

**SUPREME COURT OF NEW JERSEY**  
SUPREME COURT DOCKET NO. S-31-24 (090076)

**EL SOL CONTRACTING AND  
CONSTRUCTION CORP.**

*Respondent,*

v.

**NEW JERSEY TURNPIKE  
AUTHORITY**

*Appellant.*

: Civil Action  
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:  
: IN THE MATTER OF PROTEST  
: FILED BY EL SOL  
: CONTRACTING AND  
: CONSTRUCTION CORP.,  
: CONTRACT T100.638  
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**EL SOL CONTRACTING AND CONSTRUCTION CORP.'S BRIEF IN  
OPPOSITION TO NEW JERSEY TURNPIKE AUTHORITY'S  
PETITION FOR CERTIFICATION**

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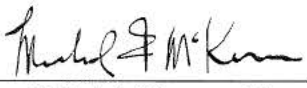
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December 31, 2024

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### **PRELIMINARY STATEMENT**

El Sol Contracting and Construction (“El Sol”) respectfully requests this Court deny the New Jersey Turnpike Authority’s (“NJTA”) Petition for Certification. NJTA fails to satisfy a single criterion for certification, let alone “several of the relevant factors” that are typically required for certification. The petitioner needs to demonstrate why this Court should hear their arguments. It cannot be because the petitioner believes that the lower court was wrong.

El Sol submits that NJTA does not provide a single compelling reason why this Court should grant certification. Instead, NJTA dedicates its Petition to arguing how it believed the Appellate Division’s ruling is incorrect. That is not sufficient. Certification is only granted upon a showing of “special reasons.” NJTA has not presented a single “special reason” to justify certification, and for that reason alone its Petition should be denied.

To keep things in context, NJTA’s Petition is the fifth time that it has presented the same arguments – two of which were presented, considered, and rejected by this Court. At no point throughout this protracted proceeding has a Court found NJTA’s arguments to be persuasive or valid. At no point has NJTA demonstrated any factual or logical reason why it continues to argue against its own interests and continues to put forth positions that are neither accurate nor stand to benefit NJTA. The Appellate Division considered multiple submissions

from the Parties and heard oral argument. All three times it ruled in favor of El Sol. We are now in the situation where NJTA has not presented compelling or “special reasons” why this Court should consider upending the Appellate Division’s well-reasoned decision.

El Sol respectfully asserts that NJTA’s Petition does not satisfy any of the four criteria for certification. As to the first and fourth factors, this matter neither involves a question of general importance to the public nor requires supervision by this Court. It is also somewhat surprising when you recognize that the Appellate Division effectively **ruled in favor of NJTA** by holding that Liberty Mutual (El Sol’s surety) is bound by the Consent of Surety (“COS”) and, thus, is required to provide the Contract Bonds and that El Sol should be awarded the Project. This ruling gives NJTA (and any other public agency) the assurance and guarantee that Liberty Mutual is bound by the COS. But just as important, NJTA was mandated to award the Project to El Sol for about \$10 million less than NJTA wanted to award to the second lowest bidder.

As to the requirements for certification, El Sol submits that this is not a matter of public importance for two reasons. First, NJTA (and by extension the public) benefit from the Appellate Division’s ruling that the COS is binding upon Liberty Mutual and that NJTA is entitled to rely upon these documents to obtain the contract bonds. Second, the arguments asserted by NJTA are moot because NJTA issued DCA2024SS-05 to change its Specifications. This change

explicitly requires a Power of Attorney (“POA”) for both the bid bond and the COS. This exact dispute can never happen again. As a result, it is moot as to its importance to the general public.

As for the second and third factors, NJTA cannot neither identify similar appeals (and does not attempt to) nor is the Appellate Division’s ruling in conflict with any other decision. NJTA solely relies upon an improper assertion that the Appellate Division’s ruling conflicts with Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307 (1994). It does not. The Appellate Division made it quite plain that El Sol’s COS was valid and thus Meadowbrook is inapplicable.

