

1. CITIBANK N.A. v. RYS, 23CV0929**Motion to Deem Facts Admitted**

Pending before the court is plaintiff's motion to deem facts admitted pursuant to Code of Civil Procedure sections 2023.010, et seq. and 2033.280.

A party served with requests for admission must serve a response within 30 days. (Code Civ. Proc., § 2033.250.) Failure to serve a response entitles the requesting party, on motion, to obtain an order that the genuineness of all documents and the truth of all matters specified in the requests for admission be deemed admitted. (Code Civ. Proc., § 2033.280, subd. (b).) When such a motion is made, the court must grant the motion and deem the requests admitted unless it finds that prior to the hearing, the party to whom the requests for admission were directed has served a proposed response that is in substantial compliance with the provisions governing responses. (Code Civ. Proc., § 2033.280, subd. (c); *St. Mary v. Superior Court* (2014) 223 Cal.App.4th 762, 776, 778; see also *Demyer v. Costa Mesa Mobile Home Estates* (1995) 36 Cal.App.4th 393, 395–396 [“two strikes and you’re out”].)

In this case, plaintiff's counsel declares that plaintiff served Requests for Admission (Set One) on defendant by mail on September 19, 2023. (Langedyk Decl., ¶ 2.) Accordingly, defendant's response was due on or before October 24, 2023. (Code Civ. Proc., §§ 1013, subd. (a) & 2033.250, subd. (a).) Plaintiff's counsel also declares that defendant did not serve a response before the filing of the instant motion. (*Id.*, ¶ 3.)

The motion is granted.

TENTATIVE RULING # 1: MOTION TO DEEM MATTERS ADMITTED IS GRANTED. NO HEARING ON THIS MATTER WILL BE HELD (*LEWIS v. SUPERIOR COURT* (1999) 19 CAL.4TH 1232, 1247), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 573-3042 BY 4:00 P.M. ON THE DAY THE TENTATIVE

RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING.

2. PEOPLE v. \$64,736.00 UNITED STATES CURRENCY, 23CV2219**Petition for Forfeiture**

On December 15, 2023, the People filed a Health and Safety Code section 11488.4, subdivision (a) petition for civil forfeiture against \$64,736.00 in United States Currency. There is no proof of service for the notice of hearing filed December 29, 2023, in the court's file. Additionally, there is no proof of publication, as required by Health and Safety Code section 11488.4, subdivision (e), in the court's file. Therefore, the petition is denied without prejudice.

TENTATIVE RULING # 2: PETITION IS DENIED WITHOUT PREJUDICE. NO HEARING ON THIS MATTER WILL BE HELD (*LEWIS v. SUPERIOR COURT* (1999) 19 CAL.4TH 1232, 1247), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 573-3042 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING.

3. IN THE MATTER OF ZOVICH & SONS, INC., 23CV1304**Writ of Mandate Hearing**

In this mandamus proceeding, petitioner Zovich & Sons, Inc., dba Zovich Construction (“Zovich”) requests the court to invalidate respondent Lake Tahoe Community College District’s (“the District”) award of a multi-million dollar public-bidding contract to real party in interest Creekside Commercial Builders, Inc. (“Creekside”), the lowest bidder on the project. Zovich, the second lowest bidder, alleges that the District could not properly award the contract to Creekside because its bid was “nonresponsive” to the Notice to Bidders.

1. Factual Background

On June 2, 2023, the District solicited bids for a project known as the “Student Housing Building Project” (the “Project”) to be constructed at Lake Tahoe Community College in South Lake Tahoe, California. (AR 1:1–2.)¹ Prospective bidders were notified of the project requirements which included submitting a proposal, and using a standard form provided by the District, along with a bid deposit securing the bidder’s proposal.

