S225398

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

ROY ALLAN SLURRY SEAL, INC., et al.
Plaintiffs and Appellants,

v.

AMERICAN ASPHALT SOUTH, INC.
Defendant and Respondent.

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND PROPOSED *AMICUS CURIAE* BRIEF OF THE LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF NO PARTY

Review of a Published Decision of the
Second Appellate District, Division Eight, No. B255558

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APPLICATION FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF

TO THE HONORABLE CHIEF JUSTICE OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to Rule 8.520, subdivision (f), the League of California Cities (the "League") respectfully requests permission of the Chief Justice to file the accompanying neutral *amicus curiae* brief in support of no party to this case.

The League is an association of 474 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 significance. The Committee has identified this case as having such significance because of the potential consequences this decision may have for California cities—and for all public agencies subject to competitive bidding requirements under the Public Contract Code.

This case arises from a dispute between private parties over the award of 23 public contracts by 16 California cities and one county. (*Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc.* (2015) 184 Cal.Rptr.3d 279, 282, fn. 1 ("*Slurry Seal*").) Although the case is directly concerned with public bidding law, none of the awarding agencies is a party to this case, and the issues are addressed solely within the context of competing private interests. The *amicus* brief advises this Court of the potential impact of this case on public bidding law, focusing on the practical consequences for cities and other public agencies. The League

believes that its perspective will assist the Court in deciding this matter and in crafting a holding that will preserve a public agency's broad discretion to reject bids and avoid creating new incentive for losing bidders to challenge public bid awards.

In this case, the Court of Appeal concluded that a second-place bidder attains an "actionable economic expectancy" in a public contract once the contract is awarded to the low bidder. (*Slurry Seal, supra,* at 288.) The majority opinion relies on this conclusion to establish the first element necessary for pleading intentional interference with prospective economic advantage against the low bidder: the "existence of an economic relationship" with the awarding agency with a probable future economic benefit. (*Id.* at 284.) Based on this reasoning, the opinion holds that a second-place bidder may state a tort cause of action against a competing bidder for interference with that prospective economic advantage.

However, the majority opinion fails to fully consider inconsistent public bidding law or the potential consequences of its reasoning and holding for cities and other public agencies. Under established California law, because public agencies have broad discretion to reject all bids, a bidder can never gain legal entitlement to a public contract. (*Kajima/Ray Wilson v. City of L.A. Cnty. Metro. Trans. Authority* (2000) 23 Cal.4th 305, 315.) The conclusion that a second-place bidder may be entitled to an "actionable economic expectancy" cannot be harmonized with this well-established principle without limiting the right to reject bids. The majority's reasoning could lead to erosion of this right by creating new precedent for the proposition that the discretion to reject any or all bids terminates upon award to a low bidder. In addition, creating a new tort right of action for losing bidders will almost certainly increase legal challenges to public bid awards, thereby increasing the cost of public bidding for cities and other public agencies in California.

An expansive discretion to reject bids is fundamental to responsible management of public project funding. If bids for a public project exceed available funding, the ability to reject the bids permits an agency to operate within its budget. However, under the majority's holding, once a public agency has awarded a contract to a low bidder, a second-place bidder may plead the existence of an economic relationship with a public agency by alleging that it was the second lowest bidder and "therefore would have otherwise been awarded the contract" by the public agency. (*Slurry Seal, supra,* at 305.) This holding is premised on an implicit assumption that once a public agency awards a contract to a low bidder, it is fully committed to awarding that contract and loses its right to subsequently reject bids. It fails to account for the not-uncommon circumstances where a contract awarded to a low bidder is not consummated—circumstances which are specifically addressed by the Public Contract Code.

The discretion to reject bids must necessarily continue beyond award to the low bidder. Otherwise, if a contract awarded to a low bidder is not consummated—for any reason—a public agency would lack authority to reject the remaining, higher bids. Arguably, it could be compelled to award the contract to the second-place bidder, regardless of the second-place bid amount.

A second-place bidder already has economic incentive to seek disqualification of a low bidder in hopes of securing the contract for its higher price. Under current law it may only *hope* for the contract; it can have no "economic expectancy" because the awarding agency may still elect to reject all bids. The majority's reasoning could raise the stakes by providing precedent to support a losing bidder's claim of entitlement to a public contract.

