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IN THE MATTER OF PROTEST	:	
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**NEW JERSEY TURNPIKE AUTHORITY'S REPLY BRIEF IN SUPPORT
OF ITS PETITION FOR CERTIFICATION**

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PRELIMINARY STATEMENT

Petitioner, New Jersey Turnpike Authority (“Petitioner”), has filed the instant Petition for Certification seeking to challenge the erroneous holding by the Appellate Division ordering that Petitioner award Respondent El Sol Contracting & Construction Corp. (“El Sol”) the bid for a certain capital construction project to rehabilitate several bridges on the Newark Bay-Hudson County Extension of the New Jersey Turnpike. As explained in Petitioner’s opening brief, the Appellate Division ignored decades-worth of binding legal precedent set by this Court in Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307 (1994) and a litany of cases thereafter requiring that when a public entity’s general bid specifications for a capital project require a Consent of Surety (“COS”) the surety’s undertaking must be facially clear and unconditional at the time of submission of the bid.

Although Petitioner has modified its contract specifications to make its requirements for a COS clear on a going forward basis, this Court’s jurisdiction should be invoked to: (1) remedy and correct the lower court’s error; and (2) reaffirm the validity of Meadowbrook and establish a bright line for the public entity and contracting community in the realm of contract surety commitments.

LEGAL ARGUMENT

I. THE COURT SHOULD GRANT CERTIFICATION TO ADDRESS AND SETTLE VITAL PUBLIC QUESTIONS REGARDING PUBLIC BIDDING LAWS THAT IMPACT EVERY ASPECT OF GOVERNMENT IN THE STATE OF NEW JERSEY

R. 2:12-4 sets forth the standard for a successful petition for certification:

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

[emphasis added]

Contrary to El Sol's apparent belief that a petitioner must satisfy all these elements to warrant certification, R. 2:12-4 clearly spells out the elements disjunctively so that Petitioner does not have to satisfy each of the above elements but only one of them. Here, certification is clearly required to remedy the Appellate Division's avoidance of over thirty years of binding precedent set by this Court in Meadowbrook and a litany of cases thereafter.

A. The Appellate Division's Holding Ignored The Fundamental Premise Of Meadowbrook That A Consent Of Surety Must Be Unequivocal And Free Of Any Ambiguity

In Point III of its opposition, El Sol tries mightily to fit the decision below into Meadowbrook's precedential confines by arguing that the Appellate Division

did not disturb the requirement that public project bidders must still submit an unequivocal COS and the failure to do so is an unwaivable material defect. El Sol, essentially, argues that it *did* submit an unequivocal Consent of Surety and therefore Meadowbrook is left undisturbed. This contention is wrong. The Appellate Division, in effect, wrongly overlooked an equivocal COS and permitted the bidder to supplement its position after the bid opening. This holding is thus directly contrary to Meadowbrook.

The core holding in Meadowbrook is that a COS must be unequivocally clear on its face, not subject to interpretation and cannot be cured post-submission. Specifically, the import of the COS was explained by this Court:

The ... Consent of Surety assures the public entity that the surety will provide the performance bond if the contract is awarded to and signed by the bidder [citation omitted]. The significance of a Consent of Surety is that it provides the [public entity] with some assurance at the time of the bid submission that the low bidder will have the capacity to perform the contract and to supply the necessary bonds.

Id. at 316.

As further articulated by the Court,

A Consent of Surety is a direct undertaking by the bonding company, enforceable by the [public entity]. Its purpose is to provide a guarantee to the [public entity], at the time of the submission of bids, that if the bidder were to be awarded the contract, the surety would issue the required performance bond.

Id. at 321.

Indeed, without a performance bond, “the bidder cannot be required to enter into and perform the contract.” Ibid. Therefore, the failure to submit a COS with the bid is “a material defect that [could] be neither waived nor cured.” Meadowbrook, 138 N.J. at p. 316. As the Meadowbrook Court held, “to permit waiver of the consent-of-surety requirement would undermine the stability of the public-bidding process.” Id. at 321. “For example, if a low bidder that had failed to submit a [COS]” later decided it no longer wished to perform the contract because its bid was too low, “that bidder could decline to obtain the Consent of Surety and the performance bond.” Ibid.

El Sol and the Appellate Division ignored the basic requirement for a COS. When reviewing the actual text of the Power of Attorney (“POA”) submitted with the COS it clearly limited the authorization of the attorney-in-fact, Ms. Acosta, to only execute the Proposal Bond, not the COS. Specifically, the POA submitted with El Sol’s Bid and bearing the logo, “Liberty Mutual Surety,” contained the following bolded statement at the very top of the POA:

This Power of Attorney limits the acts of those named herein, and they have no authority to bind the Company except in the manner and to the extent herein stated. [emphasis added]

Thus, the POA on its face limits the attorney-in-fact and only grants her that authority which is expressly stated in the document. The body of the POA then states that:

[Liberty]¹..., 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 following surety bond [emphasis added]:

Principal Name: *El Sol Contracting & Construction Corp.*
Obligee Name: *New Jersey Turnpike Authority*
Surety Bond Number: *SNJ0530362021*
Bond Amount: *See Bond Form*

[A3²]

Therefore, the POA expressly restricts the attorney-in-fact's authority to issuing the specific surety bond identified by the reference "SNJ0530362021," that is, the Proposal Bond. Nowhere in the POA did it provide authority for Ms. Acosta to bind Liberty Mutual to the undertaking required under the COS. Indeed, Liberty Mutual's own August 27, 2024, post-bid submission and post-bid award, letter to the Petitioner highlights that the POA required clarification and/or specification (A46).

