

Case No. B235067

**COURT OF APPEAL OF CALIFORNIA
SECOND APPELLATE DISTRICT
[Division Six]**

WAYNE VINCIGUERRA,
Petitioner/Plaintiff and Respondent,

v.

CITY OF SAN LUIS OBISPO,
Respondent/Defendant and Appellant;

D'ARCY AND HARTY CONSTR TUCTION, INC.,
Real Party in Interest and Respondent.

Superior Court for the County of San Luis Obispo
The Honorable Charles S. Crandall
San Luis Obispo County Superior Court Case No. CV100707

**BRIEF OF *AMICUS CURIAE*,
LEAGUE OF CALIFORNIA CITIES**

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I. SUMMARY OF THE ARGUMENT.

The instant appeal involves the question of whether the City of San Luis Obispo (“City”) lawfully rejected Vinciguerra Construction’s (“Vinciguerra”) bid as non responsive for failing to provide required references. However, the Superior Court’s Judgment and Order (“Order”) raises broader questions as to cities’ authority to request, in solicitation documents for public works projects, references demonstrating past experience, and the procedures required when cities evaluate a question of bidder responsibility. These broader questions are discussed below.

The City’s solicitation document required bidders to have experience constructing similar projects using the pipe bursting method, and to identify five references from similar, recent projects demonstrating that experience. Joint Appendix (“JA”), Vol. 2, at 226-27. In ruling on whether Vinciguerra’s bid properly was rejected, the court characterized the issue as “whether the information and level of detail sought through the City’s prior experience requirements . . . is lawful.” *Id.*, Vol. 3, at 720. The court ultimately and improperly concluded that the City’s competitive bidding process was “defective and contrary to law.” *Id.* at 724. In reaching that conclusion, the court essentially concluded that a city could not specify minimum standards of experience that bidders must meet, or require references supporting such experience, unless the right to do so was expressly provided for by statute or ordinance. To the contrary, a city has the discretion to define standards of responsibility (experience) that bidders must meet, and to reject any bidder that fails to meet reasonable standards.

In addition to objecting to references, the court expressed concern over “the City’s attempt to blur the distinction between *responsiveness* and *responsibility*.” *Id.* at 721. Vinciguerra addresses that distinction by asserting that questions of responsiveness may only address future performance, while responsibility only addresses past performance. Respondent’s Brief at 7. That position is inaccurate and too narrow. The distinction is defined by the caselaw as whether or not a bidder complies with the bidding instructions. As noted, cities have the authority to identify and enforce experience standards in evaluating responsibility. If a bidder fails to provide the references required by the bidding instructions, its bid may be non-responsive.

Finally, the court concluded that the City “made a responsibility determination by summarily denying Vinciguerra’s bid as nonresponsive” and objected that the label placed on the hearing was “responsiveness,” not “responsibility.” JA, Vol. 3, at 722, 723. Similarly, Vinciguerra asserts that it had an inadequate opportunity to respond to the City’s concerns. Respondent’s Brief at 29-30. In fact, Vinciguerra was provided notice that its references did not demonstrate the experience sought by the City, given the opportunity to submit written material addressing the City’s concern, and given an opportunity to brief and argue an appeal of the City’s decision. JA, Vol. 2, at 239 (notice of City’s concerns), 241 (notice regarding appeal), 242-45 (response, including arguing that Vinciguerra is responsible), and 246-55 (appeal). This process appears to satisfy the due process standards set forth in *City of Inglewood-Los Angeles County Civic Center Auth. v. Superior Court*, 7 Cal.3d 861 (1972). As long as due process required by *City of Inglewood* was provided,

the label applied to the determination should not invalidate the rejection of Vinciguerra's bid.

As explained below, the League requests that this Court 1) confirm that cities may require references to establish experience standards; 2) confirm that failure to respond to matters related to responsibility may render a bid non-responsive; and 3) clarify the due process required for a responsibility hearing.

II. ARGUMENT.

A. **The Public Contract Code Does Not Preclude Cities From Including Experience Qualification Requirements Or Requiring References In Their Solicitation Documents.**

1. **The Court's Order Indicates That Cities, As A Matter Of Law, Are Precluded From Requiring Bidders To Provide References Supporting An Experience Standard.**

The City's solicitation document required bidders to have "experience constructing projects similar to the work specified for this project," to provide "satisfactory evidence" of at least five years' experience "installing pipe using the pipe bursting method," and to "provide qualifications and references for **five** similar Public Works projects completed as either the prime or subcontractor." JA, Vol. 2, at 226-27. In ruling on whether Vinciguerra's bid properly was rejected, the court characterized the issue as "whether the information and level of detail sought through the City's prior experience requirements . . . is lawful."¹ *Id.*, Vol. 3, at 720.

