For Opinion See 1 P.3d 63

Supreme Court of California.
KAJIMA/RAY WILSON, a Joint Venture, Plaintiff & Respondent,
v.
LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY, Defendant and Appellant.
No. B109867.
December 2, 1999.

Court No. BC 125144.

Application of 99 California Cities and the California State Association of Counties to Submit Amicus Curiae Brief in Support of Appellant and Amicus Curiae Brief

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Hon. Victor E. Chavez.

INTRODUCTION

Amici are 99 California cities, together with the California State Association of Counties ("CSAC")[FN1], an association of all 58 California counties. These public entities, which collectively provide governmental services to virtually every Califomian, have been directly affected by the Court of Appeal's ruling that authorizes every disappointed bidder to obtain its lost profits and overhead, rather than its bid preparation costs, if a public entity makes any error in awarding a contract. At stake in this case are not only millions of dollars in public funds, but also the ability of every public entity to maintain and construct the schools, roads, bridges, transit systems, and other infrastructure necessary to meet the needs of California in the 21st century.

FN1. CSAC is a non-profit corporation. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsel's Association of California and is overseen by the Association's Litigation Overview Committee, comprised of twelve County Counsels.

The Court of Appeal's holding that a disappointed bidder is entitled to its lost profits is at odds with prior California authority, federal authorities, out-of-state authorities, the American Bar Association's Model Procurement Code, and the recommendation of the Congressional Commission on Government Procurement.

The Court of Appeal's ruling encourages losing bidders on public contracts to pursue bid protests based on every arguable irregularity in hopes of securing a windfall in lost profits and overhead damages. As a result, public entities intimidated by threats of exorbitant damage awards are much more likely to rebid every contract on which bid protests are received thereby delaying important projects and significantly increasing project costs. Such a result erodes the fundamental purpose of competitive bidding which is to obtain the best price for public improvements and goods. Anything less than a clear and unequivocal rule limiting damages for misaward of a public contract to bid preparation costs will hobble public entities throughout California at a time of increasingly acute need for rebuilding and expanding public infrastructure.

ARGUMENT

In this case, the Court of Appeal analyzed the disappointed bidder's claims under the promissory estoppel theory.[FN2] *Amici* do not dispute the general applicability of promissory estoppel to cases involving the misaward of public contracts; but *Amici* part company with the Court of Appeal on its application of the doctrine. As *Amici* will explain further in. this brief, conceptually every solicitation for bids on a public contract involves two distinct promises: 1) the promise to award the contract based on fair and honest consideration of the bids in accordance with the applicable selection criteria, and 2) the promise to comply with the terms and conditions of the proposed contract after it has been executed with the bidder, if

any, whose bid is accepted. In other words, the first promise is made to all bidders, the second only to the bidder with whom the contract is executed. The distinction is significant because a bidder who relies on the promise that all bids will be treated fairly does so only by incurring bid preparation costs. No bidder can reasonably assume that it will be the low bidder, nor can the bidder have any assurance that the public agency will not decide to reject all bids and either rebid or abandon the proposed project.

> FN2. Restatement (Second) of Contracts, Section 90 provides: "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires" (Rest 2nd (Contracts) § 90 ("Section 90").)

The Court of Appeal's application of the doctrine of promissory estoppel, by contrast, gives a rejected bidder the full benefits of the misawarded contract, thereby effectively requiring the public entity to pay twice for its error. This holding is contrary to California and federal cases and the caselaw of several states, inconsistent with the analysis required by the Restatement of Contracts, contrary to both the American Bar Association's Model Procurement Code for State and Local Governments and the recommendation of the Congressional Commission on Government Procurement, and is against public policy because of the millions of dollars in expense and delays likely to be occasioned to public infrastructure projects.

I.

THE COURT OF APPEAL'S DECISION IS CONTRARY TO TWO CALIFORNIA APPELLATE DECISIONS AND ONE FEDERAL DISTRICT COURT DECISION WHICH HELP THAT DAMAGES FOR MISAWARD OF A PUBLIC CONTRACT IN CALIFORNIA ARE LIMITED TO BID PREPARATION COSTS.

The Court of Appeal decision in this case is flatly at odds with two prior California Courts of Appeal and one federal district court applying California law. These cases hold that damages for misaward of a public contract are limited to bid preparation costs, as *Amici* explain next.

The seminal case on this point is *Swinerton & Walberg v. City of Inglewood-Los Angeles County Civic Center Authority* (1974) 40 Cal.App.3d 98. The Court of Appeal in that case was required to fashion a remedy on remand after this Court held that the Inglewood-L. A. County Civic Center Authority ("Authority") erroneously awarded a "construction management" services contract to the best qualified bidder, rather than the lowest responsible bidder, as the applicable statute required. (*City of Inglewood-L.A. County Civic Center Auth. v. Superior Court* (1970) 7 Cal.3d 861.) The Court of Appeal on remand applied the doctrine of promissory estoppel to the Authority's invitation for bids. Significantly, it concluded that the bidder's reliance on the invitation for bids was limited to preparing and submitting its bid. Thus, the remedy for the rejected bidder was recovery of its bid preparation costs. (*Swinerton & Walberg, supra*, 40 Cal.App.3d, at 105.) By determining that the improperly rejected bidder's reliance is limited to its preparation of a bid, the court recognized that a public agency's invitation for bids is not a promise to bestow upon all bidders the benefits embodied in the terms and conditions of the contract to be awarded. The court's holding is consistent with the analysis of the doctrine of promissory estoppel contained in the Restatement of Contracts, discussed in Section IV.

