

This tentative disposition of the motion(s) before Judge Ronald E. Bookbinder in Burlington County, New Jersey is based on the papers submitted in the case below. The tentative disposition may not reflect the Judge's final decision, as discussed on the record at oral argument. Pursuant to New Jersey Court Rules, Judge Bookbinder may expand his findings of fact and conclusions of law. No further paper submissions will be permitted.

**ORAL ARGUMENT IS SCHEDULED FOR
THURSDAY, JUNE 30, 2016 @ 2:00 PM**

**Quad Construction Company v.
Cinnaminson Sewage Authority and Worth & Company, Inc.
Docket No. BUR-L-1253-16
June 30, 2016**

ACTION IN LIEU OF PREROGATIVE WRITS

Moving Party

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BOOKBINDER, A.J.S.C.

I. PRELIMINARY STATEMENT

This matter concerns the award of a construction contract by defendant the Cinnaminson Sewerage Authority [*hereinafter* "the Authority"]. In May 2016, the Authority opened bidding for the construction of Wastewater Treatment Plant Upgrades. Seven bids were submitted for the project, including bids by plaintiff Quad Construction Company [*hereinafter* "Quad"] and defendant Worth & Company, Inc. [*hereinafter* "Worth"]. While Worth submitted the lowest bid, it did not include the name of its electrical subcontractor on its list of subcontractors. Quad submitted the second lowest bid and filed a bid protest in light of the omission in Worth's

subcontractor list. The Authority ultimately awarded the contract to Worth as the lowest responsible bidder. Quad thereafter initiated this action in lieu of prerogative writs, arguing that Worth's bid was non-responsive, that the Authority's decision to award the contract to Worth was arbitrary, capricious, and unreasonable, and that the contract should instead be awarded to Quad as the lowest responsible bidder. Worth argues that its bid was not materially defective because the identity of its electrical sub-contractor was provided elsewhere in its bid documents. The Authority supports the award of the contract to Worth.

The Court finds that the Authority's decision to award the contract to Worth was arbitrary, capricious, and unreasonable because Worth's failure to list its electrical subcontractor was a fatal, non-waivable defect that rendered Worth's bid non-responsive. *N.J.S.A. 40A:11-23.2*; *Star of the Sea Concrete Corp. v. Lucas Brothers, Inc.*, 370 *N.J. Super.* 60, 71 (App. Div. 2004) (stating that "any mistake . . . relating to the five itemized documents [in *N.J.S.A. 40A:11-23.2*], will automatically be 'fatal.'"). The award of the contract to Worth must therefore be set aside. *Hall Const. Co. v. New Jersey Sports & Exposition Autho.*, 295 *N.J. Super.* 629, 633 (App. Div. 1996). However, the Court will not award the contract to Quad at this time because Worth challenged the responsiveness of Quad's bid before the Authority, but the Authority made no formal findings concerning this issue. The matter is hereby remanded to the Authority to determine if Quad's bid was responsive, and if so, whether it should be awarded the contract as the lowest responsible bidder. *Ibid.* (affirming the trial court's decision to remand the matter to the authority below to determine the next lowest responsible bidder).

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

This matter concerns Quad's challenge to the Authority's award of a contract to Worth for construction of Wastewater Treatment Plant Upgrades. The Authority supplied the interested

bidders with the bid specifications, which included a section called “Instructions to Bidders.”

Section 5(D) of the “Instructions for Bidders” states:

D. Listing of subcontractors.

1. There will be set forth in the bid the name or names of all subcontractors whom the bidder will subcontract the furnishing of (1) plumbing and has fitting, and all kindred work; and of the (2) steam and hot water heating and ventilating apparatus, steam power plants and kindred work and; (3) electrical work and; (4) structural steel and ornamental iron work, each of which subcontractors shall be qualified in accordance with *N.J.S.A.* 40A:11-16.

[Quad Brief, Ex. A].

Section 6(B)(4) of the Instructions to Bidders also includes the following requirement:

The following items shall be submitted with the bid and are considered mandatory submittals in accordance with P.L. 1999, c39. Failure to submit any of the items shall be deemed a fatal defect that shall render the bid proposal unresponsive and that cannot be cured by the governing body.

....

4. A listing of subcontractors pursuant to Section 16 of P.L. 1971, c. 198 (C40A:11-16).
[*Ibid.*].

Seven public bids were submitted for the project. Worth submitted the lowest bid in the amount of \$4,461,000.00. Quad submitted the second lowest bid in the amount of \$4,617,700.00. When the bids were opened, it was determined that Worth failed to include the name of its electrical subcontractor on the list of subcontractors. Worth’s electrical subcontractor was provided in other sections of the bid documents including its New Jersey Business Registration Certificate, New Jersey Electrical Business Permit, and New Jersey Public Works Contractor Registration Certificate.

Quad initiated a formal bid protest shortly after the bids were opened. The Authority requested a statement of both bidders’ positions. Quad’s position was that Worth’s bid was materially defective for failing to list its electrical subcontractor on its subcontractor list as required

by the bid specifications and *N.J.S.A.* 40A:11-23.2. Worth's response was that this defect was immaterial because Worth complied with the spirit of the New Jersey Local Public Contracts Law ("LPCL") and the identity of its electrical subcontractor was listed elsewhere in its bid documents.

After a hearing on June 13, 2016, the Authority awarded the contract for the project to Worth. The Authority memorialized its decision in Resolution 2016-2017-23:

NOW, THEREFORE, BE IT RESOLVED on this 13th day of June, 2016 that a contract for the goods, services and amounts specified be and the same is hereby awarded to **Worth & Company, Inc.** Said contract not to exceed the sum of **\$4,461,000.00** contingent, however, upon approval of the New Jersey Department of Environmental Protection; and

[Authority Brief, Ex. G].

This litigation followed.

On or about June 7, 2016, Quad commenced this lawsuit by way of a Verified Complaint and Order to Show Cause. Quad also submitted a Memorandum of Law in support of its order to show cause.

On or about June 13, 2016, the Court signed an Order Staying Implementation of the Contract until June 20, 2016 at 4:00 PM, while also permitting the Authority to pass a resolution awarding the contract during its June 13, 2016 meeting.

On or about June 16, 2016, the Authority submitted an Answer to Quad's Verified Complaint. The Authority also submitted a brief in Support of Award of Contract to Worth.

On or about June 18, 2016, Worth submitted an Answer to Quad's Verified Complaint and a Memorandum of Law in Opposition to Quad's order to show cause and motion for temporary restraining order and preliminary injunction.

On or about June 23, 2016, Quad submitted a letter brief in reply to Worth's and the Authority's opposition.

III. ARGUMENTS

1. *Quad's brief in support of its motion for a temporary restraining order and preliminary injunction*

Quad argues that Worth's bid is in violation of the Instructions to Bidders and the Local Public Contract Law by failing to list the name of its electrical subcontractor. Quad argues Worth's apparent low bid is non-responsive under the language of the Instruction to Bidders and the Local Public Contract Law. Quad argues that Section 5D (1) of the Instruction to Bidders requires bidders "to set forth in the bid the names or names of all subcontractors whom the bidder will subcontract the furnishing of . . . (3) electrical work." Quad argues Section 6B(4) of the Instruction to Bidders requires that a bidder shall provide "*a listing of subcontractors* pursuant to Section 16 P.L. 1971, c. 198 (C40A:11-16)." Quad argues Section 6B critically states that failure to provide such a list "shall be deemed a fatal defect that shall render the bid proposal unresponsive and that cannot be cured by the governing body." Quad notes the bid package included a form entitled "Subcontractor Listing" and a space for the name of the electrical subcontractor.