1.1. Notice and Instructions to Bidders

The District’s “Notice to Bidders” indicates that “sealed bids” would be received until 2:00 p.m., Thursday, June 29, 2023, on campus in the Lisa Maloff University Center Room U112. (AR 1:1 at ¶ 6.) “All bids shall be on the form provided by the District. Each bid must conform and be responsive to all pertinent Contract Documents, including, but not limited to, the Instruction to Bidders.” (*Id.* at ¶ 7.) The Notice to Bidders provided a link to the District’s website where bidders could obtain the Contract Documents. (*Id.* at ¶ 4.) On the webpage, under the heading, “Current Requests for Proposals/Qualifications” there were

¹ Citations to the Administrative Record (“AR”) are as follows: AR [Volume]:[Bates-Stamped page number(s)].

multiple links, including: (1) “Click here for PlanetBids^{[2], [3]} access to register for District project documents;” (2) “eBidding w/ PlanetBids;” (3) “Paper Bidding;” (4) “Pre-Bid Conference Attendees;” and (5) “Addendum #1 (PDF).” (AR 8:2362.)

The Notice to Bidders instructed bidders to contact the District’s Ami Chilton by email for all requests for information or questions regarding the Project. (AR 1:1 at ¶ 5.)

Regarding the bid bond requirement, the Notice to Bidders provides, “[a] bid bond by an admitted surety insurer on the form provided by the District, cash, or a cashier’s check or a certified check ... shall accompany the Bid Form and Proposal, as a guarantee that the Bidder will, within seven (7) days after the date of the Notice of Award, enter into a contract with the District for the performance of the services as stipulated in the bid.” (AR 1:1 at ¶ 8.) The second page of the bid bond form states, in bold font, “**Bidder must attach Power of Attorney and Certificate of Authority for Surety and a Notarial Acknowledgment for all Surety’s signatures. The California Department of Insurance must authorize the Surety to be an admitted Surety Insurer.**” (*Id.* at 1:33.)

Paragraph 16 of the Notice to Bidders provides, “[t]he Board reserves the right to reject any and all bids and/or waive any irregularity in any bid received.” (AR 1:2 at ¶ 16.)

On June 22, 2023, the District issued Addendum No. 1 to the bid solicitation, which included certain changes to the Project plans and specifications. (AR 8:2197–2200.) Addendum No. 1 states, “[a]ll bidders must acknowledge receipt of this addendum on the Bid Form.” (*Id.* at 8:2197.)

The District’s bid solicitation also included “Instructions to Bidders.” (AR 1:14–22.) The Instructions to Bidders provides, “[e]ach Bidder must acknowledge each Addendum in its

² The District submitted a declaration stating that “PlanetBids is a standard of the industry tool for public contracting for community college districts....This was the very first project that the District utilized PlanetBids....” (Chilton Decl., ¶ 5.)

³ The District claims that on June 6, 2023, Zovich registered with PlanetBids as a prospective bidder for the Project and downloaded the electronic Project Contract Documents from the website. (Chilton Decl., ¶ 6.) The court finds that this fact is not relevant to the instant petition.

Bid Form and Proposal by number or its Bid shall be considered non-responsive.” (*Id.*, 1:18 at ¶ 18.) The Instructions to Bidders also provides, the “District will receive Bids for Bidders as indicated in the Notice to Bidders. [¶] All Bids must be sealed....” (*Id.*, 1:19 at ¶ 20, subd. (A).)

Paragraph 26 of the Instructions to Bidders details the bid protest procedures. (AR 1:21 at ¶ 26.) “Any bid protest by any Bidder regarding any other bid must be submitted in writing to the District, before 5:00 p.m. of the **THIRD (3rd) business day following the opening**.... [¶¶] A bid protest must contain a complete statement of any and all bases for the protest and all supporting documentation.... [¶¶] The procedure and time limits set forth in this paragraph are mandatory and are each bidder’s sole and exclusive remedy in the event of bid protest. Failure to comply with these procedures shall constitute a waiver of any right to further pursue the bid protest, including filing a Government Code claim or legal proceedings.” (*Id.*, ¶ 26, subds. (B) & (F) [emphasis in original].)

1.2. The Bids and Bid Opening

Creekside submitted its bid online through PlanetBids for \$30,290,400. (See AR 10:2754.) Zovich submitted a paper bid for \$37,103,000. (*Ibid.*) The bid opening occurred on Thursday, June 29 at 2:00 p.m. in the Lisa Maloff University Center Room U112.

