weeks between the original bid and rebid) that called the representations in the certifications into question; and (ii) the bid included other documentation and information which independently confirmed the accuracy of the representations in the sworn certifications. Id. As a result, the court found that the bidder's inclusion of these previously submitted certifications was a waivable defect because the certifications were "essentially identical" and "independently verifiable and supported by additional documents submitted in the bid." Id. at *4.

Here, in contrast, Addendum #4 introduced substantive modifications after the bid bond and consent of surety were executed. There is no comparable assurance that the surety agreed to the revised terms, nor was any "independently verifiable" documentation submitted with the bid to resolve that doubt. Instead, Benard improperly submitted the Forlenza Certification post-bid to address a facial defect — something Thassian never sanctioned and Meadowbrook squarely prohibits.

3. The Trial Court Properly Held that the Clerical Error in ML's Bid Proposal Was Immaterial and Waivable (2T:15)

The Clerical Error in ML's bid is clearly immaterial and waivable because the mistake was "obvious" on its face (as the trial court properly held). Spina Asphalt Paving Excavating Contractors, Inc. v. Bor. of Fairview, 304 N.J. Super. 425 (App. Div. 1997); Thomas P. Carney Inc. v. City of Trenton, 235 N.J. Super. 372 (App. Div. 1988). Benard's argument that the mistake was not obvious is misguided. Indeed, although Alternate No. 3 replaced a divider curtain with a folding partition, it also added "structural support" work. 188a. The modification made by Alternate No. 3 obviously added scope, which has a cost resulting in an obvious increase to the base bid price.

Benard's reliance on Remsco Associates is unavailing. There, unlike here, the solicitation required bidders to identify "substitution of equal products" along with the associated "alternate manufacturer" and increase or decrease in price associated with each substitution. Remsco Assocs., Inc. v. Raritan Township Mun. Util. Auth., 115 N.J. Super. 326, 329-30 (App. Div. 1971). Importantly, the substitution did not

increase the scope of specified work in any way, it only potentially changed the manufacturer of the specified equipment or products. Id. As the manufacturer's price for each product varied, it was not obvious whether the substitution of manufacturers would result in an increase or decrease from the base bid price. Id.

In addition, unlike Remsco, the Schedule of Alternates in the Solicitation identified three unique scopes of additional work, increasing the base scope of work. 188a. Because the alternate work only added to the base scope, the price to perform this added work obviously added to ML's base bid price. The obviousness of this mistake is certain, given that the Board was able to determine ML's bid price (with alternates) and did not identify the Clerical Error as a defect in ML's bid. 498a.[2]

Benard's reliance on Suburban Disposal is similarly ineffective. There, unlike here, a bidder responded "no bid" to an alternate scope item. Suburban Disposal, Inc. v. Tsp. of Fairfield, 383 N.J. Super. 484 (App. Div. 2006). Despite responding "no bid" to that scope, the Township awarded the bidder a contract to perform the work, including the alternate scope that it submitted "no bid." Id. at 491. While the court found the bidder's bid to be "valid and fully conforming," it held that the Township's award to the bidder was unlawful because it allowed the bidder to

[2] In its brief, Benard quotes Terminal Constr. Corp. v. Atl. County Sewerage Auth., 67 NJ. 403, 411-412 (1975), arguing that "specific amounts of additions or decreases in prices if alternate products are used . . . have been found to be so material as not to be subject to waiver." The Terminal decision cites Remsco for this proposition. Accordingly, Benard's reference to the quote in Terminal is distinguishable for the same reasons that Remsco is distinguishable from the facts of this case.

change its bid proposal post-bid opening. Id. at 492. Specifically, it allowed the bidder to effectively bid a scope of work that it submitted "no bid." Id. at 492 (stating "[a]dding a component of the work not included in the bid proposal is clearly material"). Here, by contrast, ML submitted complete price proposals for all three alternate scopes and they obviously result in an increase in price. As a result, awarding the contract to ML — unlike in Suburban Disposal — would not involve any post-bid changes and fully complies with bidding requirements.

C. The Public Interest Will be Substantially Harmed if the Board is Allowed to Continue with an Unlawful Award

The public interest weighs heavily in favor of preventing an award of a public contract that violtes the law. Hillside Twp. v. Sternin, 25 N.J. 317 (1957). Stays are routinely granted in bid protest actions involving school construction projects, despite the harms alleged by the Board and Vanas — project delays and increased costs — which are common to virtually every bid protest stay. Paul Otto Bldg. Co. v. Kearny Bd. of Educ., 2016 N.J. Super. LEXIS 806 (Law Div. April 11, 2016).

CONCLUSION

For these reasons, ML respectfully requests that this Court continue the injunction pending the conclusion of this matter.

