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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

WORD OF GOD FELLOWSHIP, INC.
dba DAYSTAR TELEVISION
NETWORK,

Petitioner and Appellant,

v.

COAST COMMUNITY COLLEGE
DISTRICT et a.,

Defendant and Respondent,

KOCE-TV FOUNDATION

Real Party in Interest.

G033901

(Super. Ct. No. 04CC03347)

OPINION

Appeal from a judgment of the Superior Court of Orange County, Corey S. Cramin, Judge. Reversed and remanded with directions.

Sherman & Nathson; Richard Lloyd Sherman and Cameron H. Totten for Plaintiff and Appellant.

Rutan & Tucker, Milford W. Dahl, Jr. and Lisa N. Neal for Defendant and Respondent Coast Community College District.

Palmieri, Tyler, Weiner Wilhelm & Waldon, Scott R. Carpenter; Stephen, Oringer, Richman & Theodora, George C. Rudolph, Robert M. Dato; Aitken, Aitken & Cohn, Wylie A. Aitkin; Manett, Phelps & Phillips, Thomas D. Phelps and Mark D. Johnson for Real Party in Interest KOCE-TV Foundation.

* * *

I. Prologue

This is an opinion after a grant of rehearing requested by both parties. We again heard oral argument and reviewed and studied additional briefing. Our now-vacated previous opinion was based on an issue of first impression, namely, whether the phrase “may sell for cash” as it is used in section 81450 of the Education Code¹ applies to and otherwise prevents the sale of a television station owned by a community college district to a private foundation for substantial amounts of credit.

On rehearing, we have concluded that disposition of this case is governed by another issue which arises out of a well-established rule controlling bidding on contracts involving public resources. The rule is so well established, in fact, that both sides agree on it: Public contracts cannot be *materially* amended in favor of the winning private bidder after bidding has closed and a public contract awarded. (See, e.g., *Valley Crest Landscape, Inc. v. City Council* (1996) 41 Cal.App.4th 1432, 1435, 1442 [trial court erred in not granting runner-up’s petition to set aside contract awarded to the successful bidder where changes after bidding closed gave the successful bidder an “unfair advantage”].)

There is no dispute here that there were, in fact, post-bid changes in the terms for the sale of the television station. The dispute is over whether the changes were material.

The changes resulted in a lowering of the price bid by the private foundation from \$32 million to (depending on the discount rate) between \$19.5 million

¹ All statutory references in this opinion to section 81450 will be to the Education Code. In that regard, the parties, on October 28 and 31, 2005, filed requests to take judicial notice of various documents bearing on the legislative history of section 81450. We grant all these requests.

and \$23.5 million. (As we show below, the trial court actually accepted the \$19.5 million-\$23.5 million range in its statement of decision as the present value of the post-bid amendments.) The runner-up bidder, who has brought this litigation and appeal, had bid \$25.1 million cash.

We conclude that the (at least) \$8 million reduction in the price of a public asset sold to a private buyer was indeed a material change. (See *Konica Business Machines U.S.A., Inc. v. Regents of University of California* (1988) 206 Cal.App.3d 449, 455 [factors to determine whether bid deviation is “minor irregularity or substantial departure” include whether “deviation could be vehicle for favoritism, affect amount of bid, influence potential bidders to refrain from bidding, or affect ability to make bid comparison”].) Further, it is unavoidable that this post-bid change clearly gave the private foundation an unfair advantage in the bidding when the board considered the various bids for the station in October 2003. That month, the board determined that a bid of \$32 million was the “highest responsible proposal.” In effect, the other bidders weren’t competing against a bid having a present value of \$23.5 million at its best -- they were competing against a bid having a present value of \$32 million, and yet the Foundation was allowed to materially alter its \$32 million bid and purchase the station for \$8.5 million less after bidding had closed.

In light of established bid law, the sale cannot be upheld. We reverse the judgment of the trial court denying the runner-up’s petition for writ of mandate to the extent that the writ petition asks the sale to be voided.

However, this case is about more than whether the sale is void. It is also the attempt of a runner-up bidder to obtain an order directing that the station be sold to it for its \$25.1 million bid because it offered the highest bid compliant with section 81450’s “for cash” language. As explained below, we will reject -- *on the merits* -- the petitioner’s argument that it is entitled to an order awarding it the station *now*. However, the *outcome* of this proceeding does not mean petitioner is without standing to bring this action in the first place. Having made a bid, the petitioner has a very real beneficial interest in the bid process itself.

II. Background

A. Events Leading Up to the Bidding

The Coast Community College District (hereinafter, the District) circulated requests for proposal to sell public television station KOCE in 2002, but nothing came of those efforts that year. Efforts to sell the station resumed in the Spring of 2003. The District's broker, MVP Ventures, took out an ad in the classified section of Broadcasting and Cable, of June 16, 2003, giving July 10 as the preliminary expression of interest deadline. On July 30 broker MVP sent out requests for additional information to those prospective buyers who had expressed an interest in buying the station, seeking "irrevocable evidence that prospective buyers: [¶] -- Qualify as a non-commercial licensee according to the FCC's rules [¶] -- *Have immediate financial capacity necessary to complete an outright purchase at level suggested in bid.*" (Italics added.)

An offering memorandum prepared about the same time by MVP Partners said: "This is an extraordinary opportunity to acquire a full-power, non-commercial television station in the second largest market in the U.S. Because of the unique nature of this offering, the District will evaluate the best bid for KOCE-TV, taking into consideration a number of possible factors to determine which bid represents the highest value to the Station's constituents. [¶] The District is requesting expressions of interest from interested parties for the consideration of a sale of KOCE's FCC licenses, transmitter and related personal property or, alternatively, a joint venture/formation of an entity to own and operate KOCE. The District reserves the right to reject any and all proposals. There is no asking price for the station." And, "In the event the District accepts a proposal, the successful bidder will have a period of 45 days to complete its required due diligence and to execute a definitive agreement. In addition, MVP and the District will make all reasonable efforts to supply interested parties with additional information as they may require. . . . [¶] All contacts should be made through Media Venture Partners' San Francisco or Chicago offices."

B. The Bidding Itself

While about ten parties had expressed an interest in the Summer of 2003, by the time of the ultimate deadline of October 8, 2003, the field had narrowed to about five. Some of the bidders, including Daystar and the Foundation, submitted edited versions of a 40-plus page purchase and sale contract. Daystar's submission deleted terms calling for buyer's indemnification of claims arising from or related to the decision to sell to the bidder.

The parties' modifications were not remarked upon in the excerpts from the "Summary of Final Proposals for KOCE-TV," which District board members had in front of them when they met on October 15, 2003. The summary was a spreadsheet giving the names of each bidder, the total amount of its bid, and comments.

We describe the summary as it applied to the three remaining bidders still in the running going into the October 15, 2003 meeting:

Described under heading "Entity" as: "Almavision Hispanic Network." Described under the heading "Purchase Price" as: "\$35,000,100 Cash." Under comments, were the words: "Have not submitted proof of financial capacity to complete transaction."