On June 29 at 2:53 p.m., the District’s Ami Chilton emailed Creekside a Post-Bid Interview questionnaire and asked Creekside to clarify its bid amount, stating, “I wanted to confirm if you have included the allowances in your base bid or if you extracted them due to the way the PlanetBids form was functioning.” (AR 9:2420.) Creekside responded that it “extracted the allowances per the Planet Bid form. So [the allowances] were not included in [Creekside’s] base bid of \$29,980,000.00.” (*Id.*, at 9:2419.)

On Monday, July 3, 2023, the District’s Board of Trustees approved the recommendation to award Creekside the Project. (AR 10:2755–2756.) On July 5, 2023, at

8:05 a.m., the District issued a Notice of Award to Creekside.⁴ (*Id.*, at 9:2421–2423, 10:2760–2761.)

1.3. Zovich’s Bid Protest

On Friday, June 30, 2023, at 12:42 p.m., Zovich emailed Ms. Chilton requesting a copy of Creekside’s bid package. (AR 9:2589.) Tuesday, July 4, 2023, was a federal holiday. On Wednesday, July 5, 2023, at 7:54 a.m., having received no response to its June 30 email, Zovich sent a follow-up email to Ms. Chilton stating that it still had not received a copy of Creekside’s bid package. (*Ibid.*)

On July 5 at 9:50 a.m., Ms. Chilton responded to Zovich, stating, “I somehow missed your original request, and I have been out of the office.” (AR 9:2589.) The District sent Creekside’s bid package to Zovich on July 5 at 12:54 p.m. (*Id.* at 9:2591–2592.) The cover email states, “I have attached the requested bid documents. I do have a copy of the bid bond (which is not included). If you require a copy, please let us know.” (*Id.* at 9:2592.)

On Friday, July 7, 2023, at 8:16 a.m., an employee of Zovich emailed the District, stating, “I have been out of the office and just seen [sic] this email. Yes, pls [sic] forward [Creekside’s] bid bond.” (AR 9:2591.) Ms. Chilton emailed Creekside’s bid bond to Zovich on July 7 at 2:46 p.m. (*Ibid.*)

Zovich submitted its written protest of Creekside’s bid to the District on July 7 at 5:30 p.m. (AR 9:2600–2633.) As relevant here, Zovich’s bid protest alleges that: (1) Creekside submitted its bid electronically through PlanetBids, as opposed to submitting a “sealed” bid in person; (2) Creekside’s electronic bid did not include the required bid form; and (3) Creekside did not acknowledge the addenda on the bid form. (*Id.*, at 9:2601–2602.)

⁴ It is unclear from the record whether the District publicly announced its award, as required under Public Contract Code section 20651.7, subdivision (g), on July 5. However, the parties do not raise any issue on this point.

On Monday, July 10, 2023, at 11:23 a.m., Zovich emailed the District with additional grounds for protesting Creekside’s bid based on its review of Creekside’s bid bond. (AR 9:2634.) These additional grounds included: (1) the Power of Attorney attached to Creekside’s bid bond showed a Notary Public Commission expiry date of April 4, 2023; and (2) Creekside did not attach a Certificate of Authority for its surety company to its bid bond.⁵ (*Ibid.*)

On July 10 at 4:36 p.m., Ms. Chilton emailed Zovich, stating, “Our team is looking into each of the points listed in your bid protest and will be responding in full shortly. In the meantime, I wanted to provide you with this corrected subcontractor list that was provided by Creekside Builders at 2:11 p.m. on June 29, within the allowable time frame.⁶ [¶] The subcontractor list you were provided earlier was the list submitted at bid time, as was identified in your request. This revised list should address bullet points six and seven on your protest.” (AR 9:2647.)

On July 13, 2023, the District sent Zovich a letter denying Zovich’s protest, stating the District found no basis to reject Creekside’s bid as nonresponsive. (AR 9:2660, 9:2667–2669.) The District’s letter also states, “Please be aware that Zovich submitted its bid protest after the deadline set forth in the Project bid packet. Specifically, the deadline to submit a bid protest for the Project was on July 5, 2023. By providing this letter, the District does not in any way waive its right to dismiss Zovich’s bid protest for its lack of timeliness. However, the District will briefly address Zovich’s concerns in this letter.” (AR 9:2667.)

On July 19, 2023, the District executed its contract with Creekside. (AR 11:2808–2813.)

