S225398

# IN THE
# SUPREME COURT OF CALIFORNIA

ROY ALLAN SLURRY SEAL, INC., et al.,

*Plaintiffs and Appellants,*

v.

AMERICAN ASPHALT SOUTH, INC.,

*Defendant and Respondent.*

## REPLY BRIEF ON THE MERITS

After a Decision by the Court of Appeal,
Second Appellate District, Division Eight
No. B255558

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## I.

## INTRODUCTION

In its Opening Brief on the Merits, Defendant and Respondent American Asphalt South, Inc. ("American") articulated numerous, compelling public policy reasons against allowing competitors to sue each other for the tort of intentional interference with prospective economic advantage in the context of bidding for public works contracts. None of these were addressed by Plaintiffs. Similarly, American discussed the various existing mechanisms through which the State enforces its prevailing wage laws. In response, Plaintiffs have failed to articulate any sound reason why this tort should be expanded to allow for the recovery of alleged lost profits by American's competitors, and the competitor's subcontractors, as a means to prevent "wage theft." As used by Plaintiffs here, "wage theft" is just a buzz word, employed for the false premise that existing enforcement mechanisms are inadequate, requiring Plaintiffs to serve as the guardians of workers employed by their business competitors.

While preventing "wage theft" is a laudable goal, Plaintiffs are unable to dispute that the public policy considerations against imposing tort liability in this setting far outweigh any trivial public benefit that might possibly result from allowing Plaintiffs' claims to proceed.

Moreover, trying to fit this square peg into the round hole of traditional tort concepts of duty and proximate cause leads to absurd results. For example, under Plaintiffs' theory, a bidder who submitted a bid inclusive of all prevailing wages, but who subsequently violated the prevailing wage laws, could not be sued by the second low bidder even though "wage theft" did occur. And, a bidder who intended to circumvent prevailing wage laws by underbidding but who ultimately did pay its workers all prevailing wages could be liable even though no "wage theft" occurred. These scenarios expose the fallacy in Plaintiffs' reasoning and

highlight that Plaintiffs' claims are not about preventing wage theft but simply an attempt to recover alleged lost profits for work Plaintiffs did not have to perform. (See *Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* (2000) 23 Cal.4th 305, 317.)

Even Plaintiffs reject the Court of Appeal's "temporally backwards" ruling, which found an economic relationship arising after American's alleged wrongful act of submitting a deflated bid. Plaintiffs now claim that the economic relationship arises at the time they submit their bid, thereby existing "contemporaneously" with American's alleged interference. Plaintiffs' revised theory still does not fit within prior case law requiring the economic relationship be in place at the time of the defendants' alleged wrongful conduct and does what the court in *Westside Center Associates v. Safeway Stores 23, Inc.* (1996) 42 Cal.App.4th 507, 523–524, specifically guarded against, potentially imposing liability for "disrupting a relationship which has yet to arise."

Accordingly, American respectfully requests that this Court reverse the Court of Appeal's decision and affirm the trial court's judgment dismissing Plaintiffs' claims.

## II.

## ARGUMENT

### A. The Court Should Not Extend Tort Liability to Bidders on a Competitively-Bid Public Works Contract

#### 1. Bidders on Public Contracts Do Not Owe Duties to Their Business Competitors

Both parties appear to agree that the threshold issue is whether American owed Plaintiffs a legal duty and if so, what that duty entailed. "A tort, whether intentional or negligent, involves a violation of a *legal duty,* imposed by statute, contract or otherwise, owed by the defendant to the person injured." (*Cedars-Sinai v. Superior Court* (1998) 18 Cal.4th 1, 8;

italics in original.) Without such a duty, any injury is injury without wrong. (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 57–58.) "The existence and scope of duty are legal questions for the court." (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 477.)

While Plaintiffs have thus far danced around and avoided identifying the specific duty they claim is owed to them by American, in their Answer Brief on the Merits they argue American had a duty to "include all of the proper prevailing wages" in its bids. (Ans. Br., pp. 4–5.) Interestingly, nowhere in their brief, or the Court of Appeal decision which they defend, do Plaintiffs identify the source of this purported duty. This is plainly because there is nothing in the fabric of California's laws or regulations which remotely suggests an obligation on the part of American to prepare its bids in any particular fashion *vis-à-vis* its competitors.

The Labor Code is clear that "The duties created by the wage-and-hour statutes run solely from employer to employee." (*Castillo v. Toll Bros., Inc.* (2011) 197 Cal.App.4th 1172, 1210.) Further, a contractor's duties under the prevailing wage law are limited to its own employees, not to its subcontractors, employees of other entities, or anyone else. (See *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 969.)

Although employees themselves enjoy a private right of action to recover unpaid prevailing wages from their employer (*Road Sprinkler Fitters Local Union No. 669 v. G & G Fire Sprinklers* (2002) 102 Cal.App.4th 765, 772–773), the prevailing wage statutes do not create any action for civil damages in favor of competing bidders who lose projects to low bidders. Here, the notion that American owed a duty of care to Plaintiffs to prepare its bids in a certain fashion—i.e., so that its bid price and labor costs would take into account compliance with prevailing wage laws—was adopted by the Court of Appeal with no analysis. There is no precedent holding that bidders owe a duty sounding in tort to the soliciting

agency to create its bids in a particular fashion, much less a duty to fellow bidders. (Accord *Settimo Associates v. Environ Systems* (1993) 14 Cal.App.4th 842.)

