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Title:WASTE MANAGEMENT OF NEW JERSEY,INC. VS MORRIS COUNTY UTILITIES AUTHORITY

APP A-002806-12

NJJO-1017-033

A-2806-12T1
A-2808-12T1

WASTE MANAGEMENT OF NEW JERSEY, INC.,

Plaintiff,

v.

MORRIS COUNTY MUNICIPAL UTILITIES AUTHORITY and SOLID WASTE SERVICES, INC. d/b/a/ MASCARO & SONS,

Defendants.

COVANTA 4RECOVERY, L.P., a Delaware Limited Partnership and New Jersey taxpayer,

Plaintiff,

v.

MORRIS COUNTY MUNICIPAL UTILITIES AUTHORITY; SOLID WASTE SERVICES, INC. d/b/a J.P. MASCARO & SONS, a Pennsylvania corporation; and WASTE MANAGEMENT OF NEW JERSEY, INC., a New Jersey corporation,

Defendants.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-2806-12T1
A-2808-12T1

Civil Action

Sat Below:
Hon. Thomas L. Weisenbeck, A.J.S.C.

APPENDIX OF MORRIS COUNTY MUNICIPAL UTILITIES AUTHORITY
APPENDIX VOLUME IV OF IV
PAGES MCMUADa698 to MCMUADa801

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INDEX TO APPENDIX

MORRIS COUNTY MUNICIPAL UTILITIES AUTHORITY
PUBLIC MEETING OCTOBER 9, 2012 - 7:00 p.m.

CONSIDERATION OF BIDS FOR THE COMBINED OPERATION OF THE TWO TRANSFER STATIONS, TRANSPORTATION OF SOLID WASTE TO FINAL DISPOSAL FACILITIES VIA OVER-THE-ROAD TRANSFER TRAILERS, AND DISPOSAL OF SOLID WASTE FROM THE MCMUA'S TWO TRANSFER STATIONS FOR A PERIOD OF FIVE YEARS.

B E F O R E:

CHAIRMAN DRUETZLER
MR. PLAMBECK
MR. BARRY
DR. NUSBAUM
MS. SZWAK
MR. DOUR
DR. KOMINOS
MR. PLATT

ALSO PRESENT:

LARRY GINDOFF
KATHLEEN HOURIHAN

GLENN SCHWEIZER
Executive Director

LARRY KALETCHER
Treasurer

JOHN SCARMOZZA
Chief Engineer

JOSEPH J. MARAZITI, JR., ESQ.
BRENT T. CARNEY, ESQ
MUA Attorney

MARILYN REGNER
MUA Secretary

JACQUELINE KLAPP, CCR
Shorthand Reporters
59 Old Croton Road
Flemington, New Jersey 08822

E X H I B I T S

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(Whereupon, the following is transcribed:)

MR. DRUETZLER: We'll move to solid waste and hazardous waste and vegetative waste. Larry?

MR. GINDOFF: Well, my first item is regarding the transfer station bids, so I believe we wanted to discuss something in closed session regarding that.

MR. DRUETZLER: I think it's appropriate that we move into a closed session to discuss matters falling within the attorney/client privilege involving anticipated litigation pursuant to N.J.S.A. 10:4-12b(7), the open public meeting law. Is there a motion for that?

MR. PLATT: So moved.

MR. NUSBAUM: Second.

MR. DRUETZLER: All in favor?

(Ayes)

MR. DRUETZLER: Opposed? Ladies and gentlemen we'll have to go into closed session, so you'll have to leave the room. Thank you.

(Whereupon there is a discussion off the record.)

MR. DRUETZLER: Folks, the good news

for the County MUA is that a lot of people would like to have the solid waste of Morris County, and we're happy about that. And we received I guess eight bids. And at first rush here it looks like Covanta is the lowest bidders, right now but Mascaro & Sons raised a number of questions and it's our job to look over those questions before we make any decisions.

So, I would like to have Mascaro come before us and give us their opinions and their -- what they feel about the, I guess, the Covanta bid.

MR. INGLESINO: Mr. Chairman, should I sit here?

MR. DRUETZLER: Sounds good.

MR. INGLESINO: Mr. Chairman, members of the Board. For the record, my name is John Inglesino of the law firm Inglesino, Pearlman, Wyciskala and Taylor located here in Parsippany-Troy Hills in Morris County. And, I am here representing the interest of J.P. Mascaro & Sons. And I do want to mention at the outset that Pasquale Mascaro, the president of the company, is here and present, along with Bill Fox, the general counsel of the company, as well as other representatives of Mascaro.

MR. DRUETZLER: Can they identify themselves by my name?

MR. MASCARO: Yes. My name is Pasquale, Pat, Mascaro and I'm the president of J.P. Mascaro & Sons.

MR. FOX: William Fox, general counsel for the company.

MR. MASCARO: Joseph Mascaro with Mascaro.

MR. DIGENARO: Albert DiGenaro, Deputy General Counsel for the company.

MR. McVEIGH: Dennis McVeigh, Director of Transportation.

MR. SASSAMAN: Thomas Sassaman, comptroller.

MR. DRUETZLER: Thank you.

MR. INGLESINO: I do at the outset want to commend your counsel, Joe Maraziti, on his professionalism. We've had the opportunity to interact with him and his office the past few days as we've become engaged in this matter, and as always Joe has conducted himself in the most professional fashion. And I believe in a way and a process that will really bring issues to light and assist the MUA in making what I think will be a

very easy decision.

I'm here tonight to ask you to award the subject contract to Mascaro, because under the law Mascaro is the lowest responsible bidder. Some general facts, I believe as the chairman indicated, there were eight bids submitted. Morris County does after all have, what do they call it Joe, a AAA waste; so, it's a very popular county in that regard.

The two lowest bids were Covanta and Mascaro. The good news for Morris County also is that irrespective of who you award this bid to, the county will realize a significant savings over the term of this contract compared to what the county is paying now. I think it's approximately a 25 million dollars savings. So the savings here is going to be significant irrespective of who is awarded the bid and who ultimately becomes the contractor.

As I will describe in more detail momentarily, Covanta's bid is legally flawed. And I believe, as a matter of law, must be rejected by the MUA. And I think that's very clear, I'm going to describe why in a moment. Mascaro's bid, on the other hand, is complete, it fulfilled all of

your requirements, all of the legal statutory requirements; and, frankly, we're not aware of any issues that have been raised relative to the sufficiency of Mascaro's bid.

Very quickly, in terms of New Jersey's public bidding law: New Jersey requires that contracts, public contracts, be awarded to the lowest responsible bidder. I think you all know that. And that means to the bidder is that it complies with applicable law and to your bid specifications. And the rationale and the public policy for this law is pretty self-evident, but certainly worth stating. It is to promote fair competition on common terms, so that all competitors are playing on a level playing field, so that there isn't any favoritism. That's the rationale.

And New Jersey statutes and the New Jersey courts take that public policy rationale very seriously. And that is why, at least in the area of public bidding, you will find that the courts actually strictly enforce and uphold what the statutes provide. In other areas of the law that is not always the case, but in public bidding law it clearly is.

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It is also clear in New Jersey that a material defect cannot be waived at the time the bid was submitted. At the time the bid was submitted. So you can't cure a defect. If there's a defect at the time the bid is submitted, it's a defect. There are no do-overs. There's no second bite at the apple. And if there are any golfers in the room, there are no Mulligans, no second shots. It is what it is when you submit the bid.

It's also worth noting that the law is really also designed somewhat to circumscribe the Authority of contracting units. You are going to wrestle with defects in whether they're material or not. A lot of the issues, in fact all of the issues that I'm going to raise tonight, your job is easier than you thought it was because the courts have already determined what's material and what's not.

There are certain categories of defects. There are statutory defects. These are defects where bidders decide that they just don't want to comply with what state law says they must comply with. And if you don't comply with a statutory requirement such as the ownership

disclosure -- which we will talk about in a moment -- the bid is dead on arrival. You have to reject it as a matter of law. It's not an area where you have any discretion.

There are also material defects. These are defects that a bidder doesn't supply important information that was requested by your bid. Sometimes a defect will be material, in which case the result as the statutory defect. The bid is dead on arrival, you can't consider it, you throw it out, you reject it.

There are other types of defects that are technical, they're not material, and they're not fatal to the bid. And again, case law has made your job a little bit easier, because whether there are material defects in failure to provide financial information, equipment certification, registration information, diesel retro-fit compliance et cetera, these are material defects. Courts have held that consistently. The law is clear, the bid is fatal. And if there's any one material defect to a bid, the bid must be thrown out.

Here Covanta 4 Recovery LP, their bid is materially deficient in numerous respects.

There are statutory defects, there are material defects. And, again, any one of these defects, any defect in this area, requires that you reject their bid. From my perspective, I think Covanta's submission doesn't comply with the law, which makes it illegal, unlawful, uncompliant with the law -- whatever term you want to use.

I have made a formal submission to your counsel, Mr. Maraziti, on October 4th. I don't know whether you received a copy of that, but it's with him, it's here, it's intended to be part of the record and for everyone to see. General counsel for Mascaro, Bill Fox, has made a supplemental submission to Mr. Maraziti dated October 5th.

I want to talk about now Covanta's bid deficiencies. And I should say at the outset that we received a letter this afternoon, the proverbial 4:30 letter before the meeting, that is sort of Covanta's response to the issues that we raised. And although we just received the letter, and I really haven't had a chance to totally digest it, I will attempt to respond to that letter and work those responses into what I had prepared for tonight.

First of all, state statute requires the disclosure of all stockholders and partners and interest in the bidder holding ten percent or more ownership interest in the company. That is state law, that is basic absolutely required. And a failure to do that is a knock-out blow. Again, you don't get a do-over if you don't submit the ownership disclosure form. You don't get a second bite at the apple. You can't fix it. You don't get a Mulligan. You're out. That's the law. And I don't think that there is a lawyer that could argue, even in good faith, that that's not the law.

Here, Covanta simply stated that Covanta 4 Recovery LLC -- and that's the bidder, that is a distinct legal entity. Okay? Has a 99 percent interest in the bidder. That's it. They don't disclose who the owners are in that entity. They just say that it's Covanta 4 Recovery LLC. And that really flies in the face of the rationale and the public policy behind the ownership disclosure requirement. And that is, that people, individuals, interests, should not be able to hide behind the veneer of an entity and do public work. That there should be full disclosure of who holds a ten percent or more interest.

Republic, one of the other bidders, is an LLC. They filled out the ownership disclosure form. Covanta's argument is pretty interesting. They say that but we're an LLC, we're somehow exempt from the ownership disclosure forms and requirements. And I find that to be a very interesting argument, and I think it's a bizarre argument. Again, I think it's an argument that flies in the face for the public policy for the disclosure. Why didn't they disclose. And it's not something you can fix after the fact. These are requirements that are made at the time of the submission of the bid. October 2nd submissions after a September 13th bid submission doesn't cut it. And that's a bright line matter of law. You do not have, I respectfully submit, the discretion to accept post-bid submissions on material items such as ownership disclosure.

Their refusal to provide the ownership disclosure required renders its bid defective. Again, there's no do overs here. There's no second bite of the apple, and no Mulligan. And that defect alone knocks out the bid.

There is another statutory defect here. They have failed to register under the

Public Works Contractor Registration Act. That Act provides that no contractor shall bid -- this is state law -- no contractor shall bid on any contractor public work unless the contractor is registered pursuant to the Act. The MCMUA bid specs require that bidders on any contract for public work be registered under the Act. Covanta did not submit a registration certificate. And they didn't do it for good reason. Not registered. It's not registered, was not registered at least at the time of the bid submission. So, therefore, the bid should be rejected on that basis.

Now, Covanta has argued that that argument doesn't apply in this instance because the work doesn't require work to be done on public buildings. And that's simply not true. That is an inaccurate statement factually made by counsel for Covanta. If you go to the public work contract, or you go to your general conditions, Page GC-10 of GC24 Paragraph 6 provides that, "except as otherwise provided in this Section 6, contractors shall be responsible for work or costs associated with its operation, maintenance, and repair of the transfer station facilities including

but not limited to the cost of operating, maintaining, repairing, or replacing all parts and supplies required for the efficient operation of the transfer station facilities".

So, I think that while I don't necessarily disagree with the argument made by counsel, I think counsel neglected to read the general conditions of the bid when he argued the bid did not contain any work on public buildings.

I would also point out Paragraph 7 of that same section, that says that "notwithstanding Section 6, contractor shall be solely responsible for any and all damage or injury to transfer station facilities caused by the contractor, his agent, service employees, or any other parties". So, there is a public building work component to this contract which brings this Act directly into applicability here.

There are also material deficiencies. And there are many, otherwise my presentation wouldn't be quite as long. Any one of them is a knock out blow. Any one of them requires you to reject this bid.

The most glaring material deficiency is that Covanta did not provide the mandatory

financial information required by the bid spec. In fact, Covanta, the bidding entity, provided no information, no financial information for the bidding company whatsoever. None. Nor did they provide a guarantee.

Now, they have asserted this afternoon that they weren't required to provide a guarantee. Again, I'm just reading from your own bid specification. "Minimum financial qualifications". And I want to read for the record "to satisfy the minimum financial qualifications, the bidder must meet at least three of the four financial criteria enumerated on Schedule 3 to the contract". Criteria, bidder has to meet the criteria. At the time the bid is submitted and throughout the term of the contract. Covanta didn't meet that part because they didn't submit any financial information for the bidder.

Then it says, "in the event that the bidder", the bidder, "is unable to meet any of the criteria, the bidder may submit a guarantee in the form attached to the contract as scheduled to guarantee by a guarantor which meets at least three of the criteria". Now, that makes perfect sense. If you're the bidder and you can't satisfy the

criteria, then you can go out and you can find a guarantor who does satisfy the criteria. The problem with Covanta's bid is they did neither at the time of the submission of the bid, which is the only time relevant for your consideration. They did not supply any financial information. That is indisputable. It is also indisputable that they did not supply the guarantee. And they say that the bid specifications didn't require a guarantee. Well, that's true, if the bidder had supplied the requisite financial information. They had a choice. Waste Management certainly understood that because Waste Management supplied a signed guarantee.

Now, their argument is labored. And I give their counsel credit for creativity, because he points to the verbiage in the guarantee itself and says, well, it says, this -- in the warehouse clause it says that this guarantee is going to secure the contract, then they said we would have signed the guarantee at the time the contract was entered into. Well, obviously the guarantee supplies the contract, but the signed guarantee is supposed to be submitted with the bid so that you know that the bidder has the financial wherewithal

to perform; and, you don't know that because they didn't comply with your bid specification. Again, Waste Management did.

What's worse than that, if they had a question about it, if they didn't know whether they should supply the guarantee, your bid specifications made very clear that they had every right to call and ask questions, and have those questions answered. But Did they do that? No. They just didn't supply the guarantee. And what they say is, we're Covanta, we're Covanta Energy, you should have just understood -- and they use the word -- you should just understand that we were going to be the guarantor. Well, Covanta Energy is not the bidder. And the consolidated financial statement that was submitted by Covanta Energy is of no moment, it is of no relevance because that's not the bidder.

So, they wanted to have it both ways. They wanted to be able to say that they complied with your financial reporting requirement, which they didn't because the bidder didn't supply anything; and, they didn't want a guarantee. Now, after the fact, they're more than happy to supply a guarantee, which they did on October 3rd. The

problem is the bid submission was due September 13th. You cannot, as a matter of law, accept a guarantee in satisfaction of the bid requirements on October 3rd. There is no way, no how any court is going to uphold that. But that's what they tried to do. And they tried to do it because they know, they know, that their bid was deficient in that most important and material respect. And I say it's a material respect because that's what the courts say. You don't have to decide that whether or not their failure to comply with your minimum financial qualifications requirement is material or not. The courts have said this since 1955, going back to the case in 1955, which was the Carey v. Fair Lawn case. And this principal has been repeatedly been upheld by New Jersey courts throughout. By the Appellate Division, by the Supreme Court.

So again, that is a knock-out blow. They failed to submit, to comply with that requirement. They don't get a do over. They don't get a second bite of the apple. And they don't get a Mulligan. They should be out.

The equipment certification. Covanta did not submit its own equipment certification

revealing the source of where it would obtain the equipment to do the job, as required by your bid specifications. And I want to read for the record from your bid specification. And this is the fourth paragraph on Page NB-3 of NB-4. "Each bidder must submit with its bid a signed equipment certification stating that it owns, leases, or controls all the necessary equipment required to accomplish the work as described and required in the bid documents. Should the bidder not be the actual owner or lessee of such equipment required, it's certification..." -- it's certification, meaning the bidder's certification -- "...shall state the source from which the equipment will be obtained, and in addition shall be accompanied by a signed certification from the owner or person in control of the equipment required for that portion of the contract, which is necessary".

Pretty straightforward. You want to know that the company that you contract with has the equipment to perform the job. And in this particular instance that would seem to me to be a pretty important requirement. And if the bidder doesn't have it, the equipment, then they have to have control of it through somebody else who has

control of it. And your certification is very clear about that. Your certification has instructions. And it's a dual certification equipment certification, that has to be signed by the bidder, and the bidder has to sign a certification, that's a requirement of bid. There's no certification signed by Covanta in connection with this bid, none that's been submitted. And if the owner, the bidder, doesn't control the equipment, then there has to be a certification -- which is on your same form by the way -- signed by the company that does control the equipment. And in that certification it relinquishes control back to the bidder.

The idea is your bidder needs to control the equipment. That's not my decision, that's your decision. That's what's in your bid, that's the way you set it up. Covanta has acted in a way that I can only characterize as arrogance, because Covanta says in its letter that not only do we not comply with your bid with respect to equipment certification, we know better.

And, I'm going to read right from the letter of today. Contracts -- and I'm on Page 6, fourth paragraph down -- contracts with the subs

will not be entered into until C4R, Covanta, is awarded the contract. The equipment certification does not say subs will enter into contracts with C4R if C4R wins the bid. The form states that the sub will grant control of the equipment to the bidder. That's what I just said. Which makes no sense, says Covanta, because the sub will never give over control of the equipment. C4R will never, never tell the transportation sub which trucks and trailers to use; and, C4R will not operate trucks and trailers, it will rely on the subs.

So, they're telling you you don't know what you're doing. Not only are they not going to comply with your bid, not only are they not going to sign your certification - which they did not, which is required by the bid specs -- but they're going to do it better because they're Covanta. Well, that's a knock out blow for them. In and of itself that's a knock-out blow, because the courts again -- and it makes your job easier, you don't have to debate whether or not failure to sign your equipment certification is a material defect -- that decision has already been made by the courts. And the law in that regard is very clear. When a

governing body requires an equipment certification to establish that the bidder owns or controls the equipment needed for the project, and the bidder fails to provide that certification with the bid, that is a material non-waivable defect. And, I cite you to the P&A Construction case 2004 Appellate Division case which we cite in our papers to Mr. Maraziti.

Once again Covanta wants it both ways. They want to say that you don't know what you're talking about, we're going to do it our way. And yet, they made a supplemental submission in October to say, okay, now we comply with your requirement. It can't count. They don't get a second bite of the apple. They don't get a do-over, and they don't get a Mulligan. If it's not there on September 13th with the bid, it's not there, period. Folks, that is as clear a line or black letter law as you're every going to find in the law. And yet again, they want to supplement after the fact.

Covanta -- and again, I apologize for taking up some time. If there wasn't so many defects I would have been through this quicker. Covanta failed to submit a certification regarding

diesel retro-fit compliance, in contravention of your bid specifications and state regulation N.J.A.C. 7:22-30, and that's the air pollution regs regarding diesel retro-fit program.

It is indisputable that Covanta did not provide this required certification at the time of the bid, because they didn't comply with the requirement to provide you with the equipment certification, and that's where this is referenced.

There is a recent Appellate Division case, it just so happens, Suburban Disposal v. Bayonne which was decided in March of this year, March 26th to be exact. That held where bid specs require a certification regarding diesel retro-fit compliance. And such is not provided with the bid, that is a material defect. Again, under the law that is a knock-out blow. No second opportunity. No second bite at the apple. No do-over. No Mulligan.

But wait, as they say, there's more, regarding the equipment certification. I want to go back -- well, I'll cover it this way. Covanta -- another material defect -- and its transportation subcontractors, did not provide a copy of their most recent DEP report. I want to

talk about -- before the DEP report -- Covanta's transportation subs and let you know exactly what they did submit and what they didn't submit regarding equipment certification, because it not only goes to equipment certification, but it goes to the diesel retro-fit compliance.

They submitted three equipment certifications. I don't know who they're signed by because it doesn't say, but it's interesting. They had somebody, I presume a subcontractor -- I don't know who it is because you can't tell from reading the certification -- for Elgin Pelican 21 or Sigin Crosswind -- these are all street sweepers. (Phonetics).

There is also a certification for nine yard hoses, docky trucks. And there's a certification for some five-wheel loaders and a couple of excavators. There's no certification for diesel fuel retro-fit compliance for any of the trucks that are going to be hauling the waste, because there's no certification from anyone for those. Not from Covanta, who again submitted no certification which is required under the bid; nor from any sub or any other contractor. And the ones they did submit for those items I just

referenced, it's not clear who they're from or what their relationship to Covanta is.

As I say, they did not provide a copy of their most recent DEP report, as required by Question 14 of the bidder's questionnaire. The bid provides that failure to provide that information shall result in the rejection of the bid.

Now, they said they don't have a report because Covanta really isn't in the solid waste transport business. So, I'm not really sure that they are really in the business that they're bidding on. And on the basis they may be in the energy business, but what part of it. And based on the bid that's submitted, I believe that's probably the case. Now, that's sort of on the side, but I wanted to make that point.

In addition, the bid requires that bidders or its subs must have at least one occasion for a period of three years transported solid waste with an average daily volume of at least 1,000 tons per day between two validly permitted disposal facilities. Covanta has listed three transportation subcontractors, two of them failed to meet the bid's minimum requirements. Again, while there's not case law on that point that says

that that's a material defect, I think you know what I'm going to say. That goes directly to health, safety and welfare because that's the transport trucks. So if you needed anymore reason to reject this bid -- and I don't think you do, in fact I know you don't -- there's some more.

So, for all of these reasons I think the law is clear, I think the facts are clear, that the MUA must reject Covanta's bid. Just because they say they're Covanta they wanted the convenience of just saying well, we're Covanta, the Red Sea would part and a different set of rules apply. But the bidder is not Covanta Energy, the bidder is not Covanta Holding, the bidder is a separate and distinct legal entity. And the law applies to that bidder every much as the law applies to my client and everybody else that submits a bid. There isn't one set of rules for Covanta and another set of rules for everybody else. That's not what the law provides for. The law is that you must award this bid to the lowest responsible bidder.

Attempting to award Covanta this bid will not only undermine the public process, undermine the public bid process, undermine the

confidence that the vendors have in the MUA to do the right thing because it's not a defendable position to award the bid to Covanta. And it will make a mockery of this process, which will reflect poorly on this Authority. And I know that's not what you want, and I know this Authority is better than that. I know our county is better than that.

Mascaro is the lowest responsible bidder, and has through the public bidding process earned the right to this contract. With over 46 years of experience and a compliant bid, Mascaro has demonstrated that it can perform the job at hand, which I know it is ready, willing and most eager to do.

I want to thank you all for listening to me tonight. Again, I apologize for taking up so much time, but there was a lot of material for me to get through. And I'm happy to answer any questions that anyone has. I don't know what your process is, if you just want to hear from us and then deliberate.

MR. DRUETZLER: Anyone have any questions? I have one question. I would like to have a little -- hear about what Mascaro is, the history about them, where this waste is going?

MR. INGLESINO: They want to here a little bit about Mascaro, for the record.

MR. DRUETZLER: Tell us about your company and where the waste is going to go?

MR. P. MASCARO: Our company is the by-product of our family. My mother, father, six children -- five boys. We grew up in the business. We started on the back of the truck. We went into the garbage business in 1964. My father was previously in the scrap business. We became a corporation in 1970.

We would describe ourself as a fully-integrated solid waste management company. And by that I mean we're involved in every aspect of the business. We collect it, we transport it, we process it, we recycle it, we dispose of it, we compost it. We're fully integrated.

We operate in every sector of the business, from the home, commerce, institutions, industry, local government, state government, federal government. We employ about 750 people. We operate about 400 trucks. We have about seven recycling processing transfer-type facilities. We have four active landfills. We have one in development.

We truly are a very unique company. We have the resources of a major company operating in the region, but we maintain the dedication and the focus of a local family-owned business. We are truly an anomaly in our business. We are rated 5A1 financially. If anyone is intricately aware of that rating, you can be rated no higher than 5A1. We've performed at all levels. We have major transfer contracts with people like Monroe County; Rochester, New York; Orange County; Tioga County; Montgomery County; Pennsylvania.

Our company is really unique. We basically operate on the three-prong approach. We are interested in well-being of our family, interested in the well-being of our employees, and we're interested in the well-being of the community. If we satisfy only two of those goals, we really did not have a successful year. We truly have an outstanding record of participating in the community. We participate very substantially with a silent manner, but we've been involved in a multitude of projects that are out there, and you can do some research. I'll just give you an example of one type of project that we have in the community, we started that eight years

ago. We go into the schools, we see about 50,000 children a year. We teach them about respect -- it's an interactive program, it's operated by professionals, compensated by the company. We teach the kids about self-respect for their colleagues, siblings, parents, authority, the law, and we culminate with the environment.

I'm really proud of our company. I believe our greatest asset is our employees. We have very low turnover in our company. We have an exemplary operation in just about every aspect that you can think of in an operation, whether it's safety. We are self-insured company, we take the first two million dollars of any Workmen's Comp. claim. We take 100 percent of any physical damage claim. We have an internal risk management department. We're very safety and compliant oriented. Even though, you know, we're in a very bureaucratic regulatory-type industry, we have an internal environmental compliance department budgeted about one million dollars a year. Our entire operation is safety monetized. We give people compensation on a monthly basis for complying with the law. We serve the largest government waste contract that the government

provided, we serve the Port Smith naval shipyard, we handled it in every respect. We did the solid waste removal, we did asbestos, we did the abrasive, we ran the incinerator on site, we did the street sweeping. You name it, we did it. We have a list of credentials this long.

And I want to tell you, you're one of the premiere waste contracts on the east coast, and we tried to demonstrate our commitment and our capability to you by the type of submittal that we gave you. We think you deserve the best in every aspect. And it's somewhat frustrating to me that on a contract of your magnitude and caliber, that these issues are even present with one of my competitors. I think in pursuit of any job, whether you're seeking employment or seeking a position or an authority or seeking anything of consequence -- and I think 135 million dollars is consequential -- I think you'd want to put your best foot forward. And I don't mean to be demeaning. I grew up on a couple of actions - number one, we stand by our actions more so than words. And I think the best way to demonstrate interest in Morris County was by submitting a responsive and responsible bid submittal. That's

where it starts. And I think presentation means a lot, because if you can't present yourself as someone who has the capability and the commitment to comply precisely, intricately with strict adherence, then I think the action in the day-to-day performance of the contract might be suspect. This is not an everyday contract. This is a very substantial contract. And I think one of the advantages of the Mascaro Company is the most critical aspects of this contract, which is the process and the maintenance of that landfill, of those two transfer stations, and the transportation, that is done by all Mascaro internal employees.

And to answer your question on disposal. Disposal occurs in three places. It occurs either at the Keystone landfill or the Commonwealth landfill in Pennsylvania, which are ISO 14,000 landfills. They're certified, independent of the state's permitting process. They were the first two I believe in the country, I know in Pennsylvania, to have that certification. And the back-up facility will be the Pioneer Crossing landfill, which is one of the Mascaro owned facility.

And just by way of information, you should know that we have almost a forty-year record with the owners of the Keystone and Commonwealth landfill. We were probably their largest customer going back to the late 80's when there was no such thing as long-haul, when trash was dumped five miles to fifteen miles from the local community.

I can tell you that we're excited to have the opportunity to serve this county. We have the resources to serve this county. But more importantly we have the dedication and the focus of a local family-owned business, and I think that's an extra. And I think one last extra will be that you'll have a real friend in your community with J.P. Mascaro & Sons, and that's not verbiage. We have a record longer than that highway that we came in today. Thank you.

MR. DRUETZLER: Do you have any contracts in New Jersey right now?

MR. P. MASCARO: We don't have any actual collection contracts in New Jersey. We have done different jobs in New Jersey, yes. And obviously we are a A901 provider.

MR. DRUETZLER: Anybody have any other questions?

DR. NUSBAUM: Is your landfill located in Pennsylvania, as well?

MR. P. MASCARO: Our landfill is in Pennsylvania also, yes. All three facilities designated for this contract are in Pennsylvania. And I think it's important to note that your contract calls for a capacity of about 430,000 tons a year. I think we provided you about 900,000 tons a year. So certainly, for whatever reason, I would think with the pricing competitiveness that you're receiving under our bid, 25 million dollar reduction, that maybe volumes could go up here, you have literally more than twice the capacity that we avail you in the bid.

MR. DRUETZLER: Any other questions? Okay. Next up, I guess Covanta is here. Thank you very much.

MR. P. MASCARO: I forgot to mention one thing. Everything will be brand new, all equipment will be brand new. Thank you.

MR. DRUETZLER: Covanta is here. I would imagine you would want retort or answer some of these questions. Why don't you tell us about your company? Up front there I should ask that question.

MR. VEENHOF: Thank you. Honorable Chairman, Board members, executive director, staff. My name is Derek Veenhof. I am the Senior Vice President of Covanta 4 Recovery. And I have with me a team of people that I'd like for them to also stand up and introduce themselves before I get started.

MR. WELCH: I am Mike Welch, I'm Market Area Vice President of C4R.

MS. BREEN: Hi, I'm Jennifer Breen, an in-house counsel or Covanta.

MR. DELACRUZ: Tom Delacruz, market manager for New Jersey/New York.

MR. OETTLE: I'm Ken Oettle, Counsel for Covanta on this bidding matter.

MR. VEENHOF: We are pleased to have the opportunity to respond to the RFP. Waste management is an important aspect and service to the citizens and taxpayers of Morris County, and we are thankful for this opportunity.

Covanta 4 Recovery is a waster services and contracting arm of Covanta Holding Company, clearly stated within our bid submission. Covanta Holding Company is a New York Stock Exchange publicly traded company that specializes

in environmental services and waste disposal, and renewable energy production. And, we're headquartered here in Morristown, New Jersey, with approximately 4,000 employees in our company. Our market capitalization is 2.3 billion dollars as of yesterday. Annual revenues of 1.7 billion dollars. Substantial company.

Covanta, through its affiliates and subsidiaries, provides municipal solid waste services, primarily energy from waste disposal, for 20 million tons of solid waste per year. Approximately six percent of the nation's total municipal solid waste. Our EFW plants produce energy in the form of electricity and steam. We have more than forty operating facilities in the United States. We produce enough electricity to power the entire City of Philadelphia each day, to give you an idea of the amount of power we generate.

We are the single largest renewable power generator in the country, generating approximately eight percent of the non-hydro renewable power used in this country. We recover over 400,000 tons of metal from the solid waste from our facilities. This is material that

otherwise wouldn't be captured in municipal solid waste recycling programs. That's enough material to build five Golden Gate bridges every year for this country. And approximately, non-ferrous metals, a billion cans of aluminum cans are recovered out of the ash from our facilities.

C4R has been providing waste transfer transportation and disposal services for many years, since the mid-1990s. Existing clients for C4R include major metropolitan entities. City of Boston, the city of Philadelphia, the City of New York are all C4R customers to the tune of approximately 50 million dollars a year of revenue from those municipalities, and over a decade worth of service to those entities, substantial municipal contracts that we have been performing on for over a decade.

C4R also owns and operates transfer stations throughout the northeast. We move approximately a million tons a year from these transfer stations into our facilities for ultimate energy from waste disposal. While we do not own waste transportation equipment, we do subcontract for waste transportation. We do understand that business. We subcontract for approximately five

million tons a year of subcontracted waste movements.

We have been thoroughly vetted by government agencies, including A901. The BIC process in New York City. Vendex in New York City. And West Chester Solid Waste Commission. We hold licenses and permission to do the services required of Morris County and the State of New Jersey. We are well-known in the State of New Jersey to all the regulatory agencies. And our information is available to the public via our filings at any time, either with the state or within our corporate 10K that was provided in our bid.

Our bid offers Morris County several tangible benefits. First and foremost, our bid saves the county several million dollars a year over the current service that has been provided. Approximately 35 million dollars cheaper over the same five-year time frame. Our bid provides for local New Jersey based energy from waste disposal, with Covanta affiliates providing disposal at Covanta Warren and Covanta Union, your neighboring counties. And a third affiliate disposal location just across the Delaware River in Chester,

Pennsylvania. Our bid allows for the minimization of fuel use, minimal use of trucking, and embraces a regional solution to solid waste management. Our bid provides a higher order of environmental sustainability to the residents of Morris County. But not only to the residents of Morris County, but to everybody inhabiting this earth.

We avoid 400,000 tons of greenhouse gas versus methane generating landfills by turning the MCMJA waste into energy. Your waste would power the homes in Morris County for approximately two months, your annual waste volumes would power homes in Morris County for approximately two months of the year, and would displace a thousand train cars loads of coal that would be generated in a coal fired power plant. Your waste would also contain 10,000 tons of metal, enhancing your overall recycling rates by an additional two and a half percent.

Our bid submission has been challenged by the second lowest bidder. This landfill bid offers none of the aforementioned benefits that would attribute directly or indirectly to the residents of Morris County, and the taxpayers of Morris County. The bidder is not a New Jersey

headquartered publicly trading company, but rather is a privately-held landfill operator in Pennsylvania who doesn't own sufficient disposal capacity to provide disposal for Morris County on its own.

The bid challenge attempts to pick and choose pieces of our compliant bid submission, and uses examples of case law to selectively try to avoid the overall completeness of our submission with respect to the bid documents. Our bid was complete in its submission, and questions from the Authority have been duly clarified, as allowed by New Jersey law.

The challenge attempts to argue that the interests of the citizens and taxpayers of Morris County are not best served by an award to the lowest bidder, a subsidiary of a wholly-owned publicly traded company based here in Morris County; well-known to Morris County residents, Morris County administrators, regulators, and state officials; with a global reputation for being the best and largest energy from waste company; with a stellar record on operations, workplace safety, and environmental performance.

We trust that our bid submission was

compliant, that we answered the questions within the RFP, and those questions of qualification after. We ask that the Authority and its members measure our bid on its economic, environmental, and societal value, and merits to the citizens and taxpayers of Morris County, and not be mislead by an overly argumentative challenger looking to merit just themselves. We look forward to serving Morris County.

With that, I'm going to turn it over to our external counsel. If you have any questions of me, I'd be more than happy to entertain them, as well.

MR. DRUETZLER: Okay.

MR. OETTLE: Mr. Chairman and members of the Authority, I thank you for this opportunity to present to you.

My name is Ken Oettle. I'm with the law firm of Sills, Cummis and Gross from Newark, New Jersey, and I represent Covanta in this bidding matter.

Counsel for Mascaro said that the case law has made your job easier in some respects. I think the case law has made your job harder, actually, because the case law and the statutes in

the area of bidding, as you know, can be strict; and, they've created a whole side industry of lawyers who hunt for mistakes in other peoples' bids, which really has nothing to do with your job. Your job is to run this Authority efficiently, to see that waste is handled efficiently, and to have it done at the least cost. Now, you tell me if the bidding laws don't interfere with your ability to do that, because they do.

I am sure that you have thrown out many low bids because they had a mistake, and the public pays for that. And I'm sure that you knew that when you threw out those low bids, there was no favoritism. You may not even have known the bidders. There's no effort by the bidders to get over on someone else, to have someone come in in a secret way or hold off so that they could make a deal with a sub. They simply made a mistake, and you lost millions of dollars and they lost the bid. Bidding laws are very tough.

And, counsel for Mascaro, who spoke well, very well, suggests that your discretion is really limited. And I suggest to you that it's not so limited as Mascaro would have you believe. And as I go through the points that counsel raised, I

think you'll see that. And I won't take too long because I know it's getting late and we spent a lot of time; but, it's an important matter and we can spend a little bit more.

Take for example the ownership disclosure form. It's not an automatic disqualifier for us because we submitted the form. You have to decide if the form is adequate, and you have some discretion in that regard. In this bid package submitted by Covanta 4 Recovery -- also called C4R, and generally speaking the use of the word Covanta -- it was made very clear in the cover letter that the bidder is a subsidiary of Covanta Energy, which is a large energy corporation with national interests, international coverage. And that Covanta Energy is a subsidiary of Covanta Holding Corporation, which is a Fortune 1000 company, very big, whose stock is sold on the New York Stock Exchange.

So, it was clear who owns the bidder. It's clear whose behind the bidder. How do we know that? Because in response to question Number 14 of the questionnaire, Covanta, the bidder, submitted the -- what they call the form 10K's. Those are the SEC documents that are annual reports

of publicly traded holding companies, publicly traded companies. One was submitted for 2010, one was submitted for 2011. The financials, the audited certified financials that appear in these documents go back several years. So, the reason this had to be, these forms, 10K's, had to be submitted is that Covanta 4 Recovery LP, which is a limited partnership, does not have audited financials, thus the specifications require that it submit the financials of a holding company, which it did.

And, Question 14 happens to be one that asks for who is your guarantor, and thus the form 10K was submitted to show who the guarantor would be. So, you have the discretion to determine that the ownership is not really in question, the ownership of the bidder is not really in question, because a publicly traded holding company is involved. You have the discretion to determine whether the non-inclusion of the intermediate companies between the bidder and its holding company guarantor were necessary for your purposes. That can be handled by clarification, and it was here. The Authority asked us to clarify the chain of ownership, and the same form was

submitted to the Authority that had already been submitted to the Division of Law which investigates all A901 companies. You need an A901 license if you're a hauler of waste, or if you handle transfer stations. When you get this kind of a license you get investigated, same as if you were, frankly, getting a casino license. You even get fingerprinted. And in the process you submit a chain of ownership which appears on one sheet, and that's what was provided here by way of clarification.