Described under the heading "Entity" as: "KOCE-TV Foundation." Described under the heading "Purchase Price" as "\$32,000,000 Cash/Note." The comments section was left blank but under purchase price were the words: "\$8,000,000 cash and \$24,000,000 on a 10-year or longer term note @ LIBOR + 2 Includes a non-refundable \$100,000 deposit upon execution."²

Described under the heading "Entity" as: "Daystar Television (Community TV Educators of OC)." Described under the heading "Purchase Price" as: "\$25,100,000 Cash \$25,000,000 cash including \$100,000 deposited upon execution of contract." At the

² This tracks the Foundation's letter of October 8, 2003, which said:

-- \$8 million in cash (all paid by the closing of the transaction)

-- A secured note in the amount of \$24 million less assumed liabilities; the note to have a fixed simple interest rate in the amount of LIBOR + 2% and no prepayment penalty."

bottom of the summary under the heading, late proposals, Daystar (again described as “Daystar Television (Community TV Educators of Orange County)”) were these words under “Purchase Price”: “\$40,000,000 Cash” and under “Comments” were the words “Received on October 9; after the established 10/8/03 deadline.”

It was the Foundation’s bid which the District board of trustees determined was “the highest responsible proposal” in its meeting of October 15, 2003.

However, in the period October through December the private foundation evidently experienced some financial difficulty, so the terms were changed so that instead of an interest bearing note of \$24 million the foundation only needed to give the District a *noninterest* bearing note of \$17.5 million. Moreover, *no payments* were due for the first five years of the loan. Further, after the first five years payments did not need to exceed \$500,000 per year. And on top of all that, the foundation was to be *credited* for \$2.5 million in “Programming and services to be received over 7 years” and credited another \$4 million “Estimated avoided costs (if sale had been to another bidder).”³ The board accepted these new terms in its meeting on December 10, 2003.

C. The Litigation

The runner-up bidder, petitioner Word of God Fellowship, Inc. dba Daystar Television Network (hereinafter Daystar) who had offered \$25.1 million cash for the station, sought a petition in the superior court to void the sale, *and* to have the court order that the station be awarded to it (as the “highest responsible bidder”) pursuant to the terms of its bid for \$25.1 million cash. Among the various grounds for having the station awarded to it were:

- the District’s notice was defective;
- the Foundations bid was not “for cash” as required by section 81450 of the Education Code;

³ In a subsequent declaration as the litigation progressed, the Foundation’s chair estimated that “an excess of \$3 million of current year dues will be returnable to donors in the event the Foundation does not get awarded the bid.” His “best estimate” was (when specific gifts for digital conversion were added) “an excess of \$7.6 million claimed by individual donors must be refunded if anyone other than the Foundation wins the bid.”

-- the Foundation was not a “responsible bidder” in the sense of being able to perform its bid;

-- the Foundation was not a “responsive” bidder in the sense of having tendered a bid that involved credit when the solicitation document had called for a “purchase price, which shall be payable all cash at closing.”

-- the District had discriminated against Daystar on the basis of religion; and

-- the change in terms from October to December.

Daystar submitted the (uncontroverted) declaration of an accountant that the present value of the terms ultimately accepted by the District’s board in December 2003 was (depending on the discount rate) somewhere between \$19.2 million and a little less than \$23.3 million. Daystar’s petition stated that it was ready, willing and able to perform its bid and should be in the process of succeeding to ownership of the station. Hence it sought a writ of mandate ordering the District to cease and desist selling the station to the Foundation and to “effectuate the transfer of the station” to itself.

The Foundation and the District argued that because Daystar’s bid contemplated the formation of a separate entity, Community Television Educators of Orange County, Daystar itself lacked standing to challenge the District’s award. On this preliminary matter, the trial court found in favor of Daystar, rejecting the Foundation’s and District’s standing argument in the opening of its statement of decision: “The Court has reviewed all of the documents, declarations and deposition testimony submitted in this case. After considering and weighing all of the evidence, the Court has reached its decision by the following analysis. [¶] Petitioner has standing to bring the instant action.”

D. The Trial Court’s Decision

Nevertheless, Daystar failed to obtain any relief on the merits. The trial court’s statement of decision appeared to accept Daystar’s accountant’s \$23.5 million

(max) figure⁴ as the present value of the consideration given by the Foundation as modified, even though it did not address the problem of the change in terms for the benefit of the foundation from October to December. Rather, the trial court compared the \$19.5 million to \$23.5 million range of the present value of the foundation's bid to Daystar's \$25.1 million cash bid, and said that the disparity in price was only "one factor" for the District's board to weigh, and the board's decision could be justified by taking into account "the total financial impact of all bids."⁵

The core of the trial court's decision was that the District's board had *discretion* to accept a bid that was *not the highest* -- it was enough that there was a "rational connection" between the "factors and the choice made." To quote from the statement of decision: "Respondent adequately considered all relevant factors and has demonstrated a rational connection between those factors and the choice made. Respondent was invested with discretionary power, and such discretion will not be interfered with by the Court in the absence of direct averments and proof of fraud."

This appeal timely followed.

⁴ An apparent typo in the statement of decision converted the accountant's declaration maximum figure of "\$23,215,390" to "\$23,515,390." We will use the trial court's (slightly overstated) \$23.5 million figure in the rest of this opinion. Here is what the court said: "On its face, the Foundation's bid was Thirty-two Million Dollars, (\$32,000,000.00), whereas Petitioner's bid totaled Twenty-five Million One-hundred Thousand Dollars (\$25,100,000.00). (Respondent was within its rights not to consider Petitioner's amended bid of Forty Million Dollars, \$40,000,000.00, as it was made late, past the deadline. Petitioner presented no evidence that Respondent waived this deficiency, or that Petitioner asked the bidding process be reopened for everyone or that Respondent abused its discretion in not doing either.) Petitioner further contends that the Foundation's bid was really worth between \$19,269,462.00 and \$23,515,390.00 based on present cash valuation, thus conclusively not the 'highest'. That's one factor. [¶] Other factors that must be considered when evaluating 'highest' include potential liabilities Respondent could face in such a transaction. . . ."

⁵ The essence of the statement of decision is in this paragraph: "The Court does not accept Petitioner's narrow view of the 'highest' bidder. The only factor Petitioner asks this Court to consider in making an evaluation of 'highest' is the element of 'present cash value'. This factor is certainly an important issue to entertain. But the examination does not end there. The sale of a television station is not the same as a school district selling surplus desks. The types of transactions are complicated and require a great deal of sophistication. The issue was no surprise to Petitioner. The offering memorandum highlighted the fact that the Respondent was going to take into consideration a number of possible factors to determine which bid represented the highest value, because of the unique nature of the offering. It was incumbent upon the Respondent to consider, and irresponsible if it failed to do so, the total financial impact of all bids. Respondent's determination of valuation cannot take place in a vacuum. More cash doesn't always equate into more value. The axiom, 'the devil in the details' is poignant here."

III. THE STANDING ISSUE

The standing issue, as it comes to this court and has it has been explicated in supplemental briefing, may be divided into two distinct aspects. One is the issue raised by the Foundation and District in the trial court, which is the idea that the runner-up bid in October was not really made by *Daystar*, since the bid contemplated actual purchase of the station by Community Television Educators of Orange County. The other is that even assuming that Daystar, and not another entity, was the true runner-up bidder, it has no beneficial interest because its bid was not accepted. (Cf. *Estate of Cahoon* (1980) 101 Cal.App.3d 434 [runner-up at probate sale].) We take the issues seriatim.

