

October 14, 2022

VIA E-MAIL AND FIRST CLASS MAIL ONLY

B. Tilden Kim
Richards Watson Gershon
350 South Grand Avenue, 37th Floor
Los Angeles, CA 90071
Email: tkim@rwglaw.com

Re: Notice of Protest and Notice that Any Award of Bid Solicitation would be Illegal

Dear Mr. Kim:

This letter is being sent to you in your capacity as the outside City Attorney for the City of Temecula relating to public works projects. Our client, MCM Construction, Inc. (“MCM”), is concurrently receiving this letter and its attachments as well, and MCM will be sharing them with your client’s Public Works department to ensure that the City of Temecula receives this content as soon as possible. I personally request that you direct your response on behalf of the City of Temecula to my personal attention via email, but if you wish to speak you can reach me on my cell phone at 916-320-4868. I have already sent you two emails alerting you to this matter earlier today and inviting you to reply but have not received any reply. As to the substance I share the following:

On behalf of MCM, this letter is sent to advise the City of Temecula (“City”) that because the actual bid day conduct implemented by the City was materially flawed, resulting in several bidders being denied their due process and other rights to submit timely bids to the City, the procurement process used by the City for the below-referenced project was in violation of the City’s own published rules and the competitive bidding laws of the State of California, and rendered the bidding process illegal. Any award of the proposed contract by the City, and any performance thereof by an awardee, would be illegal, result in a void contract, and trigger litigation. The City is therefore requested to reject all bids received, and re-advertise the solicitation of new bids to avoid any of these consequences. The details supporting these assertions and legal outcomes are set forth below and in the attachments to this letter.

MCM was a plan holder for the project known as I – 15 / French Valley Parkway Improvements – Phase II (Project No. PW16-01) (the “Project”) which was the subject of an invitation for bids published by the City of Temecula (“City”) for bids to be received **‘up to’** 10:00 a.m. on Thursday, October 6, 2022. (The use of the bold lettering in the prior sentence is intentional as it is the key verbiage which triggers this letter.)

As detailed below, the City impermissibly refused to receive through the mandatory electronic bidding process tendered bids by MCM and other bidders on October 6th when the clock was at 10:00 a.m. because the software system and bid agent used by the City elected to refuse tendered bids after 9:59:59 a.m. and this was improper. The call for bids, documented below, expressly represented that bids could be received **‘up to 10:00 A.M.’** and by law, as well as the common use of the English language, the use of the phrase ‘up to 10:00 A.M.’ means **‘up to 10:00 A.M. plus 59 seconds’**.

Because the City refused to accept bids sought to be submitted after 9:59:59 a.m., the City failed to follow its own bidding rules and tainted its own bidding process rendering the bidding process subject to this notice of legal challenge. The only viable option for the City to address this misconduct is the rejection of all bids.

We have been made aware of the following irregularities relating to the bidding process: three (3) separate, independent general contractors which each sought to follow the published bid submission rules were denied the opportunity to timely do so. As noted in the attached exhibits, each of these three bidders (all of which are very experienced bidding contractors) tried to submit their bids when the clock read 10:00 a.m. on bid day and each were improperly and illegally denied the right to submit a timely bid in accordance with the published call for bids.

Attached to this letter are three declarations under penalty of perjury, labeled Exhibits 1, 2 and 3, each of which are signed by the lead persons, respectively, at MCM, the Walsh Group and Security Paving who were in charge of submitting their company’s respective bids for this Project. Each of them detail the same independent experience: that the bidding software used by the City denied each of them the ability to submit their timely bids as the software used (and/or the personnel using the same) improperly and impermissibly closed off the bidding process before 10:00:59 a.m.

In addition, attached as Exhibit 4 is a copy of a written decision issued by a California Court of Appeal on virtually identical facts in the 2003 case known as *Solpac, Inc. v. City of Fresno*. You are urged to please carefully review the attached decision because the City of Temecula’s conduct on this project, failing to accept bids which were sought to be timely tendered, mirrors the conduct of the City of Fresno in the attached decision which the Court of Appeal determined was improper and illegal. As detailed in the attached decision, the resulting contract award and issuance was held to be illegal.

To place all of this in context, the following facts related to the City of Temecula’s bid solicitation are substantiated:

- Attached as Exhibit 5 to this letter is the City’s Notice Inviting Bids for this Project.

- The Invitation for Bids states, in its first sentence, the following:

“NOTICE IS HEREBY GIVEN that the City of Temecula, Riverside County, California, will receive **ELECTRONIC BIDS ONLY** up to **10:00 A.M.**, on **Thursday, the 6th of October, 2022.**” (Emphasis in original.)
- The Invitation for Bids later provides in the first sentence of its second paragraph the following:

“Bids must be submitted electronically via the on-line bidding service PlanetBids.”
- MCM, Security Paving and Walsh Group were each plan holders for the Project and had each logged on to submit a bid for the Project using the online bidding service of PlanetBids.
- When the clock used by PlanetBids to receive bids for the Project turned to 10:00 am on October 6, 2022, the planned bids to be submitted by MCM, Security Paving and Walsh Group had not yet been received by PlanetBids’ software.
- As documented in the attached declarations from MCM, Walsh Group and Security Paving, each of these entities, using a precise bid clock, were registered online using the required bidding software system. Both Walsh Group and Security Paving pushed ‘send’ on their respective computers to submit their bids for the Project, independent of and from each other at 10:00 a.m. on October 6, 2022 but their bids were not accepted. As to MCM, it received a message that it could not send its bid because the time to do so was closed even though the clock read 10:00.
- Each of MCM, Walsh Group and Security Paving received a computer-generated message indicating that their bids were not timely submitted (or denied the right to submit) but each of them attempted to submit their respective bids before the clock turned to 10:01 a.m. and thus timely sought to submit bids “up to 10:00 A.M.” as required by the call for bids published by the City.
- The call for bids used the wording “up to 10:00 A.M.” as contrasted with “before 10:00 A.M.” or “no later than 9:59:59 A.M.”.
- As set forth in the attached decision of the California Court of Appeal, the use of the term ‘up to 10:00 A.M.’ by the City of Temecula is the equivalent of what the City of Fresno’s invitation stated. Fresno’s bid call asked for bids ‘no later than 3:00 p.m.’ which is the same as ‘by 10:00 A.M.’ which means prior to 10:01 a.m.

- Applying the same logic and proper use of the English language as evaluated and commented upon by the *Solpac* court, the only plausible conclusion and realistic interpretation of the City of Temecula's bid call is that every bid received up to 10:00:59 a.m. using the PlanetBids software system, would be a timely submitted bid on October 6, 2022.
- Following the bidding process, MCM's Vice President, Harry McGovern, has attempted to have the City realize its mistaken conduct and throw out the bids and re-bid the Project. The email exchanges between Mr. McGovern and Mr. Odviar of the City are attached as Exhibit 6 to this letter. The email chain details that MCM's attempt to submit its bid at 10:00 a.m. was rejected as being too late. MCM's position has been, and remains, that such a refusal to receive the MCM bid was improper and in violation of the bidding rules and the call for bids, and it violates the competitive bidding laws and rules that the City is required to follow.
- The declaration of Ron Burch, the lead estimator for MCM, submitted as Exhibit 1, affirms, under oath, that MCM's bid was completed and was sought to be submitted to the City, using the PlanetBids website and software, at 10:00 a.m. on October 6, 2022, and thus prior to the clock turning 10:01 a.m. It was not allowed to be received even though the clock had not yet reached 10:01 a.m.
- The declarations from the Walsh Group and Security Paving submitted as Exhibits 2 and 3 affirm that the bids prepared by them experienced the same challenges and improper rejections.
- Mr. Odviar's email dated October 12, 2022, at 7:46 a.m., included in Exhibit 6, incorporates a report from the bidding agent PlanetBids. The content confirms that PlanetBid impermissibly denied the opportunity for a bidder to submit a timely bid prior to 10:01 a.m., as it provides:

"The bid closed exactly at 10:00 a.m. PDT."

This confirms that the software was programmed to deny the receipt of bids between 10:00:01 and 10:00:59 impermissibly.

- Within Exhibit 6, Mr. McGovern, on October 12, 2022 at 2:11 p.m., wrote: "Our contention is that we were closed out right at 10:00 from submitting the bid at 10:00 and 15 seconds and, according to Caltrans, anything before 10:01 is 10:00 so we are saying that Planet Bids closed us out too early!"

Please consider throwing out all bids and rebidding in order to receive bids from all Contractors interested in bidding in order for the City to realize the lowest price available for the project.”

- In response, Mr. Odviar’s email to Mr. McGovern on October 12, 2022, at 6:05 p.m. (also part of Exhibit 6) confirms that the bidding process used by PlanetBids impermissibly cut off the receipt of bids after 9:59:59 a.m. on October 6, 2022. Mr. Odviar wrote:

“It is peculiar that two of the larger bidding sites (Caltrans and PlanetBids) would implement slightly different cut-off times for the same stated deadline. And it is unfortunate that this one-minute differential interpretation affected MCM’s, and others’, ability to bid this project. However, after some 10+ years of use the City believes the PlanetBids system to be a solid and fair bidding system, including the cut-off time.