Creation of a new private right of action between competing bidders is also likely to have indirect adverse impacts on cities and other public

agencies. Awarding agencies may be caught in the cross-fire of litigation between private parties and required to allocate limited staff resources in response to witness subpoenas, document demands, and the like. A public agency may also have to defend against demands for an injunction to halt progress on a project while the bidders bicker in court.

These outcomes are neither necessary nor useful for addressing bidding improprieties such as those alleged by Plaintiffs and Appellants. There are already comprehensive remedies and safeguards in place to address such private disputes. Municipal contracts may only be awarded to the responsible low bidder. (Pub. Cont. Code, § 20162.) If presented with evidence of a low bidder's malfeasance—regardless of whatever the alleged improper conduct may be—a public agency may, subject to due process requirements, disqualify that bidder as not "responsible." But once a low bidder is disqualified, or if the contract is not consummated for other valid reasons, a public agency must not be compelled to award the contract to the next lowest bidder. It must retain the ability to reject any bid it cannot afford, or that is not in the best interest of the public.

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 neutral *amicus* brief primarily addresses legal and policy issues impacting cities and other public agencies, which were not fully considered in the parties' briefs. In compliance with subdivision (f)(4) of Rule 8.520, the undersigned represents that her firm authored this brief in its entirety on a pro bono basis and is paying for its entire cost, and that no party to this action or any other person either authored this brief or made any monetary contribution to fund the preparation or submission of this brief.

We believe there is a need for additional briefing on this issue, and hereby request that leave be granted to allow the accompanying *amicus curiae* brief to be filed.

JARVIS, FAY, DOPORTO & GIBSON, LLP

Dated: December 8, 2015

By: 

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

AMICUS CURIAE BRIEF

I. INTRODUCTION

This case pertains to public contract bidding, but no city or other public agency is a party to this case. If unmodified, the Court of Appeal's holding—that a second-place bidder acquires an "actionable economic expectancy" in a public contract[1]—will have unintended adverse consequences for cities and other public agencies subject to competitive bidding requirements under the Public Contract Code. This *amicus* brief is intended to address public agency concerns which were not fully considered by the Court of Appeal or the parties to this case.

The question addressed by the Court of Appeal was whether "the second-place bidder on a public works contract [may] state a cause of action for intentional interference with prospective economic advantage against the winning bidder if the winner was only able to obtain lowest bidder status by illegally paying its workers less that the prevailing wage." (*Slurry Seal,* at 282.) The majority opinion responded in the affirmative:

> "We hold that the answer is yes if the plaintiff alleges it was the second lowest bidder and *therefore would have otherwise been awarded the contract,* because that *fact* gives rise to a relationship with the public agency that made plaintiff's award of the contract reasonably probable." (*Ibid*; emphasis added.)

There is no basis for the sweeping assumption that the contracts "would have otherwise been awarded" to a higher bidder. The holding, and the assumption upon which it is based, are inconsistent with and unsupported by well-established law that a bidder can never have an "economic

[1] *Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc.* (2015) 184 Cal.Rptr.3d 279, 288 (hereinafter "*Slurry Seal*").

expectancy" in a public contract because of a public agency's broad discretion to reject all bids.

Under the Public Contract Code,[2] the fundamental requirement for competitive public bidding by cities and other public agencies is that the contract may only be awarded to the lowest responsible bidder. (§ 20162.) However, contrary to the implied assumption in the majority's holding, that does not mean that a public agency soliciting bids *must* award the contract to one of the bidders. Acceptance of a low bid should not translate to *de jure* acceptance of a higher bid.

The League's concerns with this case are twofold. First, it is concerned with the analytical underpinnings of the appellate court's determination that upon award of a contract to a low bidder, the second-place bidder attains an "economic expectancy" in that contract. That determination implies that the awarding agency lacks discretion to reject the second-place bid. Because a public agency has discretion to reject the bids, even "the lowest bidder has no absolute right to be awarded the contract." (*Kajima/Ray Wilson v. L.A. Cnty. Metro. Trans. Authority* (2000) 23 Cal.4th 305, 315 ("*Kajima/Ray*").) It follows, then, that an "economic expectancy" in award of a public contract can only arise if a public agency lacks discretion to reject the bids. Thus, the appellate court's holding is predicated on an implicit and incorrect assumption that the discretion to reject bids expires upon award of a contract—even if the contract is not yet consummated.