In tacit recognition of these principles, Plaintiffs try to find support from the contract documents by arguing American's bids contained implied promises regarding payment of prevailing wages. (See Ans. Br., p. 40.) Yet Plaintiffs' efforts to extract duties from the contracts and bid submissions are in vain. While the Public Contract Code requires several certifications to be included in the bid documents— for example, bid security (Pub. Contract Code § 20170), a subcontractor list form (§ 4104), and a non-collusion declaration (§ 7106)—nothing in the Public Contract Code or Labor Code requires the bids certify compliance with prevailing wages at the time of bidding. This is especially significant, given that state law requires an *awarding body* to identify prevailing wage contracts within its notice inviting bids and in every public contract it issues. (Lab. Code §§ 1773, 1773.2.) The information to be included in the bid documents and contract include the prevailing rate for each craft, classification or type of worker needed to execute the contract. (*Ibid.*) The prevailing wage law specifically recognizes a right of action by a contractor against an awarding agency for failing to disclose that prevailing wages were required for the project. (Lab. Code § 1726(c).)

The contrast between these clear, affirmative duties imposed on awarding agencies and the corresponding absence of any duties imposed on prospective bidders is highly significant. If the Legislature had intended for public works contractors to fashion their bids so as to take into account payment of prevailing wages, or to certify their compliance with prevailing wage laws in the bids, it certainly knew how to do so. Instead, the Labor Code makes clear that a contractor's obligations under the prevailing wage law do not arise until payment.

### 2. Duty Cannot Be Established Through Foreseeability Alone

In absence of a duty created by statute, precedent, or other positive law, Plaintiffs next try to argue that American's duty arises from the foreseeability of the harm. According to Plaintiffs, "it was reasonably foreseeable to respondent [American] if it did *not* ensure its bids on public works projects included *all* of the proper prevailing wages, respondent would probably cause economic injury to the second lowest bidder who did ensure its bid included all of the proper prevailing wages." (Ans. Br., p. 5; italics in original.) But foreseeability alone has never been deemed sufficient to impose a duty. Rather, foreseeability of harm is merely one factor to be considered in imposing liability. (*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 398–399; see also *Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 297 ["Mere foreseeability of the harm or knowledge of the danger, is insufficient to create a legally cognizable special relationship giving rise to a legal duty to prevent harm."]) As frequently noted, "there are clear judicial days on which a court can foresee forever and thus determine liability but none on which that foresight alone provides a socially and judicially acceptable limit on recovery of damages for that injury." (*Bily*, *supra*, 3 Cal.4th at p. 399.)

In support of their "foreseeability creates duty" theory, Plaintiffs try to draw an analogy between this case and a drunk driver that hits a bicyclist, arguing that "both respondent and the hypothetical drunk driver made the same intentional choice to disregard the law before coming into contact with their reasonably foreseeable victim." (Ans. Br., p. 5.) This, of course, is a false analogy in that a car hitting a bicyclist sounds in negligence whereas this case involves the intentional tort of interference with prospective business advantage. In the former, liability arises when a defendant fails to exercise reasonable care, while the latter requires a

showing that the defendant intended to produce the harm. (See, e.g., 5 Witkin, Summary 10th (2005) Torts, § 20, p. 74.)

Additionally, Plaintiffs' hypothetical is distinguishable because a drunk driver's victim suffers direct, personal injuries as a result of a collision whereas here Plaintiffs seek recovery for economic loss indirectly stemming from American's alleged failure to pay its workers prevailing wages. Thus, in order to conform Plaintiffs' hypothetical to the present case we must assume a slightly different set of facts. A more analogous scenario might be to imagine that the bicyclist was a courier on his way to deliver a bid on behalf of a third party, P. As a result of the collision, the bicyclist was unable to turn in P's bid prior to the deadline, thereby causing P to lose out on a large business opportunity, and the bicyclist to lose his fee for the bid running. Although the drunk driver would no doubt be liable to the bicyclist for his personal injuries, including loss of income, recovery for P's economic damages should be denied because they are too remote and speculative.

Indeed, this very scenario was presented by a leading commentator to explain the remoteness doctrine as a limit on tort law:

> [V]irtually every day on the freeways of Los Angeles, there is an accident. . . .When these accidents occur, they bring with them huge traffic tie-ups. Many people are delayed, sometimes for a long period of time, all because of the negligence of one or two people.
>
> When people are delayed on highways, it is quite foreseeable that in some instances, the result would be more than a mere inconvenience. People may need to get to hospitals under emergency conditions, and not make it. Millions of dollars, perhaps billions of dollars, are lost in economic opportunities. A person may fail to meet at a given time for a job interview, and loses the opportunity. A person may fail to show up for a sales opportunity that was virtually certain, and loses the sale as a result of the delay. But, if a person who is hurt is unable to get to a hospital, or the person who has lost a job

> opportunity, or a person who losses the sale sues the negligent driver, they would lose. While we may 'feel their pain,' their claim is too remote. The case law is absolutely clear on this issue, as is common sense.

(Schwartz, *The Remoteness Doctrine: A Rationale for a Rational Limit on Tort Liability* (2000) 27 Pepperdine L. Rev. 759, 760–761.)

Applying these principles to the present case, the Court should refuse Plaintiffs' invitation to find that a bidder owes a duty to its competitors to prepare its bid in any particular way. To the extent Plaintiffs incurred economic loss as a result of American's conduct in submitting the allegedly deflated bids, such damages are too remote and indirect to be recoverable.

### 3. Compelling Public Policies Weigh Against Imposing Tort Liability for a Bidder's Alleged Prevailing Wage Violations

When considering whether to recognize a new tort remedy, courts are guided by considerations of common sense and public policy. (*Youst v. Longo* (1987) 43 Cal.3d 64, 77.) Even where an argument can be made in favor of expanding tort liability—such as to deter wage theft and discourage unfair competition— "countervailing public policies may preclude recovery for injury to prospective economic advantage." (*Id.* at p. 78 [quoting *J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, 804, fn. 1.) As this Court has instructed, new tort remedies should *only* be recognized where they "would ultimately create social benefits exceeding those created by existing remedies for such conduct, and outweighing any costs and burdens it would impose." (*Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 8.)