Moreover, the facts in *Swinerton* & *Walberg* highlight the serious conceptual and policy problems with awarding a rejected bidder its lost profits based on a misawarded contract. During the pendency of the litigation, the Authority proceeded with the civic center project as an owner-builder and it was unknown whether the construction management services for which the Authority had solicited bids were even required. (*City of Inglewood, supra*, 7 Cal.3d, at n. 10.) Even if the Authority continued to require such services, the scope of work must necessarily have been different from that in the invalid contract. Thus, enforcement of the terms and conditions of the misawarded contract through promissory estoppel would have resulted in a measure of lost profits based on a fictional contract which had never come into existence with *any* bidder. Plainly, such an absurd result

would be irreconcilable with the public interest.

The next California court to consider the application of the *Swinerton* & *Walberg* rule assumed without significant question that the improperly rejected bidder was confined to recovering its bid preparation costs. (*Monterey Mechanical Company v. Sacramento Regional County Sanitation District* (1996) 44 Cal.App.4th 1391 (rehg. den. 5/23/96).) In *Monterey Mechanical*, *supra*, the Third District joined the Second District in holding that a disappointed bidder's damages are limited to bid preparation costs. There, the Sacramento County Regional Sanitation District ("District") invited bids for a construction contract to be awarded to the lowest responsible bidder. Monterey Mechanical submitted the lowest bid; however, the District found the bid non-responsive because it neither met the minority/women subcontracting goals, nor demonstrated sufficient good faith efforts to do so. The District awarded the contract to the second low bidder. Much like the instant matter, the *Monterey Mechanical* court ultimately found that the District had rejected Monterey Mechanical's bid based on improper minority business enterprise criteria.

At issue in the Court of Appeal was whether the proper vehicle to challenge the award was a writ, as the rejected bidder claimed, or an action for damages as the District asserted. In holding that a writ was the appropriate remedy, the court reasoned that the bidder had no remedy at law by way damages because it was confined to its recovery of bid preparation costs. Significantly, it appears that neither the court, nor the disappointed bidder, nor the District questioned that under *Swinerton & Walberg* it was settled law under the theory of promissory estoppel that an improperly rejected bidder's remedy was limited to the recovery of bid preparation costs. (*Monterey Mechanical, supra*, 44 Cal.App.4th, at 1413.) Although the *Monterey Mechanical* court could have parted company with the *Swinerton & Walberg* court, neither it, nor the parties saw any basis to do so.

A U.S. District Court has also read the *Swinerton & Walberg* decision to establish a clear California rule of law that a disappointed bidder's damages are limited to its bid preparation costs. In *M.G.M. Construction Company v. Alameda County*, the county improperly rejected a bid for the construction of a reservoir and pipeline based upon invalid criteria related to the contractor's failure to meet minority subcontracting requirements. (*M.G.M. Construction Company v. Alameda County* (N.D. Cal. 1985) 615 F.Supp. 149.) Nevertheless, the court's grant of summary judgment limited the bidder's damages to "the expenses incurred by the plaintiff in its bid preparation and submission." (*M.G.M. Construction, supra*, 615 F.Supp., at 151, citing, *Swinerton & Walberg, supra*.)

In sum, twenty-five years ago, the *Swinerton & Walberg* decision clearly established the rule that damages for misaward of a public contract are limited to bid preparation costs. The Second District's decision in the instant matter is contrary to this settled rule. Whether or not clearly articulated, *Swinerton & Walberg* and its progeny, stand for the proposition that in responding to an invitation for bids, a contractor reasonably relies only by preparing its bid; the invitation for bids is not a promise to bestow the benefits of the contract on any particular bidder, since the terms and conditions in that contract apply only to the party, if any, which ultimately executes the contract. The federal and other state courts which have limited the remedy afforded an improperly rejected bidder to its bid preparation costs have reasoned much the same way as the courts in California, as *Amici* next discuss.

II.

THE COURT OF APPEAL'S RULING IS CONTRARY TO THE HOLDINGS OF THE FEDERAL COURTS IN CASES OF MISAWARD OF GOVERNMENT CONTRACTS.

Since 1956, the federal courts have held that the damages available to a disappointed bidder on a government contract are limited to the costs of bid preparation. (See, *Heyer Products Co. v. U.S.* (Ct. Cl. 1956) 140 F.Supp. 409.) Federal decisions reason that a bidder's reliance is limited to the costs of bid preparation because an invitation for bids embodies only a promise to fairly and honestly consider all bids, no contract ever comes into being with a rejected bidder, and the Government retains the right to reject all bids.

In *Heyer Products, supra*, the Army invited bids for the supply of low voltage testers. Heyer submitted the lowest bid, but the Army rejected the bid in favor of

the *sixth lowest* bid-at a price nearly twice that quoted by Heyer-allegedly on the ground that the Heyer product did not meet the specifications. In the ensuing litigation, Heyer alleged that the Army rejected its bid in retaliation for its president giving adverse testimony before a Senate subcommittee. Indeed, the Senate subcommittee issued a report in which it concluded that the Army had intentionally eliminated Heyer from consideration. Despite the Government's egregious conduct, the court rejected Heyer's claim for lost profits and held that its damages were limited to the costs of preparing its bid. (*Heyer Products Co., supra*, 140 F.Supp., at 412-413.) In so ruling, the Court explained that an invitation for bids contains an implied promise by the Government to fairly and honestly consider all bids according to the applicable selection criteria. The Heyer Products rale has been followed by additional federal courts. (*Keco Industries, Inc. v. U.S.* (Ct. Cl. 1970) 428 F.2d 1233; *M. Steinthal & Co. v. Seamans* (D.C. Cir. 1971) 455 F.2d 1289,1302; *Excavation Construction, Inc. v. U.S.* (Ct. Cl. 1974) 494 F.2d 1289, 1290.)

