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J. FLETCHER CREAMER & SON,
INC.,

Appellant,

v.

NEW JERSEY DEPARTMENT OF
TRANSPORTATION and ROAD
SAFETY SYSTEMS, LLC,

Respondents.

SUPERIOR COURT OF NEW
JERSEY, APPELLATE DIVISION

DOCKET NO.: A-001270-24

CIVIL ACTION

On Appeal from Final Agency
Decision of the New Jersey
Department of Transportation

BRIEF OF APPELLANT, J. FLETCHER CREAMER & SON, INC.

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PRELIMINARY STATEMENT

Appellant, J. Fletcher Creamer & Son, Inc. (“Creamer”), appeals from a Final Agency Decision, dated December 17, 2024 (the “Final Agency Decision”), issued by the New Jersey Department of Transportation (“NJDOT”). This appeal stems from a public bid protest action related to the contract known as “Maintenance Beam Guide Rail and Attenuator Repair Contract, North - 2025; Various Locations; Bergen, Essex, Hudson, Morris, Passaic, Sussex, Union and Warren (Including and North of Route 57) Counties” (the “Project”), DP No: 25445; CE No: 2622975; Letting ID: 24101001; Contract ID: 25445; Call: 445” (the “Contract”).

The NJDOT acted arbitrarily and capriciously, and committed reversible error by awarding the Contract to Road Safety Systems, LLC (“RSS”) based on RSS’s bid, despite it containing two distinct material nonwaivable defects. The two material, nonwaivable defects contained in RSS’s bid are as follows:

- (a) RSS unequivocally failed to properly disclose and misrepresented its ownership to the NJDOT prior to bidding in violation of N.J.S.A. 52:25-24.2 and the project bid specifications;
- (b) RSS submitted a bid that was not executed by a properly disclosed authorized officer of the company.

The undisputed facts of this case confirm that prior to the time of bid submission, RSS had been acquired in 2024 by an entity known as Soil Nail Holdings, LLC ("Soil"). This acquisition was not properly disclosed by RSS to the NJDOT at the time of bid submission on October 10, 2024. At least at the time RSS submitted its bid, Soil was not an established New Jersey company and was not registered to conduct business in State. Yet, based upon RSS's own admission, through this acquisition, RSS has no assets, rendering it essentially a "shell" company. As such, based upon RSS being a shell company, the real party in interest for the Contract is Soil, not RSS. Such a lack of transparency belies the purpose of public bidding laws, and underscores Creamer's position that RSS's bid should have been rejected by the NJDOT. Moreover, and even more troubling, is the fact that through the recent affidavit filed by Bill Yost of RSS during the motion practice preceding this appeal, apparently RSS is now taking an about-face as to the nature of the asset-purchase and instead claims that RSS falsely answered the questions contained in its bid concerning the ownership of RSS. Either way, there is a material defect in RSS's disclosures.

RSS has tried to explain away its misrepresentations concerning ownership and assets by asserting that its statements to the NJDOT were a mistake. Regardless of RSS's explanations, these "false statements" are the precise type of material nonwaivable defects that prevent the award of the

Contract by the NJDOT to RSS. This type of playing fast and loose with the public bidding laws should respectfully not be allowed by this court.

RSS's bid also suffers from a second material nonwaivable defect. Specifically, RSS's electronic bid proposal had been digitally signed by a senior estimator, Jeff Brandt, who was not listed as an authorized representative of RSS on the online bidding platform or in RSS's prequalification application in contravention of N.J.A.C. 16:44-3.2. It became uncovered after bid submission that the NJDOT had originally intended to reject RSS's bid based upon this signatory issue, but it later reversed its decision after giving RSS the opportunity to explain this material defect without notice to any other bidders. Apparently, the NJDOT was satisfied with RSS's one-sided claims that the signatory to its bid had been internally "authorized" to sign bids mere days before the submission, despite the fact that there had been no advance public disclosure.

Neither RSS nor the NJDOT should be allowed to disregard the public bidding laws like they have in the case at bar. An immediate and swift reversal is wholly warranted and necessary to uphold the public policy of this state and the intent of the public bidding laws to ensure transparency and fairness. For the reasons set forth herein, Creamer requests that the award of the Contract to RSS by the NJDOT be rescinded and that Creamer be awarded the Contract as the lowest responsible bidder.

PROCEDURAL HISTORY

This matter stems from a Final Agency Decision, rendered by the NJDOT on December 17, 2024. Pa124. Subsequently, Creamer filed both a Notice of Appeal (Pa223-Pa230) and an application for permission to file a motion for emergent relief followed on January 6, 2024 (Pa231-Pa239), the latter of which was granted with temporary restraints on January 7, 2024. Pa240-Pa241. Following the submission of briefing by all parties, on January 17, 2025, the Court issued its decision denying the motion for emergent relief. Pa257-Pa264.

STATEMENT OF FACTS

This matter stems from a publicly bid contract for beam guiderail and attenuator repair. Pa1. Bids for the Contract were received and opened on October 10, 2024. Id. Prior to bidding, certain disclosures related to bidder's prequalification were required to be submitted, including the "Contractor's Financial and Equipment Statement Form DC-74A" (the "DC-74A Form"). Pa5, § 102.01(1) (Form found at Pa88).

In short, the DC-74A Form is a detailed questionnaire that sets forth key relevant information, such as the listing of the company's owned and leased equipment, its credit and working capital, and an "Entity Information Sheet" whereby "officers and employees listed below are appointed and authorized to

approve and execute on the entity's behalf." See Pa88-Pa110. In connection with the Entity Information Sheet, the following is set forth:

If any changes are made in the appointee by the action of the Board of Directors during the eighteen month period from the date of the Financial information forwarded with this form, it SHALL be the sole responsibility and WILL be required of the entity to submit an original Certified document advising of such action to the Bureau of Construction Services, Division of Procurement, New Jersey Department of Transportation.

Pa99.

Aside from such prequalification requirements, given the nature of this Contract, it was subject to the Standard Specifications for Road and Bridge Construction (the "Standard Specifications"), which also include certain requirements for bidders. Pa3; Pa84. Relevant to the matter at hand, Section 102.10 of the Standard Specifications provides in relevant part as follows:

An authorized representative of the Bidder is required to digitally sign the bid. Information regarding digital signatures is available on the Department's website. The Department may reject internet bids that are not digitally signed by the authorized representative of the Bidder with an approved digital signature.

Pa85.

Bids were submitted through the "bidx.com" website, which is a standard platform utilized by many state agencies in connection with the highway construction industry, including the NJDOT. Pa87.

Ultimately, RSS submitted the lowest bid of \$6,965,650, while Creamer submitted the second lowest bid of \$7,147,532. Pa111-Pa121.

On October 11, 2024, the NJDOT advised RSS of its intent to reject its bid for failure to properly sign the bid in accordance with N.J.A.C. 16:44-7.4(b)(2) and Section 102.10 of the 2019 Standard Specifications. Pa127. Upon review of the bid documents, it was found that RSS's electronic bid proposal had been digitally signed by Jeff Brandt, alleged to be a “senior estimator,” who was not listed as an authorized representative of RSS on the online bidding platform, or in RSS's DC-74A Form. Id. Despite this error, the NJDOT gave RSS an opportunity to contest the rejection and be heard on the matter, without notice to Creamer or any other bidders. Pa128.

On October 14, 2024, RSS submitted a notice of its intent to contest the NJDOT's determination (Pa136), and subsequently on October 16, 2024 submitted a further detailed letter and exhibits in support of its arguments. Pa130-Pa142. RSS explained that Mr. Brandt was hired in May 2024, and conveniently completed his probationary period with the company in September of that same year, allowing RSS to elevate him to Senior Estimator and granting him authority to execute and submit bids. Pa130-Pa134. These allegations were based solely upon an affidavit of RSS's Director of Operations (Pa140-Pa142) and a newly disclosed RSS “internal memo to personnel file.” Pa138.

Based solely on this one-sided submission, the NJDOT reversed its decision (Pa144) and on October 29, 2024 awarded the Project to RSS. Pa122. After becoming aware of this decision, on October 30, 2024, Creamer submitted an OPRA request to the NJDOT regarding RSS's bid. Pa191. Following receipt of the NJDOT's responses to same on November 4, 2024 (id.), and based upon certain publicly available information (Pa146-Pa147; Pa151), it became apparent that RSS has failed to make the proper disclosures with respect to a recent change in its ownership. Because of this, on November 8, 2024, Creamer filed a formal bid protest. Pa146.

At the time of its initial protest, Creamer was unaware of the earlier issue regarding the signatory to RSS's bid, and Creamer solely challenged RSS's bid for failure to properly disclose its ownership prior to bidding. See id. However, on December 3, 2024, the NJDOT provided Creamer with a supplemental response to its OPRA request (Pa217), which included the relevant documents in connection with the October 11 and October 14 correspondence between the NJDOT and RSS regarding the intent to reject the bid due to the signatory issue (Pa127-134).

Through these materials, further information regarding RSS's acquisition was disclosed, and it was made clear to Creamer that RSS had been acquired by Soil on or about February 23, 2024. Pa131; Pa158; Pa166. This discovery

prompted further research on the part of Creamer, whereby, Soil was found to be a a business apparently operating out of Colorado (based upon the addresses it provided in various documentation). Pa166; Pa185; Pa188. But perhaps even more alarming, Creamer found that Soil only registered itself as a domestic limited liability company in the State of New Jersey as of December 5, 2024, well after the time of RSS's bid submission (and even well after the purported acquisition). Pa184.

At the instruction and request of the NJDOT (Pa190), on December 9, 2024, RSS submitted opposition to Creamer's bid protest (Pa153), centering its argument upon its submission of a Notice of Partnership/Corporate Reorganization (the "Reorganization Notice") to the NJDOT on July 22, 2024. Pa154; Pa165-Pa167. RSS specifically emphasized the aspect of this Reorganization Notice that "identified Soil Nail Holdings, LLC as owner of 100% of the membership interest in RSS," which specifically provides that "Road Safety Systems, LLC transferred all assets to Soil Nail Holdings, LLC Upon[sic] purchase of the the[sic] company as of February 23, 2024." Pa154; Pa166.¹ By making this statement, RSS admitted that it is nothing more than a shell company, and thus, Creamer had ample grounds for a reply.

¹ Further, this Reorganization Notice recognizes that RSS and Soil "[h]ave [not] registered the new status (including change in corporate name) with the New Jersey Secretary of State." Pa166. While this is in keeping with the fact that Soil was not

Accordingly, Creamer intended to reply to this December 9, 2024 correspondence, but before it was given the opportunity to do so, on December 10, 2024, the NJDOT issued a decision rejecting Creamer's bid protest. Pa173-Pa174. Because Creamer was not given a chance to submit a reply and raise its additional arguments based on newly discovered facts, Creamer made a request for reconsideration on December 12, 2024. Pa176-Pa182. This letter included the aforementioned argument as to the failure on RSS's part to properly sign the bid by an authorized representative. Id. Creamer further requested the disclosure of the DC-74A Form that was submitted by RSS and/or Soil, which would give a concrete explanation as to the ownership issue and set forth what (if any) assets were owned by which entity. Pa181.

The NJDOT issued a Final Decision on December 17, 2024. Pa124. As part of this decision, the NJDOT rejected Creamer's request for the disclosure of the DC-74A Form. Pa125.

Following this correspondence, on December 27, 2024, Creamer requested that execution of the Contract be stayed pending this appeal. Pa219. The NJDOT denied this request on January 2, 2025. Pa221-Pa222. Creamer's Notice of Appeal (Pa223-Pa230) and application for permission to file a motion

even registered in this State until December 2024 (Pa184), this apparently was not appreciated by the NJDOT in connection with the propriety of the transaction and RSS's standing as a bidder.

for emergent relief followed on January 6, 2024 (Pa231-Pa239), and was granted with temporary restraints imposed on January 7, 2024. Pa240-Pa241.

Subsequently, the parties submitted briefs in connection with the emergent motion. As part of its opposition, on January 16, 2025, RSS introduced a variety of new facts and arguments that were not part of the record below, including an affidavit of Bill Yost of RSS that was also dated January 16, 2025.² Pa246-Pa253.

This January 16 Affidavit of Bill Yost takes a complete about-face from its original argument—that it properly disclosed its acquisition and ownership by Soil—and goes further by recanting its own earlier statements (thereby underscoring what are apparently false sworn statements that it made to NJDOT). Id. Specifically, it is stated:

16. RSS recognizes that the Notice of Partnership / Corporate Reorganization ("Notice") it submitted with its prequalification application says that RSS transferred all assets to Soil Nail.

17. And RSS, therefore, understands why Creamer, after receiving a copy of the Notice indicating that RSS transferred all

² While it was Creamer's position then (See Pa255-Pa256) and it is Creamer's position now that these new materials should be disregarded wholesale by this Court as an improper expanding of the record on appeal, Creamer is addressing these items herein in the interests of caution and completeness, and because certain representations made therein actually underscore Creamer's arguments that there has been a lack of proper disclosure made by RSS and improper overindulgence on the part of the NJDOT in overlooking RSS's mistaken, inaccurate, and/or false reporting.

assets to Soil Nail, would allege that Soil Nail was the real party-in-interest.

18. RSS did not transfer its assets to Soil Nail--or any other entity or person—as part of the Transaction.

19. Consequently, the description of the Transaction in the Notice that RSS submitted to the NJDOT was partially (and inadvertently) inaccurate.

20. It was accurate to say that Soil Nail acquired 100% of the membership in RSS. It was inaccurate to say that RSS transferred all assets to Soil Nail.

21. While RSS regrets that it did not identify the inaccuracy at the time it submitted the Notice to the NJDOT, the attendant concern that Creamer has raised—that Soil Nail is the real party-in-interest / bidder—is not a concern based on the actual nature of the Transaction.

Pa247-248.

Moreover, the January 16th Affidavit submitted by RSS goes on to attach documents that Creamer never saw prior to this appeal and likewise were also not part of the record below. Pa249-Pa253.

While Creamer submitted a letter to address these improper submissions on January 17, 2025 (Pa254-Pa256), on that same date the Court issued its decision denying the motion for emergent relief. Pa257-Pa264. It does not appear that Creamer's January 17th letter was considered by this Court. See Pa 257.

Upon information and belief, as the underlying Contract has been awarded to RSS (Pa122), the NJDOT intends to or has move forward. However, it is

emphasized that given the nature of the work, which largely consists of emergency remedial services, there would be minimal impact in awarding the Contract to Creamer upon a reversal of the Final Agency Decision. Creamer held the prior contract for the last several years for this work, and no interruption of services would be expected. See Pa265-Pa275.

STANDARD OF REVIEW

A. Arbitrary and Capricious

The Appellate Division has explained that in public bidding cases, the Court must review a public body's decision in a bid protest to determine if the decision was arbitrary, unreasonable, or capricious. Matter of Protest of Award of On-Line Games Prod. & Operation Servs. Contract, Bid No. 95-X-20175, 279 N.J. Super. 566, 590 (App. Div. 1995). This was broadened by this Court to include whether the decision was "supported by substantial credible evidence in the record as a whole." Barrick v. State, Dep't of Treasury, Div. of Prop. Mgmt.& Const., 218 N.J. 247, 258–61 (2014). This standard applies on appellate review of an administrative agency's actions "regardless of whether that action followed a quasi-adjudicative hearing or, as in this case, an assessment of the relevant submissions and standards by an administrative head." Id. at 259.