A. *The Issue of Which Entity Made the Bid*

As noted, the District asserted at trial, and reiterates on appeal, that Daystar was not “beneficially interested” in the writ proceeding because the runner-up bid contemplated actual purchase of the station by an entity other than Daystar, namely Community TV Educators of Orange County. That is, Daystar *qua* Daystar wasn’t the real runner-up bidder. Also as noted, this precise argument was made to the trial court, and, in its statement of decision, the trial court *rejected* it.

The question of whether Daystar or some other entity was the real runner-up bidder in October 2003 is a factual issue. There exists substantial evidence in abundance to support the trial court’s determination that Daystar was indeed the entity making the runner-up bid:

-- Daystar directly offered to form and fund Community Television Educators of Orange County to effectuate the sale. Specifically, on July 10, 2003, Daystar’s “President/CEO,” sent a fax to Elliot Evers of Media Venture Partners in San Francisco [the District’s broker] on Daystar Television Network stationary: “The following is our written offer for the assets of KOCE for Huntington Beach, CA. [¶] 1) Price - \$25,000,000 cash” The offer also stated: “3) Buyer -- Community Television Educators of Orange County [¶] -- A California non-profit corporation with an

educational purpose. [¶] -- A majority of the board members from Orange County. 4) Programming -- Educational, informational, and religious, with many programs from Orange County. [¶] “5) FCC Qualifications --Daystar already owns and operates seven: non-commercial, educational TV Stations. Therefore, we know for sure that the FCC would grant the sell [sic].” If Daystar had not made the bid, its FCC qualifications would have been irrelevant.

-- The District itself understood precisely that Daystar would be the buyer, as evidenced by the District’s summary of bids, which indicated that “Community Educators of Orange County” was an entity subsumed within Daystar. (The summary read: “Daystar Television (Community TV Educators of OC).” In that regard, board member Jerry Patterson also acknowledged at a deposition that he “understood that this offer, exhibit 2, would be presented on behalf of Daystar or a company that would be created by Daystar.” (His answer was, “Right.”)

-- Moreover, the District’s own ad and its 2002 request for proposal contemplated circumstances in which *bidders* would form new entities. (The request for proposal set forth three alternatives -- outright sale, formation of a joint venture, and, third, formation of a joint venture with an option to buy in four years.)

B. *The Issue of Beneficial Interest*

Standing is a “threshold issue to be resolved before the matter can be reached on the merits.” (*Blumhorst v. Jewish Family Services of Los Angeles* (2005) 126 Cal.App.4th 993, 1000, citing *Hernandez v. Atlantic Finance Co.* (1980) 105 Cal.App.3d 65, 71.) The idea, drawn directly from a statute governing traditional writs of mandate under section 1085 of the Code of Civil Procedure (the particular statute requiring a beneficial interest is actually section 1086) is a party seeking a writ must be “beneficially interested” in a controversy. (Code Civ. Proc., § 1086 [“The writ must be issued in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law. It must be issued upon the verified petition of the party beneficially interested.”].)

In *Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, our Supreme Court articulated the standard that beneficial interest in California “is equivalent to the federal ‘injury in fact’ test, which requires a party to prove by a preponderance of the evidence that it has suffered ‘an invasion of a legally protected interest that is “(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.”” (*Associated Builders, supra*, 21 Cal.4th at p. 362, quoting *Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville* (1993) 508 U.S. 656, 663.)

Coral Construction, Inc. v. City and County of San Francisco (2004) 116 Cal.App.4th 6, shows us how unfair procedures in a bidding process can itself create an injury in fact under *Associated Builders*. There, a “specialty highway contractor” challenged the constitutionality of a city’s minority/women/local business ordinance that declared any bid that did not comply with a minority/women/local business subcontracting program was, a priori, nonresponsive. (*Coral Construction, supra*, 116 Cal.App.4th at p. 10.) The city argued that the highway contractor was not beneficially interested -- after all, the contractor had failed to prove that it would even “be bidding on an identifiable City contract subject to the Ordinance in the reasonably near future.” (*Ibid.*) However, the appellate court rejected the argument. The court noted that the alleged denial of equal treatment *itself* was an “injury in fact” sustained by the highway contractor, and, further, by the denial in the sense that the denial of equal treatment. (*Id.* at pp. 16-17.)

Compared to the interest found sufficient to establish standing in *Coral Construction*, Daystar’s interests here surely suffice. Unlike the would-be bidder in *Coral Construction*, Daystar actually made a bid.

The Foundation in particular relies on a probate case, *Estate of Cahoon, supra*, 101 Cal.App.3d 434. *Cahoon* was a case where a party bid \$3.25 million in a probate sale for a private ranch, another party bid \$3.26 million, and the runner-up claimed that if certain *non-price* (albeit claimed to be “radical”) changes in the terms negotiated after the acceptance of the \$3.26 million bid had been known, the runner-up

would have, in retrospect, bid \$3.27 million. (While the opinion does not spell it out, these changes were geared toward making it easier for the buyer to develop the property. (See *id.* at p. 436 [“In the course of the bidding certain terms and conditions of the original sale were amended, including, for example, deletion of a ‘subdivision approval’ contingency, modification of release clauses and a change in the time for close of escrow.”].))

The appellate court ultimately held that the runner-up was not an “aggrieved party” in this paragraph: “We believe that no California case stands for the proposition, asserted by appellant, that an unsuccessful bidder at probate sale has standing to appeal an order confirming sale of estate property, as an ‘aggrieved party,’ merely by virtue of having participated as an unsuccessful bidder at the confirmation hearing.” (*Id.* at p. 438.) The essence of court’s reasoning was on the proceeding page: “Appellant here is demonstrably not an aggrieved party. On the day of his first appearance in the action, May 12, 1978, when he filed an increased bid in the confirmation hearing and was outbid, appellant had, at best, a *prospective* interest in the subject sale. Upon being outbid, his interest in the proceedings terminated.” (*Id.* at p. 437, original italics.)

It is enough to say that *Cahoon* is distinguishable from the present case in at least these major ways:

-- Unlike the present case, *Cahoon* involved no actual change of bid price in favor of the successful bidder, who still had to pay the \$3.26 million that it had bid on the property. That is, there was no question in *Cahoon* that the successful bidder had indeed outbid the appellant even after the post-bid post-acceptance changes. In the present case, by contrast, Daystar has maintained from day one that *it* was the highest responsible bidder (either because it was the highest responsible “for cash” bidder, the highest responsible bidder in the sense of being able to actually make good on its October bid and certainly the highest responsible bidder in comparison to the contract that the District ultimately made with the Foundation).

-- Unlike the present case, the appellant's *sole challenge* in *Cahoon* was based on the hypothetical that it would have outbid the successful bidder *if* it had known the post-acceptance change of terms that made development easier. Here, by contrast, Daystar does not base its challenge to the sale on the hypothetical that it *would have* bid more than \$23.5 million if it had, by some time-warp, known of the post-acceptance change of terms. Daystar argues that *it was* the highest responsible bidder, and therefore entitled to the property bid on *now*.

-- Unlike the present case, *Cahoon* involved no challenge to the *process* of the bidding itself, or the responsiveness of the winner's bid. For aught that is revealed in the *Cahoon* opinion, the appellant there accepted that it had been legitimately outbid in a fair process up to the time of the acceptance of the winner's bid. By contrast, here Daystar challenges the process of the bidding itself and the determination of the winner at the point of acceptance. It claims that the Foundation's (mostly-credit) bid was both nonresponsive (the bid specification was for an all-cash bid), and that it was a nonresponsible bidder (the Foundation didn't have the money to meet its initial \$32 million bid), and that, under the circumstances, Daystar was the winning bidder.

