

**NOT FOR PUBLICATION WITHOUT THE APPROVAL  
OF THE COMMITTEE ON OPINIONS**

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<b>TRI-TECH ENVIRONMENTAL ENGINEERING, INC.</b>	:	<b>SUPERIOR COURT OF NEW JERSEY</b>
	:	<b>LAW DIVISION-ESSEX COUNTY</b>
<b>Plaintiff,</b>	:	<b>DOCKET NO. L-009675-08</b>
	:	
<b>V.</b>	:	<u><b>Civil Action</b></u>
	:	
<b>NUTLEY BOARD OF EDUCATION,</b>	:	<b>OPINION</b>
	:	
<b>Defendant.</b>	:	

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**William J. Riina argued the cause for Plaintiff  
Tri-Tech Environmental Engineering, Inc.**

**Thomas S. Cosma argued the cause for Defendant  
Nutley Board of Education**

**KENNEDY, J.S.C.**

**Tri-Tech Environmental Engineering, Inc. (“Tri-Tech”) brings  
this summary action under R. 4:67-1 et seq. to enforce a settlement  
agreement it reached with the Nutley Board of Education (“Nutley  
Board”) during the discovery phase of an earlier arbitration  
proceeding between the parties. The Nutley Board asserts the  
agreement is void and unenforceable for reasons detailed hereinafter.**

The factual summary which follows is based upon the certifications and documents submitted by the parties and is, for the most part, uncontested. The Court does not find the isolated factual disputes between the parties to be material to its decision and is satisfied that the matter may be completely disposed of on the record as developed on the return date set by the court. R. 4:67-5

I. The Initial Contract between Tri-Tech and the Nutley Board.

On November 17, 2000, Tri-Tech submitted to the Nutley Board a proposal “to manage the construction program encompassing expansion and renovation” of seven schools within the Nutley Board’s district. The proposal was based on a four month pre-construction phase, a 24 month construction phase and a projected budget of \$39 million, which sum included construction management fees. At this time, both Tri-Tech and the Nutley Board understood that funding for the seven school project would be subject to a future public referendum approving an appropriation of approximately \$40 million through a combination of state grants and local school bonds.

On January 31, 2001, Tri-Tech and the Nutley Board entered into a “Standard Form of Agreement Between Owner and Construction Manager” respecting “additions and restorations of

seven schools in the Nutley School District.” The agreement obligated Tri-Tech to provide services in two phases: the “pre-construction phase” and the “construction phase.”

During the “pre-construction phase”, Tri-Tech was to examine and evaluate the Nutley Board’s proposed construction program; estimate construction costs; prepare a construction schedule; and assist in the preparation of bid documents and in the evaluation of bid responses. During the “construction phase”, Tri-Tech would essentially monitor the performance of the contractors undertaking the actual construction work and ensure their compliance with plans and schedules.

The contract also called for Tri-Tech to undertake “contingent additional services”, if approved by the Nutley Board, arising from significant changes in the project, damage to the project or termination of a contractor. Nutley could also request “optional additional services” respecting “future facilities”, “tenant improvements” [sic] and the like. The contract obligated Tri-Tech to obtain the Nutley Board’s written authorization before performing “optional additional services” and to simply notify it before

performing “contingent additional services” which the Nutley Board had the right to reject, if it did so in writing.

Tri-Tech’s fee was set at 3.85% of the “hard cost of construction”, with 20% of that sum to be paid in the pre-construction phase and 80% to be paid in the construction phase. Pre-referendum services (capped at \$44,500.00) and contingent and/or optional additional services were to be paid as follows: direct personnel expenses (salaries and benefits of Tri-Tech’s employees dedicated to the project) multiplied by 1.5.

Also, the contract stated that if the construction and pre-construction services were not completed within 28 months from the contract date of January 31, 2001, “through no fault” of Tri-Tech, then Tri-Tech would be compensated thereafter on the basis of direct personnel expenses multiplied by 1.5.

The contract did not establish a minimum or maximum payment to Tri-Tech for its services other than a maximum payment of \$44,500.00 for “pre-referendum services.” It is also clear that the parties anticipated that the construction package for the seven schools would be completed within 28 months and would be funded through a public referendum. Accordingly, except for the pre-referendum

services, the contract was subject to a condition: the timely approval and fulfillment of a funding referendum. And it is here, of course, that the fuse of this controversy was silently lit.