Here, there are several compelling public policies that weigh against imposing a duty.

### *a. The Court of Appeal's Decision Would Open the Floodgates to Litigation by Disappointed Bidders, Undermine the Finality of Contract Awards, and Overburden Awarding Agencies*

Currently, a disappointed bidder's remedy to challenge the mis-award of a public contract is through an administrative bid protest. (See, e.g. *Kajima, supra*, 23 Cal.4th 305, 313, fn. 1; *Great West Contractors, Inc. v. Irvine Unified School Dist.* (2010) 187 Cal.App.4th 1425, 1435.) Such bid protest proceedings are governed by due process protections, and a public agency's decision is reviewable under Code of Civil Procedure section 1085 by writ of mandate to the trial court. (*Kajima, supra*, 23 Cal.4th at 313.) Under the status quo, a disappointed bidder is entitled to declaratory and injunctive relief to set aside the contract, but is not entitled to lost profit damages. (*Ibid.*) Instead, any monetary relief is 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.) In this way, the present system is a "happy medium" in that it encourages contractors to challenge awards, but the limitation on damages means that contractors will presumably protest an award only when they have a meritorious case.

All this changes, however, if this Court were to authorize the tort of intentional interference with prospective economic advantage and allow disappointed bidders a right to recover lost profits. It does not take a leap of faith to imagine that suddenly, every contract award would be subject to hyper-scrutiny, and disappointed bidders would have a strong incentive to sue their competitors for minor, technical violations in hopes of obtaining lost profits, or even settle for nuisance damages against their business rival. (*Kajima, supra*, 23 Cal.4th at p. 317.) This is especially troublesome in cases like this one where Plaintiffs are challenging contract awards made

many years ago. As one court explained, there is a point at which the public interest would be disserved by a rule that would encourage a losing bidder "to comb through the bid proposal . . . of the low bidder after the fact" with the hope of recovering for his higher bid. (*Judson Pacific-Murphy Corp. v. Durkee* (1956) 144 Cal.App.2d 377, 383.)

The specter of constant litigation would also place a heavy burden on awarding agencies. (See *Temple Community Hospital v. Superior Court* (1999) 20 Cal.4th 464, 470 [noting that expansion of liability often causes individuals and entities to engage in unnecessary and expensive procedures to limit exposure in a manner that outweighs the social value of a particular claim].) In fact, the Court of Appeal conceded that awarding bodies may be drawn into litigation such as conducting discovery of "the relevant officials involved in the contract award process." (184 Cal.Rptr.3d at p. 290 fn. 8.)

It is inevitable that to allow losing bidders to sue the winning bidder for lost profits will open the "floodgates" for lawsuits on every public works contract where a colorable claim can be made that the winning bidder submitted a wrongfully deflated bid. Three factors in particular stand out here: the number of potential plaintiffs, the variety of conduct that could serve as the predicate "independently wrongful act," and the strong incentive provided by discovery into a competitor's proprietary pricing methods.

First, while the Court of Appeal purported to limit its holding to those bidders who can show they were the "actual and lawful lowest bidders" on the project, the court acknowledged 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. (184 Cal.Rptr.3d at p. 289.)

Second, although the Court of Appeal's decision arose within the context of the prevailing wage laws, the majority recognized 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 opens the door to tortious interference claims based on many other types of alleged misconduct. This concern is echoed by the dissent. (184 Cal.Rptr.3d at pp. 306–307 [Grimes, J., *dissenting*].) For example, one can imagine claims alleging that the lowest bidder made false representations, statements, or certifications in its bid as to business size or business ownership, which caused it to receive improper bid preference to the detriment of other bidders. (See Featherstun & Correnti, *Calif. Sup. Ct. Refines Remedies for Disappointed Bidders, Public Agencies in the Procurement Process* (2003) 17 Andrews Gov't Cont. Litig. Rep. 19.) Other claims might allege that the lowest bidder was not properly licensed, failed to identify its subcontractors (Pub. Contract Code, § 4100 et seq.), failed to comply with environmental laws or OSHA, or even something as remote to the bidding as the failure to properly smog test and license its vehicles, anything that a frustrated bidder could whip up as "wrongful" and somehow caused an unfair advantage in the award. (*Konica Business Machines USA, Inc. v. Regents of the University of California* (1998) 206 Cal.App.3d 449; *Valley Crest Landscape, Inc. v. City Council* (1996) 41 Cal.App.4th 1432, 1441–1443.)

Third, contractors will have a strong incentive to file suit simply for the opportunity to undertake discovery as to the winning bidder's confidential and proprietary vendor and material supplier lists and methods for pricing bids. (See, e.g. Rest. (First) of Torts § 759 (1939) [noting that the archetype of a rival business interest is when competitive bidders try to ascertain the bid and pricing methods of their competitors].)

In *Youst v. Longo*, which declined to extend the tort of intentional interference with prospective economic advantage to the loss of a horse race, this court explained, "If the tort of interference were recognized in the context of a sporting competition, virtually no such event would take place

without a tort claim from some losing competitor seeking to recover his supposed economic loss; a player's every move would be highly scrutinized for possible use in the courtroom." (43 Cal.3d 78.) Replace the phrase "sporting competition" with "competitive bid" and the same is true here. Consequently, the Court should likewise refuse to extend liability.