Finally, we note that nothing in the record on appeal shows the indemnity clause in the form contract was a non-modifiable term of any contract of sale, such that Daystar's deletion of the clause would make it a non-responsive bidder, thereby depriving it of standing to challenge the award.

Having concluded that Daystar has standing to bring this action, we now move on to the merits.

IV. THE MERITS

A. The Standard of Review

In reviewing Daystar's challenge to the legal and factual basis of the District's decision, we apply a deferential standard of review, and do not consider whether we would have made the same decision if we had power to do so. (*Associated Builders & Contractors, Inc. v. San Francisco Airports Com.*, *supra*, 21 Cal.4th at p. 361.) When reviewing the sufficiency of the evidence, we examine the record for

substantial evidence, and resolve all evidentiary conflicts in favor of the prevailing party.” (*Id.* at p. 374.) We exercise independent judgment, however, in determining whether the bidding process was procedurally fair and the District complied with the law.

*B. In Public Bidding Law, There Can Be No Material
Post-Bid Changes In
Favor of the Private Bidder*

Early on in public bidding law, it was established that a contract is made when a bid is accepted by the public agency, not when the formal contract is signed. (See *City of Susanville v. Lee C. Hess Co.* (1955) 45 Cal.2d 684, 695.)

Palo and Dodini v. City of Oakland (1947) 79 Cal.App.2d 739 illustrates the rule. There, a successful bidder sought its deposit when, after a city board of playground directors passed a resolution awarding the bidder the contract and directing the “city attorney to prepare the contract,” the bidder refused to sign when a formal contract was tendered. (*Id.* at pp. 740-741.) In affirming a judgment for the successful city board in an action by the bidder to recover its guarantee deposit, the *Palo & Dodini* court warned of the consequences if it had decided the case the other way: “If, as here, a bidder were allowed without loss to himself to withdraw his bid after the bids have been publicly opened, fraudulent practices would develop. The body awarding the contract could agree to release a favored contractor if it turned out that his proposal was low as compared to other bids. Moreover, any bidder who found that in comparison with the other bidders, his bid was quite low, could withdraw his bid, and the city would thereby lose the value of competitive bidding and be forced to pay the prices of higher bidders with no compensation to itself for the loss sustained.” (*Palo & Dodini, supra*, 79 Cal.App.2d at p.750.)

A more recent example of the same principle was articulated by the court in *Transdyn/Cresci JV v. City and County of San Francisco* (1999) 72 Cal.App.4th 746. There, a municipality awarded a contract to monitor water quality and flow to the third lowest bidder, on the idea that the lowest bidder had an improper bid bond and the second lowest bidder did not comply with minority business enterprise subcontracting

requirements. (*Id.* at p. 749.) However, when a subcontractor for the second lowest bidder threatened litigation on the theory that the city’s minority participation goal was set too high and could not be justified, the relevant department head refused to sign the contract. On top of that, the relevant controller refused to certify the availability of funds. When the winning third lowest bidder sued, the trial judge denied mandamus relief because he the award was “never perfected,” in that the city administrative code required both “elements” (department head signature and certification of availability of funds). (*Id.* at p. 751.)

The appellate court reversed. The core of its reasoning was this: ““All the essentials of contract”” were present when the bid was accepted. (*Transdyn/Cresci JV, supra*, 72 Cal.App.4th at p. 755, quoting *City of Susanville, supra*, 45 Cal.2d at p.695.) The court also cited *Williams v. City of Stockton* (1925) 195 Cal. 743 for the idea that a ““When an award has once been made the public body has no discretion but to execute the contract. The rights of the parties then become fixed, and the power to cancel the award or reject the bids does not exist.”” (*Transdyn/Cresci JV, supra*, 72 Cal.App.4th at p. 755, quoting *Williams v. City of Stockton, supra*, 195 Cal. 743, 751, italics added; see also *M.F. Kemper v. City of Los Angeles* (1951) 37 Cal.2d 696, 700 [once bid was opened, “the city could not be deprived” of its benefits “without its consent unless the requirements for rescission were satisfied.”].)

A corollary to the principle that the rights of the parties become fixed when a public contract is awarded to a successful bidder (as distinct from the signing of the formal contract) is what is sometimes called the “material amendments doctrine,” which, basically taking up where the *Palo & Dodini* court left off, precludes material amendments after a bid has been awarded. As explained in one treatise: “In general, under the ‘material amendments doctrine,’ competitively bid contracts involving state resources cannot be materially amended. So, for example, by seeking to modify its original bid and negotiate a more favorable agreement for itself, after it has already secured a public works contract as the low bidder, a contractor is, in effect, improperly attempting to secure an unfair competitive advantage over the other legitimate bidders

and to conduct a type of post bid negotiations that violate the practice of competitive bidding.” (Giggetts & Surette, Public Works and Contracts, 64 Am Jur. 2d, § 120, p. 749.)

*C. Even Small Changes In
Price Are Material*

Three cases, when read together, provide a pretty good idea of what is, and isn't, a post-acceptance material change.

Let us begin with *Konica Business Machines U.S.A., Inc. v. Regents of the University of California, supra*, 206 Cal.App.3d 449. There, a university system published a request for bids for photocopiers (called an RFQ in the opinion) that had very exact specifications as to quality in addition to price. The contract was awarded to a firm that submitted the lowest “per copy” price, but that firm’s submission did not meet all performance specifications required by the RFQ -- among other things its copiers would not be quite up to standard in the zoom and speed departments, though it came close (its high volume copier only did 50 copies per minute instead of the specified 55). (See *id.* at p. 452-453.) A competitor that *did* meet all the performance standards but lost out on the straight price comparison sought a writ of mandate in the trial court to set aside the contract. While the trial court disagreed, on appeal the court reversed the judgment denying the writ, setting aside the contract and requiring the university system to publish new requests for quotation and call for rebids within 30 days of the remittitur. (*Id.* at p. 458.)

The appellate court reasoned that it was not enough that the winner’s bid “substantially” complied with the request for quotations. Three reasons predominated in the court’s analysis: One, deviation from strict adherence to the bid specifics gave the winner a price advantage over its competitor, even though the price amount of that price advantage could not be determined with “mathematical precision.” (*Id.* at p. 455.)

Two, deviation from the quality requirements in the request for bid, even if they saved the public entity some money, subverted one of the important policy goals in the competitive bidding process, because it opened the door for surreptitious corruption.

“The importance of maintaining integrity in government and the ease with which policy goals underlying the requirement for open competitive bidding may be surreptitiously undercut, mandate strict compliance with bidding requirements.” (*Id.* at p. 457.)

Three, application of substantial compliance introduced uncertainty into the process, an uncertainty which was unfair to losing bidders, because it forced them to guess how close they would have to come to meet the standards. “To permit the University to allow deviations from precise specifications in its public call for bids leaves bidders in the unfair position of having to guess what will satisfy the University’s needs.” (*Id.* at p. 457.)

