A137971

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION TWO

BAY CITIES PAVING & GRADING, INC.,
Plaintiff, Petitioner and Appellant,

v.

CITY OF SAN LEANDRO,
Defendant and Respondent.

On Appeal from the Superior Court of the State of California,
County of Alameda
Case No. RG12657020
Honorable Evelio Grillo

APPLICATION OF THE LEAGUE OF CALIFORNIA CITIES TO FILE AN *AMICUS* BRIEF IN SUPPORT OF RESPONDENT CITY OF SAN LEANDRO; PROPOSED BRIEF OF *AMICUS CURIAE*

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APPLICATION FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF

TO THE HONORABLE PRESIDING JUSTICE OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST DISTRICT:

The League of California Cities (the "League"), pursuant to Rule 8.200(c) of the California Rules of Court, requests permission of the Presiding Justice to file the accompanying *amicus curiae* brief in support of the Defendant and Respondent City of San Leandro ("City").

The League of California Cities is an association of 467 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

The League and its member cities have a substantial interest in the outcome of the case because it concerns award of municipal public works contracts. California cities are generally required to award public works contracts to the lowest responsible bidder pursuant to California Public Contract Code sections 20160 et seq. In general, a bid that does not conform to a city's bidding requirements must be rejected as nonresponsive, even if it is the lowest bid and submitted by a responsible bidder. California courts have historically upheld municipal discretion to waive bidding irregularities in low bids when those irregularities are inconsequential, i.e., they do not affect the amount of the bid or afford the bidder an unfair advantage over other bidders. (*Ghilotti Construction Co.*

v. City of Richmond (1996) 45 Cal.App.4th 897, 904.) This practical approach is consistent with the express policy objective to apply the bidding requirements in the California Public Contract Code in a manner that serves the public interest.

This case has statewide significance because it implicates municipal discretion to waive minor bidding irregularities in otherwise responsive low bids. Appellant proposes to expand a narrow case law rule that limits discretion to waive a bidding mistake when that mistake affords the bidder an opportunity to withdraw its bid under Public Contract Code section 5103. Appellant seeks to extend this rule to circumstances that do not involve a bid mistake subject to Public Contract Code section 5103. This unprecedented expansion of a narrow rule could drastically limit municipal discretion to waive inconsequential errors in responsive low bids. This would have substantial costly consequences for California cities by requiring them to reject low bids based on trivial technicalities and to spend more taxpayer dollars to pay the next highest bidders for the same work.

This case also raises the question of whether California courts, and by extension California cities, must apply federal decisional law based upon federal regulations and requirements to public contracts awarded pursuant to State and local requirements. This is likewise a matter of statewide concern because the imposition of federal case law would unduly disturb an established body of consistent State law, based upon California bidding requirements.

The League believes that its perspective on these issues is important for the Court to consider and will assist the Court in deciding this matter. The undersigned counsel has examined the briefs on file in this case and is familiar with the issues involved and the scope of their presentation. This *amicus* brief primarily addresses relevant arguments which were not presented in the parties' briefs. The League thus hereby requests leave to

allow the filing of the accompanying *amicus curiae* brief.

This brief was prepared by Jarvis, Fay, Doporto & Gibson, LLP, and represents its professional judgment. The Jarvis, Fay firm prepared and filed this brief as a pro bono service to the League of California Cities in compliance with subdivision (c)(3) of Rule 8.200.

JARVIS, FAY, DOPORTO & GIBSON, LLP

Dated: September 5, 2013

By: 

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AMICUS CURIAE BRIEF

I. INTRODUCTION

Appellant in this case challenges a city's award of a public works contract to the low bidder. Appellant argues that, as next lowest bidder, it should have been awarded the contract solely because one page of one form was omitted from the low bidder's sealed bid. In order to achieve this outcome, it asks the Court to abridge a city's discretion under well-established California law to waive minor bidding errors and accept a substantially compliant public bid.