We do not intend to throw out all bids and rebid the contract as MCM has requested.”

California law governs this matter and California is very strict on requiring that public agencies, subject to the requirements of the competitive bidding laws, such as the City of Temecula, are bound to follow the law and further must follow their own published rules. The case of *Pozar v. Department of Transportation (CalTrans)* (1983) 145 Cal.App.3d 269 is crystal clear on this point. Because the term “up to 10:00 A.M.” means at any time up to 10:00:59 a.m., and the City of Temecula admittedly cut off the receipt of bids at 60 seconds too early, the implementation of the City’s bidding process was impermissibly flawed. The term “up to 10:00 A.M.” used by the City of Temecula is neither ambiguous, unintelligible nor uncertain. When this occurs the public agency is required by law to follow its own rules.

The City did not follow its own rules and impermissibly, using its agent PlanetBids, cut off the time the computer would accept bids sought to be submitted once the clock turned from 9:59:59 a.m. on October 6th to 10:00 a.m. This conduct was improper and cut off bids 60 seconds before it should have, and resulted in at least three bids not being received which were sought to be timely submitted.

The *Solpac* court published in its decision (Exhibit 4) that when such an occurrence arises the outcome is clear: the resulting contract award was and is illegal and subject to legal challenge. When such conduct occurs and the eventual contract awarded is challenged, the bidder awarded an illegal contract will be required to pay back to the City 100% of all funds it is paid as the City, as a matter of law, cannot award an illegal contract. Placing any contractor in such a position is unreasonable and improper. See the long-standing decision from the California Supreme Court in *Miller v. McKinnon* (1942) 20 Cal.2d 83, which holds that contracts issued in excess of authority are void and illegal.

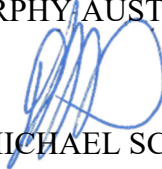
B. Tilden Kim
October 14, 2022
Page 6

While the decision in the *Solpac* case was issued after the underlying contract had been performed to such an extent that stopping it would have benefitted no one, that is not the circumstance presented in this procurement. No contract has been awarded, no work has been started and no illegal payments have been made.

The City is urged to avoid such an outcome and recognize that a very serious and unfortunate mistake was made. The City is further urged to rectify the error by tossing out all bids due to the mistakes made and avoid perpetuating the mistake and placing a contractor which is awarded the project in jeopardy of having the choose to perform an illegal contract and risk forfeiture of all payments received.

Very truly yours,

MURPHY AUSTIN ADAMS SCHOENFELD LLP



D. MICHAEL SCHOENFELD

DMS/jc
Enclosures
cc: Harry McGovern
Ron Burch

EXHIBIT 1

**Main Office**

P.O. Box 620 / 6413 32nd St. Ste A / North Highlands / CA 95660
(916) 334-1221 Estimating / Engineering FAX (916) 334-5384
Accounting FAX (916) 334-8355

Southern California Regional Office

P.O. Box 1239 / 16249 Adelanto Rd. / Adelanto / CA 92301
(909) 875-0533 Engineering / Accounting FAX (909) 875-2243

Dated: October 14, 2022

Declaration of Ronald Burch

I, Ronald Burch, declare:

1. I am an individual over 18 years of age. I have personal knowledge of the following and if called to testify I could and would competently testify thereto.
2. I am employed by MCM Construction, Inc. ("MCM") in the capacity of Chief Estimator and have held such a position for 21 years. I report to business in the MCM main office located in North Highlands, California. My responsibilities in my employment include the management of bidding and bids which MCM elects to submit for prospective construction projects.
3. MCM determined that it was interested in the advertised project by the City of Temecula known as I – 15 / French Valley Parkway Improvements – Phase II (Project No. PW16-01) (the "Project") which was the subject of an invitation for bids published by the City of Temecula ("City") for bids to be received by 10:00 am on Thursday, October 6, 2022.
4. We obtained the invitation for bids, all addenda and all contract documents, registered to submit our bid electronically as required, submitted numerous bidder questions, and prepared our bid for submission.
5. On bid day, I, along with my staff, prepared the MCM bid for the Project in my office.
6. In order to ensure that we timely submit our bids for jobs we want to bid, we confirm our clock with the owner's clock.
7. The bid required a considerable number of additional hand generated (paper) information/forms be prepared, scanned and submitted with the electronic bid items/price schedule.
8. As the clock turned exactly 10:00.00 am on October 6, 2022, the "Place ebid" button on the owner's PlanetBids website disappeared and the bid read "closed" thus not allowing MCM to submit our bid. I was ready, willing and able to timely submit MCM's bid but was denied the opportunity to do so as the bid submission opportunity was apparently closed 60 seconds earlier than it was advertised to be available to submit bids.
9. When I reviewed the Invitation for Bid I observed that it called for bids to be received 'up to 10:00 am'. A copy of the first page of the Invitation for Bids is attached to this declaration as Exhibit A.
10. In my 21 years of experience, bidding to well over a hundred different owners, including many Caltrans projects, I have always understood and learned that the words and phrase 'up to 10:00 am' means up to the designated time (in this case 10:00 am) plus 59 seconds. If the owner elected to stop its receipt of timely bids once the clock turned to 10:00 am and not up to 10:00:59, the owner needed to change the wording to read 'prior to 10:00 am' or 'no later than 9:59:59'. Because the invitation for bids did not use the latter phrases I understood, consistent with the convention used by all other owners that I have experience with, that bids submitted up to 10:00:59 on this Project would be timely.

11. I personally believe that the bid of MCM would have been timely submitted and the failure of the City to accept our bid was improper.

I declare, under penalty of perjury under the laws of the State of California, that the foregoing is true and correct. Executed this 14th day of October, 2022 at North Highlands, California.

A handwritten signature in blue ink, appearing to read "Ronald Burch", with a stylized flourish at the end.

Ronald Burch

EXHIBIT A

CITY OF TEMECULA, DEPARTMENT OF PUBLIC WORKS

NOTICE INVITING BIDS

for

I-15 / FRENCH VALLEY PARKWAY IMPROVEMENTS - PHASE II

PROJECT NO. PW16-01

FEDERAL PROJECT NO. INFRALUL-5459(031)

1. NOTICE IS HEREBY GIVEN that the City of Temecula, Riverside County, California, will receive **ELECTRONIC BIDS ONLY** up to **10:00 A.M.**, on **Thursday, the 6th day of October, 2022**. The City of Temecula utilizes PlanetBids as its online bid management provider and location for public bid openings. Bids will be opened and the results of submitted **ELECTRONIC** bids for the subject project will be immediately available to the public at the stated date and time on the City's PlanetBids portal at:

<https://pbsystem.planetbids.com/portal/14837/portal-home>

Bids must be submitted electronically via the on-line bidding service PlanetBids. To download bid documents and to submit an electronic bid, a bidder must be registered with the City of Temecula as vendor. To register as a vendor, go to the following link, then follow the "Register as a Vendor" link:

<http://temeculaca.gov/314/Purchasing-Contract-Administration>

Documents must be uploaded in PDF (Portable Document Format). Hard copies submitted to the City, in lieu of electronic copies uploaded onto the system, will not be accepted as a viable bid. Electronic bids must be received no later than the date and time specified above.

It is the bidder's responsibility to ensure that their bid documents are properly uploaded onto the City's online bid management system. Bids that are missing pages, cannot be opened, etc., may be considered unresponsive. It is the bidder's sole responsibility to contact the City's online bid management provider (PlanetBids at 818-992-1771) to resolve any technical issues related to electronic bidding, including, but not limited to, registering as a vendor, updating passwords, updating profiles, uploading/downloading documents, submitting an electronic bid, etc.

2. All of said work is to be performed in accordance with Plans and Specifications entitled **I-15 / FRENCH VALLEY PARKWAY IMPROVEMENTS - PHASE II, PROJECT NO. PW16-01, FEDERAL PROJECT NO. INFRALUL-5459(031)**. These documents can be downloaded from PlanetBids. The charge for downloading bid documents is **\$75.00**.
3. The classification of Contractor's license required in the performance of this Contract is a **Class A**.
4. Pursuant to the provisions of Section 1773 of the Labor code of the State of California, the City has obtained the general prevailing rate of per diem wages and the general prevailing rate for holiday and overtime work in this locality for each craft, classification or type of workman needed to execute the contract from the Director of the Department of Industrial Relations. These rates are available from the California Department of Industrial Relations' Internet web site at: **<http://www.dir.ca.gov>**.

The Federal wage rates for this project as predetermined by the United States Secretary of Labor are set forth in the book issued for bidding purposes entitled "Plans, Specifications, and Contract Documents," and in copies of this book that may be examined at the offices described above where project plans, special provisions, and proposal forms may be seen.

EXHIBIT 2



Dated: October 14, 2022

Declaration of Jerrald Titus, Jr.