The second case is one cited already, *Valley Crest Landscape, Inc. v. City Council*, *supra*, 41 Cal.App.4th 1432, which reversed a judgment refusing to set aside a contract when material changes in the winner’s bid were permitted after bids were opened. In *Valley Crest*, the successful low bidder submitted a bid which indicated that 83 percent of the work would be subcontracted, but, after a rival protested, the successful bidder asserted that its figures were “not correct” and provided a (conforming) figure of about 45 percent. (*Id.* at p. 1436, 1438.) There was (of course) a dispute over whether the initial 83 percent listing was an innocent mistake or a mere clerical error -- in any event the city expressly decided to waive the “irregularity” and awarded the contract to the successful low bidder. (See *id.* at p. 1437.)

The runner-up then brought a petition for writ of mandate seeking to have the successful bidder’s contract declared void. The trial court denied the petition and the runner-up appealed. In reversing, the appellate court reasoned that even if the initial 83 percent listing of subcontracted work were an innocent mistake, the contract still had to be voided, because the post-hoc change had the effect of giving the successful bidder an “unfair advantage” because the misstatement (whether innocent or not) made the contract “materially different.” (*Valley Crest, supra*, 41 Cal.App.4th at p. 1442.) The court stated: “Since it was a material element of the bid, North Bay could not change its bid to correct the mistake in stating the percentages.” (*Id.* at p. 1443.)

Now let's look at a case where differences weren't held to be material, *Ghilotti Construction Co. v. City of Richmond* (1996) 45 Cal.App.4th 897. *Ghilotti* involved a city project for a major intersection. The city restricted bidders to the same limit of no-more-than 50 percent of the work subcontracted that was present in *Valley Crest*. (*Id.* at p. 900.) The face of the winning bidder's bid, however, showed it would be subcontracting 55.44 percent of the price -- but -- and this a big but as the litigation would unfold -- the winning bidder *could easily meet the requirement at no increase in price* by the simple expedient of buying supplies and materials itself, rather than having subcontractors buy them, and if it did so, could get the subcontracted percentage down to 43.3 percent. (See *id.* at p. 903.) Moreover, the second highest lowest bidder could not show that its price would have been lower than the winner's *even if it had ignored the 50 percent requirement*. (See *id.* at p. 902.)⁶ Since the winner's bid "could be brought into compliance with only slight alterations and *without affecting the amount of the bid*," the runner-up could not show that the winner had been given an unfair competitive advantage. (See *id.* at p. 907, italics added.)

The *Ghilotti* court buttressed its determination with an extended discussion distinguishing both *Konica* and *Valley Crest* on their facts (see *Ghilotti, supra*, 45 Cal.App.4th at pp. 905-912), and that discussion is important because it emphasizes a number of fixed points in bidding law, on which the *Konica*, *Valley Crest* and *Ghilotti* courts are all in agreement -- particularly the overall "objective of insuring economy and excluding favoritism and corruption." (*Ghilotti, supra*, 45 Cal.App.4th at p. 909, quoting *Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.4th 161, 173.)

Konica was distinguished on the key factor of price. In *Konica*, said the court in *Ghilotti*, "there was no real dispute" that the winner's bid "would have been higher" if the bid had met the "performance specifications" (*Ghilotti, supra*, 45

⁶ The implication from *Ghilotti* is that bidding practices can be retrospectively analyzed for unfairness on a "would have been" basis (i.e., if there had been no alleged unfairness, would the runner-up bidder have presented a better bid?). Does this implication conflict with the rationale in *Cahoon* denying the runner-up bidder there standing? The two cases are reconcilable in that *Ghilotti* did not specifically address standing, and in any event involved public resources.

Cal.App.4th at p. 906) while in the *Ghilotti* case itself, there was “no evidence” that the winner “would have submitted a higher bid had it complied with the specification restricting the use of subcontractors.” (*Ibid.*)

An additional distinction concerned the risk of favoritism in the bid price. In *Konica* there was a risk that favoritism would mar the competitive bid process. In *Ghilotti*, by contrast, the court noted the “margin” of the winner’s “noncompliance” on the subcontractor limitation was only a 5.5 percent and “only slight alterations” could bring the winner’s bid into compliance “and without affecting the amount of the bid.” (*Ghilotti, supra*, 45 Cal.App.4th at p. 907.) The *Ghilotti* court thus concluded that the policy of guarding against favoritism and corruption was not implicated by the city’s waiving the 50 percent requirement.

Valley Crest was distinguished by (1) the sheer size of the margin between what the solicitation document required and the winner’s excused bid -- in *Valley Crest* it was 33 percent as distinct from an easily correctable 5 percent in the *Ghilotti* case, (2) the fact that winner was given the opportunity to withdraw its bid (as nonresponsive) and (3) “most important[ly],” the fact that the winner in *Valley Crest* had a competitive advantage by being able to back out of its deal. (See *Ghilotti, supra*, 45 Cal.App.4th at p. 911.)

Ghilotti also articulated two tests as to whether a deviation is “inconsequential”: “To be considered inconsequential, a deviation must neither give the bidder an unfair competitive advantage nor otherwise defeat the goals of insuring economy and preventing corruption in the public contracting process.” (*Id.* at p. 900.)

It should be clear from comparison between the three cases that price is inviolate when it comes to public bidding. Indeed, the *Ghilotti* court labored greatly to establish the proposition that it considered the total absence of any effect on price fundamental to its decision. By the same token, *Konica* recognized that even small changes in non-price terms could affect price, and, moreover, advantages obtained by a bidder in non-price terms could give it an unfair advantage over other bidders. By the same token, *Valley View* establishes that it does not take much -- again, even in non-price

terms -- for a winning bidder to gain an unfair advantage over competitors. Just being able to back out of a deal by itself opens up the door to favoritism and unfair advantage.

D. *The Changes Here*

Were Material

The District itself recognizes that material changes cannot be made to a bid after its acceptance by a public agency,⁷ but asserts that the post-acceptance modifications here were not material, because the “modified package” was for \$32 million, “the same as the value of the original offer accepted by the District.”⁸

We cannot agree. It is fundamental that the value of the payment of a lump sum of money *now* is of greater value than a stream of payments over a course of years eventually totaling that lump sum. This “time value” of money is recognized throughout the law, and courts regularly differentiate *present value* (you have it all in your hand now) from the simple sum of periodic payments totaled up over the years (you have to wait for a long time to receive your money).

Our high court’s decision in *Salgado v. County of Los Angeles* (1998) 19 Cal.4th 629 is nicely illustrative of the differentiation, because it arose because of the interaction of two statutes which force courts to deal with the concepts of both lump sum and periodic payments. One statute gives a party the right to pay certain medical malpractice damages in periodic payments instead of in a lump sum. The other statute puts a \$250,000 cap on the liability of a health care provider.

⁷ To quote from its supplemental brief filed October 28, 2005 addressing the modification issue: “There is no prohibition against the District modifying the terms of the sale of KOCE-TV to the KOCE-TV Foundation *where the modifications are neither material nor substantial.*” (Italics added.)

⁸ To quote the relevant paragraph from the October 28, 2005 supplemental brief in full: [After a previous paragraph asserting that the threat of lawsuits by various donors was the reason for the \$4 million credit for avoided costs if the sale had been to another bidder] “The estimated monetary value of the modified package was \$32 million -- the same as the value of the original offer accepted by the District. Hence, the modifications to the deal between the District and the Foundation were not material or substantial, and the District received something of value in return for the offset in the purchase price. Given the complex nature of this transaction, and all of the factors the District had to consider in evaluating the monetary value of its agreement as well as its potential exposure in selling the station, the District appropriately agreed to certain non-material modifications of the terms of its agreement with the Foundation after bidding was complete.”