On August 4, 2023, Zovich filed the instant petition for writ of mandate.

⁵ Creekside ultimately submitted a Certificate of Authority for its surety company to the District on July 12, 2023. (AR 9:2549–2550.)

⁶ It is unclear how Creekside’s 2:11 p.m. submission was timely. However, Zovich does not raise any contention in the instant petition.

2. Preliminary Matters

The District and Creekside object to Zovich’s reply brief filed on December 8, 2023, on the ground that it is untimely. They request the court to strike the reply and not consider it.

On September 26, 2023, the court set the following briefing schedule: opening brief due October 25, 2023; response due November 27, 2023; and reply due December 4, 2023.

Pursuant to California Rules of Court, rule 3.1300, subdivision (d), the court exercises its discretion to refuse consideration of Zovich’s late-filed reply.

3. Legal Principles

“Code of Civil Procedure section 1085, providing for writs of mandate, is available to compel public agencies to perform acts required by law. [Citation.] To obtain relief, a petitioner must demonstrate (1) no ‘plain, speedy, and adequate’ alternative remedy exists [citation]; (2) ‘a clear, present, ... ministerial duty on the part of the respondent’; and (3) a correlative ‘clear, present, and beneficial right in the petitioner to the performance of that duty.’ [Citations.] A ministerial duty is an obligation to perform a specific act in a manner prescribed by law whenever a given state of facts exists, without regard to any personal judgment as to the propriety of the act.” (*People v. Picklesimer* (2010) 48 Cal.4th 330, 339–340; see *Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 916 [“ ‘[a] ministerial act is an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning such act’s propriety or impropriety, when a given state of facts exists.’ ”].)

In reviewing the award of a public contract, the trial court’s function is to decide whether the public entity’s decision is supported by substantial evidence. (*Ghilotti Construction Co. v. City of Richmond* (1996) 45 Cal.App.4th 897, 903.) “[The trial court’s] review is limited to an examination of the proceedings to determine whether the [public

entity's] actions were arbitrary, capricious, entirely lacking in evidentiary support, or inconsistent with proper procedure. There is a presumption that the [public entity's] actions were supported by substantial evidence, and [the petitioning party] has the burden of proving otherwise. [The trial court] may not reweigh evidence and must view it in the light most favorable to the [public entity's] actions, indulging all reasonable inferences in support of those actions. [Citations.] Mandamus is an appropriate remedy to compel the exercise of discretion by a government agency, but does not lie to control the exercise of discretion unless under the facts, discretion can only be exercised in one way. [Citations.]" (*Id.* at pp. 903–904.)

4. Discussion

Pursuant to Public Contract Code section 20651, subdivision (b), the governing board of a community college district must award a contract for a public project to the lowest responsible bidder. (Pub. Contract Code, § 20651, subd. (b).) "The purpose of requiring governmental entities to open the contracts process to public bidding is to eliminate favoritism, fraud and corruption; avoid misuse of public funds; and stimulate advantageous market place competition. [Citations.] 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 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. [Citations.] The importance of maintaining integrity in government and the ease with which policy goals underlying the requirement for open competitive bidding may be surreptitiously undercut, mandate strict compliance with bidding requirements. [Citation.]" (*Konica Bus. Machines USA v. Regents Univ. of Cal.* (1988) 206 Cal.App.3d 449, 456–457.) "The competitive bidding statutes are for the benefit and protection of the

public, not the bidders. [Citations.]” (*Universal By-Products, Inc. v. City of Modesto* (1974) 43 Cal.App.3d 145, 152.)

4.1. Relevant Statutory Provisions

“The amount of leeway a public entity has in awarding a contract is governed by the statutory or municipal law framework applying to that contract.” (*Great W. Contractors, Inc. v. Irvine Unified Sch. Dist.* (2010) 187 Cal.App.4th 1425, 1447.) “Thus, where a statute requires a public entity to award a contract to the lowest responsible bidder, the courts have been vigilant in not excusing attempts by public entities to circumvent that requirement. [Citations.] [¶] By contrast, where a statute or city charter specifically contemplated discretion on the part of the public entity to look at factors in addition to the monetary benefit of the bid, awards to other than best monetary bidders have been upheld.” (*Id.* at p. 1448.)