Additionally, El Sol is patently incorrect in its argument on page 2 of its opposition that the Appellate Division's decision is somehow binding upon Liberty Mutual, and therefore, another layer of comfort exists that Liberty Mutual is bound by the Consent of Surety. Liberty Mutual is not a party to this matter. It had opportunity to intervene but did not. As it is not a party in this matter, it is not bound

¹ [Footnote 1 of the POA reads: Affiliates, Ohio Casualty Insurance Company and West American Insurance Company, are also named in the POA.

² El Sol's Appendix in the Appellate Division was designated "A".

by the Appellate Division's decision.

Further, El Sol and the Appellate Division are mistaken when they each rely upon Petitioner's previous acceptance of Liberty Mutual's form of POA. As explained by Petitioner during oral argument before the Appellate Division, simply because there was an administrative oversight when accepting defective POAs in the past does not estop a public entity from correcting such practice going forward to ensure full compliance, as in this case, with this Court's ruling in Meadowbrook. Had the thirteen prior, defective POA forms been contemporaneously brought to the attention of Petitioner's Law Department, they would have been rejected as well, but once the defective POA at issue in this case was identified, Petitioner was obligated to follow applicable law. There is no improper motive or misconduct, or conscious decision made by Petitioner regarding the prior POA forms, rather, Petitioner's procurement staff simply overlooked the prior submissions due to an oversight.

B. The Petitioner's Amendment To Its General Specifications As To Power Of Attorneys And Consents Of Surety Does Not Render the Petition Moot

Simply because the Petitioner subsequently amended its General Specifications to address defective POAs and COS going forward does not mean that El Sol's POA and COS was not materially defective under Meadowbrook and the litany cases cited above holding that a COS must be clear and unconditional. To simply now argue that it would have been permissible to once again allow El Sol to

submit a defective POA and COS “one last time,” asks the Petitioner and now this Court to ignore this Court’s own binding precedent established over thirty years ago. Indeed, this is effectively what the Appellate Division did when finding that El Sol was permitted to cure its defective COS and POA after-the-fact. The Court permitted El Sol a “do over” post bid-submission, a “do over” which this Court expressly held over thirty years ago was simply not allowed.

C. The Petition Requires Certification As This Is A “Question Of General Public Importance” That The “Interest Of Justice Requires” To Be Settled

El Sol’s opposition fundamentally ignores that a) the Appellate Division’s decision is a stark departure from this Court’s holding in Meadowbrook and b) the substantial public importance of this matter as it implicates public bidding laws and contracts across the State of New Jersey at every level of government.

As advanced in Petitioner’s initial Petition and above, the Appellate Division’s decision ignored this Court’s own precedent in Meadowbrook and the progeny of cases since requiring an unequivocal and unconditional COS when same is required by bid specifications. Therefore, the questions and issues presented in the instant Petition are of general interest to the public entity and contracting community and must be settled and resolved by this Court.

Second, as to R. 2:12-4’s requirement that a “question of public importance which has not been but should be settled by the Supreme Court” or “in other matters

if the interest of justice requires,” as outlined by this Court in Meadowbrook, public contracting and bidding laws are designed to “secure for the **public** the benefits of unfettered competition.” Terminal Constr. Corp. v. Atlantic County Sewerage Auth., 67 N.J. 403, 410 (1975). Public bidding laws guard against “favoritism, improvidence, extravagance and corruption.” Township of Hillside v. Sternin, 25 N.J. 317, 322 (1957).

The Petitioner is in the midst of substantial public projects throughout the State of New Jersey, including the project in which this matter arises- the Rehabilitation of the Newark Bay-Hudson County Extension on the New Jersey Turnpike. While El Sol continues to “bang the drum” that its’ bid was \$10 million lower than the awarded bid to Joseph M. Sanzari, Inc., El Sol continually ignores the fact that this matter is not simply about this one project, this one bid and/or even \$10 million.

Petitioner and every public entity in the State (State, County, Municipalities, local Boards of Education) need clear bright-line rules when it comes to public bidding laws and the consideration and issuance of those bids. This Court, as believed and argued by Petitioner, set such a bright-line over thirty years ago in Meadowbrook as to requiring a COS to be clear and unconditional, a rule that was thereafter followed by a litany cases since until the Appellate Division here abruptly decided to disregard that rule by making a results-oriented decision that is contrary

to this Court's precedent. Petitioner simply seeks to settle these vital public questions as outlined in its opening brief.

CONCLUSION

Petitioner therefore requests that the Court grant certification to address the substantial and essential public questions as they do impact public bidding laws and capital projects all across the State of New Jersey at every level of government.

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Dated: January 6, 2025