Bid Imperfections in California Public Contracting: Carving Out a Good Faith Exception to the Void Contract Rule

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I. INTRODUCTION

Public contracting\(^1\) enables our country to grow and prosper.\(^2\) Each year, billions of tax dollars are spent by our federal, state, and municipal governments on bridges, buildings, roads, and utilities.\(^3\) Because so much money is at stake, the public demands assurances that its funds are being reasonably spent.\(^4\) Accordingly, governments have established strict rules regulating the public contract procurement process.\(^5\)

One well established procurement rule requires that all public contracts be sent out for competitive bidding\(^6\) to all interested parties. This process is intended to create "full and open competition" among bidders by placing all those interested in the contract on a level playing field.\(^7\) However, many disputes arise out of this formal process. For example, bidders that are not awarded a contract often bring claims against both the prevailing contractor and the public entity. Such claims assert, for example, that the prevailing contractor wrongfully obtained the contract because a submitted bid did not conform to the precise bid specifications. Some important questions have arisen when claims of this nature ul-

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1. A public contract is any contract with a "state, county, city, city and county, district, public authority, public agency, municipal corporation, or any other political subdivision or public corporation in a state." See generally CAL. PUB. CONT. CODE § 1100 (Deering 1982). The term "public contract" includes within its scope "public works contracts" which are "agreements for the erection, construction, alteration, repair, or improvement of any public structure, building, road, or other public improvement of any kind." See generally id. at § 1101.
3. Id.
4. Id.
5. Id. at 1095. Such rules were established to prevent corruption, minimize costs, and provide a fair deal to the tax payer. Id. at 1093.
6. In public contracting, a bid is an offer to provide the materials and services described in the plans and specifications for a certain price. Id. at 1083.
7. Lee, supra note 2, at 1094.
timately prevail. This comment attempts to address these
questions.

In the realm of California public contracting, two recent
appellate court decisions expose the uncertainties that result
from bid imperfections during the procurement process. Valley
Crest Landscape, Inc. v. City of Davis\(^8\) illustrates some of
the questions that can arise when a claim alleging unfair
bidding practices is brought by a losing bidder. The Valley
Crest decision has raised serious doubts over the ability of a
California contractor, performing work on a state or local
project, to obtain payment for its services.\(^9\) This issue arises
when a court finds a contract void, after performance on
the contract has commenced, due to a technical error in a bid
submitted prior to performance. Valley Crest, as well as the
more recent decision of Monterey Mechanical Co. v. Sacra-
mento Regional County Sanitation District,\(^10\) have put Cali-
ifornia public contractors in serious jeopardy of not being paid
for work performed if a technical defect in the bidding proc-
ession renders the contract void.\(^11\)

The following questions raised in Valley Crest and Mon-
terey Mechanical have yet to be addressed by any California
court. When a public contract is declared void because of a
technical defect in a submitted bid, should the contractor who
has performed work under the contract be paid or should the
agency be absolved of the obligation of making any pay-
ments?\(^12\) If the agency is absolved of this obligation, should
the agency be entitled to reimbursement of all monies paid to
the contractor?\(^13\)

This comment will propose solutions to these specific
questions\(^14\) as well as other related problems that arise in bid
imperfection cases.\(^15\) Section II, the background section,

\(^{8}\) 49 Cal. Rptr. 2d 184 (Cal. Ct. App. 1996).
\(^{9}\) Robert W. O'Conner & Linda Beck, More About Valley Crest and Prop-
osals For Remedial Legislation, unnumbered cover page (Oct. 1996)
(unpublished article submitted for the 13th Annual Legal Retreat, on file at the
Associated General Contractors of California office in Sacramento). The
authors serve on the Legal Advisory Committee of the Associated General Con-
tractors of California. \textit{Id.} at unnumbered app.
\(^{10}\) 52 Cal. Rptr. 2d 395 (Cal. Ct. App. 1996).
\(^{11}\) O'Conner & Beck, \textit{supra} note 9, at unnumbered cover page.
\(^{12}\) \textit{Id.} at 1.
\(^{13}\) \textit{Id.}
\(^{14}\) See infra Part V.
\(^{15}\) See infra Part V.
first describes what transpired in Valley Crest and Monterey Mechanical. Second, this section traces the relevant California precedent which has denied contractor recovery for performance on void public contracts. Third, for comparison, this section examines California cases which allow payment to contractors despite violations in bidding laws. Fourth, the background also provides an explanation of the restitutionary theory of quantum meruit. Finally, this section concludes with a survey of federal and state cases that have addressed the issue of quantum meruit recovery on void public contracts.

Section III identifies the problems inherent in public contracts laced with bid defects, and poses specific questions that pertain to the contractor, the public agency, and the losing bidder in these cases. Section IV analyzes these issues.

Section V, the proposal section, offers the following assertions as a response to the problems that arise in bid imperfection cases. First, contractors should be allowed to recover for performance on public contracts that are retroactively declared void as a result of a technical flaw in a submitted bid, as long as good faith competitive bidding occurred. Second, a bidder who is wrongfully denied a contract ought to recover from a public entity for reasonable costs incurred in bid preparation and related litigation. Third, California precedent, denying quantum meruit recovery on void public contracts, should not be extended to include situations where the competitive bidding procedure took place but was technically flawed. Fourth, courts in the future should refuse to declare a contract void after performance has begun, despite a later determined error in the bidding process, as long as the contracting parties acted in good faith.

16. See infra Part II.
17. See infra Part II.A-B.
18. See infra Part II.C.
19. See infra Part II.D.
20. See infra Part II.E.
21. See infra Part II.F.
22. See infra Part III.
23. See infra Part IV.
24. See infra Part V.
25. See infra Part V.A.
26. See infra Part V.B.
27. See infra Part V.C.
Furthermore, courts, in assessing whether the competitive bidding process took place, should not base their findings on the speculative question of the revocability of a contractor’s bid bond. Finally, the proposal suggests the type of new legislation that would produce more efficient and timely resolution of bid disputes.

The conclusion of this comment urges that the proposals set forth in Section V be implemented in order to diminish the uncertainties present in California public contracting. This good faith exception to the “void contract” rule would provide a more secure future for contractors.

II. BACKGROUND

Two recent California appellate cases have given rise to the issue of whether a contractor should be allowed to retain payment for work performed if a court declares its public contract void because of an error in the bidding process. This issue arises even after performance on the contract has been substantially completed. The two decisions, Valley Crest and Monterey Mechanical, best illustrate this issue as they offer two different examples of the problems that can occur when a bid dispute arises after a contract award.