El Sol respectfully states that NJTA has not established any of the four criteria for certification set forth in Rule 2:12-4. The Appellate Division’s decision is consistent with established law and does not otherwise warrant review by the Supreme Court. Therefore, NJTA’s Petition for Certification should be denied.

## **LEGAL ARGUMENT**

### **I. STANDARD OF REVIEW**

Rule 2:12-4 provides the grounds for certification to the New Jersey Supreme Court. It provides that certification will be granted “only if” the appeal presents one of the four criteria enumerated: (1) the appeal presents a “question of general public importance which has not been but should be settled” by the Court; (2) the appeal is

“similar to a question presented on another appeal” to the Court; (3) the “decision under review is in conflict with any other decision of the same or a higher court;” or the appeal “calls for an exercise of the Supreme Court’s supervision and in other matters if the interest of justice requires.” R. 2:12-4. The Rule emphasizes that “[c]ertification will not be allowed on final judgments of the Appellate Division except for special reasons.” Id.

It is a “very high hurdle” that a “petition for certification must vault in order to justify review by [the Supreme Court].” Jersey Div. of Youth & Fam. Servs. v. E.P., 196 N.J. 88, 115 (2008) (Rivera-Soto, J. dissenting). Moreover, “[t]ypically, a case for certification encompasses several of the relevant factors controlling the exercise of the Court’s discretionary appellate jurisdiction.” Mahony v. Danis, 95 N.J. 50, 53 (1983) (Handler, J. concurring). Put simply, this Court does not need a reason to deny certification. This Court needs to get reason(s) to grant it. Here, there is no reason to grant certification. NJTA has failed to meet any of the criteria enumerated in Rule 2:12-4.

The Appellate Division’s decision is a well-reasoned application and interpretation of New Jersey law to NJTA’s benefit, rather than its detriment. There is no reason to grant certification and disrupt the Appellate Division’s ruling other than NJTA’s hubris. Based upon the Appellate Division’s ruling, Liberty Mutual is obligated to provide the Contract Bonds and NJTA must award the Project to El Sol and in the process is saving \$10 million as compared to NJTA’s current award for

the same work. It is worthy of note that the parties who would typically challenge the validity of the COS (Liberty Mutual and the second lowest bidder, Joseph M. Sanzari, Inc.) have not.

In sum, for reasons unknown, it is obvious that NJTA is dissatisfied with the Appellate Division's ruling. But that is not enough. NJTA still needs to satisfy the factors required for certification. NJTA's Petition is not similar to any other appeal pending before this Court; the decision is not in conflict with any other ruling of the Appellate Division or of this Court; and the result reached was not unfair or unjust. It does not warrant this Court's supervisory review. Plainly, no certifiable questions are presented.

**II. NJTA'S PETITION NEITHER PRESENTS A QUESTION OF GENERAL PUBLIC IMPORTANCE NOR DOES IT PRESENT A QUESTION THAT REQUIRES THE NEW JERSEY SUPREME COURT'S SUPERVISION.**

The first and fourth factors necessary for certification are arguably the most important – why should this Court expend the judicial resources needed to quell NJTA's dissatisfaction with the Appellate Division's ruling?

The New Jersey Supreme Court performs a vital role by hearing and ruling on material questions that impact the general public. This role does not extend to public agencies that are dissatisfied with an appellate ruling, particularly when that ruling ultimately benefits the public agency. NJTA has the burden of demonstrating how



the questions it presents are of importance to the general public. NJTA's sole argument in this regard is this statement:

*But, even if this Court agrees with the lower court with respect to the state of the decisional law, this is a matter of substantial public importance and, given the policy issues at stake, the holdings in Meadowbrook and Mayo should now be extended to require submission of a binding POA to authorize execution of the COS as the time of bid submission.*

**(NJTA Pet. for Cert. at 13).**

What is the "substantial public importance?" Why are "policy issues at stake?" These are questions that need to be affirmatively proven by NJTA. They go unanswered. Rather than meet its burden, NJTA expects this Court to accept NJTA's conclusory statement without the needed explanation or examination.

