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SUPREME COURT
OF NEW JERSEY

EL SOL CONTRACTING AND
CONSTRUCTION CORP.
RESPONDENT,

V.

NEW JERSEY TURNPIKE
AUTHORITY
APPELLANT.

: Civil Action
:
: IN THE MATTER OF PROTEST
: FILED BY EL SOL CONTRACTING
: AND CONSTRUCTION CORP.,
: CONTRACT T100.638
:
: ON APPEAL FROM A FINAL
: ORDER OF THE SUPERIOR COURT
: OF NEW JERSEY APPELLATE
: DIVISION
:
: Appellate Docket No.: A-0232-24
: Submission Date: February 18, 2025
:
: Sat Below:
:
: Hon. Greta Gooden Brown J.A.D.
: Hon. Morris Smith, J.A.D.
: Hon. Christine M. Vanek, J.A.D.
:
:
:

**BRIEF AND APPENDIX OF AMICUS CURIAE
THE SURETY & FIDELITY ASSOCIATION OF AMERICA**

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Table of Contents

Statement of Interest of Amicus Curiae 1

Brief Statement of Facts..... 2

Procedural History 8

Summary of Argument..... 9

Legal Argument 14

 I. The POA Satisfies the Requirements of NJTA’s 2016 Standard
 Specifications 14

 II. The POA Binds the Surety to All Required Documents 19

Conclusion..... 26

Table of Authorities

Anthony L. Petters Diner, Inc. v. Stellakis, 202 N.J.Super. 11, 21
(App.Div.1985) 21, 22

Gamble v. Connolly, 399 N.J. Super. 130, 140 (2007)..... 24

Mayo, Lynch & Assocs., Inc. v. Pollack, 351 N.J. Super. 486, 490 (App. Div.
2002)..... 21

Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307, 311
(1994)..... 20

Weichert Co. Realtors v. Ryan, 128 N.J. 427, 435 (1992)..... 24

Table of Judgments, Orders, and Rulings

In the Matter of Protest Filed by El Sol Contracting & Constr. Corp., Cont. T100.638, No. A-0232-24, 2024 WL 4901504 (N.J. Super. Ct. App. Div. Nov. 27, 2024) (per curiam)..... 8

In the Matter of Protest Filed by El Sol Contracting & Constr. Corp., No. 090076, 2025 WL 444699 (N.J. Feb. 3, 2025) 8

Table of Contents to Appendix

NJTA Solicitation for Contract T100.638 – Deck Rehabilitation of Newark Bay-Hudson County Extension (NB-HCE) Bridges Zones 2 and 3.....SFAA1

NJTA 2016 Standard Specifications, Section 102.08 – Power of Attorney and Consent of Surety.....SFAA2

El Sol’s Bid Bond Documents, including Power of Attorney, Proposal Bond, and Consent of Surety.....SFAA3

Letter from NJTA Rejecting El Sol’s Bid Dated July 29, 2024.....SFAA4

Email from NJTA Director of Law Thomas Holl, Esq. Dated August 29, 2024.....SFAA5

Letter from Liberty Senior Surety Counsel Julie Glick DePhillips Dated August 27, 2024.....SFAA6

Letter from Liberty Senior Surety Counsel Julie Glick DePhillips Dated August 29, 2024.....SFAA7

DCA2024SS-05.....SFAA8

Letter from Liberty Senior Surety Counsel Julie Glick DePhillips Dated October 31, 2024.....SFAA9

Statement of Interest of Amicus Curiae

The Surety & Fidelity Association of America (“SFAA”) is a national trade association of companies licensed to write fidelity and surety insurance. Its more than 425 member companies write 98 percent of surety bonds in both the public and private sectors, including construction surety bonds, commercial surety bonds, and a variety of fidelity bonds.