As relevant here, Public Contract Code section 20651, subdivision (b) provides: “The governing board [of any community college district] shall let any contract for a public project, as defined in subdivision (c) of Section 22002, involving an expenditure of fifteen thousand dollars (\$15,000) or more to the lowest responsible bidder who shall give security as the board requires, or else reject all bids.” (Pub. Contract Code, § 20651, subd. (b).)

4.2. Exhaustion of Remedies Doctrine

As an initial matter, Creekside and the District argue that Zovich should be precluded from the relief requested because it did not fully exhaust its administrative remedies. Under the exhaustion of remedies doctrine, “where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act.” (*Cal. Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1148.) Bid protest procedures are an administrative remedy that must be exhausted. (See, e.g., *MCM Construction, Inc. v. City & County of San Francisco* (1998) 66 Cal.App.4th 359, 378–383.)

Creekside and the District claim that Zovich did not exhaust the bid protest procedure where its bid protest was untimely and did not address certain legal arguments that Zovich now raises in the instant petition.

The bid instructions for the contract set forth mandatory procedures for bid protests. (AR 1:21 at ¶ 26.) These included the requirement that “[a]ny bid protest by any Bidder regarding any other bid must be submitted in writing to the District, before 5:00 p.m. of the **THIRD (3rd) business day following the bid opening.**” (*Ibid.*) Consequently, to protest Creekside’s bid, Zovich was required to do so in writing, with accompanying documentation, including “a complete statement of any and all bases for the protest” (*Id.* at ¶ 26, subd. (B)), on or before July 5, 2023, at 5:00 p.m. The bid instructions state “[t]he procedure and time limits set forth in this paragraph are mandatory and are each bidder’s sole and exclusive remedy in the event of bid protest. Failure to comply with these procedures shall constitute a waiver of any right to further pursue the bid protest, including filing a Government Code Claim or legal proceedings.” (*Id.* at ¶ 26, subd. (F).)

Zovich submitted its (initial) bid protest on July 7, 2023. Zovich argues, however, that even if it failed to present a timely bid protest, such failure should be excused because the District “waived” the bid protest deadline. (Petn. at 12:25–28.) Alternatively, Zovich argues that the doctrines of equitable estoppel and futility apply. (*Id.* at 12:25–13:26.)

Waiver and estoppel may be viewed as akin, and while the terms are often used interchangeably, they differ and are separate and distinct doctrines that rest on different legal principles. A waiver is the “ ‘intentional relinquishment or abandonment of a known right.’ ” (*People v. Simon* (2001) 25 Cal.4th 1082, 1097, fn. 9.) Unlike waiver, equitable estoppel requires detrimental reliance by the opposing party and does not require a voluntary relinquishment of a known right. “A public entity may be estopped from asserting noncompliance with the claims statutes where its agents or employees have deterred the filing of a timely claim by some ‘affirmative act.’ ” (*John R. v. Oakland Unified School Dist.* (1989) 48 Cal.3d 438, 445.)

Despite its contention that Zovich's bid protest was untimely, the District chose to consider Zovich's protest on the merits, issuing a full decision on July 13, 2023. The District's July 13 letter claims that it reserved the right to assert untimeliness on Zovich's part, but its actions demonstrate otherwise.

Alternatively, the District is estopped from arguing that Zovich's bid protest was untimely because the District sent an incomplete bid package to Zovich roughly four hours before the bid protest deadline on July 5, despite Zovich requesting a copy of Creekside's bid package days earlier on June 30. The bid package that the District sent to Zovich on July 5 did not include Creekside's bid bond or updated subcontractor list.

As for futility, "[a] party need not pursue administrative remedies when the agency's decision is certain to be adverse." (*Collins v. Woods* (1984) 158 Cal.App.3d 439, 442.) This "futility" exception to the exhaustion of administrative remedies requirement, however, "is a very narrow one." (*County of Contra Costa v. State of Cal.* (1986) 177 Cal.App.3d 62, 77.) It does not apply " "unless the petitioner can positively state that the administrative body has declared *what its ruling will be in a particular case.*" ' " (*Sea & Sage Audubon Society, Inc. v. Planning Com.* (1983) 34 Cal.3d 412, 418.) In this case, futility does not apply because, as previously stated, the District considered Zovich's bid protest on the merits (despite having already issued a Notice of Award of Contract to Creekside). The court finds that the District had not "declared what its ruling [would] be" in this case. (*Ibid.*)

In sum, the court overrules the District's and Creekside's exhaustion of remedies argument.

