ROY ALLAN SLURRY SEAL, INC. v. AMERICAN ASPHALT SOUTH, INC.

S225398

Supreme Court of California

March 30, 2015

Reporter
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ROY ALLAN SLURRY SEAL, INC., et al., Plaintiffs and Appellants, v. AMERICAN ASPHALT SOUTH, INC., Defendant, Respondent, and Petitioner

Type: Petition for Appeal

Prior History: From the Decision of the Court of Appeal, Second Appellate District, Division Eight No. B255558.

On Appeal from the Superior Court for the County of Riverside. Honorable Richard J. Oberholzer. No. RIC1308832.

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Title

Petition for Review

Text

TO THE HONORABLE CHIEF JUSTICE OF CALIFORNIA AND THE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

American Asphalt South, Inc. respectfully petitions for review following the 2-1 decision of the Court of Appeal, Second Appellate District, Division 8, filed on February 20, 2015. A copy of the opinion is attached as Appendix A; it is published at *234 Cal.App.4th 748.*

This petition presents critical issues of widespread interest to all California government entities that award public contracts, and the contractors that bid on them. In this case, the Court of Appeal disregarded well-established principles of public contracting law and held that a second lowest bidder to a public works contract may state a cause of action against its competitor for intentional interference with prospective economic advantage. As part of its ruling, the Court of Appeal held plaintiffs could recover lost profits **[*2]** for the public contracts they were denied, a result unprecedented in California law.

I.

QUESTIONS PRESENTED

In *Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority (2000) 23 Cal.4th 305, 313* (″Kajima″), this Court observed that ″In California, competitive bidding is largely governed by statute. None of these provisions, however, including the comprehensive 1982 Public Contract Code, address whether the lowest responsible

bidder that is wrongfully denied a contract has a cause of action for monetary damages." Kajima held that a bidder who is wrongfully denied a public works contract cannot recover lost profit damages against the public entity that misawarded the contract. Instead, the bidder may only recover its bid preparation costs under a theory of promissory estoppel. (*Id. at 308.)*

This case takes up where *Kajima* left off. Having foreclosed actions against the *awarding agency* for lost profits, this Court is now called upon to decide whether a disappointed bidder to a public works contract may state a cause of action for lost profits against the *winning bidder* to whom the contract was allegedly **[*3]** wrongfully awarded. Specifically:

1. In the context of a competitively-bid public works contract, may the second lowest bidder state a claim for intentional interference with prospective economic advantage against the winning bidder based on an allegation that after the contract is awarded the winning bidder did not fully comply with California's prevailing wage laws?

2. To state a cause of action for intentional interference with prospective economic advantage, must a plaintiff allege that it had a *preexisting* economic relationship with a third party with probable future benefit which preceded or existed separately from defendant's interference, or is it sufficient for plaintiff to allege that its economic expectancy arose at the time the public agency awarded the contract to the low bidder?

II.

REASONS REVIEW SHOULD BE GRANTED

Over the next 5 years, California plans to spend $ 56.7 billion on infrastructure improvements and another $ 815 million on maintenance of state parks, highways, local streets and roads, K-12 schools, community colleges, courts, prisons, state hospitals, and other facilities. [1] As these new projects go out to bid, contractors and public **[*4]** entities alike need clarification regarding the potential new liabilities and corresponding additional costs created by the Court of Appeal's decision to allow disappointed bidders to sue their competitors for intentional interference with the award of a public contract.

Until the Court of Appeal's decision, no California case had recognized a disappointed bidder's right to recover lost profits against its competitor for being denied an award of a public contract. Previously, the law was settled that bidders to a public works contract have no legally-protectable interest in the award of the contract. (See, e.g., *Pacific Architects Collaborative v. State of California (1979) 100 Cal.App.3d 110, 121-122;Swinerton & Walberg Co. v. City of Inglewood-L.A. County Civic Center Authority (1974) 40 Cal. App.3d 98, 101.)* **[*5]** Instead, a disappointed bidder's remedy is through an administrative bid protest to set aside the contract. (See, e.g. *Kajima/Ray Wilson v. Los Angeles County Metropolitan Transp. Authority, supra, 23 Cal.4th 305, 313, fn. 1;Great West Contractors, Inc. v. Irvine Unified School Dist. (2010) 187 Cal.App.4th 1425, 143;Eel River Disposal and Resource Recovery, Inc. v. Humboldt (2013) 221 Cal.App.4th 209, 239-240.)* Bid protest proceedings provide due process protections, and a public agency's decision is reviewable by writ of mandate. (*Kajima, supra 23 Cal.4th at 313.)* Disappointed bidders may seek declaratory and injunctive relief to set aside the contract but are not entitled to lost profits. Instead, damages are strictly limited to reimbursement of bid preparation costs. (*Ibid.; Monterey Mechanical Co. v. Sacramento Regional County Sanitation Dist. (1996) 44 Cal.App.4th 1391, 1413.)*