In *Salgado*, a child injured at birth was awarded \$550,000 for the pain and suffering he would endure for the rest of his life, but the trial judge reduced the award to the statutory cap of \$250,000 (minus \$10,000 for an award of past pain and suffering) and then, because the defendant exercised its statutory right to have the damages paid in periodic payments, ordered *that* sum to be paid off in equal installments over the course of the child's expected 66.8 year life expectancy. (See *id.* at p. 635.)

Our Supreme Court reversed, realizing that the award had to be much larger than \$250,000 totaled up over the years in order to compensate the plaintiff for the wait to receive his money. "If the award . . . is to be paid out periodically . . . the plaintiff is entitled to receive, over time, the equivalent of the immediate lump-sum award at the time of judgment, capped at \$250,000, i.e., the amount that the capped award would have yielded if invested prudently at the time of judgment." (*Id.* at p. 640.) In short, if the child was going to have to wait 66.8 years to receive his \$250,000 award, he was *entitled to interest*.

Other cases explicitly recognizing the basic accounting distinction between lump sums and periodic payments include *Nguyen v. Los Angeles County Harbor/UCLA Medical Center* (1995) 40 Cal.App.4th 1433, 1446 [dealing with problem of reconciling a lump sum attorney fee award with the fact that the award is paid in periodic payments]; *Hrimnak v. Watkins* (1995) 38 Cal.App.4th 964, 974 ["if a present value award is periodized, a plaintiff might not be fully compensated for his or her future losses; the judgment, in effect, would be discounted twice: first by reducing the gross amount to present value and second by deferring payment"]; and *Canavin v. Pacific Southwest Airlines* (1983) 148 Cal.App.3d 512, 521 ["The total future lost support must be reduced by appropriate formula to a present lump sum which, when invested to yield the highest rate of return consistent with reasonable security, will pay the equivalent of lost future benefits at the times, in the amounts and for the period such future benefits would have been received."].)

As noted, the contract which the District ultimately made with the Foundation differed significantly in terms of factors bearing on the present value. The

original bid by the Foundation was for \$32 million, with any delay in receiving all of that money to be compensated by interest -- the London Interbank Offered Rate [the rate on which banks borrow money from each other in the London Interbank Market] plus two percent. The ultimate contract, though, requires the District to wait 5 years to receive *any* money beyond the initial \$8 million payment, and for the next 5 years the payments are capped at \$500,000 a year. Thus, unlike the original bid accepted in October 2003, the contract ultimately concluded in December 2003 means the District must do an awful lot of waiting for its money.⁹ Moreover, as we have seen, the trial court did not reject Daystar's evidence that the present value of the ultimately accepted contract was worth no more than \$23.5 million; it simply based its decision on other factors (and even without mentioning the problem of the post-acceptance modification).

The *Ghilotti* court bent over backwards to establish that a mere 5 percent change in a non-price term was not material because that change did not affect the total price by a penny. The *Valley View* court struck down post-acceptance modifications based on a modification of a non-price term involving a percentage of subcontracting work. Here we are talking about no less than \$8.5 million -- the difference between \$32 million and \$23.5 million. There is no way we can hold that the difference is not material.

On top of that, the post-modification changes here implicated the fairness concerns that have been the bedrock of all jurisprudence in this area. Indeed, our

⁹ A related issue concerns the *security* given by the Foundation to the district since it is carrying so much credit for the Foundation's benefit. In particular, there is no doubt that most of the value of the station is in the FCC operating license, and both sides recognize that an FCC license cannot be "collateralized," i.e., if the Foundation doesn't meet its payments, the district cannot foreclose and get the license back. The Foundation argues that it, while it couldn't provide a security interest in the FCC license (the station's most valuable asset), the district would not be left without a remedy in the event of default by the Foundation, because the Foundation does give the district a security interest in all assets other than the FCC license, which includes any proceeds from any subsequent sale by the Foundation. However, a security interest which can be readily foreclosed on in the event of default is itself something of value. (See *Sanders Construction Co. v. San Joaquin First Fed. Sav. & Loan Assn.* (1982) 136 Cal.App.3d 387, 399 ["we note that an award of the value of the reversionary interest at the end of the lease discounted to present value neglects to account for the benefit of having a substantial building on the premises during the lease term as security for payment of rent"].) All else being equal, the value of a stream of payments secured by assets which can be readily foreclosed on is substantially higher than the value of a stream of payments where the lender would have to wait for a subsequent resale to get its money back.

Supreme Court in *Domar Electric, Inc. v. City of Los Angeles*, *supra*, 9 Cal.4th 161 quoted the *Konica* opinion with approval to show how much the court in that case was concerned that deviations from bids (or bid requirements) could open the door to favoritism and corruption.

Domar Electric is a good case to review at this point in order to remind ourselves just how seriously the Supreme Court has been concerned about practices which have an anticompetitive effect.

Domar Electric was a case where a low bidder did not comply at all with a minority outreach documentation requirement. The requirement, though, was for documentation, not a specific quota. So the low bidder didn't get the job. In ruling that the appellant low bidder's failure to provide any documentation, thereby not complying with the bid requirement, should be enforced, the court cited *Konica* for this proposition: "Finally, the Board's action in rejecting Domar's bid due to the absence of the required good faith effort documentation is consistent with the general rule that bidding requirements must be strictly adhered to in order to avoid the potential for abuse in the competitive bidding process." (*Domar Electric, supra*, 9 Cal.4th at pp. 175-176.)

Indeed, the *Domar Electric* court had much to say about the general purposes of competitive bidding in explaining the result. The case came up under a city charter, which had a requirement that public contracts go to the "lowest and best regular responsible bidder." (See *Domar Electric, supra*, 9 Cal.4th at p. 170, original italics omitted.) But the charter did not authorize or forbid subcontractor outreach requirements. So the court was forced to resort to general principles of public bidding: "Since neither [charter] section 386(c) nor section 386(f) expressly authorizes or forbids the City to adopt a requirement relating to subcontractor outreach, the validity of such a requirement must be ascertained with reference to the purposes of competitive bidding, which are 'to guard against favoritism, improvidence, extravagance, fraud and corruption; to prevent the waste of public funds; and to obtain the best economic result for the public.'" (*Id.* at pp. 172-173, citing *Graydon v. Pasadena Redevelopment Agency* (1980) 104 Cal.App.3d 631, 636.)

Thus the main issue on which the majority and the dissent in *Domar Electric* was not whether the city could do something which even had a slightly marginal anticompetitive effect (neither side was willing to allow that), but whether what the city was doing had either a *pro*-competitive effect (the majority) or an *anti*-competitive effect (the dissent). The majority said the bid outreach requirement furthered competition, the dissent said it did not; but both sides were in agreement that the test was competitive effect of the requirement. (Compare *Domar Electric, supra*, 9 Cal.4th at p. 177 (maj. opn.) [“requiring prime contractors to reach out to all types of subcontracting enterprises broadens the pool of participants in the bid process, thereby guarding against the possibility of insufficient competition”] with *id.* at p. 188 (dis. opn. of Arabian, J.) [“In this case, the requirement prime contractors bidding on city projects document good faith M/WBE outreach efforts narrows rather than expands the field of bidders capable of performing the work in question, thereby stifling, not increasing, competition.”]; accord, *Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* (2000) 23 Cal.4th 305, 314 [““The provisions of statutes, charters and ordinances requiring competitive bidding in the letting of municipal contracts are for the purpose of inviting competition, to guard against favoritism, improvidence, extravagance, fraud and corruption, and to secure the best work or supplies at the lowest price practicable””].)