One of SFAA’s major functions is to educate policymakers on the value of surety and fidelity bonding. Surety bonds minimize the risks associated with large, expensive construction projects. They also protect public and private construction projects by guaranteeing contract performance when a contractor defaults. Unbonded projects are significantly more likely to default than bonded projects.¹

SFAA, its members, and public contractors have a mutual interest in ensuring the clear and consistent textual interpretation of public bidding requirements, including the New Jersey Turnpike Authority’s (“NJTA”) Standard Specifications. The language for bid documents, including qualification letters for the contractors, powers of attorney (“POAs”), and

¹ See EY, *The Economic Value of Surety Bonds* (Nov. 17, 2022), available at <https://surety.org/wp-content/uploads/2022/11/EY-SFAA-Report-on-economic-value-of-surety-bonding-ES-2022-FINAL-1.pdf>.

consents of surety, often becomes standardized over time. Such standard language ensures efficiency since parties may submit identically or similarly worded documents in multiple bids with the understanding that they will be bound by those documents and that those documents comport with bidding requirements. It is SFAA's understanding that its members have submitted POAs with language similar to that which NJTA arbitrarily and capriciously rejected as defective in the instant matter.

SFAA agrees with the arguments of respondent, appellee El Sol Contracting and Construction Corp. ("El Sol"), but writes this Brief primarily to address the industry ramifications if this Court were to agree with the arguments made by NJTA in defending its decision to reject El Sol's bid.

Brief Statement of Facts

SFAA relies on and incorporates by reference the Statement of Facts set forth in the brief filed by El Sol, but for ease of reference, has highlighted below the facts most salient to its arguments.

NJTA's solicitation for Contract T100.638 – Deck Rehabilitation of Newark Bay-Hudson County Extension (NB-HCE) Bridges Zones 2 and 3 (the "Project") was opened on or about May 20, 2024. (SFAA1) The solicitation

referenced and incorporated NJTA's 2016 Standard Specifications, including Section 102.08 – Power of Attorney and Consent of Surety (SFAA2):

The Proposal Bond or Letter of Surety shall be accompanied by a Power of Attorney and a Consent of Surety, each in a form acceptable to the Authority, which shall be executed by the surety company. The Power of Attorney shall set forth the authority of the attorney-in-fact who has signed the Proposal Bond or Letter of Surety on behalf of the surety company and shall further certify that such power is in full force and effect as of the date of the Proposal Bond or Letter of Surety. The Consent of Surety shall set forth the surety company's obligation to provide the Contract Bond upon award of the Contract to the Bidder.

As the Court can see from the above quoted language, Section 102.08 has the following requirements applicable to this matter:

1. That a proposal bond be submitted;
2. That the proposal bond be accompanied by a power of attorney and a consent of surety;
3. That the power of attorney set forth the authority of the signer of the proposal bond; and
4. That the consent of surety set forth the surety's obligation to provide a contract bond.

Notably absent from this list is any requirement that the POA set forth the authority of the signer of the consent of surety.

Through its surety, Liberty Mutual Insurance Company ("Liberty"), El Sol included as part of its bid dated June 25, 2024, a single electronic file submitted through Surety2000 that was labeled on each page with the same control

number. This single submission contained three pages, including a POA, a proposal bond, and a consent of surety (“El Sol’s Bid Bond Documents”).

(SFAA3)

The POA submitted as part of El Sol’s bid states, in relevant part:

That the Ohio Casualty Insurance Company is a corporation duly organized under the laws of the State of New Hampshire, that Liberty Mutual Insurance Company is a corporation duly organized under the laws of the State of Massachusetts, and West American Insurance Company is a corporation duly organized under the laws of the State of Indiana (herein collectively called the “Companies”), pursuant to and by authority herein set forth, does hereby name, constitute, and appoint Katherine Acosta of the city of Uniondale, state of New York, its true and lawful attorney-in-fact, with full power and authority hereby conferred to sign, execute and acknowledge the surety bond:

Principal Name: El Sol Contracting & Construction Corp.