So, the essence of the ownership disclosure focuses on who owns you, are you financially secure, are you trying to sneak anyone in, as per the Schlumbershay case which we have cited in our papers. The court in that case pointed out that the purpose of the ownership disclosure is to make sure that no one is sneaking in. Well, that's not happening here. We have a subsidiary of a publicly traded waste treatment company, very financially strong, very well known.

The question was also raised whether a guarantee should have been executed at the time of the bid. Sometimes in bids for waste management the local -- the county Authority will say you will

submit an executed guarantee with the bid. It's not a bad idea. Sometimes they ask for it. These bid specifications did not ask for it, and it wasn't a line item in the bid. It could have been a line item -- I'm sorry, the checklist all the bidders are supposed to fill out to make sure that they have included within their bid package everything they're supposed to include. That's really a service provided by the bidding agency to make sure that bids are conforming. In this case, that checklist did not contain a line item for a signed guarantee. It could have. It could have said signed guarantee, paren, if required -- because it's not required necessarily of everyone perhaps, like Mascaro, you have the finances yourself and you do not have to rely on a holding company, a guarantor. But in this case the bidder is a subsidiary, and it can't meet the financial requirements itself, so it must rely -- as the bid specs permit -- on a guarantor. The guarantor was identified, but in this case the guarantor and the bidder didn't feel it was necessary to submit this executed guarantee because it was asked for. I reviewed the language for which counsel for Mascaro pointed, and it could be read with hindsight, if

you conclude that the bid should have contained a signed guarantee, you could read that language backwards and say, see, you should have put the guarantee in. But the stronger message from this set of bid specs is you don't have to do it quite yet. If you've identified your guarantor, there's comfort in that, and then you will submit your guarantee along with the contract; because, as counsel points out -- and I really didn't think it was my creativity, I was simply reading what was in the bid specs -- the contract says the parties having entered into a contract, we now enter this guarantee. Assuming that the bidder will read the form of guarantee supplied with the bid specs, the bidder will conclude, I guess I sign it when I sign my contract. It's a fair conclusion. And the checklist doesn't ask for a signed guarantee. The bid specs don't specifically say if you're using a guarantee we want a signed copy with the bid.

So, Mascaro is asking us to deduce that the Authority needs an executed copy, whereas the actual terms of bid specs strongly suggest that we don't need that executed copy yet, it will be sufficient to submit it with the bid. So Covanta's position on this is that there was no

mistake at all with the non-inclusion of a signed guarantee with the bid, because the message from the bid specs was you don't have to do it yet, you have to do it at the time of the agreement. And you have the discretion to interpret your bid specs to have sent that message to the bidders, not the message that Mascaro says you sent.

It's always important in bidding matters not to start from the back and go forward, because if you start from the back and you say, well, surely the guarantee was required because it would have been a good thing, then you've assumed your conclusion. They call that circular reasoning. No, in fairness to the bidders, you would start with what the specifications say, and ask yourself what's the message in the specifications, what's the real message and the strong message that the bidder is likely to take from those specifications, and are we acting fairly with respect to the bidders.

Moving to another point raised by counsel for Mascaro. What is characterized as a failure to register as a public works contractor. This isn't a public works contract. It's a contract for handling waste. The expertise here

is in handling waste, and in hiring people to haul the waste away. And the bid specs make very clear that the bidder chosen for this job will not be responsible for the cost of any structural repairs in connection with the work which will be handling the transfer station. Now with that message in the bid specs, there's no responsibility for structural repairs with the indication in the registration statute that it pertains to structures. It's a fair message received by the bidder that this is not an appropriate situation for registering as a public works contractor. After all, these are waste handlers. Maybe they would repair a light socket or anything else in the building. For that I don't think you need to register to be a public works contractor. You're hardly doing public works if you're doing small repairs, and you're not responsible as a bidder for any structural repairs, and it says so right in these specifications.

As for the financial information. This isn't a big point and not much time is required on it. The bidder submitted no financial information because it doesn't have audited financials. It was required by the bid specs to

bring in a holding company that it does have certified and audited financials to serve for that purpose, and it did. That really is no deviation, not even arguably.

The equipment certifications are a very, very interesting issue. Those certifications have two parts. There's a part one and a part two. In part one, the bidder certifies that it has all equipment necessary to do the work. In this instance Covanta did not have any of the equipment that it owned or leased at the time to do the work because it had arranged to be able to get that equipment from certain vendors. So it had it's vendors sign the equipment certification that they would provide this equipment to Covanta, if Covanta would get the bid, of course. And then Covanta would then own the equipment. And that followed proper form.

The question here is whether Covanta should have had its hauler subs sign that form. And that's where reading the form takes on quite an importance. Counsel accused Covanta of being arrogant and wanting to do it its way. I think that's one of the few times I think he stepped beyond proper boundaries. It was hardly arrogance

to read a form like the equipment certification, in which the person required to sign it certifies that they own and control equipment required and listed below, and they definitely grant or will grant the bidder named below the control of said equipment during such time as may be required for that portion of the work described in the bid documents which equipment is necessary. Granting control of the equipment. Can you imagine that a waste hauler with trucks and trailers is going to give control of its trucks and trailers to the transfer station operator? Hardly. The hauler will use its trucks and trailers as it sees fit. It won't give up control. And its drivers will be hired by the hauler company, not by the transfer station company.

So, reading this the way it appears to read is, that this form is not intended to be signed by haulers. And that's the way the Covanta read it. It's not arrogance, it's just reading language the way it sets out. No control of equipment would be given over by haulers to the transfer station operator; and, therefore this is not a form appropriate for signature by haulers. That's why Covanta did not submit these forms

signed by the haulers. They did later submit them in response to a request for clarification by the Authority. Not because they were seeking a second bite of the apple, not because they thought of it later and said oh, let's try to cure something; but, because it was requested by the Authority for clarification.

Covanta's position is that these forms were not appropriate for signature by the haulers. Now, one could say, well, we wish it didn't say control, and we wish we had put a form in there for the haulers to sign because that would be a good thing. It would be a good thing, but again, in fairness to the bidder, is it not fair to understand that this can be read by a bidder in the way that Covanta read it.

Now, maybe another bidder had their haulers sign the form. Does that prove that control means something else? Not necessarily. Not at all. Maybe it means it could mean two different things to two different people. Again, ask yourself, is it fair to disqualify a bidder because they read it the way it seems to read? Now, does that leave you naked as to the bona fides of these haulers? In other words, oh, because we

don't have a form signed by them which says I'll give control of these trucks, we have nothing. Far from it. As what we submitted today indicates, you have a lot from the haulers. First let me tell you what you don't have. This isn't a contract. The hauler is not saying I will sign a contract. So you got to ask yourself what you're really getting when the hauler signs this and says I'll give control of my trucks. Which doesn't make sense, but let's assume he signs it and says I'll give you control of my trucks to the transferring station operator. What are you getting from that? It's not a contract, there's no promise behind it, I mean it's a statement. And then suppose they back off in the end, are you getting anything? Can you shove this under their nose and say I will sue you because you said you'd give me the trucks? I don't think so, it's not there. In contrast to the vehicle dedication affidavit that Covanta signed, which said that we will provide all of the vehicles necessary, and if we don't you can sue us. Now that's something to hold on to. And we signed that and we submitted that with our bid, even though it wasn't required until the time of the contract execution; but, we put it in with our bid because

we felt well that's something that they can grip. That seems to be a meaningful part of the package.

So now let's go to what you got from Covanta with respect to the haulers. You got the haulers A901 license. You got a list of equipment from the haulers. You got their financials. You got quite a bit of information. I think there's a little bit more that's slipping my mind for the moment. You got quite a bit of information from the haulers to establish they're bona fide in the industry. So you have a level of comfort there. Would it have been better had you had a form that the hauler signed that said they will enter into a contract with the transfer station operator if that bidder gets the contract? That would have been nice, but it wasn't in there. And you really, in fairness to the bidders, can't take a form that doesn't do that and try to make it do that; and, if it's missing say, oh, they can't have the contract, we're going to pay 3.4 million dollars more. Like recall, I said, what your job is, your job isn't to find mistakes and punish bidders, your job is to run the agency well and do it at the lowest cost. And, so, there's a balance. You don't want to let people in so that you would lose respect. Well,

ask yourself, would you lose respect here taking a Fortune 500 company and its related entities to do this job? Financial strength, experience in the business? No, you would not lose any face, and you would not lose any dignity to take this bidder.

Now, the diesel retro-fit program issue is handled pretty much as the equipment certifications. Only the equipment certification asks for an assertion that vehicles meet the diesel retro-fit program. No other page in the bid specs or form supplied by the bid specs says that. So if you sign this form, you're making such an assertion; if you don't sign the form, then you're not making such an assertion. At the request of the Authority, by way of clarification, Covanta had its three proposed hauler subs sign this form, notwithstanding the language of control, just had them sign the form and they were submitted to the Authority. But for the same reason that I suggested to you that it wasn't called for to have them signed, it wasn't for equipment certification purposes, it wasn't called for for diesel retro-fit purposes either. That's the only appropriate way to get it, Covanta's position is, is by clarification and supplementation of the bid.

It's not a cure of anything because it wasn't required in the first place. Only if something is required and not supplied is there a cure, otherwise it's a clarification.

It is true that C4R, Covanta, the bidder, did not submit an annual report with its bid because none exists. This company received its certificate of public convenience and necessity only last year, and it wasn't required to submit that form this year. Covanta checked with the DEP, as a matter of fact today, and ascertained that only after you've had a full year of operation with your certificate of convenience and necessity do you actually have to do the annual report; so, they're not even late, and they don't have one.

Now the haulers could have been more Johnny-on-the-spot and supplied it, and they didn't. Now that's an omission, because the questionnaire said give us your annual report, and the haulers didn't go through with the bid. One gave, Alexum gave the guts of its annual report. You have the discretion to determine whether that's material or not. Nothing in those annual reports is new. It's all information that was in the public record, and none of it changes. The

financials don't change, the list of equipment doesn't change. It's all right there. So it's simply asking, do you have an annual report, may I have it, does the job. It has nothing to do with the cost to Covanta, the bidder, of making the bid. It gives it no advantage against any other bidder, so there's no financial aspect to it. It doesn't deprive the Authority of the assurance that the contract will be entered or the work will be done and guaranteed. And therefore it's not under the usual, what they call a two-prong test for materiality. It's not material that those reports were omitted, and they can be supplied by way of clarification.

It was pointed out that in the answers to the questionnaires two of the subs did not supply complete answers on the experience that they have. It turns out they had the experience and the clarification question brought that out. Even if those two subs were disqualified, one still is left that did satisfy all those requirements, that's Alexum and that sub is big enough to handle the job itself, if it came to that. If for some reason you deemed the other two subs to have made material mistakes for not supplying, for saying

that they had nine months of experience instead of a year when they actually had a year, if you deem that non fixable by clarification, still there's a sub left that can do the work.

Mr. Pat Mascaro, who also spoke well, suggested to you that if a bid falls short, that the bidder doesn't care enough to get the work; and maybe if the bid is sloppy, the work will be sloppy. Well, we ask you the question, is that what you think happened here? That Covanta was sloppy, or is it the way that Covanta read the bid specs that resulted in not including certain information that with hindsight looks like it might have been a good idea to include it; but, in reading the specs carefully, a bidder justifiably did not include it. Does that look to you like sloppiness or interpretation? I suggest to you that the only reasonable conclusion is that at worse it's interpretation. But this is not a sloppy company. It's a strong careful company that has a history in New Jersey and a strong work history and a good reputation, and that any deficiencies in this bid have no reflection whatsoever on the strength of the company or the amount that the Authority will save if it sustains

the low bid.

I thank you for the opportunity to speak, and of course I can answer question.

MR. DRUETZLER: Any questions?

DR. NUSBAUM: I have a quick question If your waste energy facilities are down and you can't over a reasonable amount of time bring Morris County waste to your waste energy facilities, do you have any back-up or contingency plan?

MR. OETTLE: I think probably one of the Covanta people would be stronger on answering that question.

MR. VEENHOF: Sure. In our bid submittal we actually provided the information for three of our nearby plants. So, in addition to those three, we have other plants in the region that can take our waste. So even if it came to be where we needed to divert waste form one plant to a back up, we even have a back-up for the back-up, and a back-up for that back-up; so, we're covered.

DR. NUSBAUM: Thank you.

MR. OETTLE: Thank you.

MR. DRUETZLER: Any other questions? Okay. Thank you very much. I see a representative from Waste Management. Do you wish to --

MS. AYRES: Just very briefly, Mr. Chairman. I don't think for one Waste Management needs introduction, they are your current contractor. And it looks like we may be very much in the running with this contract. Can you hear me?

Sandra T. Ayres, I'm counsel for Waste Management. We appreciate you're not making a final judgment tonight. We have yet to complete our critique, if you will, of Mascaro's bid. We understand Mascaro was not allowing release of, or didn't want release of their financial information, but only very recently today we got an e-mail from Mr. Maraziti saying that they have consented to release, and we do want to look at that. So we very much appreciate the additional time to be able to do that. That's my only comment.

MR. DRUETZLER: Thank you. Anybody?

MR. FOX: Mr. Chairman, may I briefly respond to some of counsel's arguments? Thank you.

If it please the Authority, members, my name is William Fox. I'm general counsel for J.P. Mascaro & Sons. I had the privilege of speaking before this Board five years ago. I just

want to briefly comment on some of Mr. Veenhof's initial remarks.

For about five minutes he ran on "we", "we", "we", "we", "we have this", "we do this", "we do that", "we're this". The "we" is not the bidder. The bidder here is Covanta 4 Recovery LP. Covanta 4 Recovery doesn't own or operate transportation equipment. Covanta 4 Recovery LP doesn't own or operate incinerators. I believe Covanta LP owns or operates one transfer station in Massachusetts.

We're not talking about Covanta Holding Company. We're not talking about its parent, Covanta Energy Corporation, which as you know declared bankruptcy within the last decade. We're talking about the bidder. This bidder doesn't have the privilege of talking about the global "we" because the global "we" is not going to be performing this contract.

He talked about how well-known Covanta is. He talked about how local it is. He talked about the "we's" global representation. He talked about the benefits from the way they would propose to do the job. He talked about by using his type of facilities it would be environmentally more

friendly. Whether that's true or not, and I don't know that it all is, those are not the evaluation criteria. Everything that gentleman talked about had nothing to do with the bid.

He talked about all these positive attributes, but what you really have to focus on here is what did this Authority mandate in its specifications, and did they comply? And that's the problem here. They want to camouflage all their non-compliance with all their quote/unquote "A" plus reputation, well-known everything else he talked about. The issue here is two things. Who's the lowest responsible and responsive bidder? And once you identify that entity, if a contract at all is going to be awarded it has to be awarded to that entity under your local public contracts law.

As our counsel's submission to your solicitor, if there are material bid defects in the bid, they cannot be cured by the bidder after the fact, they cannot be waived by this Board after the fact. If the bid defects are material, the bid is legally disqualified. The lowest possible bidder doesn't mean the low dollar bid. It's defined in the Act, to be responsible and responsive. The low dollar bid in compliance with the material

requirements of your specifications.

There were a couple, really three basic components, critical components of this contract. Financial qualifications, equipment equipment is huge, huge, we're going to buying twelve million dollars of new equipment -- and disposal. Those three clearly are material requirements under your specifications. Covanta LP fell short two of them, and barely made the third. It provided in its bid the bear minimum of disposal capacity when you add up all their disposal sites 430,000. They missed on the qualifications, having financial qualifications, and they missed on the equipment.

Now, the counsel said two things. He said you start with the specifications. I agree. You not only start with the specifications, you end with the specifications. The way Covanta interpreted the specifications is not relevant. What the specifications say is what is relevant. The bid specs made very clear and they gave every bidder the opportunity. They let you have site visits, they gave you the opportunity to ask questions in writing and the Authority would respond to them in writing. And that's what

happened. This particular bidder didn't ask any questions about the minimum financial qualifications. It didn't ask any questions about the equipment certifications. After the fact, when it turns out by their own admission they don't meet the minimum financial qualifications, and when it turns out neither the bidder or the people that are going to provide the trucks and trailers provided equipment certifications, they write a letter and they say we believe the approach we used was a logical and sensible approach and methodology. Well, that's fine, but that's not the methodology this Authority said all the bidders had to use, and all of the other bidder except this one followed.

As it relates to the minimum financial qualifications, counsel read it but it could not be any clearer. "To satisfy the minimum financial qualifications the bidder must meet at least three of the four financial criteria enumerated on Schedule 3 to the contract at the time the bid is submitted, and throughout the term of the contract". There is no ambiguity in that sentence. You have to meet the three scheduled three financial criteria, the minimum financial criteria

at the time the bid is submitted. This bidder in its post-bid submission letter says it did meet them, Covanta LP.

Well, then you go to the sentence. "In the event that the bidder is unable to meet the criteria", ie Covanta LP, "the bidder may submit a guarantee in the form attached to the contract as Schedule 2, by a guarantor which meets at least three of the four criteria". No ambiguity there, no reason for interpretation. If you don't meet them, submit a guarantee, the Schedule 2 guarantee by your guarantor; because if you don't meet them, your guarantor has to meet them at the time of the bid to meet the minimum financial qualifications.

Then it goes on to say, "in the event the bidder is able to meet one or two of the criteria but not three, the bidder may supplement its financial qualifications by submitting the guarantee provided that at least three criteria are met combining the independent financial qualifications of the bidder and the guarantor". Now, gentlemen, ladies, that language is clear. There's no ambiguity, and it wasn't complied with.

If Covanta didn't like the numbers here, or for any reason -- maybe it got a bigger

and better contract and it didn't want to do this one anymore, it wouldn't have to submit the guarantee and you couldn't award a contract to them. They'd be receiving a tremendous competitive advantage if they were allowed to submit the guarantee after the bid opening. And in fact, the courts have held and it's in my October 7th submission, "a post-opening commitment to a supply and essential missing from the bid is not a clarification". It's an impermissible supplemental change or correction within the meaning of the bid and it flies in the face of public bidding scheme. This guarantee is not a clarification. This guarantee that they submitted after the fact is an attempt to cure a material bid defect that was contained in their original bid. This Board has an obligation and a duty to determine whether the bid, the four corners of the Covanta bid when it was submitted on September 13th, did the bidder meet the minimum financial qualifications, either itself -- we know it didn't -- or by the submission of a Schedule 2 guarantee -- we know it didn't do that either. That's the end of the ball game. They didn't meet the minimum financial qualifications. The case law which

Mr. Inglesino has cited is very clear that when a municipality or governing body asks for financial information, that's a material requirement under the bid specifications.

You not only asked for financial information, you set forth the criteria, the minimum criteria that a bidder had to meet to be considered an eligible bidder, and they didn't read it. Waste Management wasn't confused. Waste Management of New Jersey Inc. doesn't meet the minimum financial qualification, their parent company signed a guarantee. Right there. Signed, sealed and delivered. They did the same thing in 2005, or the last time this was bid.

This isn't a case of confusion by Covanta. This is a case of either not reading the specifications closely enough, or just ignoring the specifications. Regardless of which it was, they didn't meet the minimum financial qualifications.

The equipment certifications. This is just not a specification requirement. It's also involved a specific statutory requirement under the local public contracts law. Section 40A11-20 of the local public contracts law entitled "certificate of bidder showing ability to do the

job", reads as follows: "There may be required from any bidder submitting a bid on public work to any contracting unit duly advertised for in accordance with law a certificate showing that he owns, leases, or controls all the necessary equipment required by the plans specifications and advertisements under which the bids are asked for. And if the bidder is not the actual owner or lessee of any such equipment, his certificate, the bidders, shall state the source from which the equipment will be obtained and shall be accompanied by a certificate from the owner or person in control of the equipment definitively granting to the bidder the control of the equipment required during such time as may be necessary for the completion of that portion of the contract".

That's the local public contracts law saying, if you as a governing body want to determine and put in the specs a certificate requirement for the bidder to show that he has ability to perform, you can do so, and it gives you the language. Not coincidentally, in your specifications you provided that exact language. And it said it had to be submitted with the bid. And it said "each bidder must submit with its bid a

signed equipment certification stating that it owns, leases, or controls all the necessary equipment to accomplish the work described in the bid documents". Very clear. No ambiguity.

This bidder submitted no equipment certification, none with his name on it or its name on it. And the equipment in this job is all the equipment the transfer station, which is very substantial. And more critically, all the trucks and trailers. Just by way of example, we're purchasing 27 new power units and 68 new trailers for this job, a hundred percent dedicated to this job. We signed the equipment certification and we signed that we don't own it or lease it, we're controlling it through equipment purchases, here's the list of the equipment and here's who we're purchasing it from.

But then the certification goes on to say: "Should the bidder not be the actual owner or lessee of such equipment required, its certification, the bidder's certification, shall state the source from which the equipment will be obtained", they didn't do that for truck or trailers, because he didn't have any certification; "and, in addition, shall be accompanied by a signed

certification from the owner or person in control of the equipment required for the portion of the contract". The bidder didn't do that for the most important equipment component in this contract, the scores of trucks and the scores of trailers that are needed to do this job. All this stuff he submitted after the fact, about when he got his quotes from his transportation subcontractors, all the other stuff. He's basically saying all of this stuff should suffice for the equipment certification. It doesn't.

First of all, he's not the governing body, he doesn't make the rules, you make the rules, we comply with the rules. And the law is very clear, and it's in Mr. Inglesino's submissions, that if an equipment certification under this local public contracts law is required -- the first thing I read to you -- if that's required and it's not provided, a signed equipment certification, it's a material defect, it can't be cured. There is no ambiguity. If you don't have the facts and you don't have the law, which Covanta doesn't have, you confuse them -- pardon my expression -- with bullshit. And that's what they're trying to do to this Authority.

Just briefly on the Public Works Contract Registration Act. They suggest that's not a public works. The local public contracts law defines public works to mean "building, altering, repairing, improving, or demolishing any public structure or facility constructed or acquired by a contracting unit to house local government functions, or provide water waste disposal or other public infrastructures". Under the general conditions of our specifications, we have the obligation to repair the transfer station facility, and we have the obligation and are responsible for any damage or destruction to the transfer facility. So, if somebody knocks down a wall, one of the trucks, that's on us. That's why we have these big insurance requirements. It is a public works. And your specifications specifically require in the specifications that there must be compliance with the Public Works Contract Registration Act at the time of the bid.

Now, admittedly, you don't have to submit the certificate at the time of the bid. We did, they didn't -- well, they didn't because they don't have one. But, you did have to be registered. You've got a great staff, I checked it

on September 17th, 2012, they're not registered, no Covanta entity. None of the we's are registered. So they're not even an eligible bidder.

I will close, I'm not going to go over the other stuff our counsel mentioned, but there are a couple of critical material facts or legal things here. It's absolutely undisputed material bid defects cannot be cured or waived. Interesting case, I quote from this; "A bid that fails to comply with the material requirement of the specifications is non-conforming, and a non-conforming bid is no bid at all". That's what you have here from Covanta LP, no bid at all. They're not responsible, they're not responsive in many, many ways to your specifications. But my God, there might be a couple of million dollars lower, lower than our bid over the five years. That's true, and we all know finances are important to everybody today.

To start with, our bid will be saving this Authority approximately 25 million dollars. But more significantly, the case of Star 7 Concrete versus Lucas provides "economic savings can never justify the waiver of a material bid defect". You all want the lowest price possible. You do, and

you should as an Authority. But your legal duty and your legal obligation is to get the lowest price possible from a responsive bidder. In fact, if counsel and you choose to look at the definition of lowest price under the local public contracts registration act, it's a defined word. Lowest dollar amount that meets with the bidding units specifications. That's the lowest price. They're not the lowest price because they didn't meet the mandatory material requirements of the bid specifications.

We took pride in our bid submittal last time, and we have equal pride with that bid submittal this time. If anyone on this Board would take the opportunity to look at our submittal, you would get the feeling of the breath of our experience, our commitment, our desire, and our ability to perform this job. We're right for Morris County, and we I believe have earned the right to be awarded this contract. I urge you to do so. Thank you.

MR. DRUETZLER: Anybody else looking to comment? Okay. We will then -- seeing no one, we'll close the public comment period. And we're going to go into closed session, take a little

break, but I'll ask if there's a motion to go into closed session?

MR. MARAZITI: Mr. Chairman, I'd like to put on the record the correspondence that we have received, and I would perhaps take a minute to mark these. What I'm going to identify are the legal arguments that we received from various counsel. So, the first is a letter dated September 19th, 2012 that has been sent to Mr. Schweizer, Executive Director by William Fox, Junior, Esquire.

Next is a letter, forwarded letter, September 20, 2012 from Mr. Fox to myself forwarding an attachment of the September 19th letter together with a series of exhibits marked "A" through "R".

The next item is a letter dated September 20th to Mr. Schweizer from Mr. Fox.

And the next a letter dated September 21st from Mr. Fox to Mr. Schweizer, attached is an executive summary of bid defects in the Covanta bid.

The next letter is dated October 1st addressed to Mr. Schweizer from Mr. Fox.

Next is a letter dated October 4th

addressed to myself from Mr. Inglesino.

Next is a letter dated October 7th addressed to myself by Mr. Fox.

Next is a letter dated October 8th addressed to Mr. Schweizer by Pasquale Mascaro, Senior.

Next is a letter dated October 9th addressed to Mr. Schweizer by Mr. Oettle. That is the last item.

MR. DRUETZLER: Nothing else before we --

MR. MARAZITI: Nothing further.

MR. DRUETZLER: There is a motion to go into closed --

MR. PLAMBECK: Move.

MR. BARRY: Second.

MR. DRUETZLER: All in favor?

(Ayes)

MR. DRUETZLER: Okay, we'll going to take a five-minute break.

(Whereupon, this portion of the meeting is concluded at 9:27 p.m.)

C E R T I F I C A T E

I, CHRISTINA RESTUCCIA, a Court Reporter of the State of New Jersey, CERTIFY that the foregoing is a true and accurate transcript of the testimony that was taken stenographically by and before me at the time, place and on the date herein before set forth.

I DO FURTHER CERTIFY that I am neither a relative nor employee nor attorney nor counsel of any of the parties to this action, and that I am not financially interested in the action.

Notary Public of the State of New Jersey
My Commission expires November 14, 2016

TRANSCRIPT OF SPECIAL MEETING OF THE AUTHORITY
DATED OCTOBER 16, 2012

MORRIS COUNTY MUNICIPAL UTILITIES AUTHORITY

OCTOBER 16, 2012 - 7:00 P.M.

CONSIDERATION OF BIDS FOR THE COMBINED OPERATION OF THE TWO TRANSFER STATIONS, TRANSPORTATION OF SOLID WASTE TO FINAL DISPOSAL FACILITIES VIA OVER-THE-ROAD TRANSFER TRAILERS, AND DISPOSAL OF SOLID WASTE FROM THE MCMUA'S TWO TRANSFER STATIONS FOR A PERIOD OF FIVE YEARS

PUBLIC MEETING

.....

B E F O R E:

THE MORRIS COUNTY MUNICIPAL UTILITIES AUTHORITY

CHAIRMAN DRUETZLER

MR. BARRY

MS. SZWAK

MR. DOUR

MR. PLAMBECK

MR. PLATT

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MICHAEL WELCH
Covanta 4 Recovery

A L S O P R E S E N T:

GLEN SCHWEIZER, Executive Director

MR. MARAZITI: Good evening, everyone, I didn't know we were so popular.

THE CHAIRMAN: Counsellor, you have something you want to do?

MR. MARAZITI: Yes. The purpose of this meeting is to consider the action with respect to the bids that have been submitted to operate the transfer stations for four or perhaps five years.

The first thing I want to say is due to my failure to confirm that we would have a Court Stenographer here, it was too late for her to be here. We don't have one this evening; however, we do have a very sophisticated recording device in the middle of the table, and I understand it will pick us all up if we speak clearly and first identify who we are as we speak, and then we will have a Court Stenographer subsequently type up the activities at this meeting this evening.

I think the next order of business, I would recommend that we adopt a resolution to go into closed session for the purposes of my ability to advise you with respect to some developments that have occurred since the last

meeting of the MUA on October 9th, and to discuss with you some of the legal technical and financial issues that have been evident in the consideration of these bids.

THE CHAIRMAN: Okay. Is there a motion to go into a closed session.

A MEMBER: So moved.

ANOTHER MEMBER: Second.

(On roll call, all members voted in the affirmative.)

THE CHAIRMAN: Would you all step out for a minute.

(Off the record.)

(Back in session.)

THE CHAIRMAN: As you know, the last time we had a public meeting we asked people to make statements and you all did make statements. But I understand that issues were raised in the last week, and if I can be concise with those issues. I think Covanta raised some issues, so we will start with Covanta.

Please give your name and then go ahead.

MR. WELCH: Hi, my name is Mike Welch,

I am marketing vice-president for Covanta 4 Recovery, and my comment will be brief.

You will see when I get to the end, I will definitely be anxious to answer any questions that you might have about some of the documents that we did submit to the Authority during the past week. I am sure you have seen copies of them. I have submitted some of the documents that you were talking about during some of your sessions, and hopefully these will answer your questions.

I was in charge of putting this together for a bid, and I want to make a final statement and touch on what really is the most important part of our bid. We spent the last few weeks not only with the Authority and their solicitors and different vendors and everybody talking about irregularities and technical flaws, and this wasn't printed right, and this isn't on the right form, et cetera. I just wanted to bring everybody back just for a moment and talk about what we really believe is the most important part of not only the procurement, but also our bid submittal.

As you know, the procurement involves

the transfer of the waste, the transportation of the waste, and the disposal of the waste. All three of them very important. It is the disposal component which is the most important, by far. Not only is it important whether it is from an environmental perspective or other perspective, it is also important because disposal capacity is hard to find.

So I want you to just be thinking about that part of the three components of that, disposal is the most important, really, by far.

We have ten facilities that we own or operate within a hundred miles of this room. We read through the bid specifications and we decided that three of those ten would really fit best for the service we wanted to provide to the Authority. And you have either seen our bid submittal or seen summaries of it. There was a facility in Warren County, New Jersey, a facility in Union County, New Jersey, and a facility in Delaware County, Pennsylvania.

We also included in our bid two landfills. It is important -- it is an important distinction I will make in just a moment. I will tell you what was in our bid

submittal, and I know it is fresh in your memory since you have seen summaries of our bid, and I will tell you how, through a second look, the way we were going to provide or demonstrate the annual and daily capacities that you need.

So in this submittal we have our three plants, the two in New Jersey and the one in Pennsylvania, and the two Pennsylvania landfills. And if you add it up from the questionnaires that we submitted for those five facilities, if you add it up, what is the total annual tonnage that we are prepared to take at those facilities from Morris County, and by design, it came out to exactly 430,000 tons, which is what the bid specifications require.

The important thing that you really needed to look at, though, when you looked at the questionnaires for the three Covanta facilities were actually the amount of space that we have set aside as being available to take Morris County waste, if we needed to. We are very interested in distributing the waste among our three plants, and also to the landfills, but the way we put the bid together,

though, it made it clear that not only could the three Covanta facilities take all of the waste, but the three Covanta facilities, if you see some of the footnotes on some of the notations made on our questionnaire are prepared to take up to 700,000 tons a year of Morris waste.

You asked us to demonstrate 430 and we demonstrated the 430 with five facilities in our bid submittal, which really needs to focus on the fact that although we are very appreciative of the business relationship we have with the two landfill facilities, they are not really necessary for us to perform the contract as you need it to be performed. It is the three Covanta energy from waste plants which really are the linchpin of our proposal to you.

We submitted letters, not only the last week but even within the last few weeks since the bid opening. Letters clarifying our bid submission and also, just recently in the last week, letters pointing out serious defects in both the Mascaro and the Waste Management bids, serious enough, if you had a chance to look at

the letters, serious enough that they certainly are fatal to both of those submittals.

I will gladly answer any questions you have on the letters we have submitted. I would ask you to keep in mind as we set forth not only in our bid submittal, but in the correspondence since then that our submittal was compliant with the bid specifications in accordance with law, and has the lowest price. And please, don't forget, despite all of the last few weeks of again, all of the talk about irregularities and technicalities, and this "T" wasn't crossed, and this "I" wasn't dotted, Covanta with our facilities and the assurances that we can give you since we own and/or operate not only ten facilities in the region, but three in particular that are a perfect fit for Morris County.

Please keep in mind that that really is the most important part of the procurement. That is what we focused on up until the date of the bid submittal. Unfortunately, for the last few weeks, we have been focusing on, you know, paper just lying all over the place, and letters and correspondence, and accusations,

and all kinds of name calling, and you name it. So that is really what I want to say as a final statement.

I will be glad to answer any questions if you have any. That is what I had. Anything?

THE CHAIRMAN: Thank you.

The next person would be Waste Management.

MS. AYRES: Good evening. In the interest of time, I think --

THE CHAIRMAN: Give your name, please.

MS. AYRES: Sandra Ayres, Scarinci & Hollenbeck, attorneys for Waste Management.

I won't go into the critiques made by Covanta to Waste Management's bid. I think, certainly, MCMUA can see that with respect to responsiveness it is fully responsive.

I do want to address this issue raised. There seems to be a train out of the station of let's get Waste Management's bid disqualified by claiming incorrectly, that Capital World Investors is a ten percent owner of Waste Management of New Jersey's ultimate parent, Waste Management, Inc. Capital World

Investors, and that does not own any stock in Waste Management. That is an incorrect interpretation of a recent Schedule 13G filing made by Capital World Investors with the Securities & Exchange Commission, and in that filing, Capital World Investors is deemed to be a beneficial owner of approximately 10 percent of Waste Management, Inc.'s stock by virtue only of its advisory capacity to various companies that in turn own that stock. And I think if you would go -- let me backtrack a minute and start out by saying and laying the groundwork by saying that your bid specifications, like the State law, require disclosure of any stockholder in Waste Management, Inc. owning ten percent or more of Waste Management, Inc.'s stock, that is, any stockholder.

Waste Management of New Jersey, in its bid, certified to the accuracy of its disclosure statement that it disclosed no such stockholder because there is none. They are the facts, and we have a certification, if you would look at the registry of stockholders, it has been examined by Waste Management corporate

secretary in Houston, and there is no Capital World, Inc., Capital World Investors ownership of stock. To be a stockholder you have to have record ownership of the stock. You have to be an owner of record. Capital World Investors is not the owner of record of any Waste Management, Inc. stock.

Let me just turn for a minute to Schedule 13G. It refers to or deems Capital World Investors to be a beneficial owner and that term is very important because if you go to SEC regulations you will see that entities they deem to be beneficial or have beneficial ownership in this case of what they call dispositive power, which means having power over the disposal of the stock, is not necessarily a stockholder. It includes many more entities, investment companies in particular, that have different or more limited interest in the stock by agreement. Buy and sell kind of power.

If you go to New Jersey Law and do a search, you will find that New Jersey Legislature has used beneficial ownership as a category for reporting purposes, I can't count

the number of times. They did not use beneficial ownership as the requirement for disclosure in a public bid disclosure, they used stockholders. They knew what they were saying. They knew the distinction and they used stockholders.

In this case, as I said, and I keep repeating because it is accurate, Capital World Investors is not a stockholder in Waste Management, Inc., and therefore their name was not required to be disclosed on a disclosure statement. It required only disclosure of the names of stockholders owning ten percent or more of Waste Management, Inc. stock.

Now, what Covanta has said is it must be true because MCIA recently rejected a Waste Management bid claiming that CWI, Capital World Investors, owns ten percent of Waste Management. Well, we don't know why MCIA decided that, because they haven't shared that information with us. But we do know that counsel for an opposing bidder submitted the schedule G, and we suspect it was the same kind of misinterpretation of Schedule G. Nowhere is Schedule G does it say CWI is a stockholder in

Waste Management, Inc., but there are no facts to support MCIA's conclusion, or at least we assume they are relying on a misinterpretation of Schedule G, and I will tell you it was contained in a letter this afternoon, Waste Management is filing papers in the Mercer County Superior Court to challenge that conclusion that has no basis in fact. And I would urge you not to reach the same conclusion yourself or the same incorrect conclusion, I should say, because as we have submitted in our letter, it is patently clear, and if you go to the SEC regulations in the definitions of a beneficial ownership, you will see it is patently clear that you can be a beneficial owner under SEC regulations without being a stockholder, and in this case CWI is not a stockholder. So there is no reason to even question the accuracy of Waste Management of New Jersey's disclosure, and we would urge you not to do so.

Again, I won't go into it, I think you can see by Waste Management's overall bid that those reviewing the bid will see there are no material deficiencies at all. There are no

deficiencies, but there are no material deficiencies in Waste Management's bid, and we do believe at this point they are the lowest responsible bidder.

We have pointed out, Mascaro has pointed out, certainly numerous deficiencies which they claim with respect to Covanta's bid, many of which we agree with, not all, but many of which we agree are material and should cause rejection of Covanta's bid.

We have also submitted a letter with respect to Mascaro's bid, because Mascaro did not include in its bid the required certified financial statements. It did not include in its bid the financial information that would show that it met three of the four criteria as required for minimum qualifications, financial qualifications, those, as we indicated in the prior letter recited line and verse to the cases and the case law that has definitively held the failure to submit required financial information is absolutely a material defect in a bid, requiring its rejection.

So we do believe at this point, as I said, Waste Management of New Jersey is the

lowest responsible bidder, and there is no reason for not awarding the contract to Waste Management of New Jersey. If you have any questions -- oh, incidentally, if you want to call MCIA, Mr. Maraziti, and ask them what did you base that conclusion on, I am sure you will find out Schedule G and what we maintain is an absolute misinterpretation of the beneficial ownership terminology used by SEC.