It is a matter of statewide concern that municipalities retain discretion to make fact-based determinations of substantial compliance with bidding requirements. This discretion ensures that municipal public works contracts will generally be awarded to the lowest responsible bidder in a manner that is consistent with sound public policy.

Appellant's position contravenes the frequently stated public policy that bidding requirements be construed to benefit the public, and not to enrich disappointed bidders. "[T]he competitive bidding requirements on contracts for public works exist to protect the public rather than the bidders." (*Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* (2000) 24 Cal.4th 305, 311 (*"Kajima/Ray"*); internal quotation marks omitted.)

The facts in this case are simple, well-documented and undisputed. Respondent City of San Leandro ("City"), a California charter city, solicited bids for a public works project involving street improvements. Real Party in Interest and Respondent Oliver DeSilva, Inc., dba Gallagher & Burke ("G&B"), a general contractor, submitted the lowest bid, offering to construct the Project for $4,846,700. Appellant, a competing general contractor, submitted the next lowest bid, offering to construct the Project

for $5,359,725. Appellant's bid was $513,025 higher than G&B's low bid.

Appellant protested G&B's bid, claiming that G&B's bid was nonresponsive solely because the first page of G&B's bid bond was missing from its bid. The City agreed that this omission constituted a bidding irregularity, but waived the omission as inconsequential and awarded the contract to G&B. Appellant sued, seeking invalidation of the City's contract with G&B and an award of damages to Appellant.

Appellant proposes to elevate form over substance—literally, as well as figuratively—by urging that the City should have paid an 11 percent premium of over one half million dollars for Appellant to perform the identical work, just because of a missing page.

In order to achieve this inverse application of the general rule requiring award to the low bidder, Appellant proposes that this Court disregard established California law affording cities the discretion to waive inconsequential bid variances in substantially compliant low bids. Appellant seeks to accomplish its objective by 1) urging a change in current law to limit public agency discretion to waive minor bidding errors, and 2) by applying federal case law to obtain an outcome that it cannot achieve under California case law.

Appellant's theory rests entirely upon its speculation that delayed submittal of the missing page afforded G&B an advantage over other bidders, thereby precluding the City from waiving the variance of the missing page and awarding the contract to G&B as the lowest responsible bidder. Appellant speculates that ***if*** G&B chose not to honor its bid, and ***if*** G&B's bid bond was not enforceable because the page was missing from its bid envelope, then G&B ***could have*** abandoned its bid without financial consequence.

Those are big ifs, especially with a half million public dollars at stake.

Cities are not—and should not be—required to promote the speculative over the *actual* when making a fact-based determination to accept a substantially compliant low bid.

The change in law advocated by Appellant would have substantial statewide cost consequences by affecting award of municipal public works contracts throughout the State, as well as all other public contracts subject to public bidding requirements under State law.[1] Appellant's argument is unsupported by California law and directly conflicts with the maxim that public bidding requirements are intended to benefit the public, not to enrich bidders.

II. ARGUMENT

A. Cities are properly accorded discretion to waive inconsequential bidding informalities and award public contracts to responsible low bidders.

1. Municipal discretion to waive inconsequential informalities serves the policy objectives of State bidding requirements.

A well-developed body of California case law affirms that cities and other public agencies subject to public bidding requirements under State law (collectively, "awarding agencies"), have discretion to waive immaterial bid irregularities. (*MCM Construction, Inc. v. City and County of San Francisco* (1998) 66 Cal.App.4th 359, 374 (*"MCM"*) ["An agency has discretion to waive immaterial deviations from bid specifications…."].)[2]

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[1] One commentator estimates that there are over 100 competitive bidding statutes in California that generally require public contracts to be awarded to the "lowest responsible bidder." (1 Cal. Construction Contracts, Defects, and Litigation (Cont. Ed. Bar 2013) ("Cal. Construction Contracts") Public Works Contracts: Disputes and Remedies, § 6.20, p. 481.)

[2] Within this context, California courts appear to use the terms "immaterial," "inconsequential," or "nonsubstantive" as interchangeable; likewise the terms "error," "irregularity," "informality," or "variance" are also used interchangeably, presumably as a matter of Court preference.