Quad argues that responsive bidders are required to list the names of their subcontractors pursuant to the Local Public Contracts Law. Quad argues there are five mandatory requirements under Section 23.2 of the Local Public Contracts Law. Quad argues these requirements must be satisfied at the time of the bid or the bid is deemed fatally defective and unresponsive. Quad argues these requirements are as follows:

- a. A guarantee to accompany the bid pursuant to section 21 of P.L.1971, c. 198 (C.40A:11-21);
- b. A certification 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);
- d. *A listing of subcontractors pursuant to section 16 of P.L.1971, c. 198 (C.40A:11-16);*

- e. A document provided by the contracting agent in the bid plans, specifications, or bid proposal documents for the bidder to acknowledge the bidder's receipt of any notice or revisions or addenda to the advertisement or bid documents.

[*N.J.S.A.* 40A: 11-23.2 (emphasis added)].

Quad argues that contractors submitting bids must provide a list of subcontractors because the Instruction to Bidders required a list of subcontractors to be submitted with the bid. Quad argues that failure to submit a list of subcontractors “is deemed a fatal defect that shall render the bid proposal unresponsive and cannot be cured by the governing body.” *Star of the Sea Concrete Corp., v. Lucas Bros. Inc.*, 370 *N.J. Super.* 60 (App. Div. 2004). Quad argues *N.J.S.A.* 40A:11-23.2 “circumscribed the authority of local contracting agencies to waive bid defects by designating five kinds of defects that cannot be waived under any circumstances.” *Ibid* at 68. Quad argues it is “purely prohibitory; it requires rejection of any bid that does not include all of the mandatory items set forth.” *P & A Const., Inc. v. Twp. Of Woodbridge*, 365 *N.J. Super.* 164, 176 (App. Div. 2004).

Quad argues that under the “Anti-Bid Shopping Law,” bidders are required to list the names of subcontractors performing electrical, plumbing, and structural steel work. *N.J.S.A.* 40A:11-16.

Quad argues that the public policy behind Section 16 is as follows:

The requirement that a bidder ***submit a list of subcontractors*** with each bid prevents a general contractor from negotiating or renegotiating with subcontractors after it is awarded the contract. If a bidder were able to substitute unlisted subcontractors, he could wait until after being awarded the bid and negotiate for a lower price, the savings from which he would accrue to him and not the public.

[*Applied Landscape Techs., Inc. v. Borough of Florham Park*, 2013 WL 2371704, at *1 (App. Div. June 3, 2013) (emphasis in brief)].

Quad argues there is no dispute here that Worth's bid did not list the name of its electrical subcontractor on the Subcontractor Listing form. Quad argues Worth's bid is therefore fatally defective and must be deemed non-responsive under the plain language of the Instructions to Bidders and the Local Public Contracts law. Quad argues Quad's bid follows the Instruction to

Bidders and the Local Public Contracts Law because Quad included the name of its electrical subcontractor in the Subcontractor Listing form.

Quad argues that Worth's position is that the spirit of the Local Public Contracts Law was met because Worth identified the name of its electrical subcontract on a business registration permit, public works registration certificate, and electrical business permit. Quad also argues that Worth argues "the Authority has known since bid opening the identify of Worth's electrical contractor. Accordingly, Worth's bid complies with the letter of the LPCL." [Quad's Brief Exhibit G]. Quad argues that Worth's "close enough" argument is without merit.

Quad argues the Local Public Contracts Law requires precision. *Diamond Const. v. City of Jersey City*, 2013 WL 6500162, at *4 (App. Div. 2013). Quad argues strict compliance with the Local Public Contracts Law is required. *Statewide Hi-Way Safety, Inc. v. New Jersey Dep't of Transp.*, 283 N.J. Super. 223, 231 App. Div. 1995). Quad argues Worth's argument disposes of the precision and strict compliance requirements under the Local Public Contracts Law because it ignores the fact that a list of the names of subcontractors is required, not merely the identification of them. Quad argues the required bid forms include a "Subcontractor Listing" form that the Authority required bidders to submit with their bids and that Worth admittedly failed to fully complete. Quad argues it is neither precise nor strict to partially complete a form and ask the Authority to accept the name of its subcontractor by implication.

Quad argues under Worth's "close enough" theory, the Instruction to Bidders and the Subcontractor Listing form are only advisory and would allow a bidder to ignore the express requirements of the Instructions to Bidders as long as the spirit of those instructions are met. Quad argues that Worth believes the Subcontractor Listing form could be ignored and no subcontractors would have to be listed. Quad argues that not listing any subcontractors on the form would clearly

be fatal. *Star of the Sea Concrete Corp.*, 370 N.J. Super. 60, 66–67 (App. Div. 2004) (stating that the failure to submit a list of subcontractors is a fatal defect that renders the bid proposal unresponsive and cannot be cured by the governing body). Quad argues Worth’s theory would permit the substitution of other required items by implication. Quad argues that under Worth’s theory, permitting the omission of the actual amount of a bid on the bid form would be acceptable so long as the Authority could total the amounts contained on other documents to arrive at Worth’s bid amount.

Quad recites the facts of *Ernest Bock & Sons, Inc. v. Mercer County Improvement Authority* where a low bidder failed to include a corporate ownership statement in their bid. Quad argues that a corporate ownership statement, like the list of subcontractor names, is one of the five mandatory items that must be submitted with a bid under N.J.S.A 40A:11-23.2. Quad argues the contractor in *Ernest Bock & Sons, Inc.* presented a “close enough” argument analogous to the argument presented by Worth here. Quad argues that the *Ernest* court held “defendants’ arguments ignore the plain language of N.J.S.A. 40A:11-23.2, and attempt to impose discretionary authority upon the [Authority] to waive the statute’s specific mandates. *Ibid* at *7. Quad argues Worth’s argument also ignores the plain language of N.J.S.A 40A:11-23.2. Quad argues the *Ernest Bock & Sons, Inc.* holding makes clear that the mandatory requirements of Section 23.2 cannot be satisfied through implication. Quad argues Worth’s defective bid cannot be cured because the name of the electrical subcontractor was disclosed on other documents in the bid package.

Quad argues that in *Hall Const. Co. v. New Jersey Sports & Exposition Autho.*, 295 N.J. Super. 629 (App. Div. 1996), the trial court granted injunctive relief to a second low bidder when the apparent low bidder failed to fully complete a bid form. Quad argues this provides further guidance on the importance of following the instructions contained in bid documents strictly and

precisely. Quad argues that the bidders in *Hall* were required to list a lump sum price for the work and the price for three alternates. *Ibid* at 631. Quad argues that the apparent low bidder did not list a price next to its first alternate. *Ibid* at 632. Quad argues the second low bidder argued that the low bidders bid should be rejected for failing to include a price for Alternate 1 in violation of the instructions to bidders. *Ibid*. Quad argues that the low bidder argued the omission was immaterial because New Jersey Sports & Exposition Authority had already decided that the Alternate 1 work would not be performed. *Ibid* at 635. Quad notes the Appellate Division affirmed the holding of the trial court that “failure to insert a figure for Alternate 1 rendered its bid incomplete.” *Ibid*. at 639. Quad notes the Court explained “all bids must comply with the terms imposed.” *Ibid* at 635.