***b. Recognizing Tort Remedies in the Public Bidding Context Would Significantly Burden the Court System and Risk Speculative Awards***

Another factor weighing against the extension of liability is the uncertainty of a disappointed bidder's damages and the difficulty of proof. (*Temple Community Hospital, supra*, 20 Cal.4th 464, 474.) In *Temple*, this Court explained that it was loathe to recognize new tort remedies if to do so would present logistical difficulties for a superior court trying the case such as, for example, when the trial involves "mini-trials" on separate issues, or where "the doubtful benefit of the proposed tort remedy is outweighed by the prospect of a spiral of litigation giving rise to verdicts based upon speculation." (*Id.* at p. 466.)

In this case, extending the tort of intentional interference with prospective economic advantage to the context of competitive bidding would present a number of practical, logistical problems for a trial court. Most notably, any action on such a claim would involve at least three "trials within a trial":

1. To establish that plaintiff was the second lowest bidder and would have been awarded the contract but for defendant's interference, plaintiff would have to show that not only did it submit the runner-up bid, but also that its bid was responsive, that it was a responsible bidder, and that in absence of defendant's wrongfully deflated bid, the public agency would have made the award to plaintiff rather than exercising its discretion to reject all bids and/or rebid the work. These showings would, as noted in

the Court of Appeal's decision below, require extensive discovery and evidence from the awarding agency and bidding officer.[1]

2. Plaintiff would have to establish that the defendant actually violated the prevailing wage law by failing to properly pay its workers. In Plaintiffs' own words, "venturing down this rabbit hole" would require depositions of defendant's employees regarding its wage and hour practices. (Ans. Br., p. 26.)

3. In order to establish the interfering conduct, Plaintiff would have to show that defendant's bid was "illegally deflated," that is, that the price of the bid did not take into account the payment of prevailing wages.

This last mini-trial would be especially difficult and speculative because in the world of competitive bidding, public works contractors submit "lump sum" bids that are made up of a single bid amount not broken down by line items for labor and material costs. Thus, from the face of the bid, there is no way to tell how much a bidder allocated to labor costs as opposed to, for example, overhead. There is also no way to tell whether a bidder simply underestimated the hours to perform the job, or mistook the cost of materials. As this Court has previously explained, "[w]e have been cautious in defining the interference torts [interference with contract and interference with prospective economic advantage], to avoid promoting speculative claims." (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1136–1137.)

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[1] Plaintiffs' Answer Brief adds another wrinkle by arguing that the cause of action for intentional interference only arises when the public agency actually makes an award. If an award is not made, such as when the public agency exercises its right to reject all bids, then no cause of action would lie. (Ans. Br., p. 18.) To the extent this suggests tort liability depends on the caprice of the awarding agency, as opposed to defendant's intentional acts, this further evidences the fundamental flaws with Plaintiffs' cause of action.

Moreover, within the context of public bidding, interference claims present a real risk of erroneous determinations. At page 39 of their Answer Brief, Plaintiffs write, "A great deal of forethought and analysis is put into the bid before the bid is submitted because the bid has to include all of the labor, materials, equipment, insurances, worker's compensation premiums, wages and benefits required under the prevailing wage laws to do the proposed asphalt job from start to finish." To the contrary, nothing could be further from the truth.

In the reality of public works competitive bidding, bids are neither the product of deep reflection nor careful deliberation. Indeed, this Court long ago observed that it is customary in the construction industry for contractors to assemble their bids at the last minute, typically moments before the bid submission deadline. (*Drennan v. Star Paving Co.* (1958) 51 Cal.2d 409, 411.) As one court has explained,

> Bids usually are not submitted until immediately preceding the scheduled opening time. . . . [I]t is customary, as was the case here, for the general contractors to receive bids from proposed subcontractors and suppliers of materials only an hour or two before the opening of the general contractors' bids, thereby placing the general contractors in the position of having all they can do to record the bids, prepare their own written bids and get them filed by the deadline.

(*Saliba-Kringlen Corp. v. Allen Engineering Co.* (1971) 15 Cal.App.3d 95, 100; see also *R.J. Land & Associates Const. Co. v. Kiewit-Shea* (1999) 69 Cal.App.4th 416, 422 [noting general custom of prime contractor to receive proposals from subcontractors "just minutes before the deadline for submission of sealed prime bids."].)

In this fast-paced world, bidding errors are quite common, as reflected by the well-established body of law governing relief of bidders. (See, e.g. *Diede Const., Inc. v. Monterey Mechanical Co.* (2004) 125 Cal.App.4th 380; *Emma Corp. v. Inglewood Unified School Dist.* (2004)

114 Cal.App.4th 1018.) Errors are often not apparent from the face of the bid. (See, e.g. *A&A Electric, Inc. v. City of King* (1976) 54 Cal.App.3d 457, 460.) Given these realities, unreasonably low bids are just as likely to be product of an inadvertent human error rather than an intentional design to flout the prevailing wage law. (See, e.g., *M. F. Kemper Const. Co. v. City of L.A.* (1951) 37 Cal.2d 696 [noting that bidding error "caused by the fact that the men were exhausted after working long hours under pressure."].)

Further, Plaintiff has failed to explain what result would attain if a contractor supposedly submitted a deflated bid, but thereafter had a change of heart and decided to pay prevailing wages to its workers during actual performance of the contract. Conversely, what if a contractor submitted a bid that included prevailing wages, but afterwards did not actually pay prevailing wages on the job? What then? And would the statute of limitations accrue at the time the bid was awarded, or at the time of nonpayment? If the former, trial would undoubtedly have to await completion of the job to see if and when there was a prevailing wage violation. As can be seen, Plaintiffs' theory presents a number of troublesome scenarios and practical concerns that weigh heavily against expanding tort liability.

