

# **EXHIBIT D**

Camden County Division of Purchasing  
520 Market St, 17<sup>th</sup> floor  
Camden, NJ 08102



**Proposal for: RFP #17-10 Marketing Services  
of Single-stream Recyclable Materials for the  
County of Camden and Participating County  
Municipalities**

Camden County Cooperative Pricing System ID#57-CCCPS

Submitted by:



FCR Camden, LLC dba "ReCommunity"  
2201 Mt Ephraim Ave  
Camden, NJ 08104

Corporate Address  
809 West Hill St Charlotte, NC 28208





April 13, 2017

Camden County Division of Purchasing  
Attn: Anna Marie Wright  
Courthouse - 17<sup>th</sup> Floor  
520 Market Street  
Camden, NJ 08102

Re: **RFP17-10** Marketing Services of Single-stream Recyclable Materials for the County of Camden and Participating County Municipalities, Camden County Cooperative Pricing System ID#57-CCCPS

Dear Ms. Wright:

FCR Camden, LLC (ReCommunity) is pleased to submit to Camden County (County) its proposal to receive, sort, process, and market single stream recyclables generated by the County and its participating municipalities in response to the subject Request for Proposals (RFP). ReCommunity has been providing customized recycling solutions to municipalities for over 30 years. Since 1993, ReCommunity has been Camden County's trusted provider of recycling services. During that time, the company has maximized the value and recovery of recycled materials, creating significant economic benefits for the County. ReCommunity, with the help of Camden County, created 110 local jobs with 90% of our permanent workforce living in Camden County. Our proposal details how ReCommunity will continue to deliver value by performing the requested services, with the qualifications, technical and financial capabilities, and the financial results that the County expects. ReCommunity hopes that our enclosed proposal will allow the County to once again select ReCommunity to be their provider of recycling services.

ReCommunity thoroughly understands the County's expectations and desires for its recycling programs, as expressed in the RFP and all Addenda.

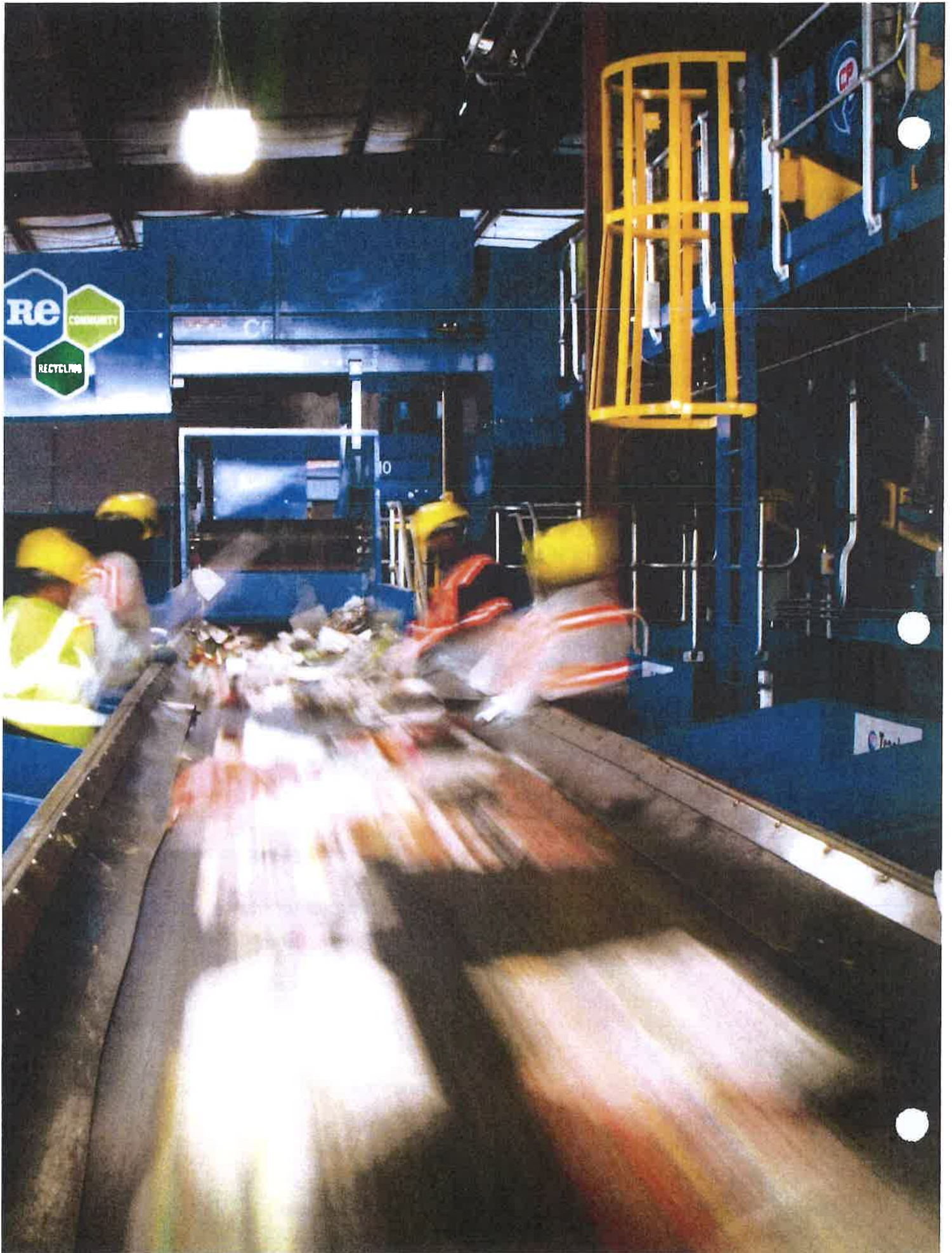
As the largest pure-play recycler in the U.S., ReCommunity's sole focus and passion is recycling. We have no conflicting interests in waste hauling or the operation of landfills, paper mills, or incinerators. ReCommunity brings continued industry leading dedication to safety, quality, and productivity. No one in the industry is as experienced or as qualified in municipal recycling partnerships as ReCommunity. We appreciate the confidence you have shown in the Company over the past 23 years and look forward to continuing to serve the County's recycling needs.

Should you have questions or require additional information about our proposal, please feel free to contact one of us.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Robert Anderson'.

Robert Anderson  
Regional Business Development Manager





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# EXECUTIVE SUMMARY



## EXECUTIVE SUMMARY

### ReCommunity's Goals

ReCommunity understands all aspects of operating and maintaining a Material Recovery Facility in order to provide the highest level of service as it pertains to the needs of Camden County, its 33 participating municipalities and its citizens. Our goals are to:

- Keep everyone who enters the facility **safe**.
- Assure **adequate processing capacity** is available at all times to receive, process, and market recyclables from the County and participating municipalities.
- Provide seamless **backup processing** at a local ReCommunity facility such as Philadelphia, PA, New Castle, DE or Atlantic County, NJ. These 3 facilities have a conservative capacity of **340,000 tons per year**.
- Receive recyclables and ensure that all materials are **processed in a timely manner**.
- **Employ local Camden County residents**. Currently **90%** of our permanent workforce are Camden County residents.
- Establish and maintain product **quality standards that secure high value** and consistent movement.
- Schedule outgoing material shipments to ensure **smooth flow of material** to the final consumer.
- Provide access to **detailed, useful, and timely reporting** and tracking data.
- Implement a system of **preventative maintenance** to keep non-scheduled breakdowns to a minimum.
- Have written plans for certain **contingencies such as equipment failure**, injury, fire, and hazardous contamination.
- Operate the Facility in an **environmentally sound** manner consistent with applicable local, State, or Federal regulations and government requirements.

**Our priorities are Safety, Quality, and Productivity in that order.** The safety of our employees and visitors will not be compromised for other objectives. This is our mantra and extends from the way we manage our operations every day and every way to the way our managers are compensated.





### Partners – ReCommunity and Camden County

ReCommunity has established a track record of providing stable value and sound partnerships with Camden County's 33 participating municipalities and throughout the country. We will be prepared to begin work on this contract on May 1, 2017 or earlier as may be mutually beneficial and will have processing capacity available for Camden County and participating municipalities during the term of the agreement, including option years. Our project team and support staff are already in place, trained, experienced, and ready to perform. Upon successful award of contract, we will rapidly and seamlessly hit the ground running.

We are committed to producing high quality materials to end markets. Our history and expertise in MRF operations and material marketing is unparalleled. Our plant productivity and more importantly our plant worker safety is a direct result of this extensive experience. ReCommunity understands what it takes to operate a safe, productive Material Recovery Facility that produces a high quality end product.

### ReCommunity Mission

Headquartered in Charlotte, North Carolina, ReCommunity is a leading resource recovery company that is focused on significantly reducing the volume of waste disposed of in landfills through the most advanced recycling programs and technology. In designing, building, and operating MRFs, we enable our community partners to:

- Meet diversion goals by recovering community-owned resources
- Generate additional revenue from the sale of recovered recyclables (subject to market conditions)
- Create new and keep existing local jobs and support local communities
- Reduce their carbon footprint
- Increase environmental awareness and participation

We are committed to "Leading the Recovery Revolution™" for forward-thinking communities like Camden County by repositioning waste as a strategic community resource instead of a growing liability.

### Background

For more than 30 years, ReCommunity's has been partnering with municipalities to maximize recyclable recovery and minimize environmental impact to our community partners. We are the nation's experts in residential recycling. Our sole focus on recycling gives us the unique ability to offer our customers a service that does not compete with any other components of the solid waste industry. Because of this strategic advantage, ReCommunity is able to consistently and significantly outperform our competitors and provide municipalities with confidence that their resources are being diverted from landfills to the maximum extent possible.

With 27 Material Recovery facilities in 14 states, and over 1,500 employees, we are the largest pure-play residential recycling company in the United States. With a strong community-focused mission/ culture and innovative intellectual property, we enable our community



partners to maximize the value of their own resources. We have an excellent track record partnering with communities and through our proven performance, we are confident in our ability to maximize value for Camden County and its citizens for the life of the contract. In short, ReCommunity will bring Camden County world-class performance, uncompromising service, and all the benefits associated with market-leading recycling services.

#### Strong Economics

Our proposal provides Camden County with a sustainable financial model that will support its long term landfill diversion program and an environmentally sound plan for the disposition of its recyclable materials.

Backed by a highly qualified, experienced, and financially firm partnership of investors with a clear vision, ReCommunity has the support to lead this industry to a higher level of resource recovery. We can provide a performance bond if requested. Our financial management systems and controls have been conservative and consistent, resulting in dependable financial performance and consistent payments to our municipal partners.

Our market size of nearly 1.8 million tons of recyclables per year of high-quality materials enable us to understand and comply with the demands of the commodities end markets.

#### Sound Processing Solutions

Our network of facilities and know-how offer Camden County assurance that ReCommunity will always have a responsible team in place to manage its recyclables. Our local management team has the support of regional and national

professionals to continuously monitor, review, and improve facility operations.

#### Reporting and Data Sharing

ReCommunity has in place the data sharing and reporting systems that allows scale information to automatically generate required reports, financial statements, and billing transactions.

ReCommunity recognizes that monitoring operational, sales, and safety data is critical to a successful recycling program. At all of our facilities we keep stringent records of inbound and outbound weights, bale production, shipping data, product sales, product quality, residual composition, maintenance updates, and safety records.

We believe that working together, and making an ongoing effort to identify and track areas of possible improvement is extremely important to a successful recycling program.

#### Reliability

We will continue to leverage our proven experience and successful history in operations, processing, and marketing, providing exceptionally consistent and dependable service to Camden County.

We offer operating resilience that will ensure a successful long-term partnership.

- We have a proven financial record of outperforming competitors and beating benchmark market indices in commanding superior pricing for our commodities.
- We are dedicated to providing the same level of service through varying market conditions and over the term of our customer contracts.



## SCOPE OF SERVICES



## Scope of Services

### Proposers Facility

ReCommunity Camden  
2201 Mt Ephraim Ave  
Camden, NJ 08104

Camden is a 30 ton per hour processing facility. The maximum capacity of the facility is 600 tons per day, 3,000 tons per week and 150,000 tons per year.

### Guarantee of capacity

ReCommunity has demonstrated through excellent performance the ability to receive, sort, process and market single stream recyclable materials collected curbside and delivered to the facility by, or on behalf of, Camden County or participating municipalities. We have successfully accepted materials seamlessly even during unexpected events and when the facility incurred a loss. Camden County represents 42,000 tons per year which represents about 30% of the current inbound volume into our Camden facility and about 12% of the capacity for our Camden, Philadelphia and Delaware facilities. ReCommunity agrees to guarantee capacity for the County and participating municipalities during the term of the agreement including option years.

### The process for receiving

Our Camden facility has an inbound and an outbound scale to limit traffic congestion, enable quick turn times for vehicle delivery and to provide backup in the event one were to fail. We jump all route trucks ahead of walking floor trailers to mitigate wait times. Personal Protective Equipment is required by all crews exiting the vehicle. For safety purposes, we typically only allow one truck at a time to tip on the tip floor. We have stringent hauler rules designed to ensure safe and efficient receipt, weighing, off-loading and exiting of vehicles.

### Average turn-around times

Historically, ReCommunity has been well within the established 20-minute average wait times prescribed in the RFP.

### Causes for rejections of loads

Historically there have been very few instances of load rejection. Rejections can occur if a load is delivered with more than 8% residue or any Hazardous Materials. Rejection rights are necessary to assure waste and hazardous materials are not delivered under our Class A permit. A Class A facility is



prohibited from accepting these materials. It remains the responsibility of the delivering party to remove these non-conforming materials.

### **Ability to accept**

ReCommunity is fully capable and prepared to continue to accept all recyclable materials collected by Camden County municipalities on or before May 1, 2017.

### **Receiving Hours**

Monday through Friday 7:00 AM to 5:45 PM

Saturdays open following a Holiday

Holidays: New Year's, Memorial, Independence, Labor, Thanksgiving and Christmas

ReCommunity will continue to open on the Saturday after a Holiday

### **Basis for determining Average Commodity Revenue (ACR)**

ReCommunity has been a leader in progressive deal structures. We strive to tether our contracts to the reality of the marketplace in both value and composition. We are transparent in sharing with our partners the actual values of commodities sold rather than an arbitrary index published by a 3<sup>rd</sup> party who is not engaged in the marketing of these materials. Regular composition audits will be performed on a schedule to be agreed upon with the County but no less than two times per year. No compositions will be tested during holiday periods where compositions could vary from a norm. The composition data will be used in conjunction with actual commodity sales to determine the ACR on a month basis.

### **Periodic recyclable material compositions**

**Composition Audit Process:** Camden County municipal representatives will be invited to observe all Composition Audits to provide full transparency of the process. At a minimum of two times per year, but more frequently if deemed necessary by ReCommunity, we will store Camden County deliveries of Single Stream, from route trucks, for a sufficient period of time to accumulate enough material that can be processed on an isolated shift. We will attempt to accumulate proportionally from the Camden municipalities so no single municipality is overrepresented. Each inbound Camden County load targeted for the audit will be accounted for by weight, segregated from all other 3<sup>rd</sup> party deliveries and stored for processing. The material will be processed in a separated shift where the system will be purged prior to processing. All bunkers will be emptied and glass pushed away from the conveyor. ReCommunity will then run only the Camden County Municipality material. Each commodity will be baled and each bale will be weighed. Glass will be collected separately and weighed. The composition will then be determined, to include ONP, OCC, Glass, PET, HD natural, HD pigmented, Mixed Plastic, MRP, Aseptic, Aluminum, Ferrous metal and Residue. Scrap metal is a non-program material and will be accounted for in residue. The composition will then be adjusted for moisture lost to account for "shrink" at 2%. If



more than 2 audits are performed in an 18 month period then all audits will be averaged together for an 18 month rolling average.

### **Basis for Revenue Share**

The Revenue Share model is designed to connect communities with the actual value of the commodities collected. It is a percentage paid to the communities after revenues exceed a base Threshold, which represents the operating costs of a facility to process and market recyclable materials. Revenue share percentages are provided in the Cost Proposal section below.

### **Maximum share cost**

ReCommunity has submitted a maximum cost share on Form 1 which reflects sustainable floor pricing from our commodity outlets. Camden County and its participating municipalities would not pay more than the specified maximum payment when revenues do not exceed the base Threshold regardless of market conditions. These "Floor Values" will be supported by outbound contract floor prices on individual commodities where available. It is very important to consider the financial strength of companies offering floors to assure the "Floor Values" will actually be available to support the contract if markets become unfavorable.

### **Calculations of values based on actual sales**

Transparency is a key to many successful partnership/relationships. Using actual sales values there are no winners or losers and the results reflect near real time conditions. Each month the actual volumes of commodities sold and the revenues received for them are used to calculate a commodity sales price for each commodity marketed. It is this actual sales price which is used in the revenue sharing calculations. ReCommunity has advocated using actual sale pricing versus arbitrary Index pricing because Index pricing is generated as best guess values from a survey of buyers and sellers compiled by parties that are not directly engaged in the marketing of recyclable materials. Actual sales reflect the reality of the month in which the commodities were sold. The use of actual sale prices is advantageous to our customers since we have a historical record of selling commodities above the published Index prices.

### **Average residue percentage resulting from proposers processing**

The clear goal of ReCommunity is to harvest all value out of the recyclables delivered to our facilities. Most municipalities work diligently to educate their residents on what is acceptable. Residue is generated through confusion by users on what is acceptable, wishful recycling or apathy. There is additionally a degree of inefficiency in the processing system where the system just cannot recover all items, e.g., small fraction fiber, fatigue in equipment or personnel and fluctuations in weather conditions. We propose composition studies because they mitigate customer exposure to any inefficiency in a processing system. Through the audit process, a fixed composition is established that represents what is delivered to the plant, including residue. During the audit process all observers will see what material is going into residue to verify that recyclables are being captured and not lost in the



residue. In this fashion, the County and its participating municipalities are paid based on the value of material they deliver to the processor, regardless of any processing inefficiencies that may occur from time to time. As a processor, ReCommunity monitors the residue percentage of the facility and closely investigates any significant changes or variations from the audited composition percentages. If residue spikes the processor may need to re-audit the material to assure nothing has changed on the inbound ton.

### **Monthly written reports | Schedule for payments to/from County/municipalities**

Each month ReCommunity will provide a monthly statement of tonnage with either a check for Revenue Share value or an Invoice for payment in unfavorable markets (subject to the proposed Floor Values). Invoices or rebate payments along with accompanying calculations and documentation are provided to the County and/or its participating municipalities for a given month in the following month, generally by the third week of the month. We have developed a web based customer portal where municipalities will be able to monitor their accounts in near real time for tonnages and payments. A Portal User will be able run reports specific to the information they are looking for rather than contact us for information and data on their account. There is additional information below of our Web based Customer Portal.

### **Contingency plans**

ReCommunity has 4 additional available proximate processing facilities within New Jersey, Pennsylvania and Delaware with over 400,000 tons of capacity. Camden County's annual tonnage of 42,000 tons represents about 12% of ReCommunity's Mid-Atlantic Region. Such nearby processing capacity should provide considerable comfort in ReCommunity's ability to process Camden County material. While we do not foresee the need to use such alternative facilities, occasionally catastrophic events such as fire, accident or weather related failures unfortunately occur. If such an event were to occur, we would seamlessly transition the volume to another ReCommunity facility at our expense with very limited impact or interruption to our contracted customers.

### **Below please find additional operating experience we thought important to your decision.**

#### **Operating Approach**

ReCommunity MRF operating personnel are guided by practices developed and optimized over the many years of successful MRF operations across the US. Benchmarking and cross pollination are encouraged to capture and standardize best practices and innovations throughout the company and the recycling industry at large.

Our priorities are Safety, Quality, and Productivity in that order. The safety of our employees and visitors will not be compromised for other objectives. This is our mantra and extends from the way we manage our operations every day and every way to the way our managers are compensated. Our safety policies and procedures are standardized at all company locations. Periodic training at both the hourly



worker and management level are non-stop, well defined and enforced. Adherence to safety policy and procedure is not negotiable and no one is exempt from the requirements therein.

ReCommunity's Goals to Operate the MRF include:

- Keep everyone who enters the facility safe.
- Weigh all incoming delivery vehicles, off load the vehicles in the tipping area, and weigh the vehicles before exiting the site. Turnaround time for delivery vehicles is expected to average no more than 20 minutes.
- Ensure that all materials are processed in a timely manner.
- Utilize an inspection system for the recyclable material in each incoming truck. Loads containing excessive amounts of contamination or any amount of hazardous or dangerous materials are unacceptable and may be rejected.
- Create a paper and picture "trail" when unacceptable materials are delivered. Provide timely feedback to the source of the contaminated load. Photos are available for viewing by the County or municipality via the web based Customer Portal.
- Feed and operate all processing lines in a way that ensures a continuous flow of materials.
- Schedule outgoing material shipments to ensure smooth flow of material to the final consumer.
- Provide useful and timely reporting and tracking data between Camden County, participating municipalities, and ReCommunity.
- Implement a system of preventative maintenance to keep non-scheduled breakdowns to a minimum.
- Have written plans for certain contingencies such as equipment failure, injury, fire, and hazardous contamination. The availability of ReCommunity's alternative processing facilities nearby provide a robust contingency should the Camden facility become unavailable to accept the County's materials for whatever reason.
  - ReCommunity Philadelphia  
2904 Ellsworth St  
Philadelphia, PA 19146
  - ReCommunity Delaware  
1101 Lambsons Lane  
New Castle, DE 19720
  - ReCommunity ACUA  
6700 Delilah Road  
Egg Harbor Township, NJ 08234





### Revenues, Records and Reporting

As outlined in the Cost Proposal section below, revenue sharing between ReCommunity and participating municipalities is based on actual market prices received from the sale of recovered commodities from the Camden facility. On a monthly basis the actual commodity prices for that month are applied to the County's material composition percentages to determine the Average Commodity Revenue (ACR) which in turn is used to calculate the Revenue Share payment amount as described in the Cost Proposal section of this proposal. Written reports will be provided identifying the received tonnages, by municipality, and the resulting revenue share/cost to the County and/or participating municipality.