In determining whether agency action is arbitrary, capricious, or unreasonable, a reviewing court must examine:

(1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.

In re Carter, 191 N.J. 474, 482 (2007) (quoting Mazza v. Bd. of Trs., 143 N.J. 22, 25 (1995)).

An appellate court's review of an agency decision is “not simply a *pro forma* exercise in which [the court] rubber stamp[s] findings that are not reasonably supported by the evidence.” Chou v. Rutgers, 283 N.J. Super. 524, 539 (App. Div. 1995), certif. denied, 145 N.J. 374 (1996); see also Costantino v. New Jersey Merit Sys. Bd., 313 N.J. Super. 212, 225 (App. Div. 1998) (noting that Appellate Division does not engage in “*pro forma*” review of agency decisions and “need not defer to an agency decision that is manifestly mistaken”), certif. denied, 157 N.J. 544 (1998). Appellate courts must engage in a “careful and principled consideration of the agency record and findings.” Mayflower Sec. Co. v. Bureau of Sec., 64 N.J. 85, 93 (1973). Furthermore, “[a]n appellate tribunal is ... in no way bound by the agency's interpretation of a statute or its determination of a strictly legal issue.” Id.; Greenwood v. State Police Training Center, 127 N.J. 500 (1992).

In this case, there is ample support in the record for this Court to reverse the Final Agency Decision rendered by the NJDOT on December 17, 2024, based upon RSS's misrepresentations concerning the ownership of RSS and its failure to follow statutory law and the relevant rules applicable to the NJDOT in connection with the execution of its bid. The NJDOT's decision was wrong based upon the valid objections of Creamer and the admitted false statements on the part of RSS as to the disclosure of its ownership and the execution of its bid by an individual that was not authorized to execute per the rules of the NJDOT. For these reasons and the reasons set forth below, a reversal of the Final Agency Decision is warranted and the Contract awarded to Creamer.

B. Public Bidding Laws

Permitting the NJDOT to proceed with the Project threatens the intentions, spirit, and protections of New Jersey's public bidding laws. The purpose of New Jersey's public bidding laws is to ensure that public contracts are awarded transparently and competitively to secure the best interest of the taxpayers. Entech Corp. v. City of Newark, 351 N.J. Super. 440 (2002); National Waste Recycling, Inc. v. Middlesex County Imp. Authority, 150 N.J. 209 (1997). "Their objects are to guard against favoritism, improvidence, extravagance and corruption; their aim is to secure for the public the benefits of unfettered

competition.” Barrick, 218 N.J. at 258 (quoting Keyes Martin & Co. v. Dir., Div. of Purchase & Prop., 99 N.J. 244, 256 (1985)).

To protect and maintain these principles, contracts must be awarded to the lowest responsible bidder following public advertisement and competitive bidding procedures. N.J.S.A. § 40A:11-4. This process is designed to place all bidders on an equal footing and to protect the public interest by ensuring that the benefits of competition are fully realized, thereby ensuring the prudent use of public funds. Moreover, the laws are intended to promote the honesty and integrity of the bidding process and those participating in it. Entech Corp. v. City of Newark, 351 N.J. Super. 440, 457 (2002). Accordingly, New Jersey's Public bidding laws "should be rigidly enforced by the courts to promote that objective.” Protest of Award of On-Line Games Production, 279 N.J. Super. 566, 589 (App. Div. 1995).

Should the NJDOT be permitted to proceed with awarding the Contract to RSS despite the indisputable discrepancies in connection with the disclosure of its ownership and execution of its bid by a non-authorized employee, a precedent will be set whereby the NJDOT (and any other public agency) can skirt the public bidding laws and award contracts to its preferred contractors, while “forgiving” material nonwaivable defects and ignoring its own bid instructions and regulations in total disregard of the law. The NJDOT will essentially be

authorized to sidestep or ignore “material defects” (based upon no valid legal rationale or credible evidence) while disqualifying otherwise qualified, low bidders and award contracts to whomever it wishes. This precedent will eviscerate the intentions and protections of New Jersey’s public bidding laws – for both potential bidders as well as the public-at-large. This type of conduct by the NJDOT and RSS should not be allowed by this Court.

LEGAL ARGUMENT

I. RSS’S BID SHOULD HAVE BEEN DISQUALIFIED FOR THE FAILURE TO MAKE THE PROPER DISCLOSURES RELATED TO ITS ACQUISITION BY SOIL NAIL HOLDINGS, INC. (PA124)

There is ample support in the record for this Court to reverse the Final Agency Decision rendered by the NJDOT on December 17, 2024 (Pa124) and award the Contract to Creamer. The nature of RSS’s acquisition and its representations that its assets were wholly assumed by Soil³ creates a questionable arrangement that calls into doubt the true company at interest here. The bidding laws are not meant to allow unregistered, unqualified, or foreign companies to simply purchase a pre-qualified New Jersey entity that goes on to exist in name only so as to allow the purchaser to participate in public contracts

³ Though, following the filing of this appeal, RSS has recanted this statement. See Pa247-248. This will be addressed in subpoint (B), below.

in the state.⁴ At a minimum, such an occurrence creates an appearance of impropriety that should not be permitted.

A. RSS's Bid Should Have Been Disqualified Because Its Ownership and Arrangement with Soil Lacked Transparency and is a Sidestep Around Proper Prequalification to Perform Work for the NJDOT

RSS's failure to honestly disclose its true owner prior to and/or at the time of bid and its failure to honestly answer the corporate reorganization questionnaire contained in its bid is a material nonwaivable defect that cannot be cured by RSS's post-bid explanations. The current dispute creates a textbook example of a public bidder failing to correctly disclose its owners, which amounts to a material nonwaivable defect that cannot be cured. The disclosing of the proper owner of a contractor that does public work has deep roots in New Jersey caselaw. See, e.g., Tufano v. Borough of Cliffside Park in Bergen Cnty., 110 N.J.L. 370, 372 (1933)) ("It is conceded that the bid of the defendant trucking company was not accompanied by proof of ownership of a dumping ground, or a written lease for the same containing the provisions set forth in the specifications, and a certificate of approval for the transportation of garbage

⁴ It is reiterated that while Soil has now registered as a domestic limited liability company in order to do business in this State as of December 5, 2024 (Pa184), it was not registered at the time of bidding (or perhaps had not even been properly "formed" and disclosed per the corporate formalities required by law). As will be argued at length below, post-bid measures are not allowable to cure an otherwise defective bid.

through the various municipalities to the final place of deposit ... The failure of the trucking company to comply with the specifications in the respects indicated deprived it of the right to the award. Public policy underlies the requirements of competitive bidding.”); In re Protest of Scheduled Award of Term Cont. T2813 RFP 12-X-22361 Lab'y Testing Serv., Equine Drug Testing, No. A-1336-12T1, 2013 WL 3447917, at *6 (N.J. Super. Ct. App. Div. July 10, 2013) (“Here, HFL's bid deficiency was not merely technical but substantive. HFL did not make full disclosure of all layers of its ownership to the DPP and the information provided with its bid was incomplete and inconsistent.”); Albanese v. Machetto, 7 N.J. Super. 188, 190 (App. Div. 1950) (“we point out that the bidder did not comply with another requirement of the specifications in that it did not ‘submit satisfactory proof of evidence of ownership or leases for five trucks suitable for the removal of the garbage specified herein.’”).

Likewise, in one case that is readily applicable to the present facts, George Harms Const. Co. v. New Jersey Tpk. Auth., 137 N.J. 8, 36 (1994), the court held that under N.J.S.A. 52:25–24.2,⁵ providing that “no” corporation “shall” be

⁵ To be clear, N.J.S.A. 52:25-24.2 states in relevant part: “No corporation , partnership, or limited liability company shall be awarded any contract nor shall any agreement be entered into for the performance of any work or the furnishing of any materials or supplies, the cost of which is to be paid with or out of any public funds, by the State, or any county, municipality or school district, or any subsidiary or agency of the State, or of any county, municipality or school district, or by any authority, board, or commission which exercises governmental functions, unless

awarded any contract to be paid out of public funds unless prior to the receipt of the bid or accompanying the bid there is submitted a statement setting forth the names and addresses of stockholders, submission of properly filed stockholders' disclosure statement is an essential and material part of the contract as a matter of law, and omission thereof cannot be waived or cured. The plaintiff in that case, who was the apparent low bidder, failed to provide a list of 10% stockholders with its bid, but shortly thereafter submitted a document to the municipality in an attempt to rectify this violation. *Id.* at 369–70. The court found that any “material departure” from the terms of N.J.S.A. 52:25–24.2 “will invalidate both the nonconforming bid and any contract based upon it,” and therefore rejected this attempt at a post-bid cure. *Id.* at 374. Simply stated, the ownership disclosure requirements of the law are *that strict*.

Just like George Harms Const., in this case, the Notice to Bidders states:

Pursuant to N.J.S.A. 52:25-24.2, no corporation, partnership, or limited liability company shall be awarded any contract nor shall any agreement be entered into for the performance of any work or the furnishing of any materials or supplies, unless prior to the receipt of the bid or proposal, or accompanying the bid or proposal of said corporation, said partnership, or said limited liability

prior to the receipt of the bid or accompanying the bid, of said corporation , said partnership, or said limited liability company there is submitted a statement setting forth the names and addresses of all stockholders in the corporation who own 10 percent or more of its stock, of any class, or of all individual partners in the partnership who own a 10 percent or greater interest therein, or of all members in the limited liability company who own a 10 percent or greater interest therein, as the case may be. ...”

company there is submitted a statement setting forth the names and addresses of all stockholders in the corporation who own 10 percent or more of its stock, of any class, or of all individual partners in the partnership who own a 10 percent or greater interest therein, or of all members in the limited liability company who own a 10 percent or greater interest therein, as the case may be.

Pa2.

This is echoed in the relevant Bid Specifications for the Contract, which provides in relevant part:

The Department will not accept bids from Bidders who fail to meet all of the following criteria:

1. The Bidder has been prequalified according to regulations covering the Classification of Prospective Bidders as required by N.J.S.A. 27:7-35.1, et seq.
2. **Before the receipt of the bid or accompanying the bid, the Bidder has disclosed ownership as required by N.J.S.A. 52:25-24.2.**
- ...
4. **If the Bidder is a corporation not incorporated in the State, the Bidder has been authorized to do business in the State as required by N.J.S.A. 14A:15-2, et seq.**

Pa5 (emphasis added).

It is reiterated, that there is a legion of caselaw in this State that confirms the failure to adequately disclose company ownership pursuant to statutory law and bid specifications, results in a material, non-waivable defect. See, e.g., Muirfield Const. Co. v. Essex Cnty. Improvement Auth., 336 N.J. Super. 126, 130 (App. Div. 2000), 336 N.J. Super. 126 (The material defect in the bid of the

lowest bidder for a public contract to provide plumbing services for county improvement authority, involving the bidder's failure to comply with the statutory requirement of submitting with the bid a statement showing that a licensed master plumber owned at least 10 percent of the bidding entity's stock, was not curable after the bids had been opened).

Moreover, the Legislative intent behind ownership disclosure requirements are so critical that it permeates even related statutory schemes, further clarifying the need for corporate ownership to be fully and honestly disclosed. For example, under the Local Public Contract Law (“LPCL”), the purposes of which have been held to be similar to the statute at hand,⁶ it is expressly explained that the aforementioned ownership disclosures are mandatory requirements, the omission of which result in a fatal defect within the bid. As set forth in N.J.S.A. 40A:11-23.2,

When required by the bid plans and specifications, the following requirements shall be considered mandatory items to be submitted at the time specified by the contracting unit for the receipt of the bids; the failure to submit any one of the mandatory items shall be deemed a fatal defect that shall

⁶ See Robert & Richard Assocs. v. State Div. of Purchase & Prop., 202 N.J. Super. 352, 369 (App. Div. 1985) (“Statutes such as N.J.S.A. 52:34–6 et seq. which require competitive bidding reflect a legislative purpose to preserve to the State all the economic benefits of full and free competition and to guard against favoritism, improvidence, extravagance and corruption in the awarding of contracts, and are enacted for the benefit of the taxpayers and are to be construed with sole reference to the public good.”).

render the bid proposal unresponsive and that cannot be cured by the governing body:

- a. A guarantee to accompany the bid pursuant to section 21 of P.L.1971, c. 198 (C.40A:11-21);
- b. A certificate from a surety company pursuant to section 22 of P.L.1971, c. 198 (C.40A:11-22);
- c. A statement of corporate ownership pursuant to section 1 of P.L.1977, c. 33 (C.52:25-24.2);**

(emphasis added).

It should be patently obvious that RSS has wholly failed to meet its obligations per the aforementioned law and requirements of the bid specifications.

In connection with the underlying bid protest, RSS took a very clear position, arguing that it had met its disclosure obligations in connection with its ownership. Pa153. In doing so, RSS highlighted its own prior submissions to the NJDOT, particularly its Reorganization Notice, in which it was very clearly set forth that Soil had purchased RSS in or around February 2024 and all of RSS's assets were thereby transferred to its new owner. Pa154; Pa166. Yet such a "disclosure" does nothing to cure the problem; rather, on its face, this arrangement calls into question the propriety of RSS being named as the "bidder" for the Project. If RSS no longer has any assets, then it is questionable

at best as to what functions, equipment, or employees—if any—truly belong to RSS rather than Soil.

Accordingly, based upon these admissions of RSS, it appears that RSS exists merely in name only, and Soil is the true entity-at-interest. In this regard, the impropriety of the arrangement is only further compounded by the fact that Soil on registered itself as a domestic limited liability company in this State on December 5, 2024 (Pa184-Pa185)—*months* after the purported purchase of RSS, and the bidding and bid protest related to the underlying Project.

Based upon the documentation surrounding this transaction, this means that Soil either did not properly “exist” per the corporate formalities required by the law under December 2024, *or* it simply had existed in some manner in a foreign jurisdiction (likely Colorado, given that this state is provided in connection with the addressed of Soil that appear throughout the relevant documents (See Pa166; Pa185; Pa188)). A non-registered business or foreign company like Soil cannot merely buy a foothold in the state so as to insert itself into public contracts. Rather, it should be subject to the same requirements as other properly prequalified bidders in this state, such as Creamer. If what RSS has disclosed was true as to the state of its assets,⁷ then RSS/Soil are essentially

⁷ Which interestingly it now apparently is taking the position that its prior representations were not wholly truthful (See the following subpoint (B), infra).

seeking to perform an end run around the public bidding laws to allow an unqualified/unregistered/foreign company to contract with a state agency. It is respectfully submitted that this should not be allowed by the Court.

A contractor's ownership and structure are prime concerns that require full transparency under the bidding laws. In the event of a corporate restructuring, purchase, etc., a contractor is expected to provide full disclosure to state departments like the NJDOT to which it is bidding projects. To address this situation, there are a series of statutorily mandated steps that a contractor must follow to provide full and accurate information to the NJDOT. Under N.J.A.C. 16:44-12.1, "Purpose," the following is provided (with emphasis added)

(a) The purpose of this subchapter is to provide the Commissioner with the means of assuring that the public is adequately protected **whenever a contractor, which is a corporation or a limited liability company (LLC), doing business with the Department, wishes to reorganize its structure in any fashion**, including a change of its name. (b) A contractor **must comply** with the procedures in this subchapter when a contractors classified with the Department and **wishes to continue bidding on Department projects** or when a contractor has an ongoing contract in existence with the Department.