By holding that the second-lowest bidder has an enforceable expectancy interest in the award of a public contract, the majority erases the bright line established in *Kajima* and upsets state contracting law. As the **[*6]** dissent rightly points out, public contract law forbids creation of an expectancy interest between bidders and the public entity soliciting bids. (Decision, p. 29 (Grimes, J., *dissenting*).) Review is therefore necessary to restore the fundamental principle of California law that submitting sealed bids to a public agency vested with discretion to reject all bids does not give any bidder an expectancy interest or a probability of future economic benefit *vis-a-vis* an awarding agency unless and until a contract is awarded. (*Kajima/Ray Wilson v. Los Angeles County Metropolitan Transp. Authority, supra, 23 Cal.4th 308;* see also *Charles L. Harney, Inc. v. Durkee (1951) 107 Cal.App.2d 570, 580.)*

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[1] These statistics are taken from the *2014 California's Five Year Infrastructure Plan*, as reflected on the California Department of Finance's Web site at http://www.ebudget.ca.gov/2014-Infrastructure-Plan.pdf, pp. 2, last accessed March 15, 2015.

Further, if not reversed, the Court of Appeal's decision will have unintended, far reaching consequences beyond this case and these parties. Disappointed bidders who were previously limited to recovering bid preparation costs from the public entity, may now turn to the lowest bidder as a source for recovering lost profits. Accordingly, every award of a public works contract would be vulnerable to litigation because disappointed bidders are now incentivized **[*7]** to sue for lost profits without actually having to perform the work under the contract. (See, e.g. *Kajima, supra, 23 Cal.4th 305, 313, fn. 1* [noting that by the time a court hears a challenge to a misawarded contract, the project is usually completed, thereby mooting injunctive relief]; *Great West Contractors, Inc. v. Irvine Unified School Dist., supra, 187 Cal.App.4th at 1444, fn. 16* [same].)

As a consequence, successful bidders will be forced to expend time and money on defending lawsuits from their competitors rather than focusing their resources on completing their projects, which in turn affects public owners if projects cannot be completed on time due to litigation. Further, it means that contractors may face exposure for past contracts long since completed based on allegations that are first made years later. This is exactly what happened in this case, as Plaintiffs are challenging contract awards dating back to 2009, based on their claim that they only recently discovered the purported violations of the prevailing wage laws. [2]
[*8]

Further, the majority's decision raises questions regarding the scope of potential liability. Although the court purported to limit its holding to those bidders who can show they were the ″actual and lawful lowest bidders″ on the project, the court acknowledges in footnotes that its holding extends by implication to a large class of potential plaintiffs, including subcontractors, suppliers, and other businesses that would have benefitted had the losing bidder obtained the contract. (Decision, p. 12.) And, while the Court of Appeal argued that its decision was supported by the public policy supporting prevailing wage laws and would prevent ″wage theft,″ the majority itself recognized that its decision is not limited to cases alleging violations of the prevailing wage laws as the predicate act of interference. The majority's holding clearly allows for tortious interference claims based on many other types of alleged misconduct. This concern is seconded by the dissent. (Decision, p. 14 (Grimes, J., *dissenting*).) Thus, while the Court of Appeal dismissed American's argument that this case will ″open the floodgates″ to new litigation, it cannot be denied that the decision paves the **[*9]** way for lawsuits by a broad class of plaintiffs alleging all types of interference.