Obligee Name: New Jersey Turnpike Authority

Surety Bond No.: SNJ0530362021

El Sol’s bid also contained a consent of surety signed by its attorney-in-fact. Significantly, the consent of surety was marked in the upper right corner with the same control number as the bond and the POA: SNJ0530362021. The consent of surety reflects that “[w]e, Liberty Mutual Insurance Company (Surety), hereby agree that in the event an Award is made to El Sol Contracting & Construction Corp. (Principal) for the project as captioned and a contract is signed, we, as Surety, will execute

or arrange for the execution of the necessary final bonds in an amount not less than 100% of the Principal's Proposal." (SFAA3)

Significantly, the proposal bond explicitly references the eventual provision of a contract bond as a condition of the proposal bond. The proposal bond provides that it will be satisfied and discharged:

If said Proposal shall be accepted by the New Jersey Turnpike Authority, and the Principal shall duly execute the Contract Agreement and furnish the required Contract Bond, within the stipulated time...

(SFAA3)

Even though El Sol was the lowest bidder,² its bid was disqualified in August 2024. NJTA defended its decision by asserting that the POA limited Liberty's attorney-in-fact's "authority to executing the proposal bond [but] provides no authority for [the attorney-in-fact] to bind the surety to the obligations contained in the consent of surety." This decision was made despite the fact that El Sol's Bid Documents were submitted electronically through Surety2000, which presented El Sol's Bid Documents to NJTA as a single file with the same control number appearing on each document contained therein. (SFAA5)

² El Sol bid \$70,865,354.00, while the next highest bidder, Joseph M. Sanzari, Inc., bid \$80,735,000.00. (SFAA4)

NJTA refused to relent in its position, despite Liberty calling and submitting two letters to NJTA insisting that the proposal bond and consent of surety were both authorized by the POA. (SFAA6-SFAA7)

It was only *after* bids had been submitted on the Project, that NJTA issued DCA2024SS-05 in August 2024, revising the language of Section 102.08 to “clarify[y] that Powers of Attorney related to Proposal Bonds must explicitly grant authority to the attorney-in-fact to execute both the Proposal Bond and Consent of Surety...” (SFAA8) This “clarification” was anything but – it was simply an additional requirement inserted into the specifications. It should have been inapposite to El Sol’s bid on the Project. NJTA specifically admonished that the revisions would only apply in the future to projects in the design phase or advertised projects where the bids have not been opened yet. Despite that, NJTA seems to have given it retroactive effect.

SFAA member Liberty has represented that it has submitted the same POA for over 225 prior projects across multiple New Jersey public agencies, including the New Jersey Department of Transportation, NJ Transit, and New Jersey Department of Treasury. (SFAA9) In a letter to El Sol’s counsel dated October 31, 2024, Liberty represented that “[n]one

of the 225 bids which Liberty customers made for other New Jersey state [agencies] in the past two years have been rejected, [and t]hey contain the same POA/Consent package as was included in El Sol's bid." (*Id.*) Moreover, those same documents accompanied the bids of thirteen low bidders for which Liberty provided NJTA performance and payment bonds. (SFAA7)

With the lone alarming exception here, no public agency has disqualified a bid regarding identical or similar language in a member's POA. Before August 2024, SFAA is unaware of any public agency ever casting doubt on the authority of Liberty's POA, or other POAs similarly worded, to bind a surety. Significantly, there is absolutely no evidence in the record of any surety ever refusing to issue a contract bond due to the POA language at issue here. Indeed, following the reversal of NJTA's decision and El Sol subsequently being awarded the Project, Liberty issued the contract bond in the amount of \$70,865,354 on February 5, 2024. (SFAA8)

Procedural History

The Appellate Division of the Superior Court of New Jersey reversed NJTA's rejection of El Sol's bid and remanded for NJTA to award the contract to El Sol, as the lowest responsible bidder. *See In the Matter of Protest Filed by El Sol Contracting & Constr. Corp., Cont. T100.638*, No. A-0232-24, 2024 WL 4901504 (N.J. Super. Ct. App. Div. Nov. 27, 2024) (*per curiam*). The Appellate Division rejected NJTA's argument that the consent of surety was not submitted with a POA setting forth the signatory's authority to sign that document as it claims was required by the bid specifications. *Id.* Based upon the Appellate Division's order, NJTA awarded the Project to El Sol, and Liberty issued the contract bond in the amount of \$70,865,354 on February 5, 2024.

