

New Case Addresses Waiving Public Works Bidding Irregularities

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Public entities' authority to waive minor public works bidding irregularities has been further clarified by a California Court of Appeal. A public entity may waive the irregularity and award a contract to the low bidder if the error in the bid is the absence of one of the pages of a standard form bid bond. In *Bay Cities Paving & Grading, Inc. v. City of San Leandro*, the City provided prospective bidders on a public works project a standard bid bond form. The low bidder submitted a bid package that included the second page of the standard bid bond form, signed by both the surety and low bidder's president, but did not include the form's first page. The bond itself was valid and enforceable.

The City waived the irregularity and awarded the contract to the low bidder, noting that the first page of the bid bond contained only three blank spaces for the insertion of the names of the low bidder and the surety and the date of bid submission, all of which were provided on the second page of the bid bond. The second lowest bidder filed suit, arguing that the omitted page gave the low bidder the option of deciding after bid opening whether it wanted to be bound by the bid bond, and thus gave the low bidder a competitive advantage over other bidders. Also, because the City used its standard bid form to supply information that was missing from the low bidder's bid, the second lowest bidder argued that the City was not allowed to look beyond the bid packet to determine its responsiveness.

The court sided with the City, highlighting that the City's Municipal Code stated that the City may waive any informalities or minor irregularities in bids received, and the notice to bidders for the particular project included similar language. The court held that every bidder had an opportunity to attempt to avoid liability under a bid bond by denying its validity, and there was nothing in the missing first page that created a competitive advantage. Also, the court stated that a public entity is not barred from using contract materials for that specific project to evaluate the responsiveness of a particular bid.

This case does not hold that a missing bid bond should be waived as an inconsequential irregularity in every instance. But if the bond is on the public entity's standard form, the missing page provides information found elsewhere in the bid packet, and the bond is valid and enforceable, the irregularity is one of a series of minor defects that may be waived at the entity's discretion. Public entities should consult with their attorneys for further guidance before waiving irregularities in bid packets.

For advice regarding *Bay Cities Paving v. City of San Leandro* or any public works matter, please contact Shiri Klima at sklima@rwglaw.com or any of the members of the Firm's Public Law Department.