No funding for the contract was in place at the time the contract was signed. Neither party appears to have questioned the propriety of such a contract under N.J.S.A. 18A:24-55 which authorizes a school board to enter into contracts only after bonds have been approved for the project. Moreover, neither party questioned whether a “no bid” contract with Tri-Tech for construction services was appropriate as an “extraordinary unspecifiable service” under N.J.S.A. 18A:18A-5a(2).

The Nutley Board, at this time, challenges only the settlement agreement and not the underlying contract. However, the court has some concern about the timing of the contract and the lack of competitive bidding that preceded it. These, no doubt, will be issues for another day.

Unfortunately, the sloppy behavior which preceded the contract characterized, as well, the conduct of the parties thereafter and compounded the problems which have shadowed this public project.<sup>1</sup>

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<sup>1</sup> Neither counsel involved in this action was involved in the formulation of the original contract or in the course of conduct that preceded the arbitration.

## **II. The Referenda.**

**Referenda for the school construction project were first submitted to the citizens of Nutley in 2002 and were defeated in January and December of that year. It appears that this sobering experience prompted the school board to reassess its program and to seek public approval for the project in phases. The Nutley Board thereafter limited the next referendum to \$4,872,673.00 for construction at the high school alone and that referendum passed in April 2003. It is unclear if Tri-Tech undertook any work with respect to this project. What is clear, however, is that Tri-Tech and the Nutley Board at this time did not modify their 2001 contract despite the significant change in circumstances.**

**In 2004, a referendum approving \$23,700,000.00 in funding for a single middle school was approved and bids were solicited. The bids exceeded the cost estimates and the Nutley Board then negotiated a contract price with several contractors to undertake the work. It is unclear at this point what services Tri-Tech provided in this process and it is similarly unclear whether the work has been completed. However, because the settlement agreement later reached by the parties herein provides for payment for work to be undertaken**

pursuant to the 2004 referendum, it would seem that the project is not yet completed and that Tri-Tech did, in fact, provide services for the project.

Having undertaken work on Nutley's high school and middle school, the Nutley Board in 2005 advanced a further referendum for Nutley's five elementary schools. The referendum was initially defeated, however. Again, despite the changed circumstances and the passage of almost five years from the date of the initial contract, Tri-Tech and the Nutley Board did not modify their contract. Clearly, by this point, circumstances had changed so dramatically, that the initial contract should have been either terminated or modified in accordance with law.

Finally, on December 12, 2006, a referendum in the amount of \$38,500,000.00 passed with respect to Nutley's five elementary schools. The projected budget for construction management fees in the referendum was \$1,300,000.00.<sup>2</sup>

At this point, the Nutley Board advised Tri-Tech that it no longer needed its services because of the "reduced scope of work." It

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<sup>2</sup> This figure is about \$183,000.00 less than would have been called for in the Tri-Tech contract. This anomaly underscores the consequences of ignoring N.J.S.A. 18A:24-55.

apparently took the position that the original contract was premised on simultaneous construction activities at seven Nutley schools which would have required an overall manager and that the reduction of the project to include only five schools with, presumably, a reduction in the scope of the construction work, eliminated any need for construction management.<sup>3</sup> Tri-Tech disagreed.

Efforts to resolve the conflict were unsuccessful and on July 19, 2007, Tri-Tech terminated the contract and filed an arbitration demand.

The Court has already adverted to the substantial changes in circumstances that occurred over time: the early rejection of the referenda by the citizens of Nutley; the decision by the Nutley Board to divide what had been one project involving seven schools into a series of discrete projects involving the high school, the middle school and the elementary schools, each subject to a separate referendum; the necessity of abandoning the initially proposed 28 month construction schedule for all the schools and the substitution of separate construction schedules spanning almost a decade for the completion of

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<sup>3</sup> It is difficult to understand how the project, as approved in the referenda, would entail a reduction in the scope of work considering that the initial estimated costs for all seven schools totaled \$39,000,000 whereas the three successful referenda in combination entailed projected costs of \$67,072,673.00