¹ As discussed below, the court also was concerned with what it viewed as a responsibility determination without due process. JA, Vol. 3, at 721-22.

Specifically, the court considered “whether the City had any special, valid procedures that would allow it to **deviate** from the Public Contract Code.” *Id.* at 720 (emphasis added). In identifying the applicable requirements of the Public Contract Code, the court stated that both the City Charter and the Public Contract Code “mandate that the public project go to the lowest responsible bidder.” *Id.* at 721. The court further acknowledged that a responsible bidder under either the Public Contract Code or City Charter is one who has, among other traits, the “experience to satisfactorily perform the public project.” *Id.* The court noted that the City “concedes that its Charter is silent as to how a ‘lowest responsible bidder’ should be determined,” and the court did not identify any statute governing how responsibility is to be determined. *Id.* However, the court did note that due process is required in rejecting a bidder for lack of responsibility. *Id.* at 722.

In its analysis, the court stated that “the City wrongfully included prior experience requirements in the pre-bid process” *Id.* at 722 n.2. The court found “no conflict or exemption [in the City charter] that would allow the City to deviate from state law.” *Id.* at 720. The court also concluded that “the City made a responsibility determination by summarily denying Vinciguerra’s bid as nonresponsive” without considering whether Vinciguerra had the experience and expertise to perform the work. *Id.* at 722-23. Ultimately, the court concluded that the City’s “competitive bidding process” was “defective and contrary to law.” *Id.* at 724.

The Order is unclear whether the defective process was defining experience requirements and seeking references with a bid,

or the lack of a responsibility hearing, or both. However, the fact that the court awarded attorneys' fees indicates that it at least considered the defect to be the experience and reference requirements. An award of attorneys' fees requires a "significant benefit . . . conferred on the general public or a large class of persons." Civ. Proc. Code § 1021.5. The absence of a responsibility hearing in a single procurement would not satisfy that factor. Thus, the court's Order reasonably is interpreted to prohibit a city from establishing experience standards and requiring references to support those standards. *See also* Appellant's Opening Brief at 6 (identifying one issue raised by the Order as "whether the Public Contract Code precludes the City from exercising its discretion to require references of similar work").²

2. The City's Process Of Establishing Experience Standards And Requesting References Was Consistent With State Law.

As acknowledged in the court's Order, cities may only award a public works contract to a responsible bidder. Because cities are obligated to determine bidder responsibility as part of the contract award procedure, the question is whether any limitation on the authority to make that determination exists. Although cases require due process prior to rejecting a bidder as not responsible, the Order cites no legal requirement limiting either information that may be sought or the process for seeking such information during bidding.

² Vinciguerra asserts that the "trial court did not make any specific finding that the information could not be sought." Respondent's Brief at 15. However, the Order is at least ambiguous as to whether experience standards may be established and references may be sought in a bid, a critical concern for California cities.

Further, the Order cites no authority limiting a city's discretion to determine the standards by which responsibility will be judged. To the contrary, cases reflect that cities have substantial discretion to make such determinations. See *M & B Const. v. Yuba County Water Agency*, 68 Cal. App. 4th 1353, 1361 n.3 (1999) (noting "that contracting entities are vested with great discretion in determining whether a bidder is responsible"); *Mike Moore's 24-Hour Towing v. City of San Diego*, 45 Cal. App. 4th 1294, 1303 (1996) (stating that the ". . . 'letting of contracts by a governmental entity necessarily requires an exercise of discretion guided by consideration of the public welfare.'") (quoting *Joint Council of Interns & Residents v. Board of Supervisors* 210 Cal. App. 3d 1202, 1211 (1989)).

Rather than "deviating" from or conflicting with any statutory requirement, requesting references to establish that the bidder meets a standard of experience is consistent with the obligation to evaluate responsibility. The court appears to have concluded that, absent a statute or ordinance specifically **permitting** the City to define experience standards or request references in the bid, the City lacked authority to do so. The error is that, absent a **restriction** on establishing standards for experience or requesting references supporting that experience, the City retains the discretion to establish and apply such standards.