I, Jerrald Titus, Jr., declare:

1. I am in individual over 18 years of age. I have personal knowledge of the following and if called to testify I could and would competently testify thereto.
2. I am employed by Walsh Construction Company II, LLC ("Walsh") in the capacity of Program Manager and have been employed by Walsh for 20 years. I report to business in the office located at 1260 Corona Pointe Court, Corona, California. Part of my responsibilities in my employment include the management of bidding and bids which Walsh elects to submit for prospective construction projects. As part of my day-to-day responsibilities in my job I supervise other Walsh employees tasked with assisting me in the preparation of our company bids.
3. Walsh determined that it was interested in the advertised project by the City of Temecula known as I – 15 / French Valley Parkway Improvements – Phase II (Project No. PW16-01) (the "Project") which was the subject of an invitation for bids published by the City of Temecula ("City") for bids to be received by 10:00 am on Thursday, October 6, 2022.
4. We obtained the Invitation for bids and all addenda, registered to submit our bid electronically as required, and prepared our bid for submission.
5. On bid day, my staff prepared the Walsh bid under my personal and direct supervision in our office. As the time neared 10:00 am Pacific Standard Time I was personally standing immediately behind Walsh employee, Maria Villegas, who was sitting at her desk and who was the person tasked to submit our bid electronically to the City.
6. In order to ensure that we timely submit our bids for jobs we want to bid, we implement a system that maintains an accurate bid clock that we carefully monitor. On October 6th, this bidding clock was within my view and also I was able to observe in real time the computer screen being used by Ms. Villegas to finalize our bid for submission to the City for the Project.
7. Before the clock turned 10:00 am on October 6, 2022 I directed Ms. Villegas to submit our bid by hitting 'send'. I watched her do so. My direction was intended to submit the bid of Walsh to the City as a general contractor to the City for the Project.
8. Ms. Villegas did hit the 'send' button but instead of receiving a confirmation that our bid was received we received banner on the screen indicating an error message that could not be deciphered. When Ms. Villegas pressed the button re-send our bid again, we received a second, banner indicating the bid was closed.
9. I found out that the City did not accept Walsh's bid when it published the bid results.



10. When I reviewed the Invitation for Bid I observed that it called for bids to be received 'up to 10:00 am'. In my 20 years of experience, bidding to well dozens of owners throughout various states, I have never encountered this issue before and generally understand based on industry experience the words and phrase 'up to 10:00 am' to mean up to the designated time (in this case 10:00 am) plus 59 seconds. If the owner elected to stop its receipt of timely bids once the clock turned to 10:00 am and not up to 10:00:59, I would expect to see the wording to read 'prior to 10:00 am' or 'no later than 9:59:59'. Because the invitation for bids did not use the latter phrases I understood, consistent with the convention used by other owners that I have experience with, that bids submitted up to 10:00:59 on this Project would be timely.
11. I personally believe that the bid of Walsh was timely submitted and the failure of the City to accept our bid was improper.

I declare, under penalty of perjury under the laws of the State of California, that the foregoing is true and correct. Executed this 14th day of October, 2022 at Corona, California.

A handwritten signature in black ink, appearing to read "Jerrald Titus, Jr.", written over a horizontal line.

Jerrald Titus, Jr.

EXHIBIT 3

DECLARATION OF JOE FERNDINO

I, Joe Ferndino, declare as follows:

1. I am an individual over 18 years of age. I have personal knowledge of the following and if called to testify I could and would competently testify thereto.

2. I am a Vice President at Security Paving Company, Inc. and have held that position for over 20 years. My office is located at 3075 Townsgate Road, Suite 200, Westlake Village, California. Part of my responsibilities in my employment include the management of bidding and bids which the Security Paving elects to submit for prospective construction projects. As part of my day-to-day responsibilities in my job I supervise other Security Paving employees tasked with assisting me in the preparation of our company bids.

3. Security Paving determined that it was interested in the advertised project by the City of Temecula known as I – 15 / French Valley Parkway Improvements – Phase II (Project No. PW16-01) (the “Project”) which was the subject of an invitation for bids published by the City of Temecula (“City”) for bids to be received by 10:00 am on Thursday, October 6, 2022.

4. We obtained the Invitation for bids and all addenda, registered to submit our bid electronically as required, and prepared our bid for submission.

5. On bid day, my staff prepared the Security Paving bid under my personal and direct supervision in our office. As the time neared 10:00 am I was personally standing immediately behind Kylee Dominguez, who was sitting at her desk and who was the person tasked to submit our bid electronically to the City.

6. In order to ensure that we timely submit our bids for jobs we want to bid, we implement a system that maintains an accurate bid clock that we carefully watch. On October 6th, this bidding clock was within my view and I was able to observe in real time the computer screen being used by Ms.

Dominguez to finalize our bid for submission to the City for the Project.

7. Just prior to the clock turning 10:00 am on October 6, 2022, I directed Ms. Dominguez to submit our bid by hitting 'send', which begins the process to upload our bid documents. I watched her hit the 'send' button. My direction was intended to submit the bid of Security Paving to the City as a general contractor to the City for the Project.

8. Instead of receiving a confirmation that our bid was received, we received a message telling us that our bid documents were successfully uploaded but the bid submittal process was closed. At the time we received this message, our bid the clock still read "10:00 am" and had not changed to 10:01 am or any later time.

9. Almost simultaneously with our receiving the message that the bid submittal process was closed, City staff began publishing the bid results. At that point, it was clear the City did not accept our bid.

10. The Invitation for Bids called for bids to be received 'up to 10:00 am'. In my 35 years of experience, bidding to well over a hundred different owners, including many CalTrans projects, I have always understood and learned that the phrases 'up to 10:00 am' and 'by 10:00 am' mean up to the designated time (in this case 10:00 am) plus 59 seconds. If the owner elected to stop its receipt of timely bids once the clock turned to 10:00 am and not up to 10:00:59, the owner needed to change the wording to read 'prior to 10:00 am' or 'no later than 9:59:59'. Because the invitation for bids did not use the latter phrases I understood, consistent with the convention used by all other owners that I have experience with, that bids submitted up to 10:00:59 on this Project would be timely.

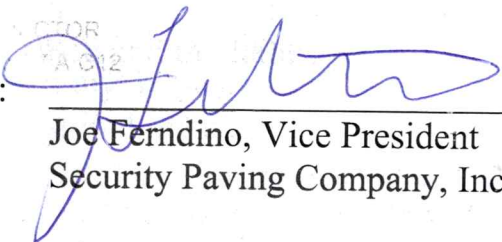
11. I personally believe that Security Paving's bid was timely submitted and the failure of the City to accept our bid was improper.

GENERAL CONTRACTOR
LICENSE NO. 116307 A C12
FAX: 818.362.9300

SECURITY PAVING COMPANY, INC.

3075 Townsgate Rd. Ste 200
Westlake Village, CA 91361
TEL. 818.362.9200

I declare, under penalty of perjury under the laws of the State of California, that the foregoing is true and correct. Executed this 14th day of October, 2022 at Westlake Village, California.

By: 
Joe Ferndino, Vice President
Security Paving Company, Inc.

declare, under penalty of
foregoing is true and cor
e Village, California.

FOR
A C12
Joe Ferndin
Security Paving Company, Inc.

declare, under penalty of
foregoing is true and cor
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FOR
A C12
Joe Ferndin
Security Paving Company, Inc.

declare, under penalty of
foregoing is true and cor
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EXHIBIT 4



User Name: Jeffrey Baird

Date and Time: Thursday, October 13, 2022 10:44:00 AM PDT

Job Number: 181614138

Document (1)

1. [SOLPAC, INC. v. CITY OF FRESNO, 2003 Cal. App. Unpub. LEXIS 614](#)

Client/Matter: 0999.001

Search Terms: SOLPAC, INC. v. CITY OF FRESNO, 2003 Cal. App. Unpub. LEXIS 614

Search Type: Natural Language

Narrowed by:

Content Type
Cases

Narrowed by
Court: State Courts > California



Warning

As of: October 13, 2022 5:44 PM Z

SOLPAC, INC. v. CITY OF FRESNO

Court of Appeal of California, Fifth Appellate District

January 17, 2003, Filed

F038079

Reporter

2003 Cal. App. Unpub. LEXIS 614 *; 2003 WL 139564

SOLPAC, INC., Plaintiff and Appellant, v. CITY OF FRESNO et al., Defendant and Respondent, MAULDIN-DORFMEIER CONSTRUCTION, INC., Real Party in Interest and Respondents.

Notice: [*1] NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS CALIFORNIA RULES OF COURT, RULE 977(a), PROHIBITS COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY RULE 977(B). THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR PURPOSES OF RULE 977.

Prior History: APPEAL from a judgment of the Superior Court of Fresno County. Donald S., Black, Judge. Super. Ct. No. 652953-1.

Disposition: Reversed, with directions.

Core Terms

bid, Purchasing, time stamp, opened, bidder, clock, stamp, documenting, trial court, competitive bidding, cause of action, damages, courts, lowest, notice, extraordinary writ, city charter, advertisement, words, question of law, specified time, time of filing, matter of law, first cause, recommendation, provisions, Municipal, inviting, mandamus, sentence

Counsel: Marks & Golia, Davide Golia, Theodore S. Drcar and Jeffrey B. Baird for Plaintiff and Appellant.

Livingston & Mattesich and Steven G. Churchwell for Defendant and Respondent.

Lang, Richert & Patch, Val W. Saldana and Matthew W. Quall for Real Party in Interest.

Judges: Dibiaso, J. WE CONCUR: Ardaiz, P.J., Levy, J.