Moreover, under N.J.A.C. 16:44-12.2, "Requirements," there is a strict protocol that is to be followed in the case of reorganization:

(a) Whenever a contractor wishes to undertake a reorganization, as described in the definition of "corporate or LLC reorganization" at N.J.A.C. 16:44-2.1, the contractor must demonstrate the following:

1. Advise the Commissioner in writing of the proposed reorganization (including a change of name) and provide a copy of the minutes or resolution or other official act properly authorizing the change. Such notice shall be made prior to the actual change when the contractor has an existing or ongoing contract in effect with the Department, and no change shall be accomplished without the express written approval of the Commissioner;

2. Proper registration of the new status, including any change in name, with the New Jersey Secretary of State or other appropriate New Jersey State office in a manner consistent with the applicable laws;

4. Proof in writing that the reorganization shall not affect in any manner:

- i. Its obligations under any existing contracts; or
- ii. Its project rating and financial capability; and

5. If the reorganization takes the form of a transfer of assets in a new or different corporation or limited liability company (LLC), the new corporation or LLC shall be required to do the following:

- iii. In the case of a foreign corporation, provide the name and address of its agent in New Jersey authorized to accept service pursuant to N.J.S.A. 14A:13-1 et seq.

Based upon the correspondence circulated between the parties and the NJDOT, it does not appear that any such proposal, minutes, notices or other relevant documents were ever exchanged regarding the change to RSS's

ownership (let alone were any such documents disclosed to Creamer in connection with its OPRA request or this bid protest). It is emphasized that as part of the underlying bid protest, Creamer explicitly requested the disclosure of such documentation, such as Soil and/or RSS's Form DC-74A. Pa181. The NJDOT refused to provide this information (Pa125), which has further muddled the truth around this dispute. This only leaves Creamer to assume that there is some discrepancy between the relevant documentation, which likely establishes that RSS either misrepresented the assets it "owns" or otherwise obfuscated that which is owned by Soil. Or, even worse, perhaps the proper documentation does not even exist. Regardless, hiding facts is not in keeping with the intent of the public bidding laws. These materials should have been provided by the NJDOT upon Creamer's request or be stated to not exist.

Without the relevant documentation as requested, and based on the only public available documents that Creamer could obtain, the only clear fact is that Soil was not registered to work in New Jersey until December 5, 2024 (Pa184-Pa185), well after the time of bid. This is not in dispute. The fact that Soil was not authorized to transact business in New Jersey on the bid date—let alone not being preregistered for state work—was apparently given no weight and totally disregarded by the NJDOT.

Simply put, there are too many open questions as to RSS's ownership (or even its continued existence). Not enough information was disclosed as part of the bidding process as required by the rules and law of this state, and it now appears based upon the admissions of RSS, that the information that was originally provided was incorrect. Specifically, to reiterate, RSS claims that its earlier representations that it holds no assets were actually false. The NJDOT and this Court cannot allow such misrepresentations to form the basis of awarding the bid for the Contract in question. Clearly, the possibility for post-bid "explanations," let alone complete about-faces as to earlier representations, are not supposed to be allowed under the public bidding laws. The door to such possible manipulation of the "facts" should have been shut long before the present juncture, through the rejection of RSS's bid as being materially defective. The controlling precedent cited above and undisputed facts of this case warrant a reversal of the Final Agency Decision rendered by the NJDOT in this matter and the Contract awarded to Creamer.

B. RSS Should not be permitted to Supplement the Record on Appeal, but Even if its New Submissions are to be Considered, RSS's Apparent False Representations and Omissions to the NJDOT Underscore its Violation of the Public Contracts Laws

RSS has sought to improperly supplement the record below in order to try and justify why it should be allowed to cure a material nonwaivable defect in its bid. Pa246-Pa253. Namely, with its opposition to the Motion for Emergent

Relief on January 16, 2025, RSS submitted an affidavit dated January 16, 2025, that is blatantly not part of the record below. Id. This affidavit clearly recants RSS's earlier statements as to the state of its assets and underscores the apparently false statements contained in RSS's bid to the NJDOT. Id.

Specifically, it is stated:

16. RSS recognizes that the Notice of Partnership / Corporate Reorganization ("Notice") it submitted with its prequalification application says that RSS transferred all assets to Soil Nail.

17. And RSS, therefore, understands why Creamer, after receiving a copy of the Notice indicating that RSS transferred all assets to Soil Nail, would allege that Soil Nail was the real party-in-interest.

18. RSS did not transfer its assets to Soil Nail--or any other entity or person—as part of the Transaction.

19. Consequently, the description of the Transaction in the Notice that RSS submitted to the NJDOT was partially (and inadvertently) inaccurate.

20. It was accurate to say that Soil Nail acquired 100% of the membership in RSS. It was inaccurate to say that RSS transferred all assets to Soil Nail.

21. While RSS regrets that it did not identify the inaccuracy at the time it submitted the Notice to the NJDOT, the attendant concern that Creamer has raised—that Soil Nail is the real party-in-interest / bidder—is not a concern based on the actual nature of the Transaction.

Id. (emphasis added).⁸

⁸ The January 16th Affidavit submitted by RSS also goes on to attach documents that Creamer has never seen before this appeal, which were likewise not part of the

Obviously, these statements fly in the face of the earlier-submitted documents, which were the basis for the NJDOT's determination in its Final Agency Decision. Pa173; see also Pa125 (referencing the December 10, 2024 NJDOT decision). In fact, RSS's own earlier Affidavit of William Yost, dated December 6, 2024, was at the crux of RSS's opposition to Creamer's bid protest. See Pa153-Pa162. Under this affidavit and the documents submitted by RSS at that time, it was clearly stated that RSS had been sold and transferred all of its assets to Soil. Pa157-Pa159. This conclusion is further corroborated by RSS's own Reorganization Notice, by which RSS "checked the box" for "Transfer of assets" to another corporation, while also conflictingly marking the box for "Change in Ownership." Pa165-Pa167. Accordingly, at the time of Creamer's bid protest, RSS's argument then was that such an arrangement had been fully and adequately disclosed to the NJDOT. Pa153-Pa162. It is emphasized that this was the argument that was apparently accepted by the NJDOT in rendering its Final Agency Decision. Pa173; see also Pa125. Now we know that the information that the NJDOT relied upon was false.

It is blatantly obvious that RSS is now taking a contrary position to cure a material nonwaivable defect in its bid. In a hollow attempt to overcome

record below, such as the purported "Exhibit A – Assignment of Membership Interests" (which is docu-signed on undated days, leaving it unclear as to when this document was even made).

Creamer's arguments that Soil is the true entity-at-interest as it holds all of RSS's assets, RSS now claims that it actually has retained all of its assets. Stated most simply, these "inaccuracies" or "mistakes" are the precise type of post bid explanations that the public bidding laws are created to prohibit. The NJDOT committed a reversible error by relying on these false statements and awarding the Contract to RSS.

As an initial matter, it is respectfully submitted that this Court should not even consider the litany of these unsupported and new allegations set forth by RSS. It is firmly established that an appellate court cannot "consider evidentiary material not contained in the record from the court below." Bergen County v. Borough of Paramus, 79 N.J. 302, 309 (1979); see also Apex Metal Stamping Co. v. Alexander & Sawyer, Inc., 48 N.J. Super. 476, 483 (App. Div. 1958); Cooper River Convalescent Center v. Dougherty, 133 N.J. Super. 226, 233 (App. Div. 1975); Kaveny v. Montclair Bd. of Com'rs, 71 N.J. Super. 244, 248 (App. Div. 1962); cert. denied, 36 N.J. 597 (1962); Matter of Kovalsky, 195 N.J. Super. 91, 99 (App. Div. 1984).

The courts of New Jersey have repeatedly underscored the necessity of citing to the record when a case is on appeal before the Appellate Division. See e.g., Sklar v. Wolfson, A-4825-10T2, 2013 WL 322518, at *2 (App. Div. Jan. 29, 2013) ("William does not cite to the record as required to support these

facts."); Somerset Cnty. Sheriff's Officers FOP Lodge # 39 v. Cnty. of Somerset, A-5789-06T3, 2008 WL 1862610, at *2, n. 2 (App. Div. Apr. 17, 2008) ("We find disingenuous the County's contention (for which it cites no record support)..."); see also Cooper River, 133 N.J. Super. at 233 ("This issue is raised for the first time on appeal, is not supported by the record and, therefore, is not properly before us."). Indeed, "appellate review is confined to the record made in the trial court, Wallach v. Williams, 52 N.J. 504, 505 (1968), and appellate courts will not consider evidence submitted on appeal that was not in the record before the trial court. Middle Dep't Insp. Agency v. Home Ins. Co., 154 N.J. Super. 49, 56, (App. Div. 1977), cert. denied, 76 N.J. 234 (1978)." Scott v. Salerno, 297 N.J. Super. 437, 447 (App. Div. 1997). As the Court in Venner v. Allstate, 306 N.J. Super. 106, 111 (App. Div. 1997) stated: "... if not part of the record below, we cannot consider these matters."

Accordingly, the January 16, 2025 affidavit that was submitted by RSS in connection with the earlier motion is improper for as it was not part of the record below and wholly consists of newly raised facts and arguments which were never proffered to Creamer or even the NJDOT.⁹ At the same time, this notable about-face highlights the exact problem that Creamer is complaining of: RSS's

⁹ Moreover, such submissions are also post-bid submissions that are wholly disallowed under the law of this state. Such is addressed at length in Point II, infra.

submissions as to its ownership were never adequately disclosed, thereby leaving the door open to self-serving post-bid explanation or even manipulation. Such tactics have never been allowed in this State.

For these reasons, it is respectfully submitted that the Court should disregard and/or strike the January 16 Affidavit (to the extent that RSS again attempts to rely upon it) or otherwise look to this submission solely for the purposes of highlighting the fact that RSS has submitted false statements to the NJDOT. Based upon the inconsistencies in the affidavits and bid submitted by RSS, an adverse negative inference should be applied to RSS's disingenuous arguments. Clearly, based upon these documents, RSS provided false statements to the NJDOT at some juncture as to the state of its assets. The NJDOT acted arbitrarily and capriciously when it ignored this fact in refusing to reject RSS's bid. For this additional reason, the reversal of the Final Agency Decision and award of the Contract to Creamer is warranted.

II. RSS'S BID SHOULD HAVE BEEN DISQUALIFIED BECAUSE THEIR BID WAS NOT EXECUTED BY AN "AUTHORIZED" OFFICER THAT WAS PROPERLY DISCLOSED UNDER THE LAW AND RELEVANT RULES APPLICABLE TO THE NJDOT (PA124)

As already described herein and well-known by this Court, New Jersey's public procurement procedures are designed "to promote the honesty and integrity of those bidding and of the system itself." Keyes Martin & Co. v. Dir., Div. of Purchase and Prop., 99 N.J. 244, 256 (1985). "Their objects are to guard

against favoritism, improvidence, extravagance and corruption; their aim is to secure for the public the benefits of unfettered competition.” George Harms Constr. Co. v. N.J. Tpk. Auth., 137 N.J. 8, 36 (1994) (quoting Terminal Constr. Corp. v. Atl. County Sewerage Auth., 67 N.J. 403, 410 (1975)); Sevell v. New Jersey Highway Authority, 329 N.J. Super. 580, 584 (App. Div. 2000) (quoting N.E.R.I. Corp. v New Jersey Highway Authority, 147 N.J. 223, 235 (1996)).

"The primary objective of these statutes is to achieve the honesty and integrity of the bidders and the bidding process." Sevell, 329 N.J. Super. at 584. Accordingly, contracts must be awarded to the lowest bid conforming to the specifications. Bodies by Lembo, Inc. v. Cty. of Middlesex, 286 N.J. Super. 298, 304 (App. Div. 1996). In line with the policy goal of thwarting favoritism, improvidence, extravagance, and corruption, an agency may not award a contract to a bidder that submits a nonconforming bid. In re Protest of Award of On-Line Games Prod. & Operation Servs. Contract, 279 N.J. Super. 566, 594–96 (App. Div. 1995).

"Because administrative regulations that apply to the regulated public have the force and effect of statutory law, an administrative agency ordinarily must enforce and adhere to, and may not disregard, the regulations it has promulgated.” Davis v. Am. Honda Motor Co., 368 N.J. Super. 333, 337 (App. Div. 2004) (quoting County of Hudson v. Dep't of Corr., 152 N.J. 60, 70 (1997));

see also Van Note-Harvey Assocs., P.C. v. New Jersey Sch. Dev. Auth., 407 N.J. Super. 643, (App. Div. 2009) (holding that Schools Development Authority failed to comply with its own regulations when undertaking two-step process to make its final selection of eligible site consultant firms).

In this case, the administrative regulations that have been adopted by the NJDOT, and govern the award of this Project, provide:

- (a) In order to bid on Department projects, a contractor must be classified and have a project rating. To be classified, the contractor must complete a Questionnaire on Form DC-74A available on the Department's website at www.nj.gov/transportation/business/procurement/ConstrServ/prequalrequire.shtm or from the Bureau at New Jersey Department of Transportation, Construction Services, 1035 Parkway Ave., P.O. Box 605, Trenton, NJ, 08625-0605, (609)530-2103. The following satisfactory information must be provided to the Department:

3. A statement as to organization, which shall show the ability of such organization, including key personnel, to undertake and successfully complete a project in the classification applied for...

N.J.A.C. 16:44-3.2.

Moreover, under N.J.A.C. 16:44-7.4(b)(2), it is expressly stated that “Bids may be rejected ... [i]f the proposal is not properly signed.”

These rules are echoed in the relevant Standard Specifications for the bid, which state at Section 102.10 in relevant part as follows:

An authorized representative of the Bidder is required to digitally sign the bid. Information regarding digital signatures is available on the Department's website. The Department may reject internet bids that are not digitally signed by the authorized representative of the Bidder with an approved digital signature.

Pa85.

As set forth in the regulations, it is the Form DC-74A that is the vehicle by which the bidder discloses its key personnel, among other things.¹⁰ Pa88. Accordingly, the Form DC-74A contains a section entitled "Entity Information Sheet" whereby the entity completing the form provides a listing of "officers and employees ... appointed and authorized to approve and execute on the entity's behalf." Pa88-Pa110. If there are any changes to these disclosures, the onus is on entity executing the document to submit an amendment as follows:

If any changes are made in the appointee by the action of the Board of Directors during the eighteen month period from the date of the Financial information forwarded with this form, it SHALL be the sole responsibility and WILL be required of the entity to submit an original Certified document advising of such action to the Bureau of Construction Services, Division of Procurement, New Jersey Department of Transportation.

Pa99.

Here, it is indisputable that RSS did not abide by any of these rules and requirements. See Pa127-Pa128. There is no argument the "Senior Estimator,"

¹⁰ Additionally, authorized representatives are to be listed on the NJDOT's online bidding platform, bidx.com. Pa87; See also Pa127 (referencing same).