The second reason why the Court should grant review is to settle an important issue of law regarding the pleading requirements for establishing a tortious interference claim. The last time this Court examined the tort of intentional inference with prospective economic advantage was in *Korea Supply Company v. Lockheed Martin Corporation (2003) 29 Cal.4th 1134* (″*Korea Supply*″). There, the Court described the threshold element of the tort as ″the existence of an economic relationship with some third party that contains the probability of future economic benefit to the plaintiff.″ (*Id. at 1164.)* According to the Court, ″[t]his tort therefore 'protects the expectation that the relationship eventually will yield the desired benefit, not necessarily the more speculative expectation that a potentially beneficial relationship will arise.' . . . Only plaintiffs that can demonstrate an economic relationship with a probable future economic benefit will be able to state a cause of action for this tort.″ (*Ibid*.)

Although *Korea Supply* arose in a bidding context, the **[*10]** first element of the tort was not at issue because the plaintiff there did have the requisite preexisting economic relationship. (*Korea Supply, supra, 29 Cal.4th at p. 1153.)* Nonetheless, the Court of Appeal's majority decision below relies on the case for the proposition 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.″ (Decision, p. 11.) The dissent correctly indicts this logic, arguing that if the mere submission of a bid gives rise to a protected economic relationship, it would effectively ″create a new tort for the benefit of parties who had no relationship with the public entity whatever before submitting a bid.″ (Decision, p. 12 (Grimes, J., *dissenting*).) The dissent correctly recognizes that plaintiff's expectancy must necessarily *precede* the interfering conduct and exist apart from defendant's illegal conduct. (*Id*. at p. 10.)

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[2] The operative complaint merely alleges on ″information and belief″ that American did not pay all prevailing wages. (1 CT 7.) The complaint does not plead, nor could it ever do so truthfully, that any court, public agency, or the Department of Industrial Relations, Division of Labor Standards Enforcement, determined that American at any time violated any prevailing wage laws.

This case provides an ideal vehicle for the Court to tackle these issues not reached in *Korea Supply* and settle the issue of whether the submission **[*11]** of a bid on a public works contract gives rise to a protected economic expectancy with a public agency, or whether, as American and the dissent contend, the plaintiff must allege an existing relationship that preceded the bids.

In light of the pressing legal and policy concerns implicated by the Court of Appeal's decision, the need for resolution by this Court is clear and immediate. For these reasons, and as explained in greater detail below, the Court should grant review.

III.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs Roy Allan Slurry Seal, Inc. and Doug Martin Contracting Co., Inc. (collectively ″Plaintiffs″) are asphalt contractors that regularly bid on municipal road maintenance projects in and around Southern California. (1 CT 3-6.) Defendant and Petitioner American Asphalt South, Inc. (″American″) is one of Plaintiffs' main business competitors and frequently bids on the same projects. (*Ibid*.)

Between 2009 and 2012, American outbid Plaintiffs on 23 public works contracts totaling more than $ 14.6 million. (Decision, p. 2.) Plaintiffs brought five separate lawsuits against American in Los Angeles, San Bernardino, Riverside, Orange and San Diego **[*12]** Counties, alleging that American failed to pay its workers prevailing wages, which artificially reduced its labor costs, and in turn, allowed American to improperly underbid its competitors. (1 CT 3-6.) Plaintiffs alleged that they were the second lowest bidders as to the contracts they respectively bid on, and would have been awarded those contracts were it not for American's unlawful deflating of its labor costs. (1 CT 6.) Based on this theory, Plaintiffs asserted causes of action for intentional interference with prospective business advantage and other claims. [3]

American demurred to the complaints, arguing **[*13]** that as bidders to a public works contract, Plaintiffs did not have an existing relationship and reasonable probability of being awarded the contracts. American contended that the act of submitting bids for public works contracts does not create a business relationship and thus Plaintiffs could not allege a necessary element of their cause of action for intentional interference with prospective economic advantage.

These demurrers led to conflicting rulings from three of the trial courts. The Riverside Superior Court sustained American's entire demurrer without leave to amend (2 CT 344-345), while the Superior Courts in Los Angeles and San Diego overruled the demurrers as to the tortious interference claims. (See 2 CT 187.) In January 2014, Plaintiffs appealed from the Riverside judgment. One week later, this Court ordered all five matters to be coordinated for trial in Los Angeles Superior Court and for appellate purposes in the Second District Court of Appeal. (Decision, p. 3.)