Second, creation of a new private right of action for second-place bidders will add to existing incentives for a second-place bidder to challenge public contract awards, either to gain the contract at a higher

[2] All code section references are to the Public Contract Code unless otherwise specified.

price or to recover alleged lost profits from the low bidder. If this holding stands, public agencies can expect an increase in direct challenges from losing bidders seeking to secure a public contract at a higher price. Public agencies are also likely to incur added costs and delay in delivery of public projects as an indirect result of private lawsuits between competing bidders. Any uptick in litigation over public contracts will necessarily place additional demands on limited court resources as well. None of this is necessary given the legal remedies already available to address bidding improprieties.

The appellate opinion relies extensively on this Court's decision in *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, a case concerned with tortious interference with a prospective economic advantage between competing bidders. However, the awarding agency in that case was the Korean government—not a city or public agency subject to the Public Contract Code. As such, *Korea Supply* does not provide adequate guidance to the lower courts for considering this tort in the context of competitive bidding under the Public Contract Code.

While the underlying case arises from alleged violations of State prevailing wage laws, this brief does not address the merits or general objectives of those laws. Similarly, this neutral brief is not submitted in support of either party to the case. Rather, this *amicus* brief is solely focused on the legal and policy implications of the appellate holding with respect to cities and other local public agencies subject to competitive bidding requirements.

II. ARGUMENT

A. Because a public agency's discretion to reject bids does not terminate upon award to a low bidder, a second-place bidder is not entitled to a legally protected "economic expectancy" in the award of a public contract.

1. An award of a public contract to a low bidder should not be construed as a commitment to award to a higher bidder.

The Court of Appeal's holding hinges on the erroneous assumption that a public agency's award to a low bidder means it is unequivocally committed to awarding the contract. It assumes that an awarding agency has a binary choice to either award the contract to a bidder *or* reject all bids. It does not consider a third possibility: that a public agency could award to a low bidder *and* subsequently reject bids if the contract is not consummated with the low bidder.

Circumstances under which an award to a low bidder does not result in consummation of a contract are specifically contemplated by the Public Contract Code. A low bidder may seek to withdraw its bid for material error under section 5103. Or a low bidder might fail or refuse to execute the contract, as contemplated by section 20174. Under these scenarios, is subsequent award to the second-place bidder "reasonably probable," as assumed by the appellate court? (*Slurry Seal*, *supra*, at 284.) Not necessarily.

For example, under current law, if a low bid does not result in a contract and the second-place bid exceeds the project budget, the awarding agency may exercise its discretion to reject all remaining bids and redesign the project to fit its budget. By contrast, to apply the appellate court's reasoning, the act of awarding to the low bidder implicitly terminates the option to subsequently reject bids, and commits the agency to award the contract to the second-place bidder. It improperly assumes that exercising

the choice to award a contract terminates the option to reject bids. This assumption is inconsistent with and unsupported by public bidding laws and the policies those laws are intended to serve.

The majority's opinion did not consider the implications for public agency discretion to reject bids when it concluded that an award to a low bidder evidences an unconditional intent to award the contract:

> "[W]e conclude that an actionable economic expectancy arises when the public agency awards a contract to an unlawful bidder, thereby signaling that the contract would have gone to the second lowest qualifying bidder." (*Id.* at 288.)

Awarding a contract to a low bidder does not signal anything other than an agency's intent to enter into a contract based on the low bid. It does not signal anything at all with respect to higher bids.

2. Cities and other public agencies have broad discretion to reject any bids.

Cities have broad discretion to reject bids, without any limitations or restrictions. Section 20166, which pertains to city contracts for public projects, provides: "In its discretion, the legislative body may reject *any* bids presented and readvertise." (Emphasis added.) This authority is unqualified. "The courts have consistently refused to interfere with the exercise of a public body's right to reject bids, however arbitrary or capricious." (*Universal By-Products, Inc. v. City of Modesto* (1974) 43 Cal.App.3d 145, 153.) Similar discretion to reject bids is specifically accorded to other public agencies, including the State.[3]

Because of this broad discretion to reject bids, it is well-established that no bidder—not even a low bidder—can claim any legal entitlement to

[3] *See, e.g.*, §§ 10122(d) and 10185 (state contracts), § 20111 (school districts), §§ 20130 and 20150.9 (counties), and § 20651 (community college districts).

award of a contract for a public project. (*Kajima/Ray, supra*, at 315; see also *Harney v. Durkee* (1951) 107 Cal.App.2d 570, 580 ["No right exists in the lowest bidder to have his bid accepted where the statute confers the power to reject all bids"].) At best, even the low bidder has only the possibility of award because the public agency reserves the right to reject all bids. (§ 20166.) But the appellate court's reasoning fails to account for the discretion to reject bids:

> "We conclude that plaintiffs, as the alleged lawful lowest bidders, had a *tangible expectancy* the contracts would be theirs, an expectation that was thwarted only by American's unlawful conduct." (*Slurry Seal, supra*, at 288; emphasis added.)