Jeff Brandt, who executed the bid for RSS, was not identified on RSS's prequalification documentation or on NJDOT's chosen bidding platform, bidx.com. Id. Rather, the only individual who was listed was RSS's original owner, Mr. John T. Flemming.¹¹ Id. This is another material nonwaivable defect that should not have been accepted by the NJDOT. Instead, the NJDOT has improperly chosen to accept¹² RSS's unilateral explanation that this material nonwaivable defect should be forgiven based upon alleged internal documents and the affidavit of an employee. Pa144. Via these documents, RSS claims that Mr. Brandt had conveniently just achieved authorization to execute bid documents mere days before the underlying bid was submitted.¹³ Pa130-Pa142. Aside from the suspect nature of this explanation, this argument does nothing to remedy the fact that Mr. Brandt had never been properly disclosed as per the

¹¹ It is unknown to Creamer who is listed on the Form DC-74A as the NJDOT refused to disclose this document despite Creamer's request for same. However, based upon the relevant correspondence, it is clear that Mr. Brandt was not identified on these documents either.

¹² Even worse, the NJDOT's decision to recant its rejection of RSS's bid came without prior notification to the other bidders such as Creamer until it filed its OPRA request. See Pa128.

¹³ Additionally, RSS linked the alleged "confusion" in failing to list Mr. Brandt as an authorized individual to the circumstances caused by change in ownership of RSS. Simply put, this is also highly suspect and further underscores the issues highlighted in connection with Soil's true interest in this matter given the sale of RSS.

rules applicable to the NJDOT. Regardless of the veracity of RSS's statements, the reality of the situation is that such an after-the-fact explanation is not allowed under the public bidding laws or the bid documents and should have been rejected by the NJDOT in its entirety.

To reiterate, this Court must be guided by the purpose of the public bidding laws "to secure for the public the benefits of unfettered competition." Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307, 313 (1995) (quoting Terminal Construction Corp. v. Atlantic City Sewerage Authority, 67 N.J. 403, 410 (1975)). Stemming from this central premise, clear New Jersey precedent does not allow RSS to remedy its defective bid by providing an after-the-fact "cure" to the underlying defect in its bid and the legitimate objection that was raised in connection with same. To hold otherwise would be fundamentally unfair to Creamer and contrary to the public bidding laws of New Jersey. In order for the NJDOT to maintain the integrity of and purpose behind the public bidding laws, RSS, like all the other bidders, must be held to the high moral standards that govern public contracts work and be equally bound to comply with all the project bid requirements.

The New Jersey Supreme Court has held and has long stood by the principle in the context of awarding public contracts that:

It is better to leave the door tightly closed than to permit it to be ajar, thus necessitating forevermore in such cases speculation as to whether or not it was purposely left that way.

Hillside v. Sternin, 25 N.J. 317, 326 (1957).

“In the context of defective bids and bidding processes, post-bid actions that would allow manipulation of the results have been declared unlawful.” Suburban Disposal, Inc. v. Twp. of Fairfield, 383 N.J. Super. 484, 494 (App. Div. 2006) (citing *inter alia*, Colonnelli Bros., Inc. v. Vill. of Ridgefield Park, 284 N.J. Super. 538, 542–43 (App. Div. 1995), certif. denied, 143 N.J. 327 (1996) (acknowledging that “there would be room for manipulation and fraud if, after the bids were rendered, a bidder could clarify its bid ...”); James Petrozello Co. v. Twp. of Chatham, 75 N.J. Super. 173, 180–81 (App. Div. 1962) (concluding that post-bid determination by municipality of estimated number of new units that would be constructed during the five-year trash collection contract, on which bidders submitted a unit price as one component of the bid, was unlawful because it gave the municipality “the arbitrary power ... to favor either of [the] two low bidders”)).

In the case at bar, the possibility for manipulation of the bidding process is rife based upon the facts of this case.¹⁴ By failing to properly sign its bid

¹⁴ Indeed, the post-bid “explanations” have only continued through the filing of this very appeal (See Point I(B)).

documents with an authorized representative, RSS has failed to comply with the express requirements of the bid documents and regulations that govern the award of the Contract for the Project. Even if the statements of RSS were taken to be true and it was accepted that Mr. Brandt was suddenly appointed to become an authorized representative and signatory of RSS in September 2024, then at that time the proper paperwork should have been filed with the state which was well in advance of the bidding for this Project. This was not done. It was only after-the-fact that the alleged missing information was finally disclosed to the NJDOT, upon its own objection. This is not how public bidding is meant to be implemented and applied. Allowing RSS to explain-away this error with its own internal documents and obviously self-serving employee testimony creates a blatant set of circumstances that opens the door to the possibility for manipulation of the precise kind warned against by the New Jersey Supreme Court.

Under the law, the NJDOT should not have allowed RSS to go back and explain this material non-waivable defect. Such conduct on the part of the NJDOT and RSS was patently unfair to the other bidders, especially Creamer who has fully complied with all of the material requirements of the bid documents issued for the Contract. This clearly satisfied the arbitrary and capricious standard that is necessary for reversal.

CONCLUSION

For all of the foregoing reasons, this Court should enter an Order reversing the Final Agency Decision rendered by the NJDOT on December 17, 2024 and order the NJDOT to award the Contract to Creamer.

Dated: April 7, 2025

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May 12, 2025

Via eCourts

Marie C. Hanley, Clerk
Superior Court of New Jersey
Appellate Division
P.O. Box 006
Trenton, NJ 08625

Re: J. Fletcher Creamer & Son, Inc. v. New Jersey Department of
Transportation and Road Safety Systems, LLC
Docket No. A-001270-24T4

On Appeal from a Final Decision of the New Jersey Department of
Transportation

Letter Brief of Respondent New Jersey Department of Transportation

Dear Ms. Hanley:

Please accept this letter brief on behalf of respondent, the New Jersey Department of Transportation ("NJDOT"), in response to the brief filed by appellant, J. Fletcher Creamer & Son, Inc. ("Creamer").



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PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS¹

In this appeal, Creamer seeks the award of a publicly advertised roadway maintenance contract. The NJDOT awarded the contract to Road Safety Systems, LLC (“RSS”) because it submitted the lowest responsible bid. (Pa123).² Creamer, the second lowest bidder, protests RSS’s bid and demands award of the contract.

¹ Because they are closely related, these sections are combined for efficiency and the court’s convenience.

² “Pa” refers to Creamer’s appendix and “Pb” to its brief.

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On June 28, 2024, RSS applied to renew its classification to bid on NJDOT projects. (Pa161-62).³ From RSS's application, the NJDOT determined that RSS had experienced a ten percent or greater change of ownership, which required submission of a corporate reorganization form. (Pa161-62). On July 22, 2024, RSS submitted the required form explaining that it had been purchased by Soil Nail Holdings, LLC ("SNH") on February 23, 2024, and that SNH was now RSS's 100 percent owner. (Pa161-67). The NJDOT confirmed the additional information was acceptable and renewed RSS's classification. (Pa125; Pa169).

On September 19, 2024, the NJDOT advertised DP No. 25445, a state funded 2025 roadway maintenance contract ("the Project").⁴ (Pa1-2). The Project's purpose was to repair or replace damaged or deteriorated roadway beam guide rails, crash cushions, and related safety infrastructure at locations

³ The NJDOT's classification statute, N.J.S.A. 27:7-35.1 to -35.12, requires that prospective bidders be classified "as to the character and amount of work on which they shall be qualified to submit bids." N.J.S.A. 27:7-35.2. To be classified, a prospective bidder must provide information regarding its financial capacity, equipment, organization, and work experience. N.J.A.C. 16:44-3.2.

⁴ The Project was also known as "Maintenance Beam Guide Rail and Attenuator Repair Contract, North - 2025, Various Locations, Bergen, Essex, Hudson, Morris, Passaic, Sussex, Union and Warren (Including and North of Route 57) Counties; 100% State Funded, PE No: 2622619, CE No: 2622975, DP No: 25445." (Pa1).

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throughout northern New Jersey. (Pa8). All work would be “if and where directed” and include emergency repairs requiring onsite mobilization within four hours. (Pa8).

The NJDOT opened electronic bids for the Project on October 10, 2024. (Pa124). RSS submitted the lowest apparent bid of \$6,965,650. (Pa121). Creamer submitted the second lowest apparent bid of \$7,147,532. (Pa121).

On October 11, 2024, the NJDOT advised RSS of its intent to reject its bid for failure to properly sign in accordance with N.J.A.C. 16:44-7.4(b)(2) and Section 102.10 of the 2019 Standard Specifications for Road and Bridge Construction (“Standard Specifications”). (Pa127-28). RSS’s electronic bid proposal had been digitally signed by a senior estimator, Jeff Brandt, who was not listed as an authorized representative of RSS for the NJDOT’s online bidding platform, www.bidx.com (“BidX”), or in RSS’s classification application. (Pa127). The NJDOT offered RSS the opportunity to be heard if it contested the proposed rejection. (Pa127-28).

RSS requested the opportunity to be heard and on October 16, 2024, submitted additional argument and exhibits, including: (1) an affidavit of William Yost, III, RSS’s director of operations; and (2) an internal RSS memorandum detailing Mr. Brandt’s employment history and confirming his

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authority to submit bids on RSS's behalf as of September 29, 2024. (Pa130-42). After reviewing RSS's documentation, the NJDOT found that Mr. Brandt had been authorized to execute and submit RSS's bid for the Project. (Pa144).

On October 29, 2024, the NJDOT awarded the Project to RSS as the lowest responsible bidder and posted notice of the award on its website. (Pa124; Pa111-21). The NJDOT provided contract documents to RSS for execution. (Pa124).

On November 8, 2024, Creamer submitted a letter to the NJDOT protesting RSS's bid and seeking award of the contract. (Pa146-51). Creamer argued that RSS's bid was materially defective for failure to disclose its ownership status in accordance with N.J.S.A. 52:25-24.2. (Pa146-50). "Upon information and belief," Creamer alleged that RSS had been acquired by GeoStabilization International ("GSI") in 2023 or 2024, whose parent company sold GSI in September 2024 and thereafter formed an entity known as RoadGuard. (Pa146-47). As proof, Creamer attached an undated press release from GSI announcing a "brand formed by the acquisition and integration of five industry leaders," including RSS. (Pa151).

Creamer also suggested that RSS's bid was materially defective for failure to include a small business enterprise ("SBE") participation plan. (Pa147). As

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proof, Creamer noted that the NJDOT did not provide SBE documentation in response to Creamer's Open Public Records Act ("OPRA") request and that RSS's bid indicated it had not uploaded such documentation to BidX. (Pa147).

On November 27, 2024, the NJDOT sent Creamer's protest to RSS and requested a response by December 9, 2024. (Pa190). That day, RSS provided various documents refuting Creamer's allegations, including an affidavit from Mr. Yost and excerpts from RSS's prequalification application. (Pa153-71). RSS affirmed that SNH remained its sole owner and that it had not experienced any change in ownership since February 23, 2024. (Pa157-58). RSS further noted that it was not, nor had ever been, owned by GSI. (Pa158-59).

On December 10, 2024, the NJDOT issued a written decision denying Creamer's bid protest after finding that RSS's ownership had been properly disclosed to the NJDOT prior to submitting its bid in accordance with N.J.S.A. 52:25-24.2 and N.J.A.C. 16:44-3.2(a)(9), and that the Project did not have a SBE goal. (Pa173-74).

On December 12, 2024, Creamer sought reconsideration, challenging the NJDOT's acceptance of RSS's bid, RSS's classification, and RSS's small business registration status. (Pa176-89). Creamer argued that: (1) SNH was the "actual party in interest"; (2) RSS was merely a shell entity; and (3) RSS no

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longer qualified as either a SBE or emerging small business enterprise (“ESBE”). (Pa176-82). Creamer demanded a copy of RSS’s prequalification application if RSS’s bid was not rejected. (Pa182).

On December 17, 2024, the NJDOT issued a written decision denying Creamer’s protest. (Pa124-89). The decision explained that, in accordance with N.J.S.A. 27:7-35.4 and N.J.A.C. 16:44-3.2 to -3.8, the NJDOT renewed RSS’s classification to bid on NJDOT projects after reviewing its submission and determining it had experienced a change in ownership. (Pa125). The decision also noted that the Project did not have either a SBE or an ESBE goal, so RSS’s status as either type of entity was not considered. (Pa125).

On December 27, 2024, Creamer asked the NJDOT to stay execution of the contract and performance of any Project work pending Creamer’s appeal. (Pa219-20). On January 2, 2025, the NJDOT denied Creamer’s request, explaining that “[a]ctive contract status is needed for the safety of the motoring public” and that the 2024 contract, which Creamer held, could “only be extended by reallocating limited funding intended for other important work.” (Pa221-22).

On January 6, 2025, Creamer filed Notice of Appeal and an application for permission to seek emergent relief. (Pa226-37). On January 7, 2025, the court granted Creamer’s request and issued a temporary stay pending the

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motion's disposition. (Pa243-44). On January 17, 2025, the court denied Creamer's motion for a stay, noting Creamer's failure to establish a reasonable probability of success on the merits or a favorable balance of hardships. (Pa257-63).

ARGUMENT

THE NJDOT'S FINAL DECISION REJECTING CREAMER'S BID PROTEST SHOULD BE AFFIRMED.

In an appeal from a final agency decision, this court has “a limited role.” Gerba v. Bd. of Trs., Pub. Emps.’ Ret. Sys., 83 N.J. 174, 189 (1980). Courts “defer to an agency’s interpretation of both a statute and implementing regulation, within the sphere of the agency’s authority, unless the interpretation is plainly unreasonable.” E. Bay Drywall, LLC v. Dep’t of Labor & Workforce Dev., 251 N.J. 477, 493 (2022) (quotation omitted). Courts also defer to agency “expertise, particularly in cases involving technical matters within the agency’s special competence.” In re Adoption of Amends. to Ne., Upper Raritan, Sussex Cnty. & Upper Del. Water Quality Mgmt. Plans, 435 N.J. Super. 571, 583 (App. Div. 2014).

Courts “cannot micromanage” agencies. Div. of Youth & Fam. Servs. v. K.M., 136 N.J. 546, 560 (1994). An agency determination may not be vacated

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“because of doubts as to its wisdom or because the record may support more than one result”; rather, courts are “obliged to give due deference to the view of those charged with the responsibility of implementing legislative programs.” In re Adoption of Amends., 435 N.J. Super. at 583 (quotations omitted). A court “can intervene only in those rare circumstances in which an agency action is clearly inconsistent with its statutory mission or with other State policy.” George Harms Constr. Co. v. N.J. Tpk. Auth., 137 N.J. 8, 27 (1994); see also Caporusso v. Dep’t of Health & Senior Servs., 434 N.J. Super. 88, 103 (App. Div. 2014) (“[A] strong presumption of reasonableness attends an agency’s exercise of its statutorily delegated duties.” (quotation omitted) (alteration in original)). The party challenging the administrative action bears the burden of demonstrating that it was “arbitrary, capricious or unreasonable.” In re Project A1150-08, Exec. State House Comprehensive Renovation & Restoration, 466 N.J. Super. 244, 258 (App. Div. 2021) (citation omitted). Creamer has failed to meet this burden.

A. RSS Properly Disclosed its Ownership Prior to Bid Opening.

N.J.S.A. 52:25-24.2 prohibits the award of any publicly funded contract to a corporate entity which has not

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submitted a statement setting forth the names and addresses of all stockholders in the corporation who own 10 percent or more of its stock, of any class, or of all individual partners in the partnership who own a 10 percent or greater interest therein, or of all members in the limited liability company who own a 10 percent or greater interest therein, as the case may be.

For this reason, in order to bid on NJDOT projects, N.J.A.C. 16:44-3.2(a)(9) requires any contractor that is a corporation, partnership, or limited liability company to submit a statement setting forth the names and home addresses of all stockholders, partners or members with a ten percent or greater interest.