Article XI, section 2(a) of the California Constitution requires the State Legislature to "provide for city powers." In doing so, Government Code section 37112 provides "catchall" authority, stating that "[i]n addition to other powers, a legislative body may perform all acts necessary or proper to carry out the provisions of this title" (Title

4, government of cities). A city's power to contract is one of the powers governed by Title 4 of the Government Code. *See South Bay Senior Hous. Corp. v. City of Hawthorne*, 56 Cal. App. 4th 1231, 1235 (1997) (citing Government Code sections 34000 *et seq.* as statutes governing a city's power to contract). Thus, except as expressly limited by statute, a city has authority to perform necessary and proper acts in connection with exercising its contracting authority.

As discussed by the City in its Opening Brief, establishing experience standards and requesting references was necessary or proper in carrying out the City's contracting duties, specifically its duty to evaluate bidder responsibility. Appellant's Opening Brief at 12-13. Vinciguerra does not dispute that the City properly may request references, objecting instead to how those references were used. Respondent's Brief at 16. The City had and properly exercised its legal authority to adopt experience standards and to request references supporting the bidders' experience.

Further, with respect to charter cities such as the City here, the California Supreme Court explained:

We begin with the cardinal principle that the charter represents the supreme law of the City, subject only to conflicting provisions in the federal and state constitutions and to preemptive state law. [citation] In this regard, "[t]he charter operates not as a grant of power, but as an instrument of limitation and restriction on the exercise of power over all municipal affairs which the city is assumed to possess; and **the enumeration of powers does not constitute an exclusion or limitation.** [Citations.]" [citations] The expenditure of city

funds on a city's public works project is a municipal affair. [citations]

“[B]y accepting the privilege of autonomous rule the city has all powers over municipal affairs, otherwise lawfully exercised, subject only to the clear and explicit limitations and restrictions contained in the charter.” [citation] **Charter provisions are construed in favor of the exercise of the power over municipal affairs and “against the existence of any limitation or restriction thereon which is not expressly stated in the charter...”** [citation] Thus, “[r]estrictions on a charter[ed] city’s power may not be implied.” [citation]

Domar Elec., Inc. v. City of Los Angeles, 9 Cal. 4th 161, 170-71 (1994) (emphasis added). Here, the court implicitly found a limitation on the City’s authority to request references supporting an experience requirement, apparently because the City Charter had not expressly enumerated that authority. The court identified no statutory or charter provision restricting the City, but simply did not find authority authorizing experience standards or references. As *Domar* makes clear, a grant of authority is unnecessary; the right to set standards and request references may be exercised, absent an express restriction on the City’s authority which was not identified.

Requesting references is wholly consistent with a city’s obligation to award only to the lowest **responsible** bidder. The Order identifies no limitation, whether in the City’s Charter or the Public Contract Code or cases, preventing cities from establishing experience standards or requiring references supporting such standards. *Domar* recognizes that charter cities have broad authority, unless expressly

limited, which includes the authority to set and apply experience standards. Similarly, Government Code section 37112 recognizes all cities' power to perform all acts necessary or proper to carry out their functions as cities. *M & B Construction* permitted a "pre-bid determination that the public would be better served in terms of quality and economy by letting the project only to licensees with the most appropriate experience." *M & B Constr.*, 68 Cal. App. 4th at 1361. Thus, statute and caselaw supports the City's authority to adopt experience standards and enforce them by requiring references.

The court's conclusion that requesting references "deviates" from legal requirements is in error. The City's decision to establish experience standards and request references to verify that a bidder meets experience standards was permitted by law, and supported by substantial evidence, so could not have been an abuse of its discretion or supported the declaratory relief granted by the court. Accordingly, the League requests that this Court overturn the trial court's Order to the extent that it prohibits references or experience standards in a bid, and confirm that cities may exercise such authority.

B. Failure To Provide Required References May Result In A Bid Being Non-Responsive.

In addition to objecting to references, the court expressed concern over "the City's attempt to blur the distinction between *responsiveness* and *responsibility*." JA, Vol. 3, at 721. The court's concern appears to have been that the City did not evaluate whether Vinciguerra's references demonstrated that it had the expertise to perform the work (responsibility) because the City concluded that the referenced projects did not meet the experience standards required by

the solicitation. However, if Vinciguerra was **non-responsive** to the reference requirement, then no **responsibility** analysis was necessary.