No such "tangible expectancy" can arise under established law because of the right to reject bids.

There is a necessary tension between the strict limitations on awarding public contracts and the expansive discretion to reject bids. When a city elects to award a contract, it may only award to the "lowest responsible bidder" (subject to exceptions not relevant here). (§ 20162.) This constraint on award of public contracts serves two purposes. It protects public funds by ensuring the lowest price for public projects and also stimulates competition among bidders to provide the lowest price.

By contrast, a city's discretion to reject bids under section 20166 is broad and unqualified. This asymmetry is logical; whereas the act of awarding a bid leads to expenditure of public funds, the act of rejecting a bid is a decision *not* to spend. The broad discretion to reject bids ensures that a public agency is not compelled to enter into a contract that it cannot afford or that is otherwise contrary to the public interest.

The discretion to reject bids is essential to prudent management of public funds. In addition to rejecting bids that exceed available funding, a public agency may also need to reject bids for other reasons. The right to

reject bids and cancel a project serves the public interest when there has been a change in circumstances affecting the need for the project or a shift in priorities. This important right should not be curtailed just because a bidder submits the lowest bid solely due to malfeasance—including, but certainly not limited to, non-compliance with prevailing wage laws. The bidder should be penalized rather than the awarding agency.

3. The implicit assumption that a public agency's discretion to reject bids terminates upon award to a low bidder is inconsistent with and unsupported by established law and public policy.

The potential consequence of the majority's holding would be to establish new legal precedent that could be used to erode a public agency's expansive right to reject bids. The dissenting opinion provides the better-reasoned argument, an argument based upon established public bidding law:

> "It is antithetical to the principles of competitive bidding on public works projects that any bidder may expect probable future economic benefit—*none* of the bidders has a "probability" of future economic benefit from the contract on which it is bidding." (*Slurry Seal*, *supra*, at 299; emphasis in original.)

Until a contract is actually consummated, there cannot be a *probability* of future economic benefit. At best, there exists only the *possibility* of future economic benefit—even for the low bidder.

The implied assumption that the discretion to reject bids ends upon award to a bidder is inconsistent with section 20174, which specifically addresses circumstances under which a city's award to a low bidder does not result in a contract:

> "The city council *may*, on refusal or failure of the successful bidder to execute the contract, award it to the next lowest bidder. *If* the legislative body awards the contract to the second lowest bidder, the amount of the lowest bidder's security shall be applied by the city to the difference between

> the low bid and the second lowest bid, and the surplus, if any, shall be returned to the lowest bidder if cash or a check is used, or to the surety on the bidder's bond if a bond is used." (Emphasis added.)

Section 20174 is instructive in two ways. First, legislative enactment of this provision indicates that it is not uncommon that a municipal contract awarded to a low bidder is not consummated.[4] Second, it is significant that the Legislature does not assume (or require) that when an award to a low bidder does not result in a contract, a city will absolutely award to another bidder. Under section 20174, awarding to another bidder is permissive, not mandatory: a city "may" award to the next lowest bidder. Because it is not required to do so, it implicitly retains the right conferred by section 20166 to reject all bids. The Court of Appeal's holding does not accord with sections 20166 and 20174, and does not account for circumstances where a contract is awarded but not executed.

Likewise, the implication that a city or other public agency could be compelled to award a contract—particularly a higher priced contract—is inconsistent with and undermines the express legislative objectives of the Public Contract Code, including the objective of "protecting the public with misuse of public funds" and stimulating "competition in a manner conducive to sound fiscal practices." (§ 100.)

The appellate opinion asserts that creating a private right of action against a bidder that has violated prevailing wage laws is justified by the interest of serving the policy objectives of prevailing wage requirements:

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[4] Each bidder must submit security with its bid in the amount of ten percent of its bid price to ensure its execution of the contract. (§§ 20170-20172.) An award of a municipal contract subject to competitive bidding is conditional: the awarded bidder must execute the contract and must generally provide the bonds and insurance documents required by the bid documents.