In June 2024, in accordance with N.J.S.A. 27:7-35.1 to -35.12, RSS applied to renew its classification to bid on NJDOT projects. (Pa162). The NJDOT determined RSS had experienced a change in ownership that required additional explanation. (Pa161-62). The NJDOT renewed RSS's classification to bid only after RSS provided the required corporation reorganization form, which confirmed it was wholly owned by SNH. (Pa125; Pa169).

In its November 8, 2024 bid protest, Creamer accused RSS of having been acquired by multiple other entities. (Pa146-47). RSS submitted an affidavit disputing Creamer's allegations and confirming that it had not experienced any change in ownership since February 2024. (Pa157-59). Therefore, RSS's

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ownership was disclosed to the NJDOT prior to submitting its bid for the Project, in accordance with N.J.S.A. 52:25-24.2 and N.J.A.C. 16:44-3.2(a)(9).

In its December 12, 2024 request for reconsideration (Pa176-89), Creamer made a different argument, which it now asserts on appeal. Creamer argues that RSS's bid should be rejected because SNH is the "true entity at interest" and was not registered to do business in New Jersey before the Project's bid opening date. (Pb17 n.4; Pb23; Pb26). However, SNH's New Jersey business registration is entirely irrelevant to this appeal. SNH did not bid on the Project and was not classified to do so. Creamer fails to identify any law or regulation prohibiting an NJDOT contractor from being owned by a properly disclosed out of state entity.

Creamer also argues that RSS's ownership arrangement with SNH "lacked transparency" and suggests it is entitled to receive a complete copy of RSS's classification application. (Pb17; Pb25-26). It is not. Pursuant to N.J.A.C. 16:1A-4.3(a)(2), all information provided to the NJDOT by construction or professional services contractors for the purposes of becoming prequalified or classified is exempt from public access. Moreover, to the extent that Creamer seeks to challenge the response to its OPRA request, it may only do so before the Superior Court or Government Records Council. N.J.S.A. 47:1A-6.

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The cases Creamer cites in support of its arguments (Pb17-21), are readily distinguishable. In Tufano v. Cliffside Park, 110 N.J.L. 370, 372-73 (1933), the New Jersey Supreme Court vacated a municipal award of a waste removal contract to a bidder who failed to provide proof of ownership or legal access to adequate dumping facilities with its bid. Similarly, in Albanese v. Machetto, 7 N.J. Super. 188, 190-91 (App. Div. 1950), the Appellate Division affirmed vacation of a municipality's award of a waste removal contract to a bidder who failed to provide with its bid proof that it owned or leased five garbage trucks. Neither case concerns a bidder's ownership or corporate organization.

In Muirfield Construction Company v. Essex County Improvement Authority, 336 N.J. Super. 126, 130 (App. Div. 2000), the Appellate Division found that a plumbing contractor's failure to demonstrate with its bid at least ten percent ownership by a licensed master plumber violated N.J.S.A. 45:14C-2(h) and could not be waived or cured. Creamer does not allege RSS is subject to an analogous requirement.

In In re Scheduled Award of Term Construction, T2813 RFP 12-X-22361, No. A-1336-12 (App. Div. July 10, 2013) (slip op. at 6-8) (Pa277-85), the Division of Purchase and Property declined to award a horse drug testing contract to a bidder whose ownership disclosure failed to comply with N.J.S.A.

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52:25-24.2. The Appellate Division rejected the bidder's argument that the statute required disclosure only of individuals with a ten percent or greater interest and not of corporate owners. Id. at 10. Here, in contrast, there is no dispute that SNH owns 100 percent of RSS, and that its ownership was disclosed to the NJDOT prior to the Project's bid opening. (Pa161-67; Pa193-216).

In George Harms Construction Company v. Borough of Lincoln Park, 161 N.J. Super. 367, 370-381 (App. Div. 1978),⁵ the Law Division enjoined a municipality from awarding a construction contract to a bidder who failed to include the ownership disclosure required by N.J.S.A. 52:25-24.2 with its bid. The court found the defect could not be cured and ordered the municipality to re-advertise the project. Id. at 376-81. Here, in contrast, there is no dispute that RSS provided the required ownership disclosure prior to submission of its bid for the Project. (Pa161-67; Pa193-216).

Fundamentally, Creamer's argument is at best speculative. Creamer asks this court to infer that RSS's classification application was incomplete,

⁵ Creamer cites George Harms Construction Company, 137 N.J. at 8 (Pb18), in which the Supreme Court affirmed the New Jersey Turnpike Authority's decision to reject all bids when it sought to change the contract's specifications to require bidders to enter into project labor agreements. While an important public bidding case, George Harms Construction Company does not discuss ownership disclosure requirements.

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inaccurate, or materially deficient despite the NJDOT's conclusion that it was acceptable.⁶ (Pb1-2; Pb10 n.2; Pb17; Pb25-30). The NJDOT's determination, which involved its expertise and technical review of RSS's classification application, is entitled to deference. See In re Adoption of Amends., 435 N.J. Super. at 583.

Since SNH's ownership of RSS was disclosed to the NJDOT prior to the Project's bid opening, the NJDOT's December 17, 2024 decision should be affirmed.

B. RSS's Bid Was Properly Signed.

N.J.A.C. 16:44-7.4(b)(2) provides that the NJDOT "may" reject a bid that "is not properly signed." Section 102.10 of the Standard Specifications provides additional information on the electronic signature requirement:

Once the Bidder has completed its bid . . . , the Bidder shall submit the electronically signed bid via the internet using the appropriate software. An authorized representative of the Bidder is required to digitally sign

⁶ As support, Creamer highlights a January 16, 2025 affidavit RSS submitted in response to Creamer's emergent motion, which is included in Creamer's appendix at Pa246-53. (Pb10 n.2; Pb27-33). The affidavit is outside the agency record in violation of Rule 2:5-4(a) and was not subject to a motion for supplementation pursuant to Rule 2:5-5. As such, this court should entirely disregard it. See, e.g., Hisenaj v. Kuehner, 194 N.J. 6, 25 (2008) (warning against an appellate court's "unconstrained review" of material outside the evidentiary record); Townsend v. Pierre, 221 N.J. 36, 45 n.2 (2015) (declining to consider deposition testimony not presented to the trial court).

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the bid. Information regarding digital signatures is available on the [NJDOT]'s website. The [NJDOT] may reject internet bids that are not digitally signed by the authorized representative of the Bidder with an approved digital signature.

[Pa85.]

Creamer argues that the NJDOT was required to reject RSS's bid because Mr. Brandt was not listed as an authorized representative of RSS for BidX or in RSS's classification application. (Pb36-37). However, rejection in such case is committed to the NJDOT's discretion pursuant to N.J.A.C. 16:44-7.4(b)(2) and Section 102.10 of the Standard Specifications. After receiving the sworn affidavit of Mr. Yost detailing Mr. Brandt's employment history and annexing an internal RSS memorandum (Pa138-42), the NJDOT was satisfied that Mr. Brandt was authorized to bid on RSS's behalf as of September 29, 2024, and therefore had the ability to bind RSS to its proposal for the Project. (Pa144). Contrary to Creamer's suggestion that "advance public disclosure" was required before it could accept Mr. Brandt's authority (Pb3), the NJDOT does not provide information on bidders' designated signatories to the public.⁷ Pursuant to

⁷ The NJDOT publishes a spreadsheet of prequalified contractors on its website with contact information and prequalified work types. www.nj.gov/transportation/business/procurement/ConstrServ/prequalification/prequalifiedcontractors.shtm (last visited May 5, 2025). The spreadsheet does

N.J.A.C. 16:1A-4.3(a)(2), all information provided to the NJDOT by construction or professional services contractors for the purposes of becoming prequalified or classified is exempt from public access.

The NJDOT's determination that Mr. Brandt was authorized to submit bids on RSS's behalf is entitled to deference. See, e.g., E. Bay Drywall, LLC, 251 N.J. at 493 (noting that courts "defer to an agency's interpretation of both a statute and implementing regulation, within the sphere of the agency's authority, unless the interpretation is 'plainly unreasonable'") (citations omitted). As noted, an agency determination may not be vacated "because of doubts as to its wisdom or because the record may support more than one result"; courts are "obliged to give due deference to the view of those charged with the responsibility of implementing legislative programs." In re Adoption of Amends., 435 N.J. Super. at 583 (citations omitted). This is not one of the "rare circumstances" in which the NJDOT's determination can be overturned. George Harms Constr. Co., 137 N.J. at 27.

Creamer suggests on appeal that the NJDOT should not have given RSS the opportunity to provide any such clarification and that its bid should have

not include any information about contractors' finances, organization, or authorized designees.

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been rejected outright. (Pb37; Pb39). However, the NJDOT routinely notifies bidders prior to rejecting their bids, with good reason. See, e.g., M.A. Stephen Constr. Co. v. Rumson, 125 N.J. Super. 67, 75 (App. Div. 1973) (noting that “the low bidder is entitled to be heard by the public authority before his bid is rejected”) (quoting Trap Rock Industries, Inc. v. Kohl, 59 N.J. 471, 479-80 (1971)).

Creamer also argues that Mr. Brandt’s signature constituted an unwaivable material defect in RSS’s bid. (Pb36; Pb39). Contracting authorities cannot waive material conditions contained in bidding specifications. Hall Constr. Co. v. N.J. Sports & Exposition Auth., 295 N.J. Super. 629, 637 (App. Div. 1996). While there is discretion to accept or reject a bid that does not conform with the specifications in non-material respects, see, e.g., Serenity Contracting Grp. v. Borough of Fort Lee, 306 N.J. Super. 151, 156 (App. Div. 1997) (can accept or reject bid with non-material defects for valid and non-pretextual reasons), any material departure from the specifications’ terms invalidates a non-conforming bid as well as any contract based on it. Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307, 315 (1994).

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To determine whether a bid's departure from the contract's terms is material, and thus unwaivable, a two-part analysis applies: (1) whether waiver of the defect would deprive the contracting party of its assurance that the contract will be performed and guaranteed according to its specifications; and (2) whether the defect is of such a nature that waiver would adversely affect competitive bidding by placing the bidder in a position of advantage over others or by otherwise undermining competition. Meadowbrook Carting, 138 N.J. at 315.

RSS's failure to obtain a digital signature for Mr. Brandt prior to the Project's bid opening was not a material defect. RSS will be required to adhere to all Project requirements and applicable laws. The NJDOT will not be deprived of any assurance that the contract will be performed and guaranteed according to its specifications. Nor is there any risk of harm to competitive bidding. RSS was not permitted to modify its bid in any way after bid opening. RSS timely submitted its electronic bid for the Project prior to bid opening through RSS's BidX account. (Pa193-216). The bid was signed by an employee of RSS with authority to bind it to its proposal. (Pa138; Pa198; Pa204; Pa206). Moreover, it was accompanied by a satisfactory proposal bond. (Pa216).

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Since Mr. Brandt was authorized to submit bids on RSS's behalf prior to the Project's bid opening date, the NJDOT's rejection of Creamer's bid protest should be affirmed.

**C. The NJDOT's Award of the Project to RSS
Adhered to the Law and Purpose of Public
Bidding.**

The purpose of public bidding is to secure for the public the benefits of unfettered competition and "to 'guard against favoritism, improvidence, extravagance, and corruption.'" Nat'l Waste Recycling v. Middlesex Cnty. Improvement Auth., 150 N.J. 209, 219 (1997) (quoting Terminal Constr. Corp. v. Atl. Cnty. Sewerage Auth., 67 N.J. 403, 410 (1975)). To this end, "[p]ublic bidding statutes exist for the benefit of taxpayers, not bidders, and should be construed with sole reference to the public good." Id. at 220 (citations omitted).

RSS submitted the lowest responsible and responsive bid of \$6,965,650. (Pa122-23). Creamer's bid of \$7,147,532 (Pa122), was \$181,882 higher. N.J.S.A. 27:7-30 requires the NJDOT to award publicly advertised construction projects to the lowest responsible bidder. See also N.J.A.C. 16:44-8.1. On October 29, 2024, the NJDOT did so. (Pa123). In a matter of months, Creamer, RSS, and all other prequalified heavy highway and guide rail NJDOT contractors will have the opportunity to bid on the 2026 contract. At that time,

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the NJDOT will award that contract to the lowest responsible bidder in accordance with its statutory requirements and the purpose of public bidding.

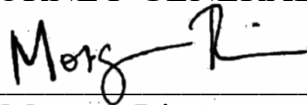
Because the NJDOT's award of the Project to RSS adhered to the law and purpose of public bidding, Creamer's appeal should be denied.

CONCLUSION

For these reasons, the NJDOT's December 17, 2024 decision denying Creamer's bid protest should be affirmed.

Respectfully submitted,

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J. FLETCHER CREAMER & SON,
INC.

Appellant,

v.

NEW JERSEY DEPARTMENT OF
TRANSPORTATION and
ROAD SAFETY SYSTEMS, LLC,

Respondents.

: SUPERIOR COURT OF NEW
: JERSEY, APPELLATE DIVISION
:
: Docket No. A-001270-24
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: CIVIL ACTION
:
: Submission Date: May 13, 2025
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: On Appeal from Final Agency
: Decision of the New Jersey
: Department of Transportation
:
:
:

**BRIEF OF RESPONDENT, ROAD SAFETY SYSTEMS, LLC, IN
OPPOSITION TO APPELLANT, J. FLETCHER CREAMER & SON, INC.**

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PRELIMINARY STATEMENT

Respondent, Road Safety Systems, LLC (“RSS”), respectfully submits this brief in opposition to the appeal filed by Appellant, J. Fletcher Creamer & Son, Inc. (“Creamer”), from the Final Agency Decision issued by the New Jersey Department of Transportation (“NJDOT”) on December 17, 2024. The appeal arises from NJDOT’s award of the public contract for “Maintenance Beam Guide Rail and Attenuator Repair Contract, North - 2025; Various Locations; Bergen, Essex, Hudson, Morris, Passaic, Sussex, Union and Warren (Including and North of Route 57) Counties,” Contract ID No. 25445 (the “Project” or the “Contract”), to RSS as the lowest responsible bidder.

NJDOT bids and awards the Project on an annual basis. Creamer held the 2024 contract and has won the Project for seventeen (17) consecutive years. For the first time in almost two decades, a responsible bidder other than Creamer has submitted the lowest bid. It is within this context that Creamer has protested the award to RSS and now asks this Court to re-award the contract to Creamer.

Contrary to Creamer’s claims, NJDOT conducted a thorough and fair bid evaluation process in accordance with applicable law and determined—correctly—that RSS’s bid was compliant. Creamer’s appeal rests on a series of speculative and legally unsupported allegations, none of which rise to the level

of a material, nonwaivable defect warranting disqualification of RSS's bid, let alone re-awarding the Project to Creamer.

First, Creamer alleges that RSS's bid was materially defective because the Senior Estimator who digitally signed it, Jeffrey Brandt, was not listed as an "authorized representative" of RSS on NJDOT's online bidding platform.

As set forth more fully in the record below, Mr. Brandt was authorized to sign RSS's bid electronically and met NJDOT's mandatory requirements regarding the submission of bids. Before awarding the Project to RSS, NJDOT notified RSS of its intent to reject RSS's bid because Mr. Brandt was not listed on NJDOT's online bidding platform. NJDOT gave RSS the opportunity to contest the intended rejection, as NJDOT was required to do under its regulations. Upon reviewing RSS's submission, NJDOT found that Mr. Brandt was in fact authorized to submit RSS's bid for the Project. NJDOT's decision was based upon a reasonable and careful review of the relevant facts and documents submitted by RSS and is, therefore, entitled to deference.