NJTA submitted a petition to certify the judgment, which this Court granted. *In the Matter of Protest Filed by El Sol Contracting & Constr. Corp.*, No. 090076, 2025 WL 444699 (N.J. Feb. 3, 2025). This Court further ordered proceedings be conducted in accordance with an expedited, peremptory schedule with motions and proposed briefs of *amicus curiae* to be submitted by February 18, 2025. *Id.* (as amended on February 4, 2025).

Summary of Argument

NJTA's decision to disqualify El Sol's bid on the basis of standard POA language appearing in hundreds of bids submitted to multiple New Jersey agencies, and in dozens of bids accepted by those same agencies, is not only arbitrary and capricious requiring reversal in this instance, but if allowed to stand, would set a dangerous precedent for agencies to arbitrarily reject otherwise qualified bidders out of an unfounded "concern" that their sureties would not issue the bonds required of them. Such a risk would make sureties more reluctant to submit bid packages or issue surety bonds in New Jersey because they could be rejected based on novel and unfounded "concerns." Such a rejection creates an unwanted conflict between a surety and its principal, wherein the principal might blame the surety for the rejection of the submission.

Surety bonds protect government agencies by guaranteeing performance if the contractor does not fulfill its commitments. It undermines the integrity of the surety industry and the public bidding process to interpret a POA as to relieve a surety of that obligation simply because the POA does not explicitly state that its authority extends to both the proposal bond and the consent of surety, even though all parties to the agreements have agreed to be bound.

Why is NJTA arguing in favor of the non-enforceability of a surety consent that no surety has ever made in New Jersey?

NJTA surety bid documents are submitted electronically, and NJTA has consented to receive such documents through the web-based software, Surety2000. As NJTA is well aware from having received hundreds, if not thousands, of bids through this software, Surety2000 presents surety documents to the public agency as a single electronic file. Here, El Sol's Bid Documents – the POA, proposal bond, and consent of surety – all bore the control number SNJ053036202. Thus, the Surety2000 electronic file submission should be considered a single submission whose provisions should be read together, with the included POA authorizing the attorney-in-fact to bind the surety to *all* documents within the electronic file. Affixing the same control number on the bond, the consent of surety, and the POA at the time of submission reflects that Liberty regarded the bid package as but one unified submission.

Failing to recognize Liberty's POA as binding it to the consent of surety runs contrary to the intent of the parties, contract law, and NJTA's past practice, as well as NJTA's own specifications as they stood at the time the bid was submitted in June 2024. If this Court were to reverse the Appellate

Division, sureties' confidence in New Jersey public agencies' accountability to the plain language of bid specifications would be irreversibly shaken. Sureties would understandably be reluctant to issue submissions in a context where their own principals might blame them for violating some non-existent requirement. Sureties would be less inclined to issue proposal and contract bonds for New Jersey public projects, to the detriment of New Jersey taxpayers.

NJTA acknowledges that the POA supports the proposal bond and that the proposal bond was properly submitted. A consent of surety is simply an express statement of what is already included in the proposal bond – that the contractor will honor the bid and the construction contract, which includes an obligation to provide a contract bond. The proposal bond expressly contemplates that “the Principal *shall* duly execute the Contract Agreement and *furnish the required Contract Bond*” (emphasis added). Failure to tender a contract bond would thus be a default by the contractor under the proposal bond and would trigger an obvious proposal bond claim. No surety issues a proposal bond – here for 10% of the value of the proposal price of over \$70

million – without also fully intending to issue the contract bond.³ Significantly, upon the Project being awarded to El Sol, Liberty issued the contract bond as it had committed to do.

If a surety that issued a proposal bond were to turn around and then immediately refuse to issue the contract bond on the pretext set forth by NJTA, unless a replacement bond could otherwise be secured, NJTA would immediately call the proposal bond, which in this instance had a penal sum over \$7 million. No surety would ever conceivably expose itself to that type of unnecessary exposure. In other words, any surety that issues a proposal bond has already prepared itself to issue the contract bond. And that is true regardless of whether there is a consent of surety. Moreover, any such surety would likely be exposed to liability from the contractor that lost the bid due to the surety's conduct. It goes against reason and common sense to think that a surety would ever comport itself in this manner. The "concern" voiced by NJTA would almost certainly never occur in practice inasmuch as any surety issuing the proposal bond would already be fully committed to the project and

³ The only time a surety would decline to issue the final contract bonds would be if there were some surprising and unexpected intervening financial event, resulting in the contractor becoming untenable. This event would have to occur in the short time period between the bid submission and the contract award. As noted, if the surety declined to issue the contract bond, it would then trigger proposal bond liability unless another surety would step in to issue the contract bond.

the failure to post the contract bond would result in an immediate claim on the proposal bond.