Federal courts have articulated three reasons for holding that damages for the Government's breach of the promise to fairly and honestly consider all bids are limited to bid preparation costs. The reasons are not derived from any unique aspect of federal procurement, but instead from the fact that the disappointed bidder's reasonable reliance in submitting the bid does not extend to receiving the benefits of the terms and conditions of the contract for which it competed. First, like the court in *Swinerton & Walberg*, federal courts have recognized that bid preparation costs compensate the disappointed bidder for the actual losses incurred by its reliance on the invitation for bids. (*M. Steinthal & Co., supra*, 455 F.2d, at 1302.) Second, no contract with the wrongfully rejected bidder ever comes into being. (*Heyer Products Co., supra*, 140 F.Supp., at 412; *Keco Industries, Inc., supra*, 428 F.2d, at 1240.) Finally, the fact that the Government reserves the right to reject all bids also supports the limit on damages. (*Keco Industries, Inc., supra*, 428 F.2d, at 1240.) As *Amici* explain below, Section IV, the characteristics of competitive bidding identified by the federal courts as justifying the limit on damages are common to competitive bidding systems at all levels of government. Moreover, many state courts have reasoned similarly in limiting the remedy of an improperly rejected bidder to its bid preparation costs, as discussed next.

III.

THE COURT OF APPEAL'S RULING IS CONTRARY TO THE HOLDINGS OF COURTS IN OTHER STATES.

Numerous states have judicially limited the damages available to a disappointed bidder to the costs of bid preparation. Some states utilize the federal concept of the implied promise to fairly consider all bids; others have identified public policy concerns of an equitable nature. However, all either explicitly or implicitly recognize that a bidder's reasonable reliance is limited to the costs of preparing its bid.

Courts in two states, New Mexico and Massachusettsl have adopted the federal concept that the mistaken award of the contract is a breach only of the implied promise to fairly and honestly consider all bids in accordance with the applicable selection criteria. (*Planning & Design Solutions v. City of Santa Fe* (N.M. 1994) 118 N.M. 707, 885 P.2d 628; *Paul Sardella Construction Co., Inc. v. Braintree Housing Auth.* (Mass. 1975) 329 N.E.2d 762.) The damages for the breach of the agency's promise are limited for the same reasons set forth in the above federal decisions, namely that: 1) no contract comes into being with the rejected bidder, 2) the public agency retains the right to reject all bids, and 3) an award of bid preparation costs adequately compensates the bidder for its actual losses. These decisions are a further indication that the analysis employed by the federal courts is generally applicable to competitive bidding at the state and local level.

Courts in other states which limit the improperly rejected bidder's remedy to recovery of bid preparation costs have articulated three additional public policy reasons for doing so. Public policy is, of course, particularly relevant when applying an equitable doctrine like promissory estoppel. The courts have reasoned as follows. First, allowing damages in excess of bid preparation costs is inconsistent with the fundamental purposes of competitive bidding which is to protect the public, not to enrich bidders. (*City of Atlanta v. J.A. Jones Constr. Co., et al.* (Ga. 1990) 398 S.E.2d 369, 370; *Telephone Associates, Inc. v. St. Louis County Ed.* (Minn. 1985) 364 N.W.2d 378, 382; *Airline Constr. Co., Inc. v. Ascension Paris School Bd.* (La. 1990) 568 So.2d 1029, 1033; *State*

Mechanical Contractors, Inc., v. Village of Pleasant Hill (Ill. 1985) 477 N.E.2d 509, 511; *City of Scottsdale v. Deem* (Ariz. 1976) 556 P.2d 328, 330.)

Second, requiring public entities to pay the contract price to the bidder that received the contract and the lost profits to the disappointed bidder imposes a double burden on the taxpayers. (*Telephone Associates, Inc., supra*, 364 N.W.2d, at 382; *Gulf Oil Corp. v. Clark County., Nevada* (Nev. 1978) 94 Nev. 116, 119.) Finally, the absence of an actual contract between the disappointed bidder and the public entity precludes an award of damages based on the terms and conditions of that contract. (*Mottner v. Town of Mercer Island* (Wash. 1969) 452 P.2d 750, 753; *Gulf Oil Corp., supra*, 94 Nev., at 118; *Paul Sardella Constr. Co., supra*, 329 N.E.2d 762, 766; *M.A. Stephen Constr. Co. v. Borough of Rumson* (N.J. 1973) 308 A.2d 380, 383.) As described below, Section IV(C), the absence of a formal contract with the rejected bidder weighs heavily against enforcement of the misawarded public contract under the analysis required by the doctrine of promissory estoppel.

IV.

THE COURT OF APPEAL'S DECISION IS INCONSISTENT WITH THE RESTATEMENT OF CONTRACTS BECAUSE THE REMEDY PROVIDED OF ENFORCEMENT OF THE MISAWARDED CONTRACT IS NOT RELATED AND IS DISPROPORTIONATE TO THE BIDDER'S ACTUAL RELIANCE-IT'S BID PREPARATION COSTS.

The Court of Appeal concluded that injustice could only be avoided in this case by full enforcement of the contract for which the bidders were competing.[FN3] However, at the time the bid was submitted, but before the agency took final action, it would not have been reasonable to rely on award of the contract to any particular bidder, given the uncertainties of competitive bidding. Thus, full enforcement of the terms and conditions of the misawarded contract is a remedy that is vastly disproportionate to the detrimental reliance of the improperly rejected bidder.