### *c. Recognition of a Damages Remedy Would Produce Incongruities in Public Contracting Law and Result in a Windfall to Unsuccessful Bidders*

As a fundamental public policy, the Legislature has commanded that California's public contract law should be uniform. (Pub. Contract Code, § 102.) In *Kajima, supra*, 23 Cal.4th 305, 313, this Court held that a bidder who is wrongfully denied a public works contract cannot recover lost profit damages. Instead, the bidder may only recover its bid preparation costs

under a theory of promissory estoppel. (*Id.* at 308.)[2] The Court of Appeal's decision would, for the first time, produce inconsistent results in that it would allow a disappointed bidder to assert tort damages against any rival who won a contract through underbidding so long as it can allege the underbidding was caused by some independently wrongful conduct.

Additionally, the Court of Appeal's decision creates new uncertainties regarding the relationship between an awarding agency and bidders. 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.) By holding that the second-lowest bidder has an enforceable expectancy interest in the award of a public contract, the Court of Appeal's majority decision erases the former bright line rule and upsets state contracting law.

As a further anomaly, recognizing a tort action for lost profits would create a windfall to disappointed bidders by compensating them "for effort they did not make and risks they did not take." (*Kajima, supra,* 23 Cal.4th at p. 317 [quoting *City of Atlanta v. J.A. Jones Construction Co.* (1990) 260 Ga. 658, 659, 398 S.E.2d 369, 371].) Previously, this Court has refused to award damages that would put plaintiff in a better position than if it had actually been awarded the contract, because "the possibility of significant monetary gain alone may encourage frivolous litigation and further expend

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[2] Since 1956, the federal courts have likewise held that the damages available to a disappointed bidder on a government contract are limited to the costs of bid preparation. (See *Heyer Products Co. v. U.S.* (Ct. Cl. 1956) 140 F.Supp. 409.)

public resources." (*Id.* at p. 317.) If Plaintiffs' position is adopted, these important public policies would be turned on their head.

**4. Existing Law Already Contains Adequate Enforcement Mechanisms to Combat Wage Theft and Deter Violations of the Prevailing Wage Law**

Plaintiffs assert that expansion of tort liability would serve the public policy of preventing "wage theft" and enforcing the prevailing wage laws. Yet, the status quo is already replete with enforcement mechanisms designed to protect workers and deter prevailing wage violations. For example, Labor Code section 1776 requires the contractor to prepare and maintain certified payroll records, affirming under oath that the contractor has paid all required prevailing wages to its workers. The awarding agency is authorized to withhold payments to any contractor found to have violated the prevailing wage laws. (Lab. Code § 1726(a), (b).)

Further, 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 to the awarding agency if the DLSE determines that there has been a violation of the prevailing wage requirements. Section 1741 also empowers 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. (*Road Sprinkler Fitters Local Union 669 v. G&G Fire Sprinklers, Inc.* (2002) 102 Cal.App.4th 765.)

Labor Code section 1777.1, subdivision (a), allows for debarment where a contractor is found to have committed two or more willful violations of the prevailing wage law within a three-year period, or where a

contractor fails to timely respond to requests for certified payroll records. (Lab. Code, § 1777.1, subds. (b)–(c).) Debarment may include prohibition on bidding and working on a public works project for a period of one to three years. (*Ogundare v. Department of Industrial Relations, Division of Labor Standards Enforcement* (2013) 214 Cal.App.4th 822, 830.) Moreover, a contractor who falsely certifies its prevailing wage payrolls may be liable under the False Claims Act, which offers treble damages and other penalties. (*U.S. ex rel. Local 342 Plumbers and Steamfitters v. Dan Caputo Co.* (9th Cir. 2003) 321 F.3d 926.) Other administrative remedies are available. (*Mobley v. Los Angeles Unified School District* (2001) 90 Cal.App.4th 1221, 1232–1233.)

Additionally, during the pendency of this litigation, the Legislature enacted SB 854 (Stat. 2014) as yet another enforcement mechanism for the prevailing wage law. Under this new legislation, codified at Labor Code section 1725.5, a contractor that wants to bid on or perform work on a public works project is required to register with the Department of Industrial Relations (DIR) and pay a registration fee of $300. As of April 1, 2015, no bid can be accepted nor any contract or subcontract entered into without proof that the contractor or subcontractor is registered.

Plaintiffs are at a loss to explain why these non-tort remedies are inadequate to deter and punish wage theft on public jobs. In cases where a prevailing wage violation can be shown, logically it is the workers—not third parties like Plaintiffs—who are directly harmed and should be entitled to recover. Instead, Plaintiffs urge the Court to adopt an indirect, derivative tort remedy that will only serve to line their own pockets. To be clear: *Not a single penny of the damages awarded to a 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.

Tellingly, Plaintiffs' Answer Brief fails to address any of these existing enforcement mechanisms. Instead, Plaintiffs parrot language from the Court of Appeal's opinion, arguing that if the judgment below is affirmed, it would effectively mean that "no losing bidder could ever sue a competitor for interfering with the bidding process no matter how egregious the misconduct. . . . It does not require much imagination to envision a contractor who obtains a public works contract by bribery, extortion, or familial connections." (Ans. Br., pp. 47–48 [citing Maj. Opn., 234 Cal.App.4th 748, 761–762].)