Opinion by: Dibiaso

Opinion

Appellant Solpac, Inc., doing business as Soltek Pacific (Solpac) appeals from the denial of its petition for a writ of mandate. Solpac sought an order from the trial court directing the City of Fresno (City) to invalidate City's contract with real party in interest Mauldin-Dorfmeier Construction, Inc. (MDC) for the construction of the Fresno Yosemite International Airport [*2] Terminal/Concourse Expansion and to award the contract to Solpac. We will reverse, with directions.

FACTUAL AND PROCEDURAL SUMMARY

In December 1999, City published a "Notice Inviting Bids" (NIB) for the construction of the Fresno Yosemite International Airport Terminal/Concourse Expansion. According to the NIB, the official deadline for the tender of bids was "no later than 3:00 p.m. on February [29], 2000, at which time the bids [would] be publicly opened and recorded." ¹ [*3] (Emphasis added.) In addition, the "Instructions to Bidders" which accompanied the NIB stated that "Bids received after the appointed hour will not be accepted." ² *The time stamp in the Purchasing Division will be the official clock for documenting the time of filing.* (Emphasis added.) The clock in the City's Purchasing Division (Purchasing Division) had a time stamp device, but it recorded only the passage of minutes and lacked any mechanism for recording the passage of seconds.

¹ The original date for submission of bids was February 3, 2000, but subsequently was extended to February 29, 2000.

² As used in this opinion, "NIB" includes the "Instructions to Bidders."

According to the "time stamp in the Purchasing Division," Solpac's bid was received at "3:00 p.m." When all the accepted bids were opened, Solpac's was found to be the lowest, at \$ 26,570,000. MDC's was the next lowest, at \$ 26,689,000. On April 6, 2000, the City's Purchasing Division declared that Solpac was the lowest responsive and responsible bidder and thus recommended that the City award the contract to Solpac.

On April 13, 2000, under City Resolution 98-59, MDC protested the Purchasing Division's recommendation and asserted that Solpac's bid had been late. A retired superior court judge was selected to conduct an evidentiary hearing and make a recommendation to the City. As a part of the hearing process, the city attorney, on behalf of City, filed a brief with the retired judge, in which the city attorney took the position that Solpac's bid was timely according to the "time stamped through the official clock located in the Purchasing Division." On May 11, 2000, the retired judge found in part that Solpac's [*4] bid was "timely filed and thus responsive as documented by the file stamp" and recommended that City "accept the recommendation of staff that the bid of [Solpac] was responsive."

On May 23, 2000, the City Council unanimously decided that Solpac's bid was late and directed that the contract be awarded to MDC.

Solpac's second amended complaint was filed on September 14, 2000. The first cause of action was a petition for a writ of mandate commanding City to revoke the contract award to MDC and to award the contract to Solpac, and the second cause of action was an alternative claim for damages. The trial court denied Solpac's first cause of action for extraordinary writ relief and stayed its second cause of action for damages.

DISCUSSION

I.

City and MDC assert that this court lacks jurisdiction to hear Solpac's appeal. According to respondents, the trial court's order was not an appealable judgment because it resolved only the first cause of action for mandamus of Solpac's complaint and did not resolve the still pending second cause of action for damages. (Morehart v. County of Santa Barbara (1994) 7 Cal.4th 725, 743, 872 P.2d 143 [an appeal cannot [*5] be taken from a judgment that fails to completely dispose of all causes of action pending between the parties].)

We have jurisdiction to entertain this appeal. The trial court's decision on Solpac's application for a writ of mandate resolved the decisive question -- did City's rejection of Solpac's bid violate City's competitive bidding laws -- at issue under both the first and second counts of Solpac's complaint.³ Although the trial court stayed further proceedings on the second cause of action, as a practical matter, and as a matter of law, the trial court's decision that Solpac's bid was untimely necessarily also decided that Solpac was not entitled to any damages. In such a situation, because the trial court inadvertently failed to formally dismiss the effectively resolved cause of action for damages, we may enter an amended judgment nunc pro tunc to reflect the legal resolution of the damages claim consistent with the trial court's ruling on the critical issue under the first cause of action. (Griset v. Fair Political Practices Com'n (2001) 25 Cal.4th 688, 700 (*Griset*); *Cal. Rules of Court, rule 2(d)(2)*.) Specifically, the Court in *Griset* said:

[*6] "When, as here, a trial court's order from which an appeal has been taken disposes of the entire action, the order 'may be amended so as to convert it into a judgment encompassing actual determinations of all remaining issues by the trial court or, if determinable as a matter of law, by the appellate court, and the notice of appeal may then be treated as a premature but valid appeal from the judgment.'" (Griset, supra, 25 Cal.4th at p. 700; see also Sullivan v. Delta Air Lines, Inc. (1997) 15 Cal.4th 288, 308, 935 P.2d 781.)

Our disposition will enter such an amended judgment.

Neither City nor MDC will suffer any prejudice by our application [*7] of the *Griset* rule. Were we to dismiss this appeal, the parties would be required to return to the trial court for the sole purpose of securing a judgment which formally incorporated the necessary disposition of Solpac's second cause of action for damages in favor of City. Solpac would then be in position to file a timely notice of appeal from that judgment and the matter would return to this court for resolution. We see no good reason to compel such a waste of time and resources.

³ MDC's reliance on Bishop Creek Lodge v. Scira (2000) 82 Cal.App.4th 631, 634 is unavailing because that case dealt with an entirely different situation -- the dismissal of an appeal from an order denying a permanent injunction -- and held that such an order was not sufficiently definitive to qualify as a final judgment.

II.

The correct standard of review is the substantial evidence test. (*Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 361, 981 P.2d 499.) Under this principle, we must determine whether City's action was "arbitrary, capricious, entirely lacking in evidentiary support, or procedurally unfair." (*Ibid.*) In applying this test, however, we will independently assess pure questions of law, such as issues of statutory and contract construction where there is no relevant factual dispute. (*Ibid.* [courts will exercise independent judgment in determining whether an instrument is consistent with applicable law, such as the competitive [*8] bidding statutes]; *Valley Crest Landscape, Inc. v. City Council* (1996) 41 Cal.App.4th 1432, 1437; 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 317, p. 355; see also *Pacific Legal Foundation v. Unemployment Ins. Appeals Bd.* (1981) 29 Cal.3d 101, 111, 172 Cal. Rptr. 194, 624 P.2d 244 [courts will reject administrative interpretations of governing law where such interpretations are contrary to the statutory intent].) The same is true with respect to written instruments such as the NIB. (*CBS Broadcasting Inc. v. Superior Court* (2001) 91 Cal.App.4th 892, 906 [interpretation of a written instrument is a question of law subject to de novo appellate review when there is no relevant extrinsic evidence]; *Harustak v. Wilkins* (2000) 84 Cal.App.4th 208, 214-215 [same].) And, within the applicable standard of review, our evaluation must be rigorous. (*Ghilotti Construction Co. v. City of Richmond* (1996) 45 Cal.App.4th 897, 907 ["Because of the potential for abuse arising from deviations from strict adherence to standards which promote these public benefits, the letting of public contracts universally [*9] receives close judicial scrutiny and contracts awarded without strict compliance with bidding requirements will be set aside. This preventative approach is applied even where it is certain there was in fact no corruption or adverse effect upon the bidding process, and the deviations would save the entity money"].)⁴

⁴ We would come to the same result on this appeal if we accepted MDC's assertion that the proper test is the most deferential "abuse of discretion" standard. (See *Bright Development v. City of Tracy* (1993) 20 Cal.App.4th 783, 795 [mandamus lies to control abuse of discretion by a local agency; discretion is abused when the agency "acts without power or refuses to obey the plain mandate of the law"].)

III.

A.

Solpac contends the award of the contract to MDC was erroneous because it violated California's competitive bidding laws, City's bidding ordinances, and the terms of the NIB. According to Solpac, its bid was timely, responsible and responsive, [*10] and, thus, because its bid was also the lowest, the City had no discretion to award the contract to MDC. On the other hand, City and MDC contend the evidence presented to City demonstrated that Solpac's bid was tendered after the time specified in the NIB and therefore City acted lawfully in awarding the contract to MDC. According to City and MDC, the evidence demonstrated that the "time stamp" on Solpac's bid was "affixed after 3:00 p.m." but "before 3:01 p.m." Among the evidence relied upon by City and MDC is testimony that, sometime before Solpac submitted its bid, the face of the Purchasing Division clock read 3:00 p.m. and the mechanism was heard to "click" or "clunk" the turn of the hour of 3:00 p.m.