> FN3. Despite the disparity between the lost profits claimed by Kajima and the judgment, this is not a case of *partial* enforcement of a contract. The trial court "did not give full credit" to Kajima's evidence and found that $350,000 reasonably represented the amount of Kajima's lost profits. (*Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* (1999) 69 Cal.App.4th 1458, 1474.) Thus, the Court of Appeal fully enforced the misawarded contract.

As Section 90 of the Second Restatement makes plain, even where the promisee has reasonably relied upon the promise, it is binding *only* to the extent necessary to avoid injustice, as measured by the promisee's detrimental reliance. (See, *Drennan v. Star Paving Co.* (1958) 51 Cal.2d 409, 413.) The drafter's comments to Section 90 further elaborate on the character of the reliance and the factors affecting the proper measure of damages. (Rest.2d (Contracts) § 90, comm. b):

b. *Character of reliance protected.* The promisor is affected only by reliance which he does or should foresee, and enforcement must be necessary to avoid injustice. Satisfaction of the latter requirement may depend on [1] the reasonableness of the promisee's reliance, [2] on its definite and substantial character in relation to the remedy sought, [3] on the formality with which the promise is made, on the extent to which the evidentiary, cautionary, deterrent and channeling functions of form are met by the commercial setting or otherwise, and [4] on the extent to which such other policies as the enforcement of bargains and [5] the prevention of unjust enrichment are relevant.

(Rest.2nd (Contracts) § 90, comm. b [numbers inserted, original emphasis].)

In the context of the misaward of a public contract, consideration of the five relevant comment "b" factors illustrates that justice does not require the enforcement of the terms and conditions of a misawarded contract.

A. A Bidder's Reasonable Reliance is Limited Due to The Inherent Uncertainties of the Competitive Bidding Process.

At the time bids are submitted, it is not reasonable for any bidder to rely on the anticipated profits and overhead contributions which it *might* receive if it actually performs the contract for which it is competing. The very essence of competitive bidding is the uncer-

tainty which forces each bidder to offer the lowest possible price for the goods or services requested. While some contractors may prove more successful at winning government contracts, even the best contractor cannot be certain that its bid will be the lowest for a particular contract. As observed by Justice Warren in *Pacific Architects Collaborative v. State* (1919) 100 Cal.App.3d 110:

… bids and quotations are a normal part of the cost of doing business. In the very nature of things some of these will fail of success. The cost of such unproductive bids is as much a general cost expense of operation as are general administrative, indirect engineering, indirect factory, and other overhead costs. (Citations omitted.)

(*Pacific Architects Collaborative, supra*, 100 Cal.App.3d, at 126.)

Under such circumstances, a bidder cannot be said to reasonably rely on the possibility that it will receive a particular contract. Measured at the time the bid is submitted, the bidder's reliance is no greater for a bid that is mistakenly rejected by a public agency than it is for a bid which is too high.

Furthermore, even if the bid is numerically lowest, the public agency retains the discretion to reject the bid as nonresponsive due to even inconsequential defects. (See, *MCM Construction, Inc. v. City and County of San Francisco* (1998) 66 Cal.App.4th 359 (rev, den. 10/21/98) [public agency may, but need not, waive inconsequential defects in bids].) Minor technical defects in bids, such as the omission of a required form, are a common feature of public competitive bidding - even on large projects with sophisticated bidders. (See, *Id.*)

Next, even if the bid is lowest and responsive, all public agencies reserve the right to reject all bids without awarding the contract to anyone.[FN4] In California the right of public agencies to reject all bids appears nearly absolute; courts have declined repeated invitations to interfere with the discretion of an awarding body to reject all bids. (See e.g., *Stanley-Taylor Co. v. Ed. Of Supervisors* (1902) 135 Cal. 486; *Charles L. Harney, Inc. v. Durkee* (1951) 107 Cal.App.2d 570; *Universal By-Products, Inc. v. City of Modesto* (1974) 43 CaI.App.3d 145.) In *Universal By-Products, Inc., supra*, Justice Franson dismissed any concern that such action by a public entity is unfair to the bidders which incurred the expenses to prepare bids because the risk that all bids will be rejected "is a cost of seeking to do business with a government body." (*Universal By-Products, Inc., supra*, 43 Cal.App.3d, at 157.) Significantly, the federal rule limiting a disappointed bidder's damages to bid preparation costs is based, in part, on the fact that the Government retains the right to reject all bids. (*Keco Industries, Inc., supra*, 428 F.2d, at 1240, and n. 11.)

FN4. (See, e.g., Pub. Con. C. §§10108, 10108.5, 10185 [specified State Departmental directors may reject all bids]; Pub, Con. C. §10507.7 [Regents of the University of California may reject all bids]; Pub. Con. C. §10785 [Trustees of California State University may reject all bids]; Pub. Con. C. § 20111, subds. (a) and (b) [governing boards of school districts may reject all bids]; Pub. Con. C. § 20150.9 [county board of supervisors may reject any bids]; Pub. Con. C. § 20166 [legislative body of city may reject all bids]; Pub. Con. C. § 20207.1 [board of public utility district may reject all bids].)

Consistent with the fundamental policies of public contracting, the law allocates to contractors the risks associated with the rejection of bids. As with bids which are too high, the bidder's reliance is no less for a contract which is rejected through exercise of the agency's right to reject than it is for a bid which is rejected due to a mistake in evaluating the bids. Given these universal features of competitive bidding, it would be highly unreasonable for a contractor to claim that, at the time it submitted its bid, it reasonably relied on the profits and overhead it expected to earn from a particular public contract.

B. Any Reasonable Reliance By the Bidder At the Time It Submits Its Bid is Not of A Sufficiently Definite and Substantial Character In Relation to the Remedy of Lost Profits and Overhead.