The Court of Appeal, in a 2-1 decision, reversed the trial court and reinstated Plaintiffs' claim for intentional interference with prospective economic advantage. Relying chiefly on this Court's **[*14]** decision in *Korea Supply, supra, 29 Cal.4th 1134,* the majority reasoned that as of the point in time when the public agency awarded the contract to the low bidders, Plaintiffs as the second lowest bidders possessed a reasonably probable economic expectancy that they would have been awarded the contracts but for American's allegedly illegal acts in underpaying its employees. (Decision, pp. 6-11.)

Because this petition raises purely legal questions that may be definitively resolved by only this Court, American did not petition for rehearing below. (Cal. Rules of Court, rule 8.504(b)(3).)

IV.

ARGUMENT

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[3] Plaintiffs also alleged a cause of action for predatory pricing under the Unfair Practices Act (Bus. & Prof. Code, §§ 17000 et seq.) and sought an injunction under the Unfair Competition Law (Bus & Prof. Code, § 17200). The trial court sustained demurrers to these causes of action, and the Court of Appeal affirmed. Accordingly, these issues are not part of the petition for review.

A. The Court of Appeal's Decision Conflicts With Competitive Bidding Laws and Creates Untenable Precedent for Public Works Projects Throughout California

1. As a Matter of Law, Bidders Have No Legally-Protected Expectancy in the Award of a Public Works Contract

In the context of competition for public works contracts, Plaintiffs' claim to an ″economic relationship″ with an awarding agency is at odds with California's competitive bidding laws, which are specifically designed to create a level playing field for all bidders. (*Swinerton & Walberg Co. v. City of Inglewood-L.A. County Civic Center Authority, supra 40 Cal.App.3d 98, 101.)* **[*15]** The bidding laws preclude any one bidder enjoying a protectable relationship with the entity, i.e., having a ″leg up″ on any of the other bidders.

The competitive bidding laws for public works contracts are designed to protect the public, not bidders. (*Konica Business Machines U.S.A., Inc. v. Regents of the University of California (1998) 206 Cal.App.3d 449, 456.)* To serve these purposes, under the competitive bidding laws the awarding agency has the sole discretion to reject all bids. (See, e.g. Pub. Contract Code, §§ 20166, 10122, subd. (d), 10185.) Where the contract must be awarded to the lowest responsible bidder, if two bids are lowest, the agency may select either bid. (Pub. Contract Code, § 22038, subd. (b).) Further, ″a public body where it has expressly reserved the right to reject all bids, [may] do so for any reason and at any time before it accepts a bid. If the entity so decides, it may return all bids unopened.″ (*Universal By-Products, Inc. v. City of Modesto (1974) 43 Cal.App.3d 145, 152.)*

Thus, when the ultimate decision to enter into a business relationship is, by statute, a purely discretionary decision on the part of the agency, **[*16]** a plaintiff cannot establish the necessary pre-existing relationship existed prior to the time the contract is awarded to it. Even the low bidder enjoys no such protectable expectancy since the public body may reject all bids, even the lowest bid, if in its sole discretion it decides to do so.

As a consequence of this discretionary authority, the court long ago held in *Charles L. Harney, Inc. v. Durkee, supra 107 Cal.App.2d 570, 580* that a disappointed bidder has no legally-protectable expectancy in a public works contract. There, the lowest bidder sought a writ of mandate to accept its bid after the state director of public works rejected all bids for a highway project. The court denied the claim, explaining that ″[the] competitive bidding statutes are not passed for the benefit of bidders but for the benefit and protection of the public. No right exists in the lowest bidder to have his bid accepted where the statute confers the power to reject all bids.″ (See also *Pacific Architects Collaborative v. State of California (1979) 100 Cal.App.3d 110, 121-122;Rubino v. Lolli (1970) 10 Cal.App.3d 1059, 1062* [the disappointed bidder **[*17]** has no right of action for tort damages against the public entity].)