ReCommunity provides a Web Based Customer Portal that was created in response to requests from municipal customers for ease of access to their account information. Each customer has secure access to a private Customer Portal that provides real time access to their account information. This enables our customers to manage their accounts without having to wait on details from the accounting staff for special reports, statements, invoices, etc.... From the Customer Portal, customers can review and download billing, invoicing and scale transaction data, view transactions on a summary basis, generate reports to Excel, check on billing status and search for individual transactions.



Browser tabs: Camden County NJ - Geo, ReCommunity Customer

Address bar: https://portal.recommunity.com/portal/ceList.asp

Navigation: Home, Invoice Detail Search, Tickets, Service, Ticket Export In, Feedback, Logout

Subs: representatives@camdenrecycling.com (704) 672-3175

### Invoices Listing

March 2017

Search | Export to Excel

Invoice No	Invoice Date	Original Amount	Outstanding Amount
03/01/2017		\$2,884.26	\$2,884.26

ReCommunity Recycling  
 100 West 10th Street, Orange, NC 27008  
 Phone: (704) 607-2000 Fax: (704) 672-3175

Footer: Home | Invoice | Invoice Detail | Ticket Search | Ticket Export In | Service | Feedback

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# RESUME AND QUALIFICATIONS



## MRF Experience

ReCommunity has been a pioneer in single-stream processing, and our history dates back to the early 1990s when some of the first single-stream facilities in the country came online. Our experience spans multiple geographic regions and is strengthened by constantly adopting new and improved processing technologies to increase material quality and efficiency. We currently process **over 1.8 million tons** of recyclable materials company-wide at **27 locations**, and the volume is growing.

### Key Company Facts:

Employees:	1,500+
Tons Processed:	1.8 million in 2016
MRFs:	27

Corporate officer authorized to execute documents: Sean P. Duffy, President and COO

Name and address of Proposer:

FCR Camden, LLC  
809 West Hill St  
Charlotte, NC 28208

### Key Personnel

#### Facility Manager – James Yezzo

Jimmy is currently the Facility Manager for the Camden MRF and will manage the transition to the new service agreement as well as be the company's Facility Manger for the new contract period. James has previously held Facility Manager Positions for ReCommunity and other recycling companies and is a graduate of Thomas Edison State College.

#### Regional Operations Manager – Steve Gray

Steve is responsible for operations at 8 ReCommunity facilities in the Mid-Atlantic region, including 5 locations in New Jersey. Steve has over 25 years of industry experience specifically in facility and equipment design, construction, maintenance, and facilities management.

#### Jim Wilson – Regional Maintenance Manager

Jim supports company facilities in the Mid-Atlantic Region, providing facility support services in the areas of technical expertise and troubleshooting, project management, maintenance system management. Jim has over 20 years of experience in the recycling industry.

#### Business Development – Robert Anderson and Steve Hastings

Bob has more than 25 years of solid waste experience makes him uniquely qualified in understanding the value of the efficiencies available in collection systems. He received a Bachelor of Science degree in Communications from Florida State University in Tallahassee, FL.

Steve Hastings has over 23 years' experience in the recycling industry and has a strong business background from owning and operating a beverage distribution business. Prior to joining ReCommunity, he had a long history with Hudson Baylor, where he served as a key member of the senior management team.

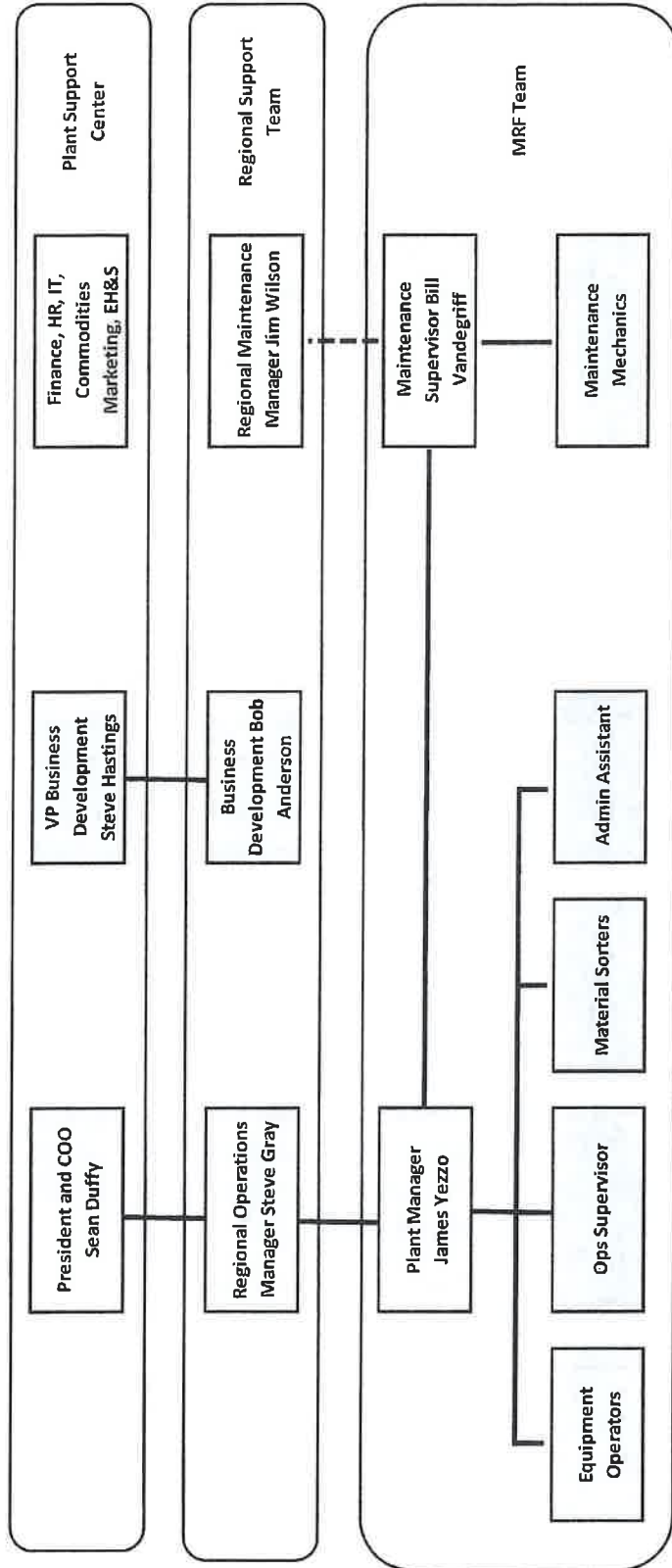
#### Plant Support Center

Headed by President Sean Duffy, the Plant Support Center in Charlotte NC provides support to the local and regional teams in the area of finance, accounting, human resources, EH&S, management and IT. Paul O'Donnell and the commodities marketing team bring over 25 years of experience and expertise in marketing outbound commodities.



Program  
Management and  
Organization

The in-house ReCommunity management team is in place and prepared to continue its history of meeting the needs of Camden County and its participating municipalities. Contract resources are only used from time to time to furnish temporary production workers. An organization chart follows.





EXPERIENCED | RELIABLE

### Processing Experience

ReCommunity specializes in public-private partnerships, with a long-term established record of on-time, on-budget and contract compliance performance. In addition to the primary processing facility in Camden described above, the following locations are provided as reference facilities demonstrating our experience of providing processing and marketing of recyclable materials to municipal customers.

1. Delaware Solid Waste Authority
2. Morris County MUA
3. Atlantic County Utility Authority(ACUA)
4. Mecklenburg County, NC

### Non Performance History

The above facilities have no outstanding compliance issues, including notices of violations, consent orders, etc. Likewise, ReCommunity has no outstanding violations of regulatory rules and regulations that could impact our operations.

During the last five years, ReCommunity and its affiliates have not been involved in any civil actions, loss of service contracts, bid bond claims, performance bond claims, liquidated damages, or administrative charges relative to any of its operations in the state of New Jersey.

### Financial Strength | Insurance

ReCommunity has demonstrated its ability to be a fiscally responsible partner to Camden County over its long relationship, with an unblemished record of on time payments. Detailed financial statements are available upon request.

ReCommunity has reviewed the insurance coverage requirement as set forth in Part I, Section 5 of the subject RFP and is prepared to fully comply with these requirements.

### Conflict of Interest

ReCommunity has no potential conflicts of interest in performing the services requested in the subject RFP for Camden County.

### References

We are proud of our record of providing valuable services to our community partners nationwide. Specific reference sites are provided, but we encourage you to contact any of our customers.



# REFERENCE FACILITY



## ReCommunity Delaware

<b>Customer</b>	Delaware Solid Waste Authority (DSWA)
<b>Since</b>	2013
<b>Location</b>	New Castle, DE
<b>Ownership</b>	Building and site by DSWA; stationary equipment and rolling stock by ReCommunity
<b>Processed</b>	Single stream residential (90%) and commercial (10%) recyclables 2015 - 132,381 tons 2016 - 126,351 tons
<b>Commodities Marketed</b>	OCC, ONP8, OMP, PET, HDPE(2), glass, mixed plastic, Al, Fe 2015 - 111,906 tons 2016 - 109,257 tons
<b>Services Provided</b>	MRF operation and maintenance, commodities marketing
<b>Contact</b>	Mike Parkowski Chief of Business and Governmental Services Delaware Solid Waste Authority 1128 S. Bradford St Dover, DE 19903 302.678.7329 <a href="mailto:mdp@dswa.com">mdp@dswa.com</a>
<b>Other</b>	ReCommunity has served the Delaware Solid Waste Authority as the waste diversion partner of choice since 2007. In 2012 ReCommunity executed a 20-year agreement with the DSWA, investing \$15 million to install a state-of-the-art processing system by repurposing two existing buildings with a total of 64,000 square feet at the Authority's Delaware Recycling Center (DRC).



# REFERENCE FACILITY



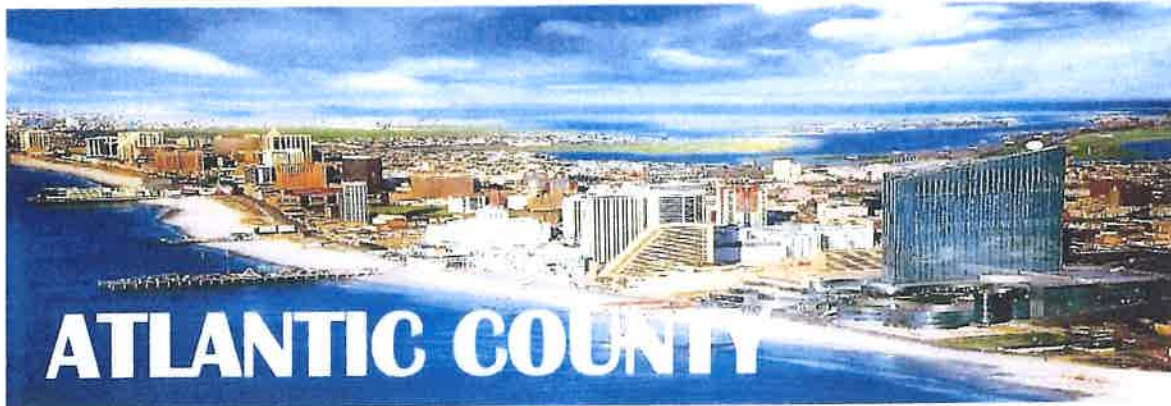
## ReCommunity Morris

<b>Anchor Customer</b>	Morris County Municipal Utilities Authority (MCMUA)
<b>Since</b>	1995
<b>Location</b>	Mine Hill, NJ
<b>Ownership</b>	Building leased by ReCommunity, all equipment owned by ReCommunity
<b>Processed</b>	Single stream residential (95%) and commercial (5%) recyclables 2015 - 46,829 tons 2016 - 52,876 tons
<b>Commodities Marketed</b>	OCC, ONP8, OMP, PET, HDPE(2), glass, mixed plastic, Al, Fe 2015 - 45,351 tons 2016 - 42,852 tons
<b>Services Provided</b>	Single stream processing, commodities marketing
<b>Contact</b>	Kathleen Hourihan MCMUUA District Recycling Coordinator 214A Center Grove Rd Randolph, NJ 07869 973 285 8392 <a href="mailto:khourihan@mcmua.com">khourihan@mcmua.com</a>
<b>Other</b>	For over 20 years, ReCommunity has processed recyclables for the MCMUA. Initially opened as a dual stream container processing facility in 1995, the facility was retrofitted to add single stream processing capability in 2011. In 2015 an all new state of the art container line was installed to replace the original container line. The plant has the capacity to process over 100,000 tons annually of single stream recyclables.





# REFERENCE FACILITY



## ReCommunity ACUA

<b>Customer</b>	Atlantic County Utility Authority (ACUA)
<b>Since</b>	2011
<b>Location</b>	Egg Harbor Township, NJ
<b>Ownership</b>	Building and site by ACUA; stationary equipment and rolling stock by ReCommunity
<b>Processed</b>	Single stream residential (95%) and commercial (5%) recyclables 2015 - 46,152 tons 2016 - 53,719 tons
<b>Commodities Marketed</b>	OCC, ONP8, OMP, PET, HDPE(2), glass, mixed plastic, Al, Fe 2015 - 40,020 tons 2016 - 45,904 tons
<b>Services Provided</b>	MRF operation and maintenance, commodities marketing
<b>Contact</b>	

**Other** In 2010 Hudson Baylor won a competitive bid to design/build/operate a modernized and expanded single stream processing facility for the ACUA. Hudson (now part of ReCommunity) invested over \$7 million and managed the successful installation and startup of the newly modernized facility in June of 2011. The plant has capacity to process over 100,000 tons annually.



# REFERENCE FACILITY



## Metrolina Recycling Center

Customer	Mecklenburg County, NC
Since	1989
Location	Charlotte, NC
Ownership	Building and stationary equipment by County; rolling stock by ReCommunity
Processed	Single stream residential recyclables 2015 - 113,630 tons 2016 - 112,808 tons
Commodities Marketed	OCC, ONP8, OMP, PET, HDPE(2), glass, mixed plastic, Al, Fe, aseptic 2015 - 99,286 tons 2016 - 97,502 tons
Services Provided	MRF operation and maintenance, commodities marketing
Contact	Jeffery Smithberger Director, Solid Waste Management 2145 Suttle Ave. Charlotte, NC 28208 980.314.3862 <a href="mailto:Jeffery.Smithberger@mecklenburgcountync.gov">Jeffery.Smithberger@mecklenburgcountync.gov</a>
Other	Approximately 70% of tons processed are controlled by the County, with the balance coming from third party (merchant) sources. ReCommunity has provided project management services for construction of new facility in 1995, \$7 million single stream retrofit in 2010, as well as other key improvements

# NATIONAL MAP



**“OUR GROWING  
FOOTPRINT IS BRINGING  
MORE JOBS AND MORE  
REVENUE TO MORE  
COMMUNITIES ACROSS  
THE COUNTRY”**

**ReCommunity Stats:**

**27** Material Recovery Facilities

ReCommunity Locations 



### SOUTHEAST REGION

Facility Name	Location	County	State	Type	Single/Dual
Sarasota	Sarasota	Sarasota	FL	MRF	Dual Stream
Lee County	Fort Myers	Lee	FL	MRF	Single Stream
West Palm	West Palm Beach	Palm Beach	FL	MRF	Dual Stream
Athens-Clarke	Athens	Clarke	GA	MRF	Single Stream
Greensboro	Greensboro	Guilford	NC	MRF	Single Stream
Mecklenburg	Charlotte	Mecklenburg	NC	MRF	Single Stream
Memphis	Memphis	Shelby	TN	MRF	Single Stream

### WEST REGION

Facility Name	Location	County	State	Type	Single/Dual
27th Avenue	Phoenix	Maricopa	AZ	MRF	Single Stream
Tucson	Tucson	Pima	AZ	MRF	Single Stream
North Gateway	Phoenix	Maricopa	AZ	MRF	Single Stream
River	Scottsdale	Maricopa	AZ	MRF	Single Stream
San Antonio	San Antonio	Bexar	TX	MRF	Single Stream



## MID-ATLANTIC REGION

Facility Name	Location	County	State	Type	Single/Dual
DSWA	New Castle	New Castle	DE	MRF	Single Stream
ACUA	Egg Harbor	Atlantic	NJ	MRF	Single Stream
Camden	Camden	Camden	NJ	MRF	Single Stream
Cape May	Woodbine	Cape May	NJ	MRF	Single Stream
Morris	Mine Hill	Morris	NJ	MRF	Single Stream
Montgomeryville	North Wales	Montgomery	PA	MRF	Commercial Processing and Transfer
Philadelphia	Philadelphia	Philadelphia	PA	MRF	Single Stream
Farmingdale	Farmingdale	Monmouth	NJ	MRF	Commercial Processing and Transfer

## NORTH REGION

Facility Name	Location	County	State	Type	Single/Dual
Beacon	Beacon	Dutchess	NY	MRF	Single Stream
Detroit	Southfield	Oakland	MI	MRF	Single Stream
Hartford	Hartford	Hartford	CT	MRF	Single Stream
Huron	New Boston	Wayne	MI	MRF	Single Stream
Milwaukee	Milwaukee	Milwaukee	WI	MRF	Single Stream
Roseville	Roseville	Macomb	MI	MRF	Single Stream
Toledo	Toledo	Lucas	OH	TS	Single Stream



## Company History | From FCR, Hudson Baylor, and GLR to ReCommunity

1927 – ReCommunity (GLR) was founded in Detroit, MI

1983 – ReCommunity (FCR) opened 1st Facility – Fairfield County, CT

1983 – ReCommunity (HBC) began operations – Newburgh, NY

1989 – Opened 1st MRF – Mecklenburg County, NC

1990 – Signed contract with Orange County, NY and Ridgefield, CT

1991 – ReCommunity (GLR) began receiving curbside materials in Detroit

1992 – Signed 1st contract with City of Greensboro, NC

1993 – Built 1st single stream facility in

U.S. – Greensboro, NC

1995 – Acquired Nutmeg Recycling

1997 – Won contract with Palm Beach County, FL

1998 – Acquired Resource Recovery Systems which added 6 MRFs

1998 – Merged with KTI, adding several more MRFs

1998 – Acquired Phoenix University MRF 1999 – Merged with Casella Waste Systems 2000 – Became first company in Michigan to process single stream

2000 – Built River Recycling at the Salt River Pima- Maricopa Indian Community landfill

2001 – Awarded contract for Waukesha County, WI

2002 – Awarded contract for MRF in Cape May County, NJ

2004 – Began operating public MRF in Cape May County, NJ

2004 – Took over MRF in Ontario County, NY

2004 – Won contract for Dutchess County, NY and Rockland County, NY

2005 – Awarded contract for MRF in Harford, CT

2005 – Acquired Blue Mountain Recycling of Philadelphia

2006 – Retrofitted MRF in Auburn, MA

2006 – Awarded processing contract for Urban County Government of Gilbert, AZ

2007 – Retrofitted MRF in Hartford, CT

2007 – Renovated MRF in South Windsor, CT

2007 – Won Phoenix North Gateway, AZ, Phoenix University, AZ, and Brookhaven, NY contracts

2008 – Opened Huron facility

2008 – Won City of Tempe, AZ contract

2009 – Commodity markets collapsed, but never turned away any customers or closed doors

2009 – Retrofitted MRFs in Boston, Brookhaven, NY Philadelphia, New Jersey, and West Palm Beach, FL

2010 – Retrofitted MRFs in Charlotte, NC and Fort Myers, FL

2011 – ReCommunity was founded, by purchasing select assets from Casella

2011 – ReCommunity acquired Great Lakes Recycling in Detroit, MI

2011 – ReCommunity acquired Hudson Baylor, making ReCommunity the largest pure-play recycling company in the U.S.

2011 – ReCommunity retrofitted MRF in Detroit, MI

2011 – ReCommunity opened a retrofitted MRF in Morris County, NJ

2012 – ReCommunity re-opened Phoenix 27th Ave MRF under new contract

2012 – ReCommunity opened a new MRF in Beacon, NY

2012 – ReCommunity retrofitted MRFs in Philadelphia, PA, Montgomeryville, PA, Camden, NJ and Atlantic County, NJ

2012 – ReCommunity opened a new MRF in Tucson, AZ

2013 – ReCommunity retrofitted MRFs in Cape May, NJ and Memphis, TN

2013 – ReCommunity Delaware opened in July

2014 – San Antonio Texas MRF opens

2015- Milwaukee MRF opens

2016 Detroit MRF Opens



## Marketing Single Stream Material

ReCommunity has industry leading commodities marketing expertise: negotiating sales contracts, scheduling shipments and managing the logistics with the outbound customers, invoicing, collecting payments, and reporting transactions. By virtue of its size, quality reputation and relationships, ReCommunity is able to secure maximum value in the marketplace for the recovered commodities – value that is shared with our partners.

The measures of excellence in commodity marketing are **pricing** and **reliable movement**. Both are needed to achieve excellence. ReCommunity reaches high levels of performance in these areas by focusing on three key success factors:

1. Product Quality
2. Long term relationships
3. Global market know how

### Product Quality

To achieve a superior quality reputation, consistency in inbound and outbound material is essential. Our systems are designed to meet the market requirements for all products generated. Our staff is trained on these specifications. At the plant level, quality audits are performed regularly depending on the material type and volume. The results of these audits are reviewed by corporate management and compared to operational targets, contractual commitments and market specifications. These audits are used to gauge equipment and sorting effectiveness, which

help focus management on areas that may need attention and improvement.