Dated: September 29, 2025

TRIF & MODUGNO LLC
Attorneys for Plaintiff-Appellant, ML, Inc.

Greg Trif

Matthew Lakind, Esq. -031382006
TESSER & COHEN, P.C.
946 Main Street
Hackensack, New Jersey 07601
(201) 343-1100
Attorneys for Cross Appellant, Benard Associates, Inc.

ML, INC., Plaintiff, vs. EDISON TOWNSHIP BD. OF EDUCATION and VANAS CONSTRUCTION CO., INC. and ML, INC., Defendant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION APP DIV. Docket No.: A-00179-25 TRIAL COURT DOCKET NO.: MID-L-3854-25 (Consolidated under this Docket Number) SAT BELOW: Hon. Benjamin S. Bucca, Jr. JSC.
BENARD ASSOCIATES, INC., Plaintiff, vs. EDISON TOWNSHIP BD. OF EDUCATION and VANAS CONSTRUCTION CO., INC. and ML, INC., Defendant.	Companion Case Docket No.: MID-L-3941-25 (Consolidated with MID-L-3854-25)

BENARD ASSOCIATES, INC.'S REPLY BRIEF IN SUPPORT OF ITS CROSS APPEAL

On the Brief:
Matthew Lakind, Esq.
Lee Tesser, Esq.

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PRELIMINARY STATEMENT

Edison Township Bd. of Education ("Edison") engaged in numerous arbitrary and capricious acts/omissions when it awarded the Contract for the James Madison School Project ("Project") to Vanas Construction Co. ("Vanas"). These include the following:

1. Edison rejected Benard Associate, Inc's ("Benard") bid based on the date of its consent of surety even though there is no requirement in the bid advertisement mandating that the consent of surety have a certain date. (**029a, Sec. 2(B)(3))**
2. Edison has not offered any sound business rationale to support its rejection of Benard's bid bond merely because it bears the date of the original bid opening.
3. Edison conducted no due diligence and admitted that it "missed" the lone material defect at issue in this entre case, that being ML's failure to indicate whether its alternates were adds or deducts. (**Arg. TR69:2-70:8)**
4. Edison rejected Benard's bid because its DPMC Form did not bear the date of the bid opening even though that is not required by the bid advertisement. (**030a, Sec. 2(B)(19))**
5. Edison rejected Benard's bid based on the date of its DMPC Form 701 while completely ignoring the fact that Benard is some $80 million **below** its aggregate limit. (**447a)**
6. Edison rejected the bids of Benard and ML, Inc. because their respective DPMC Form 701s pre-dated the bid opening, but decided that Vanas' bid was "without

defect" even though Vanas also submitted DPMC Form 701s that pre-dated the bid opening. (**492a; 498a; Dec. TR13:4-16)**

7. Edison chose to quickly award the Project to Vanas without conducting any due diligence review of any bids, thus resulting in a decision that was not based on any sound business rationale, and ignored the best interests of the taxpayers.

Edison's conduct was at best arbitrary, and at worst an exercise in favoritism towards Vanas, the third lowest bidder. What is more, the errant decision of the Trial Court, and arguments of Edison, Vanas, and ML challenging the date of Benard's bid bond, consent of surety, and/or DPMC Form 701, are based primarily on their irrational fears that the date a document is signed may affect its validity. If accepted, these arguments would call into question the enforceability of any bid documents that may be signed 2-4 months prior to award or execution because a bid protest is taken up on appeal. Taken to its illogical conclusion, Edison, Vanas and ML would have to concede that their bid bonds are stale and unenforceable because they will be no less than 4 months old when this appeal is decided.

Simply stated, the Trial Court failed to recognize Edison's arbitrary conduct and its favorable treatment of Vanas. Its decision should be reversed and the Contract for this Project should be awarded to Benard.

LEGAL ARGUMENT

I. VANAS' AND ML, INC.'S ARGUMENT, THAT ADDENDA #4 IMPAIRS THE ENFORCEABILITY OF BENARD'S BID BOND AND CONSENT OF SURETY BLATANTLY IGNORES THE PURPOSE AND INTENT OF THESE DOCUMENTS.

Neither Edison, Vanas, or ML can point to any specific language in Benard's bid bond, consent of surety, or even the form performance and payment bonds to be issued, that makes them in any way conditional on any time frame or on any change in Project scope or other intervening event. In fact, Edison required that the consent of surety be "unconditional". **(029a)** There is no language in the bid bond **(469a)** or consent of surety **(471a)** that sets a time limit for their applicability, and there are no conditions specified in the documents themselves.