4.3. Whether the Variances in Creekside's Bid Were "Inconsequential"

Zovich argues that the District had a ministerial duty to reject Creekside's bid as non-responsive because the bid failed to comply fully with the District's bidding instructions. "A bid is responsive if it promises to do what bidding instructions require." (*MCM Construction, supra*, 66 Cal.App.4th at p. 368.)

“ ‘A basic rule of competitive bidding is that bids must conform to specifications, and that if a bid does not so conform, it may not be accepted. [Citations.] However, it is further well established that a bid which substantially conforms to a call for bids may, though it is not strictly responsive, be accepted if the variance 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. [Citations.]’ [Citations.]” (*Ghilotti, supra*, 45 Cal.App.4th at pp. 904–905.)

Zovich claims there were several deviations from the competitive bidding requirements, including: (1) Creekside did not use the proper bid form; (2) Creekside’s bid did not “acknowledge” Addendum No. 1; (3) Creekside’s bid did not contain its agreement to certain terms and conditions listed on the paper bid form; (4) Creekside did not submit a Certificate of Authority for its surety insurer until July 12, 2023 (13 days after the bid submission deadline); (5) the Power of Attorney submitted with Creekside’s bid bond showed a notary public commission expiry date of April 4, 2023; and (6) Creekside failed to submit its bid and other required bid documents in-person and in a labeled, sealed envelope.

Zovich acknowledges that public agencies have the discretion to waive minor or inconsequential bid deviations (Petn. at 5:17) but contends the District exceeded or abused its discretion by waiving these particular bid irregularities, which the court addresses in turn.

4.3.1. The Bid Form

Paragraph 7 of the Notice to Bidders provides, “All bids shall be on the form provided by the District. Each bid must conform and be responsive to all pertinent Contract Documents, including, but not limited to, the Instructions to Bidders.” (AR 1:1 at ¶ 7.) Paragraph 4 of the Notice to Bidders provides a link to the District’s website where interested parties could obtain Contract Documents. (*Id.* at ¶ 4.) On the webpage, under the heading, “Current Requests for Proposals/Qualifications” there were multiple links,

including: (1) “Click here for PlanetBids access to register for District project documents;” (2) “eBidding w/ PlanetBids;” (3) “Paper Bidding;” (4) “Pre-Bid Conference Attendees;” and (5) “Addendum #1 (PDF).” (AR 8:2362.) Neither the Notice to Bidders nor the Instructions to Bidders discuss electronic bidding; it was mentioned only on the District’s website. (See AR 8:2362.)

Zovich claims that by submitting an electronic bid through PlanetBids, Creekside did not use the proper bid form, which was in paper format. (Petn. at 5:22–6:7.) The District and Creekside, on the other hand, argue that the Notice to Bidders merely states that bids shall be on the form “provided by” the District; and the District provided the bid form that Creekside used on PlanetBids. (Creekside’s Opp. at 5:16–22; District’s Opp. at 8:20–28.)

Still, Zovich argues that Creekside did not submit a “sealed” bid in person. The Notice to Bidders and Instructions to Bidders both refer to “sealed” bids without specially defining the term, “sealed.” Zovich argues that under the explicit terms of the Notice to Bidders and Instructions to Bidders, as well as Public Contract Code section 20651, subdivision (b),⁷ bids must be submitted in a sealed envelope, in person. (Petn. at 10:21–11:14.)

The court does not read the “sealed” requirement as strictly as Zovich. Even if the bid solicitation called for bids to be submitted in a sealed envelope in person, the court finds that the District was authorized to waive the irregularity in Creekside’s bid because it cannot have affected the amount of the bid or given a bidder an advantage or benefit not allowed other bidders. (*Ghilotti, supra*, 45 Cal.App.4th at pp. 904–905.) In other words, any irregularity in this regard was inconsequential.