Quality is assured at each step of the process:

- As the inbound material is being received
- As the material is being processed and sorted
- As the material is being baled
- After the bale is produced and before it is stored
- Before loading onto customer's truck

Bale integrity will be maintained on all recovered products to market specifications. No baled commodity will have less than four wires being used to hold the bale together. Baling equipment will be maintained at or above these levels.

### Long term relationships and market know how

The Commodities Marketing department is responsible for coordinating and directing the movement of all processed material sales. The department is led by recycling industry veteran Paul O'Donnell, who has over 25 years' experience in the business. Our organization has established a significant network of global customers as shown below. ReCommunity's size and long term relationships give it access to favorable contract terms such as premiums to indices, floor pricing, forward pricing, etc.

All the accounting and marketing functions are done out of the ReCommunity corporate offices in Charlotte, NC. The facility is responsible for receiving, inspecting and processing the materials to the grade specified by the commodities marketing department.



## ReCommunity's End Market Customers

### I. Newsprint

- American Chung Nam, City of Industry, CA
- Sonoco Products, Hartsville SC
- Hershman Recycling, Cheektowaga, NY
- Cellmark, INC., Norwalk, CT
- Ralison International INC., Diamond Bear, CA
- Ekman Group, Brick, NJ
- IFPLLC, Foxboro MA
- Potential Industries, Wilmington CA

### II. Miscellaneous

- American Chung Nam, City of Industry, CA
- KC international, Brick, NJ
- Pratt Industries, Conyers GA, Valparaiso IN, Shreveport LA, Staten Island NY
- Sonoco Products, Hartsville, SC

### III. Containers of Cardboard

- American Chung Nam, City of Industry, CA
- International Paper, Campiti, LA
- Eckman Group Brick, NJ
- WestRock, Norcross GA
- Solvay Paperboard, Syracuse, NY
- Harmon Associates (Georgia Pacific), Westbury, NY

### IV. Recycled Plastic Copolymers

- Storelli Recycling, Ft. Lauderdale, FL
- American Chung Nam, City of Industry, CA
- Ekman Group, Brick, NJ

### V. Aluminum Cans

- Constellium Metal, Muscle Shoals AL
- Wise Metals, Linthicom, MD
- Service Aluminum Corp, Ellicott City MD

### VI. Steel Cans

- AMG Resources, Pittsburgh, PA
- Force Recycling, Seattle WA
- Conti Group, Brooklyn NY
- GMR, Phoenix AZ
- Pacific West Recycling, Manhattan Beach, CA
- Eckmann Group, Brick, NJ
- Tube City, Pittsburgh, PA

### VII. Other Material

Syms Metal, New Haven, CT

### VIII. PET Plastic

- Mohawk Industries, Summerville, Ga
- Evergreen Plastics, Clyde, OH
- Clean Tech, INC., Dundee, MI
- ClearPath, Fayetteville, NV
- Plastitec, Quebec City PQ
- Unifi, Reidsville, NC
- Conti Group, Brooklyn, NY
- Pacific West Recycling, Manhattan Beach, CA
- Ultra PET, Albany, NY
- Marglen industries, Rome, GA

### IX. HDPE Plastic (Narrow)

- KW Plastics, Troy, AL
- Envision Plastics, Reidsville, NC
- Graham Recycling, York, PA
- Clean Tech, INC, Dundee, MI
- Bluebridge Plastics, Eden NC
- Plastic Revolutions, Reidsville NC
- ADS, Findlay OH
- Pacific West Recycling, Manhattan Beach, CA

### X. HDPE Plastic (Broad)

- KW Plastics, Troy, AL
- Ekman Group, Brick NJ
- Eco Plast, Chino CA
- Envision Plastics, Reidsville, NC
- Harmon Associates, Jericho NY
- Dubitec, Santa Anna CA
- Graham Recycling, York, PA
- Clean Tech, INC., Dundee, MI

### XI. High-Density Plastics

- Blue Ridge Plastics, Eden, NC
- Universal Commodity Services, INC., Brooklyn, MI
- QRS St Louis MO
- Clean Tech, INC., Dundee, MI

### XII. Glass Products

- Strategic Materials, INC., Atlanta, GA
- Reflective Recycling, Wilson, NC
- Anchor Glass, Tampa, FL
- Owens-Illinois, Toledo, OH
- St. Gobain Containers, Muncie, IN

RECOMMUNITY MARKETS OVER 1,800,000 TONS ANNUALLY





## Reliability

We don't operate hauling routes or own landfills, paper mills, or incinerators. Our sole focus on recycling gives us the unique ability to offer our customers a service that has no competing or conflicting business units. The ability to market commodities is a challenge that clearly separates the performance level of ReCommunity from average MRF operators. ReCommunity prides itself on its marketing history and marketing strategies. As we are all aware, commodity revenue is the area of the highest volatility in the economics of MRF operations.

Until very recently, the past few years proved to be the most challenging period in the history of recycling. Market commodity values dropped further and for a longer period than ever before. Recyclables which once generated

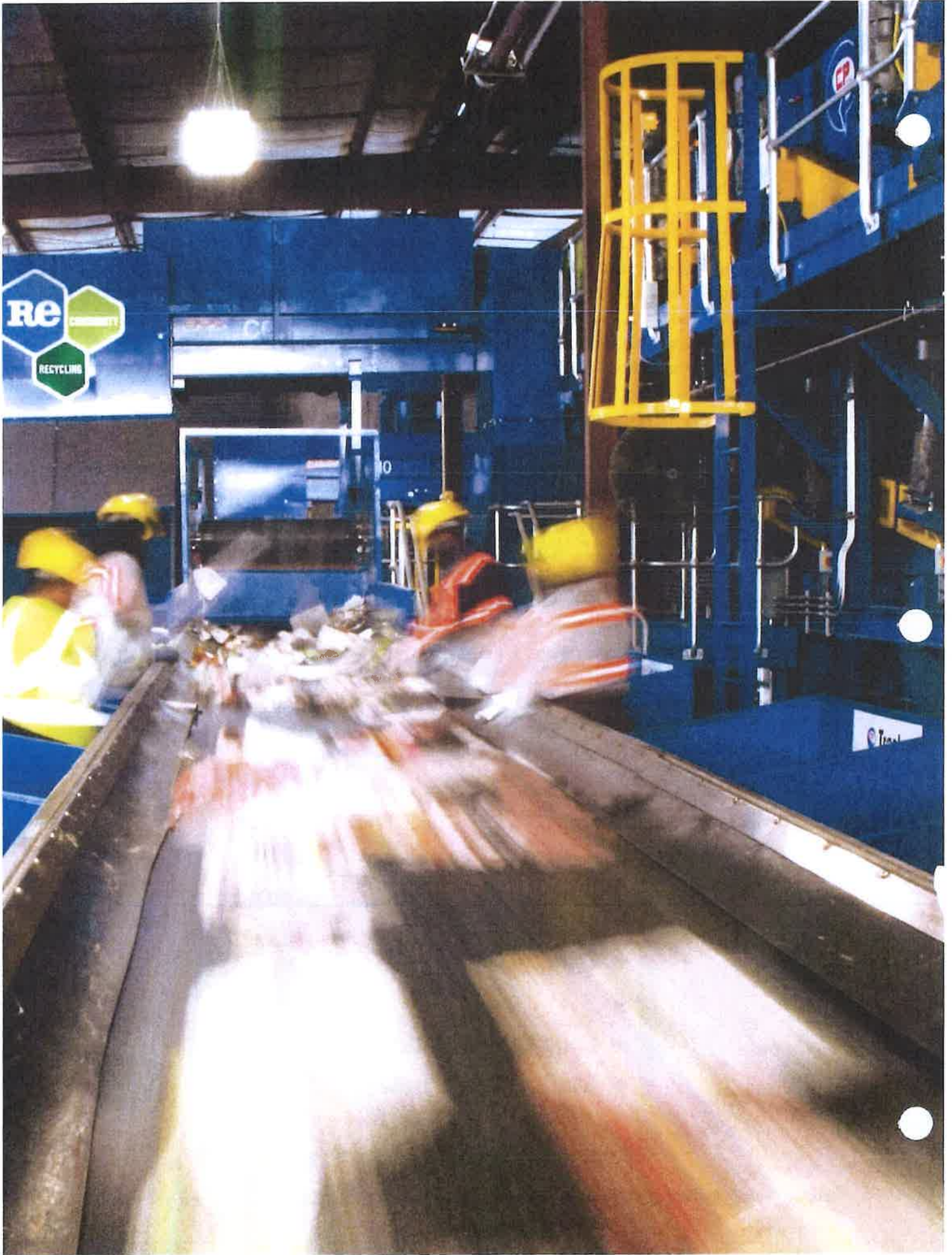
surplus revenue often failed to cover costs, and the recycling industry faced what was termed a perfect storm of extremely difficult circumstances. While others in the industry may have given up or diverted material to landfills ReCommunity's enduring reputation and long-term outbound customer relationships enabled ReCommunity to weather the storm. We kept material moving without having to landfill it, and sold all commodities produced during the historically unprecedented industry downturn. Fortunately for all, the market appears to be rebounding.

Over thirty years of the ups and downs of commodity markets, ReCommunity has developed strategies to cushion the volatility while maximizing revenue over the long-term.

### PRICING AND RELIABLE MOVEMENT

through

- **Quality**
- 
- **Long term relationships**
- **Market know how**





# COST PROPOSAL



## Pricing Proposals

Presented on the following pages is a pricing proposal that provides strong economic support to the County's recycling program and that of its participating municipalities. Our proposal is structured as a revenue sharing arrangement. When the average commodity revenue (ACR) is above a Threshold, ReCommunity will rebate the County and/or its participating municipalities 70% of the excess over the Threshold. When the ACR is less than the Threshold, ReCommunity will invoice the County and/or its participating municipalities for the difference, but in no case will any payments by the County/municipality exceed the floor pricing guarantee. This will limit the county's exposure to downturns in commodity prices. An example of the revenue sharing calculation is provided using actual commodity prices from January of this year.

As requested, the cost proposals are effective immediately and valid for the duration of the term of the contract.



**Form 1 - Price Proposal***Note: All blanks and boxes must be filled in*FCR Camden LLC dba ReCommunity*(Name of Company)*809 West Hill St Charlotte, NC 28208*(Address of Company)*Steve Hastings - VP of Corporate Development*(Company Contact Person and Title)*914 475 5946*(Tel)*215 462 7273*(Fax)*steve.hastings@recommunity.com*(Email)*

Average Commodity Revenue Threshold

\$ 70.00Revenue Percentage Share to Municipality  
(ACR above threshold)70.0 %Maximum Floor Value  
(Costs to municipality when ACR  
is below threshold)\$ MAX \$5.00 cost to municipality  
(Max costs permitted \$17.00)Initial Residue Consideration  
(Residue permitted to fluctuate monthly)\$ 49.79

- Note: 1.) Each proposer shall complete, in full, an Attachment A indicating their facility's initial proposed composition and pricing as offered by the facility in January 2017. Both composition and pricing is subject to audit and verification by the County.
- 2.) The Contract Term is for three years, with the County reserving the right to exercise, in its sole discretion, the option to extend the Contract Term by two, one-year extensions.

We, the undersigned, hereby declare that we have carefully examined the attached Request for Proposals documents attached hereto and provide a proposal with the pricing provided above in Form 1.

Signature: Sean P. Duffy Date: April 11, 2017

Name Printed: Sean P Duffy

Title/Position: President

FCR Camden LLC dba ReCommunity

**ATTACHMENT A  
AVERAGE COMMODITY REVENUE  
FOR  
THE RECEIPT, MARKETING AND COMMODITY SHARE OF  
SINGLE STREAM RECYCLABLES  
IN THE COUNTY OF CAMDEN, STATE OF NEW JERSEY**

REBATE.Fee Composition Table

Share Calculation

Date: 1/31/2017

Fiber Commodity	Camden County Composition (%)	Tons Calculated	Price Per Ton/Month Actuals	Commodity Revenue / Month Actuals
ONP #8	47.08%	4,741	\$ 133.22	\$ 631,603.30
OCC \ Kraft	14.19%	1,429	\$ 146.82	\$ 209,752.60
<b>Total Fibers:</b>	<b>61.27%</b>	<b>6,170</b>		<b>\$ 841,355.90</b>

Fiber Commodity	Camden County Composition (%)	Tons Calculated	Price Per Ton/Month Actuals	Commodity Revenue / Month Actuals
Glass - Mixed	18.02%	1,814	\$ (32.24)	\$ (58,491.21)
Plastic - PET	4.02%	405	\$ 219.59	\$ 88,839.52
Plastic - HDPE Natural	0.82%	82	\$ 526.74	\$ 43,286.59
Plastic - HDPE Pigmented	1.19%	120	\$ 289.02	\$ 34,713.24
Plastic Mixed	0.25%	25	\$ 114.76	\$ 2,901.78
Aluminum	0.31%	32	\$ 1,289.36	\$ 40,752.84
Ferrous Metals	2.01%	202	\$ 169.06	\$ 34,198.30
Other (Scrap)	0.88%	88	\$ 120.00	\$ 10,619.96
<b>Total Commingle</b>	<b>27.50%</b>	<b>2,769</b>		<b>\$ 196,821.03</b>
<b>Total Residue</b>	<b>11.24%</b>	<b>1,132</b>	<b>\$ (49.79)</b>	<b>\$ (56,338.96)</b>

SINGLE STREAM ACR CALCULATION / MONTH	
Total Tons	10,070
Total Revenue	\$ 981,837.96
SS ACR	\$ 97.50
SS ACR Threshold	\$ 70.00
Adjusted Grand Total, Average Community Value	\$ 27.50
Revenue Share %	70%
SS Commodity Rebate / Fee	\$ 19.25

**SINGLE STREAM REVENUE SHARE ALLOCATION**

Township	Tons Received	Rebate/Fee	Rebate Share Allocation or Fee Share Allocation
Anytown	1,000	\$ 19.25	\$ 19,250.90

NOTE: Values shown reflect FCR Camden LLC dba ReCommunity facility's initial composition & commodity pricing as offered by the facility in January, 2017. The form includes the pricing offered in FORM - 1 "Price Proposal". Both the composition percentages and pricing are subject to audit and verification by the County and all participating municipalities.



# REQUIRED DOCUMENTS

**SECTION H - MBE/WBE TRACKING INFORMATION**

Definitions:

A **Minority Business Enterprise (MBE)** is defined in the Camden County Affirmative Action Plan as "a business which is independently owned and operated and is at least 51% owned and controlled by minority group members". Minority group members are defined in the Camden County Affirmative Action Plan as "persons who are Black, Hispanic, Portuguese, Asian-American, American Indian or Alaskan Natives"

A **Women Business Enterprise (WBE)** is defined in the Camden County Affirmative Action Plan as "a business which is independently owned and operated and is at least 51% owned and controlled by women".

Using the definitions above, please check the following space which best describes your firm:

**Minority Business Enterprise (MBE)**

**Women Business Enterprise (WBE)**

**Neither**

**NAME OF FIRM:** FCR Camden LLC dba ReCommunity

**ADDRESS:** 809 West Hill St

Charlotte, NC 28208

**DATE:** April 10, 2017



08/01/06

Taxpayer Identification# **223-219-896/001**

Dear Business Representative:

Congratulations! You are now registered with the New Jersey Division of Revenue.

Use the Taxpayer Identification Number listed above on all correspondence with the Divisions of Revenue and Taxation, as well as with the Department of Labor (if the business is subject to unemployment withholdings). Your tax returns and payments will be filed under this number, and you will be able to access information about your account by referencing it.

Additionally, please note that State law requires all contractors and subcontractors with Public agencies to provide proof of their registration with the Division of Revenue. The law also amended Section 92 of the Casino Control Act, which deals with the casino service industry.

We have attached a Proof of Registration Certificate for your use. To comply with the law, if you are currently under contract or entering into a contract with a State agency, you must provide a copy of the certificate to the contracting agency.

If you have any questions or require more information, feel free to call our Registration Hotline at (908)292-1730.

I wish you continued success in your business endeavors.

Sincerely,



James J. Fruscione  
Acting Director  
New Jersey Division of Revenue

STATE OF NEW JERSEY  
BUSINESS REGISTRATION CERTIFICATE

DEPARTMENT OF TREASURY/  
DIVISION OF REVENUE  
PO BOX 252  
TRENTON, N J 08646-0252

TAXPAYER NAME:

**FCR CAMDEN, LLC**

TRADE NAME:

ADDRESS:

**2201 MT EPHRAIM AVE  
CAMDEN NJ 08104**

SEQUENCE NUMBER:

**1054751**

EFFECTIVE DATE:

**01/01/05**

ISSUANCE DATE:

**08/01/06**


Acting Director  
New Jersey Division of Revenue

**SECTION J**

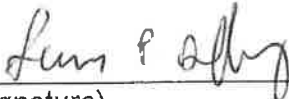
**CERTIFICATION REGARDING THE DEBARMENT, SUSPENSION, INELIGIBILITY AND VOLUNTARY EXCLUSION - LOWER TIER COVERED TRANSACTIONS**

This certification is required by the regulations implementing Executive Order 12549, Debarment and Suspension, 29 CFR Part 98, Section 98.510, titled Participants' Responsibilities. The Regulations were published as Part VII of the May 26, 1988 Federal Register (pages 19160-19211)

I am President of the firm FCR Camden LLC dba ReCommunity  
(Your Title) (Name of Your Organization)  
809 West Hill St Charlotte, NC 28208  
(Address of Your Organization)

**CHOOSE THE FOLLOWING**

- ( X ) A. I hereby certify on behalf of FCR Camden LLC dba ReCommunity  
(Name of Your Organization)  
that neither it nor its principals are debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any federal department or agency.
- ( ) B. I am unable to certify to any of the statements set forth in this certification. I have attached an explanation to this form.

  
(Signature)  
Sean P Duffy - President  
Type Name & Title

Date: April 10, 2017

**SECTION L**  
**DISCLOSURE OF INVESTMENT ACTIVITIES IN IRAN**

**PART 1: CERTIFICATION**

**BIDDERS MUST COMPLETE PART 1 BY CHECKING EITHER BOX. FAILURE TO CHECK ONE OF THE BOXES WILL RENDER THE PROPOSAL NON-RESPONSIVE.**

Pursuant to Public Law 2012, c. 25, any person or entity that submits a bid or proposal or otherwise proposes to enter into or renew a contract must complete the certification below to attest, under penalty of perjury, that neither the person or entity, nor any of its parents, subsidiaries, or affiliates, is identified on the Department of Treasury's Chapter 25 list as a person or entity engaging in investment activities in Iran. The Chapter 25 list is found on the Division's website at: <http://www.state.nj.us.treasury/purchase/pdf/Chapter25List.pdf>

Bidders must review this list prior to completing the below certification. Failure to complete the certification and return it with the RFP will render a bidder's proposal non-responsive and the RFP will be rejected. If the Director finds a person or entity to be in violation of law, s/he shall take action as may be appropriate and provided by law, rule or contract, including but not limited to, imposing sanctions, seeking compliance, recovering damages, declaring the party in default and seeking debarment or suspension of the party.

**PLEASE CHECK THE APPROPRIATE BOX:**

I certify, pursuant to Public Law 2012, c. 25, that neither the bidder listed above nor any of the bidder's parents, subsidiaries, or affiliates is listed on the N.J. Department of the Treasury's list of entities determined to be engaged in prohibited activities in Iran pursuant to P.L. 2012 c. 25, ("Chapter 25 List"). I further certify that I am the person listed above, or I am an officer or representative of the entity listed above and am authorized to make this certification on its behalf. I will skip Part 2 and sign and complete the Certification below.

OR

I am unable to certify as above because the bidder and/or one or more of its parents, subsidiaries, or affiliates is listed on the Department's Chapter 25 List. I will provide a detailed, accurate and precise description of the activities in Part 2 below and sign and complete the Certification below. Failure to provide such will result in the proposal being rendered as non-responsive and appropriate penalties, fines and/or sanctions will be assessed as provided by law.

**PART 2: PLEASE PROVIDE FURTHER INFORMATION RELATED TO  
INVESTMENT ACTIVITIES IN IRAN - add additional sheets if necessary.**

You must provide a detailed, accurate and precise description of the activities of the bidding person/entity, or one of its parents, subsidiaries or affiliates, engaging in the investment activities in Iran outlined above by completing below:

Name of Entity: \_\_\_\_\_ ; Relationship to Bidder: \_\_\_\_\_

Description of Activities: \_\_\_\_\_

Duration of Engagement: \_\_\_\_\_ Anticipated Cessation Date: \_\_\_\_\_

Bidder/Officer Contact Name: \_\_\_\_\_ ; Contact Phone: \_\_\_\_\_

Sign Certification - next page

SECTION L - continued

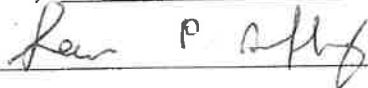
DISCLOSURE OF INVESTMENT ACTIVITIES IN IRAN

**BIDDER:** FCR Camden LLC dba ReCommunity

**Certification:**

I, being duly sworn upon my oath, hereby represent that the foregoing information and any attachments thereto to the best of my knowledge are true and complete. I acknowledge that I am authorized to execute this certification on behalf of the bidder, that the County of Camden is relying on the information contained herein and that I am under a continuing obligation from the date of this certification through the completion of any contracts with the County to notify the County in writing of any changes to the information contained herein; that I am aware that it is a criminal offense to make a false statement or misrepresentation in this certification, and if I do so, I am subject to criminal prosecution under the law and that it will constitute a material breach of my agreement(s) with the County of Camden, permitting the County to declare any contract(s) resulting from this certification void and unenforceable.