A public contract subject to competitive bidding must be awarded to the lowest responsible and responsive bidder. (See *Kajima/Ray Wilson v. Los Angeles County Metropolitan Transp. Authority* (2000) 23 Cal.4th 305, 313 (*Kajima*); *Associated Builders & Contractors, Inc. v. San Francisco Airports Com.*, *supra*, 21 Cal.4th at pp. 365-366.) "The purpose of requiring governmental entities to open the contracts process to public bidding is to eliminate [*11] favoritism, fraud and corruption; avoid misuse of public funds; and stimulate advantageous market place competition." (*Ghilotti Construction Co. v. City of Richmond*, *supra*, 45 Cal.App.4th at p. 907.) The competitive bidding law for Fresno, a home rule city (*Cal. Const.*, art. XI, § 5) is found in the Fresno City Charter. (See *Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.4th 161, 170-171, 885 P.2d 934 [a charter operates as an "instrument of limitation and restriction on the exercise of power over all municipal affairs which the city is assumed to possess"].) The relevant provisions are Fresno City Charter sections 1208 (a) and 1208 (d). Section 1208 (a) states in relevant part: "Every contract involving an expenditure of city moneys of more than twenty-seven thousand dollars (\$ 27,000) for ... public works construction, shall be let to the lowest responsive and responsible bidder" Section 1208 (d) states: "All bids shall be submitted in a sealed envelope and shall be filed with the officer in charge of the purchasing function *no later than* the opening time specified in the notice

inviting bids, who shall receive and be custodian [*12] of such bids and keep the same confidential until they are opened and declared." (Emphasis added.)

B.

The only substantive question raised on this appeal is whether Solpac's bid was responsive -- that is, was it timely under the language of the charter and the NIB?

⁵ If the answer is yes, Solpac was a responsive bidder and the failure to award it the contract was inconsistent with the competitive bidding laws applicable to City. (*Associated Builders & Contractors, Inc. v. San Francisco Airports Com.*, *supra*, 21 Cal.4th at p. 361 [question whether competitive bidding laws have been violated presents pure question of law where the evidentiary facts are undisputed]; *Ghilotti Construction Co. v. City of Richmond*, *supra*, 45 Cal.App.4th at p. 907 [contracts awarded without strict compliance with competitive bidding requirements are improper]; see also *Bright Development v. City of Tracy*, *supra*, 20 Cal.App.4th at p. 795 [public agency's discretion is abused when the agency acts inconsistent with the law].)

[*13] We agree with Solpac that the award of the contract to MDC was improper because Solpac's bid, as a matter of law, was timely. The issue is not even close to being close, and turns on the "time stamp" provision in the NIB, read in conjunction with the "time" provision.

⁶ The language and import of these two sentences could not have been clearer -- bids were required to be filed "no later than" 3:00 p.m., and the official means of documenting the "time" when a bid was filed was the "time stamp" in the Purchasing Division. (*National City Police Officers' Assn. v. City of National City* (2001) 87 Cal.App.4th 1274, 1279 [the express language of an instrument must be given effect if it is clear and explicit]; see also *People v. Superior Court (Gary)* (2000) 85 Cal.App.4th 207, 213 [a court must give statutory

⁵ The issue was framed by the City Attorney at the hearing before the City Council on MDC's bid protest; the City Attorney advised the Council that "Under the charter, the Council can award only to the lowest responsible and responsive bidder.... There was an appeal filed [by MDC] as to the issue of responsiveness only."

⁶ Virtually no consideration was given to the "time stamp" provision during the hearing before the City Council.

language its usual, ordinary meaning; if there is no ambiguity in the language the court will presume the Legislature meant what it said and the plain meaning of the statute governs[.]) The evidence is uncontested that Solpac's bid was stamped by the "time stamp" in the Purchasing Division with the "time" of "3:00 p.m." [*14] Therefore, Solpac's bid was officially submitted "no later than 3:00 p.m." according to the "time stamp" in the Purchasing Division. ⁷ (See *Hansen v. Bacher* (1927) 299 S.W. 225, 227 ["not later than" ... means 'within' or 'not beyond' and is the equivalent of 'on or before']; Webster's Third New Internat. Dict. (1986) p. 307 ["not later than" is synonymous with "by" and "at or before"].)

The time provisions of the NIB were perfectly consistent with City laws governing bidding. Both Fresno City Charter section 1208, subdivision (d) and Fresno Municipal Code section 3-105, subdivision (d), ⁸ require that bids be submitted [*15] "no later than" -- that is, "on or before" -- the opening time specified in the notice inviting bids. Obviously, the NIB used the phrase "no later than" in order to comply with the demands of the charter and the ordinance. ⁹

[*16] According to MDC's supplemental brief, the words "time stamp" in the NIB are "reasonably and practically interpreted as merely describing the actual clock [in the Purchasing Division] than ... to be read and used to identify 3:00 p.m.," and that making the "stamp conclusive proof of timeliness" would be to "significantly rewrite the NIB." In MDC's view, the words "time stamp" served merely to identify the relevant "clock" to be used

⁷ The opening briefs filed by City and MDC on this appeal fail to acknowledge the provision of the NIB designating the "time stamp" in the Purchasing Division as the official means of documenting the time of filing of bids.

⁸ Fresno Municipal Code section 3-105 (d) and (e) state, "all bids shall be submitted in a sealed envelope and shall be filed with the purchasing agent *no later than* the opening time specified in the notice inviting bids, who shall receive and be custodian of such bids and keep the same confidential until they are opened and declared. [P] ... All bids received shall be publicly opened and declared at the time and at the place fixed in the notice inviting bids." (Emphasis added.)

⁹ *Government Code section 53068*, also applicable to charter cities, states: "Any local agency [including a charter city] which seeks to enter a contract that requires the letting of bids, shall specify in the public notice the place such bids are to be received and the time by which they shall be received. Any bids received by such local agency after the time specified in the notice shall be returned unopened."

to time the submission of bids and thus that the provision should be construed as if the NIB had used, for example, the words "'the gray clock' in the Purchasing Division" instead of the words "the time stamp in the Purchasing Division." This is lawyer legerdemain. The language of the clause, taken in its entirety, simply does not support MDC's proposed construction. If "time stamp" did not have any meaning independent of "clock," "time stamp" would not have been so carefully and specifically inserted into the sentence which dealt with the official "documentation" of the "time" of a bid submission.

MDC's position is also unsupported as a matter of pure grammar. The subject of the sentence is not the "clock." The subject of the sentence is the "time [*17] stamp in the Purchasing Division." The "clock," its adjective "official," and the subsequent verb phrase "for documenting the time of filing" together constitute a predicate nominative which follows the linking verb "will be" and more particularly describes the subject of the verb; i.e., the "time stamp in the Purchasing Division." (Webster's Third New Internat. Dict., *supra*, p. 1786; Van Winkle, *Elements of English Grammar* (1990) § 3.2, pp. 158-160.)

MDC's bottom line is that "to grant the time stamp on a bid package precedence over the other measurements of time on the official clock (i.e., the movement of the minute hand or the audible click) would require the rewriting of the [NIB] to state, for example, [that] 'the time stamped by the official clock shall document the time of filing [of bids],'" but this "or *similar* language was not used [in the NIB] here." (Emphasis added.) To this assertion we need only repeat the exact terms of the NIB sentence in issue, which stated: "The time stamp in the Purchasing Division will be the official clock for documenting the time of filing" of bids. The only material divergences we perceive between the NIB provision and MDC's [*18] suggestion is a somewhat different positioning of a few of the same words and the addition in MDC's version of an "ed" to the NIB's "stamp." We have considerable difficulty perceiving, and MDC does not really explain, why the two linguistically comparable formulations are not the least, and at least, *similar*.

C.

Because the uncontested evidence established, as a matter of law, that Solpac's bid was timely under the unequivocal provisions of the NIB, we have no reason to consider the other evidence relied upon by City or MDC

or the parties' conflicting arguments about asserted past Purchasing Division practices or the doctrine of estoppel. (See [*Yamaha Corp. of America v. State Bd. of Equalization* \(1998\) 19 Cal.4th 1, 7-8, 960 P.2d 1031.](#)) It is immaterial that certain witnesses may have testified Solpac's bid was actually stamped "3:00 p.m." sometime after the face of the clock in the purchasing office registered "3:00 p.m.," or that the mechanism of the clock "clinked" or "clunked" the turn of the precise hour of "3:00 p.m." some moments before Solpac's bid was stamped "3:00 p.m." The NIB did not state that bids must be submitted "no later than" the [*19] moment when, according to whoever may have witnessed the event, the face of the clock in the Purchasing Division registered the hour of "3:00 p.m." or was heard to "clink" or "clunk" the turn of the hour of "3:00 p.m." ¹⁰ The NIB instead said that bids must be received "no later than" "3:00 p.m.," and the "time" of receipt would be "documented" by the "time stamp" in the Purchasing Division. To "document" means to use an official paper to evidence or prove something. (Webster's Third New Internat. Dict., *supra*, p. 1786.) Neither the face of the clock in the Purchasing Division nor the "click" or "clunk" of the clock mechanism is a "paper," but Solpac's written bid with the "time" stamped on it by the "time stamp" in the Purchasing Division surely is. The obvious purpose of the designation of the "time stamp" as the official recorder of the "time" of a bid filing was to insure the fair and uniform application of the bidding laws by avoiding precisely what happened here -- a costly, postbid, testimony-laden, dispute with an extended evidentiary hearing at which a parade of competing witnesses related what they recalled having seen or heard at or around 3:00 p.m. on bid [*20] day.