A. The Valley Crest Case

In Valley Crest, the City of Davis (“City”) solicited bids for the construction of a park project. The specifications provided that the contractor’s own organization was to perform work amounting to no less than 50% of the original contract price. Of the four bids the City received, North Bay Construction (“North Bay”) had the lowest bid at

28. See infra Part V.D.
29. See infra Part V.E.
30. See infra Part V.F.
31. See infra Part VI.
35. Valley Crest, 49 Cal. Rptr. 2d at 186.
36. Id. at 187.
$4,077,675.\textsuperscript{37} Valley Crest submitted the next lowest bid at $4,088,000.\textsuperscript{38} However, North Bay listed in its bid that 83% of the work was to be done by subcontractors.\textsuperscript{39}

After the bids were opened,\textsuperscript{40} Valley Crest protested North Bay's bid as nonresponsive.\textsuperscript{41} Valley Crest argued that North Bay's bid violated the bidding requirements by listing that 83% of the work was to be subcontracted.\textsuperscript{42} Thereafter, the City contacted North Bay and told the company that its bid would be deemed nonresponsive.\textsuperscript{43} In response, North Bay told the City that the percentages were incorrect and submitted revised subcontractor percentages that totaled 44.65%.\textsuperscript{44} The contract was then awarded to North Bay by the City Council based on the revised bid.\textsuperscript{45} Apparently, the City Council based its decision on a recommendation by the city attorney to waive the bid irregularity because she felt it did not give North Bay a competitive advantage over other bidders.\textsuperscript{46}

Valley Crest filed suit and sought a declaration that North Bay's contract be declared void, an order prohibiting performance, and an order compelling recovery of any con-

\textsuperscript{37} Id.
\textsuperscript{38} Id.
\textsuperscript{39} Id. This bid violated the City's standard specification that the prime contractor perform at least 50% of the work. Eileen M. Diepenbrock, Public Contract Based on Materially Nonresponsive Bid Revised After Bid Opening Is Void 1 (Oct. 1996) (unpublished article submitted for the 13th Annual Legal Retreat, on file at the Associated General Contractors of California office in Sacramento). Eileen Diepenbrock serves on the Legal Advisory Committee of the Associated General Contractors of California. Id. at unnumbered app.
\textsuperscript{40} All bids are submitted in sealed envelopes and opened publicly at the time and place set out in the Invitation to Bid. Lee, supra note 2, at 1095.
\textsuperscript{41} Valley Crest Landscape, Inc. v. City Council of Davis, 49 Cal. Rptr. 2d 184, 187 (Cal. Ct. App. 1996). In order to be accepted, a contractor's bid must be the lowest monetary bid and also a "responsive" one. David E. Rosengren and Thomas G. Librizzi, Bid Protests: Substance and Procedure on Publicly Funded Construction Projects, CONSTRUCTION LAWYER, Jan. 1987, at 11. To be considered a responsive bid, the bid must be in strict and full accordance with the material terms of the invitation for bids. Id. A contractor is not allowed to correct a material nonresponsive bid after bid opening. However, minor or immaterial omissions in a bid can be waived. Id. The contractor must also be considered a "responsible bidder." Id. The term "responsible bidder" refers to the contractor's ability to perform the proposed work. Id. at 13.
\textsuperscript{42} Valley Crest, 49 Cal. Rptr. 2d at 187.
\textsuperscript{43} Id.
\textsuperscript{44} Id.
\textsuperscript{45} Id.
\textsuperscript{46} Id.
tract payments already made. The trial court denied the petition and entered judgment for the City and North Bay.

1. Appellate Review of Valley Crest

Appealing the trial court judgment, Valley Crest argued that North Bay was improperly allowed to change its bid and that such a revision of its original bid after bid opening violated the bid mistake statutes. The respondents, the City and North Bay, asserted that the 50% requirement was not waived and that North Bay just misstated the subcontractor percentages. Siding with Valley Crest, however, the court concluded that the change in subcontractor percentages was a material element that could not be altered. The court explained that even if the change in the percentages was a result of a clerical error, the doctrine allowing waiver of inconsequential irregularities would not allow such a change. As a result, the court found that North Bay had an unfair advantage because it could have withdrawn its bid and recovered its bid bond. Therefore, because North Bay’s bid was nonresponsive, the appellate court reversed the trial court and ruled the contract void. The case was remanded to the

47. Diepenbrock, supra note 39, at 2.
49. Id. at 188.
50. Id. at 189 (referring to CAL. PUB. CONT. CODE. §§ 5101, 5105 (Deering (1982)); see also infra note 53 for a general explanation of bid mistake rules.
51. Valley Crest, 49 Cal. Rptr. 2d at 190.
52. Id.
53. The general rule in competitive bidding is that bids must conform to the required specifications. Id. at 189. If the bid does not conform, it must be rejected. Id. However, if a bid substantially conforms to a call for bids, although not strictly responsive, it may be accepted if the variance does not affect the bid amount or give the bidder an advantage not allowed other bidders. Id. at 190. This is deemed a waivable inconsequential irregularity. Id.
54. Valley Crest, 49 Cal. Rptr. 2d at 190.
55. Id. A bid bond is normally required to be submitted with a contractor’s bid on all public contracts. A bid bond typically amounts to a percentage of the total amount of the bid (i.e. 10%). If the contractor submits a bid, is awarded the job, and then refuses to perform, the public entity can collect on the face value of the bid bond. Contractors usually obtain such bonds from a surety. The Valley Crest court used the rationale in Menefee v. County of Fresno, which held that any waiver of an irregularity should only be permitted if it would not give the bidder an unfair advantage by allowing the bidder to withdraw its bid without losing its bid bond. Id. (citing Menefee v. County of Fresno, 210 Cal. Rptr. 99, 102 (Cal. Ct. App. 1985)).
56. Id. at 191.
trial court with orders to conform with the opinion.\textsuperscript{57} By the time the appellate court rendered its judgment, the contract was approximately 98\% complete.\textsuperscript{58} Of the adjusted contract price of $4.1 million, about $3.4 million had already been paid to North Bay.\textsuperscript{59} North Bay and the City filed petitions for rehearing, challenging the court's determination that the contract was void and arguing that this finding would lead to inequitable results which would disallow contractors from receiving any payment for work performed on void contracts.\textsuperscript{60} The appellate court, after initially denying the petition, modified its opinion,\textsuperscript{61} asserting that it expressed no opinion on "North Bay's right to recover in quasi-contract or some other theory for the reasonable value of labor and materials."\textsuperscript{62} However, it did cite a list of cases that disallow payment on void public contracts.\textsuperscript{63}

2. Valley Crest Proceedings After Remand

Relying on theories of quantum meruit and equitable estoppel,\textsuperscript{64} the City and North Bay moved that the City be allowed to pay North Bay for the reasonable value of work completed, as well as retain North Bay for the completion of the project.\textsuperscript{65} Valley Crest opposed these motions and moved to amend its petition to seek a claim for damages.\textsuperscript{66} The case was eventually settled prior to any ruling of the trial court.\textsuperscript{67}