**the various projects; the sheer passage of time; the diminished need to coordinate simultaneous construction activities at seven sites throughout the municipality; and the adoption of referenda that specified construction management fees that differed from the contract entered into by Tri-Tech and the Nutley Board in 2001.**

**Another substantial change in circumstances occurred when the Nutley board applied for and received grants from the New Jersey Department of Education under the Education Facilities Construction and Financing Act to supplement funding for the projects raised by the issuance of school bonds approved in the various referenda. The grants, approved in 2003 and 2004, provided that any construction or consultant contracts funded through the grant, meet state requirements respecting performance, audit and prequalification of contractors that were not part of the initial contract between Tri-Tech and the Nutley Board. Again, however, Tri-Tech and the Nutley Board chose to ignore these substantial and material changes in circumstances and no contract modification reflecting these changes was agreed upon by the parties.**

**Nonetheless, while the extent and nature of the services provided by Tri-Tech with respect to the projects approved in the 2003, 2004**

and 2006 referenda remain unclear, it is at least certain that Tri-Tech did perform some work on each of those projects. Neither Tri-Tech or the Nutley Board appears to have considered at this time whether the substantial and material changes noted above impacted in any way on Tri-Tech's right or obligation to undertake such work or the Nutley Board's capacity or lawful authority to pay for that work.

### **III Arbitration and Settlement.**

Tri-Tech claimed in its arbitration submission that the Nutley Board "unlawfully blocked" its performance under the contract and sought damages of \$3,600,081.07. Tri-Tech calculated the damages as follows:

#### **1. 2004 Referendum**

- A. Tri-Tech claimed \$210,548.96 over and above the \$770,000.00 it was apparently paid in pre-construction and construction management fees because the "lowest responsible bid" was for \$25,279,000.00 and, even though rejected, that sum provides the basis for the 3.85% fee, according to Tri-Tech. Added to that sum was \$7,324.66 (3.85% of \$190,250.82 for asbestos abatement services)**

**B. Tri-Tech claimed \$202,895.59 in extended services, based on the 28 month provision, equaling direct personnel expenses multiplied by 1.5**

**2. 2006 Referendum**

**While the Nutley Board did not disclose to Tri-Tech its actual construction costs, Tri-Tech seeks**

**\$1,155,000 (3.85% of estimated construction cost of \$30,000,000);**

**\$107,168.00 (difference between the above figure and 3.85% of the \$32,783,584.72 estimated in the bond proposal);**

**\$150,000.00 – extended basic services (estimated direct personnel expenses multiplied by 1.5, minus cost to Tri-Tech of providing such services).**

**3. Planned Referenda**

**-balance of work to be completed after 2006**

**referendum estimated at \$31,212,244.38 multiplied**

**by 3.85% less estimated expenses of \$500,000.00**

**equals \$701,940.91**

**-extended basic services of \$750,000.00**

**4. Interest as of 6/1/08: \$322,528.20**

**It is clear from the above summary that Tri-Tech claimed fees or profits on some work it never performed and may not have been entitled to bill for under its contract with the Nutley Board. For example, only \$3,697,477 in contracts for work under the 2006 referendum have been approved. Yet, Tri-Tech sought payment, in essence, for its lost profits on the entire job. This would appear to violate section 9.6 of the contract which only allows for compensation “for services performed prior to termination.” Moreover, \$1,451,940.91 in claimed damages was a projection of gross payments due on work that may never be undertaken because public referenda have not even been scheduled on the funding for such projects and, indeed, may never be scheduled.**

**After the arbitration demand was filed, the parties embarked upon discovery and during the course thereof reached a settlement. The settlement was reduced to a writing composed of a “Mutual Release and Settlement Agreement” (“Settlement Agreement”) and a “Rider to Agreement” (“Rider”) which modified the original contract between the parties. Both**

**documents were signed by representatives of the parties on May 5, 2008.**

**The Settlement Agreement provided that the Rider, “by which Nutley is retaining Tri-Tech to perform construction management services,” is part of the consideration for the settlement. The Settlement Agreement also obligated the Nutley Board to pay \$750,000.00 to Tri-Tech upon execution of the agreement and another \$1,975,000.00 in designated amounts between June 1, 2008 and June 1, 2012. These sums were deemed “unconditional, absolute and guaranteed” and were not dependent upon any additional construction management or other services to be performed by Tri-Tech under the “Rider” to the original agreement.**

**For all “Construction Phase Services” rendered after the Settlement Agreement by Tri-Tech to “complete projects under the 2004 or 2006 Nutley Board of Education Referenda” the Nutley Board agreed to pay an hourly rate which varied according to which Tri-Tech employee provided the services, with a multiplier for “consultants” hired by Tri-Tech. The document also provided maximum fees for these charges for**

years 2008 to 2010, with no maximum for “calendar year 2011 and thereafter.”