The fact that the ultimate purpose of references is to evaluate responsibility does not preclude rejection of a bidder as non-responsive for failing to comply with a reference requirement. A bid is responsive if it promises to do what the solicitation requires. *See Valley Crest Landscape, Inc. v. City of Davis*, 41 Cal. App. 4th 1432, 1438 (1996); *Taylor Bus Serv., Inc. v. San Diego Bd. of Educ.*, 195 Cal. App. 3d 1331, 1341 (1987); JA, Vol. 3, at 719 (Order). As stated recently, “literal noncompliance with a bid request does indeed make a bid nonresponsive.” *Great W. Contractors, Inc. v. Irvine Unified Sch. Dist.*, 187 Cal. App. 4th 1425, 1456 (2010), as modified (Sept. 30, 2010). Contrary to Vinciguerra’s position, responsiveness is not limited to issues related to future performance, but encompasses any failure to comply with a requirement of the solicitation document. *See, e.g., Domar*, 9 Cal. 4th 161 (finding a bidder non-responsive for failing to comply with outreach requirements in the bidding process); *Taylor Bus*, 195 Cal. App. 3d 1331 (finding a bidder non-responsive for offering an insurance trust instead of the insurance required by the public entity); *MCM Const., Inc. v. City & County of San Francisco*, 66 Cal. App. 4th 359 (1998) (permitting a bid to be rejected as non-responsive for failing to provide information required in the bid, even if the deviation was immaterial).

If, for example, Vinciguerra had provided fewer than five references, then Vinciguerra would have failed to comply with the solicitation. As such, its bid would have been non-responsive, just as if it had failed to provide a bid bond, or to list information required

about its subcontractors, or to commit to construct the project as specified by the City. Similarly, if Vinciguerra supplied a reference for a project that it stated was completed more than five years before the bid date, then its bid also would have been non-responsive to the requirement that reference projects be completed within the past five years. The League will not address whether Vinciguerra's references actually were responsive, as the parties fully address that issue.

Rather, the League is concerned with the court's conclusion that the City's "competitive bidding **process**" was "defective and contrary to law." JA, Vol. 3, at 724 (emphasis added). As demonstrated above, in the bid evaluation process, a city properly may find that failure to fully respond to requirements of a solicitation document renders a bid non-responsive, even if the purpose of the requirement is to gain information to be used to evaluate responsibility. Thus, the fact that the City evaluated the responsiveness of Vinciguerra's references does not impermissibly "blur the distinction between responsiveness and responsibility." *Id.* at 721.

C. A City Need Not Specify That It Is Assessing A Bidder's Responsibility As Long As The Bidder Was Given Notice Of The Evidence Against It And An Opportunity To Respond.

Assuming that the City was permitted to define experience requirements and to request references, and that the determination as to whether Vinciguerra's bid complied with the requirements was a determination of responsibility, the question becomes whether the process provided by the City satisfied due process. Few cases address what procedures are required for a responsibility hearing. In *City of Inglewood*, the court stated:

We hold that prior to awarding a public works contract to other than the lowest bidder, a public body must notify the low monetary bidder of any evidence reflecting upon his responsibility received from others or adduced as a result of independent investigation, afford him an opportunity to rebut such adverse evidence, and permit him to present evidence that he is qualified to perform the contract. We do not believe, however, that due process compels a quasi-judicial proceeding prior to rejection of the low monetary bidder as a nonresponsible bidder.

City of Inglewood, 7 Cal. 3d at 871; see also *Boydston v. Napa Sanitation Dist.*, 222 Cal. App. 3d 1362, 1369 (1990) (noting *City of Inglewood* factors); *Taylor Bus*, 195 Cal. App. 3d at 1341 (same).

Under *City of Inglewood*, a bidder must be notified of “evidence reflecting upon his responsibility.” Here, the City required bidders to “provide satisfactory evidence showing . . . experience in installing pipe using the pipe bursting method.” JA, Vol. 2, at 226. The City notified Vinciguerra that “the references provided are not of similar work and do not demonstrate Vinciguerra Construction’s ability to install sewerline using the pneumatic pipe bursting.” *Id.* at 239. Further, the City Manager’s report explained, prior to rejecting Vinciguerra’s bid and contract award, that Vinciguerra’s references “were for trench repairs, water service replacements, raw water and emergency bypasses, and storm drain work and not for sewerline replacements,” and did not involve pneumatic pipe-bursting. *Id.* at 224. The “evidence” against Vinciguerra was essentially the City’s position that Vinciguerra failed to establish that it had the requisite

experience. The City provided Vinciguerra with notice of its concern, and the basis for the concern.