That bidders for public works contracts possess no protectable expectancy is further shown by examining the evidence that a plaintiff in a non-public works setting might rely on in establishing the pre-existing economic relationship. In a non-public works setting, the nature and temporal proximity of prior contracts might be very relevant. It would be logical to presume a recently completed contract would be more indicative of an existing economic relationship than a contract completed years ago. It would likewise be logical to presume that the more contracts that the plaintiff had been awarded by the private entity, the more likely an economic relationship continues to exist. Moreover, to the extent there was any goodwill created in carrying out the recent contracts in a private business setting, one could reasonably conclude that such goodwill could carry over and be evident of the ongoing relationship and of the reasonable probability that a subsequent contract yielding positive economic benefits would be awarded.

However, in the public works setting, this evidence is irrelevant because the public agency is **[*18]** required by law to award the contract to the lowest responsible bidder, regardless of the number of contracts that had previously been previously awarded to the frustrated bidder. This is because the Public Contract Code is not designed to protect bidders, or their ″relationships″ with public entities, but exists specifically to ensure that any such alleged ongoing ″relationships″ have no bearing on the outcome of future bids. This competitive bidding process is designed to safeguard the public and guard against favoritism in the award of public works contracts, not to serve the interests of bidders. (Pub. Contract Code, § 100; *Swinerton & Walberg Co. v. City of Inglewood-L.A. County Civic Center Authority, supra 40 Cal. App. 3d 98, 101.)*

Thus, even if a public agency has otherwise valid business reasons for preferring to work with a particular contractor, that contractor as a matter of law has no expectancy and cannot be awarded the contract if it is not the lowest responsible bidder.

Conversely, if a particular bidder had not previously won any prior bids, if it is the low responsible bidder by law it must be awarded the contract, notwithstanding the losing bidders' **[*19]** prior contracts with the entity. Thus, the required element of a sufficient preexisting economic relationship is fatally incompatible with the purposes behind public contract laws, which are ″to guard against favoritism, improvidence, extravagance, fraud and corruption; to prevent the waste of public funds; and to obtain the best economic result for the public″ and to stimulate advantageous market place competition. (*Graydon v. Pasadena Redevelopment Agency (1980) 104 Cal.App.3d 631, 636.)*

Moreover, as previously noted, this Court held in *Kajima, supra, 23 Cal.4th 305,* that an agency which erroneously awards the contract to someone other than the lowest bidder is not liable to the disappointed bidder for lost profits or other tort damages. (*Id. at 317.)* Permitting recovery of lost profits ″provid[es] an unfair windfall to bidders like Kajima for effort they did not make and risks they did not take.″ (*Ibid*., internal citations omitted.)

For these reasons, the Court of Appeal erred in its decision and this Court should reverse.

2. This Court Should Grant Review Because the Court of Appeal's Decision Creates Bad Public Policy [*20] and Would Spur Litigation on Public Works Projects Throughout California

The Court of Appeal's decision greatly expands the potential liability of parties involved in competitive bidding. Based on the Court of Appeal's ruling, disappointed bidders who are limited to recovering bid preparation costs from the public entity may now turn to the lowest bidder as a source for recovering lost profits.

While the majority dismissed American's argument that this case will ″open the floodgates″ to new litigation, the decision paves the way for lawsuits by a broad class of plaintiffs alleging all types of interference. Although the court purported to limit its holding to those bidders who can show they were the ″actual and lawful lowest bidders″ on the project, the court acknowledges in footnotes that its holding extends by implication to a large class of potential plaintiffs, including subcontractors, suppliers, and other businesses that would have benefitted had the losing bidder obtained the contract. (Decision, p. 12.) Further, while the Court of Appeal argued that its decision was supported by public policy to enforce the prevailing wage laws and prevent ″wage theft,″ the majority itself **[*21]** recognized that its opinion is not limited to cases alleging violations of the prevailing wage laws as the predicate act of interference. The court's holding clearly allows for tortious interference claims based on many other types of alleged misconduct. (*Id*. at 14.) This concern is echoed by the dissent. (Decision, p. 14 (Grimes, J., *dissenting*).)

Significantly, the Court of Appeal blithely concedes that ″[w]hether a plaintiff was in fact the second lowest bidder and would have been awarded a contract had the winning bidder complied with the prevailing wage law is a factual issue susceptible to standard civil discovery practices,″ such as conducting discovery of ″the relevant officials involved in the contract award process.″ (Decision, p. 13, fn. 8.) This fact alone supports American's floodgate argument since it means that disappointed bidders will be allowed to undertake discovery into their competitor's confidential and proprietary methods for pricing bids. The disappointed bidders, acting under the guise of discovery, will be able to obtain a gold mine of information about their competitors' bidding techniques, their labor and material costs, supplier lists, profitability, **[*22]** and other highly sensitive information, thereby providing a strong incentive for many contractors to sue their competitors.

