

## BUSINESS & FACILITIES UPDATE

News and developments in bidding, building,  
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### **To Recover Under Public Contract Code Section 5110, A Contractor Must Demonstrate That The Public Entity Caused A Defect In The Competitive Bidding Process, Not Merely That It Caused The Contract To Be Invalidated.**

In March 2015, the California Department of Corrections and Rehabilitation (CDCR) issued an invitation for contractors to bid on a \$100 million heating, ventilation, and air conditioning (HVAC) system project.

In April 2015, Hensel Phelps submitted its bid for the project with a price just over \$88 million. As part of its bid, Phelps provided required information pertaining to the subcontractors it intended to use and the percentage of the contract work that it estimated each subcontractor would perform. CDCR determined that Phelps was the lowest bidder.

In May 2015, after the deadline for bids expired, Phelps submitted an amended bidder declaration, revising the subcontractor percentages and contractor rates.

CDCR took the position that, while a bidder could amend information concerning the contractors, bidders could not revise the subcontractor percentages or rates, which CDCR considered material terms of the bid. CDCR therefore rejected Phelps's May 1 amendment, and returned the amendment to Phelps.

In the meantime, West Coast Air Conditioning Company (West Coast), the second-lowest bidder, sent CDCR a complaint regarding Phelps's bid.

On the same day that CDCR issued a notice of intent to award the project to Phelps, Phelps learned that CDCR rejected its amended bidder declaration. Nevertheless, Phelps executed the contract with the understanding that CDCR had rejected the amended bid.

West Coast then filed a petition in the Superior Court seeking to invalidate the contract and prohibit Phelps from constructing the project. With the challenge pending, CDCR executed the contract with Phelps and issued Phelps a notice to proceed. Phelps promptly commenced work on the project.

In September 2015, the superior court invalidated the contract between CDCR and Phelps due to the "numerous arithmetical/typographical mistakes which required CDCR to reject the bid as non-responsive." The court explained that these errors were material to bid and CDCR could not

waive them and award the contract to Phelps. In October 2015, the court issued a restraining order, halting work on the project.

In August 2016, Phelps filed a complaint against CDCR, bringing a cause of action based on Public Contract Code section 5110, which, in pertinent part, provides for a contractor's recovery if "the contract is later determined to be invalid due to a defect or defects in the competitive bidding process caused solely by the public entity." Phelps sought its unpaid costs on the project, alleging that its contract was determined to be invalid as a direct result of CDCR's actions and decisions during the competitive bidding process.

In pre-trial proceedings, CDCR argued that Phelps could only prevail on its section 5110 cause of action if it established that the contract was invalidated "[d]ue to a defect or defects in the competitive bidding process caused solely by" CDCR. CDCR argued that Phelps could not do so. CDCR argued that the superior court invalidated the contract because Phelps's bid contained material non-waivable errors.

Phelps argued that the trial court's invalidation of the contract was a prerequisite to its action, and that the contract was, in fact, invalidated due to a defect in the bidding process. Phelps argued that CDCR's failure to find Phelps's bid non-responsive after West Coast's bid protest and CDCR's decision to award the contract to Phelps constituted defects in the bidding process chargeable to CDCR. After a seven-day trial, the trial court ruled in favor of Phelps.

The trial court rejected CDCR's argument that the ruling on West Coast's protest controlled the result in this case. The court found that Phelps's bid "lawfully consisted" of both the April bid and the May amended bidder declaration, and, as constituted, "fully complied" with the bid solicitation. The court found that CDCR erred in rejecting the May amended bidder declaration and that, if CDCR had accepted the amendment, the contract would not have been invalidated by the superior court. The trial court then entered judgment in favor of Phelps. CDCR appealed the decision.

On appeal, the Court of Appeal analyzed Public Contract Code section 5110. The Court questioned which of two statutory interpretations should apply: (1) recovery is possible if "the contract is invalidated for a defect or defects in the competitive bidding process caused solely by the public entity" or (2) recovery is possible if, "after the contract is invalidated, it is determined that the invalidation finding itself was due to a defect or defects in the competitive bidding process caused solely by the public entity." CDCR advocated the former interpretation and Phelps the latter.

The Court of Appeal, after reviewing the statutory language at issue and considering the language in the rest of the statute, concluded that CDCR's argument was the reasonable one. The Court of Appeal then considered the legislative history of the statute. The Court concluded that the purpose of the language at issue was to provide payment to a contractor for work already performed if the contractor relied in good faith on the public agency and the agency then invalidated the contract. The Court concluded that, in enacting the Public Contract Code section 5110, the Legislature agreed to provide an exception to established law that had placed all the risk of public contract invalidation on the contractor. The Court found that, in the final version of

the bill, the exception was limited to those cases where that defect was solely the fault of the public entity. The Court determined that it is the defect for which the contract is invalidated – not the invalidation itself – which must be the fault of the public entity.

The Court then applied its statutory analysis to the facts at issue between Phelps and CDCR, and found that the contract was invalidated for a material error in Phelps’s bid, not for any defect in CDCR’s competitive bidding process. As a result, the Court of Appeal held that Public Contract Code section 5110 cannot provide a basis for recovery.

The Court then remanded the case to the trial court to vacate its prior order and issue a new and different order in CDCR’s favor.

*Hensel Phelps Construction Company v. Department of Corrections and Rehabilitation* (2020) 45 Cal.App.5th 679.

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