The bid bond and consent of surety are monetary instruments calling for bonding in specific monetary sums, without regard to what may be included in a contractual scope of work. Benard's bid bond is fully compliant with the Public Schools Contracts Law, which simply requires that the bid bond be in the amount of 10% of the bid price not to exceed $20,000. N.J.S.A. 18A:18A-24. The scope of work of the Contract, and the date of the bid bond, are irrelevant to its enforceability. If ML's and Vanas's arguments regarding Addenda #4 were considered, then every change in the scope of the contract during a project would call into question the

validity of the bonding documents. This ignores the purpose and intent of the bonding documents.

The same is true for the consent of surety. The purpose of the consent of surety is to give the public entity assurance that if Benard is awarded the Contract, the surety will provide the requisite performance and payment bonds "in such **sum** as is required in the advertisement or in the specifications." N.J.S.A. 18A:18A-25 (**emphasis added**) Edison required bidders to submit a consent of surety from their bonding companies stating that "it will provide the Contractor, if awarded a contract for the Project, with a bond representing 100% of the Contract Sum." (**029a)** (emphasis added)

Furthermore, the form Performance and Payment Bonds to be issued by the surety confirm that they are purely financial instruments that are not conditioned on the scope of work of the Contract. Edison's Bid Advertisement requires that the performance and payment bonds be issued "in the amount of one hundred percent (100%) of the contract sum." (**090a).** The performance and payment bonds are not conditioned on some fixed scope of work.

The sample forms provided by Edison in its Bid Advertisement confirm the purely monetary nature of the performance and payment bonds. (**091a, 092a).** The form performance bond states that it is submitted in a "penal sum". (**Id.**) Both

documents also state: "*The said surety hereby stipulated and agrees that no modifications, omissions or additions in or to the terms of the said contract, or in or to the plans or specifications therefore, shall in any way effect the obligations of said surety on its bond.*" **(Id.)**

This is exactly how these bonding instruments operate, on a purely financial basis. It is well known that there will be multiple changes to the scope of work during the Project that may affect the price, schedule, or both. This is why the applicable statute, Edison's Bid Advertisement, and the form performance and payment bonds speak in terms of bonding dollar amounts/penal sums, not scopes of work. Otherwise, subsequent changes to the scope of a project would not fall under the protection of the bonds.

It is therefore irrelevant that an addendum may have been issued after the date Benard's bonding documents were signed. Benard's bid price, and the amount of its bonds, remained unchanged. If any addendum had any material effect on Benard's bid price, then Benard would have addressed that pre-bid opening. But Benard's bid price did not change, and thus there was no need to revise its bonding documents. Rather, the bonds are issued in the required penal sums.

With final respect to Benard's Consent of Surety, the Trial Court's, Vanas', Edison's, and ML's claim that a date certain was required on the Consent of Surety is

inexplicable. There is no requirement in Edison's bid advertisement or appliable law that mandates any particular date on the Consent of Surety. ((**029a, Sec. 2(B)(3))**

II. ML's FAILURE TO IDENTIFY WHETHER ITS ALTERNATES WOULD "ADD" OR "DEDUCT" FROM ITS BID PRICE ARE NOT MERE CLERICAL ERRORS, BUT INSTEAD ARE MATERIAL DEFECTS AFFECTING PRICE.

ML argues that its failure to identify whether its alternates were adds or deducts was a "clerical" error. This is false, and the Trial Court's acceptance of this argument ignored applicable law. ML relies on Spina Asphalt Paving v. Borough of Fairview, infra., but this case had nothing to do with a bidder's failure to identify alternates as adds or deducts.[1] Instead, that case concerned a bidder who submitted a unit price bid for material at $400/sqyd. instead of $4/sqyd. Spina, 304 N.J. Super. 425, 427 (App. Div. 1997). The Court found that the bidder's error was patent, the true intent of the bidder was obvious, and the $400/sqyd price was grotesquely exorbitant. Id. at 429. The Court was careful to note that it was not taking the position that "generally an error in a statement of a price can be treated as immaterial. It is only when, as here, the error is patent and the true intent of the bidder is obvious such that an error may be disregarded." Id.

[1] ML also cited Thomas P. Carney, Inc. v. City of Trenton, 235 N.J. Super. 372 (App. Div. 1988), but this case deals with the issue of listing subcontractors in a bid, not alternate pricing.