Full Name (Print): Sean P Duffy

Signature: 

Title: President

Date: April 10, 2017

**EXHIBIT A**

**STATEMENT OF OWNERSHIP DISCLOSURE**

N.J.S.A. 52:25-24.2 (P.L. 1977, c.33, as amended by P.L. 2016, c.43)

This statement shall be completed, certified to, and included with all Bid and Competitive Contracting RFP submissions. Failure to submit the required information is cause for automatic rejection of the bid or proposal.

**Name of Organization:** FCR Camden LLC dba ReCommunity

**Organization Address:** 809 West Hill St Charlotte, NC 28208

**Part I** Check the box that represents the type of business organization:

- Sole Proprietorship (skip Parts II and III, execute certification in Part IV)
- Non-Profit Corporation (skip Parts II and III, execute certification in Part IV)
- For-Profit Corporation (any type)  Limited Liability Company (LLC)
- Partnership  Limited Partnership  Limited Liability Partnership (LLP)
- Other (be specific): \_\_\_\_\_

**Part II**

The list below contains the names and addresses of all stockholders in the corporation who own 10 percent or more of its stock, of any class, or of all individual partners in the partnership who own a 10 percent or greater interest therein, or of all members in the limited liability company who own a 10 percent or greater interest therein, as the case may be. (COMPLETE THE LIST BELOW IN THIS SECTION)

OR

No one stockholder in the corporation owns 10 percent or more of its stock, of any class, or no individual partner in the partnership owns a 10 percent or greater interest therein, or no member in the limited liability company owns a 10 percent or greater interest therein, as the case may be. (SKIP TO PART IV)

(Please attach additional sheets if more space is needed):

Name of Individual or Business Entity	Home Address (for Individuals) or Business Address
None	

**Part III DISCLOSURE OF 10% OR GREATER OWNERSHIP IN THE STOCKHOLDERS, PARTNERS OR LLC MEMBERS LISTED IN PART II**

If a bidder has a direct or indirect parent entity which is publicly traded, and any person holds a 10 percent or greater beneficial interest in the publicly traded parent entity as of the last annual federal Security and Exchange Commission (SEC) or foreign equivalent filing, ownership disclosure can be met by providing links to the website(s) containing the last annual filing(s) with the federal Securities and Exchange Commission (or foreign equivalent) that contain the name and address of each person holding a 10% or greater beneficial interest in the publicly traded parent entity, along with the relevant page numbers of the filing(s) that contain the information on each such person. **Attach additional sheets if needed.**

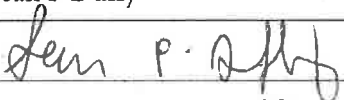
Website (URL) containing the last annual SEC (or foreign equivalent) filing	Page #'s

Please list the names and addresses of each stockholder, partner or member owning a 10 percent or greater interest in any corresponding corporation, partnership and/or limited liability company (LLC) listed in Part II other than for any publicly traded parent entities referenced above. The disclosure shall be continued until names and addresses of every noncorporate stockholder, and individual partner, and member exceeding the 10 percent ownership criteria established pursuant to N.J.S.A. 52:25-24.2 has been listed. **Attach additional sheets if more space is needed.**

Stockholder/Partner/Member and Corresponding Entity Listed in Part II	Home Address (for Individuals) or Business Address

**Part IV Certification**

I, being duly sworn upon my oath, hereby represent that the foregoing information and any attachments thereto to the best of my knowledge are true and complete. I acknowledge: that I am authorized to execute this certification on behalf of the bidder/proposer; that **Camden County** is relying on the information contained herein and that I am under a continuing obligation from the date of this certification through the completion of any contracts with **Camden County** to notify **Camden County** in writing of any changes to the information contained herein; that I am aware that it is a criminal offense to make a false statement or misrepresentation in this certification, and if I do so, I am subject to criminal prosecution under the law and that it will constitute a material breach of my agreement(s) with **Camden County** permitting **Camden County** to declare any contract(s) resulting from this certification void and unenforceable.

Full Name (Print):	Sean P Duffy	Title:	President
Signature:		Date:	April 10, 2017

**EXHIBIT B**

**COUNTY OF CAMDEN  
ACKNOWLEDGEMENT OF RECEIPT OF ADDENDA  
PROPOSER REQUIRED TO COMPLETE AND RETURN FORM REGARDLESS  
OF WHETHER ADDENDA WAS ISSUED.  
FAILURE TO COMPLETE AND RETURN FORM IS A FATAL DEFECT WHICH  
CANNOT BE CURED AND PROPOSAL WILL BE REJECTED.**

A. Bidder/Proposer hereby acknowledges receipt of the following Addenda:

<u>Addendum Number</u>	<u>Dated</u>	<u>Initial</u>
Clarification #1	3/31/17	SD
Clarification #2	4/3/17	SD
_____	_____	_____
_____	_____	_____
_____	_____	_____

OR:

B. Bidder/Proposer acknowledges to the best of his/her knowledge no addendum has been issued by the County: \_\_\_\_\_ Dated \_\_\_\_\_ Initial \_\_\_\_\_

**Bidder is required to complete, sign and submit form with bid regardless of whether addenda were issued. Failure to complete and return form is a fatal defect which cannot be cured and bid will be rejected. See: N.J.S.A. 40A:11-23.2**

By: Sean P Duffy

\_\_\_\_\_  
(Print or Type Name of Authorized Individual)

Signature: \_\_\_\_\_

\_\_\_\_\_  
Title: President FCR Camden LLC dba ReCommunity

# **EXHIBIT E**



## RESOLUTION

Res-Pg: 27-1

**RESOLUTION AUTHORIZING AN AWARD OF CONTRACT PURSUANT TO COMPETITIVE CONTRACTING REQUEST FOR PROPOSALS #17-10, BY AND BETWEEN THE COUNTY OF CAMDEN (DIVISION OF ENVIRONMENTAL AFFAIRS) AND FCR CAMDEN, LLC, FOR MARKETING SERVICES OF SINGLE-STREAM RECYCLABLE MATERIALS FOR THE COUNTY OF CAMDEN AND PARTICIPATING COUNTY MUNICIPALITIES UNDER THE CAMDEN COUNTY COOPERATIVE PRICING SYSTEM, ID#57-CCCPS**

WHEREAS, there exists a need for marketing services of single-stream recyclable materials for Camden County and participating County Municipalities; and

WHEREAS, pursuant to N.J.S.A. 40A:11-4.1, et seq., the County of Camden has conducted a publicly advertised Competitive Contracting Request For Proposals #17-10 for the provision of marketing services of single-stream recyclable materials for Camden County and participating County Municipalities under the Camden County Cooperative Pricing System, ID #57-CCCPS for a term of three (3) years with two (2) one year options to renew, said options to be exercised at the sole discretion of the County; and

WHEREAS, one response was received; and

WHEREAS, the Evaluation Committee for this Request For Proposals has reviewed the response and has recommended that an agreement be awarded to FCR Camden, LLC ("FCR"), for marketing services of single-stream recyclable materials for Camden County and participating County Municipalities under the Camden County Cooperative Pricing System ID#57-CCCPS for a term of three (3) years commencing on or about May 1, 2017 to April 30, 2020 at the unit pricing rates listed in FCR's Proposal dated April 13, 2017 with 2 (two) one-year options to renew, said options to be exercised at the sole discretion of the County; and

WHEREAS, this contract is awarded pursuant to the Local Public Contracts Law, N.J.S.A. 40A:11-4.1, et seq.; and

# RESOLUTION

Res-Pg: 27-2

WHEREAS, each participating member of the Camden County Cooperative as specified in Competitive Contracting Request For Proposal #17-10, as may be required and at their option, are hereby authorized to enter into a contract directly with FCR, pursuant to the terms and conditions of Competitive Contracting Request For Proposal #17-10, after award by its governing body in accordance with applicable law; and

WHEREAS, funding for this purpose is contingent upon the availability and appropriation of sufficient funds for this purpose in the County's 2017, 2018, 2019 and 2020 temporary and/or permanent budgets and shall be encumbered at the unit pricing listed in FCR's Proposal dated April 13, 2017 prior to the services being utilized as authorized pursuant to N.J.A.C. 5:30-5.5(b)(2) and shall not exceed any using department's line item in the budget for this purpose; now, therefore,

BE IT RESOLVED by the Board of Chosen Freeholders of the County of Camden that, contingent upon the funding as described herein and pursuant to Competitive Contracting Request For Proposals #17-10, the proper County officials be and are hereby authorized to execute all documents necessary to effect an agreement with FCR Camden, LLC, 2201 Mt. Ephraim Avenue, Camden, New Jersey 08104, for the provision of marketing services of single-stream recyclable materials for the County of Camden and participating County Municipalities under the Camden County Cooperative Pricing System, ID #57-CCCPS, at the unit pricing rates listed in FCR's Proposal dated April 13, 2017, for a term of three (3) years commencing on or about May 1, 2017 to April 30, 2020 with 2 (two) one-year options to renew, said options to be exercised at the sole discretion of the County, be and the same is hereby awarded; and

BE IT FURTHER RESOLVED that the participating members of the Camden County Cooperative as specified in Competitive Contracting Request For Proposal #17-10 are hereby authorized to enter into a contract directly with FCR, pursuant to the

# RESOLUTION

Res-Pg: 27-3

terms and conditions of Competitive Contracting Request For Proposal #17-10 after award by its governing body in accordance with funding and applicable law; and

BE IT FURTHER RESOLVED that the 2 (two) one-year options to renew shall be exercised at the sole discretion of the County; and

BE IT FURTHER RESOLVED that a copy of this Resolution or a Notice of Contract Award be advertised in accordance with N.J.S.A. 40A: 11-4.5(g).

LJP/emc  
File No. 7738

Z:\Files Gen\FCR\Comp RFP #17-10 - Resol. Auth. contract w FCR - Auth. 4-20-17

Introduced on: April 20, 2017  
Adopted on:  
Official Resolution#:

# **EXHIBIT F**

MASTER CONTRACT  
BY AND BETWEEN  
THE COUNTY OF CAMDEN  
AND  
FCR CAMDEN, LLC

This Master Contract, made this 22<sup>nd</sup> day of May, 2017, by and between the County of Camden, a body politic and corporate of the State of New Jersey and the Lead Agency for the Camden County Cooperative Pricing System, System Identifier #57-CCCPS, 14<sup>th</sup> Floor – Court House, 520 Market Street, Camden, New Jersey 08102 and FCR Camden, LLC having its principal place of business at 809 West Hill Street, Charlotte, North Carolina 28208, hereinafter called "FCR":

WITNESSETH

In consideration of the mutual promises herein contained, the parties agree as follows:

1. Term

The term of this contract is for a period of three (3) years commencing on or about May 1, 2017 through April 30, 2020 with two (2) one-year options to renew, said options to be exercised at the sole discretion of the County.

2. Competitive Contracting Request for Proposals

FCR agrees to do the work required for either the County or any System Member in strict conformity with the Competitive Contracting Request for Proposals #17-10.

a. With the County

FCR hereby agrees to furnish the necessary services to Camden County for and in accordance with the terms of Competitive Contracting Request for Proposals, (#17-10).

b. With the Participating System Members

FCR also agrees to furnish the necessary services and materials ordered by any participating member (System Member) of the Camden County Cooperative Pricing System, System Identifier #57-CCCPS, under the terms of the aforementioned after award of contract by said System Member in accordance with the Local Public Contracts Law, N.J.S.A. 40A:11-1 et seq.

3. Indemnification

FCR shall assume all risk of and responsibility for, and agrees to indemnify, defend, and save harmless the County of Camden and its officials and employees from and against any and all claims, demands, suits, actions, recoveries, judgments and costs and expenses in connection therewith on account of the loss of life, property or injury or damage to the person, body or property of any person or persons whatsoever, which shall arise from or result directly or indirectly from the work and/or materials supplied under this contract. This indemnification obligation is not limited by, but is in addition to the insurance obligations contained in this agreement.

4. Sub-Contractors

FCR agrees to make payment of all proper charges for materials and labor required in the aforementioned work. The Contractor agrees to defend, indemnify and hold harmless the County and any System Member with respect to any suit filed by any subcontractor for any damages, liability, attorney's fees and costs of suit with regard to the aforementioned work.

5. Compensation

a. By the County

The County shall pay FCR at the unit prices and/or fees submitted by FCR in its proposal dated April 13, 2017 prior to the services being utilized as authorized pursuant to N.J.A.C. 5:30-5.5(b)(2) and shall not exceed any using department's line item in the budget for this purpose. Funding for this purpose is contingent upon the availability and appropriation of sufficient funds for this purpose in the County's 2017, 2018, 2019 and 2020 temporary and/or permanent budgets.

**Under no circumstances shall Camden County as the Lead Agency be responsible or liable for any purchases on behalf of any System Member.**

b. By the System Member

The Participating Entities shall pay to FCR for the doing of said work

and/or the furnishing of said materials or services a sum not to exceed the unit prices as specified Competitive Contracting Request for Proposals #17-10. Funding of this contract for the Participating Entities' needs shall not exceed the maximum line items for the provision of marketing services of single-stream recyclable materials for Camden County and participating Participating Entities' 2017, 2018, 2019 and 2020 temporary and/or permanent budgets and shall be encumbered prior to incurring the obligation pursuant to N.J.A.C. 5:30-5.5(b)(2).

6. Prevailing Wage

Where applicable, FCR shall see to it that all persons employed in the doing of the work called for by this contract shall be paid the rate of wage prevailing in the area in accordance with N.J.S.A. 34:11-56.25 et seq.

7. Insurance Requirements

It is understood and agreed that certificates of insurance as required in the proposal must be furnished and attached to this agreement when signed by FCR and forwarded to the County consistent with the provisions of the Competitive Contracting Request for Proposals #17-10.

8. Audit

FCR shall permit the County and/or its independent auditors to have access, at a



reasonable time and place, to the records and financial statements necessary to comply with the following audit requirements as applicable:

<b>Type of Contractor</b>	<b>Audit Requirements</b>
Non-Profits and Institutions of Higher Education	<p><b>State Funds -</b> N.J.O.M.B. Circular Letter 15-08</p> <p><b>Federal Funds -</b> OMB's Uniform Administrative Requirements Cost Principles, and Audit Requirements for Federal Awards</p>
State and Local Governments	<p><b>State Funds -</b> N.J.O.M.B. Circular Letter 15-08</p> <p><b>Federal Funds</b> OMB's Uniform Administrative Requirements Cost Principles, and Audit Requirements for Federal Awards</p>
For-Profit	County's requirement of access as detailed above.

Copies of the above-referenced circulars are available upon request from the Camden County Chief Financial officer.

All non-profits, institutions of higher education, and state and local government contractors shall, annually, forward a copy of their Single Audit Report to the Camden County

Chief Financial Officer, 9<sup>th</sup> Floor - Court House, 520 Market Street, Camden, New Jersey 08102-1375. Failure to comply with this procedure will result in the withholding of payment pursuant to this contract.

9. Miscellaneous

a. Construction of Agreement

The parties acknowledge that this agreement was prepared under New Jersey Law and shall therefore be interpreted under the laws of that State.

b. Modification

This contract may not be amended, altered or modified in any manner except in writing signed by the parties hereto.

c. Headings

This section and any other headings contained in this contract are for reference only and shall not affect the meaning and interpretation of this contract.

d. Invalid Clause

The invalidity of any clause contained herein shall not render any other provision invalid and the balance of this contract shall be binding upon all parties hereto.

e. Entire Agreement

This contract shall constitute the entire agreement of the parties and it is acknowledged that there is no side or oral agreements relating to the under- taking set forth herein.

f. Assignability

This contract and all rights, duties and obligations herein may not be assigned by the Contractor without the written permission of the County.

g. Funding

This contract is subject to the availability and appropriation of sufficient funds in each year in which it is in effect.

h. Waiver

It is understood and agreed by the parties that a failure or delay in the enforcement of any of the provisions of this contract by either of the parties shall not be construed as a waiver of those provisions.

i. Governing Law

This agreement shall be construed and governed in accordance with the laws of the State of New Jersey and any disputes under this agreement shall be heard in a court of competent jurisdiction in the State of New Jersey.

j. Americans with Disabilities Act

The Americans with Disabilities Act provisions set forth in the Request for Proposal documents are incorporated herein and made a part hereof.

k. Affirmative Action

The affirmative action provisions set forth in the Request for the Proposal documents are incorporated herein and made a part hereof.

l. Licensure

Where applicable, the Contractor shall maintain all required New Jersey licenses during the term of this agreement.

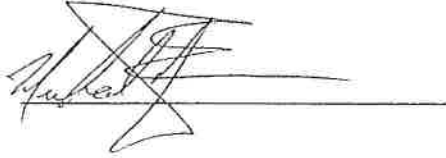
m. Binding Agreement

This contract shall be binding upon the parties hereto and their respective heirs, executors, administrators, successors or assigns.

(SIGNATURE PAGE AFFIXED HERETO)

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed  
the day and year aforesaid.

WITNESS:




FCR CAMDEN, LLC

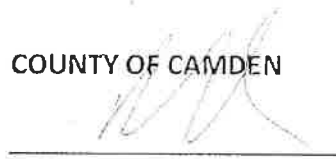


Name: Sean P. Duffy  
Title: President

ATTEST:

  
KARYN GILMORE, CLERK  
BOARD OF CHOSEN FREEHOLDERS

COUNTY OF CAMDEN

  
ROSS G. ANGILELLA  
COUNTY ADMINISTRATOR

Z:Files/General/FCR – CCCRP #17-10

# EXHIBIT G



**FCR Camden  
2201 Mt Ephraim Ave  
Camden, NJ 08104**

Dear Participating System Member,

As you know, China's National Sword and other environmental initiatives has had a materially adverse impact on recycling markets and forced seismic change in the industry. We have worked diligently to adapt to these changes while continuing to provide reliable recycling services to our customers. One of the biggest challenges has been ensuring that the materials brought to our recycling facilities is, in fact, acceptable recycling material, and not otherwise contaminated or non-recyclable.

Under FCR Camden, LLC's contracts with Camden County and its Participating System Members ("Member"), FCR reserved the right to reject materials brought into its facility that had contamination rates higher than 8 percent or contained Hazardous Material, and require the customer to remove the contaminated loads. We are at a point where we must enforce this contamination standard rigorously and, effective August 5, 2019, FCR has adopted a load inspection, notification and rejection program applicable to all inbound loads delivered for processing.

Below is a general overview of the program but we ask that you carefully review the enclosed copy of our Load Inspection and Rejection Protocol. While we will automatically reject loads containing Hazardous Material or loads that are grossly contaminated, we will otherwise perform visual inspections of incoming loads that appear to have contamination in excess of 8 percent. If the load is determined to be contaminated, we will notify the Member when we receive a contaminated load. If through the visual inspection process we determine a Member delivers more than two contaminated loads within a two-week time period, FCR will redirect future loads from that Member for a Thorough Audit Process. If as part of the Thorough Audit Process FCR determines that the load is contaminated it will be rejected. If rejected, the Member will be contacted and is expected to inspect and remove the rejected load within 2 hours of notification. Alternatively, Members, upon written agreement with FCR, can elect to have FCR dispose of or process the contaminated loads subject to applicable additional charges and fees.

Please know that if a customer delivers three or more rejected loads during a 60-day time period while its loads are being reviewed under the Thorough Audit Process, FCR reserves the right to not accept additional loads from that Member unless and until we are satisfied that the Member will discontinue delivering contaminated loads. If a Member is unwilling or unable to stop delivering contaminated loads, FCR reserves the right to terminate its contract with the Member.

We also need your help in educating your residents about the importance of only putting clean recyclable materials in their recycling bins. Contaminated recycling materials should be placed in the trash bin. We have educational materials available to help inform your residents if that would be helpful

As always, do not hesitate to contact me with any questions.

A handwritten signature in black ink, appearing to read "Gary Smalley", is written over a horizontal line.


**Gary Smalley - Municipal Services Manager**

**E: [Gsmalley@republicservices.com](mailto:Gsmalley@republicservices.com)**

**O: 908-912-5027**



# SINGLE STREAM RECYCLING

 Milk, juice cartons, etc.	 Glass bottles & jars	 #1 & #2 plastic bottles, jars, and jugs	 Aluminum, metal food, & beverage containers	 Loose metal jar lids & steel bottle caps
 Paperback books	 Junk mail, envelopes, post it notes, greeting cards, etc.	 Newspaper, magazines, circulars, brochures, inserts, etc. (no bags, do not tie & bundle)	 Telephone books	
 File folders, office paper	 Corrugated cardboard & paper bags	 Paperboard boxes (small, medium, large, etc.)	 Paper towel roll inserts	

For more information visit  
[CamdenCounty.com/Recycling](http://CamdenCounty.com/Recycling)

**AIM FOR  
MAXIMIZED  
RECYCLING**



**NO**



- NO** Plastic bags
- NO** Plastics other than #1 and #2 (identified above)
- NO** Plastic (or paper) to-go containers, cups, straws, or utensils
- NO** Plastic film, wrap, or bubble wrap
- NO** Pizza boxes
- NO** Styrofoam of ANY kind
- NO** Frozen food, ice cream, or frozen juice containers
- NO** Organic material or food waste
- NO** Hoses or hangers

**NO NEED TO REMOVE:**

Paper clips, stamps, address labels, staples, metal fasteners, cellophane address windows, rubber bands, spiral bindings, plastic tabs.

- ✓ **Empty & Rinse All Containers.**
- ✓ **Please follow these guidelines carefully.**

**camden county**

Making It Better. Together.

# WHAT GOES IN THE BIN?

camden county  
Making It Better. Together.