We do not agree with the proposition that, to be timely, bids were required to be submitted *at the latest* during the nanosecond interval between 2:59.59 p.m. and 3:00 p.m. The NIB did not say that bids must be received "before 3:00 p.m." The NIB said explicitly that bids must be received "no later than 3:00 p.m." -- that is, "on or before" 3:00 p.m. To adopt the proposition advanced by City and MDC would require us to do violence to plain

¹⁰ In effect, City and MDC posit a conflict between the two portions of the relevant NIB statement, which peg both the time for the submission of bids and the time for the opening of bids as "3:00 p.m." Based upon this purported conflict, City and MDC assert that the problem must be resolved by construing the NIB as establishing the precise moment the clock moved from 2:59:59 p.m. to 3:00 p.m. as the deadline for bid submission, so that the bids could be opened at exactly 3:00:00 p.m.

English and nonsensically read the phrase "no later than" to mean "before, [*21]" to invalidate the NIB provision denoting the "time stamp" in the Purchasing Division as the "official" means of "documenting" the "time" of the filing of bids, and to give effect only to that part of the NIB which set the time when bids would be opened. (*National City Police Officers' Assn. v. City of National City, supra, 87 Cal.App.4th at p. 1279* [if possible, courts must give effect to every provision of an instrument and avoid constructions which nullify a portion of the instrument].) Given the characteristics of the "time stamp" in the Purchasing Division, under the rationale proffered by City and MDC the last timely stamp for the receipt of bids would have been "2:59 p.m.," despite the fact that the NIB unambiguously stated that the last timely stamp for the receipt of bids was "3:00 p.m.," not "2:59 p.m." (*Ibid.* [if possible, courts must avoid constructions which result in an absurdity].) Even if the "time stamp" provision had not existed, a bid filed precisely on the moment when the clock "clicked" or "clunked" the hour of 3:00 p.m. would not have been late, because it would have been filed "at" 3:00 p.m., as authorized by the "time" provision [*22] of the NIB. (See *Hansen v. Bacher, supra, 299 S.W. at p. 227* ["not later than" ... is the equivalent of 'on or before'" (emphasis added)].)

In fact, the two portions of the NIB are not in actual conflict. (See *Southern Pacific Land Co. v. Westlake Farms, Inc. (1987) 188 Cal. App. 3d 807, 822, 233 Cal. Rptr. 794* [even when different parts of an instrument appear to be contradictory and inconsistent with each other, the court will, if possible, harmonize the parts and construe the instrument in such a way that all parts may stand and will not strike down any portion unless there is an irreconcilable conflict wherein one part of the instrument destroys in effect another part].) The NIB set a specific hour on or before which bids could be filed, with a specific means of establishing the "time" when each bid was filed -- the "time stamp" in the Purchasing Division. By also referring to the last time when bids could be submitted, the NIB set a time before which bids could not be opened. Thus, these provisions of the NIB can rationally be read together as requiring that all bids which bore a stamp later than "3:00 p.m." be returned unopened [*23] and all bids which bore a stamp of "3:00 p.m." or earlier be opened after the "time stamp" in the Purchasing Division would no longer stamp the time of "3:00 p.m." on a bid; that is, when the "time stamp" could only stamp "3:01 p.m." or later.

Moreover, even if there were a conflict between the bid submission time and the bid opening time, we would be

compelled to give precedence to the bid submission time. (See *Southern Pacific Land Co. v. Westlake Farms, Inc., supra, 188 Cal. App. 3d at p. 822.*) As between the time when bids were to be opened and the time when bids were to be submitted, the latter is the critical event for purposes of the competitive bidding laws because the timely submission of bids directly involves the rights of those whose vigorous competition on a level field ensures fairness among bidders and the wise expenditure of public funds. (See *Domar Electric, Inc. v. City of Los Angeles, supra, 9 Cal.4th at p. 173*; *Holly's Inc. v. County of Greenville (VA 1995) 250 Va. 12, 458 S.E. 2d 454, 457* ["[A] requirement in an invitation to bid that fixes the time within which bids must be received is not a minor defect [*24] or an informality that may be waived but, rather, a material and formal requirement that ... must be fulfilled to the letter of the law"]; 10 McQuillan, *Municipal Corporations* (3d ed. 1999) § 29.65 [all the terms and conditions of the advertisement become a part of a bid so that competition among bidders may be equal and fair].) It is certainly conceivable that unanticipated events may delay the opening of bids on a particular project, and we find nothing in the law or in the NIB which required City to reject any or all bids not opened precisely at the time specified, at least so long as any delay was not so substantial as to tangibly impact competition among bidders or subvert the purposes of the competitive bidding process. (See 10 McQuillan, *Municipal Corporations, supra*, § 29.70, p. 476; *McCord v. Lauterbach (1904) 91 A.D. 315, 86 N.Y. S. 503, 506-507* [bid opening time stated in advertisement was directory; no prejudice to any bidder by deferring the opening a short while]; *Konica Business Machines U.S.A., Inc. v. Regents of University of California (1988) 206 Cal. App. 3d 449, 454, 253 Cal. Rptr. 591* [if a variance from strict bid [*25] requirements could not have affected the amount of the bid or given a bidder an advantage or benefit not allowed other bidders, the variance is immaterial and may be waived].)¹¹

We find some further support for our conclusion in City Charter section 1208 (d), which expressly requires that bids be submitted "no later than" the bid opening time specified in a notice inviting bids but does not expressly require that timely bids be opened at such time. To the contrary, the section implicitly contemplates that bids

¹¹ Some evidence was presented at the hearing before the retired judge about the effect on competition when an untimely bid is accepted. However, the subject has not been raised for any purpose by any party on this appeal, and, in any event, we have found Solpac's bid was timely.

might not be opened at the specified bid opening time, for it states that the City officer in charge of bids "shall receive and be custodian of such bids and keep the same confidential *until they are opened* [*26] *and declared.*"¹² (Emphasis added.)

The case cited by MDC to support its position that timely bids were required to be submitted before "3:00 p.m." is not on point. In *Holly's Inc. v. County of Greenville*, supra, 458 S.E. 2d 454, the bid notice stated that "On Thursday, March 17, 1994 at 2:00 p.m. all bids received ... will be opened" (*id.* at p. 455), but the bidder's bid was not received until 2:02 p.m. or 2:03 p.m. (*id.* at p. 456.) The Virginia Supreme Court rejected the bidder's argument that its bid was timely and concluded in part that the bid documents required bids to be submitted before 2:00 p.m. because "a bid could not be opened at [*27] 2:00 p.m. unless it was received *before* 2:00 p.m." (*id.* at p. 457.) The situation in *Holly* is not the situation here because, unlike here, the bid documents involved in *Holly* contained no express direction concerning the last time when bids were to be submitted; it stated only that bids would be opened at 2:00 p.m. Given the content of the *Holly* bid documents, the Virginia Supreme Court's decision makes sense, but it has nothing to say about this case, where the NIB expressly permitted bids to be submitted "no later than 3:00 p.m."

D.

City's determination that Solpac's bid was not responsive because it was not timely was based upon City's construction of Fresno City Charter section 1208 (d) to mean that all bids must have been submitted before the bid opening time so that the bids could be opened precisely at 3:00 p.m. However, we have found this interpretation to be inconsistent with the plain meaning of the words "no later than" in the charter section and in the NIB. (*Associated Builders & Contractors, Inc. v. San Francisco Airports Com.*, supra, 21 Cal.4th at p. 361 [statutory interpretation is a pure question of law]; *Domar Electric, Inc. v. City of Los Angeles*, supra, 9 Cal.4th at p. 171 [*28] [home rule city charter provisions interpreted under same principles that

¹² We recognize that City Municipal Code section 3-105 (d) and (e) is more specific, but, to the extent the code section conflicts with the charter, the latter prevails. (*Domar Electric, Inc. v. City of Los Angeles*, supra, 9 Cal.4th at p. 171 [a charter city cannot act in conflict with its charter].)

govern interpretation of statutes]; *Kreeft v. City of Oakland* (1998) 68 Cal.App.4th 46, 53 [appellate court exercises independent judgment with respect to interpretation of statute]; *CBS Broadcasting Inc. v. Superior Court*, supra, 91 Cal.App.4th at p. 906 [interpretation of a written instrument is a question of law subject to de novo appellate review when there is no relevant or disputed extrinsic evidence]; *Burden v. Snowden*, supra, 2 Cal.4th at p. 562 ["plain meaning" of statute must be given effect]; *Pacific Legal Foundation v. Unemployment Ins. Appeals Bd.*, supra, 29 Cal.3d at p. 111 [courts must reject administrative interpretations of governing law if such interpretations are legally wrong].) In addition, we have concluded that the City's decision failed to give effect to the plain meaning of the provision in the NIB, which was presented to bidders and on which bidders were entitled to rely, that made the "time stamp" in the Purchasing Division the "official clock for documenting the time of filing" of bids. Consequently, [*29] City's decision that Solpac's bid was not timely was erroneous as a matter of law and made the award of the contract to MDC improper under the relevant principles and laws of competitive bidding. (*City of Inglewood-L.A. County Civic Center Auth. v. Superior Court* (1972) 7 Cal.3d 861, 870, 103 Cal. Rptr. 689, 500 P.2d 601 [a contract awarded against dictates of competitive bidding laws is improper]; 10 McQuillan, Municipal Corporations, supra, § 29.73, p. 490 [contract should be awarded to the lowest responsible bidder who complies with the terms of the advertisement].)