In this case it is impossible to avoid the anti-competitive effect which the post-acceptance modifications in favor of the Foundation had on the sale of the television station. Recall, for example, that the District’s advertisement clearly stated that a potential bidder should “Have *immediate* financial capacity necessary to complete an outright purchase at level suggested in bid.” (Italics added.) That stress on “immediate financial capacity” may have scared off some potential bidders, and could easily have prompted bidders such as Daystar to be conservative in their actual bids, since they would be expected to “complete” an “outright purchase” with their “immediate financial capacity.” To allow a successful bidder, then, to evade the need for immediate financial

capacity by stretching out its bid over time gives that bidder a favored position not available to competitors.

E. *The Sale Must Be Voided;*

What Next?

1. Relief Sought by Daystar

The voiding of the sale is predicate relief for Daystar. Daystar's challenge to the bid process ultimately seeks the direct sale of the station to it. The question that now arises in light of our determination that the sale cannot be upheld is whether Daystar, as the high bidder (\$25.1 million in cash) over the modified contract with the Foundation (cash and credit of \$23.5 million present value at the most) must be awarded the contract directly.

In our now vacated opinion, we decided this issue against Daystar, reasoning that the "may" in section 81450 of the Education Code (allowing sale of community college district personal property) as in "may sell for cash" was ultimately permissive -- the District might sell, or it might not.

The argument for requiring sale, however, demands some more explication than we previously gave it. The actual phrase from section 81450 is: "The board *shall* sell the property to the highest responsible bidder, or *shall* reject all bids." (Italics added.) Daystar's point is that the statute sets up two mutually exclusive alternatives, either to sell or not to sell, by clearly electing to sell the station at the October 2003 board meeting, the board elected to sell. Since Daystar's \$25.1 million bid was higher than the Foundation's \$23.5 million (at most) December contract, the District has a ministerial duty to sell the station to Daystar.¹⁰ Along similar lines, Daystar also asserts that even

¹⁰ In *Paterson v. Board of Trustees* (1958) 157 Cal.App.2d 811, 818, the court observed that a section within the Education Code, section 18051, which makes a reference to "lowest responsible bidder" did not specifically state that the construction contracts covered by the section must be let to the lowest responsible bidder at the bid price. Despite that lacuna, the appellate court held that such a requirement was "obvious, for otherwise the section would be meaningless." The case before us is stronger in that section 81450 the language expressly requires sale to the "highest responsible bidder." That is, under *Paterson*, there is no doubt that if the district sells, it must sell to the highest responsible bidder. (Cf. *Educational & Recreational Services, Inc. v. Pasadena Unified Sch. Dist.* (1977) 65

going into the October 2003 board meeting, its \$25.1 million cash bid necessarily was higher than the \$8 million cash component of the Foundation's original \$32 million bid (of which \$24 million was credit).

These arguments each fail because they do not account for the discretion which the "may sell for cash" language in section 81450 accords the District. Even if, for sake of argument, Daystar was the only responsible bidder, and there was absolutely no dispute at all as to whether its bid was responsive to the request for bids, the District would still have the discretion not to sell. May means may, or may not. (See *County of Orange v. Bezaire* (2004) 117 Cal.App.4th 121, 129 [collecting authorities that generally speaking "'may' is permissive -- you can do it if you want, but are aren't being forced to"].) Only *if* the board decides to sell is the "shall" language triggered -- if the board decides to sell, *then* it shall sell to the highest responsible bidder *or* -- as if the Legislature were emphasizing binary nature of the decision to sell -- it "shall reject all bids." The statute thus creates a fork in the road, but -- Yogi Berra's famous dictum notwithstanding -- we don't know yet which fork the District will take. To illustrate: If, hypothetically, Daystar had been the only bidder, would the board have voted to sell the station to it for \$25.1 million, particularly in view of Daystar's rejection of an indemnification clause? We cannot say.

We therefore must conclude that Daystar's writ petition cannot be granted to the extent that it seeks compulsion of an immediate sale to it now. The District has yet, in the first instance, to decide whether or not to sell to Daystar on the assumption that it was, as section 81450 uses the phrase, the "highest responsible bidder."

2. Guidance for the Parties on Remand

Though the sale cannot stand, this case has presented numerous issues concerning a community college district's sale of property pursuant to the Education Code. As noted, we previously issued an opinion, then vacated it, and called for two

Cal.App.3d 775 [over dissent holding that school busing statute expressly provided that contract could be made to other than the low bidder].)

rounds of additional briefing and another oral argument on more than a dozen issues. While we can avoid commenting on some of them, it would thus be unfair and unwise to give the parties no guidance on other of these issues which are likely to present themselves again in the future. (Cf. Code Civ. Proc. § 43 [where new trial is granted, appellate court is to determine all questions of law necessary to a final determination of the case].)

Issue 1: The first issue is what statute applies to the sale of the television station. In that regard we conclude Education Code section 81450 governs this sale. This is apparent from the structure of the Education Code. (See *Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737 [courts must construe statutes “in the context of the statutory framework as a whole”].) Part 49 of the Education Code addresses community college educational facilities. Chapter 2 of that part addresses the “sale, lease, use, gift, and exchange” of community college property. Chapter 2 has 16 articles, which largely address the conveyance of real property. Only one article explicitly addresses the sale of property other than real property: Article 9. This article is appropriately entitled, “Sale of Personal Property.” And it begins with section 81450. We find no other express statutory authorization for a community college district to sell property like the television station.

We must reject the District’s and Foundation’s attempts to distinguish section 81450. First, the general statutory authorization for community college districts to manage and convey property (Ed. Code, § 70902, subds. (b)(6), (b)(13)) does not somehow eviscerate a statute that specifically spells out the procedures for selling property. “‘It is well settled . . . that a general [statutory] provision is controlled by one that is special, the latter being treated as an exception to the former. A specific provision relating to a particular subject will govern in respect to that subject, as against a general provision.’” (*San Francisco Taxpayers Assn. v. Board of Supervisors* (1992) 2 Cal.4th 571, 577.)

Second, section 81450 is not by its terms limited in applicability to surplus school property. It also applies to still-valuable assets like the television station. The

statute does not use the word, “surplus.” Nor does it exempt property the District may seek to use after the sale, with the permission of the new owner. Rather, by its terms, the statute governs the sale of “any personal property belonging to the district if the property is not required for school purposes. . . .” (§ 81450, subd. (a), italics added.) The District’s decision to sell the station plainly suggests it no longer requires the station for school purposes. Thus, the sale falls within the ambit of section 81450.

Finally, section 81450 governs the sale in this case for a simple reason: the District said it would. In its request for proposals, the District stated it would conduct the sale pursuant to section 81450. Thus, even if section 81450’s statutory context and plain language did not make its applicability crystal clear, the sale would still be governed by that statute.