Under *City of Inglewood*, a bidder also must be afforded the opportunity to rebut adverse evidence and present evidence that he is qualified to perform the contract. Vinciguerra was given the opportunity to comment on the City's recommendation and to submit written material addressing the City's concern prior to contract award. *Id.* In fact, Vinciguerra did submit such written material, including an argument that it was a responsible bidder. *Id.* at 242-45. Although this process did not involve a formal evidentiary hearing, *City of Inglewood* notes that due process does not "compel[] a quasi-judicial proceeding" before a bidder is rejected as not responsible. *City of Inglewood*, 7 Cal. 3d at 871. Further, Vinciguerra was given the opportunity to – and did – appeal the City's decision to the City Council, and to argue its appeal in writing and orally. JA, Vol. 2, at 241, 246-55. Again, the City complied with the requirements of *City of Inglewood*.

Notwithstanding notice that Vinciguerra had not adequately established the experience the City was requiring, and the opportunity to submit evidence that Vinciguerra had the requisite experience, the court concluded that the City "made a responsibility determination by **summarily denying** Vinciguerra's bid as nonresponsive." *Id.*, Vol. 3, at 722 (emphasis added). The court noted that the City did not review Vinciguerra's bid for responsibility "in the context of having the experience and expertise to perform the work." *Id.* at 723. Apparently, the court concluded that the City lacked the authority to establish objective standards by which responsibility (experience) would be

judged and/or to require bidders to demonstrate that they had the requisite experience. However, as established above, the City does have that discretion. *See, supra*, Section B(2); *see also M & B Constr.*, 68 Cal. App. 4th at 1361. Rather than “summarily denying” Vinciguerra’s responsibility, the City applied its criteria to the information that had been submitted, and found that Vinciguerra did not meet the criteria established.

The court also overturned the City’s rejection of Vinciguerra’s bid because the label placed on the hearing was “responsiveness,” not “responsibility.” JA, Vol. 3, at 723. That conclusion raises form over substance. As long as Vinciguerra was provided the notice of the reasons and evidence forming the basis for rejecting its bid, and was provided the opportunity to submit argument and evidence in response, then the substance of the due process required by *City of Inglewood* has been afforded to Vinciguerra. The Order does not identify any authority requiring a city to notify a bidder that the analysis being undertaken relates to responsibility. Moreover, since Vinciguerra responded with respect to its responsibility, the court could not find that Vinciguerra was harmed if the City mistakenly believed that it was judging responsiveness, not responsibility. Thus, the label applied to the hearing should not affect whether the City’s rejection of Vinciguerra’s bid was lawful.

The League requests that this Court confirm that the process used by the City in the instant case appropriately complies with the requirements of *City of Inglewood* for a finding of non-responsibility. Specifically, the League requests that this Court confirm that a written notice of concerns, and opportunity to submit a written response with

evidence, may be sufficient when the issue is apparent failure to submit references meeting the public entity's experience standards. The League also requests that this Court find that substance controls over form, particularly when a bidder is not misled, so that failure to identify a concern as related to responsibility does not preclude rejection of a bidder on responsibility grounds.

III. CONCLUSION

As established above, cities have the authority to adopt and enforce standards of experience that bidders must meet, and to require references supporting those experience standards. The League respectfully requests that this Court confirm that cities have that authority. Second, case law establishes that failure to meet requirements of a solicitation document results in a bid being non-responsive. The League respectfully requests that this Court confirm that cities have the authority to reject a bid as non-responsive if the bid fails to respond fully to **any** requirement, even if the purpose of the requirement is to assist in evaluating bidder responsibility. Finally, the League respectfully requests that this Court find that the City's procedures in evaluating whether to reject Vinciguerra's bid met the requirements of *City of Inglewood* for a responsibility determination.

Respectfully submitted,

Dated: May 7, 2012

DIEPEN ROCK ELKIN LLP

By: 

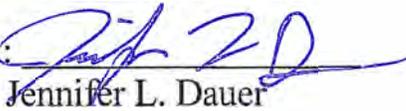
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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.204(c)(1))

I certify that the text of this brief, as defined under California Rule of Court 8.204(c), consists of 3,845 words, as counted by the Microsoft Word version 10 word-processing program used to generate the brief.

Date: May 7, 2012

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DECLARATION OF SERVICE

I am over 18 years of age and not a party to the within action; my business address is 400 Capitol Mall, Suite 1800, Sacramento, California, I am employed in Sacramento County, California.

On May 7, 2012, I served a copy of the following document(s) described as:

**BRIEF OF *AMICUS CURIAE*,
LEAGUE OF CALIFORNIA CITIES**

on parties and/or their attorney(s) of record stated in the (Attached Service List) by the following means of service:

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[X] BY EMAIL. I caused each such document to be sent by electronic mail to the addressees at the email addresses listed below.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on May 7, 2012 at Sacramento, California.


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