\textsuperscript{57} Id.
\textsuperscript{58} Diepenbrock, \textit{supra} note 39, at 3.
\textsuperscript{59} Id.
\textsuperscript{60} Id.
\textsuperscript{61} Id.
\textsuperscript{62} Valley Crest Landscape, Inc. v. City Council of Davis, 49 Cal. Rptr. 2d 184, 191 n.2 (Cal. Ct. App. 1996).
\textsuperscript{64} An action in \textit{quantum meruit} allows recovery "for services performed for another on the basis of a contract implied in law or an implied promise to pay the performer for what the services were reasonably worth." BARRON'S LAW DICTIONARY 387 (3d ed. 1991). An equitable estoppel is an estoppel that "arises out of a person's statement of fact, or out of his silence, acts, or omissions, rather than from a deed or record or written contract." \textit{Id.} at 167.
\textsuperscript{65} Diepenbrock, \textit{supra} note 39, at 4.
\textsuperscript{66} Id.
\textsuperscript{67} Id.
B. The Monterey Mechanical Case

Monterey Mechanical followed Valley Crest. The Monterey Mechanical decision answered questions of first impression regarding affirmative action requirements for contractors on public works contracts. This case involved Public Contract Code section 2000 which includes the ten criteria that help determine whether a contractor used "good faith" efforts in trying to meet Minority Business Enterprise and Women Business Enterprise (MBE/WBE) goals. Although the "good faith" issue may be considered moot with voter approval of Proposition 209 in 1996, the issue of whether a public contractor is entitled to payment on a contract declared void because of a defect in the bidding process remains unresolved.

1. The Facts of Monterey Mechanical

In Monterey Mechanical, the Sacramento Regional County Sanitation District ("public agency") solicited bids for construction of a wastewater treatment plant. Incorporated into the contract was a clause pertaining to section 00587.

68. Public works contracts are agreements for the erection, construction, alteration, repair, or improvement of any public structure, building, road, or other public improvement of any kind. See generally CAL. PUB. CONT. CODE § 1101 (Deering 1982). See also supra note 1.

69. Elmer R. Malakoff, Some Perspectives on Two Recent Public Works Construction Bid Dispute Cases (The Monterey Mechanical Case and the Valley Crest Case) 1 (Oct. 1996) (unpublished article submitted for the AGC California 13th Annual Legal Retreat, on file at the Associated General Contractors of California office in Sacramento). Elmer Malakoff served on the Legal Advisory Committee of the Associated General Contractors of California. Id. at unnumbered app.


71. Malakoff, supra note 69, at 1.

72. Proposition 209, also known as the California Civil Rights Initiative, passed in California in the November 5, 1996 election. Coalition for Econ. Equal. v. Wilson, 946 F. Supp. 1480, 1488 (N.D. Cal. 1996) (granting a preliminary injunction against the enforcement or implementation of Proposition 209), vacated, 110 F.3d 1431 (9th Cir. 1997), amended by 122 F.3d 692 (9th Cir. 1997), cert. denied, No. 97-369, 1997 U.S. LEXIS 6506 (November 3, 1997). Among other things, the amendment outlaws racial and gender based affirmative action programs on public projects solely funded by state or local governments in California. See 946 F. Supp. at 1488.


74. Section 00587 is not found in the California Public Contracts Code. Id.
entitled “Minority Owned and Women Owned Business Enterprise Participation Requirements.” This section set the public agency’s goals for Minority Owned Business Enterprises (MBEs) at 12.5% and Women Owned Business Enterprise (WBEs) at 9.5%. Section 00587 also listed criteria for assessing what constitutes a “good faith effort,” which differed from those in California Public Contract Code section 2000. Monterey Mechanical (“Monterey”) tried to meet MBE and WBE goals, but was unsuccessful. However, Monterey was the low bidder on the contract at $65.8 million, while another contractor, Hoffman/Marmolejo, was the second lowest bidder at $66.475 million. Because Monterey did not meet the MBE/WBE goals, it submitted documentation to show that it had made a “good faith effort” to do so.

Applying section 00587 criteria, the public agency concluded that Monterey’s bid was nonresponsive because it failed to show that Monterey had indeed made a “good faith effort” to achieve the MBE/WBE goals. The public agency awarded the contract to the second lowest bidder, Hoffman/Marmolejo, obligating itself to pay nearly $700,000 more on the contract than it would have had it accepted Monterey’s low bid. The trial court denied Monterey’s petition to set aside the contract award to Hoffman/Marmolejo, finding that the public agency did not abuse its discretion in utilizing section 00587 criteria to determine that Monterey did not satisfy the good faith requirement.

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at 399 n.2. It is unclear where section 00587 was originally taken from, but the court assumed it was part of a local ordinance applicable to the District. Id.
75. Id. at 399.
76. Id.
77. Section 00587 criteria requires one of three elements to be satisfied in order for a bid to be considered responsive and, therefore, the bidder eligible for award of the contract: (1) the bidder must be a certified MBE or WBE; (2) meet or exceed the stated MBE/WBE goals; or (3) demonstrate, to the satisfaction of the public agency, fulfillment of good faith efforts to achieve these goals. Id.
79. Monterey Mechanical Co., 52 Cal. Rptr. 2d at 399.
80. Id.
81. Id.
82. Id.
83. Id.
84. Id.
2. Appellate Review of Monterey

Monterey appealed, arguing that the lower court erred in its ruling because the public agency wrongfully utilized the criteria in section 00587 to determine what constituted a good faith effort. Monterey argued that the public agency was restricted to applying only the criteria of section 2000 to determine whether Monterey originally met the "good faith" requirement. The appellate court agreed with Monterey and held that because the public agency applied the wrong criteria in reaching its decision, the agency abused its discretion. The court set aside the contract award to Hoffman/Marmolejo and ordered that Monterey's good faith effort be re-evaluated using the ten criteria of section 2000. At this point, Hoffman/Marmolejo had completed about two-thirds of the work over a two year period and had been paid approximately $44 million on their $65.8 million contract.

If all the bids were then rejected, delay of the project would have resulted in an extreme risk to public health as the capacity of the existing wastewater treatment plant could be exceeded. Furthermore, the public agency had obligations to third parties which would result in large liquidated damage payments being assessed on the agency if the project was not completed on schedule. Additionally, substantial claims from Monterey would likely arise if Monterey was now awarded the job since Monterey had lost its original subcontractor commitments and the scope of the project had been significantly reduced. To resolve this dilemma, the public agency paid a settlement of some three million dollars to Monterey.

C. California Precedent Disallowing Payment to Contractors for Performance on Contracts Later Declared Void

To try and answer the questions raised in Valley Crest
and Monterey Mechanical, one must first consider one of the earliest California Supreme Court cases on the issue of a contractor's right to recover on a contract that is later declared void—Miller v. McKinnon. The Valley Crest opinion cited Miller when the court modified its ruling. In its modified ruling, the court explained that the Valley Crest holding was not meant to and did not express the court's opinion on a contractor's right to recover in quasi-contract or other theory for the reasonable value of labor and materials.

In Miller, a taxpayer brought an action on behalf of the county to recover money illegally spent by the county on a construction project not properly let out for public bidding. The court implicitly held the contract void. The court ruled that when a public entity illegally awards a contract without sending it out for competitive bidding and the contractor supplies labor and materials in performance of the contract, the contractor does so at its peril and has no right to recover the reasonable value of its services. The court reasoned that if recovery was permitted, then the competitive bidding requirement would be circumvented and the public agency could have the work done, pay for the work, and leave the taxpayers without a remedy.