Rinsed Bottles, Jars, & Jugs  
(Glass and Plastic)



Rinsed Cans  
(Aluminum and Steel)



Paper



Cardboard



**NEVER**  
Plastic Bags.

For more information about  
Single-Stream Recycling, go to:

[camdencounty.com/inthebin](http://camdencounty.com/inthebin)

...AND  
**WHEN IN DOUBT,  
THROW IT OUT!**

Brought to you by the Camden County Board of Freeholders



**FCR Camden**  
**2201 Mt Ephraim Ave**  
**Camden, NJ 08104**

### **FCR Camden, LLC Recycling Facility**

#### **Inspection, Notification and Rejection Procedures**

FCR Camden, LLC ("FCR") operates a recycling center located at 2201 Mt. Ephraim Ave in Camden, New Jersey. FCR operates under a Class A permit solely for receiving, storing, processing or transferring source separated recyclable materials and is not authorized to accept mixed loads of trash and recyclables. FCR and Camden County, New Jersey are parties to a Master Contract, and FCR also contracts with several Participating System Members ("Member" or "Members") for recycling services. FCR reserved the right to reject incoming loads from Members to the recycling center that exceed 8 percent contamination and the process for inspecting incoming loads is described below.

If in the determination of FCR that an inbound load contains Hazardous Materials or Loads Containing MSW, the Hazardous Material or exceedance will be documented, and the load will follow the Rejection Procedure. All other deliveries may be inspected and if the load appears to have contamination in excess of 8 percent, it may be inspected per the grid inspection process (Attachment #1). A log will be maintained to record all loads that are believed to contain more than 8 percent contamination with unacceptable materials. Per the process described below the Member will be notified to clean up their loads and a Thorough Audit Process and/or rejection will occur on future non-conforming loads.

#### **Visual Inspection Process**

An inbound auditor may perform a visual inspection of any load delivered to the facility. As noted above, FCR reserves the right to immediately reject any load that contains Hazardous Material or Loads Containing MSW. In addition, if the observable portions of the load appear likely to contain more than 8 percent of contaminated material or Unacceptable Material the auditor will perform a grid inspection. The auditor will photograph the contaminated load and document pertinent information regarding the contaminated load such as vehicle information, the identity of the Member and types of contamination observed.

If the auditor determines that an incoming load exceeds 8 percent contamination via the grid inspection, the Member delivering load will be notified of the issue. If a Member is determined to have delivered more than two contaminated inbound loads in any two-week period, the auditor may direct subsequent loads from the Member to a separate tip floor where the Member's loads will be inspected under the Thorough Audit Process. If the load contains 8 percent contamination or less as determined by the Thorough Audit Process, it will be accepted. If the load contains more than 8 percent contamination it

will be rejected. If rejected, the contaminated load will be moved to a separate area and handled in accordance with the Rejection Procedure.

### **Thorough Audit Process**

A delivery vehicle will identify its origin of collection to the inbound inspector and proceed to the main tip floor or the separate tip floor on the other side of the recycling facility as directed by the auditor. If a load's contents are not visible by the inspector prior to unloading, the vehicle will be instructed to dump a portion or all of its load for a load inspection. Upon visual inspection, the inspector will then decide if a Thorough Audit Process (TAP) is required. If it is determined that a TAP is required, the auditor will place a minimum of 200 pounds of the unloaded material (the sample material (SM)) into containers for weighing. The SM will be taken from multiple areas of the unloaded material for a representative sample, including material from the top, bottom, middle, front and back of the unloaded material. The SM will be collected and weighed to reach a minimum of 200 pounds. The SM weight will be recorded, pictures taken of the sample material and a calculation will be completed to establish the 8 percent Contamination Threshold (CT).

$$\text{SM weight} \times .08 = \text{CT}$$

**A sample calculation would be:**

$$\text{SM} = 210 \text{ pounds}$$

$$210 \times .08 = 16.80 \text{ pounds (CT)}$$

A separate container will be placed on the scale and its weight will either be zeroed out on the scale or added to the calculated CT amount to set the total CT level. The auditor and support staff will then remove the contamination/unacceptable materials and place into the container.

If the contamination/unacceptable materials weight exceeds the CT level, the delivering Member shall be notified and decide the next steps per the Rejection Procedure.

If the contamination/unacceptable material is below the CT level no further action is required. If only a partial load is unloaded on the separate tip floor the vehicle will be directed back to the main tip floor to complete the unloading process.

### **Rejection Procedure**

If through the TAP a load is determined to contain solid waste, non-program material or Unacceptable Recyclables in excess of 8 percent, the following options/procedures will apply:

1. During Receiving Hours, Members shall, within two hours from being notified by FCR of the contaminated load, inspect and haul away the entire contents of the load at its expense.
2. The Member can agree in writing that instead of it loading and removing a contaminated load that needs to be disposed of at a solid waste facility, it authorizes FCR to dispose of the

contaminated load(s) at a solid waste facility and agrees to pay a \$250 handling charge plus the actual costs plus 15% to transport and dispose of the contaminated load.

3. FCR and the Member may mutually agree in writing to FCR accepting and processing a contaminated load that FCR is capable of processing with the Member agreeing to pay a \$75 per ton surcharge for the entire contaminated load.

If any Member has three (3) loads rejected within a 60-day period, FCR, in its sole discretion, may refuse to accept any additional incoming loads from the Member until receiving assurances to FCR's satisfaction that the Member will discontinue delivering contaminated loads. If a Member does not pay for items #2 or #3 within 30 days of invoice, FCR, in its sole discretion, may refuse additional incoming loads from the Member. FCR reserves the right to terminate its contract with a Member for breach if a Member appears to be unwilling or unable to not deliver contaminated loads.

**"Acceptable Recyclables"** shall include only the following types of recyclables listed on this Camden County Single Stream recycling document as Attachment #2. Specifically excluded items include the items listed under **"NO"**, bagged material of any type, scrap metal or wood items. All containers need to be empty and rinsed. All materials contained within plastic bags will be considered contaminated.

**"Unacceptable Recyclables"** shall include but not limited to:

- (1) Unacceptable Waste;
- (2) Any of the following: anti-freeze containers; Asian corrugated; auto glass; ceramic cups and plates; clay post; clothes hangers; crystal; drinking glasses; food-contaminated pizza boxes; gravel; heat-resistant ovenware; hypodermic needles; leaded glass; light bulbs; metal in large pieces (e.g., metal pipe, lawnmower blades); mirror glass; motor oil containers; paint cans; plastic bags; plates; porcelain; pots and pans; processed and take-out black, plastic food containers and trays; plastic film or bubble wrap, organic material, propane or helium tanks; pyrex; screw top caps/lids, regardless of whether attached or not; stones; wood; syringes; tiles; waxed corrugated; batteries and window glass;

Loads that can be immediately rejected are the following:

**"Hazardous Materials"**- shall include all materials containing hazardous wastes as defined in N.J.A.C. 7:26 and 7:26G and any other materials with similar characteristics or presenting similar dangers. Any load containing Hazardous Materials will be the responsibility of the delivering municipality to remove within 1 hour and to dispose of at their expense. FCR will be indemnified by the delivering party for any liability arising from such load.

**"Loads containing MSW"** – any load that contains exceedingly high levels municipal solid waste (MSW) or cross contaminates.

**"Receiving Hours"** - means the recycling centers normal hours of receiving recycling material which are Monday through Friday 7:00 AM to 5:45 PM, Saturdays following a Holiday. The recycling center is closed during the following holidays: New Year's, Memorial, Independence, Labor, Thanksgiving and Christmas.

In addition, please provide contact information to include those individuals that FCR can contact at any time during the day if there are issues / concerns with a recycling load. Information to include a minimum of 2 people:

- Email address
- Office and cell phone numbers.

FCR appreciates your anticipated cooperation and understanding.

A handwritten signature in black ink, appearing to read "Gary Smalley", written over a horizontal line.

Gary Smalley - Municipal Services Manager  
E: [Gsmalley@republicservices.com](mailto:Gsmalley@republicservices.com)  
O: 908-912-5027



**kessler consulting inc.**  
innovative waste solutions

## INSPECTION PROTOCOL FOR FCR CAMDEN, LLC RECYCLING FACILITY

### Purpose

This protocol describes a semi-quantitative, visual audit for estimating the percentage of unacceptable materials in loads of delivered to the FCR Camden, LLC Recycling Facility (RF).

### Recommended Staffing

Two Sort Inspectors, one of which is designated as the Lead Inspector.

### Materials and Equipment

- Visual Audit Form (see Attachment).
- Digital camera.
- 5 ft. by 3 ft. grid with 1-sq.ft. grid – assembled from PVC pipe or other rigid material.

### Procedures – General

This visual audit should be implemented for loads that the inspectors believe, based upon their general assessment, have unacceptable materials (contamination) exceeding what is allowed under the inbound processing agreement. It may also be implemented for other loads when inspectors have time available. (A workflow diagram is included in the Attachment.) Inspectors do not need to conduct visual audits of loads containing obvious, excessively high levels of unacceptable materials (contamination) and should notify the delivering entity regarding those loads.

An Inspector will:

1. Complete information regarding the load (truck number, community name, hauler name, etc.) using information already obtained from the log-in process.
2. For collection truck loads: Visually divide the load into six sections as illustrated below. Randomly select two to four sections of the load for sampling.

Bird's Eye View of Direct Haul Collection Truck Divided into Six Sections

1	2	3
4	5	6

3. Place the grid on one of the selected sections and take a digital photo of the grid (including date & time stamp). Note: place the grid on the long side of the pile – do not place it on the ends.
4. Complete the “% Unacceptable Material” section of the Visual Audit Form by estimating the percent of the visible surface area in each square that is Unacceptable Material.
5. Repeat Steps #3 and #4 for the other selected section(s) of the pile.

Analysis

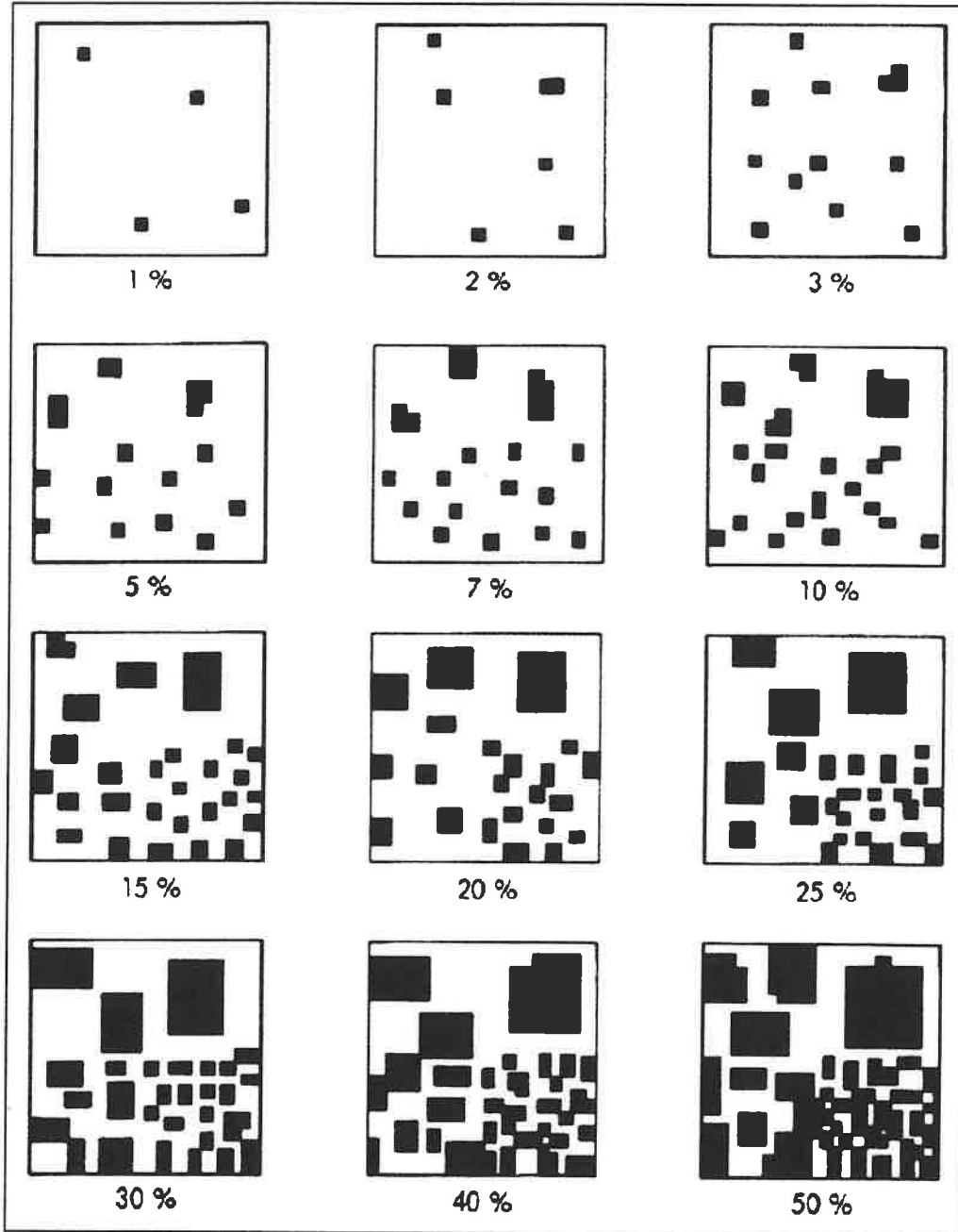
The electronic version of the Visual Audit Form automatically calculates the percent of the pile’s surface area comprised of Unacceptable Material as follows:

Unacceptable % = average of % Unacceptable Material in all grids.

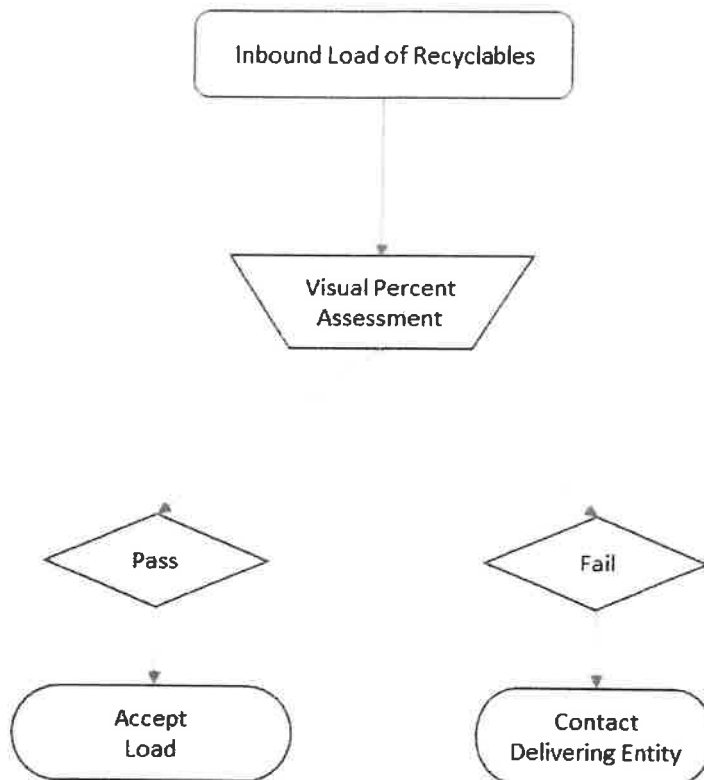




**Braun-Blanquet Visual Estimating Diagram**



**Workflow Diagram**



# EXHIBIT H

2012 WL 1328279

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK  
COURT RULES BEFORE CITING.Superior Court of New Jersey,  
Law Division.John S. HOGAN—County Clerk of  
Bergen County, New Jersey Plaintiff,

v.

Kathleen A. DONOVAN—County Executive of  
the County of Bergen, New Jersey, Defendants.

Argued April 13, 2012.

|

Decided April 17, 2012.

**Attorneys and Law Firms**

Christopher K. Harriott, Esq. appearing on behalf of the plaintiff, John S. Hogan—County Clerk of Bergen County, New Jersey (Florio & Kenny, L.L.P.) (Edward J. Florio, Esq., On the Brief).

Gage Andretta, Esq. appearing on behalf of the defendant, Kathleen A. Donovan—County Executive of the County of Bergen, New Jersey (Wolff & Samson PC) (Arthur S. Goldstein, Esq., Of Counsel, Robert L. Hornby, Esq., and Mauro G. Tucci, Jr., Esq., On the Brief).

PETER E. DOYNE, A.J.S.C.

**Introduction**

\*1 Before the court is an order to show cause brought by counsel for John S. Hogan (“Hogan” or “plaintiff”), the County Clerk of Bergen County (the “Clerk”), against Kathleen A. Donovan (“Donovan” or “defendant”), the County Executive of Bergen County (the “Executive”), directing defendant to appear on March 30, 2012, to show cause why an order should not be issued enjoining and restraining defendant from refusing to process an employee selected for a position within the Office of the County Clerk as permitted by *N.J.S.A.* 40A:9–74; ordering defendant to execute such employee requests; declaring defendant has improperly interfered in the operation of plaintiff’s office beyond the legal scope of her authority; awarding plaintiff

reasonable attorney’s fees and costs; and granting such other relief as the court deems equitable and just.<sup>1 · 2</sup>

The order to show cause was filed on February 27, 2012, and the court executed same on February 28, 2012. Defendant filed an opposition to plaintiff’s order to show cause and a motion to dismiss in lieu of answer on March 30, 2012. Plaintiff filed a reply on April 5, 2012, and an unauthorized sur-reply on *April 12, 2012*.<sup>3</sup>

Plaintiff’s request for a preliminary injunction and defendant’s motion to dismiss are denied.

**Facts and Procedural Posture**

The issues presented go to the very foundation of how the County’s government operates within its constitutional structure. Defendant, a Republican, has been the Executive since 2010. Pursuant to *N.J.S.A.* 40:41A–32, the Executive and the Board of Chosen Freeholders (the “Board”) comprise the governing body of Bergen County (the “County”). Created by *N.J.S.A.* 40:20–1, the Board is the legislative body of the County and, together with the Executive, is responsible for the County’s budget appropriations. *N.J.S.A.* 40:41A–38, 41(g). The Executive has general executive authority over the county government and is entrusted to supervise all county administrative departments. *Id.* §§ 36–37. Prior to her appointment as Executive, Donovan was the Clerk for over twenty years.

Plaintiff, a Democrat, was elected as Clerk on November 8, 2011, and is charged with specific constitutional and statutory responsibilities by virtue of his office. *See N.J. Const.* art. VII, § 2, ¶ 2; *N.J.S.A.* 40A:9–73. A specific duty of the Clerk is to oversee all of the County’s election filings.

Pursuant to *N.J.S.A.* 19:12–7.1, and resulting from the 2010 census figures, as of 2012, election ballots and voter information are required to be printed in the Korean language.<sup>4</sup> By letter dated January 9, 2012, attached to plaintiff’s verified complaint (the “Hogan Letter”), plaintiff requested defendant authorize the processing of an MI–1 employment application (the “employment application”) for Steve Seunghoon Chong (“Chong”), a bilingual individual fluent in English and Korean, as a Public Participation Specialist with an annual salary of \$35,000, to assist plaintiff in serving the County’s Korean community. The appointment was intended to be effective on January 23, 2012. The Hogan Letter also indicated the costs of hiring Chong would

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not exceed plaintiff's appropriated budget set by the Board to hire employees. Specifically, the Hogan Letter stated, "In my short time in the Office of the Bergen County Clerk, I have been able to reduce salaries by appointing quality, talented individuals to the positions held by the previous administration. Including Mr. Chong, the additions to an already dedicated staff will have reduced the prior administrations' payroll by at least \$55,000 or 16%."

\*2 Edward Trawinski ("Trawinski"), the Bergen County Administrator, responded on behalf of defendant by way of a letter dated January 10, 2012, attached to plaintiff's verified complaint (the "Trawinski Letter"), which provided the County Clerk is entitled to appoint only two (2) Deputy County Clerks and (1) Confidential Aide/Secretary. The Trawinski Letter further stated plaintiff was permitted by the administration to hire an additional employee due to a retirement, for a total of four positions. Thus, Trawinski denied plaintiff's request to process Chong's employment application, stating, "To my knowledge, there are no vacancies in your office, so you cannot hire anyone." Trawinski recommended plaintiff utilize the services of Ester Chung ("Chung"), an individual who has been employed by the Clerk's Office for several years, noting "[s]he is terrific."

Counsel for plaintiff filed a complaint and an order to show cause against defendant on February 27, 2012. Plaintiff argues he is entitled to an interim injunction requiring the immediate processing of Chong's employment application and a declaration defendant may not interfere in the operation of plaintiff's office pending final resolution. According to plaintiff's counsel, *N.J.S.A.* 40A:9-74 sets forth the authority of the Clerk to hire necessary personnel for employment in his office, and there is no legal or factual basis permitting defendant's refusal to process Chong's employment application. Plaintiff addresses the factors, outlined in *Crowe v. De Gioia*, 90 *N.J.* 126, 132, 447 *A.2d* 173 (1982), courts rely on to determine a party's entitlement to a preliminary injunction and argues they each weigh in his favor.

On March 30, 2012, defendant caused to be filed a motion to dismiss and an opposition to plaintiff's order to show cause. Defendant argues plaintiff has already filled his authorized positions with "political allies" and therefore should not be heard to complain an alleged need is going unfulfilled.<sup>5</sup> In fact, defendant argues, no Clerk has ever required additional employees to fulfill the Clerk's Office's responsibilities to the County's non-English-speaking

residents. Moreover, defendant argues the Clerk's Office already employs a Korean-speaker, Chung, who fulfills the function of facilitating outreach to the County's Korean-speaking population. In a similar vein, defendant argues the fact the 2010 census requires ballots be printed in Korean does not require the hiring of another Korean employee as the translation of ballot-related materials is a task outsourced by the Clerk's Office to a private translation service. Lastly, defendant argues the county executive form of government chosen by Bergen County and authorized by *N.J.S.A.* 40:41A-31 -44, vests her, as Executive, with responsibility for all personnel decisions. *See N.J.S.A.* 40:41A-1 -22 (providing the two procedures for adoption of one of the four optional county charter plans set forth in §§ 31-85). Defendant argues she sought to fulfill her duties by implementing a hiring freeze in October 2011 to attempt to deal with what she deems a continuing economic crisis. As a result, defendant argues plaintiff is aware the Clerk's Office has an "authorized strength," i.e., a maximum number of permitted employees, of 52.5, which would be exceeded were she to approve Chong's hiring and process the employment application.

