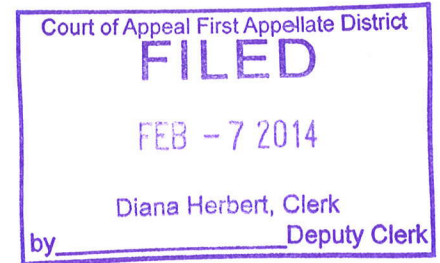


Via Federal Express

February 6, 2014

Justices Haerle, Kline, and Brick
California Court of Appeal
First District Court of Appeal, Division Two
350 McAllister Street
San Francisco, CA 94102-7421



Re: Request for Publication of *Bay Cities Paving & Grading, Inc. v. City of San Leandro* (Case No. A137971 (Opinion filed January 28, 2014))

Honorable Justices:

On behalf of the League of California Cities (“League”), we respectfully request publication of this Court’s opinion in *Bay Cities Paving & Grading, Inc. v. City of San Leandro* (Case No. A137971; filed January 28, 2014) (“Opinion”).

I. League of California Cities’ Interest

The League is an association of 470 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.

Billions of dollars of public funds are spent annually on public works contracts awarded by public agencies pursuant to California bidding laws, for projects ranging from routine street maintenance to major infrastructure and capital improvements. Bidding errors arise on a regular basis, as do disputes over an awarding agency’s discretion to waive a bidding error. Publication of the Opinion will provide essential clarification and guidance on determining the “materiality” of a bidding error, and whether the awarding agency has discretion to waive the error and award the contract to an otherwise responsive low bidder.

II. The Opinion Meets the Standard for Publication

The League believes that the Opinion meets the standards for publication under rule 8.1105(c)(2), (3), (5), and (6) of the Rules of Court because the Opinion 1) applies an existing rule of law to a set of facts significantly different from those stated in published opinions;

2) explains, with reasoning, an existing rule of law; 3) addresses an apparent conflict in the law; and 4) involves a legal issue of continuing public interest.

Appellant substantially relied on *Valley Crest Landscape, Inc. v. City Council and the City of Davis* (1996) 41 Cal.App.4th 1432 (“*Valley Crest*”) to support its contention that an awarding agency lacks discretion to waive any error which potentially affords a bidder the opportunity to withdraw its bid and avoid liability under its bid bond. According to Appellant, the mere opportunity to dispute the validity of a bid bond gives a bidder an “unfair competitive advantage,” such that the awarding agency lacks discretion to waive the error as “immaterial.” The Opinion explains why “appellant’s abstract theory of a potential competitive advantage” misinterprets and is inconsistent with existing law. The Opinion follows and expands upon this Court’s prior decision in *Ghilotti Construction Company v. City of Richmond* (1996) 45 Cal.App.4th 897 (“*Ghilotti*”), by stating that “an actual competitive advantage arises only when a bid defect establishes an actual ground for a successful bidder to withdraw its bid without incurring liability under its bond.”

A. The Opinion applies an existing rule of law regarding discretion to waive bidding errors to a set of facts significantly different from those stated in published opinions.

The Opinion applies an existing rule of law to a set of facts significantly different from those stated in published opinions, particularly *Valley Crest*, *Ghilotti*, and *MCM Construction, Inc. v. City and County of San Francisco* (1998) 66 Cal.App.4th 359 (“*MCM*”). As expressly stated in the Opinion: “Here we apply precisely the same rules that we applied in *MCM*, albeit to a very different set of facts.” *Valley Crest* and *Ghilotti* both involve compliance with limitations on the percentage of work that could be performed by subcontractors. Similarly, *MCM* involved a bidder’s failure to provide dollar values for the work to be performed by subcontractors. In short, each of those cases address the materiality of errors which involved bid requirements pertaining to subcontractors.

The Opinion addresses a very different type of bidding error—omission of a page of the bid bond form. Unlike the bidding errors at issue in *Valley Crest*, *Ghilotti*, and *MCM*, this bidding error does not involve the portion of work to be performed by subcontractors, and more importantly, does not involve grounds for withdrawal under Public Contract Code section 5103. Rather, this case raises a question not addressed in previous published decisions: whether a bidder has an unfair competitive advantage over other bidders based solely on the potential invalidity of its bid bond.

Bidding errors involving bid security or missing pages are fairly commonplace due to the nature of public bidding, which often involves a final rush to complete the bid by incorporating

last minute price quotes from subcontractors and suppliers.¹ Publication of the Opinion would provide essential guidance for public agencies when they are confronted with bidding errors and bid protests based on facts similar to those in this case.