Significantly, there is no evidence in the record of any surety ever refusing to issue a contract bond because a POA did not explicitly provide authority for the attorney-in-fact to bind the surety to the consent of surety. Were a surety to refuse to issue a contract bond on those grounds, the public agency would make the same arguments that El Sol is now making—namely, that the surety’s POA binds it to the terms of the consent of surety.

SFAA holds its members to the highest standards of ethics and integrity. It is unaware of any member sureties that have submitted identical or substantially similar POAs and refused to satisfy their obligations as set forth in the consent of surety. To suggest that such a situation is likely to occur not only defies common sense but also unnecessarily tarnishes the reputation of the surety industry and reduces public confidence in the protections that surety bonds provide to taxpayer-funded projects.

Legal Argument

I. The POA Satisfies the Requirements of NJTA's 2016 Standard Specifications

NJTA arbitrarily and capriciously⁴ sought to disqualify El Sol's bid based on a requirement that was not in effect at the time of bidding, and that El Sol has no obligation to fulfill. SFAA's members look to the plain language of the public bidding laws, bid solicitations, and agency specifications incorporated by reference to ensure that contract bids are accompanied by proposal bonds and associated documents that are acceptable to the relevant public agency. SFAA seeks fairness for its members, which is only possible when public agencies stand by clearly-drafted, consistently applied requirements.

Here, El Sol's bid fulfilled every requirement set by NJTA, as illustrated in the chart below displaying the requirements set forth in Section 102.08 as of the bid solicitation date of May 20, 2024:⁵

⁴ An agency's "final quasijudicial decision" need not be affirmed if there is a "clear showing" that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record." *Circus Liquors, Inc. v. Governing Body of Middletown Twp.*, 199 N.J. 1, 9-10 (2009) (quoting *In re Herrmann*, 192 N.J. 19, 27-28 (2007)).

⁵ These specifications were also in effect as of the bid submission date of June 25, 2024.

Specification	Fulfilled by El Sol's Bid?
That a proposal bond be submitted;	It is uncontested that El Sol submitted a proper proposal bond. (SFAA3)
That the proposal bond be accompanied by a POA and a consent of surety;	It is uncontested that the proposal bond was accompanied by a POA and a consent of surety. (Id.)
That the POA set forth the authority of the signer of the proposal bond; and	It is undisputed that the POA set forth the authority of the signer to sign the proposal bond, (Id.)
That the consent of surety set forth the surety's obligation to provide a contract bond.	The consent of surety states that Liberty "agree[s] that in the event an Award is made to El Sol Contracting & Construction Corp. [] for [Contract T100.638] and a contract is signed, [Liberty], as Surety, will execute or arrange of the execution of the necessary and final bonds" (Id.)

Simply put, El Sol, through its surety, submitted all that was required of it under the bid solicitation and the 2016 Standard Specifications, as they were written and in effect as of June 25, 2024, the date it submitted its bid. Every requirement was satisfied.

There is no requirement that the consent of surety be backed by a separate POA, or as of the date of the bid submission, that a POA explicitly provide a grant of authority to execute the consent of surety. By its own terms, the POA requirement applied only to the proposal bond. When seeking to comply with bid requirements, SFAA members should be allowed to take the bid

requirements at their word and comply with the letter of those requirements. In submitting bids, it is manifestly unfair to require SFAA members to anticipate and comply with unspoken and novel “concerns.”