To the limited extent that a bidder reasonably relies on the public agency's promise to award the contract based on fair and honest consideration of the bids, such reliance is not of a sufficiently definite and substantial character in relation to the remedy of lost profits and overhead based on the misawarded contract. The actions that the bidders take in reliance on the promise to award the contract based on a fair and

honest consideration of the bids consists solely of preparing and submitting the bid. All of the bidders expend roughly the same amount of effort in the bid phase. In contrast, the actions which a successful bidder takes in reliance on the terms and conditions of the contract which it is awarded consists of planning, scheduling and assembling resources in anticipation of performance - known in the public works context as "mobilizing." Generally, public works contracts define and allow time for the mobilizing tasks at the outset of the project.[FN5] Obviously, no reasonable bidder would mobilize before actually executing the contract with the public agency. Yet, only the reliance represented by mobilization could possibly be of a sufficiently definite and substantial character to merit an award of lost profits and overhead from the contract.

> FN5. Mobilization includes tasks such as moving plant and equipment onto the site; installing temporary power, water and fire protection; and installing storage buildings. (Fisk and Calhoun, Contracts and Specifications for Public Works Projects, 61-62 (John Wiley & Sons, Inc. 1992).)

Moreover, the award made in the instant case results in manifest injustice contrary to the Restatement's directive that the remedy be only that necessary to *avoid* injustice. In this case, the trial court found that Kajima had spent $44,869 to prepare its bid, yet it was entitled to $650,000-14 times that amount - in lost profit and overhead damages.[FN6] Allowing a measure of damages so grossly disproportionate to the bidder's actual reliance goes far beyond the remedial purpose of promissory estoppel.

> FN6. Kajima had actually claimed $ 1,544,034 in lost profits and $ 1,298,589 in anticipated home office and regional office overhead, or, in the alternative, a staggering $4,900,000 in "foregone business opportunities." (*Kajima/Ray Wilson, supra*, 69 Cal.App.4th, at 1474; Respondent's Brief at 10.)

C. Since the Disappointed Bidder and the Public Entity Do Not Execute the Mis a warded Contract, The Promises Therein. As Embodied In the Terms and Conditions. Lack the Formality Required By Law.

Plainly, the disappointed bidder never actually executes a written contract with the agency that rejected its bid. However, in the context of public contracts, the absence of statutory formalities for the execution of the misawarded contract militates heavily against its enforcement through promissory estoppel.

California law requires that contracts with public entities be executed in strict compliance with the applicable legal requirements for each particular entity. In the absence of a formal contract, the contractor is entitled to no remedy. (See e.g., *Santa Monica Unified School District v. Persh* (1970) 5 Cal.App.3d 945 (rev. den. 5/21/70); *South Bay Senior Housing Corp. v. City of Hawthorne* (1997) 56 Cal.App.4th 1231; First *Street Plaza Partners v. City of Los Angeles* (1998) 65 Cal.App.4th 650, (*rev. den.* 9/30/98); *San Francisco Internal Yachting, Etc. Group v. City and County of San Francisco* (1992) 9 Cal.App.4th 672.) As these cases demonstrate, in the absence of compliance with all statutory formalities for contract execution, courts deny the contracting party any relief, despite substantial reasonable reliance.

Notably, the federal rule limiting a disappointed bidder's damages to the costs of bid preparation is based, in part, on the fact that no contract with Government actually came into being. (*Heyer Products Co., supra*, 140 F.Supp, at 412; *Keco Industries, Inc., supra*, 428 F.2d, at 1240.) Similarly, courts in other states have indicated that the absence of a formal contract limits the disappointed bidder's damages to bid preparation costs. (*Paul Sardella Const. Co.t Inc., supra*, 329 N.E.2d, at 766; *Mottner, supra*, 452 P.2d, at 753; *M.A. Stephen Construction Co., supra*, 308 A.2d, at 383; *Gulf Oil Corp., supra*, 94 Nev., at 118.)

Thus, the absence of a formal contract between the disappointed bidder and the public agency is an additional factor weighing heavily against any finding that a rejected bidder reasonably relied to his detriment, to the extent of lost profits and overhead, merely by submitting a written bid.

D. Enforcement of the Terms and Conditions of the Misawarded Contract is Not Necessary to Further the Policy of Enforcing Bargains.

Enforcement of the terms and conditions of the misawarded contract is not necessary in order to further the policy of enforcing bargains because that policy

is adequately served by the availability of injunctive relief and reimbursement of bid preparation costs. This is especially true given that the majority of such cases involve the good faith errors of public officials, usually arising from a failure by one or more of the bidders to comply with the bid specifications. (Evid. C. § 664; see, *MCM Construction, Inc., supra*, 66 Cal.App.4th 359 [bidders failed to comply with bid submission process]; *Menefee v. County of Fresno* (1985) 163 Cal.App.3d 1175 [bidder failed to sign document]; *Ghilotti Construction Company v. City of Richmond* (1996) 45 Cal.App.4th 897 (rev.den. 8/28/96) [bidder failed to comply with limitation on percentage of work to be subcontracted].)

Allowing a disappointed bidder to recover unlimited damages might provide some added incentive to public agencies to avoid mistakes. However, any increase would, at best, be marginal because the prospect of injunctive relief and recovery of bid preparation costs provides more than adequate incentive for public agencies to avoid mistakes in their contract awards. Moreover, as explained in detail in Section VI, any marginal increase in the incentive for public agencies to avoid mistakes is substantially outweighed by the harm to the public arising from additional delay and expense in the procurement process.