D. California Precedent Allowing Payment to Contractors for Performance on Contracts Awarded in Violation of Bidding Laws

It is also important to review previous California cases that have allowed recovery under contracts that were wrongfully awarded. Significantly, in all of these cases, the court avoided declaring the contract void.

In Chas R. McCormick Lumber Co. v. Highland School District, a public entity was required to render payment for

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96. Id. See infra Part IV.A for an analysis of the court's rationale in citing Miller and other cases.
97. Miller, 124 P.2d at 37.
98. Id. at 38. See dicta discussing how no implied liability can arise from benefits received by a public agency on a contract that is void. Id. at 39.
99. Id. at 38.
100. Id.
101. Id.
102. 147 P. 1183 (Cal. 1915).
goods and services received following a bid award later determined to be defective because an advertisement for bids was not placed in the newspaper.\textsuperscript{103} It has been argued that \textit{McCormick}, cited by the supreme court in \textit{Miller}, established a rule for cases involving insufficient compliance with competitive bidding requirements, as opposed to cases, such as \textit{Miller}, where no competitive bidding process ever took place.\textsuperscript{104}

More recently, in \textit{Konica Business Machines v. Regents of the University of California},\textsuperscript{105} an action was brought by an unsuccessful bidder on a contract to supply a state university with photocopy machines when the low bidder, Copy-Line, was awarded the contract on a bid that deviated from the specifications.\textsuperscript{106} The court of appeal found that an error in the bidding process had occurred, but did not expressly rule the contract "void."\textsuperscript{107} The court authorized continued performance and payment under the "vacated" contract pending rebid of the remaining work, stating that "there is no legal impediment to requiring Copy-Line to service the University's needs on a \textit{per diem} basis at the present contract rate, and requiring the University to pay on that basis."\textsuperscript{108} The court expressed no opinion on the reimbursement rights of Copy-Line if it was not awarded the contract on rebid.\textsuperscript{109}

In the most recent case, \textit{Ghilotti Construction Co. v. City of Richmond},\textsuperscript{110} an unsuccessful bidder challenged a bid award because the winning contractor's bid deviated from contract specifications.\textsuperscript{111} Although the lowest bidder had proposed to subcontract more than 55% of the work in violation of the contract's 50% limit,\textsuperscript{112} the court held that the bid could be brought into compliance with only slight alterations and without affecting the amount of the bid.\textsuperscript{113} The court af-

\begin{small}
\textsuperscript{103.} \textit{Id.}
\textsuperscript{104.} This was unsuccessfully argued in a Petition for Rehearing that was submitted by the Respondents (the City) in \textit{Valley Crest}. See O'Connor & Beck, \textit{supra} note 9, at 4.
\textsuperscript{106.} \textit{Id.} at 592.
\textsuperscript{107.} \textit{Id.} at 596.
\textsuperscript{108.} \textit{Id.}
\textsuperscript{109.} \textit{Id.}
\textsuperscript{111.} \textit{Id.} at 390.
\textsuperscript{112.} \textit{Id.} at 397.
\textsuperscript{113.} \textit{Id.} at 395.
\end{small}
firmed the contract and held that the public entity merely waived an “inconsequential irregularity.” The court was satisfied that the contract award was fully consistent with public policy concerns and that there was “no evidence of favoritism, corruption, fraud, extravagance, or uncompetitive bidding practices.” Although the facts of Valley Crest were nearly identical to those of Ghilotti, this court distinguished Valley Crest in reaching its holding. The court stated that to the extent that its reasoning differed from that of Valley Crest, it respectfully disagreed.

E. The Restitution Theory of Quantum Meruit

If somebody mistakenly confers a benefit on another, often the only remedy is restitution. At common law, the courts developed a restitutionary device known as a “quasi-contract” which was based on an action in assumpsit. This implied contract was made by the courts and required payment to a plaintiff for the amount of unjust enrichment. One such remedy that spawned out of this restitutionary principle was an action in quantum meruit.

The translation of the Latin phrase quantum meruit is “as much as he deserves.” An action in quantum meruit seeks to establish liability for a contract implied in law—it creates a contract that arises from the “law of natural justice and equity.” For example, if a contract is unenforceable for some reason, a plaintiff can rely on the theory of quantum meruit to recover the value of any work performed under the

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114. Id. at 389; see also supra note 53.
115. Id. at 396.
117. Id. at 396.
119. Id. Actions in assumpsit are proper even if there is an express contract.
120. Id. For example, when a plaintiff has not fully performed on a contract, but the non-performance is excusable, an action in assumpsit may lie. Id.
121. Id.
122. BARRON’S LAW DICTIONARY 387 (3d ed. 1991). Historically, the action of assumpsit allowed recovery “for services performed for another on the basis of a contract implied in law or an implied promise to pay for the performance for what the services were reasonably worth.” Id.
123. Id.
mistaken belief that there was a valid contract. The idea behind quantum meruit is that were it not for this restitution action, the defendant would be unjustly enriched at the plaintiff's expense. Accordingly, the underlying issues are whether the defendant has, in fact, been enriched and whether it would be unjust for the defendant to retain the enrichment.

F. Federal and State Cases Addressing the Issue of Quantum Meruit Recovery on Void Public Contracts

Both federal and state courts have considered the issue of whether a contractor can recover on a contract that is ultimately deemed void. These decisions are helpful in analyzing this question that remains unresolved in California.

1. Quantum Meruit Recovery in Federal Cases on Void Government Contracts

Because many state courts often look to judgments of federal courts for guidance in public contract law, it is appropriate to analyze federal cases that have ruled on the issue of recovery on void contracts.

The principle of allowing a government contractor to obtain relief on an illegal contract is deeply rooted in century old Supreme Court precedent. In Clark v. United States, the federal government orally contracted with a party to use a ship. However, there was a statutory provision which required that all government contracts be in writing. The ship was destroyed while in possession of the government and the owner brought suit against the government for the loss. The Supreme Court held that, although the contract

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124. SHOBEN & TABB, supra note 118, at 770.
125. Id.
126. Id. at 771.
129. 95 U.S. 539 (1877).
130. Id.
131. Id. at 541.
132. Id. at 540.
was void, the contractor was still entitled to relief under a quantum meruit theory. The court reasoned that the claimant still had rights that arose out of an implied contract with the government.

Many federal courts, following Clark, have allowed quantum meruit recovery to contractors who undertake express contracts with the government that are later found void. For example, in New York Mail & Newspaper Transportation Co. v. United States, a contract between the government and a contractor was rescinded. The contractor sued for breach of contract. The court found that the contract was void because it was awarded in violation of an applicable statute. However, the court allowed relief in quantum meruit. It justified the relief on the principle that when one party has performed in whole or in part, the performing party should be reimbursed for the fair value of its property or services.

In contrast, some courts have denied quantum meruit recovery on void government contracts. Yet, many of these cases involve situations where there was never an express contract with the government. Additionally, a large number of courts deny quantum meruit recovery to contractors in situations tainted with fraud, bribery, or collusion.