> "We believe that sound policy reasons support our recognition that the intentional interference tort applies here. The central purpose of the prevailing wage law is to protect and benefit employees on public works projects." (*Slurry Seal*, *supra*, at 289.)

The nature of the tort remedy contemplated in this case is money damages: if successful, a second-place bidder will benefit from the improprieties of the low bidder. This outcome serves private interests rather than public policy. "The competitive bidding statutes are for the benefit and protection of the public, not the bidders." (*Universal By-Products, supra*, 43 Cal.App.3d at 152.)

To be clear, the League does not comment in this brief on the merits of prevailing wage laws or the policy objectives they are intended to advance. But the appellate court fails to account for the additional important policy objectives of competitive bidding requirements. There is no reason that a city's discretion to reject bids should terminate upon award to a bidder that used any improper or unlawful means to reduce the amount of its bid. As discussed below, other relief is available.

B. Creation of a new private right of action for losing bidders will result in adverse consequences for awarding agencies.

1. Losing bidders will have additional incentive to directly challenge awards to low bidders.

The League's member cities are often required to address bid challenges from losing bidders, many of which are based on trivial bidding errors. (*See, e.g.*, *Bay Cities Paving & Grading, Inc. v City of San Leandro* (2014) 223 Cal.App.4th 1181 [rejecting a second-place bidder's claim that a low bid was fatally defective due to the low bidder's inadvertent failure to include a pre-printed page from a bond form in its sealed bid].) Bid protests and ensuing legal challenges are costly to the taxpayers and can lead to delay in delivery of important public projects and infrastructure repairs.

If a second-place bidder is deemed to have "an actionable economic expectancy" that arises upon award to the low bidder, that second-place bidder will have new legal grounds to argue that a city is now compelled to award to the higher bidder if the contract with the low bidder is not consummated for any reason. It will also add new incentive for higher bidders to challenge bid awards. And the higher the bid, the greater the financial incentive for the losing bidder to challenge the city's award. That incentive will predictably result in an increase in challenges by losing bidders, and with it an increase in the costs and risks associated with award of public contracts.

The majority is dismissive of the argument that its holding "is bad public policy because it will open the floodgates to actions by disappointed bidders." (*Slurry Seal, supra,* at 294.) However, that argument is framed from a private contractor's perspective, based on the concern this would "lead to the release of a defendant's confidential and proprietary trade information through pretrial discovery." (*Id.* at 289.) It does not fully consider the concern that upholding a right of action based upon an "economic expectancy" in a public contract will result in increased litigation by disappointed bidders.

2. Public agencies will be adversely impacted by lawsuits between competing bidders.

Even litigation such as this case, that is limited to private bidders, will adversely impact public agencies. It is likely that public officials would be called upon as witnesses, or subject to voluminous document requests under the California Public Records Act (Gov. Code, §§ 6250 *et seq.*), solely to further the plaintiff's interest in securing a public contract at a higher price.

Creation of a new private right of action will also provide new opportunities for using the threat of litigation to bully low bidders into

forfeiting their bids. A second low bidder may sue or threaten to sue a low bidder to leverage a settlement under which the low bidder agrees to withdraw its bid, thereby enabling the plaintiff to secure the contract at its higher price. While the low bidder would forfeit its bid security under section 20172, that may be less costly than defending against litigation initiated by an aggressive second-place bidder.

3. Existing law provides adequate remedies to address improper bidding practices.

The appellate court suggests that its holding is necessary to avoid improprieties in the bidding process:

> "If we affirm [the trial court's ruling against plaintiffs], we would effectively hold that no losing bidder could ever sue a competitor for interfering with the bidding process no matter how egregious the misconduct because no economic relationship exists until and unless its bid is accepted. [fn] It does not require much imagination to envision a contractor who obtains a public works contract by bribery, extortion, or familial connections." (*Slurry Seal*, *supra*, at 289.)

A city's discretion to *not* award a contract should not be abridged because of a low bidder's malfeasance. Other remedies are available to address improper bidding practices. "Moreover, prudence is warranted whenever courts fashion damages remedies in an area of law governed by an extensive statutory scheme." (*Kajima/Ray*, *supra*, at 314.)

In fact, the Legislature has already provided such an "extensive statutory scheme" to ensure a fair, competitive bidding process and to protect against the evils envisioned by the appellate court: the Public Contract Code.

