



LOW BID PROPERLY DISQUALIFIED FOR MATERIAL DEFECT IN BONDING DOCUMENTS, SUPREME COURT RULES

BY: NICHOLAS A. SULLIVAN, ESQ.

On May 5, 2025, in In the Matter of Protest Filed by El Sol Contracting and Construction Corp., Contract T100.638, the New Jersey Supreme Court determined whether it was arbitrary, capricious, or unreasonable for the New Jersey Turnpike Authority to reject a bid from the lowest bidder due to the bid documents failing to include a validly executed Consent of Surety.

In May 2024, the New Jersey Turnpike Authority (“NJTA”) solicited bids for a contract to repair certain bridges in the Newark area as part of a redecking project. The NJTA’s bid specifications, at the time, required that proposals be accompanied by a Proposal Bond for 10% of the proposal, and that the Proposal Bond must include a Power of Attorney (“POA”) and a Consent of Surety (“COS”). Further, the bid specifications required the COS to contain the surety company’s obligation to provide the contract bond upon award of the contract. In response to the request for bids, the NJTA received five bids, and the lowest numerical bid was submitted by El Sol Contracting and Construction Corp. (“El Sol”).

In July 2024, NJTA staff completed a memorandum regarding the bid specifications and determined that all three bids where Liberty Mutual Insurance Co. (“Liberty”) was the surety, were defective because the POA provided did not grant authority to bind the surety to issue the required contract bond. Subsequently, NJTA revised the bid specifications to require the Proposal Bond and the COS to be accompanied by a POA evidencing the signatory’s authority to bind the surety company to the Proposal Bond and COS.

On August 27, 2024, NJTA rejected the bid of El Sol due to the defective POA and COS and awarded the project to the second lowest bidder. In response, Liberty submitted correspondence to NJTA and argued that: (1) it has used the COS and POA language at issue on past bids with NJTA and such language was not rejected; (2) NJTA could have allowed El Sol to correct the defect; and (3) that the Proposal Bond, POA, and COS should be treated as one document. Additionally, El Sol submitted a bid protest letter, with many of the same arguments, which was denied by NJTA.

El Sol challenged the decision of NJTA before the Appellate Division and the Appellate Division reversed the decision of NJTA. The Appellate Division interpreted the bid specifications to require that the POA be “tethered” only to the Proposal Bond and not the COS. As such, the Appellate Division concluded that Liberty’s offer to modify the language of the POA to address the issue

obviated the “NJTA’s practical concerns in obtaining assurance.” The New Jersey Supreme Court granted certification to hear the matter.

In reversing the Appellate Division, the New Jersey Supreme Court held that El Sol did not submit a COS that validly bound Liberty to execute the contract bond, which made the bid submitted by El Sol incomplete. The New Jersey Supreme Court noted that the purpose of public bidding is to safeguard against favoritism, improvidence, extravagance, corruption, and to secure for the public the benefits of unfettered competition. The Supreme Court stated that the fundamental principles of public bidding forbid the NJTA from waiving material bidding requirements, such as a valid COS, when such would impact the fairness of the competitive bidding process.

In support, the Supreme Court cited *Meadowbrook Carting Co. v. Borough of Island Heights*, 138 N.J. 307, where the Court previously held that waiving the COS requirement would undermine “the stability of the public bidding process.” As such, the Meadowbrook Court held that failure to include a COS was a non-waivable and non-curable material defect. As such, the Supreme Court reversed the decision of the Appellate Division.

Based on this understanding, the Supreme Court noted that the Proposal Bond was not a substitute for the COS because the failure to submit a COS is a non-waivable defect and El Sol submitted a defective COS with its bid. Additionally, the Supreme Court reviewed the wording of the POA and determined that the POA did not apply to the COS and Proposal Bond based on the express terms of the POA. Lastly, NJTA was not prohibited from rejecting the bid even though NJTA previously accepted a similar POA and COS from Liberty on multiple prior instances. The Supreme Court noted that once NJTA recognized the defect with the COS, NJTA was legally required to apply the law and required to amend the bid specifications for future bids in compliance with the law. For those reasons, the Supreme Court rejected the arguments of El Sol and determined the NJTA’s actions were not arbitrary, capricious or unreasonable.

Moving forward, contractors must closely review their consent of surety and power of attorney documents to ensure the surety company has properly executed the documents and that the language within those documents properly binds the surety to the project. Prior to bid submission, contractors should review these documents with their legal counsel to ensure proper compliance.