The Court of Appeal did not hide the fact that its decision was animated, in large part, by a perceived need to police the public bidding process so as to prevent ″wage theft″ and enforce the prevailing wage laws. California's Labor Code contains an extensive enforcement mechanism for the prevailing wage laws. Labor Code section 1741 authorizes the Division of Labor Standards Enforcement (″DLSE″) to issue either a civil wage and penalty assessment or a Notice of Withholding of Contract Payments to the awarding agency if the DLSE determines that there has been a violation of the prevailing wage requirements. Labor Code section 1741 also authorizes the DLSE to recover wages, interest, and liquidated damages on behalf of the employees and provides for a hearing process, including settlement and discovery procedures. Section 1771.3 authorizes a civil action by a joint labor-management committee against a contractor that violates prevailing wage laws, and the affected employees also possess a private right of action to recover the non-payment of prevailing wages. **[*23]** (*Road Sprinkler Fitters Local Union 669 v. G&G Fire Sprinklers, Inc. (2002) 102 Cal.App.4th 765.)* Other administrative remedies are available. (*Mobley v. Los Angeles Unified School Dist. (2001) 90 Cal.App.4th 1221,*

1232-1233.) Further, it is important to remember that none of the damages awarded to disappointed bidder in a tortious interference lawsuit will actually go towards reimbursement of workers' wages. The Court of Appeal's efforts to add a further layer of enforcement to the prevailing wage laws is not only unnecessary, but also results in numerous unintended consequences, as outlined above.

Exposing low bidders to tort liability and claims for money damages is a poor way to regulate public works bidders. By contrast, the existing enforcement mechanisms for prevailing wage laws, and the bid protest procedure (which allow a contract award to be set aside coupled with recovery for bid preparation expenses) provide more than adequate means to keep bidders in check. As this Court said in *Kajima, supra 23 Cal.4th at 316,* "The numerous cases in which a disappointed bidder has sought a writ of mandate to have the contract awarded **[*24]** to another set aside demonstrate that the incentive of significant monetary damages is not required for unsuccessful bidders to act as guardians of the competitive bidding process."

B. Review Is Needed to Settle an Important Issue Under California Law That in Order to State a Claim for Intentional Interference, Plaintiff's "Preexisting Economic Relationship With Future Benefit" Must Precede Defendant's Wrongful Conduct

The second reason why the Court should grant review is to clarify that liability for intentional interference with prospective economic advantage requires disruption of an existing economic relationship, and not merely potential disruption of possible future relationships or lost opportunities. (See, e.g. *Sole Energy Co. v. Petrominerals Corp. (2005) 128 Cal.App.4th 212, 243* [to be actionable, plaintiff's expectancy must precede the interfering conduct].)

The tort of intentional interference with prospective economic advantage rests upon "the existence of a business relationship with which the tortfeasor interfered. Although this need not be a contractual relationship, an existing relationship is required." (*Roth v. Rhodes (1994) 25 Cal.App.4th 530, 546,* **[*25]** internal citations omitted; emphasis added.)

In *Westside Center Associates v. Safeway Stores 23, Inc. (1996) 42 Cal.App.4th 507, 523-524,* the court explained that the elements of a cause of action for intentional interference with prospective economic advantage "presuppose a business relationship existed at the time of the defendant's allegedly tortious acts lest liability be imposed for actually and intentionally disrupting a relationship which has yet to arise." Thus, to be actionable, "a defendant's tortious conduct must have interfered with a specific existing relationship, not simply with the formation of one in the future." (*Id. at p. 525;* see also Cal. Practice Guide: Claims & Defenses (The Rutter Group), § 3:156 ["Plaintiff must have an *existing relationship* that is likely to produce economic benefits in the future. An expectation that *the relationship itself* will be created in the future is not sufficient." Italics in original].)