MP. MARAZITI: I don't want to become a witness in your lawsuit.

THE CHAIRMAN: Any questions? Thank you.

MR. FOX: If it please the Board, William Fox for J.P. Mascaro & Sons. We are here tonight with our company president, Pat Mascaro, and a number of company representatives. I, too, will be short.

The first, just to address a few of the items that were mentioned by the Covanta representative, he made reference to irregularities and technical flaws. I am not going to reiterate what was discussed at the last meeting, but I strongly suggest to the Board that what was discussed there as it

relates to the Covanta bid were not irregularities or technical flaws, but rather a material and substantive defects.

Disposal is an important component of the MCMUA contract. Tonight their representative made reference that in their bid submission with respect to the facilities they designated, each one on the facility questionnaire form submitted to a certain amount of tonnage that they anticipated would be received by their facilities. That tonnage added up to the bare minimum of 430,000 tons.

The Mascaro tonnage as committed to on the facility questionnaire forms added up to in excess of 900,000 tons per year. I won't go into detail, but there have been a number of letters submitted, but I find it extremely interesting that Covanta now is attacking in written communications the landfill that it designated for the receipt of MCMUA waste in its own bid. I just don't -- that is incomprehensible to me.

Our bid, I believe, is fully responsive to all of the material requirements of the bid specifications. The Keystone Landfill

submitted permit information from the commitment letters, they filled out the landfill questionnaire forms, specifically committing to 2,000 tons of waste per day. MCMUA Waste. They set forth their permitted tonnage, both maximum and daily, from the four corners of the documents, this Authority has everything it needs with respect to disposal in the detailed Mascaro bid, and as I said, the commitment there were three facilities in excess of 900,000 tons per year.

The Waste Management at the very end was probably the only one who didn't submit a letter until the very end, and when they did submit it, we said okay, we are fine. They didn't say anything about us, and then boom, right there they say our bid is not responsive with respect to meeting the minimum financial requirements.

I detailed that, I referenced that in detail in my letter to Mr. Maraziti today, but just briefly, this Board should know that Mascaro submitted its condensed audited financial statements with its bid which demonstrates that it meets the minimum

financial requirements for the MCMUA contract. It meets the $29,100,000 net worth, it meets the one to one current ratio, and it meets the cash of five million dollars. The information that was submitted and later clarified with respect to the Mascaro financial shows cash currently in excess of $74 million. Additionally, as it relates to the minimum financial qualifications, Mascaro submitted an independent CPA report from a certified public accounting firm, and the partners are here tonight, and based on their review and analysis of Mascaro's audited financial statement, they certified based on the applicable accounting standards which are referenced in the report that Mascaro meets all four of the minimum financial qualifications.

The one item which Mascaro submitted with its bid is the current assets and for the one year I think they listed it for all four years, but the last year I think was 145 million. The current assets includes all of our assets including cash and cash equivalents. It responds to a question by the MCMUA. They said okay, you set forth all of your current

assets, can you break down the components for us, which was a clarification of an existing line item in the original bid submittal. It was not new information, it was just saying what are the components of this 145? What are the components of this 134 million for each fiscal year, which we did. And those components show cash -- I think it was 74 million, 68 million, 60 some million, so Mascaro clearly meets all of the financial, minimum financial requirements of this bid.

I don't know who among this Board has seen our bid, but I am actually quite proud of it because I put it together, and I think it is extremely comprehensive and responsive to the MCMUA solicitation.

We would very much welcome the opportunity to serve your Authority in this County. We have the ability to do so. We have the expertise, and we will be doing so with all new equipment. We just need a contract award. Thank you.

THE CHAIRMAN: Anybody else who else who wishes to address the MUA? Yes, sir.

MR. MASCARO: My name is Pat Mascaro,

and I am the president of J.P. Mascaro & Sons, and you have heard a lot of discussion over the past two meetings, and I just want you to know from my vantage point I believe the most important component in this contract, in this equation, is Morris County. You are the most important part of this equation. You deserve first class service, and if we receive the privilege to serve this community, this County, that is exactly what you will get from J.P. Mascaro & Sons, and we thank you for the opportunity to bid.

THE CHAIRMAN: Anyone else wish to make a comment to the Board? Okay. Seeing no one else, I will close this public portion and we will go back into executive session.

MR. MARAZITI: Before we do that, I would just like to put on the record the correspondence that has been received and been referred to in some of these comments so it is part of the record.

First is a letter dated October 12, 2012 -- all these are 2012 -- addressed to Glen Schweizer, the executive director, and from a partner of the BDV Certified Public

Accountants; next is a letter dated October 15th, also addressed to Mr. Schweizer from Michael Kessler of Waste Management; next is a letter also dated October 15th, also addressed to Mr. Schweizer, and once again from Mr. Kessler.

Next is a letter dated October 15th addressed to Mr. Schweizer from Ken Polton [ph.] of Sills, Cummis on behalf of Covanta; a letter dated October 16th, addressed to myself by Mr. Fox; and finally, a letter dated October 16th addressed to Mr. Schweizer from the president of Keystone Landfill whose name is Louis DeNaples.

Mr. Chairman, those are the documents we have received since the last meeting.

THE CHAIRMAN: Is there anything else? The Board might want to ask a question before we go into executive session. Okay. We expect when we come out of executive session we will be making a decision, and when we do, we will award the contract this evening. So is there a motion to go into executive session.

A MEMBER: So moved.

ANOTHER MEMBER: Second.

MR. MARAZITI: The purpose of the executive session is set forth in the resolution on the table to discuss this issue.

THE CHAIRMAN: Yes. Instead of the reading the whole thing, we will be referring to that resolution. All in favor of going into executive session say aye.

(On roll call, all members voted in the affirmative.)

(Out of executive session.)

THE CHAIRMAN: On behalf of the Board I want to thank all of you for being here this evening, and thank all of you for submitting bids to transport Morris County's and dispose of Morris County's solid waste. I know all of you have put in a lot of time in your submittals, and the Authority has done the same thing reviewing your submittal. We have had a lot of questions here amongst our Board members, they have had a lot of questions to our staff and to our consultants here, and of course I have been through a number of these, these are always difficult decisions, big decisions, but decisions that have to be made.

It was certainly one thing about the

people in the solid waste business, they always have excellent attorneys, so we have to weigh those arguments back and forth, and that is always a difficult thing. But we have done that. We have looked at it. We have questioned it. We have questioned our staff back and forth, and we have come to a conclusion.

Is there anybody on the Board who wants to add anything to my statement or anything like that? Okay.

A MEMBER: I would like to move a resolution by title. This resolution is awarding a contract to J.P. Mascaro & Sons for the combined operation of the two transfer stations, the transfer station and solid waste and final disposal facilities by over the road transfer trailers and disposal of solid waste from the Morris County Municipal Utilities Authority two transfer stations for a period of four years with a single one year renewal extension period.

THE CHAIRMAN: Is there a second.

A MEMBER: Second.

THE CHAIRMAN: Any discussion?

Roll call.

(On roll call, all members voted in the affirmative.)

THE CHAIRMAN: I don't believe there is any other business to come before us. Once again, we thank you all for coming tonight. Motion to adjourn.

A-2806-12T1
A-2808-12T1

WASTE MANAGEMENT OF NEW JERSEY, INC., Plaintiff/Appellant, vs. MORRIS COUNTY MUNICIPAL UTILITIES AUTHORITY and SOLID WASTE SERVICES, INC., d/b/a J.P. MASCARO & SONS, Defendants/Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-002806-12T1 A-002808-12T1 Civil Action
COVANTA 4RECOVERY, L.P. Plaintiff/Appellant, vs. MORRIS COUNTY MUNICIPAL UTILITIES AUTHORITY, SOLID WASTE SERVICES, INC., d/b/a J.P. MASCARO & SONS, and WASTE MANAGEMENT OF NEW JERSEY, INC., Defendants/Respondents.	On Interlocutory Appeal From the Superior Court of New Jersey, Law Division, Morris County Docket Nos. MRS-L-2627-12 MRS-L-2868-12 Sat Below: Hon. Thomas L. Weisenbeck, A.J.S.C.

BRIEF AND APPENDIX OF DEFENDANT-RESPONDENT SOLID WASTE SERVICES, INC. d/b/a J.P. MASCARO & SONS IN OPPOSITION TO PLAINTIFFS-APPELLANTS' INTERLOCUTORY APPEALS

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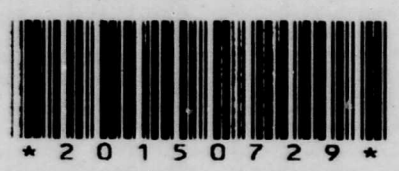

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JPMDa	Appendix of Defendant-Respondent Solid Waste Services, Inc., d/b/a J.P. Mascaro & Sons.
WMb	Appellate Brief of Plaintiff-Appellant Waste Management of New Jersey, Inc.
Cb	Appellate Brief of Plaintiff-Appellant Covanta 4Recovery, L.P.
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PRELIMINARY STATEMENT

Defendant-Respondent Solid Waste Services, Inc. d/b/a J.P. Mascaro & Sons ("Mascaro") submits this brief in opposition to the interlocutory appeals filed by Plaintiffs-Appellants, Waste Management of New Jersey, Inc. ("Waste Management") and Covanta 1Recovery, L.P. ("Covanta") (collectively, "Plaintiffs").

The narrow issue in this interlocutory appeal concerns the trial court's denial of Plaintiffs' applications for the issuance of a preliminary injunction staying the award and execution of a public contract for solid waste disposal services for the Morris County Municipal Utilities Authority ("MCMUA"). Following a hearing on the issue, where the trial court took testimony of competing experts, the trial judge ruled that Plaintiffs failed to demonstrate a likelihood of success on the merits - an essential element necessary for the issuance of such restraints. As a result, the court denied Plaintiffs' application for restraints.

Trial court determinations on whether to grant injunctive relief are granted great deference, particularly when the decision is based on credibility determinations, as the trial court did here. Generally, to overturn such a decision, the party challenging the ruling (here, the Plaintiffs) must demonstrate that the trial court clearly abused its discretion in denying the restraints. Under this standard, Plaintiffs must

show that the decision was made without a rational explanation. When the trial court makes credibility determinations (as was done here), the burden is heightened for those seeking to challenge the decision. As will be fully demonstrated herein, Plaintiffs fail to meet that burden.

The substantive issue raised by Plaintiffs is fairly straightforward - whether the financial information submitted by Mascaro was sufficient to satisfy the "certified financial statement" requirement in the bid specifications. Before accepting Mascaro's bid, the MCMUA conducted its own review of the information. The MCMUA's treasurer and outside counsel confirmed that the balance sheet, income statement, and independent auditor's report with attestation demonstrated that Mascaro met the financial requirements in the bid specifications. The MCMUA confirmed that there was no requirement that the financial information be audited.

The trial court carefully considered the arguments of Plaintiffs and even required the parties to provide reports from accounting experts on the issue. Moreover, the court took testimony from the parties' three accounting experts before rendering a decision on the application for injunctive relief. After this fact finding, the trial court held that the Mascaro's financial submissions provided the MCMUA with "substantial evidence" to support its decision to award the bid to Mascaro

and that the MCMUA's conduct was not arbitrary, capricious or unreasonable. Therefore, the trial court concluded that Plaintiffs had not demonstrated by clear and convincing evidence a likelihood of success on the merits.

In reaching this conclusion, the trial judge found Mascaro's expert's testimony to be credible and the testimony of the Plaintiffs' experts to be unpersuasive. Indeed, Mascaro's expert testified, and the trial court found, that the nature and extent of the financial information provided by Mascaro was the best and most reliable financial information that could have been submitted. The trial court specifically rejected the testimony of Plaintiffs' experts: "While both Covanta's expert…and Waste Management's expert…opined that the term ['certified financial statement'] is synonymous with 'audited financial statement,' neither provided an authority for that proposition." Pall.

As will be fully demonstrated herein, Plaintiffs have not met their heavy burden to overturn the trial court's well-reasoned decision. While Plaintiffs have attempted to argue that the MCMUA intended to have bidders submit an "audited financial statement" even though the specifications expressly state "certified financial statement," there is zero support for this claim in the record or in the law. Their appeals should be denied.

COUNTERSTATEMENT OF FACTS AND PROCEDURAL HISTORY

A. The MCMUA Request for Bids and Contract Award

1. The Financial Requirements of the Bid

On July 9, 2012, the MCMUA issued a Request for Bids ("RFB") seeking sealed bids for the operation of two solid waste transfer stations located in the County of Morris. Pa168. Specifically, the bid called for a four-year contract, with a one-year option, for the operation of the two transfer stations located in Parsippany-Troy Hills Township and Mount Olive Township as well as the transportation and disposal of all solid waste received at the transfer stations (the "Contract"). Ibid.

Paragraph Fourteen of the questionnaire included as part of the RFB (the "Questionnaire") a request that each bidder provide "[a] certified financial statement of the bidder. . .." Pa164.[1] The RFB did not define the term "certified financial statement." It did, however, state that "[i]n the case of terms not specifically defined herein, said terms shall have the meaning normally ascribed to them in the trade, profession or business with which they are associated." MCMUADa10. The RFB also

[1] Question #14 included in the Statement of Bidder's Qualifications, Experience and Financial Ability specifically states: "Supply the most recent Annual report, as required to be filed with the Department of Environmental Protection, if any, and the certified financial statement of the Bidder and/or, if applicable, the Guarantor for each of the three (3) recent fiscal years." MCMUADa41

required each bidder to demonstrate compliance with a series of financial criteria known as Minimum Financial Qualifications (the "Minimum Financial Qualifications"). Pa166. Specifically, the Minimum Financial Qualifications required compliance with three of the four following criteria:

> 1. Net worth for each of the three (3) recent fiscal years of $29,100,000 or more.
>
> 2. The ratios of net cash flow from continuing operations to annual debt (net interest and principal) for two (2) out of the three (3) most recent fiscal years were at least 1:1.
>
> 3. The "current ratio" for two (2) out of the three (3) most recent fiscal years were at least 1:1.
>
> 4. Cash and/or cash equivalent of at least $5,000,000 on the date of its most recent audited financial statement.
>
> [Pa166.]

Notably, the Specifications do not state what documents are necessary to demonstrate compliance with the Minimum Financial Qualifications and certainly do not require audited or other financial statements to demonstrate compliance.

2. Mascaro's Response to the Request for Bids

In response to the RFB, Mascaro provided the following financial documents:

> 1. Condensed financial information obtained from Mascaro's audited

financial statements as of March 31, 2010, and March 31, 2011.

2. Condensed financial information obtained from Mascaro's pre-audited financial statements as of March 31, 2012.

3. A letter from Eric R. Stephen, Partner at the accounting firm, BBD, LLP ("BBD"), dated September 7, 2012, indicating that BBD, LLP was "in the final stages of the March 31, 2012, audit and expect to issue our report within 30 days."

4. A letter from Eric R. Stephen, setting forth BBD's experience and familiarity with the Minimum Financial Qualifications; and

5. An Independent Accountant's Report submitted by BBD indicating Mascaro had complied with the Minimum Financial Qualifications.

[Pa178-Pa183.]

The condensed financial information included, among other things, a balance sheet and income statement. Pa179-Pa180. Furthermore, the Independent Accountant's Report was "conducted in accordance with attestation standards established by the American Institute of Certified Public Accounts…." Pa182. The Report states that "[i]n our opinion, [Mascaro] complied, in all material respects, with all of the aforementioned requirements for the three years ended March 31, 2013. Pa182.

3. The Unsealing of Bids and Covanta's Defective Bid

On September 13, 2013, the MCMUA received sealed bids from seven bidders. Pa168. The RFB contained three (3) alternatives on which to bid, designated "Alternate A," "Alternate B," and "Alternate C," respectively. Pa168. Of the seven bids received, six were bids for "Alternate A," including those bids submitted by Mascaro, Waste Management and Covanta. Pa168. The MCMUA determined that it was in the best interest of the public to proceed with "Alternate A," which provided for the "Combined Operation of the Two Transfer Stations, Transportation of Solid Waste to Final Disposal Facilities via Over-The-Road Transfer Trailers, and Disposal of Solid Waste from the MCMUA's two transfer stations for a period of four (4) years, with a single one-year renewal period." The following five-year total prices were received from the three lowest bidders submitting bids on Alternate A:

(1)	Covanta	$131,004,000
(2)	Mascaro	$134,380,000
(3)	Waste Management	$137,952,000

[Pa168-Pa169.]

Following receipt of the bids, on October 16, 2012, the MCMUA issued a thorough resolution, with exhibits, awarding the Contract to Mascaro (the "Resolution"). Pa167. By the Resolution, the MCMUA rejected Covanta's bid as non-responsive

and invalid. Pa173. Following the analysis of Covanta's bid by MCMUA members and professionals, it was determined that Covanta's bid must be rejected as non-responsive and invalid due to certain non-waivable, material defects. Pa173.

By letter dated October 16, 2012, MCMUA Treasurer, Larry Kaletcher (the "Kaletcher Letter") found that Covanta submitted no financial documents. Instead, it supplied 10-K reports filed with the SEC for its parent company. Covanta's bid submission omitted a financial guarantee statement for the parent company, rendering its bid materially defective. Pa197.

By letter dated October 16, 2012, Joseph J. Maraziti (the "Maraziti Letter") indicated that the defects in Covanta's bid stemmed from, among other things, a failure to comply with the Minimum Financial Qualifications. Pa203. The Maraziti Letter reiterates the findings in the Kaletcher Letter regarding Covanta's providing only consolidated financial statements of Covanta Holding Corporation, its parent corporation (the "Covanta Holding Statements"). Pa204. The submission of the Covanta Holding Statements was not, itself, a defect. Rather, Covanta's failure to submit a Guarantor Agreement in conjunction with the Covanta Holding Statements rendered Covanta's bid materially defective. Pa204-Pa206. In addition, the Maraziti Letter identified other material defects in Covanta's bid, including the failure to provide: (1) equipment certifications

at time of bid; (2) transportation subcontractor annual reports; and (3) proof of diesel retrofit compliance. Pa207-Pa209.

4. The MCMUA Review of Mascaro's Financial Records

As a result of the non-waivable defects found in Covanta's bid, Mascaro's bid was reviewed by the MCMUA, as it was the second-lowest bid received for "Alternate A." After reviewing documents submitted by Mascaro in connection with the Minimum Financial Qualifications, Kaletcher determined "that [Mascaro] meets all four of the minimum financial requirements and satisfies question[] #14 on the Questionnaire." Pa198. Kalethcer's determination was based on observations regarding the financial documents submitted by Mascaro:

> At the time of bid it was readily determinable that [Mascaro's] balance sheet and income statement submission for the last 3 years satisfied requirements #1 and #3 of the Minimum Financial Qualifications and question #14 on the Questionnaire . . .
>
> [Pa197.]

During its evaluation, the MCMUA inquired regarding the details of Mascaro's financial submissions:

> Based on the financial information provided by [Mascaro] at the time of bid, further clarification on cash flow, annual debt and cash/cash equivalents was requested pursuant to the [MCMUA's] right to do so pursuant to page twelve of the Information for Bidders, via a faxed letter from Glenn Schweizer on October 5, 2012.
>
> [Ibid.]

Mascaro promptly responded to this request, providing confirming financial entries for the three years prior that it had cash or cash equivalents over $62 million -- far exceeding the minimum required. Pa187. Accordingly, the MCMUA confirmed that Mascaro also complied with requirements #2 and #4. Pa197-Pa198.

Finally, the Kaletcher Letter addressed Mascaro's compliance with question #14, as included in the Questionnaire:

> Regarding question #14 on the [Questionnaire] the MCMUA received 2 years of audited financial statements from [Mascaro's] CPA, BBD, LLP, who has audited [Mascaro's] financials since 1977. **As audited financials, this information is examined at a higher level than a certified financial statement.** The financial date from the most recent fiscal year ending 3/31/2012 was compiled and reviewed, however the actual audit was not yet completed at the time of bid. An Independent Accountants Report from the certified public accountant for [Mascaro] dated September 7, 2012, which ". . . was conducted in accordance with the attestation standards established by the American Institute of Certified Public Accountants . . .", and reflects the knowledge based on decades of conducting audits for the company states that [Mascaro] complies with all of the Minimum Financial Requirements on Schedule 3 of the bid specification.
>
> [Pa197 (emphasis added).]

The Maraziti Letter similarly endorsed Mascaro's bid as being responsive, stating:

> Further, based upon my own review as General Counsel to the Authority, I conclude that the bid of J.P. Mascaro & Sons does not contain any material deficiencies and that it met all the legal requirements set forth in the 2012 Bid for [the Contract].

By operation of the Resolution, the MCMUA authorized its Executive Director to enter into the Contract with Mascaro for a four-year term, with a one-year renewal extension. Pa173. The Resolution formally rejected the bids of all unsuccessful bidders, including Covanta and Waste Management. Ibid.

B. Procedural History Before the Superior Court of New Jersey, Law Division, Morris County

1. The Waste Management Verified Complaint, the Covanta Verified Complaint, and Applications for Injunctive Relief

On or about October 23, 2012, Waste Management filed a Verified Complaint and Order to Show Cause with Temporary Restraints (the "Waste Management Verified Complaint") in the Superior Court of New Jersey, Law Division, Morris & Sussex Vicinage. Pa143-Pa153. The Verified Complaint, among other things, challenged the award of the Contract to Mascaro on the basis that Mascaro's bid was deficient for failing to provide the requisite financial information called for in the RFB. Pa146. Waste Management's proposed Order to Show Cause sought to enjoin and restrain Defendants from:

> A. Signing or implementing the Contract; and

B. Acting upon or continuing with the award of the Contract to [Mascaro] pursuant to the Resolution;

C. Performing any work in connection with the Contract, including but not limited to [Mascaro's] purchase of the necessary equipment to perform the Contract, or making any payments on the Contract to [Mascaro] pursuant to the prices in [Mascaro's] bid in response to the RFB for the Contract.

[JPMDa2-JPMDa3.]

On or about November 5, 2012, Covanta filed a Verified Complaint and Order to Show Cause with Temporary Restraints, similarly challenging the award to Mascaro and seeking similar temporary restraints (the "Covanta Verified Complaint"). Pa4; see also JPMDa7-JPMDa11.

2. Oral Argument on Plaintiffs' Applications for Preliminary Injunctive Relief

On November 8, 2012, the parties appeared before the Hon. Thomas L. Weisenbeck, A.J.S.C. for oral argument on both Verified Complaints. Pa24. On November 15, 2012, Judge Weisenbeck entered an order (the "November 15, 2012 Order") staying the proceedings pending the submission of expert reports addressing the following issues:

1. The meaning normally ascribed in the accounting profession to the term "financial statement;"

2. The meaning normally ascribed in the accounting profession to the term

"certified" when used in the term "certified financial statement;"

3. Whether one can determine from the "Condensed Financial Information" submitted by Mascaro with its bid on or about September 13, 2012, whether Mascaro met the Minimum Financial Qualifications set forth in the "Information for Bidders and Requirements of Bid" in the Request for Bids at page 1B-11;

4. Whether one can determine from the entirety of the Statement of Bidders, Qualifications, Experience and Financial Ability set forth at Tab 3E, which consists of two letters from Eric R. Stephen to Glenn W. Schweizer, dated September 7, 2012, the Independent Accountant's Report and the "Condensed Financial Information" submitted by Mascaro with its bid on or about September 13, 2012, whether Mascaro met the Minimum Financial Qualifications set forth in the "Information for Bidders and Requirements of Bid" in the Request for Bids at page 1B-11;

5. Whether the "Condensed Financial Information" submitted with Mascaro's bid constitutes a financial statement; and

6. Whether the financial package in its bid, which consists of two letters from Eric R. Stephen to Glenn W. Schweizer, dated September 7, 2012, the Independent Accountant's Report and the "Condensed Financial Information" was the equivalent of a certified financial statement.

[Pa24-Pa25.]

The November 15, 2012, Order further required the parties to produce their accounting experts at a hearing scheduled for November 29, 2012, to provide testimony regarding the foregoing issues raised in the Verified Complaints. Pa27.

3. The Sobel Report and Findings Regarding Mascaro's Compliance with the RFB

Following entry of the November 15, 2012 Order, Mascaro retained Alan D. Sobel, CPA, MST, to provide a report and present testimony regarding the November 15, 2012 Order. Pa404. In connection with this matter, Sobel authored a report, dated November 27, 2012 (the "Sobel Report"), detailing his opinions regarding the issues raised in the November 15, 2012 Order. Pa401-Pa422.

The first issue addressed in the Sobel Report was the meaning normally ascribed to the term "financial statement" in the accounting profession. Pa408. Sobel's opinion regarding the accepted definition of "financial statement" was informed by the Generally Accepted Accounting Principles ("GAAP") established by the Financial Accounting Standards Board ("FASB") -- the organization designated to produce such accounting standards for private-sector organizations. Ibid. The Sobel Report further explains that the FASB Accounting Standards Codification ("Codification") is the source of authoritative GAAP recognized by the FASB applicable to nongovernmental

entities when preparing and issuing financial statements in accordance to GAAP. Pa409. The Codification contains a Master Glossary of Codification (the "Master Glossary") which includes approximately 1600 defined terms. Ibid. The term "financial statement" is not included in the Master Glossary, nor is such a discussion included in the Codification. Ibid.

Due to the absence of such a definition, Sobel consulted the FASB's Conceptual Framework, noted as the "highest level of non-authoritative guidance that comprehensively addresses a definition." Pa410. Sobel also looked to the Statements of Financial Accounting Concepts ("SFAC"), "a series of publications providing non-authoritative guidance issued by the FASB," and intended "to set forth objectives and fundamental concepts that will be the basis for development of financial accounting and reporting guidance." Ibid. The SFACs indicate the "'objective of general purpose financial reporting is to provide financial information about the reporting entity that is useful to existing and potential investors, lenders, and the other creditors in making decisions about providing resources to the entity." Pa410. While financial statements are recognized as "'a principal means of communicating financial information to an outside entity,'" a review of the SFACs failed to reveal "authoritative requirements regarding the presentation of an

individual financial statement." Pa410-Pa411. The Sobel Report explains:

> There is such a broad set of circumstances under which the information communicated by a financial statement may be required, and there are many options available based on the needs of the company and the end-user, that it would be impossible to specifically define requirements that would suit all parties.
>
> [Pa411.]

Despite the lack of any formal definition of "financial statement" within the Codification, Master Glossary, or SFACs, SFAC No. 6 does define 10 elements "'that are directly related to measuring performance and status of an entity.'" Ibid. These elements include: assets, liabilities, equity or net assets, investments by owners, distributions to owners, comprehensive income, revenues, expenses, gains, and losses. Ibid. After evaluating the aforementioned documents, the Sobel Report defines the term "financial statement" as follows:

> The meaning normally ascribed in the accounting profession to the term **"financial statement" would be any individual schedule or statement** which would provide the reader the ability to understand the financial condition of or the income producing ability or the cash flows of the entity being reported on **in whatever detail the preparer and user deems appropriate for the circumstances**.
>
> [Pa412 (emphasis provided).]

Based on this definition, the Sobel Report identified two documents produced as part of Mascaro's Condensed Financial Information that satisfactorily serve as "financial statements." Ibid. The first responsive document is a statement of financial condition, commonly referred to as a balance sheet. Ibid. A balance sheet "is a financial statement and shows a 'snapshot' of a company's assets, liabilities, and owners' equity at a single point in time." Pa411. The second responsive document is a statement of operations, commonly referred to as an income statement. Pa412. The income statement "is intended to provide information on a company's revenues, expenses, and net income over an operating cycle, typically 12 months or a shorter period for interim reporting. The main categories of the [income statement] for a private company include revenues, expenses, other income or expenses, and net income." Ibid. Based on Sobel's evaluations, Mascaro's Condensed Financial Information contained both a balance sheet and an income statement, and as such constituted a "financial statement." Ibid.

The second issue addressed by the Sobel Report was a determination of "the meaning normally ascribed in the accounting profession to the term 'certified' when used in the term 'certified financial statement.'" Ibid. The Sobel Report noted that the term "certified" is not used, nor defined, in either the Codification, or in non-authoritative guidance issued

by the FASB. Pa413. In addressing this issue, Sobel also conducted extensive research of "all non-SEC and SEC applicable professional standards." Pa415. After evaluating the applicable private and public accounting standards, Sobel reached the following conclusion regarding the use of the term "certified" in the accounting profession:

> [I]t is unequivocal that the term 'certified' does not have a normal meaning in the accounting profession related to private companies and any current use in the accounting profession related to public companies. . .
>
> Based upon the information above, it is my professional opinion that **there is no meaning normally ascribed** in the accounting and auditing standards and therefore the accounting profession to the term "certified" when used in the term "certified financial statement" for private companies and public companies.

[Ibid. (emphasis provided).]

Next, the Sobel Report considers whether one could determine that Mascaro met the Minimum Financial Qualifications based on the information provided in the Condensed Financial Information. Pa415. In answering this question in the affirmative, the Sobel Report specifically indicates that "it is reasonably evident that cash and cash equivalents are included in [Mascaro's] current assets and exceeded $5 million as of [Mascaro's] most recent audited financial statement." Pa418.

The fourth issue addressed was whether it can be determined from the entirety of the documentation submitted by Mascaro in response to the RFB, including the Condensed Financial Information, two letters from Eric R. Stephen to Glenn W. Schweizer, dated September 7, 2012, and the Independent Accountant's Report issued by BBD, LLP (the "BBD Report"), that Mascaro met the Minimum Financial Qualifications. Ibid. In answering this question in the affirmative, the Sobel Report focuses on the reliability of the BBD Report in providing the MCMUA with proof that Mascaro complied with the Minimum Financial Qualifications. Pa420. After discussing the merits of the BBD Report, Sobel concluded that:

> [The BBD Report] **is the best and most objective form of proof** that Mascaro could have provided to the MCMUA that [Mascaro] complied with the Minimum Financial Qualifications. BBD's attestation of Mascaro's compliance is, in fact, a higher level of proof than submission of audited financial statements because the scope of this attest engagement was specifically designed to evaluate Mascaro's compliance with the Minimum Financial Qualifications, something that is not accomplished with an audit.
>
> [Ibid. (emphasis provided).]

After reiterating that the Condensed Financial Statement did, in fact, constitute a financial statement, the Sobel Report addressed whether the entirety of the documentation submitted by Mascaro, including the Condensed Financial Information, two

letters from Eric R. Stephen to Glenn W. Schweizer, dated September 7, 2012, and BBD Report was the equivalent of a certified financial statement. Pa421. Included in this documentation was a document entitled "Statement of Bidder's Qualifications, Experience and Financial Ability Affidavit" (the "Statement"). The Statement was signed by Mascaro's President in the presence of a notary. Sobel concluded that "the signed and notarized [Statement] is, in my opinion, clearly a certification that covers the financial information submitted by Mascaro, including specifically the condensed financial information." Ibid. As a result, the Statement, in tandem with the BBD Report, the Condensed Financial Information, and the two letters from Eric R. Stephen to Glenn W. Schweizer, dated September 7, 2012, constitutes the equivalent of a certified financial statement in accordance with the RFB. Ibid.

4. Judge Weisenbeck's December 12, 2012, Order and Written Opinion Denying Plaintiffs' Application for an Interlocutory Injunction

On November 29, 2012, the trial court heard testimony from the parties' experts and received their expert reports into evidence. Pa4. Oral argument on the temporary restraints application was concluded on December 5, 2012. Ibid.

By order entered on December 12, 2012, Judge Weisenbeck denied Plaintiffs' application for an interlocutory injunction. Pa1-Pa2. In a written opinion (the "December 2012 Opinion"),

the court noted, "Plaintiffs contend that Mascaro failed to submit a 'certified financial statement' as requested by the RFB. The Court rejects this contention." Pa11.

In reaching its decision, the trial court was informed by the expert reports and testimony provided by the parties' respective accounting experts. Covanta's expert, Edward Weinstein, CPA, and Waste Management's expert, Gary Rosen, CPA, took the position that the "certified financial statement" is synonymous with "audited financial statements." Ibid. Neither expert provided any authority for their net opinions. Although Plaintiffs' experts admitted that public companies, like Covanta and Waste Management, must submit audited financial statements to comply with SEC financial reporting requirements, they did not testify to any similar requirement for a private company, such as Mascaro. Ibid. Indeed, the Plaintiffs' experts conceded that the financial reporting obligations of private companies are different from public companies. Ibid.

5. Conclusions of Law in the December 2012 Opinion

The December 2012 Opinion concluded that Sobel's testimony and "thorough and well-documented report" was given greater weight than documents presented by Plaintiffs' experts. Pa11. As such, the Sobel Report was cited extensively throughout the December 2012 Opinion. See Pa11-Pa14.

The trial court was satisfied with each of the conclusions set forth in the Sobel Report. Pa13. The trial court held that it was appropriate for the MCMUA to consider the BBD Report when evaluating the Condensed Financial Information. Pa15. The trial court also determined that the MCMUA acted properly by exercising "its right under the RFB to require 'the submission of additional information regarding qualifications as it may deem necessary'" to further evaluate Mascaro's compliance with criteria #4 of the Minimum Financial Qualifications, as specifically attested to by Mascaro's independent auditor as part of its bid submission. Pa16.

After evaluating the evidence, including a credibility determination in favor of Mr. Sobel, the trial court denied the request for interlocutory injunctive relief because Plaintiffs failed to demonstrate a likelihood of success on the merits:

> Here, the Court is satisfied that Mascaro's certified financial statement provided the Authority with "substantial evidence" to support its decision to award the bid to Mascaro, and that its conduct was not "arbitrary, capricious, or unreasonable."
>
> Having concluded that plaintiffs have failed to satisfy by clear and convincing evidence a likelihood of success on the merits, the Court need not address the remaining Crowe factors. Plaintiffs' application for interlocutory restraints is thus denied.
>
> [Pa22.]

C. Denial of Plaintiffs' Applications for Emergent Appellate Relief

On December 17, 2012, Waste Management and Covanta each applied to the Appellate Division for leave to file emergent motions to stay the trial court's denial of the temporary restraints. Pa43, Pa56. On the same day, both applications were denied. Pa73, Pa75.

D. Execution and Performance of the Contract

On December 18, 2012, the MCMUA and Mascaro executed the Contract. Pa107. By this point, Waste Management, the incumbent vendor, had fully de-mobilized from its prior operation of the transfer stations. Pa89. Mascaro immediately took the steps necessary to operate the transfer stations and provide solid waste disposal services. Pa107. To implement the Contract, Mascaro took the following material actions:

(1) Procurement of approximately $8.95 million of equipment, including:

a. Twenty-seven (27) Ransome International trucks;

b. Sixty-eight (68) new Mac Tipper Trailers;

c. Five (5) wheel loaders;

d. Four (4) excavators;

e. Three (3) front loaders;

f. Eight (8) off-road yard trucks;

g. Four (4) service vehicles; and

h. Two (2) man lift booms.

(2) Pre-paying $10 million to the primary disposal facility designated in the bid for, inter alia, disposal of MCMUA waste; and

(3) Hiring fifty-three (53) employees to perform under the Contract.

[Pa107-Pa108.]

On January 28, 2013, Mascaro commenced performance of the Contract and began operating the MCMUA transfer stations, including transportation and final disposal. Pa108.

E. Plaintiffs' Motions for Leave to Appeal

On December 21, 2012, Waste Management filed a notice of motion for leave to appeal the December 2012 Order. Pa77. The motion sought leave to appeal from those portions of the December 2012, Order denying Waste Management's "application for a preliminary (interlocutory) injunction enjoining [Mascaro] and [the MCMUA] from entering into a contract for the operation of two solid waste transfer stations in Morris County." JPMDa16.

On December 24, 2012, Covanta similarly moved for leave to appeal the December 2012 Order. Pa78. Covanta further moved for "interlocutory injunctive relief staying the award and/or effectuation of the Contract." Ibid.

F. Pending Summary Judgment Motions Against Plaintiffs

On January 17, 2013, Mascaro filed a notice of motion for summary judgment, seeking to dismiss the Verified Complaints of

Waste Management and Covanta. JPMDa18-JPMDa19. On February 22, 2013, the trial court heard oral argument on Mascaro's motion for summary judgment and reserved decision. JPMDa78, JPMDa79.

G. Grant of Leave to Appeal and the Emergency Contract

On February 26, 2013, the Appellate Division entered orders granting Plaintiffs' December 2012 motions for leave to file interlocutory appeals and granting a stay of "award and/or effectuation of contract." Pa77, Pa78. No further instruction regarding the stay was provided. As a result of the stay, the MCMUA was required to enter into an emergency contract with Mascaro pursuant to N.J.S.A. 40A:11-6, under the same terms as the Contract ("Emergency Contract"). Pa90, Pa96.

H. Motion Practice in the Appellate Division

On February 27, 2013, the MCMUA filed an application for permission to file an emergent motion seeking clarification and/or reconsideration of the orders dated February 26, 2013 staying the effectuation of the Contract. Pa172. On February 28, 2013, Waste Management and Covanta informed the Court that they would not challenge the MCMUA's interim solution to enter into the Emergency Contract with Mascaro to operate the transfer stations:

> Waste Management agreed that Mascaro's continuation under an emergent contract with the MCMUA was the least disruptive approach until the appeal was concluded.

[JPMDa86.]

> While we do not now challenge the emergency contract as a practical solution to the problem created by the conduct of both the MCMUA and Mascaro, we want to make clear that we will resist any argument made later by either Mascaro or the MCMUA that Mascaro's operation under the emergency contract gives it an right to remain in place in the event this Court determines its bid was non-conforming.

[JPMDa89.]