Quad argues Worth’s argument is analogous to the low bidder’s argument in *Hall* because the name of its subcontractor was made known to the Authority through other documents included in the bid. Quad argues that similar to the contractor in *Hall*, Worth ignored an explicit instruction in the bid documents. Quad argues the plain language of Section 6B leaves no question as to the importance of *listing the names* of subcontractors and clearly warns contractors that the “failure to submit any one of these items shall be deemed a fatal defect and that defect shall render the bid proposal unresponsive.” Quad argues that Quad and the other five bidding contractors recognized the significance of the warning and listed the name of their electrical subcontractor. Quad argues Worth was the only bidder not to list the name of the electrical subcontractor as required by the Instructions to Bidders and the Local Public Contracts Law. Quad argues Worth should not be rewarded for ignoring the warnings in Section 6B concerning the implication of failing to include a list of all subcontractors. Quad argues Worth’s bid is fatally defective and must be rejected.

Quad argues injunctive relief is an appropriate remedy in bid protest litigation. Quad argues a disappointed bidder is entitled to seek injunctive relief because of the important public policy

underlying the public bid statutes. *Advance Elec. Co. v. Montgomery Twp. Bd. Of Educ.*, 351 N.J. Super. 160, 167 (App. Div. 2002). Quad argues New Jersey public bidding laws “should be rigidly enforced by the courts.” *Skakel v. Township of North Bergen*, 37 N.J. 369, 378 (1962).

Quad argues a rigid enforcement of the Instruction to Bidders and the Local Public Contracts law can only result in the rejection of Worth’s bid, an injunction preventing the Authority from awarding the contract to Worth, and a declaration that the contract be awarded to Quad. Quad argues Worth’s bid ignored the Instruction to Bidders and Section 23.2 of the Local Public Contracts law by failing to list the name of its electrical subcontractor in the Subcontractor Listing. Quad argues that injunctive relief is therefore necessary to uphold the integrity of the public bidding laws and because Quad lacks a remedy at law.

Quad argues all of the requirements for injunctive relief are met. Quad argues that courts consider the following factors concerning injunctive relief: (1) whether a party would suffer irreparable harm if relief is not granted; (2) whether the claim rests on settled law and has a reasonable probability of success on the merits; and (3) whether balancing the hardships to the parties demonstrates that greater harm would result from not issuing the stay than if it were issued. *Entech Corp. v. City of Newark*, 351 N.J. Super. 440, 456 (Ch. Div. 2002).

As to the first factor, Quad argues that it will suffer irreparable harm if the contract is awarded to Worth because damages may not be obtained in a public bidding case, even if the contract is erroneously awarded. Quad argues that it has met the second factor because Quad has a reasonable probability of success on the merits. Quad argues that it has shown that Worth’s bid is defective on its face and is in contravention of the clear Instructions to Bidders and the Local Public Contracts Law. Quad argues Worth admittedly failed to follow the requirement in both

public bidding laws to list the name of its electrical subcontractor. Quad argues that this requirement is mandatory and non-waivable and therefore the second element is met.

As to the final factor, Quad argues that the hardship to Quad outweighs the hardship to the Authority and Worth. Quad argues a balancing of the equities favors an injunction. Quad argues it will suffer irreparable harm if the contract is awarded to Worth. Quad argues the integrity of the Local Public Contracts Law will be harmed. Quad argues these factors weigh in favor of injunctive relief when balanced against the harm to the defendants. Quad argues the Authority may suffer no harm from rejecting Worth's bid because an injunction assures that the Authority's bid instructions are complied with. Quad argues the only harm that could possibly befall the Authority is paying approximately \$150,000 more for the work. Quad argues even if the Authority may pay more, it does not exceed the irreparable harm to Quad. Quad argues there is no harm to Worth because it submitted a fatally defective bid. Quad argues that the third factor for injunctive relief is met.

Quad argues that even if the factors necessary for the granting of a preliminary injunction are not met, the Court can still enter a temporary restraining order to preserve the status quo. Quad argues "a court may take a less rigid view" of the general rule that all factors favor injunctive relief when the interlocutory injunction is merely designed to preserve the status quo. *Waste Mgmt. of New Jersey, Inc. v. Morris Cty. Mun. Utilities Auth.*, 433 N.J. Super. 445, 453–54 (App. Div. 2013). Quad argues that the power to impose restraints pending the disposition of a claim on its merits is flexible and should be exercised "whenever necessary to sub-serve the ends of justice". *Ibid* (quoting *Christiansen v. Local 860*, 127 N.J. Eq. at 219–20 (1940)). Quad argues that "justice is not served if the subject-matter of the litigation is destroyed or substantially impaired during the pendency of the suit." *Ibid*.

Quad argues that in *Naylor v. Harkins*, the plaintiffs “were justly entitled to have the defendants restrained from taking affirmative action which might destroy their status and the subject of the litigation, and this was so notwithstanding the doubts expressed that they will ultimately prevail.” 11 N.J. 435, 446 (1953). Quad argues that “this less rigid approach, for example, permits injunctive relief preserving the status quo even if the claim appears doubtful when a balancing of the relative hardships substantially favors the movant, or the irreparable injury to be suffered by the movant in the absence of the injunction would be imminent and grave, or the subject matter of the suit would be impaired or destroyed.” *Ibid*.

Quad argues that to prevent irreparable harm to Quad and taxpayers, a stay in awarding the contract to Worth is necessary. Quad argues that if the Court fails to stay the award of the contract to Worth, the Court may not be able to undue the harm that is created, especially if Worth begins construction. Quad argues a temporary restraining order is therefore required to preserve the status quo and prevent the occurrence of further irreparable harm.

Quad argues the Court should declare Quad the lowest responsible and responsive bidder and direct the Authority to award the contract to Quad. Quad argues that, under the Local Public Contracts Law, contracts “shall be awarded only by resolution of the governing body of the contracting unit to the lowest responsible bidder.” N.J.S.A. 40A:11-4. Quad argues “the contract must be awarded not simply to the lowest bidder, but rather to the lowest bidder that complies with the substantive and procedural requirements in the bid advertisements and specifications.” *Statewide Hi-Way Safety, Inc.*, 283 N.J. Super. 223, 231 (App. Div. 1995).

Quad argues Worth is not in compliance with the substantive and procedural requirements in the bid advertisements and specifications and is, therefore, not the lowest responsible bidder, because its bid contains a fatal defect that deems it non-responsive. Quad argues that with the

rejection of Worth's bid, Quad is the lowest responsible bidder because its bid is the lowest relative to the six remaining bids and complies with all of the requirements of the bid specifications. Quad argues a declaration that the contract should be awarded to Quad is appropriate. *River Vale Twp. V. R.J. Longo Const. Co.*, 127 N.J. Super. 207, 215 (Ch. Div. 1974) (holding declaratory judgment is the appropriate procedure for resolving a bid dispute). Quad respectfully requests the Court enter an Order awarding it the requested relief.

2. *Worth's brief in opposition to Quad's motion for a temporary restraining order and preliminary injunction*

Worth argues that injunctive relief may be issued only where: (1) there is a substantial likelihood of irreparable injury to the moving party; (2) the moving party has demonstrated a reasonable probability of ultimate success on the merits; and (3) when balancing the interests involved, the harm that plaintiff seeks to avert outweighs any possible harm to the defendants. *Crowe v. DeGioia*, 90 N.J. 126 (1982); *Zoning Board of Adjustment of Spart v. Service of Electric Cable Television of New Jersey, Inc.*, 198 N.J. Super. 370 (App. Div. 1985). Worth argues it is well established that injunctive relief is an extraordinary equitable remedy that may only be granted if the plaintiff has satisfied the burden of establishing, by clear and convincing evidence, a right to the relief requested. *Dolan v. DeCapua*, 16 N.J. 599 (1954). Worth argues establishing a right to injunctive relief is a "particularly heavy" burden. *Punnett v. Carter*, 621 F.2d 578, 582 (3rd Cir. 1980). Worth argues that the Court should deny Quad's request for injunctive relief because Quad has not and cannot meet the requirements as set forth in *Crowe v. DeGioia*.