NJTA recently amended Section 102.08. In doing so, NJTA implicitly recognized that the language of the 2016 Standard Specifications allows for POAs with language substantially similar to that in Liberty’s. It implicitly recognized that the version of Section 102.08 in place at the time of the El Sol bid did *not* require a POA that specifically addressed the consent of surety. Were it the case that the 2016 Standard Specifications unambiguously required an “explicit[] grant [of] authority to the attorney-in-fact to execute both the Proposal Bond and Consent of Surety,” it would have been completely unnecessary for NJTA to issue DCA2024SS-05 on August 12, 2024. (SFAA8)

DCA2024SS-05 makes multiple substantive changes to Section 102.08, as demonstrated in the redline below.

The Proposal Bond, or Letter of Surety, and the Consent of Surety shall be accompanied by a Power of Attorney ~~and a~~ evidencing the signatory's authority to bind the Surety to the Proposal Bond, or Letter of Surety, and the Consent of Surety, each in a form acceptable to the Authority, which shall be executed by the surety company. The Power of Attorney shall expressly set forth the attorney-in-fact's authority ~~of the attorney in fact who has signed~~ to sign the Proposal Bond, or Letter of Surety, and the Consent of Surety on behalf of the surety company, and shall further certify that such power is in full force and effect as of the date of the Proposal Bond, or Letter of Surety, and the Consent of Surety. The Consent of Surety shall set forth the surety company's unqualified obligation to provide the Contract Bond upon award of the Contract to the Bidder. The Power of Attorney and Consent of Surety shall be in a form acceptable to the Authority.

This is no mere “clarification.” The specifications have now added a new requirement: that the POA *expressly* set forth the authority of the signer of the consent of surety.

In recognition of the substantive changes to Section 102.08 and the increased burdens placed on bidders and their sureties, DCA2024SS-05 makes clear that the revisions to Section 102.08 apply to those “contracts currently in the design phase” and “advertised contracts awaiting the opening of bids.” (*Id.*) Nowhere does DSC2024SS-05 state that it has retroactive effect. It is arbitrary and capricious to hold El Sol accountable to revisions to Section 102.08 that it had no knowledge of, and that it could not have foreseen.

NJTA has no legitimate argument that the POA was not “in a form acceptable to the Authority.” It is clear that the POA was “acceptable to the Authority” because NJTA has accepted Liberty’s POA from *thirteen* low bidders in the past two years alone. **(SFAA7)** It is the very definition of “arbitrary and capricious” to reject a POA that the agency deemed acceptable quite literally up to the very moment NJTA rejected El Sol’s bid as defective. Moreover, it sets a dangerous precedent, not only for NJTA, but for all NJ agencies that an otherwise qualified bidder can be disqualified without notice based on a novel and flawed interpretation of specifications that had previously been administered in the same manner for years. Indeed, over the past two years, Liberty has submitted POAs with identical or substantially similar language in over 225 bids to multiple New Jersey public agencies. **(SFAA9)**

SFAA has also confirmed that many other sureties follow this same practice in submitting the bid surety documents through Surety2000. Surety2000 presents those documents to public agencies as a single electronic filed with the same control number on each page. Sureties operate under the presumption that the POAs submitted through Surety2000 provide authorization to bind the surety to all documents within the single electronic

file. Liberty certainly understood that it was bound to issue the contract bond by the documents contained within the Surety2000 electronic file. Liberty did, in fact, issue the contract bond for the Project in the amount of \$70,865,354.00 on February 5, 2025.

SFAA thus urges this Court to affirm the Appellate Division in holding NJTA accountable to the plain language of its bid solicitation and the 2016 Standard Specifications to ensure their fair application to public contractors and their sureties. To do otherwise would inject uncertainty and arbitrariness into the New Jersey public bidding process that could deter sureties from issuing proposal and contract bonds for future New Jersey public projects, thereby harming New Jersey taxpayers.

II. The POA Binds the Surety to All Required Documents

The POA submitted by El Sol through its surety authorized Liberty's attorney-in-fact to sign both the proposal bond and consent of surety. NJTA does not dispute that the proposal bond was provided, that the POA authorized the signer to execute that bond, and that a consent of surety was provided. NJTA simply chooses to ignore that the power to execute a bond is no different than the power to commit to executing a bond. This has been the

universal understanding in New Jersey, as evidenced by NJTA's past acceptance of bid proposals identical to the one now rejected.