Read together, the Settlement Agreement and Rider obligated the Nutley Board to pay \$2,725,000.00 to Tri-Tech and obligated Tri-Tech to perform “construction phase services” for any work thereafter undertaken pursuant to the 2004 and 2006 referenda and to accept payment on an hourly rate basis with a ceiling figure for three years.

The Settlement Agreement and Rider thus appear to obligate the Nutley Board to unconditionally pay Tri-Tech \$2,725,000.00 on the basis of damage claims that are, to be charitable, vague and apparently untethered to the original contract. Further, the documents obligate the Nutley Board to retain Tri-Tech’s services throughout “calendar year 2011 and thereafter.” This latter provision itself appears to violate N.J.S.A. 18A:18A-42 which restricts contracts “for a period not to exceed 24 months.” In addition, it is again a contract for services that is unsupported by a funding source.

Tri-Tech approved the Settlement Agreement and Rider by vote of its Board of Directors on May 2, 2008. On May 5,

2008, the acting secretary of the Nutley Board signed the Settlement Agreement and Rider pursuant to a Resolution adopted by the Nutley Board on the same date. The Resolution provided:

## RESOLUTION

### SETTLEMENT AGREEMENT

**BE IT RESOLVED** that the Nutley Board of Education authorize the Board Attorney to negotiate a settlement agreement between the Nutley Board of Education and Tri-Tech Environmental Engineering, Inc. settling the pending arbitration filed by Tri-Tech environmental Engineering, Inc., pursuant to the terms discussed in Closed Executive Session, and

**BE IT FURTHER RESOLVED** that the Nutley Board of Education approve said settlement agreement subject to review of the closing documents evidencing said settlement agreement by the Board Attorney and authorize the Assistant Business Administrator/Acting Board Secretary to issue the appropriate payment pursuant to the settlement agreement.

**BE IT YET FURTHER RESOLVED** that the approval of the settlement is expressly conditioned upon the opinion of bond counsel that the settlement obligation can be funded from the 2006 Referendum.

The resolution was provided to Tri-Tech, but no party has yet provided the closed executive session minutes so that the “terms” discussed at that session can be compared to the actual

**agreement. Also, no one explained how work undertaken to complete projects under the 2004 referendum (as called for in the settlement documents) could be, in fact, funded through the 2006 referendum (a condition of settlement set forth in the Resolution).**

**On May 7, 2008, counsel for the Nutley Board wrote to Tri-Tech's counsel and advised:**

**I have reviewed the written opinion of bond counsel, Ronald J. Ianoale, Esq. dated May 2, 2008 with regard to the condition outlined in the Resolution approving the proposed Settlement Agreement between the above-referenced parties, and said opinion satisfies the condition contained in the Resolution.**

**The first payment of \$750,000.00 was forwarded to Tri-Tech by the Nutley Board on the same day. It appears that Tri-Tech repeatedly requested a copy of the bond counsel's opinion, but that request was rebuffed by the Nutley Board on grounds of privilege.**

**The fact is that the opinion of the bond counsel was not as unequivocal as suggested by the Nutley Board's attorney in his letter of May 7, 2008. The bond counsel's opinion, expressed in a letter of May 2, 2008, was as follows:**

**You have requested advice from us regarding the payment of construction management fees for the projects approved by the voters at the December 12, 2006 special school election. At that election the voters approved a bond proposal that read, in part, as follows:**