Worth argues the Authority properly awarded the contract for the project to Worth and Quad does not have a reasonable probability of success on the merits. Worth argues, therefore, Quad's request for injunctive relief should be denied because it is improper. Worth notes the Authority has already awarded the contract to Worth and Quad is seeking to have this award

overturned. Worth argues “[a] reviewing court cannot overturn the decision of a municipal body unless it finds that the decision was arbitrary, capricious and unreasonable.” *Palamar Construction, Inc. v. Township of Pennsauken*, 196 N.J. Super. 241, 250 (App. Div. 1983) (citing *Kramer v. Sea Girt Board of Adjustment*, 45 N.J. 268, 296 (1965)). Worth argues, because of this deferential standard, “[e]ven when doubt is entertained as to the wisdom of the action, or as to some part of it, *there can be no judicial declaration of invalidity in the absence of clear abuse of discretion by the public agencies involved.*” *Ibid.* (emphasis in brief). Worth argues the Authority did not act in an arbitrary, capricious, or unreasonable matter by awarding the contract to Worth. Worth argues the Authority carefully considered the plain meaning of the language contained in the LPCL and the Authority’s bid instructions, and concluded that Worth’s bid was compliant.

Worth argues that bid responses must “set forth in the bid the name or names of all subcontractors to whom the general contractor will subcontract” work in the following categories:

- (1) The plumbing and gas fitting and all kindred work;
- (2) Steam power plants, steam and hot water heating and ventilating and refrigeration apparatus and all kindred work;
- (3) Electrical work, including any electrical power plants, tele-data, fire alarm, or security system; [and]
- (4) Structural steel and ornamental iron work[.]

[N.J.S.A. 40A:11-16].

Worth argues the bidder has complied with the LPCL so long as the bidder “set forth” “the name or names of all subcontractors” for each of the above categories “in the bid.”

Worth argues there is no dispute that Worth included the name of its electrical contractor, ABS, in its bid. Worth argues ABS’s name appears three separate places in the bid, including on the bid’s attached Business Registration Certificate, Public Works Contractor Registration Certificate, and on the Electrical Business Permit. Worth argues there can be no dispute that ABS’s name appeared “in the bid” in compliance with the LPCL. Worth argues that prior to the

Authority's award of the contract to Worth, the Authority's project engineer confirmed that ABS's name appeared within the bid, and that he knew upon reviewing the bid that ABS was Worth's intended electrical subcontractor. [Worth's Brief at 6 (citing Stoughton Certification, at ¶ 13)].

Worth argues that Quad contends that Worth's bid failed to comply with the LPCL because ABS is not on the Subcontractor Listing page of the bid. Worth admits the omission and argues: "such an omission is of no moment inasmuch as Worth set forth numerous times *in its bid* the names of ABS, required by the LPCL and as required by the bid instructions that parroted the language of the LPCL." [*Ibid.*]. Worth argues Quad's argument fails and would serve to impose requirements beyond those contained in the LPCL, which only requires subcontractor names be set forth "in the bid."

Worth argues the case law cited by Quad does not support Quad's position. Worth begins with *Ernest Bock & Sons, Inc. v. Mercer County Improvement Authority*, 2010 WL 546569 (App. Div. Feb 18, 2010) and argues the omission in that case pertained to the mandatory requirement of including a *statement of corporate ownership*, and such a statement is not at issue here. Worth notes in *Ernest Bock & Sons, Inc.*, Hunter Roberts Construction Co., LLC ("Hunter") submitted an incomplete statement of ownership that failed to identify the existence of certain shareholders. *Ibid.* at *3. Worth argues Hunter argued the defect should have been overlooked because (1) Hunter was prequalified with the New Jersey Division of Property Management and Construction ("DPMC") and the identify of the shareholders was on record with the DPMC; and (2) Hunter supplemented its statement of corporate ownership post-bid. *Ibid.* at **5-6. Worth argues the Court rejected both arguments, acknowledging the disclosure was made to the DPMC, but not the Mercer County Improvement Authority that was bidding the contract. *Ibid.* at *5. Worth notes the Court

also determined there was nothing in the law that permits inadequate or inaccurate disclosure to be cured by post-bid submissions. *Ibid.* at *6.

Worth argues Quad's reliance on *Ernest Bock & Sons, Inc.* is misplaced because, unlike in *Bock*, there has been no contention that Worth failed to submit its statement of corporate disclosure, and Worth did not attempt to have the Authority rely upon documents extraneous to the bid, and Worth did not attempt to supplement its bid after bid opening. Worth argues Worth's submitted bid set forth and contained the name of ABS as its electrical subcontractor.

Worth argues Quad's discussion of *Hall Construction Co. v. New Jersey Sports & Exposition Authority*, 295 N.J. Super. 629 (App. Div. 1983) does not support Quad's position. Worth notes in *Hall*, the defect in the bid was *the failure to bid on all required items*. Worth argues it is well-established that the failure to bid on all required terms constitutes a material defect and the *Hall* court recognizes this. *Ibid.* at 638. Worth argues, as such, the Court concluded that "[t]he submission of a non-conforming bid was a material deviation from the bid specifications which invalidated the Prismatic bid in its entirety." *Ibid.* at 639.

Worth argues that, unlike in *Hall*, Worth bid on all required items. Worth argues it fully complied with LPCL requirements by including the names of all subcontractors in its bid. Worth argues Quad cannot contend that ABS's name was absent from Worth's bid. Worth argues ABS's name was in Worth's bid and the Authority's determination to award the contract to Worth was not arbitrary, capricious, or unreasonable, nor was it an abuse of discretion under the circumstances. Worth argues the award was appropriate and Quad's request should be denied.

Worth argues Quad is not entitled to injunctive relief because it will not suffer irreparable harm and Quad would not be entitled to an award of the contract in any event because Quad's bid was not responsive. Worth argues Quad's bid contained a material, non-waivable defect as a result

of Quad's failure to acknowledge all addenda and revisions to the bid documents. Worth argues that in *Thomas P. Carney, Inc. v. Franklin Township Board of Education*, 365 N.J. Super. 509 (Law Div. 2003), the court held that the plaintiff failed to establish irreparable harm because under no circumstances could it establish that it was in actuality a low bidder entitled to an award, and argues it has been recognized under the New Jersey public bidding law that a plaintiff cannot demonstrate irreparable harm where, even if successful, the plaintiff would not be entitled to a contract award.

Worth argues Quad failed to acknowledge receipt of the Addendum Change, which served to correct an error in Addendum No. 1, as required to do so under the LPCL. *N.J.S.A.* 40A:11-23.2e. Worth argues the LPCL provision identifies "a document provided by the contracting agent in the bid plans, specifications, or bid proposal documents for the bidder to acknowledge the bidder's receipt of any notice or revisions or addenda to the advertisement or bid documents" as a mandatory item to be submitted at the time of bid. Worth additionally argues the failure to include an acknowledgement of receipt of all notices, revisions, or addenda is to be deemed a fatal, material, and non-waivable defect in the bid. *N.J.S.A.* 40A:11-23.2e. *See also Suburban Disposal, Inc. v. Township of Aberdeen*, 2014 WL 2131662 (App. Div. May 23, 2014) (holding that the failure of a bidder to acknowledge a document entitled "clarification" constituted a fatal defect under LPCL requiring rejection of bid).

