

# CLIENT NEWS BRIEF

## Appellate Court Affirms a Public Agency's Right to Waive an Inconsequential Bid Defect

When is a defect in a low bidder's paperwork too significant for the public entity owner to waive? The Court of Appeal recently added another piece in the patchwork quilt of law addressing this seemingly simple, but sometimes difficult, question. The court concluded that a public agency may waive the omission of a single page of a bid package if exclusion of the page did not affect the bid amount or provide the bidder an advantage.

In *Bay Cities Paving & Grading, Inc. v. City of San Leandro* (2014) 223 Cal.App.4th 1181, the low bidder, Gallagher & Burk (G&B), omitted the first page of the City's form bid bond from its bid. G&B did include the second page, which contained the necessary signatures and other information. After the bid opening G&B promptly submitted the missing page, but the second lowest bidder, Bay Cities, protested that the G&B bid was nonresponsive and should be rejected. The City determined that the bid bond was enforceable without the first page, and that it could waive the omission of the first page as "an inconsequential bid defect." The bid bond surety confirmed that the bond was enforceable and, regardless, the information required by the missing page was stated on the second page. Bay Cities filed suit challenging the award to G&B.

The appellate court affirmed the trial court's decision rejecting Bay Cities' challenge. The court of appeal reasoned that under current law, a substantially conforming bid could be accepted if the variance at issue "cannot have affected the amount of the bid or given a bidder an advantage or benefit not allowed other bidders or, in other words, if the variance is inconsequential." (*Ghilotti Construction Co. v. City of Richmond* (1996) 45 Cal.App.4th 897, 904.) The question of a defect being inconsequential "is a question of fact," and must be evaluated "from a practical rather than a hypothetical standpoint."

The City's waiver of the defect was proper since no mistake occurred that would have allowed the low bidder to withdraw its bid without penalty. Thus, G&B had no "advantage or benefit not allowed other bidders."

The complaining bidder, Bay Cities, argued that the City could not go beyond the "four corners" of G&B's original bid to evaluate responsiveness and should have rejected the bid. However, the appellate court held that while responsiveness often can be determined from the "four corners," nothing prevented the City from also looking at contract documents that it had prepared for the project.

This decision provides another example of how the law of responsiveness can be practically applied. As questions of responsiveness arise, it is critical to bear in mind that the advantage, or lack thereof, to the low bidder is an important factor when analyzing whether the owner has the right to waive the defect.

If you have any questions regarding the *Bay Cities* decision or other bid protest issues, please feel free to contact one of our [eight offices](#) located statewide. You can also visit our [website](#), follow us on [Facebook](#) or [Twitter](#), or download our [Client News Brief App](#).

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