NJTA's current position flies in the face of established tenets of contract law and would weaken the protections a surety provides to public agencies, and by extension, taxpayers. The purpose of the surety bond is to protect the government agency by guaranteeing performance if the contractor does not fulfill its commitments. It undermines the integrity of the public bidding process to relieve a surety of that obligation because a POA does not explicitly grant authority to the attorney-in-fact to execute the consent of surety, even though all parties to the agreement understood and accepted that such authority existed. It has always been understood that the power to *execute* a bond is no different than the power to *commit to executing* a bond.

NJTA has previously asserted that failure to contemporaneously submit a POA that binds the surety is tantamount to submitting no consent of surety at all. But that is not what the law says nor is it relevant to the facts at hand. In one of the cases cited by NJTA, the bid failed to include a consent of surety at all. *Meadowbrook Carting Co. v. Borough of Island Heights*, 138 N.J. 307, 311 (1994). Another case relied upon by NJTA involves a bid that contained a consent of surety from a surety company that did not satisfy the explicit

requirements of the bid specifications, as it was neither licensed in New Jersey nor listed on a specific U.S. Treasury Circular. *Mayo, Lynch & Assocs., Inc. v. Pollack*, 351 N.J. Super. 486, 490 (App. Div. 2002). The facts of the instant case are easily distinguishable from the cases cited by NJTA, and thus, NJTA has cherry-picked *dicta* to support its unfounded decision to disqualify El Sol's bid on the basis of a POA with language identical to POAs it previously deemed acceptable.

More importantly, and contrary to the arguments put forth by NJTA, it is simply not true that the POA at issue here failed to bind Liberty. The POA, proposal bond, and consent of surety were submitted as a single electronic file, with each document bearing the same control, and thus, should be construed as a single instrument whose provisions should be read together. The facts that the bond and consent of surety bear the same control number is a reflection that the surety regarded them as part of but one, unified submission. It is well established that, “[w]here several writings are made as part of one transaction relating to the same subject matter, they may be read together as one instrument.” *Anthony L. Petters Diner, Inc. v. Stellakis*, 202 N.J. Super. 11, 21 (App. Div. 1985). Thus, “the recitals in one may be explained, amplified or limited by reference to the other—the one draws contractual sustenance from

the other.” *Id.* Clearly, Liberty understood the POA, proposal bond, and consent of surety to be a single instrument. As Liberty explained in its letter to NJTA dated August 27, 2024, “the bid[/proposal] bond and consent are a single instrument, contained in a single electronic file and labeled with the same identifying bond number specifically listed and authorized by the POA.” (SFAA6) In addition, the proposal bond and the consent of surety both bear the signature of Katherine Acosta, who was appointed by the POA as Liberty’s attorney-in-fact for the specific purpose of preparing Liberty’s documents to support El Sol’s bid, including both the proposal bond and consent of surety. (SFAA3) Thus, the POA should be read together with the proposal bond and consent of surety as to bind Liberty to both agreements. It defies common sense that Liberty would authorize the attorney-in-fact to commit Liberty to the proposal bond but not the consent of surety. Issuing a proposal bond is evidence of the clear, contemporaneous intent of the surety to issue the eventual contract bond, should the contract be awarded to the principal. Indeed, the proposal bond itself explicitly states that it will be satisfied and discharged:

If said Proposal shall be accepted by the New Jersey Turnpike Authority, and the Principal shall duly execute the Contract Agreement and furnish the required Contract Bond, within the stipulated time...

(SFAA3)

If El Sol's bid were to be accepted and Liberty were to then refuse to issue the contract bond on the basis that the POA did not bind it to the consent of surety (and no other surety stepped in), there would be an immediate call on the proposal bond. The proposal bond is in the amount of 10% of the underlying contract. In this make-believe scenario, Liberty would have to pay NJTA over \$7 million on that proposal bond. No surety would ever expose itself to such liability. Yet this is the "concern" now raised by NJTA. To put it rhetorically: why would a surety ever agree to post a proposal bond without fully committing to posting a contract bond should the bid be accepted? Similarly, why would a surety ever take the position that the bid bond was authorized but that same person could not commit Liberty to the consent of surety? The questions answer themselves: no surety would ever do that, and Liberty did not do so here. The failure of the contractor to post the contract bond would be a breach that would trigger proposal bond liability. SFAA is unaware of any of its members, including Liberty, ever refusing to issue a contract bond under these circumstances. Tellingly, NJTA has failed to identify such a single such situation in its briefing. And, of course, in this case, Liberty actually issued the contract bond on February 5, 2025.