Worth argues Quad was required to acknowledge receipt of the Addendum Change as required by the language of the Addendum Change itself, stating "[t]his Addendum forms a part of the Contract Documents and modifies the original Specifications dated October 2015, as-noted below. Acknowledge receipt of this Addendum by signing the Acknowledgment contained in the

Proposal on Page 00 41 00-11.” Worth argued since Quad failed to acknowledge receipt of the Addendum, its bid is non-responsive.

Worth argues Quad’s bid was non-responsive; therefore, Quad will not suffer any harm if the Court upholds the award of the contract to Worth. Worth argues Quad’s request for injunctive relief should be denied.

3. *The Authority’s brief in opposition to Quad’s motion for a temporary restraining order and preliminary injunction*

The Authority argues Worth’s bid met the requirements of the bid specifications and statutes with respect to the naming of the electrical subcontractor. The Authority argues that Worth is the lowest responsible bidder. The Authority argues Worth provided a listing of subcontractors in its bid in accordance with *N.J.S.A* 40:11-23.2 requiring “A list of subcontractors pursuant to section 16.” The Authority argues the only flaw in Worth’s listing of subcontractors is the space for identifying the electrical subcontractor is left blank. The Authority notes, as emphasized above, the listing of subcontractors is to be “pursuant to section 16” and only requires that the name or names of subcontractors be set forth in the bid. The Authority argues this requirement is satisfied because the electrical subcontractor’s name was set forth in the bid by virtue of the inclusion of that subcontractor’s New Jersey Business Registration Certificate, its New Jersey Electrical Business Permit, and its New Jersey Public Works Contractor Registration certificate.

The Authority argues because of the certificates and permit included in Worth’s bid, it was clear that from the time the bid was opened that Worth’s electrical subcontractor was ABS Electric, Inc. The Authority argues Worth would have been prohibited from changing its electrical subcontractor from that point forward. The Authority argues Worth was given no bidding advantage over other bidders because Worth inadvertently left the electrical subcontractor’s name off the list of subcontractors.

Worth argues a simple clerical omission should not defeat the low bid, forcing Cinnaminson ratepayers to pay an additional \$156,700.00 to complete an urgently needed project, when the statutory requirement to name the subcontractors in the bid is satisfied by other documents in the bid. The Authority argues that, on balance, the harm to the ratepayers of Cinnaminson by disqualifying Worth's bid due to a non-material and inconsequential omission far outweighs any perceived harm to the bidding process by approving Worth's bid. The Authority argues recognizing such inconsequential omissions promotes sharp gamesmanship amongst contractors after the bids are opened in an effort to defeat the low bidder. The Authority argues successful challenges will invariably increase the costs to the public. The Authority argues the citizens of Cinnaminson will pay over \$150,000 more for exactly the same product if Worth's bid is rejected. The Authority argues the award of the contract to Worth should be upheld because Worth is the lowest responsible bidder.

4. *Quad's brief in reply to Worth's and the Authority's briefs in opposition to Quad's motion for a temporary restraining order and preliminary injunction*

Quad argues Worth has admittedly not complied with *N.J.S.A.* 40A:11-23.2 and the Instructions to Bidders. Quad argues Section 23.2 mandates that Worth list the name of its electrical subcontractor and requires the name to be listed, not merely identified elsewhere in the bid. Quad argues the Authority's Instructions to Bidders are explicit and require a bidder provide "a listing of subcontractors" and that a failure to do so "shall be deemed a fatal defect that shall render the bid proposal unresponsive and that cannot be cured by the governing body." *See* Instructions to Bidders at Section 6B. Quad argues the Authority's bid package contained a form to list the names of subcontractors. Quad argues Worth's argument sidesteps both of these issues that are fatal to its argument and render its bid defective and unresponsive.

Quad argues Section 16 of the Local Public Contracts Law, which Worth's argument

focuses solely on, does not exist in a vacuum and does not supersede Section 23.2 or the Instruction to Bidders. Quad argues if it did, then Section 23.2 and the Instructions to Bidders are meaningless and a bid is responsive if all it does is comply with Section 16. Quad argues the Instruction to Bidders were plain, simple, unambiguous, and not a polite request. Quad argues the Instruction to Bidders came with a clear warning of the consequences of failing to follow the explicit instructions. Quad argues Worth's failure to follow the Instructions to Bidders comes with consequences. *See L. Pucillo & Sons, Inc. v. Mayor & Council of Borough of New Milford*, 73 N.J. 349, 356 (1977).

Quad argues Worth's theory strips Section 23.2 of any meaning and removes any consequences from failing to follow the Instructions to Bidders. Quad argues that under Worth's logic, Worth could have ignored the "Subcontractor Listing Form" contained in the bid documents and not completed it altogether, so long as the names of its subcontractors were referenced elsewhere in the bid. Quad argues there is no reason to treat the failure to list one subcontractor differently from a failure to list all of them. Quad argues Worth's failure to list the name of its subcontractor is no less severe.

Quad argues the Authority's actions in awarding the contract to Worth also strips 23.2 of any meaning and the failure to follow the Instructions to Bidders of consequences. Quad argues Section 23.2 "circumscribed the authority of local contracting agencies to waive bid defects by designating five kinds of defects that cannot be waived under any circumstances." *Star of the Sea Concrete Corp. v. Lucas Bros., Inc.*, 370 N.J. Super. 60 (App. Div. 2004). Quad argues the failure to list the names of subcontractors is one of the five non-waivable defects. Quad argues Section 23.2 "requires the rejection of any bid that does not included all of the mandatory items set forth." Quad argues the Authority's decision to accept Worth's bid ignores the mandates of Section 23.2 and renders its own instructions meaningless. Quad argues the Authority's failure to ascribe

consequences to bids submitted in contract to its explicit instructions sends a message to future bidders that the Instructions are only suggestions. Quad argues the Court should not sanction such conduct. Quad argues the Court should reject Worth's argument that it complied with Section 16 because it is an attempt to divert the Court's attention to the fatal flaws contained in its bid.

Quad argues the Authority admits that Quad is the responsible and responsive bidder. Quad argues Worth further tries to divert the Court's attention from the fatal defects by claiming Quad's bid is defective. Quad argues the Court should reject the argument because the responsiveness of Quad's bid has not been properly placed before the Court and there is no pleading attacking its responsiveness.

Quad argues the Authority admitted that Quad is a responsible and responsive bidder. Quad argues Paragraph 28 of Quad's Verified Complaint states, "Quad is the next lowest responsive and responsible bidder on the Project," and the Authority's Answer to the Verified Complaint states, "Paragraph 28 of the Complaint is admitted." Quad argues if Worth believes Quad's bid is defective, it must appropriately challenge it, otherwise its arguments should be rejected.

Quad argues even if the Court accepts Worth's challenge, it would not result in Worth being awarded the bid because it does not cure the defects in Worth's bid. Quad argues it would result in the rejection of both bids. Quad argues that issue is not properly before the Court, therefore the Court could not grant relief that is not requested. Quad argues Worth's argument fails.