B. The Opinion explains the existing rule of law regarding an agency's discretion to waive a bidding error.

The Opinion provides a reasoned explanation for an existing rule of law, namely that a public agency is not constrained from waiving a bidding error solely because the bidder could potentially withdraw its bid without forfeiting its bid bond. The critical distinction between *actual* versus *potential* opportunity to withdraw and avoid forfeiture is fleshed out more fully in this decision than in either *Ghilotti* or *MCM*, both of which address the distinction on a summary basis, as discussed in the next paragraph. The Opinion provides a more expansive explanation of when an awarding agency may properly exercise its discretion to waive a bidding error.

C. The Opinion addresses an apparent conflict in the law regarding circumstances under which an error confers an "an unfair competition advantage."

The Opinion also addresses an apparent conflict in the law with respect to the *Valley Crest* and *Ghilotti* opinions, which resulted in opposite outcomes despite similar facts. In footnotes, this Court has previously distinguished *Valley Crest* based on the fact that the city in *Valley Crest* expressly gave the bidder an opportunity to withdraw its bid. (*MCM* at 372, fn. 6; *Ghilotti* at 912, fn. 6.) Nevertheless, as evidenced by this case, there is lingering uncertainty as to whether or not an error may properly be waived as immaterial under the holdings of these cases.

When confronted with such uncertainty, an awarding agency may reasonably choose not to waive what may actually be an inconsequential bidding error and award the contract to the next highest bidder, rather than risk a costly lawsuit from that higher bidder. While a safe option from a risk management perspective, this approach is inconsistent with established public policy favoring award to the lowest responsive bidder. Publication of this opinion would help resolve uncertainty as to application of the *Valley Crest* and *Ghilotti* decisions, and make it less likely that a public contract award will be based on the threat of litigation instead of the proper application of the public bidding law and the best price for the work.

¹ Subcontractors and suppliers generally wait until just before bid time to call in their quotes to the general contractor, in order to reduce the risk of bid shopping. As a result, the full bid package is often not compiled and sealed until minutes before bid time, typically by a bid runner who is parked outside the office where the bid is to be submitted.

D. The Opinion addresses a legal issue of continuing public interest because it will promote correct application of public bidding laws.

The Opinion addresses a legal issue of continuing public interest because public agencies throughout the State must award contracts pursuant to public bidding laws, and they are continually confronted with bidding errors, bid protests, and costly litigation based on bid protests. Substantial amounts of public funds are at stake. Greater clarity on the scope of a public agency's discretion to waive a bidding error will promote the proper exercise of discretion by awarding agencies.

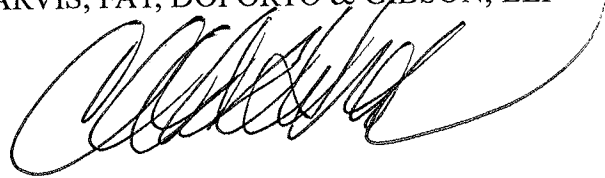
Such clarity is also likely to reduce protests and litigation based on misinterpretation of existing law on "materiality," e.g., the case that is the subject of this Opinion. This will avoid the waste of public funds and further the interest of judicial economy by reducing the burden on the courts caused by non-meritorious protests against substantially responsive low bids.

III. Conclusion

Accordingly, the League urges this Court to order publication of its Opinion pursuant to the California Rules of Court, rule 8.1120.

Respectfully submitted,

JARVIS, FAY, DOPORTO & GIBSON, LLP

A handwritten signature in black ink, appearing to read 'Clare M. Gibson', written over a white background.

Clare M. Gibson (SBN 195051)

Please see Attached Proof of Service

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, Doportto & Gibson, LLP, 492 Ninth Street, Oakland, California 94607.

On February 6, 2014, I served the within **REQUEST FOR PUBLICATION** 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.*

Benjamin T. Reyes
Meyers Nave
555 12th Street, Suite 1500
Oakland, CA 94607

*Attorneys for Defendant and
Respondent CITY OF SAN
LEANDRO*

W. Eric Blumhardt
Archer Norris
2033 North Main Street, Suite 800
Walnut Creek, CA 94596

*Attorneys for Real Party in
Interest OLIVER DeSILVA, INC.
dba GALLAGHER & BURK, INC.*

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 February 6, 2014, at Oakland, California.


Jennifer Oberholzer