E. Enforcement of the Terms and Conditions of the Misawarded Contract is Not Necessary to Avoid Unjust Enrichment.

When a public contract is mistakenly awarded to the wrong bidder, quite obviously neither the public entity, nor any public official are enriched. The only possible benefit that might accrue to the public at large by receiving an additional bid is an incremental increase in competition for the contract. However, with respect to any particular bidder, this benefit is of such a diffuse and amorphous nature that it cannot properly be characterized as "enriching" the public. Moreover, the fundamental purpose of competitive bidding is to benefit the public by obtaining the lowest price for the contract. (*Associated Builders & Contractors, Inc. v. San Francisco Airports Commission* (1999) 21 Cal.4th 352, 365; *Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.4th 161, 172-173.) Therefore, it is simply nonsensical to conclude that the public has been *unjustly* enriched.

Even the contractor awarded the contract cannot be deemed "unjustly" enriched since it performs work for a fee. Thus, there is no unjust enrichment of anyone in the case of a misawarded contract. In any event, requiring the taxpayers to pay the lost profits of two contractors on the same project does not result in disgorging profits from the contractor who received the contract.

In sum, given the characteristics of competitive bidding, a disappointed bidder cannot establish an essential element of a cause of action for promissory estoppel - that injustice can *only be avoided* by enforcement of the terms and conditions of the contract for which the bidders were competing. Application of the five relevant factors identified in comment "b" to Section 90 compels the conclusion that the interests of justice require only that the public entity reimburse the disappointed bidder for the amount it expended in preparing its bid.

V.

THE COURT OF APPEAL'S DECISION IS CONTRARY TO THE AMERICAN BAR ASSOCIATION'S MODEL PROCUREMENT CODE AND THE CONGRESSIONAL COMMISSION ON GOVERNMENT PROCUREMENT WHICH CONCLUDE THAT DAMAGES SHOULD BE LIMITED TO BID PREPARATION COSTS.

As explained in this section, two impartial bodies convened to study public contracting have concluded that damages equivalent to bid preparation costs are the proper remedy for misaward of a contract. The recommendations are unassailable evidence that justice requires the remedy to be limited in such cases. Because the essential elements of the competitive bidding process are universal, it is appropriate to reaffirm a broadly applicable rule limiting damages to bid preparation costs in cases of misaward of a public contract.

A. The Court of Appeal's Decision Is Contrary to The American Bar Association's Model Procurement Code For State and Local Governments Which Should Be Granted Great Weight in Applying An Equitable Doctrine.

The publication of the American Bar Association's Model Procurement Code for State and Local Gov-

ernments (hereafter, “Model Code”) culminated three years of joint development by the ABA Section of Urban, State and Local Government Law and the Section of Public Contract Law. The Model Code benefitted from extensive public participation, including two draft review periods during which a total of 11,000 copies of the preliminary drafts were distributed nationally. (Model Code, p. vi.) Article 9 of the Model Code addresses the subject of Legal and Contractual Remedies and with regard to the remedies available for misaward of a contract provides:
Entitlement to Costs. In addition to any other relief, when a protest is sustained and the protesting bidder or offeror should have been awarded the contract under the solicitation, but is not, then the protesting bidder or offeror shall be entitled to the reasonable costs incurred in connection with the solicitation, including bid preparation costs, other than attorney's fees. (Model Code, §9-101(7).)[FN7]

FN7. The Model Code Coordinating Committee's Tentative Draft, as presented to the ABA House of Delegates, provided: “In addition to any other relief, when the protest is sustained, the protesting bidder or offeror shall be entitled to the reasonable costs incurred in connection with the solicitation, including bid preparation costs.” (Coordinating Committee's Tentative Draft, Art. 9, p.3 (July 10, 1978).)

The drafting committee's commentary to Section 9-101 expressly states the prohibition on awarding lost profits to the disappointed bidder:
The award of costs under Subsection (7) is intended to compensate a party for reasonable expenses incurred in connection with a solicitation for which that party was wrongfully denied a contract award. *No party can recover profits which it anticipates would have been made if that party had been awarded the contract*. Attorney's fees associated with the filing and prosecution of the protest are not recoverable. (Model Code, §9-101(7), Comment (5) [emphasis added].)

On the central issue before this Court, the Model Code is entitled to substantial weight for three reasons. First, the Model Code is the product of an extensive drafting process by the ABA, including national review and input. (Model Code, p. vi.)[FN8] The Model Code Coordinating Committee also established an Advisory Board which included representatives of private industry such as IBM Corporation, the Associated General Contractors of America, and the Computer and Business Equipment Manufacturers Association. (Model Code, p. vi; A-2.)

FN8. In the initial draft, the provision on award of costs appeared at Section 7-504 and provided: “In addition to any other relief it deems appropriate, the Court, in its discretion, may award a prospective bidder or bidders the reasonable costs incurred in connection with a solicitation.” (ABA Coordinating Comm. On a Model Procurement Code for State and Local Governments, Preliminary Working Draft No. 1, Section 7, p. 12.)

Second, the ABA Model Procurement Code National Substantive Committee on Remedies included distinguished attorneys involved in all aspects of government procurement, including many who had represented contractors in lawsuits against public entities. The committee members had no reason to favor the government and possessed unique insight into the need for, and the effects of, allowing unlimited damages for misaward of a public contract. For example, Chairman Robert D. Wallick represented contractors in at least three lawsuits against the government.[FN9] Committee member Monroe Freeman represented contractors in three lawsuits against the government.[FN10] Committee member Matthew S. Perlman represented contractors in two reported lawsuits against the government.[FN11] Committee member Thomas B. Treacy represented contractors in three reported cases against the government.[FN12]

FN9. *See*, *Russell R. Gannon Co. v. U.S.* (Ct. Cl. 1969) 417 F.2d 1356; *Baltimore Contractors, Inc. v. Renegotiation Bd.* (4th Cir. 1967) 383 F.2d 690; and *Edison Sault Elec. Co. v. U.S.* (Ct. Cl. 1977) 552 F.2d 326.