\*3 Plaintiff's counsel filed a reply on April 5, 2012, which consisted of a certification of Robert J. Pantina ("Pantina" and the "Pantina Cert.") and five exhibits attached thereto. The Pantina Cert. states Pantina is the Chief of Staff/Confidential Secretary to the Clerk. It further states Chung, the employee defendant claims could fulfill the function for which plaintiff wishes to hire Chong, had been assigned to the mailroom before plaintiff took office and has remained in that position. The Pantina Cert. then asserts Chung is the only employee in the mailroom and discusses her responsibilities, which, in addition to managing the mailroom, include attending functions on behalf of the Executive and providing translation services to other departments and agencies in the County. It goes on to argue Chung has expressed she is overwhelmed by her work and recommended the hiring of Chong.<sup>6</sup> Moreover, it is urged, while an outside contractor performs the translations of ballots, the Clerk's Office must verify the accuracy of the translation, and, given Chung's current workload, another employee is needed to fulfill this function, especially as it is, according to Pantina, unclear whether Chung possesses the required qualifications according to the job specifications for "public participation specialist." Lastly, the Pantina Cert. states if Chong is not hired, there is a realistic likelihood of irreparable harm as the community of non-English, Korean speakers will be disenfranchised if there are uncorrected errors in the ballot translations.

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On April 12, 2012, plaintiff's counsel submitted a "supplement" to its reply, which consisted of an additional certification of Pantina. In pertinent part, this certification confirmed no budget for the year 2012 has yet been approved, and the County is, pursuant to *N.J.S.A.* 40A:4-20, operating under a temporary budget.

**Law**

The court will first address the standards governing defendant's motion to dismiss and plaintiff's request for a preliminary injunction before turning to the merits of the same.

**Motion to Dismiss**

Under *R.* 4:6-2(e), a complaint will be dismissed if it fails to state a claim upon which relief can be granted. The standard governing the analysis of a motion to dismiss pursuant to *R.* 4:6-2(e) requires the complaint be examined "in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary." *Printing Mart-Morristown v. Sharp Elecs. Corp.*, 116 *N.J.* 739, 746, 563 A.2d 31 (1989) (quoting *Di Cristofaro v. Laurel Grove Mem'l Park*, 43 *N.J.Super.* 244, 252, 128 A.2d 281 (App.Div.1957)). In evaluating a motion to dismiss the court is not concerned with the plaintiff's ability to prove its allegations; rather, "a complaint is entitled to liberal reading in determining its adequacy" and must merely "allege sufficient facts as give rise to a cause of action[.]" *Pressler & Verniero, Current N.J. Court Rules*, comment 1 on *R.* 4:5-2 (2012); *Printing-Mart, supra*, 116 *N.J.* at 746, 563 A.2d 31. "[P]laintiffs are entitled to every reasonable inference of fact," and the required examination of the complaint "should be one that is at once painstaking and undertaken with a generous and hospitable approach." *Printing-Mart, supra*, 116 *N.J.* at 746, 563 A.2d 31. While "the motion should be granted if even a generous reading of the allegations does not reveal a legal basis for recovery," *Edwards v. Prudential Prop. & Cas. Co.*, 357 *N.J.Super.* 196, 202, 814 A.2d 1115 (App.Div.2003), courts should only grant a motion to dismiss with caution and in 'the rarest instances.' " *Ballinger v. Del. River Port Auth.*, 311 *N.J.Super.* 317, 322, 709 A.2d 1336 (App.Div.1998) (quoting *Printing-Mart, supra*, 116 *N.J.* at 772, 563 A.2d 31); see *Ferreira v. Rancocas Orthopedic Assocs.*, 178 *N.J.* 144, 166, 836 A.2d 779 (2003) (noting courts' "aversion to dismissing complaints for failure to state a claim pursuant to Rule 4:6-2(e)").

**Injunctive Relief**

\*4 Injunctive relief is an extraordinary equitable remedy that should be entered only with the exercise of great care and only upon a showing, by clear and convincing evidence, of entitlement to the relief. *Dolan v. De Capua*, 16 *N.J.* 599, 614, 109 A.2d 615 (1954) ("Injunctive judgments are not granted in absence of clear and convincing proof."); *Mays v. Penza*, 179 *N.J.Super.* 175, 179-80, 430 A.2d 1140 (Law Div.1980) ("A court may grant the extraordinary relief of the preliminary injunction only in the clearest of factual circumstances and for the most compelling of equities.").

The seminal case in determining whether preliminary injunctive relief should be granted is *Crowe v. De Gioia*, 90 *N.J.* 126, 447 A.2d 173 (1982). Under *Crowe*, the movant bears the burden of demonstrating: 1) irreparable harm is likely if the relief is denied; 2) the applicable underlying law is well settled; 3) the material facts are not substantially disputed, and there exists a reasonable probability of ultimate success on the merits; and 4) the balance of the hardship to the parties favors the issuance of the requested relief. *Id.* at 132-34, 447 A.2d 173.

"[A] preliminary injunction should not be entered except when necessary to prevent substantial, immediate and irreparable harm." *Subcarrier Commc'ns, Inc. v. Day*, 299 *N.J.Super.* 634, 638, 691 A.2d 876 (App.Div.1997) (citing *Citizens Coach Co. v. Camden Horse R.R. Co.*, 29 *N.J. Eq.* 299, 303-04 (E. & A. 1878)). "Harm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages," which "may be inadequate due to the nature of the injury or the right affected." *Crowe, supra*, 90 *N.J.* at 132-33, 447 A.2d 173. Moreover, to prevail on an application for temporary relief, the movant "must make a preliminary showing of a reasonable probability of ultimate success on the merits," although "mere doubt as to the validity of the claim is not an adequate basis for refusing to maintain the status quo." *Id.* at 133, 447 A.2d 173. Furthermore, "[i]n exercising their equitable powers, courts 'may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.'" *Brown v. City of Paterson*, 424 *N.J.Super.* 176, 183 (App.Div.2012) (quoting *Waste Mgmt. v. Union Cnty. Utils.*, 399 *N.J.Super.* 508, 520-21, 945 A.2d 73 (App.Div.2008)).

**Analysis**

**Motion to Dismiss**

Defendant argues the court should dismiss the action as it improperly seeks to compel defendant to exercise her discretion and, even if it does not, is not ripe for adjudication as no budget has yet been approved for the 2012 fiscal year. As defendant cannot bear her burden on a motion to dismiss, and as the court, at this time, cannot glean sufficient guidance from relevant statutory and case law, at least for purposes of a motion to dismiss, the motion is denied on both grounds.

*The Ambiguities in the Language of N.J.S.A. 40A:9-74 Render Dismissal Inappropriate at This Time.*

\*5 In order to better understand the issues before it, the court finds it helpful to first analyze the Clerk's statutory authority to hire employees. It would seem, if plaintiff had plenary power to evaluate the needs of his staff, and the same is within the budgetary confines established, defendant's refusal to process Chong's employment application may well be unsustainable. Conversely, if the Executive has general oversight powers, her refusal may be within the bounds, and possibly obligations, of her position.

The fundamental issue plaintiff's application raises may be framed in multiple ways. It may be viewed, for example, as an issue of statutory interpretation, i.e., does *N.J.S.A. 40A:9-74*, which provides the Clerk "shall select and employ necessary clerks and other employees," permit plaintiff to hire as many employees as he deems appropriate, so long as he stays within budgetary limits?<sup>7</sup> To determine the statute's meaning, the court must first examine its plain language, bearing in mind "the Legislature's admonition that its words and phrases 'shall be read and construed with their context, and shall, unless inconsistent with the manifest intention of the legislature or unless another different meaning is expressly indicated, be given their generally accepted meaning, according to the approved usage of the language.'" *U.S. Bank N.A. v. Guillaume*, — N.J. —, — (2012) (slip op. at 39) (quoting *N.J.S.A. 1:1-1*). If the Legislature's language is "unambiguous, then the [c]ourt's 'interpretive process is over.'" *Ibid.* (quoting *State v. Gandhi*, 201 N.J. 161, 177, 989 A.2d 256 (2010)); see also *Di Prospero v. Penn*, 183 N.J. 477, 492-93, 874 A.2d 1039 (2005) ("A court should not resort to extrinsic interpretive aids when the statutory language is clear and unambiguous and susceptible to only one interpretation.").

At first glance and in isolation, the phrase plaintiff "shall select and employ" necessary employees may appear

straightforward. The words of a statute, though, "shall be read and construed with their context." *N.J.S.A. 1:1-1*; *Guttenberg Sav. & Loan Assoc. v. Rivera*, 85 N.J. 617, 624, 428 A.2d 1289 (1981) (quoting *In re N.Y. State Realty & Terminal Co.*, 21 N.J. 90, 98, 121 A.2d 21 (1956)) ("We have also made it clear that statutes 'must be understood in their relation and interaction with other laws which relate to the same subject or thing; they must by construed together with these related sections in order to learn and give effect to the true meaning, intent and purpose of the legislation as a whole[.]"). It is within the context of the county executive form of government, which provides the Executive with broad powers, *N.J.S.A. 40A:9-74* must be read and understood. See *N.J.S.A. 40:41A-36, 37*; see also § 3.5(a) of the Administrative Code of the County of Bergen (the "Code"), attached to the Certification of Robert L. Hornby in opposition to plaintiff's order to show cause and in support of defendant's motion to dismiss ("Hornby" and the "Hornby Cert.") (providing the Executive "[s]hall supervise, direct and control all County administrative departments").<sup>8</sup>

\*6 *N.J.S.A. 40A:9-74* does not speak to nor address the relationship between the employees hired by the Clerk and the yearly budget, an area over which defendant, pointing to the Code, argues she has control. For example, enumerating the duties of the Executive, Code § 3.4(b) provides the Executive shall "prepare and submit to the Board ... an annual operating and capital budget and program[.]" Code § 3.4(h) states the Executive shall "[d]evelop, install and maintain centralized budgeting, personnel and purchasing procedures...." Furthermore, Code § 6.6 provides, "Budget appropriations shall be controlled by an encumbrance system which shall be prescribed and established by the Executive." Importantly, the Code seemingly reflects the Executive's statutory powers. *N.J.S.A. 40:41A-36(b), (g) & (h)*; see also *id.* § 133 ("[The Executive] shall submit to the [Board] a budget document consisting of the proposed county budget and a budget message.").<sup>9</sup>

In addition to the integral role defendant occupies in establishing the County's budget, it appears defendant's position she may deny plaintiff's requested hire, despite the seemingly broad "select and employ" language of *N.J.S.A. 40A:9-74*, may have some support in case law. See *Cacciatore v. County of Bergen*, 2005 U.S. Dist. LEXIS 37568 (D.N.J. Dec. 29, 2005).<sup>10</sup> In *Cacciatore*, the plaintiffs filed suit against the County, the Bergen County Sheriff's Office, and, individually and in their official capacities, the Sheriff of Bergen County and a captain and a lieutenant



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in the Bergen County Sheriff's Office. *Cacciatore*, *supra*, 2005 U.S. Dist. LEXIS 37568 at \*1. In finding there was no "policymaker," "whose violative acts may render the County liable," the court, citing *N.J.S.A.* 40A:9-117, recognized the Sheriff's authority to make employment decisions but found "[t]he Sheriff's power pertaining to employees ... is not beyond review." *Id.* at \*10-14; see *N.J.S.A.* 40A:9-117 ("The sheriff shall select and employ the necessary deputies, chief clerks and other personnel."). Pertinent to the instant matter, in finding the Sheriff's authority was limited, the court relied on the holding of *In re Burlington County Board of Chosen Freeholders*, 188 *N.J.Super.* 343, 457 A.2d 495 (Law Div.1983), that "the sheriff acts as the 'agent' of the county in hiring his personnel, and that although *N.J.S.A.* 40A:9-117 gives him the authority to select and employ all personnel, their compensation must be recommended by the [S]heriff to the [Board.]" *Id.* at \*15, 457 A.2d 495 (quoting *In re Burlington Cnty.*, *supra*, 188 *N.J.Super.* at 350, 457 A.2d 495).

While not neatly aligned with the facts and issues presented in the instant matter, *Cacciatore* demonstrates the interplay in the county government between the Board, which works closely with the Executive, and other county officers, such as Sheriff and Clerk, and underscores the Sheriff does not have free reign over employment decisions, even within his or her department, despite the seemingly broad hiring power to "select and employ," which both Sheriff and Clerk possess. Interestingly, a comparison of the language of the statutes giving authority to the Sheriff and Clerk to "select and employ" may indicate more authority was granted to the Sheriff in determining the size of his or her staff and employee compensation. That is, *N.J.S.A.* 40A:9-77 expressly provides the Board fixes the compensation of employees in the Clerk's office "upon the recommendation" of the Clerk, while *N.J.S.A.* 40A:9-117 states, "The sheriff shall fix the compensation [employees in his office] shall receive in accordance with the generally accepted county salary ranges and within the confines of the sheriff's budget allocation set by the governing body."<sup>11</sup> The import of the apparent discrepancy in authority granted to the two offices is unclear, though the fact the Clerk may not have the same power as the Sheriff to determine the size and compensation of staff in his office may bolster defendant's argument, even putting budgetary concerns aside, the Clerk's Office's staff and employee compensation are not matters to be determined by plaintiff alone.

\*7 Yet nothing in the above analysis provides sufficient basis for defendant to prevail on the instant motion to dismiss, as

the court must read plaintiff's complaint and view his cause of action with indulgence. While the scope of plaintiff's power to "select and employ," given defendant's broad authority and responsibility in determining a yearly budget, is far from clear, defendant has not, at this time, shown unequivocally she may refuse to process an employment application the processing of which would not cause plaintiff's office to exceed its allocated budget. Moreover, the *Cacciatore* court's treatment of the relationship between the various county officers is limited and provided in the factual context of an employment lawsuit; the fact the Sheriff, a creation of the same constitutional provision as the Clerk, is not a "policymaker" for purposes of creating liability for a public entity does not mean the Sheriff, and by extension the Clerk, does not control, subject to the budget, the number of employees in his or her own office. Even the case on which that court's analysis was based, *In re Burlington County*, did not discuss the ability of the Sheriff to freely hire but rather held the Sheriff is a "county," rather than "state" office, despite the Sheriff's status as a constitutional officer. Therefore, that court held, the Sheriff could be investigated by a county agency for purported wrongdoings—a context far afield from that in which the instant matter lies. See *In re Burlington Cnty.*, *supra*, 188 *N.J.Super.* at 350-54, 457 A.2d 495. Thus, in balancing the broad "select and employ" language of *N.J.S.A.* 40A:9-74 with the equally broad statutory and Code powers of the Executive, no clear answer is derived, and, consequently, defendant cannot carry her burden for dismissal of the action.

*For Purposes of a Motion to Dismiss, Defendant Cannot Demonstrate Whether Plaintiff Seeks the Performance of a Ministerial or Discretionary Act.*

Another way of framing the issue plaintiff's order to show cause presents is whether defendant's act of processing the employment application for an employee whose hiring would not cause the Clerk's Office to exceed its budget is more properly characterized as "ministerial" or "discretionary." "Mandamus is a proper remedy: (1) to compel *specific* action when the duty is ministerial and wholly free from doubt, and (2) to compel the exercise of discretion, but *not* in a specific manner." *Loigman v. Twp. Comm. of Middletown*, 297 *N.J.Super.* 287, 299, 687 A.2d 1091 (App.Div.1997). If the processing of Chong's forms is merely ministerial, it seems plaintiff prevails; conversely, if Chong's hiring is at the discretion of the Executive, given her role in setting the budget and possibly in the allocation of staff, then it appears defendant prevails as she cannot be compelled to exercise her discretion in a particular manner. See *Switz v. Middletown*, 23

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*N.J.* 580, 587–88, 130 A.2d 15 (1957) (“Mandamus lies to compel but not control the exercise of discretion.”).

\*8 Defendant relies on *Tate v. Amato*, 220 *N.J. Super.* 235, 531 A.2d 1070 (App.Div.1987), for the proposition a County Executive's refusal to hire an unbudgeted employee was a discretionary act. In *Tate*, the county prosecutor sought to hire additional assistant prosecutors and other employees whose hires would admittedly cause his office's budget to exceed its limits. *Tate, supra*, 220 *N.J. Super.* at 237–38, 531 A.2d 1070. To avoid this result, the prosecutor planned to obtain grants or, if necessary, lay off at-will employees, and due to the possibility of obtaining the grants or the occurrence of other events not relevant here, the prosecutor argued he may have been able to avoid the projected budget deficit. *Id.* at 238, 240, 531 A.2d 1070. As this was uncertain, however, the court held the prosecutor could not show the Executive's duty to approve his employment requests was clear; the duty could not be said to be “ministerial,” therefore, and, consequently, the standard for the issuance of a writ in lieu of mandamus was not met. *Id.* at 242–43, 531 A.2d 1070.

Clearly, if plaintiff was seeking to compel defendant to execute a form to hire an unbudgeted employee, *Tate* would weigh in favor of, if not compel, dismissal. Arguing for such a result, defendant characterizes plaintiff's request for relief as requiring her to “approve *any* new hires that [plaintiff] submits to her without regard to the personnel or budgetary restraints imposed by the County.” Def. Br. at 9. However, while they do not refer to budgetary or any other constraints or limitations, the court does not read plaintiff's requests for relief so broadly and notes plaintiff seeks to restrain defendant from “interfering in the *effective and efficient* operation” of his office and to compel defendant to “cause such employee requests as the Plaintiff may, in his discretion, require to *effectively* serve the citizens of the County of Bergen.” Order to Show Cause, Feb. 28, 2012, at 2 (emphasis added). *Tate*, therefore, is not dispositive, and the question remains whether the act plaintiff requests defendant perform—the approval of a new employee whose hire will not cause a budget overage—is discretionary or ministerial in nature.

Put another way, *Tate* instructs the hiring of an unbudgeted employee is not ministerial, and, as plaintiff seeks to compel defendant “to hire a person for whom [plaintiff] lacks an available position,” i.e., an unbudgeted employee, defendant argues plaintiff seeks to compel defendant to perform a discretionary act. Def. Br. at 24. What defendant does not squarely address, and what may be an iteration of the issue

presented in its most distilled form, is the reason there is no “available position” for Chong, particularly when, according to the Hogan Letter, the prior Clerk had five “discretionary” employees, while plaintiff only has four. Defendant argues the Clerk's Office's “authorized strength,” i.e., the number of employees an office is authorized to have in a given year, is set at 52.5 employees; presumably, Chong's addition would cause the authorized strength to exceed that number. Initially, no statutory basis, or even Code citation, was provided for the imposition of an “authorized strength” number or for the legal effect of exceeding the authorized strength as long as there is compliance with budgetary constraints.<sup>12</sup>

\*9 However, at oral argument and in counsel's post-oral argument submission, defendant's counsel, expounding on the passing treatment of the issue in its initial opposition, argued Chong's salary would not be the only cost of his hiring. Rather, if hired, Chong would be entitled to a pension and benefits, payment for which defendant asserts is deducted from the overall County budget—not the Clerk's Office's budget. Andretta Letter, April 13, 2012, at 2 (“Fringe benefits (including but not limited to SSI and healthcare costs) are budgeted in total rather than allocated to each department.”). Importantly, the post-oral argument submission on behalf of plaintiff is in accord. Harriott Letter, April 13, 2012, at 2 (“[W]ith respect to the issue of where benefits are reflected in the County Budget, benefits for all employees within the County are contained in a single line item in the budget and are not allocated as per individual department.”).

Therefore, while there is no specific statutory basis for the imposition of an authorized strength, defendant asserts the number of employees within each department must be fixed as part of a given year's overall budget in order for it to account for the costs of certain benefits not allocated to the budgets of individual departments.<sup>13</sup> Defendant argues the authorized strength, then, is an “inherent” aspect of the budget process and within the Executive's authority under *N.J.S.A.* 40:41A–36(b) & (h), and Code § 3.4(h).

At first blush, it appears reasonable defendant, as head of the County and charged with proposing a budget for the Board's approval, must be concerned not only with the impact on the budget of individual departments' salaries but the impact of their other costs, including employee benefits, as well. Without the ability to fix, initially, the number of employees a department may have in a given year, it does not appear defendant would be able to effectively discharge her duty; at least, no alternative has yet been urged.<sup>14</sup> Moreover,

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defendant argues authorized strength is not a new concept, and, in fact, she was subject to it and either had her staff reduced or was not permitted to hire certain employees as a result of it when she served as Clerk. It thus appears *N.J.S.A.* 40:41A-36(h) and Code § 3.4(h), in providing as one of defendant's duties the right to "[d]evelop, install and maintain centralized budgeting, personnel and purchasing procedures," may enable the Executive to impose an authorized strength on the County's departments. It follows Chong, in causing the Clerk's Office to exceed its 52.5-employee allotment, would constitute an "unbudgeted" employee, and therefore, under *Tate*, the processing of his employment application would be a discretionary act, which this court cannot compel.<sup>15</sup>

In light of the statutory construct, which apparently authorizes defendant to impose an authorized strength, and the fact Chong's hiring would cause the Clerk's Office to exceed its authorized strength, it is difficult to envision how plaintiff ultimately may prevail. In an abundance of caution, however, and given the parties' subordinate treatment of this issue, the court will not decide at this juncture whether Chong's hiring is brought within the Executive's discretion as a result of its County-wide implications. Ultimately, on the one hand, as the Clerk has the authority under *N.J.S.A.* 40A:9-74 to "select and employ" necessary employees, if the cost of an additional employee would not cause the budget of the Clerk's Office to exceed its allotted amount, it is urged there is little reason, in law, the Executive should prevent the employee from being hired. By this logic, plaintiff only seeks the performance of a ministerial act. Conversely, as the Executive has the authority to oversee the County's budget and has an obligation to ensure the County's operations are being efficiently run, it can fairly be argued she need not permit plaintiff to spend his entire budget without being satisfied of the need for expenditures and, moreover, has the right and obligation to fix the number of employees allocated to each department. According to this argument, plaintiff seeks to compel defendant to exercise her discretion in a specific manner, i.e., to decide to approve Chong's hiring even though the overall County budget has not accounted for its attendant cost. For purposes of a motion to dismiss, the court is not satisfied unequivocally plaintiff seeks the exercise of defendant's discretion or, for that matter, whether she has the authority to so directly affect plaintiff's hiring decisions. As a result, defendant's motion to dismiss on this ground is denied.