IV.

Determining the appropriate remedy is considerably more difficult than determining whether Solpac's bid was timely.

¹³ The parties stipulated at oral argument that the work

¹³ We asked for and received supplemental briefing on the subject from the parties. Normally, we would have stricken part "A" of MDC's supplemental brief. This part addressed the substantive issues involving the validity of City's award to MDC raised in the parties' initial briefs and argued before the court and therefore exceeded the scope of this court's order for additional briefing. However, because the unauthorized argument for the first time clearly explained MDC's legal position with respect to the "time stamp" provision, we will let it stand. In addition, Solpac did not as a protective measure respond to MDC's improper supplemental argument and has not asked for monetary sanctions against MDC for its

required of MDC under the contract was more than 90 percent completed. Nevertheless, Solpac contends that its "only adequate remedy" is a reversal of the judgment and an order by this court directing the trial court to issue a writ of mandate compelling City to "set aside its award to [MDC] and to award the contract instead to" Solpac, because this court "may not weigh concerns of disruption [*30] to the project or balance the harm among the parties." City and MDC contend we have authority to deny Solpac the writ relief it seeks and to instead permit it to recover damages from City, measured by Solpac's bid preparation costs (see [Kajima, supra, 23 Cal.4th at p. 308](#)) under the second cause of action of Solpac's complaint.

[*31] First, we have no power to order the trial court to order City to award the contract to Solpac; at the most, all we could do is order the trial court to order City to revoke the award to MDC. ([Baldwin-Lima-Hamilton Corp. v. Superior Court \(1962\) 208 Cal. App. 2d 803, 817, 25 Cal. Rptr. 798](#) [where public agency has reserved, in its advertisement for bids, the right to reject all bids, the courts have no power to order the agency to award the contract to a particular bidder even though the agency may have improperly awarded the contract to one of the bidders; the courts are limited to directing the public agency to refrain from awarding the contract found to have been let in violation of the competitive bidding laws]; see also [Monterey Mechanical Co. v. Sacramento Regional County Sanitation Dist. \(1996\) 44 Cal.App.4th 1391, 1414](#); [Swinerton & Walberg Co. v. City of Inglewood-L.A. County Civic Center Authority \(1974\) 40 Cal. App. 3d 98, 104, 114 Cal. Rptr. 834](#); [Universal By-Products, Inc. v. City of Modesto \(1974\) 43 Cal. App. 3d 145, 152, 117 Cal. Rptr. 525.](#))¹⁴ The reason is the fundamental constitutional concept [*32] of the separation of powers among the three branches of government. (See 8 Witkin, Cal. Procedure (4th ed. 1997) Extraordinary Writs, § 92, pp. 880-881 [the courts have jurisdiction to reverse abuses of discretionary power by a legislative agency but the courts have no jurisdiction to direct the manner of exercise of discretionary power by a legislative agency].)

Second, the result of a judgment requiring no more than the revocation of the award to MDC would be a pointless farce, subsidized -- as all pointless governmental farces usually are -- by the taxpayers. City would be without a contractor for a project almost

deviation from this court's instructions.

¹⁴ Under both the City Charter and the NIB, City retained the discretion to reject all bids.

complete or perhaps fully complete by the date of this opinion. Under Solpac's rationale, City would be required to re-advertise for the entire project and not just for the small portion of any unperformed work; that is, City would be required to solicit bids for work that City no longer needed [*33] to have done. We suspect even Solpac would agree that City would not be required to first advertise for bids to demolish what has been built so as to be in a position to later re-bid for its reconstruction in order to give Solpac an opportunity to attempt to get what it lost by City's inappropriate award to MDC. And, even if the entire project were rebid, with or without demolition of the existing work, Solpac would not be assured of being the lowest responsible bidder for the project, whatever it was advertised to be, or of making a profit on the work. (See [Kajima, supra, 23 Cal.4th at p. 316](#) [whether the lowest bidder would have actually made a profit on the lost contract is speculation].)

We need not expend any more time playing this fantasia on the theme by Solpac. Because City would be entitled to reject all the bids for the project, including Solpac's, City would not be required to readvertise for the entire project and could simply let a contract for the work undone as of the time it revoked MDC's contract. How this would make Solpac whole, as Solpac desires to be made, is beyond us.

Therefore, the rational solution is to refuse to give Solpac extraordinary [*34] writ relief and instead give it the opportunity to recover its bid preparation costs as damages. ([Kajima, supra, 23 Cal.4th at pp. 315-316.](#)) Happily, this disposition is legally sound. Mandate, though ordinarily classed as a legal remedy, is largely controlled by equitable principles (8 Witkin, Cal. Procedure, *supra*, Extraordinary Writs, § 6, p. 787-788), and the court to which application for mandamus is made is vested with the discretion to determine whether it should be issued. ([Irvine v. Gibson \(1941\) 19 Cal.2d 14, 15, 118 P.2d 812.](#)) A court therefore may refuse mandamus when it is "useless, unenforceable, ... unavailing" or moot. ([Roscoe v. Goodale \(1951\) 105 Cal. App. 2d 271, 273, 232 P.2d 879](#); [Coyne v. Superior Court \(1947\) 80 Cal. App. 2d 898, 901, 183 P.2d 36](#); see also [Environmental Protection Information Center, Inc. v. State Bd. of Forestry \(1993\) 20 Cal.App.4th 27, 31-32](#); [Crangle v. City Council of Crescent City \(1933\) 219 Cal. 239, 242, 26 P.2d 24](#); see generally 8 Witkin, Cal. Procedure, *supra*, Extraordinary Writs, § 145, p. 939.)

In addition, in [Kajima, supra, 23 Cal.4th at p. 315](#), [*35]

the Supreme Court pointed out that, by the time a bid dispute is finally resolved in the courts, "as a practical matter" setting aside an improper contract award is not an effective remedy because "the underlying contract may already have been substantially or fully performed." (*Id. at p. 313, fn. 1*; see also *Swinerton & Walberg Co. v. City of Inglewood-L.A. County Civic Center Authority*, *supra*, 40 Cal. App. 3d at p. 103.) Although both *Kajima* and *Swinerton & Walberg* involved injunctive relief rather than writ relief, both forms of relief invoke notions of equity, and therefore the practical considerations addressed in the two cases apply here with equal force. (8 Witkin, Cal. Procedure, *supra*, Extraordinary Writs, § 6, p. 787 [mandate]; 6 Witkin, Cal. Procedure, *supra*, Provisional Remedies, § 276, pp. 219-220 [injunction].)

We recognize that the court in *Monterrey Mechanical Co. v. Sacramento Regional County Sanitation Dist.*, *supra*, 44 Cal.App.4th 1391, 1413-1414, distinguished between mandamus relief and injunctive relief, and held that, because there was "no authority for the proposition that denial of a [*36] writ of mandate may be based upon the balance of hardships," a ground upon which denial of an injunction may be based, the only applicable remedy in the mandate action was an order to the trial court "compelling the [public agency] to set aside its award of the contract" However, *Monterrey Mechanical* was decided by the Court of Appeal before the Supreme Court's opinion in *Kajima*. In addition, we are not entirely persuaded by the limited analysis of the issue reflected in *Monterrey Mechanical*, given that the competitive bidding statutes protect the public, not the bidders (*Universal By-Products, Inc. v. City of Modesto*, *supra*, 43 Cal. App. 3d at p. 152), and given the equitable overtones of mandate. If *Monterrey Mechanical* has any precedential application here, we decline to follow it.

DISPOSITION

The trial court's order from which this appeal was taken is amended nunc pro tunc to include a decision adverse to Solpac on its second cause of action for damages, and to state that Solpac's action is dismissed in its entirety. Solpac's notice of appeal is deemed to be a premature but valid notice of appeal from this amended nunc pro tunc [*37] judgment. (*Cal. Rules of Court, rule 2 (d)(2)*.) The amended nunc pro tunc judgment is reversed. On remand, the trial court is directed to (1) enter a new order dismissing Solpac's first cause of action for mandamus and (2) conduct such further proceedings on Solpac's second cause of action for

damages as may be appropriate and not inconsistent with this opinion. Solpac is awarded its appellate costs against both City (*Code Civ. Proc., § 1029*) and MDC, jointly and severally.

Dibiaso, J.

WE CONCUR:

Ardaiz, P.J.

Levy, J.

End of Document

EXHIBIT 5

CITY OF TEMECULA, DEPARTMENT OF PUBLIC WORKS

NOTICE INVITING BIDS

for

I-15 / FRENCH VALLEY PARKWAY IMPROVEMENTS - PHASE II

PROJECT NO. PW16-01

FEDERAL PROJECT NO. INFRALUL-5459(031)

1. NOTICE IS HEREBY GIVEN that the City of Temecula, Riverside County, California, will receive **ELECTRONIC BIDS ONLY** up to **10:00 A.M.**, on **Thursday, the 6th day of October, 2022**. The City of Temecula utilizes PlanetBids as its online bid management provider and location for public bid openings. Bids will be opened and the results of submitted **ELECTRONIC** bids for the subject project will be immediately available to the public at the stated date and time on the City's PlanetBids portal at:

<https://pbsystem.planetbids.com/portal/14837/portal-home>

Bids must be submitted electronically via the on-line bidding service PlanetBids. To download bid documents and to submit an electronic bid, a bidder must be registered with the City of Temecula as vendor. To register as a vendor, go to the following link, then follow the "Register as a Vendor" link:

<http://temeculaca.gov/314/Purchasing-Contract-Administration>

Documents must be uploaded in PDF (Portable Document Format). Hard copies submitted to the City, in lieu of electronic copies uploaded onto the system, will not be accepted as a viable bid. Electronic bids must be received no later than the date and time specified above.