### **PROPOSAL**

**The Board of Education of the Township of Nutley in the Count of Essex, New Jersey is authorized: (a) to undertake various renovations and improvements to the Nutley High School, Lincoln Elementary School, Radcliffe Elementary School, Washington elementary School, and Yantacaw Elementary School; (b) to undertake the construction of and addition and renovations to the Spring Garden School; (c) to acquire the necessary furnishings and equipment and undertake any associated site work; (d) to appropriate \$39,760,000, funded in part by a grant from the State of New Jersey in the amount of \$15,646,217; and (e) to issue bonds in the principal amount of \$24,113,783; and (f) to transfer the local share between the school facilities projects.**

**I understand that the amount authorized to be spent for the improvements and renovations listed to the several schools of \$39,760,000 included an amount allocated for construction management services. For that reason, Tri-Tech engineering was appointed by the Board of Education to provide construction management services for the work approved at the December 12<sup>th</sup> referendum.**

**Recently, the Board of Education and Tri-Tech Engineering have entered into a *Mutual Release and Settlement Agreement* requiring the Board of Education to pay Tri-Tech certain sums for construction management services for the December 12<sup>th</sup> bond referendum, the Board of Education may pay this additional amount from the bond proceeds provided that (i) all the work that was approved by the New Jersey Department of Education, Office of School Facilities and included in the December 12<sup>th</sup> special election has been**

**completed; and (ii) the total amount expended for the work and related fees on the December 12<sup>th</sup> bond referendum does not exceed \$39,760,000.**

**The opinion of bond counsel is obviously contingent upon a number of factors.**

**First, the work had to have been completed and approved by the New Jersey Department of Education, Office of School Facilities. Second, the work had to have been the subject of the December 12, 2006, referendum, pertaining to the five elementary schools. Third, the total sum for that work and the fees could not exceed \$39,760,000.00.<sup>4</sup> None of these conditions was referenced in the May 7, 2008 letter of the arbitration counsel which declared that the approval of bond counsel had been obtained.**

**Beyond this, bond counsel's letter appears to assume that Tri-Tech was appointed as construction manager only in connection with the project approved pursuant to the 2006 referendum, whereas, in fact, Tri-Tech's contract arose in 2001 and Tri-Tech was seeking payment on the 2004 project, as well.**

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<sup>4</sup> This is probably a typographical error. The referendum approved \$38,500,000.00 in funding.

**Again, this apparent misconception by bond counsel was never addressed.**

**After its payment of \$750,000 under the Settlement Agreement, the Nutley Board on November 24, 2008 adopted a resolution declaring “void” its prior resolution approving the settlement. This decision was ostensibly predicted upon bond counsel’s opinion that the settlement must be funded from the 2006 referendum money only. The Nutley Board claimed that no “surplus” remained from that referendum to pay the settlement.**

**IV. Proceeding under R.4:67-1.**

**Tri-Tech cannot claim a right to proceed with a summary action under the New Jersey Arbitration Act, N.J.S.A 2A:23B-1 et. seq. The statute permits a party to file a summary action to confirm or vacate an “award”, N.J.S.A 2A:23B-22, but does not address a settlement agreement between the parties that is not the subject of an “award.”<sup>5</sup> Hence, Tri-Tech’s right to proceed**

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<sup>5</sup> Tri-Tech argues that because the Settlement Agreement states that Tri-Tech may apply to the Court to enforce the settlement “in accordance with the provisions of the New Jersey Arbitration Act” it is, ipse dixit, entitled to proceed in a summary manner. Such an argument begs the question, however, where Nutley challenges the very enforceability of the settlement. The settlement agreement does not provide

by summary action must arise from R. 4:67 and consequently must be sanctioned by the rule.

R. 4:67-1 provides that, aside from actions in which the court is explicitly permitted to proceed in a summary manner by rule or statute, the court may only proceed under the rule if it appears to the court that “the matter may be completely disposed of in a summary manner.” R. 4:67-2(b) states that where a party moves for the right to proceed on a summary action “[i]f the court is satisfied that the matter may be completely disposed of on the record (which may be supplemented by interrogatories, depositions and demands for admissions) or on minimal testimony in open court,” it shall fix a short date for trial. Where, however, a defendant has a right to trial by jury and has demanded a jury, the court, upon finding

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that disputes over its enforcement shall be referred to arbitration. Enforcement is specifically reserved to the courts. Moreover, N.J.S.A 2A:23B-22 allows a summary action to enforce an “award.” No “award” was ever issued by the arbitrator, however, and thus the statute, by its terms, is inapplicable here. Cf. Pfizer, Inc. v. Uprichard, 422 F.3d, 124 (3<sup>rd</sup> Cir. 2005). Beyond this, Tri-Tech’s position would limit the court’s capacity to consider challenges to the agreement to those allowable by statute as ground to vacate an arbitration award. Such drastic limitations on challenges to an arbitration award must, as a matter of policy, be limited to “awards”, not settlements short of an award.