What Plaintiffs fail to appreciate is that California law contains a myriad of statutes and regulations specifically aimed at combatting fraud and corruption in the letting of public works contracts. Bribery and extortion of public officials, including in connection with the procurement of public contracts, are felonies that carry a possible prison sentence of two to four years and thousands of dollars in restitution. (Penal Code §§ 67, 67.5, 68, 165, 518.) Further, Government Code section 1090 prohibits public officials and employees from having a financial interest in any contract made by them in their official capacity. Contracts entered into in violation of these conflict of interest statutes are void, and any private party who is paid money by a public entity pursuant to such a contract must disgorge those public funds. (Gov. Code §1092; *Klistoff v. Superior Court* (2007) 157 Cal.App.4th 469, 481; *Carson Redevelopment Agency v. Padilla* (2006) 140 Cal.App.4th 1323, 1331 ["A person who violates section 1090, regardless of whether the violation is intentional, forfeits any rights or interests flowing from the illegal contract"]; *Finnegan v. Schrader* (2001) 91 Cal.App.4th 572, 583.) To further maintain integrity of the system, all bidders must submit a non-collusive declaration attesting that

they have not "directly or indirectly colluded, conspired, connived, or agreed with any bidder or anyone else" to submit a sham bid. (Pub. Contract Code § 7106.)

Thus, existing law provides a broad range of sanctions for those who abuse the public contracting process. In *Kajima*, this Court warned that "prudence is warranted whenever courts fashion damages remedies in an area of law governed by an extensive statutory scheme." (*Kajima, supra,* 23 Cal.4th 305, 317; accord *Settimo Associates v. Environ Systems* (1993) 14 Cal.App.4th 842 [intentional interference claim denied as contractor licensing was already regulated by other statutes].) "The numerous cases in which a disappointed bidder has sought a writ of mandate to have the contract awarded 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." (*Kajima, supra,* 23 Cal.4th at p. 316.)

Plaintiffs have not, and cannot, explain why the existing regime requires the addition of a damages remedy in favor of a runner-up bidder. This Court should affirm the trial court's judgment.

**B. Plaintiffs Cannot Establish the Required Elements of Their Claim for Intentional Interference With Prospective Economic Advantage**

In order to survive demurrer, Plaintiffs must allege "the existence of an economic relationship with some third party that contains the probability of future economic benefit." (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134.) This element has two distinct parts: First, a plaintiff must allege 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, internal citations omitted.) Second, a plaintiff

must allege that the existing relationship "probably" would have ripened into an economic benefit. (*Korea Supply Co. v. Lockheed Martin Corp., supra*, 29 Cal.4th at p. 1164.) Regarding the interplay of these two subparts, this Court has said, "The tort protects the expectation the relationship will produce the desired benefit, not 'the more speculative expectation that a potentially beneficial relationship will arise.'" (Ibid.)

Plaintiffs respond that they have met both subparts because their submission of a bid to a public agency created a "contemporaneous" economic relationship, and the fact that they were the second lowest bidder meant Plaintiffs were next in line for the economic benefit. (Ans. Br., p. 18.) Both of these arguments lack merit. In the context of competitively-bid, public works contracts, it is not possible for such a relationship to exist between the bidder and public entity because public contract law forbids it. Even if one could say the relationship between bidders and the public entity soliciting bids is an "existing economic relationship,"—a proposition this Court should squarely reject—the relationship cannot, as a matter of law contain the "probability of future economic benefit" to the bidder. To guard against favoritism and collusion, competitive bidding laws preclude any bidder from having an expectancy interest in the contract on which it is bidding. (See, e.g. *Universal By-Products, Inc. v. City of Modesto* (1974) 43 Cal.App.3d 145, 152–53.)

### 1. As Bidders to a Public Works Contract, Plaintiffs Cannot Establish an "Existing Relationship" With an Awarding Agency

Plaintiffs' argument regarding the existence of an economic relationship has morphed substantially throughout this litigation. Plaintiffs' complaint is devoid of any allegations concerning the specifics of their economic relationships with the municipal entities, and only perfunctorily refers to an undefined "relationship" with the awarding cities and county.

(1 CT 11 [Complaint, ¶ 38].) At the Court of Appeal, Plaintiffs argued the mere submission of a bid in response to a request for bids by a public agency is enough to satisfy the requisite "existing relationship" element.

Now, in their Answer Brief to this Court, the theory has changed yet again with Plaintiffs asserting they "were in a contemporaneously-existing relationship as bidders in a competitive bidding process with the awarding governmental body as the third party. (Ans. Br., p. 10.) Plaintiffs' numerous, unsuccessful attempts to state a cohesive theory for its cause of action merely underscores the fact that the tort of intentional interference cannot be squared with the Public Contract Code and competitive bidding. The two ideas are fatally incompatible.

### *a. The Court of Appeal's Analysis Was Deeply Flawed and Temporally Backward; to Be Actionable, the Existing Economic Relationship Must Precede Defendant's Interference*

The Court of Appeal held that Plaintiffs' relationship and expectancy were formed after the completion of the bidding process and after Defendant had submitted its allegedly improper bid, arguing it saw "no reason to cut off any legal effect from the winning bidder's misconduct simply because it precedes the completion of the bidding process." (184 Cal.Rptr.3d 279, 288.) Perhaps sensing this was a bridge too far, Plaintiffs have retreated from the Majority's analysis, arguing instead that their relationship with the public agencies arose *contemporaneously* with American's alleged wrongful interference. (Ans. Br., pp. 20–23.)

Plaintiffs' efforts at nuance are of no avail. To be actionable, "a defendant's tortious conduct must have interfered with a specific existing relationship, not simply with the *formation* of one." (*Westside Center Associates v. Safeway Stores 23, Inc.* (1996) 42 Cal.App.4th 507, 525, italics added.) The elements "presuppose the 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." (*Id.* at pp. 523–524.) For example, in *Korea Supply*, the plaintiff had an agency relationship with a bidder that would have given him a $30 million commission if the bidder had won the contract. (29 Cal.4th at p. 1164.) That relationship existed entirely apart from and before the defendant's illegal conduct that disrupted the relationship.