Quad argues this Court has the power to overturn the Authority's decision. Quad argues Worth's final argument that the Authority has already awarded the contract therefore this Court is powerless to overturn it, is contradictory. Quad argues Worth previously argued the exact opposite in its letter to this Court dated June 8, 2016 stating, "until the Authority awards the contract, any determination by the Court would constitute an improper advisory opinion." Quad argues if the

Court cannot enjoin the award before the award and it is powerless to overturn the award after it is made, Quad can only assume Worth's counsel believes a court can never properly enjoin the award of a contract in violation of the Local Public Contracts Law.

Quad argues Worth's argument also stands in contradiction to well-established law. Quad argues our courts have long held that injunctive and declaratory relief is available to a disappointed bidder to enjoin the award of a contract in violation of our public bid laws made after the award is made, and provides authority to support this argument. Quad argues our Supreme Court has stated: "[t]he long-standing judicial policy in construing cases governed by the Local Public Contracts Law, *N.J.S.A.* 40A:11-1 et seq. and its predecessors, has been to curtail the discretion of local authorities by demanding strict compliance with public bidding guidelines." *L Pucillo & Sons, Inc. v. Mayor & Council of Borough of New Milford*, 73 N.J. 349, 356 (1977).

Quad argues Worth's bid admittedly failed to comply with the mandates of Section 23.2 and the Instructions to Bidders. Quad argues Section 23.2 restricts the Authority's ability to waive the defect of failing to list the names of the Instruction to Bidders. Quad argues if Section 23.2 is to have any meaning and if the failure to follow specific requirements contained in the Instruction to Bidders are to have any consequences, this Court should set aside the resolution awarding the contract to Worth and order the award to Quad.

IV. STANDARD OF REVIEW

Quad frames this action as an order to show cause for temporary restraints, and therefore subject to the *Crowe v. DeGioia* injunction standard. 90 N.J. 126 (1982). Injunctive relief may be issued only where: (1) there is a substantial likelihood of irreparable injury to the moving party; (2) the moving party has demonstrated a reasonable probability of ultimate success on the merits; and (3) when balancing the interests involved, the harm that plaintiff seeks to avert outweighs any

possible harm to the defendants. *Zoning Board of Adjustment of Spart v. Service of Electric Cable Television of New Jersey, Inc.*, 198 N.J. Super. 370 (App. Div. 1985).

Actions in lieu of prerogative writs are heard summarily, and the plaintiff must generally demonstrate that the public entity's actions were "arbitrary, capricious or an abuse of discretion." *Cell S. of N.J. v. Zoning Bd. of Adjustment*, 172 N.J. 75, 81 (2002); *Marvec Const. Corp. v. Township of Belleville*, 254 N.J. Super. 282, 292 (Law Div. 1992). When reviewing whether a bid on a local public contract conforms to bid specifications, the standard of review is whether the decision was arbitrary, unreasonable or capricious. *In re Protest of the Award of the On-Line Games Prod. & Operation Servs. Contract*, 279 N.J. Super. 566, 590 (App. Div. 1995). However, purely legal decisions, such as the proper legal standard, are reviewed *de novo*. *Nuckel v. Borough of Little Ferry Planning Bd.*, 208 N.J. 95, 102 (2011); *Green Meadows at Montville, L.L.C. v. Planning Bd. of Tp. of Montville*, 329 N.J. Super. 12, 24 (App. Div. 2000).

V. ANALYSIS

The Court finds that the Authority's decision to award the contract to Worth was arbitrary, capricious, and unreasonable because Worth's failure to list its electrical subcontractor was a fatal, non-waivable defect that rendered Worth's bid non-responsive. *N.J.S.A. 40A:11-23.2*; *Star of the Sea Concrete Corp. v. Lucas Brothers, Inc.*, 370 N.J. Super. 60, 71 (App. Div. 2004) (stating that "any mistake . . . relating to the five itemized documents [in *N.J.S.A. 40A:11-23.2*], will automatically be 'fatal.'"). The award of the contract to Worth must therefore be set aside. *Hall Const. Co. v. New Jersey Sports & Exposition Autho.*, 295 N.J. Super. 629, 633 (App. Div. 1996). However, the Court will not award the contract to Quad at this time because Worth challenged the responsiveness of Quad's bid before the Authority, but the Authority made no formal findings concerning this issue. The matter is hereby remanded to the Authority to determine if Quad's bid

was responsive, and if so, whether it should be awarded the contract as the lowest responsible bidder. *Ibid.* (affirming the trial court's decision to remand the matter to the authority below to determine the next lowest responsible bidder).

1. Worth's failure to list its electrical subcontractor was a fatal defect that could not be cured by the Authority

Worth's failure to list its electrical subcontractor in its list of subcontractors was a fatal, non-waivable defect that rendered its bid non-responsive. *N.J.S.A.* 40A:11-23.2; *Star of the Sea Concrete Corp. v. Lucas Brothers, Inc.*, 370 *N.J. Super.* 60, 71 (App. Div. 2004) (stating that "any mistake . . . relating to the five itemized documents [in *N.J.S.A.* 40A:11-23.2], will automatically be 'fatal.'"). See also *Statewide Hi-Way Safety, Inc. v. New Jersey Dep't of Transp.*, 283 *N.J. Super.* 223, 231 (App. Div. 1995) (requiring strict compliance with the requirements of the LPCL).

The competitive-bidding process is incorporated in the Local Public Contracts Law ("LPCL"), *N.J.S.A.* 40A:11-1 *et seq.* The purpose of the LPCL is to "secure for the public the benefits of unfettered competition." *Meadowbrook Carting Co. v. Borough of Island Heights*, 138 *N.J.* 307, 313 (1994); *Terminal Constr. Corp. v. Atlantic County Sewerage Auth.*, 67 *N.J.* 403, 410 (1975); see also *River Vale v. R.J. Longo Constr. Co.*, 127 *N.J. Super.* 207, 215 (Law Div. 1974) (stating that the purpose of competitive bidding for local public contracts is not protection of individual interests of bidders, but rather advancement of public interest in securing the most economical result by inviting competition in which all bidders are placed on an equal basis). Strict compliance with the provisions of the LPCL is required. *Statewide Hi-Way Safety, Inc. v. New Jersey Dep't of Transp.*, 283 *N.J. Super.* 223, 231 (App. Div. 1995). Bid specifications must apply equally to all prospective bidders to ensure a common standard of competition. *Bodies by Lembo, Inc. v. Cnty. Of Middlesex*, 286 *N.J. Super.* 298, 304 (App. Div. 1996) (quoting *In re On-Line Games Contract*, 279 *N.J. Super.* 566, 590 (App. Div. 1995)). A material departure from the LPCL

invalidates a nonconforming bid. *Gaglioti Contracting, Inc. v. City of Hoboken*, 307 N.J. Super. 421, 432 (App. Div. 1997). However, “[d]iscretion exists to accept or reject, for valid reasons, a bid that does not conform with specifications or formal requirements in non-material respects.” *Serenity Contracting Grp. v. Borough of Fort Lee*, 306 N.J. Super. 151, 156–57 (App. Div. 1983). Minor or inconsequential discrepancies and technical omissions may be waived. *Gaglioti, supra*, 307 N.J. Super. at 432 (citing *Meadowbrook Carting Co. v. Bor. of Island Heights*, 138 N.J. 307, 314 (1994)).