California courts have adopted a practical approach in deferring to an awarding agency's discretion to waive immaterial bidding irregularities, an approach that is guided and informed by the express objectives of the Public Contract Code. "Competitive bidding provisions must be read in the light of the reason for their enactment, or they will be applied where they were not intended to operate and thus deny municipalities authority to deal with problems in a *sensible, practical* way." (*Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.4th 161, 173; emphasis added [quoting 10 McQuillin, Municipal Corporations (3d rev. ed. 1990) § 29.29, p. 375].)

This "sensible, practical" approach is appropriate given the frequency with which bidding issues arise. Bidding errors are commonplace for public works projects because these bids are almost always completed and assembled on a last-minute basis. A leading California construction law commentator, James Acret, describes the typical pre-bid process:

> "Mistakes are often made because subcontractors deliver their bids by telephone, usually within the last half hour before bid-opening time. [Reference omitted.] The prime contractor's staff receives the telephone bids, evaluates them, and assembles them for the prime bid. Because of the time pressure, several types of mistakes are possible…." (Cal. Construction Contracts, *supra,* Public Works Contracts: Disputes and Remedies, § 6.18, p. 479.)

When these mistakes arise, as they so often do, the threshold question for an awarding agency is whether or not a particular irregularity is immaterial. This Court stated the general rule for evaluating bidding irregularities in *Ghilotti Construction Co. v. City of Richmond* (1996) 45 Cal.App.4th 897 ("*Ghilotti*"), a decision which bears directly on this case:

> "A basic rule of competitive bidding is that bids must conform to specifications, and that if a bid does not so conform, it may not be accepted. [Citations.] However, it is further well established that *a bid which substantially*

> *conforms to a call for bids may, though it is not strictly responsive, be accepted* if the variance cannot have affected the amount of the bid or given a bidder an advantage or benefit not allowed other bidders, or in other words, *if the variance is inconsequential.* [Citations.]" (*Id.* at 904; emphasis added and internal quotation marks omitted.)

In *Ghilotti*, this Court endorsed a practical framework for evaluating bidding irregularities. The evaluation must be based upon facts and guided by the public interest, and not based on hypotheticals that serve the private interest of a disappointed bidder:

> "These considerations must be evaluated from a *practical rather than a hypothetical* standpoint, with reference to the *factual* circumstances of the case. They must also be *viewed in light of the public interest, rather than the private interest of a disappointed bidder.* 'It certainly would amount to a disservice to the public if a losing bidder were to be permitted to comb through the bid proposal or license application of the low bidder after the fact, [and] cancel the low bid on minor technicalities, with the hope of securing acceptance of his, a higher bid. Such construction would be adverse to the best interests of the public and contrary to public policy.'" (*Ghilotti, supra,* 45 Cal.App.4th at 908-909; emphasis added [quoting *Judson Pacific-Murphy Corp. v. Durkee* (1956) 144 Cal.App.2d 377, 383].)

The trial court's analysis and denial of Appellant's petition for writ of mandate was consistent with the practical, fact-based approach advocated in *Ghilotti.* The trial court's order specifically identified and discussed the relevant evidence it relied upon in concluding that the City's exercise of its discretion was supported by "substantial evidence." (Joint Appendix p. 257.)

By contrast, Appellant's approach relies solely upon hypothetical "what ifs" and improperly seeks to elevate a private bidder's interest in maximizing profit over—and at the expense of—the public interest in getting the best price for contracts paid for with public tax dollars. As such, Appellant's hypothetical approach is inconsistent with established

California case law and sound public policy.