The same is true in *Buckaloo v. Johnson* (1975) 14 Cal.3d 815, 827, wherein the Court held a real estate broker stated a claim for intentional interference with prospective economic advantage against the defendant buyer and sellers of real property "where the buyer, after taking advantage of the broker's efforts and stock in trade, induc[ed] the seller to accept the 'low net price' through the expedient of excluding the broker's commission." (*Id.* at p. 828–829.) The broker's expectancy existed without regard to the defendant's subsequent conduct. This Court said, "The actionable wrong lies in the inducement to break the contract or sever the relationship." (*Id.* at p. 822.) This reaffirms that the relationship must precede the act of interference, not arise contemporaneously with or shortly after defendant's act; otherwise, how could a defendant "sever" a relationship that does not yet exist? In sum, Plaintiffs must have an existing economic relationship with the third party without regard to defendant's alleged interfering conduct. The absence of this element is fatal to their claim.

***b. Public Contracting Law Precludes Formation of an Economic Relationship Between the Awarding Agency and Bidders Prior to the Award***

Contrary to Plaintiffs' contention, the act of submitting bids, in and of itself, does not created the existence of an economic relationship with awarding agencies. In order to avoid the suggestion of collusion or

favoritism, the competitive bidding laws specifically preclude agencies from having economic relationships with bidders prior to contract awards. (See *Swinerton*, *supra*, 40 Cal.App.3d 98, 101; *Pacific Architects Collaborative v. State of California* (1979) 100 Cal.App.3d 110, 124–125.)

Plaintiffs have not, and cannot allege that their bid constituted an "actual economic relationship or a protected expectancy" with a public entity, as opposed to "merely a hope of future transactions." (*Janda v. Madera Community Hosp.* (E.D.Cal., 1998) 16 F.Supp.2d 1181, 1189–1190.) A solicitation for bids is merely a request for offers from the universe of potentially interested and capable bidders, not just from the Plaintiffs alone, and a bidder's response to that solicitation is not evidence of any relationship between Plaintiffs and the public agencies.

Other jurisdictions are in accord. In *Powercorp Alaska, LLC v. Alaska Energy Authority* (Alaska 2012) 290 P.3d 1173, 1186–1187, the court explained that "Submitting a bid entitles the bidder to 'fair and honest consideration.' Submitting a bid does not provide any one bidder with a contract expectancy superior to the rights of other bidders." Similarly, in *Duty Free Americas, Inc. v. The Estee Lauder Companies, Inc.* (S.D. Fla. 2013) 946 F.Supp.2d 1321, the court instructed that "a bidder generally cannot establish a protected business relationship with an entity soliciting bids through a competitive bidding process," because a solicitation for bids is "merely a request for offers from interested parties," and because "a solicitation for bids encourages parties besides a bidder to submit offers in response," so "the bidding process itself cannot serve as evidence that the solicitor probably would have entered into a contract with the plaintiff but for the defendant's interference." (*Id.* at 1388–1389.)

### 2. Plaintiffs Cannot Allege an Expectancy Interest in the Award of a Public Works Contract

Plaintiffs' claim also fails because they cannot allege a legally-protected economic expectancy in the award of a public contract. Even if a bid is numerically the lowest, the public agency retains the discretion to reject the bid as nonresponsive due to even inconsequential defects. (*MCM Construction, Inc. v. City and County of San Francisco* (1998) 66 Cal.App.4th 359.) Minor technical defects in bids, such as the omission of a required form, are a common feature of public competitive bidding – even on large projects with sophisticated bidders. (*Ibid.*) Further, the "lowest responsible bidder" requirement imposes a duty on agencies to evaluate the bidder's attributes of trustworthiness, quality, fitness, capacity, and experience to carry out the contract requirements. (Pub. Contract Code, § 100; *Eel River Disposal and Resource Recovery, Inc. v. Humboldt* (2013) 221 Cal.App.4th 209, 220.)

Moreover, even if a bid is lowest and responsive, all public agencies reserve the right to reject all bids without awarding the contract to anyone. (See, e.g., Pub. Con. Code § 20166.) The right of public agencies to reject all bids appears nearly absolute; courts have declined repeated invitations to interfere with the discretion of an awarding body to reject all bids. (See, e.g. *Stanley-Taylor Co. v. Bd. of Supervisors* (1902) 135 Cal. 486; *Charles L. Harney, Inc. v. Durkee* (1951) 107 Cal.App.2d 570; *Universal By-Products, supra*, 43 Cal.App.3d 145.) In *Universal By-Products*, the court dismissed any concerns of unfairness to the unsuccessful bidders, noting that the risk that all bids will be rejected "is a cost of seeking to do business with a government body." (*Id.* at p. 157.)

In response, Plaintiffs rely heavily on the fact that this case is still in its pleading stage and argue they have properly alleged the elements of the tort and that nothing more is required at this stage. (Ans. Brief, p. 13.)

Plaintiffs' argument misses the point. The foregoing authorities show that *as a matter of law*, a bidder cannot allege an expectancy in the award of a public contract, which is fatal to the claim of intentional interference with prospective economic advantage.[3] The Court of Appeal's conclusion that "an actionable economic expectancy arises once the public agency awards a contract to an unlawful bidder, thereby signaling that the contract would have gone to the second lowest bidder," (184 Cal.Rptr.3d 279, 288), has no basis in California law and must be rejected.