133. Id. at 542.
134. Id. at 541.
137. Id. at 272.
138. Id.
139. Id. at 276.
140. Id.
141. New York Mail & Newspaper Transp. Co. v. United States, 154 F. Supp. 271, 276 (Ct. Cl. 1957), cert. denied, 355 U.S. 904 (1957); see also United States v. Mississippi Valley Generating Co., 364 U.S. 520 (1961); Crocker v. United States, 240 U.S. 74 (1916); United States v. Amdahl Corp., 786 F.2d 387, 393 (Fed. Cir. 1986) (allowing contractor to recover payment due on void contract using a quantum meruit theory because government had accepted conforming goods and services); Blake Constr. Co. v. United States, 296 F.2d 393 (D.C. Cir. 1961); Yosemite Park & Curry Co. v. United States, 582 F.2d 552 (Ct. Cl. 1978) (allowing quantum meruit recovery after ruling an illegal contract had been formed because the government had agreed to pay on the contract and had received the benefits from it).
143. Id.
144. Sheridan Strickland, Municipality of Anchorage v. Hitachi Cable, Ltd.—
Courts which allow public contractors quantum meruit recovery on void contracts typically determine the recoverable monetary damages by looking at the benefit that has been conferred on the government.\textsuperscript{145} This is the standard measure of damages for recovery on a contract implied in law.\textsuperscript{146} However, other courts calculate the amount recoverable by determining the fair market value of the contractor's services.\textsuperscript{147}

2. Quantum Meruit Recovery in State Cases on Void Public Contracts

Many state courts outside of California have allowed quantum meruit recovery on void public contracts. For example in \textit{Noel v. Cole},\textsuperscript{148} the Washington supreme court held that when a public entity has the general authority to award a contract, but the award is "technically or procedurally flawed" in violation of a statute, a contractor can recover on a theory of quantum meruit as long as the award "is not marked by fraud or bad faith and does not manifestly contravene public policy."\textsuperscript{149} Similar reasoning has been employed...

\textsuperscript{145} United States v. Amdahl Corp., 786 F.2d 387, 393 (Fed. Cir. 1986).

\textsuperscript{146} Sloan, \textit{supra} note 142, at 452 (citing \textit{FREDRICK C. WOODWARD, THE LAW OF QUASI CONTRACTS 5} (1913)).

\textsuperscript{147} \textit{Id.} at 454 (citing Campbell v. Tennessee Valley Auth., 421 F.2d 293 (5th Cir. 1969); Clark v. United States, 95 U.S. 539 (1887)).

\textsuperscript{148} 655 P.2d 245 (Wash. 1982).

\textsuperscript{149} Noel v. Cole, 655 P.2d 245, 250 (Wash. 1982); Earthmovers of Fairbanks, Inc. v. Department of Transp. & Pub. Facilities, 765 P.2d 1360, 1368 (Alaska 1988) (stating a party acting in good faith may recover the reasonable value of his services so as to prevent injustice or unjust enrichment); \textit{see also} Schipper v. City of Aurora, 22 N.E. 878, 879 (N.Y. 1889) (holding if a municipality receives a benefit of money, labor, or property on a contract that is made without authority or due formality which it refuses to execute, it is liable to the person who confers the benefit unless the contract was in violation of public policy or prohibited by statute); Boyd v. Black School, 23 N.E. 862, 863 (N.Y. 1889) (holding if the contract is found to be invalid because of noncompliance...
by other state courts. These courts have held that if a public contract is void, but the parties acted in good faith and were honest in their dealings, a contractor may recover in quantum meruit for as much as he or she reasonably deserves so as to prevent unjust enrichment.\textsuperscript{150}

Courts have consistently used the doctrine of unjust enrichment when there is no contract, but the public entity reaps benefits from the other party.\textsuperscript{151} However, these principles are generally inapplicable when the contract is "\textit{ultra vires}.\textsuperscript{152}" Moreover, other state courts have denied contractor recovery on void public contracts where the contract was not properly let out to competitive bidding, despite a showing of good faith.\textsuperscript{153} Additionally, some courts have taken a middle

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  \item with a statute, the right to recover is not in contract but upon the fact that the public entity received the benefit; Edwards v. City of Renton, 409 P.2d 153 (Wash. 1965) (holding if a contractor renders performance on a void contract it may be able to recover in quantum meruit).
  \item A.V. Smith Constr. Co. v. Midland Cas. Co., 450 So. 2d 39, 41 (La. Ct. App. 1984) (citing Fullerton v. Scarecrow Club, Inc., 440 So. 2d 945 (La. Ct. App. 1983)); Jones v. City of Lake Charles, 295 So. 2d 914 (La. Ct. App. 1974); see also Capital Bridge Co. v. County of Saunders, 83 N.W.2d 18, 24 (Neb. 1957) (holding that if a municipality enters into a contract in good faith which was within the municipality's authority to make, but which is void because of non-compliance with bidding requirements, a quantum meruit action for the service performed or material furnished is permitted). In \textit{Capital Bridge}, recovery was limited to what would have been recoverable if the contract was valid. \textit{Id.}
  \item A.V. Smith Constr. Co. v. Midland Cas. Co., 450 So. 2d 39, 41 (La. Ct. App. 1984) (citing Hinkle v. City of West Monroe, 200 So. 468 (La. 1941)); Brock v. Town of Kentwood, 199 So. 133 (La. 1940); see also Minyard v. Curtis Products, Inc., 205 So. 2d 422, 432 (La. 1967) (listing Louisiana Supreme Court elements necessary for recovery under unjust enrichment as: (1) an enrichment, (2) an impoverishment, (3) a connection between the enrichment and the resulting impoverishment, (4) an absence of justification for the enrichment or impoverishment, and (5) the absence of any other remedy at law).
  \item A contract is considered "\textit{ultra vires}" when it is completely beyond the scope of the public entity's authority under any instances. Earthmovers of Fairbanks, Inc. v. Department of Transp. & Pub. Facilities, 765 P.2d 1360, 1368 (Alaska 1988). Some state courts employ the assumpsit doctrine to analyze the enforceability of public contracts. \textit{Id.} at 1368. The underlying principle of the assumpsit doctrine is to "protect the citizens and taxpayers from unjust, ill-considered or extortionate contracts, or those showing favoritism." \textit{Id.} at 1369.
  \item Maucher v. City of Eloy, 701 P.2d 593, 596 (Ariz. Ct. App. 1985). Quantum meruit recovery was not allowed when it would circumvent the conflict of interest statute allowing the city to retain the benefits of the contract and then void it. \textit{Id.} The court reasoned that even if the contractor and public official were acting in good faith, if restitution was allowed, the policy of the conflict of interest statute would be undermined. \textit{Id.} The court felt that if corrupt public officials and contractors realized that they could recover at least restitution if caught in an illegal contract, they would likely be willing to attempt unbidden contracts. \textit{Id.} The court held that the policy against unjust enrichment "must
ground approach by not giving the contractor full recovery of the money owed on the void contract but allowing them to re-
tain either monies already received or to recover for the ex-
penses incurred.154

III. STATEMENT OF THE PROBLEM AND ISSUES PRESENTED

The two cases, Valley Crest155 and Monterey Mechanical,156 illustrate the serious problem that arises due to bid imperfections in the course of public contracting. The cases present two different scenarios that can occur. In the first scenario, the public agency awards the contract to the low bidding contractor, despite a flaw in the contractor’s bid. In the second scenario, the public agency rejects the low bidding contractor because it mistakenly determined a flaw in the contractor’s bid and awards the contract to another bidder. As these leading cases illustrate, in either scenario, a con-
tact may later be declared void by a court even after sub-
stantial completion of the contracted project.