Second, Creamer alleges that RSS failed to make the proper disclosures prior to bidding about a change in RSS's ownership. This theory is, likewise, flawed.

RSS properly registered, was prequalified, and bid for the Project in its own name. The asset acquisition involving Soil Nail Holdings (“Soil Nail”) did not result in any change to RSS’s corporate identity or ability to perform public work in New Jersey. RSS notified NJDOT of its change in ownership in June and July 2024 with the submission of its prequalification application. On October 10, 2024, RSS submitted its bid for the Project to NJDOT. NJDOT, after receiving clarifying information from RSS, rightly determined that the ownership disclosure requirements of N.J.S.A. 52:25-24.2 had not been violated in any manner that would justify disqualification. These facts informed and justified NJDOT’s decision to deny Creamer’s protest on December 10, 2024. The suggestion that RSS is a “shell company” is unsupported by any competent evidence. As demonstrated herein, RSS owned 100% of its assets before the change of ownership and has maintained its ownership thereafter.

Creamer’s assertions that NJDOT acted arbitrarily or capriciously in awarding the Contract to RSS are without merit. Public contracting authorities are entitled to deference in their procurement decisions, and there is no basis here to disturb NJDOT’s reasoned judgment.

For the foregoing reasons, RSS respectfully requests that the Court affirm the NJDOT’s Final Agency Decision and deny Creamer’s appeal in its entirety.

PROCEDURAL HISTORY

Pursuant to R. 2:6-4(a), RSS adopts, or otherwise does not refute, the procedural history set forth in Creamer's brief.

COUNTER-STATEMENT OF FACTS

RSS generally adopts the Statement of Facts set forth in Creamer's brief but writes to refute or otherwise clarify certain assertions made therein.

Creamer suggests that RSS's bid was facially defective because it was signed by an individual not listed on prequalification paperwork. However, Section 102.10 of the Standard Specifications expressly provides that: "The Department **may** reject internet bids that are not digitally signed by the authorized representative of the Bidder with an approved digital signature." Pa85 (emphasis added). The plain text of the provision confirms that the NJDOT retains discretion—not an obligation—to reject such bids.

Consistent with that discretion, NJDOT notified RSS of a potential nonconformity by letter dated October 11, 2024, indicating that Jeff Brandt, who signed RSS's bid, was not listed in prequalification documents. Pa127. RSS responded with documentation showing that Mr. Brandt had been promoted and duly authorized to act on behalf of RSS as of September 2024. Pa128-134. On

October 21, 2024, NJDOT accepted RSS's explanation and awarded RSS the contract for the Project. Pa144.

The NJDOT's process was consistent with its authority under applicable procurement rules, which not only allow, but require, the Agency to afford bidders the opportunity to clarify or cure minor, immaterial irregularities. Specifically, the regulations provide:

The Commissioner may disqualify any contractor and reject its bid at any time prior to the contract execution when there have been developments subsequent to classification, which, in the opinion of the Commissioner, would adversely affect the responsibility of the bidder. **Before taking such action, the Commissioner will notify the bidder and give it an opportunity to present additional information in support of its responsibility.**

N.J.A.C. § 16:44-7.4(a) (emphasis added).

Nothing in the governing regulations requires notice to or input from competing bidders during this preliminary clarification process.

Creamer also contends that “it became apparent that RSS had failed to make the proper disclosures with respect to a recent change in ownership.” Appellant's Br. at 7. RSS disputes this characterization. As RSS has explained in both administrative and judicial filings, it disclosed its ownership prior to submitting its bid. On July 22, 2024—more than two months before bid

submission—RSS submitted a Notice of Partnership/Corporate Reorganization to NJDOT identifying Soil Nail as the 100% owner of RSS’s membership interests. Pa163-67.

Creamer also states that “it was made clear” that “RSS had been acquired by Soil on or about February 23, 2024.” Appellant’s Br. at 7. This assertion, while partially accurate, mischaracterizes the nature of the transaction. As RSS has repeatedly clarified, Soil Nail acquired 100% of the membership interests in RSS—it did not acquire RSS’s assets. Pa153-55; Pa157-59; 163; Pa246-48; Da4. Ownership changed; the operating entity remained the same.

Creamer further claims that RSS “admitted that it is nothing more than a shell company.” Appellant’s Br. at 8. That assertion is false. RSS continues to operate as an independent contractor and performing entity, maintaining staff, assets, and responsibilities for its public contracts. The statement in Creamer’s brief misstates the record and disregards RSS’s disclosures made well in advance of bid submission.

Finally, Creamer suggests that RSS made a “complete about-face” in a January 16, 2025 affidavit submitted by RSS in response to Creamer’s emergent motion. Appellant’s Br. at 10. That affidavit, signed by RSS Director William Yost, merely clarified an inadvertent misstatement in an earlier filing—it was

not a retraction of RSS's core position. The affidavit confirmed that Soil Nail acquired membership interests only—not assets—and reaffirmed that RSS remains the legal entity responsible for performance of the Project. Pa246-48. Far from undermining RSS's prior representations, the affidavit was consistent with and supported the disclosures previously made to NJDOT.

To the extent Creamer seeks to rely on these clarifications as evidence of bad faith or false statements, its argument is without basis. The record shows that RSS engaged with NJDOT transparently and in good faith throughout the bid process and subsequent inquiry.

During the appellate process, significant headway has been made on the Project. Following the denial of Creamer's motion to stay, NJDOT and RSS proceeded with the execution of the contract and the mobilization and commencement of the Project. The contract for the Project was executed on January 24, 2025, and a Notice to Proceed was issued on the same day. Da2, ¶10. Pursuant to the Notice to Proceed, RSS mobilized Project resources and commenced construction activities on March 3, 2025. Da2, ¶11.

Since then, significant time, labor, and financial resources have been invested by both the State and RSS in furtherance of the Project. Da2, ¶12. As of the date of this filing, the Project is ongoing and approximately 10%

complete, with \$702,473.88 of the total contract value of \$6,965,650.00 having been billed. Da2, ¶13. This milestone also qualifies RSS for a mobilization payment in the amount of \$82,591, which is 50% of RSS's mobilization bid item. Da2, ¶14.

In other words, the Project has reached a stage where halting or reassigning the contract would cause substantial disruption and waste of public and private resources.

STANDARD OF REVIEW

A. Arbitrary and Capricious Standard.

Judicial review of quasi-judicial agency determinations is limited. Allstars Auto. Grp., Inc. v. N.J. Motor Vehicle Comm'n, 234 N.J. 150, 157 (2018) (citing Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011)); see also Mazza v. Bd. of Trs., Police & Firemen's Ret. Sys., 143 N.J. 22, 25 (1995) (“In light of the executive function of administrative agencies, judicial capacity to review administrative actions is severely limited.”).

“[A]n appellate court reviews agency decisions under an arbitrary and capricious standard.” Zimmerman v. Sussex Cnty. Educ. Servs. Comm'n, 237 N.J. 465, 475 (2019). “An agency's determination on the merits ‘will be sustained unless there is a clear showing that it is arbitrary, capricious, or

unreasonable, or that it lacks fair support in the record.’” Saccone v. Bd. of Trs., Police & Firemen's Ret. Sys., 219 N.J. 369, 380 (2014) (quoting Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011)). The party challenging the administrative action bears the burden of making that showing. Lavezzi v. State, 219 N.J. 163, 171 (2014).

On appeal, the judicial role in reviewing all administrative action is generally limited to three inquiries: “(1) whether the agency’s action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.” Allstars Auto. Grp., Inc. v. N.J. Motor Vehicle Comm’n, 234 N.J. 150, 157 (2018) (quoting In re Stallworth, 208 N.J. 182, 194 (2011)).

“When an agency’s decision meets those criteria, then a court owes substantial deference to the agency’s expertise and superior knowledge of a particular field.” In re Herrmann, 192 N.J. 19, 28 (2007); see also In re Request to Modify Prison Sentences, 242 N.J. 357, 390 (2020) (“Wide discretion is afforded to administrative decisions because of an agency's specialized

knowledge”); City of Newark v. Nat. Res. 30 Council, Dep't of Env't Prot., 82 N.J. 530, 539 (1980) (deferential standard is consistent with “strong presumption of reasonableness that an appellate court must accord an administrative agency's exercise of statutorily delegated responsibility”); In re Musick, 143 N.J. 206, 216 (1996) (deferential standard is consistent with the Judiciary’s “limited role ... in reviewing the actions of other branches of government”). “Deference controls even if the court would have reached a different result in the first instance.” In re Herrmann, 192 N.J. 19, 28 (2007).

Thus, “[a]n appellate court's ‘strong inclination’ must be to ‘defer to agency action that is consistent with the legislative grant of power.’” Matter of the Application for Medicinal Marijuana Alternative Treatment Center for Pangaea Health and Wellness, LLC, 465 N.J. Super. 343, 372 (App. Div. 2020).

As explained more fully below, this Court should defer to the NJDOT’s decision because the record contains no evidence suggesting that the Agency violated express or implied legislative policies—that is, the Agency acted within the bounds of its statutory authority when it examined and ultimately accepted RSS’s bid for the Project.

Furthermore, substantial evidence in the record supports NJDOT’s findings. RSS’s submissions before and during the bidding process fully

informed NJDOT of the relevant facts regarding Mr. Brandt's authority to sign bids on behalf of RSS and RSS's change in ownership. NJDOT reasonably relied on these submissions in evaluating RSS's bid and ultimately accepted them.

And, finally, there is no indication that it clearly erred in applying legislative policies to the facts. On the contrary, NJDOT's decision reflects a reasoned evaluation of the relevant factors and principles contained in New Jersey's public bidding laws and falls well within the range of acceptable outcomes contemplated by same. NJDOT's thoughtful and well-supported conclusions should not be overturned to placate the incumbent contract-holder.

B. New Jersey Public Bidding Laws.

Public bidding laws do not exist to serve disappointed bidders, but rather they exist to protect the public interest. Here, NJDOT has done just that: secured a competitively-priced, responsible contractor to perform public work in a manner consistent with statutory and regulatory requirements. Adopting Creamer's view would improperly overturn the NJDOT's reasoned decision and impede the efficient delivery of critical infrastructure service to the public.

It is axiomatic that public bidding statutes, including N.J.S.A. 27:7-1 et seq. and N.J.S.A. 27:7-30 et seq., are designed to ensure a fair, open, and competitive bidding process. See Terminal Constr. Corp. v. Atlantic County

Sewerage Auth., 67 N.J. 403, 410 (1975). These statutes must be strictly followed, but they do not mandate the automatic rejection of bids based on hyper-technical defects—particularly when such defects are not material, waivable under applicable law, and do not impact the fairness or integrity of the bidding process. See Id. at 411.

The NJDOT followed all required procedures, including a full evaluation of each submission in accordance with bid specifications. After review, NJDOT lawfully determined that RSS was the lowest responsible bidder. The minor issues identified by Creamer regarding RSS's bid documents were properly reviewed and reasonably determined not to constitute material, non-waivable defects under applicable case law and NJDOT regulations.

Contrary to Creamer's assertions, the NJDOT acted within its statutory authority and discretion in awarding the contract to RSS, the lowest responsible bidder. Creamer's arguments mischaracterize both the factual circumstances of the bid and the applicable law governing public procurement in New Jersey. Accordingly, the NJDOT's award to RSS should not be disturbed.

LEGAL ARGUMENT

I. CREAMER’S APPEAL IS MOOT.

Courts normally will not decide issues when a controversy no longer exists, and the disputed issues have become moot. De Vesa v. Dorsey, 134 N.J. 420, 428 (1993) (Pollock, J., concurring); see also Advance Elec. Co. v. Montgomery Twp. Bd. of Educ., 351 N.J. Super. 160, 166 (App. Div. 2002) (“Moot or academic appeals are generally dismissed.”)

“A case is technically moot when the original issue presented has been resolved, at least concerning the parties who initiated the litigation.” De Vesa, 134 N.J. at 428. In other words, “[a]n issue is moot when the decision sought in a matter, when rendered, can have no practical effect on the existing controversy.” Greenfield v. New Jersey Dept. of Corrections, 382 N.J. Super. 254, 257–58 (App. Div. 2006).

New Jersey courts are especially mindful of this doctrine when considering contracts for public projects because “[c]ontractual matters in which the State and its public entities engage must proceed with alacrity.” Barrick v. State, Dep’t of Treasury, 218 N.J. 247, 264 (2014). Thus, “[t]he State’s business and the public interest in the State’s contractual endeavors should not be

unreasonably delayed while an unsuccessful bidder seeks another level of review.” Ibid.

For example, in the matter of Protest of Contract Award for Project A1150-08, the court dismissed the appeal of a bid protest as moot because the contract had already been awarded, substantial work had been completed, subcontracts had been issued, and terminating the contractor would risk significant financial loss and potential damage to the project site. In re Protest of Contract Award for Project A1150-08, N.J. Executive State House Comprehensive Renovation & Restoration, 466 N.J. Super. 244, 263 (App. Div. 2021). Given the project’s advanced stage and the substantial commitments made, the court found no effective relief could be granted. Ibid.

Likewise, in Statewide Hi-Way Safety, Inc. v. N.J. Dep’t of Transp., the court dismissed as moot an appeal challenging the award of a highway construction contract because the project was “substantially completed.” 283 N.J. Super. 223, 226 (App. Div. 1995). There, the court had denied the appellant's emergent application to stay the contract award and later, during oral argument, discovered that a substantial portion of the project had already been completed. Id. at 225. The court explained that it was “too late to order rebidding

or to award the contract to another bidder” because doing so “would be contrary to the public interest.” Ibid. Accordingly, the court dismissed the appeal as moot.

Similarly, the appeal here is moot because the Project has advanced to a stage where judicial intervention would be both impractical and contrary to the public interest. The contract was executed on January 24, 2025, and a Notice to Proceed was issued the same day. In accordance with that notice, RSS mobilized resources and began construction on March 3, 2025. Since then, both the State and RSS have committed significant time, labor, and financial resources to the Project.

As of this filing, the Project is ongoing and approximately 10% complete, with \$702,473.88 billed against the total contract value of \$6,965,650.00. Da2, ¶13. This milestone also qualifies RSS for a mobilization payment in the amount of \$82,591, which is 50% of RSS’s mobilization bid item. Da2, ¶14. At this point, halting or reassigning the contract would result in substantial disruption and a waste of both public and private resources.

Under these circumstances, New Jersey case law—and common sense—strongly counsel against proceeding with a bid protest. Any attempt to rebid or reassign the remaining portion of the Project would only serve to interrupt the ongoing construction effort.

Moreover, the Project is essential to the maintenance of critical safety infrastructure on New Jersey's roadways. Prolonging this appeal would cause needless delays, thereby endangering State employees, including construction crews and law enforcement, and motorists. This Court has already denied Creamer's request for a stay, allowing the Project to continue in the interim. Reversing the award at this stage would not only impose substantial financial costs—requiring RSS to demobilize and Creamer to mobilize—but would also risk delaying necessary infrastructure repairs, thereby endangering the safety of New Jersey motorists.

New Jersey precedent cautions against such an inefficient and potentially hazardous course of action, especially when the project is already in progress and the public interest is directly implicated. For these reasons, the appeal is moot and should be dismissed.