Conversely, there is nothing obvious or patent about ML's defective bid, and no one has claimed that any alternate pricing of ML was "grotesquely exorbitant." Spina simply does not apply to this case. It bears repeating that ML (or any other bidder), could have chosen to give price deductions for its alternates to make its bid price more competitive, or, with specific respect to Alternate #3, a bidder could have used this alternate to reduce its overall bid price since Alternate #3 calls for the use of a folding partition and structural support "in lieu of" a roll up gym divider curtain. (**188a)** ML's defective pricing allows it to manipulate its alternate pricing post-bid opening. Since the bid advertisement required bidders to identify whether their alternate prices would add or deduct from the bid price, and since the true intent of ML's bid is not apparent on its face, this defect is material and could not have been waived by Edison, and should not have been ignored by the Trial Court. (**188a, 194a-195a)**

In sum, the Trial Court failed to follow the applicable law, that being, in part, Terminal Constr. Corp. v. Atl. County Sewerage Auth., 67 N.J. 403, 412 (1975) and Remsco Associates, Inc. v. Raritan Township Municipal Util. Authority, 115 N.J. Super. 326, 333-34 (App. Div. 1971). Both cases forbid the acceptance of ML's bid based on the language of Edison's bid advertisement, and because ML has left itself the option to manipulate its bid price post bid opening.

III. THE TRIAL COURT IGNORED THE SPECIFIC LANGUAGE OF EDISON'S BID ADVERTISEMENT, THEREBY CREATING MANDATES WHERE NONE EXISTED.

Both the Trial Court and Edison created new mandates in the bid advertisement by ignoring its clear language. Regarding the bid bond, Benard does not dispute that Section 2(B)(2) states: "The Bid Bond shall bear the same date as the Form of Proposal." (**029a)** Notably, this does not require the bid bond to bear the date of the bid opening. Nevertheless, Benard maintains that the date of its bid bond is entirely immaterial and inconsequential.

Momentarily putting aside the immaterial nature of the bid bond date, the Trial Court failed to compare the bid bond date requirement with language related to the Consent of Surety and DPMC Form 701. For the DPMC Form 701, if Edison wanted those forms to bear the date of the form of proposal or the bid opening, it would have stated so in terms identical to that of the bid bond clause at Section 2(B)(2). Instead, the clause on the DPMC Form 701 (Section 2(B)(19) requires only a "form indicating the amount of uncompleted contracts of the date of the bid opening." (**030a)** There is no requirement that the DPMC Form bear a certain date, as may be the case with the Section 2(B)(2) on the bid bond. Instead, Benard did as required, and submitted a DPMC Form 701 that demonstrated its uncompleted work as of the bid opening.

And, as mentioned above, the bid advertisement is silent regarding any date for the consent of surety at Section 2(B)(3). (**029a**) The Trial Court cannot impose a

requirement on bidders that does not exist. If Edison wanted to impose specific date requirements on the bidders for the consent of surety or DPMC Form 701s, then it was required to use language to that effect. Instead, Edison made a conscious choice to utilize different wording in the other clauses that, on their face, have an entirely different meaning. Neither the Trial Court nor Edison had any right or discretion to mandate additional date requirements that simply do not exist in the bid advertisement.

IV. EDISON ACTED ARBITRARILY WHEN IT REJECTED BENARD'S BID BECAUSE ITS PROPOSAL WAS NOT NOTARIZED.

Benard joins in the arguments of ML, Inc. on this point, as addressed in its 9/18/25 Brief. Suffice it to say, Benard's proposal was signed and witnessed, and there was no indication on the bid proposal that it had to be notarized. (**606a)** Moreover, Benard signed and notarized other forms that confirmed its authority to submit its bid at its stated bid price. (**611a, 612a**) While the Trial Court made numerous errors, the Court correctly found that Edison should not have rejected Benard's bid for a lack of notarization on the proposal form.

V. EDISON PERFORMED NO DUE DILIGENCE ON THE DPMC FORM 701.

If Edison was truly concerned about the accuracy of Benard's DPMC Form 701 and the amount of its uncompleted work, then it should have conducted some form of due diligence as called for by N.J.A.C. 17:19-2.13. Instead, Edison and the Trial Court ignored that Benard is some $80 million below its aggregate limit, and Edison's failure

to conduct due diligence on this and many other issues was arbitrary and capricious. Beyond this, Benard relies on the arguments it previously briefed on this issue.

In terms of discovery, the only basis for discovery would be to allow Edison to conduct the due diligence it failed to perform after the bid opening, including but not limited to gaining further confirmation that Benard is below its aggregate limit, as certified to on its DPMC Form 701, the accuracy of which has never been challenged.

But, if this Court finds that Benard's and ML's DPMC Forms are materially defective, then so too are Vanas'. If that is the case, then all bids will have to be rejected, and the Project will need to be re-bid.

CONCLUSION

For all the reasons expressed herein and in Benard's prior submissions, the Trial Court's decision should be overturned, and Edison should be compelled to award the Contract for this Project to Benard.

Dated: 10/1/25

TESSER & COHEN, P.C.
Counsel for Benard Associates, Inc.

Lee Tesser, Esq.