Appellant frames its position in terms of fairness to bidders, which is indeed *one* of several express Legislative objectives in the California Public Contract Code ("PCC"):

> "The Legislature finds and declares that placing all public contract law in one code will make that law clearer and easier to find. Further, it is the intent of the Legislature in enacting this code to achieve the following objectives:
> (a) To clarify the law with respect to competitive bidding requirements.
> (b) To ensure full compliance with competitive bidding statutes as a means of *protecting the public from misuse of public funds*.
> (c) To provide all qualified bidders with a fair opportunity to enter the bidding process, thereby stimulating competition in a manner conducive to sound fiscal practices.
> (d) To eliminate favoritism, fraud, and corruption in the awarding of public contracts." (PCC § 100; emphasis added.)

While fairness to bidders is indeed important, California courts have consistently emphasized that protection of the *public interest* is the paramount objective of public bidding requirements:

> "We have stated that the competitive bidding statutes are enacted for the benefit of property holders and taxpayers, and not for the benefit or enrichment of bidders, and should be so construed and administered as to accomplish such purpose fairly and reasonably with *sole reference to the public interest*." (*Kajima/Ray, supra,* 24 Cal.4th at pages 316-317; emphasis added and internal quotation marks omitted [holding that a wrongfully rejected *low* bidder may only recover its bid preparation costs, but not lost profits].)

The City's action and the judgment below were both consistent with this mandate to act fairly and reasonably with sole reference to the public interest.

While Appellant pays lip service to the public interest, its argument for invalidating the award to the low bidder is transparently motivated by its

own economic interest. The approach advocated by Appellant would actually be *unfair* to a responsible bidder who has submitted a substantially compliant low bid that, under current law, may be accepted at the discretion of the awarding agency. That agency discretion should be preserved to protect the public interest, not abridged to serve the private self-interest of a disgruntled losing bidder.

2. Municipal discretion to waive inconsequential informalities should not be restricted in order to enrich disappointed high bidders.

Appellant effectively seeks a radical expansion of California case law pertaining to bids that may be withdrawn for mistake under the California Public Contract Code. PCC sections 5100-5110 provide that a bidder may seek to be relieved of its bid without forfeiting its bid security if it has made a mistake in filling out its bid, resulting in a bid amount that is "materially different" from what the bidder intended it to be. (PCC § 5103.) The mistake must be "in *filling out the bid* and not due to error in judgment or to carelessness in inspecting the site of the work, or in reading the plans or specifications." (PCC § 5103(d); emphasis added.)

The City's responding brief ("City's Brief") provides a cogent analysis and explication of California cases that stand for the proposition that an awarding agency may not waive bid mistakes that afford the bidder the opportunity to be relieved of its bid pursuant to PCC section 5103. (City's Brief, pages 19-22, citing *Menefee v. County of Fresno* (1985) 163 Cal.App.3d 1175 ("*Menefee*"); *Valley Crest Landscape, Inc. v. City Council of the City of Davis* (1996) 41 Cal.App.4th 1432 (*"Valley Crest"*); and *Ghilotti, supra,* 45 Cal.App.4th 897.)

The holdings in *Menefee, Valley Crest,* and *Ghilotti* all turn on whether a bidder has an advantage over other bidders because of a mistake in ***filling out a bid*** that allows the bidder to withdraw its bid without

forfeiting its bid security ***pursuant to PCC section 5103.*** In these cases, the "advantage" to that bidder is the opportunity to withdraw its defective bid under PCC section 5103 without forfeiting its bid bond. (*Menefee, supra,* 163 Cal.App.3d at 1180-1181.) Appellant seeks to extend this rule to mandate invalidation of a responsive low bid based solely upon a minor irregularity in the bid *process*, even where there is *no mistake in filling out the bid.*

The case before us does not involve a mistake in filling out a bid. Appellant does not allege that G&B could withdraw its bid for mistake under PCC 5103. Appellant's argument is entirely predicated on speculation that *if* G&B defaulted on its bid, its bid bond *might not* be enforceable because one page was missing from its bid envelope.