II. CREAMER HAS FAILED TO ESTABLISH THAT THE NJDOT'S DECISION WAS ARBITRARY AND CAPRICIOUS.

A. RSS Complied with New Jersey Public Bidding Laws by Disclosing Its Change in Ownership.

The central argument in Creamer's brief is that RSS failed to meet statutory and regulatory disclosure obligations related to its ownership at the

time of bidding. Essentially, Creamer argues that RSS is a “sham bidder,” acting on behalf of Soil Nail to claim the contract.

This argument fails for two reasons. First, RSS did in fact disclose its corporate reorganization in its Notice of Partnership/Corporate Reorganization (the “Notice”), which was submitted to and reviewed by the NJDOT. The Department was fully aware of the transaction and determined that RSS remained eligible and qualified to bid on public projects in New Jersey—hardly the picture of concealment Creamer tries to paint.

Second, and more importantly, RSS—not Soil Nail—was the entity that submitted the bid, signed the required certifications, and stands as the contracting party. RSS has been and remains a duly registered and prequalified contractor in New Jersey, fully authorized to perform public work. The suggestion that Soil Nail, by virtue of being an upstream owner, somehow supplants RSS as the bidder is legally unsupported and factually incorrect. Ownership alone does not transform a parent into the contracting entity, and Creamer’s attempt to conflate the two misrepresents both corporate structure and the law.

New Jersey law and the Special Provisions governing the Project required bidders to disclose—prior to or accompanying a bid—the individuals or entities

owning 10 percent or more of a bidder. N.J.S.A. § 52:25-24.2. RSS satisfied this requirement by submitting its Notice of Partnership/Corporate Reorganization as part of its prequalification application to NJDOT. Pa163. RSS transmitted the Notice to NJDOT via email on July 22, 202—well in advance of the October 10, 2024 bid submission date. Pa161-67. The same day, NJDOT acknowledged receipt of the Notice and deemed it acceptable. Pa168. RSS acknowledges that the Notice says RSS transferred all of its assets to Soil Nail. The Notice was partially inaccurate in that RSS did not transfer any of its assets to Soil Nail. Rather, as RSS wrote in the Notice, Soil Nail purchased 100% of the membership in RSS and became its owner. Pa166.

The transaction at issue was a transfer of membership interests—not a transfer of assets. Pa246; Pa250. RSS owned 100% of its assets prior to the transaction and has continued to own 100% of its assets thereafter. Pa246. This is entirely consistent with the DC-74A form that RSS submitted as part of its prequalification application. Pa246. Creamer, lacking access to the DC-74A at the time of its protest, speculated—incorrectly—that RSS was a shell entity. NJDOT, however, reviewed RSS’s DC-74A, confirmed that RSS had undergone a change in ownership, and nonetheless renewed its classification to bid on NJDOT projects. Pa168. The suggestion that RSS transferred all of its assets

was an oversimplification, and the representations now in the record serve to clarify—not contradict—earlier disclosures. RSS continues to possess the necessary capacity, personnel, and assets to fully perform the Project.

Creamer devotes considerable energy to the claim that Soil Nail, not RSS, was the “true” bidder for the Project—an argument built more on speculation than fact. The record is clear: RSS, a properly prequalified and registered entity in New Jersey, was the named bidder, submitted the bid, and remains the contracting party. Creamer’s attempt to recast an ownership relationship as a bait-and-switch scheme mischaracterizes the corporate structure and ignores that ownership by a parent company does not transform that parent into the bidder. In short, RSS—not Soil Nail—bid the project, and the NJDOT treated it accordingly. The reality is that: (1) RSS’s DC-74A, (2) the Assignment of Membership Interests in RSS, and (3) the actual substance of the transaction reflect that RSS owned 100% of its assets before the transaction and has continued to own 100% of its assets after the transaction. Pa246.

Ultimately, Creamer’s protest rests on speculation and strained interpretations of corporate disclosures rather than any actual defect in RSS’s bid. RSS fully complied with the applicable legal and regulatory requirements by timely notifying NJDOT of its change in ownership through its

Reorganization Notice and supporting documentation—disclosures that NJDOT reviewed, accepted, and relied upon in renewing RSS's prequalification. Moreover, the bid was submitted by RSS, a duly registered and prequalified New Jersey entity, not by Soil Nail. Ownership by Soil Nail does not convert it into the bidder, nor does it render RSS's submission defective. The record confirms that NJDOT had the information it needed, exercised its discretion appropriately, and correctly awarded the contract to a qualified low bidder. Creamer's arguments provide no valid basis to disturb that decision.

B. The Submission of William Yost's Affidavit Was Proper and Necessary to the Consideration of the Issues.

In its submission, Creamer objects to RSS's submission of an affidavit in its filing in response to Creamer's motion for emergent relief. In doing so, Creamer mischaracterizes the purpose and misrepresents the propriety of the filing.

Rule 2:6-3 ("Preparation of Respondent's Appendix") provides: "If a joint appendix has not been filed, the respondent may prepare an appendix, conforming to the requirements of R. 2:6-1, insofar as applicable, and containing such parts of the record not included in the appellant's appendix as the respondent considers necessary to the proper consideration of the issues." R. 2:6-3.

No joint appendix was filed by the parties with respect to the motion for emergent relief. RSS was also not asked to respond to Creamer's request for reconsideration—in which Creamer first raised its theory regarding the alleged transfer of RSS's assets to Soil Nail—before NJDOT denied Creamer's request. Accordingly, RSS included the Affidavit of William L. Yost III to the Respondent's Appendix in its opposition to Creamer's motion to provide additional information that the Court may view as necessary to the proper consideration of the issues.

The affidavit provides important context and rectifies the misunderstanding regarding the transfer of assets. RSS's submission was entirely appropriate and in line with procedural requirements, ensuring that the court had all relevant information to assess the issues properly. The affidavit does not introduce new facts but rather clarifies RSS's prior filings and current position. Doing so was important for a full and fair evaluation of the issues.

C. NJDOT Properly Notified RSS of Its Intent to Reject the Bid, and RSS Addressed the Alleged Deficiencies.

Creamer argues that RSS's bid should have been disqualified for failure to include the signature of an “authorized representative” on its bid submission. In its argument, Creamer suggests that it was improper or otherwise at odds with the purpose of New Jersey's public bidding laws for NJDOT to notify RSS about

NJDOT's intent to reject the bid and allow RSS to: (1) contest the prospective rejection; and (2) provide additional information in support of the bidder's position. Creamer is decidedly wrong and has overlooked the clear language of the applicable administrative regulations.

Not only is the Commissioner of NJDOT allowed to give the bidder an opportunity to explain why its bid is responsive, it is required to:

(a) The Commissioner may disqualify any contractor and reject its bid at any time prior to the contract execution when there have been developments subsequent to classification, which, in the opinion of the Commissioner, would adversely affect the responsibility of the bidder. **Before taking such action, the Commissioner will notify the bidder and give it an opportunity to present additional information in support of its responsibility.**

N.J.A.C. § 16:44-7.4 (emphasis added).

Prior to awarding the Project, NJDOT notified RSS of its intent to reject RSS's bid for its alleged failure to sign the bid in accordance with N.J.A.C. § 16:44-7.4(b)(2) and Section 102.10 of the Standard Specifications. Pa127. As required by administrative regulation, NJDOT gave RSS the opportunity to contest the prospective rejection by making a written request to the Department and providing written documentation or argument demonstrating why RSS's bid should not be rejected for lack of responsiveness. Pa127-28.

RSS submitted a conforming bid signed by Jeff Brandt, an authorized representative of the company. Specifically, RSS complied with the only mandatory requirement of Section 102.10 of the Standard Specifications; that “[a]n authorized representative of the Bidder is required to digitally sign the bid.” Pa85.

“Authorized representative” is not a defined term in Subchapter 2 of Chapter 44 of the New Jersey Administrative Code; nor is it a defined term in the Standard Specifications. It, therefore, does not, as a matter of law, mean “authorized representative on the Department’s online bidding platform,” as Creamer has implied in its brief. Appellant’s Br. at 3, 6, 35.

In support of its position, RSS provided evidence that Mr. Brandt was, in fact, authorized to sign RSS’s bid. Pa130-132, 138, 140-42. The evidence included the Affidavit of RSS’s Director of Operations – Northeast, William L. Yost III. In that affidavit Mr. Yost explained that: (1) RSS’s change in company ownership, (2) Mr. Brandt’s employment, (3) the completion of RSS’s revised prequalification application, and (4) the submission of the subject bid. The evidence also included a September 29, 2024 Memorandum to the personnel file of Mr. Brandt authorizing Mr. Brandt, among other things, to prepare project estimates, review subcontracts, submit bids, and attend pre-bid meetings. Pa138.

NJDOT reviewed RSS's submission and concluded that Mr. Brandt was authorized to submit RSS's bid:

After review of the documentation submitted, the [NJDOT] finds that Jeff Brandt was authorized to submit RSS's bid for this project. Please be advised that all bids are under review at this time.

Pa144.

Nothing improper occurred. NJDOT followed its regulations by giving RSS an opportunity to explain why NJDOT was mistaken in its intent to reject RSS's bid. NJDOT made a reasonable finding based on its review and consideration of evidence in the record. Under the applicable standard of review, this Court should defer to NJDOT's finding. Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963) (holding that 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.").


NJDOT, in its discretion, reasonably accepted the documentation provided by RSS. The NJDOT has long-standing experience in handling such matters and its decision to accept the bid after reviewing the full context and the relevant documents was not arbitrary or capricious.

CONCLUSION

As a result of the foregoing, Road Safety Systems, LLC respectfully requests that the Court deny J. Fletcher Creamer's appeal in its entirety.

Respectfully submitted,

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J. FLETCHER CREAMER & SON,
INC.,

Appellant,

v.

NEW JERSEY DEPARTMENT OF
TRANSPORTATION and ROAD
SAFETY SYSTEMS, LLC,

Respondents.

SUPERIOR COURT OF NEW
JERSEY, APPELLATE DIVISION

DOCKET NO.: A-001270-24

CIVIL ACTION

On Appeal from Final Agency
Decision of the New Jersey
Department of Transportation

**REPLY BRIEF OF APPELLANT,
J. FLETCHER CREAMER & SON, INC.**

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PRELIMINARY STATEMENT

Appellant, J. Fletcher Creamer & Son, Inc. (“Creamer”), respectfully submits this reply brief in further support of its appeal from the Final Agency Decision, dated December 17, 2024 (the “Final Agency Decision”), issued by the New Jersey Department of Transportation (“NJDOT”).

It is emphasized that the Respondents’ oppositions contradict each other, signaling the lack of clarity as to the ownership of Road Safety Systems, LLC (“RSS”) and its assets. This underscores Creamer’s argument that RSS’s acquisition by Soil Nail Holdings, LLC (“SNH”) was not transparently disclosed to the NJDOT, in contravention of the intent and policy behind the public bidding laws, resulting in a material, non-waivable defect. By way of example,

- (i) RSS states: “As demonstrated herein, RSS owned 100% of its assets before the change of ownership **and has maintained its ownership thereafter.**” Db3, Da10 (emphasis added), however,
- (ii) NJDOT states: “**Here, in contrast, there is no dispute that SNH owns 100 percent of RSS**, and that its ownership was disclosed to the NJDOT prior to the Project’s bid opening.” NJDOT Br. (This nomenclature will be used to distinguish the NJDOT’s letter brief from RSS’s submissions, which are referred to as “Da/Db”), p. 3 (emphasis added).

This confusion and ensuing conflicting stories over RSS’s ownership is an obvious display of the consequences of RSS’s failures in full disclosure.

Additionally, now for the second time on appeal, RSS again seeks to introduce new evidence into the record in the form of additional affidavit.

Rather than either seek to expand the record by way of motion, or step back from such tactics, RSS instead has chosen to double-down on such methods. It is incumbent on this Court to strike or disregard both the improper affidavits. But even if these submissions are considered, they only serve to highlight the fact that this matter has been far muddled than it ever should have been—a straightforward explanation of ownership would never have required such a distorted and inconsistent explanation.

Finally, as to the separate signatory issue, the oppositions do not contest the underlying facts. The signatory that executed RSS's bid was never properly disclosed. Only after NJDOT gave RSS the opportunity to cure (without any notice to the other bidders), did RSS submit a one-sided explanation based almost wholly on a suspect "internal" memorandum. While the relevant regulations provide for the Commissioner to advise bidders of a possible rejection, nothing in the statute allows the NJDOT to forgive a defect when presented with even the flimsiest of a post-bid "cure." There is a wealth of caselaw that stands for the opposite conclusion: self-serving post-bid explanations are prone to manipulation and should be rejected under the law of this state.

For these reasons and those set forth in its initial brief, Creamer respectfully requests that the award of the Contract to RSS by the NJDOT be rescinded and that Creamer be awarded the Contract as the lowest responsible bidder.

STATEMENT OF FACTS

For the sake of brevity, Creamer respectfully refers to its initial Brief for a statement of the relevant facts and procedural history concerning this matter. The facts set forth therein are incorporated by reference as if set forth at length herein. While the NJDOT provides a “Counterstatement of Material Facts,” same is tied wholly to the appendix provided by Creamer. RSS also in large part generally adopts Creamer’s Statement of Facts, but goes on to improperly add legal argument (including citation to regulations). Even worse, RSS further adds *new* facts that were not part of the record based on a May 9, 2025 Affidavit of William Yost III.

LEGAL ARGUMENT

I. RSS CANNOT EXPAND THE RECORD ON APPEAL

Almost all of RSS’s arguments in opposition to this appeal are left uncited and not tied to the record.¹ But even worse, RSS premises much of its arguments upon two affidavits of its principal, Mr. William Yost III, one of which was submitted with its opposition to the Motion for Emergent Relief on January 16, 2025, and the latest was annexed to its opposition, and dated May 9, 2025. (Da1-3). These affidavits constitute improper expansions of the record on appeal.

¹ Factual statements and arguments made in appellate briefs that are uncited and not tied to the record cannot be considered by the Court. Skordos v. Colavito, No. A-4044-09T3, 2011 WL 1103645, at *1 (N.J. Super. Ct. App. Div. Mar. 28, 2011) (citing Pressler and Verniero, N.J. Court Rules, comment on R. 1:6–6 (2011); Higgins v. Thurber, 413 N.J. Super. 1, 21 n. 19 (App. Div. 2010).

Creamer argued against these tactics at length in its initial Brief (see Pb, Point I(b)). Rather than recanting the earlier January 16th affidavit, RSS repeated its tactics and submitted yet another affidavit—which almost wholly serves as the basis for its argument on Point I of Db (that Creamer’s appeal has been mooted). See Db13-16. This is patently unfair and in violation of the rules of appellate practice. Again, these arguments should not be considered.

Should there have been a proper basis to expand the record on appeal, the correct procedure would have been for RSS to seek leave for same per R. 2:5-5(b).² See 19 N.J. Prac., Skills and Methods § 1:97 (3d ed.). Obviously, this was not done. Accordingly, the improper submissions should be disregarded by this Court. See, Johnson v. Salem Corp., 189 N.J. Super. 50, 60 (App. Div. 1983); see also Kearny Fed. Sav. Bank v. 100 W. St., LLC, No. A-2164-22, 2024 WL 2966560, at *3 (N.J. Super. Ct. App. Div. June 13, 2024) (citation omitted).