FN10. *See*, *Schiavbne-Chase Corp. v. U.S.* (Ct. Cl. 1977) 553 F.2d 658; *Tidewater Mgmt. Services. Inc. v. U.S.* (Ct. Cl. 1978) 573 F.2d 65; and *Manpower, Inc. of Tidewater v. U.S.* (Ct. Cl. 1975) 513 F.2d 1396.

FN11. *See*, *J. W. Bateson Co. v. U.S.* (Ct Cl. 1971) 450 F.2d 896 and *George Hyman Const. Co. v. U.S.* (Ct Cl. 1977) 564 F.2d

939.

FN12. *See, Hunkin Conkey Construction Co. v. U.S.* (Ct. Cl. 1972) 461 F.2d 1270; *Merrit-Chapman & Scott Corp. v. U.S.* (Ct Cl. 1970) 429 F.2d 431; and *Foster Wheeler Corp. v. U.S.* (Ct. Cl. 1975) 513 F.2d 588.

Finally, the Model Code has received widespread acceptance as evidenced by its adoption in jurisdictions throughout the country. As of January 1, 1996, Model Code-based legislation had been enacted into law in eleven jurisdictions with some form of Section 9-101(7).[FN13] Thus, a majority of legislators in at least eleven jurisdictions concluded that neither justice, nor the functioning of the public procurement system, would be undermined by limiting damages for misaward of a public contract to bid preparation costs.

FN13. The following jurisdictions limit damages to bid preparation costs or less by statute: Alaska (AK. STAT. §36.30.585(c)); Arkansas (ARK. STAT. ANN. §19-11-244); Colorado (COLO. REV. STAT. §24-109-104); Hawaii (HAW. REV. STAT. §103D-701); Louisiana (LA. REV. STAT. ANN. §39:1671); Maryland (MD. STATE FIN. & PROC. CODE ANN. §15-221.1); Montana (MONT. CODE ANN. §18-4-242); South Carolina (S.C. CODE ANN. §§11-35-4310(4); 11-35-4210(1)); Territory of Guam (5 GUAM CODE ANN. §5425); Utah (UTAH CODE ANN. §63-56-47(1)); and the District of Columbia (D.C. CODE ANN. § 1189.8(f)(2)).

B. The Court of Appeal's Decision Is Contrary to the Recommendations of The Congressional Commission on Government Procurement.

Congress created the Commission on Government Procurement ("Commission") to study and recommend methods "to promote the economy, efficiency, and effectiveness" of procurement by the executive branch of the Federal Government. (Forward to the Summary of the Report of the Commission on Government Procurement) After three years, the Commission issued a four volume report addressing every aspect of government procurement. On the issue of providing an "effective remedy" for the bid protestor, the Commission recommended that the "GAO should continue to recommend termination for convenience of the Government of improperly awarded contracts in appropriate circumstances." (Comm. Rep. IV, Pt. G, p.45.)

The Commission went on to explain that under such circumstances, the contract could then be "reawarded" to the protestor who proved entitlement to that contract. (Comm. Rep., IV, Pt. G, p.45.) In further elaborating on the nature of an appropriate remedy, the Commission concluded, "[W]e also believe that awarding proposal preparation costs as damages for the wrongful rejection of a proposal is appropriate and should be authorized by statute if necessary." (Comm. Rep. IV, Pt. G, p.48.) In support of this last point, the Commission cited decisions of the U.S. Court of Appeals which confirmed the Commission's rejection of anticipated profits as a proper measure of damages. (Comm. Rep. IV, pt. G, p.48, n. 88; citing, *M. Steinthal & Co., supra*, 455 F.2d, at 1302 (award of anticipated profits is unavailable; damages for bid preparation costs in many cases will compensate the frustrated bidder's realized financial losses); *Keco Indus., Inc., supra*, 428 F.2d, at 1233 (award of anticipated profits is improper because contract with rejected bidder never came into existence and because there was no assurance that rejected bidder would have received any contract given that agency reserved right to reject all bids); *Continental Business Enterprise, Inc. v. United States*, 452 F.2d 1016 (Ct. Cl. 1971) (plaintiff raised triable issue of fact in its action to recover bid preparation costs).)

Notably, the Commission's recommendation appears to have been followed. Federal procurement law now provides that the Comptroller General may recommend that a procuring agency pay a successful bid protestor its costs for bid preparation. (31 USC § 3554(c)(1).)

Thus, the Court of Appeal's decision is inconsistent with the considered views of public contracting experts.

VI.

THE COURT OF APPEAL'S DECISION WILL ADD MILLIONS OF DOLLARS IN EXPENSE AND DELAYS TO IMPORTANT PUBLIC INFRASTRUCTURE PROJECTS AT A TIME OF INCREASING DEMAND.

California public entities face daunting challenges in attempting to repair, expand and build essential public infrastructure to accommodate a growing population. The Court of Appeal's decision will hobble the ability of all public entities, from the smallest school district to Caltrans, to rebuild aging structures and construct new ones. This Court recently deemed it proper to take into account the broad-ranging social consequences of expanding contract damages to include emotional distress claims in negligent construction cases. In *Erlich v. Menezes*, this Court observed: [A]dding an emotional distress component to recovery for construction defects could increase the already prohibitively high cost of housing in California, affect the availability of insurance for builders, and greatly diminish the supply of affordable housing.

(*Erlich v. Menezes* (1999) 21 Cal.4th 543, 560.)