**the existence of a genuine issue of material fact, shall order the action to proceed “as in a plenary action...” R.4:67-4(b)**

**Now, in the case at bar, the Nutley Board has filed an answer to Tri-Tech’s verified complaint admitting the execution of the Settlement Agreement and the Rider, but denying that the settlement is valid or enforceable. It asserts that the settlement was void as unconscionable and violative of public policy; was premised upon a mutual mistake of fact; was premised upon conditions required by bond counsel that were never fulfilled; was induced by fraud; and violated regulations and statutes pertaining to the qualifications of construction managers on school projects and to the duration of contracts.**

**In addition, the Nutley Board has filed a counterclaim for breach of contract, breach of the “covenant of good faith”, fraud and unjust enrichment. The Nutley Board has demanded trial by jury on all issues.**

**Accordingly, unless there are no disputed issues of material fact and one party or the other is entitled to summary judgment as a matter of law, the court must vacate the order to show cause under R. 4:67-2 and direct that the complaint and**

counterclaims proceed through the usual discovery as a plenary action.

Now, the complaint in the case at bar essentially asserts a cause of action for breach of contract. “A settlement agreement between parties to a lawsuit is a contract.” Nolan v. Ho, 120 N.J. 465, 472 (1990); accord: Thompson v. City of Atlantic City, 190 N.J. 359, 374 (2007). A dispute over a settlement is therefore governed by principles of contract law. Thompson v. City of Atlantic City, supra at 379; New Jersey Manufacturers v. O’Connell, 300 N.J. Super. 1, 7 (App. Div.) certif. denied 151 N.J. 75 (1997).

While the settlement of litigation ranks high in public policy, Judson v. People Bank & Trust Co., 25 N.J. 17, 35 (1957), Honeywell v. Bubb, 130 N.J. Super. 130,136 (App. Div. 1974), nonetheless settlement agreements, like all contracts, may be set aside where there is clear and convincing evidence of fraud, mutual mistake or other compelling circumstance. See Nolan v. Ho, supra 120 N.J. at 472; DeCaro v. DeCaro, 13 N.J. 36, 41-42 (1953); Pascarella v. Buick, 190 N.J. Super. 118, 124-125 (App.

Div. 1983); AT&T Corp. v. Twp. Of Morris, 19 N.J. Tax 239, 243 (Tax Ct. 2000).

Further, while courts will not ordinarily inquire into the adequacy or inadequacy of the consideration underlying a settlement agreement, Clarkson v. Kelly, 49 N.J. Super. 10,18-19 (App. Div. 1958), “if the inadequacy of the consideration is so gross as to shock its conscience, the court will decline to enforce the agreement.” DeCaro v. DeCaro, *supra*, 13 N.J. at 44; Panco v. Rogers, 19 N.J. Super. 12,19 (Ch. Div. 1952). Similarly, a contract or settlement violative of public policy should not be enforced. Varano v. Allstate Insurance Co; 366 N.J. Super. 1 (App. Div. 2004); see generally Restatement 2d of Contracts, Sec. 178 (1981). Although a governmental entity possesses the inherent right to compromise a claim against it, it may not under the guise of compromise impair a public duty owed by it or give validity to a void claim. Edelstein v. City of Asbury Park, 51 N.J. Super. 368 (App. Div. 1958); Carlin v. City of Newark, 36 N.J. Super. 74 (Law Div. 1955); Annotation, Power of city, town or county or their officials to compromise a claim, 15 A.L.R 2d 1359 (2008).