Valley Crest and Monterey Mechanical raise the following
questions that have yet to be addressed by a California court. When a public contract is declared void because of a defect in the bidding process, should the contractor who has performed work under the contract be paid or should the agency be

154. In Twohy Bros. Co., the Oregon Supreme Court held that a construction company was not allowed to recover for a substantial sum of money that re-
mained to be paid on the void public contract because the contract was not properly let out for competitive bidding. Twohy Bros. Co. v. Ochoco Irr. Dist. of Crook County, 210 P. 873, 884 (Or. 1922). However, the court allowed the con-
tactor to retain the money that had already been paid on the void contract which amounted to over $300,000. Id. The court chose to leave the parties as they were. Id. See also J & J Contractors v. State of Idaho Trans. Bd., 797 P.2d 1383, 1384 (Idaho 1990), where a contractor was not allowed to recover in quantum meruit for work done on a void contract. However, the contractor was allowed to retain the payments that had been made which exceeded the original contract price because the state did not properly appeal the award. Id. at 1385. Compare Coleman v. Bossier City, 305 So. 2d 444, 447 (La. 1974) where the Supreme Court of Louisiana denied profit recovery and limited the contractor to recovering expenses that were incurred in performance on a void contract. The court ruled that when parties act in good faith in an attempt to form a contract and there is no fraud, the party that receives the benefit of the invalid contract may be responsible for the expenses incurred by the other party. Id.


barred from making any payments? If the agency is barred from making payments, should the agency be entitled to reimbursement of all monies paid to the contractor? What are the ramifications of a court declaring a contract void after substantial performance has occurred on the original contract? How should courts determine if the competitive bidding process took place? Is the bidder that was wrongfully denied the contract entitled to damages resulting from denial of the contract award? Instead of declaring the contract void, is there a better solution for courts asked to rule on bid imperfection cases in the future? Is there a need for remedial legislation? The following sections attempt to analyze these questions.

IV. ANALYSIS

A. The Valley Crest Court’s Unclear Rationale Behind Citing Early California Precedent

The Valley Crest court expressly refused to opine on a contractor’s right to recover for the reasonable value of its services after a contract is declared void. Thus, it is inconsistent that the court would cite Miller and other appellate court cases where, in each case, the court denied recovery to the contractor who performed work on a void contract. Perhaps the Valley Crest court was hinting that it, too, would deny recovery to a contractor in a situation where a defect in the bidding process occurs. One can only speculate how far courts could extend the early precedent of Miller and other similar cases.

No case has directly addressed the question of whether a court will allow recovery to a contractor who performs work

157. See discussion infra Parts IV.B-C, V.A, V.C.
158. See discussion infra Part IV.B.
159. See discussion infra Part IV.D.
160. See discussion infra Part IV.E.
161. See discussion infra Part V.B.
162. See discussion infra Part V.D-E.
163. See discussion infra Part V.F.
164. See supra Part II.A.1.
on a contract that is later deemed void because of a defect in the bidding process, as opposed to the situation in Miller, where no competitive bidding procedure ever took place. California courts may be willing to extend Miller to bar recovery for technical errors in the bidding process or they may restrict Miller to include only situations that fail to use any competitive bidding procedure.

B. The Gross Inequity of Not Paying a Contractor

The costs contractors would have to absorb if they were denied recovery on a void contract because of a later found technical flaw in their bid could be staggering. For instance, in Valley Crest, the contractor had completed 98% of the work on a contract and received $3.4 million of the $4.1 million adjusted contract price before the contract was declared void. If the void contract rule was applied to this situation, as suggested in Miller, the contractor would not only be denied recovery of any outstanding money owed on the contract, but would also be required to reimburse the public entity for the $3.4 million dollars that the contractor had already received.

Furthermore, in Monterey Mechanical, by the time the contract was declared void, work had been proceeding for about two years. Approximately $44 million had been paid on the $65.8 million contract. Applying the Miller rule, the contractor would be required to reimburse the public entity $44 million because of the declaration two years later, that the contract is void.

Contractors would essentially be forced to work for free in these situations. One might suggest that contractors faced with this dilemma call on their subcontractors for reimbursement of all payments received for work performed in order to repay the public entity. However, if this were the case, innocent subcontractors would be required to shoulder the loss, despite the fact that they were not parties to the

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167. All early precedent cases involve situations where there was no competitive bidding.
169. Diepenbrock, supra note 39, at 3.
171. Malakoff, supra note 69, at 3.
172. Id.
contract with the public entity. Furthermore, such a practice would directly contravene the intent of all bonding statutes\textsuperscript{173} designed to insure that subcontractors receive payment for their services.

The notion of not paying a contractor for work performed in good faith reliance on a promise given by the public entity to pay for the work is simply not fair to the contractor. If courts were to adopt such a rule, gross inequities would surely result as public entities make off with the gold while the contractors would be left holding the bag.

C. Paying a Contractor Benefits the Public

Recognition of a contractor's right to recover on a void contract in the absence of bad faith benefits the public.\textsuperscript{174} By preventing losses to innocent contractors, the public entity's procurement system is preserved, while still restricting the government from entering into contracts with impunity.\textsuperscript{175} If contractors are denied recovery in good faith situations, prudent contractors will become much less interested in bidding on public contracts.\textsuperscript{176} Failing to hold a public entity liable when a contract is declared void will remove the incentive for public officials to review their contracts to ensure compliance with all statutes and regulations.\textsuperscript{177}

To illustrate this problem, imagine a situation with an unscrupulous public official.\textsuperscript{178} The official could enter the contract knowing there is an illegality, let the contractor perform, and then not be held accountable for payment.\textsuperscript{179} Therefore, allowing contractor recovery retains the division between the entity as sovereign and as a contracting party.\textsuperscript{180} If the public entity is acting as a contracting party, then it cannot be allowed to take advantage of other parties to the contract because of its sovereign position.\textsuperscript{181} After all, to say,

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\item \textsuperscript{173} CAL. CIV. CODE §§ 3247-3248 (Deering 1985).
\item \textsuperscript{174} Janik & Rhodes, supra note 128, at 1951.
\item \textsuperscript{175} Id.
\item \textsuperscript{176} O'Conner & Beck, supra note 9, at 6.
\item \textsuperscript{177} Janik & Rhodes, supra note 128, at 1951.
\item \textsuperscript{178} Id. at 1974.
\item \textsuperscript{179} Id.
\item \textsuperscript{180} Id. at 1951.
\item \textsuperscript{181} Id. “It is no less good morals and good law that the Government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their government.” Id. at 1978 (citing Maxima Corp. v. United States, 847 F.2d 1549, 1556 (Fed. Cir. 1988) (quoting St. Regis
“The joke is on you. You shouldn’t have trusted us,’ is hardly worthy of our great government.”