There are five items under the LPCL that are mandatory, non-waivable, and that must be included in a bid submission when called for by the bid specifications. These five items are:

- a. A guarantee to accompany the bid pursuant to section 21 of P.L.1971, c. 198 (C.40A:11-21);
- b. A certification 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);
- d. ***A listing of subcontractors pursuant to section 16 of P.L.1971, c. 198 (C.40A:11-16);***
- e. A document provided by the contracting agent in the bid plans, specifications, or bid proposal documents for the bidder to acknowledge the bidder’s receipt of any notice or revisions or addenda to the advertisement or bid documents.

[N.J.S.A. 40A: 11-23.2 (emphasis added)].

N.J.S.A. 40A:11-23.2.d requires a list of subcontractors to be submitted pursuant to N.J.S.A. 40A:11-16, which states:

In the case of a single bid under (b) or (c), there shall be set forth in the bid the name or names of all subcontractors to whom the general contractor will subcontract for categories (1) through (4).

[N.J.S.A. 40A:11-16a(2) (emphasis added)].

“The requirement that a bidder submit a list of subcontractors with each bid prevents a general contractor from negotiating or renegotiating with subcontractors after it is awarded the contract.” *Gaglioti, supra*, 307 N.J. at 431. However, any mistake as to the five itemized documents listed in

N.J.S.A. 40A:11-23.2 “will automatically be ‘fatal.’” *Star of the Sea Concrete Corp. v. Lucas Brothers, Inc.*, 370 *N.J. Super.* 60, 71 (App. Div. 2004)

In light of the foregoing, the Court concludes that Worth’s failure to list its electrical subcontractor on the subcontractor list was a fatal, material, non-waivable defect that could not be cured by the Authority. The Court’s analysis begins with the plain language of *N.J.S.A. 40A:11-23.2*. The language of this provision provides that when called for by the bid plans and specifications, a listing of subcontractors must be submitted, and the failure to submit that document is a fatal defect that renders the bid proposal unresponsive. *Star of the Sea, supra*, 370 *N.J. Super.* at 64. Here, the Instructions to Bidders called for a listing of subcontractors in not one but two provisions of the bid specifications.

D. Listing of subcontractors.

1. ***There will be set forth in the bid the name or names of all subcontractors whom the bidder will subcontract the furnishing of*** (1) plumbing and has fitting, and all kindred work; and of the (2) steam and hot water heating and ventilating apparatus, steam power plants and kindred work and; ***(3) electrical work*** and; (4) structural steel and ornamental iron work, each of which subcontractors shall be qualified in accordance with *N.J.S.A. 40A:11-16*.

[Instructions to Bidders, §5(D)(1) (emphasis added) (Quad Brief, Ex. A)].

Section 6(B)(4) of the Instructions to Bidders also includes the following requirement:

The following items shall be submitted with the bid and ***are considered mandatory submittals in accordance with P.L. 1999, c39. Failure to submit any of the items shall be deemed a fatal defect that shall render the bid proposal unresponsive and that cannot be cured by the governing body.***

....

4. ***A listing of subcontractors pursuant to Section 16 of P.L. 1971, c. 198 (C40A:11-16).***

[*Ibid.* (emphasis added)].

Accordingly, the inclusion of a listing of subcontractors was required in order for any bid for the Wastewater Treatment Plant Upgrades project to be considered “responsive.”

Worth did include a list of subcontractors, however, Worth omitted the name of its electrical subcontractor from the list. This failure was a material deviation from the bid specifications that renders Worth's bid non-responsive. *Star of the Sea Concrete Corp. v. Lucas Brothers, Inc.*, 370 N.J. Super. 60, 71 (App. Div. 2004). Worth did not strictly comply with the requirements of the LPCL and bid specifications. *Statewide Hi-Way Safety, Inc. v. New Jersey Dep't of Transp.*, 283 N.J. Super. 223, 231 (App. Div. 1995) (requiring strict compliance with the LPCL's requirements, but allowing minor or inconsequential discrepancies and technical omissions to be waived).

Star of the Sea controls this Court's analysis. In *Star of the Sea*, the proposed project similarly called for a listing of subcontractors, thus triggering the requirements of N.J.S.A. 40A:11-23.2. The challenged bid response in *Star of the Sea* did not include a list of subcontractors at all. The Appellate Panel rejected the defective bidder's arguments that this was a waivable, non-material requirement. *Ibid.* at 70. Emphasizing the importance of precision and proper compliance with N.J.S.A. 40A:11-23.2, the Court concluded:

In fact, N.J.S.A. 40A:11-23.2 should heighten the care bidders must pay when assembling their bid. Bidders should cautiously attend to the requirements of N.J.S.A. 40A:11-23.2 and carefully double check to ensure that their bid includes each document requested in the bid solicitation. This is so because any mistake, such as that made by Lucas Brothers in this case, relating to the five itemized documents, will automatically be "fatal."

[*Ibid.* at 70–71 (emphasis added)].

Worth did not attend to the requirements of N.J.S.A. 40A:11-23.2 with "heightened care" as called for by *Star of the Sea*. Worth made a mistake relating to one of the five itemized documents, the list of subcontractors, and therefore, this mistake was "automatically fatal."

Worth and the Authority argue that Worth nevertheless complied with "the spirit" of the LPCL because the identity of its electrical subcontractor was made clear through other documents

in its bid response. Worth also relies on the language of the Instructions to Bidders, which requires that the names of the subcontractors “appear in the bid,” and not necessarily as part of the listing of subcontractors. [Instructions to Bidders, §5(D)(1)].

The Court rejects this argument for several reasons. First, strict compliance with the LPCL’s mandatory provisions is required, not compliance with the “spirit” of the law only. *Statewide Hi-Way Safety, supra*, 223 N.J. Super. at 231. Worth’s and the Authority’s argument would vest discretion in the Authority to waive defects associated with N.J.S.A. 40A:11-23.2, but the Appellate Division has emphasized that the intent of this provision is to “circumscribe[] the authority of local contracting agencies to waive bid defects” *P & A Constr., Inc. v. Twp. of Woodbridge*, 365 N.J. Super. 164, 176–77 (App. Div. 2004).

While N.J.S.A. 40A:11-16a(2) only requires that the names of the subcontractors “appear in the bid,” Section 16b elaborates on related requirements for submitting both certificates identifying subcontractors *and* a list identifying the contractors:

Whenever a bid sets forth more than one subcontractor for any of the categories (1) through (4) in paragraph (1) of subsection a. of this section, the bidder shall submit to the contracting unit a certificate signed by the bidder listing each subcontractor named in the bid for that category. The certificate shall set forth the scope of work, goods and services for which the subcontractor has submitted a price quote and which the bidder has agreed to award to each subcontractor should the bidder be awarded the contract. ***The certificate shall be submitted to the contracting unit simultaneously with the list of the subcontractors.***

[N.J.S.A. 40A:11-6.b (emphasis added)].

The importance of submitting both a properly completed list and certificate identifying a subcontractor is therefore apparent from the plain language of N.J.S.A. 40A:11-16. *See also Hall Const. Co. v. New Jersey Sports & Exposition Autho.*, 295 N.J. Super. 629, 637 (App. Div. 1996) (holding that a failure to completely fill out a required bid form was a material defect that necessitated the invalidation of an entire bid). Furthermore, Worth’s and the Authority’s

construction of *N.J.S.A.* 40A:11-6.b would render *N.J.S.A.* 40A:11-23.2's "list requirement" inconsistent or meaningless, making such a construction implausible. See *Essex Crane Rental Corp. v. Director, Division on Civil Rights*, 294 *N.J. Super.* 101, 106 (App. Div. 1996) (statutes must be read to avoid absurd consequences); *Eckert v. New Jersey State Highway Dep't*, 1 *N.J.* 474, 479 (1949) (the Legislature is presumed to have knowledge of its own enactments).