On March 4, 2013, the Court entered an Order denying the MCMUA's application for permission to file an emergent motion for clarification and/or reconsideration. Pa102. Therein the Court held that there "is no emergency" and permitted the Emergency Contract between the MCMUA and Mascaro to proceed. Ibid. To date, the MCMUA and Mascaro have continued to operate under the Emergency Contract.

On March 6, 2013, Mascaro filed a motion for reconsideration of the Appellate Division's February 26, 2013, orders granting leave to appeal and a stay. Pa103. On April 1, 2013, the Appellate Division denied, without opinion, the motion for reconsideration. Pa140.

On April 16, 2013, Mascaro filed a motion with this Court to dismiss Plaintiffs' appeals as moot. JPMDa90. On May 20, 2013, the Court denied Mascaro's Motion to Dismiss, without opinion. Ibid.

On May 8, 2013, Mascaro filed a motion for a thirty-day extension of time to file its brief in response to the instant appeal, which was granted by way of an order entered on May 20, 2013. JPMDa91.

LEGAL ARGUMENT

POINT ONE

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE REQUEST FOR INJUNCTIVE RELIEF BECAUSE THERE WAS NOT CLEAR AND CONVINCING EVIDENCE TO PROVE THAT THE AWARD OF THE CONTRACT TO MASCARO WAS ARBITRARY, CAPRICIOUS OR UNREASONABLE

A. Plaintiffs Have Failed to Meet Their Heavy Burden on Appeal.

It must be stressed that this interlocutory appeal is from the denial of an application to temporarily enjoin a public contract. Given that unique procedural posture, Plaintiffs must overcome several levels of discretionary action to meet the heavy burden necessary to vacate the December 12, 2012, Order. Indeed, Plaintiffs must somehow demonstrate that the well-reasoned and highly supported decisions of the MCMUA and the trial court were irrational and unsupported by any facts. This involves demonstrating, at a minimum, that the trial court incorrectly ruled that Plaintiffs do not have a likelihood of success in showing that the award of the Contract to Mascaro was arbitrary, capricious or unreasonable, and further, that the trial court's credibility assessments were baseless. Mascaro

submits that the fact finding of both the MCMUA and the trial court were exhaustive and based on credible and substantial evidence, and therefore, cannot be disturbed.

Remarkably, Plaintiffs choose to ignore the standard of review in this appeal. Instead, they simply profess their disagreement with the MCMUA and the trial court's decisons.[2] This, however, falls far short of meeting their burden on appeal. The likely reason they ignore the standard of review is because they have no ability to meet it. To be sure, the MCMUA and trial court were not only correct, but their conclusion that Mascaro's bid was compliant was supported by substantial evidence. Plaintiffs' failure to demonstrate that this finding was unfounded or irrational necessitates that these appeals be denied.

1. Standard of Review on Appeal.

Waste Management is seeking to reverse the denial of its application for temporary restraints. WMb49. Covanta is seeking to void the Contract award to Mascaro.[3] Cb61. To

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[2] Waste Management posits that the standard of review is de novo (WMb12) citing the wholly inapplicable case of Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995) (generally ruling on the de novo standard in an appeal from a final judgment, not an interlocutory appeal from the denial of a preliminary injunction application). Covanta's brief is silent as to the applicable standard of review, thus waiving any argument to the contrary.

[3] As set forth in Point Two, this relief is not available on this limited interlocutory appeal.

prevail, Plaintiffs must overcome three levels of actions which are afforded wide discretion under the law.

a. Plaintiffs Must Prove the Trial Court Abused Its Discretion

First, Plaintiffs must demonstrate that the trial abused its discretion when it denied their applications for preliminary injunctive relief. It is well-settled that "[t]here is no power, the exercise of which is more delicate, which requires greater caution, deliberation and sound discretion, and which is more dangerous in a doubtful case, than the issuing of an injunction." Citizen Coach Co. v. Camden Horse R. R. Co., 29 N.J. Eq. 299, 303 (E. & A. 1878) (citations and internal quotations omitted). Indeed, "[a]n interlocutory injunction is an extraordinary equitable remedy utilized primarily to forbid and prevent irreparable injury, and it must be administered with sound discretion and always upon consideration of justice, equity, and morality in a given case." Coskey's Television & Radio Sales and Serv., Inc. v. Foti, 253 N.J. Super. 626, 640 (App. Div. 1992) (quoting Zoning Bd. of Adj. of Sparta Tp. v. Service Elec. Cable Television of New Jersey, Inc., 198 N.J. Super. 370, 379 (App. Div. 1985)). The plaintiff bears the burden of demonstrating all four factors by clear and convincing evidence. American Employers' Ins. Co. v. ElF Atochem North America Inc., 280 N.J. Super. 601, 610 n.8 (App. Div. 1995). As

such, "[a]n interlocutory injunction should not issue if plaintiff's asserted rights are not clear as a matter of law." Accident Index Bureau, Inc. v. Male, 95 N.J. Super. 39, 50 (App. Div. 1967) aff'd, 51 N.J. 107 (1968) (citing General Electric Co. v. Gem Vacuum Stores, 36 N.J. Super. 234, 236 (App. Div. 1955)).

"A trial court's decision to issue a preliminary injunction will not be disturbed on appeal unless it results from an abuse of discretion." Nat'l Starch & Chem. Corp. v. Parker Chem. Corp., 219 N.J. Super. 158, 162, (App. Div. 1987) (citing Continental Group, Inc. v. Amoco Chem. Corp., 614 F.2d 351, 357 (3d Cir. 1980)); Horizon Health Ctr. v. Felicissimo, 135 N.J. 126, 137 (1994) (citing Abbott Labs. v. Gardner, 387 U.S. 136, 154, 87 S.Ct. 1507, 1518, 18 L.Ed.2d 681, 694-95 (1967) ("The authority to issue injunctive relief falls well within the discretion of a court of equity")); see also Rindaldo v. RLR Inv. LLC, 387 N.J. Super. 387, 395 (App. Div. 2006); Van Name v. Federal Deposit Ins. Corp., 130 N.J.Eq. 433, 442-43 (Ch. 1941) (noting that "granting or refusal [of an injunction] rests in the sound discretion of the court, under the circumstances and the facts of the particular case. It is the strong arm of equity."), aff'd, 132 N.J. Eq. 302 (E. & A. 1942). Therefore, on appellate review, a court may not substitute its judgment for the trial court's if it falls within "a range of acceptable

decisions." In re Kollman, 210 N.J. 557, 577. A trial court's determination under the abuse of discretion standard should be altered only if it is "made without a rational explanation, inexplicably depart[s] from established policies, or rest[s] on an impermissible basis." Feigenbaum v. Guaracini, 402 N.J. Super. 7, 17 (App. Div. 2008) (quotations and citations omitted); State v. Daniels, 38 N.J. 242, 249 (1962) (denial of preliminary injunction application should only be overturned if the trial court's decision can be considered "an undisciplined whim").

b. Plaintiffs Must Also Demonstrate The Trial Court's Credibility Determination Was Baseless

As part of the abuse of discretion analysis - which requires a showing of irrationality - Plaintiffs must demonstrate that the trial court's decision to rely on the expert opinion and testimony of Mr. Sobel over Plaintiffs' experts was not supported by "adequate evidence." As a general rule, when error in a fact finding of a judge is alleged, the scope of appellate review is limited. Cannuscio v. Claridge Hotel and Casino, 319 N.J. Super. 342, 347 (App. Div. 1999). The Appellate Division decides whether the findings made by the trial court could reasonably have been reached on "sufficient" or "substantial" credible evidence present in the record considering the proofs as a whole. Id. The trial court is

afforded particular deference to judge credibility. Id. (citing Close v. Kordulak Bros., 44 N.J. 589, 599 (1965)). "Appellate review does not consist of weighing evidence anew and making independent factual findings; rather [its] function is to determine whether there is adequate evidence to support the judgment rendered at trial." Id. (citing State v. Johnson, 42 N.J. 146, 161 (1964)).

c. Finally Plaintiffs Must Prove By Clear and Convincing Evidence That the MCMUA's Award of the Contract Was Arbitrary, Capricious and Unreasonable

Provided Plaintiffs can demonstrate that the trial court's decision, which rested on a credibility determination, was an abuse of discretion that was not supported by the evidence, Plaintiffs must still prove by clear and convincing evidence that the MCMUA's decision was wholly without basis and irrational. Failure to do so requires affirmance of the trial court's decision because there is no likelihood of success on the merits.

To overturn governmental action, like the award of a public contract, a plaintiff must show that the action was arbitrary, capricious or unreasonable. Matter of Protest of Award of On-Line Games Prod. & Operation Servs. Contract, Bid No. 95-X-20175, 279 N.J. Super. 566, 590 (App. Div. 1995); Palamar Constr. v. Township of Pennsauken, 196 N.J. Super. 241,

250 (App. Div. 1983); Stano v. Soldo Constr. Co., 187 N.J. Super. 524, 534 (App. Div. 1983). This requires a showing that the decision was without basis or wholly irrational. Pheasant Bridge Corp. v. Township of Warren, 169 N.J. 282, 290 (2001) (citing Taxpayers Ass'n of Weymouth Township, Inc. v. Weymouth Township, 80 N.J. 6, 21 (1976); Roselle v. Wright, 21 N.J. 400, 410 (1956); Schmidt v. Board of Adjustment, 9 N.J. 405, 416 (1952)).

2. The Fact Finding of the MCMUA and Trial Court Was Exhaustive and Forms a Credible Basis for The Decisions

Plaintiffs' appeals are based on the argument that the financial submissions of Mascaro did not meet the RFB requirements. While Mascaro's submission was certainly compliant, that is beside the point for the purpose of this appeal. At this third level of review, Plaintiffs have the heightened burden to prove that the decisions of the trial court and the MCMUA finding Mascaro's bid to be compliant were irrational, baseless, and outside the realm of acceptable decisions. Plaintiffs do not even attempt to meet this burden.

The issue presented to the trial court was whether Mascaro's submission of a balance sheet, income statement, independent auditor's report, letter from its long-time auditor, and certification of its President, constituted a "certified financial statement" to comply with the financial requirements

of the RFB. Since there was no definition of "certified financial statement" in the RFB and no controlling statutory provision, the Court prudently sought the opinion of experts on the issue. After hearing testimony and making credibility determinations, the trial court rejected the net opinions of Plaintiffs' experts and accepted the opinion of Mr. Sobel. In a well-reasoned decision, the trial court concluded that Plaintiffs failed to demonstrate by clear and convincing evidence that the MCMUA's award of the Contract to Mascaro was arbitrary, capricious and unreasonable. Pa22.

Contrary to what the law requires, Plaintiffs do not point to any deficiencies in the trial court's decision that were "without a rational explanation, inexplicably depart[s] from established policies, or rest[s] on an impermissible basis" or that any dispositive finding was not within the "range of acceptable decisions." This burden is particularly difficult for Plaintiffs to meet because they have failed to provide one authoritative citation that defines "certified financial statement" in the manner consistent with their tortured interpretation of the term.

Not only was the trial court within its discretion to deny Plaintiffs' preliminary injunction applications, but the MCMUA was also well within its discretion to award the Contract to Mascaro. Indeed, the MCMUA determined that Mascaro's financial

submissions complied with the MCMUA's bid specifications. It did so after a thorough review of Mascaro's financial documentation, including the confirming financial entries, and based on the opinions of the MCMUA's internal and external professionals. Only then did the MCMUA issue its thorough Resolution. Pa168. Counsel for the MCMUA found that Mascaro's bid complied in all material aspects with the Bid Specifications. Pa172. Similarly, the MCMUA's Treasurer found that Mascaro met the Minimum Financial Qualifications of the Bid Specification. Pa172. To overturn this decision, Plaintiffs must prove that the awarding of the Contract to Mascaro was without basis or wholly irrational, which they cannot.

Clearly, the fact finding of the MCMUA and the trial court were not "undisciplined whims," but were reasonably calculated to determine if Mascaro complied with the bid specifications. Both correctly determined that Mascaro provided significant proof of its financial condition, supported by an independent auditor. Accordingly, Plaintiffs have fallen far short of meeting the heavy burden to overturn the denial of the preliminary injunction applications.

B. Plaintiffs Failed to Demonstrate a Likelihood of Success on the Merits By Clear and Convincing Evidence.

The trial court determined, without reviewing the remainder of the Crowe factors, that Plaintiffs "failed to satisfy by

clear and convincing evidence a likelihood of success on the merits." Pa22. The two issues being appealed from that decision are:

> (1) Whether the trial court abused its discretion in finding that Mascaro met the Minimum Financial Qualifications; and
>
> (2) Whether the trial court abused its discretion in finding that the financial submissions of Mascaro constituted a "certified financial statement."

1. Mascaro Met All The Minimum Financial Qualifications.

The RFB required that the bidders meet three of the four Minimum Financial Qualifications, which included:

> 1. Net worth for each of the three (3) recent fiscal years of $29,100,000 or more.
>
> 2. The ratios of net cash flow from continuing operations to annual debt (net interest and principal) for two (2) out of the three (3) most recent fiscal years were at least 1:1.
>
> 3. The "current ratio" for two (2) out of the three (3) most recent fiscal years were at least 1:1.
>
> 4. Cash and/or cash equivalent of at least $5,000,000 on the date of its most recent audited financial statement.

[Pa166.]

It is undisputed that Mascaro met Criteria #1 and #3. Pa16 ("All three (3) experts agree that Mascaro met Criteria No. 1

and 3"). The issue raised by Plaintiffs on appeal is whether the MCMUA correctly determined that Mascaro met either of the remaining two Criteria.

The evidence shows that at the time of bidding Mascaro met all four Criteria. As part of its initial bid, Mascaro submitted a balance sheet with more than $145 million in current assets as of March 31, 2012, and net income as of March 31, 2012, of almost $11 million. Pa179-Pa180. In addition, Mascaro provided a letter from Eric R. Stephen of BBD, LLP, Mascaro's certified public accountants, which stated in pertinent part:

> 2) That our firm has audited the financial statements of [Mascaro] each year since 1977 and that all of our audits were conducted in accordance with auditing standards generally accepted in the United States.
>
> 3) That our firm is familiar with all of the "Minimum Financial Qualifications" for bidders as set forth in Schedule3 of the Morris County Bid Solicitation for the above-referenced contract and that a copy of Schedule 3 is attached hereto.
>
> 4) That our firm examined [Mascaro's] compliance with the "Minimum Financial Qualifications" set forth in Schedule 3 of the Morris County Bid Solicitation for the above-referenced contract, and our report thereon is attached hereto.

[Pa181.]

The Independent Accountant's Report attached to the letter states in pertinent part: "In our opinion, [Mascaro] complied,

in all material respects, with all of the aforementioned requirements for the threes years ended March 31, 2012." Pa182.

Mr. Sobel opined, which was accepted by the trial court, that this Independent Accountant's Report was "the best and most objective form of proof that Mascaro could have provided to the MCMUA that the company complied with the Minimum Financial Qualifications" because it was an outside attestation that was narrowly tailored to this RFB. Pa14. Mr. Sobel further found that BBD complied with all professional standards governing such an attestation and that Mascaro was "perfectly correct" in using the attestation because it, coupled with the financial information, not only met the bid requirements, but surpassed them. 2T211:7-19; 2T238:20-23. Indeed, BBD's attestation is "a higher level of proof than the submission of audited financial statements because the scope of this attest engagement was specifically designed to evaluate Mascaro's compliance with the Minimum Financial Qualifications, something that is not accomplished with an audit." Ibid.

Following a review of Mascaro's financial submissions and attestation, the MCMUA sought to confirm that Mascaro met Criteria #3 and #4 by requesting a breakdown of the entries on the balance sheet and income statement provided, a right the MCMUA reserved in the Bid Specifications. Pa185. On October 5, 2012, Mascaro provided financial entries, including a draft of

the 2012 audited financial statements, confirming that Criteria #3 and #4 were easily satisfied, as was previously attested to in the Independent Auditor's Report. Pa187-Pa188. Indeed, Mascaro noted that it has no debt except a revolving bank credit line, leading to a "current ratio" of 20.649 for 2012 (1:1 was needed). Pa187. Also, Mascaro's cash and/or cash equivalents for 2012 was $74,357,562.00 -- far exceeding the $5 million minimum. Ibid. Satisfied that the Criteria were met, the Contract was awarded to Mascaro.

Plaintiffs do not attack the substance of Mascaro's financial qualifications. It is clear that Mascaro met all the Criteria. Instead, Plaintiffs argue that the financial information provided by Mascaro was technically deficient leading to an alleged defect in its bid. These same arguments were posed below and soundly rejected by the trial court. The trial court initially found that in applying the factors set forth in Meadowbrook Carting Co. v. Bor. of Island Heights, 138 N.J. 307, 315 (1994), the MCMUA "reasonably determined to exercise its right reserved under the RFB to require 'the submission of additional information regarding qualification as it may deem necessary,' and request a copy of the most recent audit reflecting [compliance.]" Pa16.

The court then distinguished the same cases cited again on appeal because they do not demonstrate that Mascaro's bid was

materially defective. For example, Impac, Inc. v. The City of Paterson, 178 N.J. Super. 195 (App. Div. 1981), is easily distinguishable because the specification in that case sought a "certified financial statement...fully itemized in accordance with accepted accounting standards and based on a proper audit." Ibid. (emphasis added). Unlike in Impac, the specification here makes no mention of itemization or a proper audit. Meadowbrook, supra, 138 N.J. at 311, is similarly distinguishable. There, the bidder's failure to include a consent of surety as required was deemed a material defect that could not be waived by the municipality. The Supreme Court found that the failure to provide the consent of surety deprived the municipality of assurance of performance and negatively affected the fairness of the bidding process.

Unlike in Meadowbrook, Mascaro did not omit any documents and at no time was the MCMUA deprived of an assurance of performance. Furthermore, as the trial court noted, there was no negative effect on fairness of the bidding process because "Mascaro possessed audited financial statements and had gone to the expense of obtaining them since at least 1977. Thus, there is no basis to conclude - as pressed by plaintiffs - that Mascaro was at an advantage over other bidders who may have been dissuaded from bidding due to the cost associated with the

preparation of audited financial statements, as Mascaro had already incurred those costs." Pa15.

The trial court aptly noted a far more analogous and persuasive case involving one of the Plaintiffs - Waste Management of New Jersey, Inc. v. The Union County Utilities Authority, 399 N.J. Super. 508 (App. Div. 2008). Pa20. In Waste Management, the authority was unclear whether the bidder intended to rely on an exception to a financial statement requirement so it wrote to the bidder seeking clarification. The bidder responded in the affirmative and the bid was accepted as compliant. The trial court found that the authority should have rejected the bid. The Appellate Division reversed, finding that "judges are not entitled to overturn the authorized decisions of municipal bodies unless those decisions are arbitrary, capricious or unreasonable." Id. at 525 (quoting Kramer v. Sea Girt Bd. of Adj., 45 N.J. 268 (1965)). To overturn such a decision, the court must find that there was not "substantial evidence" to support a decision. Id. at 539.

Here, the trial court found that the MCMUA properly sought clarification and made its determination regarding the Minimum Financial Qualifications based on "substantial evidence."[4] If

[4] "Thus, it was appropriate for the Authority to view the 'Condensed Financial Information", not in a vacuum, but the Report from BBD, L.L.P. concerning the $5M cash or cash equivalent criterion can, under these circumstances, be viewed

anything, Waste Management would require the MCMUA to seek the very clarification it obtained or be criticized for failing to act in accordance with all available evidence. The decision to review all available information to ensure that the residents of Morris County receive the lowest responsible bid was prudent and in accordance with the Local Public Contracts Law. Accordingly, the trial court did not abuse its discretion in determining that the MCMUA's finding that the Minimum Financial Qualifications were met by Mascaro, was not arbitrary, capricious or unreasonable.

2. Mascaro Submitted A "Certified Financial Statement"

The second issue presented in these appeals is whether the trial court abused its discretion in finding that the MCMUA was not arbitrary, capricious or unreasonable when it determined that Mascaro's bid complied with the "certified financial statement" requirement. The great weight of the evidence shows that Mascaro submitted more financial information than required by the bid and demonstrated through independent certification and verification its financial condition. Therefore, the trial court's decision that Plaintiffs have no likelihood of success on the merits should be affirmed.

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as a reasonable effort at clarification of the accountant's attestation." Pa15.

The RFB at Question 14 asked for the following: "the certified financial statement of the Bidder…for each of the three (3) recent fiscal years." MCMUADa141. The term "certified financial statement" is not defined by the RFB. MCMUADa34-37. Moreover, the term "audit" is found nowhere in the Question 14. Ibid. Importantly, the RFB required that for any undefined term, the industry standard should be utilized. MCMUADa10.

Plaintiffs challenge Mascaro's compliance on two fronts. First, they argue that the balance sheet and income statement provided do not constitute a "financial statement." Second, Plaintiffs assert that by using the term "certified," the MCMUA really meant "audited" financial statement. In interpreting its own bid, the MCMUA rejected these arguments. The trial court agreed. The trial court affirmed that a balance sheet and income statement clearly constitute a financial statement and that there is no evidence to support the notion that "certified" can only mean "audited" in this context, but instead Mascaro's submission more than "certified" the statements about Mascaro's financial condition. Pa13.

a. The MCMUA and Trial Court Did Not Abuse Their Discretion in Finding That A Balance Sheet and Income Statement Are Financial Statements

After receiving the bid submissions, the MCMUA received a report from its Treasurer, Larry Kaletcher, and a letter from its counsel, Joseph Maraziti, Esq., both finding that Mascaro's bid complied in all material aspects to the RFB Specifications. Pa172. Thereafter, it adopted the thorough and detailed Resolution. Pa167.

The trial court conducted its own fact finding. Noting the lack of a definition of "financial statement" in the bid, the trial court sought expert testimony on the issue. In his report, Mr. Sobel methodically walked the Court through various authorities to show that Mascaro's balance sheet and income statement constituted a financial statement because they "provide the reader the ability to understand the financial condition of or the income producing ability or the cash flows of the entity being reported on in whatever detail the preparer and use deems [sic] appropriate for the circumstances." Pa412.

Mr. Sobel started his analysis the same as Plaintiffs' experts, finding that private companies have different financial reporting requirements and standards than publicly traded companies. Pa412. He found that the Financial Accounting Standards Review Board's Accounting Standards Codifications, the

applicable principles for a private company, did not contain a definition of "financial statement." Pa412. Mr. Sobel then turned to the SAFCs, which provide that "a financial statement is a formal tabulation of names and accounts of money derived from accounting records that displays either the financial position of an entity at a moment in time or one more positions of change in financial position of the entity during a period of time." Pa12.

Based on his review of these standards, Mr. Sobel concluded that a balance sheet and income statement contain the primary categories of financial information to illustrate an entity's financial condition, thus constituting a "financial statement." Pa13. Covanta's expert witness, Mr. Weinstein agreed with Mr. Sobel's conclusion:

> Q: Is a balance sheet a financial statement?
>
> A: Yes.
>
> Q: Is an income statement a financial statement?
>
> A: Yes.

[2T18:9-13.]

After rejecting the net opinions of Plaintiffs' experts, the trial court accepted the opinion of Mr. Sobel, that Mascaro's balance sheet and income statement constitute a "financial statement." Pa13.

Plaintiffs have failed to directly challenge the opinion of Mr. Schel or his conclusions. Instead, it appears Covanta has abandoned the argument that a balance sheet and income statement do not constitute a "financial statement." Waste Management offers little more in opposition. Waste Management cites to N.J.S.A. 45:2B-1 and the testimony of Mr. Weinstein for the proposition that a "financial statement" **usually** has footnotes and because Mascaro's balance sheet and income statement did not have footnotes they cannot constitute a "financial statement." WMb28-30. As a threshold matter, Waste Management is not arguing that a financial statement **must** have footnotes. Therefore, Waste Management's argument fails on its own terms.

Moreover, the authorities relied on are faulty. First, Mr. Weinstein, Covanta's expert, has testified, without equivocating, that a balance sheet and income statement both, independently of each other, constitute a financial statement. When asked to provide authority for his statement that such "financial statements are also expected to include footnotes…," Mr. Weinstein admitted that he provided no citation to support that conclusion. 2T:18-14 to 20:1. Therefore, the trial court correctly disregarded the claim that because Mascaro's financial submissions did not have footnotes they did not constitute a financial statement.

Second, Waste Management's citation to N.J.S.A. 45:2B-1 is improper for the simple reason that N.J.S.A. 45:2B-1 has been repealed. If Waste Management meant N.J.S.A. 45:2B-44, its reading of the statute is misguided. The statute clearly provides that "financial statement" may include statements and their related footnotes. There is no mandate that a "financial statement" must have footnotes. Indeed, to adopt this narrow reading would exclude financial statements without footnotes from the statute's scope, for which there is no legal support. If anything, the statute is drafted broadly to encompass many statements of financial condition.[5]

At best, Waste Management's citation to N.J.S.A. 45:2B creates just another potential definition for "financial statement" that was rejected by the trial court. The trial court correctly relied on authorities from the accounting industry that are directly applicable to private companies like Mascaro, unlike N.J.S.A. 45:2B, which is wholly irrelevant.

Plaintiffs have failed to offer sufficient authority to show that the MCMUA and the trial court acted irrationally and without a basis to determine that Mascaro's balance sheet and

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[5] The trial court dismissed this argument in a footnote finding that the statute is inapplicable and "does not necessarily represent 'the meaning normally ascribed…in the trade, profession or business with which [it is] associated.'" Pa12, n. 1.

income statement are a "financial statement" as that term is understood in the accounting industry.

b. Nowhere In the RFB Are "Audited" Financial Statements Required.

The crux of Plaintiffs' argument on appeal is that when the MCMUA used the term "certified financial statement" it really meant "audited financial statement." It is undisputed that "audited" financial statements are not requested - a fact that has been confirmed in this case by the MCMUA.

Because "certified" is not defined and the MCMUA has made clear it did not require "audited" financial statements, Plaintiffs have the burden of proving that "certified" in this context can only mean "audited." If there is an alternative reasonable interpretation, then the decisions of the MCMUA and the trial court must be left alone. Plaintiffs have offered several potential definitions for "certified," none of which are sufficient to unequivocally find that "certified" as used in the RFB could only mean "audited."

In response to the RFB, Mascaro submitted a comprehensive package of its financial condition, which included a balance sheet, income statement (both drawn from audited financial statements), and an Independent Accountant's Report. Pal79-Pal83. These were deemed in compliance with the bid by the MCMUA's professionals, the MCMUA and the trial court. To rebut

these conclusions and prove that "certified" can only mean "audited," Plaintiffs attempt to rely on three primary sources: (i) their experts; (ii) case law; and (iii) statutes and regulations.[5] Each was addressed and rejected by the trial court as insufficient to clearly and convincingly demonstrate that the MCMUA's acceptance of Mascaro's financial submissions was arbitrary, capricious or unreasonable.

i. Plaintiffs' Experts Provided No Definition of "Certified" That Supports These Appeals

First, Plaintiffs' experts, Mr. Rosen and Mr. Weinstein, did not offer any authority, particularly any definitive authority, to demonstrate that "certified" can only mean "audited." Pa377; Pa285-Pa286. Mr. Weinstein stated that a CPA can provide three levels of a financial statement - compilation, review, and audit. Pa285. It is agreed by all experts that a "certified" review of financial statements does not exist. Indeed, the best Mr. Weinstein could offer was an unsupported statement that "certified" refers to an extinct practice where accountants would "certify" the accuracy of numbers they were reviewing. Pa286.

Mr. Rosen also failed to provide a definition of "certified" from any authority. Mr. Rosen concedes that FASB

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[5] Plaintiffs also rely on the Internet and some other unpersuasive and unreliable sources, which are refuted in Section (B)(3).

and AICOA do not define "certified." Pa377. While Mr. Rosen's report cites to 17 C.F.R. 240A for a definition of "certified," Pa377, that citation is to SEC regulations and applies only to public companies. 2T247:11 to 253:3. The remainder of Mr. Rosen's report discusses audited financial statements and fails to provide any support for his ambiguous definition of "certified."

The reason neither Mr. Weinstein nor Mr. Rosen could provide a citation to a definition for "certified" in the context of financial statements is because it is a vestige of the accounting industry no longer in use. This was clearly explained by Mr. Sobel and accepted by the Court. Pa412-Pa415. Mr. Sobel began his analysis by noting that private companies are governed by different reporting standards than public companies. Pa413. Specifically, accountants providing services to private companies apply the professional standards promulgated by the American Institute of Certified Public Accountants ("AICPA"). Ibid. Just as Plaintiffs' experts concluded, "certified" is not defined by the FASB or the AICPA. Pa413-Pa414. Mr. Sobel further found that in the SEC's interpretive response in Staff Accounting Bulletin 40, Topic 1(E)(1), "certified" is not "currently applied by the accounting profession." Pa414. Accordingly, Mr. Sobel concluded that "there is no meaning ascribed in the accounting and auditing

standards and therefore the accounting profession to the term 'certified' when used in the term 'certified financial statement' for private companies and public companies." Pa415.

Mr. Sobel's findings were adopted by the trial court:

> As to the term "certified", the Court is satisfied that while the term is commonly used by accountants, there is no industry definition for private companies that equates it to "audited"…Moreover, accountants do not "certify" financial statements, but rather issue assurances according to the level of review provided, to wit, a "compilation", a "review", or an "audit."

[Pa13.]

Accordingly, Plaintiffs have failed to provide any credible expert opinion to support their claim that "certified" could have only meant "audited." As such, the decisions of the MCMUA and trial court must stand.

ii. The Case Law Cited By Plaintiffs Is Inapplicable and Fails to Prove "Certified" Means "Audited"

Plaintiffs also offer case law that they contend stands for the proposition that "certified" always means "audited." A cursory review of the cases cited by Plaintiffs quickly disproves that proposition. See WMb21-22; Cb40-41.

Most of the cases cited have no relevance, some refer to old law, and one stands for the proposition that "financial statement" can mean balance sheet or statement of financial

condition - dispelling Plaintiffs' other argument. For example, Waste Management's quotations from First Indem. Of Amer Ins. Co. v. Letter, Meyler & Co. P.C., 326 N.J. Super. 366 (Law Div. 1998), and Petrillo v. Bachenberg, 139 N.J. 472, 484 (1995), both refer to the holding in Rosenblum, Inc. v. Adler, 93 N.J. 324 (1983). As a threshold matter, the quotations relied on by Plaintiffs are irrelevant. More importantly, the decision in Rosenblum v. Adler was superseded by statute and is no longer good law. See Cast Art Indus., LLC v. KPMG LLP, 209 N.J. 208, 220 (2012); Ronson v. David S. Talesnick, CPA, 33 F.Supp.2d 347, 355 (D.N.J. 1999).

In Herman v. Sunshine Chem. Specialties, Inc., 133 N.J. 329, 344 (1993) (cited at Cb40; WMb21-22), the Supreme Court merely discussed the discoverability of a company's "financial condition" and stated that "certified financial statements" may be discoverable in an appropriate case. This case clearly has no application and, in fact, the term "audit" is not even mentioned in the decision.

In P & A Const., Inc. v. Twp. of Woodbridge, 365 N.J. Super. 164, 168 (App. Div. 2004) (cited at WMb22; Cb40), no financial information was provided by the bidder. There is no discussion of "certified" meaning "audited." Thus, the case stands for the basic (but inapplicable) premise that failure to

provide any financial information is grounds for rejection of a public bid.

In the portion of Bondi v. Citigroup, Inc., 423 N.J. Super. 377, 390 (App. Div. 2011) cited, the Court was simply giving a factual background regarding Parmalat, a publicly-traded company and discussing the failure of their financial statements to be prepared in accordance with Italian law. It is unclear how this case has any application here. In the end, these cases does not support Plaintiffs' claim that "certified financial statement" can only mean "audited financial statement."

Plaintiffs' citation to Albert F. Ruehl Co. v. Bd. of Trustees of Sch. for Indus. Ed., 85 N.J. Super. 4, 9 (Ch. Div. 1964) (cited at WMb22; Cb40), is of particular interest. The Ruehl decision actually detracts from Plaintiffs' argument regarding the definition of "financial statement." In Ruehl, the Court used the "financial statement" interchangeably with "balance sheet or statement of financial condition" -- the term found in the public bid. This supports the conclusions of Mr. Sobel and Mr. Weinstein that a "statement of financial position, or balance sheet, is a financial statement." Pa411.

Therefore, the only case cited by Plaintiffs that is even remotely relevant to these appeals supports the findings of the MCMUA and the trial court. The remaining case law cited by Plaintiffs should be disregarded.

iii. The Statutes and Regulations Cited Do Not Demonstrate That "Certified" Means "Audited"

Finally, Plaintiffs cite to statutes and regulations to argue that "certified" can only mean "audit." Specifically, Waste Management claims that the statutes and regulations it cites "demonstrate that in **all cases** certified is equated with audited." WMb24 (emphasis added). Once again, a review of the statute and regulations reveals no such proposition. To the contrary, Plaintiffs' numerous citations point to varying definitions for "certified financial statement," proving the conclusion of Mr. Sobel that the definition of "certified financial statement" is broad and varies depending on the context it is used. Pa412.

As a threshold matter, many of the statutes and regulations cited by Plaintiffs do not even mention "audited" or "certified." See N.J.S.A. 18A:65-100; N.J.A.C. 13:47A-1.3; N.J.A.C. 13:47A-2.1; N.J.A.C. 5:80-5.2. Therefore, it is unclear how "certified" and "audited" can be synonymous when they are not both used.[7]

The remainder of the citations to statutes and regulations merely demonstrate that definitions vary depending

[7] N.J.A.C. 5:80-5.2 does not even use the phrase "financial statement" despite the quotation in Waste Management's brief. WMb23.

on the meaning ascribed by the preparer. For instance, N.J.A.C. 5:19-4.2 states that "certified financial statements" include balance sheets and income statements, both of which were provided by Mascaro. See Pa412. N.J.A.C. 8:33, App. B, defines "certified financial statement" differently to include not only a balance sheet and income statement, but also "statements of changes in financial position," "notes to the statements," and "auditor's letter." WMb24. N.J.S.A. 45:2B-44 has yet another definition:

> "Financial statements" means statements and related footnotes that purport to present an actual or a prospective financial position at a particular time, or results of operations, cash flow, or changes in financial position for a period of time, in conformity with generally accepted accounting principles or another comprehensive basis of accounting. The term includes specific elements, accounts or items of such statements, but does not include: incidental financial data included in management advisory service reports to support recommendations to a client; or tax returns and supporting schedules.
>
> [N.J.S.A. 45:2B-44.]

From all of the fact finding conducted and citations provided by counsel and their experts, it is clear that "certified" has no definitive meaning in the accounting industry. It is even more certain that "certified" does not in "all cases" mean "audited." At best, Plaintiffs have proven that "certified financial statement" can have varying

definitions, which may include an audit. There is simply nothing to prove that "certified" as used in the RFB could only have meant "audited." The MCMUA and the trial court were well within their discretion to determine that Mascaro's financial submissions complied with the RFB and constituted a "certified financial statement." Plaintiffs have failed to meet the burden to show that these decisions were irrational or wholly baseless.

3. Plaintiffs' Remaining Arguments on Likelihood of Success on the Merits Are Baseless and Should Be Rejected

In a desperate attempt to salvage an otherwise meritless appeal, Plaintiffs offer several additional arguments that should be rejected. First, since they cannot find any case law, statute, or expert to prove their case, Plaintiffs cite to the Internet for the definition of "certified financial statement." Cb43; WMb9. The citation is not to a report or other authoritative source on the Internet, but to a dictionary found on Investopedia.com.[8] As a threshold matter, this citation to the Internet should be ignored. See Borough of Paulsboro v. Essex Chem. Corp., 427 N.J. Super. 123, 131 n.3 (App. Div. 2012). Moreover, this citation is wholly unreliable. In its Terms of Use, Investopedia.com concedes that its website is not accurate and should not be relied upon: "We make no guarantees

[8] Interestingly, the definition cited states that an income statement is a financial statement.

as to the accuracy, thoroughness or quality of the information on this website, which is provided only on an 'AS-IS' and 'AS AVAILABLE' basis at User's sole risk. This information may be provided by third parties and Investopedia shall not be responsible or liable for any errors, omissions or inaccuracies in the website content." See http://www.investopedia.com/corp/termsofuse.aspx. Even if the Court were inclined to consider the unreliable definitions on Investopedia.com, which it should not, the website is clearly directed toward investors in publicly-traded companies, not private companies like Mascaro.

Not only do Plaintiffs improperly cite unreliable Internet websites, but Waste Management also asks this Court to accept the uncertified and unexplained Internet search of an attorney: "Notably, we could not find any Internet site, authoritative or otherwise, that defined 'certified' to mean anything even remotely akin to the tortured definition professed by Mr. Sobel that was accepted by the trial court." WMb19-20. Notwithstanding the absurdity of this argument, it is simply incorrect. If the Court is at all inclined to dignify Waste Management's web-search based argument, even a cursory Google search of "certified financial statement" results in the following definition from allbusiness.com: "balance sheet, income statement, and perhaps other financial papers that

are attested to by a Certified Public Accountant (CPA) who audited the company. http://www.allbusiness.com/glossaries/certified-financial-statement/4949095-1.html. This is precisely what Mascaro provided - a balance sheet and income statement, with an attestation from the CPA that audited Mascaro.

In addition to an unexplained Internet search by an attorney, Waste Management asks the Court to step into the mind of an unknown potential bidder who would have visited the MCMUA's website. Pa20. While difficult to understand, it appears Waste Management is arguing that because the MCMUA's financial statements are audited, the MCMUA meant "audited" when it said "certified financial statement." Notwithstanding its illogicality, this argument has already been rejected by all three experts and the trial court. It has been agreed that Mascaro is not required to have audited financial statements, even though it does. Therefore, its accounting review standards are different than those of publicly-traded companies like Waste Management. Similarly, the MCMUA is required to audit its financial statements pursuant to N.J.S.A. 40:14B-66. Accordingly, this argument fails to address the issue presented - what was required in the RFB.