D. Labeling a Contract Void Is Problematic

A myriad of problems stem from a contract being labeled void. First, labeling a contract void immediately halts performance on the project. The project must sit idle while the municipality re-lets the remaining portion of the work. This could take considerable time and result in enormous expense to the public entity. As the previous cited case law demonstrates, oftentimes there is only a small portion of the work remaining.

Second, unless the original contractor bids on the remaining work and is the low bidder, the original contractor will not be allowed to complete the project. In many instances, new contractors will have to pick up the project being totally unfamiliar with any of the work that has been accomplished to date. These new contractors will not have the advantage of the learning curves that the original contractors and subcontractors will have had. Furthermore, no matter what contractor is awarded the remaining portion of the work, the cost of the completion of the project will surely be more than it would have been had the original contract been affirmed.

Third, a contractor’s performance and payment bonds would now be void and entirely innocent subcontractors and suppliers who furnished work and materials no longer would have the security of a bond for payment. These contractors are left in legal limbo, possibly facing years of protracted litigation seeking payment for their work and materials.

Finally, the public entity no longer has warranty rights under the original contract since there is no longer a con-

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Paper Co. v. United States, 368 U.S. 208, 229 (1961) (Black, J., dissenting)).
183. O'Conner & Beck, supra note 9, at 4.
184. For example, in Monterey Mechanical, the public entity's schedule for completing construction of a wastewater treatment plant was crucial. Malakoff, supra note 69, at 3. A late project delivery would create a risk to the public health, cost tremendous expense if the capacity to the existing wastewater treatment plant was exceeded, and subject the public entity to liquidated damages claims. Id.
185. O’Conner & Beck, supra note 9, at 4; see discussion supra Part IV.B.
186. Id.
187. Id. at 6.
tract. Therefore, the public entity is left with an unwarranted project. If problems are later found that involve the original contractor's work, the public entity will not have the ability to ensure that the contractor will repair any faulty workmanship.

E. The Speculative Bid Bond Test

The issue of what constitutes competitive bidding is germane to the idea of adopting quantum meruit recovery on void contracts and, therefore, should be addressed. The Valley Crest test to determine whether competitive bidding occurred relies on the question of whether a contractor could or could not have revoked its bid bond. However, the problem with this test is that in many cases involving a defective bid, the defect is questionable. Municipalities, in determining the responsiveness of a bid, are forced to define the difference between a minor and a major irregularity. Minor irregularities are waivable, whereas major irregularities are not. Often times, these municipalities have no precedent to guide them and must rely on general reasonableness in arriving at a decision.

As we have learned over the course of legal history, reasonableness is not the easiest term to define. What is a reasonable, minor irregularity to one person may not be to another. Because of this nebulous gauge, public officials are put in the difficult situation of having to use their best judgment in declaring a bid either responsive or nonresponsive. As has been seen, a disgruntled bidder will often challenge a contract award. Using hindsight, this disgruntled bidder can often find something wrong with the bid, no matter how minute and inconsequential the error may be. If this upset bidder can find a judge or jury whose perception of reason-

188. "A warranty is an assurance by one party to a contract of the existence of a fact upon which the other party may rely . . ." BARRON'S LAW DICTIONARY 526 (3d ed. 1991) (emphasis added). It would be difficult to argue that warranty rights should remain, despite a finding that there is no contract, as one would be telling the contractor he or she cannot be paid for any work rendered, but must still honor its contractual warranty of good workmanship even though there is no longer a valid contract. Such an inconsistent notion cannot be justified and would result in manifest unfairness to the contractor.


190. Id. at 190.
ablleness differs from that of the public official's, then the award can be set aside.

V. PROPOSAL

A. Payment to the Original Contractor Should Be Allowed

Under a quantum meruit theory, payments should be allowed to a contractor whose contract is retroactively declared void after the award, as long as good faith competitive bidding occurred. To do otherwise would place public contractors in a difficult situation. If the contractor questions the contract award and refuses to commence performance, the contractor could forfeit its bid bond. Alternatively, if the contractor decides to begin performance on the contract and the contract is later declared void by a court, it would deny the contractor recovery, despite the fact that the illegality question is very close. In such a situation, the contractor would be forced to restrain him or herself from performance on the contract until the illegality question is resolved. Resolution could take years with California's overcrowded courts and lengthy appeals processes, as well as cost the contractor dearly.

As previously noted, many federal and state courts across the country have allowed public contractors to recover for their performance on void contracts, even when competitive bidding did not occur. While some California precedent has permitted payment to contractors on void contracts, at least one supreme court decision suggests that recovery should be denied. Nevertheless, California courts should take a middle ground approach. Courts should limit quantum meruit recovery on void contracts to instances where competitive bidding occurred and there was good faith on behalf of the parties to the contract. This will allow a retention of early California precedent, while still being fair to both the general public and innocent contractors who have performed work for which they would otherwise be uncompensated. The remedies available should depend on what stage of performance the contractor is in at the time of the notification that

191. See supra Part II.F.
192. See supra Part II.D.
193. See supra Part II.C.
the contract has been declared void.

For instance, where contract performance has begun but has not yet been completed, recovery should be limited to the value of the benefit conferred to the public entity. If a contract has been awarded but performance has not begun, the contractor's recovery should be limited to any expenses incurred (mobilization costs, purchases in reliance of contract, equipment rentals, etc.) as a result of the public entity's late notice of termination. Finally, if performance on the contract has been completed prior to a finding that the contract is void, the contractor's recovery should be the contract price.

B. Promissory Estoppel Recovery for an Unsuccessful Bidder Wrongfully Denied a Contract

An action in promissory estoppel\(^{194}\) should be allowed against the public entity if a bidder is wrongfully denied a contract.\(^{195}\) After all, it was the public entity who made the mistake in entering the contract in violation of the bidding rules,\(^{196}\) and since the public entity made the final decision to award the contract, the public entity should be responsible for the costs incurred as a result of its mistake. Allowing financial recovery in such instances is justified because it is usually not practical to re-award a contract to the unsuccessful bidder after performance has been begun by another contractor. In public works projects, general contractors have probably already lost all of their commitments from their subcontractors and can likely no longer do the job for their originally submitted bid price. In many cases, substantial performance has been rendered by the original contractor, and the scope of the job has been drastically reduced. It usually does not make sense to award the contract to the protesting bidder previously denied the job. Therefore, damages should be paid as a remedy to these contractors, but recovery should be limited to expenses the unsuccessful bidder incurred in bid preparation, along with any resulting court

\(^{194}\) "The promissor, having induced reliance on his promise by the other party, is said to be estopped from denying the existence of a contract, though in fact one has not been made." BARRON'S LAW DICTIONARY 379 (3d ed. 1991).