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⁷ Public Contract Code section 20651, subdivision (b) provides in part, “[a]ll bids for construction work shall be presented under sealed cover.” (Pub. Contract Code, § 20651, subd. (b).) The term, “sealed,” is not defined.

4.3.2. Acknowledgement of Addendum No. 1

Zovich claims that the printout of Creekside’s electronic bid does not include Creekside’s acknowledgement of Addendum No. 1 “in the manner specified by the revised Bid Form.” (Petn. at 7:2–3.) Creekside and the District, however, claim that Creekside electronically acknowledged Addendum No. 1. (See AR 8:2283.) Having reviewed the “Addenda Acknowledge Report” (*Ibid.*), the court agrees with Creekside and the District. Moreover, the court finds that any potential variance to the acknowledgement requirement cannot have affected the amount of the bid or given a bidder an advantage or benefit not allowed other bidders. Therefore, the District would have been acting within its discretion if it waived the irregularity.

4.3.3. Terms & Conditions Governing the Bid Form’s Three Allowances

Similar to the issue with Addendum No. 1, Zovich contends that the District’s bid form included 12 terms and conditions regarding three separate allowances that Creekside did not acknowledge in its electronic bid. (Petn. at 7:11–22.) The District and Creekside argue there were no material differences between the paper bid form and electronic bid form. (Creekside’s Opp. at 6:12–13; District’s Opp. at 9:21–10:17.) The court agrees with the District and Creekside. The 12 terms and conditions that Zovich takes issue with were largely restatements of the instructions to bidders. Further, the District argues, “by representing to perform under the Contract Documents, Creekside also represented it would perform under the terms and conditions as to each of the three allowances.” (District’s Opp. at 10:9–11.) The court finds that the claimed missing representations about allowances did not materially affect the bid price, or present any risk that Creekside could withdraw its bid prior to contracting without forfeiting its bid bond and were minor deviations.

4.3.4. Certificate of Authority for Surety

The District’s bid bond form states, “**Bidder must attach Power of Attorney and Certificate of Authority for Surety and a Notarial Acknowledgment for all Surety’s**

signatures. The California Department of Insurance must authorize the Surety to be an admitted Surety Insurer.” (AR 1:33.)

Apparently, Creekside did not submit the Certificate of Authority for Surety until July 12, 2023. Zovich claims that Creekside was thus afforded an unfair advantage because “it could have—after bids were opened and the amount of competing bids disclosed—chosen to withdraw its own bid without risk of forfeiting its bid security.” (Petn. at 10:14–18 [citing *MCM Construction, supra*, 66 Cal.App.4th at p. 359, and *Valley Crest Landscape, Inc. v. City Council* (1996) 41 Cal.App.4th 1432].) However, Zovich does not explain how Creekside would be allowed to withdraw its bid.

“Waiver of an irregularity in a bid should only be allowed if it would not give the bidder an unfair advantage by allowing the bidder to withdraw its bid without forfeiting its bid bond. [Citation.]” (*Valley Crest, supra*, 41 Cal.App.4th at p. 1442, citing *Menefee v. County of Fresno* (1985) 163 Cal.App.3d 1175, 1178–1181.)

In *Valley Crest*, the court found the bidder had an unfair advantage where it could have withdrawn its bid under Public Contract Code section 5103, which provides for relief on the grounds of mistake. (Pub. Contract Code, § 5103.) “Misstating the correct percentage of work to be done by a subcontractor is in the nature of a typographical or arithmetical error. It makes the bid materially different and is a mistake in filling out the bid. As such, under Public Contract Code section 5103, North Bay [the low bidder] could have sought relief by giving the City notice of the mistake within five days of the opening of the bid. That North Bay did not seek such relief is of no moment. The key point is that such relief was available. Thus, North Bay had a benefit not available to the other bidders; it could have backed out. Its mistake, therefore, could not be corrected by waiving an ‘irregularity.’ ” (*Valley Crest, supra*, 41 Cal.App.4th at p. 1442.) At the same time, the court noted that “apart from the relief afforded by section 5103 of the Public Contract Code, the City gave North Bay the opportunity to withdraw its bid. The City’s letter to North Bay stated the bid would be considered nonresponsive unless North Bay provided additional

information.” (*Id.* at p. 1442, fn. 1.) Subsequently, the *Ghilotti* court refused to read *Valley Crest* as holding that a potential competitive advantage precludes waiver of a bid irregularity, without the necessity of showing an actual advantage. “The *Valley Crest* court held North Bay had an actual advantage, not only because it could have obtained relief under the Public Contract Code as a matter of law, but also because the city expressly gave North Bay the opportunity to withdraw its bid. [Citation].” (*Ghilotti, supra*, 45 Cal.App.4th at p. 912, fn. 6.)