Historically, cases ripe for certification require that "the issues posed in a petition for certification must transcend the interests and problems of the individual litigants." 4C N.J. Prac., Civil Practice Forms § 105:127 (6<sup>th</sup> ed.). That is, the Court's role is not to rectify alleged individual injustices, but to expound and stabilize principles of law that benefit all parties. Examples of such cases that "transcend the interests and problems of the individual litigants" include:

- State v. Welch, 225 N.J. 215 (2016) (granting petition for certification to determine whether an indigent defendant was entitled to representation by the Office of the Public Defender on his petition for certification).

- State v. Bieniek, 200 N.J. 601 (2010) (granting petition for certification to determine whether trial court appropriately considered mitigating factors during sentencing for manslaughter conviction).
- New Jersey Div. of Youth & Fam. Servs. v. E.P., 196 N.J. 88 (2008) (granting petition for certification to reverse lower court's termination of parental rights).
- Reilly v. AAA Mid-Atl. Ins. Co. of New Jersey, 194 N.J. 474 (2008) (granting petition for certification to determine whether a driver who is involved in a single-vehicle accident may be considered to be "at-fault" for purposes of assessing insurance eligibility rating points).
- State v. Mahoney, 188 N.J. 359 (2006) (granting petition for certification to determine whether testimony regarding defendant's reputation in the community was admissible character evidence, whether testimony about defendant's military service was relevant, whether prosecutor's statements in closing argument were improper, and whether trial court's failure to instruct jury on how to apply rule of professional conduct to criminal case warranted reversal of conviction).
- State v. Hill, 182 N.J. 532 (2005) (granting petition for certification to resolve conflicting decisions regarding what predicate crimes must merge

with a felony murder conviction for sentencing purposes when more than one predicate crime has been proven).

The issues presented in the aforementioned cases pose questions that are important to the general public. They are obviously distinct from the questions presented by NJTA. There is no reason why this Court must “supervise” the Appellate Division or the questions at hand.

Based upon the foregoing reasons, El Sol respectfully requests this Court deny the instant Petition in its entirety as a matter of law.

**III. THE APPELLATE DIVISION’S DECISION DOES NOT CONFLICT WITH ANY DECISION, INCLUDING MEADOWBROOK OR ITS PROGENY.**

NJTA’s primary argument is that the Appellate Division’s ruling conflicts with Meadowbrook and its progeny. Its argument is that essentially for this reason alone this Court must grant certification to resolve this alleged contradiction.

The Appellate Division’s ruling does nothing to the precedent set forth by Meadowbrook. Bidders still must submit a consent of surety, and a failure to do so constitutes an incurable, unwaivable material defect. This is not disputed. NJTA asks this Court to ignore that the Appellate Division held that El Sol (and Liberty Mutual) submitted a valid, enforceable COS. Meadowbrook is still valid.

There was no incurable, unwaivable material defect as to the COS. While NJTA imagined that there was, and did what it could to create a material defect, as in the thirteen prior instances, there was no defect. By ruling that Liberty Mutual’s

Consent of Surety is valid and binding, Meadowbrook holding is irrelevant and untouched. The Appellate Division's decision does not conflict with any other decisions of the Appellate Division or the Supreme Court—including Meadowbrook. There is no need to correct NJTA's alleged error. It is an alleged error that does not and never existed. The COS was deemed valid and binding. Meadowbrook and its progeny are untouched.

NJTA's raises other questions as to the Appellate Division's lack of deference to its interpretation of its own Specifications and a misreading of the documents. This is pure argument. It is not something that is in conflict with any other Appellate Division rulings. It is not a basis for granting the certification request.

El Sol submits that it is well-settled that “[a]gencies...have no superior ability to resolve purely legal questions, and that a court is not bound by an agency's determination of a legal issue...” Greenwood v. State Police Training Center, 127 N.J. 500, 513 (1992). In that matter, the Appellate Division's ruling was based on a purely legal question presented by the Project Specifications and whether a COS is valid and binding upon a surety. It does not involve a technical interpretation of the Project Specifications such the proper concrete mixture to pour or NJTA's determination that El Sol is not qualified to perform the required construction work. Similarly, in this matter, the question presented is purely legal. As such, the Appellate Division is neither obligated to defer to NJTA nor bound by its decision.