Now, in the case at bar, Nutley claims the settlement should be set aside on grounds of unconscionability and violation of public policy because the settlement “call[s] for the payment of extensive public funds for work not performed.” It also asserts that Tri-Tech misrepresented its qualifications under relevant New Jersey statutes and regulations to serve as a construction manager for school facilities projects. See N.J.S.A 18A:18A-27.1; N.J.A.C. 17:19-2.1, see generally Donald F. Begraft, Inc. v. Borough of Franklin Bd. of Ed., 133 N.J. Super. 415, 417 (App. Div. 1975). Tri-Tech, of course, asserts that the settlement is predicated upon work it performed under its contract with Nutley and that it met all applicable state requirements as a construction manager on school board projects.

The problem here, of course, is that the court cannot resolve the factual issues attendant upon the Nutley Board’s claims of fraud on the basis of the record before it. For example, the core of the Nutley Board’s claim is that Tri-Tech and it entered into a settlement contract for services that Tri-Tech never performed or for such minor services in comparison

to the consideration being paid that to enforce the contract would shock the conscience. The court cannot, on this record, resolve this contested issue. Beyond this, the nature and extent of Tri-Tech's qualifications to serve as construction manager are also contested facts.

Accordingly, on these bases, the court would have no alternative but to discharge the order to show cause and allow the parties to proceed as in a plenary action. However, there is one issue that appears ripe for decision and does not require resolution of a contested fact. That issue is whether the settlement may be rescinded on the ground of unilateral mistake.

While mutual mistake may be grounds to reform a contract, a unilateral mistake, under certain conditions, may permit rescission of the contract, whereby the parties are then relegated to the status quo ante. Wirsching v. Grand Lodge, 67 N.J. Eq. 711, 717 (E. & A. 1904); Smith v. Fireworks by Girone, Inc., 380 N.J. Super. 273 (App. Div. 2005) certification den. 186 N.J. 243 (2006); Villanueva v. Amica Mutual Insurance Co., 374 N.J. Super. 283 (App. Div. 2005); Conduit & Foundation Corp.

**v. City of Atlantic City, 2 N.J. Super. 433, 439-440 (Ch. Div. 1949). In Conduit & Foundation Corp., citing Santamaria v. Shell Eastern Petroleum Products, Inc., 116 N.J. Eq. 26, 29 (Ch. 1934), the Court explained that “[m]istake exists when a person, under some erroneous conviction of law or fact, does or omits to do, some act which but for the erroneous conviction, he would not have done or omitted. [Citation omitted]. It may arise either from unconsciousness, ignorance, forgetfulness, imposition or misplaced confidence.” 2 N.J. Super. at 440.**

**The Court in Conduit and Foundation Corp. also summarized the conditions that must be met when a party seeks rescission on the basis of a unilateral mistake:**

**The essential conditions to such relief by way of rescission for mistake are (1) the mistake must be of so great a consequence that to enforce the contract as actually made would be unconscionable; (2) the matter as to which the mistake was made must relate to the material feature of the contract; (3) the mistake must have occurred notwithstanding the exercise of reasonable care by the party making the mistake, and (4) it must be able to get relief by way of rescission without serious prejudice to the other party, except for loss of his bargain.**

**[Id. at 440]**

**Accord: Restatement 2d of Contracts Sec. 153 (1981)**

Application of this principle in a circumstance very analogous to that at bar is found in Hamel v. Allstate Insurance Co., 233 N.J. Super. 502 (App. Div. 1989). In that case, plaintiff's attorney counseled his client to settle a personal injury claim arising from an automobile accident by accepting the tortfeasor's policy limit. The injured plaintiff's own carrier later rejected an underinsured motorist claim because counsel had not obtained its consent to settle or its waiver of subrogation rights against the other driver. In allowing a rescission of the settlement agreement, the Appellate Division explained that "the consequence of the Hamels' attorney's mistake in transmitting their executed release to Allstate without Prudential's approval was potentially so serious that to enforce the release would be unconscionable" and that the mistake clearly related to a material feature of the contract. 233 N.J. Super. at 507-508.

Further, the Appellate Division observed that counsel's error should not be visited upon plaintiff because it would be unfair to do so. As to the issue of "serious prejudice" the court explained that mere loss of the bargain does not constitute prejudice but that the other driver, having an interest in the

controversy, must be given a hearing to ascertain if he suffered any “serious prejudice” by the passage of time. Id. at 510.