*The Matter is Ripe Despite the Absence of an Approved Budget and, Even If Not, the Public Interest in This Matter Weighs Against Dismissal on Ripeness Grounds.*

\*10 Defendant also argues the matter should be dismissed as not being ripe as no 2012 budget has yet been approved, and, therefore, the court cannot pass on the merits of plaintiff's claim the hiring of Chong will not cause his office to exceed its budget.<sup>16</sup> At first blush, this argument has appeal. Certain considerations, however, weigh against dismissal on ripeness grounds. First, as made clear by plaintiff's "supplement" to his reply and post-oral argument submission, there is a budget currently in effect, funded by an "emergency temporary appropriation" and passed pursuant to *N.J.S.A.* 40A:4-20. The matter is therefore ripe, as the court could adjudicate the matter based on the budget currently in effect. Dismissal on ripeness grounds is therefore inappropriate.

Second, "[a] case's ripeness depends on two factors: (1) the fitness of issues for judicial review and (2) the hardship to the parties if judicial review is withheld at this time." *Comm. to Recall Robert Menendez From the Office of U.S. Senator v. Wells*, 204 N.J. 79, 99 (2010) (internal citations and quotations omitted). As in *Wells*, this case is fit for review as "[t]he issues in dispute are 'purely legal,' and thus 'appropriate for judicial resolution' without developing additional facts." *Ibid.* (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149, 87 S.Ct. 1507, 1515, 18 L. Ed.2d 681, 691 (1967)); *Atlantic City v. Laezza*, 80 N.J. 255, 265, 403 A.2d 465 (1979) ("Since the issue here presented is purely legal in nature, we have no need for a 'factual record' in order to meaningfully review the trial court's decision."). That is, by arguing plaintiff is requesting defendant commit a discretionary act, defendant is essentially taking the position she is free to deny an employment request as a matter of her discretion, presumably regardless of budgetary limitations. The factual question of the budget's status, then, has no effect on the disposition of this case, as when the 2012 budget is actually approved defendant could take the same position refusing to process the employment application whether or not the additional hire would cause plaintiff to exceed his budget.<sup>17</sup> Little would be gained, therefore, by adjudicating this matter in the factual context of a finalized 2012 budget as defendant's position would be the same either way.

In addition, sufficient hardship would accrue to both parties, particularly in their roles as servants of the people of Bergen County, if judicial review was withheld at this time. Plaintiff alleges a need exists for an additional employee;

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he would obviously be prejudiced if the court were to delay the disposition of this matter by dismissing it, requiring plaintiff to re-file after the budget is finalized (while spending additional taxpayer money to do so), allowing appropriate time for defendant to respond (which also requires the expenditure of additional taxpayer money), and then rehearing the matter on its merits. Disposition of this matter on its merits will allow plaintiff either to know Chong's employment application will be processed or to make alternate arrangements if defendant may validly refuse to process it. This is particularly important in light of upcoming April Board of Education elections, June primary elections, and November presidential and other elections.

\*11 And while there may be less hardship for defendant, as dismissal would allow her to continue to refuse to approve Chong's hiring, it would still be beneficial for the Executive, who is charged with supervisory and leadership responsibilities for the entire County, to bring any pending matters to resolution as quickly as possible, as opposed to obtaining a dismissal on ripeness grounds only to have the specter of an impending lawsuit to be filed as soon as the 2012 budget is approved. In like manner, a lawsuit between two elected officers of county government constitutes a matter of significant public interest, which further weighs against dismissal on ripeness grounds as well as increases the likelihood dismissal on ripeness grounds would only result in the prompt re-filing of the suit once the budget is approved. *Laezza, supra*, 80 N.J. at 265–66, 403 A.2d 465 (“[T]he question posed is one of major public importance. A remand will therefore not obviate the need for us to ultimately decide this issue at some time in the future.”); *Wells, supra*, 204 N.J. at 103. It therefore appears dismissal of the action is inappropriate, and defendant's motion to dismiss accordingly is denied.

**Injunctive Relief**

Having found it inappropriate to dismiss plaintiff's action, at this time, the court must determine whether plaintiff is entitled to preliminary relief.

*Plaintiff's Request for a Preliminary Injunction is Denied as There is No Difference Between the Preliminary and Final Relief Sought.*

At the outset, plaintiff's request for a preliminary injunction is problematic as the preliminary relief sought is identical to that which would be awarded should plaintiff prevail on the ultimate merits of the case. That is, should the court

grant plaintiff's request and compel defendant to process Chong's employment application, there would be no further substantive relief to be granted on a future return date. As defendant notes, in such instances, it is generally preferable for the court to refrain from granting relief until final disposition. *Moss Indus. v. Irving Metals Co.*, 140 N.J. Eq. 484, 486–87, 55 A.2d 30 (Ch.1947) (“[I]f the issuance on preliminary application of an injunctive order mandatory in nature will have the effect of granting to the complainant all the relief that he could obtain upon a final hearing, the application should be denied, except in very rare cases, and then only where the complainant's right to relief is clear and reasonably certain.”); *Jersey City v. Coppinger*, 101 N.J. Eq. 185, 191–92, 137 A. 572 (Ch.1927) (“[A] mandatory injunction is rarely granted before final hearing or before the parties have had full opportunity to present all the facts in such manner as will enable the court to see and judge what the truth may be. It is always granted cautiously, and is strictly confined to cases where the remedy at law is plainly inadequate. A preliminary mandatory injunction will be ordered only in cases of extreme necessity. It is ordered only in cases of obstruction to easements or rights of like nature.”) (internal citations and quotations omitted).

*Plaintiff's Request for a Preliminary Injunction is Denied as Plaintiff is Unable to Satisfy the Requirements of Crowe v. De Gioia .*

\*12 Even without regard to this impediment, though, the court finds plaintiff is unable to satisfy the requirements for a preliminary injunction. Applying the elements as enumerated in *Crowe, supra*, 90 N.J. 132–34, it is clear a preliminary injunction cannot issue.

*Plaintiff has failed to show irreparable harm.*

“[A] preliminary injunction should not issue except when necessary to prevent irreparable harm.” *Id.* at 132 (citing *Citizens Coach Co., supra*, 29 N.J. Eq. at 303). Plaintiff is unable to show he would be irreparably harmed if he was unable to obtain preliminary relief.<sup>18</sup> While plaintiff argues Chong is needed to ensure the non-English, Korean-speaking community is not disenfranchised in upcoming elections, he has failed to demonstrate by clear and convincing evidence, and for purposes of the extraordinary remedy of preliminary relief, Chung cannot adequately perform the function plaintiff wishes Chong to fill. Though plaintiff argues Chung is the only mailroom employee, and is overworked in that capacity,

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no reason has been offered why other employees, or even unpaid interns, cannot relieve, in whole or in part, Chung's mailroom duties so as to allow her to perform the duties Chong would perform.<sup>19</sup> Nor, it appears, has the viability of hiring unpaid interns as an option for fulfilling the duties plaintiff seeks Chong to perform been explored. Moreover, as defendant argues, for over a decade the County has been required to translate ballot materials into Spanish, and it has not been asserted an employee similar to Chong is needed to ensure accuracy of the Spanish-language ballots. Lastly, it appears even after plaintiff's request for defendant to process Chong's employment application was denied, plaintiff had the opportunity to reiterate his request at a budget hearing before the Board. Significantly, the new requirement for election materials to be printed in Korean and the additional work anticipated to be undertaken and expense to be incurred in mailing materials in a third language were discussed at multiple points during the budget hearing. However, at no point was an additional employee requested, although additional seasonal interns were. *See* Tr. of Seventh Board Budget Hr' g, Feb. 3, 2012, attached as Ex. H to the Hornby Cert., at 5:25 to 6:10; 10:5 to 13:1; 24:10–20; 29:5 to 30:9; 37:21 to 40:21. As plaintiff did not address his failure to raise the issue at the budget meeting, the court is left to speculate whether same indicates the alleged harm is not as drastic as urged or, rather, whether no request was made for strategic reasons.

Ultimately, the need for an additional employee and the inability of current employees to satisfy this alleged need are fact-sensitive questions better answered after the parties have been able to engage in discovery; left unanswered, a preliminary injunction cannot issue. This is not to say plaintiff cannot ultimately prevail on this factor, but, at this stage, plaintiff is unable to carry his burden of demonstrating, by clear and convincing evidence, immediate and irreparable harm.

*The issue presented appears to be one of first impression.*

\*13 “[T]emporary relief should be withheld when the legal right underlying plaintiff's claim is unsettled.” *Id.* at 133 (citing *Citizens Coach Co.*, *supra*, 29 N.J. Eq. at 304–05). As hopefully was made clear in the discussion of the motion to dismiss, plaintiff's entitlement to relief, far from being well-settled, appears to present a case of first impression as no case has addressed the issue whether the Clerk can hire more “discretionary employees” so long as the appointments do not exceed the budgetary amount appropriated for such

appointments. Indeed, in discussing the “select and employ” language of *N.J.S.A.* 40:9–74, plaintiff states, “There does not appear to be any published decision discussing this section,” although plaintiff asserts it “appears to be fairly conclusive by its plain language.” Pl. Br. at 5. For the same reasons as discussed in connection with defendant's motion to dismiss, the legal right underlying plaintiff's claim is unsettled. Consequently, preliminary relief would be improper, and plaintiff's request for a preliminary injunction is denied.

*Material facts are in dispute, and a reasonable probability of success on the merits has not been shown.*

“[A] third rule is that a preliminary injunction should not issue where all material facts are controverted. Thus, to prevail on an application for temporary relief, a plaintiff must make a preliminary showing of a reasonable probability of ultimate success on the merits.” *Ibid.* (internal citation omitted). As discussed in connection with the likelihood of the occurrence of irreparable harm, it is at this point unclear whether there is a true need for a public participation specialist and, if so, whether an existing employee can fulfill the duties for which plaintiff seeks to hire Chong. While it is important to note “mere doubt as to the validity of the claim is not an adequate basis for refusing to maintain the *status quo*,” plaintiff does not seek merely to maintain the status quo but rather to compel defendant to approve the hiring of a new employee. *Ibid.*; *Brown*, *supra*, 424 N.J. Super. at 183 (quoting *Waste Mgmt.*, *supra*, 399 N.J. Super. at 520, 945 A.2d 73 (noting courts may take a “less rigid” view when preliminary relief is “merely designed to preserve the status quo”). Again, though, “[t]he 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*, *supra*, 424 N.J. Super. at 183 (quoting *Rinaldo v. RLR Inv., LLC*, 387 N.J. Super. 387, 397, 904 A.2d 725 (App.Div.2006)) (emphasis added). Evaluated under the clear and convincing standard, then, and considering the apparent novelty of the issues involved and the absence of clarity on certain factual issues, plaintiff is unable to demonstrate the existence of a reasonable probability of success on the merits. As such, his request for a preliminary injunction is denied.

*A balance of the relative hardship to each party weighs in favor of denying preliminary relief.*

\*14 “The final test in considering the granting of a preliminary injunction is the relative hardship to the parties in granting or denying relief.” *Crowe*, *supra*, 90 N.J. at 134, 447 A.2d 173 (citing *Isolantite Inc. v. United Elec. Radio & Mach.*

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*Workers*, 130 N.J. Eq. 506, 515, 22 A.2d 796 (Ch.1941), *mod. on other grounds*, 132 N.J. Eq. 613, 29 A.2d 183 (E. & A.1942)). On balance, the greater hardship would be borne by defendant if the court granted the preliminary injunction. That is, similar to the analysis with respect to irreparable harm, if the court denies preliminary relief, plaintiff may not be greatly burdened. He still has the opportunity to obtain final relief in this matter and, in the interim, may have available Chung or other employees and resources to fulfill the duties for which he seeks to hire Chong. Alternatively, if the court granted preliminary relief, disrupting the status quo, it runs the risk of improperly compelling both the exercise of defendant's discretion and the expenditure of Bergen County tax dollars. This result constitutes more than an insignificant hardship to the Executive, as the head of the County government. Moreover, while the final return date of an order to show cause would normally provide the party adversely effected by the issuance of a preliminary injunction the opportunity to seek redress, here, the preliminary relief sought does not differ from the ultimate relief. On balance, then, the relative

hardships weigh in favor of denying preliminary relief. As a result, defendant's request for a preliminary injunction is denied.

**Conclusion**

Plaintiff's request for a preliminary injunction and defendant's motion to dismiss are denied. A case-management conference shall be conducted within the next week, at a mutually acceptable time and date, at which time an expedited discovery schedule will be memorialized.

Defendant's counsel shall prepare an order in conformity with this opinion and submit it under the five-day rule.

...

**All Citations**

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**Footnotes**

- 1 At defendant's counsel's request, the return date was adjourned to April 13, 2012.
- 2 At oral argument, plaintiff's counsel abandoned his request for legal fees and costs.
- 3 As referenced at oral argument, such a practice is, and shall be, disfavored as it imposes an undue burden on the court and opposing counsel.
- 4 N.J.S.A. 19:12-7.1 provides:
  - (b) For an election district in which the primary language of 10 percent or more of the registered voters is a language other than English, the Secretary of State shall prescribe an official version of the voter information notice in that other language or languages for use in that election district. The notice shall be posted in English and in the other language or languages in the polling places in each such district. The alternate language shall be determined based on information from the latest federal decennial census.
  - (d) The voter information notice shall be printed on each sample ballot, to the extent practicable, or if not practicable, information on how to view or obtain a copy of the voter information notice shall be printed on each sample ballot.
- 5 Sadly, given the current state of political discourse, the court is dismayed by counsel's apparent desire to impugn plaintiff in public records, and in a case of public interest, by attempting to portray him as nothing more than a partisan operative. For example, counsel repeatedly refers to plaintiff's appointed employees as "political appointments," "political allies," and "political supporters"; claims their appointment constitutes a "derogation of his public responsibility"; and insinuates plaintiff has no regard for the taxpayers of Bergen County. See Def. Br. at 26 ("Hogan is seeking to make unnecessary political appointments at the expense of Bergen County taxpayers."); *id.* at 27, 29 A.2d 183 ("Hogan's spendthrift disregard for the taxpayer's money is a brazen affront to the public's trust."). As a preliminary matter, the court wonders whether there is necessarily anything surprising, insidious, or nefarious with plaintiff appointing members of the same political party to fill positions in his office. More importantly, as no evidence of these allegations are before it, the court has focused and will continue to focus on the issues at hand, which are complicated enough, and, going forward, will hope counsel and the parties do the same. The court prefers, at least in the absence of competent evidence, to believe both public officials are proceeding in a manner each believes to be appropriate and in the public interest.
- 6 It is noted no certification by Chung is provided.
- 7 Despite defendant's characterization of plaintiff's request for relief, the court proceeds under the assumption plaintiff only seeks to be able to hire additional employees if their addition to the staff does not result in the Clerk's Office exceeding its authorized budget.

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- 8 *N.J.S.A.* 40:20–1.3(a) provides, “The [Board] may adopt an administrative code organizing the administration of the county government, setting forth the duties and responsibilities and powers of all county officials and agencies, and the manner of performance needed.” While the Board may make the Clerk subject to the budgetary procedures and requirements set forth in the Code, the Code cannot limit the Clerk’s appointing authority or otherwise diminish the Clerk’s “duties, responsibilities or powers.” *Id.* §§ (b)-(c).
- 9 It must be noted, however, after proposing a budget to the Board, the Executive’s formal involvement in a given year’s budget process apparently comes to an end. See *N.J.S.A.* 40A:4–2 –5 (detailing the Board’s involvement in adopting the budget); *N.J.S.A.* 40:41A–41(g) (“[The Board shall] approve the annual operating and capital budgets pursuant to [*N.J.S.A.* 40A:4–1 *et seq.*]”).
- 10 The court recognizes *Cacciatore* is an unpublished, federal court case, yet it appears to be the only case discussing the “select and employ” language at issue here and is therefore instructive. See *R.* 1:36–3; *R.* 1:1–2(a).
- 11 Plaintiff asserts the Board’s grant of authority in *N.J.S.A.* 40A:9–77 is to globally set the salary for the Clerk’s Office, while the salary levels of individual employees in the Clerk’s Office remains within the province of the Clerk.
- 12 Moreover, whether the imposition of an “authorized strength” number can fully explain the reason for the apparent discrepancy between the number of “discretionary” employees available to the current and previous administrations is far from clear; it has not been asserted, for example, the authorized strength changed when plaintiff came into office, leaving him with fewer personnel positions. In somewhat like manner, as long as plaintiff can hire Chong and remain under budget, it is unclear what legal effect is produced by the hiring freeze ordered by defendant, which presumably has as its purpose the maintenance of expenditures at a level below the allocated budget, other than the effect of employee benefits as discussed below.
- 13 It is urged the cost allocated to the County budget for each employee is 59% of the employee’s salary. Andretta Letter, April 13, 2012, at 2.
- 14 For example, at oral argument, the court asked plaintiff’s counsel, if plaintiff need not adhere to an authorized strength, what limit there would be to plaintiff’s freedom to burden the County budget with the benefit payments of his employees. That is, hypothetically, if the Clerk’s Office’s budget for salaries was \$100,000, what authority would there be to prevent plaintiff from hiring ten employees at \$10,000 each, or even twenty employees at \$5,000 each? In this scenario, plaintiff is able to hire as many employees as he wishes and is still within his budget—though the County becomes responsible for the cost of these employees’ various benefits. Counsel’s answer was, in deciding whether to hire additional employees whose salaries fit within his budget, the Clerk would have to “respect” the allocation for employee benefits already established in the County budget. While this court proceeds with the expectation all elected officials of Bergen County are competent and well intentioned servants of the County’s residents, the Clerk’s opinion on whether his hiring decisions “respect” their impact on the County budget clearly cannot be the standard for whether he may hire employees over and above his authorized strength. It is this issue which may be fatal to plaintiff’s claim.
- 15 To be clear, the court takes no position on whether an application should have been brought to determine whether defendant’s refusal to process the employment application was wrongful, and the court does not rule on that question. Rather, the present inquiry is solely whether plaintiff can compel defendant to sign the employment application.
- 16 Defendant asserts, “The proposed 2012 salary budget for the Clerk’s Office is \$2,444,210, down from \$2,487,011....” Def. Br. at 14.
- 17 The need for discovery in this matter differs according to which legal prism the relief sought is viewed. In as much as this case is an action in lieu of prerogative writ, there is minimal need for discovery, as just discussed, as the question of whether defendant may validly refuse to process the employment application, even if the approval of same would not cause plaintiff to exceed his budget, obviously does not rest on the factual issue of whether the application’s processing would cause plaintiff to exceed his budget. As discussed below, however, when analyzing the propriety of an injunction, certain fact-sensitive questions need be resolved, and, consequently, some discovery on those questions may be in order.
- 18 It is significant the burden of establishing irreparable harm is on the party seeking the injunction. At oral argument, plaintiff’s counsel argued the gravity of the danger of disenfranchisement should move the court to issue a preliminary injunction, subject to subsequent discovery which would, in effect, confirm or refute the need for the injunction, i.e., Chong’s hiring. This argument does not conform to the standard under *Crowe*. In like manner, whether Chung is the most qualified employee for the job, or at least as qualified as Chong, does not respond to the question of whether defendant’s failure to process Chong’s employment application results in irreparable harm.
- 19 Counsel was uncertain whether plaintiff had the ability to reassign employees.

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# **EXHIBIT I**

## American Asphalt Co., Inc. v. County of Gloucester, Not Reported in A.3d (2011)

2011 WL 1119064

2011 WL 1119064

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK  
COURT RULES BEFORE CITING.Superior Court of New Jersey,  
Appellate Division.AMERICAN ASPHALT COMPANY,  
INC., Plaintiff–Respondent,

v.

COUNTY OF GLOUCESTER, Defendant–Appellant.

Argued Nov. 29, 2010.

Decided March 29, 2011.

On appeal from the Superior Court of New Jersey, Law  
Division, Gloucester County, Docket No. L–1412–08.**Attorneys and Law Firms**Dana B. Ostrovsky argued the cause for appellant (Parker  
McCay, P .A., attorneys; Ms. Ostrovsky, of counsel and on  
the brief).George E. Pallas argued the cause for respondent (Cohen  
Seglias Pallas Greenhall & Furman, P.C., attorneys; Mr. Palas,  
Janesa Urbano, and Daniella Gordon, on the brief).

Before Judges REISNER and SABATINO.

**Opinion**

PER CURIAM.

\*1 This appeal arises out of a vendor's claim for price escalation under a government contract. The trial court interpreted the contract as authorizing the requested price increase, and granted summary judgment to the vendor. We reverse.

## I.

In March 2008, defendant, the County of Gloucester (“the County”), solicited bids for vendors to supply the County with hot mix asphalt (“HMA”) materials<sup>1</sup> for use in repairing and repaving its roads. The County's bid proposal, PD

08–021,<sup>2</sup> contemplated the award of an extendable one-year, fixed-price contract. The bid proposal included detailed specifications concerning the materials to be supplied. In particular, the proposal stated that “[a]ll materials herein specified shall comply with the 2001 New Jersey State Highway Department standard specifications for road and bridge construction, and the additions to and modifications of the standard specifications to county and municipal construction.”