Appellant seeks an unprecedented expansion of the rule followed in *Menefee, Valley Crest,* and *Ghilotti*, which has thus far been limited to bids that can actually be withdrawn for mistake under PCC section 5103. Appellant's theory rests on the implicit assumption that a responsive low bid *must* be invalidated if the bid bond *might* not be enforceable. This is not a fair or reasonable extension of the rule applicable to bidding errors subject to relief under PCC section 5103. Appellant's proposed expansion of the rule would unduly limit the discretion of local public officials to accept substantially compliant low bids, and would thereby undermine the policy objective of avoiding misuse of public funds.

There is also an important analytical distinction between an existing statutory scheme that expressly permits a bidder to be relieved of its bid (i.e., PCC section 5103), and mere speculation that a bidder might abandon its bid without any lawful basis to do so. Speculation on a bidder's behavior should not be the basis for rejecting a responsive low bid from a responsible bidder. A determination of responsiveness is properly focused on the bid itself, not the bidder. "Usually, whether a bid is responsive can

be determined from the face of the bid without outside investigation or information." (*Great West Contractors, Inc. v. Irvine Unified School District* (2010) 187 Cal.App.4th 1425, 1453 (*"Great West"*) [holding that a school district improperly rejected a low bid as nonresponsive, based upon matters pertaining to the *bidder* rather than its *bid*].)

The existence of a "material" mistake, as defined in PCC section 5103, can generally be determined from the face of the bid, e.g., a typographical or arithmetical error that makes the *bid* materially different from what the bidder intended. (*Valley Crest, supra,* 41 Cal.App.4th at 1442.) For example, it can be *objectively* determined whether a decimal point has been misplaced, or whether there was an error in adding or multiplying the unit prices in the bid itself. By contrast, speculation as to whether a bidder *might* dishonor its bid, or whether a bid bond *might* be unenforceable requires an inquiry beyond the face of the actual bid.

Appellant's speculation-based approach would subvert the fact-based approach taken by our courts when deferring to local agency determinations. See, e.g., *MCM, supra,* 66 Cal.App.4th 359, 374-375 ["On questions of fact, we defer to the findings of the public agency, where supported by substantial evidence.... Whether in any given case a bid varies substantially or only inconsequentially from the call for bids is a question of fact." (Citation and internal quotation marks omitted)].

California courts have reasonably relied upon local public officials to make fact-based determinations about the materiality of bidding irregularities. Broad curtailment of agency discretion to evaluate the materiality of a bidding error based on the particular facts could needlessly hamstring awarding agencies by tipping the scales to favor the tidiest bid over the lowest bid. This would result in the very "misuse of public funds" that the Legislature expressly intended to avoid.

In addition to serving the public interest, the current judicial

approach is also consistent with the objective of fairness to bidders (ostensibly one of Appellant's central concerns). As noted above, it would be manifestly *unfair* to a responsible low bidder to invalidate its otherwise responsive low bid based upon a minor irregularity in the bidding process that does not affect the amount of its bid and does not afford it relief from the bid for a material mistake.

B. California cities should not be required to follow federal decisional law when awarding public contracts under State law bidding requirements.

Appellant relies extensively on federal law to support its argument that the City lacked discretion to waive delayed submission of the bid bond. (Appellant's Opening Brief, 22-29.) Respondent has capably distinguished the federal cases cited by Appellant. (City's Brief, 25-28.) Even if there were federal cases with directly relevant facts, "federal decisional authority is neither binding nor controlling in matters involving state law." (*Howard Contracting, Inc. v. G.A. MacDonald Construction co., Inc.* (1998) 71 Cal.App.4th 38, 52 [declining to rely on federal case law for a construction delay claim arising under State law].)

California law on public bidding is well-developed and consistent. One of the more recent appellate opinions on public bidding law, *Great West, supra,* 187 Cal.App.4th 1425, appends a footnote to the opening paragraph which contains a lengthy chronological "bibliography" of California state court published decisions bearing on public bidding. (*Id.,* at 1428, fn.1 [listing 28 opinions spanning from 1916 through 2010].) The court observed: "Because of its relation to the public treasury and its bearing on the public interest, public contract law has deservedly received considerable attention from the courts." (*Ibid.*) And: "For a topic on which there are so many published opinions, the case law bearing on public contract bidding is remarkably consistent." (*Id.* at 1447.)