In this case, majority set aside these well-established principles and found that Plaintiffs, as the alleged lawful lowest bidders, had a reasonably probable economic expectancy that they would be awarded **[*26]** the contracts, which arose "once the public agency awards a contract to an unlawful bidder, thereby signaling that the contract would have gone to the second lowest qualifying bidder." (Decision, p. 11.) In other words, the majority uses a temporally backward analysis by relying on America's alleged wrongful misconduct to create an existing economic relationship where none otherwise exists. (*Ibid.*) The majority, straining to defend its logic, explains that "by continuing its unlawful conduct after wrongfully winning the contract, the defendant interferes with an expectancy that would have otherwise materialized."

As noted above, the majority relied in large part on *Korea Supply* to reach this result, arguing that the case stands for the proposition 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 a victim of actionable interference." (Decision, p. 11.)

The majority opinion plainly misconstrues the holding in *Korea Supply*. There, plaintiff Korea Supply Company (KSC) was a broker that represented a military supplier (MacDonald Dettwiler) in negotiations **[*27]** for a contract with the Republic of Korea. Plaintiff stood to receive a commission of over $ 30 million if its client's bid was accepted. (*Id.* at 1140.)

Ultimately, the contract was awarded to a competitor supplier, Lockheed Martin Tactical Systems, Inc. KSC then sued Lockheed, arguing that Lockheed and its agent had offered bribes and improper favors to key Korean officials in violation of federal laws governing foreign military sales. KSC asserted claims under both California's unfair competition law (Bus. & Prof. Code § 17200 et seq.) and the common law tort of interference with prospective economic advantage.

Although the trial court sustained a demurrer and dismissed KSC's claims, this Court reinstated the claims, finding that with respect to the intentional interference cause of action, KSC had pled sufficient facts to show a preexisting economic relationship with its client, MacDonald Dettwiler. (*Id.* at 1157.) As this Court explained, ″KSC merely alleged that it had an economic expectancy in that it was acting as MacDonald Dettwiler's broker and it expected a commission if the contract was awarded to MacDonald Dettwiler.″ (*Ibid.*) The Court further went on to instruct: **[*28]**

> [A] plaintiff that wishes to state a cause of action for this tort must allege the existence of an economic relationship with some third party that contains the probability of future economic benefit to the plaintiff. This tort therefore 'protects the expectation that the relationship eventually will yield the desired benefit, not necessarily the more speculative expectation that a potentially beneficial relationship will arise.' [citations.] Here, KSC had an agency relationship with MacDonald Dettwiler under which KSC's commission was fixed at 15 percent of the contract price. As alleged in the complaint, if Macdonald Dettwiler had been awarded the contract, KSC's commission would have exceeded $ 30 million. This business relationship and corresponding expectancy is sufficient to meet this first element. Only plaintiffs that can demonstrate an economic relationship with a probable future economic benefit will be able to state a cause of action for this tort. (*Korea Supply, supra, 29 Cal.4th at p. 1164,* emphasis added.)

Thus, *Korea Supply* does not support the majority's holding that the mere submission of a bid, coupled with the **[*29]** public agency's award to the unlawful bidder, constituted a sufficient existing economic relationship to give rise to a tortious interference claim. Instead, it was the *agency* relationship between KSC and its client MacDonald Dettwiler-which was already in place at the time of bidding-that the Supreme Court relied upon in recognizing an actionable claim for intentional interference. No such actual relationship can be claimed here by Plaintiffs.

Nonetheless, the majority maintains that per *Korea Supply*, if a broker of a losing bidder can state a claim for tortious interference against the winning bidder based on its expectation of receiving a commission, then ″it seems inescapable″ that the losing bidder would likewise have a cause of action based on interference with its bid. (Decision, p. 7.) This statement reveals the central flaw in the majority's reliance on *Korea Supply*. There, the plaintiff-agent had the relationship with the probability of future economic benefit *vis a vis* the losing bidder. The losing bidder had no future economic benefit with the relationship with the agent, meaning it is the agent that would benefit monetarily from that relationship and the **[*30]** losing bidder would be the one paying the agent. The dissent correctly points out that in *Korea Supply*, the ″economic relationship existed entirely apart from and before the defendant's illegal conduct that disrupted the relationship.″ (Decision, p. 10.)