Plaintiffs also ask this Court to overturn the decisions of the MCMUA and the trial court based on a piecemeal and illogical

analysis of excerpted statements from one of Mascaro's prior public bids in Pottstown, Pennsylvania. Cb45-46; WMb18-19. Covanta's argument contains no citations to the record. Waste Management cites to a letter in which Mascaro states that an "audited" financial statement necessarily encompasses the definition of "certified" financial statement. Pa836-Pa857. There is nothing surprising or nefarious about this statement as Plaintiffs would lead this Court to believe. Mascaro's statement comports with the testimony of all the experts in this case who stated that audited financial statements are the highest level of review conducted by accountants. Thus, because an "audit" is the highest review, it follows that any other review requested is encompassed therein. Plaintiffs' attempt to invert this statement is unavailing.

Finally, Waste Management contends that even if the trial court was correct, the Contract should be re-bid because of the ambiguity in the Specifications. Waste Management's request violates the Local Public Contracts Law, which states:

> Any prospective bidder who wishes to challenge a bid specification shall file such challenges in writing with the contracting agent **no less than three business days prior to the opening of the bids. Challenges filed after that time shall be considered void and having no impact on the contracting unit or the award of a contract.**
>
> [N.J.S.A. 40A:11-13 (Emphasis added)]

This provision "reveals no ambiguity; the plain language of that legislative enactment makes clear that it sets forth limitations on how and when a bid specification challenge must be prosecuted…" Jen Elec., Inc. v. Cnty. of Essex, 197 N.J. 627, 642 (2009). Waste Management offers no case law to support is "latent ambiguity" theory. Because any challenge to the specification terms should have been submitted before the bids were opened, this argument must be rejected.

Based on the foregoing, the trial court correctly relied on substantial credible evidence in finding that Plaintiffs failed to prove a likelihood of success on the merits. As evidenced by the countless definitions of "certified financial statement" proffered by Plaintiffs, their rights "are not clear as a matter of law" and therefore, no injunction should have issued. Accident Index, 96 N.J. Super. at 50 (citing General Electric Co., 36 N.J. Super. at 236). Accordingly, the December 2012 Order should be affirmed.

C. Plaintiffs Failed to Carry Their Burdens of Proof on the Remaining Crowe Factors

If the Court is inclined to revisit the likelihood of success prong, Plaintiffs are nevertheless unable to demonstrate the remaining Crowe factors warranting injunctive relief.

Entry of the requested injunctive relief will not prevent irreparable harm. Mascaro is currently working at the transport

stations under the Emergency Contract and will continue to do so until a final adjudication on the merits. Until such time, Plaintiffs have no prospect of working for the MCMUA under the Contract or having the Contract performed to their detriment.

Second, the equities weigh heavily in favor of the MCMUA, the public, and Mascaro and the stay currently in place should be lifted so that the MCMUA can enter into a permanent contract with Mascaro, leaving operation of the crucial transport station uninterrupted. Furthermore, as noted by MCMUA, award of the Contract to Mascaro yields a $3,572,000 in savings to the public. Any further restraint of the Contract will eviscerate these savings. MCMUAb53.

Plaintiffs have not met their burden on any of the Crowe factors and are not entitled any injunctive relief particularly since they have failed to demonstrate that the trial court abused its discretion. Accordingly, Plaintiffs' appeals should be denied in their entirety.

POINT TWO

THERE IS NO BASIS TO VOID THE CONTRACT AND ORDER A RE-BID ON THIS LIMITED AND NARROW INTERLOCUTORY APPEAL

Even if the December 2012 Order is reversed, the proper remedy is imposition of the requested restraints and remand for final adjudication on the merits. Indeed, to void the Contract on this narrow interlocutory appeal would be wholly improper.

As a threshold matter, a final adjudication has not been rendered that would permit final relief to be granted. By its own terms, an interlocutory appeal cannot result in a dispositive determination of the rights of the parties. Janicky v. Point Bay Fuel, Inc., 396 N.J. Super. 545, 549-50 (App. Div. 2007) (quoting S.N. Golden Estates, Inc. v. Cont'l Cas. Co., 317 N.J. Super. 82, 87 (App. Div. 1998) (holding that a "final judgment" disposes of all claims against all parties.) Specifically, this Court has explained that denial of a preliminary injunction application is not a final judgment on the merits: "deciding a preliminary injunction application 'involves a prediction of the probable outcome of the case' based on each party's initial proofs, usually limited to documents. The court is not deciding which party ultimately wins or loses, but rather 'whether the applicant has made 'a preliminary showing of a reasonable probability of ultimate success on the merits.'" Brown v. City of Paterson, 424 N.J. Super. 176, 182-83, 188 (App. Div. 2012) (quoting Rinaldo v. RLR Inv., LLC, 387 N.J. Super. 387, 395-97 (App. Div. 2006) (holding that "[o]n this record, we cannot conclude that the trial court abused its discretion in entering a preliminary injunction to preserve the status quo pending its final decision in this case, and therefore we affirm.")); see also Coskey's Television & Radio Sales & Serv., Inc. v. Foti, 253 N.J. Super. 626, 640

(App. Div. 1992) (reversing grant of injunctive relief, amending the injunction, and remanding for final adjudication).

The distinction between the denial of a preliminary injunction application and a final ruling on the merits could not be clearer. Indeed, the standard of review from a denial of injunctive relief is completely different from an appeal from a final judgment. Freehold Reg'l High Sch. Dist. Bd. of Educ. v. Freehold Reg'l High Sch. Custodial & Maint. Ass'n, A-0125-11T3, 2012 WL 1414018 (N.J. Super. App. Div. Apr. 25, 2012) (citing Brown, 424 N.J. Super. at 182 (holding "[w]e generally review a trial court's issuance of a preliminary injunction for abuse of discretion…[b]ut, because the trial judge issued a final decision on the merits of this case, we employ the de novo standard of review.").

As a matter of fundamental appellate jurisprudence, this Court does not have jurisdiction to make a final determination on the merits regarding the validity of the award of the Contract. This is a straightforward interlocutory review of the denial of preliminary injunctive relief - nothing more.

Second, Plaintiffs did not ask to void the Contract in their Notices of Motion for Leave. The Notices of Motion filed by Waste Management on December 21, 2012 (JPMDa12-JPMDa14), and Covanta on December 24, 2012 (JPMDa15-JPMDa17), seek the same relief:

> [L]eave to appeal from the interlocutory Order of the Honorable Thomas L. Weisenbeck, entered on December 12, 2012, denying [Plaintiffs'] application[s] for a preliminary (interlocutory) injunction enjoining [Mascaro] from entering into a contract for the operation of two solid waste transfer stations in Morris County finding no likelihood of success on the merits…
>
> [JPMDa13.]

In addition, Plaintiffs sought a stay of the "award and/or effectuation of the Contract." JPMDa16. There is no request for an order finding the Contract void on the merits.

Third, not only can no "effective" relief be entered on these interlocutory appeals, but Plaintiffs have already conceded this fact before the trial court. In opposition to Mascaro's motion for summary judgment, Plaintiffs argued that the trial court cannot enter a final judgment determining the validity of the award of the Contract without further discovery. Plaintiffs argued that the record before the trial court was incomplete for such a final decision on the merits.[9] JPMDa34, JPMDa35; see also JPMDa24 ("This Court has merely denied Plaintiffs' application for injunctive relief by applying an analysis which is different than and separate from the analysis to be applied to decide a motion for summary judgment");

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[9] Mascaro submits that this matter is ripe for summary judgment. However, such a final judgment should be made by the trial court in the first instance.

JPMDa33; JPMDa63; see also JPMDa46 (stating that since the denial of restraints, Plaintiffs discovered new evidence that bears on the merits of the case.)

Plaintiffs cannot have it both ways. There can be no dispute that, as matter of law, the trial court's denial of preliminary injunctive relief was interlocutory. The trial court has not yet made a final determination regarding the award of the Contract. As such, the requested dispositive relief - voiding of the Contract and a re-bid - cannot be awarded on these interlocutory appeals. Accordingly, if the December 2012 Order is overturned, the only relief is for this matter to be remanded for further proceedings, including a decision on the pending motion for summary judgment.

CONCLUSION

Based on the foregoing, Mascaro respectfully requests that Plaintiffs' interlocutory appeals be dismissed and the trial court's December 12, 2012, Order be affirmed.

Respectfully submitted,

McELROY, DEUTSCH, MULVANEY & CARPENTER, LLP
Edward B. Deutsch
Thomas P. Scrivo
Appellate Counsel for Defendant-Respondent, Solid Waste Services, Inc. d/b/a J.P. Mascaro & Sons

Dated: June 18, 2013 By: _____
Thomas P. Scrivo

INDEX TO MASCARO'S APPELLATE APPENDIX

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WASTE MANAGEMENT OF NEW JERSEY, INC., Plaintiff, v. MORRIS COUNTY MUNICIPAL UTILITIES AUTHORITY, and SOLID WASTE SERVICES, INC. d/b/a J.P. MASCARO & SONS, Defendants.	SUPERIOR COURT OF NEW JERSEY, MORRIS COUNTY, LAW DIVISION DOCKET NO **ORDER TO SHOW CAUSE WITH TEMPORARY RESTRAINTS PURSUANT TO RULE 4:52**

THIS MATTER being brought before the court by Hill Wallack LLP, attorneys for Plaintiff, Waste Management of New Jersey, Inc. ("WM" and/or "Plaintiff"), seeking relief by way of temporary restraints pursuant to R. 4:52, based upon the facts set forth in the Verified Complaint, Certification of Maeve E. Cannon, Esq. and Brief filed herewith; and upon notice to defendants, the Morris County Municipal Utilities Authority (the "MCMUA"); and Solid Waste Services, Inc. d/b/a J.P. Mascaro & Sons ("JPM") (collectively the "Defendants"), for an order compelling the MCMUA to immediately rescind its October 16, 2012 resolution awarding a contract to JPM (the "Resolution") and resulting the contract between the MCMUA and JPM for Operating the Two Morris County Solid Waste Transfer Stations Located in Parsippany-Troy Hills Township and Mount Olive Township (the "Contract"); and it appearing that immediate, substantial and irreparable damage will result to WM absent a grant of the requested relief and for good cause shown.

IT IS on this _____ day of _____, 2012

ORDERED that Defendants appear and show cause before the Superior Court at the Morris County Courthouse, Washington & Court Street, Morristown, NJ 07960-0910 at _____ o'clock in the _____ noon or as soon thereafter as counsel can be heard, on the _____ day of _____, 2012 why an order should not be issued for the following preliminary relief:

A. Permanently restraining and enjoining the acceptance of JPM's bid in response to the Request for Proposals for the Contract ("RFP"); and,

B. Rescinding the MCMUA's Resolution awarding the Contract to JPM; and,

C. Rescinding the Contract between the MCMUA and JPM; and,

D. Permanently restraining and enjoining the implementation of the Contract and Defendants from taking any action to implement the Contract; and,

E. Directing that award be made to WM as the lowest responsive and responsible bidder for the Contract; and,

F. Granting other such relief as the court deems equitable and just.

And it is FURTHER ORDERED that pending the return date herein, Defendants are temporarily enjoined and restrained from:

A. Signing or implementing the Contract; and,

B. Acting upon or continuing with the award of the Contract to JPM pursuant to the Resolution; and,

C. Performing any work in connection with the Contract, including but not limited to JPM's purchase of the necessary equipment to perform the Contract, or making any payments on the Contract to JPM pursuant to the prices submitted in JPM's bid in response to the RFP for the Contract; and,

D. Granting other such relief as the court deems equitable and just.

And it is further ORDERED that:

1. The Defendant may move to dissolve or modify the temporary restraints herein contained on two (2) days' notice to the Plaintiff's attorney, Maeve E. Cannon, Esq.

2. A copy of this Order to Show Cause, Verified Complaint, Certification of Maeve E. Cannon, Esq. and Brief submitted in support of this application be served upon the Defendants personally within _____ days of the date hereof, in accordance with R. 4:4-3 and R. 4:4-4, this being original process.

3. The Plaintiff must file with the court its proof of service of the pleadings on the Defendant no later than three (3) days before the return date.

4. Defendant shall file and serve a written response to this Order to Show Cause and the request for entry of injunctive relief and proof of service by _____, 2012. The original documents must be filed with the Clerk of the Superior Court in the county listed above. A directory of these offices is available in the Civil Division Management Office in the

county listed above and online at http://www.judiciary.state.nj.us/prose/10153_deptyclerklawref.pdf. You must send a copy of your opposition papers directly to Hon. Thomas L. Weisenbeck, A.J.S.C. whose address is Morris County Courthouse, Washington & Court Streets, Morristown, NJ 07960-0910. You must also send a copy of your opposition papers to the Plaintiff's attorney whose name and address appears above, or to the Plaintiff, if no attorney is named above. A telephone call will not protect your rights; you must file your opposition and pay the required fee of $30.00 and serve your opposition on your adversary, if you want the court to hear your opposition to the injunctive relief the Plaintiff is seeking.

5. The Plaintiff must file and serve any written reply to the Defendants' Order to Show Cause opposition by _____, 2012. The reply papers must be filed with the Clerk of the Superior Court in the county listed above and a copy of the reply papers must be sent directly to the chambers of Hon. Thomas L. Weisenbeck, A.J.S.C.

6. If the Defendant does not file and serve opposition to this Order to Show Cause, the application will be decided on the papers on the return date and relief may be granted by default, provided that the Plaintiff files a proof of service and a proposed form of order at least three days prior to the return date.

7. If the Plaintiff has not already done so, a proposed form of order addressing the relief sought on the return date (along with a self-addressed return envelope with return address and postage) must be submitted to the court no later than three (3) days before the return date.

8. Defendant take notice that the Plaintiff has filed a lawsuit against you in the Superior Court of New Jersey. The Verified Complaint attached to this Order to Show Cause

states the basis of the lawsuit. If you dispute this complaint, you, or your attorney, must file a written answer to the Complaint and proof of service within 35 days from the date of service of this Order to Show Cause, not counting the day you received it.

These documents must be filed with the Clerk of the Superior Court in the county listed above. A directory of these offices is available in the Civil Division Management Office in the county listed above and online at http://www.judiciary.state.nj.us/prose/10153_deptyclerklawref.pdf. Include a $135.00 filing fee payable to the "Treasurer State of New Jersey." You must also send a copy of your Answer to the Plaintiff's attorney whose name and address appear above, or to the Plaintiff, if no attorney is named above. A telephone call will not protect your rights; you must file and serve your Answer (with the fee) or judgment may be entered against you by default. Please note: Opposition to the Order to Show Cause is not an Answer and you must file both. Please note further: if you do not file and serve an Answer within 35 days of this Order, the Court may enter a default against you for the relief Plaintiff demands.

9. If you cannot afford an attorney, you may call the Legal Services office in the county in which you live or the Legal Services of New Jersey Statewide Hotline at 1-888-LSNJ-LAW (1-888-576-5529). If you do not have an attorney and are not eligible for free legal assistance you may obtain a referral to an attorney by calling one of the Lawyer Referral Services. A directory with contact information for local Legal Services Offices and Lawyer Referral Services is available in the Civil Division Management Office in the county listed above and online at http://www.judiciary.state.nj.us/prose/10153_deptyclerklawref.pdf

10. The Court will entertain argument, but not testimony, on the return date of the order to show cause, unless the court and parties are advised to the contrary no later than ____ days before the return date.

_____
Hon. Thomas L. Weisenbeck, A.J.S.C.

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Attorneys for Plaintiff Covanta 4Recovery, L.P.

COVANTA 4RECOVERY, L.P., a Delaware Limited Partnership and New Jersey taxpayer, Plaintiff, v. MORRIS COUNTY MUNICIPAL UTILITIES AUTHORITY; SOLID WASTE SERVICES, INC. d/b/a J.P. MASCARO & SONS, a Pennsylvania corporation; and WASTE MANAGEMENT OF NEW JERSEY, INC., a New Jersey corporation, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MORRIS COUNTY DOCKET NO. **ORDER TO SHOW CAUSE WITH TEMPORARY RESTRAINTS PURSUANT TO RULE 4:52**

THIS MATTER being brought before the court by Sills Cummis & Gross P.C., counsel for Plaintiff, Covanta 4Recovery, L.P. ("Covanta"), seeking relief by way of temporary restraints pursuant to R. 4:52, based upon the facts set forth in the Verified Complaint, Certification of Kenneth P. Oettle, Esq. and Brief filed herewith; and upon notice to defendants, the Morris County Municipal Utilities Authority (the "MCMUA"); Solid Waste Services, Inc. d/b/a J.P. Mascaro & Sons ("Mascaro"), and Waste Management of New Jersey, Inc. ("WM") (collectively the "Defendants"), for an order compelling the MCMUA to rescind its October 16, 2012 Resolution awarding a contract to Mascaro (the "Resolution") for operating the two Morris County solid waste transfer stations is located in Parsippany-Troy Hills Township and Mount

Olive Township (the "Contract"); and it appearing that immediate, substantial and irreparable damage will result absent a grant of the requested relief, and for good cause shown;

IT IS on this _____ day of November, 2012

ORDERED that Defendants appear and show cause before the Superior Court at the Morris County Courthouse, Washington & Court Streets, Morristown, NJ 07960-0910 at _____ o'clock in the _____ noon or as soon thereafter as counsel can be heard, on the _____ day of _____, 2012 why an order should not be issued for the following relief:

A. Preliminarily restraining and enjoining the acceptance of Mascaro's bid in response to the Request for Proposals for the Contract ("RFB");

B. Rescinding the MCMUA's Resolution awarding the Contract for Mascaro;

C. Rescinding the Contract between the MCMUA and Mascaro;

D. Finding WM's bid to be non-compliant with the RFB;

E. Permanently enjoining the implementation of the Contract by Mascaro or WM and enjoining Defendants from taking any action to implement the Contract;

F. Directing that award be made to Covanta as the lowest responsive and responsible bidder for the Contract,

G. In the alternative; ordering a rebid; and

H. Granting other such relief as the court deems equitable and just.

AND IT IS FURTHER ORDERED that pending the return date herein, Defendants are temporarily enjoined and restrained from:

A. Signing the Contract, or if already signed, implementing the Contract;

B. Acting upon or continuing with the award of the Contract to Mascaro pursuant to the Resolution;

C. Performing any work in connection with the Contract, including but not limited to Mascaro's purchase of the necessary equipment to perform the Contract, or making any payments on the Contract to Mascaro pursuant to the prices in Mascaro's bid in response to the RFB for the Contract; and

D. Granting other such relief as the court deems equitable and just.

And it is further ORDERED that;

1. The Defendant may move to dissolve or modify the temporary restraints herein on two (2) days' notice to the Plaintiff's attorneys, Jeffrey J. Greenbaum, Esq. and Kenneth F. Oettle, Esq.

2. A copy of this Order to Show Cause, Verified Complaint, Certification of Kenneth F. Oettle, Esq. and Brief submitted in support of this application be served upon the Defendants personally within _____ days of the date hereof or their counsel with consent, in accordance with R. 4:4-3 and R. 4:4-4, this being original process.

3. The Plaintiff must file with the court its proof of service of the pleadings on the Defendant no later than three (3) days before the return date.

4. Defendant shall file and serve a written response to this Order to Show Cause and the request for entry of injunctive relief and proof of service by _____ 2012. The original documents must be filed with the Clerk of the Superior Court in Morris County. A directory of these offices is available in the Civil Division Management Office in the county listed above and online at http://www.judiciary.state.nj.us/prose/10153_deptyclerklawref.pdf. You must send a copy of your opposition papers directly to Hon. Thomas L. Weisenbeck,

A.J.S.C. whose address is Morris County Courthouse, Washington & Courts Streets, Morristown, New Jersey 07960-0910. You must also send a copy of your opposition papers to the Plaintiff's attorney whc name and address appears above. A telephone call will not protect your rights; you must file your opposition and pay the required fee of $30.00 and serve your opposition on your adversary, if you want the court to hear your opposition to the injunctive relief the Plaintiff is seeking.

5. The Plaintiff must file and serve any written reply to the Defendants' Order to Show Cause opposition by _____, 2012. The reply papers must be filed with the Clerk of the Superior Court in the count listed above, and a copy of the reply papers must be sent directly to the chambers of Hon. Thomas L. Weisenbeck, A.J.S.C.

6. If the Defendant does not file and serve opposition to this Order to Show Cause, the application will be decided on the papers on the return date, and relief may be granted by default, provided the Plaintiff files a proof of service and a proposed form of order at least three days prior to the return date.

7. If the Plaintiff has not already done so, a proposed form of order addressing the relief sought on the return date (along with a self-addressed return envelope with return address and postage) must be submitted to the court no later than three (3) days before the return date.

8. Defendants take notice that the Plaintiff has filed a lawsuit against them in the Superior Court of New Jersey. The Verified Complaint attached to this Order to Show Cause states the basis of the lawsuit. If you dispute the complaint, you, or your attorney, must file a written answer to the Complaint and proof of service within 35 days from the date of service of this Order to Show Cause, not counting the day you receive it.

These documents must be filed with the Clerk of the Superior Court of Morris County. A directory of these offices is available in the Civil Division Management Office in the county listed above and online at http://www.judiciary.state.nj.us/prose/10153_deptyclerklawref.pdf. Include a $135.00 filing fee payable to the "Treasurer State of New Jersey." You must also send a copy to the Plaintiff's attorney whose name and address appears above, or to the Plaintiff, if no attorney is named above. A telephone call will not protect your rights; you must file your Answer (with the fee), or judgment may be entered against you by default. Please note further: if you do not file and serve an Answer within 35 days of this Order, the court may enter a default against you for the relief Plaintiff demands.

9. If you cannot afford an attorney, you may call the Legal Services office in the county in which you live or the Legal Services of New Jersey Statewide Hotline at 1-888-LSNJ-LAW (1-888-576-5529). If you do not have any attorney and are not eligible for free legal assistance, you may obtain a referral to an attorney by calling one of the Lawyer Referral Services. A directory with contact information for local Legal Services Office and Lawyer Referral Services is available in the Civil Division Management Office in the county listed above and online at http://www.judiciary.state.nj.us/prose/10153_deptyclerklawref.pdf.

10. The Court will entertain argument, but not testimony, on the return date of the order to show cause, unless the court and parties are advised to the contrary no later than _____ days before the return date.

_____
Hon. Thomas L. Weisenbeck, A.J.S.C.

HILL WALLACK LLP
202 Carnegie Center
P.O. Box 5226
Princeton, New Jersey 08543-5226
(609) 924-0808
Attorneys for Movant -Appellant Waste Management of New Jersey, Inc.

WASTE MANAGEMENT OF NEW JERSEY, INC., Plaintiff, v. MORRIS COUNTY MUNICIPAL UTILITIES AUTHORITY; and SOLID WASTE SERVICES, INC. d/b/a J.P. MASCARO & SONS, Defendants.	SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DOCKET NO: A
COVANTA 4RECOVERY, L.P., a Delaware Limited Partnership and New Jersey taxpayer, Plaintiff, v. MORRIS COUNTY MUNICIPAL UTILITIES AUTHORITY; SOLID WASTE SERVICES, INC. d/b/a J.P. MASCARO & SONS, a Pennsylvania corporation; and WASTE MANAGEMENT OF NEW JERSEY, INC., a New Jersey corporation, Defendants.	On Motion for Leave to Appeal from the December 12, 2012 Order of the Superior Court of New Jersey, Law Division, Morris County Sat Below: Hon. Thomas L. Weisenbeck, A.J.S.C. **NOTICE OF MOTION FOR LEAVE TO APPEAL FROM INTERLOCUTORY ORDER AND FOR A PRELIMINARY INJUNCTION**

TO: The Honorable Thomas L. Weisenbeck, A.J.S.C.
Morris County Courthouse
Washington & Court Streets
Morristown, NJ 07963-0910

(2786121)

Joseph J. Maraziti, Jr., Esq.
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Jeffrey J. Greenbaum, Esq.
Kenneth F. Oettle, Esq.
Sills Cummis & Gross P.C.
One Riverfront Plaza
Newark, NJ 07102
Attorneys for Covanta 4Recovery, L.P.

PLEASE TAKE NOTICE that the Movant-Appellant Waste Management of New Jersey, Inc. ("WM") hereby moves before the Superior Court of New Jersey, Appellate Division, for leave to appeal from the interlocutory Order of the Honorable Thomas L. Weisenbeck, entered on December 12, 2012, denying an WM's application for a preliminary (interlocutory) injunction enjoining defendant Solid Waste Services, Inc. d/b/a J.P. Mascaro & Sons and defendant Morris County Municipal Utilities Authority from entering into a contract for the operation of two solid waste transfer stations in Morris County finding no likelihood of success on the merits, and WM further hereby moves for a preliminary injunction.

(32780:21)

The undersigned shall rely upon the accompanying Brief and Appendix in support of this motion.

Respectfully submitted,
HILL WALLACK LLP
Attorneys for Movant-
Appellant, Waste Management
of New Jersey, Inc.

Dated: December 21, 2012

By: _____
Maeve E. Cannon, Esq.

(02780121)

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GRACE CHUN, ESQ.
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MAEVE E. CANNON, ESQ.
JAMES G. O'DONOHUE, ESQ.
Hill Wallack LLP
202 Carnegie Center
P.O. Box 5226
Princeton, NJ 08543-5226

PLEASE TAKE NOTICE that Covanta 4Recovery, L.P. ("Covanta") hereby moves before the Superior Court of New Jersey, Appellate Division, for leave to appeal from the interlocutory Order of the Honorable Thomas L. Weisenbeck, entered on December 12, 2012, denying Covanta's application for an interlocutory injunction precluding Solid Waste Services, Inc. d/b/a J.P. Mascaro & Sons and the Morris County Municipal Utilities Authority from entering into a contract ("Contract") for the operation of two solid waste transfer stations in Morris County, and Covanta further moves for interlocutory injunctive relief staying the award and/or effectuation of the Contract.

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Attorneys for Covanta 4Recovery, L.P.

WASTE MANAGEMENT OF NEW JERSEY, INC., Plaintiff, v. MORRIS COUNTY MUNICIPAL UTILITIES AUTHORITY and SOLID WASTE SERVICES, INC. d/b/a MASCARO & SONS, Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION MOTION NO.
COVANTA 4RECOVERY, L.P., a Delaware Limited Partnership and New Jersey taxpayer, Plaintiff, v. MORRIS COUNTY MUNICIPAL UTILITIES AUTHORITY; SOLID WASTE SERVICES, INC. d/b/a J.P. MASCARO & SONS, a Pennsylvania corporation; and WASTE MANAGEMENT OF NEW JERSEY, INC , a New Jersey corporation, Defendants.	On Motion for Leave to Appeal From the December 12, 2011 Order of the Superior Court of New Jersey, Law Division, Morris County Sat Below: Hon. Thomas L. Weisenbeck, A.J.S.C. **NOTICE OF MOTION FOR LEAVE TO APPEAL FROM INTERLOCUTORY ORDER AND FOR INTERLOCUTORY INJUNCTIVE RELIEF**

To: THE HONORABLE THOMAS A. WEISENBECK, A.J.S.C.
Morris County Courthouse
Washington & Court Streets
Morristown, New Jersey 07963-0910

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Attorneys for Defendant, Solid Waste Services, Inc.
d/b/a J.P. Mascaro & Sons

WASTE MANAGEMENT OF NEW JERSEY, INC., Plaintiff, v. MORRIS COUNTY MUNICIPAL UTILITIES AUTHORITY and SOLID WASTE SERVICES, INC. d/b/a/ MASCARO & SONS, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MORRIS COUNTY DOCKET NO. MRS-L-2627-12 Civil Action
COVANTA OBCOVERY, L.P., a Delaware Limited Partnership and New Jersey taxpayer, Plaintiff, v. MORRIS COUNTY MUNICIPAL UTILITIES AUTHORITY; SOLID WASTE SERVICES, INC. d/b/a J.P. MASCARO & SONS, a Pennsylvania corporation; and WASTE MANAGEMENT OF NEW JERSEY, INC., a New Jersey corporation, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MORRIS COUNTY DOCKET NO. MRS-L-2685-12 Civil Action **NOTICE OF MOTION FOR SUMMARY JUDGMENT**

To: Jeffrey Greenbaum, Esq.
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[illegible]

PG

The undersigned shall reply upon the accompanying Brief and Appendix in support of these Motions.

Respectfully submitted,

STILLS CUMMIS & GROSS P.C.
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Attorneys for Covanta 4Recovery, L.P.

By: _____
JEFFREY L. GREENBAUM
KENNETH P. OETTLE

Dated: December 24, 2012

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WASTE MANAGEMENT OF NEW JERSEY, INC., Plaintiff-Appellant, v. MORRIS COUNTY MUNICIPAL UTILITIES AUTHORITY; and SOLID WASTE SERVICES, INC. d/b/a J.P. MASCARO & SONS, Defendants-Respondents, COVANTA 4 RECOVERY, L.P., a Delaware Limited Partnership and New Jersey taxpayer, Plaintiff-Respondent, v. MORRIS COUNTY MUNICIPAL UTILITIES AUTHORITY; SOLID WASTE SERVICES, INC. d/b/a J.P. MASCARO & SONS, a Pennsylvania corporation; and WASTE MANAGEMENT OF NEW JERSEY, INC., a New Jersey corporation, Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY MORRIS COUNTY DOCKET NO. **BRIEF OF PLAINTIFF WASTE MANAGEMENT OF NEW JERSEY, INC. IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT OF DEFENDANT SOLID WASTE SERVICES, INC. d/b/a J.P. MASCARO & SONS**

On the brief and of Counsel:

Maeve E. Cannon, Esq.
James G. O'Donohue, Esq.
Susan L. Swatski, Esq.

{02806419}

PLEASE TAKE NOTICE that on Friday, February 22, 2013 at 9:00 a.m., or as soon thereafter as counsel may be heard, Defendant, Solid Waste Services, Inc. d/b/a J.P. Mascaro & Sons, by and through their undersigned attorneys, Inglesino, Pearlman, Wyciskala & Taylor, LLC, shall move before the Superior Court of New Jersey, Law Division, Morris County for an Order granting Summary Judgment to Defendant Solid Waste Services, Inc. in the above-captioned matter(s).

PLEASE TAKE FURTHER NOTICE that in support of its motion, Defendant shall rely upon the enclosed Statement of Material Facts, Brief in Support of Motion for Summary Judgment, Certification of Counsel, and all other documents and pleadings on file in this matter; and

PLEASE TAKE FURTHER NOTICE that oral argument is hereby requested.

INGLESINO, PEARLMAN, WYCISKALA & TAYLOR, LLC
600 Parsippany Road
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(973) 947-7111
Attorneys for Defendant, Solid Waste Services, Inc.
d/b/a J.P. Mascaro & Sons

By: _____
Grace Chun, Esq.

Dated: January 17, 2013

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WASTE MANAGEMENT OF NEW JERSEY, INC., Plaintiff-Appellant, v. MORRIS COUNTY MUNICIPAL UTILITIES AUTHORITY; and SOLID WASTE SERVICES, INC. d/b/a J.P. MASCARO & SONS, Defendants-Respondents, COVANTA 4 RECOVERY, L.P., a Delaware Limited Partnership and New Jersey taxpayer, Plaintiff-Respondent, v. MORRIS COUNTY MUNICIPAL UTILITIES AUTHORITY; SOLID WASTE SERVICES, INC. d/b/a J.P. MASCARO & SONS, a Pennsylvania corporation; and WASTE MANAGEMENT OF NEW JERSEY, INC., a New Jersey corporation, Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY MORRIS COUNTY DOCKET NO. **BRIEF OF PLAINTIFF WASTE MANAGEMENT OF NEW JERSEY, INC. IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT OF DEFENDANT SOLID WASTE SERVICES, INC. d/b/a J.P. MASCARO & SONS**

On the brief and of Counsel:

Maeve E. Cannon, Esq.
James G. O'Donohue, Esq.
Susan L. Swatski, Esq.

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PRELIMINARY STATEMENT

Plaintiff Waste Management of New Jersey Inc. (WM") submits this Brief in opposition to Solid Waste Services Inc. d/b/a J.P. Mascaro and Sons' ("Mascaro") Motion for Summary Judgment. Mascaro's motion is premised on facts that this Court has addressed solely in the context of denying an Order to Show Cause for issuance of a preliminary injunction that was filed by WM and Plaintiff Covanta 4Recovery, L.P. (collectively, the "Plaintiffs"). Through the Order to Show Cause, Plaintiffs sought to stay the award to Mascaro of a $134 million dollar contract to operate two Morris County solid waste transfer stations, including provision of transportation and disposal services. Mascaro's bid failed to comply with material bid specifications requiring the submission of "certified financial statements" and the demonstration of satisfaction of certain "Minimum Financial Qualifications" ("MFQ"). Plaintiffs filed an interlocutory appeal of the denial of the preliminary restraints and the Court's findings upon which that decision was premised. That appeal is pending.

Mascaro incorrectly represents that "the Court has already found that Mascaro unquestionably submitted a responsive and responsible bid." Mascaro's Br. at 4. *This Court has made no such finding.* Tellingly, Mascaro's statement is unsupported by any citation to the Record. This Court has merely denied Plaintiffs' application for injunctive relief by applying an analysis which is different than and separate from the analysis applied to decide a motion for summary judgment.

As discussed herein, the facts at bar raise a triable question of fact that Mascaro submitted a fatally non-responsive bid because Mascaro failed to submit three years of certified financial statements, which in the context of this bid meant audited financial statements, not the "condensed financial information" submitted by Mascaro. Further, the MCMUA did not accept the Attestation report submitted by Mascaro until *after* it had obtained supplemental financial

information from Mascaro post-bid. Had Mascaro refused to submit the supplemental information, the MCMUA would have had no way of determining from the information provided that Mascaro met three out of four of the minimum financial qualifications, information it clearly expected prior to making an award.

Alternatively, if this court finds that "certified" did not mean audited financial statements were required under the Request for Bids ("RFB"), then that finding would *per se* render the RFB fatally flawed because it left the MCMUA free to determine what a material term meant after the fact. A public entity cannot create a standard that may be applied differently to different bidders or change the meaning of a common term to mean different things among bidders. Here, seven (7) of the eight (8) bidders on the contract interpreted the common term "certified financial statements" to mean "audited" and supplied audited financial statements. Only Mascaro deviated from this commonly accepted term. The MCMUA's acceptance of Mascaro's submission created an ambiguity in the specification that could be manipulated by the MCMUA after the fact in evaluating the bids. On such a record, the Court must order a rebid and order the MCMUA to revise the RFB to define "certified financial statements" prior to rebidding. Such a created ambiguity in a material term in the contract would render the contract invalid and void Mascaro's award.

For these reasons as well as those addressed herein, genuine issues of material fact exist, warranting denial of Mascaro's motion for summary judgment.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

We rely upon the facts set forth in WM's Counterstatement of Material Facts. WM provides the following by way of summary.

At issue is the protest of the award by the MCMUA of a $134 million contract to Mascaro for the operation of two solid waste transfer stations in Morris County. AR-02309. The RFB required all bidders to submit "certified financial statements for each of the three recent fiscal years." AR-0041. Though "certified financial statement" was not defined in the RFB, the RFB advised bidders that undefined terms "shall have the meaning normally ascribed to them in the trade, profession or business with which they are associated." AR00010.

In their challenge to the award, Plaintiffs argued that the meaning normally ascribed to the phrase "certified financial statement" and to its constituent elements, "financial statement" and "certified," in the context of a substantial public procurement encompasses no less than an audited balance sheet, income statement, statement of cash flows, and statement of shareholders' equity, as reflected in New Jersey case law, New Jersey statutes, federal regulation, and common parlance among procuring entities and bidders.

The RFB also required that bidders satisfy three of four "Minimum Financial Qualifications" listed in the RFB at Schedule 3: (1) Net worth for each of the three recent fiscal years of $29,100,000 or more; (2) The ratios of net cash flow from continuing operations to annual debt (net interest and principal) for two out of the three most recent fiscal years were at least 1:1; (3) The "current ratio" for two out of the three most recent fiscal years were at least 1:1; and (4) Cash and/or cash equivalent of at least $5,000,000 on the date of its most recent audited financial statement. AR00129.

Plaintiffs challenged the MCMUA's decision to award the contract to Mascaro on the basis that (1) Mascaro did not submit three years of certified financial statements as required by the RFB and (2) Mascaro failed to provide with its bid sufficient information to show that it satisfied the Minimum Financial Qualifications. In an attempt to allow Mascaro to correct the

second of the two omissions after the bid opening, the MCMUA permitted Mascaro to provide additional financial information to establish that it met three of the four Minimum Financial Qualifications. AR02191.

On October 23, 2012, WM filed a Verified Complaint and Order to Show Cause with Temporary Restraints seeking to set aside the MCMUA's award to Mascaro. On November 5, 2012, Covanta filed a Verified Complaint and Order to Show Cause likewise seeking interlocutory injunctive relief and a ruling setting aside the award to Mascaro.

After hearing testimony from expert witnesses provided by the parties on November 29, 2012, this Court entered an Order and Statement of Reasons on December 12, 2012 denying Plaintiffs' application for interlocutory relief.