Amicus encourages this Court to affirm the lower court's decision because it is based on well-established and directly relevant State law.

Appellant claims that "California courts regularly look to federal public contract law for guidance and authority because it is more fully developed than State law," and cites *Amelco Electric v. City of Thousand Oaks* (2002) 27 Cal.4th 228, 244-246 and *Pacific Architects v. State of California* (1979) 100 Cal.App.3d 110, 126, to support this proposition. (Appellant's Opening Brief, p. 23, fn. 3.)

Although the *Amelco* court examines some specific federal and extra-jurisdictional case law, the opinion does not support the assertion that California courts "regularly" look to federal public contract law because State law is inadequately well-developed. Appellant also relies upon an out-of-context sentence from *Pacific Architects v. State of California*, *supra*, 100 Cal.App.3d 110 at 126: "We are strongly persuaded by decisions relating to the federal procurement bidding." However, this case—and this particular sentence—addresses the question of whether a wrongfully rejected bidder should be able to recover the costs of preparing its bid. *Pacific Architects* does not address the discretion to waive inconsequential bidding errors.

There is no legal or practical basis to require California cities to follow federal decisional law based on federal requirements when awarding public works contracts governed by *State* and *local* public bidding requirements. Importing federal law to interpret State law on bidding would needlessly and detrimentally disturb the consistent body of California law as described in *Great West.*

III. CONCLUSION

This is truly a simple case. The City waived a minor irregularity in an otherwise responsive low bid, to the disappointment of the next highest bidder. The potential public cost consequences for the change in law

proposed by Appellant would be considerable. In this case, if the low bid was invalidated as urged by Appellant, it would have cost the City an additional half million dollars to perform the same work.

The issues raised in this case reach beyond municipal public works bidding and implicate contract awards by virtually every local agency in the State for any type of contract that must be awarded to the lowest responsible bidder. It is of statewide concern that awarding agencies retain discretion to waive inconsequential bidding irregularities based upon relevant facts, in a manner that is consistent with the express objectives of the California Public Contract Code and established California case law.

Therefore, Amicus respectfully requests that this Court affirm the decision of the trial court.

JARVIS, FAY, DOPORTO & GIBSON, LLP

Dated: September 5, 2013

By: 

Clare M. Gibson
Attorneys for *Amicus Curiae*
LEAGUE OF CALIFORNIA CITIES

WORD COUNT CERTIFICATION

I certify that this brief and accompanying application contains a total of 3478 words as indicated by the word count feature of the Word Perfect computer program used to prepare it.

Dated: September 5, 2013

Clare M. Gibson

DECLARATION OF SERVICE

I, the undersigned, declare as follows:

I am a citizen of the United States and employed in the County of Alameda; I am over the age of eighteen years and not a party to the within entitled action; my business address is Jarvis, Fay, Doporto & Gibson, LLP, 492 Ninth Street, Oakland, California 94607.

On September 6, 2013, I served the within

APPLICATION OF THE LEAGUE OF CALIFORNIA CITIES TO FILE *AMICUS* BRIEF IN SUPPORT OF RESPONDENT CITY OF SAN LEANDRO; PROPOSED BRIEF OF *AMICUS CURIAE*

on the parties in this action, by placing a true copy thereof in a sealed envelope, each envelope addressed as follows:

Chris A. McCandless Diepenbrock Elkin, LLP 500 Capitol Mall, Suite 2200 Sacramento, CA 95814	*Attorneys for Petitioner and Appellant BAY CITIES PAVING & GRADING, INC.*
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Supreme Court of California 350 McAllister Street San Francisco, CA 94102	**1 copy served electronically per California Rule of Court 8.212(c)(2)**

I caused each such envelope, with postage thereon fully prepaid, to be placed in the United States mail to be mailed by First Class mail at Oakland, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on September 6, 2013, at Oakland, California.

Jennifer Oberholzer