### 3. Other Elements of the Cause of Action Have Not Been Met

Although this case focuses on the first element of the cause of action, the absence of an economic relationship between Plaintiffs and the awarding bodies, this Court should also find that Plaintiffs have failed to meet the other elements as well. Without repeating the extensive arguments from the Opening Brief, American reiterates that due to the sealed nature of the bids, American could not possibly have known at the time it submitted its bid that Plaintiffs were fellow bidders, let alone the second lowest bidders.

Additionally, Plaintiffs vacillate on what they claim was the act of interference. On one hand, they claim American submitted illegally deflated bids. However, on pages 37 to 38 of their Answer Brief, Plaintiffs now claim American engaged in a "systematic pattern" of failing to pay prevailing wages "and engaged in other illegal unfair conduct in the performance of the public works projects" which allegedly enabled

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[3] Additionally, Plaintiffs argument should be rejected because in ruling upon a demurrer courts only accept as true the properly pleaded evidentiary facts but "do not assume the truth of contentions, deductions or conclusions of fact or law." (*Interinsurance Exchange v. Narula* (1995) 33 Cal.App.4th 1140, 1143.)

American to consistently underbid jobs. Yet any alleged failure to pay prevailing wages that occurred after bidding and during the performance of the public works cannot be the cause in fact of Plaintiffs' being wrongfully denied the contract. (*PPG Industries, Inc. v. Transamerica Ins. Co.* (1999) 20 Cal.4th 310, 315 ["An act is a cause in fact if it is a necessary antecedent of an event."].) Evidence the defendant engaged in tortious conduct distinct from or only tangentially related to the conduct constituting the actual interference is insufficient. (*Limandi v. Judkins* (1997) 52 Cal.App.4th 326, 342.) In order to state a prima facie case, "a plaintiff must plead and prove that the conduct alleged to constitute the interference was independently wrongful, i.e., unlawful for reasons other than that it interfered with a prospective economic advantage." (*Stevenson Real Estate Services, Inc. v. CB Richard Ellis Real Estate Services, Inc.* (2006) 138 Cal.App.4th 1215, 1224.) For these reasons, the trial court correctly sustained the demurrers to Plaintiffs' cause of action without leave to amend.

### C. Plaintiffs' Claims for Injunctive Relief Under Business & Professions Code § 17200 Are Waived Because They Were Not Raised or "Fairly Included" in the Petition for Review

Lastly, the Court should reject Plaintiffs' request to address their claims for injunctive relief under the third cause of action for unfair competition. The Court of Appeal upheld the trial court's dismissal of the third cause of action because Plaintiffs failed to allege irreparable harm required for injunctive relief. (184 Cal.Rptr.3d 279, 298.) Plaintiffs indicate questions have developed regarding this portion of the holding because following this Court's granting of the petition for review and de-publishing the decision below, the trial court has allowed Plaintiffs to move forward with a motion for injunctive relief. (Ans. Br., pp. 48–49.)

In order to preserve an issue for review, it must be raised or "fairly included" within the issues in a petition for review or an answer to a petition. (*Scottsdale Ins. Co. v. MV Transp.* (2005) 36 Cal.4th 643, 654 fn. 2; see also *People v. Alice* (2007) 41 Cal.4th 668, 677; *People v. Villa* (2009) 45 Cal.4th 1063, 1076.) This Court will not consider issues that are "neither properly raised nor sufficiently briefed." (*Rose v. Bank of America, N.A.* (2013) 57 Cal.4th 390, 399 [declining to reach unfair business practice claim under UCL where plaintiff's petition for review were limited to claim for unlawful business practice]; *MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.* (2005) 36 Cal.4th 412, 421 fn. 4.)

In this case, American did not seek review of the Court of Appeal's decision regarding the third cause of action. In fact, American's Petition for Review expressly stated the predatory pricing and unfair competition claims were excluded from its request for review. (Petition, p. 7, fn. 3.) If Plaintiffs wanted this Court to review those claims, then pursuant to California Rules of Court, Rule 8.504(c), they could have filed an answer that raised such additional issues. Their failure to do so precludes review. Accordingly, American respectfully submits that the Court of Appeal's decision as to the third cause of action remains intact and the trial court's decision sustaining the demurrer without leave to amend should be affirmed in full.

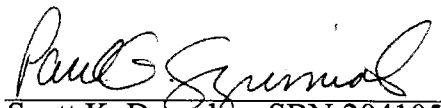
## III.

## CONCLUSION

The tort for intentional interference with prospective economic advantage is incompatible with the Public Contracts Code and extending it to the competitive bidding context would open the floodgates to new litigation, burden courts and public agencies, and risk speculative awards. Current remedies for disappointed bidders are adequate to police the bidding system and existing law—including recent amendments to the

Labor Code—contains ample remedies to deter wage theft. Accordingly, the Court should reject Plaintiffs' claims in their entirety.

Dated: November 9, 2015 Respectfully submitted,

By: 

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**CERTIFICATE OF WORD COUNT**
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Dated: November 9, 2015 Respectfully submitted,

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## AFFIDAVIT OF SERVICE BY MAIL

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is: 12800 Center Court Drive, Suite 300. Cerritos, CA 90703.

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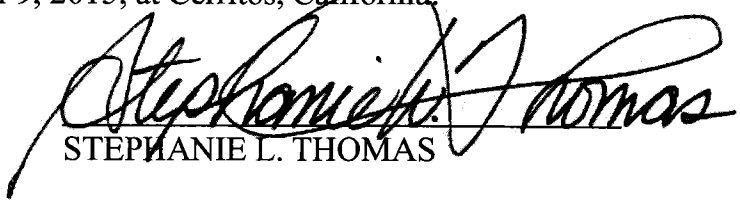
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 9, 2015, at Cerritos, California.



STEPHANIE L. THOMAS

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