LEGAL ARGUMENT

POINT I

SUMMARY JUDGMENT IS INAPPROPRIATE AS THERE ARE GENUINE ISSUES OF MATERIAL FACT IN DISPUTE

The standards applicable for summary judgment do not warrant that Mascaro's motion for summary judgment be granted. Pursuant to R. 4:46-2(c), a movant is not entitled to summary judgment unless it can show, through competent evidential materials, that there are no genuine issues as to any material fact challenged and that the moving party is entitled to judgment as a matter of law. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 528-29 (1995). The policy of New Jersey law is that each litigant should be afforded the opportunity to fully air its case. Robbins v. Jersey City, 23 N.J. 229, 240 (1957). Accordingly, courts are instructed to grant a motion for summary judgment only with *extreme caution*. Delvin v. Surgent, 18 N.J. 148, 154 (1955); Monmouth Lumber Co. v. Indem. Ins. Co. of North Am., 21 N.J. 439, 448 (1956); Ruvolo v. Am. Cas. Co., 39 N.J. 493, 499 (1963). Significantly, if there is the slightest doubt as to the existence of a material issue of fact, the motion should be denied. Shanley & Fisher, P.C. v. Sisselman, 215 N.J. Super. 200, 211 (App. Div. 1987).

In deciding an order to show cause, a court **must weigh the evidence** to assess whether "a reasonable probability of success on the merits" exists. Crowe v. DeGioia, 90 N.J. 126, 132-33 (1982). By contrast, in deciding a summary judgment application, the court's role is **not "to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial"** by considering the evidence, together with all legitimate inferences that may be drawn therefrom, in the light most favorable to the party opposing summary judgment. Brill, *supra*, 142 N.J. at 535. (emphasis added); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). Where the party opposing

summary judgment has exceeded the "mere scintilla" threshold and has offered a genuine issue of material fact, **the court cannot accept** the movant's version of the events, **even if the quantity of the movant's evidence far outweighs that of its opponent**. Judson v. People's Bank & Trust Co. of Westfield, 17 N.J. 67, 75 (1954). (emphasis added). Given these divergent standards, Mascaro's representation that summary judgment is all but a foregone conclusion based on the Court's findings on the Order to Show Cause is erroneous.

As discussed below, the standard for summary judgment cannot be satisfied in favor of Mascaro because the Record is replete with facts militating against Mascaro to raise a triable question of fact. Mascaro's motion should be denied.

A. Abundant Statutory And Case Law Defining "Certified Financial Statement" To Mean An "Audited" Statement Creates A Genuine Issue Of Material Fact To Defeat Summary Judgment

Mascaro misrepresents the findings of this Court by stating that "the Court rejected the contention that Mascaro failed to submit a "certified financial statement." Mascaro Br. at 4. That statement is simply inaccurate. Rather, the Court found that "this [certified financial statement] is not a defined term under the RFB" (Driscoll Cert., Exh. B at 11) and that the phrase can mean whatever the preparer and the user deem appropriate for the circumstances. Driscoll Cert., Exh. B at 13. The Court then *weighed* the facts and denied Plaintiffs' application for injunctive relief. Id. at 22. For purposes of this Motion for Summary Judgment, the Court must consider whether, after drawing all legitimate inferences and viewing them in the light most favorable to Plaintiffs, the abundant statutory and case law defining "certified" to mean "audited" create an issue of fact as to whether Mascaro submitted a responsible and responsive bid or whether the RFB was ambiguous.

There is no dispute that the phrase "certified financial statements" was not defined in the RFB. But, the RFB advised bidders that undefined terms "shall have the meaning normally ascribed to them in the trade, profession or business with which they are associated." AR0010. The meaning normally ascribed to the phrase "certified financial statement" in the context of a substantial public procurement with a contract value in excess of $100 million, includes an audited balance sheet, an income statement, statement of cash flows and a statement of shareholders' equity.

New Jersey case law, statutes and regulations, Federal regulations, regulations of other jurisdictions and common parlance among procuring entities, bidders and accountants consistently support this definition. See, e.g., First Indem. Of Am. Ins. Co. v. Letters, Meyler & Co. P.C., 326 N.J. Super. 366 (Law Div. 1998) ("Certified financial statements have become the benchmark for various reasonably foreseeable business purposes and accountants had been engaged to satisfy those ends."); Petrillo v. Bachenberg, 139 N.J. 472, 484 (1995) ("Because investors foreseeable may rely on certified financial statements, we held that the accountant's duty extended to those investors despite the absence of privity between them"); Herman v. Sunshine Chem. Specialties, 133 N.J. 329, 344-45 (1993) ("Certified financial statements of a privately-held corporation may also be discoverable in an appropriate case."); P & A Constr., Inc. v. Woodbridge, 365 N.J. Super. 164, 168 (App. Div. 2004) ("certified financial statements" are material; "many years of positive experience" with bidder is insufficient basis on which to waive omission of certified financial statement); N.J.S.A. § 45:2B-44 (defining "financial statements").

The New Jersey Administrative Code provides multiple examples in which the term "certified" means and is synonymous with "audited." See, e.g., N.J. Admin. Code 13:47A-1.3,

addressing financial reports for brokers and dealers, provides, in pertinent part, that "if the applicant has been engaged in business for one year or more preceding the date of the application, a certified financial statement as of the end of its last fiscal period, along with an unaudited balance sheet as of a date within 60 days of the application may be submitted ..."; N.J. Admin. Code 13:47A-2.1, addressing an application for investment advisor registration, provides, in pertinent part that "[a] certified statement of the applicant's most current financial condition as of a date within 60 days of the application; or provided the applicant has been engaged in business for one year or more preceding the date of the application, a certified financial statement as of the end of its last fiscal period, along with an unaudited balance sheet as of a date within 60 days of the application", N.J. Admin. Code 8:33 APP. B, concerning an application review process under the Department of Health and senior services, defines a "certified financial statement as follows:

> All applications from existing providers must be accompanied by a copy of the latest certified financial statements. The **certified report** must include the following:
>
> 1. Balance Sheet
> 2. Statement of Income and Expenses, with supporting schedules
> 3. Statement of Changes in Financial Position
> 4. Notes to the Statements
> 5. Auditor's Letter
>
> The regulation then goes on to distinguish "certified financial statements" from "unaudited" financial statements as follows:
>
> **If an existing provider applicant does not normally engage outside auditors to certify its financial statements**, it may provide, in lieu of the above:
>
> 1. **Unaudited financial statements** from an independent source to include the items listed above for a certified statement; .... (emphasis added).

How the phrase "certified financial statement" is understood within the industry is also a reflection of how the phrase is defined by federal regulations as well as those in other

jurisdictions. See, e.g., 17 CFR 240A.12b-2, an SEC regulation, defines the term "certified", when used in regard to financial statements, to mean "examined and reported upon with an opinion expressed by an independent public or certified public accountant."); Md Human Serv. § 10-401(C), pertaining to continuing care for the elderly, defines a "certified financial statement" to mean "a complete audit prepared and certified by an independent certified public accountant."

In deciding the Order to Show Cause, the Court did not reconcile its interpretation of "Certified Financial Statement" with New Jersey statutes, case law and regulations.[1] However, in deciding the instant motion for summary judgment the Court cannot ignore the foregoing body of law that equates "certified" with "audited." See also Bondi v. Citigroup, Inc., 423 N.J. Super at 390 (auditors "certified" that financial statements accurately represented financial condition); Albert E. Ruehl Co. v. Board of Trustees, 85 N.J. Super. 4 (Law Div. 1964) (bid specs called for balance sheet to be "certified, without qualification by an independent qualified accountant or auditor"). We are aware of no cases in which "certified" meant "unaudited." Significantly absent from Mascaro's moving brief is any legal authority, separate from the Court's opinion on the Order to Show Cause, to refute that the foregoing legal authorities raise a triable issue of fact as to whether Mascaro submitted a responsive and responsible bid. Accordingly, legitimate inferences may be drawn from the foregoing extensive survey of statutory, case law and industry guidance to raise a triable question of fact that a "certified financial statement" means an "audited" financial statement which would render Mascaro's bid unresponsive and irresponsible. Mascaro's motion should be denied.

[1] None of the experts discussed the use of the phrase "certified financial statements" in New Jersey statutes, case law or regulations.

B. Alternatively, A Finding That Mascaro's "Condensed Financial Information" Satisfied The RFB Requirement For "Certified Financial Statements" Would Create A Triable Question of Fact as to Ambiguity Of A Material Term Of The RFB

The Court's findings of fact with respect to the likelihood of success on the merits prong of the Order to Show Cause analysis raised, at a minimum, a triable question of fact by bringing to light a fatal ambiguity in the RFB – namely, its requirement for bidders to submit "certified financial statements" without having defined "certified financial statements." Although seven (7) of the eight (8) bidders on the contract - WM, Covanta, Coastal Distribution of Paterson ("Coastal"), Interstate Waste Services ("Interstate"), Blue Diamond Disposal, Inc. ("Blue Diamond"), Republic Services ("Republic") and Advanced Enterprises Recycling, Inc. ("Advanced") - interpreted that "certified" means "audited" based upon bidding parlance for a contract of this size as well as statutory and case law, the Court was "satisfied" that a "certified financial statement" can mean whatever accountants and their clients want it to mean in their private transactions.[7] Driscoll Cert., Exh. B at 13; Swatski Cert. at 3-6. This Court cannot find that Mascaro's "Condensed Financial Information" constitutes a "certified financial statement" without also finding an ambiguity in this material term of the RFB, thereby creating a material question of fact as to the validity of the RFB and the legitimacy of any award thereunder.

The creation of this variable definition of "certified financial statement" leaves the MCMUA with the unfettered discretion to pick and choose between bidders based on an undefined standard after the fact. "It is settled that bidding requirements particularly those involving material items, should be unmistakably clear. Vague, ambiguous and conflicting terms

[7] On information and belief, bidders Coastal and Interstate submitted audited financial statements with their bid. Although Ms. Swatski was not permitted to view the sealed envelopes submitted with those bids during her review of the file (see Swatski certification), it is our understanding that Covanta will be submitting certifications with its opposition to this motion affirming that Coastal and Interstate interpreted the phrase "certified financial statements" to mean "audited financial statements." WM relies upon those certifications in support of the footnoted statement. Further, in any case, the MCMUA can open and review the sealed envelopes submitted with the bids of Coastal and Interstate to confirm this fact.

may seriously affect the purpose of competitive bidding." L. Pucillo & Sons, Inc. v. Mayor and Council of Borough of New Milford, 73 N.J. 349, 355 (1977); see also Donald S. Hubsch v. Sullivan, 47 N.J. 556, 559 (1966); Matter of Reflective Sheeting License Plates, 315 N.J. Super. 266, 272 (App. Div. 1998). The specifications must be sufficiently precise so as to prevent the potential for the favoring of a particular bidder after the fact. See James Petrozello Co. v. Chatham Tp., 75 N.J. Super. 173, 178 (1962) ("[t]he failure to promulgate estimates before the reception of bids as to future development left the bidders without a common standard upon which to base their bids and created the possibility of an arbitrary computation of future growth by the municipal officials, so that one bidder rather than another could be favored by the capricious use of these variable factors.").

Although discovery in prerogative writ actions is generally limited, there are no special rules relative to discovery; the court has discretion to allow discovery where the circumstances so warrant. See PRESSLER, New Jersey Court Rules (GANN 2004) Comment to R. 4:69-4. Thus far in this case, the Court has only dealt with the preliminary restraints issue. Now, a case management conference is necessary – and prescribed under R. 4:69-4 - to allow the parties "to determine the factual and legal disputes" and to determine "the scope and time to complete discovery." R. 4:69-4. In this case, a motion for summary judgment is premature absent the following material discovery:

(1) A deposition of a person with knowledge at the MCMUA to determine:

   (a) how the MCMUA has interpreted "certified financial statements" in other procurements and
   (b) how bidders have interpreted "certified financial statements" in other procurements;

(2) A deposition of a person with knowledge from each of the other bidders to the RFB to evidence what "certified" means in a bid procurement of this size; and,

(3) Discovery from Mascaro as to how it has interpreted the phrase in other procurements. This information is relevant because Mascaro has taken a different position as to what "certified" and "audited" financial statements mean in other procurement disputes.

The latter discovery is relevant to this bidding dispute because within a year of this procurement, after the Lower Pottsgrove Township in Montgomery, Pennsylvania, rejected Mascaro's bid for failure to satisfy the "certification requirement" with respect to its financial statements, Mascaro submitted a request for reconsideration on, *inter alia*, the following basis:

> By definition, when one presents an "audited" financial statement, ***it means that the financial statement has been prepared and "certified" by a certified public accountant*** in accordance with generally accepted accounting practices ("GAAP").

A true and correct copy of Mascaro's November 8, 2011 Request for Reconsideration is attached to Swatski Cert. as Exhibit A, emphasis supplied. Mascaro's argument in the Pennsylvania bid procurement is the inverse of its argument at bar. The fact that Mascaro has taken an arguably contrary position in another procurement, at a minimum, raises a question of fact as to what "certified" means in bidding parlance. Here, Plaintiffs submit that Mascaro indeed knew that "certified" means "audited," yet it opted to try to shield its privacy in a way not available to any other bidder by submitting something less than that required by the RFB. BBD's own accountant submitted a letter in the Pennsylvania matter indicating that "by reason of the fact that your company's [Mascaro's] financial statements have been ***audited by our firm, they have already been 'certified' by us*** as being prepared in accordance with GAAP." A true and correct copy of BBD's November 7, 2011 letter to Mascaro is attached to the Certification of Michael Keszler, Esq., dated February 12, 2013 ("Keszler Cert.") at Exhibit A, emphasis supplied.

Mascaro has a "policy not to make [its] financial information readily available in bid submissions." A true and correct copy of a letter to the Upper Southampton Township

Southwestern Bucks Solid Waste Committee from Mascaro, dated January 18, 2012, is attached to Keszler Cert. as Exhibit B. Mascaro's financial statements are audited, but the company made a calculated decision not to submit them per its company policy to maintain a certain element of privacy. Id. Mascaro took the specifications in the RFB and modified them to accommodate its company's privacy policy – a luxury not afforded to the other bidders. In fact, Mascaro had audited financials and chose not to submit them to the MCMUA to protect its information from the MCMUA's review, a luxury no other bidder enjoyed. To date, the MCMUA has no knowledge of what the notes and schedules appended to Masaro's financial statements would have revealed to it in deciding whether to award this $134 million contract.

By withholding its audited financial statements, which it admittedly possessed, Mascaro was able to maintain a level of privacy that was denied to every other bidder who correctly interpreted "certified financial statements" to require audited financial statements. If other bidders and potential bidders had known that selected non-audited financial information would be accepted by MCMUA, then they may have bid or bid differently. Whether real or theoretical, Mascaro was afforded an advantage over all other bidders. See, e.g., Muirfield Constr. Co. Inc. v. Essex County Improvement Auth., 336 N.J. Super. 126, 137 (App. Div. 2000)[3] The MCMUA's award to Mascaro despite its failure to disclose its audited financial statements destroyed the common standard of competition among the bidders. This material advantage stands in direct contravention of Meadowbrook Carting Co., Inc. v. Borough of Island Heights, 138 N.J. 307, 316, 650 A.2d 748, 752 (1994).

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[3] The Appellate Division in Muirfield Constr. found that "[i]f Bartham had chosen for any reason not to proceed with the process after the bids were opened, it need not have forwarded any additional information about the asserted stock transaction and thus, had the apparent option of simply abandoning its bid. That opportunity, whether real or imagined, was sufficient to give Bartham an advantage over conforming bidders." 336 N.J. Super. at 137.

The ambiguity in the meaning of "certified" could not have been known by the bidders until after the Authority applied this new interpretation to the contract term and the Court made its findings on the Order to Show Cause. As a result, at issue is a "latent" ambiguity – which was unknown and unknowable at the time the RFB was issued - rather than a "patent" ambiguity - which was known or knowable by the parties at the time the RFB was issued. The difference between a latent and a patent ambiguity is critical here because the bidders on the instant contract had no way of knowing, nor any reason to suspect that "certified" meant anything other than "audited." It defies reason to suggest that the seven other bidders would have voluntarily submitted their audited financial statements, which provide considerably more confidential information about the company's financial position, if they thought a lesser option - *i.e.* submitting non-audited condensed financial statements - would have been compliant. In fact, several of the other bidders submitted their financials in sealed envelopes so that only the Authority could review them. Mascaro, alone, withheld this information even from the MCMUA's review.

This Court should not endorse the MCMUA's floating scale for bidders' financial disclosures, particularly where a $134 million public contract is at play. The interests of justice warrant denial of Mascaro's motion for summary judgment. In addition, we respectfully request that the Court scheduled a case management conference to determine the scope of and to set a schedule for discovery.

CONCLUSION

For each of the foregoing reasons, Mascaro's Motion for Summary Judgment should be denied and a case management conference should be scheduled to set the scope and schedule for discovery.

Respectfully submitted,

HILL WALLACK LLP
Attorneys for Plaintiff, Waste Management of New Jersey, Inc.

By: _____
Maeve E. Cannon

Dated: February 12, 2013

WASTE MANAGEMENT OF NEW JERSEY, INC., Plaintiff, v. MORRIS COUNTY MUNICIPAL UTILITIES AUTHORITY and SOLID WASTE SERVICES, INC. d/b/a/ MASCARO & SONS, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MORRIS COUNTY Civil Action DOCKET NO. L-2627-12
COVANTA 4RECOVERY, L.P., a Delaware Limited Partnership and New Jersey taxpayer, Plaintiff, v. MORRIS COUNTY MUNICIPAL UTILITIES AUTHORITY, SOLID WASTE SERVICES, INC. d/b/a J.P. MASCARO & SONS, a Pennsylvania corporation; and WASTE MANAGEMENT OF NEW JERSEY, INC., a New Jersey corporation, Defendants.	DOCKET NO. L-2686-12

BRIEF AND APPENDIX OF COVANTA 4RECOVERY, L.P. IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

The central inquiry in this case is what message the MCMUA sent to bidders by requiring that they submit three years of "certified financial statements" on pain of having their bids disqualified if they failed to comply. Several factors bear on the interpretation of that term, all of which present material fact issues. These factors include, among other things, how the term is used in business and industry, how courts use it in their opinions, how the Legislature uses it in statutes, and how agencies use it in their regulations. The factors also include how bidders understood it in this procurement, how they have understood it in other procurements, and how the MCMUA has interpreted it in the past. All these are fact issues. Some issues require discovery, like the questions of how bidders in this procurement understood the term, how the MCMUA has interpreted it in the past, and what the MCMUA has accepted where the request for bids required certified financial statements. Some issues don't require discovery, like the use of the term by courts, Legislature, and agencies.

Since the hearing to take expert testimony on November 29, 2012, Waste Management has found documents submitted by Mascaro in a Pennsylvania procurement indicating that Mascaro and its CPA took the position there, a little over a year ago, that audited financial statements had been "certified." Mascaro did so in an effort to show that by submitting condensed financial information that had been audited, Mascaro had satisfied a requirement that it submit a "certified" financial statement. Mascaro's inconsistency in Pennsylvania and New Jersey regarding the meaning of "certified" by itself creates a disputed issue of material fact that requires exploration.

The MCMUA has taken the extraordinarily aggressive position that a "certified financial statement" can be self-certified by Mascaro and limited to summary financial information with no footnotes and no auditor's opinion. Nothing in the Request for Bids so indicated, and none

of the bidders except Mascaro took it that way because they all submitted audited financial statements. Except for the testimony of Mr. Sobel that in some transactions, lenders will accept self-certification and that accounting literature does not define the term "certified," the MCMUA has shown nothing to back up its position that what the Request for Bids required is what Mascaro submitted.

The interpretation of "certified financial statement" is a live issue that cannot be resolved in favor of Mascaro and the MCMUA through the truncated process of summary judgment. To the contrary, the evidence gathered thus far is overwhelming that in common parlance, that is, in terms likely to be understood by bidders reading the Request for Bids, a "certified financial statement" is understood to mean an audited financial statement. Covanta respectfully requests that summary judgment be denied and that Covanta be granted limited factual discovery to confirm the direction in which the facts appear to be heading.

PROCEDURAL HISTORY

On July 9, 2012, the MCMUA requested bids to operate two solid waste transfer stations for up to five years. (AR-02304). Bids were opened on September 13, 2012. (Id.). The three low bidders were Covanta 4Recovery, L.P. ("Covanta")($131,004,000), Solid Waste Services, Inc. d/b/a/ J.P. Mascaro & Sons ("Mascaro")($134,380,000), and Waste Management of New Jersey, Inc. ("WM")($137,952,000). (AR-02305).

On October 16, 2012, the MCMUA rejected Covanta's bid as non-responsive and authorized a contract with Mascaro. (AR-02309). On October 23, 2012, WM filed a Verified Complaint to enjoin and reverse the award because (i) Mascaro failed to supply three years of certified financial statements explicitly required by the Request for Bids ("RFB") and (ii) the condensed financial information in Mascaro's bid failed to show that Mascaro met the MFQs.

On November 5, 2012, Covanta filed a Verified Complaint, challenging the award to Mascaro on the same grounds, challenging the rejection of its own bid, and seeking injunctive relief.

On November 8, 2012, the Court heard oral argument regarding injunctive relief, and on November 15, 2012, the Court issued an Order requiring expert witnesses to address six questions intended to explore, among other things, the meaning of the term "certified financial statement."[1] The MCMUA agreed not to award the contract pending a ruling on the request for injunctive relief. On November 29, 2012, the Court accepted the experts' reports into evidence in lieu of direct testimony and allowed cross-examination. (2Tr.). On December 5, 2012, the Court heard oral argument (3Tr.). On December 12, 2012, it denied injunctive relief. On Monday, December 17, 2012, WM and Covanta applied to the Appellate Division for leave to move on short notice to stay the award and were denied. On December 21, 2012, the Court issued an Order granting motions for summary judgment against Covanta's Verified Complaint made by Mascaro, the MCMUA, and WM and dismissed Covanta's Verified Complaint. Before receiving that Order, Covanta moved for leave to appeal from the denial of injunctive relief. As of the date of this brief, that motion is pending, along with a similar motion for leave to appeal made by WM.

While the motions for leave to appeal were pending, Covanta moved for reconsideration of the Court's dismissal of Covanta's entire Verified Complaint on the ground that only the validity of Covanta's bid, not the validity of Mascaro's bid, had been briefed and argued on the summary judgment motions, and it moved to add two plaintiffs to the Verified Complaint to ensure standing. Those motions were granted by Order dated January 25, 2013. Along with its response to Covanta's motions, Mascaro moved for summary judgment against the claim by

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[1] The Transcript of oral argument on November 8, 2012 is denoted as "1Tr." the hearing on November 29, 2012 as "2Tr." and oral argument on December 5, 2012, as "3Tr."

Covanta and WM that Mascaro's bid was non-conforming. The MCMUA has joined in that motion, which is returnable February 22, 2013.

STATEMENT OF FACTS

Bidders Are Required to Supply Three Years of Certified Financial Statements

Question 14 of the Questionnaire in the RFB asked bidders to supply "the certified financial statement of the Bidder . . for each of the three (3) recent fiscal years." (AR-00041). The RFB did not define "certified," "financial statement," or "certified financial statement," but it stated that undefined terms would have "the meaning normally ascribed to them in the trade, profession or business with which they are associated." (AR-00010). The Questionnaire warned that failure to provide any required information "shall result in rejection of the Bid." (AR-00040).

The term "certified financial statement," is common parlance for the typical audited set of financial statements, which include consisting of a balance sheet, income statement, statement of cash flows, all with relevant footnotes and an auditor's opinion. (Expert Report of E. Weinstein at 6). These are the main financial statements. Balance sheets show what a company owns and what it owes at a fixed point in time. Income statements show how much money a company made and spent over a period of time. Cash flow statements show the exchange of money between a company and the outside world, also over a period of time. They use and reorder the information from a company's balance sheet and income statement. Statements of shareholders' equity, sometimes included as a separate statement, show changes in the interests of the company's shareholders over time. (*See* the SEC's "Beginners' Guide to Financial Statements" at the SEC's website, hereinafter "SEC Guide").[2]

[2] See http://www.sec.gov/investor/pubs/begfinstmtguide.htm

Public entities conducting procurements in solid waste collection services are required by the regulations of the New Jersey Department of Environmental Protection ("DEP") to have bidders complete a questionnaire to establish their experience and their financial strength. *See N.J.A.C.* 7:26H-6.4 and *N.J.A.C.* 7:26H-6, Appx. A. The DEP's model questionnaire calls for bidders to supply "a financial statement for the most recent year." (Question 13 in Questionnaire at *N.J.A.C.* 7:26H-6, Appx. A). In this procurement, the MCMUA required a "*certified* financial statement for each of the three (3) recent fiscal years." (AR-00041; emphasis added).

The MCMUA Requires that Bidders Satisfy the MFQ

In addition to requiring three years of certified financial statements, the RFB required bidders or their guarantors to satisfy at least three of four specified Minimum Financial Qualifications ("MFQ") as of the bid opening:

> (1) Net worth for each of the three recent fiscal years of $29,100,000 or more;
>
> (2) The ratios of net cash flow from continuing operations to annual debt (net interest and principal) for two (2) out of the three (3) most recent fiscal years were at least 1:1;
>
> (3) The "current ratios" [current assets divided by current liabilities] for two (2) out of the three (3) most recent fiscal years were at least 1:1; and
>
> (4) Cash and/or cash equivalent of at least $5,000,000 on the date of [the bidder's] most recent audited financial statement. [AR-00129].

The separate requirements of (i) submitting three years of certified financial statements and (ii) satisfying three of the four MFQ did not cross-reference each other. They were independent, as Mascaro's expert testified:

> Q. And you also said there is no link between the requirement to submit a certified financial statement and the requirement to meet the minimum financial qualification, right?
>
> A. That is my view, yes.

> Q. So in your testimony they are two separate and distinct requirements with no link to each other, right?
>
> A. There's no specification in the bid that requires linkage or asks for linkage of those two documents. [2Tr.195:7 to 2Tr.196:4].

Mascaro's counsel embraced this position in oral argument on December 5:

> Now with respect to the minimum financial qualifications, our witness has testified that there is **no linkage** between the financial statement required in Question 14 and the bidder's responsibility to demonstrate that they meet the minimum financial requirements in Schedule 3. [3T69:1 to 7; emphasis added].

The minimum financial criteria of the MFQ addressed the bidder's size and value (minimum net worth), the bidder's ability to pay its debt service (ratio of net cash from operations to annual debt service), its liquidity (ratio of current assets to current liabilities), and its ability to pay its short-term obligations ($5 million cash or cash equivalents). The RFB did not specify how bidders were to establish that they met the minimum criteria, but, as indicated above, the Questionnaire required the bidder to supply a "certified financial statement" for the bidder or its guarantor "for each of the three (3) recent fiscal years." (AR-00041).

From financial statements, the MCMUA could tell if a bidder met the MFQ. Net worth would appear on the bidder's balance sheet as stockholder's equity. (*see* AR-02195). Cash or cash equivalents would appear on the balance sheet and on the statement of cash flows. (AR-02195 and 02197). The ratio of current assets to current liabilities would appear on the balance sheet. (AR-02195). The ratio of net cash flow from operations to annual debt service would appear from the combination of the statement of cash flows (the line item called "net cash provided by operating activities") and the income statement (line item called "interest expense").

Audited financial statements provide much more than the limited information needed to address the MFQ. They provide line-item details that illuminate the strengths and weaknesses of a business, including data from which other ratios can be calculated, and they provide footnotes that explain noteworthy aspects of the financial statements. Footnotes are an important element of audited financial statements. (Weinstein Report at 7) "The footnotes to financial states are packed with information." SEC Guide, *supra*, at "Read the Footnotes."

Mascaro Provides Condensed Financial Information

Mascaro tightly guards its financial privacy. It has a policy of declining to make its financial information readily available in bid submissions, as per the following statement in a recent cover letter to a procuring agency in Pennsylvania:

> J.P. Mascaro & Sons is a privately held family owned and operated company. As such we are not mandated by law as to the disclosures of publicly held companies. Based on the above, it is our policy not to make our financial information readily available in bid submissions. [A1].[3]

Mascaro followed that policy in its response to the MCMUA's two-pronged inquiry into the financial status of bidders, that is, requiring that bidders satisfy the MFQ and requiring that bidders supply three years of certified financial statements. Instead of submitting its already audited financial statements with its bid, Mascaro had its CPA prepare what he called "Condensed Financial Information," consisting of summary totals from three years of Mascaro's balance sheets and income statements. The CPA said that two years of the condensed financial information were taken from audited financial statements, and the third year was taken from financial statements in the "final stages" of an audit, albeit more than six months after the end of the fiscal year ending March 31, 2012. (AR-01647). Mascaro's CPA didn't designate the two pages of condensed information as "balance sheet" and "income

[3] Copies of documents submitted by Mascaro in Pennsylvania procurements are appended to this brief. We understand that WM will attach them to a certification.

statement." He designated both sheets as "Condensed Financial Information." (AR-02250 and 02251).

The balance sheets from which the condensed financial information was taken had line items under "Current Assets" for "Cash and cash equivalents," "Investment," "Accounts receivable, trade, net of allowance for doubtful accounts," "Prepaid disposal fees," and "Prepaid expenses and other." (AR-02195). By presenting that data in summary form, the condensed financial information failed to break out cash and cash equivalents and thus failed to show as of the date of the bid opening that Mascaro had $5 million or more in cash or cash equivalents – one of the four criteria of the MFQ.

Similarly, because Mascaro chose not to supply a statement of cash flows with its bid, its condensed financial information had no line item for "net cash from operations" and therefore could not establish a ratio of one-to-one for net cash flow from operations to annual debt service – another of the four criteria of the MFQ. Mascaro's privacy policy thus bumped up against the MFQ and fell one criterion short, given that bidders had to satisfy three of the four criteria. Mascaro's condensed financial information could show only that Mascaro satisfied two of the four criteria.

In lieu of submitting financial information to establish compliance with at least three of the four MFQ, Mascaro submitted an attestation report from its CPA, stating that Mascaro complied, in all material respects, with all four criteria of the MFQ. (AR-01645). Consistent with Mascaro's privacy policy, the attestation letter did not attach the financial information on which the CPA relied, nor did it provide an audit opinion on Mascaro's condensed financial information. It was not an audit report. The scope of the report was limited by the attestation engagement, namely, to examine Mascaro's compliance with the MFQ. (AR-01645).

By submitting condensed financial information rather than audited financial statements, Mascaro was able to conceal, among other things, related party transactions that could be a cause for concern (discussed further below). As Mascaro's expert testified, the purpose of

supplying condensed financial information with an attestation rather than audited financial statements with an audit opinion is "to maintain a certain element of privacy." (2Tr. 237:3).

> Q. So by using that method Mascaro could retain an element of privacy for itself in not having to disclose its full and complete financial information. Isn't that correct?
>
> A. Most of my private clients would absolutely look to maintain an element of privacy. [2Tr.237:7 to 12].

Mascaro's concern for its privacy was so great that its bid designated even the condensed financial information as "Confidential" and stated that the information could not be duplicated without Mascaro's written consent. (AR-01648).

The MCMUA Asks for More Information

Because the MCMUA could not determine from the financial information submitted with Mascaro's bid whether Mascaro met the MFQ, the MCMUA's Executive Director, by letter dated October 5, 2012, asked Mascaro's in-house counsel for more information "to determine if Mascaro satisfies the minimum financial qualifications (Schedule3)." The Executive Director asked for the following:

> Schedule 3 Item #2: In order to calculate the net cash flow from continuing operations to annual debt ratio, **a statement of cash flows** and a document indicating Mascaro's annual debt for the last 3 years are required.
>
> Schedule 3 Item #4: Please provide **all components of your 'current assets' line** item on the balance sheet you submitted. Also, please supply us with the **audited financials (including the statement of cash flows)** for the year ended 3/31/2012. [AR-02191; emphasis added].

The first request calls for three years of statements of cash flows and three years of documents indicating what appears to be debt service, meaning payments of interest and principal to keep a loan current. The purpose of the request, according to the MCMUA's letter, was "to calculate the net cash flow from continuing operations to annual debt ratio." (*Id.*).

The request for "all components of your 'current assets' line item on the balance sheet you submitted" addresses the missing component of $5 million of cash or cash equivalents. The

request for "the audited financials (including the statement of cash flows) for the year ended 3/31/2012" appears to address, at a minimum, the fact that the condensed financial information in Mascaro's bid was taken from only two years of audited financial statements, not three years as required by Question 14 of the bidders' Questionnaire.

Mascaro Supplies Limited Additional Information

In a letter dated October 5, 2012, Mascaro's accountants, BBD, responded to the Authority's request for additional information, but BBD did not supply three years of statements of cash flows or three years of documents indicating Mascaro's annual debt service, as the Executive Director's letter of October 5, 2012 requested. Instead, BBD enclosed a draft of Mascaro's 2012 financial statements, which were undergoing an audit. The draft included figures for 2011, presumably audited, but it provided no footnotes for 2011 or 2012 and no audit opinion for either year. Mascaro submitted no audited financial statements for 2010, with or without footnotes. In its letter, BBD took from Mascaro's 2012 statement of cash flows the line items called "net cash flow from operating activities" and "interest paid" to show that the ratio of cash flow from operations to debt service was in excess of one-to-one. (AR-02192 to 02197). In this way, BBD continued to protect Mascaro's audited financial statements from disclosure.[4]

Related-Party Transactions Are Revealed

Several figures on Mascaro's draft 2012 financial statements, not submitted until after the bids were opened,, disclose highly unusual transactions that were not explained, including extraordinarily large commitments to and from "related parties" (*e.g.*, officers and shareholders). These include receivables of $50.4 million in 2011 and $27.9 million in 2012 and payables (*i.e.*, money owed to related parties) of $45.8 million in 2011 and $40.4 million in

[4] As it turned out, BBD had mistakenly reported the cash flow from 2011 as being from 2012, 2010 as being from 2011, and 2009 as being from 2010. It corrected that mistake in a letter of October 12, 2012, still without supplying actual financial statements. A copy of that letter is appended to this brief at A39.

2012. (AR-02195). The payables constitute 40% to 45% of the company's net worth. (Id.) These obligations were not disclosed let alone footnoted in the condensed financial information that Mascaro submitted with its bid. Mascaro's draft income statement for 2012 shows net income of $10.99 million but revenue from related parties of $6.0 million, possibly constituting more than half of the company's net income. (AR-02196). Again, no footnotes addressed this related-party revenue. Thus, no information was provided to the MCMUA as to the nature of these transactions or whether they posed serious concerns regarding Mascaro's financial viability or its ability to perform the five-year contract.

Footnotes Are Essential

As explained by Covanta's expert, Edward Weinstein, the 2012 draft balance sheet submitted post-bid by Mascaro's accountant shows large current liabilities relative to the size of Mascaro's balance sheet, including a "Note payable, bank credit line" of $57.2 million for 2011 and $52.95 million for 2012 as well as the "Payables to related parties" of $45.8 million for 2011 and $40.4 million for 2012. (AR-02195; Weinstein Report at 14, 20). The details of these liabilities, including repayment terms, would customarily appear in footnotes, which were omitted from the condensed financial information submitted with Mascaro's bid and from the draft financial statements submitted post-bid. (Weinstein Report at 14-15). Footnotes would also provide information about significant accounting policies, an explanation of Mascaro's unusually low income tax expense, and information regarding the large prepaid disposal fees ($47.6 million) shown as "Current Assets" on Mascaro's draft balance sheet. (Id.)

In none of its post-bid submissions did Mascaro provide audited financial statements for fiscal years 2010 and 2011. It provided numbers for 2011 in its 2012 draft, but no footnotes or audit opinion. Thus, the MCMUA was never advised whether a clean audit opinion was provided to Mascaro for any of its most recent three years of financial statements, or what

deficiencies may have been reported by the auditors. Instead, Mascaro concealed this information, acting consistently with its policy of maintaining privacy for its financial information and thus maintaining secrecy with respect to obligations to related parties in excess of 40% of the company's net worth.

Mascaro Protects Its Privacy in Pennsylvania

Mascaro's submission of condensed financial information to the MCMUA is consistent with the approach it used in two Pennsylvania procurements a little more than a year ago. In January 2012, Mascaro submitted a "summarized Financial Statement" and three years of "condensed audited balance sheets" to the Southwestern Bucks Solid Waste Committee in Southhampton, Pennsylvania ("Committee").[5] The summary Financial Statement consisted of a series of bullet points regarding Mascaro's finances, for example, that it maintains unsecured banking and bonding lines of credit in excess of $100 million and net working capital in excess of $70 million. (A1-A2).[6] Mascaro did not submit its audited financial statements, maintaining privacy in accordance with the opening statement in its letter to the Committee, in which Mascaro stated that it is company policy "not to make our financial information readily available in bid submissions." (A1).

In a trash collection and recycling procurement in late 2011 in Lower Pottsgrove Township, Pennsylvania, where Mascaro had been the vendor for trash collection and recycling for eight years, Mascaro used the same cautionary language to declare that it does not make its financial information readily available in bid submissions. Mascaro's approach ran into trouble in Lower Pottsgrove Township because the "summary Financial Statement" and "condensed

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[5] We obtained copies of documents regarding Mascaro bids in Pennsylvania from counsel for WM and anticipate that WM will attach copies to a certification.

[6] "A" refers to the Appendix to this brief.

audited financial information" were deemed by the Township Board of Commissioners not to constitute the certified financial statement required by the bid specifications.

The first paragraph of the Instructions to Bidders in that procurement stated:

> Each bidder shall also submit a financial statement certified by the bidders' certified public accountant in accordance with generally accepted accounting practices ("GAAP") for the last complete fiscal year of the bidder. [A8].

Also, Question No. 13 of the Bidder's Questionnaire asked the bidders to attach a "statement of financial condition," including a "financial statement" containing current assets and liabilities. (A8). The condensed financial information that Mascaro submitted was the same sort of condensed balance sheet information it submitted to the MCMUA, with assets listed on three lines (current assets, property plant & equipment, and other assets), and current liabilities on one line. (A16).