There is too much emphasis on the importance of the subcontractor list in the LPCL, the Instructions to Bidders for this project, and the controlling case law to conclude that the failure to actually identify a subcontractor on the list is a waivable, non-material defect. The plain language of *N.J.S.A.* 40A:11-23.2 is unequivocal that a failure to include the list is a fatal defect that renders a bid non-responsive. This requirement is reinforced by the language in Section 6(B)(4) of the Instructions to Bidders, which states that a defect concerning the subcontractor list "cannot be cured" by the governing body. *Star of the Sea*, the most recent published Appellate Division decision interpreting *N.J.S.A.* 40A:11-23.2, reiterates that Section 23.2 was enacted to "circumscribe[] the authority of local contracting agencies to waive bid defects by designating five kinds of defects that cannot be waived under any circumstances." 370 *N.J. Super.* at 68 (citing *P&A Constr.*, *supra*, 365 *N.J. Super.* at 176–77). The *Star of the Sea* Court thereafter concluded that "any mistake . . . relating to the five itemized documents, will automatically be 'fatal.'" Here, a fatal mistake was made concerning one of the five itemized documents.

The Authority makes an additional argument that a clerical omission should not compel the ratepayers of Cinnaminson to pay an additional \$156,700.00 for the completion of a critical and urgently needed project. This argument was also raised and rejected in *Star of the Sea*:

Although the savings to the County by waiving the defect in Lucas Brothers' bid are not insignificant, that alone should not justify waiver of a material requirement. Contracts are not awarded "simply to the lowest bidder, but rather to the lowest bidder that complies with the substantive and procedural requirements in the bid

advertisements and specifications.” ***While the public may occasionally be harmed by failure to waive a bid requirement, “the overriding interest in insuring the integrity of the bidding process is more important than isolated savings at stake.”***

[*Star of the Sea, supra*, 370 N.J. Super. at 73 (citing and quoting *Meadowbrook Carting Co. v. Borough of Island Heights*, 138 N.J. 307, 325, 313 (1994) (emphasis added))].

The Court is compelled to reach the same conclusion in this matter. Accordingly, Worth’s failure to list its electrical subcontractor in its subcontractor listing was a fatal, material defect that rendered Worth’s bid non-responsive. *Star of the Sea, supra*, 370 N.J. Super. at 71.

2. The Authority’s decision to award the contract to Worth must be set aside as arbitrary, capricious, and unreasonable

The Authority’s decision to award the contract to Worth must be set aside as arbitrary, capricious, and unreasonable because Worth’s bid materially deviated from the bid specifications and requirements of the LPCL. *Hall Const. Co. v. New Jersey Sports & Exposition Autho.*, 295 N.J. Super. 629, 633 (App. Div. 1996); *Palamar Construction, Inc. v. Township of Pennsauken*, 196 N.J. Super. 241, 250 (App. Div. 1983) (citing *Kramer v. Sea Girt Bd. of Adj.*, 45 N.J. 268, 296 (1965)). Municipal actions are reviewed for arbitrary, capricious, or unreasonable decisions. *Cell v. Zoning Bd. of Adjustment*, 172 N.J. 75, 81–82 (2002); *Burbridge v. Mine Hill Twp.*, 117 N.J. 376, 385 (1990). Findings of fact, and applications of discretionary authority, are presumed to be valid unless shown by the movant to be arbitrary, capricious, or unreasonable. *Cell, supra*, 172 N.J. at 82. The burden of proof is on the plaintiff. *Ibid.* Legal decisions, however, are reviewed by the Court *de novo*. *Nuckel v. Borough of Little Ferry Planning Bd.*, 208 N.J. 95, 102 (2011); *Green Meadows at Montville, L.L.C. v. Planning Bd. of Tp. of Montville*, 329 N.J. Super. 12, 24 (App. Div. 2000).

When reviewing whether a bid on a local public contract conforms to bid specifications, the standard of review is whether the decision was arbitrary, unreasonable or capricious. *In re*

Protest of the Award of the On-Line Games Prod. & Operation Servs. Contract, 279 N.J. Super. 566, 590 (App. Div. 1995). Judicial review is intended to be a determination of the validity of the agency's action, not the substitution of the court's judgment for that of the agency. *Northeast v. Zoning Bd. of Adjustment*, 327 N.J. Super. 476, 493 (App. Div. 2000). The reviewing court must determine whether the entity below followed the statutory guidelines and properly exercised its discretion within those guidelines, or whether its decision instead amounts to an abuse of discretion. *Burbridge, supra*, 117 N.J. at 398.

Given the Court's determination that Worth's failure to list its subcontractor was a material, non-waivable defect, the Court must set aside the Authority's award of the contract to Worth in Resolution 2016-2017-23 as arbitrary, capricious, and unreasonable. *E.g., On-Line Games, supra*, 279 N.J. Super. at 590; *Palamar Construction, supra*, 196 N.J. Super. at 250; *Star of the Sea, supra*, 370 N.J. Super. at 64. The Authority did not follow the statutory guidelines of the LPCL nor the requirements of its own bid specifications, and therefore its decision was an abuse of discretion. *On-Line Games, supra*, 279 N.J. Super. at 590.

3. The matter is remanded to the Authority to make appropriate findings of fact concerning the responsiveness of Quad's bid

This matter is hereby remanded to the Authority to determine whether Quad's bid response was responsive, and if so, whether Quad should be awarded the contract as the lowest responsible builder. While Quad argues that it must be awarded the contract because the contract award to Worth was arbitrary, capricious, or unreasonable, Worth has also challenged the responsiveness

of Quad's bid; however, only by way of argument in its opposition brief to Quad's motion seeking an award of the contract. Worth did formally raise this challenge before the Authority below, but:

The board made no formal findings with respect to Worth's protest against Quad's bid in light of the fact that the contract was awarded to Worth.

[Authority Brief at 2].

Quad argues that the Authority admitted Quad's bid response was responsive through its pleadings in this litigation, however absent formal findings, the Court lacks a sufficient basis to determine whether that determination was proper. To the extent that admission was made in the pleadings, it is arbitrary, capricious, and unreasonable because it is not supported by the record. *Kramer v. Bd. of Adj., Sea Girt*, 45 N.J. 268, 296 (1965). This matter is hereby remanded to the Authority to determine whether Quad's bid response was responsive, and if so, whether Quad should be awarded the contract as the lowest responsible builder. *Hall Const. Co. v. New Jersey Sports & Exposition Autho.*, 295 N.J. Super. 629, 633 (App. Div. 1996) (affirming the trial court's decision to remand the matter to the authority below to determine the next lowest responsible bidder).

VI. TENTATIVE DISPOSITION

The Court finds that the Authority's decision to award the contract to Worth was arbitrary, capricious, or unreasonable because Worth's failure to list its electrical subcontractor was a fatal, non-waivable defect that rendered Worth's bid non-responsive. The award of the contract to Worth is therefore set aside. The matter is remanded to the Authority to determine if Quad's bid was responsive, and if so, whether it should be awarded the contract as the lowest responsible bidder.

AFTER REVIEWING THE TENTATIVE, PLEASE COMMUNICATE WITH YOUR ADVERSARY AND NOTIFY THE COURT WHETHER YOU WOULD LIKE TO PROCEED WITH ORAL ARGUMENT.