

Second Place Bidder on Public Works Project Can Sue Winning Bidder for Illegally Lowering Its Bid

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It has long been the rule in California that the competitive bidding rules applicable to public works projects exist to protect the public, not disappointed bidders. However, in the recent decision of *Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc.*, the California Court of Appeal held that a second low bidder may have recourse against the low bidder who cannot honor its bid price without violating California law. More specifically, a second place bidder may maintain a cause of action against the winning bidder if it can allege that the winning bid was based on labor costs of less than the required prevailing wages and that the second place bidder would have been awarded the contract if the low bidder had complied with the prevailing wage law.

Plaintiffs Roy Allan Slurry Seal, Inc. ("Allan") and Doug Martin Contracting, Inc. ("Martin") claimed they were outbid by American Asphalt South, Inc. ("American") on twenty-three public works contracts in Southern California from 2009 to 2012. Allan and Martin jointly sued American in five counties, alleging that each was the second lowest bidder on the various projects and that American was awarded the contracts as the lowest bidder only because its labor costs did not include payment of the prevailing wages. The complaints included claims for intentional interference with prospective economic advantage, violation of the Unfair Practices Act and violation of the Unfair Competition Law. American's demurrers (motions to dismiss the complaints before trial) led to conflicting rulings from three trial courts, including the Riverside County Superior Court, which sustained (granted) American's demurrer without leave to amend, effectively ending Allan and Martin's lawsuit in that court. Plaintiffs appealed the ruling.

The Court of Appeal reversed the trial court's ruling as to the intentional interference cause of action, effectively reviving Allan's and Martin's lawsuit. The appellate court succinctly summarized its holding as follows:

May the second-place bidder on a public works contract state a cause of action for intentional interference with prospective economic advantage against the winning bidder if the winner was only able to obtain lowest bidder status by illegally paying its workers less than the prevailing wage? We hold that the answer is yes if the plaintiff alleges it was the second lowest bidder and therefore would have otherwise been awarded the contract, because that fact gives rise to a relationship with the public agency that made plaintiff's award of the contract reasonably probable.

The appellate court's analysis regarding the intentional interference cause of action centered on whether Allan and Martin had an economic expectancy in the public works contracts. Relying primarily on the California Supreme Court's holding in *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, the Court found that "a bidder on a government contract who submits a superior bid and loses out only because a competitor manipulated the bid selection process through illegal conduct has been the victim of actionable intentional interference." The Court also wrote that allowing such a cause of action is consistent with the bid

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protest procedure, which allows the true lowest bidder to bring a mandate action seeking to compel the public agency to reverse its decision improperly awarding a contract to another bidder.

The Court was not persuaded by American's policy arguments. Specifically, American argued that allowing Allan's and Martin's intentional interference cause of action to proceed would open the floodgates to claims by disappointed bidders. The Court indicated that such arguments had been rejected by the Supreme Court in *Korea Supply*, and in any event, the Court's holding was limited "to losing bidders who can show they were the actual and lawful lowest bidders on a public works project." Similarly, the Court did not find convincing American's argument that "its conduct amounted to no more than sharp elbow competition among business competitors," because a bidder may not obtain a public works contract by intentionally violating the prevailing wage laws.

Given this potential for lawsuits by disappointed bidders, public works bidders must be especially diligent to ensure that their bids account for all costs required by California law, including the prevailing wages that the bidder must pay if awarded the contract.

Michelle focuses her practice on business and civil litigation with an emphasis on construction litigation representing general contractors, subcontractors and sureties in a variety of complex matters including, contractual disputes, bid protests, mechanic liens, bond claims and OSHA citations.