The Township Solicitor opined that Mascaro's submission did not comply with the "financial statement requirement" of the bid specifications, and the Township rejected Mascaro's bid along with the other two bids. (A7). Mascaro then submitted a memo asking the Board of Commissioners to reconsider. In an attempt to show that it had submitted a "certified financial statement," Mascaro used the terms "certified" and "audited" interchangeably, arguing that "[b]y definition, when one presents an 'audited' financial statement, it means that the financial statement has been prepared and 'certified' by a certified public accountant in accordance with generally accepted accounting practices ('GAAP')." (A5).

As confirmation that the condensed financial information presented by Mascaro had been certified, Mascaro included a letter from its accountant, BBD, stating that BBD had "certified" Mascaro's financial statements because it had audited them:

> [B]reason of the fact that your company's financial statements have been audited by our firm, they have already been "certified" by us as being prepared in accordance with GAAP. [A17].

Audited Financial Statements Reveal Strengths and Weaknesses

Audited financial statements reveal what condensed financial information conceals. As Covanta's accounting expert explained in his report, a bidder could have a significant contingent liability, normally disclosed in a footnote, which could jeopardize the bidder's performance of a multi-year contract. Or the bidder's business could be trending sharply downward but, as of the date of the bid opening, could still meet minimum financial criteria, albeit barely. (Weinstein Report at 10). In this regard, three years of certified financial statements could be ***more*** significant than the bidder's meeting three of four minimum financial criteria. (Id.).

A "Certified" Financial Statement Has Been Audited

As explained in the report of Covanta's expert, the term "certified" has its roots in the historic role of the auditor's report on financial statements, when CPAs would actually certify the accuracy of the numbers – something they no longer do. (Weinstein Report at 8). The term "certified" remains viable, however, and is commonly used by bankers, credit agencies, creditors, business executives and accountants to refer to audit work by CPAs and their audit reports. (*Id.*). The phrase "certified financial statements" typically refers to the full complement of financial statements (including balance sheet, income statement, and statement of cash flows), including footnotes, accompanied by an unqualified auditor's report. (*Id.* at 9, *see also* 2Tr. 219:21 to 24). In common parlance, "certified" and "audited" are used interchangeably to refer to financial statements audited and reported on by CPAs. (*Id.* at 8).

CPAs' audit reports summarize the scope of their engagement, reference the standards used, and provide an opinion whether the client's financial statements were prepared in accordance with Generally Accepted Accounting Principles ("GAAP") in the USA. (Id.). The required elements of an audit report are set forth in Edward Weinstein's report. (*Id.* at 8-9).

Information in financial statements goes well beyond an assessment whether minimal financial criteria have been met. It allows one to assess the overall financial health of a

company, whereas the absence of certified financial statements deprives an evaluator of valuable information. (*Id* at 9).

In contrast, Mascaro's expert, Alan Sobel, testified that a financial statement can be prepared "in whatever detail the preparer and user deem appropriate in the circumstances" (2Tr. 216:2 to 4) and that the term "certified" used with "financial statement" in the RFB could just as well refer to certification of financial statements by management, not CPAs. (2Tr.194:18 to 2Tr. 195:6).

> Q. It [the expert's report] says, "Not withstanding absence of the use of the term certified financial statement in the auditing and accounting standards, the term is commonly utilized in business transactions to refer to a certification of financial statements by officers or owners.", right?
>
> A. Yes.
>
> Q. And then you go on in the next page to say that Mr. Mascaro certified all the answers were true to the best of his personal knowledge?
>
> A. Yes.
>
> Q. And that was a certification of the financial statement?
>
> A. Yes. [2TR.194:18 to 2Tr. 195:6].

Mr. Sobel did not draw a distinction between the kind of certification required for a small transaction, like a personal bank loan, and the kind of certification required for a large transaction, such as a $130 million multi-year bid. But the Court did:

> THE COURT: [C]an we distinguish also, I mean, realistically between someone who goes in for an auto loan to buy a used car and a multi-million dollar corporation that comes in and wants a, you know, half-a-billion-dollar line of credit? I mean, clearly those of us who purchased a car and gone – and gone in for financing, we don't have to go in with certified financials, even if it's a small business. So I mean, there's – we're talking about a – I understand we're talking about a wide range here, but the reality is we're talking about parties at the table that are – have purported net worth of – they're quite considerable in the scheme of things. [2Tr.275:5 to 17].

The Court implicitly acknowledged that the meaning a bidder would give to the term "certified financial statement" would depend on the circumstances in which the term was used.

For companies bidding on a huge contract, "certified financial statement" means audited financial statements. For a car loan, "certified financial statement" means only that the borrower would swear to the numbers on a loan application.

Except for Mascaro, which has interpreted "certified" to suit its purposes depending on the procurement, all the bidders in this procurement appear to have understood "certified financial statement" to mean audited financial statement because it appears that they all submitted audited financial statements. (*see* Certif. of Derek Veenhof, ¶¶ 8-10).

ARGUMENT

POINT I

SUMMARY JUDGMENT IS INAPPROPRIATE BECAUSE DISCOVERY IS NEEDED TO RESOLVE GENUINE ISSUES OF DISPUTED MATERIAL FACT REGARDING, AMONG OTHER THINGS, THE MEANING OF "CERTIFIED FINANCIAL STATEMENT" AS USED IN THE REQUEST FOR BIDS

A. Summary Judgment is Inappropriate in the face of material fact disputes.

Pursuant to R. 4:46-2(c), a movant is not entitled to summary judgment unless it can show the absence of genuine issues as to any material fact challenged. *Brill v. Guardian Life Ins. Co. of Am.*, 142 *N.J.* 520, 528-29 (1995). Where discovery on material issues is not complete, the respondent must be given the opportunity to take discovery. *See Wilson v. Amerada Hess Corp.*, 168 *N.J.* 236, 253-254 (2001), cited in *Pressler & Verniero, Current N.J. Court Rules (Gann)*, Comment to *R.* 4:46-2 at 2.3.3.

B. Discovery in this prerogative writ case is contemplated and necessary to resolve disputed factual issues.

Prerogative writ actions may require discovery. "While a prerogative writ proceeding is ordinarily concerned with the public business, it must be remembered that it nevertheless remains a civil action between named parties in which definite issues framed by the pleadings and pretrial order are tried and determined." *Schlossberg v. Jersey City Sewerage Auth.*, 15 *N.J.*

360, 374-75 (1954). Pursuant to *R.* 4:69-4, discovery is explicitly contemplated in such actions. The scope of any discovery and the time to complete it is determined at a case management conference after the determination of the legal and factual issues in dispute. If the case involves a disputed issue of material fact, summary judgment is not appropriate. *See M.A. Stephen Constr. Co., Inc. v. Borough of Rumson*, 117 *N.J. Super.* 431, 439 (App. Div. 1971) (summary judgment reversed in prerogative writ case because genuine issues of fact needed to be resolved by trial court).

C. The parties dispute how bidders would interpret the term "certified financial statement" and the proofs appropriate to establish compliance with the MFQ.

At a minimum, the following issues bear factual exploration:

1. Mascaro has taken the position that because the term "certified financial statement" is not defined in the accounting literature, it can have a range of meanings and that as used in the RFB, it could mean financial statements certified by management. All bidders except Mascaro submitted audited financial statements and presumably understood the term "certified financial statement" to mean audited financial statements. This could be confirmed through discovery. How bidders interpreted the RFB bears on what the RFB required, and what the RFB required bears on whether Mascaro's bid was non-conforming.

2. In the procurement in Lower Pottsgrove, Pennsylvania, discussed above, Mascaro and its accountants interpreted the requirement of "certified" financial statements to be met by audited financial statements. Mascaro's submissions in the Pennsylvania procurement and other such procurements in which Mascaro participated should be explored to determine how Mascaro understands the term "certified financial statement."

3. In adopting the DEP's model Questionnaire for procurements in the solid waste industry, the MCMUA appended the word "certified" to the term "financial statement." The MCMUA may have had a specific reason for doing so, and it may have rejected other bidders in previous procurements for omitting audited financial statements. How the MCMUA interpreted

the term in post procurements, what it accepted as conforming, and when it accepted it are all relevant. These facts bear on the meaning of "certified financial statement" in this procurement and need to be explored.

4. The audit opinions regarding Mascaro's audited financial statements and the footnotes to Mascaro's audited financial statements for the last three years presumably explain Mascaro's significant related-party transactions and other significant line items on the draft financial statements for 2012 that Mascaro submitted after bids were opened. All such line items could bear on Mascaro's financial stability. Mascaro's complete audited financial statements should be supplied, and Mascaro should be deposed regarding them.

5. With respect to a bidder's meeting the MFQ, the MCMUA's past practice is relevant. What has it previously accepted from bidders as proof that the bidders met the MFQ? Has the MCMUA accepted only audited numbers as proof, and when has it required them to be submitted – with the bid or later? This should be explored as well.

All of the foregoing are disputed, material issues of fact. Accordingly, Covanta respectfully requests a management conference to determine the appropriate scope of discovery, potentially to include document requests, interrogatories, requests for admissions, and depositions.

POINT II

A BIDDER WOULD INTERPRET THE REQUIREMENT OF THREE YEARS OF "CERTIFIED FINANCIAL STATEMENTS" IN AN RFB FOR A $130 MILLION SOLID WASTE CONTRACT TO REQUIRE THREE YEARS OF AUDITED FINANCIAL STATEMENTS

A. The Proper Focus Is on What the Term "Certified Financial Statement" Meant to Bidders Reading the RFB.

Looking for a definition of "certified financial statement" in accounting literature – as we now know -- is a hopeless task because the literature does not define it. But what the literature says is not the essential question. The essential question is how bidders would

interpret "certified financial statement." It's the bidders' understanding that counts because the RFB is a communication to them.

A request for bids is an invitation to make an offer. *M.A. Stephen Construction Co., Inc. v. Borough of Rumson*, 125 *N.J. Super.* 67, 72-73 (App. Div. 1973). The bidder is what our Supreme Court calls "the ordinary reader of the specifications." *L. Pucillo & Sons, Inc. v. Borough of New Milford*, 73 *N.J.* 349, 356 (1977). Thus, the meaning to be given to the term "certified financial statement" in a request for bids is what bidders think it means. To bidders on a $130 million waste disposal contract, three years of "certified financial statements" means three years of audited financial statements.

"Certified" Means "Audited"

The Court directed the parties to prepare experts to address six questions bearing on the conformity of Mascaro's condensed financial information to the RFB. (1Tr. 77-78). One of the questions was "[t]he meaning normally ascribed in the accounting profession to the term 'certified' when used in the term 'certified financial statement.'"

This question was drawn from the directive in the RFB that if terms are undefined, they "shall have the meaning normally ascribed to them in the trade, profession or business with which they are associated." (AR-00010). Part of the November 29, 2012 hearing focused on what the term would mean in the accounting literature, but the RFB was directed to bidders, not to accountants. Bidders would not likely consult accounting literature to interpret a term in an RFB, especially one as common as "certified financial statement." (See the Certification of D. Veenhof submitted herewith, ¶¶ 2-3).

The MCMUA must have appended "certified" to "financial statement" for a reason. Question 14 of the Questionnaire could have requested just a "financial statement," which is the term used in the model questionnaire supplied by the DEP regulations that provide uniform bid

specifications for municipal solid waste collection contracts.[7] By upgrading the financial statement requirement to a "certified financial statement," the MCMUA evidently wanted someone to certify three years of financial statements. The entire bid package is certified as true by management, so the MCMUA wanted more.

In its ruling denying an injunction, the Court found that because the accounting literature doesn't define "certify," accountants don't certify financial statements. (Ca13). The Court accepted the testimony of Mascaro's expert that the requirement of a certified financial statement could mean self-certification. Even assuming that possibility to be true, it is a fact-specific observation – true for situations where the size of the transaction requires nothing more. But bidders in this procurement were not likely to think the MCMUA would permit management to self-certify financial statements for a $130 million contract involving the expenditure of public funds and the waste flow of an entire county.

Assuming the term "certified financial statement" can have different meanings in different contexts, which is what Mr. Sobel testified (*see* Court's Dec. 12, 2012 Statement of Reasons at 11 – 13), the term can have only one meaning in a particular procurement because the terms on which bidders submit offers have to be the same for all. The playing field has to be level, and therefore "certified financial statement" can't place one requirement on publicly traded companies and another requirement on private-held companies. As stated in *Hillside Tp v. Sternin*, 25 *N.J.* 317, 323 (1957):

> Every element which enters into the competitive scheme should be required equally for all and should not be left to the volition of the individual aspirant to follow or to disregard and thus to estimate his bid on a basis different from that afforded the other contenders.

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[7] See N.J.A.C. 7:26H-6, Appendix A, and see N.J.A.C. 7:26H-6.5(d)1 for the requirement that bidders submit completed questionnaires demonstrating their financial ability, experience, capital and equipment necessary to perform the contract. The questionnaire in Appendix A to N.J.A.C. 7:26H-6 is like the Questionnaire in the RFB, but the DEP version requires bidders to submit only a "financial statement," not a "certified financial statement."

Therefore, we must ask what "certified financial statement" meant to the bidders in this procurement.

B. Mascaro's position that "Certified Financial Statement" meant self-certified carries little weight because Mascaro took the position in a Pennsylvania procurement that its audited financial statements were certified.

Mascaro's position in the Lower Pottsgrove procurement establishes several points. One is that notwithstanding the absence of the term from the accounting literature, "certified" is viable in common parlance among accountants, their clients, and persons who rely on clients' financial statements, as Covanta and WM contend. BBD and Mascaro -- accountant and client – used the term "certified" in communications with the Township of Lower Pottsgrove, which relied on bidders' financial statements.

A second point is that "audited" and "certified" are commonly equated. As Mascaro asserted in the Lower Pottsgrove procurement, and BBD confirmed, financial statements that have been audited have been "certified." Hypothetically, a financial statement could be certified but not audited, like a personal financial statement certified by a consumer who cannot afford and doesn't need an audit. But self-certification would not be found in the context of a huge waste disposal contract to be performed by a company having at least $29 million net worth. In that context, an agency asking for certified financial statements is asking for audited financial statements with footnotes and a CPA's audit opinion.

Finally, the procurement in Lower Pottsgrove Township shows Mascaro's cynicism about accounting terms where its financial privacy is concerned. When it suited Mascaro's purposes, as in Lower Pottsgrove Township, Pennsylvania, audited and certified were equated. When it doesn't suit Mascaro's purposes, as in the Morris County procurement, they are not.

C. Mascaro's Interpretation of "Certified Financial Statement" Cannot Be Reconciled with New Jersey Case Law, Statutes and Regulations.

In bidding and other cases, the term "certified financial statement" has been widely used without need of definition, and in those cases, the courts were not referring to financial statements certified by management. *See, e.g., P & A Constr., Inc. v. Twp of Woodbridge*, 365 *N.J. Super.* 164 (App. Div. 2004)(failure to submit certified financial statement with bid is material defect).[8] See also *Albert F. Ruehl Co. v. Board of Trustees*, 85 *N.J. Super.* 4 (Law Div. 1964)(bid specs called for balance sheet to be "certified, without qualification by an independent qualified accountant or auditor"). We found no cases in which the word "certified" meant unaudited. To the contrary, where "audited" and "certified" cross paths, they are equated. *See, e.g., Bondi v. Citigroup, Inc.*, 423 *N.J. Super.* 377, 390 (App. Div. 2011) (auditors "certified" that financial statements accurately represented financial condition).

New Jersey statutes refer to both the terms "financial statement" and "certified financial statement." *N.J.S.A.* 45:2B-44 defines "financial statements" to include footnotes and to be prepared in conformity with GAAP or another comprehensive basis of accounting.[9] Thus, the meager condensed financial information submitted by Mascaro was not a financial statement as defined by New Jersey law, certified or otherwise. Recently, the Legislature used "certified financial statement" with respect to the transfer of the University of Medicine and Dentistry to Rutgers. *See N.J.S.A.* 18A:65-100. Clearly, that statute refers to audited financial statements, not numbers certified to by management.

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[8] *See also Petrillo v. Bachenberg*, 139 *N.J.* 472, 484 (1995) (investors foreseeably may rely on "certified financial statements"); *Herman v. Sunshine Chem. Specialties*, 133 *N.J.* 329, 344-45 (1993)("certified financial statements" of a privately-held corporation possibly discoverable); and *First Indem. of Am. Ins. Co. v. Letters, Mevier & Co. P.C.*, 326 *N.J. Super.* 366 (Law Div. 1998)("Certified financial statements" have become benchmark for reasonably foreseeable business purposes, and accountants have been engaged to satisfy those ends).

[9] This definition is found in the Public Accountancy Act of 1977, the purpose of which is "to promote the reliability of information that is used for guidance in financial transactions or for . . . assessing the financial status or performance of commercial . . . enterprises." *N.J.S.A.* 45:2B-43.

The term "certified financial statement" also appears in several administrative regulations. For example, companies seeking to register as investment advisors with the Bureau of Securities must supply a "certified financial statement" as of the end of their last fiscal period, along with an "unaudited balance sheet as of a date within 60 days of the application." A distinction is thus drawn between a "certified" financial statement for a full reporting period and an "unaudited" balance sheet as a brief update, indicating that a certified financial statement is one that has been audited. *N.J.A.C.* 13:47A-2.1. The same language is used for those seeking to register as broker-dealers. *N.J.A.C.* 13:47A-1.3.[10]

The meaning of "certified financial statement" to the Department of Health appears in instructions for applying for a Certificate of Need in Appendix B to *N.J.A.C.* 8:33:

> All applications from existing providers must be accompanied by a copy of the latest **certified financial statements**. The certified report must include the following:
>
> 1. Balance Sheet
> 2. Statement of Income and Expenses, with supporting schedules
> 3. Statement of changes in Financial Position
> 4. Notes to the Statements
> 5. Auditor's Letter [Emphasis added]

The Appendix then distinguishes "certified" financial statements from "unaudited" and "in-house" financial statements.

The Bureau of Securities and the Department of Health both juxtapose "certified" financial statements with "unaudited" financial statements, which is in accord with common parlance. Mascaro and the MCMUA have offered no reason why the MCMUA's use of the term "certified financial statement" would be understood any differently by persons considering a response to the RFB.[11] Mascaro cannot reconcile the RFB with the consistent use of

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[10] Other regulations using the term "certified financial statement" include N.J.A.C. 5:19-4.2 (disclosure statement for continuous care retirement community facilities) and N.J.A.C. 5:80-5.2 (upon changes in ownership of housing project financed by NJHMFA, buyer must supply "certified financial statements").

[11] An SEC regulation, 17 CFR 240A.12b-2, defines "certified," when used with "financial statement," to mean "examined and reported upon with an opinion expressed by an independent public or certified public accountant."

"certified financial statement" in New Jersey case law, statutes, and regulations to refer to audited financial statements.

Finally, and hardly to be ignored in an investigation of common parlance, the Internet provides guidance. Google's search engine produces, among similar references, the following definition of "certified financial statement" at the Investopedia website:

> A financial statement, such as an income statement, cash flow statement or balance sheet, that has been audited and signed off on by an accountant. Once an auditor has fully reviewed the details of a financial statement following GAAP guidelines and is confident the numbers reported within it are accurate, **they certify the documents**. [Emphasis added; long URL omitted].

Investopedia explains the function of "certified financial statements" as follows:[12]

> Certified financial statements play an important role in the financial markets. Investors demand assurance that the documents they rely upon to make investment decisions are accurate and have not been subject to any material errors or omissions by the company that compiled them.

In light of the use of the term "certified financial statement" to mean audited financial statements in all these sources – case law, statutes, regulations and Internet – and particularly in light of the absence of any contrary uses in such sources, common parlance must be taken to equate "certified financial statement" and "audited financial statement," at least in a transaction of this magnitude in terms of dollar value and public interest.

POINT III

THREE YEARS OF CONDENSED FINANCIAL INFORMATION PLUS AN ATTESTATION IS NOT THE EQUIVALENT OF THREE YEARS OF AUDITED FINANCIAL STATEMENTS

Merely satisfying the MFQ does not fulfill the requirement in the Questionnaire of three years of certified financial statements. As Mascaro's expert acknowledged, the requirements are not linked, nor should they be because the MFQ are only a baseline. In fact, two of the

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[12] Wikipedia considers Investopedia to be a well-respected source for financial information. Between 2007 and 2010, Investopedia was owned by Forbes publishing. (http://en.wikipedia.org/wiki/Investopedia)

MFQ are bare minimums. For example, the required "current ratio" of one to one (1:1)(Item 3) means that current assets need only equal current liabilities. The general standard has been characterized as two to one (2:1). *See* Droms & Wright, "Finance and Accounting for Nonfinancial Managers," 6th Ed. (2010) at 35 ("A rule of thumb commonly employed by bankers and other lenders suggests that, for most firms, current assets should be approximately twice as large as current liabilities.") (excerpt appended at A24).[13]

Similarly, the ratio of net cash flow to debt service required by Item 2 of the MFQ, generally called the "debt service coverage ratio," is only 1:1. According to Wikipedia, most commercial banks require a ratio of 1.15 to 1.35 net operating income times annual debt service to ensure cash flow sufficient to cover ongoing loan payments.[14]

Mascaro's condensed financial information didn't have enough detail to satisfy the MFQ, let alone provide the sort of window into a company's finances provided by financial statements with full detail, footnotes, and an auditor's opinion. *Compare* the summary presentation of Mascaro's condensed financial information with the multi-line-item detail of Mascaro's uncondensed draft 2012 financial statements (balance sheet, income statement, and statement of cash flows), which Mascaro provided to the MCMUA after bids were opened.

Several figures on Mascaro's draft 2012 financial statements disclose unusual transactions that were not explained, including extraordinarily large commitments to and from "related parties" (*e.g.*, officers and shareholders). These include receivables of $50.4 million in 2011 and $27.9 million in 2012 and payables (*i.e.*, money owed to related parties) of $45.8 million in 2011 and $40.4 million in 2012. (Ar-02195 - balance sheet). The payables constitute

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[13] *See also* "Understanding Financial Statements, New York Stock Exchange, 1986-87 at 15, cited in Cotton, "Toward Fairness in compensation of Management and Labor: Compensation Ratios. A Proposal for Disclosure," 18 N. Ill. U. L. Rev. 157, 176 (Fall 1997)]; see also Wikipedia at http://en.wikipedia.org/wiki/Current_ratio (acceptable current ratios are generally between 1.5 and 3 for healthy businesses).

[14] http://en.wikipedia.org/wiki/Debt_service_coverage_ratio

40% to 45% of the company's net worth. (Id.) These obligations were not disclosed let alone footnoted in the condensed financial information that Mascaro submitted with its bid. Mascaro's draft income statement for 2012 shows net income of $10.99 million but revenue from related parties of $6.0 million, possibly constituting more than half of the company's net income. (AR-02196). Again, no footnotes addressed this related-party revenue.

The omission of footnotes points up a major difference between audited financial statements and Mascaro's condensed financial information. Footnotes in audited financial statements explain noteworthy transactions that bear on the company's viability, whereas Mascaro's condensed financial information provided only selected information with no explanations. Mascaro's condensed financial information did not acknowledge the existence of related-party assets, liabilities and transactions, let alone provide details.

The Financial Accounting Standards Board (FASB), a group designated by the American Association of Certified Public Accountants to establish accounting principles, issued a standard that requires disclosure in audited financial statements of material related party transactions, including the nature of the relationship(s), a description of the transactions, amounts due from or to related parties, and the terms and manner of settlement. (Weinstein Report at 15 and Exh. 8, FAS 57). We don't know if the footnotes to Mascaro's audited financial statements satisfied these standards because Mascaro supplied no footnotes.

The explanations that would appear in the footnotes to Mascaro's audited financial statements appear to be the kind of information that Mascaro wishes to keep private. It is the kind of information that all other bidders would understand to be required by the request in Question 14 of the bidders' Questionnaire for three years of "certified financial statements."

POINT IV

MASCARO'S BID WAS NON-CONFORMING BECAUSE THE MCMUA COULD NOT TELL FROM MASCARO'S CONDENSED FINANCIAL INFORMATION WHETHER MASCARO MET THE MFQ

No material element of a bid may be provided after bids are opened. *George Harms Construction Co., Inc. v. New Jersey Turnpike Authority*, 137 *N.J.* 8, 37 (1994). If a deviation is material, a post-opening proffer is necessarily "an interdicted modification." *On-Line Games, supra*, 279 *N.J. Super.* at 602-03. Because the MCMUA could not tell from Mascaro's condensed financial information whether Mascaro satisfied Items 2 and 4 of the MFQ, it asked Mascaro to provide additional financial information to "determine" if Mascaro complied. The MCMUA called this a request for "clarification," even citing the section of the RFB that permits requests for clarification (page 1B-12), but the MCMUA wasn't seeking clarification, it was seeking confirmation.

Had the Authority been willing to accept the CPA's attestation regarding Mascaro's compliance with the MFQ, it would not have needed additional information. Since it sought the additional information, it was evidently not willing to accept the attestation without seeing the financial information that Mascaro failed to submit. The reason the MCMUA did not receive the financial information with Mascaro's bid is that Mascaro sought to mold the bidding process to its privacy policy rather than conceding an element of privacy to meet the requirements of the RFB.

Though the RFB did not say how bidders were to prove they met the MFQ, Mascaro's submission deviates materially from the RFB because it "hides the ball," in other words, protects Mascaro's privacy, this time by having a third-party attest to undisclosed financial figures. Like self-certification, third-party attestation unaccompanied by financial figures is a substitute for disclosure. The Appellate Division rejected the alternative of self-certification in *Impac, Inc. v. City of Paterson, supra*, where the omission of certified financial statements from

a bid disqualified the bid notwithstanding that the bidder certified that all statements in its proposal were true and correct.

Allowing certification by management or by third parties paid by management is a slippery slope. The RFB gave no indication to bidders that attestation by CPA's in lieu of submitting complete financial statements was an option. Allowing the MCMUA to decide *after* the bids are opened that attestation will suffice as proof that all criteria of the MFQ were met as of the date of the bid opening invites favoritism, based on the MCMUA's agenda. Maybe the MCMUA likes Mascaro, or maybe it doesn't like Mascaro but just wants to be done with the procurement. Either way, Mascaro is given a way to comply with the RFB of which the other bidders were not aware.

As the certification of Derek Veenhof explains, had Covanta known the MCMUA would accept less than a full set of audited financial statements, it could have submitted its own unaudited financial statements, which show that Covanta meets the MFQ, and if necessary, it could have arranged for an accountant's attestation. (Certif. of D. Veenhof, ¶¶ 4-7). Covanta has had a net worth of more than $29.1 million for three years, meets the ratio requirements, and thus meets three of the four criteria of the MFQ without the need of a parent guarantee. Moreover, although Covanta periodically sweeps free cash to its parent, it could arrange to retain $5 million of liquid cash on its balance sheet if required. (*Id.*, ¶¶ 5-6). Because Covanta could fully satisfy the MFQ, it did not have to rely on a guarantor to meet the MFQ, and it could have avoided the issue whether a fully executed guarantee had to be supplied with Covanta's bid – one of the grounds on which its bid was disqualified. The only reason for involving CHC as guarantor was to provide audited financial statements. (Id., ¶ 6)

Mascaro could have included audited financial statements with its bid but chose, in accord with its company policy, to withhold financial information. The irregularity in the accountant's attestation, which failed to attach the numbers to which it was attesting, was a direct result of Mascaro's policy of withholding financial information and thus protecting its

privacy. According to the sample examination reports in Appendix A to AT Section 101 (*see* Weinstein Report, Exh. 7 at AT 101:114, pp. 2545-2549), attestation reports append the subject matter as to which the attestation is given.[15] Mascaro's secretive approach disadvantaged the MCMUA because it could not ascertain from financial statements whether Mascaro complied with the MFQ, and it disadvantaged other bidders, who reasonably believed that to satisfy the MFQ, they had to supply data and thus forfeit their privacy, not merely hire an accountant to attest to undisclosed figures.

POINT V

THE OMISSIONS FROM MASCARO'S BID VIOLATE THE RIVER VALE FACTORS AND THUS DISQUALIFY MASCARO'S BID

Public bidding statutes exist for the benefit of taxpayers, not bidders, and they should be construed with sole reference to the public good. *Hillside Tp. v. Sternin*, 25 *N.J.* 317, 322 (1957). Courts have accordingly "curtailed the discretion" of local authorities by demanding strict compliance with public bidding guidelines. *L. Pucillo & Sons, Inc. v. Mayor of New Milford, supra*, 73 N.J. at 356 (1977); *Meadowbrook Carting Co., Inc. v. Borough of Island Heights*, 138 *N.J.* 307, 314 (1994).

Bearing in mind that the purpose of the bidding laws is "to guard against favoritism, improvidence, extravagance and corruption" and "to secure for the public the benefits of unfettered competition," *Terminal Const. Corp. v. Atlantic Cty. Sewerage Auth.*, 67 *N.J.* 403, 410 (1975), courts have adopted this approach largely as a prophylactic measure. *Meadowbrook supra*, 138 *N.J.* at 314. As the Supreme Court observed in *Hillside Tp. v. Sternin, supra*:

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[15] Mascaro's expert argued that an attestation report does not have to attach figures to which it attests. (2Tr. 245:6 to 25).

> In this field it is better to leave the door tightly closed than to permit it to be ajar, thus necessitating forevermore in such cases speculation as to whether or not it was purposely left that way [25 *N.J.* at 326].

The River Vale Factors Were Violated

The two-part test for determining the materiality of deviations from specification was articulated in *Twp. of River Vale v. Longo Constr. Co.*, 127 *N.J. Super.* 207, 216 (Law Div. 1974)(Pressler, J.), and later in *Meadowbrook, supra*:

> [F]irst, whether the effect of a waiver would be to deprive the municipality of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements, and second, whether it is of such a nature that its waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition.

The financial capacity of a bidder is a material consideration. *Meadowbrook, supra*, 138 *N.J.* at 315; *P & A Constr., Inc. v. Woodbridge, supra*, 365 *N.J. Super.* at 167 (requirement of a "certified financial statement" is non-waivable). Here, Mascaro's failure to submit three years of audited financial statements deprived the MCMUA of the opportunity to evaluate Mascaro's financial condition, for example, whether its finances were trending downward and whether its principals were using the company as a private bank, moving tens of millions of dollars in and out as they saw fit.

Bidders and prospective bidders were disadvantaged because they reasonably believed they had to submit audited financial statements if they wished to bid. Three years of audited financials is not a strange demand for a contract requiring the expenditure of more than $100 million of public funds and for which one of the minimum financial criteria is a net worth of $29 million. Contractors that did not bid might have bid had they known that audited financials would not be required, given the significant cost of an audit and the loss of privacy. As Mascaro's accountant conceded, an audit of a company Mascaro's size would reasonably cost $100,000. (2Tr. 183:13 to 2Tr. 184:14). If audited financial statements were not required, and Covanta could have gleaned that from the RFB, it would have submitted its own financial statements showing that it meets the minimum financial criteria without the need for a parent

guarantee. If this had occurred, Covanta would not have faced any issues with respect to the timing of submitting a parent guarantee. It was certainly disadvantaged by not being aware of this opportunity. In contrast, Mascaro gained a measure of privacy by not supplying audited financials with its bid.

Whether potential bidders were actually dissuaded is not the issue. The issue is whether they **might** have been dissuaded. *See Impac v. City of Paterson*, 178 *N.J. Super.* 195, 201 (App. Div.), certif. den. 87 *N.J.* 414 (1981) (though no proof existed that any contractor was prevented from bidding, "[T]he potentially adverse effect on bidding is sufficient to invalidate the procedure . . ."). That Mascaro already paid for its audits is irrelevant. The point is that potential bidders reasonably thought they would have to supply audited financial statements at significant cost, whereas the MCMUA excused Mascaro from this requirement.

CONCLUSION

For the foregoing reasons, Covanta 4Recovery, L.P. respectfully requests that the Court deny the motions of Mascaro and the MCMUA for summary judgment and permit discovery to proceed on the disputed issues of fact.

Respectfully submitted,

SILLS CUMMIS & GROSS P.C.
Counsel for Covanta 4Recovery, L.P.

By: _____
JEFFREY J. GREENBAUM
KENNETH F. OETTLE

Dated: February 12, 2013

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Page: 1

END OF LIST

Consolidated Case List

CONSOLIDATED ***** MAJOR CASE *********

VENUE : MORRIS COURT : LAW CVL DOCKET #: L 002627 12
CASE TITLE : WASTE MNGT OF NJ VS MORRIS MUNICIPAL UTILITIES AUT

SEL	DATE FILED			DOC NUM	DOCUMENT TYPE	NON CONF	FILING/TARGET PARTY NAME	ATTORNEY NAME	MUL PTY	DOC STA
○	10	23	2012	001	COMPLAINT		WASTE MANAGE	HILL WALLACK	N	
○	11	07	2012	002	MOTN INTERVENE		COVANTA 4REC	ATTY REQUIRE	N	DN
○	11	21	2012	003	MOTN SUMM JDGMT		MORRIS MUNIC	MARAZITI FAL	N	GR
○	11	29	2012	004	ANSWER		MORRIS MUNIC	MARAZITI FAL	N	
○	12	07	2012	006	ANSWER		MORRIS MUNIC	MARAZITI FAL	N	
○	12	11	2012	005	ANSWER		SOLID WASTE	INGLESINO PE	N	
○	12	12	2012	007	ORDR MISC		COURT INIT		N	DN
○	12	21	2012	008	ORDR SUMM JDGMT		MORRIS MUNIC	MARAZITI FAL	N	GR
○	01	03	2013	009	MOTN RECONSIDER		COVANTA 4REC	ATTY REQUIRE	N	GR
○	01	17	2013	010	MOTN SUMM JDGMT		SOLID WASTE	INGLESINO PE	N	FH

Session ID: HU2C9T Case Count: 2
BUILD [illegible]

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Consolidated Case List

VENUE : STATEWIDE COURT : LAW CVL DOCKET # : MRS L 002627 12
CASE TITLE : WASTE MNGT OF NJ VS MORRIS MUNICIPAL UTILITIES AUT

PROCEEDING TYPE	MOTION DOC/TYPE	MOTION STATUS	SESSION DATE	COURT ROOM	PROCEED TIME	JUDGE ID	PROCEEDING STATUS BY:VIA:
MOTION HRG	10 M65	PG HEARING	02 22 13	001	09 00	TLW01	PENDING
MOTION HRG	9 M48	GRANTED	01 25 13	001	09 00	TLW01	COMPLETED
MOTION HRG	3 M65	GRANTED	12 21 12	001	09 00	TLW01	COMPLETED
MOTION HRG	3 M65		12 21 12	017	09 00	SCH01	RSCHED
MOTION HRG	2 M42	DENIED	12 07 12	001	09 00	TLW01	COMPLETED

PQ

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
MORRIS COUNTY
DOCKET NOS. MRS-L-2627-12 and
MRS-L-2686-12
APP. DIV. NO. _____

WASTE MANAGEMENT OF NEW JERSEY, INC., Plaintiff, v. MORRIS COUNTY MUNICIPAL UTILITIES AUTHORITY, et al., Defendants.	TRANSCRIPT OF MOTION HEARING
COVANTA 4RECOVERY, L.P., Plaintiff, v. MORRIS COUNTY MUNICIPAL UTILITIES AUTHORITY, et al., Defendants.	

Place: Morris County Courthouse
Washington & Court Streets
Morristown, NJ 07963

Date: February 22, 2013

BEFORE:

HONORABLE THOMAS L. WEISENBECK, A.J.S.C.

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Attorney for Defendant, Morris County MUA

I N D E X

move on and have this matter dismissed so they can continue to move on in this contract.

I thank you very much for your time.

THE COURT: Thank you. Mr. Carney?

MR. CARNEY: Good afternoon, Your Honor. The Morris County MUA needs certainty and finality to this matter, and Your Honor is in the position to provide that today, because there are no genuine issues of material fact in dispute.

The discovery the plaintiffs seek in this matter is contrary to what the bid spec. requires, and I just will quote Page 10 of the record -- administrative record, which says, "In the case of terms not specifically defined herein said terms shall have the meaning normally ascribed to them in the trade profession or business," this is a key phrase, "with which they are associated."

The issue of "certified financial statement" is associated with the accounting industry as for all the reasons that Mr. Driscoll just provided.

So, for that reason, there is no other objective standard upon which discovery will provide an answer that is any different. There -- for example, there is no need to take discovery of what all the other bidders thought, or what all bidders that picked

up a bid thought with respect to the term "certified financial statement."

They state in their briefs that it means audited, but yet notwithstanding that, they want discovery of that fact, but taking the depositions of all the other bidders will provide a subjective answer, will not be -- provide anything that is objective because this would be an opportunity for an argument to be made that somehow now there's some latent ambiguity that was created by Your Honor's decision after the MCMUA awarded the contract, and it would maybe cause the potential for a re-bid, which is what all these other bidders would want. And, so, that clearly is a subjective line of discovery, would not provide an objective answer. The award of the bid should be based on what the bid specs. state in an objective manner.

Similarly what the Morris County MUA may have done in the past is totally irrelevant to what it did in awarding the contract in this case. All the facts are set forth in the record before you. Those facts don't change based on what the MCMUA may or may not have done in the past, and clearly does not have anything to do with how a certified financial statement is defined in the industry with which it is associated because it's, again, is the accounting profession.

Similarly, what Mascaro has submitted in terms of its bids in the past, including bids out of state, has absolutely no bearing on this case.

The issue before the Court was what a certified financial statement was, and whether Mascaro met the minimum financial criteria, and that has all be decided on the basis of considering three experts, and their credibility, and the findings that Your Honor made in the -- in the prior rulings.

So, I don't want to belabor the point. If Your Honor has any questions I'd be happy to address them.

THE COURT: Thank you. Not at this moment.

Mr. Greenbaum?

MR. GREENBAUM: Thank you, Your Honor.