Despite the above, even if the Court were inclined to consider both the January 16th and the May 9th Yost Affidavits, nothing would change the heart of the matter (let alone “moot” the appeal). For the reasons already set forth in Creamer’s initial brief, the January 16th affidavit does nothing more than

² Moreover, the Court should disregard RSS’s improper and inaccurate reliance on R. 2:6-3 (Db20-21), for the argument that it somehow held the ability to submit its own appendix, including client affidavits, since a joint appendix was not filed. This is an appeal from an agency determination, whereby under R. 2:5-4 a Statement of Items Comprising the Record (“SICR”) had to be filed, *months ago*.

highlight the obfuscation of RSS's ownership and relationship with SNH. Moreover, as Mr. Yost himself testified in said affidavit, RSS has submitted false statements to the NJDOT in that RSS now claims that it actually has retained all of its assets despite its purchase by SNH (Pa246-Pa253), despite its earlier representations to the contrary in 2024. Pa173; see also Pa125; Pa157-Pa159.

It is emphasized that the NJDOT apparently agrees with Creamer on this point. NJDOT states in footnote 6 of its letter brief (on page 14):

The affidavit is outside the agency record in violation of Rule 2:5-4(a) and was not subject to a motion for supplementation pursuant to Rule 2:5-5. As such, this court should entirely disregard it.

To be clear, while Creamer agrees that RSS's submissions should not be permitted to be unilaterally added to the record in contravention of the rules of procedure, Creamer also emphasizes that the January 16th affidavit further illuminates Creamer's point that there was misrepresentation in connection with RSS's disclosures to the NJDOT. These "disclosures" served as the premise of the NJDOT's determination in its Final Agency Decision. Pa173; see also Pa125.

As to arguing that the appeal has been rendered moot by RSS's performance of the underlying work (per the new May 9 affidavit, Da1), this argument is not convincing. By its own admission, RSS only began its work on March 3, 2025 and has only performed 10% of the underlying work to-date. Da2. This is insignificant, and RSS's one-sided allegations that a transition to

Creamer would cause delays or pose “dangers to the traveling public,” are unsubstantiated. Da3. Likewise unsubstantiated is RSS’s claims, without any support that it “proactively” purchased materials. Id. If true, such actions would have been taken solely at its own discretion, and has no bearing on the issues before the Court.

For these reasons, the submissions of RSS that were not tied to the record below should either be disregarded or read in favor of Creamer’s position.

II. EVEN IN THE LATEST SUBMISSIONS, THERE IS NO CLEAR ANSWER AS TO SNH’S OWNERSHIP OF RSS, AND THE STATE OF ITS ASSETS, WHICH SHOULD DISQUALIFY RSS’S BID

Simply put, RSS and the NJDOT do not appear to be on the same page. Aside from both taking the position that RSS’s prequalification and bid submissions were acceptable to the NJDOT, neither are in exact agreement as to *why*. Apparently, the NJDOT has taken the position that simply because there was advance disclosure of SNH’s acquisition of RSS, such was enough, without further inquiry into the arguments of Creamer that RSS apparently gave up all of its assets to SNH. Based upon RSS’s submissions, this would mean that RSS exists in name only. On the other hand, RSS makes a different argument and contradicts or disavows its earlier “disclosures” as to the sale of its assets—calling into question the veracity of its prior submissions to the NJDOT.

This disagreement highlights the very issue at the heart of this appeal: transparency. There should be no dispute, no contradictions, and no need for

explanation. The answer should be clear based upon the submissions as to RSS's ownership and whether RSS itself even holds any assets. RSS's conduct calls into question the fairness and trust in the bidding process and the NJDOT's assessment of the underlying disclosures. See Muirfield Const. Co. v. Essex Cnty. Improvement Auth., 336 N.J. Super. 126, 137–38 (App. Div. 2000).

Neither RSS's nor the NJDOT's oppositions provide any authority to contradict Creamer's arguments that in the context of public bidding, the ownership disclosure requirements of the law must be followed, and a material departure from same is an incurable defect. See, e.g., Muirfield Const. Co. v. Essex Cnty. Improvement Auth., 336 N.J. Super. 126, 134 (App. Div. 2000); George Harms Const. Co. v. Borough of Lincoln Park, 161 N.J. Super. 367, 371 (Law. Div. 1978).³ The problem here stems from RSS's own admissions regarding the complete transfer of its assets to its new owner, SNH. While RSS *now* argues that "RSS owned 100% of its assets before the transaction and has continued to own 100% of its assets after the transaction," (Db19), this was not always their position.

For example, in the October 16, 2024 Affidavit, Mr. Yost stated:

6. In or about January 2024, RSS's principal owner, John Flemming, sold the company to Soil Nail Holdings, LLC.

³ Additionally, Creamer must correct a mistake contained in its initial brief. Therein, at Point I(A), Creamer provided lengthy citation to George Harms Const. Co. v. New Jersey Tpk. Auth., 137 N.J. 8, 36 (1994), however, the proper case cite is George Harms Const. Co. v. Borough of Lincoln Park, 161 N.J. Super. 367, 371 (Law. Div. 1978). This latter case is directly on point as stated in Creamer's initial submissions.

7. The transaction closed on or about February 23, 2024, at which time **RSS transferred all its assets to Soil Nail Holdings, LLC.**

Pa140-Pa142 (emphasis added).

It was premised on this affidavit and its attachments that the NJDOT at that time reversed its decision (Pa144) and awarded the Project to RSS. Pa122. Indeed, such representations as to the turnover of assets are replete in RSS's other relevant submissions, such as its Notice of Partnership/Corporate Reorganization form in which it checked both of the following boxes:

1. **Check the applicable box for the corporate reorganization.**

☒ Change in Ownership of more than 10% of the stock of the Corporation

☒ Transfer of assets, in whole or in part, from the existing corporation to a new or existing corporation.

Pa165. Eliminating any doubt, on the very next page it writes as follows:

2. **Provide a brief description and explanation of the proposed reorganization.**

Soil Nail Holdings, LLC purchased Road Safety Systems, LLC and is 100% owner.

Road Safety Systems, LLC transferred all assets to Sil Nail Holdings, LLC.
Upon purchase of the company as of February 23, 2024.

Pa166.

These submissions were the central documents submitted by RSS, and relied upon by it in connection with its original opposition to Creamer's bid

protest. Pa154; Pa165-Pa167. These statements became the crux of Creamer's understanding that by virtue of this asset sale, RSS had been rendered nothing more than a shell company, leaving SNH as the actual company-at-interest. Moreover, further responses contained in these documents confirmed that this status change was not registered with the state of New Jersey. Pa166.

Later investigations then found that SNH also had not been registered to do business in this state, until December 5, 2024 (after the bid protest was well underway), at which time it registered as a domestic limited liability company in this State. Pa184-Pa185. These revelations altogether indicated an improper scheme, or at least gave the appearance of impropriety of a situation whereby a non-registered business or foreign company can purchase a foothold into NJ public contracts.

It goes without saying that a contractor must be registered before it submits its bid package for a contract for public works. R.C.G. Const. Co. v. Mayor & Council of Borough of Keyport, 346 N.J. Super. 58 (App. Div. 2001), aff'd, 175 N.J. 68 (2003). Likewise, it should be readily apparent that neither the legislature nor the courts would allow an unregistered entity to sidestep such a basic requirement simply by a purchase of a New Jersey-registered entity.

In connection with the underlying bid protest, RSS relied on these very same passages, and submitted another affidavit of William Yost, dated December 6, 2024, reemphasizing the asset transfer:

14. In the Statement, RSS notified the NJDOT, among other things, that: (a) Soil Nail Holdings, LLC purchased RSS and is its 100% owner; **(b) RSS transferred all of its assets to Soil Nail Holdings, LLC upon purchase of RSS as of February 23, 2024;** and (c) Soil Nail Holdings LLC has an address of 10225 Westmoor Drive (Suite 250) in West Minster, Colorado.

Pa158 (emphasis added).

It was based on these very submissions that the NJDOT premised its Final Agency Decision, rejecting Creamer's bid protest. Pa124-125. This determination was almost wholly based on the mere fact that prior to bidding RSS had provided the aforementioned Notice of Partnership/Corporate Reorganization, along with its prequalification questionnaire and attachments (i.e., the DC-74A, which Creamer was denied a copy of, despite request to review same). Id. There was no deeper inquiry into the asset transfer and nature of the transaction by the NJDOT then, and again there is no such analysis in its opposition papers. Their position can be summarized by the following: "...there is no dispute that SNH owns 100 percent of RSS, and that its ownership was disclosed to the NJDOT prior to the Project's bid opening." NJDOT Br., p. 3

In clear contradiction to the NJDOT's position, RSS makes an about-face like it did when it submitted opposition to the emergent motion. It now argues that *all* of the aforementioned sworn statements and submissions that it supplied to the NJDOT were inaccurate. For the sake of clarity, RSS states:

The transaction at issue was a transfer of membership interests—not a transfer of assets. ... RSS owned 100% of its assets prior to the transaction and has continued to own 100% of its assets thereafter.

Db18.⁴

Absurdly, RSS argues that its statements are somehow not in contradiction, but the documents speak for themselves. It is apparent that in earlier documents RSS states that its assets were transferred, but it now is saying otherwise (even claiming that said representations were inaccurate in the January 16th affidavit). Pa248. Perhaps even more offensive, RSS also relies upon its DC-74A form, which, without citing or attaching same, it claims confirms the propriety of the transaction and its disclosures. To be clear, Creamer requested this document but has been denied the document repeatedly by the NJDOT. However, it is doubtful that the document contains all the information that would settle the dispute. The NJDOT and RSS should not be permitted to rely so wholeheartedly on this nondisclosed document.

The reality is that there has been a lack of proper disclosure, and at worst, an outright misrepresentation on the part of RSS. These issues should not have been overlooked by the NJDOT, and in doing so, it has acted in an arbitrary and

⁴ This new position was first taken by RSS through the January 16th Yost affidavit. While Creamer has committed much argument as to the proper reading to this submission that was not part of the record below, to the extent the argument is now also being made in connection with RSS's opposition, it is requested that the Court treats same accordingly.

capricious manner. This warrants an Order reversing the Final Agency Decision rendered by the NJDOT, and an Order to award the NJDOT Contract to Creamer.

III. POST-BID EXPLANATIONS CANNOT SAVE MATERIAL, NON-WAIVABLE DEFECTS, SUCH AS RSS'S FAILURE TO PROPERLY EXECUTE ITS BID PURSUANT TO THE SPECIFICATIONS

The NJDOT agrees that contracting authorities cannot waive material conditions contained in bidding specifications. Hall Constr. Co. v. N.J. Sports & Exposition Auth., 295 N.J. Super. 629, 637 (App. Div. 1996). NJDOT Br. at 17. Where the NJDOT (and RSS) disagree with Creamer is whether the failure on the part of RSS to either disclose Mr. Brandt as an “authorized representative” of RSS prior to bid or otherwise execute the bid by a previously disclosed authorized representative per the NJDOT specifications was a material, non-waivable defect. It is Creamer’s position that it is material. Such a conclusion is corroborated by a plain reading of the NJDOT’s Standard Specifications (Section 102.10), which contains mandatory language that “An authorized representative of the Bidder is **required** to digitally sign the bid.” Pa85 (emphasis added).

A public contract award is not determined simply by the lowest bid, but rather by the lowest bid that “complies with the substantive and procedural requirements in the bid advertisements and specifications.” Gaglioti Contracting, Inc. v. City of Hoboken, 307 N.J. Super. 421, 431 (App. Div. 1997) (quoting Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307, 313 (1994)). “[M]aterial conditions contained in bidding specifications may not be waived.” Terminal Const.

Corp. v. Atlantic County Sewerage Authority, 67 N.J. 403, 411 (1975). “The law is clear that ‘where a party does not materially respond to the bid specifications he cannot be classified as a bidder at all, since the specifications are mandatory and jurisdictional.’” Bodies by Lembo, Inc. v. Cnty. of Middlesex, 286 N.J. Super. 298, 305 (App. Div. 1996) (citation omitted).

As the NJDOT agreed in its opposition, the courts of New Jersey apply a two-part test in determining whether a bidder's noncompliance with the terms of the advertised bid solicitations constitutes a material non-waivable defect:

- 1) whether [the effect] of a waiver of the bidding error would [be to] deprive the public entity of its assurance that the contract will be entered into, performed and guaranteed by the bidder according to its specified requirements, and,
- 2) whether the noncompliance is of such a nature that its waiver would adversely affect the competitive bidding process by placing the bidder who erred in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition.

See Meadowbrook, supra, 138 N.J. at 315 (citation omitted).

Here, the signatory requirements of the NJDOT’s Specifications are blatantly clear, requiring execution by an authorized representative of the company. Moreover, the level of seriousness that the NJDOT afforded this requirement is underscored by the fact that the NJDOT was wholly prepared to reject RSS’s bid on that failure alone on October 11, 2024. Pa127. While RSS argues that “authorized representative” is not a defined term in the Specifications or under the

Administrative Code, Db23, there actually is an area in which meaning for the term is given: the prequalification submission (i.e., the form DC-74A). See Pa99.

Therein, at the “Entity Information Sheet” section, the entity must identify the “the officers and employees” that “are appointed and authorized to approve and execute on the entity’s behalf,” documents, *inter alia*, contracts and bonds. Id. This disclosure of such individuals goes directly to the contractor’s “assurance that the contract will be entered into, performed and guaranteed by the bidder” (Meadowbrook, supra, 138 N.J. at 315), as the individual designated and identified therein are those with the duly appointed power to bind the company and act on its behalf. Accordingly, it is significant that the NJDOT originally identified RSS’s failure to even name Mr. Brandt within these prequalification documents. See Pa127 (“RSS’s prequalification application does not list Jeff Brandt as a full-time employee or key personnel, as required by N.J.A.C. 16:44-3.2(a)(3).”). Altogether, from these materials, it is apparent what is meant by the term “authorized representative,” and, at the minimum, every shred of relevant paper places significance on one key factor: disclosure. RSS failed this requirement by executing its bid by a non-disclosed agent.

Instead of strictly enforcing its own specifications, the NJDOT allowed RSS to “cure” this defect, which it did so by introducing self-serving, and frankly suspect, statements and “internal” documents. While the NJDOT and RSS reference N.J.A.C. § 16:44-7.4(a) as the basis for this allowance, they are incorrect to argue

that this statute authorized the NJDOT to arbitrarily and capriciously choose to ignore its own rules. Rather, this regulation merely obligates the NJDOT to give advance notice of an intent to reject a bid and disqualify a contractor, who in turn is afforded an opportunity to be heard. This does *not* give the NJDOT and bidders license to explain away defects or otherwise sidestep bidding requirements.

By relaxing such a requirement, and allowing RSS to cure same by rubberstamping RSS's self-serving statements, the situation calls into question notions of fairness thereby undermining competition and creating a situation prone to the possibility of favoritism. Accordingly, a post-bid cure should never have been permitted by the NJDOT, because the signatory requirement was a mandatory, nonwaivable requirement. For all of these additional reasons, the Final Agency Decision was improper and must be reversed.

CONCLUSION

For all of the foregoing reasons, this Court should enter an Order reversing the Final Agency Decision rendered by the NJDOT on December 17, 2024.

Dated: June 19, 2025

PECKAR & ABRAMSON, P.C.

By: /s/ Patrick T. Murray
PATRICK T. MURRAY