\(^{195}\) Owen of Georgia, Inc. v. Selby County, 648 F.2d 1084, 1096 (6th Cir. 1981).

Furthermore, recovery should only be allowed in the absence of fraud, bad faith, and grossly misleading actions by the unsuccessful bidder. A similar form of recovery has already been allowed for unsuccessful bidders in California.

C. Deny Contractor Recovery Only Where Contracts Have Not Been Sent Out for Competitive Bidding

The rule in Miller and other cases, which deny recovery to contractors in situations where contracts were not sent out for competitive bidding, should be limited to those situations. If a municipality properly advertises and sends out a contract for public bidding, then the competitive bidding process did, in fact, take place. Miller should not be extended in such instances where a bidding process takes place but is later found to be technically flawed. To do so would produce grossly inequitable results.

197. Owen of Georgia, Inc., 648 F.2d at 1096.
198. An example of fraud is when a contractor colludes with a public officer to fix or rig a bid by finding out another confidential bid price under seal that has already been submitted to the public officer by a competing contractor.
199. An example of bad faith would be if a contractor has actual knowledge that procedures being followed violate bidding requirements and the contractor still proceeds with performance on the wrongfully awarded contract. See Schoenbrod v. United States, 410 F.2d 400 (Ct. Cl. 1969).
200. An example of grossly misleading actions would be if the prevailing contractor submits a non-conforming sample in support of his bid, the non-conformity of which is not apparent until tests are performed after contract award. See Prestex, Inc. v. United States, 320 F.2d 367 (Ct. Cl. 1963).
201. See Swinerton & Walberg Co. v. City of Inglewood, 114 Cal. Rptr. 834 (Cal. Ct. App. 1974) (suggesting a low bidder might obtain relief on a theory of promissory estoppel, damages being limited to the cost of preparing the bid). But see CAL. GOVT CODE § 815.2(b) (Deering 1963) ("Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability."). See also Pacific Architects Collaborative v. State of California, 166 Cal. Rptr. 184, 188-89 (Cal. Ct. App. 1979); Rubino v. Lolli, 89 Cal. Rptr. 320, 322 (Cal. Ct. App. 1979) (holding that because the award of a public contract involves the exercise of discretion, government employees and entities involved are immune from liability).
D. Avoid Labeling the Contract Void

As previously discussed, the theory of quantum meruit is a viable theory of recovery for contractors that perform on contracts later deemed void because of defects in the procurement process. However, courts should refrain from labeling such contracts void so that the contractor's options are limited to actions in quantum meruit. Although quantum meruit recovery is certainly more desirable than disallowing any payment to the contractor, it does still have some drawbacks for both the public entity and the contractor which can be avoided. As an alternative to declaring contracts void when technical defects are found in the bidding process, courts should affirm the contract and allow the original contractor to complete performance on a contract. When there is a public construction project that has been substantially completed, it is neither practical nor financially viable for the public entity to have to cease construction and re-let the remainder of the project. Courts should follow the reasoning in Ghilotti and avoid the rigidity employed by Valley Crest and Monterey Mechanical.

E. The Speculative Bid Bond Test Should Be Abandoned

California courts should depart from the reasoning employed by the Valley Crest court to determine what constitutes competitive bidding. The court's test, which looks at whether a contractor could or could not have revoked his bid bond, is too speculative. As discussed above, what is a reasonable, minor irregularity to one person may not be to the next. Therefore, it is fair to allow the public officer the benefit of the doubt. Unless the parties acted in bad faith, courts should hold that the competitive bidding process did occur where the contract was properly let out for public bidding, despite any technical flaw in the bid that is discovered at a later date. The court's dicta in Ghilotti uses much of the

204. See discussion supra Part II.F.
208. See discussion supra Part IV.E.
209. Ghilotti Constr. Co. v. City of Richmond, 53 Cal. Rptr. at 389; see dis-
same equitable reasoning and, therefore, should be followed.\textsuperscript{210}

\section{F. The Need for New Legislation}

Both the public and public contractors could benefit from new legislation. Such legislation should mandate non-appealable, binding arbitration\textsuperscript{211} for all claims, that would take place within days after a contract award, in order to solve many of the problems that spawn from defective bids. This would save both the public and contractors bidding on public jobs an enormous amount of time and money, as well as help streamline the bid dispute process. Proposed legislation, such as that which has been suggested by legal advisors on the committee for the Associated General Contractors, should be seriously considered by state lawmakers.\textsuperscript{212}

\section{VI. Conclusion}

Serious doubts have been cast in California regarding a contractor's right of recovery on a contract later deemed void because of a flaw in the bidding process. Innocent public contractors are in serious risk of not being paid for work performed on such contracts, regardless of how much money was expended in the process. Because of this concern, California courts should adopt the approaches that have been utilized in other state and federal courts which have proven both effective and fair in dealing with public contracts that are declared void.

First, absent fraud or bad faith, quantum meruit recovery should be allowed to contractors when contracts are

\textsuperscript{210} The \textit{Ghilotti} court explained that public entities may waive inconsequential deviations from contract specifications in a public contract bid as long as the deviation neither gave the bidder an “unfair competitive advantage” or defeated “the goals of insuring economy and preventing corruption in the public contracting process.” 53 Cal. Rptr. at 390. The principle underlying the doctrine of inconsequential irregularities in \textit{Ghilotti} is if good faith is present and the general public will not be injured, innocent people should not be punished. This reasoning should also be adopted in assessing a contractor’s right of recovery for work performed on a void contract that was properly let out for competitive bidding.

\textsuperscript{211} Claims arising under the State Contract Act are resolved by arbitration. \textit{ACRET}, \textit{supra} note 70, at 258. However, it does not appear that disappointed bidders fall under the ambit of the arbitration mandate of the State Contract Act because they are not parties to a contract.

\textsuperscript{212} See O'Conner, \textit{supra} note 9, at 1-3.
properly sent out for competitive bidding and a defect in the bidding process is determined after the contract is awarded. Second, municipalities should grant promissory estoppel relief to bidders that are wrongfully denied contracts for any reasonable costs that were incurred in bid preparation. Third, early California precedent denying quantum meruit recovery on void contracts should be limited to situations where the competitive bidding procedure took place. Fourth, courts in the future should decline to declare public contracts void when no obvious defect in the bidding process occurred. Fifth, in determining whether or not competitive bidding took place, courts should depart from focusing on the question of whether or not a contractor could have withdrawn its bid and recovered its bid bond, because such an inquiry is too often purely speculative. Finally, new legislation should be considered for more efficient and timely resolution of public contract bid disputes.

There are many uncertainties with California’s current approach in resolving bid disputes in public contracting. If ideas such as those asserted in this comment are implemented, municipalities, contractors, subcontractors, material suppliers, and the general public will all benefit. California courts and the legislature should adopt these equitable and common sense approaches to dealing with bid disputes so as to ensure a better future for public contracting.

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