The Court of Appeal's decision also runs contrary to decisions in other jurisdictions that have encountered similar fact patterns. Other courts have held that a bidder in a competitive bidding situation does not possess a legally sufficient pre-existing relationship to maintain a claim for tortious interference. (See, e.g. *Powercorp Alaska, LLC v. Alaska Energy Authority (Alaska, 2012) 290 P.3d 1173, 1187* [″Submitting a bid does not provide any one bidder with a contractual expectancy superior to the rights of other bidders″ necessary to state a claim for interference].)

The decision in *Cedroni Associates, Inc. v. Tomblinson, Harburn Associate, Architects, & Planners, Inc. (Mich. 2012) 492 Mich. 40, 42-46,* is particularly instructive. In *Cedroni*, the court rejected the same argument Plaintiffs make here:

> Given that a contractor that submits the lowest bid cannot bring a cause of **[*31]** action against the municipality when its bid is rejected, even when the municipality has adopted a charter provision that requires it to accept the 'lowest responsible bidder,' it is difficult to fathom how plaintiff's submission of the lowest bid could have created a valid business expectancy in light of the highly discretionary process of awarding governmental contracts. In terms of whether a valid business expectancy is created, a plaintiff's expectations are entirely the same regardless of whether it alleges that the government has wrongfully denied it the contract or, as here, that a third party has interfered and

> caused a denial of the contract. [.] 'when the ultimate decision to enter into a business relationship is, by statute, a highly discretionary decision, a plaintiff cannot establish that its 'business expectancy' [reflected] a reasonable likelihood or possibility and not merely wishful thinking.'" (*Id., at page 46.)*

Similarly, in *Duty Free Americas, Inc. v. Estee Lauder Companies, Inc. (S.D.Fla., 2013) 946 F.Supp.2d 1321,* the court concluded that "[A] bidder generally cannot establish a protected business relationship with an entity **[*32]** soliciting bids through a competitive bidding process" because a solicitation for bids is "merely a request for offers from interested parties," and cannot serve as evidence that the bidder probably would have entered into a contract with the awarding agency but for the defendant's interference. (*Id. at pp. 1338-1339.)*

As can be seen, review of this matter is necessary in order to bring California law in line with other jurisdictions and to reaffirm the basic principle that the economic relationship containing the probability of future benefit must necessarily precede, or exist separately from, the defendant's interference.

This Court should grant review to curtail the Second Appellate District's unwarranted expansion of this tort into the competitive bidding context. As noted by the dissent, the Court of Appeal's decision effectively rewrites the first element of the cause of action for interference with prospective economic advantage -"an economic relationship with a probable future benefit"-by wiping out the predicate "relationship" language. Under Plaintiffs' theory, anyone who submits a bid has a legitimate expectation of winning the contract, an expectation **[*33]** that arose at the moment of submitting a bid, even though it cannot be determined until after all the bids have been unsealed which bidder is the second lowest bidder. Under the rule announced by the Court of Appeal, the second lowest bidder has that legitimate expectation, if it turns out that the winning bidder engaged in illegal conduct. Both these theories would create a new tort for the benefit of parties who had no relationship whatsoever with the public entity before submitting the bid. This is a sharp departure without logical reason from all prior case law limiting the tort to "interference with an existing contract or a contract which is certain to be consummated." (See *Buckaloo v. Johnson (1975) 14 Cal.3d 815, 823, fn. 6* [overruled on other grounds by *Della Penna v. Toyota Motor Sales, U.S.A, Inc. (1995) 11 Cal.4th 376].)*

V.

CONCLUSION

In *Della Penna v. Toyota Motor Sales, U.S.A., Inc., supra 11 Cal.4th 376, 378,* this Court recognized that the tort of intentional interference with prospective economic relations is a work in progress and requires frequent judicial intervention so as to strike the proper **[*34]** balance between protection of legitimate business interests and free competition. This case presents an ideal opportunity for the Court to refine and limit the tort in terms of its application in the context of competitive bidding. As shown herein, Plaintiffs have not and cannot allege a legally-protectable economic expectancy in the award of a public contract and are not entitled to lost profits. For these reasons, American respectfully requests this Court to grant review.

Dated: March 30, 2015

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

(*Cal. Rules of Court*, §§ 8.204, 8.490)

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