NJTA's assertion that the Appellate Division improperly substituted its own judgment is unfounded. The questions presented and ruled upon by the Appellate Division are the very questions intended to be able to be presented to the Appellate Division as a check on public agencies. Permitting the Appellate Division to rule on such questions maintains the fairness, equity, and justice of the public bidding structure. It precludes the public agencies' unfettered control over the public bidding process.

The Appellate Division's focus and reliance on the language of the Bid Specifications is warranted. After El Sol's bid had been opened and after El Sol was informed by the Project's Engineer of Record that a recommendation would be made to award El Sol the Contract at NJTA's July Board Meeting. Thereafter, NJTA amended the Bid Specifications and specifically provided that the change to require a POA for the COS will only apply to future projects. (PPA 5). Specifically, NJTA revised Section 102.08 of the Standard Specifications to "clarif[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 the Consent of Surety." (PPA 5-6).

If NJTA's original bid specifications clearly required a POA for the COS there would be no need for amendment of the Bid Specifications. It would be both redundant and unnecessary. NJTA's need to change the Specifications is an admission that either the POA was not initially required, or the specification was ambiguous. In either scenario, El Sol's bid conformed to the requirement as both El

Sol and NJTA had interpreted it up to that point, including on the thirteen prior occasions when NJTA accepted the exact same COS from Liberty Mutual. (PPA 7-8). This reinforces the Appellate Division's decision as being both logical and consistent with existing legal standards.

**IV. NJTA SEEKS TO HAVE THIS COURT IGNORE THE APPELLATE DIVISION'S RELIANCE ON THE PARTIES PRIOR CONDUCT ON THIRTEEN PRIOR PROJECTS.**

NJTA does not dispute in any way that on thirteen prior construction projects, Liberty Mutual submitted identical bid bond documents (including an identical power of attorney and consent of surety), that NJTA accepted those bid bond documents, and that Liberty Mutual issued the required contract bonds. NJTA does not dispute that on the fourteenth such project, suddenly the NJTA became "concerned" that the COS was not enforceable. Indeed, the Appellate Division noted that NJTA does not dispute these facts. NJTA never provided any factual proffer for the change in conduct. El Sol respectfully submits that part of the Appellate Division's ruling should not be ignored.

The parties prior conduct relying upon identical documents is fundamentally important because it speaks to two core considerations: (1) El Sol's Bid Bond Documents were in a form acceptable to NJTA; and (2) NJTA's "concerns" about enforceability of the COS is fabricated. It is straightforward that if NJTA accepted the identical bid bond documents on thirteen prior projects, El Sol's Bid Bond Documents must be in a form acceptable to NJTA. If the Bid Bond Documents were

not in a form acceptable to NJTA, NJTA would have rejected the bid bond documents prior to NJTA even letting this Project out to bid. Neither El Sol nor Liberty Mutual had any reason to believe there was an issue with its bid bond documents based on the agreed facts that NJTA accepted them on thirteen prior occasions.

Secondly, the parties prior conduct demonstrates that NJTA's "concerns" about its ability to enforce the COS is fabricated. Liberty Mutual was bound by the COS for El Sol's bid, as it was on thirteen prior projects. If any party is to properly challenge the enforceability of the COS, it is Liberty Mutual – the party against whom the COS would be enforced. Not only does Liberty Mutual not dispute that it is bound by the COS, it would be estopped from ever denying enforceability based on its prior conduct. NJTA has all the assurance it needs that Liberty Mutual is bound by the COS because Liberty Mutual has already provided a proof of concept.

**V. NJTA'S ISSUANCE OF DCA2024SS-05 CHANGES NJTA'S STANDARD SPECIFICATIONS – IT RENDERS THIS PETITION MOOT.**

Conspicuously absent from NJTA's Petition is that its issuance of the DCA2024SS-05 changes its Standard Specifications that now require all bidders to submit a Power of Attorney for the COS, in addition to the Bid Bond. Through this Document Change Announcement, NJTA renders its own Petition moot. The questions presented by NJTA can never happen again. DCA2024SS-05 changed the bidding landscape and clarified an ambiguity in NJTA's Standard Specifications.