Here, there is no indication that by omitting the Certificate of Authority for its surety company from its bid bond that Creekside had any opportunity to withdraw its bid without forfeiting its bid bond. This is not a situation like *Valley Crest*, where misstating the correct percentage of work materially changed the bid.

Further, Creekside’s bid bond contained sufficient information to demonstrate that it had secured a bid bond from an authorized surety company. The submitted bid bond included the surety company’s name, as well as the signature of the surety company’s attorney-in-fact, representing that he is a California Agent of Surety. (AR 9:2466–2467; see *Bay Cities Paving & Grading, Inc. v. City of San Leandro* (2014) 223 Cal.App.4th 1181, 1189–1190 [finding substantial evidence supported the City’s determination that the missing page of a bidder’s bid bond was an inconsequential deviation from the bidding requirements because the second page of that two-page bid bond provided sufficient information to assure the City that the bidder had complied with the bid security requirement].)

Based on the above, the District was authorized to waive the irregularity of the missing Certificate of Authority.

4.3.5. The Power of Attorney

Zovich claims that Creekside did not comply with the Power of Attorney requirement found on the bid bond form where the Power of Attorney shows that the Notary Public’s Commission expired on April 4, 2023. (See AR 9:2470.) The District argues that “[t]he

power of attorney form was valid because the notary was properly commissioned when the form was signed and notarized in 2019.” (District’s Opp. at 11:14–15 [citing AR 8:2378–2383].) The court agrees with the District. Alternatively, the court finds that the District was authorized to waive the irregularity.

4.4. The District’s Post-Bid Communications with Creekside

After bids were opened on June 29, the District’s Ami Chilton sent an email to Creekside that stated in relevant part: “I wanted to clarify one thing that became apparent when looking at you [sic] electronic bid in PlanetBids. The intention in the project documents was that the 3 allowances were to be included in your base bid. Unfortunately, the way our project was created in PlanetBids, it is adding the allowances to your base bid. I want to confirm if you have included the allowances in your base bid or if you extracted them due to the way the PlanetBids form was functioning. Please clarify.” (AR 9:2420.) Creekside responded that it “extracted the allowances per the Planet Bid form. So [the allowances] were not included in [Creekside’s] base bid of \$29,980,000.00.” (AR 9:2419.)

Zovich argues that the District improperly relied on these post-bid communications in awarding the contract to Creekside. (Petn. at 12:3–22.) The District argues that “the District[-]initiated communication resulted in no unfairness because it did not change the amount of Creekside’s bid or allow Creekside to withdraw its bid, and thus did not risk corruption in public bidding.” (District’s Opp. at 14:21–23.) Additionally, Creekside argues, “given that Zovich’s bid was millions of dollars higher, Creekside clarifying the District’s interpretation offered no advantage to Creekside.” (Creekside’s Opp. at 8:3–4.)

The court finds no error resulting from the District’s post-bid communication with Creekside.

In conclusion, the court finds that Zovich has failed to show that the District had a ministerial duty to reject Creekside’s bid as nonresponsive. Zovich’s petition for writ of mandate is denied.

TENTATIVE RULING # 3: THE PETITION FOR WRIT OF MANDATE IS DENIED. NO HEARING ON THIS MATTER WILL BE HELD (*LEWIS v. SUPERIOR COURT* (1999) 19 CAL.4TH 1232, 1247), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 573-3042 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING.

4. KOSMIDES v. VANHEE, ET AL., SCU20180131

OSC Re: Sale of Dwelling of Judgment Debtor

TENTATIVE RULING # 3: APPEARANCES ARE REQUIRED AT 1:30 P.M., FRIDAY,
FEBRUARY 9, 2024, IN DEPARTMENT FOUR.