Issue 2: The second issue is whether section 81450 allows the District to accept bids offering to purchase the station for a combination of cash and credit. We tackled this issue in our prior opinion. We concluded the statutory phrase “may sell for cash” means the District, if it chooses to sell, may accept only cash bids. (§ 81450, subd. (a).) Otherwise, the words “for cash” are surplusage. And accepting payment over time is incompatible with the statute’s provision for transferring the property to the buyer “after payment has been received.” (§ 81450, subd. (b).) Although our prior opinion is now vacated, our reasoning stands firm. Moreover, even if the statute did not mandate cash bids, the District did so in its request for proposals. Thus, when the District determines the highest bidder, it should consider only each bid’s cash component. It should disregard any credit component.

Issue 3: The third issue is what “responsible” means in the phrase, “highest responsible bidder.” In *City of Inglewood-Los Angeles County Civic Center Authority v. Superior Court* (1972) 7 Cal.3d 861, our Supreme Court adopted the factors first set forth in *West v. Oakland* (1916) 30 Cal.App. 556 : “quality, fitness and capacity . . . to satisfactorily perform the proposed work.” (*Inglewood, supra*, 7 Cal.3d at p. 867.) This definition makes sense in the public contracting context. Some contractors who bid on a project may simply lack the skill and experience needed to complete the project safely,

on time, and according to the specifications. The definition makes much less sense in the sale of public property. What special “quality” must a buyer offer? What must a buyer be fit and capable to do? In our prior opinion, we concluded a bidder is responsible if it “has the financial resources to actually make good on . . . its bid.” This conclusion has some appeal, especially if a bidder’s only responsibility is to pay cash. In hindsight, however, it seems too narrow to equate a bidder’s responsibility with its financial resources. The danger that a bidder may lack the capacity to pay cash for the District’s property is self-correcting: If the bidder does not produce the cash, the property is not sold. Basic contract law covers this scenario. So does section 81450, subdivision (b), which directs a district to transfer the property to the buyer “after payment has been received.”

Moreover, courts have recited the *West* responsibility factors in cases involving the leasing of public property without equating responsibility with the ability to pay. (See *Boydston v. Napa Sanitation District* (1990) 222 Cal.App.3d 1362, 1368-1369 [bidding to lease ranch on public land; district erred by rejecting highest bidder without finding bidder was unqualified to operate ranch]; see also *R & A Vending Services, Inc. v. City of Los Angeles* (1985) 172 Cal.App.3d 1188, 1193 [bidding to lease park concession stands; city permissibly rejected highest bid where it found the proposal was “unrealistic” and inaccurate].)

It seems reasonable to conclude the notion of responsibility in public sale cases encompasses at least the ability to pay, but may also fairly include other considerations related to the bidder’s quality, fitness, and capacity. For what else may the District seek to hold a bidder responsible?

A plausible answer is, other contract terms. Surely the district may reasonably ask a buyer to agree to certain terms besides purchase price. Most parties to commercial contracts exchange a host of promises beyond simply agreeing to pay a certain amount for a good or service. Written contracts often include mutual promises regarding issues like assignability, confidentiality, choice of law, dispute resolution, waiver of unknown claims, and indemnification. These terms may be significant. The

negotiation of otherwise “boilerplate” terms can overshadow the negotiation of a deal’s substantive terms. While the Education Code may require the district to sell the station for cash, there is nothing in the code that would preclude the district from entering into a commercially reasonable written contract containing various terms. (Cf. *Domar Electric, supra*, 9 Cal.4th at p. 175 [city may require bidders to comply with subcontractor outreach program].)

There is, however, one important qualification -- the district must set forth the desired contract terms in its request for proposals. Public bidding cases have long required agencies to make their bid calls “sufficiently detailed, definite and precise so as to provide a basis for full and fair competitive bidding upon a common standard” (*Konica, supra*, 206 Cal.App.3d at p. 456.) The district must abide by this rule. If the district’s decision to declare a bidder non-responsible may depend on the bidder’s acceptance of some contract term, the district must specify that term in its request for proposals.

It follows the district cannot allow bidders to propose their own contract terms. If bidders proposed different contract terms, the district would have to decide which bidder’s terms were the most favorable. But the concept of responsibility does not allow for “relative superiority.” (*Inglewood, supra*, 7 Cal.3d at p. 867 & fn. 5.) Responsibility is binary; a bidder is either responsible or not responsible. The district lacks the discretion to consider one bidder to be more responsible than another bidder, at least without finding the other bidder to be non-responsible. (*Ibid.*)¹¹ If each bidder proposes different terms, the district would have no baseline for distinguishing a responsible set of terms from a non-responsible set. And it would undermine the fairness of the bidding process for the district to consider a bidder non-responsible based on

¹¹ It is possible that the trial court may have concluded that the district had more discretion than is consistent with *Inglewood*, since the District’s points and authorities at the trial level inadvertently cited to the *dissenting* opinion in that case. Given the guidance we hope we now provide for remand, there should be no danger of that happening again. But just to be clear: We read *Inglewood* (the majority) for the following two propositions: (1) an agency has discretion to determine whether a bidder is responsible, but (2) an agency lacks discretion to award a contract to one responsible bidder because it is ‘more responsible’ than another responsible bidder.

factors the bidder could not have known when it submitted its bid -- like the other bidders' proposed contract terms. (See *Konica, supra*, 206 Cal.App.3d at p. 456 [public bid calls must "provide a basis for full and fair competitive bidding upon a common standard"].)

We thus conclude the District may specify mandatory contract terms in its request for proposals, on a "take it or leave it" basis, in the same manner that a public agency's purchase of goods or services may require its specifications not be modified by the bidder. It must therefore reject a bidder as non-responsive if it does not agree to all such terms. It may reject the highest responsive cash bid only if it finds the bidder is not responsible. (*Inglewood, supra*, 7 Cal.3d at p. 867 & fn. 5.) The District may not reject the highest cash bid from a responsible bidder merely because it finds a lower bidder is even more responsible. (*Ibid.*)

Issue 4: The fourth issue concerns a contract term referenced in the District's request for proposals: the indemnity clause. The request for proposals attached a proposed contract containing a provision whereby the buyer agreed to indemnify the district for any liabilities resulting from the sale. The record suggests the indemnity clause was not mere boilerplate. The trial court found the Corporation for Public Broadcasting had given the district more than \$20 million to support its operation of the television station as a PBS station, and threatened to seek reimbursement from the district if it sold the station to a non-PBS broadcaster. The District also faced potential liability to the U.S. Department of Commerce. The Foundation's bid incorporated the indemnity clause; Daystar's bid lined it out. The trial court found the district could consider this discrepancy "in making a valuation determination," and rejected Daystar's claim the potential liability "doesn't translate into cash."

As noted above, the District may consider only the cash component of a bid to determine its financial value. (§ 81450, subd. (a).) Thus, it cannot assign a cash value to the potential liability and apply it to the Foundation's bid, or subtract it from Daystar's bid. Doing so would violate the cash-only requirement. On the other hand, the District may take into account the financial ability of a bidder to indemnify it when determining

whether a bidder is responsible. But it may do so only if an indemnity clause was set forth as a requirement in the request for proposals. (See *Konica, supra*, 206 Cal.App.3d at p. 456.)

IV. DISPOSITION

The judgment is reversed with directions to grant a peremptory writ of mandate ordering the district and Foundation to set aside the sale. In the interests of justice each side will bear its own costs on appeal.

SILLS, P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.