With respect to price, the critical subject of this appeal, the County's bid proposal instructed that “[p]rices shall include *all charges* that may be imposed in fulfilling the terms of the [awarded] contract.” (Emphasis added). It further instructed that “[t]he bid prices shall remain in effect for *the entire contract period*.” (Emphasis added). Additionally, the proposal alerted bidders that “[s]hould any difference arise between the contracting parties as to the *meaning or intent* of these instructions or specifications, *the county purchasing agent's decision shall be final and conclusive*.” (Emphasis added).

Plaintiff, American Asphalt Company, Inc., timely submitted a responsive bid to the County. In its bid, plaintiff agreed to supply the County during the one-year contract period with HMA “I–2” mix at \$31.90 per ton, “I–4” mix at \$35.90 per ton, and “I–5” mix at \$36.90 per ton.

Plaintiff was the lowest bidder, and the County awarded it the contract. Plaintiff and the County memorialized their agreement in a written contract dated April 2, 2008. The one-year contract commenced immediately, and was to conclude on April 1, 2009. Article two<sup>3</sup> of the contract limited the maximum amount to be paid to plaintiff at \$1,200,000. This maximum sum was repeated in an award letter from the County to plaintiff dated April 14, 2008.

Article three of the contract incorporated by reference certain specifications contained in “Attachment A” appended to the agreement:

The specific duties of the Contractor shall be as set forth in “Program Specifications” which are incorporated and made part of this contract as *Attachment A*, or as more *particularly set forth in PD# 08–021, together with any other specifications issued by the County in connection with this contract*. Expenditures shall conform to the Budget Justification described in Attachment A or such

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budget revisions submitted by the Contractor to and authorized in writing by the Department.

\*2 [Emphasis added.]

Attachment A specified the agreed-upon contract prices for each of the HMA mixes:

A. The Contractor agrees to the supplying of Hot Mix Asphalt Material (HMA) to be used on County Roadways by county employees *in accordance with PD# 08-021*.

B. I-2 Mix shall be paid at a rate of \$31.90 per ton.

C. I-5 Mix shall be paid at a rate of \$36.90 per ton.

D. I-4 Mix shall be paid at a rate of \$35.90 per ton.

[Emphasis added.]

After plaintiff began supplying the County with HMA, the market costs of oil and other petroleum products temporarily spiked. This led plaintiff's president and sole owner, Robert M. Brown, to write a letter to the County on July 9, 2008. Brown's letter, which was in the nature of a change order request, sought an escalation in the HMA prices payable to his company under the contract:

Due to the increased costs of fuel energy and petroleum it has become necessary for us to request a change order based on article # 16 of our contract. We will invoice you an asphalt and fuel price adjustment with each invoice based on the NJDOT Asphalt Price Adjustment # 160.03.02 in the NJ Department of Transportation Standard Specifications for Road and Bridge Construction 2007.

We hope you can understand these costs are out of our control and are extraordinary. We will continue to supply Hot Mix Asphalt to the County.

Plaintiff contended that the contract authorized a price adjustment, by virtue of Attachment A's reference to the bid proposal (PD 08-021), which, in turn, referred to the "New Jersey State Highway [Transportation] Department's standard specifications" ["the DOT Specifications"]. As part of those State specifications, the DOT publishes a price index for asphalt and other materials, known as the "Asphalt Cement and Fuel Price Index" ["the Index"].

According to the Index, when plaintiff's bid was submitted to the County in March 2008, the average cost of asphalt<sup>4</sup> in the southern region of New Jersey was \$362.50 per ton. That average cost rose to \$517.50 by June 2008, the month before Brown's request for a price escalation. By comparison, in the twelve months preceding plaintiff's March 2008 contract bid, the average cost of asphalt on the Index for South Jersey had only increased from \$306.67 to \$362.50 per ton, a substantial but much less steep increase. At its peak during the contract period, the average price of asphalt rose on the Index to \$815.00 per ton in August 2008. Thereafter, as the market costs of petroleum again receded, the average per ton price of asphalt declined on the Index to \$372.50 in April 2009, the last month of the contract.

The County declined to adjust the prices that it was paying to plaintiff. The County responded to Brown that it had no legal obligation to do so under the contract, and that his firm bore the risks of such general cost fluctuations.

Consequently, plaintiff filed a complaint against the County in the Law Division in August 2008, seeking a declaratory judgment that it was entitled to a price adjustment, plus other relief. Plaintiff moved for summary judgment, which the County opposed with its own cross-motion for summary judgment.

\*3 After considering the parties' submissions, the trial court granted plaintiff's motion and denied the County's cross-motion. In her written decision, the motion judge adopted plaintiff's argument that it was entitled to a price increase by virtue of the bid proposal's references to the DOT Specifications.<sup>5</sup> The judge found the contract to be ambiguous, and she construed that perceived ambiguity against the County, which had drafted the contract and bid documents. The judge further noted that the sharp, albeit temporary, spike in the market price for asphalt was "a unique, unforeseeable situation for both parties from which neither should obtain an unfair advantage."

Thereafter, the motion judge conducted a proof hearing, at which she applied the higher price levels advocated by plaintiff to the quantities supplied. Pursuant to testimony presented at the proof hearing, the trial court performed the relevant calculations and entered a final judgment awarding plaintiff \$216,219 in damages, with post-judgment interest.

The County now appeals the trial court's determination. Fundamentally, it argues that the motion judge misconstrued

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the parties' contract. The County maintains that the judge erred, as a matter of law, in finding that the bid proposal's references to the DOT Specifications obligated the County to increase the prices for HMA payable to plaintiff when the general price Index for HMA rose. The County further argues that the motion judge erred in injecting considerations of fairness into the fixed price terms that the parties had agreed upon in the contract.

The County additionally contends that the judicial grant of price relief to plaintiff disrupts the County's budgeting and appropriations process, thereby harming the public by imposing unanticipated costs beyond those which had been contemplated in the fixed-price contract. The County also maintains that the motion judge's ruling is contrary to the policies underlying the Local Public Contracts Law, *N.J.S.A. 40A:11-1 to -51*.

## II.

In considering the issues raised by the County on appeal, we note that the construction of contract terms generally presents a question of law for the court. *Bosshard v. Hackensack Univ. Med. Ctr.*, 345 *N.J. Super.* 78, 92 (App.Div.2001). The scope of that legal review includes deciding whether a contract provision is clear and unambiguous. *Grow Co. v. Chokshi*, 403 *N.J. Super.* 443, 476 (App.Div.2008); *Nester v. O'Donnell*, 301 *N.J. Super.* 198, 210 (App.Div.1997). Because such decisions entail questions of law, we apply a de novo standard of appellate review to the construction of a contract. We do not accord any special deference to the trial court's interpretation of the contract terms. *See Fastenberg v. Prudential Ins. Co. of Am.*, 309 *N.J. Super.* 415, 420 (App.Div.1998); *Bradford v. Kupper Assocs.*, 283 *N.J. Super.* 556, 583 (App.Div.1995), *certif. denied*, 144 *N.J.* 586 (1996).

\*4 The motion judge found that the contract was ambiguous with respect to what extent the DOT's Standard Specifications were incorporated and, in particular, whether the DOT's price escalation provisions controlled. The judge noted that paragraph three of the contract incorporated the bid proposal form, i.e., PD 08-021, which, in turn, stated in paragraph five that:

## 5. DETAILED SPECIFICATIONS:

A. The materials to be supplied within the terms of the contract are as follows:

- (1) Hot Mix Asphalt (HMA) course (mix-I-2)
- (2) Hot Mix Asphalt (HMA) course  
(mix-I-4)
- (3) Hot Mix Asphalt (HMA) course  
(mix-I-5)

B. All materials herein specified *shall comply with the 2001 New Jersey State Highway Department standard specifications* for road and bridge construction, and the additions to and modifications of the standard specifications to county and municipal construction.

C. At no time will county trucks be kept waiting while private contractor's trucks are being loaded.

[Emphasis added.]

Notably, the reference to the DOT Specifications does not appear in paragraph three of PD 08-021, which is entitled "Prices and Price Adjustments." That paragraph reads as follows:

## 3. PRICES AND PRICE ADJUSTMENTS:

A. Prices shall include all charges that may be imposed in fulfilling the terms of the contract. The bid prices shall remain in effect for the entire contract period.

B. It is estimated that the county will incur a cost of \$.50 per mile to pick-up materials at the contractor's plant. Therefore, the distance between a bidder's plant and the county's stocking location will be used as an evaluation factor to determine the low bidder. Bidders must indicate the distance in miles for each location as part of their proposal.

[Emphasis omitted.]

In addition, PD 08-021 contains no language, either in paragraphs three or five, or elsewhere directly addressing price adjustments or price escalations.

Plaintiff argues that, through the generic cross-reference to the DOT Specifications in PD 08-021, its contract with the County necessarily subsumed all of the relevant provisions in those DOT standards, including the DOT provisions relating to price. In this regard, plaintiff points to Section 404 of the DOT Specifications, as promulgated in 2001.

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Section 404 contains twenty-six subsections. Those subsections address such diverse topics as materials (subsection 404.02); equipment (404.03); HMA plants (404.04); vehicles for transporting HMA mixtures (404.06); weather limitations (404.13); spreading and finishing methods (404.17); and procedures for opening roads to traffic (404.24).

Plaintiff places particular emphasis upon Subsection 404.25 of the DOT Specifications, entitled "Method of Measurement." At the time the instant contract was awarded in 2008,<sup>6</sup> Subsection 404.25 set forth how HMA materials delivered to the DOT would be measured, using scales or other weighing devices to determine the actual quantity being supplied in each truckload. Subsection 404.25 also contained several paragraphs obligating the DOT to allow monthly price adjustments during the contract period for various asphalt materials, including asphalt binder, tack coat, and prime coat. These price adjustments under Subsection 404.25 were based upon a specified formula, one tied to the DOT's Index for average monthly asphalt prices. The formula compared the average monthly price in the Index at the time of billing to the monthly asphalt price that had existed in the months before the DOT's receipt of bids. No price adjustments under Subsection 404.25 were to be made by the DOT unless the Index differed more than five percent from the prevailing level at the time of bidding.

\*5 Plaintiff maintains that in this case the price adjustments prescribed by the State under Subsection 404.25 of the DOT Specifications must govern its contract with the County. It emphasizes that the DOT's Specifications were cited in the bid proposal, PD 08-021, which, in turn, is referred to in Attachment A to the contract. Plaintiff asserts that if the County did not intend to be similarly bound to the price escalation terms of Subsection 404.25, as the DOT is to its own vendors, then the County should have included language saying so in the contract.

Plaintiff emphasizes that during the course of performance of the contract, the County had plaintiff's trucks weighed and ticketed in a manner consistent with the measuring procedures set forth in Subsection 404.25. Plaintiff argues that by doing so, the County tacitly exhibited its acquiescence to the entire panoply of terms within Subsection 404.25. According to plaintiff, if such weighing and ticketing procedures had not been required, it could have instead delivered asphalt mix to the County in four-ton batches, as is allegedly the custom in

the industry, and then simply approximated the tonnage of asphalt in each truck.

We are not persuaded by these arguments. In interpreting a requirements contract of this nature, we must remain mindful that such an agreement is entered into for the benefit of the public, the costs of which are borne by County taxpayers. In that context, we should remember the overall structure and objectives of the Local Public Contracts Law, which recites strict requirements for the advertising, competitive bidding, and the performance of public contracts to provide local governmental units with goods, materials, and services. See *N.J.S.A.* 40A:11-1 to 11-51. "Public bidding statutes exist for the benefit of taxpayers, not bidders, and should be construed with sole reference to the public good." *Nat'l Waste Recycling, Inc. v. MCLIA*, 150 *N.J.* 209, 220 (1997). Although we are also mindful that bidders should be treated fairly in the implementation of a government contract, see *W.V. Pangborne & Co. v. N.J. Dep't of Transp.*, 116 *N.J.* 543, 561-62 (1989), the public's ultimate interest in the contract and the related financial burdens on taxpayers cannot be overlooked.

We disagree with the motion judge's assessment that the parties' contract was ambiguous with respect to price. As we have already noted, the bid proposal unambiguously stated that "[t]he bid prices shall remain in effect for the entire contract period." Attachment A to the contract spelled out a fixed price for each of the three respective kinds of mixes (I-2, I-4, and I-5) to be furnished by plaintiff. There is no qualifying phrase appearing after each price figure, such as "subject to escalation if the market price of asphalt products sharply rises," or "subject to escalation pursuant to Subsection 404.25 of the DOT Specifications."

The connection that plaintiff makes from this County contract to Subsection 404.25 of the DOT Specifications is oblique and attenuated. The reference to the DOT Specifications in PD 08-021 is conspicuously absent from its third (and most relevant) paragraph, which is headed "Prices and Price Adjustments." Instead, the DOT Specifications are alluded to in paragraph five, which is not a pricing provision. Although a descriptive heading does not control a provision's meaning, a heading nevertheless can aid in interpreting what the provision was intended to convey. See *In re Attorney General's "Directive on Exit Polling: Media and Non-partisan Public Interest Groups"*, 402 *N.J. Super.* 118, 126-27 (App.Div.2008), *aff'd in part and modified in part by* 200 *N.J.* 283 (2009); *State v. Greene*, 33 *N.J. Super.* 497, 500 (App.Div.1955).

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\*6 Subparagraph (A) of paragraph five of PD 08–021 identifies the three “materials to be supplied” by the vendor, specifically HMA mixes I–2, I–4, and I–5. Subparagraph (B) of paragraph five then recites that: “*All materials* herein specified shall comply with the 2001 New Jersey State Highway Department standard specifications for road and bridge construction, and the additions to and modifications of the standard specifications to county and municipal construction.” (Emphasis added). Subsection 404.25 is not mentioned in that provision. In sum, the path to Subsection 404.25 from the contract itself is circuitous, and it strays considerably from the contract's specific price provisions.

The fact that the County chose, in practice, to weigh and ticket the HMA materials that were delivered in plaintiff's trucks in a manner that happened to be consistent with the DOT's methodology does not compel a conclusion that the County thereby adopted the DOT's price adjustment provisions that are separately recited in Subsection 404.25. Such weighing and ticketing is a sensible way to assure that the quantities being provided to the County were accurately measured. That accuracy can be advantageous to both parties, so that the County is not overbilled for material that was not supplied and plaintiff is not underpaid for material that was actually provided.

Plaintiff presented to the trial court no document or other communication from the County stating that it was invoking or enforcing the terms of DOT Specification 404.25. The weighing/ticketing procedure of Subsection 404.25, moreover, is a matter of quantity, not price. The parties' contract is silent as to the mechanisms for quantity measurement. By contrast, the contract clearly expresses in Attachment A fixed prices for the three respective kinds of asphalt mixes. The parties agreed that those prices, which plaintiff itself had proposed in its bid, were to “remain in effect for the entire contract period.”

As attested to in a certification from the County's purchasing agent, Peter Mercanti, the County had “its own General Conditions and other non-technical [c]ontract requirements that were set forth in the [contract's] Specifications and [in] the [c]ontract.” Those County-issued Specifications, which are presented in forty-six detailed paragraphs, addressed numerous matters such as bid awards, proposal and performance bonds, modifications, transportation charges, voucher submission, and adherence to County regulations. The County specifications even contain some incidental

provisions relating to price,<sup>7</sup> which are not specifically on point here. None of those County-issued Specifications mentions price adjustments or escalations. If the County had agreed, despite the fixed prices set forth in the contract, to be subject to some form of price escalation, one would reasonably expect such a term to appear in the County's own specifications. The absence of such a price escalation provision from that obvious and natural context is conspicuous.

\*7 Even if we were to adopt the motion judge's perception that the contract was ambiguous as to price, the parol evidence submitted to the court by plaintiff in an effort to shed light on that alleged ambiguity is unpersuasive. Generally, the interpretation of contract terms “are decided by the court as a matter of law unless the meaning is both unclear and dependent on conflicting testimony.” *Bosshard, supra*, 345 N.J. Super. at 92. Here, there is no such “conflicting testimony” presented in the record to substantiate the interpretation of the contract that plaintiff has adopted in this litigation.

Plaintiff submitted to the trial court only one substantive affidavit<sup>8</sup> in support of its motion for summary judgment, from its President, Brown. In his affidavit, Brown discusses various terms of the contract and, in particular, the weighing and billing procedures that were utilized when the contract was performed. Brown does not, however, state that he expected, at the time his company submitted its bid and he signed the contract, that the company would be eligible for a price increase if asphalt costs significantly rose thereafter. Nor does Brown state that he or his company relied upon such an expectation. At most, Brown asserts in his affidavit that his company “had no basis to believe that random, unspecified portions of [Subsection] 404.25 were omitted from the Project Specifications, which made general reference to the full 2001 NJDOT Specifications.” He adds that plaintiff “was not required to anticipate unprecedented price fluctuations in its bid.” Such assertions are a far cry from assertions of actual intent or reliance.

The record does not reflect that the parties had a contemporaneous meeting of the minds whereby plaintiff would be entitled to future price escalations if asphalt prices in the marketplace rapidly inflated. There is no proof that such escalations were mutually contemplated by the parties. Nor is there proof that plaintiff had, and relied upon, an understanding that it would be entitled to such an adjustment if the petroleum market spiked. Under these

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particular circumstances, there is no reason to retrospectively construe the contract as having an ambiguity as to price. Nor is it appropriate to resolve that alleged ambiguity by giving plaintiff a contractual benefit that it apparently did not expect, nor count upon.

In her letter opinion, the motion judge identified what she perceived to be a second ambiguity in the contract. She noted that the contract itself spells out no termination procedures but, instead, in Article 6A, recites that the contract incorporates by reference “the termination provisions set forth in the Bid Specifications or in the Request for Proposal, if any, as the case may be [.]” The judge found this reference concerning termination to be indicative of either an ambiguity in the contract (since there arguably are no termination provisions in the two referenced documents) or, alternatively, “an implied intent on the part of the County to incorporate the original general Specifications of the Bid and the Request for Proposal document, in addition to [Article] 3 [respecting price].”

\*8 We do not think the contract language cited by the motion judge from Article 6A relating to termination affects the legal

analysis concerning contract price. Termination and price are two entirely distinct subjects. Although the contract refers to and incorporates the bid proposal, PD 08–021, the bid proposal’s generic allusion to DOT Specifications did not, for the reasons we have already explained, impose a linguistic “back door” duty upon the County to allow price escalation.

For these various reasons, we differ with the trial court’s reading of the contract documents and, in particular, with the court’s imputation of a price escalation clause. Although we appreciate the financial burden that was likely imposed on plaintiff because of the temporary spike in worldwide petroleum costs, that was not a risk that the County agreed to bear in this case. The final judgment is consequently reversed, and the award of damages to plaintiff is vacated.<sup>9</sup>

Reversed.

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**Footnotes**

- 1 As it is described by the Industrial Resources Council, “[a]sphalt concrete pavements, or hot mix asphalt (HMA) pavement as it is more commonly called, refers to the bound layers of a flexible pavement structure. For most applications, asphalt concrete is placed as HMA, which is a mixture of coarse and fine aggregate, and asphalt binder.... The asphalt binder is typically 5–6% of the mixture, and serves to bind the aggregates together. Asphalt binder is a petroleum derivative, though additional materials are often added to modify the properties of the binder.” *Industrial Resources Council*, [http://www.industrialresourcescouncil.org/Applications/HotMixAsphaltPavement/ tabid/378/Default.aspx](http://www.industrialresourcescouncil.org/Applications/HotMixAsphaltPavement/tabid/378/Default.aspx) (last visited March 17, 2011).
- 2 PD 08–021, which we discuss in our legal analysis, *infra*, is entitled “Specifications and Proposal Form for the Supplying of Hot Mix Asphalt (HMS) Materials.”
- 3 The briefs and the trial court’s decision refer to the contract’s numbered provisions alternatively as “articles” and also as “paragraphs.” We use the former designation.
- 4 Apparently, the costs of the various asphalt mixes (I–2, I–4 and I–5) supplied under the contract are substantially less than that of pure asphalt. Nevertheless, the parties do not appear to dispute that a significant change in the market costs of asphalt will produce a corresponding significant change in the costs of HMA mix.
- 5 The motion judge declined, however, to rely upon plaintiff’s invocation of the doctrine of “force majeure,” since plaintiff managed to fully perform its supply obligations under the contract, despite the overall rise in petroleum prices. See *Facto v. Pantagis*, 390 N.J. Super. 227, 232–34 (App.Div.2007) (noting that the doctrine of force majeure can excuse a contracting party’s performance when an unforeseen event makes that party’s performance impossible or impracticable).
- 6 It appears that Subsection 404.25 has been revised by the DOT since the time of the parties’ contract. See <http://www.state.nj.us/transportation/eng/specs/english/EnglishStandardSpecifications.htm> (last visited Mar. 17, 2011). We use the version of Subsection 404.25 appearing in the County’s appendix.
- 7 The County Specifications refer to net pricing in paragraph 17, and to unit and extended prices in paragraph 19.
- 8 The other affidavit submitted was by plaintiff’s attorney, who simply attached certain pleadings, correspondence, and government documents.

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- 9 We note that in 2010 the Legislature adopted a new statute requiring price adjustments in every asphalt supply contract entered into pursuant to the Local Public Contracts Law, including contracts with County governments. See *N.J.S.A. 40A:11-16*. Although plaintiff cited this new legislation in its brief on appeal, plaintiff acknowledged at oral argument that the terms of the statute do not apply retroactively to the present case. We see no reason to apply the statute retroactively and, moreover, no reason to impose on the County public policies that were subsequently enacted long after this contract was created and performed.

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