> "[The] Legislature's intent in enacting [the] Public Contract Code includes 'ensur[ing] full compliance with competitive bidding statutes as a means of protecting the public from the misuse of public funds,' 'provid[ing] all qualified bidders with a fair opportunity to enter the bidding process, thereby stimulating competition in a manner conducive to sound

> financial practices,' and 'eliminating favoritism, fraud, and corruption in the awarding of public contracts.'"
> (*Kajima/Ray*, *supra*, at 314.)

Any public contract that is awarded without compliance with applicable bidding requirements is void and unenforceable. The "failure to publicly bid contracts when required by statute renders them void so that the public entity may not reimburse a contracting party for service or materials the agency has been provided." (*Miller v. McKinnon* (1942) 20 Cal.2d 83, 89-92.) It has long been the general rule that a contractor is not entitled to payment, not even quantum meruit, for work performed under an unlawful public contract. (*Id.* at 88.)

Under existing law, a cheating low bidder can be disqualified without infringing on a city's discretion to reject bids, and without the need for a private right of action or judicial intervention. A city may only award to the lowest "responsible" bidder. (§ 20162.) One of the attributes of a "responsible" bidder, as defined in section 1103, is "trustworthiness." A bidder who violates the law to secure a public contract is not trustworthy, and therefore not a "responsible bidder." If a bidder is not "responsible," the city would lack legal authority to award to that bidder.

If a second-place bidder knows, or believes, that a low bidder reduced its bid price by some improper means, the second-place bidder may file a bid protest with the awarding agency, or otherwise notify the agency that there are grounds for disqualifying the bidder as not "responsible." It would better serve the objectives of public bidding laws if a disappointed bidder immediately alerted an awarding agency of a low bidder's malfeasance, instead of sitting back and pursuing private damages in the courts at a later date.

A judicial remedy is also available in the event an improper award is made to a cheating bidder. "California courts long ago authorized a

disappointed bidder to seek a writ of mandate to have a contract set aside." (*Kajima/Ray*, *supra*, at 314.)

In sum, creating a new right of recovery for second-place bidders is not necessary to ensure a fair bidding process, and it is ill-advised since it will result in adverse impacts to public bidding in conflict with established law and policy.

III. CONCLUSION

The Court of Appeal's opinion is predicated on the unsupported and unwarranted implicit assumption that a public agency's discretion to reject bids terminates upon an award to a low bidder. The opinion does not adequately consider the potential consequences of its holding for cities and other public agencies, and ultimately for the tax-paying public. Unless the holding is modified, any time a low bid does not result in a contract—whether due to the low bidder's malfeasance or its mere failure to execute the contract—the second-place bidder may allege a legally cognizable entitlement to award of that public contract.

The majority's reasoning would have created new precedent for improperly restricting a public agency's discretion to reject bids and would have added new financial incentive for losing bidders to challenge public contract awards. This Court should not adopt that reasoning in deciding this case. A second-place bidder should not enjoy a legal interest in a public contract that is not available to other bidders—not even the low bidder. Likewise, a public agency should always have the discretion to decline to award a contract that is not in the public's best interest.

Amicus Curiae respectfully request the Court to reach a decision that preserves a public agency's continued right to reject bids following an

award to a low bidder, and that will not result in increased challenges to public bid awards.

JARVIS, FAY, DOPORTO & GIBSON, LLP

Dated: December 8, 2015

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 **5,177** words as indicated by the word count feature of the Microsoft Word computer program used to prepare it.

Dated: December 8, 2015

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 December 8, 2015, I served the within

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND PROPOSED AMICUS CURIAE BRIEF OF THE LEAGUE OF CALIFORNIA CITIES

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

Daniel William Doyle David Klehm Doyle Schafer McMahon 100 Spectrum Center Drive, Suite 520 Irvine, CA 92618	*Attorneys for Plaintiff and Appellant ROY ALLAN SLURRY SEAL, INC.*
Paul Szumiak Scott Karl Dauscher Jennifer Debutts Cantrell Atkinson Andelson Loya et al. 12800 Center Court Drive, Suite 300 Cerritos, CA 90703	*Attorneys for Defendant and Respondent AMERICAN ASPHALT SOUTH, INC.*
California Court of Appeal Second Appellate District, Division 8 300 S. Spring Street, Floor 2, N. Tower Los Angeles, CA 90013-1213	

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 December 8, 2015, at Oakland, California.

Jennifer Oberholzer