It is the bidder's responsibility to ensure that their bid documents are properly uploaded onto the City's online bid management system. Bids that are missing pages, cannot be opened, etc., may be considered unresponsive. It is the bidder's sole responsibility to contact the City's online bid management provider (PlanetBids at 818-992-1771) to resolve any technical issues related to electronic bidding, including, but not limited to, registering as a vendor, updating passwords, updating profiles, uploading/downloading documents, submitting an electronic bid, etc.

2. All of said work is to be performed in accordance with Plans and Specifications entitled **I-15 / FRENCH VALLEY PARKWAY IMPROVEMENTS - PHASE II, PROJECT NO. PW16-01, FEDERAL PROJECT NO. INFRALUL-5459(031)**. These documents can be downloaded from PlanetBids. The charge for downloading bid documents is **\$75.00**.
3. The classification of Contractor's license required in the performance of this Contract is a **Class A**.
4. Pursuant to the provisions of Section 1773 of the Labor code of the State of California, the City has obtained the general prevailing rate of per diem wages and the general prevailing rate for holiday and overtime work in this locality for each craft, classification or type of workman needed to execute the contract from the Director of the Department of Industrial Relations. These rates are available from the California Department of Industrial Relations' Internet web site at: **<http://www.dir.ca.gov>**.

The Federal wage rates for this project as predetermined by the United States Secretary of Labor are set forth in the book issued for bidding purposes entitled "Plans, Specifications, and Contract Documents," and in copies of this book that may be examined at the offices described above where project plans, special provisions, and proposal forms may be seen.

EXHIBIT 6

From: Avlin Odviar <Avlin.Odviar@temeculaca.gov>

Date: October 12, 2022 at 6:05:32 PM PDT

To: Harry McGovern <hmcgovern@mcmconstruction.com>

Cc: Peter Thorson <pthorson@rwglaw.com>, "Tilden Kim (tkim@rwglaw.com)" <tkim@rwglaw.com>, Patrick Thomas <Patrick.Thomas@temeculaca.gov>, Amer Attar <amer.attar@temeculaca.gov>

Subject: [EXTERNAL] RE: [EXTERNAL] I-15 French Valley Parkway Improvements - Construction Bid

Harry,

Thank you for the clarification and additional information. It is peculiar that two of the larger bidding sites (Caltrans and PlanetBids) would implement slightly different cut-off times for the same stated deadline. And it is unfortunate that this one-minute differential interpretation affected MCM's, and others', ability to bid this project. However, after some 10+ years of use the City believes the PlanetBids system to be a solid and fair bidding system, including the cut-off time.

We do not intend to throw out all bids and rebid the contract as MCM has requested.

Sincerely,

Avlin Odviar

Principal Civil Engineer

City of Temecula

(951) 693-3969

Avlin.Odviar@TemeculaCA.gov

TemeculaCA.gov

Please note that email correspondence with the City of Temecula, along with attachments, may be subject to the California Public Records Act, and therefore may be subject to disclosure unless otherwise exempt.

From: Harry McGovern <hmcgovern@mcmconstruction.com>

Sent: Wednesday, October 12, 2022 2:32 PM

To: Avlin Odviar <Avlin.Odviar@temeculaca.gov>

Subject: Re: [EXTERNAL] I-15 French Valley Parkway Improvements - Construction Bid

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Avlin

We are now hearing that at least 3 bidders were closed out from turning in their bid

Harry

On Oct 12, 2022, at 2:11 PM, Harry McGovern <hmcgovern@mcmconstruction.com> wrote:

Avlin:

Our contention is that we were closed out right at 10:00 from submitting the bid at 10:00 and 15 seconds and, according to Caltrans, anything before 10:01 is 10:00 so we are saying that Planet Bids closed us out too early!

Please consider throwing out all bids and rebidding in order to receive bids from all Contractors interested in bidding in order for the City realize the lowest price available for the project.

Harry McGovern

Exec. V. P. & G. M.

MCM Construction, Inc.

On Oct 12, 2022, at 11:57 AM, Harry McGovern <hmcgovern@mcmconstruction.com> wrote:

Begin forwarded message:

From: Avlin Odviar <Avlin.Odviar@temeculaca.gov>
Date: October 12, 2022 at 11:50:01 AM PDT
To: Harry McGovern <hmcgovern@mcmconstruction.com>
Cc: Patrick Thomas <Patrick.Thomas@temeculaca.gov>, Amer Attar <amer.attar@temeculaca.gov>, Peter Thorson <pthorson@rwglaw.com>, "Tilden Kim (tkim@rwglaw.com)" <tkim@rwglaw.com>
Subject: [EXTERNAL] I-15 French Valley Parkway Improvements - Construction Bid

Harry McGovern,

The City reached out to PlanetBids, based on your communications with me regarding MCM's bid for the subject construction contract.

Please see email below from PlanetBids which includes a MCM bidding history report. According to the report, MCM had Saved its bid multiple times but did not Submit it by hitting the Submit button.

Please let us know if you have any further questions/comments. We appreciate MCM's interest in this project and those in the future.

Sincerely,

Avlin Odviar

Principal Civil Engineer

City of Temecula

(951) 693-3969

Avlin.Odviar@TemeculaCA.gov

TemeculaCA.gov

Please note that email correspondence with the City of Temecula, along with attachments, may be subject to the California Public Records Act, and therefore may be subject to disclosure unless otherwise exempt.

From: PlanetBids Inc. <support@planetbids1.zohodesk.com>

Sent: Wednesday, October 12, 2022 7:46 AM

To: Tammy Petricka <tammy.petricka@temeculaca.gov>

Subject: Re:[## 35947 ##] RE: French Valley Parkway, PW16-01 ~ Bid Due Date 10/6/22 - Vendor Not Able to Submit Bid

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Dear Tammy Petricka,

PlanetBids has provided the following resolution to the ticket, #35947

10/11/2022 02:36 PM

Bid Title: I-15 / FRENCH VALLEY PARKWAY IMPROVEMENTS - PHASE II, PROJECT NO. PW16-01, FEDERAL PROJECT NO. INFRALUL-5459(031

Bid ID: 97471

Agency: City of Temecula (14837)

Invitation #:

Issue Date: 08/29/2022 2:26 PM (PDT)

By Invitation: No

Response Format: Electronic

Stage : Closed

Bid Due Date: 10/06/2022 10:00 AM (PDT)

Agent: Tammy Petricka

Vendor Name: mcm construction, inc.

VBID: 306693 DRAFT bid

Enclosed is the bidding history report you requested. If you have additional questions or need further assistance please let us know.

REPORT

The Vendor Pressed the Place eBid button nine (9) times:

09/13/2022 7:47:10 AM (PDT)
09/13/2022 7:47:31 AM (PDT)
10/03/2022 10:00:52 AM (PDT)
10/03/2022 10:01:11 AM (PDT)
10/06/2022 7:04:19 AM (PDT)
10/06/2022 7:04:35 AM (PDT)
10/06/2022 7:05:59 AM (PDT)
10/06/2022 7:06:55 AM (PDT)
10/06/2022 8:31:19 AM (PDT)

If you have additional questions or need further assistance please let us know.

Vendor created a Draft on 10/06/2022 at 7:06:46 AM (PDT)

Vendor last updated on 10/06/2022 9:49:40 AM (PDT)

Vendor never pressed the Submit button.

Unfortunately, after Saving their draft at 8:48am, the vendor performed no trackable actions for over an hour. Their next activity was at 9:49 a.m., when they pressed Save again.

The bid closed at exactly 10:00 a.m. PDT. Right after the bid closed, the vendor checked the Bid Results.

Regards,

PlanetBids, Inc. Support Team

--- On Tue, 11 Oct 2022 14:36:27 -0700 PlanetBids
Inc.<support@planetbids1.zohodesk.com> wrote ---

Dear Tammy Petricka,

PlanetBids has left the following comment on your ticket, #35947.

Bid Title: I-15 / FRENCH VALLEY PARKWAY IMPROVEMENTS - PHASE II, PROJECT NO. PW16-01, FEDERAL PROJECT NO. INFRALUL-5459(031

Bid ID: 97471

Agency: City of Temecula (14837)

Invitation #:

Issue Date: 08/29/2022 2:26 PM (PDT)

By Invitation: No

Response Format: Electronic

Stage : Closed

Bid Due Date: 10/06/2022 10:00 AM (PDT)

Agent: Tammy Petricka

Vendor Name: mcm construction, inc.

VBID: 306693 DRAFT bid

We have submitted a request for bidding history and any attempts to Save or submit or any errors.

We will respond again as by end of business today with a report through this support ticket.

Regards,

PlanetBids, Inc. Support Team