Liberty has consistently expressed that it was bound by its POA authorizing its attorney-in-fact to not only bind Liberty to the proposal bond, but also the consent of surety. It is a tenet of contract law that “[i]f the parties agree on essential terms and further manifest an intention to be bound by those terms, they have created an enforceable contract.” *Gamble v. Connolly*, 399 N.J. Super. 130, 140 (2007) (quoting *Weichert Co. Realtors v. Ryan*, 128 N.J. 427, 435 (1992)). Liberty stated multiple times that it viewed its POA as binding it to the terms of the consent of surety, and this is further evidenced by the POA, proposal bond, and consent of surety being submitted as part of a single electronic file with the same control number appearing on each document therein. Moreover, a proposal bond issued by the surety expressly contemplates the later issuance of a contract bond separate and apart from any consent of surety. This is reflected in the language of the proposal bond itself (“the Principal *shall* duly execute the Contract Agreement and *furnish the required Contract Bond*”) (emphasis added).

In its letter to NJTA dated August 27, 2024, Liberty stated that the “POA is valid and authorizes the consent of surety.” (SFAA6) Two days later, on August 29, 2024, Liberty wrote to NJTA that it was aware of “thirteen low bids (as well as ninety or so bid packages) [submitted to NJTA] contain[ing]

the same language in the POA supporting the bid bond and consent of surety package as the instant bid.” (SFAA7) It is clear that the surety believes the power to execute a bond is the same as the power to commit to executing a bond, further evidenced by the fact that both carried the same control number. And if that were not enough, Liberty did, in fact, issue the contract bond on February 5, 2025, after NJTA’s decision to reject El Sol’s bid had been reversed and the Project had been awarded to El Sol.

It is arbitrary and capricious to reject a bid over a “concern” that the surety might try to refuse to support the final contract bond on the grounds that the agent did not have authority to bind the surety to the consent. Such a position turns contract law on its head with NJTA asserting that it will refuse to recognize a contract, even as the parties agree on essential terms and further manifest their intentions to be bound by those terms through multiple writings.

As far as SFAA can discern, NJTA has gone on a quest to seek a solution where there is no problem. The record shows no hint that any surety has ever refused to issue a contract bond based on the “concerns” NJTA has articulated. NJTA’s arguments undermine the guarantees that sureties provide in the public bidding process. NJTA’s arguments fly in the face of the black letter of the specifications, its own past practice, and common sense. It is

arbitrary, capricious, and fundamentally unfair to reject otherwise-qualified bidders that intend to be bound by standard POAs, particularly when NJTA has proffered no evidence of any surety refusing, or even attempting to refuse, to issue contract bonds on the grounds that a POA does not explicitly grant authority to bind the surety to the consent of surety.

Conclusion

El Sol and its surety fulfilled all requirements in effect at the time of bidding, and it was arbitrary and capricious of NJTA to reject El Sol's bid on the basis that the POA did not bind Liberty to the consent of surety. To find otherwise would set a dangerous precedent for New Jersey agencies to reject otherwise qualified bidders out of a so-called concern for enforceability of surety agreements when all parties to those agreements have agreed to be bound by them. NJTA's position frustrates the interests of both public agencies and New Jersey taxpayers which should both seek to hold public bidders accountable to the promises they make during the bidding process. It could deter sureties from issuing bonds for New Jersey public projects based on the risk of arbitrary rejection and the liability for the surety that might result thereby.

Based on the foregoing reasons, this Court should find in favor of El Sol and affirm the judgment of the Appellate Division of the Superior Court of New Jersey.

/s/ Walter Buzzetta

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