Likewise, *Amici* submit that this Court should now consider the broader impact of allowing a disappointed bidder to seek an award of unlimited damages on the development and maintenance of California's public infrastructure. By creating an unnecessary incentive for disappointed bidders to pursue bid protests, the Second District's decision will increase the costs of public works projects and procurement contracts throughout the state by forcing public agencies to accept bids that will result in a higher cost to the taxpayers. The additional incentive to mount a bid protest created by the Court of Appeal's decision will also introduce delay and added administrative costs into the procurement process and, ultimately, increase greatly the cost of a project or contract at a time when California local governments face overwhelming challenges.

A. California Public Entities Face a Tremendous Unmet Need to Repair. Expand, and Build Public Infrastructure.

Not only is the state's *existing* public infrastructure aging and deteriorating, but the rapid population growth anticipated over the next twenty years will acutely increase the demand for *new* facilities. The California Transportation Commission has estimated that $10.5 billion is needed to address the current deferred maintenance backlog for rehabilitation of local roads and streets, and $400 million is required to keep pace with annual maintenance and rehabilitation needs.[FN14] The funding shortfall for rehabilitation or replacement of bridges on local roads is estimated to be $570 million over the next ten years.[FN15] The California Business Roundtable has predicted that deferred maintenance costs in K-12 school facilities will be $5 billion over the ten-year period, 1997-98 through 2006-07.[FN16]

FN14. California Transp. Comm'n. Inventory of Ten-Year Funding Needs for California's Transportation Systems 15 (1999.)

FN15. *Id.* at 19.

FN16. California Bus. Roundtable, Building a Legacy for the Next Generation 26 (1998).

With regard to future demand, the Commission on Building for the 21st Century stated that; "California's infrastructure … cannot support the expected growth in the 21st century"[FN17] According to the Commission, California's population is estimated to increase by 12 million people over the next ten years.[FN18] The Department of Finance estimates that an increase of 50,000 students per year will result in an $8.9 billion need for K-12 public school facilities over the next ten years.[FN19]

FN17. Commission on Building for the 21st Century, Initial State Infrastructure Report 6 (1998).

FN18. *Id.*

FN19. California Dept. of Fin., Capital Outlay and Infrastructure Report 15 (1999).

B. Creating a Windfall for Disappointed Bidders Will Cripple the Ability of Public Agencies to Address California's Existing and Future Infrastructure Needs.

Allowing a disappointed bidder to seek an award of unlimited damages creates a highly lucrative additional incentive for these bidders to challenge the rejection of their bids. It is conceivable that disappointed bidders will scrutinize awards in search of any basis, no matter how hyper-technical, to sustain a bid protest. California courts have observed that it is a disservice to the public if a losing bidder were per-

mitted to "comb through the bid proposal or license application of the low bidder after the fact [and] cancel the bid on minor technicalities." (*Judson Pacific-Murphy Corp. v. Durkee* (1956) 144 Cal.App.2d 377, 383; *MCM Construction, supra*, 66 Cal.App.4th, at 370.) Surely, allowing unlimited damages would further encourage such practices, with a corresponding detrimental effect on the public.

A rule that allows a disappointed bidder to seek an award of unlimited damages not only encourages the filing of bid protests, but will also adversely affect the manner in which public agencies perform their public works and procurement functions in three ways. First, public agencies will be very reluctant to exercise (heir authority to waive inconsequential defects and accept a lower bid for a project or contract out of fear of a possible claim for exorbitant damages from the losing bidder. (Cf. *Ghilloti Construction Co., supra*, 45 Cal.App.4th 897; *Valley Crest Landscape, Inc. v. City Council* (1996) 41 Cal.App.4th 1432.) Taxpayers will be forced to spend additional money, in some cases, tens of thousands of dollars, just to get a bid in which every "t" is crossed, and every "i" is dotted. Second, in cases where multiple low bids contain minor defects, public agencies will be under increased pressure to reject all bids and rebid the project or contract, thus causing delays and increasing administrative costs. (See, e.g., *MCM Construction, Inc., supra*, 66 Cal.App.4th 359.)

Third, public agencies will be much more likely to award contracts to untrustworthy or unqualified bidders, rather than engage in the inherently difficult determination of the bidder's *responsibility*. (*Inglewood-Los Angeles County Civic Center Authority v. Superior Court* (1972) 7 Cal.3d 861, 867 [determination of bidder responsibility includes attribute of trustworthiness, with reference to bidder's quality, fitness and capacity to satisfactorily perform the proposed work].) In each case, it is taxpayers who will shoulder the higher tax burden and suffer as a result of. the delayed projects, shoddy work, and higher costs.

In sum, allowing unlimited damages to disappointed bidders will create yet another obstacle that public agencies must overcome in order to provide the necessary infrastructure for the 21st century.

CONCLUSION

The Second District's decision permitting a disappointed bidder to recover unlimited damages must be viewed as a legal aberration. It is contrary to both California and federal reported cases, the decisions of several states, the principles of the Restatement of Contracts, and the conclusions of two highly distinguished bodies of public contracting experts. Furthermore, at least eleven jurisdictions have statutorily limited the measure of damages to bid preparation costs or less. (See, note 13, *supra*.)

California taxpayers need this Court to articulate a clear rule limiting damages to the costs of bid preparation in cases of misaward of a public contract. As explained above, such a rule is entirely consistent with both the theory of promissory estoppel and the public interest. In the absence of such a rule public agencies will find it more difficult than ever to meet the needs of a growing population and aging infrastructure.

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KAJIMA/RAY WILSON, a Joint Venture, Plaintiff & Respondent, v. LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY, Defendant and Appellant.
1999 WL 33649125 (Cal.) (Trial Motion, Memorandum and Affidavit)

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