The heart of the argument of the movant is that the case was over two months ago, and we just didn't know it. That when Your Honor made a ruling on a temporary restraining order, which we agreed would be binding as a preliminary injunction that that ended the case. But, we're now in a situation where we have a fuller record, we know things we didn't know at that time, and we are seeking the opportunity to have a very important issue decided on even a more full record, and namely, what is the meaning of "certified financial

statement," in this request for bids?

THE COURT: Well, I think, your position, I believe is one that's shared by Ms. Cannon, is that we need to find out what the bidders' view of this term means, right?

MR. GREENBAUM: I think we already have substantial evidence in the record, and we can confirm it with a little more discovery.

THE COURT: All right. But -- but that's your -- that's your -- I mean, the issue that you'd like to pursue is how do bidders, in this instance, view the term "certified financial statement," right?

MR. GREENBAUM: Well, it's broader than that. It's how -- as used in common parlance --

THE COURT: Right.

MR. GREENBAUM: -- in the trade, profession or business --

THE COURT: What -- what trade, profession or business?

MR. GREENBAUM: Well, I think you have to look at that in the context. This is a bid.

THE COURT: Right.

MR. GREENBAUM: Right? So, we have to look at how this would --

THE COURT: The waste hauling industry?

record, with consideration of these additional facts that we've developed so far in the record, and hope to develop, we would hope that, ultimately, you, by reconsidering, come to a different -- a more enlightened view on the meaning.

THE COURT: Right. But, the -- but I think that -- again, the --

MR. GREENBAUM: And that's what you should do on final hearing, with the full record, and we think that's why summary judgment is premature.

THE COURT: Right. There was -- you know, the -- the other hypothetical -- what you're saying to me is, these other bidders are going to say that they understood this terms to mean audited financial statements. Okay? Mascaro had audited financial statements. They just chose to be --

MR. GREENBAUM: Not forthcoming.

THE COURT: No. They chose to be selective in terms of what they believed and hoped would -- would (a) protect their privacy, but on the other hand satisfy the MCMUA that they were financially capable of carrying out this assignment. So --

MR. GREENBAUM: And we also don't know what the authority has done in the past with --

THE COURT: Is this a fourth?

MR. GREENBAUM: No, that's -- that's --

THE COURT: Oh, part of three.

MR. GREENBAUM: -- part of the same. And I'm done. Thank you.

MS. CANNON: Your Honor, I was just going to say, I -- in arguing this I was not giving up the argument --

THE COURT: Now, is this -- is this now -- where are we -- where are we here? You lost me. Is this a comment on his comment?

MS. CANNON: A following one.

THE COURT: A followup?

MS. CANNON: A followup.

THE COURT: Is this a tag team?

MS. CANNON: That I -- I was not implying that we did not want -- I wasn't relinquishing the argument that we wanted to take this discovery of the MCMUA, or the --

THE COURT: Oh, I know that. I know that. You're clear. You're clear.

MS. CANNON: I just was taking the --

THE COURT: Your papers were clear.

MS. CANNON: -- when we get to the ultimate issue -- you made a decision -- you made findings on a preliminary injunction.

THE COURT: Right. Right.
MS. CANNON: When we get to the final argument that's what my argument is going to be.
THE COURT: I understand that.
MS. CANNON: Okay. I --
THE COURT: And the question is, should that final argument be based upon additional facts, not before me now?
MS. CANNON: Correct.
THE COURT: That you would like to be expand -- that you would like to have expanded. I -- I read you loud and clear.
MS. CANNON: Okay. Thank you, Your Honor.
THE COURT: Ms. Chun, would you like to --
MS. CHUN: No, thank you.
THE COURT: Okay. I will be writing something. It will go out next week, and, again, I want to thank everybody for their advocacy, and their professionalism. It means a lot to -- to me presiding over this matter. It continues to be an interesting case with issues that, at least for me, are first impression. We'll sew where we come out. Thank you all for coming.
MR. DRISCOLL: Thank you, Your Honor.
MS. CANNON: thank you, Your Honor.

MR. GREENBAUM: Thank you, Your Honor. Have a good weekend.
(Proceedings concluded at 3:16 p.m.)
* * * * * *

CERTIFICATION

I, DEBRA L. STOREY, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on CourtSmart, Index No. from 1:46:27 to 15:16:41, is prepared to the best of my ability and in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate compressed transcript of the proceedings, as recorded.

DEBRA L. STOREY	AD/T 484 AOC Number
KLS Transcription Service Agency Name	3/6/13 Date

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February 28, 2013

Via Hand Delivery

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Honorable Allison E. Accurso, JAD
Superior Court of New Jersey, Appellate Division
Middlesex County Courthouse, The Tower, 4th Floor
56 Patterson Street, New Brunswick New Jersey 08903-0112

Re: Waste Management of New Jersey, Inc. v. Morris County Municipal Utilities Authority and Solid Waste Services, Inc. d/b/a JP Mascaro & Sons,
Docket No. AM-000182-12T2

Covanta4Recovery, L.P. v. MCMUA and Solid Waste Services, Inc. d/b/a JP Mascaro & Sons
Docket No. AM-00183-12T2

Dear Judges Simonelli and Accurso:

This firm represents plaintiff/appellant Waste Management of New Jersey, Inc. ("Waste Management") in the above referenced matters. On February 27, 2013, we received an emergent application filed by the Morris County Municipal Utilities Authority ("MCMUA") seeking leave to file an emergent motion for clarification and/or reconsideration of the Court's February 26, 2013 Orders staying the award and/or effectuation of the underlying contract that is the subject of this matter.

We are perplexed at the nature of this alleged "emergent" application since the MCMUA concedes that waste transfer services are currently being provided under an emergent contract which will continue. In the event those services cannot be provided, our client, Waste Management, can step in and provide those services as set forth herein. Since the services are being provided currently, and a backup contractor is also available on an immediate basis, we do not understand the "emergent" nature of this application. Instead, we believe that the true gravamen of MCMUA's application is to vacate the February 26, 2013 Order so that Mascaro can perform these services on a permanent contract award basis directly contrary to the court order. There is no basis for any such relief.

Although Waste Management opposes the vacation of the stay Orders entered by this Court, it has no opposition to and believes that it is correct for the MCMUA to proceed by way of an emergent contract pursuant to N.J.S.A. 40A:11-6. After Waste Management filed its motion for a stay with the Appellate Division, the term of its contract with the MCMUA ended on January 25, 2013. It demobilized shortly thereafter and Solid Waste Services, Inc. d/b/a JP Mascaro & Sons ("Mascaro") assumed operation of the transfer stations. After the Stay Order was received on February 26, I contacted counsel for the MCMUA to advise that Waste Management agreed that Mascaro's continuation under an emergent contract with the MCMUA was the least disruptive approach until the appeal was concluded. As to Counsel's assertion that Waste Management might not be able to service this contract, at no time did I make any such statement, implicitly or explicitly. Waste Management is a national contractor which is more than able to supply both the manpower and equipment to support this contract on an immediate basis.

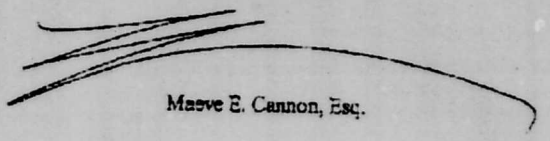
Waste Management does not agree that there is any basis to vacate the Stay Orders due to any operational needs of the MCMUA. The use of the emergency contract process authorized by N.J.S.A. 40 A:11-6 for this very circumstance resolves any and all alleged operational issues. It is our understanding that the MCMUA wanted the Court to be aware that it was using this process to obtain the needed services and not thereby run afoul of the Stay Orders. However, the use of the emergency contracting process authorized by N.J.S.A. 40A:11-6 does not require the vacation of the Stay Order as requested by the MCMUA.

Further, although it is our understanding that Mascaro has agreed to proceed under an emergency contract, the "duration" of the emergency being until the appeal is resolved, in the event that they were not, Waste Management stands ready willing and able to resume the operations on an emergent basis during the pendency of the appeal. Waste Management only agreed that, at this point, given the likely short duration of an appeal process, it would involve the least difficulty for the MCMUA if Mascaro now remained. Waste Management has sufficient manpower and equipment to resume the contract at any time, if requested.

Finally, our good faith acknowledgement of the efficiency of leaving Mascaro in place on a short term, interim, basis should in no way be construed as an acknowledgement that Mascaro has any claim to the permanent contract notwithstanding its non-conforming bid, whether because of funds expended to mobilize, experience gained in the interim, or simply its service as the interim contractor.

For all the foregoing reasons, there is no basis to grant the MCMUA's request to file an application for reconsideration of the February 26, 2013 Order.

Respectfully Submitted,



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February 28, 2013

By Hand Delivery

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Honorable Allison E. Accurso, J.A.D.
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Middlesex County Courthouse, The Tower, 4th Floor
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Re: Waste Management of New Jersey, Inc. v. Morris County Municipal Utilities Authority and Solid Waste Services, Inc. d/b/a JP Mascaro & Sons
Docket No. AM-000182-12T2; Motion No. M-2292-12

Covanta 4Recovery, L.P. v. MCMUA and Solid Waste Services, Inc. d/b/a JP Mascaro & Sons
Docket No. AM-00183-12T2; Motion No. M-2296-12

Dear Judges Simonelli and Accurso:

We represent Covanta 4Recovery L.P. and agree with the sentiments expressed in the letter today from Waste Management's counsel. We understand that solid waste needs to be transported, but we see no emergency that the MCMUA has not already resolved. We are

perplexed that the MCMUA refuses to withdraw its application for emergent relief in view of the fact that Covanta and Waste Management have advised they will not challenge the MCMUA's interim solution.

We do strongly object to any application to vacate the current stay order. Mascaro should not have been awarded the current contract and the MCMUA and Mascaro were warned by the trial court during the preliminary injunction proceedings that they would proceed at their own risk. Although the injunction was thereafter denied by the trial court, both the MCMUA and Mascaro were well aware of the pending applications before this Court by Covanta and Waste Management when they proceeded to implement the contract and "change horses" notwithstanding the offer by Waste Management to continue to remain in place on an interim basis, without prejudice, until the proceedings were resolved, and to charge lower rates than are now being charged by Mascaro.

While we do not now challenge the emergency contract as a practical solution to the problem created by the conduct of both the MCMUA and Mascaro, we want to make clear that we will resist any argument made later either by Mascaro or the MCMUA that Mascaro's operation under that emergency contract gives it any right to remain in place in the event this Court determines its bid was non-conforming.

Respectfully yours,

JEFFREY A. GREENBAUM

cc via e-mail:
Brent T. Carney, Esq. and Joseph J. Maraziti, Jr., Esq.
Denis F. Driscoll, Esq. and Grace Chun, Esq.
Maeve E. Cannon, Esq. and James G. O'Donohue, Esq.

A-2806-12T1
A-2808-12T1

FILED
APPELLATE DIVISION
May 20, 2013
CLERK

ORDER ON MOTION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-002806-12T1
MOTION NO. M-004911-12
BEFORE PART B
JUDGE(S): MARIE P SIMONELLI
ELLEN L KOBLITZ

WASTE MANAGEMENT OF NEW JERSEY,INC.
VS
MORRIS COUNTY MUNICIPAL UTILITIES AUTHORITY

MOTION FILED: 04/16/2013
ANSWER(S) FILED: 04/23/2013
04/23/2013
04/24/2013

BY: SOLID WASTE SERVICES, INC.
BY: WASTE MANAGEMENT OF NEW JERSEY, INC.
BY: COVANTA 4RECOVERY
BY: MORRIS COUNTY MUNICIPAL UTILITIES AUTHORITY

SUBMITTED TO COURT: May 16, 2013

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS, ON THIS 20th day of May, 2013, HEREBY ORDERED AS FOLLOWS:

MOTION BY RESPONDENT

MOTION TO DISMISS APPEAL AS MOOT DENIED

SUPPLEMENTAL:

FOR THE COURT:

MARIE P SIMONELLI, J.A.D.

L-2627-12 MORRIS
ORDER - REGULAR MOTION
SM

A-2806-12T1, A-2808-12T1

FILED
APPELLATE DIVISION
May 20, 2013
CLERK

ORDER ON MOTION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-002806-12T1
MOTION NO. M-005404-12
BEFORE PART B
JUDGE(S): MARIE P SIMONELLI
ELLEN L KOBLITZ

WASTE MANAGEMENT OF NEW JERSEY, INC.
VS
MORRIS COUNTY MUNICIPAL UTILITIES AUTHORITY

MOTION FILED: 05/08/2013
ANSWER(S) FILED: 05/13/2013
05/14/2013

BY: SOLID WASTE SERVICES, INC.
BY: COVANTA 4RECOVERY
BY: WASTE MANAGEMENT OF NEW JERSEY, INC.

SUBMITTED TO COURT: May 16, 2013

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS, ON THIS 20th day of May, 2013, HEREBY ORDERED AS FOLLOWS:

MOTION BY RESPONDENT

MOTION TO EXTEND TIME TO FILE RESPONDENT'S BRIEF TO JUNE 18, 2013 — GRANTED

SUPPLEMENTAL:

FOR THE COURT:

MARIE P SIMONELLI, J.A.D.

L-2627-12 MORRIS
ORDER - REGULAR MOTION
SM

Archive Date: 20150729 Brief Box no:17619

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Docket No: 002806

Year: 12

Title:WASTE MANAGEMENT OF NEW JERSEY,INC. VS MORRIS COUNTY UTILITIES AUTHORITY

APP A-002806-12

NJJ0-1017-033

A-2806-12T1
A-2808-12T1

WASTE MANAGEMENT OF NEW JERSEY, INC.,

Plaintiff-Appellant,

v.

MORRIS COUNTY MUNICIPAL UTILITIES AUTHORITY and SOLID WASTE SERVICES, INC. d/b/a/ J.P. MASCARO & SONS,

Defendants-Respondents.

COVANTA 4RECOVERY, L.P., a Delaware Limited Partnership and New Jersey taxpayer,

Plaintiff-Appellant,

v.

MORRIS COUNTY MUNICIPAL UTILITIES AUTHORITY; SOLID WASTE SERVICES, INC. d/b/a J.P. MASCARO & SONS, a Pennsylvania corporation; and WASTE MANAGEMENT OF NEW JERSEY, INC., a New Jersey corporation,

Defendants-Respondents.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Civil Action

Docket No. A-002806-12T1

On Appeal from the December 12, 2012 Order of the Superior Court of New Jersey, Law Division, Morris County

Sat Below: Hon. Thomas L. Weisenbeck, A.J.S.C.

Docket No. A-002808-12T1

REPLY BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT COVANTA 4RECOVERY, L.P.

SILLS CUMMIS & GROSS P.C.
One Riverfront Plaza
Newark, New Jersey 07102
(973) 643-7000
Attorneys for Covanta 4Recovery, L.P.

JEFFREY J. GREENBAUM
KENNETH F. OETTLE
Of Counsel and
On the Brief

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APPENDIX TO REPLY BRIEF

Slip Opinion in *I/M/O Petition of Thomas-United, Inc. v. Atlantic Cape Community College*, Docket No. A-3051-12T2 (June 28, 2013).

PRELIMINARY STATEMENT

Mascaro and the MCMUA rely heavily on agency discretion to defend the award to Mascaro, but the bidding laws curtail the discretion of public entities to award contracts other than in strict compliance with the bidding laws. As explained in Point I below, decisions on bid conformity are reviewed *de novo* as a matter of law, both at the trial and appellate levels. Though the test in reviewing administrative action is whether the action was "arbitrary, capricious, and unreasonable," waiving a material omission from a bid is arbitrary, capricious, and unreasonable as a matter of law.

Similarly, in reviewing a bid conformity decision by a trial court, the test isn't abuse of discretion; it is "error of law." Public entities and trial courts are not more qualified than appellate courts to determine compliance with the two-part *River Vale* test.

On the merits, Mascaro and the MCMUA have no answers for several crucial points raised by Covanta, including:

-- That a material term in a request for bids can't have different meanings for different bidders without impermissibly tilting the playing field;

-- That Mascaro gained a material measure of privacy over

other bidders by submitting only the bottom lines from its balance sheet and income statement and no footnotes at all;

-- That the MCMUA is unable to determine the impact on Mascaro's finances of huge related-party transactions (completely concealed in its initial bid submission) because Mascaro would not submit its audited financial statements;

-- That self-certification of financial statements by management in a bidding context has been rejected by the Appellate Division;

-- That the term "certified financial statement" is used in New Jersey's case law, statutes, and multiple regulations to mean audited financial statement and is never used to mean less; and

-- That returning the case to the trial court without a bid conformity ruling by the Appellate Division, as Mascaro and the MCMUA would have this Court do, would leave the trial court adrift, knowing it has been reversed but not knowing why and yet having to make a final ruling.

Accordingly, Covanta respectfully requests that the Appellate Division retain the case, resolve the bid conformity issue, and, for the reasons set forth below, direct an immediate rebid.

ARGUMENT

POINT I

MASCARO AND THE MCMUA MISCHARACTERIZE THE STANDARDS OF REVIEW AT BOTH ADMINISTRATIVE AND TRIAL LEVELS

Evidently seeking to cloak the bid conformity decision within the protective mantle of agency and trial court discretion, the defendants invoke the "arbitrary, capricious and unreasonable" test for agency action and the abuse of discretion test for trial courts. The former test does not give procuring agencies the authority to waive material omissions from bids, and the latter test does not apply because bid conformity is determined as a matter of law.

Though agency action is reviewed under the "arbitrary, capricious, and unreasonable" test, as the defendants point out, the test provides no cover because waiver of a material omission from a bid <u>is</u> arbitrary, capricious, and unreasonable and warrants reversal. An agency has no discretion to award to a non-conforming bid. *Matter of Protest of Award of On-Line Games*, 279 *N.J. Super.* 566, 603 (App. Div. 1995)(because bid deviated materially from RFP, it was non-conforming, and Treasurer was "without discretion" to award contract to that bidder).

With respect to trial court rulings, review of a bid conformity decision is not governed by the abuse of discretion standard because the materiality of bid defects is determined as a matter of law. *See Twp. of River Vale v. R.J. Longo Const.*

Co., Inc., 127 *N.J. Super.* 207, 215 (Law Div. 1974)(Pressler, J.); *Twp. of Hanover v. IFIC*, 122 *N.J. Super.* 544, 548 (App. Div. 1973); and *George Harms Const. Co., Inc. v. Borough of Lincoln Park*, 161 *N.J. Super.* 367, 376 (Law Div. 1978). A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to special deference. *Manalapan Realty, L.P. v. Twp. Comm. of Manalapan*, 140 *N.J.* 366, 378 (1995).

Nor is credibility at issue here. The trial court accepted the report and testimony of Mascaro's expert to the effect that the term "certified" as used in certified financial statement may, under certain circumstances, mean "certified by management" and that the term "financial statement" may, under certain circumstances, describe a less informative format than that of a full financial statement with footnotes. The experts for Covanta and Waste Management of New Jersey, Inc. ("WM") did not address alternative meanings of these terms in circumstances other than the current procurement. The plaintiffs' experts testified only that in their extensive experience, addressed to a contract to operate Morris County's two transfer stations for five years at a cost exceeding $130 million, "certified financial statement" would be taken to mean "audited financial statement." Mascaro's counsel challenged the testimony of Covanta's expert as a net opinion, but the trial court ruled that his presentation, which was based on long experience, was not a net opinion. (2Tr.67:4 to 71:2).

Mascaro's expert never stated that "certified financial statement" could mean less than "audited financial statement" in a $130 million, five-year public procurement. The trial court took that leap on its own. The court's error was in concluding that because a private person in smaller transactions, like a car loan, might interpret "certified financial statement" to mean a financial statement certified by the borrower (*see* the trial court's comment to that effect at 2Tr.275:5 to 17), therefore Mascaro, as a private company, was entitled to interpret the requirement in the request for bids ("RFB") to require less than audited financial statements. As explained in Point II, *infra*, self-certification of financial statements does not suffice where certified financial statements are required by a procuring entity. As explained in Point IV, *infra*, allowing one bidder to interpret a material specification differently from other bidders impermissibly tilts the playing field to provide an unfair advantage.

POINT II

BOTH THE MCMUA AND MASCARO IMPROPERLY RELY ON THE CERTIFICATION OF MASCARO'S PRESIDENT THAT EVERYTHING IN MASCARO'S BID WAS TRUE TO ESTABLISH THAT MASCARO SUBMITTED "CERTIFIED" FINANCIAL STATEMENTS

In the "Statement of Bidder's Qualifications, Experience and Financial Ability," Mascaro's President, Pasquale Mascaro, stated that "[a]ll of the answers set forth in the Questionnaire are true and each question is answered on the basis of my

personal knowledge." (Pa464). Question 14 of the Questionnaire required three years of certified financial statements. Mascaro's expert, Alan Sobel, concluded that the certification of truth by Mascaro's President - a form of self-certification - taken together with Mascaro's condensed financial information (not even called "financial statements" by Mascaro's accountant) and the attestation of its accountant that Mascaro met the minimum financial qualifications ("MFQs") constituted a certified financial statement (Mascaro's brief at 20)(Pa422).

Case law is clear that certification of financial statements by management doesn't satisfy the "certified" requirement where certified financial statements are required from bidders. *See Impac v. City of Paterson*, 178 *N.J. Super.* 195, 202 (App. Div.), *certif. den.* 87 *N.J.* 414 (1981)(omission of certified financial statements disqualifies bid notwithstanding that bidder certified that all statements in its proposal were true and correct). *See also On-Line Games, supra*, 279 *N.J. Super.* at 599 (if bidder is permitted to promise to meet all the requirements of the request for proposals in post-bid clarification, "it would pave the way for a two-line proposal including only a promise and a price").

POINT III

THE MCMUA AND MASCARO WRONGLY TRY TO REDUCE THE "CERTIFIED FINANCIAL STATEMENT" REQUIREMENT TO WHAT MASCARO SUBMITTED WITH ITS BID

A. The MCMUA Conflates Question 14 of the Questionnaire with the MFQ Requirement as if the Only Purpose of the Certified Financial Statements Was to Establish Compliance with the MFQs.

The MCMUA would reduce the requirement of three years of certified financial statements in Question 14 of the questionnaire to merely an adjunct of the requirement that bidders meet at least three of the four MFQs, in other words, that the only purpose of three years of certified financial statements was to verify compliance with the MFQs.

In discussing Mascaro's response to the "certified financial statement" requirement in the Questionnaire, the MCMUA contends (at 39) that Mascaro was responsive in light of its accountant's attestation that Mascaro complied with the MFQs, as if the package that Mascaro assembled in an effort to comply with the MFQs - without revealing its audited financial statements - could replace those audited financial statements.[1]

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[1] As set forth in Covanta's initial brief, in addition to Mascaro's failure to satisfy the certified financial statement requirement, its mix of information was not sufficient to establish compliance with the MFQs as of the bid opening. The cash position was not set forth in any form, and the current ratio was missing. In *Impac, Inc. v. City of Paterson*, 178 *N.J. Super.* 195 (App. Div.), *certif. den.* 87 *N.J.* 414 (1981), this Court found that supplying a performance bond that guaranteed financial capability was not a substitute for the requirement of submitting a certified financial statement. Similarly, an

As Covanta pointed out in its initial brief, both Mascaro's expert and its counsel acknowledged - indeed, insisted - that Question 14 and the MFQs were separate requirements. (Covanta's brief at 10-11). Similarly, the MCMUA's counsel implicitly agreed:

> "Bidders are required to provide three (3) years of certified financials ***and*** demonstrate that they meet at least three of the four financial criteria set forth in Schedule 3 of the Contract at the time the bid is submitted and throughout the term of the Contract." (Pa 206; emphasis added).

Counsel did not say that bidders were required to provide three years of certified financials to demonstrate compliance with the MFQs. Counsel said "and." As pointed out in Covanta's initial brief (at 12-13), three years of certified financial statements reveal much more than a bidder's compliance with minimum financial criteria. Because of their omission, as set forth in more detail below, substantial questions remain regarding Mascaro's finances.

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accountant's attestation unaccompanied by the underlying financial numbers is no substitute for demonstrating compliance with the MFQs.

B. Mascaro Argues Incorrectly that the Requirement of Certified Financial Statements Is Satisfied by Mascaro's Idiosyncratic Mix of Condensed Financial Information, Accountant's Attestation, and President's Certification.

Mascaro tries to parlay the fact that "certified" and "financial statement" can have different meanings in different contexts into the term "certified financial statement" having more than one meaning in the context of a five-year, $130 million waste disposal procurement. Proving the former fails to prove the latter for two reasons: (1) In a bidding context, a material term can have only one meaning; otherwise, the agency and a favored bidder could guide the result by giving the material term a convenient meaning after bids are opened; and (2) in the context of a huge transaction of extended duration, where the financial capability of the bidders is crucial, the word "certified" in the term "certified financial statement" can reasonably have only one meaning for bidders, and that meaning isn't "certified by management."

At bottom, the question isn't whether "certified" can have various meanings or whether financial statements can take various forms outside the context of this procurement. As Covanta pointed out in its initial brief, the bidder is "the ordinary reader of the specifications." *L. Pucillo & Sons, Inc. v. Borough of New Milford*, 73 *N.J.* 349, 356 (1977). Therefore, the dispositive question is whether the request for "certified financial statements" in a procurement of this size and duration would be understood by bidders to require audited financial

statements in traditional form. Here, because of the size and public importance of the procurement, bidders would have understood it that way, and because the MCMUA added "certified" to the financial statement requirement in the model questionnaire provided by the solid waste regulations (see N.J.A.C. 7:26H-6, Appendix A, and N.J.A.C. 7:26H-6.5(d)1, the MCMUA intended it that way. Consequently, failing to supply audited financial statements deviates from the requirements of the RFB.

C. The MCMUA and Mascaro Try to Obscure the Common Meaning of Certified Financial Statement.

1. Mascaro Identifies Distinctions without a Difference in the Case Law Cited by Covanta for the Proposition that "Certified Financial Statement" Is Commonly Used without Need of Definition by New Jersey Courts.

Covanta cited several cases for the proposition that "Certified Financial Statement" is commonly used without need of definition by New Jersey courts. That the cases have factual elements different from the present case (Mascaro's brief at 51) is irrelevant because the opinions show that courts use the term "certified financial statement" comfortably and without need of definition.

The latest example of judicial reference to "certified financial statements' was issued June 28, 2013, when the Appellate Division determined that a contractor's omission of a list of uncompleted contracts was a material bid defect. *I/M/O*

Petition of Thomas-United, Inc. v. Atlantic Cape Community College, Docket No. A-3051-12T2 (June 28, 2013)(appended hereto). Accepting the term "certified financial statement" without need of definition, the Court noted that the Appellate Division has concluded that failure to submit a "certified financial statement" with a bid for a public contract is a material defect. Slip Op. at 15.

Mascaro and the MCMUA have presented no cases in which a certified financial statement wasn't audited. Thus, in reported opinions, "certified" means "audited."

2. Mascaro Fails to Distinguish the New Jersey Regulations that Differentiate between Certified and Unaudited Financial Statements.

At page 54 of its brief, Mascaro claims that differences exist among regulations cited by Covanta but fails to acknowledge that several New Jersey regulations contrast "certified" financial statements with unaudited financial statements, such that the distinction between the two kinds of financial statements is unmistakable, and it is clear that "certified" financial statements are audited.

3. Mascaro and the MCMUA Fail to Acknowledge the Significance of All the Other Bidders' Having Submitted Audited Financial Statements.

How other bidders respond to a request for bids or proposals is a factor in determining what was required by the specifications. In *IMO Jasper Seating Co., Inc.*, 406 *N.J. Super.* 213, 225-26 (App. Div. 2009), 52 of 56 bidders understood that

bids to supply furniture could not include periodic price increases. This near-uniformity of response was held to eliminate any issue of vagueness or ambiguity in the stated terms of the request for proposals.

Here, seven of eight bidders, Mascaro being the only exception, submitted audited financial statements. This uniformity of action is consistent with Covanta's thesis that in a procurement of this size, "certified financial statement" can only mean audited financial statement. The proper test isn't how the term is defined in the technical accounting literature but how it is understood by persons responding to a request for bids.

4. Mascaro Wrongly Dismisses the Internet as a Reflection of Common Parlance.

A definition of a financial term on a respected internet site reflects the common meaning of that term, in this case, "certified financial statement," and is therefore relevant to determining how bidders would interpret the requirement of three years of certified financial statements. The internet may not be part of accounting literature, but it reflects common parlance and is often cited by courts. For example, the website cited by Covanta - Investopedia - was cited by the U.S. District Court for the District of New Jersey in *Goldenberg v. Indel, Inc.*, 741 *F. Supp.* 2d 618, 637 (D.N.J. 2010)(defining "Long Short Fund"). A Lexis search of New Jersey and national databases will show

that "Investopedia" and "Urban Dictionary," another internet definitional site, have been cited numerous times in reported and unreported cases.

In fact, when Mascaro was looking to show that an audited financial statement is "certified" in its Lower Pottsgrove Township procurement in Pennsylvania, it cited to "investorwords.com," which defines an audited financial statement as a financial statement that has been prepared and certified by a certified public accountant in accordance with generally accepted accounting practices ("GAAP"). (Pa845n.3). Investorwords.com defines "certified financial statement" as "[a] document issued by the Certified Public Accountant (CPA) who audits a firm. The certified financial statement indicates that the financial documents of the firm, such as the balance sheet and income statement, have been attested to." (Site last visited June 28, 2013).

The irony is palpable. When Mascaro argues in Pennsylvania that certified financial statements are audited, it cites a definitional site on the internet. When it argues in New Jersey that certified financial statements aren't audited, it mocks Covanta's citation of a definitional site on the internet (Brief at 57). Both internet sites use "certified financial statement" and "audited financial statement" interchangeably, reflecting common parlance in business and as used by the New Jersey courts, Legislature, and administrative agencies.

POINT IV

THE MCMUA AND MASCARO MISUNDERSTAND HOW FLEXIBILITY IN THE DEFINITION OF "CERTIFIED FINANCIAL STATEMENT" OFFENDS BOTH PRONGS OF THE RIVER VALE TEST

A. Mascaro's Withholding Its Audited Financial Statements Denied the MCMUA an Important Window into Mascaro's Financial Capabilities and Concealed Potential Questions Regarding Its Ability to Perform.

As Covanta explained in its initial brief, Mascaro concealed extraordinary related-party transactions by submitting an accountant's attestation without supporting financial figures and condensed financial information rather than audited financial statements. These related-party transactions bear on Mascaro's financial capabilities. Several figures on the draft 2012 financial statements that Mascaro submitted after bids were opened disclosed huge commitments to and from related parties (e.g., officers and shareholders), including receivables of $50.4 million in 2011 and $27.9 million in 2012 and payables of $45.8 million in 2011 and $40.4 million in 2012. (Pa191). The payables constitute 40% to 45% of the company's net worth. (Id.) In addition, Mascaro's draft income statement for 2012 showed net income of $10.99 million but revenue from related parties of $6.0 million, which was more than half the company's net income. (Pa192). No explanation was provided regarding whether more than

half its income came from related parties.

These transactions and obligations were not disclosed let alone explained by footnotes in Mascaro's condensed financial information as of the bid opening or even in the information submitted after bids were opened. The explanations had to be in the footnotes, which Mascaro declined to submit even after the MCMUA asked for Mascaro's audited financial statements. Consequently, tens of millions of dollars could have been removed from the company by related parties after bids were opened without the MCMUA even having been aware of the risk. This violates the first prong of the *River Vale* test - depriving the public entity of the assurance that the contract will be performed according to its requirements.

B. Mascaro Was Materially Advantaged Over the Other Bidders by Being Permitted to Conceal Important Financial Information, Raising Questions Regarding Its Ability to Perform.

Mascaro argues (at 40), and the trial court concluded (Da15), that because Mascaro pays for audited financials, it gained no advantage over other bidders by not having to supply the audited financials and expose Mascaro's finances to public view. That argument fails because the operative fact isn't that Mascaro paid for audited financials but that it didn't have to reveal them, whereas others did. Mascaro was able to "hide the ball," whereas other vendors had to "tell all."

Had non-participating vendors known they could cobble together a substitute for audited financial statements, they might have bid and might have offered a lower price. *See Impac, Inc. v. Paterson, supra*, 178 *N.J. Super.* at 202 ("[O]ther contractors may have been deterred from submitting a bid because they reasonably believed that they would have to submit an audited statement certified by an independent accounting firm."). Mascaro gained a tremendous advantage over other bidders because it could conceal its audited financial statements, thus preventing competitors from learning Mascaro's financial capabilities and thus its strength as a competitor (in addition to depriving the MCMUA of access to its questionable finances).

Privacy in financial matters is no small matter, and it should be dispositive of the second prong of the *River Vale* test - advantage gained by one bidder over the others. Mascaro and the MCMUA had no answer for the privacy that Mascaro gained by being permitted to substitute an idiosyncratic mix of information for audited financial statements.

C. If the MCMUA's Approach to Its Certified Financial Statement Requirement Were Upheld, the Message to Bidders Would Be Discouraging, and there Would Be No Clarity Regarding What Would Need to Be Submitted in the Future in Response to Requests for Bids Seeking Certified Financial Statements.

Waiver of a material bid defect would threaten the integrity of the policies behind the competitive bidding statutes. *Gaglioti Contracting, Inc. v. City of Hoboken*, 307 *N.J. Super.* 421, 435 (App. Div. 1997). An opportunity for favoritism is created by the award of a contract to one who fails to submit a bid in full compliance with the bidding requirements. *Id.* At 433. Permitting such waiver would be detrimental to the public interest in that it would discourage competent bidders from submitting proposals. *Cubic Western Data v. New Jersey Tpke. Auth.*, 468 *F. Supp.* 59, 69 (D.N.J. 1978):

> There would be engendered in the public contracting community a feeling that the effort of submitting a faultless proposal may not be worth the potential benefits of being selected the low bidder, since a bidder who has failed to comply with an obviously material condition may nonetheless be awarded the contract. Every bidder is entitled to have assurances that the public body is requiring that the bidder's competitors supply the same documents in the same time frame.
>
> The general citizenry is also entitled to a guarantee that public contracts are being awarded on the basis of full compliance with the bidding guidelines. [Id.]

If this contract were upheld, the message to bidders would be that one can cobble together a "certified financial statement" from condensed financial information and accountants' attestations. It would send the message that bidders could hide troublesome financial information and still get by, and there would be uncertainty as to how low the bar could be set.

The MCMUA's argument (at 53) that resurrecting Mascaro's void contract would save $3.6 million should be rejected. The *Cubic Western* court opined, like the New Jersey Supreme Court in *Meadowbrook Carting Co., Inc. v Borough of Island Heights*, 138 *N.J.* 307, 325 (1994), that apparent economic benefit is not sufficient to permit award to a bidder that submitted a defective bid. 468 *F. Supp.* at 69.

POINT V

MASCARO'S MOBILIZATION COSTS ARE NOT A BASIS ON WHICH TO PERMIT MASCARO TO RETAIN THE CONTRACT BECAUSE MASCARO INCURRED THOSE COSTS AT ITS OWN RISK IN THE FACE OF A CHALLENGE TO ITS BID

In all its briefs, Mascaro cites its alleged mobilization costs, though it is unclear when those costs were incurred. In opposition to Covanta's and WM's initial Orders to Show Cause, Mascaro said it had expended millions. It was warned by the trial court that its expenditures would not earn it the contract. Upon award of the contract, Mascaro again said it had expended millions. At some point, it incurred mobilization costs, but always with the knowledge that its contract was under challenge. Finally, the Appellate Division in denying the MCMUA's application to seek emergent relief after leave to appeal was granted, warned Mascaro that its tenure under the emergency contract would not entitle it to the work long-term. In short, Mascaro incurred its mobilization costs while well aware of the challenge to its contract and having been warned by

both the trial court and the Appellate Division that it proceeded at its own risk. Accordingly, Mascaro's mobilization costs should have no bearing on the award of the contract.

POINT VI

MASCARO INCORRECTLY CHALLENGES THE APPELLATE DIVISION'S ABILITY TO DISPOSE OF THE CASE

For the third time before the Appellate Division (and a fourth time on Mascaro's pending motion for leave to appeal to the Supreme Court), Mascaro argues that the Appellate Division cannot grant effective relief. In Mascaro's responding brief, the focus is on the fact that Covanta and WM defended against Mascaro's summary judgment motion by requesting additional discovery. Mascaro argues incorrectly that if additional discovery is requested, a ruling by the Appellate Division must be premature. The purpose of Covanta's requesting additional discovery was to develop facts that were not before the trial court when it denied injunctive relief. But the Appellate Division has already found enough in the record to take the case and to enjoin the underlying contract without need of additional discovery. Consequently, that issue is moot.

The argument that the Appellate Division "can't void the contract" is moot as well because the Appellate Division can dispose of the case without exercising original jurisdiction by directing the trial court to act in accordance with the Appellate Division's opinion. If the Appellate Division finds Mascaro's bid non-conforming, Mascaro's contract will be voided, either by the Appellate Division or by the trial court on

direction from the Appellate Division.

Given how long it has been since the RFB was promulgated (last July), and given that WM's bid suffered from at least one of the infirmities for which Covanta's bid was disqualified - omission of haulers' annual reports to the DEP - the most efficient course upon disqualification of Mascaro's bid would be to order the MCMUA to rebid the contract. The rebid would benefit from the Court's guidance regarding the requirement of certified financial statements.

CONCLUSION

For the foregoing reasons, Covanta 4Recovery, L.P. respectfully requests that the Court find Mascaro's bid materially non-conforming and, by exercising original jurisdiction or by directing the trial court on remand, reverse the award to Mascaro, void its contract, and order a rebid.

Respectfully submitted,

SILLS CUMMIS & GROSS P.C.
Counsel for Covanta 4Recovery, L.P.

By: _____
JEFFREY J. GREENBAUM
KENNETH F. OETTLE

Dated: July 2, 2013