Section 102.08 of the 2016 Standard Specifications that was in effect at the time of El Sol's Bid states:

*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.*

**(PPA 3).**

Nowhere within that version of Section 102.08 is a POA required to accompany the COS. To the contrary, only the proposal bond is required to be accompanied by a POA. Section 102.08 states the specific requirements for the POA, which is to set forth the attorney-in-fact's authority to execute the Proposal Bond. It does not require a POA to authorize the attorney-in-fact's power to execute the COS.

Section 102.08 states the requirements for the COS. It requires the COS to set forth "the surety company's obligation to provide the Contract Bond upon award of the Contract to the bidder." The Project Specifications in effect for El Sol's bid do not require the COS be accompanied by a POA. El Sol's Bid and Bid Bond Documents are in complete compliance with the Project Specifications. Also, it is consistent with what occurred on 13 prior NJTA projects with the exact same



Specification and Bid Bond Documents. The Appellate Division agreed with El Sol's position and interpretation of Section 102.08.

By comparison, DCA2024SS-05, issued after the bids were opened, changed Section 102.08 as follows:

*The Proposal Bond, or Letter of Surety, and the Consent of Surety shall be accompanied by a Power of Attorney evidencing the signatory's authority to bind the Surety to the Proposal Bond, or Letter of Surety, and the Consent of Surety. The Power of Attorney shall expressly set forth the attorney-in-fact's authority 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's 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.*

Id.

By issuing DCA2024SS-05, NJTA guaranteed that the instant dispute can never happen again. Section 102.08 for all future projects now affirmatively requires a POA for both the proposal bond and the COS. Thus, this issue can never occur again. It is moot and not worthy of certification to this Court.

**VI. NJTA'S PETITION IS AGAINST BOTH ITS OWN INTEREST, AS WELL AS THOSE OF THE PUBLIC.**

Just as El Sol stated in its submissions to the Appellate Division, El Sol is once again in the backwards position of arguing on behalf of NJTA, while NJTA

argues against its own self-interest. This entire dispute started because NJTA became “concerned” that it “lacked assurances” that El Sol’s COS was valid and binding on El Sol’s surety, Liberty Mutual. As the story goes, due to these concerns and lack of assurances, NJTA *ab initio* felt it was not guaranteed that Liberty Mutual would issue Contract Bonds if it awarded El Sol the Project. Thus, throughout these proceedings, El Sol found that it needed to argue that Liberty Mutual as it had on thirteen prior occasions intended to be and was bound by the COS. El Sol found itself in the unique situation that it needed to advance the position that even if Liberty Mutual attempted to disclaim its obligations to issue the Contract Bonds, Liberty Mutual was estopped from doing so, based on its past issuance of contract bonds on thirteen prior projects using the same COS and bid bond documents.

El Sol was successful and obtained a decision that benefits NJTA. Within its ruling, the Appellate Division deemed the COS valid and binding on Liberty Mutual thereby obligating Liberty Mutual to issue the Contract Bonds. This provides NJTA with the “assurances” and “guarantees” that form the basis of its concerns. Furthermore, because El Sol’s bid is much less than the second lowest bidder, the Appellate Division is saving NJTA (and the traveling public) about \$10 million. NJTA is getting everything it wanted or could want. But somehow, NJTA is asking this Court to upend it.

NJTA has never explained why it is continuing down this path. It has never explained why the parties more properly positioned to challenge the Consent of

Surety's validity (Liberty Mutual and Sanzari, the second lowest bidder) have not. NJTA's continued pursuit of its failed arguments defies logic and common sense. It certainly does not rise to the level of general public importance. It seems based on a desire to avoid an adverse ruling, not public importance.

### **CONCLUSION**

For the reasons stated above, El Sol respectfully requests that the Court deny NJTA's Petition for Certification in its entirety.