In the case at bar, the Nutley Board expressly conditioned its consent to settle on an opinion by bond counsel “that the settlement obligation can be funded from the 2006 Referendum.” Bond counsel, as noted earlier, approved settlement provided that all the work approved by the New Jersey Department of Education and included in the 2006 referendum “has been completed” and provided further that the expenditure for that work “and related fees on the December 12<sup>th</sup> bond referendum does not exceed \$39,760,000.”

This opinion was itself premised upon an apparently mistaken understanding of the Settlement Agreement. Bond counsel characterized the Settlement Agreement as requiring the Nutley Board to pay Tri-Tech “certain sums for construction management services for the December 12th bond referendum.” However, the Settlement Agreement clearly was predicated upon payment for services rendered under the 2004 referendum, the 2006 referendum and for other unspecified services through 2012. It appears, therefore, that both the Nutley Board, bond

**counsel and, quite possibly, arbitration counsel were under the mistaken belief that the settlement only pertained to services performed under the 2006 referendum.**

**Further, as noted, all the work under the 2006 referendum is not completed and, necessarily, not approved by the State Department of Education, Office of School Facilities. Also, the settlement agreement is contrary to law insofar as it would entail funding of 2004 referendum work from the proceeds of the 2006 referendum; authorize work in excess of 24 months, contrary to N.J.S.A. 18A:18A-42; and obligate the Nutley Board to pay for work in futuro prior to the approval of a funding source. N.J.S.A. 18A:24-55.**

**The Nutley Board clearly and explicitly conditioned its approval of the settlement upon an unqualified opinion from bond counsel that the settlement could be funded from the proceeds of the 2006 referendum. Bond counsel's opinion did not meet that requirement and, moreover, the opinion itself misstates the terms of the Settlement Agreement. Beyond this, the Settlement Agreement and Rider contain provisions for future services that are contrary to law.**

**The principle of unilateral mistake require rescission of the Settlement Agreement and Rider. First, enforcement of the settlement agreement would be unconscionable. This is so because the Nutley Board has no source with which to completely fund the settlement and because the settlement, as noted, contains provisions that are contrary to law.**

**Second, the mistaken belief by the Nutley Board that the settlement could be funded entirely through the money raised in the 2006 referendum and that bond counsel so opined, was a core, material feature of the settlement. Indeed, the Nutley Board's resolution explicitly conditioned approval of the settlement upon an unequivocal opinion from bond counsel that proceeds from the 2006 referendum could lawfully and completely fund the settlement.**

**Third, the Nutley Board's mistaken belief was reasonable and was based, in part, on a misplaced reliance upon bond counsel's understanding of the settlement terms and its arbitration attorney's misapprehension of the conditions set forth in bond counsel's opinion. Hamel v. Allstate Insurance Co, supra. What is important to remember, here, is that the**

**Nutley board did not itself undertake to evaluate the lawfulness of funding the settlement through the proceeds of the 2006 referendum; it referred that question, quite properly, to learned counsel. Given the facts of this case, any error by counsel in answering that question should not be held against a public body.**

**Fourth, the only prejudice to Tri-Tech here is the loss of its bargain and this is not the type of prejudice which defeats rescission. The fact that Tri-Tech will now have to return to the arbitration of its claims and, perhaps temporarily, disgorge the \$750,000.00 it has been paid pursuant to the settlement are not prejudicial. These factors are merely part of the loss of its bargain.**

**It may be that in returning the \$750,000.00 Tri-Tech may sustain some damage in the nature of added expense to it to raise that sum, but such expense has been offset by its use of that money since May 2008.**

**Finally, the court is firmly of the opinion that considerations of equity warrant rescission. Not only does this case concern the substantial expenditure of public funds on**

**projects of great importance to the citizens of Nutley, but also, as stated earlier, both Tri-Tech and the Nutley Board blithely ignored substantial and material changes in the circumstances attendant upon their contractual relationship. Both parties entered into a contract initially that was of questionable legality and premised upon a speculative future condition that never materialized. The Court will not compound further insult to the public purse by enforcement of a settlement characterized by the types of misjudgments that plagued the conduct of the parties from the inception of their relationship.**

**An appropriate form of judgment will follow.**